

TRINIDAD AND TOBAGO

LAND – TRESPASS

IN THE HIGH COURT OF JUSTICE
Sub-Registry, Scarborough

H.C.A No. 75 of 2000

BETWEEN

LINCOLN DILLON

Plaintiff

AND

MARY ALMONDOZ

AND

HUMPHREY ALMONDOZ

Defendants

Before: The Hon. Mr. Justice Breaux

Appearances: A. FitzPatrick S.C. and J. Gift for the Plaintiff
E. Koylass S.C. and D. Waithe for the Defendants

JUDGMENT

[1] It is a fundamental principle of the system of registered conveyancing that the title of every proprietor registered thereunder is “*absolute and indefeasible*” and cannot be impeached or affected by the existence of an estate or interest which, but for the registration, might have had priority.

The Register is conclusive. All interests are set out on its face. Nothing else is determinative. As Plowman J. said in Parkash v Irani Finance Ltd [1970] Ch. 101, 109:

“... one of the essential features of registration of title is to substitute a system of registration of rights for the doctrine of notice”.

See also Walton J in Freer v Unwins Ltd [1976] Ch. 288, 297.

“... The general scheme of the Act is that one obtains priority according to the date of registration, and one is subject, or not subject, to matters appearing on the register according to whether they were there before or after one took one’s interest whatever that interest might be”.

- [2] The system, introduced into Trinidad and Tobago by the Real Property Ordinance, now the Real Property Act Chap. 56:02, (the Act) was designed to produce and has produced, certainty in the grant of title to land registered under the Act. This has motivated many a proprietor of unregistered land to bring such lands within the provisions of the Act.
- [3] A purchaser acquiring land registered under the Real Property Act (the Act) need thenceforth be concerned only with such interests as appear in the Register and can ignore all other interests without risk to his title, provided that he is a bona fide purchaser for value.
- [4] The defendants in this case are in fact bona fide purchasers for value with the unfortunate result that the plaintiff has lost a sizeable portion of his land for which loss he now has no recourse. His land was wrongly included as part of adjoining lands which were brought under the provisions of the Act. The defendants ultimately purchased those adjoining lands which included the plaintiff’s portion. They bought without notice but, absent fraud, even if they had had notice, it would not have mattered since the plaintiff’s interest was not set out in the Register. A person taking an interest, under a registered disposition, for value, takes his interest subject to such other interests as are entered on the Register but

free from all other interests, whether he “*has or has not notice thereof express, implied, or constructive.*”

[5] The defendants, having purchased the adjoining lands as misdescribed, for (considerable) value, were guaranteed an indefeasible title under the Act and the plaintiff is left without remedy. His only recourse, that is, pursuing a claim for compensation under section 148 of the Act, is now statute barred pursuant to section 150 of the Act. The plaintiff did have one other avenue and it was to claim adverse possession of the particular portion of land. Indefeasibility of title is subject to certain stated exceptions in the Act. They include any rights of adverse possession subsisting at the time when the lands were brought under the ambit of the Act (see section 45). Unfortunately, the facts of this case do not support the plaintiff’s alternative claim of adverse possession.

[6] The plaintiff seeks the following reliefs:

- (a) a declaration that he is seized in fee simple and entitled to possession of a parcel of land comprising half of an acre more or less situate at Wilson Road, Scarborough, in the Island of Tobago bounded on the North, South and West by lands formerly of Francis Pantin but now of the defendants and on the East by Wilson Road;
- (b) an order requiring the defendants to remove a fence constructed by them upon the plaintiff’s land;
- (c) an order restraining the defendants their servants or agents or howsoever from entering or remaining upon the plaintiff’s land;
- (d) damages for trespass;

(e) Costs.

[7] He contends that he became the owner in fee simple of the half (1/2) acre in the following manner:

- (a) by deed of conveyance No. 2099 of 1944 (“the Dillon Deed”) the half (1/2) acre comprising two (2) roods (the Dillon half (1/2) acre) was conveyed by one Eliza Dove to his mother, Margaret Dillon (then Yeates).
- (b) his mother died on the 12th November, 1952 intestate and a grant of letters of administration of her estate (No. 220 of 1953) was granted to his father, Eric Highcastle Dillon. His mother left surviving her, his father and their three (3) children, namely Stanley Dillon, Elizabeth Dillon and the plaintiff.
- (c) by a deed of assent No. 5158 of 1975 his father, as administrator of the estate of Margaret Evelyn Dillon, *inter alia* assented the Dillon half (1/2) acre unto himself as to a one third (1/3) share thereof and the remainder to the three (3) children Stanley Dillon, Elizabeth Dillon and the plaintiff.
- (d) by a deed of conveyance made on the 18th day of February, 1991 and registered as No. 17222 of 1997, the plaintiff’s father, his brother and his sister conveyed their respective shares in the Dillon half (1/2) acre to the plaintiff.

[8] The plaintiff makes two (2) further contentions. The first is that he and his predecessors in title have been in continuous and undisturbed possession of the half (1/2) acre from 1944 to the present time and by virtue thereof, he is entitled to remain in possession of the Dillon half (1/2) acre, which includes the portion in dispute. The second is that the defendants have no paper title to the portion of land now in dispute, because their claim has arisen as a result of a misdescription in the deed of conveyance of the adjoining lands, which lands the defendants ultimately purchased. He particularises the latter contention as follows:

- (a) by deed dated the 15th December, 1972 and registered as No. 93 of 1973, Edith Eudosia Griffith as personal representative of the estate of Frances Ann Pantin, (one of the defendants' predecessor in title), sold to Emerald Enterprises Limited (Emerald) a parcel of land comprising four (4) acres two (2) roods and thirty-six (36) perches ("the Pantin lands");
- (b) the company brought the Pantin lands under the provisions of the Act and having done so, sold it to the defendants;
- (c) at the date of sale to the defendants, the company was and could only have been seised of the Pantin lands as purchased from Edith Eudosia Griffith.

(I must note that it is not accurate to say that Emerald sold to the defendants. After Emerald brought the lands under the Act, it sold them to one David Knott, who then sold to the defendants.)

- (d) in so far as the defendants claim to have obtained title to more than four (4) acres, two (2) roods and thirty-six (36)

perches, (being the actual acreage sold by Edith Eudisia Griffith to Emerald) any land which they occupy in excess of four (4) acres two (2) roods and thirty-six (36) perches is by reason of wrong description and “*the defendants could not have derived title in respect of it from or through a purchaser for value*”.

