

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0002

In the Matter of Road Town Registration Section Block 2836B Parcel 127

BETWEEN:

DUFF'S VALLEY CORPORATION LTD.

Claimant

AND

KUNTA BROOKES

Defendant

Appearances: Claimant in person and unrepresented
Mr. Jamal Smith, Counsel for the Defendant

2019: 3rd July

JUDGMENT

- [1] **Ellis J:** The Claimant is a BVI Company and was at all material times in the business of owning and developing real estate. During the course of these proceedings, the Claimant was represented by Mr. Ishmael Brathwaite, the purported Managing Director, President and Chief Executive Officer of the Claimant. It is his evidence that from 1986 to 2012, the Claimant was the absolute legal and beneficial freehold owner of the land at Duff's Bottom more particularly described as Parcel 127, Block 2836B, Road Town Registration Section (hereinafter referred to as "the Property").
- [2] In or around 2012, under a special arrangement the Claimant transferred legal title to JJS Investment Holdings Limited ("JJS") as security for the acquisition of another lot of land. Mr. Brathwaite contended that the arrangement arose out of an agreement whereby JJS would hold title to the Property until the other lot of land became available for transfer. Mr. Brathwaite

asserted that notwithstanding this transfer, the Claimant never surrendered possession of the Property to JJS on or after such transfer. He contends that at all material times, the Claimant remained the beneficial owner of the Property and continued to manage and have exclusive possession of the same.

- [3] The Defendant, Kunta Brookes, is and was at all material times the owner and operator of a trucking company called Kunta's Trucking & Heavy Equipment. In or around 2005 and 2008, the Defendant approached Mr. Brathwaite seeking permission to park a truck on the Property. Mr. Brathwaite granted the Defendant permission to park one truck temporarily on the Property on the express condition that such permission would continue only until the Claimant was ready to use the Property.
- [4] The Claimant alleges that thereafter the Defendant brought additional trucks onto the Property, and later added a boat and an excavator. In addition, The Defendant later began to operate a truck repair business on the Property in breach of the bare licence granted to him.
- [5] Sometime in or around 2009, the Defendant sought permission from Mr. Brathwaite to place a trailer on the Property in order to retail truck parts from/on the Property. This request was refused. However, Mr. Brathwaite gave the Defendant the option to clear off a particular area on nearby land known as Parcel 125 of Block 2836B Road Town Registration Section ("**Parcel 125**") to park his trucks and the trailer and informed him that he could temporarily carry on his business on Parcel 125, since the Claimant did not have any immediate plans to use Parcel 125. The Defendant however refused this offer. Notwithstanding, in or around January 2015, the Defendant brought the trailer and parked it in front the Claimant's company office door, blocking views, vehicular access to the rear of the Property and blocking fresh air access to the office.
- [6] When Mr. Brathwaite inquired about the presence of the trailer on the Property, the Defendant denied ownership of the trailer claiming that it belonged to someone else. However, over time he observed that this trailer was being used by the Defendant to operate his truck parts retail business. Mr. Brathwaite also alleges that in breach of the licence, the Defendant also began to occupy a portion of the rear of the building on the Property to carry on a parts store business and welding activities which were never authorized by the Claimant. Sometime after discovering this,

Mr. Brathwaite wrote to the Defendant on 8th September, 2015 demanding that he vacate the premises within 30 days of the date of that letter.

- [7] In that letter, Mr. Brathwaite also requested that the Defendant pay the sum of \$1,000 per month for the use and occupation of the Property from 1st April, 2015 to the date when he departed from the Property. The Defendant refused and or neglected to make any such payments. The Claimant therefore asserts that the Parties have never entered into any formal written or oral agreement for the Defendant to use the Property for commercial purposes. Mr. Brathwaite further asserted that the Defendant has never made any payments whatsoever for his use and occupation of the Property.
- [8] When the Defendant failed to respond to the letter of 8th September, 2015, Mr. Brathwaite wrote two further letters dated 6th October, 2015 and 27th October, 2015, in which he again demanded that the Defendant comply with the requests made on behalf of the Claimant. Notwithstanding this, the Claimant contends that the Defendant has refused to give up occupation and/or possession of the Property and so he continues in occupation as a trespasser. Further, the Claimant states that the Defendant exceeded the terms of the licence granted to him.
- [9] The Claimant therefore claims:
- i. Recovery of possession of that portion of the Property presently being occupied by the Defendant with an order that the Defendant do forthwith give and deliver up possession in good and substantial repair and condition to the Claimant.
 - ii. Mesne profits at a rate of \$1,000.00 per month from 1st April, 2015 until possession of the premises is recovered.
 - iii. Costs
 - iv. Such further or other relief the Court deems just.
- [10] The Defendant trenchantly disputed the Claim on a number of grounds. First, he argued that even if the Claimant is in fact the manager of the Property, the Claimant lacks the proper standing to bring this Claim because the current registered proprietor of the Property is JJS. The Defendant further argued that the Claim does not comply with CPR 8.5(2) which requires all persons jointly entitled to a remedy to be party to the proceedings in that JJS, the registered Proprietor of the

Property has not been made a party to these proceedings. On that basis, Counsel of the Defendant submitted that the Claim should be struck out.

