

BARBADOS

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

No. 826 of 2004

BETWEEN:

MERNA HOWARD

CLAIMANT

AND

SHIRLEY NICHOLAS

DEFENDANT

Before Dr. The Hon. Madam Justice Sonia Richards, Judge of the High Court.

2011: October 13

November 09, 11, 22

2012: February 28

March 02

2014: April 02

Mr. Edmund Hinkson and Mrs. Beverley Nicholls, Attorneys-at-law for the Claimant.

Mr. Latchman Kissoon and Mr. Lalu Hanuman, Attorneys-at-law for the Defendant.

DECISION

Introduction

[1] The Claimant wishes to recover possession of a house-spot from the Defendant. The house-spot is situated at Paynes Bay, Chapel Gap No.1 in

the parish of St. James. To this end the Claimant filed an Originating Summons with an affidavit in support on 27 May, 2004. Additional affidavits were filed by both parties. Then, pursuant to a court order, the Claimant filed a Writ of Summons on 23 May, 2006. In her Statement of Claim she requested:

- (1) possession forthwith of the land;
- (2) mesne profits at the rate of \$56.00 per month until possession is delivered up;
- (3) interest;
- (4) further or other relief; and
- (5) costs.

The Submissions

- [2] The Claimant alleges that the house-spot is part of a larger area of land which she inherited from her father Louis Jackman. As the legal owner of the land, she gave the Defendant notice to vacate and give up possession of the house-spot. She says that the Defendant is in wrongful occupation of the house-spot, and that the Defendant refuses to vacate the house-spot despite receipt of the notice to quit.
- [3] The Defence was filed on 12 June 2006. The Defendant contends that the claim is for the wrong piece of land at Chapel Gap No.1, Paynes Bay, St.

James. The Defendant further states that she and her husband Jacob Nicholas occupied land in the same area from 1980. After Jacob's death in 1992, she continued her occupation of this land *nec vi, nec clam, nec precario*, that is, without force, without secrecy and without permission. The Defendant's case is also that she has been in possession of the land for over twenty years, and that she is entitled to the area of land that she occupies. It was argued strenuously that the Claimant's action for possession is statute barred.

- [4] The Claimant countered that the house-spot was rented to a Venetia Hope. Although Ms. Hope moved from the house-spot to Folkstone, St. James, she continued to pay rent until 2003. The Claimant's counsel submitted that time only started to run against the Claimant in 2003, therefore, the Defendant's occupation of the house-spot did not dispossess the Claimant.

The Paper Title

- [5] The Claimant inherited 2,061.26 square metres of land at Chapel Gap No.1, Paynes Bay, St. James, from her father Louis Jackman. Mr. Jackman purchased this land in 1945. Over the years he rented portions of this land as house-spots to various tenants, including Miss Venetia Hope. Mr. Charles Phillips collected the land rent on Mr. Jackman's behalf. Mr. Jackman, Ms. Hope and Mr. Phillips are all deceased. After Mr. Jackman's

death, the Claimant received the land rent in her capacity as administratrix of his estate. She obtained letters of administration to Mr. Jackman's estate on 25 June, 2003. As Mr. Jackman's only child and beneficiary to his estate, the Claimant executed a Deed of Grant vesting the land in herself on 30 January, 2004. The Court is satisfied that the Claimant holds the paper title to the land at Chapel Gap No.1. The Court also accepts the expert evidence of Mr. Lloyd Powlett, a land surveyor, that the portion of land occupied by the Defendant is part of the larger lot for which the Claimant has the paper title.

Possession of the House-Spot

- [6] In order to chart the possession of the disputed land, the Court found that identification of the individual in possession of the house on the spot of land invariably indicated the individual in possession of the house-spot. The saga of the house and the house-spot are inextricably connected. This saga had its origins in the nineteen seventies when Venetia Hope began to rent a house- spot at Chapel Gap No.1 from Mr. Jackman. Although many of the critical players or dramatis personae in the saga are now deceased, they have spoken from the grave through their documents.
- [7] The relevant background information was gleaned from the documents filed in a 1987 High Court case; from the evidence of some of the tenants and

other occupiers of the land; and from other events occurring between 1985 and 1992. From this background information the Court was able to make findings of fact that are central to the determination of when the Defendant came into possession of the house-spot.

1. Cumberbatch v. Nicholas

- [8] Venetia Hope moved on to the land as a tenant, sometime in the early nineteen seventies. Despite her demise, the Court was able to glean critical background information from documentation filed in a High Court suit, No. 833 of 1987, **Wilton Cumberbatch v. Jacob Nicholas**. In that suit, Mr. Cumberbatch claimed possession of the house Ms. Hope lived in at Chapel Gap No.1. That house was on the spot she rented from Mr. Jackman. Cumberbatch claimed possession from Jacob Nicholas who was the individual living in the house at the time.
- [9] Jacob Nicholas was the husband of Shirley Nicholas, the Defendant in this matter. They were married in Guyana in 1985, and he died in Barbados in 1992. Just before Jacob's death, the then Chief Justice granted Mr. Cumberbatch possession of the house, on the basis that Mr. Cumberbatch had purchased it from Ms. Hope in October 1985, for \$8,500.00. Jacob was ordered to deliver up possession of the house to Cumberbatch.

