[2019] JMSC Civ 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 03855

BETWEEN	**WINSTON PINNOCK**	**CLAIMANT**
AND	**DONNAVAN SMITH**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 002562

BETWEEN	**WINSTON PINNOCK**	**CLAIMANT**
AND	**SHAWN MARIE SMITH**	**DEFENDANT**

Leroy K. Equiano, for the claimant

Marjorie E. Shaw and Deneve Barnett instructed by Brown and Shaw for the defendants

HEARD: September 17, 19, 20, 21, 2018 and January 11, 2019.

Property Law – Claim for declaration of possessory title – Factual possession and intention to possess – Effect of registration – Limitation of Actions Act – Registration of Tiles Act

DUNBAR GREEN, J

Factual Background

[1] The disputed land is a largely underutilized property that spans ten acres, located in Lower Works Pen in St. Elizabeth, previously registered to Mr. Patrick Coote at Volume 331 Folio 72, and now registered to Shawn Marie Smith at Volume 1466 Folio 410 ('the property'). This property was put on auction by the mortgagee, Jamaica Redevelopment Foundation Incorporated (hereinafter referred to as JRFI). Mrs Shawn Marie Smith made a successful bid and was registered as the new owner on 6th March 2013.

[2] Shortly after Mrs. Smith came into ownership of the property, her husband, Donnavan Smith, began to clear the land with a tractor. That was when he first encountered the claimant, Mr Winston Pinnock, who claimed that he owned and occupied the property. Subsequently, the parties were involved in litigious proceedings in the Black River Parish Court in St. Elizabeth and the Court of Appeal.

[3] On 9th April 2013, Mr. Pinnock filed action against Mrs Smith, by way of Fixed Date Claim Form, supported by affidavits filed 21st May, 2013 and 30th October 2014. These were sworn by Donald Clarke. Mr. Pinnock swore and filed other affidavits in this matter on 25th April 2013 (Affidavit of Urgency in Support of Application for Injunction), 21st May 2013 (Affidavit in Reply in Opposition to Discharge of Injunction) and 1st July 2013 (Affidavit of Urgency in Support of Application for Injunction and Affidavit in Support of Application for Court Orders). These affidavits particularised his interest in the property.

[4] The defendants, Mr. and Mrs. Smith, filed affidavits in response on 13th May 2013. Mr. Smith filed a further affidavit on 29th July 2013.

[5] On 1st July 2013, Mr. Pinnock filed action by way of Claim Form against Mr. Smith. Mr. Smith filed a defence on 3rd October 2013.

[6] By order of the Hon. Mrs. Georgianna Fraser J. (Acting) (as she then was), both actions were consolidated on 18th October 2013.

[7] The effect of that order was that both claims would proceed as if commenced by Claim Form. Consequently, the affidavits filed were converted to pleadings. The parties filed witness statements.

[8] The reliefs sought by Mr. Pinnock are damages for trespass, an injunction restraining the Smiths, their servants and/or agents from recovering possession without an order of the court, a declaration that he is entitled to possession in accordance with the **Statute of Limitations** and rectification of the Register of Titles.

[9] At the commencement of trial counsel for the defendants, Ms. Shaw, sought and obtained leave to make a preliminary point. She submitted that the claims should be struck out and /or summary judgment given in favour of the defendants on the bases that they established no reasonable grounds and had no real prospect of succeeding. She relied on rules 39.9, 26.1(2)(j), 26.3(1)(c), 15.1 and 15.2 of the Civil Procedure Rules (CPR), and section 106 of the **Registration of Titles Act** (ROTA). To ground the application, she relied on the affidavit of Shawn Marie Smith filed 13th May 2013 in the Fixed Date Claim Form herein and the bundle of documents admitted into evidence as exhibits 1-31.

[10] She submitted that rule 15.3 would not exclude the application for summary judgment as both claims were consolidated. The gravamen of counsel's submissions, however, was that the wrong defendants were before the court. In relation to the claim against Shawn Marie Smith, she contended that Mrs. Smith was a *bonafide* purchaser for value without notice who had purchased from JRFI under a power of sale and as a consequence was immune from suit by virtue of section 106 of the **ROTA**. That section, she said, provided that the only person who could be sued in relation to the exercise of the power of sale was the mortgagee, and the only remedy was in damages. She cited ***Donovan Foote v Capital and Credit Merchant Bank and Another*** [2012] JMCA App 14, and

Harley Corporation Guarantee Investment Company Limited v Estate of Rudolph Daley and Others [2010] JMCA Civ 46, in support.

[11] With respect to the suit against Donnavan Smith, Ms. Shaw submitted that the claim for trespass was an abuse of process as a similar claim had been brought and determined in the St. Elizabeth Parish Court. She also contended that the injunctive and declaratory reliefs sought against Mr. Smith could not be sustained as he was not the owner of the property.

[12] In response to those submissions, Mr. Equiano submitted, albeit erroneously, that the application was lacking because the affidavit relied on did not meet the requirements of rule 26.4(2)(a).

[13] He submitted further that section 106 of the **ROTA** was not applicable because it dealt with circumstances where the mortgagee had the power of sale and exercised it. In the instant case, he said, the JRFI would have had no power of sale as both the previous owner's title and the charge on the property had been extinguished due to Mr. Pinnock's occupation of the land for in of excess of twelve years. He contended that Mr. Pinnock need only establish that he was in adverse possession, in which case the title holder would hold the title as trustee for him. He cited ***Cotterel v Price*** [1960] 1 WLR 1097 and ***Peter Perry v Carol Baugh and others*** [2018] JMCA Civ 12 to support his submission that once a mortgagee cannot sue for possession he loses his status as a mortgagee and any concomitant rights. On these grounds, he argued that the proper parties were before the court.

[14] I denied the application. My reasons are set out below.

[15] *First,* the procedure for summary judgment as required by rules 15.2 to 15.55 of the CPR, was not followed.

[16] *Second,* although I agreed with counsel that the application for striking out could be made without notice, at the trial, I was nevertheless not persuaded by the arguments which were advanced in support of the application. Based on what

was before me and my view of the authorities, I concluded that Mrs. Smith would be a relevant party in the enquiry as to whether Mr. Pinnock had obtained a possessory title. I also formed the view that Mr. Smith would be a relevant party snice the claim for trespass was against him.

