

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO.: SLUHCV2009/0263

BETWEEN:

SAINT LUCIA NATIONAL HOUSING CORPORATION

Claimant

and

**FRANCIS CHITOLE
VANCE CHITOLIE**

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Petra Nelson with Mrs. Esther Greene-Ernest for the Claimant

Mr. Andie George, Mrs. Shirley Lewis, Ms. Synther Chitolie and Ms. Sherene Francis for the Defendants

2018: December 10, 11, 12;
2019: July 22, 23; (written submissions)
2020: July 16.

JUDGMENT

Introduction

- [1] **CENAC-PHULGENCE, J:** This is a claim by Saint Lucia National Housing Corporation (“NHC”) for ownership and possession of land against Francis Chitolie (“Francis”) and Vance Chitolie (“Vance”) (together “the defendants”). At the date of trial in December 2018, this claim was almost ten years old. Its history and conduct can best be described as a runaway horse with no apparent destination and a journey over many hills and into many valleys.

Procedural Background of the Claim

- [2] This claim began by fixed date claim form filed on 11th March 2009.¹ After representation by several lawyers for both NHC (three) and the defendants (six), the trial of the claim finally took place from 10th to 12th December 2018.
- [3] On 31st March 2009, an injunction was granted (a) restraining the defendants whether by themselves, their servants, agents or contractors or any other persons employed by them from constructing or continuing to construct any type of building, fence or structure or undertaking any development as defined in the Physical Planning Act No. 29 of 2001 at all on the property registered as Block 1020B Parcel No. 227; and (b) restraining the defendants from brandishing any cutlass, gun or any tool, instrument, equipment or otherwise whatsoever and precluding the claimant, its servants or agents or any person having the consent or authority of the claimant from entering and/or remaining on the property.² There were several applications by the defendants to discharge the injunction but the record does not reveal that any were successful.
- [4] Thereafter, a series of pleadings and amended pleadings were filed in this matter. The first defence and counterclaim was filed on 8th April 2009. This was followed by four amended defences and counterclaims.³ NHC filed a reply to defence and counterclaim on 13th January 2010 and an amended reply and defence to counterclaim on 19th October 2016.⁴
- [5] The first trial date for the claim was scheduled for 24th June 2010. However, the record reveals that on 27th May 2010, case management directions were given and the trial was then set for 2nd and 3rd March 2011. Over the life of this claim, there were a total of six trial dates set, all of which were vacated for reasons most of which are not quite clear from the record. The matter was referred to mediation in 2012 and a mediation agreement⁵ was

¹ Index to Core Bundle ("CB") No. 1 at pages 1-6.

² The Order granting the injunction was not part of the trial bundle but forms part of the court record.

³ Filed 21st May 2009, 28th August 2009, 15th January 2010 and 8th September 2016. (See Index to CB No. 1 at pages 7-53, 60-72 and 78-94).

⁴ Index to CB No. 1 at pages 54-59 and 95-100 respectively.

⁵ Index to CB No. 1 at page 133.

made that resulted in the conduct of a survey of the area of land occupied by the defendants by Mr. Allan Hippolyte ("Mr. Hippolyte"). In February 2016, fresh trial directions were given and in July 2016, the defendants were granted leave to file several further amended documents.

The Claim

- [6] NHC claims that it is, and was at all material times, the owner entitled to possession of land registered in the Land Registry as Block 1020B Parcel 227 (the "Property").⁶ The Property was transferred to it by Southern Development Corporation ("SDC") by a deed of transfer executed and registered in July 2008 as Instrument No. 4252/2008⁷ (the "2008 Deed"). The defendants were at all material times trespassers in illegal occupation of a portion of the Property, even before the Property had been transferred to NHC in 2008.
- [7] NHC says that the defendants knew or ought to have known that they were trespassers on the Property, not entitled to possession as owners or otherwise, as a claim⁸ had been filed against Francis by the former registered proprietor, National Development Corporation ("NDC") in 2006. From as early as 1995, Francis sought to preclude NDC from entering the Property. NDC, by that claim, sought an injunction restraining Francis and his servants/agents from entering, remaining on, continuing or engaging in construction of any building or structure on the Property; an order that he vacate the Property and demolish the structure constructed thereon; damages for trespass; and costs (the "2006 Claim"). An interim injunction was granted in July 2006 when the house Francis was constructing on the Property was at its foundation stage. Nonetheless, Francis continued construction in contempt of the order of the Court. NHC avers that the injunction remains in effect despite the 2006 Claim being discontinued in January 2008 when the Property was transferred from NDC to SDC. The defendants have since then wrongfully completed construction of the house and commenced construction of a fence around it.

⁶ Also referred to in the judgment as "1020B 227" and "Parcel 227".

⁷ CB No. 3 at pages 121-131.

⁸ SLUHCV2006/594.

- [8] NHC avers that it has been precluded from having full access to the Property by the actions of the defendants. Their trespass has been exacerbated by the fact that on 17th February 2009, the defendants prevented NHC's servants/agents, Mr. Joseph Alexander ("Mr. Alexander"), Licensed Land Surveyor, and his team from undertaking a survey of the Property. The defendants accosted Mr. Alexander and his team, brandishing cutlasses and a gun and forcefully brought the survey to a halt. By their actions, the defendants also caused delay in the project intended to be carried out on the Property. The then Government of Saint Lucia had ear-marked 40 acres to be partitioned from the Property for a housing development comprising 292 affordable housing units and infrastructure.
- [9] NHC states that the defendants have shown, by their conduct, that they have no regard for any order of the court, having continued and completed construction of their structures despite the Court order restraining them from doing so and despite NHC's written demand to stop the illegal construction dated 22nd December 2008.⁹ They will continue their wrongful occupation and seek to preclude NHC from accessing and undertaking work on the Property unless restrained by the Court.
- [10] NHC further states that Francis claims ownership of the Property but has not furnished any title deed for the Property. It therefore claims orders for possession of the Property; demolition of the house wrongfully erected thereon; an injunction restraining the defendants or their servants/agents from entering, remaining on, constructing or continuing to construct any building or fence, undertaking any development on the Property, brandishing any gun, cutlass or other instrument, and precluding NHC or its servants/agents from entering or remaining on the property; damages; costs; and interest.

The Defence

- [11] The defendants say that they were at all material times in lawful ownership, occupation and possession of a portion of land called Aubrier¹⁰ in Augier, Vieux Fort, shown in the registered Survey Plan No. VF 2237T ("the Hippolyte Survey")¹¹ and registered in the Land Registry as

⁹ CB No. 3 at pages 37-38.

¹⁰ This land is also referred to by the names Obrier, O'Brea, Obrie and refer to the same place.

¹¹ CB No. 3 at page 146.

Block 1020B Parcels 441, 444, 446 and 447.¹² The rights, interest and title of Francis and his grandfather, Chitolie Coolie, therein are registered in the Registry of Deeds and Mortgages in Vol 162A No. 199632.¹³ Their land, they say, is separate and distinct from the land claimed by NHC, which the defendants allege is situate in and called La Retraite and is not part of their lands in Aubrier. They say NHC and its predecessors were at all material times aware that they occupied land at Aubrier and NHC has admitted that Block 1020B Parcel 441 represents land occupied by them in Aubrier as shown by the Hippolyte Survey and is not NHC's land at La Retraite.

[12] The defendants say that NHC has failed to identify the lands they claim called La Retraite, as there is no registered survey plan to show the location and boundaries of the land called La Retraite; and there are no documents at the Land Registry to show which land Block 1020B Parcel 227 represents or that it represents lands at La Retraite. The defendants say the subject matter of the claim has, therefore, at all material times been unknown to NHC and the claim ought to be dismissed. In the same breath, they say that the boundaries of the land at La Retraite purchased by the Government in 1952 contained in Vol. 92 No. 59243 ("the 1952 Deed")¹⁴ are conspicuous and distinct from their surveyed lands at Aubrier and thus cannot be one and the same. They stated that NHC, although knowing that the defendants' land is at Aubrier, has knowingly and falsely for seven years proceeded with the claim, pretending and misleading the Court that it is at La Retraite.

[13] The defendants also allege that NHC has no cause of action against them because NHC's land at La Retraite was at all material times leased by the Ministry of Agriculture prior to 1973 and by NDC after 1978. Receipts of rent for lease of land at La Retraite by NDC dated 1999, 2009 and 2010 show that the lease of La Retraite continued prior to and after the transfer to NHC in 2008.

[14] It is also the defendants' case that registration of Block 1020B Parcel 227 is void on the basis that there are no documents in support of its registration. The defendants say that whilst

¹² Also referred to in the judgment as "Parcels 441, 444, 446 and 447" and "1020B 441, 444, 446 and 447".

¹³ CB No. 3 at pages 174.

¹⁴ CB No. 3 at pages 151-156.

NHC alleges that NDC became the registered owner of the Property during the Land Registration and Titling Project (the “LRTP”) on 23rd June 1987, there is no adjudication record for Block 1020B Parcel 227 and no documents to prove how NDC obtained first registration and what title it had for the Property. The Land Register for Block 1020B Parcel 227 cites an adjudication record that has never existed. There is also no survey plan or other title or document that shows which land Block 1020B Parcel 227 represents or that it represents La Retraite. There is also no adjudication record for La Retraite at the Land Registry. The defendants allege that NHC has admitted that it has no documents to prove adjudication of Block 1020B Parcel 227.

[15] The defendants say the fact that first registration of Block 1020B Parcel 227 was made by a non-existent adjudication record is ultra vires sections 9(1), 10 and 11 of the **Land Registration Act**¹⁵ (“the LRA”), null and void. Therefore, the consequent transfers of title to, and registrations of SDC and NHC are nullified and of no legal effect, as the NDC, by virtue of the principle of *nemo dat quod non habet*, was incapable of transferring title it did not have. The LRA does not speak to an unlawful registration and the claim cannot proceed on the void registration of Block 1020B Parcel 227. NHC was at all material times aware that registration of the Property was void and falsely instituted this claim against them and misled the Court.

[16] The defendants further allege that registration of NHC’s transferor SDC was also null and void and SDC was therefore incapable of transferring the Property to NHC for the reasons that follow. Registration was ultra vires section 37(1) of the LRA because NDC was the registered proprietor and only NDC could dispose of the Property pursuant to the LRA and not the **National Development Corporation Act**¹⁶ (the “NDC Act”). The Property had therefore not been lawfully transferred from NDC to SDC. It was ultra vires sections 56(1) and 67(1) of the LRA as the alleged statutory instrument by NDC does not satisfy the requirements of a valid transfer by the registered proprietor in notarial form under the LRA. Registration was also ultra vires section 26(1) of the NDC Act as the Minister sought to vest

¹⁵ Cap. 5.01, Revised Laws of Saint Lucia 2008.

¹⁶ Cap. 15.24, Revised Laws of Saint Lucia.

lands contrary to the express power to transfer. Further, the defendants allege that SDC is not established as a statutory body under the laws of Saint Lucia and was incapable of transferring title to NHC in that capacity.

[17] The defendants further say that the claim is unsustainable because the 2008 Deed expressly mandates non-interference with their land. The schedule to the deed expressly described the boundaries of the land transferred as “or however otherwise the same may be bounded” which makes NHC’s ownership subject to and bound by the pre-existing boundaries of occupation and the survey monuments in the Hippolyte Survey. The 2008 Deed also states expressly that the transfer was made for the express purpose of granting title to occupied lands and for housing development on unoccupied lands. Therefore, NHC is estopped from bringing a claim against the defendants for land occupied by them and precluded from establishing the intended housing development on land occupied by them. NHC’s trespass on the defendants’ land by destroying their farm for the purpose of the housing development is therefore also in breach of the 2008 Deed.

[18] Further, as NHC has always expressly acknowledged and accepted that the land being transferred from their predecessors in title was partly occupied, the 2008 Deed was expressly made subject to the defendants’ overriding interest of occupation as per the Hippolyte Survey pursuant to section 28(f) and (g) of the LRA. NHC therefore took ownership subject to their overriding interest. The defendants state that as NHC is not in possession of the land it claims and is seeking possession, it is also not in a position to sustain a claim for trespass.

[19] Additionally, NHC’s claim is statute-barred and therefore extinguished by articles 2103, 2103A and 2106 of the **Civil Code of Saint Lucia** (“the Civil Code”)¹⁷ as Francis purchased the land in Aubrier in the year 1976, in excess of the 30-year limitation period.

[20] The defendants also stated that NHC’s repetition of the discontinued proceedings is irrelevant and inadmissible because NHC is precluded from relying on the discontinued

¹⁷ Cap. 4.01, Revised Laws of Saint Lucia.

proceedings by NDC in support of its claim. The proceedings were expressly withdrawn before final determination by the court, which effectively disposed of the claim as non-existent per rule 37.25(2) of the **Civil Procedure Rules 2000** (“CPR”). Cause of action estoppel also bars subsequent proceedings by NHC against them – the same defendants, for the same subject matter, and upon the same cause of action that could have been dealt with in those earlier proceedings by NDC. Yet, the defendants say NHC was not a party to those proceedings and cannot rely on the same facts in the discontinued proceedings to initiate its own claim per CPR 37.8(b) and Vance was not a party to the discontinued claim such that those proceedings are irrelevant and inadmissible against him.

[21] It is further an abuse of the process of the court for NHC to repeat and rehash the proceedings brought by NDC, yet fail to disclose that the proceedings were withdrawn because NDC failed to establish its right, the registration of Block 1020B Parcel 227 being void; and that NDC, in order to avoid liability, unlawfully vested title in SDC, which unlawfully transferred void title to NHC. It is also an abuse where the 2008 Deed expressly prohibits the housing development and any interference with occupied lands, save for title regularization. They claim that the history of proceedings is a false attempt to deprive them of their lands.

[22] The defendants also deny the continuation of the injunction granted in the discontinued proceedings. They say that in accordance with CPR 17.4(5) and paragraph 3 of the order by which the injunction was granted, it was effectively terminated on 22nd August 2006 and no further order of the Court was made in respect of same. Further CPR 17.3 and 17.4(2) and (5)-(7) provide that an interim remedy is only granted *in personam* to the applicant and is neither transferrable to another party nor successive, but always subject to the requirement for the personal undertaking in damages, the termination date expressed therein or an express order of the Court for extension thereof.

[23] The defendants state that they have more than just the one house and fence complained of on their land at Augier. They have a number of structures and operate a multimillion-dollar farm investment there. They deny precluding NHC access to the land and accosting Mr.

Alexander and his team as alleged. They put NHC to strict proof of this. They allege that it is NHC and its servants/agents who broke and entered their farm at Aubrier, who were in possession of cutlasses used in demolishing/destroying their fence and gate, slaughtering their animals, and clearing their land in order to carry out the unlawful survey, without notice, to which they objected. They say the destruction inflicted is evidenced by a survey report by Mr. Hippolyte¹⁸ and a valuation report of Mr. Tedburt Theobalds ("Mr. Theobalds")¹⁹ ("2014 Valuation Report"), both of which are exhibited.