[9] The plaintiff complains that the defendants have effectively divided the Dillon half (1/2) acre by the construction of a fence and have refused to remove it. The plaintiff is now in occupation of six thousand (6000) square feet of the land.

[10] The defendants by their re-re-amended defence contend as follows:

- (a) if the lands occupied by the plaintiff form part of the lands purporting to be that referred to in the Dillon Deed, then the plaintiff and his predecessors in title did not occupy, or discontinued or abandoned possession of, or were dispossessed of, so much of those lands as is claimed in excess of the plaintiff's occupied area, for more than twenty-five (25) years at least before this action was brought. (The area claimed in excess of the plaintiff's occupied area and which is now in dispute is referred to as the disputed portion);
- (b) the defendants derived title to the Pantin lands from Emerald, having purchased the Pantin lands as bona fide purchasers for value, which lands comprise five (5) acres, one (1) rood and twenty eight (28) perches. This acreage is set out on the survey plan to the lands described in the certificate of title, 2165 Folio 101 dated 25th March 1975. The defendants' lands are a portion of the five (5) acre parcel and they are the registered owners under certificate

of title Vol. 3078 Folio 137, comprising four thousand eight hundred and thirty nine point five square metres (4839.5 sq m);

- (c) Emerald purchased the Pantin lands from Edith Eudisia Griffith and the Pantin lands were resurveyed. The resurvey was conducted on the basis of land actually in the sole, undisturbed and exclusive occupation of the defendants' predecessors and the same was found to comprise five (5) acres one (1) rood and twenty-eight (28) perches. The fence was constructed on the proper boundary in March 1984;
- (d) if the disputed portion is found to be part of the lands described in either of the certificates of title at 9(b) above, possessory title by the plaintiff is denied. The defendants' predecessors in title have been in continuous and undisturbed possession of the disputed lands from at least 1973 and they themselves were in open and undisputed possession from January 1984 without protest from anyone, until a letter of complaint from the plaintiff dated 13th April 2000;
- (e) in the event that the disputed portion is found to form part of the lands described in the Dillon Deed and enclosed by the defendants' eastern fence, the defendants, by the sole and exclusive possession of their predecessors in title for more than (16) years before the commencement of the action herein, have extinguished the plaintiff's title in the disputed portion.

- (f) that the plaintiff has not been in possession of any part of the lands enclosed by their fence for the duration alleged or at all but has been in occupation of approximately six thousand (6000) square feet of land, the western boundary of which is along the eastern boundary of the defendants' land.

Undisputed Facts

[11] The undisputed facts are as follows:

- (a) by the Dillon Deed the plaintiff's mother Margaret Evelyn Yeates (later Dillon) became the owner of the Dillon half (1/2) acre which is bounded on the North, South and West by lands of Francis Pantin (which are the Pantin lands) and on the East by Plymouth Road. During the period 1944 to 1952, the plaintiff's mother and her family lived on the Dillon half (1/2) acre. The three (3) children of the family, which included the plaintiff, were born on the property;
- (b) Margaret Yeates Dillon died on 12th November, 1952 intestate, leaving surviving her, her husband Eric Dillon and their three (3) children, Stanley Dillon, Elizabeth Dillon and the plaintiff, Lincoln Dillon;
- (c) by deed of assent No. 5158 of 1975, Eric Dillon, as administrator of the estate of his wife Margaret Dillon, assented the half (1/2) acre to himself as to 1/3 share and the remainder to his children in equal shares;
- (d) by deed of conveyance made on the 18th February 1991 and registered as No. 17222 of 1997, Eric Dillon, Stanley

Dillon and Elizabeth Dillon conveyed their respective shares in the Dillon half (1/2) acre to the plaintiff;

- (e) by deed No. 93 of 1973, (the 1973 deed) Emerald purchased the Pantin lands which lands were said to comprise four (4) acres, two (2) roods and thirty-six (36) perches. Neither the Dillon half (1/2) acre nor the Pantin lands was surveyed;
- (f) in June 1973, the Pantin lands, which were unregistered lands, were surveyed by Leslie Akum Lum, land surveyor, with a view to bringing them under the Act. The lands were found by that survey to comprise five (5) acres, one (1) rood and twenty-eight (28) perches;
- (g) in 1975 the Pantin lands were brought under the provisions of the Act and a certificate of title, Volume 2165 Folio 101 was issued to Emerald;
- (h) on 14th March, 1983, Emerald, having gone into liquidation, the directors, J A Scott and M. Scott-Knott sold the Pantin lands (as resurveyed) to David Knott;
- (i) on 2nd April, 1984, the defendants (as one party) and three other parties purchased the Pantin lands (as resurveyed) for the sum of two million dollars (\$2,000,000.00) from David Knott by memorandum of transfer held in Vol. 2165, Folio 101;
- (j) the defendants and the three (3) other parties subdivided the Pantin lands (as resurveyed) into four (4) portions. Each

party obtained separate certificates of title for each portion. The defendants by their Certificate of title in Volume 30787 of Folio 137 became registered proprietors of a 4839.5m² portion of the Pantin lands and this included the disputed portion.

The Issues

[12] The issues which arise on the pleadings are:

- (i) were the Pantin lands misdescribed by the 1973 Deed or at all;
- (ii) was the plaintiff the paper title owner of a half (1/2) acre of land as he contends;
- (iii) if the plaintiff was not the paper title owner of the entire half (1/2) acre, was he in continuous and undisturbed adverse possession of the disputed portion from 1944;
- (iv) were the defendants bona fide purchasers for value of the Pantin lands including the disputed portion;
- (v) if the plaintiff did have a possessory title or was the true paper title owner, was he himself dispossessed of the disputed portion by the defendants' predecessors in title from 1973, or by the defendants themselves from 1984. (The plaintiff contends that the defendants and their predecessors in title did not enter into possession until 1987.)

[13] Despite the plaintiff's pleading of the misdescription as an alternative issue, it was in fact a central part of his pleaded claim to paper title ownership of the half (1/2) acre. Mr. FitzPatrick, in the course of the trial (when the hopelessness of his client's claim of misdescription became clear but after the close of his case) abandoned the contention that it was the Pantin lands which were misdescribed and contended that it was instead the Dillon half (1/2) acre which was misdescribed by the Dillon Deed. He added that because of the misdescription of the Dillon half (1/2) acre, the plaintiff was in fact the fee simple owner of only six thousand (6000) square feet of land and that the plaintiff and his predecessors had been in adverse possession of the disputed portion, which was the remaining portion of the Dillon half (1/2) acre.

