

BARBADOS

CIVIL SUIT No. 0090 of 2021

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

BETWEEN

DAPHNE EUDORA DEAR

First Claimant

**(acting herein by Jennifer Dolores Dear her duly
appointed Attorney on record in his Island)**

JENNIFER DOLORES DEAR

Second Claimant

And

DAVID BOURNE

Defendant

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Dates of Hearing: 2021 March 22, April 6, May 5, 25 and August 31

Date of Decision: 2021 October 5

Appearances:

Ms. Paulette Sealy for the First and Second Claimants.

The Defendant in person.

Striking out – Summary judgment – Abuse of Process – Defence of Adverse Possession and Counterclaim – Whether the Defendant’s Defence and Counterclaim and Affidavit in Answer ought to be struck out and judgment entered for the First and Second Claimants – Applicable principles – CPR Parts 26.3 and 2.3 – CPR Part 15.2 – Definition of Statement of case includes Defence.

Decision

Introduction

[1] There are two applications before the Court, the first is made by the First and Second Claimants to strike out the Defendant's Defence and Affidavit in Answer, particulars of which are set out later in this decision under **Part 26.3** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)** and for summary judgment under **Part 15.2 (a) and (b)** of the **CPR**. The second is made by the Defendant to strike out the Claimants' Fixed Date Claim Form and application for summary judgment. In order to contextualize these applications, I now set out the particulars of the principal application of the First and Second Claimants.

The Principal Application

[2] This principal application was filed by way of Fixed Date Claim Form on 2 February, 2021 by the First and Second Claimants against the Defendant for the removal of trees and dogs owned by the Defendant and which are currently on a parcel of land situate at Lot 5 Maxwell Main Road in the Parish of Christ Church containing 3782.0 square meters of land, the property of the First Claimant (the property). The application was filed under a certificate of urgency since the First and Second Claimants contracted for the sale of the property and the date of completion has now passed. Non-completion was

occasioned by the presence of the trees and the placement of dogs on the property.

The Parties

[3] The First Claimant resides at Boston, Massachusetts in the United States of America. The Second Claimant is the daughter of the First Claimant and her duly appointed attorney on record in Barbados for the purposes of these proceedings. She resides at Cane Vale in the Parish of Christ Church. The Defendant resides at Maxwell Main Road, Christ Church, Barbados on a property which adjoins the property.

The Affidavit in Support of the Application

[4] The application is supported by an affidavit, sworn to by the Second Claimant and filed on 2 February, 2021, attached to it is a copy of the power of attorney.

The salient parts of the affidavit are:

- a. That the First Claimant is the owner of the property under and by virtue of a conveyance dated 25 August 1987 recorded in a registration office on 11 September 1987 as deed number 7924-7925 of 1987.
- b. The deponent possesses an equitable interest in the property since she joined with the First Claimant and mortgaged the property to Life of Barbados now Sagicor Life Inc.
- c. By an agreement for sale dated 4 September, 2020 the Claimants entered into a contract for the sale of the property with a completion date of September 28, 2020.
- d. Non completion was occasioned by the planting of trees on the property by the Defendant about three years ago which now had to be cleared.

- e. Correspondence had been exchanged between the attorneys-at-law for the vendor and the purchaser. The Defendant had not responded to a letter requesting the removal of the trees by 8 January, 2021 nor had the trees they removed.
- f. The Defendant demanded compensation for the trees planted on the property.
- g. The deponent visited the parcel of land to have it cleaned and cleared in preparation for the completion of the transaction but was prevented from doing so by three large dogs which had been placed on the property.
- h. The deponent sought assistance from police officers at the Oistins police station who visited the property and informed the Second Claimant that they could offer no assistance and advised her to seek the assistance of an attorney-at-law.
- i. The deponent had been advised by her attorney-at-law that the Defendant's claim was baseless and that the sale and purchase could not be completed until the trees had been removed from the land.
- j. Further that the failure of the Defendant to remove the trees posed a serious threat to the First Claimant's ability to complete the sale thereby occasioning much loss to the First Claimant.

