

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007 HCV 0152

BETWEEN HADEED HOLDINGS LIMITED CLAIMANT
AND ANDERSON'S HAULAGE SERVICES LTD. DEFENDANT

Mr. David Batts instructed by Livingston Alexander & Levy for the Claimant

Miss Gillian Mullings instructed by Mullings & Company for the Defendant

Heard: November 2, 4, December 17, 2010 and February 4, 2011

Land - Whether defendant is a trespasser or tenant-at-will – Whether the defendant was allowed to occupy land pending sale of property - Whether claimant is entitled to damages for trespass by way of mesne profits - Whether defendant is a purchaser who is entitled to specific performance

Sinclair-Haynes J

1. The claimant, Hadeed Holdings Limited claims from the defendant, Anderson's Haulage Services Limited, the sum of US\$62,314.82 which translates to J\$4,191,917.90 inclusive of GCT, at the rate of 16.5%. This claim is for the use and occupation of 16,256 square feet of land registered at Volume 1332 Folio 310 of the Register Book of Titles for the period September 2001 to June 2005 (46 months) and alternatively for damages for trespass.

2. The defendant resists vigorously this claim and has counter-claimed against the claimant that it is entitled to the said portion of land.

Background

3. The defendant purchased land at Ashenheim Road in 1977 from the claimant through its managing director, Mr. Ray Hadeed who died in 2006. At the time of purchase, there was uncertainty as to the delineation of the portion of land the defendant was purchasing. Mr. Hadeed allowed the defendant to park vehicles on the portion of land in issue.

Defendant's Case

4. The defendant's claim is that in 1997, the defendant's managing director, Mr. Arthur Anderson negotiated with Mr. Ray Hadeed to purchase one acre of land at 19 Ashenheim Road. Mr. Ray Hadeed represented on behalf of the claimant that they were able to sell one acre of land. The land which was shown to Mr. Arthur Anderson by Mr. Ray Hadeed was comprised of three parcels namely:

- a. all land comprised in Certificate of Title registered at Volume 1332 Folio 309 of the Register Book of Title;
- b. an unregistered parcel of land adjacent to land described at one (1) above;
- c. a portion of land registered in the Certificate of Title at Volume 1332 Folio 310.

5. The sums of \$2 million and \$2.5 million were paid to Mr. Ray Hadeed on the 19th March 1997 and on the 4th June 1997 respectively. Those sums represented the purchase price for the land registered in the Certificate of Title at Volume 1332 Folio 310. The sum of \$3,850,000.00 was paid to Messrs Donald Bernard & Company who were the attorneys-at-law with carriage of sale and who acted for both vendor and purchaser. This

sum represented the full purchase price for lots registered at (1) and (2) above. The defendant was allowed to take immediate possession upon the payment of the full purchase price.

6. In 2001, Messrs Donald Bernard & Company registered the transfer to the defendant of title to the property registered at Volume 1332 Folio 309 and the unregistered portion.

7. However, the claimant has failed to transfer to the defendant the portion of land registered at Certificate of Title Volume 1332 Folio 310, although the defendant remained in possession of it from 1997 – 2005 and exercised rights in and over the said land without interference.

8. The defendant denies having trespassed on the claimant's property and denies that there was any agreement to pay for the use and occupation of the premises. The defendant now seeks by way of counterclaim:

- a. a declaration that it is entitled to the portion of property registered at Volume 1332 Folio 310;
- b. an Order that the said land be transferred to it.

Careful scrutiny of the evidence is critical.

Mr. Russell Hadeed's Evidence

9. Mr. Russell Hadeed testified on behalf of the claimant. In his evidence-in-chief, he denied that the land was represented to the defendant as an acre. He asserted that during the negotiations, the land was surveyed and it was discovered that it was less than one acre. The negotiations continued and ended with the full knowledge of the true size of the land. The defendant was let into possession of the following portions of land:

- a. all the land registered at Volume 1332 Folio 309;

- b. an unregistered parcel of land adjacent to the land registered at Volume 1332 Folio 309.

