REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 266 of 2012

Between

KENNETH LASHLEY

Appellant

And

PATRICIA MARCHONG
JULIANA WINTER HONORE

Respondents

PANEL: **N. BEREAUX, J.A.**
R. NARINE, J.A.
J. JONES, J.A.

APPEARANCES: **Ms. S. Lawson instructed by Ms. A. Mottley for the appellant**
Ms. D. Allison Prowell instructed by Ms. C. Prowell for the second respondent

DATE DELIVERED: 31st May 2017

Dissenting Judgment delivered by Bereaux, J.A.

The majority has concluded that this appeal should be allowed. I respectfully disagree for the reasons which follow herein.

Introduction

[1] Kenneth Lashley (Kenneth) is the appellant. He claims a parcel of land which he alleges is located at 140 Lopinot Road, Arouca. That location is disputed by the first respondent, Patricia Marchong, the paper title owner, who contends that the parcel is located at 143 Lopinot Road, Arouca. Nothing turns on it. It is beyond question that the parcel of land is the subject of the dispute in this appeal. On balance the evidence points to the lot being 143 and I shall refer to it by that number.

[2] As can be gleaned from the deeds which were put into evidence, Lot 143 was originally owned by International Property Development Limited, formerly Trinidad Sugar Estate Limited, which had an office at Orange Grove, Tacarigua ('the sugar estate'). The sugar estate sold it to Horace and Albert Marchong on 15th August 1970. Horace and Albert were father and son and held as joint tenants. Horace died on 18th May 1973 and his son Albert died on 23rd November 1976. Patricia Marchong, Albert's wife and executrix of his estate, conveyed the lot to herself on 28th January 1980.

[3] Kenneth claims to have dispossessed Patricia Marchong who purportedly entered into an agreement for the sale of Lot 143 to Ms. Juliana Winter Honore, the second respondent. Under authority given by Patricia Marchong, Juliana Winter Honore entered the parcel of land and demolished what she claims was an old abandoned house. Kenneth alleges that the house was not abandoned and that he was in actual occupation. He claims damages for trespass to the parcel and for the destruction of the house.

[4] Kenneth lays claim to the parcel on four fronts:

(i) By being the heir of Cleveland Lashley (Cleveland) who was his father

and who died on 30th April 1976 and of Carmen Lashley (Carmen) who was Cleveland's wife and Kenneth's mother and died on 9th October 1987.

(ii) By virtue of a verbal gift from his parents.

(iii) Pursuant to the Real Property Limitation Act Ch 56:03 ("the Act") by being in sole and exclusive possession of the premises for upwards of 16 years thus extinguishing the rights or title of every person other than himself.

(iv) By virtue of an equitable interest in the parcel.

All four contentions were rejected by the trial judge who dismissed Kenneth's claim. The main issue on this appeal is whether Kenneth has extinguished the title of Patricia Marchong by being in sole and continuous possession for a period of sixteen years pursuant to the Act. Ms. Lawson also argued that Kenneth should have succeeded in his claim for trespass based on his possession. The final issue to be considered is whether Kenneth was entitled to damages for the destruction of the house. The other findings of the judge were not challenged by Kenneth.

<u>The appellant's case</u>

[5] Kenneth contended that his father, Cleveland Lashley (Cleveland) went into occupation of the parcel in 1961. Cleveland and his family, including Kenneth, resided in a three bedroom concrete dwelling house constructed on the parcel by Kenneth's brother, Dennis Winter (Dennis), with moneys loaned to him by Albert Marchong. Dennis was the son of Cleveland's wife Carmen Lashley (Carmen). Kenneth alleges that he was *"about six years old"* and that he lived with his father and Carmen, his mother, on the parcel. When Cleveland died on 30th April 1976, Kenneth and his mother Carmen became entitled to his father's estate.

[6] Kenneth contends that the title of every person other than himself, has been extinguished by reason of section 3 of the Act which 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."***

[7] He alleges that over the years he repaired, renovated and expanded the house, building an annex and a perimeter fence. He began paying taxes in 1961. That allegation of fact must be untrue given that he was then about six years old. He alleges that he has occupied the parcel of land continuously and exclusively, without hindrance or the consent or authority of any other person, for upwards of sixteen years.

<u>Patricia Marchong's defence</u>

[8] Patricia Marchong denied that Kenneth was in the sole and exclusive possession of the parcel. She denied that Kenneth was paying taxes in 1961. She contended that in or about 1983, she allowed Kenneth to reside on the parcel rent-free so long as he continued to work for her as he had then begun to do; that upon ceasing this employment in 1992 he vacated the land and from then to present the parcel was unoccupied, abandoned, overgrown with bush and remained vacant until June 2004. She admitted the agreement for sale with Ms. Honore and stated that Ms. Honore entered the premises with her consent.

<u>Juliana Winter Honore's defence</u>

[9] Ms. Honore also denied continuous possession by Kenneth for the sixteen-year period. She alleged that Kenneth has lived at Tunapuna since 1985. She admitted the agreement for sale adding that Ms. Marchong had sold the parcel of land for forty-five thousand dollars ($45,000.00) and that she had paid a total of twelve thousand dollars ($12,000.00) toward the purchase price. She said she had

been given permission by Patricia Marchong's agent Mr. Hubert Joseph, who was the attorney at law for Ms. Marchong, to go onto the parcel of land and to clear it in preparation for the construction thereupon of a dwelling house.

[10] She said it was untrue that she demolished a three bedroom concrete dwelling house on the parcel. The structure demolished was a dilapidated building *"which had reached the end of its physical and economic lives"*.

The appellant's reply

[11] Kenneth in reply contended that:

i. Since Carmen's death in October 1987, he and his family have been in sole occupation of the property *"without let or hindrance of any person"*.
ii. He did not occupy the premises as a licensee. He worked for Ms. Marchong *"in or about 1979 to about 1981"*. In 1981, he began working with Telecommunication Services of Trinidad and Tobago and became a permanent employee in 1982. It was untrue that Ms. Marchong allowed him to reside at the premises as a result of his working for her. He never paid any rent for the premises.
iii. Before they died his parents gave him the premises *"by word of mouth"*.
iv. It was untrue that he has lived at Tunapuna since 1985.

The judge's findings

[12] The trial judge identified four sub-issues as to whether Kenneth was entitled to possession of the Arouca property. These were whether his entitlement arose by virtue of:

(i) his being the lawful heir of Cleveland Lashley, deceased; or
(ii) a verbal gift from his parents before they died; or
(iii) his own possession for more than sixteen (16) years; or
(iv) an equitable interest therein.