The Defence and Counterclaim

The Defence

[5] The Defendant, acting in person, filed his Defence and Counterclaim on 23 March, 2021 in which he disputed the claim on the grounds that:

- a. His grandfather Samuel Nathaniel Bourne also known as Samuel Bourne, his spouse Susana Bourne also known as Susanna Bourne, their daughter Andrea Bourne-Best (mother of the Defendant) and the Defendant's siblings had lived on the land undisturbed for all of his, the Defendant's life.
- b. His grandfather had inherited this land containing one rood or 10,890 square feet by an Indenture prepared 9 October 1901 recorded on 11 July 1945 (the Indenture).

- c. His grandfather died on 21 April 1967 and letters of administration to his estate were granted to his grandmother on 18 June 1968.
- d. The Claimants' conveyance, recorded in 1987, clearly showed that the Claimant's land abutted and bounded on his grandfather's land.
- e. The Defendant himself had been working and caring for the land in question from the age of 15 years old and he always knew that the land was connected to a greater portion as identified in the Indenture, accordingly he rejected the Claimants' claim.

The Counterclaim

- [6] By virtue of the counterclaim, the Defendant claimed that the Claimants had:
- I. Filed false accusations against him.
 - II. Known since 1987 that there were butting and bounding on his grandfather's land as expressed in the 1987 conveyance.
 - III. Had never, as neighbours, whether in person or by agent, visited their home to "levy any concerns that could have been easily resolved working together".
 - IV. Had never previously shown him any evidence of their root of title as required by section 50(1) of the Property Act of Barbados.

The counterclaim further averred that:

- V. The indenture and the letters of administration exhibited in the defence showed that the wrong party was being sued.
- VI. The letters of administration clearly showed who was in charge of the land and therefore the administratrix should be the party being sued.

The Defendant alleged also that:

- VII. The Claimant had been harassing him personally and his family since 2007.
- VIII. The Claimants had entered on the land with surveyors, strangers and trespassers, disrupting his peace and tranquillity and forcing him to leave his business for two years or thereabouts.
- IX. As a result of the false accusations and constant harassment, he suffered and continues to suffer:

“(a) a high level of anxiety,

(b) high levels of frustration

(c) legal fees in the of \$21,500 [sic].”

He therefore claimed against the Claimants the sum of \$21,500.00, costs and any other remedy that the court should consider fit.

The Affidavit in Answer

[7] The Defendant filed an “affidavit in answer” on 1 April, 2021 in which he repeated the particulars previously deposed to in his Defence and Counterclaim more particularly set out at paragraphs [5] and [6] of this decision.

The Application to Strike Out

[8] On 20 April 2021, the Claimants applied to the Court for orders that:

1. The defence and affidavit of [sic] answer of the Defendant be struck out under **Part 26.3** of the **CPR**.
2. That the First and Second Claimants be granted summary judgment against the Defendant under **Part 15.2 (a)** and **(b)** of the **CPR**, and
3. Costs.

The Claimants’ Affidavit in Support

[9] The Second Claimant filed an affidavit in support of the application on 20 April, 2021 in which she deposed, inter alia, that:

- (1) The property was duly conveyed to the First Claimant by conveyance dated 29 August 1987.
- (2) The layout of the land forming part of the property is shown on a plan certified 10 February 1982 by R. S. Gittens, Land Surveyor.

- (3) Since the purchase of the property in 1987 there had been no challenge to the ownership and no boundary dispute.
- (4) The property is subject to a mortgage in favour of Sagicor Life Inc. (Sagicor), formerly the Barbados Mutual Life Assurance Society, executed in 1998 and the title deeds were held by Sagicor as security for a mortgage.
- (5) In or about 2013 she retained the services of Mr. Samuel Taylor, Land Surveyor (Mr. Taylor), to conduct a survey of the property and in consequence she filed an application to the Chief Town Planner for subdivision of the property. Since that time she again engaged Mr. Taylor's services on at least three other occasions.
- (6) She had been advised and verily believed that the copy of the title deeds exhibited by the Defendant showed ownership of the land described therein by Susana Bourne also known as Susanna Bourne who was not named, and had not shown any interest, in these proceedings.
- (7) She had been advised that neither the documents filed nor the documents of title had given any indication that the Defendant had any right to represent the said Susana Bourne or any owner of the said land.