- [24] The defendants say that NHC falsely misled the court in obtaining the injunction against them and did not approach the court with clean hands. The injunction was obtained on the basis of the void registration of Block 1020B Parcel 227. As a result, the defendants have suffered and continue to suffer loss of their farm, livelihood and income. Therefore, by its undertaking in damages, NHC is liable for all the damage and loss, aggravated damages, value of improvements, loss of use and for restoration of the land as stated in the 2014 Valuation Report, and a further valuation report of Mr. Theobalds dated 6th September 2016.²⁰ This further valuation report shows the total loss and damage for 2015 to have increased to the sum of \$1,027,254,050.81.

Counterclaim

- [25] The defendants claim that they were at all material times the lawful owners in occupation and possession of land at Aubrier shown in the Hippolyte Survey. Francis' grandfather Chitolie Coolie purchased the said land by deed of sale dated 9th September 1911²¹ registered in Vol. 68 No. 34323 at the Registry of Deeds and Mortgages ("the 1911 Deed") along with a survey plan dated 1906. The purchase is also evidenced by receipt dated 1911²² ("the 1911 Receipt") which acknowledges the registered power of attorney by Mary Melville, the vendor to Sydney Melville, and the registered declaration of succession of the vendor at the date of purchase.

¹⁸ Survey Report dated March 2014. See CB No. 2.4 at pages 365-418.

¹⁹ Valuation Report filed 9th October 2015 at pages 419-442 of CB No. 2.4.

²⁰ CB No. 2.4 at pages 465-471.

²¹ CB No. 3 at pages 84-85.

²² CB No. 3 at page 176; see also CB No. 2.3 at pages 136-139.

- [26] Francis became the lawful owner when he purchased the land by written agreement and assignment dated 19th July 1976 (“the 1976 Deed”) from Stephen Chitolie, the last son and survivor of Chitolie Coolie.²³ His legal title and interest therein is registered in Vol. 162A No. 199632 at the Registry of Deeds and Mortgages. Francis had the land surveyed immediately after purchase in 1976 by Licensed Land Surveyor Vernon Augustin (“Mr. Augustin”), however, the survey plan was never registered (“unlodged Augustin Survey”) because of Mr. Augustin’s sudden death. The defendants’ land at Aubrier was resurveyed by court order and is shown in the Hippolyte Survey which replicates the boundaries marked by Mr. Augustin in 1976 and which land is registered at the Land Registry in Block 1020B Parcels 441, 444, 446 and 447. Therefore, the defendants claim that they and their predecessors have at all material times been in lawful ownership and occupation of the said land over the past 100 years.
- [27] The defendants further claim that their long-established house on the land is first recorded in the unlodged Augustin Survey. Over the years, the defendants and their predecessors have improved their dwelling house and developed the land into a farm investment of crops and livestock with extensive infrastructure. The defendants were born and raised on this land and continued their predecessors’ cultivation of crops and rearing of animals for their livelihood. The entire land is fenced and gated. They reside on the land with their family of about 20 persons. Their extensive farm investment is described in the respective reports of Mr. Hippolyte and Mr. Theobalds.
- [28] The defendants state that in or about February 2009, NHC and its servants/agents invaded their land without notice and destroyed their long-established farm investment for the purpose of carrying out their housing development. NHC and its servants/agents trespassed on their land by breaking and entering the farm, unlawfully uprooting the survey iron pegs placed by Mr. Augustin, demolishing the fence, destroying the gate, scattering, stoning and slaughtering the animals, destroying crops planted over the past 30 years and also threatened physical injury against the defendants and their family. NHC and its servants/agents have further bulldozed and excavated the farm and created roads and

²³ CB No. 3 at pages 111-112; see also CB No. 2.3 at pages 136-139.

gullies thereon. They continue to enter the farm daily with a group of plain-clothed policemen to threaten and intimidate the defendants. They have also sent squatters to build houses within the defendants' fences and to attack the defendants with cutlasses and stones. As a result, the defendants continue to suffer loss of their farm, livelihood and source of income. The damage and loss caused by NHC's acts is shown in the said survey and valuation reports.

- [29] The defendants say that any and all claims against them are now statute-barred and any title extinguished by articles 2103, 2103A and 2106 of the **Civil Code** as the law is clear that after 30 years no action for land can proceed. The prescribed period of 30 years is equivalent to 100 years in law that prohibits any claim for land. The Hippolyte Survey clearly shows the defendants' exact occupation with fences and survey monuments from 1976, in excess of the 30-year limitation. Francis' purchase and survey in 1976 is also in excess of 30 years.
- [30] Therefore, the defendants counter-claim for: (i) an order cancelling the claimant's registration as owner of Block 1020B Parcels 441, 444, 446 and 447; (ii) a declaration that the defendants are the lawful owners of the land surveyed in VF 2237T and registered in Block 1020B Parcels 441, 444, 446 and 447; (iii) an order for registration of the defendants as owners with absolute title to the land surveyed in VF 2237T and registered in Block 1020B Parcels 441, 444, 446 and 447; (iv) damages for trespass; (v) aggravated damages; (vi) restoration of the land and farm; (vii) compensation in the sum of \$1,027,254,050.81 for the destruction of the farm, loss of use, improvements, and restoration of the land surveyed in VF 2237T and registered in Block 1020B Parcels 441, 444, 446 and 447 as shown in the valuation report dated 9th October 2015 and further valuation report dated 6th September 2016; (viii) an order that the injunction entered against the defendants on 15th April 2009 be discharged; (ix) damages suffered as a result of the injunction; (x) a permanent injunction restraining the claimant from any interference with the lands surveyed in VF 2237T and registered in Block 1020B Parcels 441, 444, 446 and 447; (xi) an order that the claimant relocate and resettle the squatters they permitted to trespass on the land surveyed in VF 2237T and registered in Block 1020B Parcels 441, 444, 446 and 447, or that the squatters be made to vacate the said land; (xii) an order that the place name called La Retraite, which

erroneously appears as being west of the Petit Riviere du Vieux Fort on the map sheet of 1020B at the Land Registry be rectified to be correctly represented as east of the Vieux Fort River, in accordance with its location as per Government Deed of Settlement of 1952; and (xiii) an order that the claim be dismissed with costs and interest.

Reply to Defence and Counterclaim

- [31] NHC denies the defendants' defence and counterclaim. It states that the Property was claimed, as shown by the adjudication record for Claim No. 6K-207 relating to Block 1020B Parcel 46.²⁴ It was claimed by and awarded to its predecessor, NDC, although it was undemarcated. The list of documents produced to the adjudication officer were (i) Vieux Fort Development Area Vesting Order 1974 (No. 31 of 1974) and (ii) Vieux Fort Development Area Vesting (Amendment) Order 1976 (No. 41 of 1976) ("the Vesting Orders"). It was further recorded on the exhibited map sheet at the Land Registry as La Retraite. This is supported by the Hippolyte Survey done at the instance of the High Court, which shows that the land occupied by the defendants falls within the area recorded in the Land Registry as La Retraite of which NHC and its predecessors have been owners with absolute title from 1987. NHC says the defendants never made a claim for the Property during the LRTP, which land was properly registered in NHC's name. Block 1020B Parcel 46 was mutated into respective Parcels 264 – 311 and 227, all being part of the original Parcel 46. It therefore maintains that the defendants are trespassers on the Property.
- [32] NHC denies that the land is part of Aubrier and denies the defendants' assertions that it has failed to identify the Property and that there are no documents at the Land Registry that show what land Block 1020B Parcel 227 represents. It says it has never made the admissions alleged by the defendants. Further, NHC says that at this stage, the defendants cannot seek to invoke the jurisdiction of the Court, without having employed the appellate procedure laid down by the **Land Adjudication Act**²⁵ (the "LAA"). Any allegations of void registration should have been properly placed before the appellate forum made available under the LAA. The defendants were not at liberty to ignore the regime provided under the LAA and now

²⁴ Also referred to in the judgment as "Parcel 46").

²⁵ Cap. 5:06, Revised Laws of Saint Lucia 2008.

years later, seek to invoke the jurisdiction of the High Court. The defendants are seeking to use a back-door mechanism to claim the land which violates the rule of law, and on this basis, their defence and counterclaim should be struck out as an abuse of the court's process. Further there is no factual basis put forward by the defendants as to how the claim is statute barred.

[33] NHC states that NDC is its predecessor in title and it is not precluded from raising issues of title against the defendants. It raised the matter of the previous proceedings to show that from the time NDC owned the Property, its predecessors have always asserted ownership by instituting proceedings against the defendants and that the defendants have never been in peaceful and unequivocal possession of the Property. NHC denies that the 2008 Deed precludes it from establishing a housing development on the Property as alleged.

[34] NHC therefore asks the Court to strike out the defence as an abuse of process; to dismiss the counterclaim with costs; and further states that the Court ought not to make an order for compensation, as the defendants are possessors in bad faith in accordance with article 374 of the **Civil Code**, as, by their own admissions, there has been continuous litigation even from the time of NHC's predecessors to have them vacate the Property.

Issues

[35] The parties had been asked to file preliminary submissions to facilitate closing arguments at trial. They did so in February 2018 in preparation for the scheduled April 2018 trial date. However, Mr. Andie George joined the representative team of lawyers for the defendants in April 2018, and on 11th April 2018, the scheduled first day of trial, requested an adjournment. The Court obliged and granted an adjournment to December 2018. The Court ordered the parties to file a joint pre-trial memorandum setting out the issues to be determined, which if not filed, the Court would revert to the pre-trial memoranda filed in 2010 and 2016. The parties filed a pre-trial memorandum on 7th December 2018 as requested; however, stated that it was not a joint representation of the parties. Rather, it contained both the claimant's and defendants' issues. A total of 19 issues were identified in that pre-trial memorandum.

[36] In order to achieve a more structured approach to the judgment, I have identified four overarching issues set out in the paragraphs below under which the issues identified in the joint pre-trial memorandum have been categorized. The claimant relies on submissions filed on 28th February 2018 and 22nd July 2019 whilst the defendants' submissions were filed on 23rd July 2019. Before embarking on a consideration of the issues, I think that it would be beneficial to commence the discussion in this matter with an exposition of the law relating to land registration in Saint Lucia.

The Legislative Scheme-Pre and Post LRTP

Pre-LRTP

[37] Prior to the LRTP, there existed in Saint Lucia a system of registration of deeds and hypothecs which began on 7th July 1879 with the establishment of the Registry of Deeds and Mortgages. This system of registration established by the 1879 and 1957 Civil Codes has been called a system of registration of assurances or deeds. The object was to enable real rights such as conveyances of ownership, nuda proprietas and usufructs of land to be recorded in a public register so that an intending purchaser or other dealer may discover without difficulty any previous disposition that may have been made.²⁶

[38] Mr. Winston Cenac, QC in his text, **Coutume de Paris to 1988-The Evolution of Land Law in St. Lucia**²⁷ states that a major defect of the system of registration under the 1879 and 1957 Civil Codes was that registration neither conferred title nor did it guarantee title. According to Mr. Cenac, there was no guarantee under the system that the person whose name appears in a registered deed as the owner of a portion of land was in fact the true owner. It was quite possible that there might be at the same time another registered deed showing another person to be the owner of the land. It was precisely these observations and concerns which led to the LRTP.

²⁶ Coutume de Paris to 1988, The Evolution of Land Law in Saint Lucia, Cenac, Winston F. at Page 29.

²⁷ At page 39.

The LRTP

[39] In the Privy Council case of **Sylvina Louisien v Joachim Rodney Jacob**²⁸, their Lordships thoroughly explained the history and current scheme of land ownership in Saint Lucia. Thereafter, our Court of Appeal undertook the same exercise in **Joseph and others v Francois; and Matty and others v Francois**²⁹. The applicable principles of land law are therefore well settled, having been applied in several other ECSC cases and ought not to require rehashing at this stage. Nonetheless, as there still appears to be a lack of understanding of the land law system in Saint Lucia, I feel it necessary to restate these principles at length.

[40] As stated by the Board in **Louisien v Jacob**, in the early 1980s, Saint Lucia adopted the Torrens system of registration of title to land. To give effect to this new system, two statutes were enacted in 1984: the LAA and the LRA. The LAA provided for advertising for and receiving of claims to ownership, investigating of claims, and adjudicating on rival claims to the same land. Subject to various processes of review and appeal, the LAA provided for the passing of those results in the form of a certified adjudication record to the Registrar of Lands as the basis for first registration of title under the LRA. The LAA was therefore concerned with the production of adjudication records which were to form the basis of first registration of title under the LRA. The LRA provided not only for first registration of title to land adjudicated under the LAA, but also for the operation of the whole system of registered land for the indefinite future.³⁰

The LAA and the LRA

[41] To truly appreciate the LAA and the LRA and how they together implemented a system of title to land by registration, it is useful to briefly highlight some of their provisions. Under the LAA, the adjudication officer was in charge of adjudication³¹ and was authorised to appoint demarcation officers, recording officers and survey officers for performing the duties

²⁸ [2009] UKPC 3.

²⁹ SLUHCVP 2011/0026

³⁰ At paragraphs 2-4.

³¹ Section 4(2) of the LAA.

imposed by the LAA.³² He was required by the LAA to prepare and advertise notice, invite claims in respect of each adjudication section and fix a time limit for submission of claims, thereby initiating the process of the LRTP.

[42] The LAA made the demarcation officer responsible for demarcation of boundaries and gave him the power to indicate or cause to be indicated the boundaries of both claimed and unclaimed land, Crown land, and public roads and rights of way. The demarcation officer was to give notice of intended demarcation of boundaries and require every claimant to indicate the boundaries which he claimed.³³ The survey officer was responsible for carrying out such survey work as was required for adjudication and preparing a demarcation index map of the adjudication section from survey data and aerial photographs.³⁴

[43] The LAA gave the recording officer responsibility for considering all claims to any interest in land and carrying out such investigation of claims as he considered necessary.³⁵ Except for where there was more than one claimant between whom he was unable to effect agreement, the recording officer was responsible for preparing the adjudication record in respect of each parcel of land shown on the demarcation map. The adjudication record for each parcel was to show (a) the number and approximate area of the parcel; (b) ... the name and description of the person entitled to be registered as owner, with particulars of his title; (c) particulars of any registerable adverse rights ...; (d) ...; (e) a list of the documents produced to the recording officer; and (f) the date of completion of the form. It also provided that the form should be signed by the recording officer, and where possible, the owner and any person recorded as having an adverse interest in the parcel.³⁶

[44] Resolution of disputes between claimants was the sole purview of the adjudication officer. In any case in which there was a dispute as to any boundary or there were two or more claims to any interest in land, the adjudication officer was required to adjudicate upon and

³² Section 4(1) of the LAA.

³³ Section 10 of the LAA.

³⁴ Section 13 of the LAA.

³⁵ Section 14 of the LAA.

