[2014] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 5/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**GEORGE ROWE**	**APPELLANT**
AND	**ROBIN ROWE**	**RESPONDENT**

Jeremy Palmer and Mrs Kelly Pascoe-Muir instructed by Jeremy A Palmer & Company for the appellant

Leroy Equiano for the respondent

24, 25 September and 5 December 2014

PHILLIPS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 21 January 2014, a Resident Magistrate for the parish of Saint Elizabeth gave judgment in favour of Mr Robin Rowe in a claim that his half-brother, Mr George Rowe, had instituted against him. George has appealed from the learned Resident

Magistrate's decision. He seeks to have this court set it aside and give judgment in his favour instead.

[3] The claim was for damages for trespass to land and for an injunction to prevent further trespass. Their late father, Uriah Rowe, had previously owned the land. Uriah had devised it in his will to Nora Rowe, who is George and Robin's sister. Nora died after Uriah. George and Robin separately claim that they have acquired possession of the land.

[4] The issue that the learned Resident Magistrate had to resolve, and with which this court has also had to wrestle, is whether Robin's actions in 2009, in respect of the land, which had, some years before, been fenced by George, amounted to trespass. The learned Resident Magistrate found that George did not prove a degree of possession sufficient to mount an action for trespass. Before assessing that issue and her decision, some of the background facts will be outlined. Each of the Rowes will be referred to, in this judgment, by their respective first names. This is for convenience only. No disrespect is intended.

The background facts

[5] Uriah died in 1963. In his will, he left various parcels of land to each of his children. Probate of the will was granted in 1978 to Mr Samuel Blair and Ms Alice Daniels, the named executors. Unlike Mr Blair, Ms Daniels does not feature in these proceedings.

[6] The land in dispute, which consists of approximately 1 acre, was part of a larger parcel of unregistered land. The family residence stood on that larger holding but was not on the disputed land. It seems that the entire parcel, by Uriah's estimate, was 9 ¾ acres. The relevant part of Uriah's will stated:

> "I give to my daughter Nora 1 acre adjoining to Adina Whitely and parochial road as her personal claim. I give my dwelling house to May Griffiths, my housekeeper and my daughter Nora for their life and after their death the balance of 8 ¾ acres must be shared and share [sic] alike between my two sons Donald and Rabin [sic]."

Uriah devised a separate parcel, at a different location, to George. It does not appear, however, that the executors vested any of these lands in their respective beneficiaries.

[7] May Griffiths was also the mother of some of Uriah's children. She died after Uriah. Nora survived her, but suffered from a disability and needed assistance. Although there was a dispute between George and Robin as to the nature of the disability, it was Mr Blair's opinion that she required special care. In September 1997, subsequent to Ms Daniels' death, Mr Blair executed an indenture transferring Nora's parcel to George. He did so in consideration of George promising to take certain steps in relation to Nora. The relevant portion of the indenture (which was not stamped), stated:

> "…I…hereby state…that as Nora Rowe is unable to protect herself and is mentally unable to make decisions in her own best interest, that as Executor of the Estate [of Uriah Rowe] the ONE [sic] acre of land as shown on the said Will as bequeathed to Nora (Rowe) be conveyed to George Rowe – brother, of Round Hill, Southfield Po. who will be held responsible for all medical expenses and the burial of Nora at her decease and that from this day forward the said

> George Rowe will enter into full and undisturbed possession and to own it in fee Simple from this day forward."

George testified that that document only confirmed a previous agreement that he had had with Mr Blair from as far back as 1978. He testified that, pursuant to that agreement, he had erected a perimeter fence on the disputed land in 1978. It seems that Nora died in late 1997, shortly after the indenture was executed.

[8] Although Robin denied that George had had anything to do with that land, it is not disputed that a perimeter fence existed on the disputed land until about January 2009. It was in place in November 2008 when Robin had secured Mr Desmond Rowe, a commissioned land surveyor, to carry out a survey of the 9 ¾ acres. On those instructions, the surveyor issued a notice to George, as a person who would have been affected by that survey.