[17] In particular, I found that section 106 of the **ROTA** was not relevant to whether a possessory title could extinguish a paper owner's title as it does not deal with possessory rights. That section pertains to a mortgagee's right to sell where there is a default in payment and any loss occasioned. It also relieves the *bonafide* purchaser for value of the obligation to ensure that the power of sale was properly exercised, and provides the mortgagor with a remedy in damages against the mortgagee, in an appropriate case. The cases cited by Ms. Shaw were unhelpful. I found ***Perry***, cited by Mr. Equiano, to be more relevant to the issues. I will deal with this case later in the judgment when I return to the question of whether a new charge would affect a claim to possessory title.

[18] *Third,* I did not agree that the claim for trespass could not be brought because of a similar claim that had been struck out in the Parish Court. I pointed out that trespass can be a continuing act and moreover there was no conclusive evidence as to why the action was struck out.

Agreed Documents

[19] The parties agreed the following documents and they were admitted into evidence as exhibits 1 – 31.

Exhibit 1: Certified Copy of Duplicate Certificate of Title registered at Volume 1466 Folio 410

Exhibit 2: Certified Copy of Duplicate Certificate of Title registered at Volume 331 Folio 72

Exhibit 3: Property Tax Receipt numbered 6798260 in the sum of Seventy-Nine Thousand Dollars ($79,000.00)

Exhibit 4: Certified Copies of Pleadings filed in the Resident Magistrate's Court for the Parish of Saint Elizabeth in Plaints numbered 163/2013, 192/2013, 169/2013

Exhibit 5: Copy Certificate of Payment of Taxes dated the 6th day of March, 2013

Exhibit 6: Marriage Certificate between Donavon Orlando Foote and Marcella Earlene Vassell dated 23rd December 1995

Exhibit 7: Copy of Agreement for Sale of Land dated the 9th January 2013 between Jamaica Redevelopment Bank and Shawn Marie Smith

Exhibit 8: Parish of Saint Elizabeth Sub-division Approval Folio: 3976

Exhibit 9: Letters of Demand dated August 1, 1996 to Marcella Vassell and to Patrick Coote

Exhibit 10: Copy letter dated March 27, 1997 from National Commercial Bank to Marcella Vassell

Exhibit 11: Copy letter dated September 27, 1996 from Don Foote, Attorney-at-Law, to National Commercial Bank, Savanna-la-Mar

Exhibit 12: Copy letter dated October 18, 1996 from Sharon Evans, Attorney-at-Law to Don O. Foote, Attorney-at-Law

Exhibit 13: Copy letter dated November 19, 1998 from Don O. Foote to National Commercial Bank, Savanna-la-Mar

Exhibit 14: Letter dated August 2, 2000, from Marcella Vassell to National Commercial Bank

Exhibit 15: Letter dated May 31, 2001 from Finsac Limited to Marcella Vassell

Exhibit 16: Copy letter dated September 13, 2002 from Dennis Joslin Jamaica Inc. to Marcella Vassell (unclaimed)

Exhibit 17: Copy letter dated October 22, 2003 from Don O. Foote to Refin Trust Limited/Joslin Jamaica Limited

Exhibit 18: Copy letter dated October 23, 2003 from Dennis Joslin Jamaica, Inc, to Don O. Foote

Exhibit 19: Copy letter dated January 19, 2004 from Dennis Joslin Jamaica Inc. to Patrick Coote

Exhibit 20: Letters each dated October 25, 2005 from Jamaica Redevelopment Foundation, Inc. to Patrick Coote and to Marcella Vassell (unclaimed)

Exhibit 21: Instrument of Mortgage executed by Patrick Coote dated December 13, 1995

Exhibit 22: Instrument of Guarantee (Unlimited) executed by Patrick Coote dated December 11, 1995

Exhibit 23: Letter dated June 18, 2012 from Jamaica Redevelopment Foundation Inc. to Patrick Coote

Exhibit 24: Statutory Registered Notice to Patrick Coote dated July 2, 2012

Exhibit 25: Copy letter dated December 6, 2012 from Preferred Properties Limited on behalf of Shawn Marie Smith to Jamaica Redevelopment Foundation, Inc

Exhibit 26: Copy Property Tax Payment Advice for Lower Works Pen in the name of Patrick Coote dated December 7, 2012

Exhibit 27: Copy letter dated April 10, 2013 from Jamaica Redevelopment Foundation, Inc. to Marcella Vassell

Exhibit 28: Photographs of the dilapidated house on the property, the shed and outer surroundings

Exhibit 29: Strokes and Slants, International Handwriting Services, Expert Report of Beverly East – The Authenticity of Mr Winston Pinnock's Signature

Exhibit 30: Draft Formal Order of The Honourable Mr Justice Anderson, dated April 9, 2014

Exhibit 31: Agreement for Sale dated 1st May 1994

Witness Summonses

[20] The National Commercial Bank (NCB) which was summoned to produce the mortgage documents and/or records in relation to the property and also to give *viva voce* evidence in relation to affidavit sworn on 18th May 2015, on behalf of the defendants, was represented at the trial through its attorney-at-law, Mr. Maurice Manning, but was not required to give viva voce evidence because of

the agreed documents. This was also the case with JRFI, which was represented by its attorney-at-law, Ms. Naudia Sinclair, in relation to its affidavit filed in this case on 20th May 2015.

[21] Mr. Donnovan Foote and Mrs. Marcella Vassel who were also summoned as witnesses in relation to documents included in the Bundle of Agreed Exhibits did not attend.

The Claimant's Case

[22] Mr. Pinnock's witness statement filed 30th October 2014 was ordered to stand as his evidence in chief, but not for long.

[23] Under cross examination, it emerged that Mr. Pinnock could not read his witness statement or spell words from it because he was illiterate. The court upheld a submission that it was improper because it had omitted the mandatory certificate that should be included in any statement that has been made by a person who is blind or illiterate. The witness statement was therefore struck out as it did not conform to rule 29.4(2) of the CPR, and the order for it to stand as his evidence in chief was vacated. He was, however, permitted to give oral evidence in accordance with rule 29.2(1).

[24] Mr. Pinnock's *viva voce* evidence was, broadly, as I have set out below.

[25] He was a fisherman and in 1994 did "labour work" for about three months at a house which was under construction on the property. At some point the owner failed to send money and the workers were not paid. He stayed at the property with the foreman and watchman who eventually left him there. He testified that he had lived alone on the property and was unmolested for all the years leading up to the Smiths' entry onto the land in 2013. Sometime in October 1994, Mr. Patrick Coote visited for five minutes but he never saw him again. He remained at the property because he had nowhere to go and was waiting on his money.