[14] Mr. Koylass objected to Mr. FitzPatrick's adjustment (of his case) contending that it could not be made without a formal amendment and in any event it is not the case which he has come to defend. I do not agree. In my judgment Mr. FitzPatrick's contention fell squarely within the alternative pleading by which the plaintiff alleges that he has been in undisturbed possession of the entire Dillon half (1/2) acre (which included the disputed portion) since 1944. Since there is no dispute that the plaintiff owns and occupies at least part of the Dillon half (1/2) acre, which occupied portion it is agreed, amounts to six thousand (6000) square feet, then Mr. FitzPatrick was entitled on the pleadings to mount his argument as to adverse possession in respect of the disputed portion which also formed part of the Dillon half (1/2) acre. Any misdescription by the Dillon Deed would be a matter of evidence. The fact pleaded is adverse possession of the Dillon half (1/2) acre.

[15] Despite that adjustment, it is important to the outcome that I examine the issue of misdescription of the Pantin lands. I shall do so along with the question of misdescription of the Dillon half (1/2) acre because together, they bear on the paper title ownership of the Dillon half (1/2) acre and of the disputed portion in

particular. They also bear on the question whether the plaintiff was in adverse possession of the disputed portion and on whether the defendants were bona fide purchasers for value.

Short Conclusion

[16] I shall set out a summary of my conclusions on the issues at this stage.

Issue I – The Pantin lands were not misdescribed by the 1973 Deed but were misdescribed to wrongly include the disputed portion within their boundaries, when Emerald brought the Pantin lands under the provisions of the Act.

Issue II – The plaintiff’s predecessors in title did have valid paper title ownership of the Dillon half (1/2) acre from 1944 pursuant to the Dillon Deed. However, the disputed portion, which formed part of the Dillon half (1/2) acre was wrongly included within the boundaries of the Pantin lands when Emerald brought the Pantin lands under the provisions of the Act.

Issue III – Since the plaintiff’s predecessors in title were valid paper title owners of the Dillon half (1/2) acre in 1944, they were in possession as true owners and were not in adverse possession of the disputed portion which then formed part of the Dillon half (1/2) acre.

Issue IV

- (a) The defendants being one of four (4) parties who purchased the Pantin lands (as misdescribed) from David Knott on 2nd April, 1984, were bona fide purchasers for value under the provisions of the Act and, pursuant to sections 45, 143(c), 145 & 146 of the Act, once the disputed portion was transferred to the defendants, for value, as part of the Pantin lands, the plaintiff could not recover possession.
- (b) While the defendants’ title was subject to any rights of adverse possession subsisting at the time when the Pantin lands (as misdescribed) were brought under

the provisions of the Act, the plaintiff's predecessors in title were in possession from 1944 as paper title owners of the disputed portion and, because they were not in adverse possession, the plaintiff could not claim adverse possession of the disputed portion from 1944.

Issue V – In any event, even if I am wrong on Issue IV and the plaintiff can claim adverse possession of the disputed portion from 1944, the defendants had dispossessed the plaintiff in March 1984 and would have acquired possessory title by the time of the plaintiff's action in May 2000.

The Evidence:

[17] Four (4) persons testified for each of the parties. Kenneth Sturge, Land Surveyor, the plaintiff, his brother Stanley Dillon and James Paul, gave evidence on behalf of the plaintiff. David Knott, Chartered Valuator Surveyor, Hubert Grant, Clerk of the Registrar General's Office, John Duncan, handyman, and the second defendant testified for the defendants. Mr. Arnold Ramon-Fortune gave a witness statement on behalf of the defendants to which was attached a survey plan. He was not cross-examined. Miles Almondoz, who was originally the first defendant, attended court on at least two (2) occasions and gave a witness statement in the expectation that he would be cross-examined but passed away before the matter commenced. His widow, Mary, was substituted in his place. His witness statement was still considered, due weight being given to the fact that he could not be cross-examined.

Evidence on behalf of the plaintiff

Kenneth Sturge

[18] Mr. Sturge's evidence was directed towards proving the plaintiff's ownership of the Dillon half (1/2) acre. He produced a survey plan showing the Dillon half (1/2) acre but which divided the area into the undisputed portion (now occupied by the plaintiff and comprising approximately six thousand (6000) square feet) and the disputed portion claimed by the plaintiff but occupied by the defendants.

He said the Dillon half (1/2) acre comprised a little more than half (1/2) acre. He produced his plan after having seen the Dillon Deed. The Dillon Deed described the parcel conveyed to Margaret Yeates Dillon as comprising two (2) roods. He added that two (2) roods amounts to half (1/2) an acre.

[19] He also looked at an aerial photograph obtained from the Lands and Survey Department and a topographical survey. The survey was conducted in 1988, essentially on the instructions of the plaintiff. During cross-examination, Mr. Sturge stated that he was able to identify the Dillon half (1/2) acre solely using the Dillon deed and pickets he discovered while conducting the survey. He was able to draw a plan of the Dillon half (1/2) acre as described in the Dillon Deed using only pickets found. He added that the disputed portion, which he found to be part of the Dillon half (1/2) acre, was absorbed into the plan produced from Mr. Leslie Akum Lum's survey of the Pantin lands. Mr. Akum Lum's survey plan was drawn to facilitate Emerald's application to have the Pantin lands brought under the Act. It was his opinion that Emerald took the disputed portion from the Dillon half (1/2) acre. That opinion was not shaken by Mr. Koylass in cross-examination in any way.

Lincoln Dillon

[20] The plaintiff's evidence was also directed at proving that he was the paper title owner, in possession of the Dillon half (1/2) acre. He was one of the three children of the marriage of his parents, Eric and Margaret Dillon, all three children were born on that parcel. The Dillon half (1/2) acre was bounded on three (3) sides (North, South and West) by the Pantin lands and on the East by Wilson Road/Plymouth Road. Upon the death of his mother in 1952 his father migrated to England. The plaintiff and his two (2) siblings grew up with their paternal grandmother, Ada Dillon. Two (2) persons, Katie Prince and one "O'Brien" lived in the house after they went to live at their grandmother. The house was partitioned with both parties living in separate portions. The house was blown down when the infamous Hurricane "Flora" hit Tobago in 1963 and O'Brien left. Katie Prince remained and was joined by "two (2) boys". He added

that “Katie used to keep the land clean as far as she was able”. She left “in 1982 or 1983 to go to live somewhere else” breaking down the house leaving only “the concrete steps”.