³⁶ Section 18 of the LAA.

determine the dispute, acting in a quasi-judicial capacity, weighing up evidence and applying principles of land law.³⁷ For this purpose, the adjudication officer was competent to administer oaths and take affidavits on enquiry; issue summonses, notices and orders; and require attendance of persons and production of documents as he considered necessary for adjudication.³⁸

[45] When the adjudication record was completed for the adjudication section, the adjudication officer was required to give notice of completion thereof and the place and time the adjudication record and demarcation map could be inspected.³⁹ After the expiry of 90 days from the date of publication of the notice of completion or upon determination by the adjudication officer of all petitions, the adjudication record became final and would be certified as such.⁴⁰ At any time before it became final however, the adjudication officer had the opportunity to correct in the record any error or omission, whether or not materially affecting any person's interest; provided however that where it affected a person's interest, he could only do so after taking steps to bring to such person's notice his intention to make the alteration and giving such person an opportunity to be heard.⁴¹

[46] The LAA also granted dissatisfied persons the right of review and appeal. Any person affected by the adjudication record or demarcation map who considered it inaccurate or incomplete, or was aggrieved by any act, omission or decision of the demarcation officer, survey officer or recording officer could petition the adjudication officer who was required to hear and determine such petition.⁴² Further, any person dissatisfied with the decision of the adjudication officer could appeal against that decision to the Land Adjudication Tribunal ("the Tribunal").⁴³ Any person dissatisfied with a decision of the Tribunal could appeal against its decision to the Court of Appeal. The Court of Appeal could make such order or substitute

³⁷ Section 15 of the LAA. See also *Louisien v Jacob* [2009] UKPC 3 at paragraph 39.

³⁸ Section 4(3) of the LAA.

³⁹ Section 19 of the LAA.

⁴⁰ Section 23 of the LAA.

⁴¹ Section 22 of the LAA.

⁴² Section 20(1) of the LAA.

⁴³ Section 20 of the LAA

for the decision of the Tribunal such decision as it considered just, and pursuant to the LRA, order rectification of the Register.

- [47] The LRA would then take effect. The LRA provided that when an adjudication record became final under section 23 of the LAA, the Registrar should prepare a Register for the subject parcel and register therein the particulars of the adjudication record.⁴⁴ This was the all-encompassing process that led to first registration of land under the LRTP.

Analysis

SECTION A

Issue: Whether NHC is the owner of Block 1020B Parcel 227 or Block 1020B Parcels 441, 444, 446 and 447 entitled to possession thereof?

Related issues as identified by the parties:

- (a) Whether 1020B 227 is in fact Parcels 441, 444, 446 and 447?*
- (b) Are the defendants in occupation of the Property?*
- (c) Does the defendants' alleged root of title from Mary Melville refer to the same lands registered in NHC's name?*
- (d) Whether the claim is sustainable when NHC has not shown by registered survey plan the geographic location and boundaries of Parcel 227 or La Retraite?*

Claimant's Submissions

- [48] NHC submits that it and its predecessors have a clear chain of registered title dating from Crown ownership to land registration and therefore it is undisputed that NHC is the owner of the Property and is entitled to occupy same. It notes that the defendants rely on a title deed to a third party, Chitolie Coolie which was used to claim another parcel of land and also a receipt which was deposited in the Registry of Deeds and Mortgages which does not conform to registered title under the **Civil Code** or **LRA**. The receipt, they argue, is not known to the LRA and cannot confer title to land. NHC argues that the defendants cannot at this point challenge their indefeasible title.

⁴⁴ Section 10 of the LRA

- [49] NHC further argues that the defendants failed to make a claim to the Property during the LRTP and upon completion of the adjudication record failed to avail themselves of the appeal process provided in the LAA. They rely on the case of **Berthilia Ennis v Phyllis Barras et al**⁴⁵ where the court said that one “can never put forward her first deed as some sort of title document”. NHC says that the defendants were squatters who reared animals on government land and decided to take advantage of this fact by constructing a house thereon in bad faith.
- [50] NHC argues that title can only be challenged on the basis of fraud or mistake pursuant to section 98(1) of the LRA and the defendants have not particularized any mistake or fraud in their defence.
- [51] They say the defendants in their counterclaim seek cancellation of NHC’s registration as owner, a declaration of ownership in their favour, and their registration as proprietors. However, NHC argues that the redress sought is misconceived and the defendants are estopped from making such a claim on the basis of the principle of res judicata. The decision of the adjudication officer is not subject to review by way of these proceedings. The bodies with exclusive jurisdiction no longer exist and the defendants having not availed themselves of that process are now attempting to do so through the back door. NHC also submits that the defendants are estopped by (a) their acquiescence evidenced by their failure to avail themselves of the machinery available to them during the LRTP and (b) by record.
- [52] NHC concludes that the defendants are unable to seek a declaration that they are the owners of the Property, as proprietorship has already been determined, pursuant to the LAA, in favour of NHC’s predecessor in title. The defendants do not have any title capable of challenging that of NHC whose title is registered.

⁴⁵ No. 760 of 1995 at page 12.

Does the defendants' alleged root of title from Mary Melville refer to the same lands registered in NHC's name?

- [53] NHC submits that the 47 carres of land originally owned by Mary Melville is not within the boundaries of the Property. Mr. Lester Martyr's ("Mr. Martyr") report reveals that the lands that belonged to Mary Melville traverse Block 1021B and 1022B to the north of NHC's lands. It says that once the defendants accepted in their amended defence and counterclaim filed 8th September 2016⁴⁶ that they were in occupation of Parcels 441, 444, 446 and 447, this was an admission that they are in occupation of the Property.
- [54] NHC submits that prior to this admission in 2016, the defendants' experts spun a web of confusion referring to old estate names so as not to admit their occupation of the Property and insisted that the parties' statements of case referred to different pieces of land.
- [55] NHC says that Mr. Martyr's evidence remains uncontroverted, however. The dissection of the Melville lands and proof that only 5 ¼ carres was purchased by the defendants' predecessors could not be challenged. The several reports of Mr. Jack McKenna ("Mr. McKenna") on the other hand were rendered nugatory, as prior to 2016, the said reports stated that the land occupied by the defendants was not adjudicated during the LRTP and denied that the defendants occupied Parcel 227. After the Hippolyte Survey, the defendants finally accepted in their 2016 Amended Defence and a further report from Mr. McKenna that they were in occupation of Parcels 441, 444, 446 and 447, resulting from mutations of Parcel 227. However, they insisted that they owned the Property despite the land register which showed NHC as proprietor.

Defendants' Submissions

- [56] The defendants contend that the Vesting Orders do not clearly describe the area of land vested and it is therefore impossible to determine the extent thereof. They say they can trace how Block and Parcel 1020B 46 became 1020B 49-97 and 1019B 390-395 but that there is no further identifiable link between Parcels 46 and 227, implying that there must

⁴⁶ Also referred to in the judgment as "the 2016 Amended Defence and Counterclaim" or "the 2016 Amended Defence" or "the 2016 Amended Counterclaim" respectively.

- have been some mistake as to NHC's registration of Parcel 227. They further contend that it is inexplicable that Parcel 227 was first registered in 2007 but its date of first registration is noted on the land register as 1987. They refer to the evidence of their expert Mr. Christopher De Myers ("Mr. De Myers") that there appeared to be alterations on the adjudication record for Parcel 46, which were not initialed and made by hand, making the changes unreliable.
- [57] The defendants argue further that the application for subdivision of 1020B 227 shows the resulting parcels as 1020B 264-311 which suggests that 1020B 441, 444, 446 and 447 were not derived from 1020B 227. They say that there is therefore no proof that 1020B 441, 444, 446 and 447 belong to NHC, as there is no evidence tracing title to NHC.
- [58] The defendants suggest that NHC failed to ascertain the extent and boundaries of 1020B 227 and that these were unknown. They also pointed out that NHC's witnesses could not point to a survey plan for 1020B 227 to support their contention that the extent and boundaries were known.
- [59] The defendants say that La Retraite has never been surveyed, and on the earliest plans of the Colony, La Retraite is not shown or described so as to ascertain its boundaries. Further, the old plans upon which the 1952 Deed was based are unreliable because they were hand drawn and the surveyors lacked the necessary technology to ensure accuracy. Notwithstanding, they say that the 1952 Deed, like others between 1900 and 1952, had consistently recorded the boundaries of La Retraite. This is the same La Retraite which they say has never been surveyed and the boundaries unknown.
- [60] The defendants argue that La Retraite and Augier are two different areas as seen from the old deeds. They say that the boundaries traditionally stated for La Retraite are different from the land occupied by the defendants as shown by the Hippolyte Survey. The land transferred by the 1952 Deed did not include land in Augier even though the adjudication record for 1020B 46 identified the land as Augier. They claim that Mr. Martyr confirmed that the La Retraite land in the 1952 Deed was bounded to the north by land known as Augier. This means that they are not the same lands.

[61] The defendants suggest that after the 1952 Deed there is no further disposition or transfer of lands having the said boundaries and there is no indication that the lands in the 1952 Deed are the same vested by the Vesting Orders.

[62] The defendants also suggest that the Hippolyte survey shows them as occupying the same area of land as the unlodged Augustin Survey. The defendants submit that the map sheet represents the general boundaries identified during the LRTP to demarcate land and as such is not conclusive or precise, is only a guide, and should never be used to accurately determine the position of boundaries. The defendants further submit that this means that the LRA only guarantees title of the approximate position of boundaries and therefore, title under the LRA is defeasible if there is a mistake as to the boundaries.

Discussion

[63] The whole purpose of the LRTP was to bring certainty to ownership and identification of lands. This was explained by Pereira CJ in **Joseph v Francois; Matty v Francois**⁴⁷ where the learned Chief Justice said:

“In our view the learned judge was right to recognize 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 was a holistic scheme implemented for the purpose of **bringing certainty to the ownership and identification of lands in Saint Lucia**.”⁴⁸ (my emphasis)

[64] As part of the demarcation process during the LRTP persons who claimed land were to have identified their boundaries. Such land would subsequently have been registered and given a block and parcel number. Therefore, the contentions of the defendants as to the place name, location and boundaries of 1020B 227 are of no moment. There is a land register showing that there was a first registration in relation to Parcel 227, following the adjudication in relation to Parcel 46, the parent parcel to Parcel 227. There is only one piece of land

⁴⁷ SLUHCVP2011/0025 consolidated with SLUHCVP2012/0037, delivered 15th April 2015 with written reasons delivered 21st August 2015.

⁴⁸ Joseph v Francois at paragraph 25.

registered as 1020B 227 and therefore, it really is unimportant whether it is called La Retraite or Augier or Aubrier.

[65] The defendants' contention that it is inexplicable that 1020B 227 was first registered in 2007 but its date of first registration is noted on the register as 1987 indicates a lack of appreciation for the land registration system. A mutated parcel of land will be assigned a new block and parcel number and a new register opened in respect thereof, but the date of first registration of the parcel will naturally reflect the date on which the parent parcel from which the mutated parcel is derived was first registered during the LRTP. There is therefore nothing inexplicable about this.

[66] In the more recent Court of Appeal case of **Ferdinand James v Planviron (Caribbean Practice) Limited and Rodney Bay Marina Limited**,⁴⁹ Pereira CJ made similar pronouncements to those in **Joseph v Francois; Matty v Francois**:

"The LRA and the LRTP signalled the adoption of the Torrens system of land registration in place of the existing 'title by deed' system. The LRTP took place in the early 1980s when all lands in Saint Lucia were surveyed and adjudicated upon under the Land Adjudication Act (the "LAA"). The LAA was the companion interlocking legislation in the LRTP process which brought all lands, upon adjudication pursuant to the LAA, under the registered land regime established by the LRA..."⁵⁰ (my emphasis)

[67] The learned Chief Justice added to this, two quotations. One from the Privy Council in the case **Richardson Anthony Arthur v The Attorney General of Turks and Caicos Islands**⁵¹ regarding the Torrens system, which I will quote only in part:

"The objective of the system was to achieve complete certainty of title. It was described by Barwick CJ in *Breskevar [sic] v Wall* (1971) 126 CLR 376, 385 as 'not so much a system of registration of title but a system of title by registration'." (my emphasis)

[68] The second quotation was from Barwick CJ in **Breskvar v Wall**⁵² where he explained the nature of this paradigm shift as follows:

⁴⁹ SLUHCVP2017/0050, delivered 16th October 2019, unreported.

⁵⁰ At paragraph 9.

⁵¹ [2012] UKPC 30.

⁵² (1971) 126 CLR 376.

“The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. **That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.**” (my emphasis)

[69] Her Ladyship then came to the following conclusion on the current state of affairs:

“With the completion of the LRTP, and the advent of the LRA, the goalposts of Saint Lucia’s land ownership system shifted significantly. **Title is no longer derivative and can no longer be conferred, discerned or extracted from any document other than the land register. It is the LRA which governs all lands in Saint Lucia, as all lands have been registered under the regime operated by the LRA. The registered land system replaced the previous system whereby title was conferred by deed and subsequently registered by volume and folio (the “title by deed system”).**”⁵³ (my emphasis)

[70] Since the implementation of the registered land system, there is simply no system of land ownership in Saint Lucia existing outside of the registered land system under the LRA in respect of which a declaration of title may effectively vest title. In other words, because of its purported effect, a declaration of title is, by its very nature, incompatible with the registered land regime. Title must necessarily be registered title in accordance with the LRA which expressly and exclusively ‘applies to registered land’.

[71] I pause here to reiterate that on a proper understanding of the working of the LAA and the LRA as confirmed by the Chief Justice’s statements, there is no basis on which any Court is entitled, at this time, to go behind the land register and, by examining deeds of title from any time prior, award ownership of land. The LRTP, and with it, its adjudication, review and appeal processes have long ago come to an end.

[72] Similar observations on the Torrens system of registration and the effect of registered title were also made in the Belizean Court of Appeal case of **Santiago Castillo Ltd v Quinto and another; Santiago Castillo Ltd v Registrar of Lands**.⁵⁴ There, Morrison JA, reviewed the statutory scheme in Belize, which is similar to that in Saint Lucia, and the relevant

⁵³ Planviron at paragraph 25.

⁵⁴ (2007) 71 WIR 156.

authorities. He observed that the provisions of the statutory scheme establish and entrench the Torrens system of land title, whereby title can only be created by registration of a certificate of title to the land. Registration in the land register is the sole source of rights and obligations with respect to lands falling within its ambit, subject only to the exceptions stated in the Act. The statutory scheme was designed to further the objective of indefeasibility of registered title notwithstanding the curious fact that the word 'indefeasibility', did not appear in the legislation.

[73] Morrison JA observed that the common aim of the Torrens system is:

“to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain **an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause**’. It is for this reason that under the Torrens system ‘a registered proprietor may obtain absolute title to land or an interest in land by registration even though there was no title in the person who granted him those rights’.”⁵⁵ (my emphasis)

In this regard, Morrison JA also quoted from the Privy Council cases of **Frazer v Walker** [1967] 1 All ER 649 and **Gibbs v Messer** [1891] AC 248 and observed that registration was effective to vest title in a registered proprietor notwithstanding that he had acquired his interest under an instrument that was void. Morrison JA also said that registration, once effected, must attract the consequences which the Act attaches to registration whether that was regular or otherwise.⁵⁶ Whilst the **Santiago Castillo** case was appealed to the Privy Council, the Board did not disturb the findings of the Court of Appeal as to the nature and consequence of the operation of the Torrens system, but affirmed it.