[9] The surveyor prepared a subdivision plan in January 2009, and in that month, Robin removed the fence enclosing the disputed land. That removal prompted George's complaint in the Resident Magistrate's Court. The relevant portion of the particulars of claim, dated 6 July 2009, stated:

> "THAT on or about January, 2009, the Defendant entered upon the said property located at ROUND HILL in the parish of Saint Elizabeth, clipped down the Plaintiff's wire fence and weed [sic] up a section of the Plaintiff's property and has started farming the said property."

[10] Among the disputes as to fact between George and Robin, is whether either had used the land prior to 2009. George testified that he took possession of the land in

1978, fenced it, and "had guinea grass on the land at the time" of Robin's entry on the land. George also said that he "used that grass to mulch other land that we do farming [on]" (page 10 of the record).

[11] Robin's case was that he had been "in control of the whole of the land since Nora died" (page 20 of the record). He said that he had paid taxes for the land but had never seen George pay any taxes for that land. He testified that George had had nothing to do with the disputed land. According to Robin, he had "never seen George come on or occupy land [at that location]" (page 21 of the record).

The findings in the court below

[12] The learned Resident Magistrate, after assessing the law and distilling the facts, found that the conveyance executed by Mr Blair was "void and of no effect" and therefore failed to vest ownership in George. Although she found that George had entered on the land in 1978 and had fenced it at some point before 1997, the learned Resident Magistrate held that George:

> "…did nothing about the land until 1997 when Samuel Blair was bedridden… [George then] confirmed ownership of the subject land and did nothing else until he brought this action in 2009." (Paragraph 36 of her reasons for judgment)

[13] George's connection to the land, she held, did "not amount to possession sufficient to bring an action in trespass" (paragraph 40 of her reasons for judgment). On the contrary, she found that Robin had demonstrated that he had a claim to the land, in that he paid land taxes in respect of it, entered it and started to clear and

cultivate it. Consequently, she found that George had failed to prove on a balance of probabilities that Robin was liable in trespass. Accordingly, she gave judgment for Robin, with costs.

The grounds of appeal

[14] Mr Palmer argued three grounds of appeal on George's behalf. They are:

> "a. … [T]he Learned Magistrate erred when she found that [the conveyance by Mr Blair] was of no effect and therefore failed to vest any ownership in [George].
>
> b. The Learned Magistrate erred in finding that [George] was not seized [sic] of possession of the property when [Robin] by his own conduct acknowledge [sic] that [George] was in possession by serving him with a notice as an adjoining owner to attend the survey commissioned by him.
>
> c. The Learned Magistrate erred in finding for [Robin] as [Robin] relied on two irreconcilable defences that of adverse possession as well as a purported paper Title."

The relevant law

[15] The law regarding trespass to land does not require a person complaining of a trespass to be the owner of that land. Trespass to land consists of interference with possession. The person claiming possession may be mistaken as to his ownership of the property but would still be entitled to maintain an action for trespass against another. In **Toolsie Persaud Ltd v Andrew James Investments Ltd and Others** [2008] CCJ 5 (AJ), the Caribbean Court of Justice opined that a defect in the paper title does not nullify the intention to possess. The court stated at paragraph [29]:

> "…Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to be the owner eg due to a misleading plan or a forged document…"

Although the court made its observations in a case dealing with adverse possession, the principle is applicable to the issue of possession as an element for founding a claim in trespass.

[16] The learned Resident Magistrate correctly identified that it is the party who has the greater right to possession that is entitled to maintain a claim for trespass. At paragraph 23 of her judgment she quoted from the decision in **JA Pye (Oxford) Ltd v Graham** [2003] 1 AC 419. Lord Browne-Wilkinson, at paragraph 32 of his judgment in **Pye**, himself quoted with approval from the judgment of Slade J in **Powell v McFarlane** (1977) 38 P & CR 452. The quoted passage focuses on the issue of possession in a claim for trespass:

> "Possession of land…entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession…."

