



[2024] JMSC Civ 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV00986

BETWEEN LUCINDA GORDON CLAIMANT

AND ELIZABETH RICHARDS
 (t/a ALMOND LODGE) DEFENDANT

CONSOLIDATED WITH

CLAIM NO. SU2023CV00684

BETWEEN ELIZABETH RICHARDS CLAIMANT

AND LUCINDA GORDON DEFENDANT

Miss. Annaliesa Lindsay and Miss. Aaliyah Green instructed by Lindsay Law for the claimant

Miss Sacia Anderson and Mr Jahmar Clarke for the defendant

Heard March 6, 2023, March 7, 2023, March 17, 2023, and February 29, 2024

Recovery of possession of land - Whether the registered proprietor is barred from seeking recovery of possession under sections 3 and 30 of the Limitation of Actions Act - Whether the registered proprietor's

rights and interest have been extinguished – Whether mesne profits are payable – Whether the lack of building approval should disentitle the defendant from a possessory title – Whether mesne profits are payable

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] Lucinda Gordon ('the claimant') is the registered proprietor of lot numbered 14 ('Lot 14') on the plan of lands part of Leyton Valley and Mid Leyton, in the parish of Portland, registered at Volume 1123 Folio 425 of the Register Book of Titles. She seeks, among other remedies, a declaration that she is entitled to recover from Elizabeth Richards trading as Almond Lodge ('the defendant'), possession of all that portion of Lot 14 being encroached upon by her. The defendant seeks a declaration that she is the true and rightful owner of that part of Lot 14 on which she has encroached as she has been in possession of it for in excess of twelve years. She contends that pursuant to sections 3 and 30 of the Limitation of Actions Act, the claimant's right to recover possession has been extinguished.

[2] The claimant and the defendant each filed fixed date claim forms which were consolidated at trial. Pursuant to an order of the court, the defendant's fixed date claim form was filed after the trial began, because she had sought to commence her claim by a document she styled "Ancillary Claim Form /Counterclaim" supported by an affidavit, but in my view, the appropriate originating document in the circumstances ought to have been a fixed date claim form. The claimant took no objection to this course and in any event was not prejudiced by it as the defendant's fixed date claim form did not seek any new remedies beyond those already contained in the "Ancillary Claim Form /Counterclaim" which had been served on her prior to trial. Besides, the claimant was permitted at trial to give oral

evidence in response to the affidavit filed by the defendant in support of her claim, since she had not filed any affidavits in answer to it.

The claimant's case

[3] In her fixed date claim form filed on March 18, 2020, the claimant seeks the following remedies: -

“1) A Declaration that the Claimant is entitled to recover all that portion of land currently being encroached upon by the Defendant, said lands (sic) being a part of Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles;

2) An injunction requiring the Defendant within thirty (30) days of the Order herein to remove, demolish and/or pull down the offending section of the building structures and or walls which encroach on Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles;

3) Mesne profits to the Claimant for the period that the Defendant occupied and/or encroached on Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles;

4) Interest

5) Costs

6) Such further and /or other relief as the Court shall think fit.”

The claimant's evidence.

[4] In support of her claim, the claimant relies on her affidavit filed on March 18, 2020, as well as the affidavit of Dr Adolph Edwards filed on June 4, 2021. In her affidavit

she says that she resides in Canada and is the registered proprietor of Lot 14 and that the defendant is the owner of Almond Lodge which is 'primarily located' on Lot 17 part of Leyton Valley and Mid Leyton in the parish of Portland, registered at Volume 1123 Folio 428 of the Register Book of Titles. According to her, in about 2014, she became aware that the defendant had 'possibly constructed and/or erected a dwelling house and walls' thereby encroaching on her property without her permission and/or consent. Her enquires through agents of the Portland Parish Council ('the Council') confirmed that no permission to build was granted. The claimant says that she approached the defendant and her now deceased husband about the encroachment in or about 2014. Since then, and prior to the death in 2016 of the defendant's husband, she made several unsuccessful attempts to have discussions with them.

- [5] In early January 2016, she instructed her then attorney-at-law, Dr Adolph Edwards to visit Almond Lodge to meet and have discussions with the defendant and her husband to see whether the issue of the encroachment could be resolved amicably. Her attorney reported to her on his efforts, in a letter dated February 3, 2016, where he stated that at the beginning of his meeting with the defendant and her husband, the defendant's husband said that he had built on the claimant's lot but had not done so deliberately. Since then, all attempts to engage the defendant in further discussions have proven futile. She instructed R.L Wilson & Associates to provide her with a surveyor's report in relation to her property in 2016. She received a report from them dated June 12, 2019, in which it is stated that the owners of Almond Lodge have built a dwelling house with outbuildings on a portion of her lot; the concrete wall forming the road boundary encroaches on the reserve road, and the apartment block straddles the western boundary of her lot. The report was exhibited by the claimant to her affidavit and was an agreed document. The defendant's encroachment on Lot 14, says the claimant, has denied her the ability to fully utilize her property. She has suffered loss and is concerned that the defendant may seek to adversely possess her property.

- [6] In her oral direct evidence, the claimant denied that the defendant's encroachment on Lot 14 began in the year 2001. When she and her husband bought their lot in 1976, they were living in Canada. She and her husband visited Jamaica from time to time and they visited their lot whenever they were on the island. The last time she visited Jamaica was in 2017 and at that time, there was a two-storey building on her lot. Prior to that visit, she thinks she saw her property in 2014 or 'maybe 2012', but in 2012 she did not see anyone on the property. On her visit in 2017, she did not do anything when she saw the two-storey building on her property, she 'just observed' and had breakfast at the restaurant at Almond Lodge.
- [7] When a gentleman by the name of Dr Wong, wanted to buy Lot 14, the claimant says that she asked her then attorney-at-law, Dr Adolph Edwards to investigate the Council's assertion that there was a building on the lot. She does not agree that the defendant has been on her lot since 2001, and she thinks that the encroachment began 'probably' in 2014 or before, but not prior to 2012. Her discussions with Dr Wong to purchase the lot began in 2014 and it was he who discovered the encroachment. According to the claimant, neither the defendant nor her husband offered to purchase her lot as they said they could not afford it. The defendant's husband told her he had mistakenly built on her lot, but he did not tell her when he had done so. This admission was made by the defendant's husband before the 2019 survey, and she thinks it was in 2016. She does not agree that the defendant has exercised 'all powers of ownership' over her lot. She noted her husband's death on the title in 2019, and she pays the property taxes for her lot, the last payment being in 2022. She did not receive any notice of the defendant's intention to build.
- [8] At the close of her direct evidence, when asked whether on her visit in 2017, the restaurant at Almond Lodge where she had breakfast was on her property, the claimant said she was not sure. Asked if the restaurant was where there is an encroachment, the claimant said she thinks so. She did see the sign for Almond Lodge beside her lot on her 2017 visit, and there was a concrete wall that seemed to her to go "a long way across many lots". The sign for Almond Lodge did seem

to be on her lot too. Asked whether there were buildings on the land beside her lot, the claimant answered that: 'there is a lot of bush, no building'.

