EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2012/0002

BETWEEN:

ECEDRO THOMAS
ALFRED THOMAS
ELSAIR THOMAS MALONE
ALICE THOMAS

Claimants

-AND-

DAISY STOUT
GARFIELD STOUT
IONA STOUT FORBES (Executrix of the Will of Essie Stout)
GRETHEL STOUT (Administratrix of the Estate of Richard Cardinal Stout)

Respondents

Appearances: Ms. Tamara T. Cameron, Counsel for the Claimants
Mrs. Patricia Archibald-Bowers, Counsel for the Third Respondent

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2018: September 25th

JUDGMENT

[1] Ellis J: This is an appeal pursuant to section 147 of the Registered Land Ordinance against the 2011 decision of the Chief Registrar of Lands (**"**the **Registrar") to dismiss the Claimant's** application for prescriptive title to the property located in Paraquita Bay registered as Parcels 5, 104 and 105 of Block 3337B and Parcels 65 and 66 of Block 3437B all of Long Look Registration Section ("the Disputed Lands**"**).

[2] The current land registers for the Disputed Lands reflect that the First and Second Respondents, Daisy Stout and Garfield Stout, are the registered proprietors of Parcels 65, 66 and 105, each such

Parcel being held jointly by them with a different third party. Parcel 104 is currently registered in the names of William Glanville Stout and Iona Stout Forbes as executors of the Estate of Essie Stout. They are also the registered proprietors of Parcel 5 along with Walter Stout; Victorene Joseph; Edmund Stout; Garfield Stout; Clara Wheatley; Moses Stevens; Ingham Frett; Anthony Stout; Benjamin Stout; Caroline Stout and Egon Stout (as representatives of the estate of Samuel Stout, deceased); Grethel Stout Richardson and Augustine Stout (as personal representatives of Richard Cardinal Stout); and Esme Ernestine Rabsatt and Marion Smith (as personal representatives of the estate of Rosamond Malone, deceased).

[3] By way of background, Parcels 65, 66, 104 and 105 are derived from an original thirteen acre lot called Parcel 9 Block 3437B, Long Look Registration Section which was first mutated to create Parcels 38 and 39. Parcel 39 was then further mutated to create Parcels 55 and 56. Parcel 38 was registered to Iona Stout Forbes as Executrix of Essie Stout. Parcel 55 was registered to Anthony Stout. Parcel 56 was later mutated to create the Parcels 65, 66, 67, 104 and 105 which have been registered as stated above while Parcel 5 remains in its original first registration state.

[4] On 21st June, 2010 the Claimants applied to the Land Registry for an Order that the Disputed Lands be vested in them by prescription in view of the fact that they, and their father before them, had been in open, peaceful and uninterrupted possession of the said lands from at least 1942 until **their father's death in 1984 and thereafter up to the present.**

[5] At the hearing of the application in February 2011, the Registrar heard evidence from Ecedro Thomas on behalf of the Claimants who gave evidence of the acts of possession carried out by his father, Caesar Thomas over a 42 year period up to his death and thereafter by his brother and himself. The Claimants contended that the Disputed Lands were used openly and exclusively by them except for a brief period when their relative, Samuel Stout fenced the property to keep cows **until the 1950's when** he left the property.

[6] Iona Stout Forbes filed two (2) Affidavits and Grethel Stout one challenging the Application. Daisy and Garfield Stout also filed a joint affidavit and gave oral testimony in support of the objectors. Daisy and Garfield Stout gave evidence that in and around 2001 they had surveyed Parcel 56

which was derived from Parcel 9 through a mutation, and during the survey process had walked the land but saw no evidence of the Applicants' alleged possession.

[7] In addition to having the benefit of the written and oral testimony, and she also conducted a site visit during which the parties present were invited to point out any and all evidence which would confirm, support and undermine the case advance by the other side. After considering all of these matters and after considering legal submissions advanced by counsel, the Registrar denied the Application. In a written decision rendered on the 12th December 2011, the Registrar found that Caesar Thomas and the applicants after him were not in peaceful, open and uninterrupted possession factually or with intent, of Parcels 5, 65, 66, 104 and 105 from 20th April 1978 for the prescribed period of 20 years, or at the time of the Application on 23rd June 2010.

[8] The Claimants have lodged this matter pursuant to section 147 of Registered Land Ordinance and Rule 60.8 of the Civil Procedure Rules which provides that this appeal is by way of re-hearing[1]. During these proceedings, Mr. Ecedro Thomas and Louis Malone gave evidence on behalf of the Claimants. The First and Second Respondents who are represented by Daisy Stout filed a joint Witness Summary on 9th January 2014. Her attendance at the trial was excused due to ill-health by Order of the Court dated 16th March, 2015. The Third Respondent, Iona Stout-Forbes (Executrix of the Will of Essie Stout) filed no Witness Statement and gave no oral evidence in this Appeal. However, in the proceedings before the Registrar, she filed two affidavits objecting to the Claimants' application for prescriptive title. Grethel Stout (Administratrix of the Estate of Richard Cardinal Stout) who is one of the proprietors of Parcel 5 and Parcel 104 is now deceased was represented in these proceedings by Miss Lorna George pursuant to an Order of the Court. Grethel Stout filed a Witness Statement on 9th January, 2014.

[9] Although Claimants have advanced a number of grounds, the case on appeal is essentially four-pronged. The first line of argument is that the Registrar erred in concluding that she was bound by the 20th April 1978 decision of the Adjudication Officer and the Court of Appeal decision in Civil Appeal No. 1 of 1993 – Ecedro Thomas and Others v Augustine Stoutt and Another and therefore all evidence relating to the alleged acts of user by Caesar Thomas can have no bearing in the case at bar.

[1] Rule 60.8 Civil Procedure Rules

[10] The Claimants also challenge that the Registrar failed to give due consideration to relevant evidence and that her findings of fact in the hearing below are manifestly wrong as they were based on several incorrect assumptions. The final line of argument is based on fresh evidence which was admitted by the court. The Claimants contend that had the Registrar been aware of this fresh evidence, she would have inevitably ruled for the Claimants. The Claimants therefore submit that this court in its appellate jurisdiction ought to order rectification of the land register on the basis of this fresh evidence. In the interest of efficiency, the grounds were not considered in the order in which they were advanced. Taking the issues which arise on the admission of the fresh evidence first, the Court will then consider the other grounds advanced by the Claimants.

Fresh Evidence

[11] The Claimants were given leave to produce fresh evidence in support of their case to show that the Respondents have no lawful entitlement to the Disputed Lands. This was presented in the Affidavit of Louis Malone, the lawful son of the Third Claimant. In summary, the Claimants contend that during the land adjudication process, the Respondents acquired ownership of the Disputed Lands by a false claim well knowing that the lands to which they had been entitled had already been disposed of by a sale to the Government in 1961.

[12] The Claimants contend that the Disputed Lands belonged to their father Caesar Thomas who had him**self inherited the lands from his father John "Sonny" Thomas.** The Claimants state that John P. Tomar, the father of Caesar Thomas, purchased 27 acres of land at Paraquita Bay from John C. Fleming under Deed No. 36 of 1911 which land was described as being bounded:

> ***"to the Southward by the Sea, to the East by Fat Hog's Bay Estate to Northward by Long Look Land and to the Southwest by one part of the Parachutte Bay Estate".***

[13] They state that the Disputed Lands are part of this land which passed down from John P. Tomar to his son, Caesar Thomas who possessed the lands in the manner set out **in the Claimants'** application for prescriptive title.

[14] The Claimants stated that the Respondents, on the other hand, acquired an entirely separate property measuring 13 acres through a gift from their great grand-uncle, John Cunningham under Deed No. 10 of 1910. By that deed, John Cunningham gave a gift of 13 acres of land at Paraquita

Bay to the 13 children of his brother, Thomas Stout (including the Claimants' grandmother Angela Tomar, and the Respondents' grandfather, Anthony Stout ("the gift lands")). The 13 acres of land was said to derive from 54 acres of undivided land owned by the said John Cunningham which is described as being bounded as follows:

> "*to the East by Fat* ***Hog's Bay Estate, to the Southward by the sea, northward Long Look*** *land, to the Northwest by Lot No. 90 on the plan of the late George Martin, and to the southward by the other half of the said estate*".

[15] The remainder of John Cunningham's 54 acres of undivided land were disposed of in Deed No. 9 of 1910 (made on the same day as Deed No. 10 of 1910) in which John Cunningham gave 26 acres of the 54 acres to his sisters, Ann Louisa Nottingham (the great grandmother of Iona Stout Forbes) and Sylvia Pickering; and by Deed No. 21 of 1920 in which Louisa Nottingham sought to complete a sale of the remaining 15 acres of the 54 acres from John Cunningham to Anthony Stout.

[16] Counsel for the Claimants submitted that the description of the lands under Deed No. 9 of 1910 and Deed No. 21 of 1920 is identical to the description of the land in Deed No. 10 of 1910, and firmly supports the Claimants' position that they were part and parcel of the same undivided land owned by John Cunningham.

[17] In 1973, the Respondents through Richard Stout, the father of Grethel Stout, made a claim in the adjudication process which was determined by the Adjudication Officer on 20th April 1978. In making their claim during the adjudication process, the Respondents relied on certain deeds to prove their entitlement to the lands. A copy of the Claim 53/1410 which was submitted by Richard Stout on behalf of the Respondents (or their predecessors) shows that he relied on Deed No. 10 of 1910. A notation at the back of the document indicates that the officer also considered Deed No. 21 of 1920, Deed No. 40 of 1957 and a letter.