[13] The judge found against Kenneth on all four sub-issues. The judge's

findings in respect of sub-issues (i) and (ii) and (iv) have not been challenged on appeal. The arguments on appeal relate to adverse possession and trespass. The judge's finding in respect of issue (iv) remains relevant to the question of damages.

[14] On the question of adverse possession the judge found that Kenneth had failed to prove on a balance of probability that he had remained in exclusive and undisturbed possession of the Arouca property for a continuous period of more than sixteen years from 9th October 1987. The judge noted that there were contradictions in the evidence given by Kenneth and his witnesses. He was therefore not satisfied that Kenneth had discharged his burden of proof. He concluded that Ann Lashley (Kenneth's wife) had moved back to her ancestral home in Tunapuna to take care of her ailing father in or about 1996 and that she and Kenneth then began to live in Tunapuna with their children. Kenneth may have visited the Arouca property from time to time thereafter but given the disconnection of electricity, the lack of water at the house and the clear evidence as to the dilapidated condition of the house, he considered that it was more credible that Kenneth began to reside in Tunapuna.

[15] The judge concluded that Ms. Marchong was empowered to sell her interest in the property to Ms. Honore. Further, Ms. Honore was entitled to complete the agreement for sale and to enter into possession of the property. The interim injunction, which had been granted to prevent the respondents from entering upon the disputed property, was discharged.

[16] The first question in this appeal therefore is whether the trial judge was right to find that Kenneth had failed to prove continuous possession for sixteen years. The broad planks of Ms. Lawson's submissions before us on this question were twofold:

(i) On the totality of the evidence Kenneth and Cleveland had extinguished Ms. Marchong's title to the parcel.

(ii) The judge had misdirected himself on the law as it relates to adverse possession.

The second question, relating to the trespass claim, is whether the trial judge was right in finding that the appellant was not in lawful possession of the disputed property and that he had failed to show a possessory title to the land. Ms. Lawson submitted that the appellant was in actual possession of the property and Ms. Honore's presence on the property was unlawful. Ms. Honore's destruction of the home, she submitted, entitled the appellant to damages.

The law

[17] On the issue of findings of fact it is trite that an appellate court will be slow to reverse findings of fact of a trial judge *"unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion".* (Per Lord Thankerton in **Thomas v. Thomas [1947] AC 484** at 487-488.) The appellate court may also reverse such findings where it is satisfied, *"either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence ... that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court"* – per Lord Thankerton in **Thomas v. Thomas (supra)** at page 488.

[18] In such circumstances the appellate court must be satisfied that the trial judge has gone *"plainly wrong",* in so far as it considers that the judge's findings of fact were not permissible in the face of the evidence as a whole. To justify a reversal of the judge's findings of fact the court must identify a mistake in the judge's evaluation of the evidence which is sufficiently material to undermine his conclusions. (See Lord Hodge in **Beacon Insurance Company Ltd v. Maharaj Bookstore Ltd [2014] UKPC 21, [2014] 4 ALL ER 418** at paragraph 12.)

Adverse possession

[19] The judge's findings can be separated into three periods:

(i) 1961 to 1976 when Cleveland was in occupation of the property

(ii) 1976 to 1987 when Carmen was in occupation

(iii) 1987 to 2004 (when the action was filed) when Kenneth and his family were in occupation.

As to Cleveland and Carmen's occupation the judge found that Kenneth remained on the property with the permission of his father and mother and that Kenneth only asserted rights of ownership from 1987 upon Carmen's death. In regard to Kenneth's occupation he found that Kenneth had taken up residence at Tunapuna in 1996 although he may have visited the premises from time to time. The period of occupation in his own right was not sufficient to exclude Patricia Marchong's title.

[20] The judge committed a material error. He did not consider whether Kenneth could rely on the previous possession of his parents in support of his claim. In my judgment Kenneth was entitled in law to rely on their possession if their possession was adverse to the Marchongs.

Kenneth's occupation between 1961 and 1987

[21] The judge found that Kenneth treated both parents as owners of the property and only asserted his ownership after Carmen's death in 1987. Kenneth's evidence does support a finding that he treated his father as the owner of the disputed property. There is no categorical statement from Kenneth that he regarded his mother as the owner of the property but the trial judge's finding of fact was consistent with Kenneth's reply as set out in paragraph 11(i) and (iii) above and with Kenneth's evidence taken as a whole. The trial judge had the benefit of seeing and hearing Kenneth's evidence. He was entitled to make those findings having regard to the evidence. In effect he found that Kenneth had manifested no rights of ownership and did not have the intention to own the property to the exclusion of all else until 1987; that is to say, he found that Kenneth's possession prior to 1987 was not joint possession with his parents. His handwritten notes of evidence would not have reflected the entire oral testimony

of Kenneth but his finding would have come from his appreciation of what he had heard and seen of Kenneth's evidence. The judge's apportionment of possession into the three periods set out at paragraph 19 cannot be thus faulted.

[22] The important question which the judge failed to consider however is whether Kenneth in claiming to have dispossessed Patricia Marchong could rely on the possession of both parents or any one of them. The authorities suggest that he can. In **International Hotels (Jamaica) Limited v Proprietors Strata Plan No. 461 [2013] JMCA Civ 45**, the Jamaican Court of Appeal considered the issue of successive squatters (see paragraphs 84, 85 and 89 of the judgment). The respondent in the matter, the registered title holder, had sought to recover possession from the appellant of two parcels of land. Both of the parcels were in use by the appellant and had been enclosed by a fence. One of the grounds for resisting the claim was that the appellant and its predecessors in title had been in continuous, peaceful and undisturbed possession of the disputed land from and since 1976. It was submitted that by reason of section 3 of the Limitation of Actions Act, the respondent's claim for recovery of possession and damages was statute-barred by the time the action was filed in 1999. Section 3 of the Jamaican Limitation of Actions Act is similar to Section 3 of the Trinidad and Tobago Real Property Limitation Act Ch. 56:03. Morrison J.A., giving the decision of the Court of Appeal, held that the appellant, as the ultimate successor in title to previous companies, would be entitled to rely, as against the respondent, on the principle that each one of a succession of squatters gives to his successor a right, as against the paper owner, which is as good as his own. The Court was of the view that, in the absence of any other relevant factors, the aggregation of the continuous period of seamless possession of the disputed land by the previous companies should inure to the benefit of the appellant, which had succeeded them. One of the cases considered was the English Court of Appeal decision in **Mount Carmel Investments Ltd v Peter Thurlow Ltd and Another [1988] 1 WLR 1078**.