[9] In cross examination, the claimant said it is "perhaps", safe to say that she visits Jamaica once, every other year. She would not say she knows the defendant but thinks she saw her when she visited in 2017, but on that visit, she: "went incognito". According to her, she has never spoken with the defendant, but she knew the defendant's late husband. He repaired her shoes, but she never told him she was the owner of Lot 14, and she had no discussions with him about the lot when she visited. The claimant agreed that before obtaining the survey report in 2019, she was not absolutely sure where the boundaries for her property were. The following exchange thereafter took place between the claimant and cross examining counsel Mr Clarke:-

Q. Prior to receiving the 1st survey report in 2019, you weren't sure whether there was an encroachment?

A. There wasn't any because it was only bush.

Q. Prior to receiving the report in 2019, you could not have definitively said that the encroaching building was indeed on your property?

A. I wasn't completely sure. No.

[10] When asked if she agrees that there is a perimeter wall that runs on her property, the claimant said that there is one now. In further cross examination she said she did not know if the defendant and her late husband were in possession of all the property within the perimeter wall. She did not know when the perimeter wall was built, and except for the time she visited the restaurant in 2017, she did not know how long she had known of the defendant's guest house and restaurant known as Almond Lodge. It was Dr Wong's enquires of the Council that made her aware of the encroachment and it was the Council that told him that there was a hotel on the property. Asked when she first approached the defendant about the

encroachment, the claimant said she never approached the defendant about the encroachment. When reminded of her evidence in paragraph 5 of her affidavit filed on March 18, 2020, where she said she had approached the defendant in 2014 about the possible encroachment, the claimant's response was that she did so by phone or by Facebook, and perhaps 'approach' was not the right verb. When it was suggested to her that her earlier evidence was true and that she had not approached the defendant about the encroachment until she filed her claim in 2020, the claimant said:

"I never spoke with her. No."

- [11] The claimant did not agree that the first time the defendant found out about the encroachment was when Dr Adolph Edwards visited in 2016. She said it was in 2014 when Dr Wong went to the property and had conversations with the defendant and her late husband about the encroachment as the Council had told him about it. When it was pointed out to her that she has not provided any receipts to support her evidence that she has been paying taxes for Lot 14, the claimant said she paid them, she has never been in arrears and counsel could check "online".

The evidence of Dr Adolph Edwards

- [12] Dr Adolph Edwards is an attorney-at-law and in his affidavit filed on June 4, 2021, he says that in early 2015, he was requested by the claimant and her husband to advise them on a probable encroachment on Lot 14. According to him, he has known the claimant and her husband for many years, they intended to sell their lot, but an issue arose as to whether there had been an encroachment on it by the owners of the adjoining property. On January 28, 2016, he travelled to Leyton Valley and met with the defendant and her late husband Mr Roger Richards, the owners of the adjoining lot. By then, he said, the claimant's husband had died. He states at paragraph 3 of that affidavit that: "A Hotel /Guest House - Almond Lodge - had been built on the adjoining lot."

[13] The defendant's husband told him that he grew up in Leyton Valley and migrated to England as a young man. While in England, he heard that Leyton Valley was being cut up into lots and he thought it would be a good idea to purchase a lot and build a guest house or hotel on it. He purchased Lot 17 in 2001. The vendor had informed him that the boundaries were demarcated by coconut trees, which he saw when he visited the lot, and he therefore did not think it necessary to have a surveyor identify the boundaries of his lot. Dr Edwards further stated that he was told by the defendant's husband that he had unintentionally built on the claimant's lot and that the encroachment on Lot 14 was about 25 feet and he had built partially on Lot 17 and on Lot 14. The solution to the problem expressed by the defendant's husband, said Dr Edwards, was to buy out the claimant's lot, but he had no money to do so as business was slow. Dr Edwards said he reported his visit to the claimant in a letter dated February 3, 2016.

[14] Dr Edward's exhibited to his affidavit, his letter to the claimant dated February 3, 2016, which was an agreed document. This letter mirrored his affidavit evidence with respect to his account of his conversation with the defendant's husband. At page 3, he wrote: -

“There are three structures on the property: one facing the road on the southern boundary which is used as a dining room, a reception area and a bar area. Another floor is being added to this structure. To the north, bounding on the sea, are some rooms which are for guests; to the east where the encroachment is said to be is the main two floor structure where Richard said he resides. After he showed me the main two floor building where he resides and which he said encroached on the adjoining lot I asked him for his solution to the problem. He replied that he would have to: “buy out” Mrs Gordon but added quickly that he had no money ‘because business is slow and almost non-existent – one or two people sometime come’...

I got the impression that he has already sought legal advice because he (and his wife) kept referring to when “persons are on land for a certain time”.

His wife even asked how “is only now we hear that the boundaries are not right”.

[15] According to Dr Edwards, he also advised the claimant to retain a Commissioned Land Surveyor to do a Surveyor’s Identification Report for Lot 14. This advice was accepted, and R.L Wilson & Associates, Commissioned Land Surveyors were retained by the claimant. They produced a Surveyor’s Identification Report dated June 12, 2019. That report states the following:-

- i. “The Owners of Almond Lodge Guest House and Restaurant have built a dwelling with outbuildings on a portion of lot forming subject of the Land Surveyor’s Report”.
- ii. “The concrete wall forming the road boundary encroaches on the Reserve Road”.
- iii. “The Apartment Block straddles the Western Boundary of subject lot.”

