THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2016-03195

BETWEEN

LERON DUNCAN

Claimant

AND

ANN CHAPMAN

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Ms. T. Caraballo for the claimant

Ms. S. S. Lawson instructed by Mr. R. Hinds for the defendant

Judgment

1. This claim is one for possession of a parcel of land situate in the Parish of St. Patrick in the Island of Tobago. By Deed dated the 27th September, 2001 and registered as DE200102671978 later rectified by Deed of Rectification dated the 11th December, 2008 and registered as DE200900284267D001, the claimant became the freehold title owner of that parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island of Tobago comprising nine hundred and seventy-six point zero square metres (976.0m^2) bounded on the north by lands of Gemma Chapman and by a road reserve 6.00 metres wide, on the south by lands of F. George, on the east by lands of Olive Chapman and on the west by lands of Peter Hackett more particularly described as Lot No. 2 on the Survey Plan annexed and marked "A" to registered Deed No. 200050155159D001 ("lot 2").

2. It is the case of the claimant that the defendant has trespassed upon lot 2 and wrongfully deprived him of the use of same. As such, by claim form filed on the 23rd September, 2016 the claimant claims damages for trespass, including aggravated damages amongst other things.

3. By Defence filed on the 16th December, 2016 the defendant claims that she is the owner of that parcel of land described in the schedule of Deed dated the 28th October, 1961 and registered as Deed No. 7141 of 1962 and which is that certain piece or parcel of land situate at Canaan, in the Parish of St. Patrick in the Island Ward of Tobago comprising two lots and bounded on the North by lands Patrick Chapman, on the South by lands of Ferdie George, on the East by lands of Olive Chapman and on the West by lands of Peter Hackett or whosoever otherwise the same may be butted, bounded, known or described ("'the said parcel of land"). By two lots the court understands the land to measure approximately 10,000 square feet or 929.03 meters square.

4. As the court understands, the claimant is alleging that his land comprises 976 meters square and is known as lot 2. In support he has produced a survey plan dated 6th February 1998. The defendant's allegation is somewhat ambiguous. She has produced two survey plans. In the first dated 27th October 1961, she alleges that the land comprised 12, 467 square feet

which when converted amounts to 1,158.2 meters square. The defendant then attempted to sub divide the land and therefore caused another survey plan to be done in 2010 in which the land appears to have been divided into two lots, one measuring 0.1056 hectares or 1,056 meters square and 703 meters square. The difficulty is that when the areas of the two lots are added they amount to 1,759 meters square which is 600.8 meters square more than that shown in her 1961 survey plan and certainly much more than what is described in the schedule to the 1962 deed. In fact when converted it amounts to over 18,000 square feet. So that the defendant who is in possession appears to be in possession of more than that which she was given by the 1962 deed namely 12, 467 square feet.

Issues

5. The issues for determination are as follows;

    i. Which party prima facie holds the better chain of title;
    ii. Whether the claimant is a bona fide purchaser for value without notice;
    iii. Whether the defendant has adversely possessed lot 2; and
    iv. If the claimant is the legal title holder of lot 2, whether he is entitled to damages for trespass.

6. It must be noted that there exists no counterclaim by the defendant in adverse possession but the issue was raised by paragraph 20 of the defence. It was incumbent on the defendant to plead this issue by way of a counterclaim. The court has nonetheless considered the issue as a live one having regard to the fact that all parties submitted on the issue and the court was of the view that it was fair and just to consider it.

The case for the claimant

7. The claimant gave evidence for himself and called one other witness, Gemma Chapman ("Gemma").

8. **Gemma** is the defendant's cousin. Gemma's father, Feletus Chapman, deceased ("Feletus") and the defendant's father, Bertram Chapman, also deceased ("Bertram") were brothers.

9. According to Gemma, her brother Lennox Chapman, deceased ("Lennox") was the former owner of lot 2. Lennox died intestate on the 4th March, 1997. Gemma's mother, Millicent Chapman applied for and received letters of administration for Lennox's estate on the 2nd July, 1999. As such, by Deed dated the 27th September, 2001 and registered as DE200102671978 ("the claimant's 2001 Deed") Millicent as Legal Personal Representative ("LPR") of the estate of Lennox conveyed lot 2 to the claimant for the sum of two hundred thousand dollars.

10. Lot 2 is situated directly to the south of the lands of Gemma. Before lot 2 was sold to the claimant, Gemma lived on the property from about 1999 to 2000. She occupied Lennox's house which was constructed upon lot 2.

11. Gemma further testified that due to a family dispute regarding the lands owned by Olive Chapman ("Olive"), Bertram at some point in time became the owner and occupier of those lands on the eastern boundary of lot 2. Olive (deceased) was Gemma's aunt.

12. According to Gemma, Feletus was the owner of a parcel of land from which Lennox's parcel was excised. Feletus died intestate and as such, Millicent applied for and received a grant of letters of administration for his estate. Millicent then subdivided and distributed the said larger parcel to Gemma, Lennox and their siblings. This subdivision is shown on the survey plan annexed to Deed of Partition dated the 15th November, 2000 and registered as DE200050155159D00 ("the 2000 Deed of Partition").

13. During cross-examination, Gemma testified that Feletus died testate which was contrary to the evidence set out in her witness statement. She further testified that her brother, Roy Chapman ("Roy") was the executor of Feletus' Will but that Roy was unable to carry out his duties as executor so their mother, Millicent took over as executor of Feletus' estate and administrated same. As such, even though Gemma admitted that Feletus died testate,

she maintained that Millicent obtained letters of administration for his estate. Gemma was clearly mistaken as Roy did in fact apply for and was granted probate of Feletus' Will on the 22nd May, 1992.

