REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
COURT OFFICE, SAN FERNANDO

CLAIM NO. CV2013-02916

IN THE MATTER OF THE REAL PROPERTY ORDINANCE CHAP: 27 NO: 11 (TT)

AND

IN THE MATTER OF AN APPLICATION BY DEBRA NELSON FOR AN ORDER VESTING IN HER ALL THAT PIECE AND PARCEL OF LAND WHICH IS THE SUBJECT OF THIS ACTION AND WHICH IS HEREIN DESCRIBED AS "THE AREA OF OCCUPATION"

BETWEEN
DEBRA NELSON
(By virtue of and through her Lawful Attorney Jeselle Nelson by deed registered as No. DE201102518303)
Claimant

AND

CLIVE SIRJU
First Defendant

RITA OMRIAH SIRJU
(Joined pursuant to the Order of the Honourable Mr Justice R Mohammed dated 9 May 2014)
Second Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Monday 26 October 2020

Appearances:

Mr Everard Davidson for the Claimant

Mr Hendrickson R M Seunath SC instructed by Mr Shastri Maharaj for the Defendants

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JUDGMENT

I. INTRODUCTION

[1] The case at bar involves a claim for adverse possession by the Claimant for an abutting Parcel of land belonging to the Defendants. The Defendants counterclaim seeking an order that they are the owners of the said Parcel of land including the portion occupied by the Claimant. The Claimant's Parcel of land is known as the "Nelson Plot" or "Parcel 3," whereas the Defendants' Parcel is known as "Parcel 4". Prior to sub-division, both Parcels formed part of a larger piece of land owned by Motiechand Maharaj.

[2] The Claim Form and Statement of Case were filed on 12 July 2013 by Jeselle Nelson as the lawful attorney for her mother, Debra Nelson, who is the Claimant. The Defence and Counterclaim were filed on 25 October 2013. The First Defendant acted on behalf of the Second Defendant by virtue of a Power of Attorney registered as No. DE201402214773 and dated 23 September 2014. The Defence to Counterclaim was filed on 26 November 2013. An Amended Claim Form and Statement of Case was filed on 9 May 2014. An Amended Defence and Counterclaim was filed on 16 June 2014. An Amended Defence to Counterclaim was filed on 11 July 2014. A Re-Amended Claim Form and Statement of Case was filed on 16 May 2014. A Re-Amended Defence and Counterclaim was filed on 21 January 2015.

[3] The trial was held on 30 July and 21 September 2018 after which the Court directed that closing submissions be by way of written submissions. Parties filed and exchanged submissions by the 26 October 2018 and whilst both parties were permitted to file replies to any new matters raised in each other's submissions, only counsel for the Claimant utilised this facility and filed on 6 December 2018.

Claimant's Case – The Re-Amended Claim and Statement of Case

[4] The Claimant seeks the following relief against the Defendants:

(i) A declaration that the Claimant has, by virtue of the exclusive and or uninterrupted and or continuous and or undisturbed occupation and or possession of herself and or her predecessors in occupation and or possession and or title,

acquired a possessory title to **ALL AND SINGULAR** that piece or Parcel of land comprising 106.8m^2 and bounded on the North by Lot 2 on the West by lands of the Defendants on the East by lands of Debra Nelson and on the South by Potters Lane (hereinafter, "the area of occupation") and which said area of occupation is more particularly described in paragraph 3 of the Statement of Case and shown on and shaded in grey on the survey plan dated 18 February 2013 which is annexed thereto and marked "**C**."

(ii) A declaration that any Estate and or right and or title and or interest which the First and Second Defendants may have or may have had in the area of occupation is extinguished.

(iii) An order vesting the area of occupation in the Claimant for an Estate in fee simple or such other Estate as may have been acquired by her, free from all encumbrances.

(iv) Damages for trespass to the area of occupation.

(v) An injunction restraining the First Defendant, whether by himself or through his servants and or agents or otherwise howsoever from entering, remaining and or crossing the area of occupation and or from doing any act or thing thereon.

(vi) An injunction restraining the First Defendant whether by himself or through his servants and or agents or otherwise howsoever from interfering with, harassing, molesting and or threatening the Claimant.

(vii) Such further and or other reliefs as to the Court may be just in the circumstances.

(viii) Costs.

[5] The Claimant acts through her lawful attorney, Jeselle Nelson, who was appointed by virtue of Power of Attorney dated 26 September 2011 and registered as DE201102518303.

[6] By virtue of Certificate of Title Volume 3905 Folio 285, Raymond Emmanuel Joseph Nelson (hereinafter called "Raymond"), the Claimant's father, became seised in fee simple in possession in or around 1959 of that piece of land situate in the Ward of Siparia in the island of Trinidad comprising **EIGHT THOUSAND FOUR**

HUNDRED AND FORTY SEVEN SUPERFICIAL FEET to be the same more or less delineated and coloured pink in the plan registered in Volume 1539 Folio 123 and drawn in the margin of and described in the Certificate of Title in Volume 1539 Folio 129 being portion of the lands described in the Crown Grant in Volume 260 Folio 377 and also described in the Certificate of Title in Volume 1364 Folio 127 and shown as Lot 3 in the General Plan filed in Volume 1539 Folio 117 and bounded on the North by 2 drains on the South by a Street 33 feet wide on the East by a drain and by Lot 71 and on West by Lot 4 and by a drain (hereinafter "the Nelson plot").

[7] Upon becoming seised and possessed of the Nelson plot, Raymond in 1959, constructed his family home on the southern portion of the Nelson plot (hereinafter "the first house") within its boundaries. However, he also occupied areas along its western boundary but beyond its boundary line, upon which he cultivated two garden plots and assumed possession thereof. Up to 2008, such occupation and or possession and or title was exclusive and uninterrupted and or continued undisturbed.

