[2020] JMSC Civ 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010HCV03830

BETWEEN	**NORMAN WILLIAMS**	**CLAIMANT**
AND	**CLIFFORD ISAIAH DAVIS**	**DEFENDANT**

IN OPEN COURT

Ms. Aisha M.N. Mulendwe, Attorney-at-Law, for the Claimant.

Ms. Marcelle Donaldson, Attorney-at-Law, for the Defendant.

HEARD: 19TH and 20th September, 2016, and 16th November 2016, 17th November 2016, 24th November 2016 and 29th May 2020

LAND – BOUNDARIES OF CONTIGUOUS PARCELS OF LAND – WHETHER THE CLAIMANT IS ENTITLED TO SPECIFIC PERFORMANCE

STAMP J.

BACKGROUND

[1] This cause arises from a dispute over the true location of the boundaries of a parcel of land sold to the claimant by the defendant. The parties were once close friends. The defendant, a mechanic, farmer and businessman owned a parcel of land, "Rosemary Castle" situated at Newlands in the parish of Saint Catherine. He

decided to subdivide it and sell some of the lots. The plaintiff, a carpenter, was interested and in October 1990, they agreed upon the sale of one lot to the claimant. On or about 12 October 1990, the defendant walked with the claimant along the boundaries of the agreed lot and showed him four red pegs placed at the four corners of the lot demarcating its boundaries. The same day they together attended the office of the defendant's attorney-at-law and it is not disputed in the pleadings in this matter that they signed a written Agreement for Sale that was prepared by the attorney-at-law for the defendant. It was also not disputed on the pleadings that the claimant paid over the full purchase price.

[2] That same day defendant put the claimant in possession of the lot. With the knowledge of the defendant, he erected a fence according to the boundaries shown to him and constructed a dwelling house on the property commencing in 1990. Sometime in or around 2004 they had a disagreement over the correct boundaries of the lot sold. That was the end of the friendship and preparations for litigation ensued.

[3] The defendant accused the claimant of encroaching on an adjoining lot. He said that at some point between the sale and the disagreement, the claimant moved the fence to enclose more land area than the lot sold. The claimant maintains that the location of the fence, constructed in 1990, has not changed and he had remained in undisturbed possession of that parcel of land ever since. In 2004, he engaged a commissioned land surveyor, Mr Isa Angulu, to prepare a plan delineating the lot using the disputed fence as the boundaries ("Angulu's plan").

Angulu's plan, bearing the date 5 April 2005, delineates the boundaries of the lot claimed by the claimant and describes the land as comprising 436.162 square metres. This is part of Rosemary Castle, the larger parcel of land owned by the defendant.

[4] In or about 2007 the claimant erected another dwelling house on the eastern section of the lot.

[5] The defendant rejects Angulu's plan. He says that he did not authorise, was not present at and was unaware of the survey conducted by Mr Angulu and that the plan does not correctly delineate the boundaries of the lot sold in 1990. The lot sold was approximately 2,000 square feet, about one-half of the area claimed. He contends that the fence was relocated to enlarge the land area by enclosing an additional lot, that is, to include two lots instead of the one sold. The defendant also caused several plans to be prepared delineating what he asserts are the agreed boundaries. He put into evidence a subdivision plan of the property dated 20 June 2009 prepared on his instructions by a land surveyor Mr Andrew Mackenzie ("Mackenzie's subdivision plan"). According to him, the lot sold to the claimant is depicted in Mackenzie's subdivision plan as lot 15 and the claimant has wrongly encroached upon, taken possession of and fenced around lot 16 on the said plan. Together, lots 15 and 16 on Mackenzie's subdivision plan delineate the same area as the lot portrayed in Angulu's plan with each lot being approximately one-half of the land area of the lot in Angulu's plan. Of course, the claimant rejects the plans tendered by the defendant. He says that these plans involve an attempt to dispossess him of part of the lot that he purchased.

[6] At the outset one would suppose that the correct boundaries of the land sold could readily be determined by reference to the the description in the Agreement for Sale that was drawn up by the attorney-at-law and signed by the parties. This Agreement was received in evidence. Although it is undated, there is no dispute on the pleadings regarding its authenticity and terms. It described the land sold by in the following terms:

> *"ALL THAT PARCEL of land of Newlands (sic) called Rosemary Castle in the parish of Saint Catherine being the lot Numbered 14 on the plan prepared by Mr Desmond Baugh, Commissioned Land Surveyor and being a part of land Registered at Volume 1108 Folio 274 of the Register Book of Titles."*

[7] However, no plan of a Mr Desmond Baugh if it existed was tendered into evidence. The evidence of the defendant is that as far as he knew no such plan was ever

prepared. Neither party has ever seen it. It was not lodged with the survey department. The lawyer, Mr. Alvin Mundell, who prepared it died a long time ago and his law practice was wound up.

[8] There is no document contemporaneous to the time of the sale in 1990 or the time when the parties were on amicable terms from which the true agreed boundaries of the lot sold can be discerned. The several survey diagrams relied on by the parties were prepared some 15 years or more after the transaction on the instructions of either party in the absence of the opposing party and while they were on their way to litigation. Those plans were prepared in support of the contending claims.

[9] One would then consider that the matter could be resolved by reference to the red pegs that the parties agree were planted in the ground and marked the four corners of the lot in 1990. However, by the time the dispute arose in 2004 the pegs were not in place. The court must therefore assess the relative credibility of the parties to make a determination of the agreed boundaries of the lot bought and sold in 1990.