14. During cross-examination, Gemma was shown the 2000 Deed of Partition. Gemma agreed that by this deed the following land (which is lot 2) was conveyed to her;

"ALL AND SINGULAR that certain piece or parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island of Tobago comprising NINE HUNDRED AND SIXTY SEVEN POINT TWO SQUARE METRES (967.2 m2) being a portion of the lands and hereditaments described in the Second Schedule hereto and bounded on the North by lands Gemma Chapman and by a Road Reserve 6.00 metres wide on the South by lands of F. George on the East by lands of Olive Chapman and on the West by lands of Peter Hackett which said piece or parcel of land is designated as Lot Number 2 and is delineated and shown coloured pink on the survey plan annexed hereto and marked "A" ".

15. It is be noted that by the deed of rectification of the 5th February 2003, the deed of partition as rectified to reflect the fact that lot 1 and not lot 2 had been conveyed to Gemma. The said deed also rectified the fact that lot 2 had been conveyed to Lennox and not lot 1 as originally set out in the deed of partition.

16. She testified that even though in the 2000 Deed of Partition lot 2 was conveyed to her, she did not occupy that land save and except during the years 1999 to 2000 when she occupied Lennox's house with permission from Millicent. She testified that she is the owner of the parcel of land which is described in the first part of the fourth schedule of the 2000 Deed of Partition which is lot 1.

17. Gemma testified that Bertram owned and occupied the parcel of land between lot 2 and Olive. She further testified that the defendant inherited her land from Bertram.

18. Gemma was the caretaker of lot 2. She was responsible for overseeing the cutting of the grass and keeping the claimant informed as to any occurrences on lot 2. During cross-

examination, Gemma testified that the claimant paid her five hundred dollars a month as caretaker of lot 2.

19. According to Gemma, the boundaries of lot 2 were identified by four iron spoke boundary markers. There were orange ribbons tied to the top of each spoke. During her childhood, Feletus had erected a wire fence separating the eastern boundary of his land from the western boundary of Bertram's land. This fence remained in place up until sometime in or around January to April, 2015 when the defendant removed it.

20. Subsequently, the defendant began clearing vegetation off of lot 2. During this clearing, she removed a coconut tree, a mango tree and nine concrete pillar posts which formed a part of Lennox's residential dwelling house which was previously situated on lot 2. On or around the 17th October, 2015, the defendant entered upon lot 2 again and unlawfully erected a new wire fence enclosing the entire subject property and also deposited gravel thereon. She also secured the said fence with a padlock. In or around June or July, 2016 the defendant stockpiled construction materials such as gravel, dirt, steel and pvc pipes on lot 2. The defendant also installed a water line and constructed a ply-board shed on lot 2. Gemma testified that subsequent to the filing of this action, the defendant constructed a concrete foundation on lot 2.

21. **The claimant** is fifty-four years of age and is a Transmission Mechanic. During cross-examination, the claimant testified that at the time he purchased lot 2 he was resident in Canada. He caused a title search to be done prior to purchase but the title search was placed not before the court. Moreover, during cross-examination the claimant testified that he did not pay Gemma as caretaker for lot 2.

22. According to the claimant, he has paid all of the land taxes associated with lot 2 which is assessed as No. 3ZO-036. He has been issued a Certificate of Assessment from the District Revenue Service evidencing proof of taxes paid up to 2009 for lot 2.

23. The claimant testified that the defendant is a trespasser on lot 2. According to the claimant, when he bought lot 2 there was a partial wire fence to the eastern and southern boundaries of the property. The boundaries of lot 2 were set out in Deed of Rectification dated the 11th

December, 2008 and registered as DE200900284267D0012008 and was further identified by iron spoke boundary markers. During cross-examination, the claimant testified that Gemma pointed out the boundaries of the subject land to him but that the boundaries were shown to him without a survey.

24. During cross-examination, the claimant also testified that he never saw the defendant removing the fence from lot 2 on or around January to April, 2015. He further testified that he never saw the defendant clearing any vegetation off of the subject land. Gemma informed the claimant of these events and most others. Moreover, the claimant testified that concrete pillar posts were standing on lot 2. That he never counted how many concrete pillars there were but that he knew there were more than five.

25. According to the claimant, the fence enclosing lot 2 which was unlawfully erected by the defendant on or around the 17th October, 2015 precluded him from accessing the property since the 17th October, 2015 to present. During cross-examination, he testified that he did not see when the defendant constructed the fence around lot 2 and secured same with a padlock.

26. On the 12th January, 2016, the claimant caused his Attorney at law to issue a pre-action protocol letter to the defendant formally demanding that she remove her unjustifiable intrusions to lot 2 and to cease and desist from any further trespass to or encroachment upon the subject land.

27. By letter dated the 10th February, 2016 the defendant through her Attorney at law responded to the claimant's letter alleging that the defendant is the owner of lot 2 and would continue to deal with lot 2 in whatever manner she chose.

28. According to the claimant, the defendant has demonstrated a pattern of disregard for his rights over lot 2. By letter dated the 13th May, 2013, the claimant's Attorney again demanded that the defendant immediately cease his trespass and by letter dated the 27th May, 2013, the defendant refused to comply. By letter dated the 12th August, 2013, the claimant's Attorney once again wrote to the defendant reiterating the demand that she

desist from any further interference with lot 2. Despite the several demands for her to desist from trespassing, the defendant has continued to enter, use and occupy lot 2.