[26] Mr Pinnock testified that he enlisted some masons and completed the construction over a period of three years. It was a five-apartment, two-storey

house that he made with the financial assistance of his sister in England. The funds she sent were used to purchase blocks, cement and sand. There was no documentary support for that claim.

[27] He had first met Mr. Smith when he visited the property along with another man and said he liked the design of the roof. On that occasion, Mr. Smith was allowed inside and complimented him on the good view. He returned later with a bulldozer and started to clear the land. Mr. Pinnock confronted him and was met by threatening words to the effect that he should not ask any questions otherwise men would be sent to kill him. The bulldozing continued for a week.

[28] According to Mr. Pinnock, the property was accessed by Mr. Smith through a little road on which he, Mr. Pinnock, had carried cement and blocks to put up the house. This road, he said, could have accommodated a truck and a car alongside each other.

[29] Other than the Smiths, he was not aware of any other visitor to the property, including surveyors. Mr. Pinnock also said that he did not know a Dr. Michael Brown.

[30] He had planted logwood trees to help finance himself as well as a little cultivation of tomatoes, escallion, callaloo and cabbage but these were destroyed by the bulldozing. As a result, he obtained an injunction against Mr. Smith.

[31] Under further cross-examination, Mr. Pinnock said that the house had several windows and consisted of four bedrooms and four bathrooms. He said he had receipts for the building material but they had been lost in a storm which “blow down and blow off” his housetop. He, however, retained the withdrawal slips for the monies which his sister had deposited to his bank account. Those documents had not been produced to his attorneys because “it was [his] personal information” and they had not asked him about them. He was questioned about the state of his finances in 1994, and said he only had twenty pounds to his name.

[32] He testified to having a close and loving relationship, since 1994, with one neighbour, Mr. Ambersley, but said he had not asked him to be a witness because he did not "carry [his] business to people just like that". He was aware of another neighbour but did not communicate with that person because "he was a bad man." A spa was to the right of the property and there were people at the back but he knew nothing about them.

[33] Mr. Pinnock was questioned about his legal representation and the attorney who had prepared his Supreme Court documents. He gave different answers, naming Mr Equiano, Mr Morgan and an unknown attorney who had been instructed by Mr Foote. He also said that Mr. Foote represented him in court on some occasions. He had known Mr Foote since 1992 and was also familiar with his wife, Marcella Vassel. Mr. Pinnock said he had no knowledge about a matter which was filed on his behalf in the Court of Appeal. He also knew nothing about documents which had been filed against Mrs. Smith in the Supreme Court and said he had requested no one to take any action against her. He agreed with counsel that on 11th July 2016 an application was made to remove the firm of Messrs. Brown, Godfrey and Morgan from the instant case. The purpose of this line of questioning will become clear when I get to the submissions.

[34] Mr. Pinnock testified that he had no money to furnish the house. He only had a bed, gas stove, coal stove, and a refrigerator which was not working. For nearly twenty years he resided there without any electricity, water or telephone service.

[35] In response to a question whether there were houses across from the front of the land, he replied, "Yes, but further down to the hospital way." He was then shown exhibit 28, photo numbered 7 and said it showed his land across the road from an apartment complex. He did not know anything about the residents because he did not "try to know people."

[36] He was then asked to look at photo numbered 2, and said it showed his land but that he could not see the house clear enough because of bushes. He agreed with

the suggestion that bushes were very close to the house. He also agreed that the land in front of the house had been cleared by Mr. Smith.

[37] Mr. Pinnock was shown photo numbered 15 and he identified a shed which he said was used to store his boat engine and parts. He was then questioned about photo numbered 13 which showed a crudely-made bed which was in the shed. He was asked to whom the bed belonged and replied, "I have a chap there with me." He was questioned further by the court in relation to the bed and agreed, reluctantly, that it belonged to him. He was shown photo numbered 3 and said it was not his house because "my housetop don't shape like that and I don't have any missing window…I have good windows."

[38] Mr. Pinnock denied that he started building the shed on 7th April 2013 and said it was built in 1994. He also said that the shed had not been destroyed by the storm which had damaged the roof of the house.

[39] He asserted his ownership of the entire parcel of land and said he had paid taxes for the first time in 2018.

Mr Everol Esson

[40] Mr Esson was the only witness called on behalf of Mr. Pinnock. His witness statement filed 30th October 2014, was ordered to stand as his evidence in chief.

[41] He testified that he had known Mr Pinnock since 1995 and was familiar with the property because his mother worked at an establishment on the same street and he had done a summer job at a spa nearby. He knew him to be living on the property from 1995 "to date". He had also known him as a fisherman who came to the spa to sell his catch. On one occasion in 1995 he assisted him to carry a small boat engine to his house across from the spa.

[42] Under cross examination, Mr. Esson said that he was unable to speak about the condition of the house in 2013 because the last time he had been there was in

1997. He was not sure whether he knew Dr Michael Brown but was familiar with Mr. Ambersley who lived nearby the property.

[43] Mr. Esson agreed with counsel that he did not know much about the property.

[44] He was questioned about the preparation of his statement and said it had been done by Mr. Don Foote after he had discussed the contents with him. Mr. Foote was the only attorney with whom he had spoken in relation to the case.

The Defendants' Case

Donnavan Smith

[45] The witness statement of Donnavan Smith was ordered to stand as his evidence in chief. He gave further evidence in amplification and cross-examination.

[46] He was a businessman who lived in close proximity to the property for approximately thirty-three (33) years, worked for many years on the same street and owned lands close by. He passed the property whilst jogging in the mornings and had never known it to be occupied.

[47] He had seen an advertisement that the property was for sale and drove around it several times as it had been overgrown with high bushes and tall trees. It had no driveway or access from the roadway.

[48] When Mrs. Smith was put in possession, he began to clear the land with the use of heavy duty equipment because of the high bushes and trees. At first, he used a backhoe and later utilised a construction company.

[49] It was not until he started clearing the land that he came close to the house. It was old, dilapidated and uninhabitable. A section of the roof had fallen in, the grill-work was rusted, and the majority of the doors were missing and others unattached. There was a wall around the house but the property itself was unfenced. He said that in all the years he had known the land, it had no fencing.

[50] Mr. Smith testified that he was confronted twice by Mr. Pinnock who asked why he was on "Mr Foote's land" and told him to "lef the land". He and Mrs. Smith were subsequently served notice of an ex parte injunction to which they responded by serving a notice to quit. Subsequently, the parties litigated against each other. On 27th March 2013 he was served with an ex parte injunction which prevented him from going onto the property. He subsequently observed Mr. Pinnock building a shack on a part of the property which had been cleared.