[16] On cross examination, when asked whether the defendant’s husband had told him what he had built on the claimant’s lot, Dr Edwards said that he had not gone into that kind of detail. Asked if he had observed a perimeter wall around the premises the defendant’s husband said was his, Dr Edwards said: “No. We didn’t go into that kind of detail. We were dealing with the three buildings. We didn’t go into details of perimeter wall”. He recalled the buildings but did not recall anything about a perimeter wall. He said he had referred to the number of buildings he saw in his affidavit and that he thinks he saw a two-storey structure where the defendant’s husband said he resides. Dr Edwards said that the defendant’s husband did not go into the details about how long he was living there, and he did not take a good look at the two-storey structure but looked ‘generally’ at the structures. According to him, he would not be able to speak to how long the two-storey structure was there. When asked whether in his estimation it was a freshly constructed building,

Dr Edwards said it was not a new building, it was not a building that had just been built and did not give the appearance of one that was just built.

The defendant's case

[17] In her fixed date claim form filed on March 7, 2023, the defendant (the claimant in that claim) states that she seeks the following "orders": -

"a) The Claimant has been in occupation of part of all that parcel of land known as Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles for upwards of 12 years;

b) Pursuant to section 3 and 30 of the Limitations of Actions Act the Defendant's rights to recover possession of part of the said Lot 14 has been extinguished;

c) The Claimant seeks a declaration that she is now the true and rightful owner of part of all that parcel known as Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles;

d) That the court makes an order that the said Lot 14 be subdivided and that the portion occupied by me be transferred into my name;

e) Interest;

f) Costs;

g) Such further and other relief as the Honourable Court deems fit".

The defendant's evidence

- [18]** In the defendant's affidavit filed on July 22, 2020, in support of her claim, she says that she and her husband have been in occupation of part of Lot 14 since 2001, until his death in 2019 and she has continued being in occupation ever since. Their occupation of part of Lot 14 has been undisturbed and they have exercised acts of ownership over it including the operation of a guesthouse and restaurant known as Almond Lodge.
- [19]** In her affidavit filed on July 22, 2020, in response to the claimant's claim, the defendant says she is a businesswoman and operator of a restaurant and guest house known as Almond Lodge, a business registered under the laws of Jamaica. She and her husband (who died on March 16, 2019) are the registered proprietors of land registered at Volume 1123 Folio 428 of the Registered Book of Titles. The land was registered in their names on June 4, 2001. She says that the boundaries were pointed out to her and her husband by the vendor and upon purchasing the land they immediately began building on what the vendor had pointed out to them. According to her, they applied for and obtained planning permission and began building as soon as the transfer of the land was completed.
- [20]** Almond Lodge comprises a total of four buildings. The first building to be constructed in 2001, by her and her husband was a bar. Upstairs the bar, they built their place of residence. Currently, this building consists of a bar, her home, and a games area. She now knows that this building is built on Lot 14, which is owned by the claimant. The defendant said that the second building constructed was a five-bedroom lodging for guests. The third building comprises a restaurant, another bar and two rooms for lodging upstairs. She said that the fourth building is an outside kitchen with a generator room attached. Before her husband died, the defendant said she recalls him mentioning 'something' about an encroachment however she cannot remember exactly when that was.

- [21]** According to the defendant, she and her husband have been in possession of part of Lot 14 for upwards of twelve years. Only one building comprising Almond Lodge is on Lot 17, the others are located on Lots 14, 15 and 16. No permission was given to her and her husband to build on Lot 14, and it is not true that her husband did not obtain building approval from the Council. In 2001, her husband applied for and obtained permission to build on land owned by them, which at the time they thought included part of Lot 14. Exhibited to her affidavit is a notice which she says indicates that planning permission was applied for, and that construction was about to begin. She believed that planning permission was obtained but she is unable to locate it. Her lawyer has written a letter to the now Portland Municipal Corporation to obtain a copy of it, but she has not received a response.
- [22]** The defendant says that the bar was the first building which was built, and construction began in or about August 2001. The construction of the other three buildings was done over a fifteen-year period, but this was not on Lot 14. During the construction of the bar, neither the claimant nor anyone claiming through her objected to that construction which took place on Lot 14. She and her husband have occupied a part of Lot 14 for upwards of twelve years. She has never met the claimant. The defendant denied that the claimant approached her to discuss a possible encroachment and said that on one occasion after her husband's death, someone who identified themselves as the claimant called his telephone and spoke with her and that was the only time she recalls having a conversation with anyone about an encroachment on the claimant's lot. She has no recollection of talking with an attorney-at-law for the claimant about a possible encroachment, is unable to confirm the accuracy of the report relied on by the claimant and intends to call her own surveyor.
- [23]** In a supplemental affidavit filed on September 30, 2020, the defendant refers to a response from the Council to her attorney-at-law dated August 20, 2020, in which it is stated that the application for building permission was not recommended as the application violated two restrictive covenants endorsed on the title for Lot 17.

According to the defendant, she had believed that permission was obtained by her husband who was the one who made the application.

[24] In cross examination, the defendant said she disagrees that she did not receive building permission to build Almond Lodge and said that her husband had obtained permission from the Council in 2001. She accepts that the notice was given to the Council by her husband and was signed by him. She said that she and her husband bought only one lot which is Lot 17, but the notice to the Council was in respect of: "everything in the boundary of Almond Lodge", which she said comprises four lots. On further cross examination, the defendant said that the notice to the Council was in relation to Lot 17, she did not know about any other lots but the one the perimeter wall is around, and she thought it was included in the lot she and her husband had bought. What they bought, is what they intended to build on, whether or not they knew its dimensions. Upon being shown letter from the Council dated August 20, 2020, which she exhibited to her September 30, 2020, affidavit, the defendant said she would now agree that she did not receive permission from the Council to build, but, she said, it was her husband who was dealing with the situation.

[25] In further cross examination, the business registration date for Almond Lodge was shown to the defendant from a document obtained from the Companies Office of Jamaica. She accepted that Almond Lodge was registered as a business on October 8, 2019. When asked about the telephone call she said she received on her husband's telephone after his death, the defendant said that on that call there was no discussion about an encroachment and that the only time an encroachment came up was when she was served in 2020 with the court papers in this matter. When she was reminded of her affidavit evidence in which she said there was a discussion about encroachment on a call to her husband's telephone after he had died, the defendant said there was a phone call but there was no discussion, and she could not recall whether the person who called her said anything about an encroachment. Asked if her affidavit was incorrect, the defendant said that at the time she made the affidavit it was fresh in her mind, but at this time she cannot recall.