10. According to him the land registered at Volume 1332 Folio 310 never formed part of the sale agreement between the claimant and the defendant. According to him, the initial sale price which was discussed by the parties as consideration for the land now registered at Volume 1330 Folio 309 was \$9 million. However, upon survey by the defendant, it was discovered that the claimant's buildings encroached on the property registered at Volume 1332 Folio 310. Consequently, the agreed sale price of \$9 million was reduced to \$8,350,000.00. The adjustment reflected the reduced size.

11. The sum of \$4,500,000.00 was paid in two tranches by the defendant - \$2 million and \$2.5 million. The balance of \$385,000.00 has not been paid. He alleges that entry of the sum of \$385,000.00 which was endorsed on the duplicate certificate of the registered title was fraudulently and/or negligently made by the defendant or his attorney. It is his evidence that the defendant was never let into possession of the portion of land registered at Volume 1332 Folio 310. The defendant trespassed upon that portion of land.

12. It is Mr. Russell Hadeed's evidence that upon discovering the trespass to the land situated at Volume 1332 Folio 310, the defendant's agent acknowledged the claimant's title to the land by the following actions:

- a. entering into negotiations with the defendant for the continued use and occupation of the land;
- b. relying on letters dated June 8, 2005 and June 15, 2005. By these letters, he asserts that the defendants acknowledged that the claimant was the legal and beneficial owner and is entitled to possession of the land;
- c. constructing a wall between the claimant's property and its property.

Evidence of Mr. Arthur Anderson

13. Mr. Anderson's evidence is that the defendant did not trespass on the said parcel of land registered at Volume 1332 Folio 310. According to him, the defendant has been defrauded of land it paid for and is claiming that the disputed land be transferred to it.

14. It is his evidence that he negotiated with Mr. Ray Hadeed to purchase one acre of land at Ashenheim Road. He made it clear that the defendant required a minimum of one acre of land for its operation. He was assured by Mr. Ray Hadeed that the area of land measured 44,203.65 square feet, which was over one acre. He was shown a survey diagram which he was told was the size of the land being offered. The survey showed that the land measured 44,203.65 square feet. In reliance on the representation, he paid the sum of \$2 million on the 19th March 1997. Subsequent to the payment of \$2 million, the defendant entered into a Sale Agreement with the claimant in respect of the said land on or about the 4th June 1997.

15. He later contracted a chartered surveyor who surveyed the property at Ashenheim Road and discovered that the property measured less than one acre. Upon receipt of that information, he demanded a refund of the money he paid. However, Mr. Ray Hadeed told him, "Junior ... all the properties are mine, you can park your equipment right behind Serv-Wel Electric Limited." Counsel for the claimant cross-examined Mr. Anderson extensively on this issue and did not at any time during the hearing object to this evidence being admitted. However, in his closing submissions, he took issue with the statement as being hearsay.

16. Upon payment of the full purchase price, he was put in possession of a strip of land of approximately one acre in order to fulfil Mr. Hadeed's obligations to the defendant. The defendant took possession of the following three parcels of land:

- a. land which was formerly comprised in Certificate of Title registered at Volume 1293 Folio 567;
- b. land registered at Volume 1290 Folio 976 which in 1977 belonged to Serv-Wel Electric Limited;
- c. an unregistered parcel of land adjacent to land registered Volume 1293 Folio 567 (now Volume 1321 Folio 350).

17. The purchase price was paid in full, part to Mr. Ray Hadeed and part to Mr. D. Bernard of Donald Bernard & Company. The defendant took occupation of the land by moving its trucking equipment onto the land and improving and maintaining the said land. Indeed it (the defendant) incurred costs of \$870,000.00 levelling the land to facilitate the parking of its equipment. It also added proper lighting to the entire property. The defendant remained in possession of the entire property from 1997 to 2004 without interference.