[74] Congruent with the observations of Morrison JA and the cases cited by him is section 38(1)(a) of the LRA which provides that any person dealing for consideration with a proprietor shall not be required or in any way concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered. The gravamen of the matter is that investigation of root of title is no longer necessary to establish

⁵⁵ At paragraph 30.

⁵⁶ *Frazer v Walker* at page 651.

title to land. The fact of registration is all that is required to establish ownership under the registered land system. As Lord Wilberforce put it in **Frazer v Walker**, 'it is in fact the registration and not its antecedents that vests and divests title.'⁵⁷

[75] In relation to the defendants' contention that there is no link between 1020B 227 and 1020B 441, 444, 446 and 447, it is clear that 1020B 227 was mutated and the defendants accept this based on the evidence. The claim was originally filed in relation to 1020B 227. The defendants, by their own admission, in their 2016 Amended Defence aver at paragraph 1(a) that they are in occupation, ownership and possession of 1020B 441, 444, 446 and 447 although at paragraph 1(c) they only refer to Parcel 441. As to whether there was a further mutation which led to the creation of Parcels 441, 444, 446 and 447, no evidence was led in this regard at the trial. I also note that the defendants did not raise this point in their 2016 Amended Defence, although by the time the Hippolyte Survey was lodged in 2014, it would appear that Parcel 227 had already been mutated. A review of the Hippolyte Survey shows that it is consistent with the map sheet pertaining to the Property as regards the adjoining parcels to the north. All of this taken together to my mind confirms that after the mutation of Parcel 227 in 2012, there were further mutations which resulted in the creation of Parcels 441, 444, 446 and 447.

[76] The LRA in section 23 clearly provides that the registration of any person as the proprietor with absolute title of a parcel vests in that person the absolute ownership together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims, subject only to sections 27 and 28 of the LRA. There can be no dispute that NHC was the proprietor recorded on the land register for Parcel 227 and now in relation to Parcels 441, 444, 446 and 447. The Hippolyte Survey clearly shows that the defendants are in occupation of Parcels 441, 444, 446 and 447 formerly 227 and none of the parties have challenged that survey.

[77] In cross-examination, Mr. De Myers clearly accepted that Parcel 227 was mutated. He also agreed that the LRTP did away with the references to land by estate names and now lands

⁵⁷ At page 651.

are referred to by block and parcel numbers, reducing to my mind the significance the defendants have placed on the name of the areas, La Retraite, Aubrier or Augier.

[78] The defendants raised an issue relating to boundary disputes and relied on section 17 of the LRA. However, determination of boundaries was never part of the defendants' pleaded case. In any event, section 17 of the LRA relates to boundary disputes between adjoining registered owners. The defendants do not fall into this category.

[79] The land register for Parcel 46 shows the notation "un-demarcated boundary" and the Adjudication Record for the said parcel shows the approximate area of the Parcel as "un-demarcated". In cross examination, both Mr. Martyr, former Chief Surveyor and Mr. Hippolyte, Licensed Land Surveyor, were asked the meaning of "un-demarcated boundary". Mr. Martyr explained that un-demarcated meant that one boundary was not demarcated but it did not translate to a possibility that it was not surveyed. On the other hand, Mr. Hippolyte's answer was that it meant that one party was not present at the demarcation stage.

[80] Mr. Hippolyte's response cannot be correct as the Adjudication Record for 1020B 46 notes all owners of adjoining parcels (48-50) as being present, as well as the representative of NHC. The demarcation certificate dated 11th November 1986 in respect of the claim by NDC shows a note which reads:

"Surveyor Modeste had not surveyed this part of the NDC boundary by the time demarcation of section 6K was complete. No NDC rep knew the boundary. Demarcation was carried out along the lines shown by neighbouring landowners, checking that these lines conformed to the survey plan."

Number 3 on that certificate states:

"When NDC has completed survey, this may mean petitions or applications to alter if they disagree with boundaries demarcated."

[81] Mr. Winston Cenac QC in his book **Coutume de Paris to 1988-The Evolution of Land Law in St. Lucia**⁵⁸ refers to a passage written by Keith Syrett in his discussion of surveys and boundaries under the LRTP. Mr. Syrett said thus:

⁵⁸ At page 68.

“Once the demarcation officer is satisfied that the boundary is cleared and there are no disputes concerning the state or size of the piece of land claimed, the land is then measured by the project survey assistants. This survey is of an accuracy necessary to enable the parcel of land to be plotted on the registry map in its correct geographic location. **It is not a legally binding, defining survey as is normally done by licensed surveyors in St. Lucia.** There are many different types of boundary survey. **The type used for registry maps is to an accuracy that will enable the piece of land to be plotted on the map in its correct location and its correct relationship to adjoining parcels. It is not a legal survey which will unambiguously define the boundaries to the satisfaction of a Court of Law.**” (my emphasis)

- [82] Mr. Martyr’s answer is more acceptable as it aligns with the demarcation certificate and the learning from **Coutume de Paris**. No authority has been provided in support of the defendants’ contention that an un-demarcated boundary in respect of a parcel of land makes title to that parcel indefeasible. That is certainly not the case. The learning on the system of title by registration and indefeasibility of title discussed above negates such a proposition.
- [83] The largest part of the evidence in this case surrounds the issue of whether the Property represents Aubrier owned by the defendants or La Retraite claimed by NHC and by extension whether the map sheet 1020B accurately describes the geographic location and boundaries of La Retraite. Whilst given the law, that evidence is irrelevant to the final determination of this claim, what it reveals is that there is a difference between the name given to a registration section and a local place name.
- [84] In cross examination, Mr. Martyr when asked whether Parcel 227 was La Retraite or Augier responded that La Retraite and Augier are local place names. He said that Augier is derived from the Fort de La Tour⁵⁹ names and those estate names are a common feature of the old deeds. He also remarked that the LRTP was to take us away from the old estate names. He was asked whether the old estate names were used as guides to determine various boundaries and he indicated that this was incorrect. He explained that the LRTP followed a process of demarcation, the boundaries were surveyed and then parcel maps were prepared.

⁵⁹ Plan of the Colony (1787) by Lefort de Latour

- [85] What is clear is that the name, whether it be the local name or estate name is no longer used to define the boundaries of a piece of land. To attempt to use local place names or estate names as a means of defining an area of land, as the defendants have sought to do, is outside of the registered land system and in the words of Mr. Martyr is “to tear the curtain to go back.”
- [86] Whilst Mr. McKenna’s report sought to persuade the Court that where the defendants occupy is not La Retraite but Aubrier, it failed to consider the impact of the LRTP on land registration in Saint Lucia. It was clear from his cross examination that he lacked an understanding and appreciation for the LRTP and that he had not taken the time to apprise himself of even the most basic features of the system. For instance, he indicated that he was not aware of the intention of moving away from estate names; he did not agree that the adjudication process was final; he could not recollect seeing the land register for 1020B 227; he thought that map sheet 1020B had the name Obre on it; he disagreed that the registry maps were compiled from demarcation maps and said that there were no demarcation maps, but then when asked again stated he was not aware; when asked whether he knew that the registry map sheets for 1020B and 1021B are registered as a registration section, he indicated that he had never thought about it in those terms, but accepted that it could be the case.
- [87] The repeated distinguishing of La Retraite, Augier, and Aubrier does not advance the defendants’ case any further. It must be remembered that land is referenced by block and parcel numbers and no longer by the estate names, local names or any other names. The names on the map sheet are used to identify the map sheet but do not necessarily correspond to the name by which the community may know it.
- [88] Similarly, the defendants’ submissions as regards the multiple versions of the map of Saint Lucia arising from adjudication seek to put on trial in this claim the LRTP, which according to the case law is a complete and final process and has ended. There is therefore no utility in this submission which could be of benefit to the defendants’ case.

- [89] From inception, the defendants' defence included the contention that neither their land nor NHC's land has ever been adjudicated. This assertion also featured prominently in the report of their expert Mr. De Myers. However, it was never addressed in their submissions and appears to have been abandoned for good reason.
- [90] On the evidence, both Mr. McKenna and Mr. De Myers made several criticisms of the LRTP including the fact that there were costs and time constraints which would account for the alleged non-adjudication of Aubrier. The perceived inadequacies or inaccuracies of the LRTP alluded to by the defendants and their witnesses is not a matter that is relevant. The process happened; it is final and complete. There was ample opportunity for the defendants to make a claim, to point out boundaries and to appeal any adjudication record or demarcation index map. They did not avail themselves of the process during the LRTP, nor did they appeal and are now seeking to re-open that process. The case law is clear that the title of a registered proprietor is indefeasible and can only be challenged on the grounds of fraud or mistake in the registration process.
- [91] An understanding of the LRTP cannot support the contention of Mr. De Myers in his report that there is no evidence that NDC was registered as proprietor of 1020B 227 during the adjudication process; that the land register was opened on 15th September 2003 and not 1987 after the adjudication process; or that the land register was opened on the basis of a mutation and not by an adjudication record from adjudication. Mr. De Myers appeared to be suggesting that 'adjudication' referred to a decision rendered only where there was a dispute, but that is not in keeping with the learning which emanates from the **Joseph v Francois** case. In the case of **Joseph v Francois; Matty v Francois** the learned Chief Justice was very clear that all lands in Saint Lucia were adjudicated and registered whether there was a competing claim or not. This is what she said:
- “... [T]he 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 ... an uncontested claim.**⁶⁰

⁶⁰ At paragraph 23.

[92] 'Adjudicated' in this context is not limited to circumstances in which there were rival claims to land and therefore a dispute between claimants, failing which it can be said that land was not adjudicated. As seen by the provisions of the LAA, even if there was no contest between claims, the recording officer still had to subject a claim to land to scrutiny and conduct such investigation as he considered necessary before completing and signing the adjudication record for certification by the adjudication officer.⁶¹

Conclusion

[93] It is therefore undeniable that NHC is the owner of Parcel 227 (accepted as now being Parcels 441, 444, 446 and 447) given that NHC is registered as owner with absolute title on the land register for the respective Parcels. There can be no assertion of title/ownership based on any documents which predated the LRTP (the defendants' 1911 Deed and corresponding receipt⁶² and/or 1976 Deed). There is also no question of whether the said parcels are called or located in either La Retraite, Augier or Aubrier, given that lands are now identified by their block and parcel numbers. The defendants have conceded, and the Hippolyte Survey confirms, and the Court therefore accepts and finds that the defendants are in occupation of the said Parcel 227 (now Parcels 441, 444, 446, and 447).

SECTION B

Issue: Is NHC estopped from the relief sought by virtue of the express terms of the 2008 Deed?

Defendants' Submissions

[94] The defendants argue that by the 2008 Deed, NHC accepted that at least some of the lands transferred were occupied. Therefore, NHC and its predecessors ought to have known of their occupation. The defendants submit that by the clauses in the 2008 Deed, NHC recognized the prior rights of persons in occupation. In other words, upon transfer, NHC held the land subject to the defendants' occupation. They say further that NHC was bound by its obligation under the 2008 Deed to regularize title to the occupied land, regardless of

⁶¹ Louisien v Jacob, at paragraph 39

⁶² As referred to/described/pleaded by the defendants at paragraph 39 of their Amended Counterclaim filed 8th September 2016

whom it found to be in occupation. NHC, they say, failed to honour the terms of the 2008 Deed.

- [95] The defendants also submit that NHC, having agreed at mediation⁶³ to survey the part of the Property occupied by the defendants, which led to Mr. Hippolyte's appointment and subsequently the Hippolyte Survey, ought to be prevented from making a claim to the land occupied by them.

Claimant's Submissions

- [96] NHC submits that it is not estopped by the 2008 Deed from making this claim as it and its predecessor, SDC treated the defendants as trespassers and not as tenants, tenants at sufferance or squatters who recognised that they had no rights and were prepared to be either relocated or to purchase the land. To the contrary, the defendants have no title but are claiming to be owners. NHC notes that adverse action had already been taken by NHC's predecessor, NDC when they wrote to the defendants in 1995 and later filed the 2006 Claim. An application for an injunction was also secured by NDC. All of this, it says shows that the defendants were not the type of occupiers being contemplated by the 2008 Deed. In support, NHC refers to the evidence of Mr. Faisal, their managing director, when he said that the defendants were seen as squatters who were claiming to have title and that they would be treated differently from others who were occupying but knew they had no rights or title to the land.

Discussion

- [97] The 2008 Deed stated that the transfer of the Property was being effected for the purpose of regularizing titles to those parcels of land currently occupied, and further, for vesting in NHC the unoccupied parcels of lands for the purpose of housing development. I accept NHC's submission on this issue. The defendants claimed to have been the owners of the land so there could have been no regularization of title by NHC in relation to them.

⁶³ See Mediation Agreement dated 9th November 2012.

- [98] In relation to the defendants' reliance on the mediation agreement, there was no evidence led at trial about the intention behind that agreement which commissioned the Hippolyte Survey and further, it is impermissible to rely on discussions had at a mediation session which are supposed to be confidential and without prejudice. That mediation agreement whilst indicating that it settled some of the issues, did not state what these were and certainly did not bring finality to the matter.

Conclusion

- [99] I therefore find that NHC is not estopped from making this claim against the defendants by virtue of the terms of the 2008 Deed.

SECTION C

Issue: Whether the defendants have any interest that can defeat NHC's registered title?

Related issues as identified by the parties:

- (a) *Whether the defendants have an overriding interest in the Property pursuant to section 28(g) of the LRA?*
- (b) *Did NHC take the Property subject to the unregistered rights and interest of the defendants?*
- (c) *Was the 2008 Deed made subject to the defendants' rights in actual occupation?*
- (d) *What is the extent and nature of the defendants' occupation?*
- (e) *Does a receipt confer title?*
- (f) *Is the receipt on which the defendants rely valid?*
- (g) *Is NHC's title extinguished by the statutory limitation of 30 years?*
- (h) *Can the defendants, now on a counterclaim, claim entitlement to the Property whether by title or possession when the defendants never availed themselves of the adjudication process and the machinery set up during the LRTP by making a claim for the land or challenging the adjudication to NDC, NHC's predecessor?*

Defendants' Position in Summary

- [100] The defendants submit that although registration as proprietor on the land register is prima facie proof of title, there are certain exceptions which may defeat that title. They rely on the

case of **Ulina Jennifer George v Hilary Charlemagne**.⁶⁴ They suggest that the effect of section 23 of the LRA is that once there is a claim that is adverse to that of the registered proprietor, such claim is to be regarded as an overriding interest which takes priority to the title of the registered proprietor. Despite what is reflected in the land register, the defendants say that they have an overriding interest in the Property under the LRA by virtue of (i) section 28(g) – rights as persons in actual occupation, (ii) section 28(f) – prescription, or (iii) section 27 – voluntary transfer. They also rely on section 37(2) of the LRA – subsequent dealings.