THE PLEADINGS

[10] By way of amended Fixed Date Claim Form with affidavit in support filed August 12, 2016, the claimant sought, among other things:

1. Specific performance of a contract executed on or about 12 October 1990 for the sale and purchase of a parcel of land … being lot numbered 14 on the proposed Subdivision Plan of the said land prepared by Desmond Baugh, Commissioned land Surveyor, and being the lot described on pre-checked plan prepared by Isa Angulu Commissioned Land Surveyor comprising of 436.162 square meters;

2. An order that the defendant secure the registration of the claimant as the legal proprietor of the said land;
3. An injunction restraining the defendant from dealing with the same land in any manner prejudicial to the interest of the claimant.

[11] In his amended Defence and Counterclaim filed with supporting affidavit on 16 August 2016 the defendant admitted that he entered into the Agreement for Sale and that he showed the claimant the boundaries and put him in possession. He averred that he is prepared to consent to the transfer to the claimant of a splinter title to the land sold in accordance with the Agreement for Sale of 12 October 1990. He denied that he put the claimant in possession of Angulu's plan. This plan does not correctly delineate and describe the land which is the subject matter of the sale. The claimant had wrongfully assumed possession of and encroached upon parts of the defendant's property not included in the agreement and is claiming land in excess of what they had bargained for.

[12] The defendant contended that he did not refuse to deliver the relevant certificate of titles to the claimant but had made multiple applications throughout the years to the parish council to have subdivision approved. Without the approval of the parish council, he was not in a position to deliver the splinter titles to the purchasers.

[13] By way of Counterclaim, the defendant seeks:

i. An injunction restraining the claimant whether by himself, his servants and/or agents from interfering with and or/or disrupting the defendant's reasonable use and enjoyment or entering upon the defendant's property registered at volume 1108 folio 274 save and except lot 14, which was purchased by the claimant, measuring approximately 2000 square feet;
ii. An injunction retraining the claimant whether by himself, his servants and/or agents from leasing the defendant's property registered at

volume 1108 folio 274 save and except lot 14, which was purchased by the claimant, measuring approximately 2000 square feet;

iii. An order that the claimant whether by himself, his servants and/or agents vacate the premises known as lot 15 that he has encroached upon and to pull down and demolish a structure that he erected thereon;

iv. An order that the claimant is entitled to land measuring approximately 2000 square feet more or less;

v. An order that the claimant whether by himself, his servants and/or agents vacate the premises on the easterly and westerly side of lot 14 he has encroached upon and to pull down and demolish a structure that he erected thereon;

vi. damages for trespass and mesne profits and costs.

PROCEDURAL HISTORY

[14] Some aspects of the procedural history are of significance in understanding how the matter progressed. On 18 August 2010, Sinclair-Haynes J (as she then was) granted an injunction restraining the defendant from selling or dealing with any part of the entire unsubdivided parcel of land, Rosemary Castle. She also ordered the defendant:

> "*to produce the original subdivision plan and the re-surveyed subdivision plan requisitioned sometime in or about February 20, 2009 from Messrs. Masters and Johnson, Commissioned land surveyors, if any, of the said land …*"

[15] It is clear that the "original subdivision plan" is the plan of Mr Desmond Baugh referred to in the Agreement for Sale. There is no indication that at that stage the defendant's attorneys-at-law advised the court that he was unaware of the existence of that plan. The "*re-surveyed subdivision plan*" is a reference to another plan mentioned in a letter of 20 February 2009 from Messrs. Kinghorn and

Kinghorn, attorneys-at-law, who represented the defendant at that time. This letter indicated that land surveyors Messrs Masters and Johnson, would be conducting a survey of the property with a view to finalizing an application for the individual Certificates of Title, for the several lots "*as delineated in the proposed boundaries sub-division of the land*". The claimant said that he feared that the purpose of this new survey was to reduce the size of the lot that he had purchased. That resurveyed subdivision plan, if it was prepared, has also not been produced by the defendant.

[16] On 11 February 2011, Rattray J, with the consent of the parties, referred the matter to the Dispute Resolution Foundation for mediation. Both parties attended the mediation with their attorneys-at-law. The late Mr Barrington Frankson represented the defendant at that time. The meeting resulted in a mediation settlement agreement dated 9 September 2011 signed by both parties. However, this agreement was not implemented and no steps were taken by either party to enforce it. I will revisit this later in this judgment.

[17] Having regard to the delay in the delivery of this judgment, I think that it is necessary to review the evidence in some detail.

EVIDENCE FOR THE CLAIMANT

[18] Initially there were two witnesses on the claimant's case, the claimant himself and the commissioned land surveyor, Mr Isa Angulu. At the close of the defendant's case and after hearing submissions from counsel, I permitted the claimant to reopen his case to call evidence in rebuttal of the defendant's testimony.

[19] The claimant's evidence is summarised from his written statements and oral testimony. He exhibited the undated Agreement for Sale signed by the parties as well as a receipt for the purchase price of $26,000.00 paid by him bearing the date 12 October 1990. The authenticity of these documents was not disputed on the pleadings and in the several affidavits and statements filed on behalf of the

defendant in these proceedings. However, during the trial the defendant for the first time raised issues regarding these documents that I will return to later.

[20] In addition to the description of the land subject matter of the sale, the Agreement for Sale provided for a purchase price of $26,000.00 payable in full on signing. It stipulated at Special Condition (a) that the vendor would apply *"to the relevant authority for the subdivision of the land known as Rosemary Castle registered at Volume 1108 Folio 274 of the Register Book of Titles and that the Purchaser shall be liable for the costs of such application and the issuing of the Title to this Lot"*.