[51] The parties went to court on 11th April 2013 and the injunction was discharged. Mr. Smith said he resumed clearing the land and erected a fence but Mr. Pinnock and third parties removed the fence posts. He was served another injunction which restricted both parties' access to the property. Mr. Pinnock had access to the house and curtilage and the Smiths to the rest of the property. An application for extension of this injunction was refused on 7th June 2013.

[52] Mr. Smith testified that for many years Dr Michael Brown had cleared part of the land and cultivated it.

[53] He was questioned about the legal representations and said Mr. Pinnock had been represented by Mr. Foote in some of the court matters. He also asserted that on one occasion the firm of Brown, Godfrey and Morgan had successfully made an application to remove its name from the record of the instant case as it had not been retained by Mr. Pinnock and did not file any documents on his behalf. He also said that Mr. Foote had represented Mr. Pinnock in a related matter before the Court of Appeal.

[54] Under cross examination, Mr. Smith said he did not know when the house was built and had no knowledge of who had owned the property. He denied that Mr. Pinnock was in occupation when he first entered the property. He also said that he had first noticed the house when he visited Dr. Michael Brown's home in 2009 and had never seen any vehicles transporting material to the property. He did not agree with counsel that there were several entry points to the property, and said it could only be accessed from High Street.

Shawn Marie Smith

[55] The witness statement of Mrs. Smith, filed on 8th December 2014, was ordered to stand as her evidence in chief. She gave further evidence in amplification and cross-examination.

[56] Mrs. Smith testified that she had known the property for many years, having lived next door for one (1) year in 1990 at the Amberselys, then at her current residence nearby since 1997. She too had jogged past the property frequently and did not know it to be occupied by anyone. For as long as she could recall it had been overgrown.

[57] Otherwise, she gave essentially the same evidence as Mr. Smith. It is therefore not necessary for me to repeat that information.

Donovan Burke

[58] The witness statement of Donovan Burke, filed 8th December 2014, was ordered to stand as his evidence in chief. He gave further evidence by way of amplification and cross examination.

[59] He went to school in Black River and had known the land from childhood. In 2002, he was hired by Dr Michael Brown to clear the land because it was overgrown with bushes and trees which posed a security hazard. In order to enter the property, he had to pull down a part of Dr Brown's fence because there was no access from the road. It was not until he was clearing the land that the abandoned dilapidated house was seen close to the boundary of Dr Brown's land. It had a few windows and the doors and roof were rotted. He had also observed a tree growing in the middle of the house. He cleared the land regularly for Dr Brown and had never seen anyone occupying the house.

[60] In 2013, he saw Mr Smith using a JCB backhoe to clear the land. He approached him and asked him for the work because he was familiar with the property and owned a Caterpillar front end loader. He was hired by Mr. Smith and took two

weeks to clear the land. On the sixth day of work, he observed Mr. Pinnock walking “back and forth” on the land and questioned him about his presence there. He said Mr. Pinnock became vexed and, in the presence of Mr. Smith, threatened to shoot him. Fearing for his life, Mr. Burke said he did not return to the property and the last time he did so was about June 2013. He had never seen Mr. Pinnock on the land until he began clearing it for Mr. Smith and did not know him to be the owner or occupier. He agreed that photographs numbered 1, 2, 3, 5, 6 and 11 of exhibit 28 were of the house and property.

[61] Under cross-examination, Mr Burke confirmed that he had known the property for about forty-five years and had been travelling past it since his days as a high school student. In all those years he had never seen the house until he began clearing the land for Dr. Brown. The curtilage of the house was some 150 feet from Dr. Brown’s property. He said he had never been inside the house nor had he ever seen any material being transported to the property.

[62] Mr. Burke was questioned about hurricanes Gilbert, Andrew, Ivan and Dean. He recalled big trees falling as a consequence of hurricanes and also that he did a lot of roadwork but said he had never seen the house from High Street on any of those occasions. He could not recall whether the house was fully fenced in 2002 but knew it to have a metal fencing which was broken and rotted. When he entered the property to clear it in 2013, he did so from Dr. Brown’s land on Picadilly Road.

Issues

[63] The main issue for this court’s consideration is whether the claimant was in factual possession of the property since 1994 and by his actions, conduct and intention had acquired possessory title prior to Mrs. Smith’s acquisition of a paper title. The subsidiary issue is whether JRFI had passed a good title to Mrs. Smith.

[64] I will now deal with those issues along with the submissions advanced by both parties.

Submissions

The Claimant

[65] The substantive submissions by Mr. Equiano are set out below.

[66] Counsel submitted that the evidence detailing Mr. Pinnock's occupation and possession of the property was sufficient to prove ownership. He questioned the truthfulness of the evidence by the Smiths that they had first noticed the house at the same time in 2009 and their witness who said he first noticed it in 2002. Counsel said it was not believable that they had been living in the area before the house was built but had no knowledge of its construction, its existence or any activity on the property. Counsel submitted further, that if the Smiths had not noticed the house over a long period, it would also be the case that they would not have seen the "smaller structure of a man" on the property.

[67] He said there was a discrepancy in the evidence of Mr. Smith and Mr. Burke in relation to fencing of the property.

[68] Counsel asked the court to consider that the Notice for Mr. Pinnock to vacate the property was acknowledgement that he was in possession. He rejected the Smiths' explanation that they had acted as lay persons without the benefit of legal advice. Counsel posited, instead, that Mr. Smith was an experienced businessman who had knowledge of and dealings with various properties and had attorneys acting on his behalf in relation to the purchase, so he must be taken to have known the effect of a Notice to Quit and deliver up Possession.

[69] The court was urged to disregard the photographs which were exhibited by the Smiths on the basis that there was insufficient evidence to identify the angles and distance from which they were taken.

[70] Mr. Equiano cited ***Winnifred Fullwood v Paulette Curchar*** [2015] JMCA Civ 37, paras 37-42, in support of his position that because Mr. Pinnock was the one in possession of the property the burden of proof rested on Mrs. Smith to prove that she had a superior title to his.

[71] He submitted that Mr. Pinnock was not seeking to dispossess Mrs. Smith. Rather, he was only seeking the court's protection because Mr. Coote's title had been extinguished in his favour as at 2006. As a consequence, the mortgagee's power of sale had lapsed. He did not agree with counsel, Ms. Shaw that sections 106 and 107 of the **ROTA** offered protection to Mrs. Smith. Here he referenced (***Winnifred Fullwood, Cotterel v Price*** Supra, and ***Recreational Holdings v Lazarus*** [2016] UKPC 22).