The case for the defendant

29. The defendant gave evidence for herself and called one other witness, Thomas George.

30. The defendant is sixty-eight years of age and is employed as a Security Officer at Rapid Response Security Services Company. She is the only child of Bertram who died on the 22nd October, 1998. According to the defendant, when Bertram died, he was seized and possessed of the said parcel of land. By Deed of Assent dated the 5th May, 2008 and registered as DE200801213956D001 which was rectified by Deed of Rectification dated 10th June, 2009 and registered as DE200901270586D001, the defendant as LPR of Bertram's estate assented to and conveyed the said parcel of land. The said parcel of land was once a part of a larger parcel of land owned by Feletus as shown on the Assessment Roll.

31. During cross-examination, the defendant denied that there was a dispute between Bertram and Olive concerning land. In 1961 Bertram planted several fruit trees and two large cedar trees on the said parcel of land. Further, in October, 1961, Bertram caused a survey to be done on the said parcel of land. Prior to 1990, Bertram paid the land and building taxes and from the year 1990 to 2007 the defendant paid the land and building taxes. According to the defendant, since Bertram's death she has always treated and regarded the said parcel of land as hers. On the 10th July, 2009, the defendant caused the said parcel of land to be excavated and cleared of trees and debris. The cost of this job was fifteen thousand dollars.

32. The defendant commissioned a licensed surveyor, Mr. Rawle Derrick ("Derrick") to search the cadastral plan and thereafter to subdivide it into two parcels. Sometime in the month of July, 2010 Derrick conducted and prepared the survey. By survey dated the 4th August, 2010 it was found that the said parcel of land comprises of zero point one seven five nine (0.1759) hectares.

33. Notice of the defendant's intention to survey the said parcel of land was served on the adjoining owners and at no time during the survey did the defendant receive any objections from the claimant or any of the adjoining owners who placed chain linked fences along the common boundaries. The defendant testified that over the years the chain link fences deteriorated. She denied removing a fence on the said parcel of land in 2014. She further denied removing a coconut tree and a mango tree from the said parcel of land. During cross-examination, the defendant denied that Lennox's house had concrete pillars and that she removed those pillars from the said parcel of land.

34. In October, 2015 the defendant caused a chain link fence with an accompanying concrete foundation to be constructed on the boundaries of the said parcel of land. This construction cost some eighty-two hundred dollars. The defendant admitted that in or around June or July, 2016 she stockpiled construction related materials on the said parcel of land. She further admitted to installing a water line and constructing a ply-board shed on the said parcel of land.

35. **Thomas** is ninety years of age. He has known the defendant since she was a child as they lived in the same village, Bon Accord, Tobago. Thomas testified that he knows that the said parcel of land was bounded by Ferdie George on the south, Peter Hackett on the west, Olive on the east and Patrick Chapman on the north. Thomas lived on the adjoining land owned by Ferdie George. During cross-examination, Thomas testified that Bertram showed him the boundaries of the said parcel of land and that this was done without a surveyor being present.

36. According to Thomas, Lennox built a little wooden house on the said parcel of land but never lived in the house. Thomas testified that Lennox went to work on a tourist boat and when he returned he only spent a day or two in Tobago and went back to work. Lennox died at work and the house eventually deteriorated.

37. Thomas testified further that some of the adjoining land owners to the said parcel of land built fences but that the said parcel of land did not have a fence until 2015. The portion of

land fenced in by the defendant was the said parcel of land he knew to be Bertram's. During cross-examination, Thomas testified that there was a fence separating Olive's land from Bertram's land. He did not know when this fence was constructed.

Issue 1 – *which party prima facie holds the better chain of title.*

The chain of title of the claimant

38. On 22nd May, 1992 Feletus' Will dated the 1st March, 1983 was proved in the High Court of Justice. Roy being the sole executor in Feletus' Will, executed a *Deed of Assent dated 9th November, 1992 and registered as 18513 of 1992* which vested title in in the following properties in the names of Colston Chapman, Roy Chapman, **Lennox Chapman**, Mirian Chapman, Albertha Chapman and Gemma Chapman, in fee simple as tenants in common:

    i. ***"ALL AND SINGULAR** that certain piece or parcel of land comprising **TWO ACRES** (more or less) situate at Bon Accord in the Parish of St. Patrick in the Island Ward of Tobago and bounded on the North by the Milford Main Road on the South by lands of Ferdie George on the East by lands of the Church of England by lands of Kilgwyn Estate and on the West by lands of Peter Hackett or howsoever otherwise the said may be butted or bounded together with the building thereon and also described in deeds registered as No. 557 of 1936 and No. 20307 of 1982 respectively.*

    ii. ***ALL AND SINGULAR** that certain piece or parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island Ward of Tobago comprising **THIRTY TWO POINT TWO EIGHT PERCHES** more or less and bounded on the North by lands of G. Scott on the South by lands of Leonora Samuel on the East by lands of P. Lovell and B. Chapman now by a Private Road and on the West by lands of Hackett which said piece or parcel of land is portion of Two Acres Three Roods and Two Perches more or less described in Assessment Roll as No . ZB 199 and therein referred to as being bounded on the North by Milford Road on the South*

by lands of Thomas George on the East by Kilgwyn Estate and on the West by lands of Peter Hackett."

