

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF THE BAHAMAS
2017/CLE/gen/FP/00142

BETWEEN
RAYMOND MEADOWS
Plaintiff
AND
KEITH ROLLE
DOROTHEA AVRIL ROLLE
First Defendants
AND
FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED
Second Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES: Miss Meryl Ginton for the Plaintiff
Mr. Harvey Tynes, QC and Tanisha Tynes-Cambridge for the First
Defendants
Mrs. Aisha Stuart-Smith for the Second Defendant
TRIAL DATES: 9th and 13th August, 2019

JUDGMENT

Hanna-Adderley, J

Introduction

1. The Plaintiff and the First Defendants are adjacent property owners. This is an action commenced by the Plaintiff against the Defendants by way of Writ of Summons filed on the 3rd July, 2017.
2. In his Writ of Summons the Plaintiff claims that as a result of the First Defendants encroachment onto a portion of his property, namely 1.305 acres comprising a portion of

Tract '19A' situate on Lunar Boulevard in the area known as 'Britannia' in the City of Freeport on the Island of Grand Bahama, one of the Islands of the Commonwealth of The Bahamas ("the Subject Property"), by way of the erection of a fence and the pouring of a paved roadway, covering a 10 foot wide portion of the Subject Property ("the disputed strip of land"), he has suffered loss and damage. Specifically, the Plaintiff seeks an Order for vacant possession, damages for tortious interference, interest and costs.

3. The Plaintiff also claims against the Second Defendant for breach and/or frustration of the terms of an Indenture of Conveyance ("the Conveyance") made on the 1st February, 2017 between the Plaintiff and the Second Defendant and a Mortgage Agreement ("the Second Mortgage") by which the Second Defendant sold and conveyed to the Plaintiff the Subject Property which breaches and or renders the Conveyance and the Second Mortgage null and void. On the 11th October, 2018 the Court ordered that the trial of the action would proceed against the First Defendants until a further order is made.
4. The First Defendants filed their Defence on the 12th July, 2017 denying that they had interfered with the Plaintiff's use or enjoyment of the Subject Property. The First Defendants rely on the defence of adverse possession as they claim that they erected a commercial complex which is adjacent to the Subject Property over 13 years prior to the issue of the Writ of Summons and has not paid any rent to the Plaintiff or any person from whom the Plaintiff derived title. The First Defendants also rely on the defence of the Plaintiff's claim being statute barred under the provisions of Section 16(3) of the Limitation Act 1995 and that the Plaintiff's right and title (if any) to the said land has been extinguished by virtue of Section 25(1) of the said Act.
5. The Plaintiff was subsequently granted leave to amend his Writ of Summons, which was filed on the 2nd August, 2019 by inter alia, adding the wife of the First Defendant as a party to the action, deleting his claim for damages for breach of contract and by adding a claim for tortious interference as against the First Defendants.
6. In response to the Plaintiff's Amended Writ of Summons the First Defendants filed their amended Defence on the 6th August, 2019. Thereafter, the trial of this matter was heard on the 9th and 13th August, 2019. The Plaintiff relied on Written Submissions dated the

29th January, 2020 and 3rd July, 2020 and the First Defendants relied on Closing Submissions filed the 5th December, 2019 and dated 3rd July, 2020.

7. Essentially, the primary issue to be determined in this action is whether the First Defendants have encroached on the disputed strip of land and are thus trespassers and if so whether the First Defendants can rely on the defences of adverse possession and statutory limitation.
8. I find that the Plaintiff's claim is a claim in trespass alone to which the defences of adverse possession and statutory limitation are unsustainable.

Statement of Facts

The Plaintiff's Case

9. The Plaintiff relied on the evidence of two witnesses, namely, his evidence and Mr. Randy D. White, Land Surveyor whose evidence-in-chief was contained in their Witness Statements filed the 3rd May, 2019 and the 13th August, 2019, respectively.
10. The Plaintiff stated in his evidence-in-chief that he purchased the Subject Property on or about the 1st February, 2017 and subsequently mortgaged it to the Second Defendant. Shortly thereafter, he decided to take steps to enhance the Subject Property and engaged the services of a property surveyor to, amongst other things, stake the boundaries of the Subject Property. While he could not be sure, it seemed likely that the fence and roadway had been erected by the owner of the neighboring property, who he knew to be Keith Rolle, one of the First Defendants. On or about 3rd March 2017, he met with Mr. Rolle at his office and alerted him to the encroachment. Mr. Rolle acknowledged that his fence and roadway were indeed encroaching on the Plaintiff's property, and that the portion of the property rightly belonged to the Plaintiff. That Mr. Rolle explained that he had asked the former owners of the property to allow him to make use of the portion of land, and that they had agreed. That approximately one week later, he met with Mr. Rolle and offered to give him a lease for that portion of the Subject Property for a fair price. That he and Mr. Rolle discussed having their lawyers prepare paperwork, however, shortly after that meeting Mr. Rolle changed his mind and refused to negotiate.
11. During cross-examination by Counsel for the First Defendants, Mr. Harvey O. Tynes, QC the Plaintiff stated that before purchasing the property he did not look for any boundary