[21] According to the claimant, at the time of the sale there was no mention of any measurement of the land. He was not told that he had purchased approximately 2,000 square feet as the defendant said in his statement. When he visited the offices of the defendant's attorney-at-law he paid in full the purchase price of $26,000 which is evidenced by the receipt submitted. At the time of sale, with the full acquiescence of the defendant, he erected a fence of wood and barbed wire according to the boundaries shown to him by the defendant. The defendant was frequently present in the area and saw the fence. From 1990, he has remained in possession of exactly the same area of the land.

[22] At no time prior to, during or after the purchasing of the land was he shown a subdivision plan prepared by Mr Desmond Baugh, or any subdivision plan at all.

[23] He constructed a dwelling house on the eastern side of the same land. It was completed sometime in 1992 and in 2004, he built block and steel walls to the front and to the back of the premises. He said that over the years, despite several demands made by him and other individual purchasers of other lots part of the same subdivision, the defendant failed to deliver the certificate of title duly registered in his name as stipulated in the Agreement for Sale. The defendant explained to him that he had difficulties obtaining subdivision approval from the parish council because he was unable to satisfy some requisitions made, in particular, that the lots were too small to be approved. During this time, the parties

made joint efforts in approaching several government agencies with the aim of effecting approval of the subdivision.

[24] The claimant maintained that he remained in undisturbed possession of the house and land with the same boundaries until December 2004 when, on a visit to the defendant's home at Point Hill District, the defendant accused him of encroaching on an adjoining lot. Following this event, he commissioned Mr Angulu to prepare the pre-checked plan delineating his lot.

[25] In September 2005, the defendant filed and served on him a Fixed Date Claim Form claiming that he was encroaching on lot 15 on the same sub-division. By then, the defendant was represented by a Mr Jarrett, attorney-at-law. On 29 May 2006 the matter was adjourned for a date to be fixed by the Registrar and thereafter, the case seems to have been abandoned as there were no further proceedings.

[26] The claimant also paid property taxes for his lot 14 and produced in evidence notices of assessment for property tax for the years of assessment 2002-2003 and 2008-2009. The lot was described on the tax roll as Rosemary Castle, Gregory Park P.O. containing 436.162 square metres with a designated valuation number. The owner was recorded as Clifford Davis and the person in possession being the claimant. He said that he attended at the tax office to pay his property taxes for 2009 and was informed that the valuation number could not be located. This caused him to form the belief that the defendant was attempting or may have succeeded in re-surveying the land and effecting a change on the tax roll. He subsequently saw the letter referred to above from the defendant's then attorneysat-law, Messrs Kinghorn and Kinghorn dated 20 February 2009 notifying a purchaser of another lot that there was a planned re-survey of the said land with a view to finalizing an application for a sub-division approval. The claimant formed the belief that this re-survey was being conducted in order to reduce the size of his lot. Subsequently he brought this claim.

[27] The claimant said that he attended at mediation along with the defendant and that they reached a written agreement which was signed by both himself and the defendant in the presence of their attorneys-at-law. He said that despite the agreement, the defendant failed to cause the certificate of title in the claimant's name to be issued in keeping with the agreement.

The Evidence of Isa Angulu

[28] Mr Isa Angulu, the commissioned land surveyor, testified on behalf of the claimant. He stated that on the claimant's instructions on 13 August 2004 he carried out a survey of the claimant's holding and prepared a pre-checked plan of the property. This survey was prepared on the basis of the fence that the claimant showed to him that was built around the property. He could not determine how long before the fences were there. He did not see any pegs. The land surveyed comprised 436.162 square metres. At the time of the survey, there was one building to the extreme left of the claimant's holding when viewed on the survey diagram.

[18] During his testimony, Mr Angulu was shown a copy of Mackenzie's subdivision plan dated 20 June 2009. He was also shown a copy of a surveyor's report dated 20 May 2014 prepared by Mr Derrick Dixon, a commissioned land surveyor. Both drawings were requisitioned by the defendant in respect to the disputed lot. Mr Angulu said that, on examination, two adjoining lots numbered lot 15 and lot 16 on both Mackenzie's subdivision plan and Dixon's surveyor's report depicted exactly the same area of land which is delineated in his, Angulu's plan. In other words, the two subsequent drawings done on the instructions of the defendant, depicts as two lots the land which the claimant claims and which he had instructed Mr Angulu to survey.

[19] Mr Angulu asserted that prior to his own survey, there had been no other survey or sub-division plan of the land that had been pre-checked and submitted to the survey department. This does not mean that no survey was done and plan drawn before, just that if there was a previous survey, it was not pre-checked and lodged.

Re-Opening of the Claimant's Case

[29] After the close of the defendant's case and after hearing submissions from learned counsel for the parties, I permitted the claimant to reopen his case to call evidence in rebuttal. He himself gave further testimony and called two additional witnesses, Mr Lloyd Gordon and Mr Roy Thomas.

Further Evidence of the Claimant

[30] The defendant in his evidence had, for the first time, denied receiving the purchase price for the lot sold. In rebuttal, the claimant reaffirmed that he paid the $26,000.00 directly to the defendant in the presence Mr Mundell, attorney-at-law, at his office at Laws Street, Kingston, by putting the money in the defendant's hand. He saw the defendant pay to the lawyer the cost of the Agreement for Sale out of that money.

Evidence of Lloyd Gordon

[31] The defendant had said in his testimony before the court that he did not sell to Mr Lloyd Gordon land abutting the claimant's lot and that Mr Gordon was a squatter. In rebuttal, Mr Gordon testified that sometime in 1996, the defendant took him to Rosemary Castle and showed him property that he was selling. He chose one lot and they agreed the purchase price of $380,000.00. Both he and the defendant went to the defendant's attorney-at-law, at that time Mr Frank Beckford, where he counted out the money in the presence of the lawyer and handed the money to Mr Davis. He also paid his share of the expenses for the purchase of the property and he signed along with the defendant an Agreement for Sale. This Agreement for Sale bearing the defendant's signature and Mr Gordon's signature was received in evidence as well as a letter dated 21 October 1996 from Mr Beckford in respect to the same sale.