[23] In **Mount Carmel**, the first squatter began squatting on the property in 1970. In 1974 the first squatter permitted the first defendant, a company of which

the second defendant was a director, to go into exclusive occupation. The second defendant and the other director went into actual occupation. The relevant writ seeking possession of the property was brought in 1984. It was accepted that after the first squatter took possession of the property, there had been continuous possession adverse to the plaintiff up to the date when the action was brought. The question arose as to whether the second defendant could count the time which the first squatter had spent in adverse possession toward the 12-year period required under English law. If this was not the case then the second defendant's occupation could not bar the first squatter's rights to the property which he had assigned to the plaintiff in 1984. At page 135, Nicholls LJ stated:

> ***"In our view this argument is well founded in this case if, but only if, the defendant's continuation in occupation after [the first squatter] ended his connection with the property was contrary to his will. If squatter A is dispossessed by squatter B, squatter A can recover possession from squatter B and he has 12 years to do so, time running from his dispossession. But squatter A may permit squatter B to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A sells or gives his interest in the property, insecure as it may be, to B."***

It was held that since the first squatter had abandoned any rights to possession which he may have had, the defendants were entitled to rely on the combined period of possession to bar the plaintiff's claim.

[24] This case was decided under the UK Limitation Act, 1980 which has no local equivalent. (See **Manzoor Ali v Tobago House of Assembly C.A. CIV 43/2008** at paragraph 21.) But there is no reason why the principle should not be relevant to this jurisdiction. It follows that Kenneth would be able to rely on either or both of Cleveland's and Carmen's possession if they were adverse to Patricia Marchong's title. The next question is therefore whether either of Cleveland's or Carmen's possession (or both) was adverse to Patricia Marchong's

paper title.

Cleveland's occupation from 1961 to 1976

[25] If Cleveland's possession was adverse it meant that the claim became statute barred in 1977 one year after Cleveland's death (and during Carmen's occupation). The judge however held that Cleveland was a licensee and was not in adverse possession. He accepted the evidence of Dennis Winter, who testified on Kenneth's behalf, that Cleveland was given permission by Orange Grove Sugar Estate to build on Lot 143 Lopinot Road. He applied the decision of this court in **Grace Latmore Smith v. David Benjamin, Civil Appeal No. 67 of 2007** per Mendonça JA. The judge's decision was a mixed finding of fact and law. His conclusion on this issue cannot be faulted. It was a finding of fact which the judge would have made on the evidence. There is no basis for interfering with it. The finding of law follows logically from it. It is inferential that the judge did not find that, at any stage, Cleveland's occupation became adverse to the paper title owner. Kenneth contended that Cleveland paid the land taxes; it does not appear that the judge accepted this oral evidence. Moreover no tax receipts were tendered into evidence. In any event the payment of taxes is not conclusive. But there is an additional question.

[26] Lot 143 was sold by the sugar estate to Horace and Albert Marchong in 1970. They bought as joint tenants which raises the question whether the licence was terminated after the change of ownership.

[27] This issue was not raised before the trial judge. It is now at large but it does not appear from the evidence that either Horace or Albert sought to terminate this licence. Horace died on 18th May 1973. That left Albert his son as the sole owner of the property. In my judgment it would have been odd for Albert to have loaned money to Cleveland to build the house and then seek to evict him, more so given Kenneth's own evidence that there appeared to have been an arrangement if not an agreement for Cleveland to repay the loan. It is a more than reasonable inference that Horace and Albert as joint tenants and then Albert, in

his own right, continued to permit Cleveland to live on the land after they bought it in 1970. It follows therefore that Cleveland's continued possession was by permission of the Marchongs. There was no adverse possession on which Kenneth could rely in respect of Cleveland's occupation.

Carmen's occupation from 1976 to 1987

[28] The next question is whether the licence ended with Cleveland's death on 30th April 1976. This issue is also at large. It seems to me to be inherently probable that Albert would have agreed to permit Carmen to continue on the parcel after 30th April 1976, on the same basis on which he had permitted her husband between May 1973 to April 1976. The real issue is whether Patricia Marchong granted further permission to Carmen to remain on the parcel after Albert's death in November 1976. The judge did not actively consider whether Carmen was a licensee but his approach would suggest however that he did not think that she was and that she occupied in her own right as a squatter. Patricia Marchong pleaded that in 1983 she allowed Kenneth to reside on the premises rent free for as long as he continued to work for her, that upon ceasing this employment in 1992 he vacated the land and from then to present the parcel was unoccupied, abandoned and overgrown with bush until June 2004. She has not pleaded giving a licence to Carmen.

[29] Patricia Marchong has not given evidence. We are told from the bar table by Ms. Prowell that she was abroad, is in feeble health and unable to undertake the return to Trinidad and Tobago. We thus have no affirmative evidence of any licence to Carmen to occupy.

[30] If no licence was given to Carmen it would mean that Carmen's possession became adverse in 1976 upon Albert's death when the licence terminated and that Kenneth could rely on her possession. It would follow that Carmen's occupation from November 1976, upon Albert's death, to 1987 (when she died) was adverse to Patricia. It would also follow that Kenneth could rely upon that adverse possession to buttress his own claim to the parcel. The sixteen

year period of limitation would then have ended in Kenneth's favour in October 1992, four years before the judge found him to have vacated the premises. On the other side of the coin however is the fact that the only evidence of the nature of Carmen's possession comes from Kenneth alone. Much turns on his credibility.

[31] During the cross-examination of Kenneth, Ms. Prowell for the third defendant sought to cross-examine Kenneth on a mortgage bill of sale executed on 16th July 1984 between Carmen and Kenneth as mortgagors and Patricia Marchong as mortgagee. By that mortgage bill of sale, Carmen and Kenneth purported to mortgage their interest in the chattel house situated at Lot 143 Lopinot Road, Arouca to Patricia Marchong for the repayment of the sum of seven thousand dollars. In the schedule to the mortgage bill of sale, both Carmen and Kenneth identify the dwelling house as *"situate at Lot 143 Bon Air Village, Lopinot Road, Arouca ... on one lot of land belonging to Mrs. Patricia Marchong"*. It also shows that both Carmen and Kenneth occupied the property subject to Ms. Marchong's paper title which they acknowledged. In effect, they were there by her licence.

[32] It shows that both Carmen and Kenneth were always aware of Carmen's title and always occupied the parcel subject to Patricia's title.