stakes relating to the property he was buying nor did he ask anyone at the Bank to show him the boundary stakes. His evidence was that before purchasing the property he had seen a paved roadway running from east to west on the northern side of the fence that separated the two properties, a fence and a grass verge about 12 to 18 inches wide. The Plaintiff stated that he did not know when the fence was erected nor how long it had been there and stated that before making the purchase of the property that he did not know how long the paved roadway had been there nor who had created it. He stated that it was his belief that Mr. Rolle erected the fence and created the roadway because Mr. Rolle was the only one who had access to the road and the gate. He further confirmed that the state of the property i.e. the fence, paved roadway and grass verge was, the physical state of the affairs when he purchased the property and he stated that he assumed that the land on the northern side of the fence belonged in its entirety to the First Defendants.

12. The Plaintiff stated that he attended to Mr. Rolle's office on the 3rd March, 2017 for a meeting and that the purpose of the meeting was to tell Mr. Rolle that he had his property surveyed and he had a report that the First Defendants were infringing on a piece of his property and that this was the first time that he had spoken to him about the subject. He stated that he did not have a copy of the surveyor's report during the meeting that day and that Mr. Rolle admitted that the fence and road were his but belonged to the Plaintiff. The Plaintiff accepted that letters written on his behalf by his attorneys to the First Defendants or their attorneys did not include that Mr. Rolle had acknowledged that the property rightly belonged to him, provide any reference about Mr. Rolle's explanation that the former owners had given him permission to make use of the portion of the roadway, or given him any permission to use the property.
13. Under re-examination by his Counsel, the Plaintiff stated that his state of mind during his meeting with Mr. Rolle was based on what the surveyor had given him, that he didn't know who purchased the fence on the property, who laid the cement on the property, and that the fence and cement were not his. He stated that the option of the First Defendants renting the "encroached property" was put to him via the letter dated 16th May, 2017 from his attorneys to Mr. Rolle (Tab 4 of the Defendant's Bundle of Documents). That he would have had discussions with Mr. Rolle about renting the "encroached property" in February, 2017.

14. On 13th August, 2019 Mr. Randy D. White stated in evidence in chief that he is a Registered Land Surveyor within the Commonwealth of The Bahamas. That he received his Bachelor of Science in Surveying and Graphic Information Science from the University of Technology in 2007. That he has worked as a Surveyor for 17 years and is presently employed as the Chief Surveyor at Riviere & Associates. He has been a member of the Bahamas Association of Land Surveyors since 2011.
15. That his evidence was that he was engaged by the Plaintiff to survey the subject property and to provide a report. That he attended the property on or about 14th May 2019 and there were several boundary markers found within the subdivision which were used as reference to complete the survey of the Subject Property. All measurements and angles were taken with the aid of a Leica TS02 Total Station & Ranger Data Collector, which were used for electronic data collection and that data was processed using Autodesk Civil 3D2013 to create the survey plan. He also relied on the original subdivision plan of Britannia Subdivision (D.L.S. Plan No. 548 G.B.) which, coincidentally, had been prepared by his office. In the course while surveying the Subject Property, he discovered two encroachments: one from the north and one from the east lots. He was asked by Counsel for Mr. Meadows to confine his Statement to the encroachment from the north. He stated that there is a chain link fence which runs east to west along the northern end of the Subject Property which prevents access to its northern boundary. The said fence continues onto the property now or formerly owned by Keith Rolle and Dorothea Avril Rolle. The fence encroaches upon and prevents access to a 10 foot wide portion of the Subject Property.
16. Mr. White stated that he produced for the Plaintiff a survey report setting out his findings along with a large site map detailing the metes and bounds of the Subject Property and indicating various structures there on, including the said chain linked fence.
17. Mr. White's survey report is at page 88 of the Plaintiff's Bundle of Documents filed on the 17th May, 2019 and is not disputed by the First Defendants.
18. Under cross-examination Mr. White stated that he could not gain access to the 10 foot wide strip of land as it was inaccessible because of the fence. He stated he would not have known how long that wire fence had been there and he also saw a paved roadway

north of the fence running east to west but could not say how long it was paved when he visited the property. He stated that he did not survey the plot or lot of land to the north of the fence (i.e. the First Defendant's land). He also stated based on an assumption that if the fence constituted the boundary of the Plaintiff's land there could be no encroachment to the north of the fence. He accepted the position of Counsel for the First Defendants that if the Plaintiff did not own land north of the fence, then there could be no complaint of encroachment about land north of the fence.