- (8) That she had been advised and verily believed that the documents filed or exhibited by the Defendant did not show that the Defendant had any right, title or interest in the land described in the said documents.
- (9) To the best of her knowledge, information and belief, there was no claim by way of adverse possession or otherwise by Susana Bourne or anyone claiming on her behalf.
- (10) That the affidavit of Mr. Taylor showed some young trees and a portion of a chain linked fence which was not there on the northern boundary of the property in September 2020 but was seen on 27 March 2021 and created a barrier to the said land.
- (11) When she visited the property in November 2020 only a portion of the chain link fence was on the property.
- (12) Mr. Taylor's affidavit showed that he pointed out to the Defendant on more than one occasion, that no part of the property was owned by Susana Bourne.
- [10] The Second Claimant deposed and that she had been advised and verily believed that the Defence and affidavit in answer of the Defendant were baseless and irrelevant, further that they were a sham, frivolous, vexatious and a waste of the court's time.

[11] She further deposed that the Defendant's request for compensation for trees planted on the property and present claim to occupation or ownership of a portion of the property, amounted to an attempt to frustrate the claim and to seek compensation to which the Defendant was not entitled.

[12] It was her affidavit evidence that, based upon an examination of the title deeds to the property and the title deeds exhibited by the Defendant, there were two separate parcels of land. There was no challenge to the ownership of the land of Susana Bourne and that the issue before the Court was simply that there was an encroachment on the property by the Defendant.

[13] Finally, the Second Claimant opined that the completion of the sale hinged upon the disposal of the case and that a further delay would be potentially fatal to the completion of the sale and purchase and that she would suffer loss.

The Affidavit of Samuel Nicholas Taylor (the Taylor affidavit)

[14] This affidavit was deposed to on 15 April, 2021 by Mr. Samuel Nicholas Taylor, Land Surveyor and filed 20 April, 2021. He deposed that he had been contacted by the Second Claimant in August 2013 for the purposes of conducting a cadastral survey of the property for a proposed subdivision to the Town and Country Planning Development Office. He also deposed to the

fact that he was retained on other occasions to survey the property and his findings when he visited the property.

[15] He deposed that, to the best of his knowledge and in his opinion between the period August 2013 and September 2020, the northern lands of the Second Claimant were never utilized for farming (neither crop nor animal husbandry). He, however, noted the presence of varying young and small fruit trees within the northern region of the property in or around November 2020 but did not have any knowledge as to how or when they came about on the land. In addition, due to the overgrown vegetation within the said region, there was no indication that led him to believe that any structured farming was practiced on the property. Some of the trees identified are one (1) cherry, one (1) pomegranate, two (2) paw paw, two (2) soursop, four (4) banana, three (3) pepper, one (1) lime and one (1) golden apple.

The Defendant's Application to Strike Out the Fixed Date Claim Form

[16] The Defendant filed an application on 27 April 2021 for Orders that:

- (a) The Claimants' Fixed Date Claim and Affidavit of Daphne Eudora Dear and Jennifer Dolores Dear and the Notice of Application and Affidavit filed on 20 April 2021 be struck out,
- (b) The Defendant is not a proper party to these proceedings,

- (c) The Claimants reimburse Defendant Three Thousand Dollars (\$3000.00) the cost to have an agent prepare file and serve all documents with respect to this matter,
- (d) The Claimants compensate the Defendant in the sum of One Million Dollars (\$1,000,000.00) for harassment, pain and suffering,
- (e) Such other Orders as this Honourable Court sees fit,
- (f) Cost of and incidental to this Application.

[17] The grounds of the application are:

- (a) The Claimants' Affidavit filed herein on 2 February, 2021 is an abuse of process of the Court in so far as the Defendant is not a proper party to these proceedings,
- (b) The Claimants' Affidavit and Exhibit(s) do not show that the Defendant in any event has no right to be on said land,
- (c) The Claimants have not shown their Root of Title to the land being claimed;
- (d) The Defendant produced a Deed Of Gift prepared in 1909, witnessed by a Commissioner of Probate in 1911 and recorded July 11, 1945 by his great grandfather Edward Burnett establishing legal transfer of one (1) Rood or 1/4 Acre of land to his son, the Defendant's grandfather Samuel Nathaniel Bourne as required by **Section 59 (1) of the Property Act, Cap 236.**
- (e) The Defendant produced Letters of Administration 141/1968 granting full power and authority, custody and possession, to

Susana Bourne also known as Susanna Bourne spouse of the late Samuel Nathaniel Bourne, rights of administration on all the estate which devolves to and vest in the personal representative the said spouse of Samuel Nathaniel Bourne.