18. Sometime between 1997 and 2001, Mr. Ray Hadeed changed the land holding of the properties as follows:

- a. property formerly registered at Volume 1293 Folio 567 of the Registered Book of Titles and which was sold to the defendant was sub-divided on 5th March 2004 and a portion of that land is now comprised in Certificate of Title registered in Volume 1332 Folio 310 registered in the name of Hadeed Holdings Limited;
- b. another portion of the land registered at Volume 1293 Folio 567 is now registered at Volume 1332 Folio 309 of Registrar Book of Titles. This parcel was eventually transferred to the defendant;
- c. land which was formerly registered at Volume 1290 Folio 976 and was previously owned by Serv-Wel Electric Limited was registered as part of

land registered at Volume 1332 Folio 310 in the name of Hadeed Holdings Limited;

d. the unregistered portion was eventually registered.

19. At the time, the parcel of land which was registered at Volume 1332 Folio 310 was transferred to the claimant; the defendant had been in possession of it, had maintained and significantly improved it and was exercising rights of ownership over the said land.

20. The defendant did not receive a Certificate of Title for the portion of land registered at Volume 1332 Folio 310 which it occupied.

21. By the year 2001, the relationship between Mr. Hadeed and Mr. Bernard ruptured. Indeed the relationship among all the parties fractured. The defendant instituted proceedings against the claimant for specific performance of sale in respect of land registered at Volume 1332 Folio 309. In 2001, the defendant obtained the registered title for the said parcel that it sued for.

22. In 2001 a small portion of land registered at Volume 1290 Folio 976 (now registered at Volume 1332 Folio 310) of the Register Book of Titles became an issue of contention. Mr. Raggie Wynter, the defendant's former general manager negotiated with Mr. Russell Hadeed of Hadeed Holdings Limited regarding the portion of land registered at Volume 1332 Folio 310 which the defendant occupied. The negotiations were commenced in order to resolve the dispute which had arisen regarding the said piece of land. They were conducted on a "without prejudice" basis.

23. Under cross-examination, Mr. Anderson accepted that having obtained the surveyor's diagrams, he was aware before he signed the agreement that the property

measured less than one acre. Further, he accepted that because the boundary was not exactly delineated, the agreement was worded in the manner it was.

24. It was his evidence that upon realizing that the property measured less than one acre and upon demanding a refund of the sums of money the defendant had paid, Mr. Ray Hadeed permitted him to park his equipment behind Serv-Wel Electric Limited on land registered at Volume 1332 Folio 310 which the claimant occupied.

Mr. Ray Hadeed was managing director of several companies including Serv-Wel of Jamaica Limited and Hadeed Holdings Limited and was able to make decisions as to the use of the properties belonging to the companies.

Submission by Mr. David Batts on behalf of the Claimant

25. Mr. Batts submits that the defendant's chairman and managing director's oral evidence negated almost every aspect of his witness statement and of the company's pleadings. Mr. Arthur Anderson stated as follows:

- a. that he was aware prior to signing the agreement to purchase land at Ashenheim Road from the claimant, that the said land was less than one acre;
- b. that the survey which established this fact was done prior to the entry into the agreement of June 1997;
- c. that the parcel of land the defendant purchased was contained in lots (1) and (2) of the plan. Lots (3), (4) and (5) on the plan remained the property of the claimant;
- d. that a part of lot (4) was to the rear of the claimant's premises and the building thereon and it was very convenient for the defendant to park its vehicles thereon;
- e. that any permission granted by the claimant's agent for the defendant to park vehicles on lot (4) was an act of friendship and that such permission could be revoked at any time;

- f. that there was a dispute between the claimant and the defendant concerning the payment of the balance purchase price because although the defendant gave its lawyer (Donald Bernard & Co.) the money, the claimant alleged that Donald Bernard & Co. had not paid that money over to the claimant;
- g. that the defendant removed its vehicles and equipment from Lot 4 prior to January 2007;
- h. in January 2007 the defendant erected a wall separating its piece of land from Lot 4 of the premises which belonged to the claimant.

26. He further submits that the oral evidence of Mr. Arthur Anderson varies so greatly from that contained in his witness statement (or the facts pleaded in the defendant's defence and counterclaim) that this court ought to reject Mr. Anderson as a witness of truth and any conflict between Mr. Anderson's evidence and the evidence of Mr. Russell Hadeed should be resolved in favour of the latter.