[26] When asked whether it is fair to say that having been told by her husband about the encroachment, she took no steps to investigate it, the defendant said that she was not told about an encroachment by her husband. When her affidavit, in which she said her husband had mentioned something about an encroachment before his death was brought to her attention, she said that evidence is true. She then stated that she was confused. According to the defendant she did not meet Dr Edwards in January 2016 and could not recall that her husband met with him and that she later joined them. She did not know if her husband admitted to mistakenly encroaching on Lot 14, in discussions with Dr Edwards as she was not there; and for that same reason she said she could not agree that her husband had said he could not buy out the encroached portion. The defendant further said she thought the perimeter fence around Almond Lodge encloses all the land that she and her husband had a right to, but she came to find out that Lot 14 was included inside the fence. She admitted to not knowing the individual boundaries for Lots 14, 15, 16. When it was suggested to her that the section of Lot 14 which is encroached upon was vacant in 2012, she was adamant that it was not vacant. She said that she and her husband were living on it from 2001. In answer to questions from the court, the defendant said that she returned to Jamaica in 2001 but still visited England from time to time. When the first building was being constructed, she was living at Almond Lodge in a room inside a plywood storeroom her husband had built.

[27] In her response to a request for Information, in which the defendant was asked to indicate the specific dates or times when construction on Lot 14 began, the defendant produced a copy of an invitation to what was described as the “Grand Opening of Almond Lodge Club on December 14, 2001”. This document was an agreed document at trial.

Mr Tarrick Williams

[28] Tarrick Williams filed an affidavit on February 25, 2021. He says he is a building contractor and has known the defendant since 2010 when he started working for

the defendant and her husband. The defendant's husband employed him as a development consultant for their restaurant and guest house known as Almond Lodge, situated on land part of Leyton Valley and Mid Leyton, registered at Volume 1123 Folio 428 of the Register Book of Titles. According to him, the defendant's husband also had him do marketing for Almond Lodge and he became his good friend and confidante. Three buildings and the perimeter wall were there when he went to Almond Lodge in 2010. The defendant's husband told him about the plans he had to further develop the property and in 2018 he contacted him and informed him that he was ready to do some development. In 2012/2013 and 2019, he did some community surveys to ascertain the types of products Almond Lodge could provide to attract members of the community. This was to market the business.

- [29]** On cross examination, Mr Williams did not know the size of the land that constitutes Almond Lodge and said that he believes that all the land upon which it is built, is contained in the defendant's certificate of title.

Miss Lamata Williams

- [30]** Lamata Williams is a retired social worker who lives in Thornton Hill, London, England. She says she has known the defendant for over twenty-five years and they are close friends. She knows and is well acquainted with Almond Lodge. According to her she knew when in 2001 the defendant and her husband purchased land in Orange Bay, Portland. At that time the defendant was in England and her husband in Jamaica. She said that the defendant showed her pictures of the property that her husband had sent to her while he was in Jamaica. She said that the defendant's husband had constructed the outer walls of the property and had started the first building. That building, she said, was completed in December 2001 and opened on December 14, 2001. She said she remembers the date as it was her birthday.
- [31]** When asked in cross examination if she recalled when the defendant went to Jamaica, Miss Williams says she recalls that it was in 2001 and she knows the

defendant was there for the opening of the property on December 14, 2001, when they opened the bar. Asked further whether she was saying that it was the bar and not the hotel that was opened in December 2001, Miss Williams said that it was the “first building” that they opened on December 14, 2001. The following exchange then took place between cross examining counsel and Miss Williams:

Q. What building was that?

A. The main building as you enter the gate to the right. Downstairs there is a bar.

Q. What was there on December 14, 2001?

A. A bar. Also, a games room that was used for entertainment as well.

Q. Did you stay at Almond Lodge in December 2001?

A. I spent a week there.

According to Miss Williams, she did not know the boundaries of Almond Lodge, and did not know on which lot construction first begun.

Submissions

The claimant

[32] In her submissions on behalf of the claimant, Miss Lindsay identified four issues which she argues need to be determined by the court. In summary, the issues are as follows:

- a) Whether the claimant is the registered owner of Lot 14.
- b) Whether the defendant’s encroachment on Lot 14 entitles her to possessory title under the Limitation of Actions Act.

- c) Whether the defendant is entitled to rely on the illegally constructed building on Lot 14 in furtherance of her claim for possessory title.
- d) Whether the claimant is entitled to mesne profits.

[33] In support of her submission that the claimant is the registered proprietor of Lot 14 and therefore is entitled to recover possession of the portion on which the defendant has encroached, Miss Lindsay argued that the court must have regard to the indefeasibility of the claimant's title. She cited sections 68 and 70 of the Registration of Titles Act (ROTA) and the Privy Council decision in **Pottinger v Raffone [2007] UKPC 22**, to underscore her submissions. Counsel argued that because of the indefeasibility of the claimant's title, she is entitled to recover possession of the portion of Lot 14 on which the defendant has encroached. Miss Lindsay further argued that the claimant's evidence, which was unchallenged on cross examination was that when she saw her land in 2012/2013 there were no buildings or encroachments on it. The claimant's entitlement to Lot 14, counsel argued, can only be disturbed if the defendant can prove that she has adversely possessed the lot.

[34] On the question whether the defendant's encroachment entitles her to a possessory title under the Limitation of Actions Act, counsel submitted that the burden is on the defendant to prove when the encroachment took place and the period of time during which it continued. **Pflug v Collins [1952] D.L.R.** was cited for this proposition. It was also argued that the defendant must prove that she has been in physical custody or control (factual possession) and that she has the intention to exercise such custody or control (intention to possess). The decisions in **JA Prye (Oxford) Ltd and Another v Graham and Another [2002] UKHL 30**, and **Wills v Wills [2003] 64 W.I.R 176**, were relied on to support this submission. Learned counsel argued that the defendant has failed to sufficiently satisfy either factual possession or the intention to possess. While the evidence is that structures were built by the defendant in 2001, this does not mean, counsel argued, that those same structures were the ones built on Lot 14. It was submitted that the defendant

has failed to plead the date her possession of part of Lot 14 began and has therefore failed to sufficiently plead her case or give any evidence to support her claim for adverse possession.

