

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2014/0261

BETWEEN:

**[1] EUGENE PETTY
[2] DOREEN PETTY**

Claimants

and

ADISON MARKMAN

Defendant/Ancillary Claimant

and

SYLVIA MILLS

Ancillary Defendant

Appearances:-

Mr. Terence V. Byron and Mr. Nassibou Butler of Counsel for the Claimants.

Mr. Sylvester Anthony, Mrs. Angelina Gracy Sookoo-Bobb, instructed by Ms. Renal Edwards for the Defendant/Ancillary Claimant.

Ms. Miselle O'Brien for the Ancillary Defendant.

2021: March 08
November 05

JUDGMENT

[1] **WARD, J.:** In 1972, Mrs. Mills and her husband purchased approximately one acre of land at the Alley, Sandy Point. They subsequently constructed their dwelling house thereon. At the time of purchase a few tenants lived in chattel houses on part of the land but eventually only three tenants remained; one of whom was the first claimant's family who resided in the house that is the subject of this claim. Mr. Petty ceased to reside at the house in 1974 and his mother died in 1989. His two nieces, Gail and Marci Warner continued to live there for a short time thereafter. In April, 1990, Mr.

and Mrs. Mills instituted court proceedings against Mr. Petty's nieces for possession of the land and arrears of rent in respect of the house and premises. This action failed. The nieces sometime thereafter moved to St. Maarten.

- [2] By declarations published in the Official Gazette on 10th and 17th January, 1991, the Government of St. Christopher and Nevis compulsorily acquired approximately 8,903.41 square feet of the land for a public purpose, namely, housing. This portion of land included that on which the subject house stood. Mr. and Mrs. Mills sought to challenge the compulsory acquisition of their land in the High Court and Court of Appeal but failed in both courts.
- [3] Subsequently, on 7th December, 1998, by Resolution of the National Assembly, Statutory Rules and Orders No. 46 of 1998, the Government purported to revoke the 1991 declarations by which the said lands were compulsorily acquired and resolved that they be restored to Mrs. Mills and her husband on the basis that they were no longer needed for a public purpose.
- [4] By Certificate of Title issued 19th April, 1999, dated 27th May, 1999 and registered in Book Y2 Folio 161, Mrs. Mills and her husband became registered proprietors of the said lands.
- [5] On 18th December, 2008, the defendant/ancillary claimant (Mr. Markman), acting on instructions of the ancillary defendant (Mrs. Mills), used a backhoe to demolish the house where the first claimant (Mr. Petty) and his family once resided. The claimants (Mr. Petty or Mrs. Petty) who allege that they are the owners in possession of a portion of the said land (2,410.59 square feet) on which the house sat, filed a claim on 14th December 2014 seeking damages, including aggravated damages, for trespass and damage to the said house and its furnishings.
- [6] The claimants contend that they became owners in possession after they purchased the said portion of land measuring 2,410.59 square feet from the Government on 20th December 1994 after it had been compulsorily acquired on or about 7th January 1991, as part of a larger parcel measuring 8,903.41 square feet from Mrs. Mills and her late husband, Charles Robert Mills. This acquisition was done pursuant to the provisions of the Land Acquisition Act, Cap 10:08.
- [7] Mr. Markman does not deny that he entered onto the said property and demolished it. However, by his defence filed on 4th March, 2015, he denied that the house was owned or in the possession of the claimants. He avers that, to his knowledge, Mrs. Mills and her late husband were the registered owners of the said property and that it was on the instructions of Mrs. Mills that he entered and

demolished the said house. He denied that the house was furnished. He claims it was a dilapidated, unoccupied and empty wooden structure.

The ancillary claim

[8] Pursuant to Rule 18.4(1) of CPR 2000, Mr. Markman subsequently instituted an ancillary claim against Mrs. Mills, seeking indemnity or contribution in the event that he was to be found liable on the claim. He claims such entitlement on the assertion that at all material times there was a master/servant and/or an agency relationship existing between himself and Mrs. Mills, and that at the time of the alleged trespass and damages he acted as her servant/and or agent. A claim by a defendant against any person (whether or not already a party) for contribution or indemnity is included in the definition of ancillary claim. An obvious benefit of bringing an ancillary claim as opposed to the defendant instituting a fresh claim against the third party is that it allows for a more expeditious determination of the claim against the third party and eliminates the costs that would be incurred in another hearing. Nonetheless, an ancillary claim is to be treated as if it were a separate action because, *inter alia*, the claimant in the main action cannot obtain judgment against the ancillary defendant nor can the ancillary defendant counterclaim against the claimant: Rule 18.1 and 18.6.

[9] By ancillary defence, Mrs. Mills contends that she is the sole surviving registered proprietor of the said property which she formerly held as joint tenants with her late husband. As evidence of her ownership, she pleads a Certificate of Title dated 27th May, 1999 and registered in Book Y2 Folio 161 and Statutory Rules and Orders No. 46 of 1998 which embodies a Resolution of the National Assembly which purported to restore to her late husband the lands which had been previously compulsorily acquired. Mrs. Mills admits that in December, 2008 she instructed Mr. Markman to clean up the said lands and specifically instructed him to remove the house from the property but says he acted as an independent contractor and not as her servant or agent. Mrs. Mills admits that Mr. Markman is entitled to be indemnified by her should he be found liable to pay the claimant any sums by way of damages, interests or costs.