27. He submits that the claimant's case is supported by the documentary evidence

- a. Sale Agreement dated 4th June 1977 [**p.13 of Agreed Bundle**].
- b. Newsome McCook & Associates survey report addressed to Mr. Arthur Anderson and dated 8th April 1977 [**p. 12 of Agreed Bundle**].
- c. Certificate of Title for lots (1) and (2) registered in the defendant's name and registered at Volume 1332 Folio 309 [**p. 1 of Agreed Bundle**] and Certificate of Title for lots (3), (4) and (5) registered in the claimant's name and registered at Volume 1332 Folio 310 [**p. 5 of Agreed Bundle**].
- d. Letter dated 16th June 1997 from Donald Bernard & Co., confirming that the civic address for the property purchased was known as 19 Ashenheim Road, Kingston 11 [**p. 18 of Agreed Bundle**].
- e. Letter dated 16th August 2000 - Donald Bernard & Co. to Arthur Anderson [**p. 34 of Agreed Bundle**], letter dated 27th April 2001 - Donald Bernard & Co. [**p. 56 of Agreed Bundle**] and the statement enclosed with that letter dated 10th April 2001 the caption to which confirms the land purchased is Sections (1) and (2) of plan of 19 Ashenheim Road [**p. 55 of Agreed Bundle**], and letter dated 15th March 2005 - Newsome McCook & Associates to Mr. Arthur Anderson which confirms the defendant's parcel is sections (1) and (2). That letter, he submits, although captioned "Re 19

Ashenheim Road” points out that the correct civic address really is 13 Ashenheim Road [**p. 63 of Agreed Bundle**].

- f. Letter dated 3rd April 1998 - Ray Hadeed to Donald Bernard & Co. [**p. 21 Agreed Bundle**], letter dated 21st April 1998 - Ray Hadeed to Arthur Anderson [**p. 22 Agreed Bundle**]. Letter dated 22nd April 1998 [**p. 23 Agreed Bundle**] and letter dated 2nd June 1998 [**p. 24 Agreed Bundle**]. This latter letter, he submits, clearly evidenced an intention that the defendant remove unless payment was made for the balance. It is common ground that no further payment was made by the defendant who maintains that their attorney-at-laws Donald Bernard & Co., were placed in funds.
- g. The letters dated 26th January 2005 and 15th February 2005, [**Exhibits 3(a) and (b)**] also evidence the demand for possession by the claimant.
- h. Letters dated 15th June 2005 and 8th June 2005 evidence an offer of rental [and an offer to purchase] from the defendant to the claimant.

28. He further submits that the oral evidence of Mr. Arthur Anderson as well as the documentary evidence before the court serve to discredit the Defence and Counterclaim whereas the evidence from the claimant’s witness is clear and supported by documentation.

29. He submits that notwithstanding the fact that Mr. Ray Hadeed is deceased, on a balance of probabilities, the court is entitled to find that the defendant occupied lot (4), which was the claimant’s land, without the knowledge or consent of the claimant. Mr. Arthur Anderson’s admission that lot (4) is to the rear behind a solid wall and not easily visible from the front part of the claimant’s property is important, in the circumstances. He submits that the convenience of parking on the said premises is also relevant, and supports the evidence of Mr. Russell Hadeed that the defendant occupied that portion without the knowledge or consent of the claimant. This, he submits, explains the statement in the claimant’s letters, [**Exhibits 3(a) and (b)**] that it had recently been

discovered that the defendant was using the said land for parking. He submits that the claimant, in the circumstances, is entitled to damages for this trespass.

30. He further submits that when regard is had to the court's ruling that what was told to Mr. Russell Hadeed by his deceased father is inadmissible, the defendant may argue that Mr. Arthur Anderson's evidence as to what Mr. Ray Hadeed told him stands alone and should not be accepted. He submits that Mr. Arthur Anderson's oral evidence is inconsistent with his written statement in almost every other material respect and that this court should have little difficulty rejecting it in its entirety. If rejected, there is no evidence as to the alleged permission or the extent of permission or as to what land it related. It may well have been possession "pending completion of sale" of the land being sold.