[35] Miss Lindsay said that the claimant's evidence is that there was no encroachment on her lot from 2001 to 2014 and that she visited it in 2012. The encroachment, argued counsel, would have begun between 2012 and 2014 and this would not satisfy the twelve-year requirement under the Limitation of Actions Act or the common law. Counsel further submitted that the defendant has not delineated the boundaries of the land purchased by her or those on which she has encroached. Nor has she given evidence of any dates when she began to encroach on Lot 14 and when construction began on that lot. At its highest, said counsel, the defendant is unable to state categorically that she has in fact encroached on the claimant's lot from 2001 as contended in her pleadings. Counsel sought support in **Michael Emmanuel Johnson v Fredrica Eunice Crooks [2017] 2017 JMSC Civ 100**, and **Seaton Campbell v Donna Rose Brown & Carlton Brown [2016] JMSC Civ 157**, for the submission that the absence from the defendant's case of the date of the encroachment has fatal consequences.

[36] Mr Tarrick Williams' evidence was said to support that of the claimant's as to the likely date of the encroachment, as he said that it was in September 2018 that the defendant's husband contacted him to indicate that he intended to do some development. Counsel argued that the registration details of the defendant's business known as Almond Lodge shows that it was registered in 2019 which is consistent with Mr Williams' evidence.

[37] On the question of the intention to possess, it was submitted that the defendant's evidence is insufficient to establish the necessary intention, as her case is that the encroachment was done in error. She had no intention to dispossess anyone, particularly the claimant, as she thought the land was hers. Additionally, the fact that in her husband's discussions with Dr Edwards, there was an acknowledgment that the encroachment was unintentional, and an indication given by him that in his

view, the solution to the problem was to 'buy out' the claimant but he had no money, show the lack of the necessary intention. The Canadian decision in **Re St Clair Beach Estates Ltd v MacDonald et al (1975) 5 O.R. (2d) 482**, was cited in support of this submission.

[38] The argument was also made that if the court takes the view that the defendant had the necessary intention to possess and that the defendant has established the period of her possession, the defendant's possession has been disturbed by the claimant. The disturbance, submitted counsel, occurred in 2015 or 2016 either by the claimant or through her then attorney-at-law, when she instructed Dr Edwards to visit with the defendant and her husband. It was at that time, said counsel, that the defendant had notice that she and her husband had encroached on Lot 14 and that the claimant had not abandoned her lot. The decision of Sykes J (as he then was) in **Valerie Patricia Freckleton v Winston Earle Freckleton unreported supreme court decision decided on July 25, 2006**, was cited to support the submission that the claimant's 'slight acts' of instructing and sending her then attorney-at-law, to visit the defendant and her husband ; paying property taxes and noting the fact of her husband's death on the certificate of title, all: "negative the purported assertions" of the defendant, and were sufficient to: "maintain her title".

[39] Counsel further submitted that the fact that the Council's letter dated August 20, 2020, indicates that the defendant did not obtain building permission, means that the court must consider the maxim "*ex turpi causa non oritur actio*" and Lord Mansfield's dictum in **Holman v Johnson (1775) 1 Cowp 341**, that a court should not aid a litigant whose cause of action is founded on an immoral or illegal act. On this point, counsel also relied on the following statement quoted from the text "**Adverse Possession by Stephen Jourdan Q C and Oliver Radley- Gardener, 2nd Edn.at page 166:-**

"There is a general principle that a person should not be granted a remedy where he has to rely directly on unlawful conduct to succeed."

[40] In relation to the claimant's claim for mesne profits, it was submitted that although there was no evidence to support it, the court should follow the approach taken in **Michael Emanuel Johnson v Eunica Crooks [2017] JMSC Civ 100**, and award nominal damages to the claimant.

The defendant

[41] It was argued on behalf of the defendant that since 2001 she has been in open and undisturbed possession of a portion of Lot 14. She has demonstrated the factual possession and the necessary intention in her own name and on her behalf to exclude the world at large including the owner with the paper title from the disputed land. The defendant's evidence is that she was under the impression that the bar and her dwelling house were constructed on her property. The 2023 Surveyor's Report of Keith Wignall (who was jointly instructed by the parties) , confirms that the only two storey building at Almond Lodge is on Lot 14. Mr Clarke, counsel for the defendant argued that the evidence has established that the defendant went into possession of part of Lot 14 in August 2001. According to him, although the claimant's evidence is that she visited her lot in 2012 and there was no encroachment, there is no dispute between the parties that it was in 2014 when Dr Wong informed the claimant about the building on her lot, that she became aware of the encroachment. According to learned counsel, the defendant was never stopped or disturbed by anyone in furtherance of the construction on Lot 14. If, he argued, the claimant had visited her property as she claimed she did, she would have seen the construction.

[42] Counsel further submitted that it is reasonable to infer that between 1976, when the claimant purchased Lot 14, and March 18, 2020, when she filed her claim, she was not monitoring her lot. Furthermore, argued Mr Clarke, the claimant admitted that it was after the 2019 survey that she was able to confirm the existence of an encroachment. A two -floor building and a perimeter wall could not have been built

overnight. He submitted that the evidence of Mr Williams that in 2010 there were buildings and a perimeter wall at Almond Lodge supports the defendant's claim that she has been in possession of a portion of Lot 14 since 2001. The defendant's evidence is that the construction of a bar started in August 2001, the invitation to its opening is dated December 2001 and Miss Williams confirms that date as it was her birthday. Counsel asked the court to accept that the March 2001 notice to the Council is an indication that the application for building permission was made in 2001.

[43] In his response to the claimant's reliance on the *ex turpi causa non oritur actio* principle, Mr Clarke said that the decision in **Holman v Johnson** was inapplicable as that case dealt with an illegal contract, and there is no contract in these proceedings. The Privy Council decisions in **James Clinton Chisholm v James Hall [1959] AC 719**, and **Recreational Holdings v Lazarus [2016] UKPC 22** were relied on by Mr Clarke, for the proposition that on a true construction of section 68 and 70 of the Registration of Titles Act, nothing in law alters the acquisition rights under the Limitation of Actions Act in relation to registered land at any time after registration.