19. At the completion of Mr. Whites' evidence, the Court, the parties and Mr. White attended the Subject Property and the adjoining 28,000 square feet of land and Mr. White pointed out the relevant surveyors boundary markers and the boundaries of the parties respective properties. He also pointed out the location of the wire fence, a narrow grass verge and a paved roadway measuring 10 feet in width which he demonstrated was an encroachment on the Plaintiff's land.

The First Defendants' Case

20. The First Defendant, Mr. Keith Rolle was the only person to give evidence on his behalf and his evidence was contained in his Witness Statement filed on the 3rd May, 2019. He stated that he and his wife purchased a parcel of land containing 28,000 square feet from East Land Company Limited in December, 2003. He stated that prior to the purchase he engaged the services of Stanley S. Low, a Registered Land Surveyor who identified the exact location of the boundaries on the ground and placed metal stakes in the ground to indicate the precise location of the boundaries of the parcel. A copy of the surveyor's drawing by Stanley S. Low was attached to the Indenture of Conveyance between him and his wife and East End Land Company Limited. He stated that the surveyor's drawing showed the shape, the size and location of the land that was purchased by himself and his wife. He went on to describe in detail the location and the dimensions of his property. He stated that after he purchased the land he immediately proceeded to erect a six unit commercial building on the land. The building extended from east to west, and except for a small portion of the building, the southern wall of the building was placed a distance of some 20 feet away from the southern boundary of his land leaving a space measuring some 200 feet long and 20 feet wide between the building and the southern boundary of the property. He also stated that he erected a 6 foot high wire fence which ran from east

to west along the entire southern boundary line of his property and paved a 10 foot wide roadway which runs from east to west along the southern perimeter of his property approximately one foot to the north of the wire fence to give him access from Polaris Drive to the rear section of his property to the east.

21. He stated that he was issued a Certificate of Occupancy by the Technical Department of the Grand Bahama Port Authority Limited on the 18th March, 2005 after he completed the construction of the commercial complex and the paved 10 foot wide roadway. He further stated that he commenced occupation of the commercial building and began to use the 10 foot wide roadway to gain access to the rear of the building on the eastern side of his property. He stated that these events all took place prior to the month of April 2005 at which time the parcel of land to the south of the fence was still vacant land and it was still his understanding that the land to the south of the fence belonged to East End Land Company Limited or the principal shareholders of that company.
22. He recalled that it was several months, possibly years, after he had received the Certificate of Occupancy in March, 2005 that the land to the south of his fence was cleared and a building complex was constructed thereon. He stated that after the construction he noticed that the owners of the land to the south of his fence also created a paved roadway on the southern side of his fence and the roadway runs between the fence itself and the commercial complex which was constructed on the land to the south. He stated that between the months of December, 2003 and February, 2017 no one ever questioned or challenged his right to occupy or make use of the land which comprises the 10 foot wide roadway which runs along the southern perimeter of his property to the north of the 6 foot high wire fence which he erected prior to the month of April 2005. He asserted that he has been in open undisturbed possession of the entire area of land located between the 40 foot wide access road which runs along the northern boundary of his property and the 6 foot high wire fence which runs along the southern boundary of his property (inclusive of the 10 foot wide paved roadway) from the 3rd December, 2003 until the 3rd July, 2017.
23. Mr. Rolle stated that he met with the Plaintiff on the 3rd March, 2017 whereby the Plaintiff advised him of the encroachment. However, he denied that he acknowledged that the fence and paved roadway were encroaching on to the Plaintiff's property and that that

portion belonged to the Plaintiff. He also denied that he had told the Plaintiff that he had entered into an agreement with the former owners to allow him to make use of the portion of land.

24. During cross-examination by Miss Ginton, Mr. Rolle denied that he had encroached on the portion of land belonging to the Plaintiff but stated that he had constructed the fence. He also denied that his fence was over the boundary line and encroached on the Plaintiff's property. He further denied that he erected the fence less than 12 years prior to the commencement of the action. He also denied that he was alerted that his fence was over the boundary line by the previous owners and that he had an agreement with the former owners to use the disputed area. He denied that during the meeting with Mr. Meadows on the 3rd March, 2017 that he admitted to him that he knew his fence was over the boundary and Mr. Meadows informed him that the fence needed to be removed at that time. Lastly, he stated that he and his wife signed an Indenture of Conveyance that was at page 11 of the Plaintiff's Bundle of Documents and accepted that he is bound by the terms of that conveyance.

Findings of fact

25. There is no dispute and I accept that the First Defendants, according to the evidence of Mr. Rolle and to the description in the Schedule of an Indenture of Conveyance dated December 3, 2003 between East End Land Company Limited and the First Defendants and the Plot Plan attached thereto and found at Tab 1 of the First Defendants' Bundle of Documents, purchased 28,000 square feet of land being a portion of Tract 19A in the area known as "Britannia".
26. There is no dispute and I accept that the Plaintiff, according to his evidence and to the description in the Schedule of the Conveyance and the Plot Plan attached thereto, purchased the Subject Property on 1st February, 2017.
27. I accept on the evidence of the parties and an inspection of the said Plot Plans that the said two portions of land are adjacent to each other.
28. I accept Mr. Rolle's evidence that between 3rd December 2003 and the 18th March 2005 the First Defendants constructed a six unit commercial building on the 28,000 square feet of land. I find on his evidence that the First Defendants erected a 6 foot high wire fence

and paved a 10 foot wide roadway, on the disputed strip of land no earlier than 18th March 2005, the date of the issuance of the Certificate of Occupancy, the First Defendants having led no direct evidence as to the date on which the roadway was paved or the fence erected.

29. Having carefully considered the evidence of Mr. Randy White and the surveyor's report adduced into evidence by him of the Subject Property, and having attended the locus in quo with the parties and Mr. White on the 13th August, 2019, and Mr. White having pointed out the respective boundaries of the parties' properties and the disputed strip of land, and having compared this evidence with the surveyor's report, I accept that the disputed strip of land falls within the Subject Property and not within the 28,000 square feet of land. I found Mr. White to be a credible witness.
30. The First Defendants did not rebut the evidence of Mr. White save for the assertion by Mr. Rolle that the disputed strip of land fell within the parameters of his property. I refer to paragraphs 12 to 18 at pages 3 to 5 of his witness Statement, which are summarized in paragraphs 21 and 22 above. The only reasonable conclusion which can be drawn or inferred from this evidence is an assertion by Mr. Rolle that the disputed strip of land was along the southern parameter and formed a part of the 28,000 square feet of land. However, no evidence was led by the First Defendants to corroborate this assertion.

Issues

31. Having decided that the disputed strip of land falls within the Plaintiff's property the issues to be determined in this action are whether the First Defendants have encroached on the Subject Property and are trespassers and if so, whether the First Defendants can rely on the defences of adverse possession and/or statutory limitation.

Analysis and Conclusions

The Law

32. The Plaintiff's claim as against the First Defendants is grounded in tortious interference. Although the Plaintiff has not specifically pleaded the type of tortious interference committed by the First Defendants, both parties have accepted that the instant case is an action in trespass. Mr. Tynes, QC helpfully referred the Court to the case of **Drane v Evangelou [1978] 2 All E.R. 437** where the Court of Appeal (per Lord Denning MR at

page 440) held that the judge in the Court of first instance was entitled of his own motion to raise the issue of trespass even though it had not been pleaded, because the facts were sufficient to warrant a claim for trespass and as they were set out in the particulars of claim the Defendant could not claim that he had been taken by surprise when the judge raised the issue.

33. The First Defendants also submit at paragraph 13 of their Closing Submissions that the tort of trespass is committed whenever there is an unlawful interference with the possessory rights of the land belonging to another. Mr. Tynes, QC referred the Court to the following cases, **Entick v Carrington 95 E.R. 807; Harrison v Duke of Rutland [1893] 1 Q.B.D. 142; Hickman v Maisey [1900] 1 Q.B.D. 752; Ocean Estates v Pinder [1969] 2 A.C. 19**, which all illustrate when the tort of trespass is committed consistent with this definition.
34. Trespass as defined at paragraph 563 of the Fifth Edition of **Halsbury's Laws of England** (2015) in Volume 97 is the unlawful presence on land in the possession of another. Moreover, in the same paragraph it states that a person trespasses on land "if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession."
35. Counsel for both parties have submitted by way of their Written Submissions that there are three requirements to establish a cause of action in trespass. It is noted however that the last requirement identified by Counsel for the First Defendants differs from the last requirement identified by the Plaintiff. In particular, they both agree that the first requirement is that the Plaintiff has to establish that he has title to the property and secondly that the First Defendants have entered upon the Plaintiff's property without his permission or have unlawfully intruded on the Plaintiff's possessory right to the disputed strip of land.
36. Where Counsel differ is this. Counsel for the Plaintiff argues that the last requirement to establish a cause of action in trespass is that there is no legal justification for the interference. However, Counsel for the First Defendants, at paragraph 14 of his Closing Submissions, argues that ultimately the Plaintiff must establish that the Plaintiff's claim as to trespass is not barred by virtue of the provisions of Section 16(3) of the Limitation Act.

Encroachment

Whether the First Defendants have encroached on the Subject Property and are thus trespassers?

37. According to Halsburys (supra) at paragraph 563, it states:-

"A person's unlawful presence on land in the possession of another is a trespass for which a claim may be brought, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another."

38. Counsel for the Plaintiff, Miss Meryl Ginton submits that by virtue of the evidence provided by Mr. Randy White in his Witness Statement at paragraph 7 and the undisputed survey report found at page 88 of the Plaintiff's Bundle of Documents filed on the 17th May, 2019 the issue of encroachment by the First Defendants has been proven and that the disputed strip of land falls within the Plaintiff's 1.305 acres of land.

39. Secondly, she submits that the First Defendants' encroachment onto the property constitutes a tortious interference and in particular the tort of trespass. At paragraph 25 of her Submissions she referred to the case of **Entick v Carrington (supra)** which she submits states the requirements for an action in trespass. Moreover she submits that to establish a cause of action in trespass the Plaintiff must prove that he has title (or some other right) to the property; that the Defendant has entered upon (whether himself or his goods) his property without his permission; and there is no legal justification for the interference.

40. Moreover she submits that Mr. Rolle's failure to provide evidence in support of his denial that he encroached onto a portion of the Plaintiff's land nor to provide any explanation as to the plan prepared by Low's Surveying Company Limited and attached to his Indenture of Conveyance, fails to support his claim that the portion of land belongs to him.

41. The First Defendants on the other hand, in their submissions at paragraph 50 submit that the First Defendants became the documentary owners of the parcel of land which measures 200 feet by 140 feet by virtue of a conveyance on the 3rd December, 2003; that the disputed strip of land was included in the First Defendants' parcel of land and as documentary owners of the disputed strip of land were in open and undisturbed possession of such from the 3rd December, 2003 until the commencement of these proceedings. The First Defendants at paragraph 50 of their Written Submissions also submit that the admissions made by the Plaintiff during cross-examination along with the unchallenged evidence of Mr. Keith Rolle established that the Plaintiff has no cause of action against the First Defendants based on trespass in relation to the disputed strip of land.
42. It appears to me that the First Defendants have not denied that they erected a 6 foot high wire fence which ran from east to west along the entire southern boundary line of the First Defendants' property nor denied that they paved a 10 foot wide roadway that runs from east to west along the southern perimeter of their property approximately to the north of the wire fence giving them access from Polaris Drive to the rear section of their property to the east. Further, the First Defendants claim that these structures were placed on to the property prior to April, 2005. Moreover, it was not disputed that the First Defendants erections on the disputed strip of land were there from the earliest the 18th March, 2005, the date of the Certificate of Occupancy. Having made a finding of fact that the disputed strip of land falls within the Subject Property, the evidence that is before the Court supports the assertion that the First Defendants are trespassers and that the trespass is a continuing trespass meaning that as long as they continue to trespass by failing to remove the property that is intruding a new trespass continues day to day (See Halsburys paragraph 569).
43. Additionally, the First Defendants have not stated, by way of their pleadings or their evidence, that they received permission from the Plaintiff's predecessor in title nor from the Plaintiff himself to either erect or maintain the intrusions that encroach onto the Plaintiff's property. In fact, Mr. Rolle stated under cross-examination that he did not tell the Plaintiff that he had received permission from the previous owners to erect the fence and pave the road.

44. It is also not disputed between the parties that the Plaintiff and Mr. Rolle met on the 3rd March, 2017 at Mr. Rolle's office. It is clear from Mr. Rolle's evidence-in-chief seen at page 12 lines 8 to 13 and page 13 lines 3 to 16 of the Transcript that the Plaintiff alerted him to the fact that the Plaintiff's surveyor had found that, in his words, "some mismarking as such such 10 feet area of which he referred to as what I use to put my trailers and stuff in the back".
45. To my mind, the Plaintiff made the First Defendants aware of the unlawful intrusion from as early as the 3rd March, 2017 at this meeting. Moreover, the finding of the Court is that the First Defendants erected the intrusions no earlier than 18th March, 2005, from that date onward whether or not the First Defendants held a mistaken belief that they were entitled to the disputed strip of land, the intrusion was unlawful and remains unlawful.

Whether the First Defendants can rely on the defences of adverse possession and/or statutory limitation?

46. The First Defendants rely on the defence of adverse possession as the basis of their entitlement to possession of the disputed strip of land. They claim that since 3rd December, 2003 they acquired a fee simple title to, took possession of, and exercised dominion of the disputed strip of land. In their submissions they rely on the provisions of the Limitation Act in particular Section 16(3).
47. Mr. Tynes QC asserts that the First Defendants have been in open undisturbed possession of the entire area of land, essentially, the 28,000 square feet inclusive of the disputed strip of land from the 3rd December, 2003 until the 3rd July, 2017 (the issue date of the Writ of Summons). He further submits that Section 10 of the Registration of Records Act applies if the Court determines that the paved roadway is a case of overlapping boundaries as he has superior title. Moreover, he submits that the provisions of Section 16(3) of the Limitation Act and the decision of the Privy Council in **Perry v Clissold [1907] A.C. 73** applies in relation to the Plaintiff's claim to the disputed strip of land.
48. Counsel for the First Defendants alternatively submits that the First Defendants acquired the fee simple title to, took possession of, and exercised dominion over the disputed strip of land on the 3rd December, 2003 and has been doing so since. As a result, he submits that Section 16(3) of the Limitation Act applies. He further relies on the case of **Perry v**

Clissold (supra) and submits that the principle as founded in **Perry v Clissold (supra)** and subsequently applied in **Shelia Schulerbrandt v Gertrude Callwood Coakley** a decision of the High Court of the British Virgin Islands Claim No. BVIHC 2000/0039, prevents the Plaintiff from pursuing an action in trespass against the First Defendants.

49. At paragraph 63 of his Submissions Counsel for the First Defendants asserts that should the Court accept "admissions" made by Keith Rolle during the 3rd March, 2017 meeting between himself and the Plaintiff he submits that those admissions could not change the legal effect that the First Defendants became the fee simple owners of the entire parcel of land including the disputed strip of land by virtue of an Indenture of Conveyance on the 3rd December, 2003; that the First Defendants have been in open and undisturbed possession of the entire parcel of land including the disputed strip of land; the Plaintiff never acquired any right, title or interest in the disputed strip of land by virtue of the Conveyance from the Second Defendant on the 1st February, 2017 and that the Plaintiff never acquired access to the disputed strip of land and has never been in possession of the disputed strip.
50. Lastly, Counsel for the First Defendants submit that the evidence provided by Randy White during the trial can provide no support to the Plaintiff's claim against the First Defendants following the determination that the First Defendants were the fee simple owners of the disputed strip of land.
51. In response to the First Defendants defence the Plaintiff submits, in part, that the defence of adverse possession places the burden of proof on the First Defendants to establish the period of occupancy of the disputed strip of land however she submits they have failed to meet that burden. Counsel for the Plaintiff in support of her submissions relies on **Fleming in The Law of Torts** which identifies the principal that the burden of proving any one of the recognized defences of trespass is on the defendant. (She also referred the Court to **Neil Andrews in Principles of Civil Procedure** and to **Andrew McGee in Limitation Periods.**)
52. She submits that the First Defendants have failed to provide any corroborating evidence that they erected the structures prior to April 2005 onto the disputed strip of land and as such has failed to provide any evidence that their trespass onto the property began 12

years prior to the start of this action. Moreover, she submits that the First Defendants failed to demonstrate that any right of action has accrued as required by Sections 16(3) and 17(1) of the Limitation Act.

53. It is my understanding that the First Defendants' claim throughout this case is that they were entitled by virtue of their acquiring of the 28,000 square feet property on the 3rd December, 2003. Moreover, if the Court fails to accept that they were the documentary title holders then they are so entitled by way of adverse possession and the Plaintiff is now statute barred based on the effect of Section 16(3) of the Limitation Act.

54. It should be noted that Section 16(3) of the Limitation Act states "No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the action accrued to such person or, if first accrued to some other person through whom such person claims, to that person." Therefore, it places a limitation on persons wishing to commence an action for the **recovery of any land** after the expiry of twelve years from the date on which the right of action accrued (**emphasis mine**).

55. The instant action is not an action for the recovery of land but is an action in trespass. Therefore, I find that the First Defendants reliance on adverse possession as a defence to the Plaintiff's claim of trespass cannot be sustained. In any event, I have made a finding of fact that the First Defendants evidence before the Court demonstrates that they were in actual possession of the disputed strip of land on the 18th March, 2005 as provided for by the Certificate of Occupancy by the Grand Bahama Port Authority, Limited. It was not disputed that the parties met on the 3rd March, 2017 whereby the Plaintiff advised Mr. Keith Rolle of the trespass of onto the Subject Property. In my view, not only did the First Defendants as at that date have knowledge of the Plaintiff's assertion of ownership of the disputed strip of land, but time stopped running from the 3rd March, 2017, bringing the First Defendants undisturbed possession to an end. In that vein the First Defendants alleged occupation falls short by 15 days (total time of actual possession 11 years and 350 days) to meet the 12 year requirement as provided for by the provisions of the Limitation Act.