NHC's Position in Summary

- [101] NHC submits that if the defendants were in occupation during the LRTP, they never claimed the Property either by documentary or possessory title. Their occupation is not noted on the demarcation certificate; neither was there a dispute in relation to the Property nor a competing claim put in by them. Francis is using the very same title of his grandfather, Chitolie Coolie that he used to claim Block 1022B Parcel 37⁶⁵ as the basis of his claim to title to the Property. The receipt of purchase on which the defendants rely only materialized in 2009 after the claim was filed and was never used by Francis to claim Parcel 46 or dispute NDC's claim to it. NHC therefore contends that the defendants could not have been in occupation at the time of the LRTP and must have commenced their wrongful occupation in 1991 as stated in the 1995 letter from NDC to Francis.

Issue: Whether the defendants have an overriding interest in the Property?

(i) Section 37(2) of the LRA

Defendants' Submissions

- [102] The defendants submit that NHC took the land subject to their rights regardless of whether the 1976 Deed or the 1911 Receipt was registered. They submit that the proper interpretation of section 37(2) is that it validates unregistered instruments giving title to land, where although an instrument is not registered, there is some memorandum in writing evidencing the transaction. They submit that the unregistered 1976 Deed duly signed and witnessed and containing the terms of the agreement for transfer of title to the Property constitutes such

⁶⁴ SLUHCVP2001/0024, delivered 3rd April 2003, unreported.

⁶⁵ Also referred to in the judgment as 1022B 37 and Parcel 37.

a memorandum in writing. They can therefore rely on it as evidence of unregistered title to the land which they occupy. They also submit that as the 1976 Deed was registered at the Registry of Deeds and Mortgages and not the Land Registry it should therefore be considered unregistered.

- [103] The defendants further contend that the fact of non-registration does not make their claim to the land void. Relying on **Raoul Odium v Catherina Jean Jacques nee Antoine et al**,⁶⁶ they state that since the 1976 Deed was earlier in time to NHC's purported registration as owner of Parcel 227 or Parcels 441, 444, 446 and 447, the 1976 Deed should take priority to NHC's purchase per section 37 of the LRA. The transactions are therefore valid, and the land rightfully belongs to them. The defendants submit that the same argument applies to the unlodged Augustin Survey.

Discussion

- [104] Section 37 of the LRA is inapplicable to the present case. The section recognises the contractual relations between parties where there is an unregistered instrument post LRTP. Subsequent dealings here must refer to instruments that are post LRTP as the contemplation is that all land would have been registered and there would have been opportunity for any documentation preceding LRTP to have been brought forward to establish any interest in land. In the **Raoul Odium** case, the first defendant purported to deal with property that had already been registered under the LRA. The learned judge held that despite a deed of sale to the claimant being unregistered, the first defendant had divested herself of her interest in the land and could not thereafter lawfully transfer the land by deed of donation to anyone else. The court rightly accepted that the deed of sale was valid though not registered. The first defendant had no equitable title to transfer at the stage of the donation to the second defendant and per section 37, the claimant was allowed to seek to enforce his contractual rights by virtue of the unregistered deed of sale as between himself and the vendor. The claimant's cause of action could not be against the persons to whom the first defendant sought to donate.

⁶⁶ SLUHCV2007/0015, delivered 12th August 2011, unreported.

[105] In the case of **Ulina Jennifer George v Hilary Charlemagne**, the subject transactions were also post LRTP. In **Ulina George**, the respondent had only an unregistered receipt of purchase from the vendor for 1 acre of land dated 1994 and had gone into occupation of the land purchased. Thereafter, the appellant purchased the entire property including the 1 acre previously sold to the respondent from the same vendor and was registered as proprietor based on her deed of sale dated 1996. Counsel for the appellant argued that the receipt relied on by the respondent had not been signed by the vendor and had not been registered. The Court of Appeal found that counsel's argument had to have been based upon the premise that the receipt was part of the process of title transfer and rejected this supposition. The Court stated that "it is clear that the receipt has absolutely no value as a document of transfer of the legal interest in land."⁶⁷ The Court acknowledged its value being "what it does, however, is to provide evidence that the purchase price was paid."⁶⁸ I vehemently agree with the Court of Appeal in **Ulina George** that a receipt does not confer title. This is applicable to the present case.

[106] More so, what we have in this case is a receipt pre LRTP which would, in any event, have been subject to article 1980 of the **Civil Code** which required registration for the purpose of conveying immovables.

[107] I accept that the 1976 Deed and the 1911 Receipt were registered in the Registry of Deeds and Mortgages in 2009 which can be of no legal effect post LRTP. To describe them therefore as unregistered does not assist the defendants because they are not documents coming into existence subsequent to the enactment of the LRA as section 37 contemplates.

[108] The words of Mitchell J in the case of **Berthilia Ennis v Phyllis Barras et al**⁶⁹ are very applicable to the defendants' defence in this case. The learned judge said:

"The reliance in the Statement of Claim on the validity of the first Deed raised the ancient principles applicable to Deeds of Conveyance. **The Plaintiff's pleading of the existence of her first Deed, as if it was some sort of title document, was based on a misunderstanding as to what constitutes today in St. Lucia a**

⁶⁷ At paragraph 11 of *Ulina George*.

⁶⁸ At paragraph 11 of *Ulina George*.

⁶⁹ SLUHCV1995/0760, delivered 3rd December 1998 at paragraph 24 (unreported).

document of title to land. The ignoring in the Statement of Claim of the new procedures governing modern land title registrations, and for the challenging of the registration of such land titles, rendered the claim misdirected.” (my emphasis)

- [109] In relation to the unlodged Augustin Survey, it is clear that it has no legal effect. Mr. Hippolyte in cross examination admitted that Mr. Augustin’s 1976 survey was unlodged and went further to say that an unlodged plan is useless. It in any event does not advance the defendants’ case as it does not go to proof of any of the essential issues in the case.

(ii) Section 28 (g) and Section 27 of the LRA
Section 28(g) of the LRA

Claimant’s Submissions

Was the 2008 Deed made subject to the defendant’s rights in actual occupation?

- [110] NHC contends that the defendants’ claim to have both written title and an overriding interest by virtue of their actual occupation is incongruous, and a litigant cannot rely on them in the alternative. Likewise, one cannot claim to have title to property as owner and also claim to have title by way of prescription.
- [111] NHC argues that the transfer of the Property to it was not made subject to the defendants’ rights as they had no rights to use or occupy their lands. At the time of the transfer of the Property to NHC, it was an accepted fact that their predecessors in title, NDC had filed a claim for possession against the defendants treating them as trespassers and attempting to stop the defendants’ trespass and illegal construction. The defendants remained in unlawful occupation and compounded the situation by building without NHC or its predecessor’s consent in flagrant disregard for the court orders granting the injunction on behalf of the NDC and thereafter NHC.
- [112] NHC submits that the defendants are trespassers and never acquired any registrable interest or rights which coupled with occupation could constitute an overriding interest as envisaged by section 28 of the LRA.

Does a receipt confer title and is the 1911 Receipt valid?

- [113] NHC submits that a receipt does not confer title and relies on article 957 of the **Civil Code**. They say that the 1911 Receipt was only deposited and registered at the Registry of Deeds and Mortgages in 2009 after the claim was filed. It is made between the same parties, dated the same date with the same purchase price for the 5 ¼ carres shown in the 1911 Deed but purports to be a sale of 47 carres which is the full extent of the land which was owned by the vendor and from which she sold several lots for which there are deeds of sale.
- [114] NHC contends that the 1911 Receipt refers to lands in another adjudication section 1021B and 1022B but not in 1020B where NHC's land is located. NHC says Mr. Martyr whose evidence is supported by Mr. Hippolyte states that the defendants occupy the northern portion of their lands which is bounded on the north by the southern-most parcels of the lands originally owned by Mary Melville. The 1911 Receipt, NHC contends is not valid, and even if it was, it never conferred title and could not do so as it refers to all land of the vendor which was disposed of by deeds of sale to other persons.

Defendants' Submissions

- [115] The defendants say that they are and have at all material times been in actual occupation of the Property for over a century and this has not been disputed. They say their occupation was formalized by a purchase of the Property from Sydney Melville as evidenced by the 1911 Deed (5 ¼ carres) which was prior to LRTP and the 1952 Deed. In addition, they say that Chitolie Coolie, acquired an additional 47 carres of land in Aubrier by purchase from Sydney Melville on behalf of Mary Melville also in 1911 evidenced by the 1911 Receipt. In 1976, Francis also purchased that land. They say that it is established that the defendants are and were at all material times in actual occupation establishing an overriding interest.

Section 27 of the LRA

Defendants' Submissions

- [116] The defendants submit that the 2008 Deed would constitute a voluntary transfer without consideration since there was no indication that money had been paid for the lands

transferred thereby. NHC would have taken subject to their overriding interest at the date of acquisition of the Property in 2008.

Discussion

[117] Sections 23 and 28 of the LRA which must be read together provide:

“23. Subject to sections 27 and 28 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:

...

(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 noting on the register.”

“28. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register.

...

(g) the rights of a person in actual occupation of land or in receipt of the income thereof save where inquiry is made of such person and the rights are not disclosed.”

[118] In **Joseph v Francois**, the learned Chief Justice stated that “section 28(g) protects the rights enjoyed by persons such as lessees or licensees.” I would agree and merely highlight that it protects not just a person in actual occupation of land but the rights of such a person. The person must have therefore acquired some recognisable right in the land: **Williams & Glyn's Bank Ltd. v Boland and another; Williams & Glyn's Bank Ltd. v Brown and another**.⁷⁰ This has also been recognised by our Court of Appeal in the case of **Spiricor Saint Lucia Limited v The Attorney General and another**⁷¹ where Sir Vincent Floissac CJ stated:

“38. A careful perusal of the words of section 28(g) would indicate that the “actual occupation” is not the protected interest. What is protected are the “rights” of a person in actual occupation. The word rights is not limited by any definition. In my view although the section does not refer to the equitable interest of a purchaser whose title has not been registered as an overriding interest, it could and should be included among those equitable rights which are treated as overriding if the purchaser is in actual occupation. This has been the construction given to similar provisions in the English Land Registration legislation.” (my emphasis)

⁷⁰ [1981] A.C. 487.

⁷¹ Saint Lucia Civil Appeal No 3. of 1996 at para 38.

- [119] The defendants submit that they have had a physical presence on the land which is what is required for establishing actual occupation and the Court accepts this. However, the defendants failed to identify what right they have in the Property, which coupled with their physical presence gives rise to an overriding interest under section 28(g). They failed to do so despite their reliance upon the quoted paragraph of the **Spiricor** case. The right that is being sought to protect is certainly not under a lease or license but appears to be grounded in their unregistered 1976 Deed and the 1911 Receipt⁷² dated prior to the LRTP.
- [120] It appears the defendants are still touting the 1911 Receipt and the 1976 Deed as conferring title - an equitable interest in the Property to them. However, as previously discussed, documents which predated LRTP and purport to confer title are of no effect if no claim was made during the LRTP on the basis of such documents, nor any challenge made to a competing claim in respect of the same land.
- [121] Furthermore, pre-LRTP, the 1911 Receipt and 1976 Deed would not in any event have conferred title because they were at the time unregistered instruments and would not have conformed with articles 957 and 1980 of the **Civil Code**. Article 957 requires that in the case of immovables there must be a deed of sale, or memorandum in writing, stating the conditions of the sale. Article 1980 states that an act *inter vivos*, conveying the ownership of an immovable must be registered at length or by an abstract called a memorial. In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property or received an onerous gift of it from the same vendor or donor for a valuable consideration and whose title is registered.
- [122] The belated registration of the 1911 Receipt and the 1976 Deed at the Registry of Deeds and Mortgages in 2009 subsequent to the filing of the claim does not assist the defendants.
- [123] I would also simply state that in **Joseph v Francois**, the learned Chief Justice held that to allow a claim of an overriding interest under section 28 (g) of the LRA:

⁷² Subsequently registered in 2009 in the Registry of Deeds and Mortgages in Vol 162A No.199632.

“would involve an acknowledgement of the rightful entitlement of Jacob Fanus as registered proprietor and run completely counter to the defence of prescription raised with the object of defeating in its entirety Jacob Fanus’ claim.”

The same would apply in this case. The defendants’ initial defence was that they are the owners of the Property by virtue of the 1911 Deed and corresponding 1911 Receipt and then the 1976 Deed. They also argue that the land owned by NHC is not the same as the land which belongs to them. Later, the defendants acknowledged NHC as registered proprietor of the Property but alleged that NHC’s claim for possession of the Property was barred by 30 years prescription. The defendants have not suggested that they were ever licensees or tenants on the Property and their pleadings do not allow for such a posture. They have always claimed to be entitled to ownership and I would agree and adopt NHC’s submission that a claim of an overriding interest here is inconsistent with such a position.

Conclusion

- [124] I conclude therefore that the defendants can have no overriding interest pursuant to section 28(g) of the LRA. Section 27 of the LRA does not give rise to an overriding interest. Nonetheless, I find it important to make some observations on the evidence that was presented, only because it raises some peculiarities.
- [125] The 1911 Deed on which the defendants rely to establish their ownership of the Property reveals that ‘5 ¼ carres to be dismembered from the Augier Estate’ was sold to Chitolie Coolie, Francis’ grandfather. It notes that the vendor, Mary Melville, obtained her title to that Augier Estate by a Declaration of Succession dated 30th November 1906 registered in Vol. 64 No. 30222⁷³ and refers to two pieces of land together comprising ‘the Augier Estate’, one of them being the Aubrier or O’Brea Estate, comprising 47 carres of land.
- [126] The evidence reveals that Francis used this 1911 Deed along with a deed of partition to claim land during the LRTP on behalf of the heirs of Stephen Chitolie. That claim resulted in Block 1022B Parcel 37 being registered in the name of the heirs of Stephen Chitolie. Francis is now seeking to use the very same deed of sale he used to claim 1022B 37 to

⁷³ CB No. 3 at pages 80-81.

establish ownership of the Property, suggesting that the Property is the land sold by the 1911 Deed. It is incomprehensible that the same deed of sale could relate to two separate and distinct parcels of land.

[127] The defendants are also seeking to rely on the unregistered 1976 Deed, which purports to subsequently transfer the same land referred in the 1911 Deed from Stephen Chitolie to Francis. The 1976 Deed describes title to the land therein as having been '*acquired by Chitolie Coolie from Sydney Melville in receipt of purchase dated 9th September 1911 and registered in deed of sale by Sydney Melville to Chitolie Coolie dated 9th September, 1911 in Volume 68 Number 34323*'. I reiterate, this is the very same root of title used by Francis to claim 1022B 37 during the LRTP but which he failed to use to claim Parcel 46 over which the defendants now wish the court to declare ownership in their favour. Curiously, though the 1976 Deed existed at the time of the LRTP and would have conveyed ownership of the land therein to Francis, he never used it to ground the claim he made in respect of Parcel 37 or to make any claim at all in respect of Parcel 46.