[17] Possession may be manifested in a number of ways. The circumstances constituting possession will vary from case to case. The learned editors of Clerk and Lindsell on Tort 19th ed outline, by reference to decided cases, that possession may be concluded from the enclosing of land and from taking grass from it. They stated at paragraph 19-13:

> "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, for '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 little which can be done on the land to indicate possession.' [See **Wuta-Ofei v Mabel Danquah** [1961] 1 WLR 1238, 1243]… In the case of land without buildings, possession is shown by 'acts of enjoyment of the land itself,' [see **Jones v Williams** (1837) 2 M & W 326, 331; 150 ER 781] **as by building a wall upon it** [see **Every v Smith** (1857) 26 LJ Ex 344]… [and] **taking grass from it** [see **Harper v Charlesworth** (1825) 4 B & C 574; 107 ER 1174]…" (Emphasis supplied)

The learned editors correctly emphasise, however, that in order to found a claim in trespass, the possession asserted must be exclusive.

[18] With those basic principles concerning the law of trespass being outlined, it is now convenient to assess the grounds of appeal.

Ground a – the effect of the conveyance

[19] The learned Resident Magistrate relied on section 18 of the Wills Act in order to conclude that Mr Blair had no power to execute a conveyance to George. According to her analysis, the conveyance, "did not prevent [the bequest to Nora] which had been disposed of at the time of the testator's death" (see paragraph 20 of the judgment).

[20] Mr Palmer, appearing for George, submitted that the land was vested in Mr Blair as executor of Uriah's estate and as trustee for the beneficiary, Nora. Learned counsel argued that, as trustee, Mr Blair acted in the best interest of both Uriah's estate and

Nora, who could not make decisions for herself. Having acted in good faith, Mr Palmer submitted, the court should uphold the conveyance. Learned counsel relied, in part, on sections 43 and 44 of the Trustee Act and, among others, **Stein v Sybmore Holdings Pty Ltd** [2006] NSWSC 1004, in support of his submissions.

[21] Mr Equiano, for Robin, argued that the learned Resident Magistrate's reference to the Wills Act was quite appropriate. The operation of section 18, he submitted, and the fact that Mr Blair was a trustee, meant that Mr Blair could not "do as he liked" with the estate property. Any step taken outside of the ambit of the will, learned counsel submitted, should have had the prior approval of the court. That approval, not having been secured, he submitted, the conveyance is "null and void".

[22] Mr Equiano's stance in respect of section 18 of the Wills Act cannot be supported. In dealing with that section, the learned Resident Magistrate opined that its provisions nullified the conveyance by Mr Blair. She said at paragraph 20 of her judgment:

> "The section contemplates an act or conveyance during the lifetime of the testator, after the execution of the will….The section does not exclude an act or conveyance made after the death of the testator…."

[23] Although the learned Resident Magistrate evidently put a lot of thought and effort into her judgment, it is not correct to say that section 18 of the Wills Act prevents conveyances during the lifetime of the testator, of property that is already the subject

of a will. Nor does section 18 govern actions by the personal administrators of a testator's estate in the execution of their duties. Section 18 states:

> "No conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, **except an act by which such will shall be revoked as aforesaid**, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." (Emphasis supplied)

The section was not intended to prevent a testator from alienating any part of his estate subsequent to the execution of his will. The testator is, for example, entitled to sell the property despite the fact that it is the subject of a gift in his will. When he sells the property, it is gone, and does not form a part of his estate at the date of his death. The sale, in such an event, is an act of revocation of the disposition of that property by the will.

[24] Sir L Shadwell VC, in **Moor v Raisbeck** (1841) 12 Sim 123; 59 ER 1078, considered a provision identical to section 18 and explained its import. He found that any alienation by the testator amounted to a revocation of the will in respect of that gift. In that case, the testatrix, after having devised real property to beneficiaries in her will, sold the devised property. She was in possession of the title deeds at the time of her death, but this was due to a collateral agreement between herself and the purchasers. In a dispute as to ownership between the named beneficiaries and the purchasers, the Vice-Chancellor said at page 139; 1084:

> "...That clause [the equivalent of section 18] applies to cases where testators, after having devised their estates, make

> conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee, and afterwards take a reconveyance of them to themselves and a trustee to uses to bar dower; **but the clause does not apply to cases like the present, where the thing meant to be given is gone**." (Emphasis supplied)

[25] As the testator is free to deal with his property despite the provisions of his will, his personal representatives are, likewise, not restricted by the provisions of section 18.