Analysis and discussion

[44] Sykes J (as he then was) in **Valerie Patricia Freckleton v Winston Earle Freckleton**, fittingly expressed the legal position to be that a registered owner of land or indeed any other owner, may have his title extinguished by lack of vigilance. Indeed, since the Privy Council in **Recreational Holdings v Lazarus**, the law is now settled with respect to registered owners of land. In that case, this is what Lord Wilson, writing for the Board said at paragraphs 34 and 35: -

“34. So, the Board...concludes as follows:

(a) the Board's Opinion in the **Chisholm** case was correct;

(b) the proviso to section 70 of the Act explicitly subordinates the title of the registered proprietor to such unregistered rights under the Limitation Act as have begun to accrue since the first registration under the Act; and no exception is made, as it is elsewhere in the Act, for the registered proprietor who can claim to have been a bona fide purchaser for value;

(c) section 68 of the Act does not ... trump the proviso to section 70 because, as was held in the Chisholm case, the word “subsequent” in section 68 means “subsequent to the first registration”, with the result that section 68 is complementary to the proviso;

(d) notwithstanding the near paramountcy under it of the registered title and the often-favoured status under it of the bona fide purchaser for value, the Act does nothing to disturb this obvious conclusion: that, if the vendor’s title has been “extinguished” under section 30 of the Limitation Act, there remains no title for the vendor to pass...and none for his purchaser to receive;

35. In passing the Act in 1888 Parliament was deciding how best to allocate risk in circumstances where an innocent purchaser buys land subject to unregistered rights of adverse possession. It decided that the risk of failing to secure title should be allocated not to the adverse possessor, but instead to the innocent purchaser who should be confined to his right to damages against his vendor for breach of contract. In the article which the Board has already praised at para 31 above, Dr Barnett writes:

“From a practical point of view, the major qualification of the principle of indefeasibility [of the registered title] is the possessory title. This is especially so, because of the number of landowners who have migrated, the shortages and high cost of good agricultural or building land, the widespread squatting on lands which prevails throughout

Jamaica, and the highly developed techniques of capturing land. Section 70 contains the relevant statutory provision.”

[45] It is common ground that the combined effect of sections 3 and 30 of the Limitation of Actions Act is that actions for the recovery of possession of land must be brought within a period of twelve years after the cause of action has accrued; and once that limitation period has expired, the paper title owner’s right and title to the land are extinguished. In **Lois Hawkins (Administrator of the Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McInnis**, Sykes J (as he then was) helpfully summarised the law in this area by adopting the dicta of McDonald Bishop JA (Ag) (as she then was) in **Fullwood v Curchar [2015] JMCA Civ 37** at paragraph 12 of his judgment :

*“[12] The law in this area is no longer in doubt. It was most recently expounded by the Court of Appeal in **Fullwood v Curchar [2015] JMCA Civ 37**. This court cannot improve on the clarity, precision and exposition of McDonald Bishop JA (Ag). The court will simply refer to paragraphs [29] to [54]. From these passages the following propositions are established:*

- (i) the fact that a person’s name is on a title is not conclusive evidence such that such a person cannot be dispossessed by another including a co-owner;
- (ii) the fact of co-ownership does not prevent one co-owner from dispossessing another;
- (iii) sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing any action to recover property after 12 years if certain circumstances exist;

- (iv) in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenancy [sic] dies, the normal rule of survivorship would apply and the co-owner takes the whole;
- (v) however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant;
- (vi) the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other co-owner to resist any claim for possession;
- (vii) when a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished thereby proving good standing to bring the claim;
- (viii) the reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place;

- (ix) dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit;
- (x) the relevant intention is that of the dispossessor and not that of the dispossessed;
- (xi) in determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists it makes the extinction of title claim stronger but it is not a legal requirement;
- (xii) the question in every case is whether the acts relied on to prove dispossession are sufficient."

[46] I will carefully bear in mind the abovementioned principles in determining the following issues which arise in this case: -.

- a) Has the defendant acquired possessory rights over a portion of Lot 14 thereby extinguishing the title of the claimant.
- b) Does the fact that the defendant built without obtaining building approval, disentitle her from claiming possessory rights over a portion of Lot 14.
- c) Whether mesne profits are payable by the defendant.

Has the defendant acquired possessory rights over a portion of Lot 14 thereby extinguishing the title of the claimant?

[47] This issue requires a determination of the question whether the defendant has demonstrated by the evidence, both the factual possession as well as the intention to possess a part or portion of Lot 14. In the defendant's affidavit filed on July 22, 2020, in support of her claim, she relies on her affidavit also filed on July 22, 2020, in answer to the claimant's claim. In the latter affidavit, the defendant clearly states that a bar was the first building constructed in 2001 at Almond Lodge, and that upstairs that bar they built their dwelling house. She then goes on to say, that she is now aware that this building is on Lot 14. This is how she puts it at paragraph 5:

“The premises known as Almond Lodge comprises a total of 4 buildings. The first building which was erected by my husband and I in 2001 was a bar. We built our place of abode upstairs the said bar. Currently the building consists of the bar and my home and a games area which is sometimes used for functions. I am now aware that this building is located on land being claimed by the Claimant in this matter, known as Lot 14 Part of Leyton Valley and Mid Leyton in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles”.

[48] In my view, this evidence was not contradicted in any credible or significant way. The claimant says she visited her property in 2014 or maybe 2012 and did not see anyone on it. But at the same time, she admitted that before the 2019 survey, she was not absolutely sure where the boundaries for her lot were. She also was not sure whether in 2017, the restaurant at Almond Lodge where she had breakfast was on her lot. It is noteworthy that the claimant's evidence is that there were no buildings on the land adjoining her lot on her 2017 visit, but: “there is a lot of bush”; and before the 2019 survey, there was no encroachment, “only bush”. This however could hardly have been the case because Dr Edwards said that on his visit in 2016, he saw structures on the defendant's lot when the encroachment on Lot 14 was pointed out to him. Furthermore, it is also the claimant's evidence that

in 2014 Dr Wong discovered the encroachment and advised of it. As the claimant was clearly not sure where her boundaries were until 2019, I find it difficult to accept as reliable, her evidence that in “2014 or maybe 2012”, she did not see anyone on her lot.

[49] The defendant also gave evidence that construction of the bar started in August 2001 and was completed in December 2001. The other buildings, she said were constructed over a fifteen-year period. Dr Edwards’ letter to the claimant dated February 3, 2016, also corroborates the defendant’s evidence that in 2001 the first building constructed was a bar, upstairs that bar they built their dwelling home and that that is the building that encroaches on Lot 14. In that letter, Dr Edwards said that he was advised by the defendant’s husband that the encroachment is to the east and is the main two floor structure where he resides. There is also the notice to the Council from the defendant’s husband dated March 2001, indicating an intention to apply for building approval. The fact that this notice predates the transfer of lot 17 to the defendant and her husband does not make it less reliable as evidence on which to draw the inference that the application was in fact made in 2001. This notice was an agreed document, and the Council by its letter does establish that indeed an application was made. I am prepared to accept, and I find that the application for building approval was indeed made to the Council in 2001. Then there is the December 14, 2001, invitation to the opening of the bar. It states that the grand opening of the bar was to take place on December 14, 2001. This document was never challenged by the claimant and in fact, as with all the other documents in this matter, it was agreed. Miss Lamata Williams also corroborates the evidence of the defendant. She says she attended the grand opening and remembers the date as it was on her birthday. I therefore disagree with Miss Lindsay’s submission that the defendant has failed to provide evidence that she began to encroach on Lot 14 in 2001 or that the construction which took place in 2001 was in fact on Lot 14.