39. *By Deed of Partition dated 15th November, 2000 and registered as DE200050155159D001 of 2000* the following property was vested in Millicent Chapman as the LPR of Lennox who was by then deceased;

***"ALL AND SINGULAR** that certain piece or parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island of Tobago comprising **NINE HUNDRED AND SIXTY SEVEN POINT TWO SQUARE METRES (967.2 m^2)** being a portion of the lands and hereditaments described in the Second Schedule hereto and bounded on the North by lands G. Scott on the South partly by lands of Lennox Chapman now Millicent Chapman and partly by a Road Reserve 6.00 metres wide on the East by two Road Reserves 7.50 meters wide and 6.00 metres wide respectively and on the West by lands of Peter Hackett which said piece or parcel of land is designated as **Lot Number 1** and is delineated and shown coloured pink annexed hereto and marked "A" ".*

40. *By Deed dated the 27th September, 2000 and registered as DE200102671978,* Millicent as LPR sold and conveyed the following parcel of land to the claimant and Karin Fung in fee simple as tenants in common for the sum of two hundred thousand dollars;

***"ALL AND SINGULAR** that certain piece or parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island of Tobago comprising **NINE HUNDRED SEVENTY SIX POINT ZERO (976.0) SQUARE METRES** (being a portion of the lands and hereditaments described in the Second Schedule hereto) and bounded on the North by lands Gemma Chapman and by a Road Reserve 6.00 metres wide on the South by lands of F. George on the East by lands of Olive Chapman and on the West by lands of Peter Hackett which said piece or parcel of land is designated as **Lot Number 2** and is delineated and shown coloured pink on the survey plan marked "A" annexed to Deed registered as No. DE200050155159001 of 2000."*

41. Deed of Partition dated 15th November, 2000 and registered as DE200050155159D001 of 2000 was rectified by *supplemental Deed dated the 5th February, 2003 and registered as DE200301345947D001*. By this supplemental deed Millicent as the LPR of the estate of Lennox became vested with lot 2 instead of lot number 1. It means that after Millicent had sold lot number 2 (which the parties agree is the subject lot) to the claimant and Karen Fung, an attempt was made some three years later to rectify the partition to give the very lot No 2 to Millicent as LPR of Lennox.

42. According to ***Halsbury's Laws of England, Fifth edition (2016) Volume 77, paragraph 62,*** rectification if granted relates back to the time when the instrument was executed and after rectification the instrument is to be read as if it had been originally drawn up in its rectified form.

43. Consequently, as the execution and registration of the 2003 Deed of Rectification would have had the legal effect of relating back to the original deed of partition of 2000, at the time when Millicent sold lot 2 to the claimant and Karen Fung, she held no legal interest in the fee simple of Lot 2 capable of being conveyed.

The defendant's chain of title

44. By *Deed dated the 28th day of October, 1961 and registered as Deed No. 7141 of 1962* Feletus conveyed to Bertram, in consideration of the sum of Five Hundred Dollars, title in fee simple of the following parcel of land;

"ALL AND SINGULAR that certain piece or parcel of land situate at Canaan, in the Parish of St. Patrick in the Island Ward of Tobago, comprising, TWO LOTS and bounded on the North bylands Patrick Chapman, on the South by lands of Ferdie George, on the East by lands of Olive Chapman, and on the West by lands of Peter Hackett, or howsoever otherwise the same may be butted, bounded, known or described."

45. By *Deed of Assent dated 5th May, 2008 and registered as DE200801213956D001*, the defendant as the executrix of Bertram's will assented and conveyed to herself as beneficiary the following parcel of land;

"ALL AND SINGULAR that certain parcel of land situate at Canaan, in the Parish of St. Patrick, in the Island Ward of Tobago comprising TWO LOTS and bounded on the North by lands of Patrick Chapman, on the South by lands of Ferdie George, on the East by lands of Olive Chapman and on the West by lands of Peter Hackett or howsoever otherwise the same may be butted, bounded, known or described and more particularly described in Deed registered as No. 7141 of 1962."

46. By *Deed of Rectification dated the 10th June, 2009 and registered as DE 200901270586*, the defendant rectified Deed of Assent dated 5th May, 2008 and registered as DE200801213956D001 to correct Bertram's name to include, *"Bertrand Chapman"*.

47. It therefore appears from the defendant's chain of title that in any event, Feletus had in fact alienated his interest in the subject land by way of sale prior to his death so that upon his death he held no interest in the land which he could have lawfully devised to Lennox by way of his Will which made in the year 1983. It follows that on the face of it, the defendant's chain of title appears to be better than that of the claimant. But the matter does not end there as the issue of whether the claimant was a bona fide purchaser for value without notice must be determined.

Issue 2 - *Whether the claimant is a bona fide purchaser for value without notice*

Law

48. In ***Pilcher v Rawlins (1872) 7 Ch. App. 259 at 269,*** Sir W.M. James LJ stated as follows;

"I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase

deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without - notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the bona fides or mala fides of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has conveyed to him."

49. As such, there are three main requirements for a purchaser to be considered a bona fide purchaser for value without notice. They are as follows;

    i. The purchaser must have gained the legal interest in the property;
    ii. The purchaser must have given valuable consideration for the property; and
    iii. The purchaser must not have had notice of any equitable interest at the time of the giving of consideration: ***See Snell's Equity, 30th Edition, paragraphs 4-12 to 4-25.***

Whether the claimant gained a legal interest in lot 2

The submissions of the defendant

50. The defendant submitted that the claimant's title to lot 2 is defective since the Deed of Assent dated the 9th November, 1992 and registered as 18513 of 1992 which purportedly vested lot 2 to Millicent as LPR of Lennox was not a good root of title because Feletus by his Will was essentially demising of that which did not form part of his estate since by deed dated the 28th October, 1961 and registered as 7141 of 1962 ("Bertram's 1962 deed")

Feletus sold the said parcel of land to Bertram. As such, the defendant submitted that her title which she derived from Bertram's deed is superior to that of the claimant's

51. Moreover, the defendant submitted that the boundaries of the said parcel of land as described in Bertram's 1962 deed and in the 1961 and 2010 surveys were clear and unambiguous and that the claimant provided no evidence to bring its validity into question *(see surveys in the defendant's list of documents files on the 15th February, 2017).* According to the defendant, the description of lot 2 that the claimant says he purchased does not match the description of the said parcel of land in her Deed of Assent dated the 5th May, 2008 and registered as DE200801213956D001 later rectified by Deed of Rectification dated the 10th June, 2009 and registered as DE200901270586 both of which referenced Bertram's deed.