[26] It is not entirely clear what the learned Resident Magistrate meant by saying that the devise to Nora was "disposed of at the time of [Uriah's] death". It is without question that a testator's real property vests in his personal representative at the time of his death. That is the effect of section 3 of the Real Property Representative Act. Section 3(1) states:

> "Where real estate is vested in any person, without a right in any other person to take by survivorship, it shall **on his death**, **notwithstanding any testamentary, disposition**, devolve to and become vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him." (Emphasis supplied)

The result of the operation of section 3(1) is that on Uriah's death, the disputed land vested in his executors, not, as the learned Resident Magistrate seemed to have opined, in Nora.

[27] Undoubtedly, the executors held the property, not for themselves, but in trust for the beneficiaries. That is the import of section 5 of the Real Property Representative Act. The provisions of the Trustees Act govern the actions of the executors. Section 43

of the Trustee Act speaks to executors securing the court's permission to deal with trust property in a manner other than that specified in the will, if expediency demands it. Section 44 of that Act allows the court to excuse a trustee who has not secured the permission of the court and has acted in breach of trust. The court may grant its pardon where it finds that the trustee's actions were honest and reasonable.

[28] Although Mr Equiano is correct in stating that there are strictures to the correct administration of the estate of a deceased person, he is wrong to the extent that he states that the personal representatives may not transfer the trust property contrary to the terms of the will. The property is vested in the personal representatives and they may therefore, at law, treat with the property as if it were theirs. That is implicit in the provisions of section 44 of the Trustee Act. There are sanctions that may be imposed following a wrongful exercise of the personal representative's duties, but their alienation of trust property is not automatically void.

[29] The application of those principles to the instant case means that, in the absence of a complaint by Nora's personal representatives, the learned Resident Magistrate was wrong in finding that Mr Blair could not have properly conveyed the property to George. That finding is not critical to this case, however. This is so because the conveyance was not stamped and should not have been received into evidence.

[30] The document that was admitted into evidence was not the original conveyance signed by Mr Blair. George said that the original had been given to his attorney-at-law in order to secure a registered title. There was no evidence indicating that the original

conveyance had been stamped. Evidently, no registered title had been secured. There was, however, no objection to the copy being admitted into evidence and the learned Resident Magistrate admitted it without reference to the fact that section 36 of the Stamp Duty Act precludes such admission. The section states:

> "No instrument, not duly stamped according to law shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

[31] It is by virtue of that defect that the conveyance could not be declared to be effective. Although her reasoning was not correct, the learned Resident Magistrate could not properly state that the document vested any ownership in George. Ground a must therefore fail.

[32] It is important to note, however, that, as has been said above, the tort of trespass is not an imposition on the right to ownership, but affects the fact of possession. It is therefore necessary to consider the status of both George and Robin in the context of possession.

Ground b – The respective status of the disputants on the land

[33] The learned Resident Magistrate's ruling in respect of the claim turned significantly on her finding of fact in respect of the issue of possession. Although she found that George had an intention to own the land, she held that, in addition to his defective title, he had not taken care of Nora as he had contracted to do. She also found that all that he did, in the way of asserting possession, was to fence the land and used, as mulch, the guinea grass that grew on it. According to her, although that was

some evidence of an intention to possess, "there was no indication as to what if anything the land would be used for" (see paragraph 32 of her reasons for judgment).

[34] In assessing Robin's status, the learned Resident Magistrate referred to the "entire estate". She addressed his farming of the land, his payment of land taxes, his cultivating the ground as well as his selling off a portion of the estate. She used this evidence to show that Robin had an intention to possess the land. She concluded at paragraph 41 that Robin "has established the requisite elements required by law to establish a claim to the subject property".

[35] Mr Palmer submitted that the learned Resident Magistrate ignored crucial facts in arriving at her decision. He argued that the learned Resident Magistrate ignored the evidence that George had "enjoyed unchallenged single and exclusive possession as there is no evidence that [anyone] else was in occupation of the premises whilst he was in occupation" (paragraph 24 of the written submissions). Learned counsel relied heavily on the fact that Robin, in instructing the land surveyor to attend on the land, had the surveyor give notice to George as an interested party. This is despite the fact that George had no other land in that vicinity. That fact, Mr Palmer submitted, was evidence of Robin's acknowledgement of George's ownership of the disputed land.

[36] Mr Equiano, in supporting the learned Resident Magistrate's findings, focussed on George's failings in respect of the land. He argued that, based on the following criteria, the learned Resident Magistrate was right in rejecting George's claim to possession. The criteria he identified were:

a. Occupation;

b. Use;

c. Exclusion of others;

d. Other acts asserting a possessory title.

Mr Equiano argued that, when looked at against these criteria, George had failed in establishing a claim of possession.

[37] Although this court is very reluctant to set aside findings of fact by the tribunal that saw and heard the witnesses, it will do so in circumstances where it is clear that the tribunal has not made proper use of that privilege. That is the effect of the decision of the House of Lords in **Watt v Thomas** [1947] AC 484 and the Privy Council in **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303. In **Watt v Thomas**, Lord Macmillan explained one justification for interfering with the finding of fact of a judge sitting alone. He said at page 491:

> "The judgment of the learned trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

[38] In this case, it is apparent that the learned Resident Magistrate did not appreciate the weight that her findings of fact should have had in arriving at her conclusion on the issue before her. In particular, she seems to have drawn a conclusion that contradicted her findings in respect of Robin's status on the land. In

her reasons for judgment, the learned Resident Magistrate found that Robin had not entered the disputed land until 2009 when he demolished the fence that George had constructed. On that basis, she rejected that Robin had any claim to ownership of the disputed land by virtue of adverse possession. She said, in part, at paragraph 37:

> "[Robin] could not have relied upon adverse possession as his entry was on or about 2009, the year this action commenced. Though Nora Rowe had died in 1997, [Robin] has not led any evidence to show his occupation of the subject land from the date of her death...."

Despite finding that he only entered the land in 2009, and that he had not evidenced occupation of the land prior to that time, the learned Resident Magistrate concluded that Robin had a sufficient intention to possess the disputed land, which intention trumped George's claim to possession. Considering that it was Robin's entry that George had complained about in the court action, the learned Resident Magistrate's conclusion is indeed curious. Robin's entry at that time plainly could not have been capable of ousting George's claim to possession.

[39] On the contrary, Robin had provided no valid evidence to show that he was entitled to enter upon the land when he did. The learned Resident Magistrate had, in addition to rejecting his claim to adverse possession, quite properly, rejected his claim that he had secured a paper title from Nora.

[40] The learned Resident Magistrate seemed to have relied on the state of the land (it needed bushing) as an indication that George had no intention to possess the

disputed land. Mr Palmer is correct in his submission that she did not give sufficient weight to the fact that:

a. George had entered the land in 1987 (as she found).

b. He had fenced the land some time prior to 1997 (as she found).

c. He reaped grass from it (as she seemed to accept).

d. No one else used the land or had challenged George's use.

e. Robin, by virtue of the intervention of the surveyor, seemed to have recognised George's occupation of it.

Those acts, based on the authority of **Toolsie Persaud Ltd**, **Powell v McFarlane**, **Every v Smith** (1857) 26 LJ Ex 344, and **Harper v Charlesworth** (1825) 4 B & C 574; 107 ER 1174, would amount to acts of possession that would have entitled George to establish a claim of trespass against Robin.

[41] The status of the disputed land should not have been merged with the larger parcel of land in the context of Robin's actions in respect of that larger area. There is authority that the administration of a large parcel of land may be said to apply to a part of that land, as was done in **The Attorney General v John Barnaby** (1968) 11 JLR 75. Such administration should, however, be distinguished where there is a clear separation of the smaller from the larger parcel, as occurred in this case by virtue of George's fencing of the disputed land.

[42] Based on that reasoning, it must be found that the learned Resident Magistrate erred in concluding that George had not established sufficient possession of the land to

entitle him to succeed in his claim. The conclusion she drew at paragraph 40 of her judgment that George did not have possession sufficient to bring an action in trespass, was not justified by her findings on the evidence. Indeed, paragraph 40 seems to be self-contradicting, based on the law regarding trespass:

> "On the totality of the evidence, on a balance of probabilities, the plaintiff [George] intended to eventually own the land, however **his mere presence on the land and his de facto control of it** does not amount to possession sufficient to bring an action in trespass. An erroneous belief that the land was his is similarly not sufficient to bring an action in trespass for it is not even a defence to such an action." (Emphasis supplied)

The findings of fact in that statement seem to indicate that the learned Resident Magistrate had accepted that George had factual possession as well as the intention to possess. She was in error to, thereafter, find that he was not in possession of the land.

[43] Ground b must succeed.

Ground c – the compatibility of the defences

[44] Mr Palmer, in this third ground of appeal, complained that the learned Resident Magistrate did not have sufficient regard to the fact that Robin had relied on inconsistent defences. His submission was based on the fact that Robin had first filed a statutory defence to the claim, namely, that he was entitled to the land by virtue of the operation of the Limitation of Actions Act, but during the trial, he asserted that he held a paper title from Nora. It is also to be noted that at the start of the trial Robin stated that his defence was also that George had no connection with the land.

[45] Learned counsel submitted that the claim to ownership by adverse possession as well as by a paper title amounted to an abuse of the process of the court. He submitted that the court should show its disapproval of it. Mr Palmer relied on the cases of **R v Smith** [2013] EWCA Crim 238; [2014] 2 Cr App Rep 1 and **First National Bank plc v Walker** [2001] 1 FCR 21, in support of his submissions.

[46] Mr Equiano asserted that there was nothing wrong or inconsistent about the defence.

[47] Mr Palmer is not on good ground with this complaint. He has arrived at his position based on the finding of the learned Resident Magistrate that the statutory defence could not succeed, based on the evidence. An examination of the defence, as recorded by the learned Resident Magistrate, shows that Robin was asserting a constant presence on the land as opposed to George's lack of connection thereto. The defence as set out at page 7 of the record of appeal states:

> "1. Statutory Defence.
>
> 2. Defendant says he was born on the land in question 73 years ago and he has never left or been off this portion of land from that time.
>
> 3. On the contrary, Plaintiff has never been on this land, the land in question was disposed of in his father's will and Plaintiff was not the beneficiary of this land. It was disposed of to his sister, Nora Rowe and she died some 18 years ago and defendant has been and continue [sic] to be in possession since Nora's death he was in possession during her lifetime and continues after her death.
>
> 4. Plaintiff has no connection to the land."

[48] George was entitled to advance defences in the alternative. The fact that the learned Resident Magistrate rejected the statutory defence, as not being supported by the evidence, is the consequence of analysis of the defence. There was no abuse of the process of the court as Mr Palmer complains. As a result, this ground fails.

Damages

[49] Based on the reasoning in respect of ground b, the judgment of the learned Resident Magistrate ought to be set aside and a judgment in favour of George substituted. Although, on her conclusion, the question of damages did not arise for her consideration, it does arise in this court because of the finding that Robin's entry amounted to a trespass. What stance should this court take in respect of the issue of damages?

[50] In this regard, certain well-established principles apply. The general rule that damages are intended to be compensatory was set out in **Stoke-on-Trent City Council v W & J Wass Ltd** [1988] 3 All ER 394; [1988] 1 WLR 1406. In that case, Nourse LJ explained the general rule and the basis of exceptions. The following extracts are taken from his judgment at pages 397-8 of the report:

> "**The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages.** A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that

> both these rules are subject to exceptions." (Emphasis supplied)

[51] One of the exceptions to that general rule lies in the tort of trespass. Nourse LJ explained that the origins of this exception lay in wayleave cases. He said:

> "The first and best-established exception is in trespass to land. It originated in the wayleave cases, where the defendant trespassed by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a wayleave..."

[52] Based on those origins, it is said that trespass is actionable without the need to prove loss. Proof of loss is, however, what is required to assist the court in quantifying the appropriate award of damages. Nourse LJ pointed out that for residential properties the court would use evidence of the rental value to guide its deliberations. He said:

> "...in **Swordheath Properties Ltd v Tabet** [1979] 1 All ER 240, [1979] 1 WLR, 285... it was held that **a defendant who had occupied residential premises as a trespasser was liable to pay damages calculated by reference to the ordinary letting value of the premises even where there was no evidence that the plaintiff could or would have let the premises to someone else**....
>
> As I understand these authorities, their broad effect is this. In cases of trespass to land and patent infringement and in some cases of detinue and nuisance the court will award damages in accordance with what Nicholls LJ has aptly termed 'the user principle'...." (Emphasis supplied)

[53] The 'user principle' referred to in that extract states simply:

> "…if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user."

[54] Although Nicholls LJ, in **Stoke-on-Trent City Council**, stated in his judgment that a trespasser may be liable to pay more than nominal damages for his tort, a claimant who proves trespass, but fails to prove the value of the property trespassed upon may yet only recover nominal damages. The restriction to nominal damages, in cases where only the fact of the trespass is proved, was explained in **Twyman v Knowles** (1853) 13 CB 222; 138 ER 1183. There the Court of Appeal of England approved a summation in the court below, to the effect that where a claimant in a case of trespass, fails to prove more than his bare possession of the land, he is only entitled to nominal damages.

[55] The Earl of Halsbury LC explained the concept of nominal damages from as far back as 1900. He did so in **The Owners of the Steamship 'Mediana" v The Owners, Master and Crew of the Lightship "Comet" - The Mediana** [1900] AC 113. The learned Lord Chancellor pointed out that:

> '"Nominal damages' is a technical phrase which means that you have negatived anything like real damage but you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages." (Page 116)

At page 118 of the report, Halsbury LC pointed out that nominal damages are distinct from a "trifling amount". In England, the sum awarded for nominal damages has

generally remained static for long periods. The learned editors of McGregor on Damages 17th Ed note at paragraph 10-006 that the sum that was usually awarded in such cases was £2.00. After a century at that level, it was, in more recent times, increased to £5.00 (see **Brandeis Goldschmidt & Co v Western Transport** [1981] QB 864 at page 874).

[56] In **Beaumont v Greathead** (1846) 2 CB 494 at 499; 135 ER 1039 at 1041, Maule J is reported to have said:

> "Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity: and I think a man may very well pay 50/ in satisfaction and discharge of a debt of 50/ **and** of the nominal damages due for its detention." (Emphasis supplied)

[57] In **Greer v Alstons Engineering Sales and Services Ltd** [2003] UKPC 46; (2003) 63 WIR 388, the Privy Council cautioned that courts have a duty to ensure that awards are not "out of scale". Despite that guidance, there have been recent cases in England with wide variances in the award of nominal damages. In **Richmond Pharmacology Ltd v Chester Overseas Ltd and Others** [2014] EWHC 2692 (Ch), the learned trial judge in a breach of confidence case was inclined to award £1.00 as nominal damages. He said at paragraph 253:

> "I will hear counsel on the appropriate order to make in those circumstances, but provisionally, it seems to me that the right course is to award nominal damages of £1 against Chester for breach of contract, and to dismiss the claims against Larry and Milton Levine."

By way of contrast, in **Martin John Coward v Phaestos Limited and Others** [2013] EWCA Civ 1256 the Court of Appeal did not disturb an award of £1,000.00 made as nominal damages for breach of confidence. The court noted at paragraph 17 that the judge at first instance:

> "…also ordered Dr Coward to pay IKOS the sum of £1,000 by way of nominal damages for copyright infringement and breach of confidence."

It should be noted that in both those cases other awards of damages were made.

[58] Locally, the awards for nominal damages have varied significantly as well. Some older cases on the point have not been included in the following analysis. This is because the rapid devaluation of the Jamaican currency has minimised their value in identifying the scale. In **Sailsman v The Attorney General of Jamaica and Another** CL S206/2001 (delivered 26 March 2010), the issue of nominal damages arose when the claimant in a personal injury claim did not present any medical evidence. Sykes J considered the fact that the claimant had been shot in the back by a police officer. The learned judge awarded $100,000.00 to the claimant as nominal damages.

[59] This court, in **The Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13, although it did not award nominal damages in a claim for defamation, seemed to agree that an award of $50,000.00 would have been considered nominal damages. Panton P, at paragraph [12] of his judgment said:

> "...It should be mentioned that Miss Lindsay readily conceded that the sum of $50,000.00 would be in the category of nominal damages."