Preliminary Issue

[10] At the conclusion of the trial, counsel for the defendant noted the absence of the second claimant during the trial and questioned whether her claim should be sustained. The court gave directions

for the filing of written submissions in relation to that issue. The defendant subsequently filed applications to strike out the claim in relation to the 2nd claimant on the basis that she had not given any evidence in the case. CPR 29.2(1) was cited for the general rule that any fact which needs to be proved by evidence of witnesses should be by oral evidence. It was said that the second claimant, not having filed a witness statement and not having given evidence at the trial, the effect of this is that the second claimant has not presented, far less proved, her case. CPR 39.4 is also cited to say that the court has power to strike out a claim where any party does not appear and the court is satisfied that, that party was served with notice of the hearing. Alternatively, it is said that not having adduced evidence herself, the second claimant's case depends on the evidence adduced by the first claimant. This evidence, it was submitted, fails to establish that either claimant was in possession of the disputed property, thereby disabling them from maintaining a claim in trespass.

- [11] The application was opposed by Mr. Byron who submitted that CPR 29.4 does not confer any power on the court to dismiss the second claimant's case against the defendant. He further submitted that the invocation of CPR.39.4 is unhelpful because no application was made to the court to exercise its power under Rule 39.4(a) to strike out the claim for failure of the second claimant to attend the trial. Rather, says Mr. Byron, the court seems to have exercised its power conferred by Rule 39.4(b) to proceed in the absence of the second claimant.
- [12] In relation to the alternative limb of the application, Mr. Byron further submitted that evidence about an issue can be given by anyone and not necessarily the claimant. He submitted that CPR29.2(1) is inapplicable because it merely refers to facts which need to be proved by a witness, but facts may be proved in other ways. He relied on **Falmouth House Ltd v Abou-Hamdan**¹ for the proposition that in civil litigation a claimant is not obliged to give evidence if he can make out his case by some other evidence or by admissions and this is unaffected by the courts case management powers under the CPR. Mr. Byron argues that the evidence given by the first claimant and the witness Michael Harris, fulfils this purpose.
- [13] Rule 29.4 concerns the court's case management as it relates to the requirement to file witness statements. It does not give rise to any power to strike out a claim where a claimant does not file a witness statement or does not give evidence at trial. Rule 39.4(a) contemplates such a discretion to

¹ [2017] EWHC 779 (Ch)

strike out a claim if any party does not appear at the trial. But where one or more but not all parties appear, the judge has a discretion to proceed in the absence of the party who does not appear. It seems to me therefore that the discretion to strike out the claim is usually exercisable at the outset of a trial when it is apparent that the claimant is absent and cannot otherwise prove her case.

[14] In my view the second claimant's case is indistinguishable from the first claimant's and is predicated on their being joint owners in joint possession of the property in dispute. While the second claimant did not give evidence herself, if Mr. Petty's evidence is accepted then the case is made out for both claimants.

[15] Mr. Byron is correct when he submits that a claimant does not necessarily have to give evidence herself in order to prove her case. This can be achieved in other ways and through other evidence adduced at the trial. In **Falmouth**, the court identified two features of civil litigation which it considered to be well established and uncontroversial. The first is a party's right to appear by counsel; the second is a party's right to choose whether to give evidence or not. The court stated:

"A claimant is not obliged to give evidence if he can make out his case by some other evidence or by admissions...All of this is very familiar and (largely) unaffected by the Court's case management powers under the CPR."

[16] Additionally, though absent, Mrs. Petty was represented by counsel. The learning suggests that in such a case the court should be slow to exercise its discretion in favor of striking out a claim. See **Justin Pemberton v Attorney General et al**². In those circumstances, the court may proceed in the absence of the claimant as occurred here.

[17] In my view, therefore, even if the application had been timeously made, this would not have been an appropriate case to exercise my discretion to strike out the case for failure of the second claimant to give evidence.

[18] As to the alternative limb of the application which argues that the evidence adduced fails to establish that the second claimant was in possession of the disputed property, such a submission may properly be deployed as a no case submission at the close of the claimants' case or at the end of the case when all of the evidence is before the court. Given that this requires an

² DOMHCVA2010/016

assessment and analysis of the evidence in the case, I shall treat with it after I have conducted that exercise.

[19] That said, I turn now to the substantive case.

The claimants' evidence

[20] Mr. Petty states that he was born and raised on the land which is the subject of this claim and lived there with his mother, siblings and nieces until he was 25 years old. In 1970 his mother made a concrete addition of a permanent nature to her house on the said land with the express permission of Claude Woods, who was then the owner of the land, on the agreed basis that the defendant would at a later date be offered the land for sale.