56. In **Perry v Clissold (supra)** the Plaintiff took possession of land in 1881, he subsequently fenced the said land and peaceably maintained possession of such and conducted

businesses up until the date of resumption by the then Minister of Public Instruction (at that time the rightful owner of the land was unknown and out of possession). At no point during his possession of the vacant land was there any notice of any adverse claim and as such he received rents and paid rates and taxes and the land stood in his name. The Court determined that the Plaintiff had not been a mere trespasser as alleged by the Defendant but that he had a possessory title which was good at the date of resumption as against everyone *but the rightful owner*. As the Minister had resumed the land, the Plaintiff had a prima facie case for compensation within the Land Acquisition Act, 1880 Section 13 as he had been deprived of his land (Emphasis mine).

57. The case of **Perry v Clissold (supra)**, in my view, can be distinguished from the instant case. In **Perry v Clissold (supra)** the rightful owner was unknown as at the date of resumption and as such there was no other owner who could have ousted the Plaintiff's "possessory title". In the instant case, the rightful owner has been identified and as such even his predecessor in title was identified by virtue of the recitals in his documentary title. The First Defendants have not established that they were in actual possession for 12 years, therefore the First Defendants mere "possession" does not qualify them to be more than just trespassers in the circumstances. Further, the portion of the Judgment in **Perry v Clissold (supra)** relied upon by Mr. Tynes QC was the dicta of the Court and not the ratio decidendi.

Court of Appeal Decision

58. **Fairness Limited v Steven Bain et. al No. 30 of 2015** was an appeal from a decision of the then Chief Justice Sir Michael Barnett in actions CLE/gen/01741 and 01758 of 2009 whereby he determined that:

- a) The Respondents have a defence under the Limitation Act against these actions by the Appellant to remove them from the land;
- b) The Respondents have been in exclusive possession since at least 1995;
- c) The Appellant's claim to be dismissed;

- d) The Appellant will pay to the Respondents their costs of these actions to be taxed if not agreed. The amount of the taxed costs will be reduced by 10% to take account of the Appellant's costs in the unsuccessful counterclaim.

- 59. The appellant's case before the Chief Justice was that by virtue of being the holder of the documentary title of the subject property the respondents had unlawfully entered the said property and constructed buildings without the permission of the appellant. The appellant sought a declaration that it alone was entitled to occupy the land; damages for the respondents' trespass; an injunction requiring the respondents to demolish and remove the building or parts of the building constructed on the lots; and an injunction restraining the respondents from entering upon the lots.
- 60. The respondents in their defence all pleaded that they derived their title of the respective lots from one Penial Bain who they claimed was the legal and beneficial owner of a larger tract of land owned and occupied by him since 1995. Additionally, they claimed that they together with Penial Bain were in long, exclusive and undisturbed occupation and possession as the legal and beneficial owner of the said land for more than twenty years prior to the commencement of the action by the appellant.
- 61. During the trial before the Chief Justice the respondents provided conflicting facts in their witness statements and oral evidence relative to the length of time they were in undisturbed occupation and possession of the said land.
- 62. Given the facts and arguments that was before the Chief Justice he made the determination stated above at paragraph 58.
- 63. The Justices in discussing the matter before them made it clear that the matter before the learned Chief Justice was a matter that was treated as an adverse possession action as opposed to an action in trespass. As a result, certain principles and legal findings made by the Chief Justice were ones that were in relation to adverse possession.
- 64. The Justices accepted the Chief Justice's finding that the respondents were indeed trespassers as the documentary title they had relied on (i.e. a Certificate of Title that had been granted to John Sands by virtue of a Quieting Title Action and the subsequent conveying of the interest of the said land to Penial Bain) fell away due to the Certificate of Title being set aside following a determination of fraud by a separate action. They also

accepted the Chief Justice's finding that the appellant's predecessor in title, Arawak Homes Ltd. was the legal owner of the land by virtue of its documentary title.

65. However, at paragraph 41 of the Judgment they opined that adverse possession does not give interest or title to any person unless or until it is declared by the Supreme Court on the conclusion of an investigation under the Quieting Titles Act.
66. Additionally, the Justices at paragraph 44 repeated that the matter before the Chief Justice was an action in trespass and not a Quieting Titles action or one of adverse possession. Therefore, in the circumstances Sections 16 to 25 of the Limitation Act that was referred to by the Chief Justice in his Judgment did not arise. As the matter was an action in the tort of trespass any defence of limitation would refer to Section 5 of the Limitation Act whereby the limitation period would be six years from the date on which the cause of action accrued.
67. Further, as the respondents continued to remain on the subject property the appellant's cause of action was not barred as their actions constituted to a continuing trespass.
68. The Court of Appeal ultimately determined that there was no defence available to the respondents against the appellant's claims for trespass.
69. This Court invited Counsel for the Plaintiff and First Defendants to consider the case of **Fairness Limited v Steven Bain et. al (supra)** and subsequently Supplemental Submissions were laid over to the Court.
70. Counsel for the Plaintiff in her Supplemental Submissions asserts that **Fairness Limited v Steven Bain et. al (supra)** further supports the Plaintiff's case as the burden of proof lies with the First Defendants to prove the length of time he has been in occupation of the land. Moreover, she submits that the Court of Appeal's finding that the limitation period could not run in favour of the Respondents as their trespass was a continuing trespass further supports the Plaintiff's contention that he is not barred in his cause of action. Miss Glinton submits that the decision of the Court of Appeal in **Fairness Limited v Steven Bain et. al (supra)** is binding authority on this Court. Moreover, she submits that the First Defendants have failed to obtain title to the property by application under the Quieting Titles Act, that they have failed to establish a greater interest than that of the Plaintiff and they have not counterclaimed for the same. Lastly, she submits that the