[8] One garden plot was located on the lands to the southwest, beyond and abutting the south-western boundary of the Nelson plot. The second garden plot was located on the lands to the northwest, beyond and abutting the north-western boundary of the Nelson plot. Raymond also cultivated several fruit trees and a coconut tree along the aforesaid lands abutting the western boundary of the Nelson plot. For the purposes of the instant matter, the contentious area is known as the "area of occupation."

[9] The Claimant avers that after becoming the owner of the Nelson plot, Raymond laid water lines within the area of occupation to connect to the water main. This was done without any protest or complaint of encroachment. Motiechand Maharaj, the predecessor in occupation to the Defendants, assisted in the laying of these pipes.

[10] In 1984, Raymond's daughter, the Claimant, constructed another house on the northern portion of the Nelson plot to the back (north) of the first house ("the second house"). A portion of the second house was built on the area of occupation. Up to

the point that the second house was built, and thereafter, the area of occupation had been occupied by Raymond and persons claiming through him without disturbance, with the consequence that the second house had been built in the position in which it stands without any complaint.

[11] On 2 August 2001, Raymond died and by virtue of his Last Will and Testament dated 6 July 1998, appointed the Claimant as executrix. He bequeathed the first house to Carole Nelson, Anthony Nelson, Debra Nelson, Susan Nelson and Portia Nelson together with the land on which it stood. He also bequeathed the land on which the second house stood to the Claimant, but she maintains that the second house was always hers and did not form part of the bequests.

[12] Following Raymond's death, the Claimant and her successors in occupation, up to 2008, have continued to occupy and cultivate the area of occupation exclusively to present.

[13] In May 2003, the Claimant left Trinidad to reside abroad leaving her daughter, Jeselle Nelson, to continue to reside in the second house, and her son, Kerry Nelson, to occupy the first house.

[14] Since 1959 up to 2008, the Claimant by virtue of her father, Raymond, herself and then her daughter have remained in exclusive and continuous possession of the area of occupation and they exercised rights of dominion over and cultivated same.

[15] Over time, the Claimant developed the area of occupation by placing her water tanks thereon on concrete stands, planting decorative plants as well as continuing to cultivate same, and generally utilising the space and having a day-to-day presence thereon.

[16] In April 2008, the Defendants dumped a truckload of rubbish onto the area of occupation, destroying the decorative plants as well as the Claimant's garbage holder and water pipe line, which ran through the area of occupation. The Claimant

avers that in so doing, the Defendants trespassed upon the area of occupation. The Claimant further avers that she protested to the dumping of the rubbish to the Defendants, but no response was forthcoming.

[17] The Claimant avers that the dumping of the rubbish was the first act of interference by anyone against Raymond and his successors. Thereafter, the second act of interference occurred in January 2011, when the First Defendant unlawfully entered into the area of occupation and uprooted some banana suckers growing thereon, thereby trespassing. The Claimant enquired as to why this was done and protested such action being done without her permission. A couple days thereafter, the First Defendant asserted for the first time that the area of occupation fell within his boundaries and that he was entitled to same.

[18] In June 2011, the First and or Second Defendants conducted a survey and the First Defendant then asserted that the area of occupation was his and fell within his boundaries and asked the Claimant to clear off the same, which she refused to do.

[19] By virtue of letter dated 15 July 2011, the Claimant's daughter and Attorney, sought legal advice and to formally advise and inform the First Defendant of her and her family's legal position on their possession of the area of occupation for over the past 28 years. The Claimant avers that since 1959, for a period of almost 50 years, the area of occupation had been occupied by Raymond undisturbed.

[20] By letter dated 18 July 2011, the First Defendant sought to dispute the length of time that the Claimant and her family had been in actual possession of the area of occupation.

[21] On 20 September 2011, the First Defendant without the permission of the Claimant unlawfully entered upon the area of occupation and cut down a coconut tree growing thereon and belonging to the Claimant. The Claimant avers that this was an act of trespass by the First Defendant. The Claimant, through her daughter and

Attorney, made a report to the police and thereafter instituted Magisterial Complaint No. 5785 of 2011 at the Siparia Magistrates' Court, which was eventually withdrawn.

[22] On 17 May 2012, the First Defendant unlawfully cut branches off the Claimant's fruit and some decorative trees and damaged growing crops located in the area of occupation. In addition, the First Defendant commenced the construction of a fence through the area of occupation, which is incomplete. The Claimant avers that in so doing the Defendants again trespassed upon the area of occupation. The Claimant, through her Attorney, made a report to the police and thereafter instituted Magisterial Complaints Nos. 3285 and 3286 of 2012 at the Siparia Magistrates' Court, which matter was withdrawn.

[23] Since the incidents above, the First Defendant has repeatedly harassed, verbally abused and threatened to call the police whenever the Claimant's daughter and lawful Attorney enters the area of occupation. The First Defendant has prevented the Claimant and her servants from entering the area of occupation and enjoying same.

[24] By way of Pre-Action Protocol Letter dated 27 July 2012, the Claimant informed the First Defendant of her acquired interest in the area of occupation.

[25] Subsequent to the institution of this Action, on or about 11/12 January 2014, a water main burst causing the area of occupation to be inundated with water. As a result, a deep hole developed. The First Defendant by his conduct prevented the Claimant through her Attorney to enter the area of occupation and remedy the situation. The Claimant contends that as a result, the foundation of the second house is affected and in danger of being damaged or destroyed.

[26] The Claimant has claimed the following Special Damages:

(i) Loss of use and occupation of the area of occupation at such a rate from in or around September 2011 to date and continuing: to be provided; [not provided]

(ii) Loss of coconut tree on 20 September 2011: $1,500.00;

(iii) Loss of fruit and or decorative trees and or crops on 17 May 2012: $1,500.00.

