

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2003 HCV1837

BETWEEN	CEBERT WRIGHT <i>(Executor, estate Clarice Findlay)</i>	1ST CLAIMANT
A N D	OLIVE HOPWOOD <i>(Executrix estate Clarice Findlay and in her personal capacity)</i>	2nd CLAIMANT
A N D	VECAS PENNYCOOKE	1ST DEFENDANT
A N D	CORDEY PENNYCOOKE	2ND DEFENDANT
A N D	ISWEL PENNYCOOKE	3RD DEFENDANT
A N D	MARY PENNYCOOKE	4TH DEFENDANT
A N D	PAULINE PENNYCOOKE	5TH DEFENDANT
A N D	ROY LEVY	6TH DEFENDANT

Appearances: Mr. Donald A. Bryan for the 2nd Claimant.

Miss Judith M. Clarke instructed by Judith M. Clarke and Co. for the defendants.

Heard: May 11, 12 & 13, September 22, 2010 and January 20, 2011

P.A. Williams, J.

Background

1. In Warminister, St. Elizabeth is located lands which was originally owned by

Alfred Pennycooke.

Clarice Findlay and Beswick o/c Beswreck Pennycooke are children of Alfred and ended up in possession of some of these land over the years.

Clarice Findlay died in or about 1984 and Beswick Pennycooke died in 1995.

2. The parties to this action claim ownership to these lands arising from their relationship with the deceased. The 2nd claimant Olive Hopwood is grandchild of Clarice Findlay and also executrix of her Will along with the 1st claimant, Cebert Wright, who has not involved himself in these proceedings beyond being a signatory to the amended claim form and amended particular of claim filed October 6, 2003.

The 2nd claimant is the sole beneficiary of Clarice Findlay.

3. Vecas, Cordey, Iswel, Mary and Pauline are all children of Beswick Pennycooke and are the 1st to 5th defendants respectively. The 6th defendant Roy Levy is a sibling of the 1st, 2nd, 4th and 5th defendants but he has a different father.
4. The land now in dispute was the property of Beswick Pennycooke. The 2nd claimant assert that this land had become part of the estate of Clarice Findlay, she having purchased it in 1972. Upon her death this land formed part of her residual estate which was left to the 2nd claimant alone.
5. The amended statement of claim states that the claimants are entitled to possession of all that parcel of land situated lying and being in the parish of Saint Elizabeth and known as Folly containing three (3) acres more or less and butting and bounding.

Easterly on lands of Manou Johnson

Northerly on lands of Bathrice Blake

Westerly on Parochial Road leading to More Hill

Southerly on lands of Olive Hopwood or however otherwise the same may

be butted bounded known distinguished or described.

In the amended particulars of claim they also claim an order that the defendants do pay to the claimants mesne profit for the period that they have been wrongfully in possession of a portion of the said land.

The value of the said land was then in 2003 valued at approximately \$500,000.00 – in the claim.

6. The defendants maintained that the lands is theirs – inherited from their father who never parted possession with any of it.

In their defence they assert that the 1st, 2nd, 4th and 5th defendants have remained in lawful possession and occupation of the said land having been put in possession thereof by the said Beswick Pennycooke prior to his death and being lawful beneficiaries of his estate under and by virtue of his Will.

The 3rd defendant is the lawful executor of the Will of the said Beswick Pennycooke. The 6th defendant is the brother of the 1st, 2nd, 4th and 5th defendants and his occupation is not unlawful.

The issue

7. The sole issue to be determined is therefore, whether the claimants are entitled to possession of the land.

The issue has to be determined by considering whether on the evidence presented by the 2nd claimant, she has successfully established her entitlement. She has sought to do this mainly on 2 limbs:-

- a) her use and occupation of the land fostered through the relationship which existed between herself and Beswick Pennycooke and her grandmother and as between them.

b) documentary evidence establishing the sale and transfer of the land to her grandmother.

