COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/00289

BETWEEN

GARY A. RITCHIE

Plaintiff

AND

DELORES VICTORIA CARTWRIGHT

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Norwood Rolle for the Plaintiff

Lisa Fox and Lessiah Rolle (holding brief for Lisa Fox) for the Defendant

JUDGMENT

WINDER, CJ

[1.] This is a land dispute, formally an action in trespass, between the Plaintiff, Gary A. Ritchie, and the Defendant, Delores V. Cartwright, the successor in title to the Plaintiff's brother, Cyril Stanley Jordan Ritchie ("Jordan Ritchie"). The dispute relates to land situate on the southeastern side of Buckley (or Buckley's) Road in the settlement of Deadman's Cay, Long Island which the Plaintiff claims forms a part of the curtilage of his dwelling.

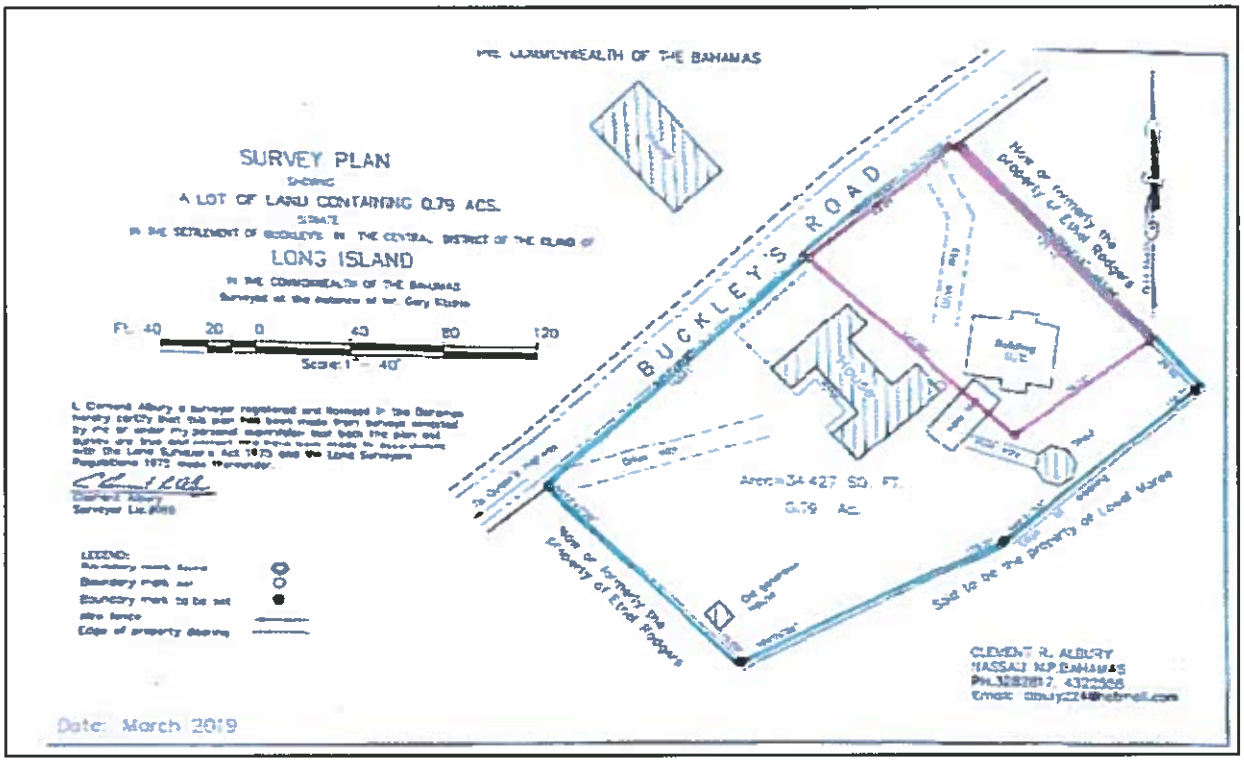
Background

[2.] This action was commenced by the Plaintiff by a specially indorsed Writ of Summons. The Statement of Claim provides, in material part, as follows:

> 1. The Plaintiff is and was at all material times the owner in fee simple in possession of a tract of land, described as:
> "ALL THAT piece parcel or lot of land being part of a tract known as 'Buckley's' situate in Deadman's Cay in the said Island of Long Island and bounded on the North by land the property of C.S. Jordan Ritchie [the Vendor and my brother] and running thereon One Hundred and Fifteen (115) feet on the East by land the property of Lowell Moree and running thereon One Hundred and sixty (160) feet on the South by land the property of the said C.S. Jordan Ritchie and running thereon One Hundred and Fifteen (115) feet and on the West by a public road leading from the main public road to the North Beach and running thereon One Hundred and Sixty (160)"
> by virtue of a Conveyance dated the 7th day of June, A.D., 1989 and recorded in the Registry of Records in the City of Nassau in Volume 5291 at pages 599 to 601.
> 2. At the time of the Plaintiff's purchase he entered into, and remained in continuous uninterrupted undisturbed, possession of the dwelling house situate upon the land described in the said Conveyance and made use of cartilage [edged in Pink] used by the previous owner and/or occupier(s) for almost Thirty (30) years. The Plaintiff's initial occupation encompassed the land shown edged in Green on the Plan attached hereto ("the Plaintiff's property"). There was no plan, survey or otherwise, attached to the said Conveyance.
> 3. In or about January 2019 the Defendant by herself her servants and agents without the consent of the Plaintiff has wrongfully entered upon the Plaintiff's property and has placed survey markers thereon and commenced the construction of a building on the same and has thereby interfered with the Plaintiff's use and enjoyment of the same.
> 4. The Defendant threatened and intends, unless restrained by this Honourable Court, to continue the acts complained of.
> 5. By reason of the matters aforesaid, the Plaintiff has suffered loss and damage.
> AND THE PLAINTIFF CLAIMS:
> 1. Possession of:
>
> > "ALL THAT piece parcel or lot of land shown on the Plan attached hereto and edged in Pink.
>
> 2. An injunction to restrain the Defendant whether by herself her servants or agents or otherwise howsoever from entering upon or remaining on or continuing in occupation of the said property;

3. An Order, ordering the Defendant to demolish the said structure and to remove the debris resulting therefrom, from the Subject Land;
4. Damages;
5. Such further or other relief as to the Court seems just;
6. Interest; and
7. Costs

[3.] The survey plan referred to in the Statement of Claim is a plan dated March 2019 prepared by Clement R. Albury ("Surveyor Albury") (the "2019 Albury Plan"). The 2019 Albury Plan is reproduced below:

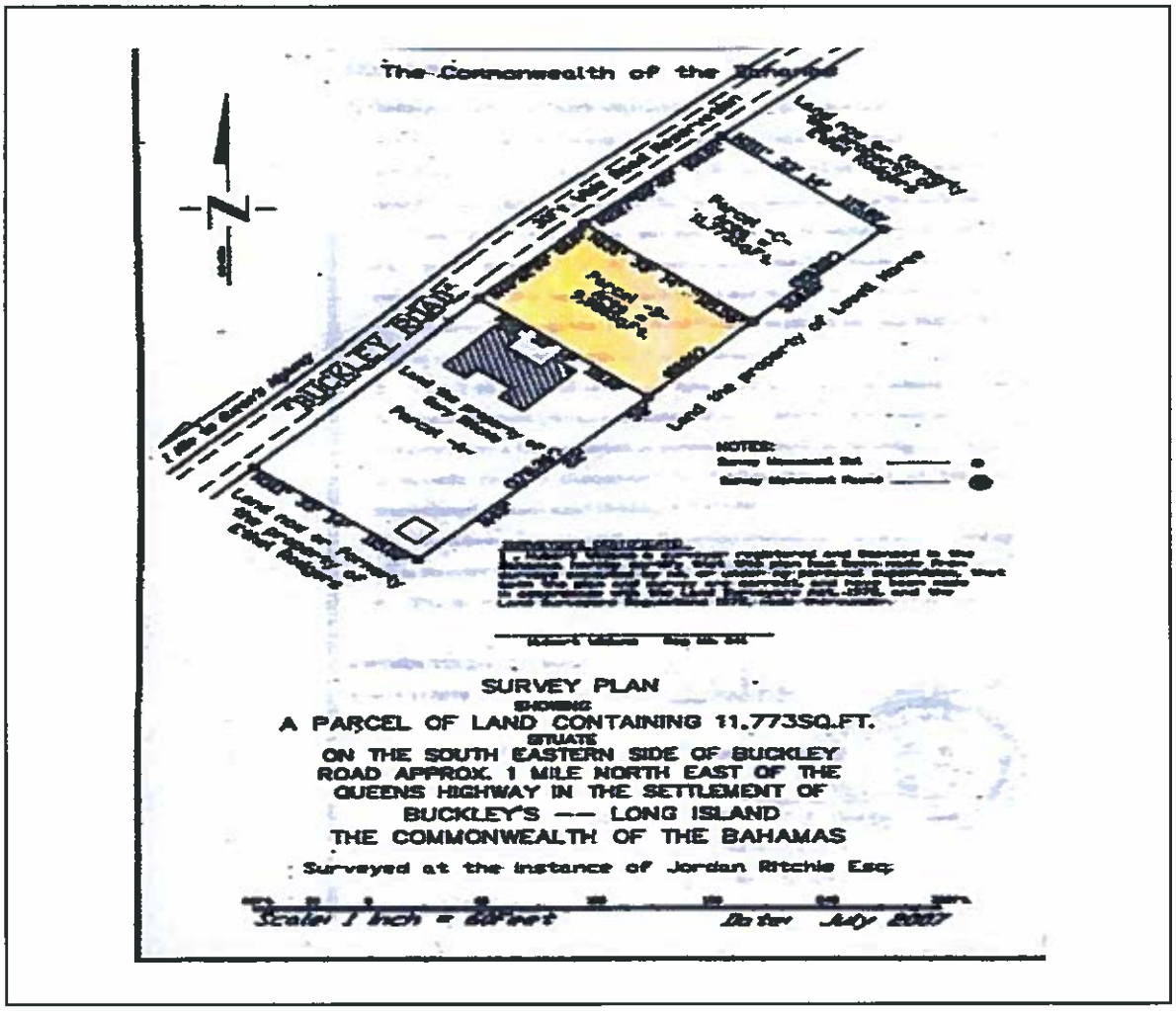


[4.] The Defence provides, in material part, as follows:

1. As to paragraph 1 of the Particulars of Claim save for the fact that a conveyance was executed and dated June 7, 1989 from Jordan Ritchie (the Plaintiff's brother) to Gary Ritchie (the Plaintiff) the Defendant denies that the Plaintiff is and was at all material times the owner in fee simple in possession of a tract of land described therein at paragraph 1 of the Statement of Claim and the Defendant puts the Plaintiff to strict proof. The Defendant instead avers that:
1.1 The Defendant is and was at all material times the owner in fee simple in possession of a tract of land described in a survey plan of Hubert Williams dated July 2007 and shown on the Plan attached and edged in Yellow;
2. The Defendant denies paragraph 2 of the Statement of Claim and puts the Plaintiff to strict proof. The Defendant instead avers that the plan referred to at paragraph 2 of the statement of claim appears to have been produced sometime in March 2019. The legitimacy of the said plan produced by the Plaintiff is vehemently challenged and the Defendant puts the Plaintiff to strict proof of the legitimacy and authenticity of the plan;

3. The Defendant denies paragraph 3 of the Statement of Claim and instead avers as follows:
3.1 The Defendant is a bonafide purchaser of a Parcel shown in the plan referred to at paragraph 1.1 herein. The Defendant's purchase of the said Parcel is legitimized by a duly recorded conveyance dated June 22, 2018 and recorded in the registry of records in the city of New Providence, of the Commonwealth of The Bahamas in Volume 13035PG pages 453 to 456 [sic];
3.2 By virtue of the conveyance mentioned at paragraph 3.1 herein the Defendant is the lawful owner of the said property and has paid valuable consideration for the same;
4. Paragraphs 4 and 5 of the Statement of Claim are denied and the Defendant puts the Plaintiff to strict proof of the allegations therein;

[5.] The survey plan referred to in the Defence is a plan dated July 2007 prepared by Hubert Williams ("Surveyor Williams") (the "2007 Williams Plan"). A plan dated June 2009, included at Tab 44 of the Defendant's Bundle of Documents, is a signed version of the 2007 Williams Plan (the "Williams Plan"). The 2007 Williams Plan is reproduced below:



[6.] The land edged in pink on the 2019 Albury Plan and Parcel B on the Williams Plan are not, by their measurements, precisely the same parcel of land.

Evidence

[7.] At trial, each party called four witnesses. Surveyor Albury, the Plaintiff, Gordon L. Rose ("Attorney Rose") and Barbara Elisabeth Jones ("Lisa Jones") testified in support of the claim. The Defendant, Kevin Burrows ("Contractor Burrows"), Jordan Ritchie and Surveyor Williams testified in support of the defence.

Surveyor Albury's Evidence

[8.] Surveyor Albury's witness statement filed on 27 October 2020 stood as his evidence in chief and he was cross-examined. Surveyor Albury is a registered and licensed land surveyor under the *Land Surveyors Act, 1975* who has given testimony before in proceedings in the Supreme Court of the Commonwealth of The Bahamas.

[9.] Two Google Earth images of the Plaintiff's property and the surrounding area were admitted in evidence through Surveyor Albury:

(i) the first (the "2017 Google Earth Image") depicts the Plaintiff's property and its immediate surrounding environment on 28 January 2017.

(ii) the second (the "2019 Google Earth Image") depicts the Plaintiff's property and its immediate surrounding environment on 16 July 2019.

[10.] While Surveyor Albury said that the Google Earth images were prepared "in reference to" his survey, that the 2019 Albury Plan showed the Plaintiff's occupation "relative to" the 2017 Google Earth Image, and that the Google Earth images "reflected" the Plaintiff's occupation, no real attempt was made by Surveyor Albury to compare or relate the Google Earth images to the 2019 Albury Plan.

[11.] In his evidence in chief, Surveyor Albury said that he was engaged by the Plaintiff in or about March 2019 to conduct a survey of the Plaintiff's property. After carrying out preliminary investigations, he travelled to Long Island and entered upon the Plaintiff's property for the purpose of conducting field work to determine the location and dimensions of the property and the features and structures thereon. On the basis of this fieldwork, he prepared the 2019 Albury Plan, which he believed was an accurate reflection of that fieldwork.

[12.] In cross-examination, Surveyor Albury acknowledged that the 2019 Albury Plan did not accord with the description of the Plaintiff's property in the Plaintiff's conveyance. He said that the survey he conducted was an "occupational survey" and not a "physical boundary survey". In other words, the 2019 Albury Plan depicted the state of occupation

at the time of the survey and was not based on the description of the Plaintiff's land in his conveyance. He repeated this explanation in re-examination. Surveyor Albury gave no evidence about the state of occupation prior to his survey. He did not visit the property before he was engaged by the Plaintiff to prepare the 2019 Albury Plan.

[13.] Having observed him giving evidence, I found Surveyor Albury to be a credible witness. I was content to accept that he prepared the 2019 Albury Plan based on fieldwork conducted by him after being engaged by the Plaintiff in *circa* March 2019. I was also content to accept that the 2019 Albury Plan accurately depicted the location of fixtures and the location of boundary markers found and set by Surveyor Albury at the time of his survey.