31. Further, he submits in the alternative and even if Mr. Arthur Anderson's evidence is accepted that his initial entry into possession of lot (4) was with the claimant's permission, there is no doubt that that permission was subsequently terminated. The letters complaining about non-payment and the request to remove if payment was not made support the averment that permission was terminated. Although Mr. Ray Hadeed has died, it is clear from **Exhibits 3(a) and (b)** that any alleged permission to occupy had been terminated long before those letters were written. He submits that the letters are inconsistent with any permission having been given. According to Mr. Batts, the only way to reconcile **Exhibits 3(a) and (b)** with a finding of initial permission is that that permission was earlier revoked and that Mr. Ray Hadeed was unaware that the use had continued. He submits that Mr. Ray Hadeed might have been unaware because lot (4) is

to the back of the wall which bisects the property and, as Mr. Anderson admitted, is not easily seen from the part of lot (4) which is to the Ashenheim Road end.

32. He submits that on either of these two (2) alternative views of the facts, the claimant will still be entitled to compensation by way of damages or mesne profits for the defendant's use and occupation.

33. The period without the permission therefore ought to be from the date of the letters complaining about payment to the date the defendant constructed the wall or some time before. The claimant's evidence is that the defendant removed in June 2005 two (2) years before the wall was constructed.

34. Further, he submits, that the damages claimed represent a reasonable rent; he relies on **Inverugie Investments Ltd. v Hackett** [1995] 3 All ER 841. The court should award US\$1 per square foot per annum. Further, he submits, the evidence of Mr. Russell Hadeed that that parcel of land attracts such a rental is unchallenged.

Submission by Ms. G. Mullings on behalf of the Defendant

Legal Issues

35. Ms. Mullings submits that the claimant has not proven on a balance of probabilities that there has been a trespass. She relies on **Halsbury's Laws of England** Vol. 45 (4th Ed.) para 1384.

36. She submits that the uncontradicted evidence of Mr. Arthur Anderson is that he was put in possession of the land in question by Ray Hadeed in 1997. The defendant was let into possession after paying the purchase price for what he believed to have been an acre of land. His evidence that Mr Ray Hadeed represented to him that the defendant was

buying an acre of land is uncontradicted. In those circumstances, she argues, the defendant cannot be regarded as a trespasser.

37. It is her submission that the defendant occupied the land as a tenant-at-will. In support of this proposition, she relies on paragraph 169 of **Halsbury's Laws of England**, 4th Ed. Reissue, Vol. 27 (1).

38. The said definition, she submits, accords with the claimant's occupation and is reiterated in two cases: the English case of **Hearn and Another v Tomlin** (1793), English Reports Vol CLXX "where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance at a considerate expense enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term) be charged in an action for use and occupation." Similarly in the West Indian case of **Dean v Mahabir** (1970) 17 W.I.R. 21, where it was held that when a person is let into exclusive possession of premises, *prima facie* he becomes a tenant unless the circumstances manifest a different intention.

39. It is her submission that the clear and unequivocal conclusion is that the defendant came into possession not as a trespasser but as a tenant-at-will pursuant to Mr. Ray Hadeed's invitation. She submits that pursuant to the case of **Hearn and Another v Tomlin** (supra) a defendant is not under an obligation to pay for the use and occupation of premises.

40. According to her, the issue is whether the tenancy-at-will came to an end and an obligation to pay for the use and occupation of the premises came into being and she

submits that on the facts, there is a tenancy. It is therefore for Hadeed Holdings Ltd., to prove that this tenancy was properly terminated.

41. She submits that the evidence of Mr. Russell Hadeed is that he is unaware of a notice to quit being given to the defendant. He stated that there were two letters signed by Mr. Ray Hadeed on the matter. The first of these letters was dated January 27, 2005, which stated:

*"The writer has repeatedly spoken to you on numerous occasions that you have been **occupying** our premises located at 13 Ashenheim Road, Kingston 11."*

42. She submits that this line does not use the word 'trespassing' but "occupying." The letter speaks to an acknowledged course of dealings over time.