- [10] This Court perused the original court file in the 1987 suit, noting that after Jacob was ordered to give up possession of the house, he appealed the decision of the Chief Justice on 05 June, 1992 (Civ. App.No.18 of 1992). However, an appeal file could not be found. Cumberbatch then filed an application for a Writ of Possession, and in response, Jacob filed an affidavit in opposition.
- [11] Jacob died shortly thereafter, and Cumberbatch was given leave to join Jacob's wife, our Defendant, as the representative of Jacob's estate, in order to continue the hearing of the application for the Writ of Possession. There is nothing on the file after this order for the joinder of Shirley Nicholas as a party to that action. All that can be said with certainty is that after Jacob's death, the Defendant Shirley Nicholas continues to this day to live in the house and on the land.
- [12] Ms. Hope filed an affidavit on 03 September, 1987, in the **Cumberbatch v. Nicholas** matter. In that affidavit she swore that:
- “3. I used to reside at the said house with [Jacob Nicholas] from about February 1983 to about March 1984 but [Jacob Nicholas] and I separated during the said month of March 1984.
 4.
 5. I was the sole owner of the said house immediately prior to its sale to [Cumberbatch].”.

- [13] In his affidavit of defence filed on 12 November, 1987, Jacob admitted that Ms. Hope was the former owner of the house. However, he denied that she had sold it to Cumberbatch. Jacob alleged that Ms. Hope had abandoned her house rather than pay a debt she owed to him for repairs he carried out on the house. A defence was also filed on Jacob's behalf on 22 March, 1988. In that defence it was stated that Ms. Hope had abandoned her house in March 1984, and that Jacob repaired the house in 1982 while living in the house with Ms. Hope.
- [14] The Court has deduced from the documentation filed in the 1987 matter, that Jacob and Miss Hope lived together for a brief period, and separated in March 1984 when she left the house. Miss Hope then sold the house to Cumberbatch in October 1985. The joint occupation of the house by Jacob and Ms. Hope is confirmed by some of the Claimant's witnesses.

2. The Evidence of Tenants and Other Occupiers of the Land

- [15] Glenys Haynes lives on the land in her father's house. Her father is the tenant of a house-spot on the land. When she gave her evidence, her father was hospitalised with Alzheimer's disease. Her brother pays the land rent on their father's behalf. Ms. Haynes was born on the land, and she recalled last seeing Ms. Hope in the nineteen eighties. She also told the Court that Ms. Hope lived on the same spot now occupied by the Defendant, and that:

“...Ms. Hope’s house was the house [the Defendant] lives in. It is not substantially different from what Ms. Hope lived in.”.

- [16] Jeffrey Bovell is the son of a tenant, Mrs. Edna Greenidge. He came on to the land when he was ten years old. As a young boy, Mr. Bovell visited Ms. Hope regularly in order to assist her and run errands for her. His evidence was that:

“I see a gentleman come there to Ms. Hope and live a couple years. I remember his first name, Jacob. This would be in the eighties or close to the nineties. That is my best recollection. What I realised is that when he came, a few years after I understand that she was not living there anymoreI don’t know what happened to the relationship between Jacob and Ms. Hope. I don’t know the kind of relationship they had.”.

- [17] Carol Bovell is Mr. Bovell’s sister and Mrs. Greenidge’s daughter. When she gave her evidence her family had lived on the land for thirty-one years from 1980. She said that:

“Ms. Hope was living below us in the house where [the Defendant] lives now.....There was a gentleman; I would say she gave him a lodging. A couple years after I started to see him, about five years after.....I cannot say she moved. She probably was pushed. I don’t think at her age she would want to move, and the noise got to her. I could hear quarrels coming from the house.....”.

- [18] Wayne Haynes was born at Chapel Road No.1 in 1958. His father Kenneth Walters rents a house-spot on the land. He could not recall anyone living

with Ms. Hope. He knew she moved from the area, but he could not recall when she moved. He further informed the Court that:

“After Ms. Hope left, a guy was living at the house, and a year or two after I saw this lady going backward and forward. We called the guy Jacob. I could remember Jacob built on a shower for Ms. Hope. He was not living there at the time. I don’t know if Jacob and Ms. Hope had a relationship other than a business relationship.”.

[19] The Court approached the evidence of Edna Greenidge with a degree of caution. Jacob Nicholas was clearly not her favourite person. She described him as a devil, based on her personal experience with him. The Court was also conscious of the fact that, when these events were unfolding, the other occupants of the land who gave evidence were children and young adults. Mrs. Greenidge was a mature woman at the time, and her perspective might be more insightful.

[20] Mrs. Greenidge confirmed that Jacob lived at Ms. Hope’s house. However, in her words,, “I don’t know if she had him, if he did she boyfriend or not, but he was living there.”. Mrs. Greenidge also confirmed that Ms. Hope left the house. Her reason for leaving was because every night Jacob was quarrelling (“making noise”) with her. According to Mrs. Greenidge, “After she get tired with how he cahing she long and doing she, she leave and run to Holetown.”.

3. The Saga Continues

- [21] Ms. Hope left her home and moved from the house-spot in March 1984. Jacob remained in the house and on the land. The documents filed by Ms. Hope and Jacob in the 1987 matter, refer to March 1984 as their separation and her "abandonment" of the house. Ms. Hope attempted to have Jacob ejected from the house in 1985. She brought a complaint against him at the Holetown Magistrates' Court, alleging that on 06 January, 1985, Jacob refused to leave her premises after she requested him to do so. The complaint was dismissed by Magistrate Haynes Blackman on 23 April, 1985.
- [22] After her unsuccessful attempt to eject Jacob from her house, Ms. Hope sold the house to Cumberbatch on 02 October 1985. The record of Cumberbatch's 1987 High Court action suggests that Jacob's appeal against the order to give Cumberbatch possession of the house was never heard. There is no indication that after Jacob's death in 1992, his wife, the Defendant in this matter, pursued the appeal on behalf of Jacob's estate. Indeed, her evidence is that she could not recall the name Wilton Cumberbatch. Both the Defendant, the tenants and the other occupiers of the land appear to have been unaware of the drama played out in the

Magistrates' Court at Holetown and in the High Court, between 1985 and 1992.