- [11] The Defendant does not deny that he is in occupation of the Property; however, he denies that he has either by himself or through his agents, trespassed on the Property. In fact, he concedes that the trucks, equipment, boat and trailer which he owns are parked at the front of the Property with access to the main road but without any obstruction of any other structure on the Property. He further stated that he has remained in occupation for an uninterrupted period of about 19 years but that his occupation was never with the permission of Mr. Braithwaite. In fact, he asserts that he has never had any discussions with Ishmael Braithwaite in 2008 or at any time for the purpose of obtaining permission to park his vehicles temporarily, or otherwise, on the Property. Instead, the Defendant asserts that he only had discussions with one Mr. Michael Smith (acting with the ostensible authority of the Claimant), concerning what was to be placed on the Property but there was never any license to remain on the Property on the terms claimed in the Statement of Claim.
- [12] According to the Defendant, in 2013, he was approached by Ms. Kishmet Daniel who informed him that Ishmael Braithwaite would compensate him if he agreed to clean the Property. He stated that although Mr. Braithwaite partly paid for these services, the entire family and original shareholders of the Claimant urged the Defendant not to clean the Property. There was no further discussion concerning the use of the Property between the Defendant and Ishmael Braithwaite.
- [13] The Defendant concedes that he received the Claimant's letter of 8th September, 2015, but he asserts that at that date the Claimant was no longer the owner of the Property and the letter did not refer to the Claimant as the manager of the Property. Instead, it indicated that Ms. Kishmet Daniel was in charge of managing the Property. The Defendant denies receiving the letter of 6th October, 2015 but he confirms receipt of the letter dated 27th October, 2015. In the latter correspondence (which was copied to the "site manager", Kishmet Daniel), the Claimant sought to recover arrears on rental income when there was never any agreement in regard to the payment of rent.
- [14] The Defendant reiterated that the Claimant is unable to maintain this Claim because only the owner of property (or any person claiming under or through that owner), has the legal right to

demand possession. Alternatively, the Defendant asserts that he is not the only person who has trucks and equipment on the Property. The Defendant states that he occupies a portion of the Property together with other family members who occupy and use the Property for similar purposes. The Defendant therefore argued that he cannot be the only defendant to these proceedings.

ISSUES FOR DETERMINATION

[15] The following issue arise for determination:

- i. What is the nature of the Defendant's occupation of the Property?
- ii. Whether, the Claimant is entitled to bring this Claim.
- iii. Whether the Defendant should be ordered to yield possession of the Property.

i. What is the nature of the Defendant's occupation of the Property?

[16] Mr. Brathwaite who gave evidence on behalf of the Claimant asserts that sometime between 2005 and 2008 (he could not recall the exact date or year), in his capacity as the managing director of the Claimant, he had a discussion with the Defendant regarding use of the Property. This discussion stemmed from the Defendant's request for permission to park a truck on the Property. He stated that he gave the Defendant permission to park one truck on the land free of charge until the Claimant was ready to use the land. Mr. Brathwaite stated that the Defendant later accepted these terms.

[17] The Defendant's evidence largely dovetails with Mr. Brathwaite's save in one material particular. In his written evidence, the Defendant stated that for approximately, 19 years he has used a part of the Property for the purpose of operating Kunta's Trucking & Heavy Equipment and for parking his trucks, trailer and boat. However, he asserts that he did so with the permission of Mr. Michael Smith who at the material time was a director of the Claimant.

[18] During the course of cross examination of Mr. Brathwaite, Counsel for the Defendant was at great pains to dispute Mr. Brathwaite's evidence that he (rather than Mr. Michael Smith *qua* director of the company) gave permission to the Defendant to occupy the Property. The Defendant's case is

that Mr. Smith had ostensible authority and purported to bind the Claimant Company in its dealings with him.¹

[19] In the Court's judgment, an assessment of all of the evidence in this case leads to the inevitable conclusion that regardless of whether it was at the instance of Mr. Brathwaite or Mr. Smith (acting at the time on behalf of the Claimant); the Defendant took up occupation of the Property as no more than a bare licensee. In fact, the Defendant maintains that his permission to occupy the Property was not based on any formal terms and this reinforces the conclusion that he took up occupation and remained in possession as a bare licensee.

[20] A bare licence is one granted otherwise than for valuable consideration. It amounts to a mere permission to enter and occupy. A critical feature of the bare license is that it gives that licensee no proprietary interest in the land and can be withdrawn at any time by the licensor without notice but the licensee must be given a reasonable time to depart. It follows that where, as in this case, there is no reason to impute a contractual arrangement between the Parties, the permitted occupancy remains that of a revocable licence.

[21] It is also clear that a licensee's presence on the land is only justified to the extent granted in the licence. If the licensee acts in anyway which is inconsistent with the permission granted, then his act will be considered a trespass. In the same way, a licensee who remains on land after his licence expires or is properly revoked is also a trespasser.²

[22] The evidence before the Court discloses that the Claimant owned the Property at the time when the Defendant was granted the gratuitous licence to occupy. It is also clear to the Court that regardless of which agent acted in granting this licence, it is apparent that they did so for and on behalf of the Claimant. However, it is apparent that in October, 2012, the Claimant transferred the Property to JJS and that notwithstanding this transfer; the Defendant remained in actual possession of the Property. The Court must therefore consider the impact which this material change had on the Parties legal positions.