It continues:

"We intend to expand our existing building southward therefore we require you to remove your equipment."

43. This particular sentence, she submits, is not a request for possession but instead a notification that construction work is slated to begin. It is not clear from this what the defendant is to do. Should he:

- a. remove his equipment alone; or
- b. remove his equipment and his operations; or
- c. conduct himself in a way to facilitate the expansion.

44. It is unclear on the face of this letter that this request was intended to terminate the tenancy-at-will.

45. The letter also points out that:

"This is to advise you that should you fail to positively respond to the contents of this letter

within fourteen (14) days of the date hereof, we will have no alternative but to instruct our attorneys to take the necessary steps to recover possession of the premises from you and to pursue the compensation being claimed."

46. The letter speaks of taking steps to recover possession of the premises in the future and not in the present tense. The inference is that possession is not required and will only be required if there is no "positive" response.

47. She submits that the letter did not determine the tenancy-at-will created by Mr. Ray Hadeed on behalf of the claimant.

48. Further, she submits that the uncontradicted evidence of Mr. Raggie Wynter is that Mr. Ray Hadeed told another court that out of generosity he allowed the defendant to utilize the adjacent parcels of land free of charge. In making the said statement, she submits that he contradicted himself.

49. She submits that it is interesting that on February 15, 2005, some twelve days after the aforesaid court hearing, the said Ray Hadeed, made another claim on behalf of Serv-Wel Electric Ltd., again demanding rental. She finds it curious that both the February 15 2005 letter and January 27, 2005 letter speak of property at 13 Ashenheim Road. It has been established by the Surveyor's Report at page 63 of the Bundle that the correct address of the premises occupied by the defendant is in fact 13 Ashenheim Road. Both of these letters are confusing and unclear in the description of the subject properties. The civic address on the letters is incorrect. The court cannot therefore place any reliance on these letters as constituting an unequivocal and binding determination of the tenancy-at-will.

50. It is her submission that a simple and clear method of terminating the tenancy-at-will would have been a notice to quit in the terms stipulated by the Rent Restriction Act. In the absence of such a notice the claimant is not entitled to mesne profits, see **Crampad International Marketing Co Ltd and Another v Val Benjamin Thomas** (1989) 1 W.L.R. 242; 252 (P.C.). In that case a judgment for mesne profits could not stand as an order for possession ought not to have been made. The reasoning of that court was that a tenant is not liable for mesne profits if they are properly in possession under the terms of the agreement under which they took possession of the property.

51. Regarding the letters forwarded dated June 5, 2005, signed by Mr. Raggie Wynter, she submits that the letters point to the willingness of the defendant to settle the matter. The offer of settlement was accepted. It is her submission that the claimant can take the matter no further as the letters do not disclose an admission of liability for rent but instead are offers to settle. Similarly, the letter in respect of the boundary wall addressed to "Hadeed Holdings Ltd., at 8 Ashenheim Road in 2007" is evidence that the defendant came to accept the termination of the tenancy-at-will and their paramount concern was security. She submits that the letter shows that the defendant removed. There is therefore no proof of the determination of the tenancy-at-will.

52. Also, she submits, the evidence was that the settlement offer was in June 2005 and the removal in June 2005. A claim for mesne profits does not arise on that evidence as there was no wrongful occupation. She relies on the learned authors of **Woodfall on Landlord and Tenant Service Information and Release Bulletin** 975-6 and the Rent Restriction Act, Section 10A (1) which states:

"Subject to the provisions of this Act or any regulations hereunder, an Assessment Officer shall

have power to determine the standard rent of controlled premises and to perform such other functions as may be prescribed."

53. She submits that in accordance with the law there are two methods by which mesne profits can be determined. They are:

- a. having the premises assessed by a Rent Assessment Officer; or
- b. giving evidence of the market value of the premises by exhibiting leases/rental agreements entered into with respect to same.