4. Relevant Findings of Fact

- [23] It cannot be disputed that Venetia Hope rented a house-spot at Chapel Gap No.1 from the Claimant's father. Mrs. Greenidge came and found her on the spot in 1980 or 1981. Mrs. Greenidge knew that Ms. Hope continued to pay rent for the house-spot after she left. Ms. Bovell also confirmed that there were occasions, when Mr. Phillips collected her mother's rent, that "...he would say he was going to Holetown to collect Ms. Hope's rent". The Claimant also collected rent from Ms. Hope at Holetown after her father died.
- [24] The Court accepts the receipts provided by the Claimant as evidence that Ms. Hope paid rent for the house spot from 28 April 1984 to 16 September 1986 for the period from 01 April 1984 to 27 September 1986. Additionally, the Court accepts the two receipt books (Exhibits MH10 and MH11) tendered by the Claimant in evidence. These show payment of land rent by Ms. Hope from 1996 to 2003. The last rent payment was made on 03 May 2003 for the period 03 March 2003 to 03 April, 2003.
- [25] Although there is a period not covered by the receipts, the Court has no reason to doubt that Ms. Hope paid rent continuously as either a weekly or a

monthly tenant, until 2003, for the house-spot at Chapel Gap. No.1. The Defendant has not rebutted the evidence that, until 2003, Ms. Hope was paying land rent for the house-spot during the years that the Defendant was in possession of the house-spot. Her counsel challenged the Court's acceptance of the receipt books as evidence. Even without the receipt books, the oral evidence of Mrs. Greenidge, Ms. Bovell and the Claimant confirmed that Ms. Hope was a non-resident rent paying tenant between 1984 and 2003. The notice to quit from Cottle Catford & Co. also adds credence to the Court's finding that Ms. Hope was the tenant of the house-spot until 2003.

[26] Ms. Hope also owned the house she lived in on the house-spot. Jacob Nicholas did some work on the house for Ms. Hope. Thereafter, he moved into the house with her. Theirs was possibly an intimate relationship. She alleged this in her 1987 affidavit, and it was not denied by Jacob in his defence to Cumberbatch's action, or in the affidavit signed by him.

[27] What is also evident is that the Defendant is occupying the house where Ms. Hope once resided, although there may have been repairs and alterations carried out over the years. The crucial finding of fact for this case is that the Defendant is occupying a house that is on the spot of land once rented to

Venetia Hope. That spot is part of the larger area of land for which the Claimant has the paper title

[28] The Court does not accept the Defendant's evidence that she lived in the house and on the land from 1980. Both her affidavit in reply filed on 20 September, 2004, and her defence filed on 12 June, 2006 allege that the Defendant was in undisturbed possession of the land since 1980. This claim is repeated in her oral evidence. However, the documents of the dead and the evidence of the living indicate otherwise.

[29] Jacob and Ms. Hope agreed in 1987 that they were both at the house and on the land until March 1984, when Ms. Hope left. The Defendant clearly said in her oral evidence that she did not know a Venetia Hope and that, while living with Jacob, she never heard the name Venetia Hope. Also, the Defendant gave no evidence of another adult female living at the house with Jacob and herself. The evidence of the neighbours and tenants on the land do not place the Defendant at the house until after Ms. Hope's departure. Therefore, the Defendant was not in undisturbed possession, of either the house or the house-spot, prior to March 1984.

The Defendant's Occupation of the Land

[30] When then did the Defendant truly begin her occupation of the land at Chapel Gap No.1? The Defendant's witness Lewis Burrows said that Jacob

introduced the Defendant to him in the mid nineteen eighties. He could not recall if Jacob and the Defendant were married when he met her. And he did not know if the Defendant was living on the land before he met her.

[31] Glenys Haynes was of no assistance because she never knew Jacob Nicholas. Ms. Haynes only heard Jacob's name in the context of him living with the Defendant. And in relation to the Defendant, Ms. Haynes' evidence is that she never saw the Defendant in the nineteen eighties or nineties.

[32] Jeffrey Bovell told the Court that he did not see the Defendant immediately after Ms. Hope left Chapel Gap No.1. He said that:

“After [Ms. Hope] left Jacob was living in the house. Then I saw the lady over there [*points to the Defendant*] living there. He lived there alone then I saw the lady living with him. I don't think she lived there immediately.”.

In cross examination, Mr. Bovell added that he first saw the Defendant a little after Ms. Hope was put out of the house.

[33] Carol Bovell accepted the possibility of seeing the Defendant before 1990.

The Defendant was “going and coming but not living”. She said that:

“For sure [Ms. Hope] could not be there around 1990, because that was the time I started to work, and that was the time I saw [the Defendant] and Jacob together at the house. To put years on things is a challenge. I could have seen [the Defendant] before 1990 going and coming but not living.”.

[34] Wayne Haynes' evidence was that:

“I know the Defendant by seeing her. I think her name is Shirley. After Ms. Hope left, a guy was living at the house, and a year or two after I saw this lady going backward and forward.”.

It is not clear from this evidence whether Haynes saw the Defendant living at the house and going “backward and forward”, or whether he meant that she was just visiting Jacob at the house. Haynes had no idea in which year he first saw the Defendant.

[35] Mrs. Greenidge saw the Defendant living at the house from the time Ms. Hope left. Her evidence was that:

“I know the Defendant after the man that she say she married to run the lady out she house.....I know her about a couple weeks after she turned up there..... That is about six weeks after 'round there.....I saw her coming there, then I hear she lived there.”.