The Defendants

[72] The substantive submissions by Ms. Shaw are set out below.

[73] Counsel submitted that Mr. Pinnock could not have had possession between 1994 and 1998 because the Knuckles were given possession in 1992, had asserted their ownership of Lot 3 by placing a caveat against the property in 1996 and the construction of their two-storey house was completed in 1998. Counsel also asked the court to consider that a Surveyor's Report was prepared in February 1996 and it raised no alarm about the existence of activities on the part of Mr. Pinnock.

[74] The court was asked to consider that Mr. Don Foote had written the mortgagee in September 1996 to inform it of the "almost completely constructed" house and the sale of Lot 3 to the Knuckles. Mr. Foote, she said, did not communicate any knowledge of a third party being interested or prejudiced. It was therefore more probable, she argued, that the Knuckles had constructed the house than a poor fisherman and labourer who had only twenty pounds in his bank account in 1994.

[75] Counsel urged the court to find that Mr. Pinnock was not credible in his assertion that the construction was funded by monies sent by his sister on the bases that he proffered no receipts of lodgements or withdrawals and provided no documentation for the purchase of construction material. Counsel submitted that it was not credible evidence that Mr. Pinnock had relevant documentation which he had not brought to the attention of his attorneys.

[76] It was her contention that Mr. Pinnock had shown a complete lack of knowledge of the community in which the property is situated and gave contradictory evidence. As an example, she cited his response when asked whether houses were to the front of the property. He had replied that they were "further down to the hospital way" but on being shown a photograph, admitted that an apartment building was directly in front. He had also disputed that the property was overgrown with bushes but conceded when shown photographs.

[77] Ms Shaw asked the court to find that Mr. Pinnock had given varying descriptions of the house in his oral evidence and court documents, saying it was comprised of five apartments, seven apartments, five bedrooms and four bedrooms. She also pointed to the evidence that he had no knowledge of a person named Dr Michael Brown, and contrasted that claim with a statement in the pleadings that he had given Dr. Brown permission to clear a part of the land for security reasons.

[78] Counsel also asked the court to reject the evidence that the wooden shed was constructed in 1994, positing that the material which was used for its construction was not weather-worn as would have been expected if it had been built in 1994. On the other hand, Mr. Smith's evidence was more believable that he saw the shed being built in April 2013. She submitted further that the presence of a makeshift bed in the shed was more consistent with use for accommodation than storage of a boat or boat engine.

[79] The court was urged to find that there was no intention to possess because Mr. Pinnock had stated repeatedly that he stayed on the land to wait for his money. He would have also made no effort to maintain the house or land, yet he was a labourer. He had purportedly paid taxes only while the matter was before the court and the absence of basic amenities or furnishing at the house suggested that he would not have settled himself there. Counsel suggested further that Mr. Pinnock would not have engaged the visits of family members or visitors which was customary of home owners.

[80] For these reasons, she submitted that there was no evidence that Mr. Pinnock had been in factual occupation of the land or that he had the requisite intention to possess it.

[81] Counsel cited sections 30 and 68 of the **Statute of Limitations**, ***Powell v McFarlane*** (1977) 38 P & CR, and ***J A Pye (Oxford) Ltd and another v Graham and another*** [2003] 1 AC 419, in support of those submissions.

[82] In the alternative, she submitted that were the court to find dispossession it should only relate to Lot 3 as, on Mr. Pinnock's case, he had only "stuck to [that] side of the house."

[83] Counsel raised doubt about the veracity of Mr. Pinnock's pleadings as there was expert evidence that the signatures on various documents purportedly signed by him were not his and there was uncertainty as to whether he had given instructions for the preparation of those documents. She referred to the assertion by Messrs. Brown, Godfrey and Morgan, on the record in this claim, that they did not prepare or file any document on his behalf and had never been retained by or acted for him in the Supreme Court. She also referred to Mr. Pinnock's assertion that he did not instruct any attorney-at-law to act on his behalf against Mrs. Smith in the Supreme Court.

Analysis - Possessory Title

[84] I will first deal with the burden of proof and Mr. Equiano's reliance on **Winnifred Fullwood**. On the issue of burden of proof, McIntosh-Bishop JA said:

> *…The English authorities that have treated with the English 1833 Act have proved to be quite instructive in treating with this issue. They have unequivocally established that when a claimant brings a claim to recover possession, he "must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his on title, not on the weakness of the defendant's"…The Laws of*

England, The Earl of Halsbury (1912) Volume 24, paragraph 609. (para 38)

McIntosh-Bishop JA continued at paragraph 39*:*

> *Even more importantly in the context of this case, the authorities have also established that* ***where the person against whom the claimant has brought the action pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute:*** *The Laws of England, The Earl of Halsbury, Volume 24 paragraph 606 and* ***Dawkins v Penhyn*** *(Lord) (1878) 4 App Cas 51."*

[85] After considering the **Statute of Limitations** and the authorities, McDonald-Bishop JA, concluded:

> *These authorities have forcefully brought home the point that a claimant in a case for recovery of possession must state the basis of his claim which is his title to the property and once that is laid on the table (so to speak) then the statute of limitations will come into play and may operate to bar a stale claim regardless of whether or not the statute is expressly pleaded by a defendant in possession. So, the statute automatically arises for consideration once the title to the land is being relied on to ground the claim and its operation is not dependent on whether the defendant chooses to avail himself of it…This is understandably so because as the authorities have established, the statute goes to the root of the claim or to the right to bring the claim and not to the remedy. It is this hurdle that is set up by law in the path of the claimant that can affect his claim rather than one to be set up by a defendant to defeat the claim. (para 42).*

[86] McDonald-Bishop JA's judgment offers characteristically sound guidance but she was dealing with the burden of proof in an action for recovery of possession. The issue that arises in the instant case is different. The paper title owner took possession and is being challenged by Mr. Pinnock who has brought an action seeking damages for trespass, injunctive relief, declaratory relief and rectification of the Register of Titles. There is no counter-claim to this action. The issue is whether Mr. Pinnock in fact has a possessory title. In these circumstances, the general principle applies – he who avers must prove.

[87] The **Statute of Limitations** allows for the legal title owner's rights over a property to be extinguished if a 12-year period of undisturbed occupation is established by the non-paper owner who seeks possessory title by adverse means.