8. The defendants have sought to challenge her alleged entitlement by firstly setting out their use and occupation of the lands. The documents they relied on were land tax receipts for the property from 1983 to 2009.

Although they referred to the Will of their father, this document was not relied on by them.

9. The overriding factor will be the credibility of the parties and the veracity of their assertions; bearing in mind of course that it is he who alleges who must prove to the requisite standard.

With the passage of time, memories and recollections may have dimmed so there must be allowance for this in determining if the true facts are honestly forgotten or if deliberate untruths are being told.

The evidence re the occupation and use of the land.

10. There is no dispute that the land once owned by Beswick Pennycooke was mainly “farming” land. He farmed there himself at some point.

The evidence suggests that there was once a house of some sort on the land which “broke down” and in the 1990’s the 5th defendant constructed another house on the land; she said it was commenced with the permission of her father.

11. It is also undisputed that Beswick Pennycooke lived with his sister Clarice Findlay at one point and with relatives in Malvern, St. Elizabeth as well as resided in England for at least seven (7) years. It is also accepted that at the time of his death he was then residing with his son, the 3rd defendant.

12. The 2nd defendant identifies the land in dispute as being adjoining the property owned by Clarice Findlay and in her estimate measured approximately three (3) acres.

The Pennycookes do not dispute where the land was located and in his witness statement the 3rd defendant agreed with the size of the land being three (3) acres.

13. The Pennycookes maintain that upon their father migrating to England in or about 1960, he left them and their mother Doris Goodwin residing on the land.

She and some of the children left and Vecas and Cordey, the 1st and 2nd defendants said they were left farming the land.

Upon the return of their father permission was sought from him and either one, or both of the two then carried on farming on the land at different points in time.

14. The 2nd claimant had set out to establish that it was she or her grandmother who enjoyed undisturbed occupation of the property from 1972 to 1983.

1972 being the year that it was sold to Clarice Findlay. 1983 being the year that Clarice Findlay died.

Under cross-examination she at one stage agreed that Beswick Pennycooke would go on the land and farm it and look after it when he was alive. She further volunteered that it was farming he used to do.

At another stage she said when he returned from England he never worked the land – he never even went back over there.

Hence on the state of her evidence it is unclear what Beswick Pennycooke would have done in the twenty (20) or so years between the time he returned from

England and his death. More precisely if indeed he was a farmer, where did he carry out his farming.

15. It is not expressly stated by her that the assertions of the Pennycokes that they lived on the land while their father was in England is untrue.

In any event it is after 1972 that she claimed either herself or her grandmother would farm the land.

Under cross-examination when asked if she used to see the 1st, 2nd, 4th and 5th defendants on the land, her response was yes – they used to reap from the land.

She maintains however she did not see the 1st defendant planting on it neither did she see the 2nd defendant working it.

16. The 5th defendant said she obtained permission from her father and commenced construction of a house on the property in his lifetime. No one she said sought to prevent her from doing so. It was upon his death that the 2nd claimant tried to intervene.

The 2nd claimant agrees that the 5th defendant built a house on the land but insist that it was commenced after the death of Beswick Pennycoke. She only stopped planting on the land at this time and it was then that there was construction of the house. She insists that she did object and tried to prevent the construction even calling in the police.

17. Neither side seemed absolutely clear as to the actual dates the construction commenced and was completed.

It is consistent with the defendant that it was commenced in the early part of the 1990's. The 5th defendant herself said it was in 1993 and it took her some three (3) to five (5) years to complete.

The 2nd claimant said it was in or around 1995 that the 5th defendant started to erect a building on the property – despite her protest.

Significantly it was in about April of 1995 that the 3rd defendant says his father died.

In her Particulars of claim, the 2nd claimant asserted that it was in or about 1997 that the defendants jointly and severally entered upon a portion of the land and started to erect buildings thereon.