[18] After considering the evidence, the Adjudication Officer determined that the heirs of Angela Thomas, which included Caesar Thomas, were entitled to a share of 26/338 in Parcel 9. The first registration of Parcel 9 reflected this interest.

[19] Mr. Caesar Thomas had maintained in those proceedings, as the Claimants have in these **proceedings, that the "gift land" to which the Respo**ndents were entitled, was an entirely different portion of land from the Disputed Lands (which are located about half a mile to the east of the gift lands.

[20] The Claimants submit that the fresh evidence supports this fact in view of the difference in the description of the lands in the deeds being relied on by the Claimants and the Respondents and goes further to establish that the "G*ift Lands*" to which the Respondents were entitled had been sold in 1961 to the Government of the Virgin Islands long before the cadastral survey. This is evidenced in Deed No. 139 of 1961, a document not produced during the adjudication process, by which the vendors, being the owners in common, sold to the Government 69.85 acres of land in Paraquita Bay. Included among the vendors were the lawful heirs of Thomas Stout, Samuel Stout, Edmund Stout, Albertha Wheatley, Richard Stout, Ingar Consuela Frett, Anthony Stout, Moses Stephens, William Stout and Caesar Thomas who signed the said deed.

[21] To the said deed was annexed a plan which contained 5 Parcels of land including an undivided Parcel measuring approximately 13.73 acres. Mr. Malone contended that the 69 acres of land sold to the Government comprised 5 Parcels of land as set out in the map attached to the deed of sale[2]. One of the Parcels measured approximately 13.73 acres which the Claimants submit was the "gift lands" given to the Respondents[3].

[22] The Claimants submit that the fact that the land sold to the Government was the *"Gift Lands"* which had been given to the children of Thomas Stout by John Cunningham is beyond doubt. They rely on the uncontroverted evidence of Mr. Malone which they say demonstrates that on the overleaf of Deed No. 9 of 1910 and Deed No. 21 of 1920, is a notation by Mr. Alex Besson who was at the time Crown Attorney of the British Virgin Islands, stating that the lands described in the deeds were sold to the Government of the Virgin Islands by Deed No. 139 of 1961. These lands were part of the 54 undivided acres of land owned by John Cunningham and given or sold to the Respondents' predecessors.

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[2] P. 191 Hearing Bundle
[3] Affidavit of Louis Malone Tab 18 para 8

[23] The Claimant say that if the lands in Deeds No. 9 of 1910 and Deed No. 21 of 1920 (together comprising 41 acres) which formed part of the 54 undivided acres previously owned by John Cunningham had been sold to the Government, then the contiguous undivided lands in Deed No. 10 (13 acres) also formed part of the 69 acres of land sold to the Government in 1961.

[24] The Claimants stated that they were not aware of Deed No. 139 of 961 or the notation until recently although they have always believed that the property to which the Respondents were entitled was different from the Disputed Lands. They now contend that the notations prove that the Respondents' predecessors in title sold all the lands gifted to them by John Cunningham to the Government in 1961 in the sale of the 69 acres.

[25] The Claimants contends that Respondents' evidence given by Iona Stout Forbes in the hearing before the Registrar to the effect that the Disputed Lands were part of the land referred to in deed No. 2 of 1916 was false as was her evidence that her father William Stout and her grandfather Anthony Stout Sr. possessed the Disputed Lands.

Court's Analysis and Conclusion

[26] Counsel for the Respondents devoted very little time to analyzing the deeds which make up the Claimant's fresh evidence save to say that the lands sold are not the same lands as the Disputed Lands in question. Instead, she reminded the Court that pursuant to the order from the Court of Appeal, a rehearing was conducted by the Land Adjudication Officer who in a decision dated 20th April 1978 – determined that the Gift Lands was in fact the Disputed Lands and awarded title accordingly including a 26/338 share to Caesar Thomas and those claiming through Angela Thomas. She emphasized that this decision was not appealed. Counsel submitted that absent a claim alleging fraud or mistake, the Court is not at liberty to disturb the decision of the Adjudication Officer.

[27] This appeal involves consideration of the provisions of the Land Adjudication Ordinance, Cap 223 and the Registered Land Ordinance Cap 229 of the Laws of the Virgin Islands which changed the system of land registration from one of deeds to one of title. The Land Adjudication Ordinance was enacted for the purpose of effecting the adjudication and registration of rights and interest in land.

Under section 15 of the Ordinance, the Adjudication officer was entrusted with the power to adjudicate competing claims of interest in land.

[28] The Ordinance required the preparation of an adjudication record consisting of a form relating to each parcel of land which is to form the basis of the land register prepared under the Registered Land Ordinance. Once the adjudication record in respect of any adjudication section had been completed, the adjudication officer was required to sign and publish a certificate to that effect. Within 90 days of the publication of the notice of completion, any person named in or affected by the adjudication record or the demarcation map who considered such record or map to be inaccurate in any respect might give notice of his intention to petition the adjudication officer in respect of the alleged mistake and the petition would then be heard by the adjudication officer.

[29] Critical to this dispute resolution process is section 22 of the Ordinance which provided as follows:

> "After the expiry of 90 days from the date of publication of the notice of completion of the adjudication record or on the determination by the adjudication officer of all petitions presented in accordance with section 20(1), whichever shall be later, the adjudication record shall, subject to the provisions of the Land Registration Act, become final and the adjudication officer shall sign a certificate to that effect and shall deliver the adjudication record and demarcation map to the Registrar together with all documents received by him or her in the process of adjudication."

[30] The end product of this adjudication process was the compulsory creation by the Registrar of a first registration of land with absolute or provisional title on the land register. Under the provisions of the Registered Land Ordinance[4], whenever an adjudication record became final under section 23 of the Land Adjudication Ordinance and the Adjudication Officer delivered the adjudication record to the Registrar, the Registrar had to prepare a register for each parcel shown in the adjudication record and for any lease required to be registered, and she was obliged to register therein any of the particulars in the adjudication record which required registration.

[31] Under section 23 of the Land Adjudication Ordinance an appeal from the Adjudication Officer's decision lay to the Court of Appeal. The time for appeal was 90 days from the date of the Adjudication Officer's certificate. On appeal, if satisfied that the Act, decision or omission was erroneous, the Court of Appeal could make such order or substitute such decision as it may

[4] Section 9 and 10 of the Registered Land Ordinance

consider just and may under section 140 of the Registered Land Ordinance order rectification of the land register.

[32] Section 23 of the Registered Land Ordinance prescribes the effect of the registration:

> "Subject to the provisions of section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel, together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject-
>
> (a) To the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require nothing on the register.
>
> (c) Provided that-
>
> (i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
>
> (ii) the registration of any person under this Ordinance shall not confer on him any right to any minerals or to any mineral oils unless the same are expressly referred to in the register."

[33] Having reviewed the relevant statutory provisions, in the Court's judgment there is therefore much to commend the arguments of Counsel for the Third Respondent, who argued that it is too late for Claimants to assert a claim to the land based on the fresh evidence which was tendered. There are a number of regional judicial authorities which support this view. In considering a provision similar to section 22 of the Virgin Islands Land Adjudication Ordinance, Byron J.A. (as he then was) at page 9 of James Ronald Webster and another v Beryl St. Clair Fleming observed that:[5]

> "The legislation intends that this adjudication process should be final except for a right to appeal to the High Court against the decisions and acts of the adjudication officer within a limited time . . . "

[34] Similarly, in the case of Thelma Crane v David Worrell et al[6] Byron CJ (Ag.), (again as he then was):

> "The Land Adjudication Act had unmistakably created a regime to produce finality to the adjudication process which would lead to a firm and certain register of lands."

[35] These cases followed the definitive appellate judgment in Loopsome Portland et al v Sidonia Joseph where the relevant provisions in the St. Lucia Land Adjudication Act and the Land

[5] Civil Appeal No. 6 of 1993 (Anguilla) delivered 5/5/95
[6] Civil Appeal No. 13 of 1997

Registration Act are expressed in almost identical terms to the BVI Legislation.[7] At page 6 of the Judgment, the Court of Appeal held:

> "The effect of these provisions is that when the land became registered under the Act the root of title for the first registration was based on the adjudication record and not on the deeds of the parties. The registration is effected by the Registrar of Lands and he has a mandatory obligation to record the particulars appearing on the adjudication record, when it is delivered to him by the Adjudication officer. Accordingly, the persons who are registered as proprietors have no role to play in the process of the first registration."

[36] After considering the relevant provisions, the Court concluded that:

> "These provisions demonstrate that the adjudication process was a judicial process with a right of appeal. They also provide for the finality of the adjudication process, and make it clear that the document on which the Registrar of Land becomes bound to act is the final adjudication record. That is a very important point in the case because the Act provides for the intermediate steps between the completion of the adjudication record and the time when it becomes final
> ……….
>
> The provisions of section 23 of the land Adjudication Act 1984 make this consideration of no effect. Once the Adjudication Officer has signed the certificate that the adjudication record is final, the remedy of any aggrieved person is to appeal against his decision. The adjudication record is a valid and affective order. The well established principle is that a judicial order is effective and binding until it is set aside."

