

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2008-04271
H.C.A. No 224 of 2004

Between

TREVOR KERRY

Claimant

AND

LESLIE ELEY

Defendant

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

JUDGMENT

Appearances:

Mr. R. Bissessar instructed by Ms. J. Mycoo for the Claimant.

Mr. G. Mungalsingh instructed by Ms. C. Sonny for the Defendant.

1. This is a dispute arising from the ownership of and right to possession of two parcels of land situate at No. 29 Manuel Congo Road, San Carlos Estates, Guanapo, Arima more specifically known as Lot No. 24 and a five acre parcel adjoining said Lot No. 24.

The Claim

2. The Statement of Claim was filed on the 7th May 2004 and an Amended Statement Case was filed on the 4th June 2009.
3. The Claimant claimed that he was the owner of, *inter alia*:
 - i. A parcel of land in the Ward of Arima comprising 3.2971 Hectares more or less bounded on the North partly by San Carlos Road and partly by Lot (V) conveyed to Elizabeth Kerry-Schoeller, on the South partly by Manuel Congo Road and partly by a Ravine 4 metres wide, on the East partly by Lot (V) conveyed to Elizabeth Kerry-Schoeller and partly by Lot E conveyed to Franklyn Kerry and on the West partly by the San Carlos Estate and partly by the Manuel Congo Road (“the first parcel of lands”).
 - ii. A parcel of land situate at San Carlos Estate in the Ward of Arima comprising 1.5426 hectares and bounded on the North by Manuel Congo Ravine on the South by Sasa Trace on the East by lands formerly of Frank Kerry and on the West by Manuel Congo Road and intersected by the Manuel Congo Ravine from North to South (“the second parcel of lands”).
4. The Claimant claimed to have obtained the benefit of these parcels of land upon the death of his father and predecessor, Mr. Frank Kerry, on the 14th November 1992 by virtue of intestacy.
5. The Claimant averred that in or about October 1980 the Defendant trespassed onto certain agricultural lands forming part of the first parcel of lands situated at No. 29

Manuel Congo Road, San Carlos Estates, Guanapo, Arima and known as Lot No. 24 comprising 527.3 square metres or 5,676 square metres (“Lot No. 24”) and erected a house thereon.

6. The Claimant claimed that although his predecessor, Mr. Frank Kerry, offered to sell the Defendant Lot No. 24 at \$10.00 per square foot, Mr. Frank Kerry instituted High Court proceedings on the 24th June 1986 against the Defendant for an order of possession of Lot No. 24. This application is intituled H.C.A. No. 3714 of 1986 and the Claimant says it has not been determined by the court.
7. The Claimant further claimed that on or about 11th June 1989 the Defendant advised Mr. Frank Kerry that he was interested in purchasing five acres of land adjoining Lot No. 24 which formed part of the second parcel of land (“the five acre parcel”) and sent to Mr. Frank Kerry a draft Agreement for Sale.
8. The Claimant contended that the Agreement for Sale was never executed and although Mr. Frank Kerry accepted a deposit of \$3000.00 on the 4th August 1989 from the Defendant pursuant to the purchase of the five acre parcel, the deposit was subsequently returned by Mr. Frank Kerry’s then Attorney-at-law Messrs. Malcolm Milne & Co. to the Defendant’s Attorney-at-law by letter dated 25th June 1991.
9. The Claimant maintained that although Mr. Frank Kerry was prepared to sell the land he did not do so as is evident by the unexecuted Agreement for Sale. He cited, at paragraph 13 of his Amended Statement of Case, the following reasons for the Agreement for Sale not being executed:
 - i. *The boundaries of the said 5 A parcel had not been determined;*
 - ii. *Planning permission had not been given for partitioning of the second parcel of lands into a 5 A parcel;*
 - iii. *The 5 A parcel was not free from encumbrances;*

- iv. *The purchase price had not been agreed since the adjoining lands including Lot No. 24 was being sold for \$10.00 per square foot (0.8361m²) which meant that the purchase price for the 5 A parcel was in the region of \$2.0 million; and*
- v. *The sum of \$98,000.00 in taxes were owing to the authorities in respect of the 5 A parcel.*

10. Upon the death of Mr. Frank Kerry on 14th November 1992 the Defendant, his servant and/or agents trespassed into the five acre parcel and erected a fence enclosing the five acre parcel. The Claimant claimed that despite numerous requests to the Defendant to vacate the five acre parcel he remains a trespasser in respect of both the five acre parcel and Lot No. 24.

11. Consequently, the Claimant claimed at paragraph 21 of his Amended Statement of Case *inter alia*:

- i. *A declaration that the Claimant is the registered legal owner and entitled to possession of Lot No. 24 forming part of the first parcel of lands, comprising 3.2971 hectares and more particularly described in the third Part of the fourth schedule to the Deed of Assent made on 17gth February 1997 and registered as No. 10929 of 1997.*
- ii. *A declaration that the purported sale of the 5 A parcel of lands more particularly described in the Deed of Conveyance made on 30th August 2001 and registered as No. DE200102131202 being the second parcel of lands is null, void and of no effect.*
- iii. *Damages or mesne profits.*

The Defence

12. The Defence and Counterclaim was filed on the 27th May 2004. No Amended Defence and Counterclaim was filed in answer to the Claimant's Amended Statement of Case.
13. The Defendant disputed the Claimant's assertion that he is a trespasser on Lot No. 24 and the five acre parcel and stated in relation to Lot No. 24 that on or about the 8th October 1980 Mr. Frank Kerry agreed to rent the lot of land on which the Defendant lived to the Defendant at a rent to be agreed in the future. The Defendant pleaded that he entered into possession of the land, built his house and went into occupation of the house with his family before Christmas of that same year. He stated that Mr. Frank Kerry died before the rent could be agreed and that the Claimant refused to honour the agreement for rent between the Defendant and the Claimant's predecessor. Consequently, no rent had been paid for more than seventeen years.
14. In relation to the occupation of the five acre parcel, the Defendant pleaded that he entered into an agreement on or about the 4th August 1989 with Mr. Frank Kerry for its purchase and paid a deposit of \$3000.00 on the agreed purchase price of \$30,000.00. The Defendant assert that he immediately took possession of the five acre parcel, had its excision from the larger parcel approved by Town and Country Planning Division and earth-filled the larger parcel which was swampy
15. The Defendant stated that he was always ready, willing and able to pay the balance of the purchase price but Mr. Frank Kerry never accepted same because the land was encumbered.
16. The Defendant asserted that he was not a trespasser and has a legal right to occupy both parcels of lands. He therefore counterclaimed at paragraph 7 of his Defence and Counterclaim for, *inter alia*:
- i. *A declaration that he is the owner in possession of the lot of land on which he lives or alternatively that he is the tenant thereof and that his tenancy is protected under the terms of the Land Tenants (Security of Tenure) Act.*

- ii. *An order that the Plaintiff conveys to the Defendant the 5 acre parcel of land on the Defendant paying the balance of \$27,000.00 and the Plaintiff showing a good marketable title thereto.*

The Reply and Defence to Counterclaim

17. The Reply and Defence to Counterclaim was filed on the 21st February 2005 by which the Claimant denied all allegations made by the Defendant.
18. The Claimant stated that at all material times the Defendant was a licensee in occupation of Lot No. 24 and denied that the Defendant took possession pursuant to the agreement he alleged was made between himself and Mr. Frank Kerry.
19. The Claimant denied any agreement was ever made between Mr. Frank Kerry and the Defendant with regard to the purchase of the five acre parcel and that the sum of \$3000.00 was refunded to the Defendant on or about 22nd June 1991.
20. The Claimant answered that Mr. Frank Kerry paid all rates and taxes for the lands and denied that the Defendant was a statutory tenant or owner entitled to possession

The Claimant's Case on the Evidence in Chief

21. The sole witness for the Claimant was the Claimant himself and his evidence in chief was comprised of that contained in his Witness Statement filed on the 29th January 2010 and his Supplemental Witness Statement filed on the 3rd February 2012.
22. The Claimant testified that he was the registered owner and entitled to possession of certain lands described in the Fourth Schedule of a Deed of Assent made on the 17th

February 1997 and registered as No. 10929 of 1997 being three pieces of land in the Ward of Arima.