Defendants' case - The Re-Amended Defence and Counterclaim

[27] The Defendants have counterclaimed seeking the following reliefs:

(i) That the First Defendant and his mother Rita Omriah Sirju are the owners of and entitled to possession of the lands shown as Parcel 4 as the plan C annexed to the re-amended Statement of Case including the portion claimed by the Claimant, and which said Parcel of land is described in the Certificate of Title in Volume 2616 Folio 465.

(ii) Damages for trespass.

(iii) Damages for negligence and or nuisance causing and or permitting her water line to discharge water for an inordinate length of time causing extensive damage to the Defendants' lands and crops.

(iv) An injunction restraining the Claimant by herself or by her servants or agents from entering upon the said Parcel 4 and or from interfering with anything thereon.

(v) Costs.

(vi) Such further or other relief as the nature of the case may require.

[28] The First Defendant is the joint proprietor along with his mother Rita Omriah Sirju of All that piece of land situate in the Ward of Siparia in the Island of Trinidad comprising **SEVENTEEN THOUSAND FIVE HUNDRED AND SIXTY NINE SQUARE FEET** be the same more or less delineated and coloured pink in the plan registered in Volume 2616 Folio 447 being portion of the lands described in the Crown Grant in Volume 260 Folio 377 and also described in the Certificate of Title in Volume 1364 Folio 127 and now described in Certificate of Title in Volume 2616 Folio 465 and bounded on the North by a drain on the South by a Street (now known

as Potters Lane) 33 feet wide on the East by Plot 3 and on the West by a drain and intersected by a drain.

[29] The Defendants admit that Raymond owned the Nelson plot, which they refer to as Parcel 3. Prior to sub-division, the Defendants' predecessor in title, Motiechand Maharaj, operated a sawmill on lands on which there were several fruit trees, a coconut tree, banana or fig trees, three bamboo patches and a cedar tree.

[30] Up to 1984 there were two buildings on the Nelson plot, one at the front and another which had been abandoned and dilapidated for several years and situate in or about the area where the second house is now located, but completely on the Nelson plot.

[31] After the Defendants purchased their lands in 1984 ("Parcel 4"), they regularly kept it clear of heavy bushes and reaped the fruits from the trees, including the eastern portion of Parcel 4 claimed by the Claimant.

[32] From 1987 to 2003, the entire Parcel 4 was continuously under cultivation in garden crops such as bananas, plantains, cassava, peas, corn, and other short crops. The fruit trees, bamboo patches and cedar tree were kept on the said Parcel 4 until 2002 when the Defendants began to make preparations to construct their building on Parcel 4.

[33] The Defendants removed the cedar and other trees in preparation for construction, and brought a backhoe onto the lands through the north-eastern boundary to prepare their building site.

[34] The Defendants aver that save for a small portion of the second house and a tank on the concrete stand near to the said house, both of which were erected in 1998, they (the Defendants) have been in exclusive possession and occupation of the portion of land referred to as the area of occupation since 1984.

[35] The Defendants deny that the water lines were run by Raymond but was so done by Motiechand Maharaj who at the time operated a small sawmill on his lands and permitted Raymond to take a connection from his land. Notwithstanding said connection, Motiechand Maharaj and all his successors in title continued to be in and to exercise exclusive control over the lands through which the said water line passed.

[36] The Defendants deny that Raymond ever cultivated any garden plots abutting their south-western boundary or their north-western boundary or that he cultivated any fruit trees and a coconut tree as alleged. The Defendants contend that there was always a coconut tree along the Defendants' eastern boundary which separates the Defendants' lands from the Nelson land and that the said coconut tree was on the Defendants' lands.

[37] The Defendants admit that the Claimant constructed a house partly on their lands but that it was constructed in 1998.

[38] The Defendants admit that Jeselle and Keroyn Nelson have been living on the Nelson plot in the two houses but deny that they have been cultivating the area of occupation.

[39] The Defendants deny that Raymond ever occupied any of their lands now claimed by the Claimant, and no one ever protested the Defendants' user of the lands. Further, the Defendants aver that apart from depositing some fill on their lands and passing heavy equipment thereon, they did not deposit any rubbish on the lands.

[40] The Defendants contend that all things done by them on the land including the removal of the banana plants were as lawful owners of the said lands. The Defendants admit cutting down the coconut tree but deny that same belonged to the Claimant or her predecessors.

[41] The Defendants admit conducting a survey in 2011, to redefine their eastern boundary, which separates the Nelson plot from theirs, but contend that same was done as they were preparing to erect a fence along that boundary. Upon the removal of a coconut tree by the Defendants, which was near the eastern boundary, Jeselle Nelson claimed that the tree was on her side and as a result of that false claim, the Defendants proceeded to have a survey of their entire Parcel of land. The Defendants deny that they required that the portion of the building on the said Parcel 4 be removed, though they did ask that the tank be relocated so as to enable full access to the Parcel 4 through the north-eastern boundary line.

[42] On 1 January 2013, the Claimant removed 3 fence posts the Defendants had erected along the eastern boundary of Parcel 4.

[43] The Defendants deny that Raymond or the Claimant ever occupied and or cultivated the area of occupation, save for the portion of the building and tank and stand on the north-eastern portion thereof.

[44] The Defendants admit that in May 2012, in preparation to construct a fence, certain shrubs and bushes which were on the lands in their occupation, were cleared, but no growing crops were removed or destroyed.

[45] The Defendants admit the bursting of the water line but deny that they prevented the Nelsons from repairing same. The Defendants contend that between 3 and 7 January 2014, the water line through which water is supplied to the Nelsons' property running across the Defendants' lands burst and was left unrepaired by the Nelsons until 7 January 2014 when said repairs were effected by the Defendants. The Defendants further contend that as a result of the said burst line, the Defendants' land suffered extensive damage through the negligence of Jeselle Nelson and the Claimant, as a result of their failure to take reasonable steps to avoid the occurrence of said damage which has been assessed at **$36,900.00** particularised as follows:

"PARTICULARS OF DAMAGE

Cost of re-instatement of land - $22,000.00

Damage to foundation of building- $13,000.00

Damage to crops- $1,900.00

TOTAL- $36,900.00"

[46] The Defendants deny that the Claimant has suffered any damage as set out in her Statement of Case.

The Amended Defence to Counterclaim

[47] The Claimant denies that the second house had been abandoned and dilapidated for several years or at any point.

[48] The Claimant avers that after the Defendants purchased Parcel 4, it remained covered in bush and it was the Claimant's family who utilised the entirety of Parcel 4 to plant green fig and bananas.

[49] The Claimant avers that there are 2 water lines from the WASA main line: one running from such WASA main to the first house and the other to the second house, but that neither connects with any water line of the Defendants. It was the water line running to the second house that burst on the 11 January 2014, and was repaired on 12 January 2014. On the night of the 11 January 2014, there was heavy rainfall with heavy run-off of rainwater. As such, the Claimant denies that the Defendants sustained the alleged loss or damage and that if they did, it was due to the heavy rainfall.

II. EVIDENCE

[50] The Claimant had two witnesses and herself. These were Jeselle Nelson and Shawn Lovell. Prior to the trial, unfortunately, the First Defendant died. However, his Witness Statement filed into Court on 15 October 2015 was adduced into evidence as his evidence-in-chief on the basis of a Hearsay Notice filed on 7 May 2018

pursuant to CPR Part 30.6(a)(i). The Court made it clear that such evidence shall be given such weight as is deemed appropriate bearing in mind that the evidence was not tested under cross-examination. The other witnesses for the Defendants included Danhai Sieunarine, Pooran Moonasar and Godfrey Alexis.

III. SUBMISSIONS

[51] Counsel for the Claimant, Mr Davidson, submitted that the Claimant has been in adverse possession of the area of occupation in excess of 16 years and since she was unaware of the area of occupation, the counterclaim for damages must be dismissed as the crops valuer could not with certainty prove the resulting damage to the Defendants' land and crops. Counsel further submitted that the Claimant's right to possession is established by the fact that the water line constructed on the area of occupation with the aid of the previous owner speaks to the fact that there were no boundary issues and that the Claimant's predecessor in title and now the Claimant believed that she was the true owner of the land.

[52] Senior Counsel, Mr Seunath, on behalf of the Defendants, submitted that Jeselle Nelson, as the Attorney for the Claimant, could not institute the instant proceedings on the Claimant's behalf since the Power of Attorney, relied on by her, granted her no such authority.

[53] Alternatively, Senior Counsel submitted that based on the evidence, the Court should have no difficulty in making the following findings of fact:

(i) That a portion of the Claimant's house and her entire tank stand are on the Defendants' land;

(ii) That neither the Claimant nor the Defendants were aware of that fact until 2011, when the Defendants surveyed their eastern boundary line;

(iii) That at least up to 2012 when the Claimant's surveyor, Mr Nicholas Westmaas, carried out the survey for the Claimant, the only area of the Defendants' land which the Claimant was occupying was the north-eastern

corner where the tank stand and part of the house were constructed as shown in the Westmaas plan;

(iv) That the water line through which water is supplied to the Nelson property is connected from WASA's main at a point away from the Nelson's western boundary line, and that the said water line runs across the south-eastern corner of the Defendants' land in the area where the previous owner of both the Nelson and the Defendants' land maintained a sawmill;

(v) That around January 2014, the water line running across the Defendants' land burst and caused damage to the said land and crops to the extent of $36,000.00 as supported by the evidence of Godfrey Alexis, valuer.

IV. ISSUES

[54] Upon consideration of the pleadings, evidence and submissions by both parties, the issues for determination have been crystallized by this Court as follows:

1. ***Whether the Defendants' title to the area of occupation has been extinguished by virtue of the Claimant's adverse possession? Resolution of this issue, however, requires an assessment of the following sub-issues:***
    - ***(a) What is the area of occupation?***
    - ***(b) When did the Claimant or her family commence possession of the area of occupation?***
    - ***(c) Whether the Claimant and or her family had at least 16 years of continuous exclusive possession over the area of occupation?***

2. ***In the event that issue 1 is decided in favour of the Claimant, are the Defendants liable to the Claimant for damages for trespass?***

3. ***Conversely, in the event that issue 1 is decided against the Claimant, is she liable to the Defendants for damages, including damages for trespass, negligence and/or nuisance owing to the burst water line?***

IV. LAW AND ANALYSIS

[55] At the outset, it is necessary to address the preliminary point raised by Mr Seunath SC as to whether the Power of Attorney authorises Jeselle Nelson to institute these proceedings on behalf of the Claimant.

[56] A Power of Attorney, like any other contract, ought to be construed by ascertaining the intention of the parties, particularly the intention of the donor of the powers. Although the general terms are strictly construed so as to be restricted to consistency with the controlling purpose, they include things, which are usual and necessary to carry out that purpose.

[57] According to **Halsbury's Laws of England**:

> *"A power of attorney is construed strictly by the courts, according to well-recognised rules, regard first being had to any recitals which, showing the general object, control the general terms in the operative part of the deed. General words used in conferring the power are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied."*[1]

[58] **Halsbury's** continues:

> *"A power to deal with land gives authority to sell, the conditions of sale depending on the wording of the authority, but not to sell that portion included in a voluntary settlement*. ***A general power gives authority to instruct a solicitor, to sue, and to submit to arbitration****..."*[2] (Emphasis added)

[59] Having thoroughly considered the contents of the Power of Attorney done by the Claimant, I have concluded that the said Jeselle Nelson is authorised to institute the

[1] Agency Volume 1 (2017) at Paragraph 31
[2] Agency Volume 1 (2017) at Paragraph 33

instant proceedings on behalf of the Claimant. In particular, **Clause 28** states as follows:

> *"In general to do all other acts deeds matters and things whatsoever in or about my estates property and affairs of me or concur with persons jointly interested with myself therein in doing all acts deeds matters and things therein either particularly or generally described as amply and effectually to all intents and purposes as I could do in our own proper person if this deed had not been made."*

[60] The Power of Attorney executed by the Claimant authorises Jeselle Nelson to perform functions relating to property and estates belonging to the Claimant, the general object thereby being for Jeselle Nelson to have control over the Claimant's property and estates. Instituting claims on behalf of the Claimant ought reasonably to be considered to have been caught by the general wording of Clause 28, so as to give intention to the purpose of the said Power of Attorney. Jeselle Nelson is therefore authorised to institute the instant proceedings on behalf of the Claimant.

<u>Issue 1</u>: Whether the Defendants' title to the area of occupation has been extinguished by virtue of the Claimant's adverse possession?

[61] To succeed in a claim for adverse possession, the Claimant must establish that she had been in continuous possession of the area of occupation for at least 16 years from the date from which she first entered the said area and or had a right to bring the adverse possession action. **<u>Section 3 of the Real Property Limitation Act</u>[3] (RPA)** states:

> *"3. No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next*

[3] Chap. 56:03

after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

[62] **Section 22 RPA** states:

"22. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."

[63] The case of **JA Pye (Oxford) Limited v Graham**[4] sets out the elements for a claim of adverse possession. A claim for adverse possession must comprise two essential elements: (i) a sufficient degree of physical custody and control (factual possession); and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess). It is understood that the paper title owner is deemed to be in possession of the lands vested in him and thus, the Claimant must show that she dispossessed him and was in exclusive possession of the land for at least the 16-year period.

[64] The judgment of Slade J. in **Powell v McFarlane**[5] is instructive in providing guidance on what constitutes "possession". The Court stated that -

"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title

[4] [2003] 1 AC 419
[5] [1977] 38 P & CR 452

to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")".

[65] "Factual Possession" was described by Slade J in **Powell** as follows:

"Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

[66] "Intention to possess" was described by Slade J in **Powell** as:

"The animus possidendi, which is also necessary to constitute possession, was defined by Lindley MR in Littledale v Liverpool College [1900] 1 Ch. 19, as "the intention of excluding the owner as well as other people." ... What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

[67] Based on the learning above, the onus is on the Claimant to satisfy the Court that she not only had factual possession of the area of occupation for at least 16 years

but that she also had the requisite intention to possess same to the exclusion of all others including the paper title owner.

<u>Sub-issue (a)</u>: What is the area of occupation?

[68] While the Claimant has claimed possession of 106.8m^2 as the area of occupation, as shown on Survey Plan annexed to her Re-Amended Statement of Case and marked "C," the evidence before the Court does not support this.

[69] In cross-examination both the Claimant and her lawful Attorney admitted to instructing Mr Westmaas in 2012 to conduct a survey on their behalf. This survey plan was not annexed to the pleadings or the witness statements of either witness. It was however annexed to Mr Iqbal Mohammed's witness statement, who was a witness for the Defendants. Mr Mohammed appeared on the first day of the trial to give evidence, however, due to time constraints, he was not cross-examined. Unfortunately, Mr Mohammed could not attend on the second day of the trial, and Counsel for the Claimant was not in agreement with admitting his witness statement into evidence, despite his attendance on the first day.

[70] Nonetheless, on the first day of the trial, the Claimant was shown the survey plan annexed to Mr Mohammed's witness statement marked "B", titled "Redefinition Survey" and dated 21 June 2012. She was asked whether that was the survey done by Mr Westmaas, to which she agreed. The said survey plan was tendered into evidence and marked "**D.N.K**." There was no objection by Counsel for the Claimant. Both the Claimant and her lawful Attorney were cross-examined on the survey plan done by Mr Westmaas.

[71] The Claimant admitted in cross-examination that when she brought Mr Westmaas, she showed him the land she was occupying and asked him to put a boundary, and to put where she was occupying, so that she would know if she was encroaching on the Defendants' land. The Claimant also admitted in cross-examination that it was only after the survey plan was done by her surveyor, Mr Westmaas, did she become

aware that the only portion of the Defendants' land, which she occupied, was where her tank stand is and where the portion of her house rests. She also admitted in cross-examination that to her father's knowing, he never occupied any lands belonging to the Defendants.

[72] In cross-examination, Jeselle Nelson admitted to bringing Mr Westmaas because she did not know where the survey line was and that was why she got Mr Westmaas to conduct a survey, and from his survey, she found out that the tank stand and part of the house were on the Defendants' land. She admitted to showing Mr Westmaas the encroachment where she was going beyond her boundary onto the Defendants' land.

[73] While I am aware that the witness statement of Mr Mohammed to which Mr Westmaas' plan is attached was not admitted into evidence, the Claimant after being shown the said survey plan admitted to it being the survey plan she had instructed of Mr Westmaas. Counsel for the Claimant also had no objection to it being admitted into evidence, and made no submissions on this. There is therefore no dispute that the survey plan attached to Mr Mohammed's witness statement as "B" is the true and correct survey plan of the Claimant's surveyor.

[74] In fact, during cross-examination, the Claimant admitted to giving a copy of Mr Westmaas' survey plan to her lawyers, but as pointed out by Senior Counsel for the Defendants, the said survey plan was not disclosed by the Claimant either in her pleadings or evidence.

[75] Taking the above into consideration, I am of the opinion there is no prejudice to the Claimant in the Court taking into account the said survey plan. Accordingly, I will attach the relevant weight to the survey plan as is deemed appropriate.

[76] Mr Westmaas' survey plan shows that the only area of occupation by the Claimant on the Defendants' land was where her tank stand and a portion of her house stood.

This area of occupation according to Mr Westmaas' survey plan measures **17.6m^2 of the Defendants' land, that is, Parcel 4.** Therefore, the area of occupation is not 106.8m^2 as claimed by the Claimant but 17.6m^2.

<u>Sub-issue (b)</u>: When did the Claimant or her family commence possession of the area of occupation?

[77] Having determined what constitutes the area of occupation, the question to be answered now is when did the Claimant construct the portion of her house that rests on the Defendants' land and when did she construct the tank stand.

[78] In cross-examination, the Claimant testified that she completed her house, that is, the second house, in 1998. She also testified that she built the tank stand after the house was completed. Jeselle Nelson also testified in cross-examination that the second house built by her mother, the Claimant, was completed in 1998.

[79] There is no evidence that suggests that prior to 1998 when the Claimant's house was completed, that she was ever in possession or occupation of the now defined area of occupation. Therefore, from the evidence before the Court the earliest date that the Claimant could have occupied the 17.6m^2 area of occupation was as of 1998. I so hold.

<u>Sub-issue (c)</u>: Whether the Claimant and or her family had at least 16 years of continuous exclusive possession over the area of occupation

[80] In order to successfully claim adverse possession of the said area, in addition to proving that she had the requisite intention to possess same to the exclusion of all others including the paper title owner, she must prove that she had factual possession of the area of occupation for at least 16 years. This means that she must satisfy the requirements laid down by the law up to at least 2014.

[81] The evidence before the Court is that in 2011 the Defendants conducted a survey, which showed that the Claimant was encroaching on their Parcel of land. To

determine whether this was in fact true, the Claimant instructed her own surveyor to conduct a survey of her Parcel of land. This survey was done in 2012.

[82] The Claimant testified that the First Defendant did speak to her about the boundary sometime when she returned to Trinidad, after he conducted his survey. She also testified that he asked her lawful Attorney, Jeselle Nelson, to move the tank stand. She testified that the First Claimant also put up posts where he was putting up a fence, but she was not there when he did that. However, she did pull out the posts.

[83] In cross-examination, Jeselle Nelson testified that problems started with the Defendants in 2008 when they dumped garbage in what she considered the area of occupation. In January 2011, the Defendants uprooted some banana suckers. In July 2011, when she attempted to burn some rubbish in the area of occupation, the Defendants called both the fire service and the police for her. In September 2011, the Defendants entered into the area of occupation and cut down a coconut tree, which she claimed belonged to them and not the Defendants. This was even after she had her attorney-at-law, Joel Gobin, write to the Defendants in July 2011 about what she then saw as trespass to the area of occupation. In May 2012, the Defendants cut branches off fruit and decorative trees and damaged crops located in the area of occupation.

[84] Jeselle Nelson testified that since the incidents above, beginning in 2008 the Defendants have prevented her from entering the area of occupation, and would call the police.

[85] From the evidence of the Claimant and her Attorney, Jeselle Nelson, it is clear that the Claimant does not satisfy the requirements of factual possession and animus possidendi, and has not been in possession of the area of occupation for the requisite 16 years. In fact, time stopped running when the Claim and Counterclaim were filed in 2013. Further, the evidence of the Claimant and her Attorney shows that the

Defendants treated the area of occupation as their own since 2008, and have continuously done so since then.

[86] The Claimant therefore cannot be said to have adversely possessed the area of occupation to satisfy the requirements of the law.

[87] Issue 1 having been decided against the Claimant, the question of damages for trespass against the Defendants does not now arise. The only outstanding substantive issue for determination, therefore, is whether the Claimant is liable for damages caused to the Defendants as will now be canvassed hereunder as issue 2.

<u>Issue 2:</u> In the event that the Claimant fails to prove adverse possession of the area of occupation, is she liable to the Defendants for damages, including damages for trespass and negligence/nuisance?

[88] The counterclaim for damages was for trespass and negligence and/or nuisance. I took this to mean that the Defendants wanted damages in one or more of these causes of action. I hasten to add that neither party presented by way of submissions any assistance to the Court on the law or manner by which the Court should go about determining the issue of damages.

[89] The Defendants have claimed damages in the sum of **$36,900.00** for damage to the land, building and crops and rely on the Valuation Report of Mr Godfrey Alexis dated 9 January 2014.

[90] At the outset, I do not find the Valuation Report of Mr Alexis to be of significant assistance to the Court in assessing damages, and found it to be unclear and unconvincing, for the following reasons.

[91] First, on the day of his site visit to the area of damage, Mr Alexis testified he spent about 1.5 hours at the site. It is evident that he took pictures of the damage, as they are attached to his report. However, nowhere in Mr Alexis' report did he state any

measurements as to what area of land was in fact damaged, what area of the building was damaged and what specific crops were damaged.

[92] In cross-examination, he testified that there were banana trees including plantain trees, one or two avocado trees, citrus and some short-term crops. He was referred to his Valuation Report and was asked to show where he itemized these, to which he testified that he did not attach it to his Valuation Report, but that it would have been in his notes. Mr Alexis' notes are not before this Court and are of no assistance.

[93] Secondly, stemming from Mr Alexis' failure to itemise the crops damaged, there is no indication of how he arrived at the figure for the value of the crops damaged.

[94] Thirdly, Mr Alexis' Valuation Report does not state whether he took any measurements of the land where the depression occurred due to the burst water pipe so as to show what area of land was in fact damaged or the depth of the erosion caused. In cross-examination he testified that he did calculations and "the area of land that was damaged might have been around 200 to 300 square feet of land." He admitted in cross-examination that he did not put this in his Valuation Report. When asked about the depth of the damage, he testified that *"it might have been about 15 feet [at the top] and it might have as base to be about 2 feet."* Again, this was not included in Mr Alexis' Valuation Report.

[95] Fourthly, when asked about the damage to the basement of the Defendants' building, he testified that when the soil eroded it went down to the basement and spread. When asked if it was due to the severing of the water line that caused the sludge to go down into the basement, he testified that he did not say so but rather what he said was that it appeared to have been the water from the burst pipe with a certain amount of pressure that caused the erosion. In cross-examination he estimated that the pipe was about 40 feet from the Defendants' building. Again, there was no evidence of actual measurements taken by Mr Alexis, included in his Valuation Report.

[96] Fifthly, Mr Alexis failed to give any indication of what the values of the land and building were before the actual damage.

[97] In **Sookdeo Ramsaran & Ors v Lorris Sandy & Anor**,[6] the Court of Appeal stated at paragraph 37:

> *"37. In the first place, as demonstrated above, the primary facts have not been proved.* ***Secondly, there is no evidence as to who prepared the statistics of average yield per acre for each crop, on what qualifications and on what methodology. Nor is there evidence that those guidelines from the Information Division of the Ministry of Agriculture were accepted as part of the corpus of knowledge in the field of crop valuation alongside textbooks or formulae or the results of research published by reputable experts in professional journals."*** [Emphasis added]

[98] From **Ramsaran** (supra), it is clear that for the Court to attach any weight to Mr Alexis' evidence of the damage to the value of the land, building and crops, it cannot be based on speculation and there must be some statistical evidence and accepted methodology as to how someone in his position and with his instructions would have arrived at the figures he did. In the absence of any explanation and proof of methodology used as to how he arrived at his conclusions, I was of the view that this information was speculative.

[99] Due to the failure of the Defendants' valuer to properly assist the Court with his Valuation Report, the Defendants' cannot be awarded damages in the amount of **$36,900.00**, which they seek.

[100] In light of my finding above that, there is no evidence of the value of the actual damage caused, I do not see this as a case fit to award damages for negligence and/or nuisance.

[6] Civ. App. No. 55 of 2003

[101] Despite the lack of evidence to support actual damage, I believe this is an appropriate case for an award of nominal damages for trespass, which would serve as a vindication of the Defendants' rights. Trespass, unlike nuisance, is one of the torts that is actionable without proof of loss. In fact, damages for trespass are available without any proof of loss. It is irrelevant that the Claimant at some point believed the area of occupation to belong to her. Deliberate entry is sufficient to constitute trespass, whether or not the Claimant honestly believed the land belonged to her: **Conway v Wimpey**[7].

[102] The authors of **Clerk & Lindsell on Torts**[8] at paragraph 19.01 described a trespass to land as an unjustifiable intrusion by one person upon land in the possession of another. Trespass is a direct entry on the land of another and is actionable per se and the slightest cross of the boundary is sufficient.

[103] In **Halsbury's Laws of England**,[9] actual possession of land for the purposes of trespass is defined as follows:

> *"Actual possession is a question of fact. It consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; and possession means possession of that character of which the land is capable...."*

[104] In the case of **Gabriella Belfon v Anil Chotalal**[10], Rahim J at paragraph 10 of the judgment stated as follows:

> *"Where a party shows that he has a greater possessory title to the land than the person alleged to have interfered with this right to possession, he may recover possession of the land. This is because possession of land,*

[7] **Conway v George Wimpey & Co (1951) 2 KB 266**
[8] 22 Ed (2017)
[9] Volume 97 (2015) at paragraph 575
[10] CV2012-01479

entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession: JA Pye (Oxford) Ltd v Graham (2002) UKHL 30."

[105] **Halsbury's Laws of England on Remedies for Trespass**[11] states:

"In a claim of trespass, if the Claimant proves the trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the Claimant actual damage, he is entitled to receive such amount as will compensate him for his loss."

[106] In **Jacob & Polar v Samlal**[12] , Pemberton J (as she then was) accepted that nominal damages will be awarded in two circumstances:

(a) In recognition of an infraction of a legal right giving the successful party judgment. There is no need to prove actual loss; and

(b) Where damage is shown but its amount is not sufficiently proved.

[107] There is no dispute that there were several acts of trespass by the Claimant onto the Defendants' land, both deliberately and indirectly. The water line did burst and caused damage to the property of the Defendants. This was admitted by the Claimant in cross-examination, who testified that a depression was created and it pulled down plantain trees and other crops. The Court also found that the Claimant's tank stand and a portion of her house are on the Defendants' land. Even after the surveys were done by both parties, the Claimant continued to trespass on the Defendants' land.

[11] Tort Vol 97 (2015) 591
[12] CV2005-00454

[108] In **Mano Sakal v Dinesh Kelvin**[13] on 22 March 2016, Donaldson-Honeywell J awarded $30,000.00 in nominal damages since the Claimant established loss but the value was not adequately quantified.

[109] In **Ann Edwards v Neomi Hinds**[14] on the 16 November 2018 the Claimants had established that they have suffered loss as a result of the water emitted from the pipes, which were laid by the Defendant. They had established that the nature of the loss was slope instability. An award of nominal damages in the sum of $30,000.00 was awarded.

[110] In **Rodney Jaglal and anor v Jean Hunte**[15]the Court awarded $25,000.00 in December 2018 as nominal damages for trespass.

[111] In **Satnarine Singh v Patricia Sinaswee-Manwaring & Ors**[16] the Court on 21 October 2019, awarded $10,000.00 as there was no evidence with respect to the value of the lands and the diminution in value as a result of the acts of trespass.

[112] In light of the above, and the awards made for similar trespass by the Courts in this jurisdiction, I would award the Defendants' **$30,000.00** as damages for trespass.

V. ENTITLEMENT TO COSTS

[113] The general rule is that the Court must order the unsuccessful party to pay the costs of the successful party: **CPR Part 66.6(1).** However, under the CPR, this general rule that costs follow the event is just a starting point since **CPR Part 66.6(2)** gives the Court the discretion to order the successful party to pay all or part of the costs of the unsuccessful party: [see **A.E.I. Rediffusion Music Ltd v**

[13] CV 2015-00748
[14] CV 2017-02552
[15] CV 2014-01776
[16] CV 2017-01944

Phonographic Performance Ltd[17] per Lord Woolf and **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd**[18] per Jackson J.]

[114] The new approach which is the issue-based approach, requires the Court to consider issue by issue to ascertain where costs should fall, particularly in cases which are not "money claims" which more accurately reflect the level of success achieved: [see the cases of: (1) **Summit Property Ltd v Pitmans**[19]; (2) **Secretary of State v Frontline**[20]; (3) **Fulham Leisure Holdings v Nicholson Graham**[21] per Mann J.; and **A.E.I. Rediffusion** (supra).

[115] In exercising its discretion as to who should pay costs, the Court is mandated to consider all the circumstances of the case including, but not limited to: (a) the conduct of the parties (both before and during proceedings); (b) whether the party has succeeded on particular issues even if not wholly successful; (c) the manner and reasonableness in which a party pursued the proceedings, a particular allegation or issue; and all other factors provided for in **CPR Part 66.6 (5) and (6)**: [see **Firle v Data Point International Ltd**[22] and **Islam v Ali**[23].

[116] The question as to who is the successful party was considered in the case of **BCCI v Ali (No. 4)**[24] which was approved in **Day v Day**[25] in which it was stated that the Court must treat "success" not as a technical term but "a result in real life" to be determined with the "exercise of common sense". In **CPR Part 66.6(3)**, the Court is given the power in particular to order a person to pay (a) only a specified proportion of another person's costs; (b) costs from or up to a certain date only; or (c) costs relating only to a certain distinct part of the proceedings.

[17] [1999] 1 W.L.R. 1507, CA
[18] [2008] EWHC 2280 (TCC)
[19] [2001] EWCA Civ. 2020
[20] [2004] EWHC 1563
[21] [2006] EWHC 2428, Ch
[22] [2001] EWCA Civ. 1106, CA
[23] [2003] EWCA Civ. 612]
[24] The Times March 2, 2000
[25] [2006] EWCA Civ. 415

[117] It has long been settled that a **Claim** and a **Counterclaim** must be treated as distinct and separate actions and so for the purposes of entitlement and quantification of costs separate orders must be made. In light of the new regime to the entitlement of costs under the CPR, and applying the issue-based approach, it appears to me that in relation to the **Claim** and **Counterclaim** there is no question that the Defendants' are the fully successful parties on all issues traversed. It therefore leaves this Court no option but to apply the general rule in this case that costs ought to follow the event. And I so order.

[118] In this regard, since the **Re-Amended Claim** is substantially a non-monetary claim (that is, the dominant claim being for adverse possession of land) and one which must be calculated on the prescribed scale, the said Re-Amended Claim is to be treated as one for **$50,000.00** pursuant to **CPR 1998 Part 67.5(2)(c).** Consequently, in accordance with the scale of costs in **CPR Part 67** Appendix B, the Defendants will be entitled to the sum of $**14,000.00** on the Re-Amended Claim.

[119] In relation to the **Re-Amended Counterclaim**, taking all the circumstances into account, I am of the view that the Defendants are also entitled to their full costs. The Re-Amended Counterclaim being also a non-monetary claim and no value having been ascribed to it, in accordance with **CPR 1998 Part 67.5(2)(c)** the Re-Amended Counterclaim is to be treated as one for **$50,000.00** the prescribed costs for which is **$14,000.00** as aforesaid.

VI. DISPOSITION

[120] Given the pleadings, evidence, submissions, analyses and findings canvassed above, the Order of the Court is as follows:

ORDER:

1. **The Claimant's Re-Amended Claim filed on 16 May 2014 be and is hereby dismissed.**

2. **Judgment be and is hereby awarded to the Defendants on their Re-Amended Counterclaim filed on 21 January 2015 for the reliefs stated hereunder.**

3. **It is declared that the First Defendant and his mother, Rita Omriah Sirju, are the owners of and entitled to possession of the lands shown as Parcel 4 on the plan marked "C" annexed to the Re-Amended Statement of Case including the portion claimed by the Claimant, and which said Parcel of land is described in the Certificate of Title in Volume 2616 Folio 465.**

4. **The Claimant shall remove the tank stand and portion of her house from the Defendants' land.**

5. **The Defendants are awarded nominal damages for trespass to the said Parcel of land in the sum of $30,000.00.**

6. **The Claimant shall pay to the Defendants costs of the Re-Amended Claim and Re-Amended Counterclaim, to be quantified on the prescribed scale of costs. On the basis that both the Re-Amended Claim and Re-Amended Counterclaim are deemed claims valued at $50,000.00, prescribed costs are quantified in the sum of $14,000.00 each, making a total of $28,000.00 to be paid, in default of agreement.**

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Robin N. Mohammed
Judge