[37] It is common ground between the Parties that following the Adjudicator's decision of 1978 the Respondents' predecessors did not avail themselves of the appellate process and so what was recorded in the Land Registry, in accordance with section 9 (1) of the Registered Land Ordinance, was a register in respect of Block 3437B Parcel 9 (the Disputed Lands) reflecting the adjudication by the Adjudication Officer in favour of the Claimants. The consequence of this fact was authoritatively prescribed in the judgment of Robotham CJ in Skelton and Others v Skelton[8]:

> "I am of the view that the respondent not having exercised his right to petition the adjudication officer, and not having exercised his right of appeal to the Court of Appeal, nor sought an extension of time within which to appeal, and easily not having done anything for a period of nine (9) years, cannot now impeach the finding of the adjudication officer by an ingenious action for rectification in the High Court".

[38] The Court notes that the case at bar is not an action brought by way of appeal under section 23 of the Land Adjudication Ordinance. Indeed, no complaint is made against any act or decision of the Adjudication Officer and in the event that it did, clearly no such action could lie because of the

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[7] [1993] Civil Appeal No. 2 of 1992, St. Lucia, unreported
[8] (1986) 37 W.I.R. 177 at paragraph [52]

inordinate delay. This was made clear in Webster v Fleming, where the court was at pains to point that the period by which the time for an application would be extended must not be so long as to prejudice the interests of the party against whom such an application is made.[9]

[39] It follows that the 1978 decision of the Adjudicator which resulted in the first registration of Block 3437B Parcel 9 recording ownership of the Disputed Lands in following names and in the following shares: Heirs of Richard Stoutt (57/338), the Heirs of Samuel Stoutt (42/338), Walter Stoutt (15/338), Rosamund Malone (15/338), Victorene Joseph (15/338), heirs of Edmund Stoutt (12/338), Garfield Stoutt 45/338), Essie Stoutt (45/338), Clara Wheatley (6/338), Heirs of Moses Stephens (6/338), Ingham Frett (30/334), Anthony Stoutt (24/338) and Heirs of Angela Thomas (26/338) is final and binding. It has not been appealed or set aside. Moreover when a court is looking at the root of title for the first registration, it is this adjudication record and not the deeds of the parties which will form the basis for title.

[40] It is also settled law that once a register in respect of a discreet parcel of land is established by the Registrar, a court may only intervene to alter or amend such registration in strictly limited circumstances. Section 140 of the Registered Land Ordinance reads as follows:

> "(1) Subject to the provisions of subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents and acquired the land, lease or hypothec for consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his or her act, neglect or default."

[41] In the case at bar, it is readily apparent that the Claimants have not sought to challenge the first registration on the basis of mistake. Instead, Counsel for the Claimants relied on the old maxim *fraus omnia corrumpit*-fraud unravels all. Counsel submitted that no court will allow a person to keep an advantage which he was obtained by fraud. No judgment of a court, no order of a minister

[9] See: Skelton v Skelton [1986] 37 W.I.R. 177 and Frett et al v Thomas et al [1991] Civil Appeal No. 2 of 1990, British Virgin Islands.

can be allowed to stand if it has been obtained by fraud. Once fraud is proved; "*it vitiates judgments, contracts and all transactions whatsoever*."

[42] The Claimants relied on Derry v Peek[10] which held that fraud is proved when it is shown that a false misrepresentation has been made knowingly or without belief in its truth, or recklessly, careless in disregard whether it be true or false. The Claimants also rely on the Cayman Islands case in Ebanks v Clarke[11] in which the Grand Court considered identical provisions to the case the bar. In return for paying off the mortgage on land belonging to his half-brother, was given the land by deed of gift subject to his half-brother's being entitled to occupy the house which was on the land, for life. Later, during the land registration process, when the claimant was possibly away at sea, the land was registered in the name of his half-brother who subsequently transferred it jointly to himself, his companion and her daughter, the Respondent. There was no direct evidence of fraud, but there was evidence that a conveyance in the half-brother's name had been tendered during the adjudication process and that an application had also been made by him for that land certificate. The deed of gift was not recorded as having been produced before the records officer. The Claimant submitted that he had been deprived of title to the land by undisclosed fraud on the part of his half- brother. The plaintiff sought an order to rectify the land register.

[43] Schofield J found that although there was no direct evidence of fraud by the claimant's half-brother, there was conclusive evidence that he had acquired title by fraudulent non-disclosure. The learned Judge relied on the fact that the claimant had never sought to assert his own title as he was statutorily required to do because of his illiteracy. This factor weighed heavily against allowing the fraud to prevail. The Court further held that the finality of registered titles which is prescribed in the registered land system should not be construed in such a way as to condone fraud. Moreover, fraud on the adjudication process itself must be open to review. In the words of the Schofield J.;

> *"…the court should never in its desire to bring certainty and finality into a process, permit fraud to prevail. A fraud on the adjudication process itself must be open to review. In a desire to sanctify the land register we must be careful not to sanctify the results of fraudulent or dishonest actions."*

[44] It is plain that in accordance with the specific provisions of section 140, aforesaid, the High Court could lawfully interfere with the first registration of Block 3437B Parcel 9 in the absence of an

[10] [1889] 14 App Case 337
[11] [1992 – 1993] CILR 33

appeal under the Land Adjudication Ordinance, but only on proof of mistake or fraud in the registration process.

[45] The courts have long held that in order to prove that a fraud was committed, it is incumbent on a claimant to specifically lead credible and reliable evidence of the exact nature of the fraud and how it was perpetrated. In order to set aside a decree allegedly obtained by fraud, it is not sufficient merely to allege fraud without giving the particulars and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral.[12]

[46] These principles were usefully distilled in Ecedro Thomas lawful attorney for Alice Thomas and Alphonso Thomas v Augustine Stoutt and Grethel Stoutt – Richardson,[13] a judgment which is particularly relevant to the present case. In that case, the statement of claim filed by the claimants sought to set aside on the ground of fraud of the Respondents, the decision by the adjudication officer made on the 20th April 1978. This is the very same decision which led to the first registration of Block 3437B Parcel 9, which claimants once again seek to challenge on the basis of fraud.

[47] At page 3 of the judgment, the Court of Appeal summarized the obviously familiar background:

> "The decision of the Adjudication Officer revealed that the appellant's predecessor Caesar Thomas and other descendants of John Tomar [aka Thomas] claimed the disputed land on the basis that the said John C. Tomar was the grantee of 27 acres conveyed by John C. Fleming in a deed dated 28th May, 1911. The respondent and other descendants of the thirteen children of Thomas Stoutt claimed on the basis of a deed of gift dated 5th March, 1910 in which John Cunningham conveyed to the thirteen children of his deceased brother Thomas Stoutt by his first and second marriages thirteen acres of land at Paraquita Bay Estate ["the gift land"].
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> In his reasons for decision the Adjudication Officer stated that there were two issues before him: 1. was the disputed land [ie. Parcel 9] part of the land sold by J.C. Fleming to the appellant's predecessors in title or was it the gift land or part of the gift land? 2. was Samuel Stoutt in peaceful and undisturbed possession of the gift land or did he hold it by leave and license of the appellant?
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> The first question was unequivocally answered by the declaration that the disputed area was a portion of the gift land, and the second question was answered by finding that "all the Stoutt Family" including Caesar Thomas, Richard Stoutt and Samuel Stoutt used "the gift land" as descendants of the thirteen children in the deed of gift."

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[12] Halsbury's Laws of England 4th Ed. Vol. 26 paragraph 560
[13] Civil Appeal No. 1 of 1993 (BVI)

[48] In those proceedings, the claimants sought to amend the statement of claim to add yet another fraudulent representation that "the gift land" was the disputed land, when it should have been the land in the 1911 deed. The Respondents alleged that the statement of claim which sought to demonstrate that it was a fraud to designate the gift land as Parcel 9 was intended to have the adjudication officer's decision relitigated. The Court of Appeal first considered the principles upon which a judgment obtained by fraud may be set aside and relied on the following excerpt from **Halsbury's Laws of England 4th Ed. Vol.** 26 para. 560:

> "…..In such an action it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment."

[49] From this text, the Court extrapolated the following legal principles: [i] a court ought to disregard general and vague allegations of fraud; [ii] it is necessary to show that the alleged fraud was discovered since the judgment sought to be set aside; [iii] the alleged fraud must be shown to relate to matters which prima facie would be a reason for setting aside the judgment.

[50] Refining these principles, the Court first observed that:

> "The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest."

After considering the allegations levied, the Court concluded that the allegations of fraud were general and vague.

[51] The Court of Appeal also held that there was no allegation of the discovery of new and material evidence. The Court specifically concluded that the location of the gift land did not give rise to any probability of discovery since the judgment. Finally, in respect of the third principle, the Court held:

> "....the fraud must relate to some matter which would be a reason for setting aside the judgment. Perjury on a matter which is collateral to the issue would not suffice.
>
> The requirement that there must be a reason other than mere falsehood for setting aside the judgment was referred to in Flower v Lloyd (1879) Ch.D.327 at p 333-334:

> "….Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given?"