¹ Paragraphs 21 and 23 of the Defendant's witness statement

² Wood v Leadbitter (1845) 13 M&W 838

[23] At common law, a revocable licence was revoked when the licensor conveys the property to another. So that if the licensee remained on the land or entered on it after the transfer, he would become a trespasser.³ In **King v David Allen & Sons Billposting Limited**,⁴ the English House of Lords made it clear that this would be the case at common law even if the third party purchaser bought the property with express notice of the licensee's occupation. Thus, as a matter of general principle a licence creates personal rights which are binding solely upon the parties to the contract and do not run with the land.

[24] The position was reiterated in respect of a registered land system in the English decision of **National Provincial Bank v Ainsworth**.⁵ In that case, a man, his wife and children were occupants of a piece of property, though the defendant was the sole registered proprietor. The property was later used to secure an overdraft for his company, and the bank which granted the overdraft registered a charge against the house accordingly. However, prior to arrangement with the bank, the man had abandoned the property, along with his family, and the wife was permitted to continue living there rent free as part of the separation agreement. The bank sought possession of the property, which the wife resisted. Under the English Land Registration Act 2002, Schedule 3 (and its predecessors), certain interests are 'overriding', meaning that even if they are not registered they can be asserted against those with registered interests in the property. One of these overriding interests is any interest belonging to a person in actual occupation of the property.

[25] The issue in that case was therefore whether the bank could claim possession of the house despite the continued occupation by the defendant's family. The House of Lords held that the wife had no overriding interest, and so the bank could take possession of the property. In order for her to successfully maintain her claim, the necessary interest would have had to be proprietary. The Law Lords held that the separation agreement permitting the wife to remain in the house was a mere license, and licenses are a personal, non-proprietary right. As the wife did not have a proprietary interest in the house, she had no interest which could amount to an overriding interest. She could not, therefore, resist possession.

³ Wallis v Harrison (1834) 4 M&W 538

⁴ [1916] 2 A.C. 54; see also Clore v Theatrical Properties Ltd. [1936] 3 ALL ER 483

⁵ [1965] A.C. 1175

[26] The Court is guided by the persuasive legal reasoning in this case which has been applied in appellate decisions of the Eastern Caribbean Supreme Court in **HCVAP 2006/025 Andre Winter v. Charles Richardson** where Edwards JA held that the rights of a person in actual occupation under section 28 (g) of the Registered Land Act Cap 374 are not protected as an overriding interest where that person is a bare or gratuitous licensee. The respondent, who was inferred to have been a bare or gratuitous licensee, did not have a right which could be protected as an overriding interest. Further, a gratuitous or bare licence is revoked by the death of the licensor/licensee or by an assignment of the land over which the licence is granted.

[27] Applying the law to the relevant evidence in this case, the clear conclusion to be drawn is that the Defendant being a bare licensee who has no "legal or equitable right" to the Property would essentially have become a trespasser when he continued in occupation of Property after it had effectively be transferred to JJS.

ii. Is the Claimant is entitled to bring this Claim?

[28] Having reached the conclusion that the Defendant's legal status following the transfer of title to the Property to JJS, is no longer that of a licensee, the Court must now determine whether the Claimant is entitled to maintain its claim for possession.

[29] At common law, an action for possession is ordinarily based upon title so that a Claimant, can 'eject' the occupant, by establishing that he, has a better title to possession than the occupant. Under the English common law, title is a relative concept. It matters not that a third person, who is not a party to the claim, has an even better title to possession than the claimant: provided that the claimant has a better title than occupant, he is entitled to succeed against him. The remedy granted to a claimant is an order that he shall have possession (and that the occupant shall give up possession). This was affirmed in the case of **Dunford v. McAnulty**⁶ where Lord Blackburn stated:

"in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against anyone, and those who sought to turn the man in possession out must shew a superior legal title to his."

⁶ (1883) 8 AC 456 at 462

[30] Notwithstanding its vintage, this dictum provides a summary of the current state of the law which is instructive. Case law now makes it clear that a claimant no longer needs to demonstrate that it has an estate in the land. In **Manchester Airport Plc v. Lee Dutton & Other**,⁷ a number of protestors occupied woodland near Manchester Airport with the intention of obstructing tree-felling works by the Airport's contractors that were required to reduce the height of obstacles on the flight path. The woodland was owned by the National Trust, which had previously granted the Airport and its contractors a licence permitting them to occupy the woodland in order to undertake the tree-felling works. The contractors had not, however, gone into occupation of the land. The Airport successfully brought a claim for possession against the protestors. The question on appeal was whether the Airport had standing to bring the proceedings; in other words, whether the license granted to the Airport gave it a sufficient interest in the land to enable it to bring a possession claim. It was not doubted that a claim for possession could have been brought had the Airport or its contractors actually been in occupation, at least if they had been in effective control of the land.

[31] Laws LJ held that:

"The court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the license. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no voice in the question; it cannot speak beyond its own limits...

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contracts with his licensor he enjoys."

[32] For Kennedy LJ, the key factor was that:

"The plaintiff does have a right to possession of the land granted to it by the license. It is entitled to "enter and occupy" the land in question. The fact that it has only been granted the right to enter and occupy for a specific purpose and that... the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to be critical.