Plaintiff remains the owner of the property and the First Defendants infringing structures on the said property amounts to trespass.

71. Counsel for the First Defendants in his Supplemental Submissions in response to the Court of Appeal decision in **Fairness Limited v Steven Bain et. al (supra)** submits that the Court of Appeal was "*patently wrong*" to conclude that the limitation period for commencing an action in trespass against a wrongful occupier of land is six years and not twelve years. Moreover, he submits that the Justices of Appeal wrongly stated that a trespasser remains a trespasser no matter how long he remains in possession on property on which he has unlawfully entered. He submits that that conclusion is contrary to the provisions of Section 25 of the Limitation Act and contrary to the dicta of their Lordships in **Perry v Clissold (supra)**. Lastly, Mr. Tynes submits that the case of **Fairness Limited v Steven Bain et. al (supra)** would not undermine the instant case as the Plaintiff has failed to prove that he ever acquired possessory rights to the disputed strip of land and the First Defendants have been lawfully in possession of the disputed strip of land since the 3rd December, 2003 as owners in fee simple and entitled to possession.
72. I do not accept the submissions of Counsel for the First Defendants in respect of the applicability of **Fairness Limited v Steven Bain et. al (supra)** to the case at hand. According to Halsbury's (supra) at paragraph 576 "*Trespass is an injury to a possessory right, and therefore the proper claimant in a claim of trespass to land is the person who was or who is deemed to have been in possession at the time of the trespass...Where possession is doubtful the law attaches it to the title.*" Counsel for the Plaintiff, Miss Meryl Ginton submits that the Plaintiff has adequately proved that he has title to the Subject Property by way of his Conveyance and has proven that the disputed strip of land falls within his property boundary. Further, she submits that by the admissions of Mr. Rolle that he erected the fence and paved the roadway which encroached upon the Plaintiff's property, an action in trespass has been made out.
73. Having already determined that the Plaintiff by way of the Conveyance purchased the Subject Property in 2017 and that the disputed strip of land falls within it, I conclude that he has established that he is the documentary title holder over the Subject Property including the disputed strip of land. That although he did not own the Subject Property

prior to 2017 his predecessors in title have been identified. Possessory title attaches to them and to the title and consequently to the Plaintiff.

74. As was the case of **Fairness Limited v Steven Bain et. al (supra)**, the Plaintiff's claim in the instant case is a claim in trespass and trespass alone. It is noted however that upon the removal of the infringing fence the Plaintiff to my mind would "recover" the subject property and it would "officially" form a part of the Plaintiff's parcel of land. However, as this is not an action under the Quieting Titles Act, it is not for this Court to now investigate the nature of the parties "quieting" of the said property. Further, Sections 16 and 25 of the Limitation Act and adverse possession do not arise. In the circumstances, the submissions of Miss Ginton in her Supplemental Submissions on the applicability of **Fairness Limited v Steven Bain et al (supra)** are accepted and I am bound by the decision of the Court of Appeal. Moreover, the evidence that is before the Court tips in favour of the Plaintiff's claim. It is on this basis that I find in favour of the Plaintiff in this action.

Disposition

75. I make the following Orders:

- (1) That the First Defendants deliver up vacant possession of the disputed strip of land to the Plaintiff forthwith;
- (2) That the First Defendants whether by themselves their servants or agents within 120 days hereof demolish and remove the erections thereof constructed on the disputed strip of land; and further that the First Defendants be restrained whether by themselves their servants or agents, from entering upon the said disputed strip of land thereafter. That in default of compliance by the First Defendants with the said order, the Plaintiff may demolish and remove the said erections or parts thereof in assertion of his rights as legal and beneficial owner of the disputed strip of land.
- (3) That this matter is remitted to the Deputy Registrar for the assessment of any actual damage, if any, sustained by the Plaintiff as result of the trespass by the First Defendants;

(4) That Costs shall follow the event and are awarded in favour of the Plaintiff, to be taxed if not agreed.

Dated this 29th day of September, A.D. 2020

Petra M. Hanna-Adderley
Justice