[52] At page 11 of the judgment, the Court of Appeal concluded:

> "The fraud alleged, relates to the issues which the Adjudication Officer had before him. The Statement of Claim in effect invited the court to reverse the Adjudication **Officer's finding of fact that the land in dispute was the "gift land"** and that Richard Stoutt was a descendant of one of the thirteen children of Thomas Stoutt. The well known case of Skelton v Skelton 37 W.I.R. 181 is authority that a High Court Judge sitting in original jurisdiction has no right to alter or amend a final decision of the Adjudication Officer on a question of fact based on his own inquiry in the absence of an appeal following a lapse of nine years, under the guise of an ingenious action for rectification." Emphasis mine

[53] It is evident that in the case at bar, the Claimants essentially raise the same issue which was squarely before the adjudication officer – whether the Disputed Lands were in fact the "gift lands". The adjudication officer clearly had to consider two competing claims – that advanced by the Claimants' predecessors in title (Claim 34//910) and that advanced by Respondents, predecessors in title (Claim 53/1410). In support of their claim, the Claimants' predecessors in title produced two deeds. The first, was a Deed dated 20th May 1871 in which Goodluck Cunningham and Angella Cunningham granted to Jacob Gordon et al a portion of land situate in East End measuring 80 acres and bounded on the south by the sea, to the east by Fat Hog's Bay estate, to the north by Long Look land and on the northwest by other part of the Paraquita Bay Estate. The second was the Deed No. 36 of 1911 dated 15th August 1911. The Respondents' predecessors relied on the Deed of Gift, No. 10 of 1910.

[54] Then, the Claimants' predecessors in title maintained that the land conveyed by the Deed of Gift to the thirteen (13) children is not the Disputed Lands which was identified in the 1911 Deed and is a portion of the land conveyed in the 1871 Deed. The Claimants now contend that the Deed No. 139 of 1961 (a document not produced in the adjudication process) proves that the "*gift lands*" to which the Respondents were entitled had been sold in 1961 to the Government of the Virgin Islands long before the cadastral survey.

[55] It bears repeating that in order to prove that a fraud was committed, it is incumbent on the Claimants to specifically lead credible and reliable evidence of the exact nature of the fraud and how it was perpetrated. In the Court's judgment, the weight of the documentary evidence is far from sufficient to reach the threshold required to prove that the Respondents' predecessors obtained title by fraudulent means. Having had a chance to observe Mr. Malone give evidence under oath, the Court found his testimony to be equivocal and inconclusive. The gravamen of the Claimants' claim now rests on the presence of the notations inscribed on Deed No. 9 of 1910 and Deed No. 21 of 1920 in which the Crown Attorney states: "*Part of undivided holding described within deed sold to the Government of the Colony of the Virgin Islands by Deed No. 139 of 1961*."

[56] The legal import of such a notation was not immediately clear to the Court. First, the notations are undated and the Court is therefore not satisfied of the relevance bearing in mind that while they reflect a conclusion drawn by the Crown Attorney, the basis of such conclusion is not made clear. Certainly, the Court is not satisfied that legal title in the holdings could have been transferred by virtue of the simple notations inscribed on the deeds.

[57] For that, the Court must look at the actual terms of the 1961 Deed and in that regard, the Court found little to assist the Claimants' case. First, the 1961 Deed reflects a conveyance of 69.85 acres with the vendors listed as Samuel Stout, Edmund Stout, Albertha Wheatley, Richard Stout, Ingar Consuela Frett, Anthony Stout, Moses Stephens and Ceasar Thomas. The land conveyed is not defined in terms of its boundaries, rather, the Deed stated that the land conveyed was delineated and shaded on a plan which was annexed thereto. No doubt this would have presented quite a challenge in an unregistered land system in which a root of title would have been critical. What is clear however, is that Deed No. 9 of 1910 and Deed No. 21 of 1920 conveyed a total of 41 acres only and Mr. Malone was unable to provide any convincing explanation for the significant discrepancy.

[58] Moreover, even if the Court were to accept that the notations reflected anything more than an attempt to trace the root of title, it is apparent that the deed relied on by the Respondents' predecessors during the adjudication process was not Deed No. 9 of 1910 or No. 21 of 1920 but instead Deed No 10. 1910, which contains no equivalent notation. The Court therefore has some

difficulty in discerning how Mr. Malone could conflate the deeds and conclude that the lands gifted in Deed No. 10 of 1910 had in fact been sold by the Respondents to the Government in 1961.

[59] Counsel for the Claimant contends that the 69.85 acres sold to the Government comprised 5 parcels which included a parcel which measured approximately 13.73 acres. On the basis of this fact alone she submits that this parcel was the gift lands given to th**e Respondents' predecessors.** The Court is unable to make that quantum leap. Further, a review of Deed No. 10 of 1910 reflects a myriad of named donees who are completely absent from the 1961 conveyance. Moreover, there is no indication that the Government has ever levied any claim to lands gifted in the Deed No. 10 of 1910 whether on the basis of the 1961 sale or otherwise and this does not surprise the Court.

[60] The reality is that other than the unsupported conjecture, the Claimants have posited no cogent **proof that the Respondents' predecessors fraudulently relied on Deed** No. 10 of 1910 to support their claim. In any event, there can be no allegation of the discovery of new and material evidence **because it is clear that the Claimants' predecessor,** Caesar Thomas was in fact one of the vendors listed in the 1961 Deed and would thus have been fully aware of its import.

[61] **Moreover, it is clear that the adjudication officer's** judgment was obtained in an action fought out adversely between the two opposing claimants **and at arm's length**. In 1978, the adjudication officer considered conflicting claims which were supported by entirely different deeds. Having carefully examined the same, he concluded that the land sought to be conveyed in these deeds shared similar eastern and southern **boundaries and he was satisfied that** "*it would be unwise to consider any of these deeds as being wholly reliable.*" Notwithstanding the clear and unequivocal **assertion the Claimants' predecessors that the "gifted land" is not the land in the disputed area, the** Officer assessed the witnesses who gave evidence in the claims and he concluded and declared, on a balance of probabilities that the disputed area is more likely to have been and was in fact the portion of **the "gift land**s**" above the public road at the east of Par**aquita Bay. It is also noteworthy that a licensed land surveyor also identified the land on the dispute form as Parcel 9 on the cadastral survey sheet of No 3437 B.

[62] In making that declaration, the adjudication officer conversely rejected the contention that the **Disputed Lands formed part of the Deeds relied on by the Claimants' predecessors.** This

definitively critical finding is a hurdle with which the Claimants must now contend. **In the Court's** judgment, they have produced no evidence and have submitted no legal basis upon which this finding could be disturbed.

[63] Applying the reasoning in Flower v Lloyd**, this Court can find no basis on which the adjudicator's** decision could be set aside by a fresh action on the grounds set out. The Claimants have failed to meet the standard required to establish any fraud and thus secure rectification of the land register. This claim therefore fails.

Did the Registrar err in concluding that the 20th April 1978 decision of the Adjudication Officer as to the issues of long possession of Caesar Thomas was binding pursuant to section 23 (1) of the Land Adjudication Act?

Did the Registrar err in concluding that she was bound by the Court of Appeal judgment in Civil Appeal 1 of 1993 on the issue of long possession of the Disputed Lands?

[64] In regard to these Grounds, the Claimants' submissions are succinctly set out in paragraphs 20 – 22 of their Closing Submissions. They contend that the Registrar erred in finding that while she was bound by the decision of the Adjudication Officer and the Court of Appeal on the issue of long possession she was similarly not bound by the decision in Egon Stout (*qua personal representative of Samual Stoutt*) and Anor v Ecedro Thomas et al[14] which dealt with the same issues.

[65] Counsel for the Claimants submitted that in the Egon Stout case, the High Court considered an appeal from the decision of the Registrar made in favour of the Claimants for prescriptive title to certain areas of the hillside lands which originally comprised Parcel 9. The appellate Court accepted virtually the same evidence as to possession and user given by the Claimants which is now being given in these proceedings, that is, that their father and they after his death, raised cows and goats on the land, grew crops, chopped wood for coal and fenced areas of the land.

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[14] Claim No. BVIHCV 224 of 2007

[66] **The Claimants' evidence as to possession and user of the Disputed Lands which were formerly** part of Parcel 9 is consistent with the evidence in the Egon Stout case which was accepted by the High Court in its appellate jurisdiction. That evidence was found not only to be factually correct by the Chief Registrar and upheld on appeal to the High Court but also sufficient in law to establish physical possession and the r**equisite intention to possess. The Claimants' contend** that the evidence ought to have been treated as credible by the Chief Registrar and no suitable explanation was given for its rejection.

[67] Having reviewed paragraphs 27 to 30 of th**e Registrar's** Decision, this Court finds no fault with her reasoning. There can be no doubt that the question of long possession was one of the central issues before the Adjudicating Officer and was fully ventilated in those proceedings. It is apparent th**at both sides were given leave to amend their respective claims by adding the words** "*long possession*" **after the words** "*documentary evidence*". The Adjudication Officer heard from several witnesses on both sides in regard to the claims for long possession. These witnesses were evaluated and their evidence analyzed and assessed. Ultimately, the Adjudication Officer found **that "all the Stout Family" includi**ng Caesar Thomas, Richard Stout and Samuel Stout **used "the gift land" as descendants of the thirteen c**hildren in the deed of gift and so their acts of possession were more consistent with exercise of legal ownership derived from paper title

[68] This recount was reiterated by the Court of Appeal at pages 3 **–** 4 of Ecedro Thomas lawful attorney for Alice Thomas and Alphonso Thomas v Augustine Stout and Grethel Stout-Richardson. **The Adjudicator's decision was not disturbed in that judgment.**

[69] For the reasons already set out herein, this Court concurs that section 22 provides for the finality of the adjudication process, and makes it clear that the document on which the Registrar of Land becomes bound to act is the final adjudication record. Once the Adjudication Officer has signed the certificate that the adjudication record is final, the remedy of any aggrieved person is to appeal against his decision. Until it is set aside, that record is a valid and effective order which binds the Registrar.