[33] Turning now to the Claimant's evidence, the Court heard from Mr Brathwaite the professed Managing Director, President and Chief Executive Officer of the Claimant. At paragraphs 8 – 10 of his

⁷ [2000] QB 133

witness statement, Mr. Brathwaite explains the Claimant's interest in the Property in the following terms:

"In or around October 2012, under a special arrangement the Claimant transferred bare title of Parcel 127 aforesaid to another company called JJS Holding Ltd. ...as security for JJS's acquisition of another portion of land. Although the Claimant transferred legal title to the land to JJS, the Claimant did not part with possession of the property nor did it deliver up possession of any part of the land to JJS. The Claimant continues to retain exclusive possession and is the sole beneficial owner of the property despite the transfer of the title.

The special arrangement with JJS arose out of an agreement that JJS would hold the title of Parcel 127, until the land they wanted was available for transfer. The land that JJS required was a seaside property located south of Parcel 133. At that time, the land in question did not have coordinates and the Claimant had not yet obtained title to the area south of Parcel 133. The Claimant agreed with JJS that they could hold bare title of parcel 127 until the land was ready....

At all times to date, the Claimant retained control and management of Parcel 127 aforesaid."

- [34] During his oral evidence, Counsel for the Defendant put a copy of the Transfer of Land Instrument to Mr. Brathwaite and he confirmed that it reflected a transfer of absolute title of the Property to JJS with no reservations or conditions in favour of the Claimant. However, Mr. Brathwaite was also shown a copy of the Agreement for Sale and Purchase of the Property dated 12th October, 2012. At clauses 1 and 7(3) of that Agreement, the Parties clearly agreed to swap all interests and titles to the reclaimed land for the Property. The position is summarized in clause 1 which provides:

"Subject to the terms hereof, the Vendor will sell and the Purchaser will buy all that freehold land registered as Parcel 127 of Block 2836B of the Road Town Registration Section comprising approximately 0.979 of an acre (hereafter referred to as the "Property"), subject to Clause 7 (3) and the right of the Purchaser to exchange the Property for that area of reclaimed land immediately in front of Parcel 133 of the same Block and Registration Section (previously acquired from the Vendor) extending from the western boundary where Parcel 133 meets Parcel 223 extending southward to the water and to the eastern corner of Parcel 133 where it meets Parcel 134 (hereinafter referred to as the "Reclaimed Land")"

- [35] Mr. Brathwaite confirmed that the Claimant entered into a contractual arrangement with JJS because JJS wanted to purchase a lot of land on the seaside. JJS was prepared to pay the full price for that lot if it could hold the Property as security while the arrangements were finalized for the seaside lot. When that property became ready, the Parties agreed that the Property would be re-transferred to the Claimant and the seaside property would then be transferred to JJS, as purchaser.

- [36] The Court has no reason to doubt this evidence which was not traversed by the Defendant. Indeed, the scenario described seems entirely plausible in light of Mr. Brathwaite's evidence that the Claimant never surrendered possession of the Property but instead continued to deal with it *qua* proprietor. The evidence of Ms. Kishmet Daniel supports this. She testified that she was permitted to reside on the Property and that she was also recruited to act as site manager, responsible for overseeing the Property. This is confirmed in the Notices to Quit which were served on the Defendant and by the Defendant's own evidence. Ms. Daniel also testified that the Defendant was paid by Mr. Brathwaite to clean the Property. Again the Defendant's own evidence supports this. In his witness statement, he notes that in 2013 he was paid to clean the Property and in his oral evidence, he confirmed that he was paid two (2) cheques in the amount of \$15,000.00 to clean the Property.
- [37] It is not disputed that the Claimant does not have a legal title to the Property. Legal title currently vests in JJS which has not been made a party to this Claim. However, the Claimant has advanced the existence of an arrangement which, at its highest, could vest the Claimant with a possible equitable interest in the Property.
- [38] There are a number of ways in which equitable interests in land can be created, and can exist separate to the legal interests registered over property. This is because the law of equity regards as done that which ought to be done⁸ and acts to ensure that parties receive the benefit from property that they are rightly entitled to, whether they are legally registered or not. The most common way that an equitable interest is created is where the legal title is held on trust for another person. It is entirely arguable that the Sale and Purchase Agreement between the Claimant and JJS may vest the Claimant with an equitable interest in the Property which is enforceable in equity. This is because equity will look beyond the legal title to other factors such as the common intention and conduct of the Parties, the actual contributions and any valuable consideration which may have passed between parties in relation to the property.
- [39] Assuming that this is the case, the Court must consider whether the Claimant is entitled to demand possession on the strength of that interest alone. The critical factor here is that an action to recover land is a common law action. In commencing such an action, a claimant alleges that he is entitled to possess a legal estate and the defendant is wrongly keeping him out of possession of it. The

⁸ Walsh v Lonsdale (1882) 21 Ch D 9

claimant will normally seek as a remedy an order that he be put in possession of the property and compensation for having been wrongly kept out of possession (mesne profits) in the meantime. In order to succeed in such a claim, the claimant must show a better title to the legal estate than the defendant (or anyone claiming through him) holds. This means that a claimant who has an equitable interest in that estate notwithstanding that it may be proprietary in nature can never recover possession on the strength of that interest alone.⁹ In the same way, a person with an equitable interest cannot hope to recover mesne profits which are common law damages due to a person who has been wrongfully kept of possession of his property. This means that whenever a claimant is a purchaser or property under a specifically enforceable contract to purchase land; it is the transferor and not the transferee who has the right at common law to bring an action for recovery of land or for trespass or nuisance.