54. The claimant, she submits in this case has provided neither an evaluation for the amount he is demanding nor an assessment by the Rent Assessment Officer. There is no evidence that he has any special expertise in assessing rental value. Since he has failed to prove that the sum he is seeking is the sum that would be paid as rental for the premises by the market, he has not proved sufficient evidence to ground an award for mesne profits.

Assessment of the Claimant's Evidence

55. Cross-examination revealed that Mr. Russell Hadeed, the claimant's sole witness was not a party to the negotiations and was unable to support some of his assertions. His information allegedly emanated from Mr. Ray Hadeed who is now deceased and Mr Arthur Anderson who disputes his version of the facts.

56. Under cross-examination, he admitted that he was not present when any of the properties were shown to the defendant. Indeed between 1997 and 2001, he had no involvement with Serv-Wel Limited. He was never present during the negotiations and had no personal involvement with or knowledge of the transaction. It was his evidence that he could not speak to the agreement because he was not a party to the transaction.

57. He was unable to explain the presence of special conditions in the Agreement of Sale. He admitted that he was unsure as to what exactly it was that the claimant, through Mr. Ray Hadeed, had contracted to sell the defendant under the agreement. Further, he could not say whether what was being sold to the defendant was agreed by an oral discussion with Mr. Ray Hadeed. To quote him, he said: "It seems to me there was a doubt as to the size of the property and that was why the clause was included." Regarding the adjustment of the price, he admitted that that information was not of his personal knowledge.

Is the Claimant entitled to Mesne Profits?

Re Trespass

58. The learned authors of **Halsbury's Laws of England** Fourth edition Volume 45 paragraph 1384 state:

"A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

59. Mr. Russell Hadeed was unable, on a balance of probabilities, to prove that the defendant's entry upon the portion of land was unlawful. He failed to substantiate his claim that the defendant was never let into possession of land registered at Volume 1332 Folio 310. It is his evidence that his knowledge of the trespass is based on:

- a. the diagrams that indicate which property belonged to Mr. Anderson;

- b. the fact that he saw Mr. Anderson's equipment on the property. (He, however, admitted that he had no personal knowledge of how they came to be there. He was unable to say whether Mr. Anderson was put in possession by Hadeed's Holdings).

60. Under cross-examination, he testified that Mr. Anderson told him that Mr. Ray Hadeed allowed the defendant to use the property and he told him he never trespassed on the property. He was unable to say whether the defendant was put in possession of the disputed lot by Hadeed's Holdings, after it was discovered by Mr. Anderson that the property did not measure an acre and he (Mr. Anderson) spoke to Mr. Ray Hadeed. He was also unable to say whether the defendant was put into possession by Hadeed Holdings whilst Mr. Ray Hadeed was in charge.

61. Indeed, he stated that he had no personal knowledge of how the defendant came to occupy that portion of land. He saw no document which indicated that the defendant was regarded as a trespasser nor has he seen any document which requested its removal. It was also his evidence that upon the discovery of the trespass the defendant and claimant entered into negotiations. The defendant was allowed to remain in possession during the negotiations. The negotiations broke down and the defendant vacated the premises in or about June 2005. There is no evidence that the defendant tarried on the property beyond the time it was allowed to remain. The evidence is that the defendant removed. No date was given as to when the negotiations ended and when the defendant removed. The uncertainty or, rather, lack of evidence in this regard certainly prevents a finding that the defendant remained in possession beyond the period they were allowed to remain pending the negotiations. I therefore find that at all material times the defendant's occupation of the said lot was with the permission of the claimant.

62. I cannot accept Mr. Batts' submission that the defendant may have entered possession 'pending completion of sale' of land being sold. It is trite law that 'he who asserts must prove'. There is not an iota of evidence which supports that submission. Mr Batts is therefore advocating that I enter into the forbidden realm of speculation. In any event that was never pleaded.