[70] The Court **finds no merit in the Claimants' submission that the Registrar** would be equally bound by the findings of the High Court in Egon Stout. That case concerned an appeal by the named

applicants who were aggrieved by the Registrar's decision to allow the application of Ecedro Thomas, Alfred Thomas, Alsie Thomas Malone and Alice Thomas for prescriptive title to Block 3437B Parcel 67, Long Look Registration Section. This Parcel was mutated from 3437B Parcel 9, the Disputed Lands. The gist of the evidence is that the Respondents have been in occupation of Parcel 67 on a daily basis over a period of more than forty (40) years tending their cattle and fencing the land including that portion occupied by Samuel Stout. Ecedro Thomas testified that the lands have been used for rearing animals since 1951. The Court concluded that the Respondents' user coupled with their fencing, excluded the rights of the appellants as owners.

[71] The Court agrees that the findings must be confined to the facts of that case. The Registrar was at pains to explain how she was able to distinguish that case from the matter before her. Moreover, for some inexplicable reason, the Parties in that case failed to present and the consequently the learned Judge did not consider the 20th April, 1978 decision of the Adjudication Officer or the Court of Appeal judgment in Civil Appeal No. 1 of 1993 which would no doubt have materially affected the learned Judge's findings.

[72] It therefore follows that in respect of Block 3437 B Parcel 9, the issue of long possession up to the point of first registration (1978) was definitively pronounced and settled.

Was the **Registrar's conclusion that the Claimants had not demonstrated the degree of** exclusive or physical control and custody of both the hillside lands and seas side lands up to the date of their application for prescriptive title against the weight of the evidence?

[73] It is the Claimants' case that they occupied the Disputed Lands first through their father, Caesar Thomas over a 42 year period from 1942 up to his death in 1984 and thereafter through Ecedro Thomas and his brother. They contend that Caesar Thomas used the lands to cultivate crops such as potatoes and bananas and to rear cattle. In addition, they claim that their father had erected barbed wire fencing around the property which was repaired and replaced several times over the years. They say that he was assisted in his activities by the First and Second Claimants who after his death continued to use the land to plant crops, rear animals such as cows and goats, to cut wood to make coal, cut sticks for fish posts and in respect of Parcel 5 to moor their boats and store equipment.

[74] The Respondents on the other hand, submit that the Claimants did not occupy or have any physical control over the Disputed Lands in the manner alleged. They submit that during the sole site visit, Ecedro Thomas was not able to prove any such possession, as there was no livestock or evidence of such, no fence which he claimed was present, no buildings, and no human tracks. In fact the area was overgrown. Daisy and Garfield Stout stated that in and around 2001 they had surveyed Parcel 56 which was mutated from Parcel 9 and during the process, they visited the property and walked the land but saw no evidence of possession. Iona Stout also claimed that she made several visits to the land over the years.

[75] They also say that is quite noteworthy that the Claimants have in the past sought and gained possessory title to other lands (Parcel 67)[15] but did not seek title to these Disputed Lands till years later.

[76] The Claimants trenchantly maintained that the decision of the Registrar is flawed and must be overturned. They first point out that the Registrar had no difficulty in accepting that at some point in the past, Caesar Thomas and those claiming through him had a presence on Parcel 9 to graze, cows, goats and sheep. She even held that it was highly likely that Caesar Thomas could have reaped the profits of wood from the land with which to burn his coal pit. Notwithstanding this, the Registrar concluded that she was:

> "…**unable to conceive from the sole testimony of Ecedro Thoma**s that immediately after highly contentious legal proceedings which concluded in April 1978 where the parties would no doubt have been sensitive to the dangers of long possession, Caesar Thomas and Applicants who hitherto did not have a registered interest, went into immediate **exclusive possession of the disputed lands in the legal sense.**"

[77] The Registrar theorized that it was more plausible that Caesar Thomas having succeeded in obtaining a registered interest in Parcel 9 as an heir of Angela Thomas was allowed to use the land with permission or the acquiescence of the family.

[78] Counsel for the Claimants submitted that this finding was wholly erroneous and against the weight of the evidence. She argued that given the evidence before her and the protracted and acrimonious litigation history between the parties in which Caesar Thomas maintained that the Disputed Lands belonged to him, it was more unlikely that he would have been allowed to use the

[15] Egon Stout (qua personal representative of Samuel Stout) and Anor v Ecedro Thomas et al

entire land when he was only entitled to a 26/228 share through his mother. Counsel submitted that it is more plausible that he used the Disputed Lands without permission on his own behalf and for his own benefit. She further submitted that there was no evidence that any of the legal owners had expressly given Caesar Thomas permission to use the land and in light of this, the Registrar could not properly draw the conclusion which she did.

[79] The Claimants then pointed to the evidence of Daisy and Garfield Stout who testified that they were aware that Parcel 5 and 104 was occupied by Samuel Stout from 1950 to 2001 and after his death by Egon Stout who planted crops. Counsel for the Claimants stated that this evidence was critical because it corroborates the Claimants' claim that there was farming and crop growing activities ongoing on the Disputed Lands during the relevant period. If the Registrar accepted the Respondents evidence that these activities were being carried out on the property after the 1950s, they submit that she should have taken into account the Claimants' evidence that this activity was being carried out by their father and later by them.

[80] Counsel for the Claimant also submitted that the Registrar erred when she concluded that because she observed no evidence of present day user, the application must fail. Counsel submitted that it was open to the Registrar to have found that even if there was no evidence of factual possession at present, the evidence of possession and intent between 1978 and 1998 was sufficient to vest the Claimants with possessory title.

[81] In respect of the seaside parcel (Parcel 5), the Registrar found that the claim for prescriptive title to that Parcel could not be sustained in view of occupation of a portion of the property by Elton Gordon and in view of the fact that Ecedro Thomas was unable to properly identify the precise boundaries of the Parcel. Counsel for the Claimants submitted that this finding is erroneous because there was no evidence the Mr. Gordon was in single and exclusive occupation of the land **such as to defeat the Claimants' title.** She submitted that mere user of the property would be insufficient.

[82] Moreover, Counsel submitted that the Registrar discounted her own finding that Ecedro Thomas had given permission to Curtis Smith to use the area to moor his boat. She submitted that this was

consistent with the Claimants' sole occupation and control of the entire seaside parcel and demonstrative of the fact that the Respondents were not in possession or control of the lands.

[83] The Claimants also assert that the Registrar failed to properly treat with the evidence of Grethel Stout that she was aware that Ecedro Thomas and Alfred Thomas moored their fishing boats on Parcel 5 although she claimed that this only started in 2010. Counsel for the Claimants argued that this evidence placed the Claimants in physical possession of the Parcel and demanded that the Registrar fully explore the evidence which demonstrated that the Claimants had a sufficient degree of physical control and the requisite intention to be vested with prescriptive title.

[84] With respect to the hillside lands, the Claimants also argued that the Registrar's rejection of the Claimants' claim that the Disputed Lands was used to rear animals and her conclusion that there was no fencing on the property is erroneous and against the weight of the evidence. Counsel pointed to Ecedro Thomas' evidence that the Registrar failed to properly examine the Disputed Lands because she only observed the property from the vantage point of the access road at the base of Parcel 66. They say that the Registrar therefore failed to observe that there were remnants of barb wire fencing along the portion of the Parcel bounding the highway.

[85] They also say the Ecedro Thomas was clear that there were cows and goats on the land. Counsel for the Claimants submitted that the Registrar neglected to consider or treat with any gravity, the evidence of Ecedro Thomas that there were still goats being kept by them in the interior of the land. She argued that the absence of physical structures on the land was not enough for her to conclude that goats could not be kept on the land as it is common to graze goats in open lands and without pens.

[86] Counsel for the Claimants concluded that there was no evidence that the Claimants' user of the land was interrupted by any of the registered owners or the persons claiming through them. She submitted that partitioning of the lands without more would not be sufficient to disrupt possession, neither would the onetime entry by a surveyor be sufficient to divest the Claimants of their title by prescription.

COURT'S ANALYSIS AND CONCLUSION

[87] The simple question for determination is whether the Claimants and their predecessors acquired possessory title to the Disputed Lands by peaceable, open and uninterrupted possession for a period of twenty (20) years without the permission of the person lawfully entitled thereto. Although this is essentially a question of fact to be determined on the evidence, it is worthwhile to first review the applicable law.

[88] It is now settled law that the onus is on an applicant for possessory title to prove on a balance of probabilities that he has been in adverse possession of the land for a period of twenty years. The factors to be proved are set out in section 135 of the Registered Land Ordinance which provides as follows:

> "(1) The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twenty years, provided that no person shall so acquire the ownership of Crown land.
>
> (2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor thereof."