[40] However, a claimant who has an equitable interest in land, and who is "vested with possession" in equity is allowed to bring an action if he joins the legal owner. If the legal owner does not agree to be joined as a co-claimant, he or she may be joined as a defendant but the legal owner *must* be joined. In **Allen v. Woods**,¹⁰ the English Court of Appeal held that a person who seeks to recover possession of land upon an equitable title must make the person in whom the legal estate is vested, a party to the action. The rationale for this general statement of principle was explained by Viscount Cave LC in **Performing Right Society Ltd. V London Theatre of Varieties Ltd.**¹¹:

"That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction is not in doubt; and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made, a party to the action: **Daniells' Chancery Practice (7th ed), Vol 1, p 172**. If this were not so, a defendant after defeating the claim the equitable claimant might have to resist like proceedings by the legal owner or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. No doubt the rule does not apply to a mortgagor at least since the passing of section 25(6) of the Judicature Act 1873; and there may be special reasons, were, it will not be enforced as in **William Brandt's Sons and Co v Dunlop Rubber Co [1905] AC 454**, where the defendant disclaimed any wish to have the legal owners made parties."

⁹ Doe v Staple (1788) 2TR 684; Butler v Kensington (1846) 8 QB 429

¹⁰ (1893) 68 LT 143

¹¹ (1924) AC 1 at page 14

[41] In that same case, Viscount Findlay also said:

“Except under very special circumstances the ordinary rule should be observed, that the legal owner should be a party to the proceedings... But whatever may be the balance of convenience, the established rules of practice should be adhered to, even in cases, of which I think the present is one, when their observance in all probability will serve no useful purpose. The parties have joined battle on the applicability to the present case of this particular rule of practice, and we must decide according to law, however much we may regret that success in the action should depend on mere technicality which has no relation to the merits of the case.”

[42] There is however an established exception to this general principle. Where, for whatever reason, a person who has an equitable interest was formerly, in fact, in possession of the legal estate, such a person does not need to prove the lawfulness of that possession by relying on an equitable title or indeed any title at all. A person who has formerly been in possession of a legal estate is allowed to bring an action to recover it on the basis of prior possession alone. That person may plead the bare fact of his prior possession only, and will succeed against a subsequent dispossessor unless that person can show a better title or right to remain in possession.¹²

[43] The modern position in a claim for possession of land has been usefully summarized by the learned authors in **Clerk and Lindsell on Torts**¹³

- (a) In the case of ordinary trespass where the claimant in possession sues for interference with his possession of land, *jus tertii* is no defence.
- (b) If the claimant is not in possession and is suing an occupier for ejectment, he claims a right to possession based on the strength of his title so he must show that title for “*possession is good against all the world except the person which can show a good title.*”¹⁴
- (c) Since title to land is relative, the claimant may show a better title either:
 - i. by his prior possession previous to that of the defendant. In such a case where the defendant has taken possession wrongfully from the claimant, the defendant cannot plead *jus tertii* and it is irrelevant that, as in **Asher v Whitlock** some third person has a better right to possess than the claimant; or
 - ii. by his title independently of prior possession, to own the land. In such case where the claimant produces a documentary or paper title the defendant may challenge it by pleading *jus tertii* that is that the claimant has no such legal title as alleged and that the title belongs to another person.

¹² *Roe v Reade* (1799) 8 TR 118 122 – 123; *Leigh & Sullivan v Aliakmon Shipping* (1986) 1 AC 785 at 812

¹³ Twentieth Edition Sweet and Maxwell paragraphs 19 – 71

¹⁴ *Asher v Whitlock* (1865) L.R. 1 Q.B. 1 at 6 per Lord Cockburn

[44] In order to maintain an action for trespass the claimant must have been in possession at the date of the appellant's entry on the land. Ultimately, this is largely a question of fact. Generally, possession means the occupation or physical control of the land. The degree of physical control necessary to constitute possession may vary from one case to another. The type of conduct which indicates possession varies with the type of land. In the case of vacant, unenclosed land there is little which can be done on the land to indicate possession.

[45] In **Wuta-Ofei v Mabel Danquah [1961] 1WLR 1238** the Law Lords did not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The Board held that the type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient. The Board applied the judgment in **Bristow v. Cormican** where Lord Hatherley said:

"There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

[46] In the case at bar, it is apparent that the Claimant held the legal title to the Property and was in exclusive possession of the same until 2012. In furtherance of its legal title, the Claimant granted a revocable licence to the Defendant. This establishes that when the Defendant entered the land, the Claimant was in possession. The Claimant contends that notwithstanding the transfer to JJS, it remained in possession of the Property. This averment is not traversed by the Defendant and in fact there is no evidence that the Claimant ever abandoned its possession. Indeed, following the transfer of legal title in 2012, the Claimant continued to treat with the Property *qua* owner, granting licences to occupy (Kishmet Daniel), appointing an overseer/site manager, authorizing the cleaning of the Property and issuing notices to quit. As in **Wuta-Ofei**, these actions disclose a clear intention to retain possession and in the Court's judgment would be sufficient to entitle the Claimant to maintain an action for trespass. It is therefore irrelevant that some third person has a better right to possess than the Claimant and as such the Claimant is permitted to bring an action to recover possession on the basis of prior possession alone.

iii. Should the Defendant be ordered to yield possession of the Property?