[21] The plaintiff said in 1984-1985, “I saw a tractor on our land, the tractor was cutting down everything on the land up to Wilson Road. The tractor cut down all the trees and removed the concrete steps”. He spoke to Miles Almondoz and told him that his workmen were tractoring lands belonging to the Dillons. He replied that they had bought the lands. The plaintiff said that, “I protested that we had not sold our lands”. The plaintiff added that he constructed a fence on the northern boundary but in or about 1987 the defendants broke down his fence and “erected fencing which effectively separated an area of about seven thousand (7000) feet from the balance of the Dillon half (1/2) acre of land”.

[22] Under cross-examination by Mr. Koylass, the plaintiff admitted not growing up on the property. He said that the bulldozing of the property involved the use of heavy-duty equipment and that “after they bulldozed their land, they bulldozed our entire half acre”. He added that after bulldozing the land they began putting up the fence “quite a long while” after. They began constructing the fence in late 1986-1987. Between the bulldozing and the fencing, the land was left alone “for a few months”. The bulldozing started on the adjoining lands in 1984/1985 but “not on my lands”. They started bulldozing his lands “between 1985 to early 1987. That was the last piece they would have bulldozed”.

Stanley Dillon

[23] Stanley Dillon is the elder brother of the plaintiff. His evidence also went towards proof of ownership of the disputed portion as part of the Dillon half (1/2) acre. His evidence was the same as the plaintiff’s as to the occupation of the Dillon half (1/2) acre from the date of purchase of the parcel by his mother in 1944. He admitted under cross-examination that when he, his father and his sister sold their interests to the plaintiff in 1991, the only area of the Dillon half (1/2)

acre which they occupied was 6000-7000 square feet. He was aware of the existing dispute at the time of the sale but was not then aware who had put up the fence which excluded them from the disputed portion. He said that in 1984 he was *“in and out of Tobago, I spent a lot of time in Sweden where my children went to school.”*

[24] He said that as far as he was aware the Pantin lands were not bulldozed in 1984 but in 1986/1987 around the same time as the Dillon half (1/2) acre. This was inconsistent with his brother's evidence which initially had put the bulldozing of the Dillon half (1/2) acre in 1984/1985 and which he later changed to *“between 1985 to early 1987”*. Stanley Dillon said that he was not aware of surveying works being done on the land in 1973, *“it could happen, it couldn't have happened. I didn't see anything happening. I was not aware of anything happening”*. He added that he was not aware of persons being on the land and performing survey works. Nor was he aware that in 1983 Mr. David Knott had commenced more clearing of the lands on the disputed area. He conceded that after he left Wilson Road in 1965 he had little involvement with the lands at Wilson Road, admitting further that his life centered around his business at Milford Road rather than Wilson Road.

James Paul

[25] Mr. Paul in his witness statement also testified to the residence of Katie Prince on the Dillon half (1/2) acre. He said she lived in the duplex with Jacob Prince, who lived in the other half of it. He, James Paul, later joined them on the premises. He left the premises in 1971 when he got married. Jacob Prince continued living there. He added that *“at the time we lived there with my aunt, “I didn't know how much land Mr. Dillon owned but the adjoining lands were owned by the Pantins”*.

Evidence on behalf of the defendants

Mr. Knott

[26] Mr. Knott was the brother-in-law of James Arden Scott and the husband of Mr. Scott's sister, Maudrie Scott. James Arden Scott and Maudrie Scott-Knott (both deceased) were directors of Emerald. He is quite familiar with the business of Emerald and with its purchase of and subsequent dealings with the Pantin lands.

[27] In his witness statement he stated that he was also very familiar with the Pantin lands which he said were "*generally overgrown*". He recalled that prior to Emerald's purchase of the Pantin lands he walked on the lands with James Scott who pointed out the area of land which he intended to purchase. After Emerald's purchase it was determined that the lands should be brought within the provisions of the Act because there was no actual survey plan of the lands. He said the survey was conducted by "*Leslie Lum Kee Lum*". (I consider that to be an error since the surveyor has been named as "*Leslie Akum Lum*") and "*the necessary notices were served on adjoining land owners*". He said:

"I am aware that Emerald Enterprises Limited commenced land clearing works upon the entire parcel of land prior to the survey and even during the course of the survey land clearing works were performed. Such works involved the entry of workmen on the lands and the tracing of boundaries as to the intended survey. After the lands were brought under the R.P.O, even more development works were openly performed upon the entire area of the surveyed lands. This involved the accomplishment of a topographical survey by entry upon the lands and the lands were cleared of high bush. All these works were done in the open and were in plain sight of any of the adjoining owners and in fact of anyone passing along Wilson Road. At no time was any complaint made as to Emerald Enterprises Limited's entry, occupation and possession of its lands".

[28] He said that the land was cleared to its defined boundaries in 1974. On 18th May, 1977 Emerald was put into members voluntary liquidation and its property was distributed on 9th May, 1978 to James Scott and Maudrie Scott Knott by deed. He purchased the property on 14th March, 1983. He said in his witness statement that:

“At the time of my purchase I fully accepted the correctness of the boundaries of the five (5)acre 1 rood 28 perches parcel of land as being accurate and of being lands belonging to my vendors and I have never considered it otherwise. Furthermore, as from Emerald Enterprises 1973 Limited’s purchase of the Pantin lands and thereafter as to the survey, Emerald Enterprises Limited was in sole occupation and possession of the lands and prior to the time of my purchase no other person was in possession.

I purchased the lands accepting the right of my vendors to transfer to me the entirety of the lands held by them”.

[29] On 8th September 1983 he signed an agreement for sale and the purchasers (who included the defendants) were put into possession on 4th January, 1984. The sale was completed on 2nd April, 1984 and the memorandum of transfer to the Almondoz and their fellow purchasers was executed. He added that up to that time no person approached him about encroaching upon adjoining land. He was cross-examined at length by Mr. FitzPatrick.

[30] Mr. Knott said that the topographical survey which was conducted in 1975, did not require that the entire five (5) acres of land be cleared and not all of the lands were cleared. He accepted that while there were springs on the land which he had drained (upon his purchase in 1983) there were no springs on the disputed area. As such, if it were not necessary to clear any section of the disputed portion, there

would not have been any clearing. He was not able to say what specific part of the five (5) acres would have been cleared.

[31] He conceded that when the Almondoz approached him to purchase the land he did not point out the boundaries. He was shown his letters, exhibits D 22 and D 23A. However, he was not prepared to accept that he imposed a condition that the Almondoz establish the boundaries at their own expense, because (as the letters suggested) he himself did not know where the boundaries were.