The Plaintiff's Evidence

[14.] The Plaintiff is a restaurant owner who has resided at his dwelling house mentioned in paragraph 2 of the Statement of Claim (identified as the "H"-shaped structure appearing on the 2017 Google Earth Image) since the 1980s. His witness statement filed on 16 October 2020 stood as his evidence in chief and he was cross-examined.

[15.] The Plaintiff confirmed that he purchased the land described in paragraph 1 of the Statement of Claim from Jordan Ritchie sometime in 1989 after being in occupation of it for a time. A copy of the conveyance is included in the Agreed Bundle of Documents filed on 6 November 2020. The legal description in the parcels clause reads:

> ALL that piece parcel or lot of land being part of that tract of land known as 'Buckley's' situate in Deadman's Cay in the said Island of Long Island and recorded in the Registry of Records in the City of Nassau in book 2282 at pages 561 to 563 and on which is erected Two (2) concrete-block buildings and bounded as follows:- On the North by land the property of the Vendor and running thereon One Hundred and Fifteen (115) feet on the East by land the property of Lowell Moree and running thereon One Hundred and Sixty (160) feet on the South by land the property of the Vendor and running thereon One Hundred and Fifteen (115) feet on the West by a public road leading from the main public road to the North Beach and running thereon One Hundred and Sixty (160) feet.

[16.] According to the Plaintiff, when he purchased his home from Jordan Ritchie there was no infrastructure in the area and Buckley Road had not been paved yet. He said there was a grassy clearing to the rear of his dwelling house which was used as a playground and upon which was a clothesline and several structures were already situate on the property, including a power generator house, an unpaved driveway to the rear of the dwelling house, a rainwater reservoir and a gravity water tank housed in a separate concrete structure next to the rear of the dwelling house. He mentioned possessing

photographs showing the state of the property in 1988 but he did not produce those photographs in evidence.

[17.] The Plaintiff identified the unpaved driveway at the rear of his dwelling house in a grassy area on the 2017 Google Earth Image. He said that the Defendant paved the driveway so it was "brighter" on the 2019 Google Earth Image. He said that a water delivery truck which serviced the water tank at his property from time to time used the rear driveway, as his front driveway was too steep for it. He said that he had also used the rear driveway "many times" when leaving his property to visit friends, albeit less regularly than once per week. According to the Plaintiff, the rear driveway had been smooth and maintained and kids had used it for playing ball games. Also, the Plaintiff hosted a hog roast party for 150 to 200 people on the 31 December each year for about 15 years and the rear driveway is where everyone parked and tables were set up.

[18.] The Plaintiff identified the grassy clearing to the rear of his dwelling house on the 2017 Google Earth Image, which he considered reflected its size when he purchased his home in 1989. He said that he kept it clean and has used it the entire time he has occupied the property as he assumed it was his property. The Plaintiff said that he first used it to grow garden vegetables and maintained gardens "all the time" until his children graduated high school. He also used it for family recreational purposes and maintained a lawn. The Plaintiff averred there was a clothesline in the clearing which had existed at the time of purchase, which he utilized and occasionally replaced until electricity was put in the area.

[19.] The Plaintiff's evidence was that he used the water tank and clothesline in the same fashion as did Jordan Ritchie. When the Plaintiff was asked whether Jordan Ritchie ever used the water tank, he said that it came with the house, as it was the only source of water until City Water was installed at the house. Before City Water was installed, the water truck would replenish the water tank and that served as the house's only source of water. The water tank had a reservoir that Jordan Ritchie had built out of concrete and an 85-gallon rain water tank on top of it.

[20.] The Plaintiff averred that there was no survey attached to his conveyance. He said that he never thought to get the property surveyed in accordance with the conveyance from his brother because he was purchasing from his brother. The Plaintiff averred that all the structures around the house and area that was cleared back to the bushes in 1989 were regarded and used by him as being a part of, and included in, the conveyance to him.

[21.] The Plaintiff elaborated that there was only one cleared area when he purchased in 1989, the rest of the surrounding land being "bush", and he assumed that his property

was what was cleared. Nevertheless, under cross-examination, the Plaintiff admitted that he knew the legal dimensions of his property and that those dimensions were, strictly, 115 feet by 160 feet. He attempted to qualify this, however, by saying that there was no "beginning line" for those dimensions.

[22.] The Plaintiff deposed that he had owned and occupied the same parcel of land for almost 30 years and that, during that time, he regarded all of the property shown on the 2019 Albury Plan as being under his occupation, or a part of his home, and he "fully utilized" the same without disturbance, permission or consent from anyone. This, as will be seen, was an exaggeration. The Plaintiff's own evidence was inconsistent with this. The Plaintiff also deposed that no one had ever questioned his title or possession of the entire parcel during his occupation of the same. The Plaintiff averred that "everybody" knew that the property was his.

[23.] When asked since purchasing Parcel A how often he would have seen Jordan Ritchie "coming on to Parcel B", the Plaintiff answered that Jordan Ritchie could not have gotten onto Parcel B because "most of it was bush and the rest of it was my yard".

[24.] The Plaintiff stated that he was informed by Jordan Ritchie "during the latter part of 2018" that he had sold Parcel B to the Defendant. The Plaintiff admitted that he knew about the sale but thought Jordan Ritchie had sold "bush". The Plaintiff, at some unspecified time, obtained a copy of the conveyance from Jordan Ritchie to the Defendant and noted the plan accompanying the conveyance purported to include his rainwater reservoir, his gravity water-fed holding tank and the cleared grassy area to the rear of his home.

[25.] The Plaintiff acknowledged that Jordan Ritchie had offered to sell him the adjacent land to the north of his property but said that he declined to purchase it as he believed the property to be "bush" and felt he had enough property. The Plaintiff also conceded that he was aware that, sometime between 2000 and 2002, Jordan Ritchie had intended to sell land to Mousurri Peters and conceded it could have been Parcel B, but he maintained, in essence, that he believed that it had "nothing to do with him" as he did not appreciate that the land now in dispute was being offered for sale due to the uncertainty surrounding his boundaries.

[26.] The Plaintiff said that, in January 2019, he noticed that agents of the Defendant, without his permission or consent, had entered on the land shown on the 2019 Albury Plan edged in pink and cleared a portion of the same, plotted the layout for a building on the ground and placed property building materials. He said that he told Tanario Turnquest, the person conducting the work on behalf of the contractor on the job, that they were

trespassing, and he contacted Todd Cole, a relative of the Defendant's, to advise that the construction was being carried out on his property. The Plaintiff also wrote a letter dated 28 February 2019 to his Member of Parliament seeking assistance. That letter was not exhibited with his witness statement but was included in an affidavit filed by him in these proceedings on 14 March 2019.

[27.] The Plaintiff said that, in or about February 2019, he discovered that survey markers had been placed by surveyor Frank Dean on a portion of the land occupied by him which purported to establish a boundary line between his property and the property to the east of him. That survey marker ran through a portion of his rainwater reservoir, which he believed was included in his conveyance.

[28.] Under cross-examination, the Plaintiff admitted that he never built anything outside the boundaries indicated in his conveyance. The Plaintiff also admitted that he never planted hedges to exclude others or erected a fence or placed boundary markers to show where his claimed rear boundary ended. He acknowledged the property was "totally open". He admitted that there is one property in the area that is fenced but said the owner of that property does not live at the property. He averred that he could not have erected a fence as he was uncertain about the precise location of his boundaries. He also said that he hadn't felt there was a need for him to do so as Jordan Ritchie, his brother, owned "both sides" and he had no fear of anyone entering on his property.

[29.] The Plaintiff maintained that he had assumed or believed the property upon which the Defendant had begun construction belonged to him and not Jordan Ritchie. He attributed this to a lack of a survey plan accompanying the conveyance in 1989 and the fact that the property was not surveyed for 18 years. When he was shown the Williams Plan, the Plaintiff said that it was his belief that his boundary extended into "part of Parcel B".

[30.] The Plaintiff said that he never saw Surveyor Williams in 2007 nor did he see him in 2009. The Plaintiff also claimed that he never saw any survey markers Surveyor Williams put down. He was aware, however, that Surveyor Williams had surveyed the property. Jordan Ritchie had informed him that his property's boundary line at a distance of 160 feet actually ran through the middle of his bedroom and therefore couldn't be right. The pertinent boundary of his property was therefore informally "increased" to 178 feet without any conveyance to him.

[31.] The Plaintiff stated in passing that "on all he has left" of Parcel B, he does a small amount of pothole farming.

[32.] Having observed him giving evidence and reflected on his testimony, I was satisfied that the Plaintiff was a generally credible witness and has given an account that is largely true. I therefore accepted most of the Plaintiff's evidence save that I did not believe him when he said he "fully utilized" the disputed land, when he said that no one ever spoke to him or questioned him about his activities on the disputed land or when he said that Jordan Ritchie could not have accessed any part of the disputed land. I found these claims incredible in light of the other evidence before the Court.

Attorney Rose's Evidence

[33.] Attorney Rose is a friend of the Plaintiff and a US attorney licensed to practice in the States of Ohio and Florida who, together with two partners, purchased a home in *circa* 1988 on Long Island. His witness statement filed on 16 September 2020 stood as his evidence in chief and he was cross-examined.

[34.] In his evidence in chief, Attorney Rose said that he has known the Plaintiff and his wife (the "Ritchies") since shortly after he purchased his home in Long Island and he has visited them at their home many times since 1989. He said that during his visits, he personally observed:

(i) the location of the Ritchies' residence and the fixtures and accoutrements used by them at their home.

(ii) the Ritchies' maintenance and use of an underground water tank on the southeastern side adjacent to their home.

(iii) the Ritchies' maintenance and use of a permanent clothesline directly to the rear of their home.

(iv) the Ritchies' construction, maintenance and use of a large gazebo on the southeastern side of their home approximately 40 feet from their home.

(v) the Ritchies' maintenance and use of a secondary utility driveway and parking area at the rear of their home and approximately 25 feet from their home; and

(vi) the Ritchies' maintenance, grass mowing, landscaping and use of the property at the rear of their home not inhabited by permanent fixtures as an exercise and recreation area for the Ritchie family.

[35.] Under cross-examination, Attorney Rose said that he was not familiar with the Plaintiff's property prior to the Plaintiff purchasing it and he had not seen the Plaintiff's conveyance. He said since he started visiting the Plaintiff, he would visit the Plaintiff several times when he visited Long Island, which he did once per year for 1 to 3 months until the COVID-19 pandemic.

[36.] Attorney Rose said that he had personally used both driveways at the Plaintiff's property, and probably used the rear driveway once a trip as it was not the Plaintiff's main

driveway. His recollection was the rear driveway was made out of natural limestone and was very rough; it was not grown over by grass but the area surrounding the driveway had vegetation. He could not identify it on the 2017 Google Earth Map Image.

[37.] Having observed him, I found Attorney Rose to be a careful and credible witness. Despite his nexus to the Plaintiff, I accepted his evidence about the existence and locations of the water tank, gazebo, clothesline and rear driveway; his evidence that the Plaintiff maintained the water tank, the clothesline, the gazebo and the rear driveway; and his evidence that the Plaintiff landscaped and maintained the clearing and used it as an exercise and family recreation area.

[38.] However, as Attorney Rose's visits, though numerous, were only ever temporary and occasional, I could not place any real weight on Attorney Rose's evidence to the extent it was potentially probative of the regularity and exclusivity of the Plaintiff's use of the disputed land. I also disregarded the opinion evidence Attorney Rose expressed in his witness statement "as a practicing Real Property Attorney for approximately forty (40) years" as I held that evidence was inadmissible.

Lisa Jones' Evidence

[39.] Lisa Jones is a friend of the Plaintiff and a retired teacher who was posted to Long Island in January 1983 and remained in the service of the Ministry of Education until her retirement in 2017. She still lived in Deadman's Cay at the time of trial. Her witness statement filed on 21 January 2021 stood as her evidence in chief and she was cross-examined.

[40.] In her evidence in chief, Lisa Jones stated that she has known the Ritchies since they relocated to Long Island from New Providence in 1983. She recollected that, in 1989, the Ritchies took up residence at Jordan Ritchie's house. Jordan Ritchie was not resident in Long Island at the time, and they purchased the house from him. She said that she had spent much time, on many occasions, at the Plaintiff's residence, and could attest to the fact that:

(i) the Ritchies had 2 driveways, one to the front (west) of their house and one to the rear (east) of their house.

(ii) the Ritchies maintained a large area of lawn and flower bushes to the rear [east] of their house on which were located some clothes drying posts and lines, on which her children and the Ritchies' children had spent many hours in play, and which on social occasions would be furnished with tables and chairs for guests and used for off-road parking; and

(iii) from the time the Ritchies took up residence, there was a large, concrete rainwater tank to the south-east of the property. Initially, this was their only source of water until City Water was piped to the residence. Prior to this, a water delivery truck would replenish the water tank, using the rear driveway.

[41.] In cross-examination, Lisa Jones said that she first visited the property in 1982 but admitted she seldomly visited it between 1982 and 1989. Her evidence was that the area around the property was cleared in 1982, there was a clothesline at the rear of the property, and both driveways were on the property. Her evidence was that the rear driveway was a rock driveway that grass grew over from time to time.

[42.] Jones confirmed that, in 1982, the clearing at the rear of the property was cleared to the extent, or approximately to the extent, indicated on 2017 Google Earth Image, and she identified the clothesline as being in the same area pointed to by the Plaintiff in his evidence.

[43.] Having observed her giving evidence, I was satisfied that Lisa Jones was a candid witness who attempted to recall matters to the best of her ability. Despite her nexus to the Plaintiff, and even allowing for the considerable amount of time that has elapsed since some of the events in question, which events would have been trivial to her, I believed her evidence, which I found to be consistent with other evidence adduced at trial.

Defendant's Evidence

[44.] The Defendant is a retired teacher who was resident in New Providence at the time of trial. Her witness statement filed on 14 October 2020 and her supplemental witness statement filed on 30 November 2020 stood as her evidence in chief and she was cross-examined.

[45.] In her evidence, the Defendant deposed that she purchased Parcel B depicted on the Williams Plan (which she was shown before her purchase) from Jordan Ritchie by her conveyance and that she had completed the construction of a home upon it. She said that she had visited her home in Long Island "undisturbed" since it was completed and additionally noted that another building had been constructed on Parcel C depicted on the Williams Plan.

[46.] The Defendant stated that, before commencing the construction of her home, she prepared the property for building between December 2018 and January 2019. The Defendant said that at no time when she initially viewed the property prior to purchase or during the time that Parcel B was being prepared for construction did she see anything

on the property indicating that anyone other than Jordan Ritchie had been in possession of the parcel.

[47.] The Defendant's evidence was that, prior to her purchase of Parcel B or building upon it, there was no evidence of a fence, buildings, structures, any type of divider or any farming activity on the property. The Defendant also said that at no time during the construction of her home and since being in occupation of the home she constructed was anything done to indicate that the Plaintiff owned Parcel B. The Defendant averred that she had spent a total of $140,000 on labour, materials, furnishings, appliances, freight and taxes in addition to the purchase price of Parcel B.

[48.] In cross-examination, the Defendant confirmed that she had not gone into occupation of Parcel B before purchasing it but she had visited it in July 2018. She said that when she visited Parcel B, it was "just bush". However, she reluctantly accepted that there was a small clearing on the northern side of the Plaintiff's house when pressed, which she described as a "small walkway". When asked about whether she saw anything that showed Jordan Ritchie was in possession of the land, she said that she "knew a long time ago that the property belonged to Jordan Ritchie" as she is familiar with the area and is related to him.

[49.] Having observed her giving evidence, I found the Defendant to be credible on some matters but not others. She did not appear to be readily forthcoming with information that might damage her case during cross-examination. I accepted her evidence except for her evidence that Parcel B was exclusively bushland when she visited it in July 2018, her evidence that at no time during the construction of her house and since being in occupation thereof has anything been done to indicate that the Plaintiff owns Parcel B and the suggestion in her evidence that the Plaintiff knew he was not in possession of Parcel B at any time. On the first point, I preferred to place reliance on the 2017 Google Earth image and, on the other points, I preferred the Plaintiff's evidence.

Surveyor Williams' Evidence

[50.] Surveyor Williams' witness statement filed on 14 October 2020, his supplemental witness statement filed on 27 November 2020 and his second supplemental witness statement filed on 4 February 2021 stood as his evidence in chief and he was cross-examined. Surveyor Williams is *inter alia* a registered and licensed land surveyor under the *Land Surveyors Act, 1975*. Like Surveyor Albury he has given testimony before in proceedings in the Supreme Court of the Commonwealth of The Bahamas.

[51.] Surveyor Williams said that he first visited the Ritchie property in 1975. He agreed that the clearing depicted on the 2017 Google Earth Map Image was consistent with what

he had seen when he visited the property and he was able to identify the water tank on the 2017 Google Earth Map Image and the driveway to the rear of the Plaintiff's dwelling.

[52.] Surveyor Williams said he surveyed the property at the instance of Jordan Ritchie in 2007 and placed survey markers on Parcel B. He said he again surveyed the property at the instance of Jordan Ritchie sometime in 2009 after which he prepared the Williams Plan but, in his testimony at trial, he said he could not recall placing survey markers in 2009. His witness statement said that he placed the survey markers on Parcel B in 2009.

[53.] Surveyor Williams said that, in addition to the survey markers placed by him, the Plaintiff should have known that there were survey monuments placed on the property in 2014 when Roland John, another surveyor, surveyed the area at the instance of Lowell Moree. Surveyor Williams noted that the Plaintiff erected his Gazebo on property that is said to be owned by Lowell Moree.

[54.] Surveyor Williams reviewed the 2019 Albury Plan and opined that the 2019 Albury Plan does not match the description of the land sold by Jordan Ritchie to the Plaintiff in his conveyance nor is the eastern boundary on the plan consistent with the land Jordan Ritchie purchased from Ethel Rogers according to the conveyance. Surveyor Williams also expressed other criticisms of the 2019 Albury Plan but these criticisms were undermined during cross-examination.

[55.] Surveyor Williams agreed that his "position plan" differed from the 2019 Albury Plan because his was based on the conveyancing description of the Plaintiff's land. He accepted that an occupational survey would not match the conveyancing description if the occupation of the property differed from the position of the boundaries as stated in the conveyance.

[56.] When asked whether he had seen Jordan Ritchie's conveyance, Surveyor Williams said that he was told the dimensions of the property by Jordan Ritchie but he could not recall those dimensions. He said the dimensions given to him intersected the Plaintiff's house and Jordan Ritchie was apprised of the situation.

[57.] Surveyor Williams accepted that once the conveyancing dimensions were found to have intersected the Plaintiff's house, they had to move the boundary marker further to the northeast. He recalled the distance it was shifted as being 6 feet, however, after further questioning, he accepted the Plaintiff's northeastern boundary marker had been moved 18.36 feet further to the north *inter alia* to comply with Ministry of Works' requirements. He acknowledged that this encroached on Parcel B. Surveyor Williams said

that the Plaintiff's boundary line extended by 6 feet "crossed-over" the water tank and gave the Plaintiff the majority of the water tank.

[58.] Surveyor Williams estimated that the Plaintiff's land (Parcel A) on the Williams Plan measured 178.36 feet by 115 feet and that Parcel C on the Williams Plan measured 82 feet by 120 feet. Surveyor Williams said that, with the clearing, Parcel A measured 115 feet by 198 feet.

[59.] Having observed Surveyor Williams giving evidence, I was content to accept his evidence at trial, including that he set survey monuments on Parcel B in 2007 and not 2009, except for his evidence about what the Plaintiff "should have done" and the criticisms that he made of the 2019 Albury Plan, that I have noted were undermined during cross-examination.

Contractor Burrows' Evidence

[60.] Contractor Burrows is the contractor that completed the Defendant's home on Parcel B. His witness statement filed on 29 January 2021 stood as his evidence in chief and he was cross-examined.

[61.] Contractor Burrows deposed that he first visited the property in December 2018. Contractor Burrows said that, prior to commencing the construction of the Defendant's home, there was no evidence of any previous construction of any kind or any farming on the property. However, he accepted in cross-examination that there was a clearing on the north side of the Plaintiff's property and agreed there was a "little" unpaved access road. He could not recall whether a car or truck could drive up it. He said he had walked onto the property from the north side. He described Parcel B at the time as being elevated on a hill with trees surrounding it, with a little clearance at the highest elevation. He accepted there was a rain water tank on the Plaintiff's land which extended onto the Defendant's property and he accepted that the home that he built was very close to the water tank, but not that it touched it.

[62.] Contractor Burrows stated that the Defendant's home on Parcel B was constructed between January 2019 and May 2019 and confirmed that a Certificate of Occupancy has been issued in respect of it. He deposed that, after completing the building in May 2019, he was further instructed to build a driveway on the property, which he built out of concrete slab, curbs and finishing rocks during December 2019. Contractor Burrows' evidence was that prior to construction of the driveway, there was no driveway on the Defendant's property. I understood him to mean no paved driveway. He said that both the building and the driveway were constructed completely undisturbed.

[63.] Having observed him giving evidence, I found Contractor Burrows to be a candid witness and was content to accept his evidence, except that I did not accept that both the building and the driveway were constructed completely undisturbed in light of the fact that, again, I believed the Plaintiff regarding the steps he took following him noticing people had cleared and begun construction on Parcel B in January 2019. In fairness to Contractor Burrows, however, there is no evidence that what was communicated to Tanario Turnquest was communicated to him.

Jordan Ritchie's Evidence

[64.] Jordan Ritchie is the Plaintiff's brother and a retired educator and family island administrator. He served as a public servant for 46 years. He has been a Justice of the Peace since 2000. His witness statement filed on 14 October 2020 and his supplemental witness statement filed on 29 January 2021 stood as his evidence in chief and he was cross-examined. I found him to be credible as to some issues but not others. Unlike with the other witnesses, it is most convenient to express my findings as I recount his evidence.

[65.] In his evidence, Jordan Ritchie confirmed that he purchased around 2 acres of land in Long Island from Ethel Rogers, his late aunt, on or around 6 April 1973, and that he conveyed around 1.2 acres of those 2 acres to the Plaintiff on or around 7 June 1989 and around 0.25 acres of those 2 acres to the Defendant on or around 22 June 2018. This is substantiated by documentary evidence and is evidence that I readily accepted.

[66.] There is in evidence a copy of a deed of gift dated 6 April 1973 from Ethel Rogers to Jordan Ritchie. The legal description in the parcels clause reads:

> ALL that piece parcel or lot of land being part of a tract of land known as "Buckleys" situate in Deadman's Cay in the said Island of Long Island and bounded as follows:- On the North by land the property of the Donor and running thereon One Hundred and Fifteen (115) feet, on the East by land the property of the Donor and running thereon Three Hundred and Sixty (360) feet, on the South by land the property of the Donor and running thereon One Hundred and fifteen (115) feet, and on the West by a public road lading from the main public road to the north beach and running thereon Three Hundred and Sixty (360) feet

[67.] There is also in evidence a copy of a conveyance dated 5 July 2018 from Jordan Ritchie to the Defendant. The legal description in the parcels clause reads:

> ALL THAT piece parcel or lot of land containing 9,980 square feet and being a portion of a larger tract of land which is a portion of an original piece parcel or track of land and being a Portion of the Buckley's Estate situated in the Settlement of Buckleys on the Island of Long Island which said piece parcel or lot of land is bounded Southwesterly by land now the property of Gary A. Ritchie and running thereon One Hundred Twenty One and Eighty-hundredths (121.80) Feet Southeasterly by land the property of Lowell Moree and running thereon Eighty Two and Zero Six-hundredths (82.06) Feet Northwesterly by a street commonly called Buckley Road and running thereon Eighty Two and Zero Seven

> Hundredths (82.07) Feet Northeasterly by a portion of the same Track, the property of the Vendor and running thereon One Hundred and Twenty one and Fifty Sixth Hundrets [sic] (121.56) Feet which said piece parcel or lot of land has such position shape boundaries marks and dimensions as are shown on the diagram or plan attached to the said Indenture and is thereon coloured Pink.

[68.] Jordan Ritchie said that he visited the property at least once per year between 1989 and 2018 until he conveyed Parcel B to the Defendant in 2018. He was never seriously questioned on the basis that he did not conduct these visits and I therefore accepted this aspect of his evidence.

[69.] Jordan Ritchie claimed the Plaintiff was at no time in possession of Parcel B or Parcel C and never disturbed his use of those properties. I accepted that evidence about his perception of the state of affairs on Parcel B and Parcel C. He said there was nothing built nor constructed on Parcel B or Parcel C since the Plaintiff acquired Parcel A and no farming on the properties. I accepted this evidence as it was corroborated by other evidence.

[70.] Jordan Ritchie denied that there was a clearing to the north of the Plaintiff's dwelling house or that there was ever a clothesline on Parcel B or Parcel C. He said that the clothesline he established when he occupied the Plaintiff's property was located between the carport of the Plaintiff's home and Buckley's Road. This evidence was against the weight of the evidence and I therefore rejected it.

[71.] Jordan Ritchie acknowledged the existence of the generator house and the water tank, which he said pre-existed the Plaintiff's dwelling house. However, he said that the water tank, which he agreed was mostly on the Plaintiff's land and was about 4 feet from the Defendant's building, had been abandoned by the Plaintiff for "a long time" and was now a health hazard. I accepted his explanation that, after the Plaintiff's house was connected to City Water in 1995, there was no longer a use for the water tank after that.

[72.] Jordan Ritchie disputed that the Plaintiff ever used a driveway other than the driveway on the southern side of his house which leads to his front door. He could not say who created the rear driveway as he said he never saw it on his annual visits. I was not satisfied with Jordan Ritchie's evidence on this point. His evidence was difficult to reconcile with his statement that, if the Plaintiff had to have water delivered to the water tank, the water truck would park on an unpaved road and use a pump. I therefore did not accept it.

[73.] Jordan Ritchie testified that, in 1975, he commenced building the dwelling house he eventually sold to the Plaintiff with the intention of using it as the family's vacation

home and a rental "home away from home". He said that four survey stakes were placed in 1975, two on the southern boundary and two on the northern boundary marking out 360 feet by 115 feet. He asserted the survey monuments that existed in 1975 were present on the land when he sold Parcel A on the Williams Plan to the Plaintiff but there was nothing to corroborate this and so I did not accept this evidence.

[74.] Jordan Ritchie said that, when he built the home on the Plaintiff's land, he intended to add another two small cottages as rental units, which created a need for a water tank, a generator house and a septic soak away, but he was transferred from Long Island to Grand Bahama before he could do so. He said that he completed the Plaintiff's home in or about 1980 and that, before he sold it to the Plaintiff, he vacationed there occasionally and rented it out when not staying there. He denied he built the house with the intention of selling it to the Plaintiff. I accepted his evidence as to these matters.

[75.] Jordan Ritchie accepted that the Plaintiff's house formed a part of the land conveyed to the Plaintiff in 1989. He explained that, sometime in the 1980s, the Plaintiff relocated to Long Island with his family. Jordan Ritchie put the dwelling house on the market for sale for $90,000 but the Plaintiff begged him for the house, so he sold the Plaintiff the home for $30,000 out of genuine love and affection and because he was living with their parents and Jordan Ritchie wished to make things more comfortable for the Plaintiff and his family. Jordan Ritchie admitted that he did not point out on the ground what the Plaintiff was buying at the time of the sale of the land to him. I accepted his evidence as to these matters.

[76.] Jordan Ritchie accepted in cross-examination that, when he intended to sell the property he sold to the Plaintiff, he intended to sell the whole house and the grounds that the house occupied. However, he did not accept without qualification that he intended to sell the Plaintiff the features that he occupied when he (Jordan Ritchie) lived there. He said he did not intend to sell the entirety of the grounds he utilized when he occupied the land to the Plaintiff and, in relation to the water tank, he said he intended for both he and the Plaintiff to use it, which is something he communicated to the Plaintiff. He said while use of the water tank was not stated in the conveyance to the Plaintiff, the property conveyed was 160 feet by 115 feet and he intended the Plaintiff to use whatever was there on the 160 feet by 115 feet. He admitted, however, that he did not know exactly where the 160 feet stopped. I viewed this evidence with some skepticism but it is ultimately unnecessary for me to make a finding as his subjective intentions are irrelevant. This is not an action for rectification.

[77.] Jordan Ritchie accused the Plaintiff of having changed his attitude after the sale of his dwelling house to him. He said that the Plaintiff has intentionally sought to acquire

more than what he was legally entitled to. Jordan Ritchie said that, as a result, he "always" visited the property and "often" reminded the Plaintiff that he was sold "160 feet only", as specified in his conveyance, and that he was misusing property not owned by him. While I accepted Jordan Ritchie's evidence that he visited the property and confronted the Plaintiff about his use of Parcel B, I did not accept that the Plaintiff had a change of attitude, as alleged, and has deliberately sought to acquire more land than was sold to him. The Plaintiff appeared to me to be genuinely mistaken about his boundaries.

[78.] Jordan Ritchie said that the Plaintiff has had every opportunity to purchase Parcel B before it was sold to someone else legitimately but failed to do so. He said that he has offered to sell Parcel B to the Plaintiff but the Plaintiff was not in a position to pay for it. Although I did accept that Jordan Ritchie offered to sell Parcel B to the Plaintiff, I did not see the Plaintiff's refusal as significant, as I accepted the Plaintiff's evidence to the effect that he did not have a full appreciation of what he was being offered to purchase.

[79.] Jordan Ritchie acknowledged that the 160 feet conveyed by him to the Plaintiff in 1989 did not include the whole house in which the Plaintiff resides. He said that an extra 18.36 feet was notionally "granted" to the Plaintiff and was determined by "the surveyors" after surveying the land. According to Jordan Ritchie, Surveyor Williams said that if the Plaintiff did not want Parcel B, he (Jordan Ritchie) would have to give the Plaintiff an extra 6 feet beyond the house in order to comply with the *Bahamas Building Code*. I accepted this evidence.

[80.] When asked when the Plaintiff's encroachment on his land began, Jordan Ritchie said he could not recall precisely when but there was a hurricane that damaged the Plaintiff's property and, in the aftermath of that hurricane, the Plaintiff had used holes on Parcel B to dump garbage and kept doing so until the Defendant began building her home. Jordan Ritchie appeared to assert that dumping garbage in holes on Parcel B was the Plaintiff's only encroachment that he was personally aware of. I accepted this evidence.

[81.] Jordan Ritchie denied that the Plaintiff occupied the property shown on the 2019 Albury Plan since 1989 (apart from the additional 18.36 feet exceeding the boundary in his conveyance).

[82.] Jordan Ritchie confirmed that there was no agreement for the Plaintiff to do so (apart from the additional 18.36 feet exceeding the boundary in his conveyance). When asked whether he tried to stop the Plaintiff, he said that he only advised the Plaintiff to stop, as he was his brother, the implication being that he took no formal steps to do so. I accepted this evidence.

[83.] Jordan Ritchie's evidence was that the Plaintiff knew Parcel B rightfully belonged to him and that he (Jordan Ritchie) had, in the past, exercised rights of ownership which the Plaintiff did nothing about. He mentioned a potential sale to Missouri Sherman Peters between 2000 and 2002, and the fact that he continued to list Parcel B with real estate agents after that sale fell through, without challenge from the Plaintiff. He said the potential sale of Parcel B was always known to the Plaintiff. I accepted this evidence save that I found the Plaintiff knew Jordan Ritchie owned property to the rear of his house without knowing precisely what the boundaries of that property were.

Submissions

[84.] At the conclusion of the evidence, the parties were directed to submit written closing submissions by 14 May 2021 with liberty to reply within 7 days. The Plaintiff lodged written closing submissions dated 22 July 2021. The Defendant lodged written closing submissions bearing no date after a period of excusable delay. I have considered the submissions advanced and the authorities relied on by the parties but refer to them only briefly below. The fact that not all such submissions and authorities have been referred to does not mean that they have not been considered.

Issues

[85.] The parties differed in the issues they identified in their respective statements of facts and issues. Nevertheless, both parties identified the key issues of whether the Plaintiff was in continuous exclusive possession of the land now in dispute for the applicable period under the ***Limitation Act*** and, if so, whether the Plaintiff's exclusive possession "defeats" or "ousts" the Defendant's title. I confine my attention to those issues. Whether the Defendant is or was in breach of the *Building Code* is only relevant if the Plaintiff is otherwise successful and the question of whether an injunction should issue is live.

[86.] The Plaintiff sought to raise in his closing submissions the new point, of whether his perceived curtilage passed to him under his conveyance, pursuant to ***section 6*** of the ***Conveyancing and Law of Property Act***. In this connection, the Plaintiff sought to rely on the English cases ***International Tea Stores Co v Hobbs [1903] 2 Ch. 165*** and ***Kay v Oxley [1875] LR 10 QB 360*** in submitting on the interpretation and application of ***section 6*** of the ***Conveyancing and Law of Property Act*** to the facts of this case.

[87.] ***Section 6*** of the ***Conveyancing and Law of Property Act*** provides, in pertinent part:

> 6. (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, hedges, ditches, walls, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised,

> occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
> (2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, tanks, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses or other buildings conveyed, or any of them, or any part thereof.
> ...
> (4) This section shall not be construed as giving to any person a better title to any property, right or thing in this section mentioned than the title which the conveyance gives to him to the land expressed to be conveyed, or as conveying to him any property, right or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

[88.] It is sometimes acceptable for new points to be taken at the stage of closing submissions. There are, however, several objections that counsel might take. In ***Marubeni Hong Kong Ltd v Mongolian Government [2005] 1 WLR 2497***, *Carnwath LJ* (as he then was) said at paragraph 37:

> ...Where a new point is sought to be raised in closing, the objection may take a number of forms, and the court's response will differ accordingly. If the objection is that the new point is not covered by the pleadings, the court can insist on an application to amend, and rule accordingly. If the problem is that the witnesses have not had an opportunity to deal with the new point, it may be possible to recall them. It might have been open to Mr White to make a more fundamental objection: that a complex and expensive case had been conducted for 10 days by each party on a particular basis, and that it would be contrary to the overriding objectives of the Civil Procedure Rules to allow a change. It is unnecessary for us to consider how, if such an objection had been made, the judge should have dealt with it.

[89.] In the case at bar, the Plaintiff's attempt to raise his new point in closing submissions was met with silence. Silence may, in many cases, warrant a court entertaining a new point in an adversarial system such as ours. However, as a matter of case management, I do not propose to entertain the Plaintiff's new point. The Plaintiff was evidently content to run a case to trial on the basis of adverse possession and I have not had proper argument on the new point, raised at the eleventh hour, such as might enable me to properly decide it. While my provisional view is the new point does not avail the Plaintiff, the point is potentially prejudicial to the Defendant without a further opportunity to address it, and to reopen the matter at this stage would entail further expense and delay which is best avoided.

Law and Discussion

[90.] The general principles of the law of adverse possession have been discussed in numerous local, Caribbean, and English decisions, perhaps most recently in this jurisdiction in the judgment of *Charles JA* in ***Carla Anita Cecilia Braynen Turnquest v Water and Sewerage Corporation SCCiv App No. 5 of 2023*** (5 December 2023). While there is little difference between the parties on the applicable law, it is useful to undertake a review of the general principles before applying them to the facts.

The meaning of "adverse possession"

[91.] "Adverse" in the expression "adverse possession" refers not to the quality of the possession but to the capacity of the party claiming possessory title, as being a person in whose favour the period of limitation can run and whose possession is adverse to the interests of the documentary title holder. It does not connote an element of aggression, hostility or subterfuge, nor does it shed light on whether the possessory claimant is or is not in possession of the land: ***J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419*** at [35], [36], [69].

The applicable limitation period and from when time starts to run

[92.] Pursuant to ***section 16(3)*** of the ***Limitation Act***, an action to recover land in adverse possession may not be brought by any person (other than the Crown) after the expiration of 12 years from the date on which the right of action accrued. If the entry took place prior to 28 March 1995, the limitation period is, on the current state of the law, not 12 years but 20 years, by virtue of the proviso contained in ***section 16(1)*** of the ***Limitation Act***: ***Eric Hepburn v Moyia Taylor SCCivApp No. 130 of 2017*** (13 December 2018) at [12] to [18] (but cf ***Bannerman Town v Eleuthera Properties Ltd [2018] UKPC 17*** at [70]). For time to run under the ***Limitation Act*** there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not: ***The Trustees, Executors and Agency Company Ltd v Short (1888) 13 App Cas 793*** at page 798.

[93.] There is a factual presumption that possession of land is retained by the documentary title holder. Accordingly, any person claiming title to land by adverse possession must show either discontinuance of possession by the documentary title holder followed by their (or a predecessor's) possession or dispossession by them (or a predecessor) which effectively ousts the documentary title holder: ***James Wallace and Martha Wallace v Addington Nairn Jr. [2017] 2 BHS J. No. 27*** at [77]. ***Section 17(1)*** of

the ***Limitation Act*** stipulates that the right of action to recover land is deemed to accrue on the date of the dispossession or discontinuance of possession.

Possession in law

[94.] There are two elements necessary to establish possession in law: (1) a sufficient degree of physical custody and control of the land (factual possession) and (2) an intention to exercise such custody and control on one's own behalf and benefit (intention to possess): ***J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419*** at [40], [70]. A possessory claimant must therefore establish both (1) continuous undisturbed factum possessionis (factual possession) and (2) continuous intention to possess the land claimed (animus possidendi) for the statutory period: ***In the matter of the Petition of Kirkwood D Knowles [2022] 1 BHS J No 147*** at [54]. The burden of proof lies on the possessory claimant.

Factual possession

[95.] Generally, factual possession requires some occupation, use or other dealing with the land as an occupying owner might have been expected to undertake: ***Bannerman Town v Eleuthera Properties Ltd [2018] UKPC 17*** at [71]. The adverse possessor must show they have been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so: ***Armbrister v Lightbourn [2012] UKPC 40*** at [82]. The Court will not readily infer possession from relatively trivial acts: ***Wills v Wills [2003] UKPC 84*** at [19]. There is no additional legal requirement that the adverse possessor's use of the land must be inconsistent with the true owner's intended use of it: ***J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419*** at [45].

[96.] The question of what acts constitute a sufficient degree of exclusive physical control so as to amount to possession of the particular land is a case-specific question which must be examined in light of the particular circumstances. The acts implying possession in one case may be wholly inadequate to prove it in another. The character and value of the land, the suitable and natural mode of using it and the course of conduct which the owner might reasonably be expected to follow with a due regard to his own interests, are all factors that must be taken into account: ***Lord Advocat v Lovat (1880) 5 App. Cas 273*** at page 288. Because of the consequences of adverse possession, the possession must be openly enjoyed so that the true landowner can know that he must take action to recover his land: ***George Nathaniel Hall and another v Anthony Dean [2021] 1 BHS J. No. 203*** at [35].

Intention to possess

[97.] The requisite intention to possess has been phrased as an intention to exclude the world at large, including the documentary title holder, so far as is reasonably practicable

and so far as the processes of the law will allow: ***Buckinghamshire County Council v Moran [1990] Ch 623*** at page 640. It has also been phrased as an intention to occupy and use the land as one's own: ***J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419*** at [71]. This has two elements: (1) a subjective intention to possess (which involves showing that the trespasser actually had the requisite intention to possess) and (2) some outward manifestation of the trespasser's subjective intention which makes clear that intention to the world at large: ***Smith v Waterman [2003] EWHC 1266 (Ch)*** at [19]. The Court will insist on "clear and affirmative evidence": ***Powell v McFarlane (1977) 3 8 P&CR 452*** at page 472.

[98.] The ordinary way in which the relevant intention is ascertained is by inference from the actions of the adverse possessor because evidence from the adverse possessor as to their state of mind is usually of little evidential value: ***Powell v Macfarlane (1977) P & CR 452*** at pages 476 to 477. The intention to possess must be manifested clearly so that it is apparent that the person claiming to have been in possession was seeking to dispossess the true owner. If the acts relied on are equivocal and open to more than one interpretation, then they will not in and of themselves demonstrate the necessary intention to possess: ***J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419*** at [40], [76], [77]. The mere fact that the putative adverse possessor was operating under the mistaken belief that they were the true owner of the land does not preclude them from establishing adverse possession: ***Roberts v Swangrove Estates Ltd [2008] Ch 439*** at [87]; ***Toolsie Persaud Ltd v Andrew James Investments Ltd (2008) 72 WIR 292*** at [25].

The effect of adverse possession being established for the statutory period

[99.] The effect of an adverse possessor being in continuous and exclusive possession without the consent of the true owner for the applicable statutory period is that the documentary title holder cannot recover the land in adverse possession: ***Ocean Estates Ltd v Pinder [1969] 2 AC 19*** at page 25. The possession must be without the consent of the true owner because possession is not adverse if it is with permission: ***Ramnarace v Lutchman [2001] 59 WIR 511*** at [10]. Pursuant to ***section 25*** of the ***Limitation Act***, at the expiration of the limitation period prescribed by the Act, the estate or interest of the documentary title holder vests by operation of law in the adverse possessor without any requirement for a Certificate of Title or a declaration from the Court: ***Keith Rolle v Raymond Meadows [2021] 1 BHS J. No.275*** at [46].

Stopping time running under the Limitation Act

[100.] Neither a demand letter nor an oral demand requiring the trespasser to vacate suffices to stop time from running under ***section 16*** of the ***Limitation Act:***: ***Keith Rolle***

v Raymond Meadows [2021] 1 BHS J. No. 275 at [58]. The remedy of a documentary title holder whose attempts to request possession are rebuffed, is either to commence legal proceedings for possession, which will stop time running, or, if it can be done without breach of the criminal law, to re-enter, re-take possession and throw the trespasser out: ***Higgs v Leshelmaryas Investment Company Limited [2009] UKPC 47*** at [57]. An oral acknowledgment of title by the adverse possessor is ineffective to stop time running: ***Browne v Perry [1991] 1 WLR 1297*** at pages 1301 to 1302.

Application of the law to the facts

[101.] Turning to the case at bar, the Plaintiff's case is that, applying the principles established by the authorities, by virtue of his use of the disputed land established by the evidence, the Plaintiff dispossessed Jordan Ritchie, the Defendant's predecessor in title, from 1989 onwards, without his permission, and, therefore, when Jordan Ritchie purported to sell Parcel B to the Defendant in July 2018, he had no valid title to convey to the Defendant as his title had already been extinguished under the ***Limitation Act***.

[102.] The Defendant's core response is that the Plaintiff has not demonstrated open, peaceful and undisturbed possession of the disputed land since Parcel A was conveyed to him in 1989.

[103.] Having considered the evidence and the competing positions of the parties, as set out in their respective closing submissions, bearing in mind the size and character of the disputed land, I concur with the Defendant that the Plaintiff has not demonstrated open, peaceful and undisturbed possession of the disputed land for 20 years, the applicable statutory period based on the Plaintiff's entry in 1989.

[104.] I readily accept the Defendant's submission that the mere presence of the Plaintiff on part of the disputed land, without more, did not establish possession. It is necessary to consider the Plaintiff's use of the land. The evidence establishes that the Plaintiff maintained and sometimes personally used the rear driveway, permitted guests and family members to sometimes use the rear driveway, used the water tank until City Water was connected in 1995, dumped garbage in holes on Parcel B for an unknown period of time, maintained and landscaped the rear clearing, used and replaced the permanent clothesline on the rear clearing until electricity was brought to the area, and used the rear clearing as a backyard, exercise and family recreational area and for occasional social functions. Those acts are relatively trivial in the scheme of things and are quite consistent with acting under easements than under a freehold title.

[105.] While a person may exercise physical control over land in a diversity of ways, the authorities are clear that relatively trivial acts rarely suffice to establish possession, and I would hold on the facts of this particular case that the Plaintiff's relatively trivial acts do not do so. The Plaintiff did not carry out any substantial improvements to the land which would have made an intention to possess clear and it is, in my estimation, of some significance that the Plaintiff also did not erect a fence around the land now in dispute or otherwise attempt to enclose it. There is no evidence that the Plaintiff ever excluded or attempted to exclude Jordan Ritchie from free access to the disputed land. To the contrary, it appears that Jordan Ritchie was free to visit the land as he pleased, and did so by his annual visits. That is hardly consistent with exclusive possession and the requirement to clearly manifest an intention to possess to the exclusion of the true owner.

[106.] In the final analysis, the burden of proof to establish adverse possession was on the Plaintiff. It was for him to demonstrate the necessary elements to the standard of the balance of probabilities for the statutory period under the ***Limitation Act***, which was 20 years on the Plaintiff's theory of case. The Plaintiff's established acts were at best equivocal. The Plaintiff's case, such as it was, was greatly harmed by the scanty quality of his evidence. The lack of detail in the Plaintiff's evidence regarding the continuity, extent and regularity of the Plaintiff's activities on the disputed land put it beyond him to establish that he exercised the open control and dominion that an owner in occupation might reasonably have been expected to have done or that he clearly manifested the necessary intention to exclude the world at large, including Jordan Ritchie, though I do find he subjectively had an intention to possess the disputed land as he believed he owned it.

[107.] I am only concerned in this action with the relative strengths of the titles proved by the parties: ***Ocean Estates Ltd v Pinder [1969] 2 AC 19*** at page 25. The Plaintiff has failed to make good his adverse possession claim. On the evidence, I find that the Defendant was a *bona fide* purchaser for value of Parcel B and is the documentary owner in fee simple of Parcel B by virtue of her conveyance dated 22 June 2018 from Jordan Ritchie. The Plaintiff has no better title to Parcel B and therefore cannot succeed in trespass.

Conclusion

[108.] For the foregoing reasons, the Plaintiff's claim is dismissed. I see no basis to depart from the usual rule that costs follow the event. However, before making any order as to costs, I will allow the Plaintiff 7 days to lodge written submissions on costs, which are not to exceed 5 pages, should he wish for some other costs order to be made. Should costs follow the event, I intend to fix the costs of the action. The Defendant is accordingly to

lodge and serve a bill of costs within 14 days and the Plaintiff may lodge and serve written representations on quantum within 7 days thereafter. I thank counsel for their assistance.

Dated the 19th day of December, 2023

Sir Ian R. Winder
Chief Justice