18. Thus the 2nd claimant's challenge as to when construction commenced; whether before or after the death of Beswick Pennycooke was inconsistent and again unclear.
19. There is evidence that the grave of Doris Goodwin and three (3) of her children are now on the land.

The defendants say they obtained permission from their father to have Doris Goodwin buried there as at the time no relationship existed between them and she had in fact been married to someone else.

The 2nd claimant agrees that Doris Goodwin is buried on the property and that she died before Beswick Pennycooke but is not clear as to whether this was before Clarice Findlay had died.

20. The significance of this is that once Doris Goodwin died after 1992 the property would have belonged to Clarice Findlay and any permission for her to be buried there would have to come from either the claimants or Clarice Findlay herself.

There is no evidence that the claimants challenged the burial.

There were in fact suggestions put to the 1st defendant that the 2nd defendant had gone to their step-father and quarreled about where their mother should be buried.

Nothing was raised as to whether either the claimants or Clarice Findlay were consulted about the burial on the property.

Under cross-examination it is noted that the 1st defendant said it is some twenty (20) years now since his mother had died making it about in 1990 – after Clarice Findlay but before Beswick Pennycooke.

21. It is significant that the Pennycooks maintained that their usage of the land came with the consent, agreement or permission of their father Beswick. One may well question if he had sold the land to his sister their aunt, he may well have been expected to so advise them.

Mr. Don Bryan in his submissions argued that there was a disconnect between the defendants and their father and the 2nd claimant was more “au fait with his life and business affairs”.

22. Mr. Bryan outlined bits of evidence which proved this disconnect and found especially significant the fact that he seemed to have lived with Clarice Findlay and the 2nd claimant for the most of his life.

Indeed the evidence supported this submission and further there is evidence that the 5th defendant also lived with Clarice Findlay for some time. The 1st defendant said that he too lived there but this was challenged by the 2nd claimant.

23. Mr. Bryan also found some significance in the fact that the 2nd claimant said it was after welfare cheques for their father started arriving that the sons took interest in their father. He opined that they were “opportunistic” men now seizing on the arrival of the cheques to get close to their father and in a similar way they are seizing on the opportunity of his death to lay claim on the land which they know he had owned and occupied at one point in time.

24. Interesting as this line of argument may be, it is significant that ultimately Beswick Pennycooke died while living with his son, the 3rd defendant. He left a Will naming this son as one of the executors. This Will, the 3rd defendant indicates was probated and he has a copy of the original grant and probate.

Neither of these documents were relied on by the defendants in presenting their case. While one cannot speculate as to the contents of the Will, it can be assumed that if it had anything that could assist the court in making a determination as to the ownership of the land, it would have been exhibited and relied on.

25. It is noteworthy that the 1st, 2nd, 3rd and 5th defendants in their witness statement referred to their father’s use of the land, his actions in relation to the land and to their use of the land as the basis of challenging the claimants claim to the lands. They did not seek to rely in the Will.

The 1st defendant said their father gave them permission to work the land, came on it regularly, reaped crops, paid his taxes and even allowed the 5th defendant to build a house on part of it.

The 2nd defendant, whose witness statement was admitted as an exhibit, had died prior to the commencement of the trial. He said he and the 1st defendant had occupied and worked the land from 1981 or 1982 unmolested and without disturbance from anyone. They never occupied the land with the permission of the 2nd claimant, Clarice Findlay or anyone acting on their behalf. Up to the time of his death, they occupied the property with their father's permission.

The 3rd defendant emphasized that it was the 1st defendant who used to pay the taxes for the land prior to his return to Jamaica. Since that time it is he and the 5th defendant who have been paying.

The 5th defendant concluded in her witness statement that up to the time of his death in 1995, her father had exercised all right of ownership over the land – he did so before he went to England and continued to do so upon his return. It is he who gave her permission to build a house on it.

26. In any event, the 2nd claimant maintained that it was after the death of their father that the defendants attitude and behaviour towards her deteriorated to a point where she became fearful of them.

It was out of this fear that she said she did not object when they went on the land to reap what they did not sow. She however also said she did not see them on the land but they remained in the district.

She also was unclear as to whether it was she who initiated court action against them in the Resident Magistrate's Court or whether it was they who did.

She at one stage stated that this was the only court action pursued although she admitted that the matter was in court before the magistrate in the hope that there would be peace but there has been none.

The documentary evidence re the indenture

27. The 2nd claimant has presented to the court an indenture as proof of the transaction which took place between her grandmother and Beswick Pennycooke. It is perhaps useful to note here that whereas the Pennycooke siblings refer to their father as BESWICK the 2nd claimant refer to him as BESWRECK.

This latter name is the one that appears on the indenture which was entered in the Registrar Book of Records on the 5th of September 2003 at 9:30 a.m. and is recorded at LN8066 Folio 41 – according to the document exhibited.

This indenture was therefore registered approximately one (1) month before the claim form in this matter was filed.

28. Under cross-examination, the 2nd claimant explained how it was a crowd of them who went to the Island Record Office to register the indenture – Findlay's children and grandchildren; some from England. She said she was among the crowd and that this took place in 1972. She explained that neither Miss Clarice nor Mr. Beswick went with them as the former had asthma. She gave no explanation as to why the latter did not attend but insist that he was alive when they went to register it.

This evidence as to when it was registered is not supported by what is contained on the exhibit itself and this fact is noted by Ms. Judith Clarke in her submission.

29. Another feature noted by Ms. Clarke is that the sale price of the property stated in the indenture in 1972 was ninety thousand dollars. On the land tax receipts exhibited through the defendants the unimproved value of the land in 1983 was \$2000.00 and in 2003 was \$70,000.00.

30. She also highlighted the fact that an X appears beside the hand written BESWRECK PENNYCOOKE with the penning of names following this one which she opined is strikingly identical and do not purport to be signatures.

On this aspect, also she further submitted that it is particularly significant in light of the fact that there is no declaration of understanding on the document and there is the undisputed assertion by the defendants that their father was illiterate.

None of the persons whose name appear on the indenture as witnesses to its execution, were called as witnesses although the evidence from the 2nd claimant is that they are all alive. Two (2) of the witnesses live in England and all three (3) are relatives of Clarice Findlay and the 2nd claimant.

The Justice of the Peace, the 2nd claimant explained is too ill to have traveled to court to give evidence.

The 2nd claimant admitted that she herself was not present when the indenture was signed.

31. Another feature Ms. Clarke referred to as notable is the designation of the southern boundary of the land as belonging to "Olive Hopwood" which does not

accord with the 2nd claimant's oral evidence that her grandmother gave her the lands she owed by a probated Will and had never given her anything before.

In her witness statement she said her grandmother had given her lands "before she bought the land from Beswick Pennycooke" while her grandmother was alive. In the Will of August 1983, her grandmother spoke to leaving to the 2nd claimant the two (2) acres; already given away during her lifetime. The 2nd claimant in recognizing this fact in her witness statement stated therein that her grandmother gave all the residue and remainder of her estate including the property in dispute".

32. The question therefore that remains must be whether in fact the 2nd claimant did own the lands adjoining the land in dispute in 1972 such that her name ought to appear on the indenture.

Indeed this position remains unclear against the evidence also of the 2nd claimant that it was not until after her grandmother's death that she applied to have her name endorsed on the Tax Roll as the owner and person in possession of the land.

33. Another submission of Ms. Clarke that can be considered here is that it is opined that it would be highly unlikely that Clarice Findlay would have declined to make an express devise of the subject land in her Will, if she had indeed bought it from Beswick Pennycooke in 1972 for \$90,000.00 over ten (10) years earlier and had been up to the time of her death the owner in possession therefore.

She urged that it seem more credible that she made express devise of that which she knew she owned "two acres of land with house".