[32] The lot he purchased was immediately to the west of the lot owned by the claimant, on which the claimant had built his house.

The Evidence of Roy Thomas

[33] During his testimony before the court, the defendant said that the perimeter fence that the claimant relies on was not constructed in 1990 as the claimant stated, but in 2004. In rebuttal, Mr Roy Thomas testified that in 1990 the claimant gave him the job to build a fence around the property which was delineated by four pegs. He asserted that he built a picket fence and barbed wire fence around the premises in October to November 1990. He further asserted that in October 2016 he returned to look on the property and he found that the fence was in the same position as he built in 1990. The only change was that the front fence and the back fence were now replaced with concrete walls.

The Evidence of the Defendant

[34] In his statement, the defendant said that he purchased the property at Rosemary Castle in November 1987. Thereafter, he commissioned a land surveyor, a Mr Donald Lemonious, to survey the property for subdivision and Mr Lemonious placed red iron boundary pegs to delineate the boundaries of the lots. Each of the lots for lease or sale was approximately 2,000 square feet. He entered into the agreement to sell a lot to the claimant for $26,000 and put him in possession of said land. Prior to the sale, they both walked the boundaries together. The land sold was later described in the Agreement for Sale as lot 14 and was approximately 2,000 square feet in size.

[35] He agreed that he was present when the fence was erected in 1990 but at that time it was put in the proper location, that is, the fence went between lots 14 and lot 15 and not around the land area now claimed.

[36] The defendant agreed that the claimant built a house on the lot. However some time thereafter he went to the land and discovered that the claimant had gone outside the boundary of lot number 14 and had encroached 2 feet upon and built on lot number 15 which was located to the east of the lot which was sold to him. The claimant had also built a permanent fence around his house. He stated that

he spoke to the claimant about the error and he allowed the claimant to live on lot number 15. By this he meant that he allowed the claimant to continue to occupy the two feet of lot 15 that he had encroached upon.

[37] According to the defendant, in 2005 that the claimant started to build a house on lot 15 and around that time he moved the walls to include the two lots. He stated further, that when the claimant started to build a second house on the property in 2005, he brought the action against the claimant for trespass. In that case he was represented by a Mr Jarrett, attorney-at-law. At some point Mr Jarrett told him that he could not find the papers for his case and he now does not know what has become of Mr Jarrett.

[38] The defendant averred that when he commissioned Mr Andrew McKenzie to prepare a sub-division plan of the property, Mr McKenzie used the same pegs that were placed by Mr Lemonious to determine the lot sizes on the plan that he, McKenzie, prepared. This was Mckenzie's sub-division plan which was exhibited in the course of the claimant's case. He asserted that the claimant has encroached and trespassed on the adjoining lot and thereby increased the land space of the lot that was sold to him by about another 2,000 square feet.

[39] I pause here to recall that no survey diagram of Mr Lemonious to whom the defendant referred to in his statement or of a Mr Desmond Baugh, commissioned land surveyor, who is referred to in the Agreement for Sale was ever produced to the court. The evidence of Mr Angulu which I accept is that that if any prior survey diagram in respect to the lot was done at all it was never pre-checked and certified by the survey department. Otherwise, Angulu's pre-checked plan of 2005 would not have been certified. In cross-examination the defendant said he did not know of a Mr Desmond Baugh and he had no knowledge why his attorney-at-law who prepared the agreement in 1990, Mr Alvin Mundell, described the property sold in these terms: "being Lot Numbered 14 on the plan prepared by Mr Desmond Baugh". He insisted that prior to the sale, the lot was surveyed by Mr Lemonious. However subsequently Mr Lemonious "left his job and went to St. Thomas". His

work was complete when he put the pegs in the ground. At the time of the sale, there was no plan to show to the claimant.

[40] During his testimony the defendant accepted that after he showed the claimant the lot they visited his attorney-at-law, Mr Mundell. However, and for the first time in these proceedings, the defendant said on cross-examination that he did not sign any agreement “with” Mr Mundell and he did not get any money from Mr Mundell because Mr Mundell died soon after the transaction.

[41] In his testimony before the court, the defendant said that he erred when in his statements he referred to the sale of lot 14. The reality was that the claimant was sold lot 15 and later encroached on lot 16. When shown McKenzie’s subdivision plan of June 2009, he said that the property sold to the claimant is represented there as lot 15 and maintained that the claimant has encroached on and wrongly taken possession of lot 16 on that plan. He said that the fence that was built around both lot 15 and lot 16 was built in about 2005.

[42] The defendant was asked about the sale of other lots and he said he did not sell any property to a Lloyd Gordon. He did not know Mr Gordon but he understood that his attorney-at-law at the time, Mr Rudolph Francis, sold him a lot.

[43] As regards the mediation proceedings and the resulting signed mediation settlement agreement, the defendant said that his attorney-at-law at that time, Mr Barrington Frankson, told him to sign the mediation document with nothing written on it, and he did so.

SUBMISSIONS

[44] I am grateful to the parties for the industry both displayed in the preparation and filing of written opening and closing submissions in this matter. They were very helpful and I mean no disrespect if they are not set out here at length.