[128] Another anomaly is that the 1911 Deed and the 1911 Receipt on which the defendants rely contradict each other. As stated, the 1911 Deed refers to the sale to Chitolie Coolie of 5 ¼ carres from the Augier Estate. The consideration stated therein was the sum of 26 pounds 5 shillings sterling paid before execution of the Deed. On the other hand, the 1911 Receipt refers to the sale of 47 carres of land. Counsel for the defendants, states for the first time in submissions that aside from the 5 ¼ carres sold by the 1911 Deed, Chitolie Coolie purchased an additional 47 carres of land in Aurbrier from Mary Melville which is evidenced by the 1911 Receipt. This is in direct contradiction to the defendants' pleadings which describe the 1911 Receipt as corresponding with the 1911 Deed and evidencing the purchase recorded therein. It also contradicts the 1976 Deed which states that the land being transferred thereby was acquired by Chitolie Coolie from Sydney Melville by receipt dated 1911 and registered in the 1911 Deed.

[129] If the defendants' new contention was to be accepted, this would suggest that both the 5 ¼ carres and the 47 carres would have been purchased by Chitolie Coolie on the same day

and that he would have paid the same consideration for the 5 ¼ carres as he paid for the 47 carres. He would have purchased 5 ¼ carres to be dismembered from the 47-carre Aubrier Estate and then purchased the whole 47-carre Aubrier Estate or vice versa. The evidence also reveals there were other deeds of sale by Mary Melville of land which was to be dismembered from the said 47-carre Aubrier Estate and sold to other persons. All of these deeds of sale referred to the same declaration of succession in respect of Mary Melville's root of title. It is also surprising that Chitoile Coolie would, having allegedly done both transactions on the same day, proceed to register his purchase of the significantly smaller piece of land (the 5 ¼ carre purchase by the 1911 Deed) yet fail to register the more substantial purchase (the alleged 47-carre purchase by the 1911 Receipt).

- [130] All this to say, it is patently clear that the 1911 Receipt containing 47-carres must be an error and does not evidence a further sale of any additional carres of land. The 1911 Receipt is contemporaneous with the 1911 Deed and I find that it evidenced that purchase as initially pleaded.

(iii) Section 28(f) of the LRA-Prescription

Claimant's Submissions

- [131] NHC's contention is that the defendants are prohibited from claiming prescription as an alternative remedy. They argue that positive prescription pursuant to the **Civil Code** has specific rules for making such a claim and the defendants did not employ them. NHC argues that the declaration of title sought by the defendants should have been brought by petition pursuant to the **Supreme Court-Prescription By Thirty Years (Declaration of Title) Saint Lucia Rules** and there must be strict compliance with these rules.

- [132] Further, if, as the defendants say, they were in adverse possession for 30 years, they should have claimed title during the LRTP but failed to do so. Francis clearly knew and understood his rights during the LRTP as he claimed title to 1022B 37, but never asserted rights to the land which the defendants claim they own by virtue of a receipt or long possession. NHC says that the fact that the defendants seek to claim title to the Property by virtue of Francis' purchase by the 1976 Deed or through his grandfather, Chitolie Coolie's 1911 Deed defeats

a claim for prescription. NHC submits that it is incongruous that the defendants are the owners of the land they occupy and yet claim to have acquired it by prescription.

- [133] NHC says Jonah Chitolie was not in a position to state what occurred on the land 100 years ago and some of his statements contradict statements in the several defences where the defendants insisted that they were not in occupation of NHC's lands but on their own property for which they had title.
- [134] NHC submits that the amended 2016 Defence and Counterclaim and the evidence led on behalf of the defendants reveal the many contradictions within their claim. A summary of the inconsistencies are: (i) the defendants were insisting they occupied their own lands to which they had title; (ii) they were in occupation of lands which are different from NHC's; (iii) they were occupying lands which had not been adjudicated during the LRTP as opposed to the NHC's lands; (iv) then in the amended 2016 Defence, the defendants first admitted that they were in occupation of registered lands being Block 1020B Parcels 441, 444, 446 and 447 which are mutations of Parcel 227 – the lands they previously insisted they did not occupy. This is actually resiling from their previous defences, which undermines their whole case.
- [135] NHC further submits that the issue of title by prescription should not arise as the defendants, by their own pleadings, have shown that their possession is not sole, peaceable, undisturbed, unequivocal and public.
- [136] NHC's position is that it and its predecessors always had possession of the Property by their actions of leasing to other persons as noted in the socio-economic plan filed in November 2018 in a supplemental list of documents. The evidence shows that there was no report of damage by the defendants during this period and it is clear that the defendants were not in occupation of the southern part of the lands. They were not affected by the development, their general area of occupation being to the northern-most part of Parcel 227 where the defendants wrongfully constructed their house.

- [137] The only independent evidence of when the defendants entered into possession can be gleaned from the 1995 letter which said they were occupying the lands from 1991. The defendants have therefore not been in possession for 30 years nor have they been in sole, exclusive and undisturbed possession of the Property. There are at least 88 other families on the Property and NHC has displaced and relocated the families who were in occupation by surveying, renting and commencing the St. Jude's East Gardens Development. The defendants never sought to assert their rights as owner to preclude NHC or its servants or agents from entering the Property. The defendants never took any action against NHC or its predecessors or any of the persons who occupied the land. They never made a formal complaint against NHC's alleged entry onto the Property and damage to animals and the farm, and only raised this in the last of the many defences filed.
- [138] NHC submits that the defendants' occupation was not peaceable, and pursuant to article 2062, acts of violence by the defendants could not support peaceable possession. The defendants responded with violent behaviour when Mr. Alexander went to conduct the survey in 2009. When Mr. Ronald Polius, NHC's staff surveyor, went to the Property in the company of a police officer, the defendants approached him but did not ask him to leave. They could have done so had they believed the Property to be theirs.
- [139] NHC also argues that possession is equivocal where it is open to explanation on a ground other than that of the possessor holding the property with the intention of making it his own. The defendants' possession would be equivocal per article 2072 of the **Civil Code**, as they claim to possess and have title to the Property as heirs or pursuant to deeds of sale and are therefore prohibited from claiming prescriptive title.
- [140] As to exclusive possession, NHC contends that the defendants did not limit their claim to the small area which they occupy but sought wrongfully to claim occupation of the entire Property. There is no cogent evidence which would prove exclusive possession of the whole Property.

[141] Further, NHC submits that Francis, in the claim **Francis Chitolie aka Catchel v Theresa Vitalis et al**,⁷⁴ claimed that he remained, lived, built and established himself on the subject Parcel 37. The parcel claimed therein is described as comprising 5 ¼ carres purchased by Chitolie Coolie on 11th September 1911 presently registered as 1022B 37. NHC asks the Court to have regard to that case as it belies and contradicts Francis' contentions in the present case.

[142] In relation to the requirement that possession be uninterrupted, NHC states that the filing of the 2006 Claim is a judicial demand which would have interrupted prescription relying on article 2085 of the **Civil Code**. This means that the time that had elapsed was wiped out so that the possessor must recommence prescribing anew.

Defendants' Submissions

[143] The defendants accept that what is contemplated by section 28(f) of the LRA are the relevant articles of the **Civil Code** being articles 2047 and 2103A. They submit whether used as a sword or shield, possession must be sole and undisturbed for at least 30 years and they have been in possession of the Property since the 20th century. They submit that 66 years would have passed from the time Francis was born on the land in 1941 to 2007 when Parcel 227 was first registered. They also say that even if the relevant date is 1986 when Parcel 46 was first registered, a period of 45 years would have expired from his date of birth. They then say that both periods are therefore much more than the 30 years required for claiming prescription. This is overwhelming evidence that the defendants have been in occupation for a continuous period of at least 100 years and have so remained uninterrupted to date.

[144] The defendants submit that until NDC filed the claim and application for injunction in 2006, there was no dispute concerning their occupation; and until this claim in 2009, there was no dispute between them and NHC. The defendants also state that there is no evidence to support NHC's contention that other persons occupied the land. They contend therefore that they have been in peaceful occupation. They also say that their possession was public and unequivocal. As to possession as proprietor, they say that they have always occupied the

⁷⁴ SLUHCv2005/0375, delivered 30th April 2007, unreported.

land as any owner, by constructing fences to keep persons off the land, rearing of animals and planting of crops which is cogent evidence of intention to exercise ownership. They have both factual possession and intention to possess as proprietor.

[145] The defendants contend that civil interruption requires filing and service of a claim on them before the lapse of 30 years per article 2103A of the **Civil Code**. The only true judicial demand prior to this case was an application for injunction in the 2006 Claim filed by NDC against Francis. This judicial demand occurred after the defendants had been in possession of the land for well over a century and was discontinued. The only other demand has been this claim which still does not interrupt prescription.

[146] They say that NHC's predecessor in title writing to them and requesting that they vacate the Property does not constitute civil interruption under the **Civil Code** because, even if such a letter could be prima facie considered an extra-judicial demand, the defendants have never acknowledged that NHC or its predecessors are/were entitled to the Property.

[147] The defendants therefore submit that this claim is barred since there was no relevant act interrupting their prescriptive title. More than thirty years have passed since their occupation began to the date of service of any claim whether by NHC or its predecessors.

[148] The defendants also submit that adjudication/registration during LRTP did not interrupt their prescription. In keeping with articles 2083-2085 of the **Civil Code**, subsequent registration cannot interrupt prescription as it does not constitute either a natural or civil interruption. They rely on the case **Noel Gregson Graham-Davis et al v Henry Strickland Charles et al**⁷⁵ and in short, say that a similar position ought to be taken in this case where there is no evidence that there was a determination of the defendants' overriding interest whether by prescription or otherwise at the time of adjudication.

[149] The defendants continue to submit that there was no adjudication in the sense of a settled dispute in respect of the Property. They refer to Jonah's evidence that Francis made

⁷⁵ (1992) 43 WIR 188.

representation to the recording officer that they were in occupation but that he did not return to investigate as promised. There was also no demarcation of the boundaries by an adjudication since the Adjudication Record for Parcel 46 notes that the area is undemarcated, which Mr. Hippolyte, in cross examination, stated meant that a party was not present at the demarcation stage. They conclude that the process was therefore incomplete and amounts to an error in the adjudication process under the LAA. They conclude that their established prescription effectively operates as a bar to NHC's claim.

Discussion

[150] It would appear that the defendants are (i) raising negative prescription as a bar to NHC's claim in their defence; and (ii) claiming positive prescription entitling them to cancellation of NHC's registration as proprietor and their registration as proprietor of the Property on their counterclaim.

[151] In the Court of Appeal case **Joseph v Francois; Matty v Francois**, the Chief Justice explained positive and negative prescription as follows:

“Article 2047 of the Civil Code allows for positive prescription as well as for extinctive or negative prescription. It states in part as follows:

‘Prescription is a means of acquiring property or of being discharged from an obligation by lapse of time, and subject to the conditions fixed by law. In positive prescription title is presumed or confirmed and ownership is transferred to a possessor by the continuance of his possession. Extinctive or negative prescription is a bar to ... any action for the ... acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law’⁷⁶

[152] The Chief Justice then states:

“The same elements required for establishing positive prescription applies equally to setting up negative prescription as a bar. Article 2057 of the Civil Code make this clear. It states as follows:

“For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor” (emphasis added).

This Article is not confined to positive prescription only. It speaks to the elements which must be established for prescription generally whether for use as the sword

⁷⁶ Joseph v Francois; Matty v Francois at paragraph 16.

(positive prescription) or the shield (negative prescription). This roundly encapsulates the common law principles required for establishing adverse possession. Accordingly, where the defence of prescription is raised, evidence must be led which satisfies Article 2057 of the Civil Code in order to successfully defeat a claim made by a person as owner.”

[153] Though the substantive requirements for negative and positive prescription are the same, the procedure is not, and this cannot be overlooked. The recent Court of Appeal case of **James v Planviron** established that the procedure for obtaining title by prescription (positive prescription) is no longer governed by article 2103A of **Civil Code**⁷⁷ and the **Supreme Court – Prescription By 30 Years (Declaration of Title) Rules (the “Prescription Rules”)**,⁷⁸ which required a petition to the High Court. The case determined that these provisions have been impliedly repealed by the LRA and the effect is that pursuant to sections 94(1) and 95 of the LRA, application for title by prescription ought to be made to the Registrar of Lands.

[154] The decision in **James v Planviron** is the subject of an appeal to the Privy Council and it remains to be seen whether this ruling will be upheld. For the purpose of the present case however, whatever the outcome of the appeal, it would not avail the defendants as they neither petitioned the Court in accordance with the Prescription Rules nor made application to the Registrar of Lands under the LRA. Therefore, their claim for positive prescription is not properly made and cannot be considered. All that is left for the Court’s consideration is the issue of negative prescription.

Whether the defendants’ have met the 30-year prescriptive period?

[155] Contrary to the defendants’ submission that first registration under the LRTP does not interrupt prescription, in the case of **Joseph v Francois; Matty v Francois**, the Chief Justice examined extensively the effect of the LRTP on prescription and made the following pronouncements which are apt:

“[19] The evidence before the learned judge comprised the witness statements of the appellants and other relatives of the appellants filed in 2007. The common theme throughout the witness statements which was their evidence in chief was that the appellants lived on the land, some for over 50 years.

⁷⁷ Cap. 4.01, Revised Laws of Saint Lucia 2013.

⁷⁸ Cap. 2.01, Revised Laws of Saint Lucia.

...

[22] Learned Counsel for the appellants sought to suggest during the hearing of the appeal that the learned judge was wrong as a matter of law to hold that Jacob Fanus' registered title obtained in 1987 interrupted prescription. He says that the learned judge made no finding as to when prescription started to run and that by 1987 St. Torrance Matty was on the land for in excess of thirty years. He also relies on Article 1978 of the Civil Code which simply states that "registration does not interrupt prescription". He also contends that the registration process which occurred during the Land Registration Titling Project ("LRTP") does not constitute a judicial demand under Articles 2084 and 2085 of the Civil Code.

...

[24] It is common ground that Jacob Fanus claimed the Disputed Land by long possession. He alone filed a claim to the land during the Land Adjudication process which was part and parcel of the LRTP. His claim to the land was not disputed by any of the appellants. Neither did any of the appellants seek to submit any claim in relation thereto whether by way of long possession or otherwise. The Disputed Land, following on the Adjudication process was then first registered to Jacob Fanus. He was first registered with provisional title in 1987. His provisional title was only upgraded to absolute title in 2005. During that 18-year period (between provisional title and the title being made absolute), no challenge was made by any of the appellants to Jacob Fanus' title.

...