34. In his submission Mr. Bryan referred to the evidence of Iswel Pennycooke – that his father was illiterate as giving support to the validity of the document as it does

have an "X" (his mark) beside where the name Beswick Pennycooke appears as executing the document.

Further he noted that at least one of the names appearing as witness was known to the 3rd defendant and thus was not a figment of the imagination.

35. The concluding submission of Miss Clarke touching this indenture bears repeating verbatim:-

"Save that this document exists and to that extent is authentic, no reliance can be placed on it for proof that the subject land was sold to the 2nd claimant's grandmother by the defendant's father. The court will also no doubt have regard to the physical state of the original document tendered to assess whether it more closely resembles a seven year old document than a thirty-eight year old document".

The documentary evidence – re the payment of taxes for the land.

36. It is firstly to be noted that all the receipts tendered into evidence proving taxes were paid for the land was done so by the defendants.

This is against the background of the 2nd claimant's assertion that it was she who had paid the taxes but was now unable to account for her receipts in proof of this. She said they may have been destroyed in the hurricane or otherwise damaged or destroyed over the years.

37. Under cross-examination the 2nd claimant firstly said the taxes were paid in her name especially since her application in 2003 to have the valuation roll amended to have her name noted as the owner and person in possession.

The notice of amendment of valuation roll was exhibited and bears the date the 9th of May 2003. It states that at the valuation date of 2002/03/01 the unimproved value was \$800,000.00. It also states that the owner was BOWRICK Pennycooke. The effective date of the amendment was given at 1997/04/01.

The features of this notice that gives rise to questions is firstly the fact that the owner was given as BOWRICK Pennycooke – this some thirty (30) years after it was supposed to have been sold with the 2nd claimant being in possession of the indenture proving conveyance.

Secondly what is the significance, if any, of the effective dated of the amendment – it was supposedly sold in 1972 and devised to the 2nd defendant in 1984. No steps were taken on either of these occasions to have the name of the owner changed.

38. The 2nd claimant gave evidence that before the change the receipts would have been in Clarice Findlay's name before hers was placed thereon.

She also said the taxes were always paid in Beswick Pennycooke's name and then it was changed from his name to hers.

She however went back to maintaining that it was in fact paid in Clarice Findlay's name before "it go into her name" although she couldn't remember when it was she started paying taxes for the land.

39. The receipts exhibited were for the period 1983 to 2009.

Mr. Bryan noted that the first tax receipt had the name Clarice Findlay i/c endorsed at the top of it. This receipt it must also be noted had the name Bowick Pennycooke as owner and is dated 25/4/83.

Mr. Bryan pointed out that this is the only evidence of payment of taxes before the death of Clarice Findlay in 1985.

Mr. Bryan submitted that the words Clarice Findlay i/c were written there because the person who collected the taxes knew she was in charge from local knowledge or she paid it herself. If she did, it is Mr. Bryan submitted because she was asserting her possession or control of the property.

He however had earlier submitted that payment of taxes does not define ownership of land; neither does occupation means ownership.

40. There is no comment from Mr. Bryan on the fact that the tax receipts between 1985 to 2002 has the name of the owner as being Beswick Pennycooke spelt however in different ways.

The receipt of May 2003 has the name of the owner as Olive Hopwood et al executors/Cebert Wright and indicates it was paid by Pauline Pennycooke.

All the receipts thereafter bears the same name as the owner but indicate payment being made by BOWRICK, BESRIVK, or Beswick Pennycooke – who had been dead since 1994. An accurate record had therefore not been made of who was making the payment but the fact that the receipts were in the possession of the Pennycookes must be considered.

41. In her submission Miss Clarke highlights the evidence of the 3rd defendant explaining how the taxes had come to be paid by his family.

Evidence she submitted which must be seen as credible when taken with the totality of the evidence and in particular against the background that no steps had

been taken for the records to be altered to show that Clarice Findlay was the owner of the property and not just the person in charge.

42. It can also be considered significant that the amendment to the Tax Roll was also done in 2003 – the year this action commenced.

The evidence of the surveyor

43. On the 29th of July, 2008 the Court ordered that there be a survey of the disputed land to establish the boundaries and the size thereof.

Mr. K.V. Masters conducted the survey, prepared and presented his report and attended to be cross-examined on it.

44. He was able to conduct the survey in the presence of the claimants, the 2nd, 3rd and 4th defendants along with Winston Blake and Hazel Douglas.

The latter is important in that lands were sold to her which the 2nd claimant said does not form part of the disputed property but was lands bought by her from Clarice Findlay.

45. It is noted that among the documents presented to the surveyor was the indenture of 1972, the Will of Beswick Pennycooke dated August 24, 1994 and an indenture dated June 27, 1998 between Olive Hopwood and Hazel Douglas.

46. The survey was done on September 30, 2009.

Mr. Masters submitted a diagram of the property with his report and the first thing to be noted is that the land claimed and occupied by the Pennycookes is 2.3498 ha or 5.80 acres.

The property would include that parcel which was allegedly bought by Hazel Douglas from the 2nd claimant on which a house had been constructed.

47. The surveyor indicated that if one used the information as given in the indenture evidencing this sale there would be no match to what was actually on the ground. This indenture was not accompanied by a diagram.
- Mr. Masters indicated that the description given in the indenture between the 2nd claimant and Douglas did not in fact have the boundaries defined in the document. It could not be of the size given in the indenture.
48. The 2nd claimant in her evidence was adamant that the land sold to Douglas was separate from the property now in dispute.
- She was claiming ownership of three (3) acres. The surveyor agreed that if it was only three (3) acres the Pennycookes were claiming it would not include the property on which Hazel Douglas had done her construction.
- He however said there was no visible demarcation between the two parcels and that it was all being farmed by the Pennycookes.
49. Another aspect of Master's evidence which is significant relates to dry rubble packed stone walls which runs one on the eastern side, one on the northern boundary and one on the southern boundary. He noted a gap in the wall to the north.
- In her evidence the 2nd claimant had said that three (3) different pieces of the wall "had been taken down" by the 1st, 2nd and 5th defendants – the surveyor seemingly saw no evidence of this.
50. The 2nd claimant had stated in her evidence that after she sold the land to Douglas, she was shown where it was she was to "walk" to get to this property. She said

this track- once a road but overgrown with bush would be over the land in dispute. It wouldn't however be close to where the 5th defendant had built her house.

She also said that there was access over land owned by Barrett Stewart – their cousin – to get to Hazel Douglas' land. This land owned by Stewart was considered family land and there was actually a little track they had cut to get to the property.

Mr. Masters found that access to Hazel Douglas' property came through property owned by Winston Thomas and there was in fact no access from property identified as belonging to Barrett Stewart.

51. Mr. Masters agreed that the land sold to Hazel Douglas reflects land locked boundaries. Miss Clarke in her submission noted that it is against public policy to convey land locked holdings.

It can be noted here that also in her submissions Miss Clarke opined that Olive Hopwood's familiarity with the land its boundaries "is at best very limited".

The submissions

52. Much of the submissions made by counsel has already been considered during the review of the evidence. However, there are some matters urged by them that bears consideration before a decision is arrived at.

For the defendants

53. Miss Clarke felt that in assessing the claim, the evidence may be analyzed in three segments:
- The documentary data

- The oral accounts/approach/demeanour of the contenders and their predecessors relative to the land from the 1960's to present
- The credibility of the contenders having regard to the evidence of the court appointed expert.

54. After reviewing and analyzing the evidence concerning the indenture exhibit 1 she concluded that the 2nd claimant's claim to ownership of the subject land based on this indenture is unsustainable.

She assessed the 2nd claimant when dealing with this area and opined that from her demeanour it is clear that she was uncomfortable with any questions as to how, when and in what circumstances this document was created, stamped and recorded. She found the 2nd claimant "a simple woman, who not being able to explain discern the incongruities in her explanation becomes flustered and inconsistent"

55. Miss Clarke went on to consider the other exhibits – the probate and Will of Clarice Findlay, the Notice of Amendment of tax roll, the witness statement of Cordey Pennycooke, the tax receipts and the surveyor's report and diagram.

She summarized the evidence of the parties and concluded that the claimant cannot sustain her claim that she is entitled to possession of the subject land. Further it is submitted, the claimant has failed to establish any justifiable basis upon which the court could order the defendants to deliver up the subject land to her or award mesne profits to her.

56. She concluded that there being no counterclaim, the defendants are merely asking that there be judgment for them with costs to be taxed if not agreed.

For the claimants

57. Mr. Bryan commenced his submission by identifying that the substantive issue in this case is that of credibility.

He spent much of his opening considering the evidence relative to the relationship which existed between the defendants and their father in comparison to that which he had with the 2nd claimant and her grandmother – his sister.

58. Given what he described as the cordial relationship which existed between Clarice Findlay and Beswick Pennycooke, Mr. Bryan opined that it is not improbable that he could have sold her the land when he was going to England or even upon his return.

He urged the court to find the 2nd claimant's evidence as more compelling, credible and reliable with the chronology and details in her witness statement being far more convincing.

He posed the question whether with the death of their father the defendants felt insecure about the 2nd claimant's activity on the land and sought to stop her coming onto it, in case she sought to assert any claim to it.

59. He pointed to fact that the 2nd claimant probated her grandmother's Will within seven (7) months of her death and regarded this as going to the state of mind of the 2nd claimant because to her knowledge and belief the land, the subject matter of this suit, was devised and bequeathed to her absolutely by the Will.

He noted the failure of the defendants to produce their father's Will and questioned whether this was because they have something to hide.

60. He considered the steps taken to establish ownership by having her name placed on the valuation roll in 2003 and the indenture made on the 27th December, 1972 other bits of evidence which makes her case more credible.

61. He interpreted the evidence of the 5th defendant's admission that the 2nd claimant tried to stop her from completing her house after she had completed two (2) bedrooms as amounting to her being put on notice by the 2nd claimant of her ownership of the property.

He pointed to what he considered contradictions in the evidence between the 3rd defendant and what the 5th defendant had said, the former having said she built the totally unmolested.

He stressed that it was the 2nd claimant who had taken action against the defendants for trespassing on the land.

62. He considered one contradiction in the evidence of Cordy Pennycooke who in his witness statement had claimed that the old house located on the land had broken down causing him to go to Manchester to live. Yet he went on to say that upon his return to St. Elizabeth, he returned to live on the land. These bits of evidence forced Mr. Bryan to ask where he would have lived when he returned to the land – since the old house had broken down.

One however would be forced to note that Cordey Pennycooke now deceased was not available for cross-examination and his witness statement was admitted as an exhibit.

63. Mr. Bryan concluded his submission by arguing that Beswick Pennycooke could not have transmitted the land to the defendants as he no longer owned it consequent on its sale to Clarice Findlay.

Further the defendants failed to show any evidence of an intervivos grant or a Will or intestate succession which would vest the property in them.

He submitted that “in order to prove the legal interest which the defendants are saying they have viz-a-viz the claim of the 2nd claimant they would need to satisfy the court by presenting compelling evidences of person who were familiar with the land and could attest to them dealing with the land in the way they are contending”.

The 2nd claimant, he felt, has proven her case on a balance of probability and should get the orders sought.

The decision

64. Evidence from persons who were familiar with the land and who could attest to its usage independent of both sides would certainly have assisted the court. However, I cannot agree with Mr. Bryan that the obligation was on the defendant solely to bring compelling evidence of this nature.