[33] The document was not admitted into evidence but forms part of the record of appeal at page 163. It was not admitted because the trial judge upheld Ms. Lawson's objection to the document being put to Kenneth on the ground that it had not been disclosed by the third defendant. The judge was wrong. It was an agreement between Kenneth and Carmen as mortgagors and Patricia Marchong as mortgagee. Kenneth would have known of it and was under a duty to disclose it. Any disclosure should have come from Kenneth and/or from Patricia Marchong. It was not the third defendant's document. Kenneth never disclosed that he had the document in his possession. As a party to the document he would not have been taken by surprise by its production in court. Ms. Lawson's objection was a successful attempt to suppress its introduction into evidence and the cross-examination of her client on its contents.

[34] Even if the document was not disclosed by the third defendant it was disclosed by Patricia Marchong at item 29 of the list of documents provided by the first and second respondents which forms part of the record of appeal at pages 24 to 48. Document 29 is set out at page 29 of the record of appeal as *"Mortgage Bill of Sale dated 16th July 1984 registered on 17th February 1984 as number 12621 of 1984, and re-registered on 3rd July 1987 as number 10671 of 1987, made between Carmen Lashley, Keneth Lashley and Patricia Marchong".* Since it was fully disclosed in the proceedings by Patricia Marchong, Ms. Lawson could not be said to have been taken by surprise by Ms. Prowell's use of it in the trial. The objective of discovery is to permit the other side to be aware of the nature of the other side's case and to be able to respond as it can. Moreover, Kenneth was a party to the document and, as his evidence to which I shall soon refer indicates, he was well aware of it.

The dictum of Lord Donaldson MR in **Davies v. Eli Lilly & Co. [1987] 1 WLR 428** at 431 is relevant. Speaking on the right to discovery (in that case it was the plaintiff's) he said:

> ***"This right is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table.' Some people from other lands regard this as incomprehensible. 'Why,' they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object."***

[35] How could it be said that real justice will be achieved in this case if a document, well known to the plaintiff (whose document it is and who was himself under a duty to disclose it but did not) and his attorney-at-law and highly relevant to the real issue in this case is excluded from evidence on the technicality that the

third defendant, whose document it is not and who seeks to rely on it, has not disclosed it to the plaintiff. The injustice will be compounded by the fact that the same document has already been disclosed to the plaintiff by the first defendant.

[36] I consider the objection taken by Ms. Lawson to have been nothing more than an attempt to suppress highly relevant evidence from being admitted. The judge was plainly wrong to have excluded it.

[37] The document was thus highly relevant to the issue of adverse possession and particularly to whether Kenneth was a licensee as pleaded by Ms. Marchong as well as to the credibility of Kenneth's evidence that he was in adverse possession as the following passages from his cross-examination demonstrate:

> ***"I know that Patricia Marchong is related to Albert Marchong and that Albert Marchong was claiming to be owner of land. Dennis in his Witness Statement, at paragraph 7, said that it was Albert Marchong who loaned money to build. I would say that is a true statement. Dennis at paragraph 18 said that Patricia Marchong approached Dennis in 1980 for monies that Cleveland Lashley had for her. I had knowledge of that. She also spoke with me about alleged money that was owing. That is money that was lent to my father to build house. Mum was still alive and Patricia Marchong also spoke with my mother. We subsequently agreed to pay money to Patricia Marchong. Every year we would pay $900 and every 3 months I would pay $250. I and mother signed document witnessing this agreement …*** *(emphasis added)*
>
> ***… I was aware that Albert Marchong was claiming to be owner of land. I first became aware of Mr. Marchong's alleged ownership of land after my father died and before my mother died. At time I became aware … Father died in 1976 and mother died in 1987. I remember I said I signed agreement to make payments. The money she was claiming was same money that was owing that father borrowed to build house. When I was dealing with Patricia***

Marchong I was living in house on disputed land. I communicated to her that I was living in house. It is true that Patricia Marchong knew I was living on land. She never took me to Court. She never sent me lawyer's letter. She never objected to me living on land."

Kenneth's evidence was quite clearly referable to the mortgage bill of sale.

[38] Moreover, it seems more than a little odd that Patricia Marchong would demand payment of a long outstanding loan but not insist on the payment of rent. It clearly points to a licence being given to both Kenneth and Carmen to occupy the property (even without considering the mortgage bill of sale).

[39] There was no appeal by the third defendant against the judge's decision, no doubt because the judge dismissed Kenneth's claim. However the Court of Appeal is empowered to admit the mortgage bill of sale under section 39 of the Supreme Court of Judicature Act. Because of the gravity of the matter, we invited submissions on whether we should consider the document. Unsurprisingly, Ms. Lawson submitted that it should not be admitted, while Ms. Prowell submitted that it should. Section 39 provides that:

(1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to –

(a) confirm, vary, amend, or set aside the order or make any such order as the Court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;

(b) draw inferences of fact;

(c) direct the Court from whose order the appeal is brought to enquire into and certify its finding on any question which the Court of Appeal thinks fit to be determined before final judgment in the appeal.

(2) ***The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.***

(3) ***The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.***

[40] Having considered the submissions of both counsel I propose to invoke the provisions of section 39(1)(a) and (2), to set aside the judge's order and to admit the document into evidence. The result of Ms. Lawson's successful objection was to curtail Ms. Prowell's cross-examination of Kenneth on the document and on the question of his occupation by licence. It was a successful suppression of the document. It is far too late in the day to pursue cross-examination on this question. In my judgment however I am entitled to draw inferences from the document and from Ms. Lawson's clear unwillingness to have the document admitted into evidence. I do so pursuant to section 39(1)(b) of the Supreme Court of Judicature Act. The mortgage bill of sale went to the heart of the issue between the parties. Taking the mortgage bill of sale into consideration I reject the evidence of Kenneth and find that he well knew of Patricia Marchong's title and that he and Carmen were in possession subject to her paper title and with her permission. The effect of the document was also to negatively impact on Kenneth's credibility as to the nature of his possession.

[41] At paragraph 68 of the judgment of Jones JA, the majority view is that the mortgage bill of sale would not have affected the nature of Carmen's and

Kenneth's occupation. I respectfully disagree. They cite the decision of the House of Lords in **J A Pye (Oxford) Ltd v. Graham (HL) [2003] 1 AC 419** per Lord Browne-Wilkinson at paragraph 36 but the facts of **Pye** are plainly distinguishable. In this case the mortgaging of the house for the repayment of the loan and the acknowledgment in writing of Patricia Marchong's title went to the root of Carmen's (and subsequently Kenneth's) occupation. The clear inference to be drawn is that Carmen's (and subsequently Kenneth's) occupation was by the licence of Patricia Marchong. **See Adverse Possession by Jourdan and Radley-Gardner, second edition, page 327, paragraph 16-05**. In the context of the previous licence granted to Cleveland, it also strongly points to their occupation as always having been by permission. In any event, the grant of a licence by Patricia Marchong to Kenneth is consistent with her plea at paragraph 7 of her defence that she permitted him to reside on the land albeit while he continued to work for her. The substance of her defence as a <u>matter of law</u> is that she granted him a licence.