[36] The evidence points to the Defendant first coming to Chapel Gap No.1 after Ms. Hope moved out. That would be after March 1984. Mrs. Greenidge spoke of seeing the Defendant living there about six weeks after, and that would be around May 1984. Carol Bovell noticed the Defendant going and coming, but not actually living at the house. This was also after Ms. Hope left. Carol's brother noticed the Defendant after Ms. Hope left, but he didn't think that she arrived immediately after Ms. Hope left. Although Mr. Haynes could not recall the year when he first saw the Defendant, he narrowed her

arrival down to a year or two after Ms. Hope left the house. And Burrows recalls being introduced to the Defendant in the mid nineteen eighties.

[37] The Defendant's evidence is of coming to Barbados, and to the house and the land in 1980; of returning to Guyana with Jacob in 1981; of returning to Barbados; and finally going to Guyana and marrying Jacob there in 1985, and again returning to Barbados. A marriage certificate was produced to the Court. Despite this evidence the Court has deduced that the Defendant arrived at Chapel Gap No.1 after Ms. Hope left in March 1984. If the Defendant's evidence of returning to Guyana, on at least two occasions, is to be believed, these trips must have occurred after May 1984. One of these trips was possibly in 1985 for her marriage to Jacob.

[38] The Court also took into consideration additional information contained in the affidavits filed by Jacob and Cumberbatch in the 1987 case. This information suggests that there was a period, after Ms. Hope left the house, when Jacob was neither in possession of the house nor on the land. Cumberbatch, in his Statement of Claim filed on 02 February, 1988, alleged that:

“2. The Plaintiff purchased the said house from one Venetia Hope on 2nd October, 1985 for the price of \$8,500.00 and was thereupon let into possession of the said house.

3. The Defendant has since about the month of March, 1986 wrongfully occupied the said house.”.

- [39] The Court understands from these paragraphs in the Statement of Claim, that Cumberbatch was saying that he took possession of the house after he purchased it in October 1985. He is stating further that Jacob wrongfully occupied the house from March 1986. The Court is not aware of what evidence the then Chief Justice accepted or took into consideration when he made the order for Jacob to deliver up possession of the house to Cumberbatch.
- [40] No written decision was located. But in making this Order, the learned Chief Justice must have accepted that Cumberbatch was the lawful owner of the house. However, this Court cannot jump to the conclusion that the learned Chief Justice also found as a fact that between 02 October, 1985, and March 1986, Jacob was not in possession of the house.
- [41] What is more telling is the affidavit of defence sworn by Jacob and filed on 12 November, 1987. In that affidavit Jacob swore that:
- “6. The Plaintiff owes me \$70,000 for the loss or damage of various articles of furniture, fittings and parts of the house done during the month of July to August 1986, including one Cabinet for Cutlery, one Wardrobe, Kitchen sink, toilet bowl which disappeared. The sewing machine, front door, inside door leading from bedroom to kitchen were

damaged the house was repainted inside, the floor was revarnished and the electrical wiring was changed along with the plumbing system, causing damage to the walls.”.

[42] The Court views this part of Jacob’s affidavit as an admission by him that he was not in possession of the house for the months of July and August 1986. How else would Cumberbatch have been able to effect significant changes to the house, such as repainting the inside, revarnishing the floor, and changing the electrical wiring and plumbing? Whereas the missing articles could have been spirited away overnight, the work done to the house would have taken more time.

[43] The Defendant’s evidence is that Jacob spent two periods of time with her in Guyana, three months and two months respectively. Perhaps it was during one of Jacob’s trips to Guyana that Cumberbatch was able to wrest possession of the house from Jacob. If Jacob was not in possession of the house in July and August 1986, he could not have been in possession of the house-spot on which the house is sited.

[44] It is unlikely that the Defendant remained at the house, when Jacob lost possession of the house to Cumberbatch. Therefore, if Jacob was not in possession of the house and off the land, so too was the Defendant. By the

time Cumberbatch filed his action in 1987 claiming possession of the house, Jacob had regained possession of the house and returned to the house-spot.

[45] The Court is prepared to accept that the Defendant arrived at Chapel Gap No.1 soon after Ms. Hope left in March 1984. When cross-examined by counsel for the Defendant, the Defendant's testimony was that:

“Between 1980 and 1985 we lived continuously at Chapel Gap. I went back to Guyana to visit. I came here in 1980 and I went back to Guyana in 1981. When I went back to Guyana Jacob came to Guyana. He was visiting me in Guyana before we got married. I came back to Barbados before we got married, and we went back to Guyana to get married. I used to live in Buxton. After we married we came back to Barbados. I used to stay long in Barbados. Sometimes I stayed long, longer than a year.”.

[46] Further, when re-examined by her counsel, the Defendant also said that:

“From 1980 I was living at No.1 Chapel Gap, St. James. When I got married I came back to Barbados. When I went back in 1981 I was visiting. My husband went with me. I came back to Barbados and lived here about four years before I went back to Guyana again. I have not been back to Guyana since 1985. My Guyana address is on the marriage certificate because I used to live in Guyana, and I got married in Guyana.”.