[32] He was unpersuasive in that regard. The letters were clear in their purport. I have no doubt that he himself could not identify the boundaries to the lands he had purchased. It was apparent that, up until the survey was conducted for the defendant in 1984, Mr. Knott did not know where the boundaries of the Pantin lands (as defined by the Akum Lum plan) were. It also explains the error which occurred.

[33] He was also quite effectively challenged by Mr. FitzPatrick on his, (Mr. Knott's) assertion that he had occupied and bulldozed the disputed portion after his purchase from Emerald. In re-examination Mr. Knott stated that his impression was that the application to register the lands under the Act was brought "*in order to establish that the land purchased by Emerald was the land that was occupied by the Pantins and to ensure that we had the description of the land and proper title to it*".

John Duncan

[34] John Duncan had worked for the defendants for several years. He constructed the fence which enclosed the disputed portion. His evidence went towards establishing the defendants' alternative claim of adverse possession from 1984. He was not a very effective witness. His recall appeared convenient, given that he was unable to recall the birth dates of his children but could remember the specific dates of construction of the fence (9th April, 1984 to 13th April, 1984).

While he did recall the month and year of birth of his second son which he said coincided with the construction of the fence, the date he gave (for his son's birth) was July 1975.

Humphrey Almondoz

[35] In his witness statement the second defendant stated that he executed a written agreement on 8th September, 1983 for the purchase from Mr. David Knott of a parcel of land comprising five (5) acres one (1) rood twenty-eight (28) perches at Wilson Road. Because of its relevance to the question of adverse possession by the defendants, his evidence in his witness statement bears some reproduction. He said:

“The lands were really intended to be co-owned by 4 parties viz Almondoz Tobago Limited, Miles and Humphrey Almondoz, Pasaram N. Maharaj & Manmohan Maharaj and Tommy Elias and Bernadette Elias, and this was reflected in an agreement among the intended co-owners dated the 8th September, 1983.

Prior to entering into the agreement to purchase, my brother and I, together with some of the other co-owners actually walked on the land and inspected the property using the Real Property Ordinance plan describing the lands intended to be purchased. During this time no person made any objection to our being upon the lands.

Having entered into the agreement the parties agreed to the subdivision of the lands into 4 lots and a partition of the lands so that each co-owning party would be entitled to an individual lot. My brother and I were to own lot 1 or A as was identified on a copy of the Real Property Ordinance survey plan which was used as the basis of the subdivision. At that time I had no idea that

anyone other than Mr. Knott claimed to be the owner of any part of the lands. I accepted the correctness of the Real Property Ordinance plan.

On the 4th January I got permission from Mr. Knott to enter, survey and fence our lands.

In January 1984 my brother and I entered the lands with our surveyor who identified the southern and eastern boundaries of the Almondoz lot with a view towards our fencing our lot starting at the southern boundary and proceeding along to the eastern boundary which abutted the road.

In order to carry out our works we brought equipment unto the lands and started excavating and levelling the land. My brother and I personally supervised the works which started on a daily basis at 8:00 a.m. finishing no earlier than 5:00 p.m. During the course of any workday and there was an arrangement between my brother and I so as to ensure the presence at the worksite of at least one of us and in fact as it occurred we were regularly on the worksite together.

When at the worksite I was actively involved in overseeing and supervising the works and my presence was obviously as a person in charge of the works.

There were at least four (4) workmen on site throughout the day. The works were substantial removing mounds of earth from one location of the land and placing it at lower levels. Trucks were also driving on and off the land from Wilson Road. Our presence, occupation and the works that we carried out on the

land were all done in the open and the movement of vehicles on the land created noise and the raising of clouds of dust. We sheeted the lands and in particular the soggy areas with rotten rocks which was brought unto the lands by trucks. In those days the works that we were performing were big operations and it actually involved transforming the entire look of the lands along a busy area of Scarborough.

In fact, our occupation of the land even involved changing the course of a river that passed through the lands to within the edge of our western boundary. At no time during the course of the works did anyone make any complaint, protest or objection to my presence on the land or as to the works on the land or as to any boundary dispute.

After having done sufficient levelling so as to be able to commence the fencing, fencing works began in the 3rd week of March 1984 starting at the southern boundary. The head workman for the fencing works was John Duncan also called Chin. He had three (3) other men with him. Chin was familiar with the land because he was involved in the earlier excavation works.

The fencing proceeded along the southern boundary as was identified to my brother and I by our surveyor until we reached the end of our southern boundary to the Wilson Road because by that time we had entered into an agreement dated 9th April, 1984 with Ifill Dillon to purchase the parcel of land now occupied by the plaintiff and had got his consent to fence the lands the subject of the agreement.

Having completed that wall, a complaint was made as a result of which we took the advice of our attorney and sought and received the repayment of our deposit.

Subsequent to the oral complaint over the weekend and on the Monday I saw a crude barbed wire fence erected at the western and northern boundary of the lands now occupied by the plaintiff. That wire fence coincided with the identification of the boundaries of our lot 1, which had been earlier pointed out by our surveyor Murray & Partners and as was consistent with the Real Property Ordinance survey.

We simply removed the posts that had been erected on the extended southern boundary wall and continued fencing our eastern and southern boundaries at their original points which works were completed by the 27th April, 1984.

No objection was made whatever from anyone when we resumed our fencing at our eastern boundary even to the completion of the same and years thereafter.

During that time we maintained sole exclusive and undisturbed possession of our lands. In fact during the construction of the boundary walls we parked vehicles on the lands and in particular the now disputed area of the lands as well as stored lumber on it. After the wall was completed we continued our occupation of the lands described as the disputed area. We had a shed which garaged a forklift on it as well as a dog kennel which housed my dog. As from going onto the lands my brother and I treated and considered the land to be our own and we occupied it to the exclusion of all others.

I certainly considered that the lands belonged to me and my brother and I occupied it as an owner would occupy and possess his lands.”

[36] The four (4) parties paid a total of two million dollars (\$2,000,000.00) for the five acre parcel and he and his brother subsequently received their individual certificate of title. He accepted as correctly described, the lands described in the certificate of title *“being part of the lands for which we paid our vendor two million dollars (\$2,000,000.00)”*. He added that because they were instrumental in procuring the agreement to purchase the five (5) acre parcel, he and his brother could have chosen any part of the lands for their individual lot but *“not having any notice of any claim by anyone to the lands nor of there being anything which questioned the correctness of the survey plan of the lands, my brother and I chose lot 1 and proceeded as the first persons of the co-owners to commence the development of our lands”*.

[37] Mr. Almondoz was challenged by Mr. FitzPatrick as to the date of entry onto the disputed portion for the construction of the fence. The pleading having been amended from July 1987 to March 1984 it appeared to have been a very convenient amendment so as to allow for the newly pleaded period to fit squarely within the sixteen (16) year limitation period. The defendants said that when they gave instructions to Mr. Kelshall their attorney-at-law, they had said 1984 and not 1987 and that the wrong date was put in the defence. The actual instructions verifying that allegation were later produced in re-examination. He denied that the year of actual entry onto the plaintiff’s lands was July 1987.

[38] He admitted to continued construction on the property even after he had been served with these proceedings saying, *“I could see no reason why Mr. Dillon could stop me from building on my land”*. He was evasive as to whether the reason for engaging the surveyors was to fence or to subdivide, contending that the *“main objective”* for engaging the surveyors was to sub-divide the land into

four (4) divisions to satisfy the four parties and to place a road. He did admit however that the task of the surveyors was to identify the boundaries so that he and his brother could commence fencing their lot but added that in order “*to define each lot the surveyors had to do an entire survey*” and he and his brother “*did not want to disturb our neighbour’s boundaries*”.

[39] He was also challenged by Mr. FitzPatrick as to the date when the actual survey was conducted. Mr. FitzPatrick directed the second defendant to the witness statement of Mr. Arnold Ramon-Fortuné in which Mr. Ramon-Fortuné stated that he conducted his survey in 1985. The second defendant appeared not to know whether that was correct or not, stating:

“I would not know. All I can say is that he started his survey in 1984 and it went further in 1985 ... The preliminary surveys were done in 1984.”

[40] The second defendant also insisted that the fencing was done in 1984 and that surveyors were brought onto the property as early as January 1984 to subdivide the lands and to redefine the boundaries. In re-examination, Mr. Koylass was able to have admitted into evidence (despite strong objection from Mr. FitzPatrick) the actual written instructions given by the defendants to their attorney, Mr. Kelshall in 2000, which stated that they took possession of their share of the five (5) acre parcel in “*early 1984*”. Those instructions also speak of Mr. Ramon-Fortuné giving them in 1984 a plan for subdivision which divided the property into four (4) equal parcels. This is of course inconsistent with the evidence of Mr. Ramon-Fortuné whose witness statement gave the date of his survey as 1985.

Conclusion

Misdescription of the Pantin lands/ownership of the Dillon half (1/2) acre

(a) *Misdescription of the Pantin Lands*

[41] Despite the headings my conclusion addresses issues I to IV as they are all inextricably bound. In my judgment there was a misdescription of the Pantin

lands which resulted in Emerald acquiring five (5) acres, one (1) rood and twenty-eight (28) perches, instead of four (4) acres, two (2) roods and thirty-six (36) perches. The evidence shows that the misdescription occurred in the application to have the lands brought under the provisions of the Act. More particularly, it occurred during the Akum Lum survey of the Pantin lands which was conducted to facilitate the application and by which the disputed portion (which then form part of the Dillon half (1/2) acre) was wrongly included in the boundaries of the Pantin lands. I shall return to this evidence at paragraphs 50 to 55 when I deal with the issue of misdescription of the Dillon half (1/2) acre.

[42] The Pantin lands having been brought under the Act, the provisions of that Act govern any claim or defence raised by the parties in this case. Having regard to those provisions, (sections 45, 143(c), 145 & 146), misdescription of the Pantin lands cannot assist the plaintiff because the defendants were bona fide purchasers for value. But such title is subject *inter alia* to any subsisting rights of adverse possession at the time the land was brought under the provisions of the Act. See section 45 of the Act which provides:

“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor registered under the provisions of this Act, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of

such land holding under a tenancy for any term not exceeding three (3) years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value.

[43] The section enables a proprietor of land under the provisions of the Act to hold the parcel free from all encumbrances not notified on the Register but subject to a number of exceptions including any subsisting rights of any adverse possession. It sets out other exceptions to the absoluteness of the proprietor's title, among them, any estates or interests "*as regards any portion of land that may by wrong description of parcels or of boundaries*", be included in the grant or certificate of title, of the proprietor. Excluded from the exception for wrong description however, is a proprietor who purchased the land for value or anyone deriving title from or through him.

[44] A misdescription is an error of fact relating to the description of a parcel of land. It may relate to the physical description of the parcel (usually of the boundaries), the extent of the acreage, the nature of the interest sold or the quality of the land. In my judgment the wrongful inclusion of the disputed portion into the acreage of the Pantin lands brings it within the definition.

[45] Thus, once a proprietor who acquires title to land through a misdescription disposes of the land to a third party, for value, the title of that third party, having been acquired for value and absent fraud, cannot be challenged by the proprietor whose land has been wrongly absorbed as a result of the misdescription. Recovery is available only if the land remains in the ownership of the acquiring

proprietor. This position is complemented by the provisions of section 143(c) and 145 of the Act. Section 143(c) expressly excepts from indefeasibility;

***“the case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the proprietor of such other land not being a transferee thereof bona fide for value; (emphasis mine).*”**

[46] Section 145 specifically enables a proprietor deprived of land by misdescription, *inter alia* , “to bring an action at law against the person upon whose application such land was brought under the provisions of this Act”, “or who acquired title to the estate or interest in question through such ... misdescription” (*inter alia*). But the liability of the person who acquires by misdescription ceases “upon a transfer of such land bona fide for value”. In such a case the aggrieved proprietor may recover damages from the Assurance Fund (set up by the Act) in an action brought against the Registrar General who is joined as the nominal defendant. Such right of action is subject to a six (6) year limitation beginning from the date of deprivation. (See section 150).

[47] The position of the bona fide purchaser for value is further preserved by section 146 which provides that:

***“Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action for recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the plea that his vendor or mortgagor may have been registered as proprietor or procured the registration of such transfer to such purchaser or mortgagee*”**

through fraud or error, or may have derived title from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of land, or otherwise, howsoever.”

[48] The defendants bought from David Knott who himself purchased from Emerald which brought the Pantin lands under the provisions of the Act. There is no challenge to the validity of Mr. Knott’s purchase. On a strict interpretation of the section 45, the defendants derive title *from* Mr. Knott who, on the face of it, was a bona fide purchaser of value. But for the purposes of section 143(c) and 146 the defendants are “*transferee(s) bona fide for value*” or “*purchasers ... bonafide for valuable consideration*.” The clear and unchallenged evidence of the second defendant is that the defendants were one of four parties who purchased the Pantin lands from Mr. Knott for the sum of two million dollars (\$2,000,000.00) and then subdivided the lands among them, obtaining individual certificates of title for the specific subdivided parcels. They too, are bona fide purchasers for value and their title cannot be challenged for misdescription.