[88] Section 30 states:

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

[89] Sections 68 and 70 of the **ROTA** deal with the indefeasibility of the registered title. But those sections also make it clear that a registered title is subject to the subsequent operation of the **Statute of Limitations**.

[90] Section 68 provides:

> *No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts*

as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and ***shall subject to the subsequent operation of any statute of limitations,*** *be conclusive evidence that the person name in such certificate as the proprietor of or having any estate or interest or has such power.* (emphasis added)

[91] Section 70 provides:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified…provided always that the land which shall be included in any certificate of title…shall be deemed to be subject to…any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations…

[92] The import of both sections was explained by the Privy Council in ***Recreational Holdings*** at paragraphs 16, 17 and 34. There is no need for me to elaborate.

[93] The legal principles relating to the rights of the paper owner are well settled. In ***Powell v MacFarlane*** (1977) 38 P & CR 452 Slade J summarised the principles thus:

(1) *In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The Law will thus, without reluctance, ascribe*

possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) *If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')*

[94] That statement was approved by Lord Justice Browne-Wilkinson in **JA Pye** and applied by our Court of Appeal in ***Winnifred Fulwood*** and as recent as 2018 in ***Peter Perry.***

[95] In ***JA Pye,*** Lord Hope of Craighead made a clear statement about what the law requires to effectively establish possession.

> … ***Occupation of the land alone is not enough****,* ***nor is an intention to occupy which is not put into effect by action. Both aspects must be examined, and each is bound up with the other.*** *But acts of the mind can be, and sometimes can only be, demonstrated by acts of the body.* ***In practice, the best evidence of intention is frequently found in the acts which have taken place.***
>
> *The question as to the nature of the intention that has to be demonstrated to establish possession was controversial, particularly among jurists in Germany (see, for example, Henry Bond 'Possession in the Roman Law' (1890) 6 LQR 259).* ***But it is reasonably clear that the animus which is required is the intent to exercise exclusive control over the thing for oneself*** *(see Bond (1890) 6 LQR 259 at 270). The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The*

word 'adverse' in the context of s 15(1) of the 1980 Act does not carry this implication. ***The only intention which has to be demonstrated is an intention to occupy and use the land as one's own****. (paras 70-71, my emphasis).*

[96] Mr. Pinnock has asked the court to rely entirely on his oral evidence and that of Mr Esson, to establish that he had lived on the property since 1994 and had dispossessed Mrs. Smith.

[97] Slade J pointed out in ***Powell v McFarlane*** that the acts which are taken to constitute a sufficient degree of exclusive physical control depend on the circumstances, particularly "the nature of the land and the manner in which land of that nature is commonly used or enjoyed." (p. 472). The person in possession must show that "he had been dealing with the land in question as an occupying owner might have been expected to deal with it…" (pp. 470-471).

[98] In this case, the facts that I will consider to determine whether there has been open and undisturbed possession include treatment of the land. I have considered that the land was not intended to be used for forestry but residential purposes. From the evidence adduced on behalf of the Smiths, it was allowed to be overgrown by Mrs. Smith's predecessor in title. This is not an uncommon state of affairs in Jamaica, where land is often left unattended and susceptible to squatting.

[99] On Mr. Pinnock's case, he would have completed the construction of a house and resided in it. That would have been consistent with the purpose for which the land was sub-divided and a portion acquired by the Knuckles. His evidence was that he began his construction works on the house in 1994 and the works were carried out over three years. He claimed that this was financed by his sister. No documentary evidence was produced to support his position. He claimed to have maintained a bank account and said his sister had made deposits in it so it would have been a simple matter for the bank book or a statement of the lodgements and withdrawals to be produced. I do not believe any of this evidence to be true.

[100] I also do not believe Mr. Pinnock's assertion, during cross-examination, that he never told his lawyers about his banking documents because they had never asked him any questions about them, and that it was his private business. That information would go to the heart of proving that he, an impecunious man, had managed to construct a multi-storey house, as he described it.

[101] I found Mr. Pinnock's description of the house (two-storey, four bedrooms) to be a remarkable concurrence with how Mr. Don Foote described the dwelling house as having been built by the Knuckles, in his letters of 27th September 1996 and 19th November 1998 to NCB (exhibits 11 and 13, and also affidavit of JRFI filed 20th May 2015 per Naudia Sinclair).

[102] In his letter of 27th September 1996, Mr. Foote, writing as the attorney at law for Mr. Patrick Coote, stated as follows: "…There is a two storey, four (4) bedroom house, almost completely constructed on lot 3 of the aforementioned property. The said lot has been sold to Mr. Dale Knuckle…of London, England and I enclose a copy of the Agreement for Sale…".

[103] In the letter of 19th November 1998, writing again on behalf of Mr. Coote, Mr. Foote stated, "…(1) That it is your bank's intention to auction the said property in toto which is a sub division of 38 residential lots which has (sic) not yet been splintered into separate titles from the above captioned Registered Title of Volume 331 Folio 72; (2) That you might not be aware that lot 3 has been sold to Mr and Mrs Dale Knuckle of a London, England address; (3) That the purchasers have constructed a two (2) storey dwelling house on the said lot and are in possession thereof; (4) That the interest of Mr. and Mrs. Knuckle is protected by the lodgement of caveat No. 930739 endorsed on the said Certificate of Title by Myers, Fletcher & Gordon Attorneys at Law. This therefore serves to advise that with knowledge of the interest of the owners of lot 3, you run the risk of being in breach of your obligation to warrant that there is no defect in the principal's title to this property should you proceed to auction same including the residence of the owners of lot 3…"

[104] Mr. Foote was clearly familiar with the details of the property when he wrote to NCB in 1996 and 1998. He was attorney-at-law for the then registered proprietor, Mr. Coote, and was also involved in the subdivision process (exhibits 11 and 12). The property was used as security for a loan to Marcella Vassel on 11th December 1995 (exhibits 10, 11, 12 and 21 A & B). Mr. Pinnock had testified that he knew Marcella Vassel to be Mr. Foote's wife. Mr. Foote had also represented Marcella Vassel in relation to her dealings with Refin Trust Limited and the land in question (exhibits 10, 17 & 18).

[105] It therefore baffles me as to how Mr. Foote could be involved in the representation that Mr. Pinnock has a possessory title on the basis that between 1994 and 1998 he had completed construction of the Knuckles' incomplete house and had remained in possession since that time. Clearly, Mr. Pinnock and the Knuckles could not have been in possession at the same time.