[21] In 1972, Charles and Sylvia Mills purchased the land. At that time there were 17 families occupying the land which Charles and Sylvia Mills bought from Claude Woods. All of the families except for three lived in wooden chattel houses and were moved off the land by Charles and Sylvia Mills in the 1970s. Mr. Petty alleges three families lived in houses which could not be moved because they were affixed to the land. His family was among them. Charles and Sylvia Mills took his mother to court in 1984 seeking a High Court Order for possession. This claim did not succeed. His mother died on the land without further disturbance on 6th September, 1989. His nieces, Gail and Marcia Warner continued to live in the house. Charles and Sylvia Mills then sued them in the High Court for an Order of possession, but this claim was also dismissed on 28th November, 1990. Mr. Petty states that by that time (1990) he had added another concrete structure to the wooden house, so that it had two concrete additions: a verandah at the front of the house and a bath and toilet to the rear. His nieces moved to St. Thomas but they would often return and stay in the house which was furnished but had not been to St. Kitts for a while, to stay in the house. Mr. Petty describes the house as a wooden and wall house, about 75% wood and 25% wall/concrete, containing 3 bedrooms, a kitchen/dining room, and one bathroom, and was located on the land bought by Charles and Sylvia Mills. The house contained 1 refrigerator, 1 stove, 1 dining table and 3 chairs, 1 stereo set and 2 speakers, 1 three-piece living room suite, 2 dressing tables, bookshelf and books, 1 coffee table, and 6 suitcases with personal belongings. Mr. Petty estimates the value of the house and its contents in 2009 at \$50,000 for the house and \$10,000 for the contents.

- [22] In 1991 the government compulsorily acquired 8,903.41 square feet of the land representing the area occupied by the three families. The land was acquired for the public purpose of housing. This acquisition was unsuccessfully challenged in court by Mr. and Mrs. Mills.
- [23] By letter dated 28th November, 1994 the Permanent Secretary in the Ministry of Agriculture, Lands, Housing and Development, wrote to Mr. Petty, who was by then the Assistant Permanent Secretary in the said Ministry, informing him that the Government had agreed to the sale of 2,410.59 square feet of that land at a cost of \$1.00 per square foot, with a total cost of \$2,410.59. It is not disputed that this portion of land included the house in which Mr. Petty and his mother and relatives once lived. The letter directed Mr. Petty to pay the said sum into the Treasury. He did so on 20th December, 1994. Mr. Petty alleges that at the date of purchase the land comprised a fixture in the form of a furnished cottage (the house) as described above (the house).
- [24] In 1996 Mr. Petty applied to the Building Committee to erect a new building on the site at a cost EC\$156,840.00, which was to consist of two levels comprising 3 bedrooms, a bathroom, a corridor and a patio on the upper level, and with a bedroom, bathroom, kitchen, living and dining rooms, and a patio, on the lower level. This application was approved on 12th June 1996. By letter dated 19th June 1996, the claimants, through counsel, wrote to the Governor General signifying their election to have a Certificate of Title issued to them in lieu of a Crown Grant. They subsequently submitted a Crown Grant for the Governor General's signature which was returned unsigned. By letter dated 27th June 1996, Mr. Petty was informed by the Permanent Secretary in the Ministry of Agriculture, Lands and Housing that the lands "formed part of an acquisition by Government of lands owned by Mr. Mills who had not been compensated for the said lands and as such the Crown was not in a position to transfer any portion of that land." The previously submitted Crown Grant and election documents were returned to Mr. Petty for "safe keeping".
- [25] On 7th December, 1998, the new Government went back to the National Assembly and by Resolution purported to resolve that the compulsory acquisition of the said 8,903.41 square feet of land was revoked on the ground that the Cabinet had decided it no longer required the said lands for the particular public purpose.
- [26] Subsequently between 15th May, 1998 and 7th September, 2000 written communication ensued between Mr. Petty and the Attorney General of the day which culminated in an offer to compensate the claimants by providing them with an alternative piece of land and assistance in relocating the

house to the new site. Mr. Petty, by letter dated 15th August 2000, itemized a number of matters that he stipulated should be considered should a serious offer be made to relocate him. By reply dated 7th September 2000, the Attorney General promised to refer the matter to the Ministry of Agriculture for them to give due consideration to the matters raised by Mr. Petty. He says no offer was ever forthcoming.

- [27] Mr. Petty states that in 2003, he received a letter from counsel for Mr. and Mrs. Mills purporting to give him notice to quit the land. He regards that letter, which he says was authored on the instructions of the Mills', as evidence of their acknowledgment that he was still in possession of the property.
- [28] On 18th December 2008, while still in Guyana where he was based, he received a phone call from his cousin Michael Harris alerting him that Mr. Markman was on his property tearing down his house with a JBC backhoe. Other persons also conveyed this information to him. When he returned home, he instructed his lawyer to write a letter to Mrs. Mills to enquire if she had indeed hired Mr. Markman to "clean up my land". Mrs. Mills did not reply so he sued Mr. Markman.
- [29] Mr. Petty states that it was only after he sued Mr. Markman that he learnt through his defence that the Government had purported to issue a Crown Grant and Certificate of Title to Charles and Sylvia Mills in 1999, purporting to give them back the 8,903.41 square feet which had been compulsorily acquired in 1991.
- [30] Under cross-examination, Mr. Petty conceded that he was not party or privy to any discussions between the previous owner and his mother regarding sale of the land to her. He further conceded that it was mere assumption on his part that Mrs. Mills was aware of this promised sale to his mother when they bought the property in 1972. He disagreed with the suggestion that at that time there was no concrete addition to the house. When it was suggested to him that it was his niece Marcia who had added the concrete structure in the eighties he replied: "She made a contribution." He did agree that over time the house which had begun as a wooden chattel house had "morphed into a wooden and concrete structure and that the concrete part was affixed to the land such that it would not have been possible to remove the house in one piece."
- [31] Mr. Petty testified that he left the house in dispute in 1974 at age 25 and has not lived on that land since then. He said his nieces continued to reside in the house until about 1991 and that since then

no one had lived there. He got married after he had moved out of the house and his wife has never lived there at any time.