Submission of the claimant

[45] Counsel for the claimant submitted that the remedy of specific performance is available to enforce the contract notwithstanding that there was an error in the Agreement for Sale in the description in the land sold. The land was sufficiently identified when the claimant and defendant walked along the agreed boundaries. There was also an abundance of part performance of the agreement. The claimant had paid the full purchase price and was put into possession of said land and remained in possession for over 12 years. Counsel submitted further that if there was an error in the description, the defendant should not be allowed to benefit from his own mistake.

[46] The claimant also based his claim on adverse possession under the ***Limitation of Actions Act ('LAA')*** and the doctrine of proprietary estoppel. These heads are grounded on his evidence that in 1990 he fenced around the property that he now claims and remained in undisturbed possession until 2005, a period of over 12 years, before there was any interference by the defendant. Further, that over this period he expended resources on the said premises in the honest belief that he was the rightful proprietor, and it would be inequitable for the defendant who had kept silent over this period to dispossess him at this late stage. In support of the claim under the ***LAA*** counsel relied on the case of ***Zephaniah Blake and Inez Blake v Almando Hunt and Hazel Hunt et al,*** *Claim 2008 HCV 01773*, which applied the Privy Council case of ***James Clinton Chisolm v James Hall*** *[1959] A.C. 719*. Regarding the head of proprietary estoppel, counsel relied on cases of ***Willmot v Barber*** *(1880) 15 Ch D 96* and the case of ***Gillett v Holt*** *[2001] Ch 210*.

[47] Most of counsel's submissions however went to the relative credibility of the claimant and the defendant on the central issue of what were the boundaries agreed in 1990 that the claimant fenced around.

Submission of the defendant

[48] Counsel for the defendant did not dispute the validity and enforceability of the Agreement for Sale. In respect to trespass to land counsel for the defendant submitted that the encroachment of the claimant constituted interference with his possession of said land and relied on the cases of ***Toolsie Persaud Ltd and Andrew James Investments Ltd and Others*** *[2008] CCJ 5 (AJ)* and ***JA Pye (Oxford) Ltd v Graham*** *[2003] 1 AC 419*.

[49] Counsel for the defendant also submitted that the ***LAA*** could not bar the defendant from bringing an action for trespass against the claimant given the evidence of defendant that the claimant had not been in undisturbed possession of the land that he encroached upon for more than twelve years. When the claimant first built his fence in 1990 it was at the correct boundary. Later when he discovered that the claimant had taken in 2 feet of the adjoining lot he spoke to the claimant about it and the claimant promised to rectify it. The claimant erected the fence around the two lots which he now claims in or around 2005 and as a result he brought the action for trespass 2005 and this action would have stopped the limitation period from continuing to run.

[50] It was also submitted that the claimant should not be granted the equitable relief of specific performance when he, the claimant, is guilty of breach of contract and was not prepared to do equity. In support counsel highlighted the cases of ***Neesom v Clarkson*** *(1845) 4 Hare 97,* ***Jones v Lenthal*** *(1669) 1 Chan. Cas. 154* and ***Brewer v Brown*** *(1884) 28 Ch. D 309*.

ANALYSIS

[51] On the pleadings, the parties do not dispute that they executed the Agreement for Sale and that at the time of the sale, the defendant walked with the claimant around the land sold and showed him four red pegs that marked the borders of the lot.

There is also no dispute concerning the binding nature and validity of the Agreement for Sale notwithstanding the insufficiency of the description of the subject matter of the sale. Neither is it disputed on the pleadings and affidavits that the claimant paid the full purchase price of $26,000.00 even though, in the course of his testimony, the defendant belatedly declared that he did not know that the purchase price had been paid.

[52] The primary issue in this matter is the agreed and true delineation of the lot which is the subject-matter of the Agreement for Sale. Is it as it is depicted in Mr Angulu's pre-checked plan as the claimant avers? Or, is it the approximately 2000 square feet which the defendant says he showed to the claimant in 1990 and which he says is now depicted as lot 15 in McKenzie's subdivision plan. I agree with both counsel that the outcome of this case depends on an assessment of the relative credibility of the parties in respect to the boundary of the land that was agreed upon. This is apparent from the skeleton submissions filed by the parties prior to the commencement of the trial.

[53] In my view, the governing principle is that it is the accord and intention of the parties at the time of the Agreement for Sale that is the relevant consideration for the determination of the correct boundaries. Subsequent conduct of the parties is relevant only to the extent that it may shed some light on the intention and state of mind of the parties at the time of the sale. As I stated before, there is no plan or description of the land contemporaneous with the time of execution of the Agreement for Sale, and the plans drawn up after that are of little assistance as they were prepared many years later and in contemplation of litigation.

[54] I hold that the claim of proprietary estoppel was not adequately raised in the Amended Fixed Date Claim Form or the Affidavit in Support and is therefore not properly before me for adjudication. It was not specifically set out as a ground of the claim nor were the supporting facts particularized.

[55] In any event, I do not think that it is necessary to say more regarding the claims of adverse possession and proprietary estoppel. It is clear from the evidence in the case and the submission of the parties that resolution of those matters would depend on resolution of the primary factual issue in the claim and counter-claim, that is, what were the agreed boundaries of the land that the claimant was put in possession of. If the claimant succeeds in establishing that, at the time of the agreement in 1990, he was put in possession of, fenced around and occupied the land that he now claims, then he would succeed on the primary issue in this case, that is the true boundaries of the land sold, and the issues of adverse possession and proprietary estoppel would become superfluous.

[56] The remedy of specific performance is a purely equitable form of relief to ensure that justice is done on the merits of each case. It is a discretionary relief and will only be granted "*under all the circumstances, if it is just and equitable so to do.*" See Lord Parker in ***Stickney v Keeble*** *[1915] AC 386,* at page 419. The order will be granted instead of damages only when by that means it can do more perfect and complete justice. Where a contract encompasses interdependent undertakings, a claimant cannot obtain for specific performance if he is in breach of his own obligations or if he fails to show that he is ready and willing to perform his outstanding obligations.