[89] In reckoning the period of possession, this Court is bound by the Court of Appeal judgment in Moses Joseph et al v Alicia Francois[16] which prescribes that the appropriate starting point would be the date of first registration which in this case was 1973. In considering the impact of the land registration titling project (LRTP), the Court held that:

> "…..the LRTP was not simply about registration of title but very importantly that all first registrations were predicated upon an adjudication under the LAA. This was so whether it flowed from a contested claim or (as is the case here) an uncontested claim. As the Privy Council said in Louisen v Jacob at paragraph 39:
>
>> "The LAA and the LRA were intended to operate as two interlocking elements of the process of first registration of title. The LAA was concerned, as its name indicates, with the adjudication of claims to land ownership. If there were competing claims the adjudication officer was to decide them in a quasi-judicial capacity, weighing up the evidence and applying principles of land law. Even if there was no contest between claims, the recording officer still had to subject the claim to scrutiny (section 14 refers to "such investigation as he or she considers necessary") before completing and signing the adjudication record for certification by the adjudication officer. Once it became final the certified record was to be passed to the Registrar (as provided in

[16] SLUHCVAP 2011/0025 St. Lucia

section 10 of the LRA) for first registration. If the confirmed adjudication record appeared to be in order there would be no reason for the Registrar to seek to go behind it."

[90] The Court went on to hold that:

> "In our view the learned judge was right to recognise the intervention of the LRTP which by the conjoint effect of the LAA and the LRA, provided an entirely new all-embracing and comprehensive scheme designed to adjudicate upon and provide registered title to all lands in Saint Lucia. It provided for a process for hearing disputed claims or claims to the same land by different parties; for the conduct of investigations to ascertain ownership, and finally for appeals from decisions of the adjudicator as to ownership and other rights claimed. It was a holistic scheme implemented for the purpose of bringing certainty to the ownership and identification of lands in Saint Lucia. It provided for a system of land registration (the "Torrens system") similar to that undertaken and implemented in the 1970s in a number of Commonwealth Caribbean States and United Kingdom Overseas Territories."

[91] Accordingly, the Court of Appeal in that case concluded that the learned judge was right to hold that the relevant period for the purposes of prescription operating as a bar to Jacob Fanus' claim must be reckoned, not from some time prior to the LRTP, but as commencing from the time Jacob Fanus became registered proprietor in 1987.

[92] At the very heart of prescription law is the need to establish when the person entitled to claim the land was either dispossessed or discontinued possession of the land. This is because time starts to run "at the time of such dispossession or discontinuance of possession." Before that question can be settled, it must be understood what the law means by possession. The English courts have provided a number of useful judicial precedents in this area but it is generally accepted that the case of JA Pye (Oxford) Ltd. & Anr. v Graham & Anor[17] stands as a definitive authority on the applicable legal principles. In that case, the House of Lords helpfully traced the history and development of the law relating prescriptive title and adverse possession and restated the applicable principles relating to 'possession'.

[93] J.A. Pye (Oxford) Ltd reproduced from Slade LJ in Powell v McFarlane[18] the following statement of principle:

> "Factual possession signifies an appropriate degree of physical control .... Thus an owner of land and a person intruding on that land without his consent cannot both be in

[17] 2003 1 AC 419
[18] [1977] 38 P & CR 452 at 470 – 471

possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.... what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

[94] Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. A tribunal must consider whether the squatter/ trespasser has dispossessed the paper owner (in this case, the registered proprietor) by going into ordinary possession of the land for the requisite period without the consent of the owner. The two elements necessary for establishing legal possession are:

"(1) a sufficient degree of physical custody and control ("factual possession");

(2) an intention to exercise such custody on one's own behalf and for one's own benefit ("intention to possess").

[95] Such an intention may be, and frequently is, deduced from the physical acts themselves. The courts have made it clear that "it is not the nature of the acts which "A" [*an applicant for possessory title*] does but the intention with which he does them which determines whether or not he is in possession." The squatter/trespasser's attitude to ownership is irrelevant. He may know that the land belongs to someone else or he may mistakenly believe that it is his. Alternatively, he may never have thought about the question of ownership but simply treated the land as his because it was there and it suited his purposes. Whatever the squatter/ trespasser's understanding about the ownership of the land, he must intend to exclusively possess it – in other words he must intend to take control of it as if it were his own and to exclude everyone else from it.

[96] The *animus possidendi* was defined by Slade LJ in Powell v McFarlane[19] in the following way:

"….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."

[19] [1977] 38 P & CR 452 at 471 – 472

[97] It will always be a question of evidence as to whether the squatter/trespasser had the necessary *animus possidendi*. In many circumstances this will be inferred from his acts of factual possession – for example, enclosing land by erecting a new fence or fitting new locks to doors will usually be taken as convincing evidence that the trespasser intends to establish exclusive possession.

[98] The Registrar's written reasons disclose that she took into account these legal principles when she considered the evidence presented. She very helpfully considered the evidence in relation to what she termed the "seaside lands" or Parcel 5 which is described as "s strip of flat, low lying land bound on the north by the Blackburne Highway and on the south by the Paraquita Bay Lagoon, and the "hillside lands" consisting of Parcels 65, 66, 104 and 105 and which is described as gentle sloping land just opposite Parcel 5 on the north, separated only by Blackburne Highway and a triangular piece of land.

[99] The Parties have taken no issue with these descriptions and for ease of reference this Court has considered the Claimants' case in accordance with this categorization.

Seaside Lands

[100] The land register for Parcel 5 reflects that a first registration date of 26th March 1973. The land is held in common by the registered owners who were awarded title further to an adjudication record dated 23rd March 1973. The then owners were listed as Richard Stout, Samuel Stout, Walter Stout; Rosamond Malone, Victorene Joseph; Edmund Stout; Essie Stout, Garfield Stout; Clara Wheatley; Moses Stevens; Ingham Frett; Anthony Stout; Benjamin Stout. Save for some entries reflecting transmission of title upon succession, the register has remained essentially the same.

[101] During the course of these proceedings, the evidence advanced on behalf of the Claimants with regard to the seaside lands was consistent with that which was advanced before the Registrar. The First Claimant who gave evidence before the Registrar on behalf of the Claimants contended that he used the seaside land together with his father and brother Alfred Thomas to store and launch their fishing boats and that their father Ecedro Thomas also used it to burn a coal pit. He further stated that he and his brother continued to use the seaside land for fishing boats up to today.

[102] During the site visit, the First Claimant was given an opportunity to shore up or strengthen his case. He pointed out an area with a makeshift ramp where a fishing vessel owned by Curtis Smith was tied to the Mangroves. The Registrar accepted the evidence of the First Claimant that he had given Curtis Smith permission to use the area. However, in her words the true status of the seaside land was revealed in the well worn path 6 – 8 feet leading from the Blackburne Highway to floating dock some 15 – 20 feet in length. There was a larger clearing surrounding the area. There was large fishing vessel with 10 large fishing traps and a motor vehicle parked immediately in front of the dock.

[103] When he was asked who had constructed the dock and who owned the boat, the First Claimant admitted that he had no knowledge. However, Grethel Stout who was present during the site visit and who was one of the objectors was able to identify the owner of the vessel as Elton Gordon who she said had used the area for some time and had been responsible for constructing the dock. The First Claimant did not dispute this evidence. Grethel Stout was also able to point out the eastern boundary of the seaside lands when the First Claimant could not.

[104] It is clear that the Registrar much preferred the evidence of Grethel Stout who she described as a "*witness of candour who knew somewhat of the activities on the disputed lands*." This was further exacerbated when the Registrar toured the western side of the seaside land and was directed to the presence of several vessels, a tent and a wooden building said to belong to the applicants' family. Unfortunately, it was pointed out that most of what was shown was not on the disputed seaside land but on the adjacent parcel of land. Having had an opportunity to observe all of the witnesses in the matter, she concluded "*I prefer the Third Objector's evidence as the most accurate account of the activities on the disputed lands*."

[105] On these bases, the Registrar concluded that the claim in respect of the seaside land could not be sustained because the Claimants lacked the degree of physical control which they claimed to have had and still claim to have. The Registrar was also satisfied that the activities of Elton Gordon was evidence of the fact that the Claimants did not intend to exclude the whole world from the seaside land. She was also unimpressed by the First Claimants' confusion as to the size and extent of the seaside land which led the applicants to file a claim based on possession of other seaside lands which were not in dispute.

[106] In Luella Mitchell et al v Maurice Jones[20] the Eastern Caribbean Court of Appeal considered the proper approach of an appellate court on an appeal against findings of fact. The Court of Appeal referenced the now well-established principle which prescribes that an appellate court will not lightly overturn a trial judge's findings of fact. This principle was said to give "*due recognition to the trial judge's unique position of being able not only to hear a witness but also to observe his or her demeanor during testimony and thus being much better placed than an appellate court to assess credibility*." The Court quoted Lord Macmillan in Watt v Thomas[21] who stated:

> "The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so…then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

[107] It is clear that having assessed the credibility of the witnesses, the Registrar found the Third Objector to be the more reliable and credible witness. In her written Decision, she has set out her reasons for so finding which in my view cannot be faulted. The evidence presented by the claimants was imprecise and lacking in detail, it was not consistent within itself and it was in material respects contradicted by other evidence. The Registrar was not bound to accept it: on the contrary it was open to her to take the view that the evidence was nebulous and unreliable and insufficient to discharge the burden of proof resting on the Claimants.

[108] During the course of this appeal, the First Claimant was permitted to file witness statements. The Court has reviewed these statements and finds that they essentially repeat the evidence which was before the Registrar. The First Claimant took no opportunity to plug or otherwise explain the obvious lacunas which were referenced in the Registrar's Decision and which informed her very obvious concerns about his reliability. It is clear from her Decision, that the Registrar was

[20] HCVAP 2006/016 St. Vincent and the Grenadines

[21] [1947] AC 484

concerned that the First Claimant's inability to accurately identify the area of land in Dispute and she was satisfied that it was this confusion as to the size and extent of the seaside land which essentially led the applicants to file a claim based on possession of other seaside lands which were not in dispute.

[109] This Claimants' case on appeal has done little to traverse this critical issue. Instead, they submit that having accepted the evidence of the First Claimant that he had given permission to Curtis Smith to use an area of the seaside lands where he had a ramp and fishing boat is consistent with the Claimants sole occupation and control of the entire seaside lands and demonstrative of the Respondents not being in possession of the said lands. This Court was not persuaded by this argument.

[110] First, on an application for possessory title, there is no obligation on part of the registered title holder to prove possession and use of their property. Instead, the onus is on the party seeking to dispossess the paper owner, to establish that he/she was in adverse possession of the land for a period in excess of 20 years, by satisfying the court that he/she had exclusive possession of it with the intention of possessing it to the exclusion of all others, including the paper owner, for a continuous period of over 20 years immediately preceding the institution of the proceedings. [22]

[111] Secondly, it is clear that factual possession connotes a sufficient degree of occupation or physical control coupled with an intention to possess. Powell v McFarlane stresses that it must be a single and exclusive possession and so it is clear that enjoyment of the property must be exclusive to the Claimant. In J.A. Pye (Oxford) Ltd, the intention to possess is described as an "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..., so far as is reasonably practicable and so far as the processes of the law will allow.[23]

[112] Of course the Court accepts that the context is relevant. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, including the nature of the land and the manner in which such land is commonly used or enjoyed.[24] The Court must ask itself what would be expected of a person in possession of land in the particular

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[22] Marlon Mills v Stacey Mckie SVGHCVAP2016/0001
[23] J.A. Pye (Oxford) Ltd at paragraph [43]
[24] J.A. Pye (Oxford) Ltd at paragraph [41]; Buckinghamshire County Council v Moran

circumstances of this case, or what would such a person be expected to be doing in order to demonstrate his intention to exclude the world at large. Having regard to the nature of this land, this Court is not satisfied that the Claimants were doing all that they could be expected to do in relation to the land to make their intentions unambiguously clear to the world at large. This is especially so when the Court has regard to the fact that Mr. Thomas conceded that there were other boats on the property and that not everyone who used the boats had sought and obtained his permission. This was clearly evident when it became clear that he was not even aware of the presence of Mr. Gordon who had constructed a permanent structure on the land and who openly utilized the land. In the Court's judgment, this does not amount to an appropriate or sufficient degree of control which would lead the Court to conclude that over the course of 20 years, the Claimants possessed the land in such a way as a full owner would and in such a way as would exclude the registered owner or indeed the world at large.

[113] In Marlon Mills v Stacey Mckie, the Eastern Caribbean Court of Appeal prescribed that a person seeking to dispossess the owner of land by adverse possession must identify with precision the land being claimed and must establish a sufficient degree of factual possession and *animus possidendi* to prove his or her clear and unequivocal possession of the land to the exclusion of all others, including the paper owner.[25] Given the unreliability of the First Claimants' testimony before the Registrar, it is not surprising that she placed little store in his evidence. What little evidence of use: mooring of boats and cutting of wood for burning of coal could carry little weight in view of his confusion as to the boundaries of Parcel 5 and in view of the fact that the activities seemed to be carried out on lands which were contiguous to the Parcel 5 and which are not the subject of this claim. The Court is persuaded that there was enough evidence to negate a conclusion that the Claimants had unequivocally and exclusively possessed the seaside lands.

[114] The case for the Claimants ultimately rests on the permission given by the First Claimant to one user one year before the date of the Application. The Claimants' case did not improve before this Court. Having reviewed all the somewhat nebuolous evidence of factual possession and having had an opportunity to observe the First Claimant under cross examination, the Court finds no cogent reason for disturbing the Registrar's findings.

[25] see: pages 3 – 4 of the judgment

Hillside Lands

[115] Following the appellate judgment in Moses Joseph et al v Alicia Francois, the Court is again satisfied that the relevant period for the purposes of prescription must be reckoned, not from some time prior to the Land Registration Titling Project, but as commencing from the time the paper owner became registered proprietor. In the case of the hillside lands that would be 20th April 1978 following the order of the Adjudication Officer.

[116] As at 1978, the subject Parcels would have been derived from Parcel 9 which was originally held by proprietors in common who included the heirs of Richard Stoutt, the heirs of Samuel Stoutt, Walter Stoutt, Rosamund Malone, Victorene Joseph, heirs of Edmund Stoutt, Garfield Stout, Essie Stout, Clara Wheatley, heirs of Moses Stephens, Ingham Frett, Anthony Stout and the heirs of Angela Thomas, the latter being the C**laimants' predecessors in title.**

[117] As indicated earlier, Parcel 9 Block 3437B, Long Look Registration Section was first mutated in 1981 to create Parcels 38 and 39. Parcel 38 was vested in the estate of the Essie Stout, leaving Parcel to be held in common. Parcel 39 was then further mutated in 1988 to create Parcels 55 and 56. Parcel 55 was registered to Anthony Stout, leaving Parcel 56 in the names of the remaining original proprietors. In 2003 and pursuant to the application of Garfield Stout, Parcel 56 was mutated to create the Parcels 65, 66, 67 on Block 3437 B and Parcels 104 and 105 which fell to the adjacent Block 3337B.

[118] Parcels 65, 66 and 105 are now held jointly by Garfield Stout, Daisy Stout and a third party. Parcel 104 remains registered in names of the original proprietors in common. This Appeal concerns Parcels 104 and 105 and Parcels 65 and 66.

[119] It follows that the facts of this case reveal that up until 2003, the lands which formed part of the Disputed Lands were **owned by the Claimants' predecessors in title who held the same in common** with the Respondents and/or their predecessors in title.

[120] In Corea v. Appuhami[26] the Privy Council approved the well-known principle that possession is never considered adverse if it can be referred to a lawful title. In that case the appellant sued for partition of certain lands in which he claimed as purchaser to be interested as co-owner with the respondent Iseris Appuhamy, who had with his three sisters succeeded thereto as heirs of their brother Elias, who died on July 23, 1878. It appeared that on January 26, 1907, the first respondent, Iseris donated the lands to his son, the second respondent, reserving to himself a life interest therein; and that on December 5, 1907, the surviving sister of Elias and her nieces sold their interests in the lands in suit to the appellant, who thereupon claimed to be entitled to a two-thirds share thereof. The first respondent, besides denying the appellant's title, pleaded that he as the sole heir of Elias entered into possession and had been in undisturbed possession for a period of ten years by a title adverse to and independent of the appellant and all others, and relied upon section 3 of Ordinance 22 of 1871.

[121] The Court first pointed out that his title was not independent but rather was held in common to Iseris and to his three sisters. The Court observed that on the death of Elias, his heirs had unity of title as well as unity of possession. So that in on entering into possession, and having a lawful title to enter, the first respondent could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors.

[122] The Board held that the possession of one co-owner could not be held as adverse to the other co-owners. Lord Macnaghten, who delivered the judgment, cited the dictum of Wood V.-C. in Thomas v. Thomas[27]:

> "Possession is never considered adverse if it can be referred to a lawful title."

[123] Although the Board concluded **that the first respondent's possession was in law the possession of** his co-owners and that it was not possible for him to put an end to that possession by any secret intention in his mind, the Board did not suggest that a co-owner can never acquire adverse possession against other co-owners. Rather this case stands as authority for the point that

[26] [1912] A.C. 230; and see Kenneth McKinney Higgs, Snr. v Leshel Maryas Investment Company Limited and Another [2009] UKPC 47
[27] (1855) 2 K. & J. 79

possession *by itself* is never considered adverse if it can be referred to a lawful title. If however exclusive possession of one co-owner is accompanied by an open assertion of adverse title which amounts to an ouster of the other co-owners, and the fact of such assertion is brought to their knowledge there is nothing to prevent the character of his possession from changing into adverse. In the words of Lord Macnaghten; "…*nothing short of ouster or something equivalent to ouster could bring about that result*."

[124] It therefore follows that there can be no adverse possession by one co-owner unless there has been a denial of title and an ouster to the knowledge of the other. This legal principle is predicated on the fact that entitled to a property, each of them has a right to enjoy the whole property but without excluding the others. The underlying principle is that the possession by one co-owner of the entire joint property is perfectly lawful as he has the title not only to his undivided share but to the whole of the property, and is entitled to possession of the whole property as well as of every undivided part. Therefore, an owner of an undivided share in a property can be rightly in possession of the whole. The possession by him of the entire common property is referable to his legal title and is not adverse to any other co-owner.

[125] The case law also make it clear that the mere fact that one co-owner is in possession of the whole property at any time does not necessarily imply his denial of the title of his co-owners, their ouster or any assertion of adverse possession against them. If the other co-owners find no occasion to effectively enjoy the property at the time, they need not mind the possession by one of them. In the eyes of the law they are deemed to be in constructive possession of the joint property and the possession of one must prima facie be deemed to be permissive and not adverse. Each co-owner is entitled to assume that a co-owner exclusively possessing the property is in possession of the property on behalf of all co-owners and not adversely to the other co-owners.

[126] The position becomes different when their title has been denied and their right of enjoyment of the property has been repudiated to their knowledge. From that moment the character of the possession of the co-owner changes, and it becomes adverse against those who have knowledge of the ouster, and time begins to run against them.

[127] As between the co-owners there must therefore be an open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster in order to make out a case of ouster against the other co-owner. Acts that are considered "ouster" include denial of title, changing locks on gates or other entries to the property, posting "no trespassing" signs on the property, and denying admittance to the property. The burden of making out ouster is on the person claiming to displace the lawful title of the co-owner by his adverse possession, and so, in the case at bar, this would mean that it would be necessary for the Claimants to plead and prove to the requisite standard, that they had asserted a hostile title coupled with exclusive possession and enjoyment of the property to the knowledge of their fellow co-owners.

[128] In this case, the evidence of possession relied on by the Claimants was advanced by the First Claimant who stated that from about 5 years of age (1942) he knew his father, Caesar Thomas to be occupying the entire area of land making up the Parcels 65, 66, 104 and 105 Disputed Lands. According to him, his father fenced portions of the land and used it to cultivate potatoes and bananas and rearing of cattle and horses. The First Claimant stated that his father put up barb-wire fencing and this fencing was repaired and replaced several times over the years. At paragraph 9 of his first witness statement, he states that for a period of years when his father occupied and used the said land, Samuel Stout used a limited portion including part of the area where the Disputed Lands are now located. He contends that Samuel Stout fenced that area and kept cows on that portion but eventually left the land in the 1950s. The First Claimant goes on to state that thereafter, his father, his brother Alfred and himself began occupying and using the area where Samuel Stout had fenced to the exclusion of all other persons.

[129] For the reasons which have already explained herein, the Court is satisfied that the relevant period for the purposes of prescription must be reckoned, not from some time prior to the first registration, but as commencing from the time original proprietors became registered proprietors in 1978. The Court is satisfied that the evidence alleged in these proceedings, was before the Adjudicator in 1978 who concluded that:

> ***"It must be remembered that the gift lands was given by John Cunningham to the thirteen*** *children of his deceased brother Thomas Stout and that among those children were Samuel Stout, Angela Thomas (nee Stout) and Rebecca Pickering, that Angela Thomas was the mother of Caesar Thomas that Samuel was his uncle, that Rebecca was his Aunt*

and that Richard Stout was a descendant of one of the thirteen children to whom the "gift land" was given.

I think therefore that the use of the disputed land by any of the thirteen children or their ***descendants would be consistent with their using it as the gift land…."***

[130] So that the acts of possession which pre-dated the process whereby the certified record became final and was passed to the Registrar for first registration would not be relevant for the purposes of this Appeal.

[131] The First Claimant however states that his father continued to use the Disputed Land until 1984 when he died. Thereafter, together with his brother Alfred, he asserts that he continued rearing animals on the property until present day. He also stated that they have cut wood and sticks to make fish pots and burn coal. When he was examined under oath, the First Claimant was repeatedly taxed about the presence of fencing on the property and whether he identified the same during the site visit and whether he continued to rear animals on the Disputed Lands. From his evidence, it became clear that Claimants user of the property had substantially waned in the years immediately preceding the Application. The fence was in disrepair and only remnants remain, they had ceased farming years ago and there were only a few goats roaming at will.

[132] Given that the Disputed Lands were held in common between 1978 and 2003, it is necessary in this case for the Claimants to prove that they had asserted a hostile title coupled with exclusive possession and enjoyment of the property to the knowledge of the other co-owners. In this case, neither in the case before the Registrar nor in these proceedings did the Claimants contend that the Respondents' rights were openly denied through ouster or adverse possession.

[133] At paragraphs 21 – 28 of his first witness statement, the First Claimant asserts repeatedly that the Respondents never maintained a presence on the land but it is clear that it would not be sufficient to show that one co-owner was in separate possession of the property and another co-owner was out of possession.[28] Even if the entirety of the Claimants' evidence is accepted, it is clear that **nowhere in the evidence proffered can it be said that Claimants' possession was open with the** assertion of hostile title and to the knowledge of the other co-owners such as would constitute

[28] Subah Lal vs Fateh Mohamad on 1st March, 1932 AIR 1932 ALL 393

ouster. It is settled principle that as between the co-owners, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment of one of them to the knowledge of the other, so as to constitute ouster. This burden has not been discharged in this case. There is no evidence that the Claimants ever told the other tenants in common to stay off the property, or otherwise excluded them from the property. The Claimants actions rearing animals and repairing fencing necessary to pen in cattle and cutting trees for coal did not involve the type of open, notorious and unequivocal ouster of the other tenants in common required to establish title by adverse possession.

[134] Parcel 104 remains in common ownership. However, the Court notes that from 2003, the other four Parcels forming part of the Disputed Lands were registered to First and Second Respondents. While the additional complication presented by co-ownership would have ceased in 2003, the prescribed statutory period would not have elapsed as against the current registered owners.

[135] Further, and in any event having considered the First Claimants' evidence both before the Registrar and in the proceedings herein, the Court is not satisfied that it could it be said that the evidence rose to the quality and particularity of establishing the requisite elements for prescription whether prior to or following 2003. In that regard, the Court found the case of Powell v Mc Farlane to be particularly relevant.

[136] In that case Powell, aged 14, lived on his grand-father's farm. McFarlane owned land adjacent to the farm. McFarlane moved overseas and Powell started making use of the land by grazing a cow and a goat there. He increased the mowing area by clearing brambles and cutting trees and also used the land for shooting and undertook repairs on the fence. These activities continued to varying extents until 1973. The grazing increased between 1957 and 1960 when the cow had two heifers, but ceased altogether in 1968 when the cow finally died. The court held that Powell's actions were not sufficient to amount to factual possession therefore his claim failed.

[137] In Tecbild Ltd. v Chamberlain[29] possessory title was claimed to an area of rough grass and scrub termed idle land, adjacent to the squatter's property which for over 30 years had been put to no use by the paper owner. The acts relied on by the Respondent to establish adverse possession were that her

[29](1969) 20 P & CR 633 CA and see: Brown v Fahy (1975) (unreported) High Court per Kenny J.

children had played on the two plots as and when they wished, the family ponies had been tethered and grazed on them and there was a rough old fence on one boundary. The Court of Appeal dismissed her claim. Sachs LJ said (at pp 642 – 643):

> . . . As regards adverse possession in cases such as the present, it is of no use relying only on acts which are equivocal as regards intent to exclude the true owner. If authority were needed for that proposition, it could be found in the judgment of Harman LJ in *George Wimpey & Co Ltd* v *Sohn* [1967] Ch 487; indeed, in that case it was pointed out that even all-round fencing is not unequivocal if other explanations exist as to why it may well have been placed round the land in question, as, for instance, to protect the ground from incursions of others.

[138] **In the Court's judgment, the acts of** possession relating to farming, rearing of cattle and cutting of trees relied on by Claimants would have been inadequate to bar the title of registered owner.

[139] The Claimants have argued that the Registrar found no historical or recent evidence of factual possession on the ground because she neglected to carry out a thorough tour during the site visit. This was categorically denied by the Registrar in her affidavit filed on 12th March 2014. The Court has no reason to doubt that the Registrar afforded all parties liberty to refer to any and all evidence which would confirm support or undermine the **Parties'** case. Throughout the proceedings, the burden remained on the Claimants to prove the facts alleged in their affidavits and witness statements. Having reviewed that evidence it is clear to the Court that the Claimants had essentially ceased their activities on the hillside lands for several years prior to the Application which no doubt explained the overgrowth of thick vegetation, the lack of peripheral fencing. While there may have been goats roaming at will on the land which were once owned by the First Claimant, during the site visit, he admitted that there may well have been goats owned by other persons on the property and that he has never prevented such access. This evidence is not surprising given the totality of the evidence presented in this case.

[140] It is clear that the Registrar was **not persuaded by the First Claimant's testimony.** Instead, Registrar **found that Respondents' evidence to** be comparably more reliable and credible. It is not disputed that the Respondents had open access to the hillside lands and had authorized surveys and partitions to be conducted with no demure by the Claimants. **In the Court's judgment**, the acts relied on by the Claimants provide an equal balance between intent to exclude the true owner from possession and an intent merely to derive some enjoyment from the land wholly consistent with such use as the true

owner [or co-owner in this case] might wish to make of it.[30] The Claimants have therefore not satisfactorily discharged their burden and this ground of appeal must also fail.

[141] The Court therefore finds that this Appeal should be dismissed on the basis of the reasons set out herein. **The Court's order is the**refore as follows:

i. **The Claimants' appeal is dismissed.**

ii. **The Registrar's Decision dated 12**th December, 2011 is affirmed.

iii. **The Claimants will pay the Respondents' costs in the** agreed amount of $3000.00.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

[30] Farrington v Bush 1974 12 JLR 1492 at 1493