[106] Having considered the evidence as a whole, the more believable version of the two tales before me is that the Knuckles had fully constructed the house by 1998 as was represented by Mr. Foote in his letters. On this aspect of Mr. Pinnock's evidence and in others which I will deal with shortly, I therefore did not find him to be a credible witness. It seems to me that he was clearly privy to information about the house but he did not build it between 1994 and 1997, as he claimed.

[107] Mr. Pinnock gave evidence in cross examination that "…storm mash up and blow off the roof". He gave no evidence that it had ever been repaired. Yet, according to him, Mr. Smith had come to the property in 2013, and admired the roof and design of the house. He would have admitted Mr. Smith and the other man, both strangers, to tour the house for no explicable reason other than to admire it, including the view from upstairs. Here, I am recalling that Mr. Pinnock described himself as a man who kept to himself, such that he would have enjoyed relations with only one neighbour. On his evidence, Mr. Smith would have conducted the tour of the house, expressed his admiration and then returned the following day and started bulldozing the property, uttering not a word, until he, Mr. Pinnock,

asked, “what [was] this all about?”. Mr. Smith would have then, in a “Jekyll and Hyde” moment, changed from the admiration-effusing man the day before to one who threatened to kill Mr. Pinnock. This evidence does not have the ring of truth in it.

[108] The evidence that he did not know Dr. Brown was inconsistent with his pleadings that he knew and interacted with him and gave permission for him to clear a portion of the land for security reasons. He had also been inconsistent in the description of the house. In his evidence, he described it as “a four bedroom, four bathroom, two-storey house” and a “five apartment upstairs and downstairs house” while in his pleadings it has been described as a “five bedroom seven apartment house”. This evidence was not suggestive of a sufficient degree of familiarity with the property to be compelling.

[109] He testified that an apartment building was closer to a hospital, down the road from the property but it was established from a photograph that the apartment complex was across the road from the land. He also insisted that the land had not been overgrown but changed his position when he was confronted with a photograph of the property.

[110] I could not attribute those inconsistencies to his illiteracy.

[111] Mr Pinnock was an evasive witness. A most glaring demonstration of this was his assertion that he had lived at the property alone but when he was pressed to explain the presence of a make-shift bed in the shed, he uttered, “I have a chap there with me.” Nothing more was said about this ‘mystery’ chap. This evidence does not strike me as truthful. Moreover, it directly contradicts Mr. Pinnock’s claim to have been living alone in the house and using the shed as a storehouse. I find, as he reluctantly admitted, that the make-shift bed belonged to him. I also find that the shed was built in 2013 when Mr. Smith observed it being constructed. I am satisfied that Mr. Pinnock constructed it and behaved in a confrontational manner in order to intimidate Mr. Smith into abandoning the property.

[112] There was no evidence to support the claim that Mr. Pinnock had generated income by selling wood from the property, apart from his bald assertion that he had planted logwood trees to sell and that Mr. Smith had cut them down to make fence posts. There was evidence that logwood trees were on the property but this was forested land. So, in the absence of any specifics in relation to them, I cannot attribute their existence to him.

[113] I now turn to Mr. Esson's evidence. In his witness statement, when speaking about his knowledge of the property, he referenced only one occasion, in 1995, when he would have gone onto the land, yet in cross-examination he said the last time he had been there was in 1997. He gave no description of the property or any activity on it and was unable to speak to the condition of the house. I therefore accept, as he said, that he did not know much about the property. For these reasons, Mr. Esson's evidence that he had known Mr. Pinnock to be residing on the property "from 1995 to date", was not reliable.

[114] In contrast, I found Mr. Burke, who gave evidence for the Smiths, to be a candid and helpful witness. His evidence was unshaken by cross-examination. I accept as truthful that he worked for Dr. Brown who lived in a house which was adjacent to the property. I believed him that he was familiar with the property, having cleared a part of it just outside the curtilage of the house, some ten (10) times starting in 2002. I also accept his evidence that he saw the house in a state of ruination and the property was overgrown by bushes and trees. I believed him that he was employed by Mr. Smith to help in the clearing of the land and that was the first time he had seen Mr. Pinnock there.

[115] The Smiths were also believable witnesses and their evidence was not impeached. However, I had to disregard aspects of their witness statements which contained hearsay evidence, although there was no application for me to do so.

[116] I do not accept Mr. Equiano's submission that the Smiths were not truthful in saying that they did not see the house under construction. There was no

evidence by Mr. Pinnock, his witness or anyone as to whether the house was visible from High Street at any time between 1994 and when the Smiths went onto the land in 2013. The Smiths' evidence was that they had seen the house in 2009 on a visit to Dr. Brown's House, located on Piccadilly Road. There was also evidence from Mr. Burke that in 2002 he had started clearing a portion of the land which was adjacent to Dr. Brown's property and had continued doing this for some time.

[117] Mr. Equiano contended that there was a discrepancy between the evidence of the Smiths and Mr. Burke in relation to fencing. I do not find this to be so. Mr. Smith said that in all the years he had known the land there was no fence around it and he began fencing it in 2013. Mr. Burke's evidence was that he had seen a broken and rotted fence around the dilapidated house.

[118] I do not agree with Mr. Equiano's submission that there was a conflict in the evidence of Mr. Smith and Mr. Burke as to how the land was accessed, Mr. Smith testified that the property could only be accessed from High Street. That was in response to a suggestion from counsel that there were multiple access points from the sea to it. This does not conflict with Mr. Burke's evidence that he accessed the property from Dr. Brown's side on Picadilly Road when he saw Mr. Smith on the land in 2013. I also found no credible evidence that there was a road leading from High Street onto the property in 2013.

[119] Mr. Equiano contended that the photographs should be rejected because there was no evidence as to the manner in which they were taken by Mr. Smith but there was no challenge to them during trial. It was open to Mr. Equiano to have challenged Mr. Smith about those matters and he did not do so.

[120] I found that the Smiths did serve on Mr. Pinnock a notice to quit and deliver up possession after he had secured an injunction against them. However, I did not find that by so acting they were necessarily conceding that they had not been in possession when the injunction was served on them.

[121] As to intention, Mr. Pinnock needed to have made it known to the world that he intended to possess the property, that is, to exclude all persons from it, including the paper title owner, whether he was aware of such person being in existence (See Powell, per Slade J, p. 471, approved by Bowne-Wilkinson LJ in ***J A Pye***, para 43).