[57] In the instant case the claimant avers that he has performed all his obligations under the Agreement for Sale in paying the full purchase price stipulated.

FINDINGS

[58] After careful evaluation of the evidence in the trial in particular the testimony of the witnesses and their demeanour I found this to be a very difficult matter to adjudicate. This was largely because it seemed to me that neither the claimant nor defendant were at all times faithful to the truth. It was also very troubling that in respect to several important issues arising on the cases presented by both parties

there was an absence of documentation, explanation or clarification where it was reasonable to expect that such would be forthcoming.

[59] There were several unsatisfactory aspects of the claimant's evidence and, indeed, his case. For example, he testified in court that he could not serve the defendant with Mr Angulu's notice of survey because the defendant was 'deceptive' about his residential address so he had to leave it at a bar that the defendant owns. However, in his statement which stood as his examination-in-chief, he said that prior to this dispute he was a friend of the defendant and visited him at his house in Point Hill, Saint Catherine. This was just at about the time when the dispute arose and when Mr Angulu did the survey. I find that the claimant was not truthful when he said or implied that he did not know where the defendant resided.

[60] Also, several aspects of the claimant's case caused some concern. When the plans put into evidence are examined, one observes that the location of the first house that he built was to the extreme eastern section of the lot which he claims (see Angulu's plan) and exactly in the middle of the lot which the defendant said he was sold (see Mckenzie's subdivision plan). The positioning of this first house seems more consistent with the defendant's case that the claimant built it on the lot sold as depicted in Mckenzie's subdivision plan, and initially did not exercise dominion and control over the entire area that he is now claiming and that he later took possession of the adjoining lot on which he built the second house.

[61] In addition, there was a long period prior to the time the dispute arose when the parties unsuccessfully made joint efforts to obtain subdivision approval for the lot sold so that the claimant could get his title. According to Mr Angulu, the local authority would not approve subdivisions for lots as small as 2,000 square feet. This is the approximate area of the lot that the defendant said was sold. The failure to obtain the subdivision approval over many years is also consistent with the defendant's contention that the lot sold was about 2,000 square meters in size.

[62] It would be reasonable to believe that the claimant would be paying land taxes for the property he purchased from around 1990. However, the claimant only provided land tax notices in respect to the claimed lot containing 436.162 square metres for the years of assessment 2002-2003 and 2008-2009. He provided no earlier document in to show that he exercised ownership over land of those dimensions.

[63] I am also very uneasy about the disappearance of the red pegs that were effectively in the claimant's custody when he took possession of the lot and built his house. It is agreed that at the time of the Agreement for Sale the pegs were present and marked the four corners of the boundaries. Until he receives his title, the claimant would reasonably be expected to keep careful watch to ensure that they remained in place as they marked the land he had bought. Yet sometime between the sale in 1990 and when Mr Angulu conducted his survey in 2004 they were nowhere to be found and the claimant could not offer any explanation at all for their disappearance.

[64] Finally, the claimant on re-opening his case put up a witness, Mr Roy Thomas, who I found to be untruthful and probably was suborned. His demeanour was quite unimpressive and he seemed prepared to utter anything that he thought would benefit the claimant's case. Mr Thomas said that he built the vitally important fence in 1990 and returned in 2016 and saw that it was in exactly the same place. His family and whereabouts were well known to the claimant yet he is not mentioned in any pleading or statements but was brought forward very late in the trial. I found his memory of certain minor details from 1990 to be quite implausible, for example, when he asserted that he built the original fence in two weeks and three days. Equally implausible was his evidence that after twenty-six years he could remember the exact location of the fence without a point of reference. It is noteworthy that over that period of time a considerable amount of construction had been done and other changes made at the property and the surrounding community.

[65] I found Mr Angulu to be entirely truthful and reliable, notwithstanding that he was hired and paid by the claimant to do his survey. I did not find that he was prone to exaggeration in order to assist the claimant or that any aspect of his testimony was fabricated. His evidence was useful in aiding understanding of some technical and tangential issues, however for reasons stated earlier, was of little value in resolving the issue of the boundaries at the time of the agreement.

[66] Mr Lloyd Gordon also impressed me as a credible and reliable witness for the claimant and I accept his evidence that he purchased a lot from the defendant for $380,000.00, he signed along with the defendant an Agreement for Sale and paid to him the purchase price in the presence of the defendant's attorney-at-law. I reject the defendant's evidence that he did not sell a lot to Mr Beckford.

[67] The defendant gravely undermined and discredited his own case when he made several assertions during his evidence that were inconsistent with his pleadings and statement.

[68] The Agreement for Sale described the lot sold by reference to a plan prepared by Desmond Baugh yet the defendant denied any knowledge of any such plan. He said that he does not understand why his attorney-at-law used those terms in drafting the Agreement for Sale. That being the stance of the defendant, it is difficult to understand why the Defence and Counterclaim filed herein (which is accompanied by a Certificate of Truth signed by the defendant) maintains in paragraph 2 that the land sold was "Lot numbered 14 on the plan prepared by Mr Desmond Baugh, commissioned land surveyor per our sales agreement dated the 12th day of October 1990." There was no application to amend so I must take it that this remained the defendant's version of the events surrounding the sale prior to his testimony in court. Even though in his statement of 2016 prepared for this trial there is reference to Mr Lemonious, there is no indication there that Desmond Baugh's plan did not exist. I find this to be a serious inconsistency which has not been explained

[69] It is even more difficult to understand why the defendant or his representatives failed to inform the court that he was unaware that any such plan existed when on 18 August 2010 Sinclair-Haynes J ordered him to produce it.