[50] I also disagree with learned counsel Miss Lindsay, that Mr Williams’ evidence is helpful to the claimant’s case. It is to be recalled that Mr Williams stated in his

affidavit that when he first went to Almond Lodge in 2010, there were three buildings which the defendant's husband had already completed and that there was in existence, a perimeter wall. This was around nine years before the registration of Almond Lodge as a business. I agree with Mr Clarke, that registering the business name 'Almond Lodge' in 2019 is not evidence that Almond Lodge came into existence in 2019. For that matter, neither is the registration of the business evidence that the buildings constituting Almond Lodge were built in or around 2019. The registration details only indicate when the defendant registered the business under the Business Names Act. Indeed, on the claimant's own evidence she visited the restaurant at Almond Lodge in 2017; Dr Edwards in his affidavit said that on his visit in January 2016: "A Hotel/Guest House - Almond Lodge- had been built on the adjoining lot", and according to the claimant, in 2014 Dr Wong reported construction on Lot 14. Besides, the three buildings Mr Williams says he saw in 2010, show that development had already taken place. Therefore, when he says in the second sentence of paragraph 4 of his affidavit that: 'Mr Richards told me of his plans to further develop the property', this is surely consistent with development having already taken place.

[51] In my view the evidence is clear that the encroachment on Lot 14 is a two-floor structure where the defendant resides. I am satisfied and therefore find that that is the building which in 2001 housed a bar downstairs. Based on the evidence I am equally satisfied and find on a balance of probabilities that the defendant's encroachment on Lot 14 began in or about August 2001 with the construction of a bar.

[52] Counsel Miss Lindsay relied heavily on the decision in **Re St Clair Beach Estates Ltd v MacDonald et al**, to support her argument that the defendant has failed to demonstrate the necessary intention to possess the portion of Lot 14 on which she has encroached. That case was an appeal from the decision of a trial judge who upheld the Registrar of Titles' direction to accept the respondent's application for first registration of a large parcel of land formerly known as Grant Farm. Grant Farm did not include some small residential parcels which were close to it. The

appellant purchased one of those residential parcels and used the land in dispute (which abutted its southern limits and was part of the Grant Farm), for domestic and recreational purposes. The appellant knew fully well that this land was not part of the parcel purchased and conveyed. The septic tank for sewage from the appellants' house was located on this disputed land. The predecessors for the respondent were never out of possession of the disputed land and continued to pick from cherry trees growing on it. The trial judge found that the title to the disputed land of the respondent's predecessors in title had been acknowledged by the appellant and on two separate occasions they had made attempts to purchase it. On one occasion an offer to purchase was made and renewed and on the other occasion, a cheque in the sum of \$1,000.00 was sent to the appellant's solicitors to complete the transaction. On appeal the court reviewed the law in relation to possessory title and in addressing the question whether the appellant needed the required intention to defeat or exclude the true owners of the disputed land, agreed with the trial judge that they did. The court went on to state that there was no controversy that the appellants never had the requisite intention, nor did they claim to have had it and that the dominant feature in the case was that the appellant had offered to purchase the land for \$1,000.00. The appeal was dismissed.

[53] The relevant facts of **Re St Clair Beach Estates Ltd v MacDonald et al** are easily distinguishable from the case before me. I do not accept that the answer given by the defendant's husband, to Dr Edwards' request for his solution to the problem of the encroachment, was an unequivocal offer to purchase sufficient to defeat the *animus possidendi*. In that very same discussion in January 2016, which Dr Edwards recounts in his letter to the claimant, he says that he got the impression that the defendant's husband had sought legal advice because he and the defendant kept referring to when: "persons are on land for a certain time" and that "[h]is wife even asked how 'is only now we hear that the boundaries are not right". In my view, these statements by the defendant and her husband demonstrate that they recognised, perhaps with the assistance of counsel, that they may well have acquired title by long possession over the portion of Lot 14 which they had

occupied since August 2001. Considered together, I am of the opinion that the utterances of the defendant and her husband in January 2016, do not demonstrate that they lacked the intention to occupy and use that part of Lot 14 as their own since August 2001, when they started construction of a bar on it. Furthermore, the claimant's direct evidence at trial was that neither the defendant nor her husband offered to buy her lot as they could not afford it.

[54] Since the decision in **JA Pye (Oxford) Ltd and Ors v Graham and Another**, it is now settled that it is irrelevant whether a squatter occupies land in the mistaken belief that it is his or whether he knew he was a trespasser. The intention that is required is to occupy, use and control the land as his own to the exclusion of all others. In the Privy Council's decision in **Anthony Ambrister and Cyril Ambrister v Marion Lightbourne & Ors [2012] UKPC 40**, the Board applied **JA Pye (Oxford) Ltd and Ors v Graham and Another** and held that where a person acted openly as owner of land in the belief, albeit wrongly, that he has a good title to it, that is sufficient factual possession to ground a claim for possessory title. The Board expressed its views this way at paragraphs 82 and 83 of its decision:-

“**82.** The issue is whether Cyril Ambrister and after his death Mrs Frances Ambrister, by herself and through Anthony Ambrister and the family overseers as their agents, were in possession of the land in the requisite sense. The clearest statement of the law is in the speech of Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd v Graham [2002] UKHL 30, [2003] 1 AC 419**, with which the rest of the House agreed. Lord Browne-Wilkinson (at para 41) approved the principles stated by Slade J in **Powell v McFarlane (1977) 38 P & CR 452, 470-471:**

“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 . . . Everything must depend on the particular circumstances, but broadly, I think what must be shown as

constituting factual possession is that the alleged possessor had 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.”

83. In the Board’s view the evidence adduced by the adverse claimants met this test. The Armbristers acted openly as owners because they believed (though wrongly) that they were the legal owners with a good title.

I am satisfied on the evidence that the defendant occupied that part or portion of Lot 14 on which a two-floor building is constructed, since August 2001 with the intention to use , occupy and control it as her own, and I therefore so find.