The learned President did not disagree with that assessment.

[60] In **Attorney General of Jamaica v Devon Bryan (Administrator of the Estate of Ian Bryan)** [2013] JMCA Civ 3, a man was stabbed by an unknown assailant and then shot by a police officer. He died at hospital within hours of the shooting. Death was due to both injuries. This court ruled that the first instance award of $130,000.00 (half of which was awarded against the police officer), as nominal damages for pain and suffering prior to death, could not be considered excessive.

[61] Finally, the issue of nominal damages for trespass was recently considered by McDonald-Bishop J, as she then was, in **Delia Burke v Deputy Superintendent Carol McKenzie and Another** [2014] JMSC Civ 139. After referring to the general principles governing the award of nominal damages and after referring to **Linneth Vassell and Cyril Vassell v The Attorney General** (1996) 33 JLR 1, the learned judge awarded $65,000.00 as nominal damages. McDonald-Bishop J made that award after noting that **Vassell** involved an invasion of the claimant's home. She said at paragraph [72]:

> "But in an effort to maintain uniformity and consistency in awards and having looked at the nature and extent of the trespass in this case which took the police in the bedroom of the claimant, I would award $65,000.00 for damages for trespass."

In **Delia Burke,** the trespass also involved the improper invasion of the claimant's home by the police.

[62] Although these awards for nominal damages cannot be said to be within a narrow band, it may be said that claims involving personal injuries seem to attract higher awards within the band than claims involving injury to reputation or trespass to land. Even where there is no personal injury, claims arising from tortious high-handed behaviour may result in an increase in the level of the award. Trial judges must be mindful, however, that if they are of the view that only nominal damages are merited, there should be compliance with the principle explained in **The Mediana**.

[63] In this case, the learned Resident Magistrate noted that George had adduced no evidence concerning the value of the land. He did not even provide a value for the fence that Robin had destroyed. In his claim, he sought $250,000.00 as damages for trespass. There is, however, nothing that would assist this court in that regard. George may, therefore, only recover nominal damages.

[64] George's complaint does not concern personal injury and does not possess the humiliating and embarrassing character of a home invasion. It is noted that Robin's trespass did involve the removal of George's fence. There is, however, no evidence of any other inconvenience or loss and there is no evidence of the cost of replacing the fence.

[65] After considering these authorities, an award of $50,000.00 as nominal damages, in these circumstances, would be the appropriate award.

[66] George did also seek an injunction "restraining and forbidding the Defendant and or his agents from further entry upon his land". He may obtain an order that Robin should vacate the land and refrain from re-entering it.

Conclusion

[67] The learned Resident Magistrate, although correctly assessing the law with regard to trespass, failed to draw the correct conclusions from her findings of fact. In finding that George had entered and fenced the land and had taken "*de facto* control of it" without any interruption by any person, including Robin, for a period in excess of 30 years, she erred in finding that he had not established possession sufficient to ground a claim for trespass.

[68] Although George is entitled to damages, he has not proved any quantifiable loss. His monetary award should, therefore, be restricted to nominal damages.

[69] In the circumstances, the appeal should be allowed, and a judgment for George substituted with costs, both here and below.

McDONALD-BISHOP JA (Ag)

[70] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and there is nothing useful that I could add.

PHILLIPS JA

ORDER

1) The appeal is allowed.
2) The judgment of the Resident Magistrates' Court delivered herein on 21 January 2014 is set aside and judgment for the appellant substituted therefor.
3) Damages are awarded to the appellant in the sum of $50,000.00.
4) The respondent is hereby ordered to quit and deliver up the land, part of Round Hill in the parish of Saint Elizabeth, containing by estimate one acre, more or less and butting and bounding:-

    North and East: On the land belonging to the estate of Uriah Rowe;

    South: On lands belonging to the estate of Adina Whitely;

    West: On the parochial road leading from Pedro Cross to Chelsea,

    and is forbidden, by himself or his servants and/or agents from entry upon the said land.
5) Costs to the appellant both here and below. The costs in this court are fixed at $15,000.00. The costs in the court below are to be taxed if not agreed.