[70] I do note that the defendant did say that in 2005 during previous litigation regarding the land in dispute, he was represented by an attorney-at-law, one Mr Jarrett, and "I don't know what has happened to Mr Jarrett, but he told me he cannot find the papers for my case". Therefore he could not proceed with the case in 2005. However, this does provide an explanation for the inconsistency as the defendant is now saying that as far as he knew, no survey plan by a Mr Baugh ever existed so it could not have been lost by the attorney. I add that no detail is provided of the papers which the attorney allegedly said were lost.

[71] The Agreement for Sale herein is not the only agreement in evidence that makes reference to Desmond Baugh. Among the batch of documents included in "Exhibit B" are two agreements for sale in respect to other lots being part of Rosemary Castle that were sold by the defendant. One agreement dated 21 May 1990 naming Mr Alvin Mundell as attorney-at-law with the carriage of sale referred to "lot numbered 27 on the plan prepared by MR DESMOND H. BAUGH, Commissioned Land Surveyor". The other agreement states that it was made in 2001 but is otherwise undated. It names Franklyn Beckford and Company as the attorneysatlaw with the carriage of sale and describes the property sold as "being the LOT

NUMBERED 37 on the plan prepared by MR DESMOND H. BAUGH, Commissioned Land Surveyor."

[72] Thus, two attorneys-at-law on separate occasions between 1990 and 2001 referred to a plan prepared by Desmond Baugh in agreements for sale prepared on the instructions of the defendant. The bald statement by the defendant that he does not know why the attorney-at-law Mr Mundell referred to a plan prepared by Desmond Baugh is wholly unsatisfactory particularly when he had affirmed this for

many years during the course of these proceedings and even in the previous proceedings which were abandoned. The failure of the defendant to produce a

plan prepared by Desmond Baugh and his recent denial that it ever existed in my view seriously undermines the integrity of his case.

[73] While I am on the topic of surveys that were conducted at the time of or prior to the sale, the defendant also said that he never saw a plan by Mr Lemonious. If, as the defendant testified, Mr Lemonious was commissioned to do a survey of the subdivision, and did so, and even marked the boundaries with red pegs then it is likely, even certain, that a survey diagram would have been prepared. The defendant's explanation that Mr Lemonious moved on to St. Thomas is unsatisfactory.

[74] Further, the evidence of both parties is that throughout the years prior to this dispute, the defendant made multiple applications to the parish council to obtain approval for the subdivision. A subdivision blue print or survey diagram must have accompanied these applications and would have shown what at the time the defendant was saying were the boundaries of the lot sold. In a letter to the defendant dated 11 December 2000, the claimant's attorney-at-law requested that he deliver to her the blue print of the proposed subdivision so that she could follow up on the application to get it approved. There is no evidence that this was provided and the defendant has not furnished to the court any survey diagram or blue print that accompanied the early application for subdivision prior to this dispute. I bear in mind that the defendant was not asked about this during the trial but the absence of those documents does, in the absence of explanation, raise serious concerns about the sincerity of the defence.

[75] The defendant was also inconsistent with his earlier statements when he denied that he received any money in respect to the sale. This had been admitted in his pleadings and the receipt for the payment was not put in issue. I do not accept the defendant's testimony that he did not receive the purchase price.

[76] In support of his case that he sold to the claimant a lot amounting to 2000 square feet, the defendant said that each and every lot that he sold or leased in that subdivision was about 2000 square feet in area. I do not accept this. I believe Mr Angulu's testimony that he subsequently surveyed several lots in the subdivision and only 60-70% were 2000 square feet; at least nine of the others were much bigger than 2,000 square feet.

[77] I assessed the defendant to be a moderately successful businessman of reasonable intelligence but prone to be spontaneously and sometimes artlessly inventive if he believed it to be necessary. His tendency when confronted to explain several questionable aspects of his case by casting blame on his several attorneys-at-law did not impress regarding his veracity. From what he has said, it is apparent that he has had no less than seven attorneys-at-law engaged for him in respect to this sub-division. He said he did not know why Mr Mundell referred to Desmond Baugh's plan on the Agreement for Sale. As regards his earlier abandoned claim in 2005 he said Mr Jarrett could not find his papers and therefore he could not proceed with the case. When, during cross-examination an issue arose in respect to the alleged sale of another lot, he was shown a document and it was put to him that he had refused to sign an instrument of transfer that was sent to him for his signature by Mr Rudolph Francis, his then attorney-at-law. His response was that he could not read. I had to intervene and remind him that earlier I had seen him read his witness statement in court without any difficulty. He later said that Mr Rudolph Francis sold some of the land without him knowing; he signed a paper given to him by Mr Rudolph Francis not knowing what he was signing. He denied that he sold a lot to Mr Lloyd Gordon, notwithstanding the abundance of documents evidencing this sale including a signed Agreement for Sale prepared by Mr Franklyn Beckford, his cover letter plus a receipt for the attorney's fees. He said he could not answer questions pertaining to the mediation settlement agreement because Mr Barrington Frankson gave him a blank document to sign.