[47] The Defendant's evidence must be interpreted against the backdrop of her arrival after March 1984. Assuming that she first appeared at Chapel Gap No.1 in May 1984, the Defendant returned to Guyana for her marriage to

Jacob. The marriage took place on 11 June, 1985. Therefore, the maximum amount of time she spent in Barbados before her marriage was approximately one year. Prior to the marriage, the Defendant was not a spouse as defined by the Succession Act, Cap. 249. There is no evidence of her immigration status at this time. At best she may be described as Jacob's house guest or a long stay visitor. Jacob was then the person in possession of the house and the house-spot, not the Defendant. Having returned to the house at Chapel Gap No.1 after her marriage, the Defendant shared possession of the house with Jacob as their matrimonial home.

[48] But both Jacob and the Defendant lost possession of the house to Cumberbatch by July of 1986. This is confirmed by Jacob's 1987 affidavit. Cumberbatch filed his Originating Summons to regain possession of the house on 26 June, 1987. It follows that Jacob resumed possession of the house between August 1986 and June 1987.

[49] The Court concludes that Jacob and the Defendant were in joint possession of the house and on the land from August 1986 until Jacob's death on 04 July, 1992. Jacob was in continuous possession of the house for approximately six years prior to his death. The period between August 1986 and June 2003, when the Defendant received a notice to quit from the Claimant's attorney-at-law, represents almost seventeen years of continuous

occupation of the house and, more importantly the house-spot, by the Defendant.

The Applicable Law

- [50] At the outset it must be said that the Defendant is not making a claim for an easement by prescription. Neither the Limitation And Prescription Act, Cap.232, nor common law principles of prescription have any bearing on this case. Therefore, any concepts of *nec vi, nec clam, nec precario* are not pertinent to the Court's deliberations. (See S. Owusu, "Commonwealth Caribbean Land Law", 2007, at 431-433).
- [51] The statutory framework for the determination of the issues is the Limitation of Actions Act, Cap 231, ("the Act"). In the recent case of **Browne v. Moore-Griffith**, (B'dos. Civ. Ap. No.16 of 2009; judgment delivered on 02 July, 2012), the Court of Appeal described this legislation as:
- ".....providing the legal basis on which a claim by the true owner is made whenever the circumstances surrounding the possession of the stranger for 10 years are found to be sufficient to manifest incompatibility with the title of the true owner."
- [52] With respect, the Act does not provide "the legal basis on which a claim by the true owner is *made*". Rather, the Act provides the legal basis on which a claim by the true owner may be defeated. In fact, the long title to the Act

describes it as “An Act to reform the law relating to the barring of civil actions through the effluence of time.”.

[53] It is section 25 (1) of the Act that establishes the ten year time limit as the minimum period required to effectively dispossess the holder of the paper title. The section provides that:

“.....no action shall be brought by any person to recover land after the expiration of 10 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”.

[54] The Court has found that the Defendant was in continuous possession of the house-spot from August 1986. The holder of the paper title to the land in 1986 was the Claimant’s father. The Defendant has been in possession of the house-spot for more than 10 years. Therefore, two critical questions must be resolved by the Court:

- (1) were the circumstances surrounding the possession of the land by the Defendant sufficient to manifest incompatibility with the Claimant’s title; and
- (2) when did the cause of action to recover the house spot accrue to either the Claimant or to her father?

1. Adverse Possession

- [55] In **Brown** (supra), the Court of Appeal adumbrated the relevant statute law and common law. (See paragraphs [33] to [37] of the judgment). Therefore, the Court does not find it necessary to restate at length the relevant statutory provisions and general principles relating to the adverse possession of property. Suffice it to say that, based on the principles enunciated by the Court of Appeal in **Brown**, this Court is of the view that the Defendant was in exclusive continuous possession of the house-spot for more than ten years.
- [56] The Defendant also demonstrated the *animus possidendi*, that is, the intention to exclude everyone, including the Claimant and her father, from possession of the house-spot. The Defendant satisfied Lord Millet's description of adverse possession as "possession which is inconsistent with and in denial of the title of the true owner.". (See **Ramnarace v. Lutchman** [2001] 5LRC 239 at 244 (a) – (b), P.C. T.&T.).
- [57] There is no evidence that the Defendant or her husband paid rent to anyone. There is no evidence that the Claimant or her father were ever recognized as the owners of the fee simple in the house-spot. The Defendant was a squatter on the land, and she dealt with the house-spot "as an occupying owner might have been expected to deal with it.....". (See Slade J. in

Powell v. McFarlane, [1979] 38 P.& C. R 452, quoted at para.[37] of the **Brown** judgment).

[58] Andrew McGee in his seminal work “Limitation Periods” (2010, 6th ed. Sweet & Maxwell), posits that:

“It is inherent in the notion of dispossession that the squatter must himself take possession of the land. Therefore acts which fall short of possession will not cause time to start running. It is a question of fact in each case what is necessary to amount to dispossession, [**Red House Farms (Thornden) Ltd. v. Catchpole** (1977) 244 E.G. 295, CA] and this may well vary according to the character of the land. [**Mashall v. Taylor** [1895] 1 ch.641, CA]. “. (Page 279).

[59] In **Treloar v. Nute**, ([1977] 1 W.L.R. 1295 CA), the placing of soil on the land by a squatter was highlighted as an act justifying a finding, by the appeal court, that the squatter had taken possession. McGee noted that:

“It is irrelevant in this context that the squatter’s actions do not inconvenience the rightful owner – if they amount to possession, then the latter is, in the absence of contrary evidence....to be treated as having been dispossessed.”. (Page 279-280; see also S.31 (4) of the Act).

[60] The Defendant told the Court that she and her husband built up the curtilage around the house by dropping approximately forty truck loads of sand and mould on the land. The evidence of Mrs. Greenidge is that the land was rocky. The Court went on a site visit to the area occupied by the Defendant.

Rocky areas were evident, but some of these areas were filled in to accommodate the various fruit trees and other vegetation growing there.