[55] Since I have found that the defendant’s possession of part of Lot 14 began in August 2001, it means that to succeed in her claim for recovery of possession, the claimant must establish that before the expiration of the twelve year limitation period, she performed acts which amount to her resumption of possession of the encroached portion of Lot 14 , thereby stopping time from running against her and preventing the defendant from extinguishing her title. Dr Edward’s visit to the defendant and her husband was in January 2016, but by that time, the defendant’s rights were no longer “burgeoning” (to borrow a phrase from the decision in **Valerie Patricia Freckleton v Winston Earle Freckleton**). Those rights had crystallised into a possessory title since around August 2013, when the twelve-year limitation period expired. The certificate of title for Lot 14 shows that the claimant noted the fact of her husband’s death on April 4, 2019, and while I doubt that this can be considered an act of possession, it would also have occurred after the defendant’s rights had crystalised. As to the payment of property taxes, there is no documentary evidence to support the claimant’s assertion that she has been making those annual payments, but in any event, those payments alone, would not amount to the resumption of possession.

[56] There were obvious inconsistencies in the defendant's evidence in relation to, for example, when her husband mentioned the matter of the encroachment to her; whether they had obtained building approval and whether she had any discussion about the encroachment by phone with the claimant after her husband's death. However, in my view these inconsistencies do not diminish or destroy the other critical aspects of her evidence which, as I have stated earlier, were not challenged in any significant or credible way and which demonstrate that she went into possession of a portion of Lot 14 in or around August 2001 and remained there undisturbed during the limitation period.

Does the fact that the defendant built without obtaining building approval, disentitle her from claiming possessory rights over a portion of Lot 14.

[57] I have carefully considered counsel Miss Lindsay's argument on illegality. As outlined earlier, the argument in summary is that the defendant has unlawfully constructed buildings on both Lots 17 and 14 without approval from the Council, the court ought to remember that he who comes to equity must come with clean hands, that no action can arise from an illegal act and, ipso facto, should dismiss the defendant's claim.

[58] The Council's letter to the defendant's attorney-at-law dated August 20, 2020, indicates that the application for building permission was not recommended for approval because it breached restrictive covenants 10 and 13 endorsed on the defendant's title. The authors of the text : **Adverse Possession**, on which counsel relies , also make the point that the law of adverse possession is concerned with making lawful, conduct which initially constitutes the tort of trespass, and that it is not obvious that simply because the squatter's conduct is contrary to a statutory prohibition, that the principle that a person should not be granted a remedy where he has to rely on unlawful conduct to succeed, should apply to prevent long possession of land being a bar to a claim for recovery of possession.

[59] The application for building permission is dated March 2001. I have found that the application was made in 2001, and that construction of a bar on Lot 14 took place in that same year. In 2014, on the claimant's evidence, the Council advised Dr Wong, a prospective purchaser of Lot 14, that there was a building on the lot. Interestingly, nearly twenty years after the application was made, the Council wrote (in response to a request from the defendant's attorney-at-law for a copy of the building approval), advising that the application for building permission was not approved due to it being in breach of two restrictive covenants, There is no evidence that the Council took any steps to address the failure of the defendant to build without planning permission. The Council has not sought to intervene in these proceedings. The restrictive covenants which the Council said the application violated prohibits the use of the land for purposes other than a dwelling house and the construction of a building with more than one storey. These covenants were endorsed on the title for the lots in issue since 1976. There is no evidence of the current nature of the neighbourhood in which the lots are located, or whether any of the restrictive covenants have since been modified or discharged. I doubt that the defendant's acquisition of title by adverse possession in this case, will have any effect on public rights protected by the statutory prohibitions against building without planning permission. In all the circumstances of this case therefore, I am not prepared to treat the defendant's failure to obtain building approval as a basis to prevent her from acquiring possessory title.

Whether mesne profits are payable by the defendant

[60] No evidence was given as to when the gazebo was constructed by the defendant on Lot 14. It was not on the sketch plan attached to R.L Wilson & Associates Surveyor's Report prepared in 2019, but it appears on the sketch plan prepared in 2023 by Keith Wignall and is attached to his Surveyor's Report. Based on that sketch plan, the gazebo is not located within the perimeter wall which encloses Almond Lodge, but the statement by Keith Wignall in his report that the owners of

Almond Lodge have constructed a gazebo on Lot 14 was never challenged or refuted by the defendant and his report was jointly commissioned by the parties. No evidence was given by the claimant as to the rental value of Lot 14 to substantiate her claim for mesne profits. I have considered the approach taken by the court in **Michael Johnson v Fredrica Crooks**, to grant nominal damages in the absence of evidence to support a claim for mesne profits. Rather than do so in this case however, I will order the defendant to remove the Gazebo from Lot 14 and reduce her entitlement to costs by 40%.

Disposition

[61] In the result, I make the following declarations: -

- a) Elizabeth Richards has been in possession of all that part or portion of Lot 14, Part of Leyton Valley, Mid Island in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles on which is constructed a two-floor building for in excess of twelve years; consequently, pursuant to sections 3 and 30 of the Limitation of Actions Act, Lucinda Gordon's right and title thereof, including her right to recover possession have been extinguished.
- b) Elizabeth Richards is the legal owner of all that part or portion of Lot 14, Part of Leyton Valley, Mid Island in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles on which is constructed a two-floor building.

[62] I also make the following orders: -

- a) Lot 14 Part of Leyton Valley, Mid Island in the parish of Portland registered at Volume 1123 Folio 425 of the Register Book of Titles is to be subdivided and all that part or portion of it on which is constructed a two-floor building is to be transferred by Lucinda Gordon to Elizabeth Richards. The cost of the subdivision and the cost of the transfer to be borne by Elizabeth Richards.
- b) Elizabeth Richards is to vacate all that part or portion of Lot 14 Part of Leyton Valley, Mid Island in the parish of Portland registered at Volume 1123 Folio 425 of

the Register Book of Titles on which is constructed a gazebo identified in the Surveyor's Report of Keith Wignall, Commissioned Land Surveyor dated January 20, 2023, and is to remove the said Gazebo within 21 days of this order.

- c) Should Lucinda Gordon refuse or fail to sign any or all documents including an instrument of transfer required to give effect to the orders herein, within 14 days of being provided with such documents, the Registrar of the Supreme Court is empowered to sign them.

[63] Elizabeth Richards is to have 60% of her costs which are to be taxed if not agreed.

**A Jarrett
Puisne Judge**