23. Specific to the present matter the Claimant gave evidence that he was the owner of the following:

- i. a parcel of land in the Ward of Arima comprising 3.2971 Hectares more or less bounded on the North partly by San Carlos Road and partly by Lot (V) conveyed to Elizabeth Kerry-Schoeller, on the South partly by Manuel Congo Road and partly by a Ravine 4 metres wide, on the East partly by Lot (V) conveyed to Elizabeth Kerry-Schoeller and partly by Lot E conveyed to Franklyn Kerry and on the West partly by the San Carlos Estate and partly by the Manuel Congo Road (“the first parcel of lands”).
- ii. a parcel of land situate at San Carlos Estate in the Ward of Arima comprising 1.5426 hectares and bounded on the North by Manuel Congo Ravine on the South by Sasa Trace on the East by lands formerly of Frank Kerry and on the West by Manuel Congo Road and intersected by the Manuel Congo Ravine from North to South (“the second parcel of lands”).

24. It was the Claimant’s evidence that in or about October 1980 the Defendant was allowed as a licensee by his father and predecessor Mr. Frank Kerry to occupy certain agricultural lands forming part of the first parcel of lands know as and situate at Lot No. 24 comprising 527.3 square metres or 5,676 square metres (“Lot No. 24”) and erected a house thereon. The Claimant further testified that in or around early 1984 Mr. Frank Kerry revoked the licence when the Defendant ceased working for him.

25. By letter dated 23rd July 1984 Mr. Frank Kerry informed all tenants and squatters, including the Defendant that they would have the option to purchase the lands of which they were in occupation. On 30th January 1985 Mr. S.D. Vincent, Attorney-at-law wrote to the Defendant on behalf of Mr. Frank Kerry offering to sell Lot No. 24, of which the

Defendant was in occupation, to the Defendant at \$10.00 per square foot. This offer was again made by letter dated 15th March 1985 by Mr. William Richards, Real Estate Broker on the instructions of Mr. Frank Kerry. These letters have been annexed to the Claimant's Witness Statement.

26. The Claimant asserted in his evidence, that a High Court action was instituted on the 24th June 1986 by Mr. Frank Kerry against the Defendant for an order for possession of the land being occupied by the Defendant. The action was intituled H.C.A. No. 3714 of 1986 and has never been determined by the court. The Claimant has annexed a copy of this application to his Witness Statement.
27. By a letter dated the 11th June 1989 the Defendant wrote to Mr. Frank Kerry expressing his interest in purchasing Lot No. 24 and a five acre parcel of land which included Lot No. 25, which abutted Lot No. 24, and the Road Reserve ("the five acre parcel"). An Agreement for Sale was sent to Mr. Frank Kerry in relation to the five acre parcel but was never executed. The Claimant annexed a copy of the letter and unexecuted Agreement for Sale to his Witness Statement.
28. The Claimant testified that Mr. Frank Kerry accepted the sum of \$3000.00 from the Defendant on account of the purchase price for the five acre parcel on the 4th August 1989. However, he gave evidence that in a letter dated 25th June 1991 the sum was later returned by Mr. Frank Kerry's then Attorney-at-law, Messrs. Malcolm Milne & Co., to the Defendant's then Attorney-at-law, Messrs. De Nobreiga Iniss and Company, by cheque dated 22nd June 1991. The Agreement for Sale was also returned. The Claimant has annexed copies of the cheque sent to return the deposit and the letter of the 25th June 1991 to his Witness Statement.
29. The cheque which was sent to the Defendant's Attorney was subsequently returned to Mr. Frank Kerry's Attorney and by letter dated 1st July 1991 the latter stated that he was holding the cheque.

30. The Claimant testified that based on the documentation he viewed and conversations with Mr. Frank Kerry, the following were the reasons for the Agreement for Sale being unexecuted:

- i. The 5 A parcel was not free from encumbrances;*
- ii. The boundaries of the said 5 A parcel had not been determined;*
- iii. The purchase price had not been agreed since the adjoining lands including Lot No. 24 was being sold for \$10.00 per square foot (0.8361m²) which meant that the purchase price for the 5 A parcel was in the region of \$2.0 million;*
- iv. The sum of \$98,000.00 being costs due and owing by Mr. Frank Kerry to Trinidad and Tobago Development Finance Company Limited in H.C.A. 3436 of 1985; as a result the judgment creditor had filed a lis pendens attached to all lands owned by Mr. Frank Kerry which meant that the 5 A parcel could not have been transferred until this payment had been made and the debt discharged.*

31. The Claimant gave evidence that he issued the payment for the \$98,000.00. Subsequently, he was issued a Notice of Discharge filed on 17th February 1993. This Notice is annexed to the Claimant's Witness Statement.

32. The Claimant testified that upon the death of Mr. Frank Kerry on the 14th November 1992 the Defendant, his servants and/or agents trespassed onto the five acre parcel and erected a fence enclosing it. He gave evidence that up until this encroachment the Defendant had not entered the five acre parcel nor did he cultivate any crops on it.

33. The Claimant testified that despite numerous requests to the Defendant to vacate the five acre parcel he remained a trespasser in respect of both the five acre parcel and Lot No. 24. In this regard the Claimant gave evidence that a notice dated 6th July 1994 was sent to

the Defendant to deliver up possession of the five acre parcel. By letter dated 6th September 2001 the Claimant called on the Defendant to desist from erecting a concrete structure adjacent to the chattel house on Lot No. 24 and to cease his trespass of the five acre parcel. Both the notice and the letter aforementioned were annexed to the Claimant's Witness Statement.

34. It was the Claimant's evidence that in early January 2009 the Defendant filled up the lands at the northern side of the five acre parcel blocking the drains and thereby impeding the flow of water. Consequently the Claimant wrote to the Defendant by letter dated 16th January 2009, asking him to cease further works on the lands until proceedings were completed. According to the Claimant, the Defendant ignored these requests and has continued construction on the land. A copy of the letter was annexed to the Claimant's Witness Statement.

35. The Claimant testified that on the 27th November 2010 he received a notice signed by the Defendant dated 25th November 2010 being a notice of his desire to renew the statutory lease of lands situate at No. 29 Manuel Congo Road, San Carlos Estates, Guanapo. Arima forming part of the lands which are the subject of the present proceedings. A copy of this notice was annexed to the Claimant's Witness Statement.

36. The court notes that there being no evidence that the Claimant was privy to the transaction between the Defendant and Mr. Frank Kerry, the Claimant could be in no position to testify from his own knowledge as to the original arrangement.