- [47] The Court is satisfied that at the time that the Defendant came into possession of the Property, it was owned by the Claimant. The Court is also satisfied that the Claimant (through its servants or agents) granted the Defendant permission to occupy the Property under a gratuitous and revocable licence for an indeterminable period. That licence was revoked by operation of law when the Claimant transferred title to the Property to JJS.
- [48] The Claimant also contends that it terminated the Defendant's licence in correspondence commencing 8th September, 2015. In that correspondence, the President and CEO indicates that the Claimant is ready to use the Property and it gave the Defendant thirty (30) days' notice to vacate the premises. The Claimant also demanded rental payments retroactive to April 2015 and until the Defendant vacated the Property. The Claimant contends that there was further correspondence on 6th October, 2015 in which the Claimant reiterated the demand for vacant possession no later than 8th October, 2015. A final letter, dated 27th October, 2015, maintained this demand seeking vacant possession by 28th October, 2015. It appears that enclosed with that letter, were the letters of 8th September and 6th October purportedly delivered by the site manager, Ms. Kishmet Daniel.
- [49] The Defendant does not deny that he received the letters of the 8th September, 2015 and 27th October, 2015 but he denies having received the letter of 6th October, 2015. In the Court's judgment this is of no moment because the two letters which he did receive were unambiguous and would have left the Defendant in no doubt that his licence had been revoked by the Claimant. The Defendant does not contend any equivocation, instead, he asserts that as at the date of these letters, the Claimant no longer owned the Property and was not therefore entitled to seek possession. For the reasons which have already been explained, the Court has found that this position is not maintainable.
- [50] It is clear that a licensee who remains on property after his license expires or is properly revoked is a trespasser.¹⁵ He is however entitled to a reasonable time for packing and removal of his belongings. It is also clear that where the licence is revocable, the licensor in his notice of

¹⁵ Wood v Leadbitter (1845) 13 M&W 838

revocation is not obliged unless contractually bound, to specify the time within which the licensee must remove himself and his belongings. The revocation will be valid even if the time given is insufficient.¹⁶

[51] In the case at bar, the Court finds that the Defendant's bare licence was unequivocally revoked and that he is therefore obliged to yield up possession of Property.

[52] During these proceedings, the Defendant has suggested that as there are other family members currently in occupation of the Property and so he cannot be the only subject of this suit. He has also questioned the motives of the President and CEO of the Claimant alleging that there was malice consequent on his refusal to assist with legal fees. Unfortunately, these arguments do not assist the Defendant as they afford no defence to a claim for possession.

[53] Finally, Counsel for the Defendant has argued that Mr. Brathwaite is not the Managing Director or other officer of the Company and is not a duly authorized director or officer of the Claimant to commence these proceedings. Counsel relies on the evidence of Eileen Poponne and Edric Brathwaite in support of this. Having reviewed the evidence of these witnesses the Court is not persuaded that there is any basis to doubt the authority of Mr. Brathwaite to act as an officer of the Claimant. It is clear to the Court that these witnesses have minimal involvement in the current operations of the Claimant. Their oral testimony was generally uninformed and therefore did little to assist the Court. In the case of Edric Brathwaite he concedes that he was terminated as an officer of the Claimant is not a shareholder and has not examined the corporate documents and in the case of Ms. Poponne, it is apparent that she has no direct interest in the Claimant and little reliable information about its dealings.

CLAIM FOR MESNE PROFITS

[54] As part of its Claim, the Claimant asserts that the Defendant has used the Property for commercial purposes and has used a greater part of the Property than was permitted in breach of the licence given to him. The Claimant seeks to mesne profits at the rate of \$1,000.00 per month from 1st April, 2015 until possession is given up by the Defendant.

¹⁶ Minister of Health v Bellotti [1944] KB 298

[55] Once a court makes an order for recovery of possession in favour of a claimant, he or she is entitled to compensation against the unlawful possessor of property. Mesne profits are one such mode of compensation that can be claimed against a person in unlawful possession. The main object of awarding mesne profits is to compensate the person who has been kept out of possession and deprived of enjoyment of his property. Mesne profits may be defined as the profits or other pecuniary benefits, which one who dispossesses the true owner receives between disseizing and the restoration of possession. It is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so.¹⁷

[56] In assessing mesne profits, the proper starting point is the value of the land encroached upon. The court may then take into account the extent to which the piece of land encroached upon has enhanced the amenities of the defendant's own user. In **Inverugie Investments Ltd v. Hackett**¹⁸ Lord Lloyd of Berbick, delivering the advice of the Board of the Judicial Committee of the Privy Council, discussed the legal position as follows:

"Before stating their own conclusions on the facts, their lordships should say a brief word on the law. The cases to which they have already referred establish, beyond any doubt, that a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in **Swordheath Properties Ltd v Tabet** as follows (at page 288):

"It appears to me to be clear, both as a matter of principle and authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages."

"It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in **The Mediana** [1900] AC 113 at page 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

¹⁷ *Stoke City Council v. W and J Wass* [1988] 1 WLR 1406

¹⁸ [1995] 1 WLR 713

In **Stoke-on-Trent City Council v. W & J Wass Ltd [1988] 1 WLR 1406** Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both."