52. Further, the defendant submitted that an analysis of the Deed of Partition dated the 15th November, 2000 and registered as DE2000501551159D001 of 2000 ("the 2000 Deed of Partition"), revealed that the description in schedule of the claimant's deed dated the 27th September, 2001 and registered as DE200102671978 ("the claimant's 2001 deed") matches the description of the land in the second part of the Fourth Schedule attached to the 2000 Deed of Partition. This parcel of land was vested in Gemma not Millicent as the LPR of the estate of Lennox. According to the defendant, supplemental deed dated the 5th February, 2003 and registered as DE200301345947D001 attempted to vest title to the parcel described in the 2000 Deed of Partition's Fourth Schedule, second part, in Millicent as the LPR of Lennox. However Deed of Rectification dated the 11th December, 2008 and registered as DE200900284267D001 did not seek to correct the description of the claimant's 2001 deed but rather purported to address the share the claimant was purported to have been conveyed under same. The defendant submitted that this discrepancy is an important factor in gauging the strength of the claimant's title.

53. The defendant further submitted that the claimant under cross-examination testified that he did a title search. The defendant argued that a reasonably competent search clerk would have realized upon conducting said search that the title to the property described was vested in Gemma and that only Gemma had the legal authority to convey title to it by way of a

Deed of Conveyance which is the instrument of title that the claimant relies on to maintain his claim.

54. Moreover, the defendant submitted that the claimant is attempting to cast aspersions on her title rather than prove the strength of his own title and adequately address the failures in it, which runs afoul of Justice Boodoosingh's guidance in the case of ***Rudolph Sydney (through his lawful attorney, Shirley Jones Rajkumar) v Nicole Hyacinth Joseph Marshal and Stephen Marshal CV 2011 – 01729.*** In ***Rudolph Sydney*** supra at paragraphs 12 & 13 Boodoosingh J stated as follows;

"12. In Bullen and Leake, Precedents of Pleadings, 12th edition, page 67 it is stated:

"It was a rule of the common law that anyone who was out of possession must recover the land by the strength of his own title, and not by reason of any defect in the title of the person in possession. Even when it was clear that the person in possession had no right to be there, still the claimant in ejectment could not turn him out unless he could show in himself a title which was – prima facie, at all events – good against all the world".

13. This principle has been consistently applied in this jurisdiction. See Olga Charles v Harrichand, Civil Appeal No. 50 of 1960, per Wooding CJ; Ramdhan v Solomon, HCA 522 of 1975, per Ibrahim J.; Man Hong and Others v Singh, HCA 1278 of 1980 per Edoo J. ; Murray v Biggart, HCA T 101 of 1998 per Smith J.; and Jobe v Ryan, CV 2010- 01509, per Kokaram J."

The submissions of the claimant

55. According to the claimant, he was vested with legal title in lot 2 by his 2001 deed which was later rectified by Deed of Rectification dated the 11th December, 2008 and registered as DE200900284267D001. The claimant submitted that in an action to recover land where the defendant is alleged to be a trespasser, the claimant must prove that he is entitled to recover the land as against the person in possession. The claimant therefore recovers on the strength of his own title, not on the weakness of the defendant's: ***See Goodridge v***

Nagassar, Civil Appeal No: 243 of 2011 (2015), Mendonça JA at pages 7-8 (citing Civil Appeal 50 of 1960 Olga Charles v Harrichand Singh and Another).

56. The claimant submitted that in order for him to prove the strength of his own title, he must establish a good root of title. According to the claimant, a good root of title at law is title established for the full period required by Section 5 of the Conveyancing and Law of Property Act Chapter 56:01 ("CLPA"), which provides as follows;

"5. In the completion of any contract of sale of land after the 13th October, 2000 and subject to any stipulation to the contrary in the contract, twenty years shall be the period of commencement of the title which a purchaser may require."

57. Therefore, the claimant submitted that he and his then Attorney at Law would have been statutorily mandated to conduct a title search dating back only to 1972, which was twenty years back from the Deed of Assent dated the 9th November, 1992 and registered as No. 18513 of 1992 ("Feletus' 1992 Deed of Assent"). The claimant submitted that no higher duty than that which is statutorily required ought to be imposed upon the claimant. The defendant's predecessor in title, Bertram's deed dated the 28th October, 1961 was registered on the 14th June, 1962 as 7141 of 1962 ("Bertram's 1962 deed"). As such, it was the submission of the claimant that a competent search clerk conducting a twenty year search from Feletus' 1992 Deed of Assent (dating back to 1972) would not have identified Bertram's 1962 deed.

58. The claimant submitted that the 2000 Deed of Partition created doubts as to which parcel of land was purportedly conveyed to Gemma and which to Millicent as LPR of Lennox. However, that the 2000 Deed of Partition was later rectified by Deed dated the 5th February, 2003 and registered as DE200301345947D001 ("the 2003 deed"). The 2003 deed conveyed and confirmed unto Gemma the parcel of land described in the First Part of the Fourth Schedule and moreover conveyed and confirmed unto Millicent in her capacity as LPR of Lennox the parcel of land described in the Second Part of the Fourth Schedule of the 2000 Deed of Partition. As such, the claimant submitted that all ambiguity and doubt

was removed thereby vesting Millicent as LPR for Lennox with lot 2 which was sold to the claimant.