"[26] In having regard to the entire scheme of the LRTP it is inconceivable that the learned judge should reckon the prescription period for the purpose of defeating the claim of Jacob Fanus as commencing from some period prior to when Jacob Fanus made his claim during the LRTP from which his registered title then flowed. To argue that Jacob Fanus' title which he himself only obtained by long possession in 1987 pursuant to the adjudication process was by that time extinguished by the appellants having prescribed against him would be nonsensical and an utter disregard for the land adjudication process where registered title could be obtained not only based on documentary title but also by possessory title. Indeed Jacob Fanus' 'greater title' against which the appellants could prescribe only crystallised in 1987 as a result of the adjudication and registration in his name pursuant to the LRTP.

"[27] For similar reasons reliance on Articles 1978, 2084 and 2085 of the Civil Code does not assist the appellants, and, no matter how ingenious the attempt, these Articles cannot be made to fit into the LAA and LRA scheme which came into operation in the State of Saint Lucia notwithstanding the Civil Code. While the LAA may have become spent in terms of its operational life having regard to its objective, the LRA is very much a part of Saint Lucia's legal landscape and it coexists alongside the Civil Code. The Articles of the Code prayed in aid by the appellants are simply inapplicable to the prescription defence as relied upon by them. Accordingly, 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. As such, the defence of prescription was bound to fail as this period fell far short of the thirty (30) year period by which the claim could be prescribed."⁷⁹ (my emphasis)

[156] It is to be noted that the defendants' arguments are similar to those rejected by the Chief Justice in **Joseph v Francois; Matty v Francois**. That case is authority for the principle that first registration interrupts prescription, whether or not at the time of first registration the person claiming prescription had already been in possession of land for in excess of 30 years. For the purpose of defeating a claim, the prescription period cannot be considered as commencing prior to the claim from which registered title flows. This would make nonsense of the scheme and render grave uncertainty to the system of registration by title, which is the opposite of its intended effect.

[157] I so conclude in spite of certain dicta in the Privy Council case of **Graham-Davis v Charles**⁸⁰ which the defendants ask the Court to follow. I note that this case is from Antigua and Barbuda and had already been decided when the learned Chief Justice delivered her judgment in **Joseph v Francois; Matty v Francois**. I am of the view that **Graham-Davis v Charles** is distinguishable based on the peculiar legislative provisions of the Antiguan land registration system and the facts of that case.

[158] In that case, counsel for the appellants made a submission to the effect that *'the appellants' title having been registered under the Registered Land Act (the equivalent of the LRA), any prescriptive period must run from the date of that registration, which was less than twelve years before the commencement of the present proceedings.'* The Privy Council indicated that they had no doubt this argument was unsound and went on to say the following, which I note reveals the distinguishing features of that case:

"The scheme of the 1975 legislation was that an interest registered under the Title by Registration Act [the previous regime] would be registered in the 1975 Land Register without alteration but that such registration would not affect the existence of overriding interests such as rights acquired or in the process

⁷⁹ At paragraphs 19, 22, 24, 26-27.

⁸⁰ (1992) 43 WIR 188.

of being acquired by prescription. This was an eminently logical approach since many of the overriding interests detailed in section 28 are of a character which might very well not be apparent to an officer visiting the land in the performance of his duties under the Land Adjudication Act. It would be manifestly unfair that a person who had acquired or was in the process of acquiring an overriding interest in a parcel of land and upon whom no specific notice had been served should forfeit such interests simply because he had not become aware of the publication by the adjudication officer of the statutory notice under section 6 of the Land Adjudication Act 1975. It was no doubt one of the purposes of section 28 of the Registered Land Act to avoid such unfairness. **In their lordships' opinion the proviso to section 15 left the adjudication officer with no alternative but to record that ownership of the Bluff [the property in dispute] should be vested in the appellants. In so doing he made no decision as to the validity of the disponees' counterclaim, leaving it to them to pursue their remedies through the courts.** Indeed, the acceptance by some of the disponees that it would be futile for the adjudication officer to record evidence emphasised that this was the case. It follows that the respondents did not lose any overriding interests which they or their predecessors in title possessed at the date of the appellants' registration and are in no way barred from seeking now to enforce those interests. In the event of their success in this appeal it will be open to them to apply to the Registrar of Titles for registration as proprietors under section 135(2) of the Registered Land Act.⁸¹ (my emphasis)

- [159] The Board's pronouncement must be looked at in the context of the specific legislative provisions of the Land Adjudication Act of Antigua and Barbuda⁸² (the "Antigua LAA"), which, while similar in many respects to the Saint Lucia LAA, contains some differences that are critical. This approach was commended by Mr. Justice Burgess in the Caribbean Court of Justice case of **David George v Albert Guye**.⁸³ He quoted from the Privy Council decision in **Richardson Anthony Arthur v AG for Turks and Caicos** where Sir Terrence Etherton reaffirmed that:

"It is necessary...when considering the effect of legislation implementing the Torrens system in any jurisdiction, to focus on the provisions of the particular legislation in question, and to take special care when considering the relevance and usefulness of judgments in cases in other jurisdictions where the legislation, policy considerations and general principles of law may be different."⁸⁴

⁸¹ At pages 198-199.

⁸² Cap. 234, Laws of Antigua and Barbuda.

⁸³ [2019] CCJ 19 (AJ).

⁸⁴ At paragraph 111.

[160] Section 15 of the Antigua LAA provides as follows:

“(1) If in any case –

(a) ...

(b) there are two or more claimants to any interest in land and the Recording Officer is unable to effect agreement between them, the Demarcation Officer or the Recording Officer as the case may be shall refer the matter to the Adjudication Officer.

(2) The Adjudication Officer shall adjudicate upon and determine any dispute referred to him under subsection (1), having regard to any law which may be applicable, and shall make and sign a record of the proceedings:

Provided that nothing in this section shall empower the Adjudication Officer to vary any interest in land registered under the Title by Registration Act.” (my emphasis)

Section 6 of the Antigua LAA provided that the notice to be prepared by the adjudication officer was, among other things, *“to declare that any interest in land within the adjudication section which is registered under the Title by Registration Act will be carried forward to the new register established under the Registered Land Act 1975.”*

[161] In **Graham-Davis v Charles**, in accordance with section 15 of the Antigua LAA, the land adjudicator recorded ownership as vested in the appellants by virtue of their certificate of title issued under the previous Title By Registration Act, and the existence of the respondents’ counterclaim by means of a note to the registrar at paragraph 12 of the adjudication record.

[162] Therefore, although the respondents made a claim relying upon the deeds of conveyance to them by John D. Charles during the new land registration process, they never had the benefit of their claim being adjudicated. This was because of the proviso requiring the appellants’ registered title under the Title by Registration Act to be registered in the Land Register under the 1975 Registered Land Act without alteration. The effect of the proviso was that where there were competing claims to land, one of which was registered under the previous legislation, the adjudication officer under the Antigua LAA could not vary such interest in the land. That would have been a matter reserved for the Court. The Antigua LAA only gave the

adjudication officer the right to adjudicate on the basis of long possession where there were no other claims based on a certificate of title.

[163] It was in these circumstances that the High Court and Court of Appeal concluded that the respondents' prescriptive rights, by virtue of being in occupation, must be deemed to have been overriding interests protected by section 28(g) of the Registered Land Act 1975 of Antigua and Barbuda. It therefore made sense for the Privy Council to have held that first registration could not interrupt prescription where the respondents had in fact made a claim during the land registration process, but that claim was simply not adjudicated based on the proviso to section 15(2) of the Antigua LAA.

[164] However, the Saint Lucia LAA does not contain the proviso contained in the Antigua LAA. To the contrary, an adjudication officer in Saint Lucia during the LRTP had full powers to adjudicate and determine interests and competing claims to land and make a final determination on a dispute based on the applicable principles of land law, subject to the processes of appeal provided.

[165] The LRTP in Saint Lucia was an all-encompassing procedure requiring all persons who had interest in land whether based on long possession or other documentary title to make their claim and the land adjudication officer had the power to award their interest. This is the reason that in Saint Lucia first registration, or rather the judicial process under the LRA and LAA during the LRTP which culminated in first registration, interrupts prescription. This is a major distinction between **Joseph v Francois; Matty v Francois** and **Graham-Davis v Charles** and the reason that the latter is inapplicable to Saint Lucia. It would make complete nonsense of the process and defeat the intention of the LRTP if a person could rely on possession before the LRTP to now ground a claim in prescription when the very LRTP gave an avenue for such a claim to have been made and awarded.

[166] The date of first registration of the Property was 23rd June 1987 according to the land register. As indicated earlier, mutations of a parcel of land do not change the date when the parent parcel was first registered at the conclusion of the LRTP. Applying the principles

enunciated in **Joseph v Francois; Matty v Francois**, first registration would have interrupted any prescription period existing prior to the LRTP. Therefore, the defendants are precluded from relying on any possession prior to LRTP to ground their defence of prescription. If, as the defendants say, they were in occupation of the Property long before the LRTP, then the LRTP would have provided an opportunity for them to have claimed the land whether by way of title documents or long possession. The defendants did neither and the period from which any prescriptive period is to be reckoned is 23rd June 1987. Jonah's evidence that Francis had made a claim and that the recording officer failed to return is unsubstantiated on the evidence. In any event, even if the recording officer may not have returned as Jonah suggests, it was incumbent on Francis to ensure that he took steps to bring notification of his interest to the recording officer. It is clear from the evidence that Francis was familiar with the LRTP process, having himself claimed 1022B 37 on behalf of the heirs of Stephen Chitolie. Why then did he not pursue his interest in the Property with the same vigor and determination he does now?

[167] In keeping with article 2085, the filing of the 2006 Claim would have interrupted any prescriptive period claimed by the defendants. From 1987 to the filing of the 2006 Claim is a period of 19 years, which is 11 years short of the 30 years required for a prescriptive claim. The filing of the claim in 2006 meant that the prescriptive period was interrupted and would have recommenced on discontinuance of that claim in 2008. Thereafter, prescription would have run for a period of one year and three months before it would have been interrupted again by this claim. The fact that the 2006 Claim was discontinued does not render it ineffectual to interrupt prescription.

[168] Even if I were to accept NHC's evidence that the NDC's letter of 1995 states that Francis was in illegal occupation of the land from 1991, it would mean that the defendants would only have been on the land for fifteen years when the 2006 Claim was filed. This would still be less than the required 30-year period.

[169] The defendants' submission that the 1995 letter does not amount to a judicial demand was never in issue and is accepted. The 1995 letter would only be relevant to the question

whether the defendants' possession was peaceable, which means without objection from any other person, as opposed to non-violent. However, since the defendants have not met the 30-year prescriptive period, there is no need to consider the other requirements necessary to make out a claim for prescription.

Un-Pleaded Issues

- [170] I believe it is important to make two observations here. I note firstly that the issue of whether NHC is estopped in the claim by virtue of the limitation period of 10 years for recovery of the land against the defendants was not pleaded and only raised for the first time in their submissions. The purpose of pleadings cannot be over-stated, and parties should ensure that they do not raise new matters outside of their pleadings and thereby deprive the other side of the opportunity to address them. As a consequence, I decline to consider this issue.
- [171] Secondly, it would seem, from the defendants' submissions, that they are also seeking to claim mistake or fraud pursuant to section 98 of the LRA. There was however no pleading to this effect in any of the defences filed and was also raised for the first time in the submissions, and thus cannot be considered. It is very curious, in any event, that the defendants are suggesting mistake/fraud in the adjudication process when they have consistently alleged in their pleadings and evidence that the Property was never adjudicated. Further, it is the case that allegations of mistake and fraud are very serious and cannot be lightly made in passing. The law is clear that mistake and fraud must be specifically pleaded and proven, and, for the purpose of establishing the basis for rectification of the land register, must relate to mistake or fraud in the registration process. Mistake or fraud pursuant to section 98 of the LRA cannot be used as an alternative remedy for a claimant under the LAA who failed in his/her claim and omitted to use the avenues of review and appeal, or a person who failed to make a claim altogether.⁸⁵

Overall Conclusion

- [172] NHC is the owner of the Property by virtue of its registration as proprietor on the land register for 1020B 227 (now 1020B 441, 444, 446 and 447). The defendants have failed to

⁸⁵ See *Louisien v Jacob and Joseph v Francois*; *Matty v Francois*.

substantiate their defence or counterclaim. Their deeds of sale and/or receipt of purchase prior to the LRTP can give them no title or overriding interest in the Property pursuant to section 28(g). They have also failed to establish that NHC is barred from bringing this claim by 30 years prescription or otherwise. The defendants therefore fail in their claim for ownership and possession of the Property, and trespass against NHC, and are not entitled to any of the relief sought. It therefore stands to reason that the defendants are in illegal occupation of NHC's land for which it is entitled to remedies which will be discussed below.

Section D

Issue: What remedies is NHC entitled to?

Related issues as identified by the parties:

- (a) *Whether the defendants' house and fence on 1020B 441, 444, 446 and 447 constitutes improvements to which article 372 of the **Civil Code** applies?*
- (b) *Is the claimant entitled to a final mandatory injunction?*

(a) Whether the defendants' house and fence on 1020B 441, 444, 446 and 447 constitutes improvements to which article 372 of the Civil Code applies?

Claimant's Submissions

- [173] NHC submits that the house and fence are not improvements as the defendants clearly acted in bad faith at all material times. The defendants wrongfully trespassed onto the Property in 1991 knowing that they did not have title. They commenced and completed construction of the house and fence despite the claims filed and injunctions obtained against them. They defended this claim using a deed, which they knew related to land already claimed by them during LRTP and registered as 1022B 37 and a receipt which only surfaced after the filing of this claim. As a result, NHC has been forced into protracted litigation for almost 10 years.
- [174] Further, the defendants' construction was done without DCA approval and in contravention of the relevant statute. NHC refers to the cases of **Development Control Authority v**

Darnley Ishmael et al⁸⁶ and **Justin Surage et al v Cendra Charles**⁸⁷ in support of its submission that the defendants cannot claim the wrongful construction as improvements.

Defendants' Submissions

- [175] The defendants' submissions in this regard were very short. They quoted article 372 of the **Civil Code** and stated that it is self-explanatory. In relation to the improvements made by them, they refer the Court to the Hippolyte Survey.

Discussion

- [176] Articles 372-373 of the **Civil Code** provide as follows:

“372. When improvements have been made by a possessor with his or her own materials, the right of the owner to such improvements depends on their nature and the good or bad faith of such possessor.

If they were necessary, the owner of the land cannot have them taken away. He or she must, in all cases, pay what they cost, even when they no longer exist; except, in the case of bad faith, the compensation of rents issues and profits.

If they were not necessary, and were made by a possessor in good faith, the owner is obliged to keep them, if they still exist, and to pay either the amount they cost or that to the extent of which the value of the land has been augmented.

If, on the contrary, the possessor were in bad faith, the owner has the option either of keeping them, upon paying what they cost on their actual value, or of permitting such possessor, if the latter can do so with advantage to himself or herself without deteriorating the land, to remove them at his or her own expense. Otherwise, in each case, the improvements belong to the owner, without indemnification. The owner may, in every case, compel the possessor in bad faith to remove them.