The Defendant's Case on the Evidence in Chief

37. Evidence on behalf of the Defendant was given solely by the Defendant and was contained in his Witness Statement filed on the 29th January 2010.
38. The Defendant testified that in or around October 1980 Mr. Frank Kerry agreed to allow the Defendant to occupy a plot of land to build a house in San Carlos Estate at a rent to be agreed. The Defendant stated that he was employed by Mr. Frank Kerry at that time as a Truck Driver in his business known as Guanapo Sand & Gravel Plant.
39. The Defendant gave evidence that because the land was low lying and swampy, he had to fill the land in order to construct his dwelling house on it and that Mr. Frank Kerry assisted him with this by providing transportation and some land fill. The Defendant testified that this plot of land measured approximately two hundred feet in length by eighty-three feet in width (Lot No. 24). The Defendant explained that the five acre parcel is located behind this land.
40. The Defendant moved into the dwelling house sometime in December 1980 and has lived there with his wife and children since. He testified that shortly after moving into the house he began planting short-term crops on the five acre parcel without objection from Mr. Frank Kerry. He stated that around the end of 1985 he decided to fence Lot No. 24 and enquired of Mr. Frank Kerry how much land he should fence. The Defendant asserted that Mr. Frank Kerry told him to fence the full amount of land he occupied and on the 5th November Mr. Frank Kerry gave him sixty wooden fence posts which he used to subsequently fence Lot No. 24.
41. The Defendant testified that although he was always ready and willing to pay the rent for Lot No. 24 to Mr. Frank Kerry, none was ever paid. By letters dated the 30th January 1985 and 15th March 1985 Mr. Frank Kerry offered Lot No. 24 for sale. Despite this offer, no agreement was ever made for the purchase of this land.
42. The Defendant gave evidence that on the 11th June 1989 he wrote to Mr. Frank Kerry expressing his interest in purchasing the five acre parcel for agriculture to which Mr.

Frank Kerry agreed. The Defendant paid \$3000.00 as a deposit on the agreed purchase price of \$30,000.00 and received a receipt in respect of the deposit paid dated the 4th August 1989. This receipt was contained in the Defendant's List of Documents. The Defendant stated that although an Agreement for Sale was prepared with respect to the purchase of the five acre parcel, it was never executed.

43. The Defendant's evidence was that after payment of the deposit, since he was already in possession of the five acre parcel, he started to grade the land and continued planting crops on it. He asserted that at present he has a large amount of trees, plants and crops on the five acre parcel. He testified that over time he erected a chain link wire fence along the boundary at the side of the main road and a single wire fence along the northern and eastern boundaries of the five acre parcel, in order to keep out trespassers.
44. The Defendant gave evidence that he obtained financing from Republic Bank Limited for the five acre parcel to settle the \$27,000.00 balance on the purchase price. In a letter dated 6th October 1989 the bank's attorney wrote requesting information for the preparation of the mortgage for the five acre parcel. The Defendant subsequently retained counsel to prepare the Deed of Conveyance for the five acre parcel. His attorney, by letter dated 23rd November 1989, wrote to Mr. Frank Kerry's then attorney requesting a copy of the Town and Country Approval for subdivision. These letters were contained in the Defendant's List of Documents.
45. Investigations by the Defendant's then attorney revealed a mortgage in favour of the Agricultural Credit Bank of Trinidad and Tobago registered as No. 8243 of 1965 in respect of the five acre parcel and a registered judgment against Mr. Frank Kerry dated the 18th May 1989 in H.C.A. 3436 of 1985.
46. The Defendant testified that in March 1990 he caused a survey to be done on the five acre parcel with the consent of Mr. Frank Kerry and on the 11th May 1990 he was granted approval by Town and Country Planning division to develop the five acre parcel. This

notice of permission to develop the five acre parcel and the approved survey plan was contained in the Defendant's Supplemental List of Documents.

47. The Defendant stated that he paid land tax on the 6th July 1990 in the sum of \$110.00 for the five acre parcel of lands. A copy of the receipt is contained in his Supplemental List of Documents.
48. The Defendant's attorney at the time wrote to Mr. Frank Kerry by letter dated 10th October 1990 informing him of the registered judgment and requiring him to complete the sale. By letter dated 28th May 1991 the Trinidad and Tobago Development Finance Company Limited wrote to the Defendant's attorney indicating that Mr. Frank Kerry had made a payment of \$154,120.17 towards the judgment debt of \$164,188.17 and agreed to lift the judgment on the condition that the Defendant pay to them the \$27,000.00 balance of the purchase price. By letter dated 3rd June 1991 the Defendant's attorney wrote to Mr. Frank Kerry's attorney informing them of this concession and forwarding the deed of conveyance for execution. The Defendant testified that Mr. Frank Kerry's attorney responded to this letter saying that they had forwarded the information to Mr. Frank Kerry and are awaiting his instructions. Copies of these letters were contained in the Defendant List of Documents.
49. The Defendant testified that by letter dated 14th June 1991, the Trinidad and Tobago Development Finance Company Limited wrote to his attorney indicating that one Mr. Mohammed contacted them on behalf of Mr. Frank Kerry offering the sum of \$10,068.00 in satisfaction of the judgment debt. Mr. Mohammed indicated that Mr. Frank Kerry no longer wanted to sell the five acre parcel to the Defendant. However, the Trinidad and Tobago Development Finance Company Limited stated that they were willing to accept \$191,188.17 in satisfaction of the judgment debt. This letter is contained in the Defendant's List of Documents.

50. By letter dated 25th June 1991 Mr. Frank Kerry's attorney returned the down payment of \$3000.00 by cheque. By letter the 27th June 1991 the Defendant's attorney returned the said cheque. Copies of these letters were contained in the Defendant's List of Documents.
51. It was the Defendant's evidence that, by a notice dated 6th July 1994, Attorney for the legal personal representatives of the estate of Mr. Frank Kerry demanded that the Defendant deliver up possession of the five acre parcel. The Defendant attached this notice to his List of Documents.
52. The Defendant explained in his Witness Statement that despite several pieces of correspondence between the attorney for the legal personal representatives of the estate of Mr. Frank Kerry and the Defendant's attorney nothing was done to further the sale of the five acre parcel although he was ready, willing and able to complete at any time.

Analysis of Evidence including cross examination

53. The Claimant stated in cross examination that the Defendant was at first a licensee and became a trespasser in 1984 when the licence was revoked by Mr. Frank Kerry. He stated that the licence was an oral one but could not say if it was a term of the oral licence that the Defendant be permitted to build his house on the land on the condition that when Mr. Frank Kerry wanted the land the Defendant would break the house and vacate the land. He again could not say if the licence was to operate only for the duration of the Defendant's employment with Mr. Frank Kerry.
54. Contrary to the Claimant's statement that the Defendant entered the land as a licensee and later became a trespasser, it was pointed out and accepted by the Claimant during cross examination that in the High Court proceedings instituted by Mr. Frank Kerry against the Defendant, Mr. Frank Kerry deposed in his affidavit that the Defendant entered occupation of Lot No. 24 without any licence or consent of Mr. Frank Kerry. The

Claimant accepted that the affidavit was silent on the assertion of the Claimant that Mr. Frank Kerry revoked the licence when the Defendant ceased working for him.

55. The Claimant agreed with the suggestion that based on the affidavit of Mr. Frank Kerry in the proceedings of 1986 brought by him against the Defendant, it seemed that from 1980 to when the proceedings were filed, the Defendant was a trespasser.
56. The Claimant agreed that the Defendant offered the sum of \$30,000.000 for the five acre parcel and payed the deposit of \$3000.00 for which Mr. Frank Kerry issued a receipt. Although the Claimant agreed that an Agreement for Sale was drawn up he could not confirm if it was prepared by Mr. Frank Kerry's then attorney, Messrs. Malcolm Milne & Co. After having been referred to a series of correspondence between Messrs. Malcolm Milne & Co. and the Defendant's then Attorney-at-law, Messrs. De Nobreiga Iniss and Company contained in the Defendant's List of Documents, the Claimant accepted that the Agreement for Sale referred to in the receipt was the Agreement for Sale prepared by Messrs. Malcolm Milne & Co.
57. The Claimant accepted in cross examination that the land taxes owing were paid and that a notice of full satisfaction was filed in relation to the debt owing to the Development Finance Limited. Thus, the Claimant accepted that since 1993 there were no further encumbrances on the five acre parcel. The Claimant also accepted that Town and Country Planning approval depicted the boundaries for the five acre parcel since 1980.
58. The Claimant further accepted that the purchase price agreed between the Defendant and Mr. Frank Kerry was \$30,000.00.
59. Under cross examination, the Claimant stated that the Defendant was a tenant and that he became a tenant in 1980 when he went into possession. He explained there was no agreed sum for rent and that he never paid any rent. He further stated that the Defendant was a tenant with an option to purchase. He agreed that the offer to the Defendant to purchase the land in 1985 was done as a tenant.

60. During cross examination the Defendant stated that he asked Mr. Frank Kerry for a piece of land to rent upon which he could build his house and identified the lands he wanted. He explained in cross examination that Mr. Frank Kerry did not tell him the precise area of land he could occupy but told him to take the land by the ravine. After the Defendant went into occupation in late 1980, he asked Mr. Frank Kerry for something he could be comfortable with stating that he gave him permission to occupy the land. He explained that Mr. Kerry refused to give him any written confirmation but instead told him to go onto the lands and when he (Mr. Frank Kerry) was ready he would decide if he is renting the lands.
61. He stated that he never asked Mr. Frank Kerry how much he would have rented the lands for and that he never paid any rent.
62. During cross examination the Defendant repeatedly stated that he was not a tenant of Mr. Frank Kerry. He stated at one point that sometimes he would feel like a tenant, then a squatter, then Mr. Frank Kerry would tell him that he was selling the lands and then he would change his mind. He explained that when he approached Mr. Frank Kerry for the lands he had hoped that he would pay a rent so that he would be secure but it never materialised. The Defendant affirmed that Mr. Frank Kerry never treated him as a tenant. This is contrary to the Defendant's pleaded case and evidence that he entered into possession of Lot. No 24 as a tenant.
63. He was in agreement with Counsel for the Claimant that when Mr. Frank Kerry brought proceedings against him in 1986 he was regarded as a trespasser.
64. During cross examination, the Defendant stated that when he fenced the lands he occupied in 1985 it included some part of the five acre parcel.
65. As this matter relates to two parcels of land, Lot No. 24 and a five acre parcel, for clarity, these will be dealt with separately.

Lot No. 24

Defendant's Submissions

66. Written submissions on behalf of the Defendant were filed on the 15th March 2012 by the Defendant's Attorney.

67. With respect to Lot No. 24 the Defendant's submissions were stated as follows at paragraph 9:

9. The Defendant has been in continuous undisturbed possession of the first parcel in excess of the statutory period of 16 years prior to the commencement of these proceedings (October 1980 to January 2004).

The Defendant has acquired title by adverse possession whether the Defendant:-

- (i) Commenced occupation of the first parcel as trespasser in October 1980, as Frank Kerry says or*
- (ii) Commenced occupation of the first parcel as licensee whose license was revoked whereupon the Defendant became a trespasser in 1984 as the Claimant says or*
- (iii) As tenant at will, as the Defendant says (and the Claimant) admits under cross examination) in which case adverse possession by the Defendant commenced one (1) year from October 1980 (October 1981) by virtue of Section 8 of the Real Property Limitation Act Chap 56:03 No. 8.*
- (iv) It is to be noted that the Claimant was not party to the agreement between the deceased and the Defendant and has no direct knowledge of what transpired between them in relation to the Defendant's going into occupation of and constructing his dwelling house on the first parcel. The oral agreement was made*

between the Defendant and Frank Kerry, deceased, who died on the 14th November 1992.

68. The Attorney for the Defendant submitted that when the evidence of the Claimant elicited from cross examination is considered what was created between Mr. Frank Kerry and the Defendant was a tenancy at will. Attorney for the Defendant itemised the evidence of the Claimant brought out during cross examination at paragraph 7 of the submissions whereby the Claimant admitted that the Defendant was a tenant of Lot No. 24 of which he had been in exclusive rent free possession with an option to purchase.
69. Accordingly, the Defendant's Attorney put forward that the adverse possession by the Defendant commenced one year after the Defendant went into possession of Lot No. 24. He referred to section 8 of the **Real Property Limitation Act Chap. 56:03** in support of this contention. The Defendant's Attorney submitted that the adverse possession commenced in 1981 and continued until the filing of the present proceedings, in 2004. It was further submitted that there was no evidence of the tenancy at will every being determined by notice or otherwise.
70. The Defendant's Attorney thus concluded that the Claimant's claim to Lot No. 24 was statute barred and his paper title giving him the right to possession has been extinguished.

The Claimant's Submissions

71. Written submissions on behalf of the Claimant were filed on the 13th April 2012 by the Claimant's Attorney.
72. Attorney for the Claimant pointed out that the submission of the Defendant's Attorney that the Defendant was entitled to a declaration that he had been in adverse possession of Lot No. 24 were different to what was stated in his Defence and Counterclaim. Consequently the Claimant's Attorney submitted that since no relief was prayed for in

relation to adverse possession, the Defendant is not entitled to a declaration in those terms.

73. It is noted at this stage that although it was not specifically pleaded, the claim of adverse possession was stated as an issue in the Defendant's Unagreed Statement of Issues filed on the 27th May 2009.

74. In relation to Lot No. 24, Counsel for the Claimant identified the following issues:

- i. whether the Defendant is a statutory tenant of Lot 24 (“*the statutory tenancy issue*”)
- iii. whether the Claimant's paper title to Lot 24 has been extinguished by virtue of the operations of **Section 3 of the Real Property Limitation Act Chapter 53:06** having regard to the Defendant's alleged adverse possession (“*the adverse possession issue*”)

75. In addressing the issue of the statutory tenancy, the Claimant's Attorney submitted that from the evidence of the Defendant during cross examination there was no express or implied contract of tenancy between himself and Mr. Frank Kerry nor was there any assignment of a tenancy of Lot 24 to the Defendant. Counsel stated that the *viva voce* evidence disclosed that Mr. Frank Kerry never treated the Defendant as a tenant of Lot 24 nor did Mr. Frank Kerry acknowledge him to be a tenant. Counsel further opined that Mr. Frank Kerry's refusal to give the Defendant a document manifesting a tenancy reinforced the view that Mr. Frank Kerry did not intend, by allowing the Defendant into possession of Lot No. 24, to create a tenancy.

76. Attorney for the Claimant submitted therefore that as at 1st June 1981 using the definition of tenant in the **Land Tenants (Security of Tenure) Act Chapter 59:54** there was no contract of tenancy between the Defendant and Mr. Frank Kerry to give the Defendant the benefit of the protection of the Act or to treat him as a statutory tenant. Consequently,

Counsel surmised that the Defendant could only succeed in his claim that he was a statutory tenant if he could show that as at 1st June 1981, in relation to Lot 24, he was either a tenant at will or a tenant at sufferance.

77. Counsel submitted that in order to make a finding that the Defendant was, prior to 1st June 1981, a tenant at will of Mr. Frank Kerry it was necessary for the Defendant to demonstrate, on a balance of probabilities, that there was an intention between himself and Mr. Frank Kerry to create legal relations. Counsel for the Claimant reasoned that Mr. Frank Kerry's adamant refusal to execute a lease agreement is compelling evidence that Mr. Frank Kerry never intended to create a legal relationship with the Defendant. Additionally, Counsel contended that the absence of a rent removed a foundation principle of the landlord and tenant relationship such that it cannot be concluded that a tenancy was ever intended or even contemplated.

78. Counsel offered that on the evidence the decision by Mr. Frank Kerry to allow an employee to go into occupation of Lot 24 constituted an act of fidelity or loyalty or even generosity which negatives any intention to create legal relations.

79. The Claimant's Attorney concluded that the Defendant was not a tenant at will for the following reasons:-

- (1) There is no evidence of negotiations between the parties in order to settle the terms of any tenancy;
- (2) It is the Defendant's pleaded case that the option to purchase was in respect of the 5A parcel and not Lot No. 24; and
- (3) There was no intention to create any legal relations as admitted by the Defendant in his *viva voce* evidence who unequivocally stated that Frank Kerry did not treat him as a tenant and refused and/or was unwilling to give him any documents evidencing any legal entitlement to his occupation of Lot No. 24.

80. Counsel for the Claimant denied the existence of a tenancy at sufferance for the reason that for a tenancy at sufferance to exist, a condition precedent was that there existed a tenancy which was then determined.
81. Counsel therefore concluded on the issue of the Defendant being a statutory tenant that the Defendant was not a statutory tenant for the purpose of **Section 2 of the Act** and *ipso facto* did not have the benefit or the protection of the Act.
82. In relation to the adverse possession argument by Attorney for the Defendant, the Claimant's Attorney proposed that the Defendant was not entitled to any relief in adverse possession in the absence of any pleading which prays for declaratory relief that the Defendant is in adverse possession of Lots 24 and/or 25 and/or in the absence of any averment that the Claimant's paper title to Lots 24 and/or 25 had been extinguished by virtue of the operation of **Section 3 of the Real Property Limitation Act Chap 56:03**
83. It was argued that, in the event that the Court entertained the adverse possession argument, although the Defendant had proved he had factual possession the second essential element of a claim in adverse possession, that is, *animus possidendi*, had not been made out.
84. Counsel relied on the case of **Ian Roach and Marjorie Roach v Hugh Jack and Ors CV 2007-01451/CV2007-01452** where Smith J explained:

“The animus possidendi to establish adverse possession is an intention to possess property in one's own right without the consent of the owner”

85. Counsel therefore reasoned that the effect of this proposition was that consent or permission by the paper title owner to the adverse possessor's possession negated an inference that the adverse possessor possessed the requisite *animus possidendi*. Counsel for the Claimant submitted that the Defendant's possession of Lot 24 was pursuant to Mr. Frank Kerry's consent and grace and further that that the Defendant's willingness to pay

rent and *ipso facto* acknowledge Mr. Frank Kerry as his landlord was inconsistent with an intention to exercise control over Lot 24 and to exclude the world.

86. The Claimant's Attorney opined that the fact that he submitted that the Defendant is not a statutory tenant is irrelevant to the success of the Defendant's argument that he has acquired title by adverse possession since the *animus possidendi* goes to the adverse possessor's intention, and that the Defendant for all purposes regarded himself (and probably still does) as the Claimant's statutory tenant.

87. Counsel therefore concluded that the Defendant does not have the *animus possidendi* in order to sustain his claim in *adverse possession* for the following reasons:-

- (1) the Defendant commenced occupation of Lot 24 with the permission and/or consent of Frank Kerry and remained in possession at his grace;
- (2) In 1985 the Defendant acknowledged Frank Kerry as the owner by seeking his permission to fence Lot 24;
- (3) The Defendant remained ready, able and willing to pay rent to Frank Kerry which meant that he treated himself as a tenant and ipso fact regarded Frank Kerry as the owner or a person having a superior interest in Lot 24; and
- (4) The Defendant's belief that he was a tenant continued as late as 25th November 2010 when he notified the Claimant of his intention to renew the statutory lease.

The Defendant's Submissions in reply

88. The Defendant's Attorney filed written submissions in reply to the submissions of the Claimant's Attorney on the 27th April 2012.

89. It was submitted that, contrary to the Claimant's submission that no relief was prayed for in relation to adverse possession of the first parcel of land, the Defendant did raise the issue of adverse possession at paragraph 2 of his Defence and Counterclaim where it was pleaded that:

“2.No rent was paid for more than 17 years and the title to any one to the said lot has expired under the terms of the Real Property Limitation Ordinance”.

90. Further, it was contended that at paragraph 7 (1) of his Counterclaim the Defendant claimed to be the owner in possession of the lot of land on which he lived and claimed in the alternative that he was a tenant under the provisions of the Land Tenants (Security of Tenure) Act.

91. Counsel also posited that at trial the Defendant gave evidence in support of his claim that he's the owner of the first parcel by virtue of adverse possession but did not give evidence in support of the alternative relief that there was a tenancy under the Land Tenants (Security of Tenure) Act 1981. Consequently Counsel stated that the statutory tenancy issue was a non-issue.

92. Counsel submitted that whether the Defendant was found to be a tenant at will or a trespasser, the Claimant's right had been extinguished in either situation as 16 years had elapsed.

93. Counsel submitted that the arguments in relation to tenancy at sufferance were irrelevant.

94. It was contended that since the Defendant raised the issue of adverse possession (expressed in his Defence as extinguishment of the Claimant's title) he is entitled to the relief in adverse possession as Part 8.5 1 (b) of the CPR enables the Court to grant such reliefs to which the Defendant is entitled as the evidence establishes.

The Claimant's Attorney had submitted that the Defendant had established one aspect of the requirements for a claim for adverse possession. Of the two fold test, factual

possession and *animus possidendi* it was submitted by the Claimant that the Defendant for had satisfied the test of factual possession of the first parcel but not the requirement of the intention to possess. In this regard, Counsel for the Defendant submitted that the Claimant's Attorney misstated the test laid down in **JA Pye (Oxford) Ltd. & Anor. v Graham & Anor. ALL ER [2002]** as a requirement to “demonstrate an intention to occupy and use the land as one's own”. Instead, Counsel suggested that an intention to possess “in one own's right” or “in one's own name” and on one's own behalf” without the consent of the owner (as was stated in *Pye*) is an intention to trespass not “an intention to treat the land as one's own”. Counsel for the defendant further submitted that the Defendant's intention to possess in his own right or in his own name and on his own behalf is manifest by him fencing the first parcel in 1985 with sixty (60) fence posts given to him by Mr. Frank Kerry.

The five acre parcel

The Defendant's Submissions

95. The Defendant's Attorney submitted that the documentary evidence, inclusive of the receipt for the deposit for the purchase of the five acre parcel, the Agreement for Sale and a series of letters between the Attorney for Mr. Frank Kerry and the Attorney for the Defendant at the time, established that an agreement was made between Mr. Frank Kerry and the Defendant for the sale of the five acre parcel at the sum of \$30,000.00.
96. It was submitted further that the reasons proffered by the Claimant for the non-completion of the sale no longer applies. The Defendant's Attorney stated that during cross examination the Claimant admitted that all encumbrances on the five acre parcel had been removed since 1993. The Claimant had pleaded that one of the reasons for non completion was that the boundaries of the five acre parcel had not been determined, in this regard Attorney for the Defendant pointed out that the Claimant admitted in cross examination that the boundaries for the land had been determined since 1990.

97. The Claimant pleaded that the purchase price for the sale of the five acre parcel had not been agreed. However, the Defendant's Attorney submitted that the purchase price was in fact agreed, as the receipt had clearly stated that the sum of \$3000.00 was accepted as a 10% down payment on the five acre parcel. Additionally, the Defendant's attorney stated that the Agreement for Sale stated the purchase price as \$30,000.00 and that the Claimant in cross examination admitted that the purchase price was \$30,000.00.

98. The Defendant's Attorney contended further that the reasons given by the Claimant for refusing to sign the Agreement for Sale are obligations to be performed by Mr Frank Kerry and cannot be used by the Claimant as reason for him not completing the sale.

99. Attorney for the Defendant submitted that the Agreement for Sale, together with the receipt for the deposit, formed part of a sufficient note or memorandum evidencing a binding agreement between Mr. Frank Kerry and the Defendant, by which the Claimant was now bound.