(f) The Defendant produced the certified copy of the Deed of Assent or Assent evidencing the legal transfer of one (1) Rood or 1/4 Acre of land to his grandmother Susana Bourne who is the proper party to these proceedings.

The Affidavit in Support of the Defendant's Application

[18] The Defendant filed an affidavit in support of his application on 27 April, 2021 in which he deposed that he had read the Claimants' Fixed Date Claim, the Claimants' affidavit filed 2 February, 2021 and the Notice Of Application supported by an affidavit filed 20 April, 2021 and recited the contents of these documents.

[19] He deposed that:

1. The Claimants had not shown that the Defendant does not have a right to be on the land.
2. The evidence contained in the Claimants' Affidavit is not sufficient to support the Order sought.
3. The Claimants had not shown that the land to which they lay claim is theirs by Deed and have not shown root of title to the said land.
4. The Claimants had not reciprocated to his correspondence email(s) asking to sit and amicably resolve their claim even as the Court has suggested.

5. He took great offense that all around us “our 1/4 acre of land evidenced in a 1909 Deed of Gift has now dwindled down to 4888 square feet or thereabout by neighbors with agents taking advantage of our lack of knowledge and for the Claimant to state that our Defence is frivolous vexatious and a waste of the Court’s time.”
6. He never claimed in any paperwork to the Court that he was representing anyone as stated by the Claimants at paragraph 15 of the Affidavit filed April 20, 2021, and that the Claimants should produce such evidence or withdraw the accusation.
7. He verily believed that the proceedings should therefore be discontinued for the reasons set out above and that he, the Defendant, be struck out as a party to these proceedings, that the Claimants’ affidavit ought to be struck out and that the Claimants ought to pay the costs of the application in any event.

The Issue

[20] The issue before the court is whether the Defendant’s Defence and Counterclaim and affidavit in answer ought to be struck out and judgment entered for the First and Second Claimants on their claim. If the answer is in the affirmative, there is no need to discuss the Defendant’s application to strike out the First and Second Claimants’ Fixed Date Claim Form. In the event that the answer is in the negative, I will go on to frame the other issues attendant upon the other application.

The Claimants' Submissions

[21] The Claimants filed written submissions on 10 May, 2021 which will be canvassed in the Discussion and Analysis which follows.

The Defendant's Submissions

[22] The Defendant filed written submissions on the 17 May, 2021 which will also be canvassed in the Discussion and Analysis later in this decision. Of particular interest is the submission of the Defendant that Susana Bourne or the Estate of Samuel Bourne, deceased, is the proper party to the proceedings and not he.

The Applicable Law

[23] The law with respect to striking out a Defence and Counterclaim is found in

Part 26.3 of the **CPR** which is now reproduced:

26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim;

Part 2.3 of the **CPR** defined Statement of Case in the following manner:

2.3 "statement of case" includes

(a) an application, statement of claim, defence, counterclaim, third party (or subsequent) notice or other ancillary claim or defence and a reply to a defence;

[24] **Part 15.2** of the **CPR** deals with the issue of summary judgment in the following manner:

15.2 The court may give summary judgment against a party on the whole of a claim or on a particular issue if

(a) it considers that

(i) the claimant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of at a trial.

[25] I find it convenient here to set out the statutory provisions relating to adverse possession since the discussion and analysis of the Claimants' application will require an understanding of adverse possession.

[26] The law relating to adverse possession is governed by **sections 25 (1) and 31** of the **Limitations of Actions Act, Cap 231 (Cap 231)** which are now reproduced:

Section 25 (1) "Subject to **subsection (2)** 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.”

Section 31 (1) “No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run, that is to say, the land is in “adverse possession”, and when under this **Act** any right of action to recover land is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing until adverse possession is taken of the land.”

Discussion and Analysis

[27] I will analyse firstly the issue arising under **Part 15.2** of the **CPR** since I consider the application of **Part 15.2** to be dispositive of the matter at bar. For reasons which will follow hereafter I am of the view that the submissions in relation to **Part 26.3** do not fully address the issues arising under **Part 26.3**.

[28] The jurisdiction to give summary judgment against a Defendant under **Part 15.2 of the Supreme Court (Civil Procedure) Rules, 2008 (the CPR)** arises where the Court is of the opinion that:

- (a) (ii) the Defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other reason why the case or issue should be disposed of at a trial.

Part 15.2 of the **CPR** is in pari materia with *Rule 24.2* of the *Civil Procedure Rules (UK)*. The import of the UK Rule was set out by *Lord Woolf* in *Swain v Hillman and another [2001] 1 ALL ER 91 at 93 (Swain)* when he opined that:

“Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ...they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.”

It is generally accepted that this dictum represents the approach taken by our Courts in relation to **Part 15.2** of the **CPR**.

- [29] I am of the opinion that it is a serious step to give summary judgment against a litigant on the papers without giving him the opportunity to advance his case. This, however, is an inevitable consequence of the overriding objective in **Part 1** of the **CPR** to save judicial time, costs and expense. The fact that the Court is obligated to exercise its discretion reasonably and in accordance with known principles of law, is the safeguard of the rights of litigants not to be summarily run from the judgment seat.
- [30] We now proceed to examine the facts as outlined in the papers. The Claimants application is for removal of encroachments on their property. The

conveyance exhibited to the Second Claimant's affidavit clearly shows that the property is vested in the First Claimant. Ms. Sealy submitted that the Defendant has already admitted to the claim and that if the matter is taken to trial it will result in substantial costs to the parties. It was her further submission that the Defendant had admitted planting the trees on a portion of the property and had repeatedly been shown the boundaries to the property which do not form part of the lands of the estate of Samuel Bourne in which the Defendant might have an interest. Counsel submitted that **without a "substantiated interest" in the parts of land which form the subject matter of the proceedings,** the Defendant had no real prospect of successfully defending the claim. Counsel referenced **Part 15.2 (a)** of the **CPR** and relied upon *Swain*. Counsel did not elaborate on what was meant by a "substantiated interest" in the property. That, however, is no bar to the Court considering the substance of this submission.

[31] It is her further submission that the Defendant has been made aware of all relevant circumstances in the matter and that the facts show that there is no issue to be tried.

[32] I must state at the outset that, apart from the Defendant's admission of planting the trees, counsel has not pointed the Court to any part of the pleadings where

the Defendant has admitted the claim. The burden of proof lies on the Claimant. The Defendant has admitted planting the trees but appears to deny encroachment based on adverse possession. I therefore am unable to accept Ms. Sealy's submission.

[33] In relation to whether the issue should be disposed of at trial, it was Ms. Sealy's submission that the Claimants have spent considerable sums in an effort to settle this matter without the Court's intervention and that they would be severely prejudiced if the matter is not dealt with expeditiously. Further litigation would result in additional expense to the Court and parties and that, based on the facts, the result will be the same whether the matter is sent to trial or is dealt with summarily.

[34] The expense incurred by the Claimants is a consideration relevant to the expedition with which the matter ought to be heard. It is an expense which would have had to be incurred in any event in support of the claim and in resisting the Defence and Counterclaim. It is not a consideration in a striking out application. Further, counsel has not demonstrated in what way the result would be the same whether the matter is dealt with summarily or at trial.

[35] With respect to the issue whether the Defence and Affidavit in Answer disclose any reasonable ground for defending the claim, it was counsel's further submission that the documents exhibited by the Defendant showed

title to a parcel of land to which the Claimants made no claim, namely the neighbouring lands of the Estate. Furthermore, counsel argued that none of these documents showed any interest or right of the Defendant in the property.

[36] It is convenient to set out here the other submissions of counsel since they appear to partake of one nature.

[37] With respect to the ground whether the Defence and Affidavit in Answer disclosed any reasonable ground for defending the claim, counsel submitted that, under **Part 26.3(3)** of the **CPR**, the documents exhibited by the Defendant in his affidavit showed title to a parcel of land in which the Claimants made no claim and did not disclose any interests or right of the Defendant in the property or the lands of the Estate of Samuel Bourne, deceased.

[38] Under the head whether the Defendant's case presented through a Defence and Counterclaim and Affidavit in Answer amounted to an abuse of process and/or is frivolous, vexatious and a waste of the Court's time, it was Ms. Sealy's submission that the facts of the case showed that the Defendant's defence was baseless. The Defendant, she submitted, first filed the Defence which clearly referred to land in which the Claimants had no interest and in which the Defendant had not shown that he had any right interest or

entitlement. The extrinsic evidence, counsel opined, even if considered, did not add value to the case and need not be considered by the court.

[39] In analysing these submissions, we must, at all times, bear in mind the Defendant's Defence and Counterclaim and his submissions with respect to the application. I turn to them now.

[40] The Defendant, acting in person, filed his Defence and Counterclaim on 23 March, 2021 in which he disputed the claim on the grounds which are set out at paragraph [5] of this decision.

[41] There must be a sufficient substratum of fact to justify the pleading of adverse possession. The Defendant's defence is that he and his family are the owners of the property by inheritance and by virtue of the Indenture exhibited to the Defendant's affidavit and that he and his family have been farming the land since he was a young man. This is the gravamen of his adverse claim.

[42] There is no plan exhibited of the area claimed by way of adverse possession. The Defendant's affidavit evidence in support is equivocal. On the one hand it suggests that the Defendant considers the property to be a part of his family's ¼ acre of land which has now devolved upon the Estate and Susanna Bourne by virtue of the Deed of Assent. He deposed that:

“He took great offense that all around us “our 1/4 acre of land evidenced in a 1909 Deed of Gift has now dwindled down to 4888

square feet or thereabout by neighbors with agents taking advantage of our lack of knowledge and for the Claimant to state that our Defence is frivolous vexatious and a waste of the Court's time.”

A consideration of the parcels clauses in both documents, suggests that there are two adjoining lots. The Indenture shows that the adjoining lot which measured 1 rood or a quarter acre was conveyed to Samuel Bourne for consideration and not by inheritance or by way of foreclosure. The Deed of Assent exhibited by the Defendant shows that, on the death of Samuel Bourne and consequent upon the grant of letters of administration to Samuel Bourne’s estate, one rood of land was vested in Susana Bourne, his wife as administratrix of the estate contrary to the Defendant’s contention that their property had dwindled.

[43] On the other hand, the Defendant avers that the real Defendant to the suit ought to be the administratrix of the estate of Samuel Bourne. This submission is grounded in the fact that the lands of the Estate have been vested in Susana Bourne by virtue of the Deed of Assent. It must be remembered that the Defendant’s case is that he and the estate have been exercising rights over the property. This is also the basis upon which he has moved this Court to strike out the Claimants’ claim against him.

[44] This dichotomous situation has serious implications for the Defendant's Defence having regard to the nature of his claim to adverse possession. We have already set out the provisions of **Cap 231** which ground a claim in adverse possession. In **Browne v Moore-Griffith et al BB 2012 CA 8; Civil Appeal No. 16 of 2009 (July 2, 2012) (Browne), Mason JA**, as she then was, noted at paragraph [33] of the decision that:

“The Limitation of Actions Act, Cap. 231 (the Act) provides 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.”

This statement of principle distinguishes between possession simpliciter and possession which is adverse to the rights of the true owner. The *animus possidendi* or intention to possess to the exclusion of others distinguishes possession which is adverse from simple possession. In **Browne** the Court of Appeal considered the principles adumbrated by **Slade J** in **Powell v. McFarlane [1979] 38 P. & C.R. 452 at 470–472**, namely that:

“(1) ...

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

(3) ...