However, the Court did not see “a verdant botanical garden” as described by counsel for the Defendant at paragraph 6 of his written submissions filed on 15 February, 2012.

[61] The Court accepts that the Defendant and her husband did fill in parts of the land with mould and sand. However, the Court does not believe that this was done to the extent claimed by the Defendant. None of the neighbours who gave evidence observed this work. It is quite possible for the off-loading of a few truck loads to escape observation. But some neighbour would have seen this work being carried out on the land, if forty truck loads were required.

[62] Mrs. Greenidge lived nearby and she saw nothing of the sort. And in the words of Glenys Haynes:

“....sand, mould and dirt could not have been delivered without my knowing, because lumber and so on could have been taken on to the property behind the galvanise; sand and stone would have to be dumped by the truck on the outside of the property.”.

At paragraph 6 of his written submissions, counsel for the Defendant submitted that the word “ “truck” is a Guyanese colloquialism to denote a

delivery, rather than an actual vehicle or quantity”. The Court cannot accept this submission without evidence coming from the Defendant to support it.

[63] Notwithstanding the weaknesses in her evidence, the evidence suggests that the Defendant may have taken adverse possession of the house-spot, because the circumstances surrounding her possession of the house-spot appear to manifest incompatibility with the Claimant’s title to the house-spot as part of the larger area of land owned by the Claimant. But despite the seemingly manifest incompatibility with the Claimant’s title, counsel for the Claimant contended that time did not start to run against the Claimant until the determination of Ms. Hope’s tenancy in 2003. Put another way, the Claimant could not bring an action against the Defendant, for possession of the house-spot, until Ms. Hope’s tenancy had come to an end.

2. Ms. Hope’s Tenancy

[64] Ms. Hope’s tenancy was an oral periodic tenancy. The notice to quit sent to her by Cottle Catford, dated 30 August 2002, described her tenancy as “a monthly tenancy under a contract of tenancy under the Security of Tenure of Small Holdings Act [“Cap. 237”]”. Despite moving away from the house-spot and selling the house, the Court found that Ms. Hope continued to pay land rent until May, 2003.

[65] Section 29 of the Act delineates rules for the determination of the accrual of a right of action to recover land. Section 29(1) provides that:

“The date of accrual of rights to recover land must be determined in accordance with the rules provided in this section for the described circumstances.”.

[66] Section 29 also describes the circumstances of an oral periodic tenancy as follows:

“(6) A tenancy from year to year or other period without a lease in writing, shall, for the purposes of this Act, be treated as being determined at the expiration of the first year or other period; and the right of action of the person entitled to the land that is subject to the tenancy, shall be treated as having accrued accordingly at the date on which the tenancy is taken as determined.

(7) If any rent has subsequently been received in respect of a tenancy referred to in subsection (6), the right of action therein mentioned shall be treated as having accrued on the date of the last receipt of rent.”.

[67] These subsections have their origin in three pieces of U.K. legislation, namely, the Limitation Act, 1833 (S.8); the Limitation Act, 1939 (S.9(2)); and the Limitation Act, 1980 (Schedule 1, paragraph 5 (1)). With reference to these provisions, McGee (*supra*) opined that:

“The basic rule here is that a tenancy from year to year or other period, without a lease in writing, shall be treated for limitation purposes as

having determined at the end of the first year or other period. There is an exception to this general rule where any rent has been received in respect of the tenancy after the expiry of that period. In such cases the cause of action is treated as having accrued on the date of the last receipt of rent. Therefore, if the tenancy continues for a number of periods after the expiry of the first period, a fresh cause of action will accrue (so that time will start to run afresh) every time a payment of rent is made. The statutory rules are clumsily worded, but the effect which they seek to achieve is reasonably clear. So long as the tenant goes on paying rent, time does not run in his favour, but once payment ceases, time begins to run.” (Pages 264-265).

- [68] If Ms. Hope had been a weekly tenant, time would have run against her landlord at the end of the first week of her tenancy, had she not continued paying rent thereafter. (See **Jessamine Investments Co. v. Schwartz** , [1978] Q.B.264,268 E-G). If Ms. Hope’s tenancy was monthly, time would run from the end of the first month of her tenancy if no more rent was paid. (See too Jourdan QC and Radley-Gardner in “Adverse Possession”, 2nd ed.,2011 at para. 24-32). Renewal of Ms. Hope’s tenancy, on a weekly or monthly basis, stopped time running against her landlord.
- [69] Ms. Hope never went into adverse possession of the house-spot, because she continued to pay land rent until May 2003. When she stopped paying rent she was not in possession of the house-spot, and she did not own the house on the spot of land. But her tenancy of the land continued uninterrupted

until 2003. It was Ms. Hope's occupation and possession of the house-spot that was usurped by Jacob Nicholas. And that usurpation was continued by the Defendant after her husband died.

[70] The Defendant's possession of the house-spot was not adverse to the Claimant, it was adverse to the tenant Ms. Hope. Adverse possession against a tenant does not affect the freeholder, where the lease is still in operation. Time does not run against the freeholder as the reversioner until the lease comes to an end. (See *Owusu*, supra, at pages 313-315). Therefore, time did not begin to run against the Claimant until the expiration of Ms. Hope's lease in 2003. Any adverse possession by the Defendant was thereafter swiftly undermined by the Claimant through the notice to vacate dated 12 June, 2003; and by the filing of these proceedings in May, 2004.

[71] According to **Fairweather v. St. Marylebone Property Co. Ltd.** ([1963] AC 510), the Claimant could not bring an action for possession against the Defendant, until the end of Ms. Hope's tenancy. Lord Radcliff in that case observed that:

“...an owner in fee simple subject to a term of years has an estate or interest in reversion or remainder and, consequently, his right of action against a squatter on the demised land is to be deemed to have accrued at the date when the preceding estate or interest represented by the term determines in such manner that his estate or

interest falls into possession.”. (Page 536 HL; see also S.29 (5) of the Act).

Although the lease in **Fairweather** was for a term of years, **Fairweather** was applied to a weekly tenancy in the **Jessamine** case (supra [1978] Q.B.264,269 E-G and 276 C-D).

3. Forfeiture

[72] During his cross-examination of three of the witnesses, counsel for the Defendant pursued a line of questioning that sought to elicit evidence about any conditions attached to the rental of the land. His written submissions filed on 15 February, 2012, raised the issue of the possible forfeiture of Ms. Hope’s lease, because she “assigned the tenancy in the mid to late 1980’s.”.

The specific questions for consideration are whether:

- (1) either the Claimant or her predecessor in title Mr. Jackman could have forfeited Ms. Hope’s lease; and, if so,
- (2) did time begin to run against either of the landlords when a right to forfeit the lease accrued?

[73] The right of a landlord to forfeit a lease, otherwise called the right of re-entry, describes the landlord’s right to determine a lease “if: (a) when exercised, it operates to bring the lease to an end earlier than it would “naturally” terminate; and (b) it is exercisable in the event of some default by the tenant”. (See **Clays Lane Co-operative Ltd. v. Patrick**, (1984) 49 P&CR 72 at 78, per Fox J.).

[74] The learned authors of “Hill & Redman’s Law of Landlord and Tenant” further explain that:

“A right to forfeit gives the landlord an option to exercise his right of determining the lease upon a cause of forfeiture arising: the lease is not automatically void on an event giving rise to the right to forfeit occurring, but is avoidable at the landlord’s option.....The landlord has to choose to determine the term.Consequently, even though events have occurred which give the lessor the right to forfeit the lease, the tenancy continues until the lessor does some act which shows his intention to determine it.”. (Butterworths 2009 Vol.1, para. A [4603]).

[75] Mrs. Greenidge was asked whether she was told about any conditions attaching to her rental of the land, other than payment of the rent. Her reply to this question was in the negative, except for a concession allowing her to use a small adjoining portion of land. Mrs. Greenidge was also asked whether she could have given the land to a stranger. She responded that:

“I don’t like court, I couldn’t do nothing so.you think I would like to know somebody hold me and throw me in prison for thieving somebody land. Not me I rather dead first.”.

[76] The Claimant was also required to respond to questions concerning conditions attached to the rental of the house-spots. In further cross-examination she informed the Court that:

“[The tenants] pay rent for the land on which their house is situated.....Paying rent and

not misusing the land and not building without permission comes under that framework. The tenants are not allowed to assign. By "assign" I understand that they pass the tenancy over to another person. If they did so they would terminate the tenancy."

[77] Finally, Mr. Haynes' evidence was that:

"I pay rent for my father from 2004.....
There are not any other conditions of the tenancy to my knowledge other than paying rent. I would not be able to give up the land to a third party without consulting the landlady."

[78] The Claimants and the tenants spoke intuitively of an awareness of an implied term of the oral tenancies, that a tenant could not give up possession of the house-spot to a third party or stranger. Where the landlord was unaware of the passing of possession of the house-spot by the tenant to a third party, according to the Claimant "they would terminate the tenancy.". In these circumstances, can it be argued on behalf of the Defendant, that Ms. Hope's tenancy was subject to forfeiture between 1984 and 1985, and that, for the purposes of the Act, time began to run against the landlord and in favour of the Defendant from that time?

[79] Ms. Hope's tenancy was governed by Cap.237. (See para. [64] supra of this judgment). By virtue of section 2 of Cap. 237, certain terms and conditions are implied into a contract of tenancy of a house-spot. Those terms and

conditions are to be found in Part II of the First Schedule to Cap.237. Part II stipulates, inter alia, that:

“(1) The tenant shall -

.....

(d) not part with the possession of, mortgage or assign or sub-let or otherwise alienate the house-spot or any part thereof except by will in favour of some member of his family or except with the consent in writing of the landlord previously obtained which consent the landlord shall not unreasonably withhold.”.

[80] Ordinarily, a contract of tenancy of a house-spot may be terminated by either party giving to the other six months’ notice. (S.11 (1) Cap.237). However, the landlord may terminate the tenancy without notice, if the tenant parts with possession of the house-spot without consent. Section 12 provides that:

“The tenancy of.....a house-spot may, notwithstanding anything to the contrary contained in section 11, be terminated –

(a) by the landlord without notice -

.....

(ii) where the tenant parts with the possession of, mortgages, assigns sub-lets or otherwise alienates thehouse-spot (except by will in favour of some member of his family) without the consent of the landlord previously obtained in writing;”.

[81] Mr. Philips, the agent who collected the land rent for the Claimant’s father, was aware that Ms. Hope had moved off the house-spot. The evidence is

that Mr. Philips collected the rent from Ms. Hope at her new address in Holetown. Therefore, there must have been some tacit agreement between Mr. Philips (as Mr. Jackman's agent) and Ms. Hope, that permitted her to continue paying land rent after 1984 when she was not in possession of the house-spot.