100. It was argued on behalf of the Defendant that there were acts of part performance by the Defendant since he went into possession of the five acre parcel in 1989 and fenced in 1993 and has cultivated short crops and planted fruit trees thereon.

101. The Defendant's Attorney therefore concluded that:

- i. There is sufficient note or memorandum of an agreement for sale of the second parcel to the Defendant: being the said receipt dated the 4th August, 1989 and the prepared agreement directly referred therein; and/or
- ii. Irrespective of an agreement for sale the Defendant has part performed the agreement for sale; and
- iii. The Defendant is entitled to specific performance of the agreement for sale of the second parcel as according to the Claimant, "Mr. Frank Kerry was prepared in principle to sell" same to the Defendant.

The Claimant's Submissions

102. With respect to the five acre parcel Counsel for the Claimant has identified the issue as:

- i. Whether the Defendant is entitled to specific performance of the agreement between himself and Mr. Frank Kerry for the purchase by the Defendant of the 5A Parcel (“*the specific performance issue*”).

103. In this regard it was argued on behalf of the Claimant that that there was no certainty as to the terms of the agreement so that it is unenforceable; moreover there was no part performance by the Defendant as the cheque issued in the sum of \$3,000.00 being the downpayment was never accepted and encashed by the Claimant. Alternatively, the Claimant contends that the Defendant is *estopped* from seeking an order for specific performance having regard to his delay in issuing these proceedings in his counterclaim.

104. Counsel stated that, although the Defendant has relied on the receipt dated 4th August 1989 and an unexecuted Agreement for Sale to as evidencing the agreement between Mr. Frank Kerry and the Defendant for the sale of the five acre parcel, the Defendant was not entitled to rely on the unexecuted agreement as conclusive evidence of an agreement but may rely on it as *parol* evidence of the agreement for sale.

105. He further submitted that in order to have an enforceable agreement with respect to the sale of land there must be *certainty* of the essential aspects of the agreement, that being:-

- (1) the parties
- (2) purchase price
- (3) subject matter
- (4) completion date

106. Counsel submitted therefore, that there was considerable ambiguity with respect to the subject matter and the completion date.

107. It was submitted that there was uncertainty as to the boundaries of the five acre parcel and *ipso facto* the exact location of the five acre parcel so that it could not be described with sufficient particularity to be identified in relation to surrounding lands. The Claimant's Attorney further contended that the *onus* of describing the agreement for which specific performance is sought falls on the Defendant. He explained that the Court must make a finding of fact as to the precise area of the lands which is the subject of the agreement and that the Defendant did not provide any evidence that will allow the Court to make this finding.

108. Counsel stated that there was no evidence of a completion date.

109. It was submitted that Mr. Frank Kerry never intended to sell the five acre parcel, as discerned from:-

- (1) failing to execute the agreement for sale;
- (2) failing to accept the balance of the purchase price;
- (3) failing to take any steps to convey the 5A parcel, that is to say, paying taxes, obtaining town and country planning approval;
- (4) failing to execute the Deed of Conveyance;
- (5) giving direct instructions that he was not selling the 5A parcel of land;
- (6) returning the sum of \$3,000.00 by cheque No. 0134; and
- (7) refusing to accept the sum of \$3,000.00 by cheque No. 002984

110. On the issue of part performance, the Claimant's Attorney explained that on 4th August 1989 the Defendant paid Mr. Frank Kerry the sum of \$3,000.00 as a *downpayment* for the purchase of the five acre parcel. By a letter dated 17th June 1991

Mr. Frank Kerry's, Attorney at Law returned *the downpayment* to the Defendant by enclosing a new cheque No. 0134 in the sum of \$3,000.00 ("the first cheque"). This cheque was encashed by the Defendant. Subsequent to this by letter dated 27th June 1991 the Defendant caused another cheque No. 002984 in the sum of \$3,000.00 in favour of Mr. Frank Kerry to be delivered to Mr. Frank Kerry's Attorney (the second cheque").

111. Consequently it was submitted that the second cheque was a *conditional payment* as it was not encashed and at the time it was *held* (not accepted) and Mr. Frank Kerry's last instructions was that he was not selling the five acre parcel. It follows that the sum of \$3,000.00 was never received nor was it ever accepted as any payment towards the purchase of the five acre parcel. Further, the Defendant has suffered no detriment as the actual sum of \$3,000.00 has not been *transferred* from him to Mr. Frank Kerry or withdrawn from his account. In other words there was no consideration from the Defendant to Mr. Frank Kerry.

112. Counsel argued that an order for specific performance would not be made where it would cause hardship and inconvenience on a third party. Counsel submitted that before an order for specific performance can be made, the Court must be satisfied that such an order would not impose any hardship or inconvenience on the Claimant. Further, the hardship and inconvenience suffered by the Claimant ought to be examined in the context of any excessive delay and acquiescence on the part of the Defendant.

113. It was submitted that the evidence disclosed that the Defendant had no intention of seeking an order for specific performance for the following reasons:-

- (1) The Defendant was aware that the 5A parcel was going to be and was transferred to one of the beneficiaries of Frank Kerry (See Notice to Quit dated 06th July 1994) ;
- (2) The Defendant refused to provide the Attorney for the Estate of Frank Kerry with any documents evidencing the agreement for sale (See letter

dated 06th October 1994 from Attorney for the Estate of Frank Kerry to the Defendant);

- (3) The Defendant took no steps to assert his right in enforcing the agreement for sale prior to the 5A parcel being transferred to the beneficiaries; and
- (4) When the Defendant became aware that the Claimant was the new owner of the 5A parcel he did not inform the Claimant or his then Attorney at Law of the agreement for sale nor did he take any steps to issue the balance of the purchase price. The Defendant's failure to inform the Claimant must be viewed in context of the fact that the Claimant's then Attorney at Law repeatedly asked the Defendant to produce any documents evidencing that he had a legal right to occupy Lot No. 24 and the 5A parcel.

114. Attorney for the Claimant further submitted that if the Court grants an order for specific performance then the Claimant would suffer undue hardship as he has in effect lost the benefit of a five acre parcel and is therefore deprived of the income or the revenues that would have been generated from its use or sale.

115. The Claimant submitted that even if the court accepts that there was part performance the agreement for sale is not enforceable because of the unreasonable delay and or *laches* of the Defendant in instituting proceedings. In this regard the Claimant's Attorney proposed that in order to successfully rely on the doctrine of *laches* the Claimant must demonstrate that the Defendant was responsible for the delay which, according to the Claimant, he was.

The Defendant's Submissions in reply

116. Counsel for the Defendant submitted that the Claimant could not raise the issue of ambiguity of the completion date in his submissions as it was not raised in his pleadings

resulting in the Defendant not addressing it at all. With respect to the alleged ambiguity in the subject matter (“boundaries of the second parcel of land was not determined” as pleaded in 13 (a) the Amended Statement of Case) it was submitted that the agreement for sale referred to in the receipt dated the 4th August, 1989 made it, the obligation of Mr. Frank Kerry

- i) to identify the exact boundaries to be confirmed in the survey plan; and
- ii) to retain a surveyor to make the survey and prepare the plan and to have it approved by the competent authorities.

Counsel consequently submitted that the Claimant could not rely on his own failure to identify the exact boundaries as a ground for avoiding the agreement for sale.

117. Counsel for the Defendant submitted that the Claimant’s Attorney only raised the issue of third party prejudice for the first time. He contended that it was not raised by the Claimant in his Statement of Case or his Reply and consequently the Defendant had no opportunity to answer this fresh. Counsel concluded that it would prejudice the Defendant if the Claimant is allowed to now argue this point.