- [32] He testified that he left St. Kitts on 1st February, 2000 to take up a job with Caricom based in Guyana. In 2006 he left Caricom and went to reside in the United States until 2010 when he returned to St. Kitts. He remained here until 2013 when he resumed working with Caricom. During the period 2010 to 2013 he resided at his residence at Frigate Bay. His tenure with Caricom ended on 31st December, 2018.
- [33] He said while he received an offer from the Government to purchase the property in dispute and paid for it, he never received title to the land as it was never transferred to him or his wife.
- [34] As at 18th December, 2008 the house was valued at \$90,000 and its contents at \$15,250.00. Months later in 2009, he valued the house itself at \$50,000 and its contents at \$10,000 as the value was adjusted to take account of its deterioration. He said the value of \$90,000 which he placed on the house itself was his own estimation and not that of a professional valuator. He alleged that he had a professional valuation done for the house itself as at 18th December, 2008 but could not remember if such a valuation had been exhibited or disclosed in the case.
- [35] He accepted that he had received an offer of alternative accommodation from the Attorney General via letter dated 7th September, 2000.
- [36] In re-examination he said that his mother had given him the house and that he had contributed to the addition of the concrete structures. He regarded himself as being in possession of it and that Mrs. Mills recognized him as owner of it because in 2003 her lawyer wrote to him asking him to remove the house from the land.
- [37] Michael Harris gave evidence for the claimants. His witness statement was admitted into evidence. He states that he and Mr. Petty are cousins. He was born in The Alley, Sandy Point and lived there all his life. He was Mr. Petty's neighbour. He states that the house in which Mr. Petty grew up was a wooden house with a concrete back and toilet. He states that he could recall when that concrete addition was done and also when a piece of wall verandah was added to the house by one Bradford when he was "small."

- [38] He said he also knew Charles Mills and Sylvia Mills who were neighbourly to him. He recalls that they bought the land on which his parents resided. They wrote to his parents informing them of the purchase.
- [39] As it relates to Mr. Petty's house, Mr. Harris states that Mr. Petty's two nieces, Marcia and Gail, were living there. They migrated to St. Thomas. He says that to his knowledge the house was furnished. The house was closed down for a while but Marcia and Gail would come now and again and check it out and spend some time in it. He states that for a good time, nobody was living in it. "It is a couple years Marcia never come to St. Kitts. The house was then closed down. But it had things in it."
- [40] On 18th December, 2008, he was out working but returned home to get a paint brush. He observed that Mr. Markman was using a JCB backhoe to demolish the house. He says he cannot say if the backhoe was demolishing anything that was inside the house. When he arrived most of the front of the house had already been demolished. The wall section was being demolished. He observed Mr. Bristol who was driving a truck at the scene and who told him he was just there to remove the debris. He said he also observed Mrs. Mills on her landing a little distance off. Mr. Harris says he remained there for a little while during which time he removed 6 boxes of tiles that were in the house. He grew frustrated and left the scene after about half an hour.
- [41] Mr. Harris was not cross-examined.
- [42] The final witness for the claimants was Warren Bristol, whose witness statement was tendered into evidence. He was hired to remove the debris from the land after the house was demolished. He states that when he got there at about 8:30 a.m. demolition had already commenced. At one point, he noticed that there were a few sheets of galvanize on the concrete section of the house which he figured he could use. He jumped out the truck and motioned to Mr. Markman that he wanted them and pulled them out. He said he never examined any of the debris and does not know what they consisted of. In all, he made about six trips carting away debris in his truck between 8.45 a.m. and 3.30 p.m.
- [43] Mr. Bristol was not cross-examined.

The defendant's evidence

- [44] Mr. Markman's evidence as contained in his witness statement was that in or around December 2008, Mrs. Mills hired him to clean up her land at The Alley, Sandy Point and to remove an old abandoned house that was on the land. She told him that she owned the house which had not been lived in since the 1990s.
- [45] He visited the land before carrying out the instructions of Mrs. Mills and noticed that the house was a board house which was old and run down. It was dilapidated and looked like it had been condemned. The house was mainly made of wood but with some concrete added on to it. The wood was rotten and parts of the walls had rotted to such an extent that they were missing. The house did not have any doors on it and most of the windows were off and open. The house was overgrown with vines and bushes. There was no one living there and the house could not be lived in given the state in which it was. There were no items at all in the house.
- [46] On or about December 18th, 2008, on the instructions of Mrs. Mills, he used his backhoe to remove the old and run-down wooden house from the property and cleaned up the overgrown bushes. He stated that when he began demolition, he observed rats running out of the house. He also noticed that there was a massive woodlice nest in the house. He cleared the overgrown grass and bush around the house and in the entire yard. It took him about three hours to clear the land. He was paid about \$400.00 by Mrs. Mills for the job. He stated that there was no one living there in December 2008 when he cleaned up the land.
- [47] Under cross-examination by Mr. Byron, Mr. Markman said he did not recall seeing anyone on the site during the demolition and did not recall seeing a gentleman remove several boxes of tiles from the property. He said that he did not see any tiles in the house. He further disagreed with the suggestion that Mr. Bristol had told him that he wanted to save something from the house and said he could not recall Mr. Bristol motioning to him that he wanted some galvanize from the concrete section.
- [48] He disagreed with the suggestion that there were items of furniture in the house.
- [49] Ms. O'Brien did not cross-examine Mr. Markman.