[82] Counsel for the parties did not ask the tenants and other occupiers of the land if they had knowledge of such an agreement between Ms. Hope and the landlord. And these witnesses did not volunteer that information. The documents of the dead are also silent in this regard. The Claimant knew that Ms. Hope did not live on the land. She said in her evidence that:

“I collected rent from Mrs. Hope after my father's death around the end of 2001 until 2003. I collected rent from her every month during that period. I met her when she was living in Folkstone, and she handed over the rent to me. It is obvious to me that she paid rent for land where she did not live....I never asked her why she was paying rent for land that she did not occupy. I did not find it strange.”.

[83] The Court is of the view that the only reasonable conclusion is that neither the Claimant, nor her father, nor Mr. Philips as her father's agent, objected to Ms. Hope continuing as a tenant of the house-spot, even though she had moved off the land. While section 12 (a) (ii) of Cap.237 requires the landlord's consent in writing for a tenant to part with possession of the house-

spot, there is nothing in Cap.237 that prohibits the parties from contracting out of this statutory requirement. In the absence of written permission from the landlord, the Court concludes that the statutory requirement for written permission was waived by Ms. Hope's landlords.

[84] Perhaps Ms. Hope was allowed to continue as an off-site tenant, paying land rent, because the relevant parties were not aware that she had sold her house. But Mr. Phillips as the rent collector must have known that other individuals occupied the house over the years. He must have been privy to the gossip surrounding Ms. Hope's sudden departure in 1984, and the continued occupation of the house by the Defendant and her husband.

[85] Another possibility is that Ms. Hope was permitted by her landlords to rent her house and sub-let the house-spot to the Defendant and her husband. The Court makes this suggestion in light of the Defendant's Affidavit in Reply, filed on 20 September, 2004, in answer to the Claimant's Originating Summons. The Defendant swore in this affidavit as follows:

“3. I lived in a small *rented* wooden house with Mr. Jacob James Nicholas to whom I was lawfully married.....

5. My husband and I subsequently bought the old house from a Vanessa Hope who informed us that the house was hers but she never knew the owner of the land.”.

[86] If such an arrangement existed between Ms. Hope and the Nicholases, it would have ended in 1985 when the house was sold to Wilton Cumberbatch. And there is no evidence to support a sale of the house to the Defendant and her husband. Unfortunately, the Defendant was never probed about this part of her affidavit. Therefore, the Court is unable to make any definitive findings of fact in this regard.

[87] Assuming that Ms. Hope did not have permission to give up possession of the house-spot to Jacob Nicholas, or to anyone else, the right to forfeit her lease accrued to the landlord in 1984. Alternatively, assuming that Ms. Hope was permitted to continue as the tenant of the house-spot while she owned the house, the landlord's right to forfeit her tenancy accrued in 1985 when Ms. Hope sold the house. The sale of the house was a well guarded secret, apparently not known to the other tenants and occupiers of the land at Chapel Gap No.1, except Jacob Nicholas. Therefore, it is not surprising that it was in 2003 when the Claimant first had knowledge of the sale of the house.

[88] The Act contains rules for determining the date of accrual of a right of action to recover land in circumstances of a right to forfeit a lease. Section 30 stipulates that:

“(1) Subject to subsection (2), a right of action to recover land by virtue of a forfeiture or breach of condition shall be treated as having accrued on the date on which the forfeiture was incurred or the condition broken.

(2) If the right of action described in subsection (1) had accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by the exercise of that right, the right of action to recover the land shall not be treated as having accrued to the person interested in the estate or interest in reversion or remainder until his estate or interest fell into possession as if no forfeiture or breach of condition had occurred.”.

[89] Writing in the context of similarly worded U.K. legislation, one author commented that:

“A right of action to recover land by virtue of a forfeiture or breach of condition is treated as having accrued on the date on which the forfeiture was incurred or the condition broken. However, this does not apply where the right has accrued to a person entitled to an estate or interest in reversion or remainder (including the landlord) where the land was not recovered by virtue of that right: in such circumstances, the cause of action accrues when the estate or trust falls into possession. Thus, if a landlord elects not to forfeit the lease, time does not run against him until the lease is otherwise determined.”. (See Hill & Redman, *supra* at para.A [5343], and **Doe d Davy v. Oxenham** (1840) 7 M&W 131).

[90] In effect, it does not matter whether the Claimant or her father were entitled to forfeit Ms. Hope’s lease between 1984 and 2003. The landlords did not

elect to forfeit the lease. To the contrary, rent was received from Ms. Hope for the house-spot until 2003. Therefore, any right to forfeit accrued to the landlords while they were entitled to an estate in reversion. And according to a section 30 (2) of the Act, time did not begin to run against the Claimant until Ms. Hope's lease was determined in 2003. It follows that the Defendant cannot rely on any breach of the lease agreement, that gave the landlord the right to forfeit the lease, in order to support her claim to possession of the house-spot.

Disposal

[91] The judgment of the Court is that:-

- (1) the Claimant is entitled to possession of the house-spot occupied by the Defendant at Chapel Gap No.1, Paynes Bay, St. James;
- (2) the Defendant shall forthwith deliver up possession of the house-spot to the Claimant, but in any event no later than 30 June, 2014;
- (3) the Defendant shall pay to the Claimant mesne profits at the rate of \$56.00 per month with effect from 27 May, 2004, until possession of the house spot is delivered up to the Claimant;
- (4) the mesne profits due to the Claimant from 27 May, 2004 to 02 April, 2014, shall bear interest at the rate of 4 per cent per annum until payment in full;

- (5) should any payment of mesne profits due to the Claimant after 02 April, 2014, fall into arrears, it shall bear interest at the rate of 6 per cent per annum until payment in full; and
- (6) costs are awarded to the Claimant, fit for two counsel, to be agreed or assessed.

Sonia L. Richards

Dr. Sonia Richards

Judge of the High Court