[122] Mr. Pinnock said he stayed on the property because he was waiting to be paid for his work as a labourer and he declared to the court that he was still waiting. That motive for staying on the property, in my view, would not have been inconsistent with an intention to possess. But, I have formed the view, looking at the whole of his evidence in relation to the property, that there was no conduct or activity on his part that would have crystallized into an intention to be in permanent possession, in the sense postulated by Slade J in ***Powell*** and elaborated on in JA ***Pye***.

[123] Before me, the parties agreed that the photographs show that the property was overgrown by bushes and trees and that Mr. Smith used equipment to clear the land. If, as I accepted, this aspect of the evidence is true, then on Mr. Pinnock's case, he would have lived in a finely constructed house, buried in bushes and trees, akin to subterfuge. But, as I have said before, I do not believe that to be so.

[124] I find the purported payment of taxes by Mr. Pinnock in 2018 to be convenient, in the circumstances. I agree with counsel for the Smiths that the material used to build the shed showed no discolouration or other sign of being weather-worn. Such a flimsy structure, seemingly made of ply board and zinc, if made in 1994, should not have withstood any storm or hurricane. As I found earlier, the shed was a recent construction and that evidence does not support the claim to possession or an intention to possess.

[125] The evidence I have accepted is that the roof of the house was in disrepair, the windows and doors were missing or broken, there was a tree growing in the middle of the house, there were no amenities and furnishings, the land was

overgrown and unfenced, and a flimsy shed was recently constructed on the property.

[126] For these reasons I am satisfied, on a balance of probabilities, that the property had not been inhabited by Mr. Pinnock at the time the Smiths took possession in 2013 or that he had been in physical control of it with an intention to possess. I have also not found any credible and/or reliable evidence to support Mr. Pinnock's claim that he had taken possession in 1994, completed and lived in the house on the property and cultivated the land continuously for twelve years with an intention to possess it wholly or in part.

[127] The evidence adduced by Mr. Pinnock has therefore not met the requirements of the **Statute of Limitations** and he failed the JA **Pye** test. It follows from this that the claim for trespass against Mr. Smith cannot be sustained.

Effect of Mortgage on claim for possessory title

[128] Having regard to my findings, the subsidiary issue falls away. I will, however, comment on it because Ms. Shaw's submissions disclosed a misunderstanding of Batts J's decision in ***Dagor*** **Limited v MSB Limited & National Commercial Bank Jamaica Limited** [2015] JMSC Civ 242***.***

[129] Ms. Shaw submitted that the mortgage had been endorsed on the title approximately one year after Mr. Pinnock would have taken possession and at that time, Mr. Coote's interest would not have been extinguished. Therefore, he was capable of vesting the mortgagee with a valid interest or charge against the property which when registered, created covenants from which certain powers derived in favour of the mortgagee. Therefore, even had Mr. Pinnock subsequently dispossessed Mr. Coote, he would have done so subject to any charge, power or encumbrance endorsed on the title. In other words, JRFI would have had a valid legal interest which was binding on Mr. Coote and all successors of his legal title as the mortgage deed was executed and endorsed

on the title approximately one year after Mr. Pinnock would have taken possession.

[130] In support of this submission she cited ***Dagor***, in which Batts J stated, "I hold however,...that the Limitation of Actions Act does not apply to the exercise of the mortgagee's power of sale" (para 14). Ms. Shaw also referred to *Donnovan Foote and Harley Corporation* Supra and sections 70, 105, 106 and 111 of the **Registration of Titles Act.**

[131] As I understand it, in ***Dagor,*** Batts J was dealing with the right of a mortgagee to exercise his rights at any time against the mortgagor. His lordship was not saying that prescriptive rights attained under the **Statute of Limitations** could be extinguished by the mortgagee's right to call in his charge.

[132] In reference to ***Dagor***, Brooks JA said in ***Perry***, "That case concerned the effect of the Limitations Act on the right of a mortgagee to secure payment of the mortgage debt. It therefore dealt with the rights of the mortgagee as opposed to those of the mortgagor (para 23).

[133] As it pertains to the effect of a mortgage on the accrual of time in relation to a possessory title, Brooks JA, applying the Privy Council decision in ***Recreational Holdings***, said:

> *…the registration of a transfer of land to a purchaser, for value, was subject to the possessory title that had been acquired by a third party. The principle would be equally applicable to the registration of a mortgage… It was entirely possible, therefore, for the respondents to acquire a possessory title despite [the immediate predecessor in title] granting mortgages of the property from time to time…the mere creation of a mortgage could not assist [the immediate predecessor in title] or his mortgagee in causing time to stop running against a person claiming a possessory title, any more than a purported sale of the title for the registered property would have done" (**Perry,** paras 20-22).*

[134] Therefore, the creation of a mortgage one year after Mr. Pinnock said he took possession would not have affected the accrual of time for his claim to possessory title.

[135] I have already expressed a view on section 70 of **ROTA.** It offers no assistance to Ms. Shaw. Sections 105, 106 and 111 are also unhelpful as they pertain to the effect of a mortgage, *simpliciter*, and have no relevance to a claim for possessory title.

Implication of Third Party

[136] There is one matter left for me to dispose of. It pertains to suggestions by Ms. Shaw as to the motives for bringing this case and the role of counsel.

[137] Miss Beverley East, a hand writing expert, gave evidence that signatures which were purportedly Mr. Pinnock's, differed on various documents which were filed in these actions. Mr. Pinnock had also testified that he did not give instructions for Mrs. Smith to be a party to this action and was unaware that a matter had been filed in the Court of Appeal on his behalf. Then there was the withdrawal of Messrs Brown, Godfrey and Morgan who would have stated on the record that they had never been retained to act for Mr. Pinnock and did not prepare or file documents in this court on his behalf.

[138] On the basis of these assertions, Ms. Shaw implicated a third party as being a puppeteer behind Mr. Pinnock. I cannot speculate about that. However, a dark cloud does hang over the circumstances in which documents came to be filed in the names of Messrs Brown, Godfrey and Morgan and the different signatures which appeared on documents which were purportedly signed by Mr. Pinnock. I will make the observation, at minimum, that the preparation of Mr. Pinnock's matters at the initial stage of filing and case management was far from diligent. One casualty was the striking out of his witness statement. Notwithstanding, the outcome of these matters would have been no different.

[139] Accordingly, the reliefs sought on each claim are denied. Judgment is hereby given for the defendant on each claim. Costs to the defendants to be agreed or taxed.

……..
Dunbar Green, J