[42] I conclude therefore that, both Carmen's possession from 1976 to 1987 and Kenneth's possession from 1987 onwards was by licence, was always subject to the Marchong's paper title and was not adverse to it. This would be sufficient to dispose of this appeal. However, I shall consider whether Kenneth's possession from 1987 onwards, was adverse on the basis that the acknowledgement of Patricia Marchong's title in the 1984 mortgage bill of sale was a once and for all acknowledgment (as the majority contends). In my judgment it makes no difference to the outcome.

<u>Kenneth's possession from 1987</u>

[43] Kenneth was in sole possession from 1987. He filed this action in 2004 claiming, inter alia, adverse possession. That was sufficient time to extinguish Patricia Marchong's title. However, the judge found that he had abandoned the property in 1996. He made this finding after considering the whole body of evidence. The judge's comments at paragraphs 37 and 38 of the judgment are relevant. He had earlier noted that the evidence of Kenneth and his witnesses were full of inconsistency and contradiction. He then concluded starting at

paragraph 37:

> ***"37. So what do I make of this evidence, given all the contradictions hereinbefore referred to? Bearing in mind that in matters such as this, the burden of proof lies upon the party alleging that the title of the owner has been extinguished by his possession, I am not satisfied that the Claimant has discharged that burden of proof. There were too many conflicts in the evidence given on behalf of the Claimant to persuade me on a balance of probabilities that Kenneth remained in undisturbed and exclusive possession of the property between October 1987 and 2004. Although I believe there was some confusion in dates in the evidence of Dennis and Irving with respect to Kenneth and his wife moving out of the house in 1984 and leaving Irving there alone, I believe that when Ann moved to Tunapuna to take care of her father on or about 1996, she and Kenneth began to live in Tunapuna with their children. Kenneth may have visited the Arouca property from time to time thereafter but given the disconnection of electricity, the lack of water at the house and the clear evidence as to the dilapidated condition of the house, I consider it more credible that Kenneth began to reside in Tunapuna where there were all the comforts and amenities available to him, his wife and his children. I certainly do not believe Ann's evidence that she continued to live in the house in Arouca with her children and I formed the view that she was inclined to overstate the extent to which she spent time there in order to bolster her husband's claim without realising that by so doing she was contradicting what he had said, what Dennis and Irving had said and even what she had stated in her own witness statement.***
>
> ***38. In my opinion, therefore, Kenneth has failed to prove to my satisfaction on a balance of probabilities that he remained in***

exclusive and undisturbed possession of the Arouca property for a continuous period of more than 16 years from 9th October, 1987 and therefore, his claim that the title of the First Defendant was extinguished, fails."

[44] The trial judge was thus unconvinced by the evidence provided by Kenneth. Given the contradictions and inconsistencies, his is a conclusion which should not be lightly disturbed. There must be an error or misapprehension of fact, or an error of law. I do not consider that any such event has occurred. The judge found that Kenneth moved residence to Tunapuna in 1996 when his wife's father fell ill and she moved to Tunapuna to take care of him. On the evidence that was a finding to which he could come. He held however that *"he may have visited the Arouca property from time to time"*. That finding has caused me some pause. Change of residence does not always mean surrender of possession or control over the property previously occupied. Kenneth's visits to the Arouca property from time to time could also have been a continued exercise of control or ownership over it. Occasional acts of user are not inconsistent with continuous possession and control. See the decision of this court in **Katwaroo v. Majid Abdul Kadir & Anor., Civil Appeal No. 86 of 2009**, (Weekes, Bereaux and Narine, JJA) in which it was held, following the decision of Pennycuick J in **Bligh v Martin [1968] 1 WLR 804**, that possession can still subsist even with long intervals between acts of user (see paragraphs 7 and 25). It will all depend on the circumstances of the case.

[45] But I do not consider that the judge fell into error in this case. He correctly applied the test in **Pye**. At paragraphs 25 and 26 he said:

25. The Claimant must establish: (i) factual possession (without the consent of the paper title owner), a single and exclusive possession and such acts as demonstrate that in the circumstances, he had dealt with the land as an occupying owner might be expected to do and that no other person had done so; and (ii) the intention to possess and on one's own behalf and in one's own

name to exclude the world at large including the paper title owner: J A PYE (Oxford) Ltd. v Graham (HL) [2003] 1 AC 419.

26. Therefore, in order to succeed in his claim to possessory title of the disputed property the Claimant must prove that he enjoyed factual possession of the property for more than 16 years after 9th October, 1987 and that he had the necessary intention to possess same in his own name and on his own behalf.

His finding at paragraph 37 that Kenneth may have visited the premises from *"time to time"* is to be viewed against his subsequent finding in paragraph 38 that Kenneth had *"failed to prove to my satisfaction on a balance of probabilities that he remained in exclusive and undisturbed possession of the Arouca property"*. Taken in context, the judge's finding was that the occasional visits were not sufficient to demonstrate that Kenneth **<u>remained</u>** in <u>continuous and exclusive possession of the premises, to the exclusion of Patricia Marchong</u>, after he left the premises. As the trial judge he was entitled to come to such a conclusion having regard to the evidence, more so the evidence on behalf of Kenneth, which was full of *"contradictions"*. Further, two decisions of the Privy Council support my conclusion: **West Bank Estates Ltd v. Shakespeare Cornelius Arthur and Others [1967] 1 AC 665** and **Cobham v. Frett [2001] 1 WLR 1775**. Both are decisions in respect of claims of adverse possession based on intermittent acts of user. The Board's decision in the **West Bank** case was applied in **Cobham v. Frett**. The facts of **West Bank** are sufficiently cited in the dictum of Lord Scott of Foscote in **Cobham v. Frett**. In **Cobham v. Frett**, the defendant and his witnesses testified that for many years he had intermittently carried out activities on the land including cutting down trees, preparing charcoal, grazing cows, picking and selling sea grapes, fishing and occasionally taking sand for building purposes. Georges J upheld the paper title owner's claim, holding that the defendant's activities on the land had not been sufficient to dispossess him. The Privy Council (reversing the Court of Appeal) upheld that finding. Lord Scott of Foscote, delivering the decision of the Board, stated at pages 1784-1785:

Their Lordships are impressed by the analogy that can be drawn between West Bank Estates Ltd. v. Arthur [1967] 1 AC 665 and the present case. The West Bank Estates' case was an appeal to the Privy Council from the Federal Supreme Court of the West Indies in its appellate jurisdiction for British Guyana. The case involved a claim to a possessory title of a strip of land. The acts relied on were acts of cultivation, the cutting of timber, wood and grass, fishing and growing rice. The trial judge disallowed the claim to a possessory title. The Federal Supreme Court reversed him. They took the view that the respondents had made what was, for persons of their means and class, normal user of the land. Lord Wilberforce, who delivered the judgment of the Board said, at pp 677-678:

> *'The learned judge … applied his mind correctly to the question whether the respondents had proved 'sole and undisturbed possession user and enjoyment' of the disputed strip. As the Federal Supreme Court itself stated, these words convey the same meaning as possession to the exclusion of the true owner. The learned judge gave recognition to the fact that what constitutes possession, adequate to establish a prescriptive claim, may depend upon the physical characteristics of the land. On the other hand, he was, in their Lordships' view, correct in regarding such acts as cutting timber and grass from time to time as not sufficient to prove the sole possession which is required … The respondents had, in [the view of the Federal Supreme Court], proved that they had made what was for persons of their means and class normal user of the land … This does not appear to be a correct approach to the evidence. Admitting the utility of the respondents' operations, and that they did what was*

> *normal for small peasant farmers, this still does not establish a sufficient degree of sole possession and user to satisfy the Ordinance, or carry the matter beyond a user which remains consistent with the possession of the true owner.'*

> ***In their Lordships' view, Georges J's approach to the evidence in the present case is supported by Lord Wilberforce's remarks. The judge was entitled to regard the evidence as not establishing a sufficient degree of sole possession and user by Mr. Thomas Frett. Mr. Archibald's plea to their Lordships 'What else could have been done on the land?' is not the right question. An answer might be that Mr. Frett could have fenced-off parcel 57, incorporating it into his own property, parcel 58, and excluding every one, including the true owner and his agents. But in any event the right question would be whether what was done by Mr. Thomas Frett was sufficient to exclude the possession of Mr. Cobham and his agents. The judge answered the question with a 'No'. "*** *(emphasis added)*

In this case, the judge concluded that Kenneth had not proven to his satisfaction that he had remained in exclusive and undisturbed possession of the property. He had directed his mind to the right question which was whether Kenneth had shown that he had done sufficient to exclude the possession of Patricia Marchong. He did so against a backdrop of contradiction and inconsistency in the evidence given by Kenneth and his witnesses whom he had the benefit of seeing and hearing. Clearly the level of contradiction left him in doubt and consequently, unpersuaded. It must follow that he found the occasional visits to the property insufficient to exclude Patricia Marchong's title.

[46] The judge also had before him the evidence of the third defendant Ms. Winter-Honore that the house was dilapidated and abandoned. (See paragraphs 35 and 36 of the judgment.) He had before him the valuation report which described

the building as a *"very dilapidated dwelling house …"* This all went to his assessment of Kenneth's claim that he was in continuous possession of the property. He was entitled to take that evidence into account. It is not for the Court of Appeal now to second guess that assessment. This is not only because of the trial judge's advantage in hearing and seeing the witnesses. The comments of Lord Mance in **Central Bank of Ecuador & Ors. v. Conticorp SA & Ors. [2015] UKPC 11, [2016] 2 LRC 46** are apposite. At paragraph 6 he noted:

> ***"As the Supreme Court pointed out, the reasons justifying this approach are not limited to the fact that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. As mentioned by the United States Supreme Court in Anderson v City of Bessemer 470 US 564 (1985), 574-575, they include the considerations that***
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>> ***'Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the "main event" … rather than a "try-out on the road.' "***

The result is that Kenneth, having been found by the judge to have left the property in 1996, did not prove possession for a continuous period of sixteen years. In effect the judge found that he had abandoned his possession.

[47] Ms. Lawson also submitted that Ms. Winter Honore was guilty of trespass

because Kenneth was in actual possession at the time the house was broken down. If Kenneth were in actual possession, his possession would have been good against all but the true owner. In this case however, Ms. Winter Honore acted on the specific authorisation of Patricia Marchong who was the paper title owner. Moreover, the judge found that Kenneth was not in actual possession at the time of Ms. Winter Honore's entry onto the parcel. For these reasons the claim in trespass fails.

[48] As to the claim for damages for the destruction of the house, it is arguable that the claim still falls to be considered on the basis there was no allegation on the part of the respondents that the dwelling house belonged to Ms. Marchong. The evidence indicates that the house was built on behalf of Cleveland, father of Kenneth. There is no evidence that Cleveland's estate had been administered and that the interest in the house had been passed to Kenneth as next of kin. The ownership of the house and therefore Kenneth's basis for making the claim is uncertain. Second and in any event, the claim for damages was not sufficiently proven. The appellant submitted evidence from a valuator who testified that, based on an inspection of the already demolished property as well as a conversation with the builder of the house, the value of the dwelling house would have been seventy-three thousand, three hundred and fifty dollars ($73,350.00). This evidence fell short of the required standard of proof. It raises the obvious question how is it possible to state with any degree of certainty the value of the building after it had already been destroyed. Moreover, the evidence on behalf of the third defendant was that the house was at the end of its physical and economic life and was of little value.

I would dismiss the appeal and direct that the appellant pay the second respondent's costs assessed at 2/3 of assessed costs of the trial in the High Court.

Nolan P.G. Bereaux
Justice of Appeal

I have read, in draft, the judgment of Jones J.A. I agree with it and have nothing to add.

Rajendra Narine
Justice of Appeal

Majority judgment delivered by J. Jones, J.A.

[49] This appeal is against the finding of the trial judge by which he determined that the appellant, Kenneth Lashley, failed to prove that he was in exclusive and undisturbed possession of the land, the subject matter of the action, for a period in excess of 16 years in accordance with the provisions of the **Real Property Limitation Act Chap. 56:03** ("the Act").

[50] By his claim the appellant sought declarations that he was entitled to the possession of a parcel of land situated in Arouca; injunctions in support of those declarations and damages for unlawful eviction and trespass. The second defendant, Hubert Joseph, died prior to the trial of the action and the appellant discontinued the action against him. The case therefore proceeded against the two respondents to this appeal only.

[51] The primary facts as found by the judge are not under challenge. At issue here are the inferences drawn by the judge from those facts. Where the sole question is the proper inferences to be drawn from specific facts we, as a court of

appeal, are in as good a position as the trial judge to evaluate those facts and arrive at our own conclusions: **Benmax v Austin Motor Co. Ltd[1]; Ryan and another v Petroleum Company of Trinidad and Tobago Limited[2].**

[52] While a more expansive account of the facts, inclusive of the pleadings and the contentions of the parties, can be found in the judgment of my brother Bereaux JA the facts, as found by the judge, are relatively straightforward. The land, the subject matter of the action, had been owned by the first respondent's predecessors in title: Horace and Albert Marchong. They died in 1973 and 1976 respectfully. Thereafter the paper title passed to the first respondent, Patricia Marchong, who in 2004 entered into an agreement to sell the land to the second respondent Juliana Winter Honore. In that year, with the permission of the first respondent and prior to completing the sale, the second respondent entered onto the land and demolished the house that stood there. At the time the house was in a dilapidated condition.

[53] The house on the land had been erected by the appellant's family who had been in exclusive occupation of the land since the year 1961. The appellant was born in 1951. In 1961 the appellant's father had entered onto the land pursuant to a licence granted to him by the owner of the land. The judge seems to accept that this licence continued during the lifetime of Horace and Albert Marchong. The house was erected during the lifetime of the appellant's father. The appellant's father died in April 1976 leaving the appellant's mother and the appellant in the occupation of the house and land. The appellant's mother died on 9th October 1987 leaving the appellant in occupation. The judge found that the appellant continued in occupation of the land until the year 1996 when, "although the appellant may have continued to visit the property from time to time", the appellant began to reside in other premises.

[54] For the purpose of the possessory title claimed the issues for the judge's determination were: (i) the nature of the occupation by the appellant and his

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1 [1955] 1 All E.R 326 at page 329
2 CA No. S-012 of 2011 at paragraph 19

family; and (ii) the date when the appellant's occupation ended. For the purpose of the claim in trespass the issue was whether, at the time of the second respondent's entry onto the land, the appellant had sufficient control over the land to maintain a claim in trespass against her.

[55] In the case of **Grace Latmore Smith v David Benjamin** [3] it was recognized that to maintain a claim in adverse possession under the Act there must be an absence of consent of the paper title owner or his predecessor in title, factual possession and an intention to possess by the occupier. [4] In that case the court accepted that the principles adduced in the case of **J.A. Pye (Oxford) Ltd. and another v Graham and another[5],** applied in this jurisdiction. With respect to the intention to possess what was required to be demonstrated was "an 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, as far as is reasonably practicable and as far as the processes of the law will allow."[6]

[56] According to **Lord Browne-Wilkinson in Pye**: "Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession, though there can be 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 that 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

[3] Civ. App 67 and 68 of 2007
[4] per Mendonca JA at paragraph 48 of the judgment
[5] [2003] 1 AC 419
[6] per Browne- Wilkinson quoting Slade J. in Powell v Mc Farlane (1977) 38 P&CR 452 at paragraph 43 of Pye.

so."[7]

[57] A claim in trespass is also a claim in possession. In the case of **RB Wutu Ofei v Mabel Danqua** the judicial committee adopting the position taken in the case of **Bristow v Cormican**[8] stated:

> "Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient. In *Bristow v. Cormican* Lord Hatherley said:
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> > "There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

[58] The trial judge concluded that for the appellant to succeed in his claim for possessory title the appellant was required to prove that he enjoyed factual possession of the property for more than 16 years from, 9th October 1987, the date of his mother's death. According to the judge the fact that, in his witness statement, the appellant states that he treated his father and then his mother as the owners of the property clearly demonstrated that between the years 1961 and 1987 the appellant remained in occupation of the property with the permission of his father and mother and that he could only claim to be in the exclusive physical

[7] Quoting from Slade J in Powell v Mc Farlane (1977) 38 P and CR 452 at page 470-471.
[8] (1878) 3 App .Cas. 641 ,657, H.L.

control and possession in his own right thereafter.

[59] The judge further concluded that, despite the fact that the appellant may have continued to visit the property from time to time, the appellant's occupation of the land ended in 1996 when he began to reside in other premises. He therefore determined that the appellant had failed to prove that he remained in exclusive and undisturbed possession of the land for a period of more than 16 years. With respect to the trespass the judge concluded that since the appellant was not in the lawful possession of the land, and having failed to show a better title than the second respondent, his claim in trespass also failed.

[60] Insofar as the judge concluded that the relevant period was from October 1987 to 1996 the judge was wrong. In the first place the judge wrongly concluded that time began to run in the appellant's favour only from the death of the appellant's mother. Time began to run from the death of the appellant's father in 1976 when the licence granted to his father to occupy the land determined. That licence, being purely personal to the parties, would have terminated upon the death of either of the parties to it: **Halsbury's Laws of England**[9]. While there is no finding by the judge as to who died first, Albert Marchong or the appellant's father, by the latest the licence would have terminated in April 1976 with the death of the appellant's father. It was on the determination of the licence that the right to make an entry or bring an action to recover the land accrued to the owner in accordance with section 4 of the Act.

[61] The trial judge failed to take into consideration the undisputed evidence that the appellant's mother and the appellant were in continuous and undisturbed occupation of the premises after the death of appellant's father from the year 1976 and that this occupation was adverse to the paper title owner. In those circumstances, for the purpose of the Act, time started to run against the Marchongs from that time.

[62] It is clear on the law that the interest of a squatter even before the statutory

[9] Vol 62(2016) at paragraph 6

period has elapsed is transmissible and if that squatter is succeeded in possession by one claiming through him who holds until the expiration of the statutory period the successor has as good a right to the possession as if he himself had occupied for the whole period: **Halsbury's Laws of England**[10]**.**

[63] Indeed relying on the authority of the case of **Willis v Earl Howe [1893]2 Ch. 545 Megarry** states "If a squatter is himself dispossessed the second squatter can add the former period of occupation to his own as against the true owner. This is because time runs against the true owner from the time when adverse possession began, and so long as adverse possession continues unbroken it makes no difference who continues it. But as against the first squatter, the second squatter must himself occupy for the full period before his title becomes unassailable."[11]

[64] Nichols LJ in **Mount Carmel Investments v Peter Thurlow** [12]put it this way:

> "If squatter A is dispossessed by squatter B, squatter A can recover possession from squatter B and he has 12 years to do so[13], time running from his dispossession. But squatter A may permit squatter B to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A sells or gives his interest in the property, insecure as it may be, to B."

[65] This is not, strictly speaking, a case of successive squatters. In the instant case the occupation of the appellant and his mother were not adverse to each other. They occupied the premises jointly. This was a case of a single possession exercised by them jointly. Under ordinary principles of law therefore the right of the survivorship would operate. Accordingly the appellant would be entitled to include the period of his joint occupation with his mother in computing the time.

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[10] Vol 28 Fourth edition para 777
[11] Megarry & Wade: The Law of Real Property Sixth Edition at paragraph 21-022
[12] [1988]1 WLR 1078 at page 1086
[13] Sze To Chun Kueng v Kung Kwok Wai David and another [1997]3 LRC 253

[66] On the evidence therefore the paper title owner had been out of the occupation of the land from 1976 when the licence to occupy the land ended. In accordance with the Act therefore the failure to make an entry onto or bring an action to recover the land within the 16 year period identified by the Act resulted in the inability of the paper title owner to make an entry onto the land and the extinguishment of that paper title in accordance with **sections 3 and 21 of the Act.** On the evidence before the judge therefore the paper owner's title was extinguished by the year 1992.

[67] In this regard, with the greatest of respect, I do not agree with the conclusions arrived at by my brother Bereaux J.A. whose draft judgment I have had the opportunity of reading. There was no evidence before the trial judge of any permission being granted to the appellant or his mother to continue in the occupation of the land. Neither was there any evidence from which such an inference can be drawn. The mortgage bill of sale, relied on by Bereaux JA, was not admitted into evidence and the decision of the trial judge to exclude same has not been challenged on appeal.

[68] In any event, even if the mortgage bill of sale had been so admitted, the purpose of the document is clearly to acknowledge the existence of a debt and make arrangements for its repayment. The fact that in the schedule to this mortgage bill of sale, when describing the building being used as security for the loan, it describes the building as standing on lands owned by the first respondent would not have affected the nature of their occupation. In the case of **J.A. Pye (Oxford) Ltd.,** referred to above, the occupier knew and acknowledged the owner's title to the land. That fact did not affect the nature of his occupation of the land. Indeed the position taken by the occupier was that had he been asked he would have been willing to pay the owner for the use of the land.

[69] Similarly, in the instant case, the knowledge that the land was owned by the first respondent did not affect the nature of the appellant's or his mother's occupation of the land:

> "The question is simply whether the defendant squatter has dispossessed

> the paper title owner of the land by going into ordinary possession of the land for the requisite period without the consent of the owner.”:

per Lord Browne-Wilkinson in Pye at paragraph 36.

[70] Here the fact that the mortgage bill of sale recognized that the first respondent was the owner of the land; acknowledged that money owed to her predecessor in title was payable to her and provided the house as security for the outstanding sum was not evidence of a licence granted by the first respondent to the appellant and his mother to occupy the land. Neither could such a licence have been inferred. Indeed such a conclusion is completely contrary to the case presented by the first defendant in her defence.

[71] At best the effect of the mortgage bill of sale, if admitted into evidence, would have been to constitute an acknowledgement of title in writing within the meaning of **section 15 of the Act** the consequence of which would have been to stop time running and require that time begin running afresh from that date. According to the mortgage bill of sale it was executed in July 1984. As we will see when we examine the finding of the judge as to when time stopped running the fact that the mortgage bill of sale may have been an acknowledgment in writing of the first respondent’s title would have made no difference to my conclusion as to the outcome of this case.

[72] The judge therefore was wrong when he determined that the relevant period began in October 1987. He incorrectly treated the occupation of the appellant and his mother as being adverse to each other. Time had started to run against the paper title owner from April 1976 and in favor of the appellant and his mother upon the death of the appellant’s father. In the absence of the mortgage bill of sale therefore the first respondent’s title would have been extinguished by April 1992 well before the 1996 date when the judge determined that the appellant was no longer in the occupation of the land.

[73] In any event, even if the mortgage bill of sale had been admitted into evidence and constituted an acknowledgement in writing in accordance with

section 15 of the Act, by finding that the appellant was no longer in the occupation of the land when he began to reside at the other premises the judge ignored the fact that the house, albeit in a dilapidated state, was still on the land and that the appellant continued to visit the land "from time to time". This was sufficient to indicate a continuing occupation of the land by the appellant.

[74] "The degree of physical control necessary to constitute possession may vary from one case to the other, for "by possession is meant possession of that character of which the thing is capable." "The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done in the land to indicate possession." In the case of a building, possession is evidenced by occupation, or if the building is unoccupied, by possession of the key or other method of obtaining entry…..": **Clerk & Lindsell on Torts Eighteenth Edition at paragraph 18-11**

[75] The evidence of the appellant continuing to visit the house and the land was sufficient to comprise a continuation of possession by the appellant for the purposes of the Act. The judge therefore was wrong when he concluded that in the circumstances that pertained the fact that the appellant no longer resided on the land meant that he did not remain in exclusive and undisturbed possession of the land.

[76] In the circumstances of this case therefore, on the evidence before him, the judge ought to have concluded that the first respondent's paper title was extinguished in 1992. Accordingly the appellant was entitled to a declaration affirming such an extinguishment in his favour and the supporting injunction. Even if the mortgage bill of sale had been admitted into evidence the appellant's continued occupation on the land from 1984 to 2000 would have resulted in the extinguishment of the first respondent's title long before the agreement to sell the land to the second respondent in 2004 and the second respondent's entry onto the land in that year. At the time of the second respondent's entry onto the land therefore neither she nor the first respondent had title to the land.

[77] Insofar as the trial judge concluded that the appellant was unable to maintain a claim in trespass he was therefore wrong. At the time of her entry onto the land the second respondent was acting under the authority of a title that had already been extinguished. Her entry onto the land would have been barred by section 3 of the Act. She was at that time therefore an unauthorized intruder. In those circumstances the appellant was entitled to damages for her trespass onto the land.

[78] With respect to the appellant's claim for damages for trespass there seems to have been some evidence of the appellant obtaining a valuation of the house conducted after it had been destroyed. The judge made no finding of fact with respect to that valuation. Although in these circumstances it is open to this court to send the case back for an assessment of these damages no useful purpose would be served by doing so since no special damages had been claimed by the appellant in his statement of case. Special damages, as the loss arising from the destruction of the house would have been, must be specially pleaded: **Edwards v Namalco Construction Services and another**[14]. In these circumstances the appellant will only be entitled to nominal damages for the trespass onto the land. The sum of $15,000.00 is in the circumstances appropriate.

[79] Accordingly the appeal is allowed and the order of the trial judge set aside. The appellant is entitled to a declaration that he has acquired a possessory title to the land the subject matter of the action; an injunction restraining the second respondent from entering upon or removing the appellant from the said land and the sum of $15,000.00 representing his damages for trespass.

Judith Jones
Justice of Appeal

[14] CA Civ. No 28 of 2011