(b) *Misdescription of the Dillon half (1/2) acre/adverse possession*

[49] I turn then to the issue of adverse possession based on the alleged misdescription of the Dillon half (1/2) acre by the Dillon Deed. Pursuant to section 45, if rights of adverse possession validly existed in 1975 when Emerald was issued a certificate of title in respect of the Pantin lands, then the plaintiff would ordinarily be entitled to pursue them in these proceedings subject only to the pleadings and of course the evidence led.

[50] Of course, it would follow from my earlier finding of the misdescription of the Pantin lands that there was no misdescription of the Dillon lands by the Dillon Deed. There is no evidence to support Mr. FitzPatrick’s alternative submission as

to adverse possession of the disputed portion and or his contention that it was the Dillon Deed which misdescribed the Dillon half (1/2) acre.

[51] The plaintiff's surveyor Mr. Kenneth Sturge, testified in support of the initial contention that the plaintiff was the paper title owner of the Dillon half (1/2) acre. Under cross examination by Mr. Koylass, Mr. Sturge, who was called to give evidence by Mr. FitzPatrick and who was a sound witness, opined that the disputed portion was wrongly absorbed into the Pantin lands by Mr. Akum Lum's survey. Mr. Sturge was a highly persuasive witness who could not be faulted. However, Mr. FitzPatrick intrepidly sought to rely on the survey plan of Mr. Ramon-Fortuné (a witness for the defendants whom he did not cross-examine) which was put into evidence on behalf of the defendants and which gave the acreage of the lands purchased by Margaret Yeates Dillon as six thousand (6000) square feet.

[52] But Mr. FitzPatrick himself led no such evidence. Rather, the evidence he put forward on behalf of the plaintiff, right up to the close of the plaintiff's case, was directed at proving that he was the paper title owner in possession of the Dillon half (1/2) acre and to disputing that the disputed portion formed part of the Pantin lands. In my judgment the evidence does not support any misdescription by the Dillon deed. Mr Ramon-Fortuné's survey was done in 1985 after all the neighbouring boundaries were conclusively defined by other surveyors. Mr. Sturge is correct that the error occurred when the survey of the Pantin lands was undertaken by Mr. Akum Lum in 1973.

[53] In addition to the firm opinion of Mr. Sturge, it was quite obvious to me that during the period of the Akum Lum survey in 1973, the Dillons were less than vigilant in supervision of the Dillon half (1/2) acre. Stanley Dillon in his evidence, openly admitted that after he left the Dillon half (1/2) acre in 1965, he had little to do with the property and his life was centered around his own business at Milford Road. It is not in dispute that the adjoining landowners were

served with notice of the Akum Lum survey but by then the plaintiff was not living on the property and it is not clear how lucid or vigilant either Katie Prince or Jacob Prince were when the survey was conducted, or whether they were even present.

[54] It would follow therefore that the Dillons were in proper occupation of the Dillon half (1/2) acre as the true paper title owners and there was no misdescription by the Dillon deed. The Dillon deed had properly conveyed the lands to Margaret Yeates-Dillon in 1944, and had properly described the lands as comprising two (2) roods. It follows as well that the plaintiff was not in adverse possession of the disputed portion but was in possession as the valid paper title owner of the entire Dillon half (1/2) acre including the disputed portion. There can be no question of adverse possession by the plaintiff's predecessors in title of the disputed portion.

[55] The Pantin lands along with the disputed portion, having been brought under the Act, the certificate of title issued to Emerald in respect thereof could only be voided for misdescription if they had remained in the possession of Emerald (as per section 145 of the Act). Once they had been validly sold to Mr. Knott as a bona fide purchaser for value, the plaintiff could not recover. The defendants who purchased the Pantin lands (as misdescribed) from Mr. Knott for the sum of two million dollars (\$2,000,000.00) on the basis of the certificate of title issued to Emerald which showed that the Pantin lands comprised five (5) acres one (1) rood twenty-eight (28) perches, (as described in the Akum Lum plan) were also bona fide purchasers for value. Their title is indefeasible and is not subject to the exception set out in section 143(c) of the Act. Certainly, the defendants are protected by section 146 of the Act against any allegation that Mr. Knott's purchase may not have been at arms length. In any event there is no evidence in this case that Mr. Knott's purchase was not.

Issue V: Were the Almondoz or their predecessors in title in adverse possession of the disputed portion from 1973 or at least from March 1984.

- [56] While my earlier conclusions are enough to dispose of this matter, I shall pronounce on this final issue in the event that I am wrong that the plaintiff and his predecessors were not in adverse possession from 1944, and because it was a matter which was quite keenly contested and argued.
- [57] I note that on this issue the question also arose on the pleadings, whether the defendant's predecessors in title had actually dispossessed the plaintiff from 1973. While Mr. Knott's evidence was that there was entry onto the entire five (5) acre parcel in 1973, I do not find that his evidence established specific entry onto the disputed portion in 1973. Mr. Knott's evidence was that topographical surveys were done and the lands were cleared for that purpose but the clearings were limited to areas specific to the survey. He also testified to draining the lower areas of the land but conceded that the disputed area was higher and required no draining.
- [58] His evidence as a whole did not show that there was any specific clearing of the disputed portion and given that some occupation of the disputed area was being exercised by Katie Prince and Jacob Prince on behalf of the plaintiff, I do not consider that there is sufficient evidence of dispossession of the plaintiff in 1973.
- [59] The defendants themselves have set up a specific plea of adverse possession of the disputed parcel. At issue in particular was the time of construction of a fence by the defendants. In their original defence the defendants alleged that they were in occupation of the entire lands since July 1987. That was amended to January 1984. A plea was added that a fence was constructed enclosing the plaintiff's undisputed portion in March 1984.
- [60] Occupation in 1987 would not have been sufficient to raise a defence of sixteen (16) years undisturbed possession given that the plaintiff took action on 3rd May, 2000 but the new allegation that the fence was constructed in March 1984 puts the defendant just within the sixteen (16) year statutory limitation period. Mr.

FitzPatrick seized upon the apparent convenience of that date to suggest that it was nothing but a fabrication to accommodate the limitation plea and he suggested as much during cross-examination of the second defendant and his witnesses.