The ancillary defendant's evidence

- [50] Mrs. Mills, at age 92, attended court to give her evidence. Her witness statement stood as her evidence in chief. She asserts that she is the registered proprietor of the property which is the subject matter of these proceedings, being the sole surviving owner in relation to the said property after the death of her husband on 7th February 2007. She relies on a Certificate of Title dated 27th May, 1999 and registered in Book Y2 Folio 161 as evidence of her ownership of the property. At all material times, the chattel house, which is also part of the subject matter of these proceedings, sat on a portion of the land described in the Certificate of Title. Mrs. Mills states that she has been in possession of the said property since in or about 1972, save for a brief period when a portion of the land was compulsorily acquired by the then government. The land described in the Certificate of Title formed part of the lands conveyed to her and her husband in 1972, by virtue of a Deed of Conveyance Number 0198 dated 28th March, 1972 and registered in Uber Q Volume 6 Folios 1504-1509 of the Register of Deeds for the Saint Christopher Circuit. She and her husband had purchased the said land from Claude Woods.
- [51] Mrs. Mills states that when they purchased the said land in 1972, there were a number of wooden chattel houses located on the said property but most of the occupants relocated to government land afterwards, save for three families who remained on the property. These families paid rent to them for occupying the said land. However, after sometime, and without consent, the claimant's mother Elaine Davis, and another tenant stopped paying the required rent.
- [52] Mrs. Mills states that Mr. Petty lived with his mother and other family members in the said wooden chattel house until in or about 1974 but has not resided there since that time. Sometime after his departure, his niece, Marcia Warner, sought permission to add a concrete bathroom to the said house. Thereafter, a small bathroom constructed from concrete was added to the wooden chattel house. The second claimant has never occupied the said property, says Mrs. Mills.
- [53] Turning to events after the government had compulsorily acquired 8,901.43 square feet of the land in 1991, Mrs. Mills states that at that time Mr. Petty was employed as the Assistant Permanent Secretary in the Ministry of Agriculture, Lands, Housing and Development. She states that she is unaware whether after the acquisition, the claimants purchased 2, 410.59 square feet of the acquired land in 1994 with the furnished house on it.

- [54] According to Mrs. Mills, by the time the government of the day acquired the said portion of her property, the chattel house which was previously occupied by Mr. Petty's family had been boarded up and abandoned. The chattel house was already dilapidated and rotting in certain spots. No one occupied the said house. She states that in or about December 1990, she hired Joseph Fahie, a photographer to take photographs of the house at the time. She states that the structure which the claimants refer to in their claim as a cottage was in fact an abandoned, dilapidated and derelict chattel house positioned on stilts. It consisted mostly of rotten boards with very little concrete. At all material times the house was overgrown by vines and trees and served as a breeding ground and habitat for rodents and woodlice. The floor of the house had fallen in. The house had not been maintained and was uninhabitable. Since about 1989 or early 1990, the house had been boarded up and was in a far worse condition when it was demolished some eighteen (18) years, on 18th December 2008. She states that there were no visitors on behalf of the claimants to the said house in the said eighteen (18) years. On 18th December, 2008, the said chattel house did not contain the items claimed by the claimants or any items at all. There were no items of furniture or appliances in the said chattel house. The said chattel house did not contain a refrigerator, stove, 3 piece living room set, beds, stereo set, speakers, dining table and chairs, dressing tables, books, bookshelves nor suitcases with clothing. She maintains that at all material times the house was empty. She denies that it was worth EC\$90,000.00 as claimed by the claimants.
- [55] In 2008, as a result of the state of the house she perceived that it posed a health risk as she resided nearby. The infestation of termites and woodlice also caused her to lose fruit trees. In light of this, she hired Mr. Markman to clean the property and to remove the remains of the dilapidated chattel house. She says the chattel house was empty and there was no malice or ill will involved in making the decision to remove the derelict structure.
- [56] Under cross-examination, Mrs. Mills was shown the receipt which the claimants say was issued when they purchased the land from the Government in 1994. Mrs. Mills observed that the receipt does not state which land it refers to; it merely says 2, 410.59 square feet. When confronted with the claimants' application to the building committee in relation to constructing a new house on the 2, 410.59 square feet of land, Mrs. Mills replied: "This construction says 2, 688 square feet. I don't know anything about 2,688 square feet of land in question." She was questioned about the challenge mounted by her regarding the compulsory acquisition of the lands and acknowledged

that they were unsuccessful. As it relates to when Mr. Petty's niece made the addition of the concrete bathroom to the house, she was asked whether the verandah was already there when the bathroom was added. She said that when they bought the property in 1972 it was not a verandah but a platform with steps. It was made into a verandah after they bought the property. She was shown a letter from a law firm written in 2003 to Mr. Petty requiring him to remove the house from the land. Mrs. Mills said that she could not remember giving such instructions.