[57] It follows from this that mesne profits are measured as the amount that might reasonably have been demanded by the Claimant as payment for the use of the land for the period of trespass. They represent the profits which the person in unlawful possession actually earned or might have earned with the ordinary diligence; they may also be awarded on the basis of market rent even if the claimant would not have let the property if vacant.¹⁹

[58] The evidence before the Court reveals that the Defendant occupied the Property as a gratuitous licence and not as a paid tenant. Nevertheless, the Claimant has claimed the sum of \$1,000.00 per month as an appropriate basis of award. The Claim first originated in correspondence sent on behalf of the Claimant by Mr. Brathwaite. In the letter of 8th September, 2015 he claims:

"Retroactive to April 1, 2015, I want \$1,000.00 per month for the space you occupy and \$1,000.00. Per month until you vacate the premises."

[59] The Court is unclear as to the legal basis upon which the retroactive claim for rent was being maintained and there is no indication of the rationale for the quantum claimed. This position was not assisted by the subsequent correspondence. In fact, the waters were severely muddied in the 6th October letter where he claimed the sum of "*\$7,000.00 in arrears and an additional monthly rent of \$1000 for each additional month that you remained on the premises beyond October 8, 2015.*" In the letter of 27th October 2015, he reiterated "*I am giving you until October 28, 2015 to make arrangement to pay your rent arrears and to vacate the premises.*"

[60] The only attempt to advance a rationale is found at paragraph 14 of the Claimant's Reply. There, the Claimant contends that it requested rent from April 2015 because the Defendant refused to make a donation of a voluntary amount to the legal expense of defending the same property which

¹⁹ *Swordheath Properties Ltd v. Tabet* [1979] 1 WLR 285; *Whitwham v. Westminster Brymbo Coal and Coke Co.* [1896] 2 Ch 538 and *Attorney General v Blake* [2001] 1 AC 268

he has and is still using. There can therefore be no doubt that the Claimant had no legal basis to levy any claim for rent on the facts of this case or indeed to claim at arrears of rent backdated to 1st April, 2015. Indeed, the Court has found no maintainable rationale for any claim originating in April 2015 because the relationship between the Parties was not that of landlord and tenant but rather licensor and gratuitous licensee. Counsel for the Defendant has submitted that the sum of \$1,000.00 per month claimed for mesne profits is without assessable bases because the Claimant has not provided any evidence of the market rent neither has it determined how much of Parcel 127 was occupied by the Defendant as no survey plans or other evidence was provided of the area actually occupied by the Defendant. This is not in dispute.

[61] Indeed it is a settled principle of law that the onus of proving what profits might have received with the ordinary diligence rests on the claimant. Although the Claimant has provided an appraisal report showing the market value of the Property, it is deficient in that it provides no opinion as to the letting value, or the theoretical or derived letting value, of the areas of the Property upon which the Defendant is said to have trespassed. Indeed, the extent of the Claimant's case is set out at paragraph 13 of the Amended Statement of Claim. This provides that:

"The area occupied by the Defendant comprises about 1/3 acre of prime commercial land and the property on a whole is approximately 1 acre which would attract rent of a minimum of \$2,000.00 per month. Further as the Defendant has failed to give up occupation and/or possession he is denying the Claimant Company the possibility of further developing the property or earning rental income."

[62] Surprisingly, this evidence is untraversed by the Defendant.

[63] The relevant common law authorities reveal that where a claimant has been deprived of the use of the premises, this is a thing of value which must be assessed. In **Mediana (Owners) v Comet (Owners)**²⁰, the House of Lords had to decide whether the Mersey Docks and Harbour Board should be entitled to recover damages for the loss of use of one of its reserve ships, which was caused by a collision due to the negligence of persons in charge of the Mediana, despite the board having failed to prove its loss. In concluding that the board was entitled to damages, Lord Halsbury said this in relation to special and general damages:

"Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have the opportunity of inquiring into the

²⁰ [1900-03] ALL ER Rep 126

details before the case comes to court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling."

- [64] The position of the same in the case of loss of use of real property. As Devlin J stated in **Biggin and Co Ltd v Permanite Ltd**²¹ ".....where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can." In light of this broad principle, the determination of quantum of mesne profits is left to the discretion of the court, and mesne profits, being in the nature of damages, the Court may mould an award and assessment according to the justice of the case.
- [65] The question which arises is: what is an appropriate sum to be awarded? The Court has looked to the relevant pleadings and in responding to the Claimant's case, the Court notes that the Defendant asserts that the approximate area of the entire Property is in fact 0.979 acre. However, he does not specifically dispute the Claimant's assertion that he occupies 1/3 of the area. Instead, in responding to the actual acreage occupied by him, he asserts only that he does not occupy the entire property but merely a small portion along with other family members. Most notably, he does not deny the entire Property, being commercial land, would attract a monthly rental of \$2,000.00 per month. The Claimant's Reply appears to concede the point on the actual acreage and otherwise repeats its claim.
- [66] Taking the pleaded cases together and after considering the evidence of the witnesses, the Court is prepared to accept the Defendant's assertion that the entire Property measures 0.979 acres (a difference of 84.9m²). The Court will accept that the Defendant only occupies a portion of that land approximately 1/3 of that area measuring 1,320.62415m². The Court is satisfied that on the Claimant's estimate an appropriate apportionment of the total rental due would be \$1,958.00. One-third of that total rental would be \$652.66.
- [67] The Court notes that the Claimant gave the Defendant multiple notices of termination the last of which gave him until 28th October, 2015 to vacate the property. Given the termination of his licence, the Court finds that this would have been a reasonable period to vacate the Property. The

²¹ [1950] 2 ALL ER 859 at 870

Court therefore finds that the Claimant is entitled to mesne profits in the sum of \$652.66 per month from 28th October, 2015 to the date when he vacates the Property.

THE DEFENDANT'S COUNTERCLAIM

- [68] The Defendant's Counterclaim is two-fold. First he claims damages to his business or trade as a result of the unlawful and intentional interference by the Claimant. The particulars of this Counterclaim centre on the actions taken by the Claimant to secure possession of the Property. The Defendant claims that the Claimant has by letter dated 8th September, 2015, without lawful authority, sought to have the Defendant removed from the Property which he has been occupying for the purpose of his business for about 19 years. He further claims that the Claimant has threatened the Defendant, without lawful authority, to commence legal proceedings in order to have him remove his trucks and other equipment from the Property which would impact his business.
- [69] This claim was not pursued with any enthusiasm by the Defendant or his Counsel. It was wholly unsupported in evidence and in submissions. In any event, for the reasons already indicated the Court is satisfied that the underlying premise of this Counterclaim cannot be maintained.
- [70] The Defendant further contends that he was granted permission by a duly authorized representative of the Claimant, to occupy the Property. At paragraph 15 of his witness statement, asserts that he has kept the Property clean for 19 years at \$1,000.00 per month and so the total amount due to him is USD \$228,000.00. The Defendant contends that the Claimant made a part payment by 2013 and that except for this part payment, the Claimant has failed and/or refused to make any further payment for the cleaning works that the Defendant has carried out on the Property.
- [71] In responding to this Counterclaim, the Claimant denies that the Defendant is entitled to the sum claimed. The Claimant denies that any of its authorized agents made an agreement with the Defendant to keep the Property clean at the monthly payment of \$1,000 per month as is alleged or at all. Instead, the Claimant asserts that given the Defendant's assertion that he has occupied the

Property for a period of 19 years, it follows that any pollution on the site during that time would have been produced by him and it would therefore have been his responsibility to keep it clean.

[72] The Claimant further asserts that if the Defendant did indeed enter into an agreement with Mr. Smith it would have been foolhardy for the Counterclaimant to enter into an illegal and unnecessary agreement with someone who had no authority to enter into an agreement with him, to clean the property especially when he already had a gratuitous licence to occupy.

[73] In explaining the events of 2013, the Claimant asserts that the Defendant along with his sister Ms. Kismet Daniel, came to the Claimant's office in Road Town, and claimed that he was broke and needed some money to buy parts for his equipment. In a further attempt to help him, after having noticed the filthy condition of the Property. The Claimants' President offered him a mini contract to clean up for the sum of \$10,000.00. This agreement was not made in writing. The Claimant alleges that the Defendant indicated that the excavator which he needed to use to clean up the lot was inoperable and he needed some money in advance to buy parts to repair it. He advanced \$5,000.00 to buy the parts and clean up the lot. After the Defendant received the money, there was significant delay before he actually started to clean the lot, and even then, he never worked a full day on the job. Mr. Brathwaite further alleged that the Defendant stopped the work before it was completed. Sometime later, Defendant approached Mr. Brathwaite seeking additional monies. He was paid a further \$2,500.00 and instructed that he would not receive an additional penny until he had finished the job. The Claimant contends that to date, the Defendant has never completed the works.

[74] The Defendant averred in reply, that Mr. Michael Smith had ostensible authority and purported to bind the Claimant in its dealings with the Defendant. It was an agreement validly entered into between two competent adults acting on behalf of their purported business interests, and the terms of which are not contrary to public policy or law.

[75] The Defendant categorically denied Mr. Brathwaite is recount of the events of 2013. He asserts that at no time, and certainly not in 2013, did the Defendant approach the Claimant, or any of its officers, for money in exchange for clearing the lot. The Defendant admits that he was paid to clear the Property but not on the terms set out by the Claimant. Instead he stated that the sum of

\$7,500.00 was advanced as part-payment for the debt owed to him. He further asserts that it was never intended that these cleaning services would have been provided on a full-time basis. Rather, whenever the Defendant had a few hours to spare during the week between other jobs, he would perform the services of cleaning the lot.

[76] The Defendant's entire claim in debt for work done unraveled in the course of his oral testimony. There, his evidence was equivocal and diverged materially from his written evidence and pleaded case. When he was cross examined in regards to paragraph 15 of his witness statement, the Defendant testified that he had never received the sum of \$1,000.00 per month in return for cleaning the Property. Indeed he testified that there was no agreement for him to receive the sum of \$1,000.00 rather, according to him *"it is just what I think is reasonable"*. The demise of his Counterclaim was further assured when he testified that he *"had no agreement to receive \$1,000.00 but they agreed to let me stay there rent free."* In light of his prevaricating evidence, the Court has no hesitation in rejecting the Defendant's Counterclaim

ORDER

[77] In light of the foregoing, the Court makes the following order:

- i. The Claimant is granted vacant possession of the Property.
- ii. The Defendant shall deliver up vacant possession of the Property to the Claimant within 30 days of the date of this judgment.
- iii. The Defendant is to pay to the Claimant mesne profits of \$652.66 per month commencing from 28th October, 2015 to the date of delivery of possession plus interest on the said sum at the statutory rate.
- iv. The Defendant's counterclaim is dismissed.
- v. In accordance with the terms of the Order 30th January, 2018, the Claimant will have its costs in the sum of \$5,000.00.

Vicki Ann Ellis
High Court Judge

By the Court


Registrar