59. The claimant submitted that the alleged conveyance by Feletus to Bertram by the Bertram's 1962 deed was arguably a secret act done on the part of Feletus who sought to re-convey the said lands later by will dated the 1st March, 1982. According to the claimant, it is unknown whether the reason for the re-conveyance was predicated upon fraud or mistake. As such the claimant submitted that by applying the learning of the Court of Appeal's decision in ***Ramoutar and Ors v Moser and Ors CA 103 of 2011*** this *"secret act"* ought not to set aside the claimant's root of title as it could not have been detected by reasonable diligence which required a twenty year search dating back to 1972. Moreover, the claimant submitted that he visited the lands and had the boundaries pointed out to him by Gemma on behalf of Millicent who he believed to be in possession of the lands.

60. Accordingly, the claimant submitted that he has established a stronger title which takes priority over the defendant's title. Additionally, that the strength of his title outweighs that of the defendant's. The claimant submitted that as at 2001 he was vested with legal title whereas the defendant as a beneficiary would have been vested with an equitable title. That legal interest in lot 2 only passed to the Defendant when her deed of assent was registered in 2008. This was however after the claimant had already become the legal owner of lot 2. In so submitting the claimant relied on ***Halsbury Laws of England 3rd Edition Volume 14, paragraph 1011*** which provides as follows;

"Where there is an existing equitable interest in property and an interest is subsequently created in favour of a purchaser for value without notice of the earlier interest and that purchaser gets in the legal estate at the time of his purchase or in certain circumstances after his purchase his possession of the legal estate gives him priority over the earlier equitable owner."

61. As such, the claimant submitted that his 2001 deed rectified by Deed of Rectification registered on 6th February 2009 takes precedence over the defendant's 2008 Deed of Assent rectified by her Deed of Rectification registered on the 23rd June, 2009 which occurred

after the claimant's Deed of Rectification. In so submitting, the claimant relied on ***Section 16 of the Registration of Deeds Act Chapter 19:06*** which provides as follows;

"Every Deed whereby any lands in Trinidad and Tobago may be in any way affected at law or in equity shall be registered under this Act, and every such Deed duly registered shall be good and effectual both at law and in equity, according to the priority of time of registering such Deed, according to the right, title and interest of the person conveying such lands against every other Deed, conveyance or disposition of the same lands or any part thereof, and against all creditors by judgment of the same person so conveying such land."

62. Additionally, the claimant submitted that his description of lot 2 is specific, constant and unambiguous. That his Deed as well as the deeds of his predecessor in title specifies the size of lot 2 as measuring nine hundred and seventy-six square metres. Similarly, the 2009 land and building tax receipt and the Certificate of Assessment attached to the claimant's witness statement described the land as measuring thirty eight point five nine perches which is equivalent to approximately nine hundred and seventy-six square metres.

Findings

63. In determining whether the claimant gained a legal interest, the court is entitled to look beyond the period of twenty years. The court agrees that the claimant's title to lot 2 was defective as it was found that Feletus had alienated his interest in lot 2 by way of sale prior to his death which inevitably led to him holding no interest in the land upon his death which was capable of being lawfully devised to Lennox by way of his Will. Further, the court finds that there was no evidence of suspicion or fraud arising out of Bertram's 1962 deed. However, in ***Ramoutar*** supra the Court of Appeal considered whether there was any exception to the plea of bona fide purchaser for value without notice in cases involving a defect in the purchaser's title. Consistent with the decision of Sir John Leach in Jones v Powles (1834) 49 ER 222 at 228, the Court of Appeal found as follows at paragraph 33;

"The plea of bona fide purchaser for value, which has as its foundation a title which has proven to be defective, is not removed or disabled because of that title defect. There is no obvious logical basis to confine cases involving a defect in title to a separate category out of the reach of the protection of the bona fide purchaser for value principle. The equitable rationale behind the plea is as much protective of the interests of the bona fide purchaser for value in the subcategory of cases involving a defect in title as in other broader categories, once of course all of the relevant considerations have been met."

64. As such, the defendant's attempt to impeach the claimant's plea of bona fide purchaser without value on the basis that his title was defective is without merit. In fact, it is for the very reason that the title is defective that the claimant seeks the protection of the equitable principle of bona fide purchaser for value without notice. In that regard the submission of the defendant holds no merit. Consequently, the court finds that the claimant did gain a legal interest in lot 2 by his 2001 deed which was later rectified by as DE200900284267D001.

65. It is acknowledged that the defendant now has a legal title in the entire parcel of land which includes lot 2 as a result of the deed of assent dated the 5th May, 2008. However, as aptly pointed out by the claimant, this title was created after he had acquired title in 2001. Therefore, the law as it relates to priorities applies: ***See section 16(1) of the Registration of Deeds Act Chapter 19:06***. The claimant's legal title having been first established must prevail unless it could be proven that he is not bona fide purchaser for value.

Whether the claimant gave valuable consideration for lot 2

66. The answer to this is clearly in the affirmative having regard to the contents of the deed. Further no issue has been taken by the defendant in this regard.

Whether the claimant had notice of any equitable interest at the time of the giving of consideration

The submissions of the defendant

67. The defendant submitted that the claimant had both actual and constructive notice of her claim and entitlement to the said parcel of land. According to the defendant, she has detailed during the course of this claim acts consistent with possession of the said parcel of land. Those acts which would have given the claimant **actual notice** of the defendant's claim to the said parcel of land were as follows;

    i. In 1961 Bertram planted several fruit trees and two cedar trees on the said parcel of land;
    ii. Bertram caused a survey to be conducted on the said parcel of land in 1961;
    iii. The paying of land and building taxes both by Bertram and the defendant;
    iv. In 2009, the defendant caused the said parcel of land to be excavated and cleared of trees and debris,
    v. In 2010, the defendant had a Cadastral Research and survey done on the land. She also had the land subdivided into two parcels.
    vi. In 2015, the defendant caused a chain link fence with an accompanying concrete foundation constructed on the land. In 2016, she continued to stockpile construction related material on the land and also installed a water line and constructed a ply-board wooden shed on the land; and
    vii. She refused to comply with the claimant's many demands to desist from dealing with the said parcel of land and enforced via her letters to the claimant that she was the owner of the land.

68. The defendant relied on the case of ***Janet Daniel Silverthorne v Barbel Muller Gollenstede and Sandra Heetai (The administratrix of the Estate of Mohan Heetai) CV2006-00331 per Narine J*** wherein the defendant was accepted to be a bona fide purchaser for value but it had to be determined whether the defendant received actual or constructive notice of the claimant's title. The decision of Justice Narine turned on the description of the subject property in the claimant's deed of conveyance and the defendant's deed of conveyance and whether a reasonably competent search clerk would have identified the property described in the claimant's deed and his predecessor in title, as being the same as the property described in the defendant's deed of conveyance. Justice Narine was of the view that the description in the deeds of the claimant and his predecessor

in title were so vague that a reasonably competent search clerk would not been made aware that the lot described in the claimant's deed and the deed of the claimant's predecessor in title was the same as the Lot of land which was the subject of the claim. His Lordship was thus of the view that the defendant in that matter was indeed a bona fide purchaser for value without notice, given that there was no evidence of actual notice and that given the reasons aforementioned, there was no constructive notice.

The submissions of the claimant

69. The claimant submitted that a purchaser will generally be bound by all legal estates and interests affecting the property, whether he has notice of them or not, provided that if such estates or interests were registrable and they were registered. The claimant relied on ***Section 80 of the CLPA*** which provides as follows;

"80. (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(a) it is within his own knowledge, or would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him; or
(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his Attorney-at-law, as such, or of his other agent, as such, or would have come to the knowledge of his Attorney-at-law or other agent, as such, if such enquiries and inspections had been made as ought reasonably to have been made by the Attorney-at-law or other agent.

(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not, by reason of anything in this section, be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act."

70. As such, the claimant submitted that notice is threefold actual, constructive or imputed. Registration constitutes actual notice, constructive notice requires that the purchaser investigate title and imputed notice is considered as notice to the purchaser's attorney or agent in the course of the transaction: ***See Section 80 of the CPLA, Lewis, Smith v Sookdeo, Anjan, CV2011-00281, Rahim J paragraph 26.***

71. The claimant submitted that he had no actual knowledge of Bertram's 1962 deed prior to his purchase of lot 2 and that there was nothing pleaded in the defendant's case to establish that he had such knowledge. The claimant further submitted that he had no knowledge of Bertram's alleged planting of fruit trees on the land. According to the claimant, as any reasonable purchaser would do, he conducted inquiries by visiting and inspecting the land prior to his purchase.

72. Moreover, the claimant submitted that he had neither constructive nor imputed notice of Bertram's alleged ownership of lot 2 because a competent search clerk conducting a twenty year search dating back to 1972 could not have identified Bertram's 1962 deed.

Findings

73. The claimant's evidence on the issue of notice was untenable. An analysis of the evidence revealed that the claimant had no knowledge of the defendant's occupation and interest before he completed the purchase of lot 2. The defendant cannot rely on acts done by Bertram in 1961 to show that the claimant had actual notice of her occupation of lot 2 as the claimant was not around in 1961.

74. Further, the defendant cannot rely on the fact that she paid land and building taxes for the land as actual notice to the claimant as the evidence unequivocally disclosed that the defendant's land and building tax receipts contained a different assessment number from the assessment number in the claimant's land and buildings tax receipts. Therefore, the claimant would not have had notice that the defendant was claiming an interest in lot 2 when he paid taxes.

75. Moreover, the defendant cannot rely on her acts in the year 2009 and thereafter to demonstrate that the claimant had actual notice of her occupation of lot 2 as it was those very acts which catalyzed this claim brought by the claimant to assert his right to the property. The material period for reckoning notice would be prior to purchase and the acts highlighted by the defendant are post purchase by some eight years.

76. It is to be noted further that the claimant testified that he visited lot 2 between 1999 and 2001 and that the boundaries were then pointed out to him by Gemma acting on behalf of Millicent. There is however no evidence from the defence that the defendant paid visits to the land during the same period. It follows that in those circumstances, the claimant would not have had notice of the defendant's claim to title. Therefore, the court finds that the claimant had no actual notice of the defendant's occupation of lot 2.

77. Additionally, the court agrees with the submission of the claimant that a competent search clerk conducting a twenty year search dating back to 1972 would not have identified Bertram's 1962 deed. The court accepted the claimant's evidence that he did in fact carry out a title search before purchasing lot 2. Further, the court finds that a competent search clerk would not have identified that the property described in the claimant's deed and his predecessor in title as being the same as the property described in Bertram's 1962 deed. The evidence in this case revealed that there were many discrepancies between the claimant's description of his land and the defendant's description of her land such as the size of the lots and the boundaries. Therefore, the court disagreed with the submission of the defendant that the authority of ***Janet Daniel Silverthorne*** supra can be distinguished from this case. In fact to the contrary ***Janet Daniel Silverthorne*** supra supported the claimant's case herein. It follows that neither did the claimant have constructive notice of

the defendant's interest. Consequently, the court finds that the claimant was a bona fide purchaser for value without notice.