It is the claimant who having brought the claim had that initial duty and obligation in proof of her assertion that she is entitled to possession of the land.

65. The 2nd claimant having called no witness, relies on the indenture to support her claim that the land was in fact sold to her grandmother and then devised to her as part of the residuary estate.

As a witness, the 2nd claimant appeared at times confused and uncertain as to certain basic facts.

It is indicative of the type of witness she turned out to be that in her witness statement of January 21, 2010 she certified as true that she was fifty-one (51) years of age but by the date of trial in May she said she was sixty-two (62). No explanation was given for this.

At one stage while being cross-examined she expressed that her head “kind of mix-up”

66. Her evidence as to the occupation and usage of the land was at times unclear especially when she was being questioned as to whether any of defendants used to be on the land.

Further as regards the construction of the 5th defendant’s house she asserted it was in 1995 that this commenced, whereas she gave 1997 as the date the defendants sought to interfere with her undisturbed possession.

The 5th defendant stated that she had commenced building while her father was alive and it was after his death – when some rooms had already been completed that the 2nd claimant sought to stop her.

67. It is recognized that there were inconsistencies and discrepancies in the evidence offered by the defendants. The manner in which evidence was given was also found at times to be unsatisfactory.

However, given the 2nd claimant’s overall demeanour, her denials of suggestions that the defendants were the ones who had been in occupation of the land during the time their father was alive, was not convincing.

68. Mr. Bryan had submitted at one point that if Miss Findlay herself paid the property taxes she was asserting her possession or control of the property.

The evidence of the 2nd claimant seeking to establish that it was she who paid the relevant taxes was obscure and unconvincing.

She wavered as to whose name she had paid it in; when she paid it and what had become of the receipts she would have got if she had in fact paid it.

The defendants on the other hand were more credible in their account of how those taxes were paid and were in possession of their receipts to buttress their contention.

69. The indenture presented by the 2nd claimant in proof of the sale taking place between Beswick Pennycooke and his sister was accepted to be an authentic document but this does not to my mind prevent the veracity of its contents to be examined and challenged.

The appearance of the name of the 2nd claimant as owning lands adjoining the disputed land from 1972 appears questionable and she failed to convincingly explain how it could have got there. Once again she wavered in from her account as to how she would have come in possession of the land prior to 1972.

Her account as to how this indenture was registered also does not escape scrutiny; particularly concerning was her attempt to account for the absence of the parties to the conveyance who would have been dead years before the registration took place in 2003.

70. The evidence of the surveyor Mr. K. Masters assisted the court greatly in understanding the actual topography of the property which in turn led to a greater appreciation of what the parties were claiming.

It is clear that the defendants were wrong in the estimation of the size of the land they were claiming. They seemingly however on the evidence of the surveyor, had been farming on all that they claimed which amounted to over the three (3) acres.

The 2nd claimant asserted that lands she purportedly sold to a third party did not form part of the disputed land. Again the evidence of the surveyor is significant because the land she described as selling does not in fact exist in the manner as described.

As Miss Clarke submitted, it is apparent that the 2nd claimant's familiarity with the land and its boundaries is at best very limited. This is in and of itself surprising since she is claiming she was in undisturbed possession and usage of the lands for over thirty (30) years.

71. The defendants did not present evidence of their having inherited the land from their father or of him having officially "passed" it on to them. They take refuge in their assertions that it was from his acts of ownership that they derived theirs. They however are not seeking an order as to their entitlement, as Miss Clarke quite rightly noted – there is no counterclaim. They set out to challenge the 2nd claimant's claim of entitlement, on the balance of probabilities.

72. On the totality of the evidence while it is recognized that the defendants may not be regarded as proving their ownership of the property; they have sufficiently challenged the 2nd claimant's claim for an order that they deliver up possession.
73. It is therefore the order of the court that there be judgment to the defendants with cost to them to be taxed, if not agreed.