[57] Valerie Rawlins testified on behalf of the ancillary defendant. Her witness statement stood as evidence in chief. In it she states that she has lived in Sandy Point all her life. She knows both Mrs. Mills and Mr. Petty. She recalls that at one time, Mr. Petty lived in a wooden chattel house near to the residence of Mr. and Mrs. Mills with his mother Elaine Mills and other relatives but he left the said premises to live elsewhere in the 1970s.

[58] She states that Gail Warner and Marcia Warner also lived there at one time but eventually migrated abroad. By 1990, the said chattel house was unoccupied and boarded up. The structure was old and she could see that the wood had begun to rot in certain areas. Over time, the house became even more dilapidated. The front door was hanging off and the windows rotted off. For some years, the property remained open and passers-by could see into the house through the open windows. At times, she would even see a vagrant around the said chattel house. The house was not being maintained and had become overgrown by bush and there was a woodlice nest on it.

[59] Under cross-examination, Ms. Rawlins said she could not recall when Mr. Petty's mother died. She did not know that when Mr. Petty's nieces moved to St. Thomas that they would return and stay in the house from time to time. She only discovered the house was demolished when she passed by subsequently.

[60] Mr. Joseph Fahie was the final witness. His statement stood as evidence in chief. He states that in December 1990, Mrs. Mills hired him to take photos of what he describes as an old and dilapidated chattel house near her home. Under cross-examination, he stated that he does not have anything to show that he took the photos in December, 1990 but as a photographer he remembers that, that is when he took them. It was put to him that they were not taken in 1990, but he did not agree.

Issues

- [61] At issue in the claim is whether the admitted acts of the defendant amount to a trespass thus rendering the defendant liable to the claimants. If so, what is the appropriate quantum of damages to which the claimants are entitled.

Discussion

- [62] In order to amount to trespass there must be an unlawful entry by one person on land in the possession of another. In order to be said to be in possession of the land the person complaining of trespass must have the intention to possess the land and the exercise of control over the land to the exclusion of other persons. To maintain an action in trespass, therefore, Mr. and Mrs. Petty must establish that *at the time of the trespass* they had both the intention to possess the land and the exercise of control over the land to the exclusion of other persons. As Byron C.J. stated in **Lorenze A.D. Williams et al v Hestina Edwards**³ : “Trespass is the interference of one’s possession and it does not turn on whether the party bringing the action had a deed in law or was in fact the owner of the land.”

- [63] Halsbury’s Laws of England (3rd Edition) sets out clearly who may sue for trespass at paragraph 1214:

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who was, or who is deemed to have been, in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of property without possession is not sufficient to support the action. If, however, land is vacant, the owner has sufficient possession to sue in trespass . . .”

- [64] The learned authors of Clerk and Lindsell on Torts 20th edition at paragraphs 19-13 further elaborate on the meaning of possession:

“Possession means generally the occupation or physical control of land. The degree of physical control necessary to constitute possession may vary from one case to another. By possession is meant possession of that character of which the thing is capable”. 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 very little which can be done on the land to indicate possession. In the case of a building possession is evidenced by occupation, or if the building is unoccupied, by possession of the key or other method of

³ SVG Civil Appeal No. 20 of 2000 at paragraph 7.

obtaining entry. ...Proof of ownership is prima facie proof of possession. That is, if there is a dispute as to which of two persons is in possession, the presumption is that the person holding title to the land is in possession. "

The claimants' submissions

- [65] Learned counsel for the claimants, Mr. Byron, submitted that the claimants' possession of the land is established by their purchase on 20th December, 1994 of 2, 410.09 square feet on which the house was affixed and therefore formed part of the land sold. Their intention to possess it is evidenced by their application in 1996 to the Building Committee to erect a new building on the site at a cost of EC\$156,840.00, which was to consist of two levels with 3 bedrooms, a bathroom, a corridor and a patio on the upper level, and with a bedroom, bathroom, kitchen, living and dining rooms, and a patio, on the lower level. Mr. Byron submitted that their intention to possess the land may also be gleaned from their subsequent submission of a Crown Grant for the Governor General's signature which was returned unsigned. As to the exercise of control over the land to the exclusion of others, Mr. Byron submitted that this is established by the evidence that the claimants left the house fully furnished and secured.
- [66] Mr. Byron further submitted that the defendant's reliance on the Resolution of the National Assembly of 1998 to show that the Declaration of the Governor-General of 7th January, 1991, was revoked is misconceived as it did not have that effect. He dismisses the claim of indefeasibility of the Certificate of Title issued to Mrs. Mills and her husband as being similarly misconceived and misguided.

The defendant's submissions

- [67] On behalf of the defendant learned counsel, Mr. Sylvester Anthony, submitted that the claimants were not in ownership or possession of the lands at the time of the alleged trespass. Mr. Anthony submitted that Mr. Markman was acting on the instructions of the lawful owner of the lands, Mrs. Mills, who by virtue of her Certificate of Title held an indefeasible title to the property. He submitted that on the evidence the claimants were not in possession of the house at the material time as it was abandoned and in a dilapidated state.

The ancillary defendant's submissions

- [68] On behalf of Mrs. Mills, learned counsel, Ms. Miselle O'Brien, also invoked the indefeasibility of title argument citing section 8 of the Title by Registration Act and the definition of the term indefeasible as contained in the said Act. She also submitted that the house had become affixed to the land and thus passed with the land when Mrs. Mills was issued the Certificate of Title. Yet further, Ms. O'Brien submitted that the house was not in the possession of the claimants because since at least 1990 it had been abandoned and was in a derelict state, devoid of any furnishings whatsoever and was the abode of rodents and wood lice. This posed a health hazard to Mrs. Mills which she was entitled to mitigate.

Analysis and findings

- [69] The central question here is whether, as at 18th December, 2008, the claimants were in possession of the 2, 410.09 square feet of land with the house thereon. Given that there is a dispute over who had possession, the presumption is that the party who held title had possession, so that title is not entirely irrelevant to determining this issue. The claimants do not base their claim on legal title but on possession.
- [70] In so far as Mr. Byron places reliance on the earlier judgments against Mr. and Mrs. Mills to debunk her claim to title, I make the following observations. It cannot be disputed that the effect of the judgment of the Court of Appeal was a determination that the lands were lawfully acquired from Mrs. Mills and her husband in January, 1991. Nor can it be denied that in 1994 the Government offered to sell to Mr. Petty a portion of the lands so acquired and that he and his wife paid for it in full. It is well to bear in mind, however, that none of those judgments addressed the claimants' ownership or possession of the land for the obvious reason that all of these judgments predated the Petty's purchase of the land. Moreover, they all predate the issue of the Certificate of Title to Mr. and Mrs. Mills in 1999. The last judgment was delivered on 22nd March 1993. The issues before the Court of Appeal, as framed by Liverpool J.A., were stated to be: (1) "Has the court got the power to inquire whether land, which has been compulsorily acquired, has in fact been acquired for a public purpose (the "public purpose" question); and (2) does paragraph 10 of Schedule 2 to the 1983 Constitution Order shield the Land Acquisition Act from being declared

unconstitutional if it offends against section 8 of the Constitution.”⁴ In short, they did not address the specific issue that engages this Court. Nor did any of those judgments decide that the Crown, in whom the land was vested, could not subsequently dispose of it as it saw fit, consistent with the purported purpose for which it had been acquired. Nor am I called upon to decide this issue in this claim.

[71] Mr. Byron also contends that the Resolution of 7th December 1998 was ineffective to pass title to Mrs. Mills. While it is correct that the Resolution of the National Assembly was ineffective to confer title on Mrs. Mills, it demonstrates that the Government intended that the land be returned to her, purportedly for the reason that it was no longer required for a public purpose. That Resolution is also not the subject of this claim.

[72] The fact is that in 1999 Mr. and Mrs. Mills were issued a Certificate of Title and I am obliged to treat it as indefeasible by virtue of section 8 of the Title by Registration Act, Cap which provides:

“All certificates of title granted under this Act, and all notings of mortgages and encumbrances on the same, shall be indefeasible.”

[73] The term “Indefeasible, so far as material, is defined in the Act as follows:

“Indefeasible. The word used to express that the certificate of title issued by the Registrar of Titles, and the notings by him or her thereon, cannot be challenged in any Court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth...except on the ground of fraud connected with the issue of such certificate of title... or that the title of the registered proprietor had been superseded by a title acquired under the Limitation Act, Cap. 5.09 by the person making the challenge. The word also means that, the certificate of title being issued by the Government of the State, the Government of the State is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving any one justly aggrieved by its issue to bring an action for money damages against the Government of the State.”

⁴ Mills (Charles) and Another v Attorney-General of St. Christopher and Nevis and Another, (1993) 45 WIR, 125 at 130.

- [74] While that title gives rise to a presumption of possession, I must still consider whether the presumption of possession in favour of Mrs. Mills is rebutted by the evidence adduced by the claimants to establish their possession of the property.
- [75] I therefore turn to an analysis of the evidence on which I base my findings. I find that Mr. Petty last resided in the house in 1974. After leaving the house he never subsequently resided there. I find that when he ceased to reside there in 1974 there were no concrete additions to the house. I accept Mrs. Mills' evidence that at the time she and her husband purchased the land in 1972 it was a wooden structure only.
- [76] I accept Mrs. Mills' evidence that the concrete additions were constructed during the 1980's by Mr. Petty's niece. Indeed, when it was put to Mr. Petty under cross-examination that his niece Marcia added the concrete structure in the eighties, he replied: "She made a contribution." This must be seen as an acceptance that there were concrete additions made in the eighties. I therefore do not accept his evidence that the concrete additions were made prior to 1972 when the property was conveyed to Mrs. Mills and her husband. Further, while Mr. Petty claims that he assisted or was partially responsible for the additions to the house he does not clearly state when he did so save for a hint that this was by 1990. There is a gap in the evidence as it relates to Mr. Petty's possession, or even involvement in the property between his departure in 1974 and his purchase of it in 1994.
- [77] I accept that after the lands had been compulsorily acquired in 1991, Mr. and Mrs. Petty purchased the said portion measuring 2, 410.09 square feet with the house affixed. They were never issued with a Certificate of Title or Crown Grant in respect of that land. I find that while Mr. Petty never occupied the house thereafter, by subsequently applying to the Building Committee to construct a new structure on the land he evinced an intention to possess it. That intention subsisted between 1996 and 2000 and may be gleaned from his attempt to obtain a Certificate of Title in lieu of a Crown Grant. Even though his documents were returned to him unsigned with the letter from the Permanent Secretary indicating that the government was not in a position to transfer the land to him because no compensation had been paid to Mr. and Mrs. Mills, his subsequent letters to the Permanent Secretary and Attorney General in which he continued to assert his right to the land demonstrate that he still had the intention to possess the land.

[78] However, I find that Mr. Petty had by 2000 seemingly abandoned the intention to possess the land. This view derives from Mr. Petty's own evidence that he subsequently engaged in discussions with the Attorney General for an alternative land site. His letter dated 15th August 2000 shows clearly the terms on which he was prepared to accept an alternative site. He demanded that consideration be given to, among other things, the costs he had incurred for survey fees; for building plans and drawings associated with his application to the Building Board; the value of and compensation for the property on the land which he described as a wooden/concrete structure that could not be removed from the land without being broken up; the costs, including survey and legal fees, related to the transfer of the alternative lot of land and the need for the alternative lot to be adequate in terms of size and satisfactory in terms of location⁵. It does not appear, and Mr. Petty has not adduced any evidence, that the claimants took any steps after those exchanges of letters in 2000 to assert their ownership of the said property or manifested any intention to possess it, far less exercise actual control of it to the exclusion of others. Having learnt of the demolition of the house as it was occurring on 18th December 2008 it was not until May, 2009 that Mr. Petty engaged counsel to write to Mrs. Mills regarding the property.

[79] But even if it could be said that the claimants manifested an intention to possess the land, the greater hurdle facing the claimants, which they have not mounted, was their failure to establish the second element of possession: they have failed to establish that they exercised control of the land to the exclusion of others since at least 1990. With his mother's death in 1989 and his nieces' relocation to St. Thomas, leaving the house empty and boarded up, there was no tenancy subsisting since at least 1991, if one is to accept Mr. Petty's evidence that, that is when the house was boarded up. The claimants were not exercising any control whatsoever over that property in the ensuing years.

[80] I reject Mr. Petty's evidence that the house was a fully furnished cottage at the time of its demolition. I totally reject as untrue his evidence that the house contained six suitcases of clothes which had been left there for some 17 years. I prefer and accept the evidence of Mrs. Mills, Mr. Markman and Ms. Rawlins whom I found to be candid, credible witnesses whose evidence remained completely unshaken under cross-examination. I had no reason to doubt the veracity of

⁵ See letter to the Attorney General dated 15 August, 2000, Trial Bundle Volume 2 at electronic page 65.

the evidence of Mr. Markman as to the condition of the house on 18th December, 2008 when he demolished it.

[81] Strikingly, while Michael Harris claims to have retrieved a box of tiles from the house on the day it was demolished, neither he nor Mr. Bristol gave evidence of seeing any refrigerator, stove, living room set, stereo or suitcases of clothes in the house or among the rubble. Given that a backhoe was used to demolish the house, it is highly unlikely that if such items were indeed in the house, anyone could have failed to notice them strewn among the debris. I find as a fact that none of those items was in the house. When I consider further the photographic evidence depicting the dilapidated and derelict state of the house around 1990 and the fact that the claimant has not adduced any evidence that he effected repairs to the house after that time, it is inconceivable that a house in that state could possibly be a fully furnished cottage ready to be lived in as Mr. Petty claims. It casts serious doubt on the evidence of Mr. Petty that Michael Harris was caretaker of that house in his absence. Indeed, nowhere in his witness statement or in his evidence before the court did Michael Harris say that Mr. Petty appointed him caretaker of the house.

[82] In light of the foregoing, it follows that I find that the claimants have failed to establish that at the material time they were the owners in possession of the said property.

[83] On the contrary, I find that in 1999 Mrs. Mills and her husband became the registered proprietors of the land by virtue of a Certificate of Title issued in 1999 and acquired an indefeasible title by virtue of section 8 of the Title by Registration Act. Unless the claimants can prove fraud connected with the issue of the Certificate of Title then it is to be regarded as indefeasible. This they have failed to prove as there is no assertion, far less any evidence, in Mr. Petty's witness statement capable of establishing fraud. The claimants have similarly failed to allege or prove that Mrs. Mills' title had been superseded by a title acquired by them under the Limitation Act, Cap. 5.09.

[84] Further, notwithstanding the disagreement as to when the concrete additions were first made to the house, there is no dispute that at the time that Mr. and Mrs. Mills were issued with the Certificate of Title in 1999 the house was by then affixed to the land by virtue of the concrete additions and was therefore no longer a chattel but a fixture which thus passed with the land. See **Marie Makhoul v Cicely Foster and anor**⁶; **Elitestone Ltd v Morris**⁷.

⁶ ANUHCVP2009/0014.

[85] Mrs. Mills' title therefore gives rise to a presumption of possession of the house and land. Furthermore, her actions demonstrate both the animus of possession and actual control over all of the land. Accordingly, I find that from 1999 and up to the alleged acts of trespass on 18th December, 2008, Mrs. Mills was the legal owner in possession of all of the land, including the house. She was therefore authorised to instruct Mr. Markman to demolish the house. He committed no trespass against the claimants when he did so on her instructions.

[86] The claim is dismissed with costs to the defendant and ancillary defendant.

[87] Given the outcome on the claim, the need for consideration of the ancillary claim does not arise.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar

⁷ [1997] 1 All ER 513.