Issue 3 -*Whether the defendant has adversely possessed lot 2*

Law

78. In relation to the principle of adverse possession, ***Section 3 of the Real Property Limitation Act Chapter 56:03*** provides as follows;

"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 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."

79. Further, ***Section 22 of the Real Property Limitation Act*** provides as follows;

"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."

80. The law on adverse possession is well known. For the defendant's claim in adverse possession to be made out, she must prove both factual possession and an intention to possess lot 2. This factual possession should be exclusive and ought not to have been by force, hidden or with the paper owner's permission. She must also show an intention to take possession on her own behalf and for her own benefit to the exclusion of all other persons including the owner with the paper title so far as is reasonably practicable: See ***JA Pye (Oxford) Ltd v Graham [2002] UKHL 30.***

The submissions of the defendant

81. The defendant submitted that she and her predecessor in title have been in possession of the said parcel of land for a combined period of fifty-five years. This period is calculated from 1962 when the defendant's predecessor in title entered unto the land to 2016 when the present action was initiated by the claimant. According to the defendant, Bertram carried out several acts as set out above consistent with occupation and possession. As such, the defendant submitted that by continuing in occupation and carrying out acts on the land consistent with possession, she has established an unbroken chain of possession.

The submissions of the claimant

82. The claimant submitted that to succeed on a claim for adverse possession, the defendant must prove on a balance of probability that she and her predecessor's in title had remained in exclusive and undisturbed possession of the subject land for a continuous period of more than sixteen years from 2001 when the claimant's interest in lot 2 was vested. According to the claimant, he only became the legal title owner of lot 2 in 2001 and as such, pursuant to Section 3 of the Real Property Limitation Act he has until 2017 to bring an action of this nature against the defendant.

83. The claimant further submitted that the defendant has nonetheless failed to establish exclusive and undisturbed possession since the claimant walked lot 2 with Gemma in 2001 and observed partial fencing on it and some trees. This was not done with the consent of the defendant. Also, the claimant and Gemma testified that Gemma was the caretaker of lot 2. As such, the claimant submitted that the defendant was not in exclusive and continuous possession.

Findings

84. According to the evidence of the defendant, her father, Bertram occupied the land since 1961 and after his death in 1998, the defendant treated and regarded the land as hers.

However, the defendant and her witness Thomas testified that Lennox built a house on the land. The exact date of when this house was built was not given, but both the defendant and Thomas testified that Lennox did not live in the house but only stayed a day or two when he visited Tobago. No evidence was given as to whether Lennox had the defendant's and/or Bertram's permission to build the said house. Gemma, the claimant's witness testified that she with Millicent's permission occupied the house in or about the year 1999 to 2000. This evidence demonstrated to the court that the defendant and her predecessor's occupation was not exclusive in that Lennox built on the parcel that is the subject of this dispute and lived in the house that he built. Whether he was only present when he came on shore after working on ships is irrelevant to the issue as the evidence shows that he built and lived there without permission of anyone else.

85. Further, the defendant did not provide the court with any evidence to prove that she had both factual possession and an intention to possess the land to the exclusion to all other persons between 1998 and 2009. In 2009 and thereafter the defendant had the land excavated, cleared and fenced. Therefore, based on the evidence the earliest time at which the defendant could have had an intention to possess the subject land to the exclusion to all other persons was in 2009. In any event if there was evidence of possession by the defendant and her predecessor in title that possession was broken in 2001 when the claimant took possession of lot 2 without any action on the part of the defendant until 2009. As such, the court finds that the defendant was not in adverse possession of lot 2.

Issue 4 – *Trespass*

86. According to ***Halsbury's Laws of England, Volume 97 (2015) paragraph 591,*** in a claim for 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 an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use.

87. Based on the foregoing, the claimant has proven that the defendant trespassed onto his land when she did the following acts (which she admitted);

i. Caused the land to be excavated, and cleared of trees and debris;
ii. Caused a chain link fence with an accompanying concrete foundation to be constructed on the boundaries of the land;
iii. Stockpiled construction related materials including but not limited to gravel, steel, and pvc pipes on the said land; and
iv. Installed a water line and constructed a ply-board wooden shed upon the land.

88. In the absence of proof of actual damage the claimant is entitled to nominal damages. The accepted range for an award of nominal damages is $3,500.00 to $10,500.00: ***See Jacob & Polar v Samlal CV 2005-00454, Pemberton J, paragraph 8.*** The court is of the view that in the circumstances of this case, the claimant should be awarded the sum of $7,500.00 as nominal damages for trespass to land.

89. There will therefore be judgment on the claim as follows;

a. It is declared that the claimant is entitled to possession of that parcel of land situate at Bon Accord in the Parish of St. Patrick in the Island of Tobago comprising nine hundred and seventy-six point zero square metres (976.0m^2) bounded on the north by lands of Gemma Chapman and by a road reserve 6.00 metres wide, on the south by lands of F. George, on the east by lands of Olive Chapman and on the west by lands of Peter Hackett more particularly described as Lot No. 2 on the Survey Plan annexed and marked "A" to registered Deed No. 200050155159D001 ("lot 2");
b. The defendant is to surrender and deliver possession of lot 2 to the claimant;
c. The defendant is to remove the wire fence, load(s) of gravel, steel, pvc pipes and any other construction materials placed on lot 2 by the defendant, her servants and/or agents;
d. The defendant is restrained whether by herself, or through her servants, agents, or otherwise from entering, using and remaining upon lot 2;

e. The defendant shall pay to the claimant nominal damages for trespass in the sum of $7,500.00; and
f. The defendant shall pay to the claimant the prescribed costs of the claim in the sum of $14,000.00.
g. There shall be a stay of execution of forty-two days.

Dated the 24th October, 2017

Ricky Rahim

Judge