(4) The *animus possidendi*, which is also necessary to constitute possession, was defined by *Lindley MR* in *Littledale v. Liverpool College [1990] 1 Ch. 19, 23 CA* (a case involving an alleged adverse possession) as ‘the intention of excluding the owner as well as other people.’ This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, **in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor**, so far as is reasonably practicable and so far as the processes of the law will allow.” (emphasis added)

- [45] The Defendant claims the property by way of adverse possession, however, his affidavit evidence is that he has been cultivating a part of the property and not the entirety of it. How much has not been established by the Defendant.
- [46] In looking at the Defence holistically I must ask myself whether the Defendant has a realistic as distinct from a fanciful chance of success.
- [47] Whilst I agree with Ms. Sealy that there is no provision in the **CPR** for the filing of both a Defence and Counterclaim and an Affidavit in answer, I consider that the Affidavit in answer is helpful to my disposal of the application in so far as the Defendant relies upon its contents to buttress his application to be removed from the suit.

[48] It is clear that the Defendant's claim relates to that area of land on which the fruit trees are planted. There is no evidence to support any contention that the claim is to the entirety of the property save and except the Defendant's bald assertion that he and his family had been cultivating the land since he was a young man. In fact, the suggestion is that the area cultivated by his family is a ¼ acre which, as already said, is the area vested in Susana Bourne.

[49] In **Browne** the Court of Appeal clearly stated that whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree and noted that it is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. Each case must be decided upon its own peculiar facts.

[50] In the case at bar, we are concerned to determine whether or not the Defence and Counterclaim have a reasonable prospect of success. We have been careful not to conduct a mini trial of the issue but have tried to discuss this issue in a manner that can be easily understood by the Defendant.

[51] The Defendant's Counterclaim and affidavit evidence in support of his application to be removed as Defendant, namely that Susana Bourne is the person who ought rightly to be sued totally undermines his adverse possession claim for the following reasons:

1. The Defendant's claim is not jointly made with Susana Bourne. His submission, supported by his affidavit, is that any adverse claims devolved upon the Estate and subsequently Susana Bourne on the execution of the vesting Assent. There is some merit in this submission since a title by adverse possession is a possessory title which is transmissible by devolution.
2. Susana Bourne has not made any claim to the property or any part thereof in these proceedings.

[52] What is the significance of all this? I am of the view that the Defendant's assertion of title in Susana Bourne and the devolution of any adverse claims to her leads to a reasonable inference that he is asserting that any title by way of adverse possession does not vest in him but in Susana Bourne. This is the basis of the Defendant's submission that the wrong person is before the Court.

[53] I now turn to the Defendant's Counterclaim. A counterclaim is a claim in its own right and I therefore decided, on the peculiar facts of this case, to deal with it separately. Having raised the spectre of adverse possession and having pleaded that the Estate ought properly to be the Defendant in this suit, there is no counterclaim that the Defendant has acquired title to the property by way of adverse possession. His counterclaim is for legal fees of \$21,500.00, costs and any other remedy that the Court may see fit to order. Suffice to say that

having represented himself in these proceedings the issue of legal fees does not arise.

[54] Having made the findings of fact above and the inferences which flow logically therefrom. I now return to the issue at hand, namely, whether the Defendant has any reasonable prospect of successfully defending the claim. The answer is no. The Defendant's affidavit evidence and his submissions consequent upon that evidence demonstrate an incongruity in his case that cannot, in my opinion, be resolved by amendment of his pleadings.

[55] With respect to the Counterclaim, this Counterclaim is predicated upon the issue of the Defendant's adverse possession of the property raised in the Defendant's Defence from which he has resiled and cannot stand on its own. This in my opinion is an abuse of process of the Court.

[56] The Defendant has not urged upon this Court that there is some other reason why the issue should be disposed of at trial and I can find none on the papers.

Conclusion

[57] I am therefore of the view and hold that (1) the defendant has no real prospect of successfully defending the claim, (2) there is no other reason why the case or issue should be disposed of at a trial and (3) the Defence and Counterclaim are an abuse of process of the Court.

Disposal

[58] In the circumstances, it is ordered as follows:

1. The Defendant's Defence and Counterclaim are struck out,
2. The Defendant shall remove the fruit trees and any dogs presently on the property on or before Tuesday 12 October 2021, and
3. The Defendant shall pay the Claimants' costs of this application to be assessed if not agreed.

William J. Chandler

Judge of the High Court