[61] The second defendant contended however that “*July 1987*” was an error by his instructing attorney in the preparation of the pleadings and that they had told him during their consultations with him that the year of entry into possession was 1984. He produced written instructions to that effect, signed by both he and his late brother and given to Mr. Kelshall, which clearly show that the year given was 1984 and not 1987. Those instructions were not originally disclosed to the plaintiff and Mr. FitzPatrick objected to their admission. They were eventually admitted “*de bene esse*” to await my ruling.

[62] I agree with Mr. Koylass that those instructions were not originally disclosed because among other things their relevance at the time of normal disclosure, was neither immediately clear nor immediately foreseeable and only became an issue during cross-examination of the defendants’ witnesses as a result of the amendment. I do not find them inauthentic or contrived. I accept that the defendants did tell their instructing attorney that they entered in possession in 1984 and I formally admit the instructions into evidence.

[63] I must still assess the truthfulness of that allegation and the issue therefore remains when did the defendants actually enter into possession. The defendants allege that they entered into possession of the entirety of the Pantin lands as purchased, in January 1984 and that they constructed a fence on the disputed portion in March 1984. In addition to his objection on the lack of disclosure, Mr. FitzPatrick submitted that it was “*unbelievable*” that the defendants, both successful businessmen claiming a valuable portion of land, did not notice that the defence was inaccurately drafted. He contended that it was not just “*1987*” which

was pleaded but also a specific month – *July* – such as to suggest that the original pleading was deliberate and could not have come about by an error.

[64] He strongly criticized the evidence of John Duncan who testified that he and three (3) other men constructed the fence in about April 1984. He submitted that while Mr. Duncan did construct the fence it was not in April 1984. Mr. Duncan was not the most felicitous of witnesses, his answers did not excite any confidence in his truthfulness. He could not remember when he did other work for the defendants or even his children's birthdays but could remember the days, month and year of construction of the fence. Asked why he could remember the construction so specifically Mr. Duncan's explanation appeared to be that it coincided with the birth of his second son who was born in July 1985 and who was quite sickly as a child. This date however did not support his contention that it was an April 1984 construction (but it did support the contention that the fence was constructed in 1985).

[65] Mr. FitzPatrick also pointed to the independent evidence of Mr. Ramon Fortuné as the only true indication of when the fence was constructed. Mr. Ramon Fortuné has stated that he conducted his survey in 1985 and he submitted his report in the same year. This, submitted counsel, was to be taken together with the admission of the second defendant, during cross-examination that he engaged a surveyor to subdivide the lands and collectively demonstrated that the fence was constructed in 1985.

[66] I do not agree. I accept the second defendant's evidence that the fence was constructed in March/April of 1984. Mr. Duncan's evidence as to the time of construction was unreliable and I reject it. Having regard to all of the other evidence including the documentary evidence, it seems to me that what the second defendant said was highly probable. I had the benefit of observing this witness as he gave his evidence and as he listened to the evidence of the plaintiff and his witnesses. I have seen his reactions in court, both in and out of the

witness box. I have also heard and observed the plaintiff and his witnesses in the same way. I believe the second defendant was a truthful witness and I prefer his evidence on the question of entry onto the disputed portion, the time of construction of the fence and the commencement of earthmoving works on the property.

[67] There is no doubt that Mr. Ramon Fortune's survey was conducted in early 1985 sometime before May 1985, but that was not the only survey nor was he the only surveyor. The evidence of both the second defendant and his late brother, Miles, in their respective witness statements was that they got permission from Mr. Knott in 1984, to enter the lands for the purpose of conducting surveying works and putting up a fence. Those surveying works were done by Murray and Partners and not by Mr. Ramon Fortuné. The defendants' **exhibits D 22, D 23A and D 23B** evidence the dialogue between Mr. Knott and the second defendant which resulted in the permission being granted for Murray and Partners to do the survey.

[68] Moreover, both the second defendant and his late brother stated that they entered the lands in 1984. The second defendant in his witness statement said that he and his brother:

“entered in the lands with our surveyor who identified the southern and eastern boundaries of the Almondoz lot with a view towards fencing our lot starting at the southern boundary and proceeding along to the eastern boundary which abutted the road”.

[69] In my judgment, the “*surveyor*” in question was the firm of Murray and Partners. The second defendant and his brother in their respective witness statements then gave graphic and detailed evidence of extensive earthworks on the property thereafter. I accept that Miles Almondoz' witness statement could not be tested in

cross-examination due to his untimely death and I gave due weight to that fact but when taken with the evidence of his brother, who was cross-examined, Miles' witness statement was also credible.

[70] During cross-examination by Mr. FitzPatrick, the second defendant was challenged that the survey conducted by Mr. Ramon Fortuné was in 1985 not 1984. His response was that –

“all I can say is that he started his survey in 1984 and it went even further in 1985”.

He added that *“the preliminary surveys were done in 1984”*. Pressed further that the construction of the fence was conducted in 1985 the second defendant said:

“we brought the surveyors from early as January 1984 to subdivide the lands and redefine the lands and we were shown the actual boundary and we started to fence in mid March 1984 and that was done so as not to offend any of our neighbours”.

[71] It was clear to me that the second defendant, when he was referred to *“preliminary surveys in 1984”* and the bringing of surveyors *“from early January 1984”* was referring to the work of Murray and Partners and not to Mr. Ramon-Fortune's although he did not say so. The second defendant's apparent inability to recall can be put to faded memory having regard to the fact that 1984 was twenty-four (24) years ago. The documentary evidence at exhibits D 22, D23A and D 23B make it highly probable that the surveys and fencing were done in 1984.

[72] As to the erroneous pleading that the defendants had been in possession since 1987 and that the amendment was contrived so as to bring the plea within the sixteen (16) year statutory period, I have already found that to have been an error

by the defendants' attorneys. Even without the defendants' written instructions it was apparent from the pleading itself that the year "1987" was pleaded in error since the period 1987 to 2000 amounted to thirteen (13) years and would not have met the sixteen (16) year statutory period, which is what the pleading was seeking to set up.

[73] I find that on a balance of probability the defendants were in occupation of the disputed portion from as early as January 1984 and certainly from March 1984. I have considerable sympathy for the plaintiff in what has happened to him in this case. It would appear that any redress he may have had under the Assurance Fund set up by the Act is now statute barred pursuant to section 150 of the Act. The defendants cannot be faulted in any way however. I give judgment for the defendants. The plaintiff's action is dismissed with costs certified fit for one (1) senior and one (1) junior counsel.

NOLAN P.G. BERAUX
Puisne Judge.

31st July, 2008