Re Claim for use and occupation

63. **Woodfall Landlord and Tenant Service Information and Release Bulletin** at paragraph 1-2158 states:

"If the plaintiff seeks to recover mesne profits, he must prove-(1) His right to recover possession of the whole or part of the premises mentioned in the writ. No mesne profits are recoverable in an action for the recovery of land, except as between landlord and tenant..."

64. There is not a scintilla of evidence from Mr. Russell Hadeed or anyone that the defendant's occupation of the land was based on any rental arrangement. It was his evidence that he was unable to say whether the defendant was parking its truck free of charge from 1997 – 2001.

Was the Defendant a Tenant-at-Will?

65. A tenant-at-will is defined by the learned authors of **Halsbury's Laws of England** Fourth edition Volume 27 as follows:

"A tenancy-at-will is implied where a person is in possession by the owner's consent, and his possession is not as employee or agent or as licensee holding under an irrevocable licence and is not held in virtue of any freehold estate or of any tenancy for a certain term. It is implied accordingly in cases of mere permissive occupation without payment of rent."

66. It seems to me, in the absence of any cogent and reliable evidence from the claimant to the contrary, that the defendant was a tenant-at-will.

67. It is the finding of the court on a balance of probabilities that the defendant was allowed to enter the portion of land after the discovery was made that the land measured less than was originally thought and as a result Mr Ray Hadeed allowed him to utilize the area.

Is the Defendant entitled to the disputed portion of land?

Assessment of the Defendant's Evidence

68. It is Mr. Anderson's evidence that there were no negotiations between the defendant and the claimant for the purchase of lot number four, nor was there any offer to pay rent for its use because the defendant was claiming the land as part of the land it had purchased. When confronted with the letters written on behalf of the defendant, he stated that he did not sign them and that Mr. Raggie Wynter who signed them did not have the full understanding because he was not present when the property was bought. However, upon perusing the letters, he was constrained to admit that the author of that letter offered to pay rent for that parcel of land and offered to purchase the land.

69. It is the evidence of Mr. Raggie Wynter that the defendant was attempting to resolve, "All matters by purchasing the whole of the adjoining properties in order to bring closure to all matters between the parties." According to him, only he, Mr. Raggie Wynter, was involved in the negotiation on behalf of the defendant. Mr. Anderson was not involved. It is my finding that it is improbable that the general manager would embark on such negotiations without the knowledge of Mr. Anderson, the managing director.

70. Significantly, the defendant sued the claimant for specific performance of the Agreement for Sale in respect of Volume 1332 Folio 309 and did not seek specific performance of the Agreement for Sale in respect of the disputed portion of land. On a balance of probabilities, I find that the disputed parcel of land did not form part of the Agreement for Sale. I find also that Mr. Anderson was well aware that the disputed portion did not form part of the agreement because the Agreement for Sale was signed subsequent to him obtaining the Surveyor's Report which clearly showed that the land measured less than one acre.

71. Mr. Anderson acknowledged that the defendant was only "allowed to park" on the said land by Mr. Ray Hadeed. It was also his evidence that whilst testifying in another court before Anderson J, Mr. Ray Hadeed admitted that he had allowed the defendant to park in the disputed area. Again this evidence was not objected to and accordingly was admitted. (See **Capital Insurance Limited v Rajendranath Seeray** (1986) 35 WIR 372).

72. Further, he agreed that he removed the defendant's equipment when the negotiations broke down. He also constructed a wall between his premises and lot 4. The foregoing actions were clear demonstrations that he knew he was not entitled to that parcel of land.

73. It is therefore evident that he acknowledged that the defendant was not entitled to that portion of land but that it was owned by Mr. R. Hadeed, Serv-Wel or Hadeed Holdings Limited.

74. This view is further strengthened by his evidence that although it was convenient to park there, he would not do what was illegal. Further, his retort to the question posed

in cross-examination, whether Mr. Hadeed could revoke his permission at anytime, was in the affirmative but that he never expected it. This also supports the conclusion that he knew that the portion of land in dispute was never included in the agreement.

75. Accordingly, the:

1. claimant's claim is dismissed;
2. defendant's counterclaim is dismissed;
3. each party to bear its own costs.

PC

KG