[78] I now return to the matter of the mediation settlement agreement. This I find to be of great, albeit, by itself, not decisive importance, in the disposition of this

cause. Both parties attended the mediation at the Dispute Resolution Foundation with their attorneys-at-law. The meeting resulted in a mediation settlement agreement dated 9 September 2011, signed by them. It provides in paragraph 2 that the parties agree that the execution of the agreement operates as a withdrawal of the complaint, that is, this case HCV 3830 of 2010, and that the parties agree to utilize the Supreme Court to enforce the terms and conditions of the agreement. Although I raised the matter during the trial, I do not now intend to enforce the mediation settlement agreement as the claimant did not seek this remedy in his pleadings. However if it was entered into by the parties freely and voluntarily as it states at paragraph 2, then it is evidence of their state of mind, in particular their understanding of the true dimensions of the land sold. This recognition does not deflect me from applying the principle already stated that it is the intention at the time of the agreement that determines the issue.

[79] The mediation settlement agreement provided at paragraph 3.1 that:

> *"Defendant agrees to obtain Certificates of Title in the name of Norman Williams and or his nominees for the property referred to as lot 14 in the Agreement for Sale dated 12th October 1990 comprised in plan dated 200504-05, R 41219 PE 309441 also appearing on Blue Print plan subdivision dated 2009/06/20 drawn by ANDREW McKENZIE Commissioned land surveyor referred to as lot 14 being 207.544 square meters and lot 15 being 210.563 square meters and totalling 418.107 square metres subject to verification with Land Administration and Management Programme (LAMP)."*

[80] Although this paragraph in the mediation settlement agreement would benefit from more care in drafting, I have no doubt that the first plan referred to as "dated 2005-04-05, R 41219 PE 309441" is Angulu's plan which is in evidence. Angulu's plan is marked R41219 in handwriting. This appears to be the file number or reference number. It bears the date in this format "2005-04-05". It is stamped PE:309411. I

note the discrepancy in the recording of the PE number in the agreement, “PE 309441” when compared the document in evidence, “PE:309411”. I am satisfied that this is a drafting error. All the other reference points of the two documents correspond and additionally there is no mention or evidence in this case of any other plan or survey diagram of 2005.

[81] The second plan referred to in the mediation settlement agreement as “Blue Print plan sub-division dated 2009/06/20 drawn by ANDREW McKENZIE” is no doubt Mckenzie’s subdivision plan, that was also received in evidence. This mediation settlement agreement equates the land delineated in Angulu’s plan to the land described in McKenzie’s subdivision plan as lot 14 and lot 15 totalling 418.107 square metres. However, the evidence before me from Mr Angulu, which I accept, is that lots 15 and 16, not lots 14 and 15, of Mckenzie’s subdivision plan are exactly the same as the land that he surveyed which amounts to 436.162 square metres.

[82] In resolving this matter I am bound to bear in mind that much confusion and difficulty arose in this case from the discrepancy in the description by the defendant of the land sold as lot 14 and then later during the trial as lot 15. It is described as lot 14 in the Agreement for Sale, in the pleadings and witness statements of the parties. During the trial the defendant revealed that there was no survey by Desmond Baugh and therefore the reference to lot 14 in the Agreement for Sale, the pleadings and statements was not correct, and that the lot he sold was actually lot 15 as depicted on McKenzie’s subdivision plan and that the encroachment was on lot 16. I find it probable that the mediation agreement erroneously referred to lots 14 and 15 because the mediation was conducted on the basis that those lot numbers comprised the land in dispute whereas in reality the disputed land is depicted on McKenzie’s subdivision plan as lots 15 and 16.

[83] The mediation settlement agreement required the defendant to transfer title to the claimant for the land comprised in Angulu’s plan which is the same as lots 15 and 16 on McKenzie’s subdivision plan. This is the property that the claimant says was sold to him. I do not understand why the claimant did not seek to rectify the error

and to enforce the mediation settlement agreement as a civil obligation. Counsel for the defendant said it could not be enforced because it described the lots on McKenzie's subdivision plan as lot 14 and lot 15 when in fact it ought to be lot 15 and lot 16. However, I find that the mediation settlement agreement does supply cogent evidence of the defendant's state of mind at that time it was signed and, by inference, at the time of the sale. He accepted that Angulu's plan and most probably also that lots 15 and 16 of McKenzie's subdivision plan represented the property to which the claimant was entitled and he agreed to transfer that property to him.

[84] I reject the defendant's testimony that he signed a blank mediation settlement agreement.

[85] Overall, I find it very difficult to accept the defendant's case notwithstanding that I have strong reservations about the claimant's case. On a balance of probabilities, I find that the claimant did purchase the land as described in Angulu's plan.

[86] Notwithstanding my reservations about the claimant's case, I do not find that there is any equitable consideration sufficient to disentitle the claimant to an order of specific performance of the Agreement for Sale.

DISPOSITION

[87] Judgment is entered for the claimant against the defendant and the defendant's counter-claim is dismissed.

1) It is ordered that there be specific performance of the undated contract of sale of October 1990 signed by the parties and that the defendant effects

   the registration of the claimant or his nominee(s) as the legal proprietors of property demarcated and delineated in the pre-checked plan marked PE309411 and R41219 dated 2005-04-05 comprising 436.162 square metres.

2) Should the defendant fail or refuse to comply within 45 days of being requested to do so, the Registrar of the Supreme Court is empowered to execute the instrument of transfer and any document necessary to effect the transfer of title to the claimant or his nominees.

3) Each party is to pay half the cost of the transfer except the transfer tax which is to be borne by the defendant.
4) The claimant's attorney-at-law is to have carriage in sale.
5) In the event the original Agreement for Sale cannot be found, a copy of that agreement is to be accepted by the Stamp Commissioner in place of the original.
6) Cost to the claimant to be taxed if not agreed.

[88] This judgment was not delivered in a timely manner for several reasons. I deeply regret the delay and any undue inconvenience caused to the parties. My sincere apologies to them.

……
Chester Stamp
Puisne Judge