Analysis

Lot No. 24

118. The court has identified the following issues with respect to this parcel of land:

- (1) Whether the Defendant’s occupation was as a (i) tenant who is ultimately protected under the terms of the Land Tenants (Security of Tenure) Act, or (ii) licensee, or (iii) trespasser.
- (2) Whether the Defendant has acquired title by adverse possession as a result of any of the above occupation.

119. The first issue turns on the facts of the case. In this regard, the court found favour with the submissions of Counsel for the Claimant. There was no contract of tenancy between

the Defendant and Mr. Frank Kerry to give the Defendant the benefit of the protection of the Land Tenants (Security of Tenure) Act or to treat him as a statutory tenant.

120. Under the Land Tenants (security of Tenure Act) tenant is defined as follows:

“tenant” means any person entitled in possession to land under a contract of tenancy whether express or implied, and whether the interest of such person was acquired by original agreement or by assignment or by operation of law or otherwise; and includes a tenant at will and a tenant at sufferance and “tenancy” shall be construed accordingly.

121. Under the common law it is essential that four conditions are satisfied for a valid tenancy: (1) premises sufficiently defined, (2) exclusive possession by tenant, (3) certain duration (4) proper formalities: *Megarry’s Manual of the Law of Real Property, 8th Edition page 339*. Of utmost to a tenancy is that the parties intended to create legal relations.

122. In the present case, it could not be found that there was certainty of duration, proper formalities or that Mr. Frank Kerry had any intention to create legal relations under the common law. Additionally, there was equally no evidence of an expressed or implied tenancy created pursuant to the Act. It is clear that at least one party, the deceased, never agreed to rent the subject land. In those circumstances a tenancy cannot be implied under the Act.

123. Additionally, it could not be found that there existed a tenancy at will, there being no intention between the Defendant and Mr. Frank Kerry to create legal relations as evident by, *inter alia*, Mr. Frank Kerry’s refusal to give the Defendant any documents evidencing any legal entitlement to his occupation of Lot No. 24. This refusal was admitted by the Defendant in cross examination. The decision by Mr. Frank Kerry to allow an employee to go into occupation of Lot 24 constituted an act of fidelity or loyalty or even generosity which negates any intention to create legal relations. Further, the court finds that there

was no evidence of a tenancy at sufferance, since no tenancy had ever existed between the Defendant and Mr. Frank Kerry. Although the Defendant had testified that he was a tenant, the Defendant admitted in cross examination that he never felt like a tenant, nor was he ever treated like a tenant by Mr. Frank Kerry. In this regard, the inconsistency in the Defendant's testimony impacts on his credibility on this issue. The Defendant seems to the court to be unsure of his standing as far as his occupation of the premises were concerned. On the one hand he testified that he was a tenant and felt like a tenant but in cross examination he makes an about face. It appears to the court that this may have been a late attempt to bolster into his claim of adverse possession.

124. The court therefore finds that there having been no tenancy, the Defendant became a trespasser upon being asked to vacate by way of the High Court Action instituted by Mr. Frank Kerry on 24th June 1986. Prior to this, he was nothing more than a bare licensee who was permitted to build his house on the subject land. This licence could have been determined by the Licensor with reasonable notice. However, having regard to the Courts finding hereafter, this does not assist the Defendant.

125. With respect to the issue of adverse possession this court agrees with the submission of Counsel for the Claimant that although the Defendant had proven that he had factual possession of Lot No. 24, the second essential element of a claim in adverse possession, that is, *animus possidendi*, has not been made out.

126. For there to be adverse possession the person claiming possession should have the necessary intention, that is, an intention to possess the land to the exclusion of all other persons including the owner with the paper title so far as is reasonable and so far as the process of the law will allow: *Halsbury's Laws of England, Volume 68 (2008), 5th Edition/2. Possession of Land para. 1080 Intention to possess; JA Pye (Oxford) Ltd v Graham [2002] UKHL 30.*

127. In *JA Pye (Oxford) Ltd v Graham* (*supra*) at page 879 Lord Brown-Wilkinson stated the necessary intent as an intent to possess not to own, and an intention to exclude the paper owner only so far as is reasonably possible.

128. Consequently, after June 1986, the Defendant, as a trespasser, had physical possession but not the *animus*, on the evidence, to maintain a claim in adverse possession for the following reasons submitted by Counsel for the Claimant:-

- (1) The Defendant commenced occupation of Lot No. 24 with the permission and/or consent of Frank Kerry and remained in possession at his grace;
- (2) In 1985 the Defendant acknowledged Frank Kerry as the owner by seeking his permission to fence Lot No. 24;
- (3) The Defendant remained ready, able and willing to pay rent to Frank Kerry which meant that he treated himself as a tenant and ipso facto regarded Frank Kerry as the owner or a person having a superior interest in Lot No. 24; and
- (4) The Defendant's belief that he was a tenant continued as late as 25th November 2010 when he notified the Claimant of his intention to renew the statutory lease he purportedly had.

129. In this regard the court is also guided by the dictum of their Lordships of the Court of Appeal in the case of *Sonny Goolcharan v Desmond Balgaloo* CVA No. 92/92. The Honourable court in that case made it clear that the allegations of tenancy and a claim based on adverse possession were completely inconsistent and could not dwell together in harmony. So that the evidence of the Defendant, in the present case, that he considered himself to be a tenant, coupled with his notice of renewal of the tenancy is inconsistent with the *animus possidendi* necessary for adverse possession.

130. Counsel for the Defendant submitted that the Defendant's intention to possess in his own right or in his own name and on his own behalf was manifest by him fencing Lot No. 24 in 1985 with sixty (60) fence posts given to him by Mr. Frank Kerry. The Defendant asserted in cross examination that when he fenced in 1985, he enclosed not only Lot No. 24 but also parts of the five acre parcel. However, this court is of the view

that in this case, the fencing of the premises by itself is not sufficient to reflect the necessary *animus*. This is particularly so as it is the evidence of the Defendant that he fenced the premises with the consent of the deceased having asked him for permission.

131. The court finds that the fencing of the premises may well have been an attempt to keep out other trespassers as stated *by the Defendant* in his evidence and not an action which was designed to assert his entitlement to possess to the exclusion of the deceased. So that without the necessary *animus possidendi* the Defendant remains a trespasser.

132. With respect to the claim for mesne profits, the Claimant has not led evidence of quantum. An award of nominal damages for trespass will therefore be made.

The five acre parcel

133. The issue in relation to this parcel of land is whether the Defendant is entitled to specific performance of the agreement made between him and Mr. Frank Kerry.

134. Generally, specific performance is not ordered unless a subsisting contract enforceable at law is established: *Equitable Remedies, Spry. 7th Edition, pg 52.*

135. In this regard, section 4 of the *Conveyancing and Law of Property Act, Chap 56:01* states:

“(1) No action may be brought upon any contract for the sale or other disposition of and or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the Court”

136. A document relied upon as a written memorandum of a parol contract need not be prepared as such. Any document will suffice provided that it fulfills the requirements of the statute by recognising the existence of a contract, recording the essential terms of that contract and being signed by the party to be charged on the contract. Thus, it has been held that the statute may be satisfied by correspondence in letters, a receipt, pleadings in litigation and a codicil to a will: *Common Law Series: The Law of Contract, Fourth Edition, October 2010. The Statute of Frauds, Written contract or written memorandum para 2.275; Timmins v. Moreland Street Property Co. Ltd. [1958] Ch. 110*; see also *Long v Millar [1874-80] All ER Rep 556* (where a receipt linked to an agreement was considered sufficient memorandum in writing).

137. The receipt has been signed by Mr. Frank Kerry and consequently fulfills that aspect of the memorandum. The court must now consider whether the purported memorandum contains the essential terms.

138. The memorandum must:

- (1) Identify the parties and the capacity in which each of them contracts.
- (2) Describe the subject-matter. It may sufficiently describe it even though the description has to be supplemented by extrinsic evidence.
- (3) State the consideration provided by the purchaser.
- (4) Contain a statement of the material terms of the contract.

See Chitty on Contracts General Principles 24th Edition, paras. 233-237

139. When read together, the receipt dated 4th August 1989 signed by Mr. Frank Kerry and the prepared, unexecuted Agreement for Sale contained:

- (1) The parties - Frank Kerry, being the Vendor and the Defendant, being the Purchaser.

(2) The subject matter - Referred to in the receipt as a “5 acre of land at San Carlos Estate Guanapo” which the Agreement for Sale has more particularly described. With respect to the alleged ambiguity in the subject matter (“boundaries of the second parcel of land was not determined” as pleaded in 13 (a) the Amended Statement of Case) it was submitted that the agreement for sale referred to in the receipt dated the 4th August, 1989 made it, the obligation of Mr. Frank Kerry

- i. to identify the exact boundaries to be confirmed in the survey plan; and
- ii. to retain a surveyor to make the survey and prepare the plan and to have it approved by the competent authorities.

This court agrees with Counsel for the Defendant’s submission that consequently it would operate against the grain of fairness and equity for the Claimant to be allowed to rely on his own failure to identify the exact boundaries as a ground for avoiding the agreement for sale.

(3) Consideration - The receipt has referred to \$3000 as being 10% down payment on the parcel of land and the Agreement for Sale has referred to the purchase price as \$30,000.00. Thus the consideration has been sufficiently described.

(4) Material Terms - the Agreement for Sale has included the material terms of the contract. Contrary to the submission of the Claimant’s Attorney, the completion date is not a material term to be included in the present agreement.

140. The court agrees with the submissions of Attorney for the Defendant that there is sufficient note or memorandum of an Agreement for Sale of the five acre parcel to the Defendant. This memorandum is evidenced by the receipt dated the 4th August 1989 signed by Mr. Frank Kerry and the prepared, unexecuted Agreement for Sale referred to in the said receipt. The court must now consider whether specific performance ought to be or can be granted.

Specific performance

141. Specific Performance will not be granted where an award of damages is an adequate remedy. The law takes the view that damages cannot adequately compensate a party for breach of a contract for sale of an interest in a particular piece of land: *Chitty on Contracts General Principles 24th Edition, paras. 1634*.
142. Counsel for the Claimant has submitted that the agreement for sale was not enforceable because of the unreasonable delay and/or *laches* of the Defendant in instituting proceedings. Counsel has argued that in any event specific performance should not be granted as it would cause hardship to the Claimant as he has in effect lost the benefit of a five acre parcel and is therefore deprived of the income or the revenues that would have been generated from its use or sale.
143. Laches would entitle the court to refuse to grant an order for specific performance. To amount to laches the delay must be sufficient to be evidence of the abandonment of the contract or it must be coupled with some other factor which makes it unjust or inequitable to order specific performance: *Specific Performance, Jones & Goodhart, pg. 71*
144. However, this court finds that there was nothing in the evidence that supports abandonment of the agreement by the Defendant. Although Mr. Frank Kerry attempted to unilaterally terminate the agreement after accepting the deposit, the Defendant has always remained ready, able and willing to complete. This is also evident in the correspondence between the Defendant's then attorney and Mr. Frank Kerry's then attorney about completion of the sale.
145. Further, specific performance would not be granted where such an order would cause severe hardship. Hardship to third parties may also be cause for the court to refuse an order for specific performance.

146. In the circumstances of this case, the court is of the view that there is no proof that the Claimant will endure any hardship having lost the benefit of the five acre parcel having regard to the findings of the court in relation to the agreement for sale (supra). In effect this court has found that the Claimant ought not to have inherited this parcel of land in the first place, there having been a valid agreement for sale to the Defendant which ought to have been completed. The Claimant cannot therefore suffer hardship if he was not entitled to the land *ab initio*.

147. Further the court notes that the reasons proffered by the Claimant for non-completion are no longer applicable as accepted by the Claimant in cross examination. Specifically the reasons given were that:

- i. *The 5 A parcel was not free from encumbrances;*
- ii. *The boundaries of the said 5 A parcel had not been determined;*
- iii. *The purchase price had not been agreed since the adjoining lands including Lot No. 24 was being sold for \$10.00 per square foot (0.8361m²) which meant that the purchase price for the 5 A parcel was in the region of \$2.0 million;*
- iv. *The sum of \$98,000.00 being costs due and owing by Mr. Frank Kerry to Trinidad and Tobago Development Finance Company Limited in H.C.A. 3436 of 1985; as a result the judgment creditor had filed a lis pendens attached to all lands owned by Mr. Frank Kerry which meant that the 5 A parcel could not have been transferred until this payment had been made and the debt discharged.*

148. In this regard the court finds that:

- i. The five acre parcel was free from **all** encumbrances since 1993.
- ii. The boundaries of the five acre parcel had been determined since 1990 as evidenced by the survey plan dated 23rd April 1990 attached to the notice of

permission to develop land from Town and Country Planning Division dated 11th May 1990.

- iii. The purchase price had been agreed at \$30,000. This is evident in the receipt and the Agreement for sale and was also accepted by the Claimant in cross examination.

149. Additionally, quite apart from the issue of a sufficient memorandum, where a party has partly performed an oral contract in the expectation that the other party would perform the rest of the contract, the court will not allow the other party to escape from his contract upon the strength of the statute, but may order specific performance of the contract. The acts of part performance must have been done by the person seeking to enforce the contract and it must point to the existence of a contract: *Chitty on Contracts General Principles 24th Edition, paras. 251-254.*

150. In this regard, it is the finding of the court that pursuant to a concluded agreement \$3,000.00 was sent to Mr. Frank Kerry, which was accepted and encashed. Notwithstanding the attempt to return the said sum this, coupled with the permission granted to the Defendant by the Deceased to fence and occupy the five acre parcel is evidence of part performance.

151. Consequently, there being an enforceable contract, coupled with sufficient part performance, this court is of the view that equitable relief by way of specific performance ought to be granted.

Disposition

The Order of the Court is therefore as follows:

1. It is hereby declared that the Claimant is the registered legal owner and entitled to possession of Lot No. 24 forming part of the first parcel of lands comprising 3.2981 hectares and more particularly described in the third part of the Fourth Schedule to the

Deed of Assent made on the 17th of February 1997 and registered as No. **10929 of 1997**, (hereinafter referred to as “Lot No. 24”).

2. The Defendant is to deliver up possession of Lot No. 24 to the Claimant.
3. The Defendant is to pay to the Claimant nominal damages in the sum of \$5,000.00 for trespass.
4. The Defendant’s counterclaim in respect of Lot No. 24 is dismissed.
5. The Claimant shall convey to the Defendant the five acre parcel of land occupied by the Defendant, adjoining Lot No. 24 but forming part of that parcel of land situate at San Carlos Estate in the Ward of Arima comprising 1.5426 hectares and bounded on the North by Manuel Congo Ravine on the South by Sasa Trace on the East by lands formerly of Frank Kerry and on the West by Manuel Congo Road and intersected by the Manuel Congo Ravine from North to South and is more particularly described in the Deed of Conveyance made on 30th August 2001 and registered as No. **DE200102131202** in the Protocol of Deeds (hereinafter referred to as “the five acre parcel”) upon payment by the Defendant of the balance of the purchase price in the sum of \$27,000.00.
6. The Claimant’s claim in respect of the five acre parcel is dismissed.
7. The Defendant is to pay to the Claimant half the costs of the claim to be assessed by the Registrar in default of agreement and the Claimant is to pay to the Defendant half the costs of the Counterclaim to be assessed by the Registrar in default of agreement.

Dated this 1st day of June, 2012.

Ricky Rahim

Judge