373. In the case of the third paragraph of the preceding article, if the improvements made by the possessor be so extensive and costly that the owner of the land cannot pay for them, he or she may, according to the circumstances and the discretion of the court, compel the possessor to keep the property, and to pay the estimated value of it.” (my emphasis)

⁸⁶ SLUHCV2005/0916 delivered 31st July 2009, unreported.

⁸⁷ SLUHCV2003/0418 delivered 26th September 2003, unreported.

- [177] By virtue of article 2066 of the **Civil Code**, good faith is always presumed, and it is for he who alleges bad faith to so prove. In the Quebec case of **Gagnon v Loubliere**,⁸⁸ the court discussed article 412 (the equivalent of our article 372) of the Quebec Civil Code. What is clear from that case is that a defendant's right to compensation under this article is dependent on his good faith which consists in his belief that he is really the owner.
- [178] Article 373 which gives the court discretion to order the possessor to keep the property on payment of its estimated value is premised on the possessor having acted in good faith. Where the possessor has acted in bad faith, articles 372-373 give the owner the breadth of options as to how the improvements are to be treated.
- [179] The evidence is clear that the defendants continued and completed construction of their house and fence in flagrant disregard for the court ordered injunctions against Francis in the 2006 Claim and against both defendants in the present claim. They made several applications to have the injunction in this claim discharged, all of which were denied. Yet, they continued construction wrongfully and it would appear even expanded the area of their occupation. It cannot be said, in these circumstances, that the defendants occupied the Property in good faith, when they were aware of the dispute as to ownership and acted in willful disregard for the Court's orders.
- [180] Their occupation consisted of their dwelling houses, farm, and the fence around the Property. It is clear that these structures were for their own use and benefit and were also not 'necessary' so as to be considered an improvement for which compensation could be awarded. I therefore conclude that the defendants are not entitled to compensation.

(b) Is the claimant entitled to a final mandatory injunction?

Claimant's Submissions

- [181] NHC submits that, as the owner of the Property with indefeasible title, it is entitled to a final mandatory injunction ordering the demolition of the house wrongfully built by the defendants on its land. NHC acknowledges that the court is to exercise great care when considering an

⁸⁸ [1925] SCR 334.

order for demolition and refers to **Halsbury's Laws of England**.⁸⁹ Further, it submits that all the defendants' actions must be considered.

[182] NHC says that the defendants wrongfully and without permission or consent and in the face of opposition and objection by NHC and its predecessors, constructed the house in flagrant disregard for their rights as owners of the land. NHC relies on **Clarabell Investments Limited et al v Antigua Isle et al**⁹⁰ where the court issued a mandatory order for removal of part of the offending structure, as well as a restraining order preventing continuation of the trespass, although the trespass was over a small portion of land.

[183] NHC says also that it was granted an interim injunction which is still in effect but the defendants continued and completed the house and built a fence on the Property. NHC referred to **Redland Bricks Ltd. v Morris**⁹¹ and noted that unlike the facts of that case, in the present case, the terms of the interim injunctions granted to it and NDC were clear and unambiguous. The defendants continued their wrongdoing in bad faith and enlarged the area of their occupation by claiming all the Property.

[184] Further, the actions of the defendants in defending this claim, protracting the litigation and manufacturing unreliable evidence has compounded the bad faith and justifies the grant of a demolition order. There was no mistake as to ownership but a willful misleading, manipulation and abuse of the court system by the defendants to deprive NHC of the use of its Property and to preclude its development of affordable housing for other persons. NHC distinguished the case of **Patricia Willard Hurst et al v Paragon et al**⁹² where the court refrained from granting a demolition order where it found that an error on the part of the defendants caused the offending action and not a willful trespass as in the case at bar.

[185] NHC also points out that the defendants seek to claim all its Property which is over 230 acres despite evidence to the contrary as to the extent of their occupation. The evidence of

⁸⁹ Vol 24 4th edition re-issue at para 846, 847 and 850.

⁹⁰ ANUHCv2006/0326, delivered 8th October 2008 at paragraphs 41-46.

⁹¹ [1970] AC 652.

⁹² AXAHCv2006/0088, delivered 21st June 2012, unreported.

Mr. Faisal, Mr. Polius, Mr. Martyr and Mr. Hippolyte clearly restrict the defendants' occupation to the northern most portion of the Property. The defendants' claim to the entire Property, NHC says, is disingenuous and self-serving.

- [186] NHC submits that this case features the prime circumstances for ordering the demolition of the house and fence. If, however, the Court is minded to exercise its discretion otherwise, NHC submits that the defendants should be ordered to pay damages for loss of use and occupation from 2009 at the rental value of the area occupied by them, and the market value of that area to be surveyed and valued for that purpose.

Defendants' Submissions

- [187] The defendants made no submissions in this regard. Their submissions on damages were focused on the relief they sought in their counterclaim.

Discussion

(i) Damages for trespass

- [188] Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another. Where a defendant has trespassed on property belonging to a claimant, the claimant is entitled to recover damages even if he has suffered no actual loss. There is no need for the claimant to prove any actual damage in order to be able to sustain an action for trespass.
- [189] In determining the measure of damages to be awarded to NHC, the Court must consider the loss suffered. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use.⁹³
- [190] The evidence is that the defendants continued their construction of the house and fence on the Property despite the Court order of 31st March 2009 and in disregard for the NHC's rights.

⁹³ Halsbury's Laws of England/Tort (Volume 97 (2015))/5. Torts to Land/(1) Trespass to Land/(v) Remedies for Trespass to Land/591. Damages for trespass to land.

Unlike most cases of trespass, the defendants are in occupation of a significant portion of the Property as can be seen from the Hippolyte Survey. The trespass continues unabated and therefore gives rise to a continuing action for as long as it lasts.

- [191] NHC is therefore entitled to damages for trespass. However, I note that while NHC has claimed damages, they have not quantified their loss by providing any evidence of the rental value of the Property. In the circumstances, the Court may award nominal damages. Bearing in mind (i) that the 1995 letter indicated the rental sum of \$6,141.66 per year; (ii) that it is now 15 years later; and (iii) the appreciation in the value of land, I am inclined to award a total sum of \$88,000.00, being the rental sum of \$8,000.00 yearly as damages for trespass.

(ii) Injunction

- [192] NHC is prima facie entitled to injunctive relief based on the finding that the defendants have trespassed on the Property. However, where a claimant is entitled to injunctive relief the Court may exercise its discretion to award damages in lieu where the circumstances warrant.
- [193] The case of **Shelfer v City of London Electric Lighting Company**⁹⁴ is very instructive as to the circumstances in which damages may properly be awarded in lieu of an injunction. A.L. Smith LJ said as follows:

“Many judges have stated, and I emphatically agree with them, that **a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance... In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.** There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. **In my opinion, it may be stated as a good working**

⁹⁴ [1895] 1 CH. 287.

rule that — (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction: — then damages in substitution for an injunction may be given.

“There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction. It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication... Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception...”⁹⁵ (my emphasis)

[194] In **Jaggard v Sawyer et al**⁹⁶ Lord Justice Millet addressing the same issue emphasized the following:

“Laid down just 100 years ago, A. L. Smith L.J.'s check-list has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.

Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.”⁹⁷ (my emphasis)

[195] In the present case, the relevant circumstances which I have considered in deciding whether to exercise the discretion to award damages in lieu of an injunction are:

- i. NHC wrote to the defendants in December 2008 demanding that they immediately cease construction and then filed this claim on 11th March 2009;

⁹⁵ Shelfer at pages 322-323.

⁹⁶ [1995] 1 WLR 269.

⁹⁷ Jaggard at pages 287-288.

- ii. NHC obtained an injunction against the defendants on 31st March 2009 which restrained them from (a) entering and/or remaining and/or constructing or continuing to construct any type of building, fence or other structure or undertaking any development on the Property as defined in the Physical Planning Act and (b) brandishing any cutlass, gun or any tool, instrument, equipment or otherwise whatsoever and precluding NHC from entering and/or remaining on the Property;
- iii. Prior to this, NHC's predecessor in title, NDC had written to Francis in 1995 indicating that he had been illegally occupying 33.5 acres of its lands and advising him that prompt action would be taken if he did not within 14 days pay the stated sum for loss of revenue for the years 1991-1994 or vacate the lands forthwith;
- iv. NDC in 2006 filed a claim and obtained an injunction against Francis restraining him from constructing or continuing to construct any building on the land registered as 1020B 227, which the defendants also breached; and
- v. It has been said that at the time this injunction was granted on 27th July 2006, the house being constructed was at its foundation stage.

[196] It is therefore clear that from as early as 1995, Francis was aware of the dispute as to title and the objections to him being present and constructing on the Property. Despite this, in flagrant disregard for both injunctions, in particular, the 2009 injunction granted in this claim restraining the defendants from continuing construction of the house and fence, the defendants completed construction of the house and erected a fence not just around the house but it would appear around the entirety of Parcel 227.

[197] The terms of the injunction were clear and unambiguous and would have precluded the defendants from undertaking any further construction/development on the Property. The Hippolyte Survey which was some four years later is instructive as to what the defendants did. It appears that after the filing of the claim they sought to expand their occupation of Parcel 227. The injury to NHC's rights is not small, as the defendants have trespassed on a significant part of the Property. Compensation therefor would not be a small money payment.

[198] The defendants chose not only to ignore NHC's rights as proprietor but also displayed audacious contempt for the Court and such behaviour cannot be countenanced. Defendants cannot be given the impression that they can ignore the clear terms of a court order and by doing so manipulate and force the hand of the court into permitting them to buy their way out. In **Jaggard v Sawyer** the court resounded the ancient warning of judges that the jurisdiction to award damages instead of an injunction should not be exercised as a matter of course so as to legalise the commission of a tort by any defendant who was willing and able to pay compensation.

[199] In the case of **Patricia-Ann Hurst Willard et al v Paragon Holdings**⁹⁸ Blenman J in deciding whether to grant a demolition order said that "[t]he Court has to examine the entire matter in the round and seek to do justice between the parties."⁹⁹ Her Ladyship also remarked that: "... the financial costs to demolish the building have not been provided. These are all relevant factors to the Court's determination of the appropriate remedies that should be awarded."¹⁰⁰ The court in that case was of the view that the defendants' infractions were not so serious as to warrant the ultimate sanction of demolition. The court went on to say that this in no way condoned the defendants' wrongdoing and it does not sanction a person trespassing on another's property and thereby infringing another person's rights. While Blenman J was of the view that though demolition orders are routinely granted by the court in deserving cases, she had no doubt that an award of damages would be very adequate and appropriate to compensate Mr. and Mrs. Willard for the inconvenience and losses they had suffered as a consequence of the defendants' unlawful act.

[200] In **Clarabell Investments Ltd v Antigua Isle Co Ltd.**,¹⁰¹ the learned judge in making a demolition order took into consideration the following, (a) that the costs of removing the unlawful structure would not have been astronomical as distinct from demolishing an entire building; (b) the fact that the defendant had acted with a degree of highhandedness in

⁹⁸ AXAHCV2006/0088, delivered 21st June 2012, (unreported).

⁹⁹ At Paragraph 109.

¹⁰⁰ At paragraph 109.

¹⁰¹ ANU HCV 2006/0326, delivered (unreported).

trespassing on the claimant's property and (c) that there were no third parties likely to be affected by a demolition order.

[201] In the Court of Appeal decision of **Cendra Chares v Justin Surage et al**, the sole issue was whether the learned trial judge had properly exercised her discretion in granting the mandatory injunction. Gordon JA at paragraph 6 said that 'the power of granting mandatory injunctions must be exercised with the greatest possible care and that the granting of a mandatory injunction is always at the discretion of the court and cannot be 'as of course'.' Gordon JA referred to the case of **Redland Bricks Ltd v Morris**¹⁰² and quoted from Lord Upjohn certain general principles for the guidance of courts in the exercise of its discretion:

" ...

- iii. Unlike the case where a negative injunction is sought to restrain the defendant from continuing or repeating a wrongful act, **the cost to the defendant of compliance with a mandatory injunction must be taken into account;**
 - a. **where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court, or has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff;"** (my emphasis)

Conclusion

[202] Whilst in all the circumstances of this case, there is sufficient to justify the grant of a demolition order, including the defendants' behaviour, neither NHC nor the defendants has assisted the Court with the exercise of its discretion in keeping with the requirements outlined in **Shelfer**. Indeed, NHC, by its submissions on damages in lieu of an injunction, has acknowledged the court's discretion. Yet, NHC has not provided evidence that damages would be inadequate. Although in evidence Mr. Faisal alluded to the fact that the Property was needed for the provision of affordable housing, there was no evidence of the extent to

¹⁰² 1970] A.C. 652 at pages 665 to 666.

which the defendants' occupation impacted the proposed development. The defendants for their part have not stated if or how a demolition order would be oppressive to them.

[203] Given the harsh effect of a demolition order, and in circumstances where neither party has provided the Court with the material upon which it is to conduct the balancing exercise, taking into account justice as between the parties, I have decided that the parties should be given an opportunity to explore the possibility of purchase of such area of the Property as is occupied by the defendants, as intimated by NHC in its submissions as an alternative to a demolition order.

Order:

[204] In light of the foregoing discussion, I hereby order as follows:

1. The defendants shall pay NHC nominal damages for trespass in the sum of \$88,000.00.
2. The defendants shall at their own cost demolish and remove all structures including houses, fences, animal pods or any other structure whatsoever on Block 1020B Parcels 441, 444, 446 and 447 ("the Property") and give up vacant possession thereof, after the lapse of nine (9) months from the date of this judgment, UNLESS the defendants sooner purchase from NHC at market value the occupied area as shown and determined by the lodged survey plan number VF2237T dated 20th August 2013 by Allan Hippolyte ("the Survey") subject to a valuation to be conducted by a valuer to be agreed by the parties.
3. The valuer is to provide a valuation of the market value of the area of the Property occupied by the defendants as shown and determined by the Survey.
4. The cost of the valuation is to be borne by NHC and the defendants equally.
5. Should the defendants agree to purchase the occupied area as shown and determined by the Survey, the defendants shall demolish and remove all structures, whatever they may be, erected outside of that occupied area.
6. Should the defendants agree to purchase the occupied area as shown and determined by the Survey and the transaction would not be fully completed by the end of the nine (9) month period stated in paragraph 2, the parties are at liberty to apply to the Court for an extension of the nine (9) month period, prior to the expiration of that period.

7. In respect of any such portion of the Property not purchased by the defendants within the nine (9) month or any extended period granted, the defendants shall be restrained:
 - (a) whether by themselves, their servants, agents or contractors or any other persons employed by them from constructing any type of building, fence or structure or undertaking any development as defined in the Physical Planning Act No. 29 of 2001;
 - and (b) from brandishing any cutlass, gun or any tool, instrument, equipment or otherwise whatsoever and precluding NHC, its servants or agents or any person having the consent or authority of NHC from entering and/or remaining on such portion of the Property.
8. Costs to NHC on the claim and counterclaim to be assessed, if not agreed within 30 days of the date of this judgment.

[204] I wish to sincerely apologise for the delay in the delivery of this judgment and thank counsel and the parties for their patience.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar