IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2003 No. 279

BETWEEN:

JAY TIMOTHY LEVINCE SIMMONS

Plaintiff

-v-

BETTY STEEDE

First Defendant

-and-

ALICE MAUDE STEEDE

Second Defendant

-and-

KWAME CLIFFORD FITZGERALD STEEDE

Third Defendant

-and-

MATTHEW OSBORNE JAMES STEEDE

Fourth Defendant

-and-

MARK ROBERT LEON STEEDE

Fifth Defendant

-and-

THE BANK OF BERMUDA LIMITED

Sixth Defendant

JUDGMENT

Dates of hearing: November 24-27,
December 5, 2008[1]

Date of Judgment: January 27, 2009

Mr. Allan Doughty, Trott & Duncan, for the Plaintiff
Mr. Ray DeSilva, Conyers Dill & Pearman,
for the 2nd-5th Defendants

Introductory

1. Swansbay Hill is a neighbourhood in Pembroke where land has been owned by the same families for over 50 years. The present action is a property dispute over the ownership of vacant land which was legally described as two lots of land, lots 13 and 14 ("the disputed land") which lies between property which is admittedly owned by the Plaintiff and the 1st to 5th Defendants ("the Defendants"), respectively. The Defendants' undisputed property is referred to in various plans as Lots 11and 12 and has been in their family for more than 50 years.

2. The Plaintiff claims an injunction restraining the Defendants from trespassing on his land and a declaration that he is the true owner of it. The Plaintiff relies on a paper title to the disputed land, going back to March 2, 1943. The 1st-5th Defendants rely on adverse possession. They aver that they and their predecessors in title were in factual possession of and used the vacant Lot 14 as their own from August 15, 1958. It is essentially common ground that the disputed land was an undeveloped hillside until in or about 1988 when the Plaintiff, whose in-laws then had acquired paper title to the disputed property on March 30, 1984, carried out excavation work there. The previous year the Plaintiff had applied for permission to develop the land. Whether he erected a fence in or about 1986 is controversial.

3. These acts by the Plaintiff, who did not purportedly himself acquire title from his in-laws until October 22 1999, very arguably interrupted any prior period of adverse possession which had not already extinguished his title. The dispute came to a head after the 1st -5th Defendants purportedly acquired paper title to some of the disputed property from their grandmother's estate on April 4, 2003 and obtained a mortgage from the 6th Defendant on the basis that they owned Lot 14 as well as Lots 11 and 12. It therefore follows that the crucial period during which the Defendants must make out their adverse possession claim is any period of 20

[1] Counsel were granted until January 9 and 19, 2009, respectively, to file supplementary written submissions.

years commencing on August 15, 1958 and ending on whatever date the Plaintiff's excavations were carried out in or about 1988. This requires the Court to undertake the difficult task of looking back at a period of time between 20 to 50 years ago. The oral evidence adduced from more than a dozen witnesses painted coloured images of childhood and adolescence in Bermuda of recent yesteryear.

4. The Sixth Defendant appeared at the beginning of the trial through Mrs. Rana-Fahy, who withdrew after indicating that her client's position was the same as the 1st to 5th Defendants ("the Defendants").

The Plaintiff's paper title

5. On March 2, 1943, Arthur William Bluck conveyed Lot 13 and Lot 14 to Louis Peterson. Each lot was described in the First and Second Schedule to the Deed of Conveyance respectively as being bounded to the north by a right-of way 10 feet wide, and as being bounded to the south by Lots 11 and 12 respectively. On April 29, 1981[2], Edgerton Peterson as Administrator of the Estate of Louis Peterson, conveyed Lot 14 to Benjamin Rego. And on March 30, 1984, Benjamin Rego conveyed Lot 14 to Luther O'Fleck Wilkin and Lois Gertrude Wilkin, the Plaintiff's in-laws. On October 22, 1999, the Plaintiff's in-laws conveyed Lot 14 to him. This latter fact was conceded even though a stamped copy of the Deed was not produced in evidence.

6. Lots 11 and 12 were admittedly conveyed to the late David and Wilhelmina Steede, the Defendants' grandparents, by Reginald Carl Semos, the 6th Defendant and Charles Nathaniel Arthur Butterfield, on August 15, 1958. The Steede family accordingly occupied a house on Lot 12 (principally) and Lot 11 (partially) from on or about that date, at the top of the gently sloping hill to the north which comprised the Lot.

The Defendants' paper title

7. By a Deed of Conveyance dated August 15, 1958, Reginald Carl Semos, the 6th Defendant and Charles Nathaniel Butterfield conveyed to David Alexander Steede and Wilhelmina Alberta Steede lots 11, 12, and 14. According to the recitals to this Deed, the property described in the Second Schedule (including Lot 14 on the attached plan) was (a) owned by Arthur William Bluck in his lifetime, (b) devised under his last will and testament as residue to the Bank and Charles Butterfield upon trust for sale, and (c) was the subject of an agreement for sale by the trustees to Semos and by Semos to the Steedes.

8. The Defendants on April 4 2003 were purportedly conveyed Lot 14 on the 1958 plan (i.e. Lot 14) by the 6th Defendant and the estate of Wilhelmina Steede in

[2] Although the year date of this Deed is recited in a subsequent deed as 1980, the typed date on page 1 and on the back-sheet is 1981.

reliance on the title purportedly conveyed by the 1958 Deed[3]. However it seems obvious that no title in Lot 14 was conveyed to their predecessors in title in respect of Lot 14 on the 1958 plan (in any event only one lot out of the two which comprised the disputed land). This is because the relevant land had already been conveyed to the Plaintiff's predecessors in title in 1943 during the lifetime of Arthur William Bluck to Louis Peterson. What is curious about the 1958 Deed and the plan annexed to the 1958 Deed is that they both accurately describe Lot 13 as being owned by Louis Peterson. As Peterson acquired both Lots 13 and 14 under the same March 2, 1943 deed, it is difficult to understand how the persons preparing the 1958 Deed and/or plan and exercising reasonable care could have had both (a) actual and/or constructive knowledge of the 1943 conveyance of Lot 13 to Peterson, and (b) no knowledge of the transfer of Lot 14 effected by the same transfer instrument.

9. Nevertheless, the purported conveyance to the Steedes in 1958 of Lot 14 provides very strong support for the Defendants' broad contention that their family genuinely regarded this portion of the disputed property at least (if not all of it) as their own property from the time it was acquired.

The Plaintiff's evidence

10. The Plaintiff's oral evidence was adduced to rebut the Defendants' adverse possession claim. It may helpfully be summarised with respect to two periods in time. Firstly, the period from August 15 1958 to August 15, 1978 ("the first 20 years"), and secondly the period from August 15 1978 to a date uncertain in or about 1988 when the Plaintiff admittedly carried out excavation work on te disputed land ("the next 10 years"). If the Defendants establish that they were in possession of the disputed land during the first 20 years, the next 10 years become irrelevant. On the other hand it is open to the Defendants to seek to establish uninterrupted adverse possession for any 20 year period.

The first 20 years

11. The Plaintiff himself testified in relation to his recollection of Lot 14 based in part on his childhood memories, as his father lived in the neighbourhood virtually next door to the home of his subsequent wife and in-laws. He moved to # 6 Swansbay Hill in 1984 after his marriage. As an adult, he lived in the area for a total of 29 years. Because of the extent of his obvious emotional and commercial interest in this case, I feel I should exercise caution before placing reliance on his evidence on any contentious and important matter without looking for some independent confirmation. The most honest of witnesses with vital interests at stake may fall prone to the tendency to convince themselves of a version of the truth which is supportive of their own case. The need for such caution applies to interested witnesses on both sides of the present case.

[3] Lots 11 and 12 were also conveyed as well.

12. The Plaintiff testified that Lot 14 was always a hillside with trees and bushes on which children often played (in his own childhood during the first 20 years) and which people regularly traversed as a short cut to Berkeley Hill. He took pictures at a party in the yard of #6 Swansbay Hill on May 29, 1985 which show portions of the disputed land before the excavation which took place in 1988 (Bundle, pages 8-10). These pictures show a hillside with high grass, bushes and trees, generally consistent with his case that the disputed land was not being actively used by the Steedes. These pictures support a conclusion that the disputed land was not being trimmed (either by humans or goats) and had no structures on it at this point of time.

13. His wife Linda-Mae Lois Simmons moved to the area in 1967 when she was only 5 years old. Her adult memories would not have begun until 1980 after the first 20 year period had elapsed. She did not appear in any event to have had any particular reason for recalling in any detail the condition and use of Lot 14 before her parents purchased Lot 14 in 1984. It was common ground that she did not herself play on the hillside. Under cross-examination she admitted that the blanket denial in her witness statement of having seen any activity by the Steedes on the disputed land since 1967 was inaccurate.

14. Although Lois Gertrude Wilkin (the Plaintiff's mother-in-law) moved to the neighbourhood in 1967 and claimed to see no activity on the bush and tree covered vacant lot by the Steede family from then on, it is unclear why she would have had any particular interest in such activities prior to the 1984 purchase, six years after the end of the first 20 year period. Nevertheless she admitted hearing chickens at some point in time, as well as seeing a goat. It is, on the other hand, significant that she and her now late husband admittedly lived in the Swansbay Hill area for some 17 years before they purchased Lot 14 for $12,500 in 1984. That sum does not appear to be an insignificant price to pay almost 25 years ago for a sloping lot of land in a fairly densely populated neighbourhood.

15. The Plaintiff's in-laws were in an ideal position to access informally "local knowledge" about the vacant lot, and it seems inherently improbable that if it was generally known in the neighbourhood that the Steede family had since 1958 been using the vacant lot as their own property, the Wilkins would not have ascertained this fact and been deterred from completing the proposed purchase for such a substantial price. On the other hand it is not altogether impossible that they satisfied themselves that they had a good paper title and decided to take the risk of losing any adverse possession claim which the defendants might mount against them in the fullness of time.

16. It is equally possible, as Mr. DeSilva seemed to suggest may have occurred, that there was declining use of the disputed land in the years immediately preceding the Wilkins' purchase. In addition, there appeared to be no close social connection in the neighbourhood between the Wilkins and the Steedes. So while those close

to the Steedes might have had reason to know that the Steedes regarded the disputed land (or part of it) as their own (assuming this to have been the case), this fact might not have been more widely known.

17. The first independent witness called by the Plaintiff was Leonard Holder, who was born in 1942 and lived in the Swansbay Hill area until 1974. He portrayed a vivid picture of football being played beneath the hill on the flat area now occupied by the Plaintiff's home, claiming that three famous football clubs (PHC, Mount Hill Rangers and Dandy Town) were formed out of informal games in that specific area. Boys would relax in the tall grass of the hillside, making pipes from the fennel which grew there and using cedar bark for tobacco. Under cross-examination he agreed that the Steede family would use the hillside; however, he denied that they used it in a different manner to other members of the neighbourhood. He also agreed that people would cut across the bottom of the hillside as a short cut. Mr. Holder was around 16 at the beginning of the 20 year period, and left the area 16 years later when he was in his mid-30's. He displayed considerable familiarity with the neighbourhood and the families that lived in it.

18. Although I found him to be a credible witness in general terms, his evidence did not decisively refute the adverse possession claim. He only knew Wilhelmina Steede by sight and did not know David Steede at all. Mr. Holder did not actually live in close proximity to the disputed land. The most important part of his evidence was the following. He never saw any evidence that the Steedes used the property on an ongoing basis as their own as opposed to using it in the same manner that others in the neighbourhood did. He also agreed with the Defendants that shortcuts were routinely taken over the northern boundary of Lot 14.

19. The second independent Plaintiff witness was Ronald Trott, born in late 1942. He lived in the neighbourhood from ages 4 to 16 (1947 to 1959). This means that he would have left the neighbourhood shortly after the Steedes acquired their property at the top of the hill in 1958, although returned later and recalled playing cricket on the flat area at the bottom of the hill with Ed Steede. He played football in the vicinity of #6 Swansbay Hill, and remembered playing with other children (including the Steedes on the hillside and using a pathway across it. He did not remember chickens and goats on the hillside, but did recall some large wooden box like structure at the top of the hill near Lot 12 on the western boundary which resembled an old shipping box. He also recalled paths which were used by everyone, not just the Steedes. He remembered the Steedes flying kites at the top of the hill, rather than on the hillside itself.

20. I found Mr. Trott to be a credible witness but again his childhood memories were not decisive. He would have left the area not long after the Steedes moved into the neighbourhood. Any subsequent visits would not have given him the best possible view of how the disputed land was being used.

The next 10 years

21. The Plaintiff's evidence as to what happened after his in-laws purchased the property was of little direct significance to rebutting the Defendants' adverse possession claim. Some of the key elements of the testimony were not altogether convincing. In particular the Plaintiff and his wife denied completing the excavation of Lot 14 which was started in or about 1988, because of a complaint by the Steedes made to the Plaintiff's father. They insisted that this was simply because the wife changed her mind about living so close to the Steedes. The Defendants' suggestion that this work was stopped because a member of the Steede family challenged their right to the disputed property seemed inherently plausible in light of subsequent events. But while what happened at this stage may be important to the parties, it has little direct bearing on the legal issues to be determined by this Court.

22. Mrs. Wilkin stated that she did not remember seeing any Steede activity at all on the disputed land since 1967. Her daughter made a similar averment in her witness statement which she qualified under cross-examination. The fact that Mr. and Mrs. Wilkin after living in the Swansbay Hill area since 1967 proceeded to purchase Lot 14 in 1984 does, however, provides some support for the broad purport of the testimony the Plaintiff, his wife and mother-in-law gave. Namely, the Plaintiff's in-laws were not aware that the Defendants either (a) regarded the disputed land as their property, or (b) had a credible adverse possession claim, when they purchased it from a third party.

The Defendants' evidence

23. The Defendants, Betty Steede and her sons, adduced evidence through nine witnesses in support of their adverse possession claim. Most of witnesses were close family members of the 1st Defendant. The distinct impression that one gained was of a family with considerable clan loyalty so it is obvious that their evidence (like that of the Plaintiff and his family members) must be treated with some caution save to the extent that it is supported by other evidence.

The first 20 years

24. Betty Steede is the granddaughter of David and Wilhelmina Steede who admittedly purchased Lots 11 and 12 in 1958. Born in 1957, she would have been only 21 when the limitation period she relies upon expired in 1978. Nevertheless, she testified that the disputed land was always regarded as Steede land and was used regularly as such. She stated that most of the children in the neighbourhood played with her and her family on the hill, although some were "too stuck-up" to join them. The Plaintiff's wife was not allowed to play with them. She took many of the pictures produced and explained what they showed. Under cross-examination, she described her Uncle Ed's hut as being near the stone structure at the top of the hill. She also described various pathways.

25. Her cousin Gail Calderon was born in 1952 and remembered moving into the Steede house in 1958. She moved out of #12 Swansbay Hill in 1973. She remembered a play house built by the boys and that it was blown down at some point. Although neighbours used the hillside regularly, she was adamant that it was understood to be Steede property and regarded by the family as part of their yard. Ms. Calderon also admitted that they flew kites usually at the top of the hill on the east side, although this would vary depending on the wind direction.

26. Norris Edward Steede (Betty Steede's Uncle Ed) was born in 1949 and lived in the Steede home from 1958 to 1986. He stated that the hillside was treated as part of the family's yard, but conceded that the only area he personally cleared was a pathway leading down the hill to the east of #12 Swansbay Hill. In about 1964 he built a shed which remained in place for about 5 years. Nobody else built sheds on the hillside. He suggested this was constructed at the top of the hill to the east of the Plaintiff's house, the only witness to locate it there.

27. William "Moody" Steede was born just over a month before the 1958 conveyance and has lived in the Steede house for 50 years. He recalled his grandfather having a chicken coop on the western side of the old chimney at the top of the hill near the boundary with Northlands School where the house was[4]. He built a playhouse near where his uncle built a shed. He appeared in his oral evidence to locate his playhouse on the bank near the house; in his witness statement he had placed in the middle of Lot 14. He also described a diagonal path crossing the hillside which he said he cleared himself as he cleaned his bike on the western boundary midway down Lot 14. He kept goats after his grandfather's death as late as Hurricane Emily in 1987.

28. One of the most important family members to testify was the oldest Steede witness, Betty Steede's Uncle Kelvin Steede born in 1934. He was almost 24 years old when his parents purchased the property and recalled the agent, Mr. Dunstan, showing them the property. In his witness statement, Mr. Steede described what he understood they purchased to encompass both Lots 13 and 14. Yet he claimed to have seen the lot plan at some point; and this would not have given the impression that Lot 13 had been conveyed.

29. Under cross-examination he testified that the real estate agent suggested that both Lots were included in the purchase. However, when recalling the precise words the real estate agent used, he recalled as follows. Firstly, he believed the lot plan attached to the 1958 Deed was what he and his parents were shown by Mr. Dunstan, the real estate agent. Secondly he believed the agent said that Lots 13 and 14 came with Lots 11 and 12. Thirdly, Mr. Dunstan "*stated there was a small piece of property below the hill which belonged to Mr. Peets. It was not even large enough to build a shed on. At the time I think you needed 5000 square feet to build a house.*" In fact Lot 13 on the plan in question is shown as owned by a

[4] In his witness statement he had stated that the coop was actually on Lot 14.

Mr. Peterson and only Lot 14 (as attached to the Deed) was shown as being conveyed together with Lots 11 and 12. Mr. Steede himself worked in real estate for some 10 years at a later juncture.

30. Based on the measurements on the plan attached to the 1958 Deed, Mr. DeSilva calculated that each lot was approximately 1/20th of an acre, the two combined 1/10th of an acre. It is a notorious that the standard lot size in Bermuda used to be 1/8th of an acre. If the agent was referring to a lot of 1/10th of an acre as opposed to 1/8th, this would not be dramatically smaller than the standard lot size. Bearing in mind that the lot plan attached to the subsequent conveyance only purported to convey Lot 14 together with Lots 11 and 12, it seems plausible that the agent prior to the sale described Lot 14 as the extremely small and almost useless part of the total property conveyed. By my own calculations the plan appears to show Lot 14's measurements as 55 feet by 42.5 feet or 2337 ½ square feet. Lot 13 is shown on the plan as having similar dimensions meaning a combined square footage of 4675 square feet. This would be only marginally too small, by Mr. Steede's account, to build a house on. Assuming it takes 43,560 square feet to make an acre, two lots totalling 4675 square feet represents an area slightly larger than 1/10th of an acre and slightly smaller than 1/9th of an acre. The old and modern pictures of the disputed land as a whole are wholly inconsistent with both lots 13 and 14 together being described, even with some exaggeration, as "too small to build a shed on".

31. Accordingly, the most that the Defendants can potentially extract from the important evidence of the only witness who was an adult when the 1958 conveyance took place is as follows. Betty Steede's grandparents believed (as she herself did 45 years later) that they had purchased Lot 14 together with Lots 11 and 12 because this is what their Deed of Conveyance purported to convey to them.

32. Gregory Talford was the last "family" member to testify before the 1st Defendant herself. He is the father of Kwame Steede (2nd Defendant), Betty Steede's apparently personable son who featured as a young boy in several photographs. Mr. Talford gave his evidence in a very straightforward and credible manner. He described the location of the old chimney as on the boundary of Lot 12, consistently with what appeared likely to be the position having regard to the photographic evidence. He placed Ed Steede's hut to the west of the old chimney near the top of the hill under cross-examination. In examination –in-chief, he placed both this hut and the boy's structure on the western boundary of Lot 14. He conceded the old chimney was probably on Lot 12. He did not remember a chicken coop at all, but recalled goats being kept near the house on the hill but grazing all over the disputed land. Mr. Talford confirmed that the Steede children treated the disputed land as their own, as did the other defence witnesses. However there was no suggestion that he was eager to shape his answers to suit the Defendants' case and he differed from other defence witnesses on more than one contentious issue.

33. Clyde Cannon was technically independent but was clearly a close family friend of the Steedes. He was born in 1954 but based his evidence on memories of the neighbourhood starting around 1960. He recalled hunting for lizards with slingshots in the tall grass on the hillside and gathering under a tree (which he effectively described as the playhouse) at the bottom of the hill. He remembered goats being kept on and off, a couple of dogs and a chicken coop up by the house. He could not remember chickens after David Steede died. He also confirmed that it was "taken as such" that the disputed land belonged to the Steedes.

34. Derek Wellman was another close neighbour born in 1949 and a contemporary of Ed Steede. He lived in the neighbourhood from his birth until 1989. He recalled pathways on the hillside and assuming that the disputed land belonged to the Steedes.

35. Mark Basden was the last independent witness for the Defendants. Born in 1952, he lived at #6 Swansbay Hill, now the Plaintiff's home, immediately to the north of the disputed land between around 1964 and 1967. He remembered some for of shed or similar structure on the western boundary of Lot 14; he also recalled the Steedes having goats on the hillside. Under cross-examination he admitted to uncertainty as to precisely where the shed was in boundary line terms.

The next 10 years

36. Various witnesses for the Defendant (principally Betty Steede and Kelvin Steede) stated that the excavation the Plaintiff initiated in or about 1988 removed the old chimney and wall ruins which were at least partially located on Lot #12. Ms. Steede denied ever seeing the fence the Plaintiff says he erected along the southern boundary of the disputed land after it was acquired by his in-laws. Mr. Kelvin Steede testified that his mother complained of the excavation after which he spoke to the Plaintiff's father warning him that any structure the plaintiff built on Steede land would belong to them. He was unequivocal that this happened, in the face of vigorous cross-examination by Mr. Doughty.

37. It was common ground that in or about 2002 some discussions took place between the Plaintiff and the Steedes about he ownership of the disputed land. The differences between the opposing versions of precisely who said what at this stage do not need to be resolved for the purposes of this case. It seemed obvious to me that Betty Steede's grandparents must have believed they had purchased Lot 14 as well as Lots 11 and 12 in 1958. Their purported paper title to this portion of the disputed land under the 1958 deed seemingly convinced Betty Steede's conveyancing attorneys in 2003 that she could acquire good title to Lot 14 under the April 4, 2003 conveyance by which the 1st Defendant purchased the family property from her family's estate.

38. The Defendants' ultimate remedy, should their adverse possession claim fail, may well be to assert a separate claim in negligence against their conveyancing attorneys. This is because their litigation attorneys were bound to concede that no valid paper title to Lot 14 was conveyed under the 2003 Deed.

Legal findings: what the Defendants must prove to make good their adverse possession claim

39. The law related to the evidence required to prove an adverse possession claim is shaped by the following practical considerations. The whole framework of private property ownership would be thrown into chaos if people with valid legal title to land could be easily displaced by trespassers or squatters. There is obviously a strong public policy interest in protecting persons who have acquired valid legal title to real property from having their property rights being usurped by trespassers bold enough to take advantage of the fact that the true owner is not occupying their property. There is a countervailing legal policy which holds that if the true owner permits a trespasser to use his property for many years, the trespasser's extensive use of the property will (at such point as Parliament may determine to be the limitation period) will extinguish the original owner's title. The original owner is effectively treated as having abandoned his title if he has permitted the trespasser to treat the property as his own for 20 years.

40. The tension between these two opposing legal policies has resulted in rules designed to assist both courts and property owners to determine what physical acts in connection with somebody else's property if not interrupted for 20 years will extinguish the owner's title. These rules state certain basis principles the application of which may vary greatly depending on the type and location of property to which the adverse possession claim relates. The present case, subject to one exception, raised no controversy as to the content of the applicable legal principles; rather, the real dispute was how the principles ought to be applied to the facts of the present case.

41. It was common ground that the Limitation Act 1984 did not apply to claims prior to the entry into force of this Act. Sections 2, 3(a) and 30 of the Real Property Limitation of Actions Act 1936 provide as follows:

> "2. *After the commencement of this Act no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action , has first accrued to some person through whom he claims; or if such right has not accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, has first accrued to the person making or bringing the same.*

> 3. *In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say,*
>
> > *(a)when the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; ...*
>
> *30. At the determination of the period limited by this Act to any person for making an entry or distress, or for bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action, respectively might have been made or brought within such period, shall be extinguished.*"

42. Mr. DeSilva in his written submissions accurately summarised the two essential legal requirements for proving adverse possession as follows:

> "*1. <u>Factual possession</u>- an appropriate degree of physical control given the circumstances; and*
>
> *2. <u>Animus possidendi</u> - requisite intention to exclude the world at large.*"

43. Mr. Doughty very properly made the following text authority available to the Court which was extremely unhelpful to one aspect of his client's case. In paragraph 9.14 of Stephen Jourdan's '*Adverse Possession*'[5], the learned author states in paragraph 9-13 a proposition which I accept:

> "*It follows that, if the squatter does believe, erroneously, that he owns the property, that clearly constitutes the necessary <u>animus</u>.*"

44. As far as Lot 14 is concerned, is it open to the Court to find that the requisite intention has been proved on the basis that it is clear that the Defendants' predecessor in title purportedly acquired that portion of the disputed land under the 1958 Deed? Is it only necessary to consider whether the extent of their use of the land manifested an intention to exclude the world at large as regards Lot 13? It

[5] (Butterworths: London, [ ])

is arguable that the dominant question which has to be resolved as regards both Lots 13 and 14 is whether the Defendants' predecessors in title were factually in possession of the disputed land. This was the first and most important legal point of principle which counsel disagreed upon, so much so that they requested an opportunity to tender supplementary submissions on this issue. Mr. Doughty 's authorities dealt both with this question and (as considered below) the separate question of the factual elements of possession.

45. The Plaintiff's counsel further confirmed the ultimately obvious legal position to be as follows. Where the adverse possession claimant establishes that he believed he was the legal owner, this merely makes it easier to conclude that he intended to treat the disputed land as his own. The claimant must still go further and prove that he did actually enter into factual possession of the land. The Plaintiff's counsel aptly relied upon the following dictum of Stuart –Smith LJ in *Newlands (Charmouth)Ltd.-v-Langran* (unreported), July 14, 1989:

> "*Although intention to possess is relevant, belief as to ownership is not sufficient in the absence of acts of possession.*"[6]

46. The Defendants', in their supplementary submissions, happily agreed that a mistaken belief on the part of a trespasser that he was the true owner clearly reduced the evidential threshold for proof on the mental element of adverse possession. However, Mr. DeSilva was compelled to argue, without reference to authority, that a mistaken belief could be taken into account in lowering the evidential threshold for factual possession as well. Despite the absence of authority on this point, I find that where an adverse possession claimant had at the material time a mistaken belief that he was the true owner may, in certain borderline cases lower the evidential threshold not just for proving the mental element of possession, but the elements of factual possession as well.

47. Mr. Doughty also submitted without dissent that the leading Bermudian authority on adverse possession under the 1936 Act is the Court of Appeal decision in *Wilson-v-Mackie* [1990] Bda LR 7 where Harvey da Costa JA at pages 10 to 12 of his judgment cited with approval the following passages from *Powell-v-McFarlane* (1977) 38 P & CR 452 at 470-472:

> " '(3) *Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land,*

[6] Transcript, page 6.

absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. 'What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants'; West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessor titled is sought may be evidence of possession of the whole. Whether or not acts of possession done on pars or an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalize with any precision as to what acts will or will not suffice to evidence factual possession. On the particular facts of Cadija Umma v.s. Don Manis Appu the taking of a nay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the Red House Farms case, mere shoo-ting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting; per Cairns. Orr and Wiker L. JJ. Everything must depend on the particular circumstances, but broadly, I think that must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else had done so.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley M.K., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realize that, at least until he acquires a statutory title by possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow.

> *The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. 'This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.' (emphasis added).*"

48. The second controversial point of legal principle advanced by Mr. Doughty was as follows. He sought to rely on the doctrine of implied license according which possession of vacant land which was not altered in a manner inconsistent with any development plans of the owner would not be treated as adverse. This doctrine was abolished by statute in England in 1980 and in Bermuda in 1984. However, this doctrine had been previously disapproved by Slade J *Powell-v-McFarlane* (1977) 38 P & CR 452 at 484, before it was repealed by statute in 1980. As Slade LJ, he repeated these observations in *Buckinghamshire CC –v- Moran* [1990] 1 Ch 623 at 627, noting that the implied license authorities appeared to him have been inconsistent with the natural and ordinary meaning of the words "possession" and "dispossessed", used in the old and new legislation. Nourse LJ (at page 645) also rejected the conventional wisdom (generally regarded as having been established by *Leigh-v-Jack*, 5 Ex.D 264) that the adverse possession claimant had to use the land in a way which was inconsistent with the development plans of the true owner.

49. These views have been approved by the Court of Appeal for Bermuda in a case to which the 1936 Limitation Act applied: *Lewis and Lewis-v- Swan* [1999] Bda LR 10. An alternative argument was advanced in this Court that the adverse possession claim failed because the land could be regarded as being held for some future purpose by the true owner and the claimant had done nothing to the land. Sir Derek Cons giving the judgment of the Court of Appeal observed in relation to this argument[7]:

[7] At page 5.

"*We interpose to observe that the alternative submission was put forward having regard to a view of the law which was in fact rejected in Moran's case(see Slade L.J. at page 637 et seq. and Nourse L.J. at page 645 et seq.*)

50. Accordingly I find that the Defendants need not prove that they altered the disputed land in a manner inconsistent with some unidentified development plans of the Plaintiff or his predecessors in title. As Bell J (Acting) (as he then was) held a first instance in *Swan –v-Lewis and Lewis*, Supreme Court Civil Jurisdiction 1997 No. 331[8], assuming the implied license theory to be correct, it can have no application in the absence of evidence that the adverse possession claimant was aware of some special purpose for which the true owner was keeping the disputed land.

51. The third controversial legal point is as follows. Mr. Doughty in his reply submissions contended that the requirement that the trespasser must make "*it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can*" encompassed an obligation to prevent other persons from traversing the land. In my judgment the only person the adverse possession claimant must manifest an intention of excluding is either (a) the true owner, or (b) any other person seeking to assert ownership rights over the disputed land. Permitting people on a regular basis to take short-cuts across the land would at most create an easement over the land, not a competing ownership claim. In the present case (where the disputed land was vacant and not enclosed) the pertinent evidence would be not that relating to short-cuts, but any evidence shedding light on how third persons engaged in acts of ownership on the land. In the event, there was no suggestion that any third parties engaged in acts of ownership at all.

52. In the Plaintiff's supplementary submissions, however, counsel advanced two additional authorities which shed light on the quality of acts required to constitute evidence of factual (adverse) possession for in a more insightful way. Firstly, *Tecbild-v- Chamberlain* (1969) 20 P &CR 633, an English Court of Appeal decision, suggests that merely allowing children to play and animals to be tied on vacant land are acts too trivial to dispossess the true owner, even though such owner never used the land at all during the requisite period. By way of contrast, a borderline claim was upheld in *Treloar-v-Nute* [1977] 1 All ER 230 (CA) where soil was put in a gully across the disputed land, in addition to animals grazing on and motorcycles riding across the land the claimant believed he actually owned[9]. The appellate court considered that the only material acts of possession were constituted by "*the change in the surface of the land by placing spoil in the gully, thereby setting in train the leveling of the land on which a bungalow could be*

[8] Judgment dated September 16, 1998, pages 12-15.
[9] This case was not relied upon by the Plaintiff but was distinguished in *Dear-v-Wood* (unreported), July 25, 1984 (English Court of Appeal).

built."[10] No or no convincing basis for rejecting the requirement that only certain acts were capable of constituting evidence of possession (as illustrated by *Tecbild-v- Chamberlain* (1969) 20 P &CR 633) was advanced by the Defendants' counsel in his supplementary submissions.

53. I accept that no question of proving an intention to displace the true owner arises on the present facts as far as Lot 14 is concerned. However, I find as a matter of law that mere evidence of children playing on and animals grazing on vacant land, without more, will not ordinarily constitute sufficient evidence of factual possession to support an adverse possession claim. *Tecbild-v- Chamberlain* (1969) 20 P &CR 633 dealt with facts remarkably similar to those in the present case. The adverse possession claimant lived in a house adjacent to two vacant lots of land and relied primarily on the fact that her children played on the vacant lots and that ponies were tethered there, as well as contending that the lots were partially enclosed by a fence erected by some unknown person at an unknown time. The Court of Appeal upheld the County Court's rejection of the adverse possession claim on the basis that (a) the claimant had no belief that she owned the vacant lots, and (b) no evidence of use of the land in a manner inconsistent with the true owner's future development plans had been adduced. As Sachs LJ observed [11]:

> "*To my mind, the acts relied on in this case by the defendant were not even equivocal in that they did not appear to provide an equal balance between intent to exclude the true owner from possession and an intent merely to derive some enjoyment from the land wholly consistent with such use as the true owner might wish to make of it. The scales tipped clearly toward the latter conclusion.*"

54. In the same case, Fenton Atkinson LJ held[12] as follows:

> "*I cannot think for a moment that by letting her children play on the land and exercise their ponies upon it Mrs. Chamberlain was taking possession of the land or bringing about a state of adverse possession. There was here no more than a series of minor and harmless acts of trespass which in no way altered or affected the land or in any way interfered with any future use of the land contemplated by the plaintiffs.*"

55. Although I have rejected the proposition that as a matter of law an adverse possession claimant in respect of undeveloped land must prove alteration of the land in a manner inconsistent with the owner's development plans, this case is

[10] Sir John Pennycuick at page 234b.
[11] Transcript, page 7.
[12] Transcript, page 8.

still instructive in terms of highlighting the need to distinguish between "*a series of minor and harmless acts of trespass*" which would not be viewed as inconsistent with the true owners rights and acts which constitute acts of possession. In other words, to qualify as possessory acts, the use of the land relied upon must be more consistent with acts which only an owner would perform than with acts a mere trespasser would perform. Having regard to the nature of the disputed land in the present case, I find as a matter of law that children playing and animals grazing, even combined with a belief on the part of the children's parents (or grandparents) that the claimant was the true owner of the disputed land, do not constitute without more evidence of adverse possession.

56. In summary, I find that the Defendants must prove in terms of factual possession that their predecessors in title were, at the material time (and in the words of Slade J as approved by the Court of Appeal for Bermuda in the passage fully set out above): "*dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so.*" Whether they have succeeded in doing so does not depend on any abstract legal formula, but depends on "*the nature of the land and the manner in which land of that nature is commonly enjoyed*".

57. In terms of proving the intention to possess disputed land, or *animus possidendi*, the Court requires[13] "*clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world.*" However such affirmative evidence of intent is not required where the claimant establishes that he mistakenly but genuinely believed he held paper title to the disputed land (or any material portion thereof).

Findings: factual possession

58. The facts in the present case do not as a matter of first impression suggest an obviously strong case of factual possession. The disputed land was admittedly not enclosed in any way. The disputed land was admittedly neither cultivated nor maintained to any substantial extent. The Defendants contend that children were allowed to play on the hillside, and goats were allowed to graze on it. Various people were permitted to cross over it. Many people used it for recreational purposes, but it was generally understood by anyone who did so that the hillside was Steede property. Sheds and/or playhouses were temporarily erected on the land and an old car was abandoned there. Grass was cut on the disputed land from time to time. The Plaintiff contends that the hillside was used as open space by all residents of the area equally, and was not treated by the Steedes as part of the adjacent property they undeniably owned at the top of the hill.

[13] In cases where the adverse possession claimant does not believe he has a good paper title.

59. It is essentially common ground and I am bound to find having regard to all the evidence that the disputed land adjoined Lots 11 and 12 at the top of the hill and sloped gently down to the property now owned by the Plaintiff. There was no physical boundary between the property at the top of the hill and the adjacent hillside to the north. But there is no clear evidence that the hillside was ever cleared in such a manner that it a represented an obviously visible extension of the yard surrounding the Steede homestead. Nevertheless there was in a very general way, at all material times between August 1958 and August 1978, a connection based on proximity between the house on the hill and the largely "wild" hillside.

60. I further find that there was a pathway, before the Plaintiff's house was built at the bottom of the hill in the mid-1960's, across the southern boundary of No. 6 Swansbay Hill on land which was flat. This probably corresponded in a general way to the roadway shown on the plan attached to the 1958 Deed. It likely constituted a visible informal boundary between the disputed property and what became the Plaintiff's property in 1999. Once the Plaintiff's house was built, a wall was cut along the northern boundary of the disputed land, and a new pedestrian pathway emerged along the bottom of the hillside which was by now even more clearly separated from No. 6 Swansbay Hill because of the natural stone wall. By way of contrast, there was, with one qualification, no visible physical divide between Lots 11 and 12 where the Steedes lived and Lots 13 and 14 on the hillside.

61. Because of the remnants of an old wall and chimney extending from the house roughly onto the southwest boundary of the disputed land and other obstructions referred to by Ms. Steede, it seems unlikely that Lot 14 was routinely accessed from Lot 12. The house faced east and it seems most likely that for most of the relevant period, the disputed land was most easily accessed from the eastern side of the house. Most of the social activities of the family, including kite flying, more likely than not took place more on the top of the hill than on the hillside which was never cleared so as to become a natural extension of the homestead's yard. To this extent, there was a visible divide between Lots 11 and 12 on the top of the hill and the largely wild hillside comprising the disputed land for all or a material part of the period to which the adverse possession claim relates. Nevertheless both chickens and goats were primarily housed on the western side of the house on Lot 12.

62. I find that David Steede kept a chicken coop, but on Lot 12. I find that the hillside was occasionally used by the Steede family for social activities, and that the Steede children and various other children from the neighbourhood played there on a regular basis. Occasionally, one or more Steede matriarch would oversee such activities. I find that David Steede and later Moody Steede used the disputed land as a grazing area for goats, although this use of the land more likely than not gradually diminished after the death of David Steede in or about 1974. I find that a trash barrel was placed on the south eastern portion of the disputed land by one of the Steedes, but this was at the request of "Aunt Celeste", who lived in No. 10

Swansbay Hill. A car was abandoned in the same general area, which the Steede children and their friends played in. None of these activities in my judgment carry any great evidential weight in terms of evidencing acts of ownership in light of the legal findings which I have reached above.

63. For most of the period in question (1958 to 1978) in the neighbourhood in question, I find that it was not unusual for owners of vacant land to allow pedestrian traffic to routinely cross it. It was also not unusual to leave such vacant land un-manicured and unfenced even though it was in a residential area. Moreover its clear from pictures taken by the 1st Defendant in the late 1970's, that the Steede family did not at this point expend resources on home maintenance to the same extent that Mr. Simmons' modern photos demonstrate Ms. Steede does today. The somewhat wild and natural state of the hillside on which the house was perched was therefore not a stark contrast to the condition of the house and yard area immediately surrounding it. If the house and its immediate environs was a candidate for a home beautiful magazine, the proposition that the hillside with its uncut grass and untrimmed trees was in the possession of the owners of the house would be more improbable than it is in the circumstances of the present case.

64. I infer from the undisputed evidence that the 1st Defendant's grandparents had a large family and limited means; they purchased the property in 1958 as a mature couple who were by that date already grandparents. At least one son was born in the middle of the Second World War. Their attitude to expending resources on property development would likely be far more conservative than a generation born into the comparative prosperity of the post-war era.

65. By the time the Plaintiff moved into No. 6 Swansbay Hill and his in-laws had purchased Lot 14 the pictures he took in the mid-1980's show the hillside (seen from below) as heavily overgrown. This suggests that as the 1st Defendant's generation became adults, the hillside was hardly used at all. The late 1970's and early 1980's pictures she took from the house suggest far less vegetation on the hillside at that point. However, it was only after the Plaintiff's in-laws purchased Lots 13 and 14 in 1984 that any possession on the Steede's part was interrupted by (a) possibly the erection of a fence along the southern boundary of the hillside near the house on a date uncertain in or about 1986, and (b) unarguably by the excavation in or about 1988. Mr. DeSilva submitted that it appeared the Plaintiff was attempting to establish an adverse possession claim of his own by these excavations in 1988.

66. There is no direct evidence that the Plaintiff at this juncture had any knowledge of the Defendants' adverse possession claim. However assuming in his favour that he did not have any such knowledge, his erection of fence near the open northern boundary of the undisputed Steede property at the top of the hill at a time when he was contemplating developing the property strongly suggests that he felt the need to rebut an appearance that the hillside formed part of the Steede property at the top of the hill. This also suggests that even in its undeveloped state, the hillside

running down from the brow of the rise on which the Steede homestead was constructed appeared to be a natural extension of Lots 11 and 12. After all, it is essentially undisputed that No. 6 Swansbay Hill had both (a) a separate legal title and (b) was physically separated by a pathway and then a wall from Lots 13 and 14 throughout the crucial period. Be that as it may, some consideration should perhaps be given to what the status of the hillside was before the 1958 Deed was executed.

67. There is no clear evidence of when the Steede House was built. It is clear that in 1958 it was sold purportedly together with Lot 14, the western portion of the hillside. It is unclear how it was realised in 1958 that Lot 13 had been sold to Mr. Peterson (in 1943) but nevertheless believed that Lot 14 had been retained by Mr. Bluck together with Lots 11 and 12. Until 1943, Arthur William Bluck owned Lots 11, 12, 13 and 14. Moreover, all of these lots had already been subdivided by this date as they are referred to as separate lots in the 1943 Deed. If by 1958 lots 11, 12 and 14 were being sold as part of a single package, it is possible that at some point after 1943 Lot 14 was used by the occupants of the house on Lots 11 and 12 as part of their property resulting in the mistaken assumption after Arthur Bluck's death that Lot 14 like Lots 11 and 12 had not been disposed of during the testator's lifetime. The evidence adduced does not support any positive finding in this regard, however.

68. Nevertheless I find based on Mr. Kelvin Steede's evidence, and consistent with the 1958 Deed itself, that when the Steedes made their purchase the agent told them that the hillside lot they were purchasing was too small to build on. It seems probable that Lot 14 was regarded as having no commercial value by itself and because of its physical proximity to the house on the hill could only realistically be sold together with the hilltop property. If, as I find occurred, the Steedes believed that they had acquired paper title to Lot 14, does this makes it more plausible that they would have entered into factual or physical possession of that part of the hillside at the very least throughout the period in question? I initially regarded this factor as pivotal in terms of giving solidity to the Defendants' otherwise somewhat shadowy oral evidence of how the disputed land was used. But having regard to the applicable law, the crucial question remains whether they used the disputed land (or simply Lot 14) in a way which would have made it obvious to the world (assuming the world was looking) that they were treating the land as their own. Moreover, it is equally plausible that because the Steedes believed they owned Lot 14 and were unaware of any competing title they would have seen no need to demonstrate their ownership of the land, just as the Plaintiff's predecessors in title apparently ignored it altogether for over 20 years. Had the Steedes been aware of a competing claim to the disputed land, they could presumably with little difficulty or expense taken various steps to strengthen their claim.

69. Nevertheless the belief that they actually owned Lot 14 does in a general sense make it more credible that the Steedes would have used this portion of the land as

their own, even if not necessarily manifesting this intention as the law requires. The Defendants' claim is in many respects not even a borderline case as most of the evidence of use of the disputed land relied upon (children playing, the flying of kites, the grazing of animals and the dumping of a car) carries very limited probative weight. The only evidence which is potentially capable of supporting the claim is that relating to three matters.

70. Firstly, there is the evidence relating to the erection of structures (albeit of a temporary nature) on the western boundary of the disputed land, being vacant land which had (to some extent at least) the visual appearance of being more naturally connected to the Defendants' property than to the Plaintiff's undisputed property at the bottom of the hill. If the Defendants entered into possession and displaced the true owners for the requisite statutory period, it would not matter that the sheds were temporary in the absence of evidence that the Plaintiff's predecessors in title either (a) challenged the relevant acts, or (b) regained possession. Secondly, there is the evidence that all or a portion of the disputed land was cleared from time to time (not necessarily for the entire 20 year period) would also potentially constitute an act of ownership supporting a finding of factual possession or dispossession of the Plaintiff's predecessors in title.

71. The Defendants relied on two specific instances of leaving items on Lot 13 as illustrating acts of ownership over and above the generalised evidence of grazing of animals and social activities said to have taken place over the hillside generally (e.g. children playing under the berry tree in the middle of the hillside and possibly straddling both lots 13 and 14). One was an abandoned car which the Steede children would play in. William Moody Steede in his witness statement placed this in the middle of the hillside straddling Lots 13 and 14 near the berry tree. Betty Steede located the car on lot 13 near the boundary with Lot 14. In my judgment where somebody leaves an abandoned vehicle is not cogent evidence of an intention to possess the land in question. While it is not unheard of for people to use their own property as a dumping ground, and accepting that dumping practices may well have changed with increasing congestion of living space in Bermuda, the location of the abandoned car is at the very least consistent with the owner regarding the site of the relic as somebody else property. Further, the car did not even belong to one of the Steedes; it is said to have belonged to a boyfriend of the 1st Defendant's mother.

72. I accept the Defendants' contention that Moody Steede placed a barrel for burning trash on Lot 13. Despite the inconsistency in paragraph 6 of his witness statement as to where the barrel was located, I find as a result of his oral evidence that this was placed on the eastern part of Lot 13 near Aunt Celeste's house either at her request or for benefit. Even if Moody himself occasionally used the barrel to burn trash, the fact that it was originally placed there at a neighbour's request can hardly be a clear manifestation of an intention by the Steede family to treat Lot 13 as their own property. By way of contrast the clearest manifestation of an

intention to assume ownership of the hillside took place on Lot 14 near the boundary with Northlands School. This is where Moody Steede testified both he and his Uncle Ed erected a playhouse and shed respectively. Mr. Basden located the shed clearly on Lot 14 and colourfully remembered it being used as a smoking den by his older brother and one or more of the Steede boys. He described seeing smoke rising from the shed structure. Edward Steede himself described building a shed or club-house where parties were held. His witness statement omits any mention of where on the hillside this shed was located. In his oral evidence, he located the shed near the south-eastern boundary of Lot 13 at the top of the hill. The precise location of this shed is of some importance and is dealt with in further detail below.

73. Much was made by the Plaintiff in evidence and by his counsel in cross-examination of the fact that no protest was made by the Steedes after a fence was erected and/or after the excavation was carried out. This line of argument went as follows. If the Steedes genuinely believed that they were or had become legal owners of the disputed land, they should have immediately raised a hullabaloo. The Plaintiff denied knowledge of any approach by Kelvin Steede to his father warning the Plaintiff that he should not build on Steede property. I accept the evidence of Kelvin Steede that his mother complained to him about the excavation and that he had an informal discussion with the Plaintiff's father who was his own generation and known to him. It seems to me highly likely that the Plaintiff discovered that the Steedes had a serious competing claim to at least part of the hillside not long after this discussion in or about 1988 and that this contributed to the decision he and his wife made to postpone building on the disputed land.

74. In 1988 when the excavation was carried out (quite possibly removing the old chimney and wall which extended from Lot 12 to or just across the southern boundary of Lot 14), the hilltop land was owned by the elderly Wilhelmina Steede and the house at the bottom of the hill by the mature Wilkins (Mrs. Wilkin would have been in her 50's and Mr. Wilkin possibly older). The failure of Wilhelmina Steede to launch a contentious boundary dispute does not weaken the natural inference which arises from the 1958 Deed; namely, that she and her husband from the date of the conveyance in 1958 had every reason to believe that they had acquired good paper title to Lots 11, 12 and 14. Witnesses on both sides were cross-examined about discussions which seemingly took place about the ownership of the hillside lots in or about 2002. This has no meaningful bearing on whether or not the Steedes used the disputed land with the requisite intent between 1958 and 1978. I see no need to make any positive findings about precisely what occurred at this stage.

75. The first question which falls to be considered is whether or not the first shed was erected more than 20 years before the Plaintiff erected the fence in or about 1986 at the earliest or carried out the excavations in 1988 at the latest. Only if I find

that it was is it necessary to consider whether the erection of the shed should be accepted as sufficient proof of an overt act of ownership in respect of some or all of the disputed land. On balance I am satisfied that a semi-permanent shed was erected between 1964 and 1967 by Ed Steede and remained in place for approximately 5 years. I also find that that the clearest evidence adduced by the Plaintiff of interrupting any possession of the disputed land exercised after the shed was erected was the excavation work he commissioned in 1988. So if the Defendants were in possession of the disputed land (or either one of the lots) by virtue of the erection of the shed, such possession was uninterrupted for the requisite period of 20 years. This leaves the important question of whether the shed was erected on the disputed land in such a way that made it apparent that the person who erected the shed and was using it was in possession of all or any material portion of the disputed land. The inconsistency of the Defendants' witnesses in a case where their evidence is wholly dependent on the testimony of family and friends is clear proof that the Defendants have not sought to colour their evidence in any material way and must be commended.

76. Betty Steede herself referred in her Witness Statement to children building temporary wooden structures which would not stay up for more than a day. She recalled her Uncle Ed having a hut or shed on the hillside but is unclear as to when it was erected. Gregory Talford recalled in about 1964 when he was 10 years old building "sheds and huts". He suggested that they would "*play cards, smoke cigarettes and just generally play in these huts.*" It seems somewhat implausible that this occurred when Talford was as young as 10 years old. Moody Steede recalled building a shed for his age-group to play in when he was around 10 years old in 1968 (he is four years younger than Talford). On the other hand, he also stated in his witness statement that he recalled his Uncle Ed built a bigger shed for himself and his friends to play cards in, which seems far more plausible. It is unclear whether this was as late as 1968 as well or at some earlier or later time. Such lack of clarity as to dates in relation to a time when the witnesses mentioned (and even the slightly older Colin Basden) were only children is entirely understandable and a credit to their general status as witnesses of truth.

77. So the best evidence as to when what appears to have been a fairly solid temporary structure was erected by Ed Steede would clearly come from members of Edward Steede's own generation. But even this evidence is not altogether clear. Norris Edward Steede, who all agree erected the structure, placed it somewhere entirely different to all other witnesses, locating it on the south-eastern boundary of the disputed land rather than the south-west. Mr. Ed Steede in his oral evidence stated that he erected the shed in around 1965 and that it was standing for about 5 years. This date estimate is broadly consistent with the recollection of the younger generation witnesses and Mr. Wellman, a contemporary of Mr. Moody Steede.

78. Ed Steede in his evidence-in-chief described being aged around 15 to 17 years of age when he erected a shed which (he stated under cross-examination) stood for as long as five years. He was born on New Year's Day 1949, so this estimate

would place the erection of the shed during the period 1964 to 1967. The most surprising thing about the evidence of the witness most likely to clearly recall where he himself erected the shed is that Ed Steede placed it at the top of the hill just north of the south-eastern boundary of Lot 13. Was he mistaken on such an important point? He was also quite positive that the area of the hillside that he personally cleared was just south of this area on the eastern edge of Lot 11, which admittedly belonged to the Steede family. Moody Steede claimed that he cleared this general area as well, which is wholly consistent with the undisputed fact that the front of the house was on the eastern side. Ed Steede had difficulty making sense of the plans he was shown in the witness box so it is entirely plausible that he was honestly mistaken when he suggested that his shed was near the front of the house. This would be an unusual place for a shed to be and no other witness recalled it being nearer Lot 13 than Lot 14.

79. Mr. Basden, a childhood friend of Moody Steede, described the shed (in his witness statement and in his oral evidence) as being at the "top of the hill" (like Ed Steede), only near the Northlands wall. In his witness statement he was unsure of the precise location but in his oral evidence located the shed on the western boundary of Lot 14. While he seemed positive about this assertion, which was admittedly consistent with the somewhat less reliable recollection of other younger witnesses, this would place the shed quite close to the back of the Steede house where Basden himself vividly described two nasty dogs being tied on long leads. Since he did not even use the shed, unlike his older brother and Ed Steede himself, it is not immediately obvious why his recollection as to precisely where the shed was located should be more reliable than Ed Steede's. Nevertheless, he was an independent witness who corroborated (a) the majority of the Defendants' witnesses in locating the shed on the western side of the property and (b) Ed Steede himself in placing the shed at the top of the hill, as opposed to on the hillside unequivocally on Lot 14.

80. Derek Wellman, a friend and contemporary of Ed Steede, made no mention of the shed at all in his witness statement. He ought to have been the second best placed person to identify where it was located. In his oral evidence-in-chief, he was not asked about the shed at all. At worst, for the Defendants, this suggests that his recollection was that the shed was not located on the disputed land at all, and so was deliberately not asked about it, with all references to the shed being deliberately omitted from his witness statement. At best Wellman's silence on the location of the shed serves to highlight how tenuous the Defendants' evidence is as to precisely where the shed was located. And the erection by Ed Steede of the shed was the strongest act of ownership on which the Defendants are legally entitled to rely. Rather than speculating as to why Derek Wellman was not asked about the shed, I simply note this fact as illustrating a lack of clarity in the Defendants' evidence on the precise location of the one semi-permanent structure said to be located on the disputed land.

81. However, it is noteworthy that one the Plaintiff's independent witnesses, Mr. Trott, described seeing a wooden box-like structure "near the top of the hill" on the western boundary of what was probably Lot 14, when asked in cross-examination whether he recalled seeing a shed. It is unclear when this was and whether this was Moody Steede's temporary shed (which he positively placed in the middle of Lot 14) or Ed Steede's semi-permanent structure (which he placed at the top of the hill). He described this not as a shed-like structure but as resembling an old shipping box. But he left the area in or about 1958 and returned to the area as a young man until around 1961. Since he left Bermuda at around 19 for three years to study abroad, returning at age 22 to commence self-employment in or about 1965 when Ed Steede recalls erecting the shed, it seems more likely than not that Mr. Trott had no occasion to see the shed at all. In any event, he was a witness who was an adult when the shed was erected who did not support the Defendants' case on this particular issue, albeit that he did not contradict it either.

82. However the crucial issue is not simply whether a semi-permanent structure was erected on some part of the disputed land for a period of up to 5 years. The crucial question is whether the erection of such shed (no weight in my judgment attaching to the more transitory playhouses erected by pre-teen or teenaged children) is evidence of possession of some or all of the disputed land. It is possible that Ed Steede's shed was erected in part on Lot 14, but I am, after careful consideration of all the evidence unable to find that it was located wholly or substantially on that portion of the disputed land in such a manner as to signify to the world at large that either Lot 14 alone, or, both of Lot 13 and 14, were in the possession of the Steede family.

83. The second category of alleged acts of ownership which was potentially significant was that relating to the clearing of the land. It is therefore necessary to formally record my findings in relation to the evidence of clearing the hillside. Regular clearance of the vacant lots would potentially have constituted an act of ownership. Edward Steede, whom I found to be generally very credible, was quite clear (and more so than in relation t the location of his shed) in describing clearing a route to the roadway from the eastern front of the Steede homestead. The area he described did not appear to involve the disputed land at all. Moody Steede, described a period of time (a) when he was either a child or a minor, or (b) less than 20 years before any adverse possession was interrupted by the Plaintiff's 1988 excavation). He recalled clearing a similar area (but possibly inside the eastern boundary of Lot 13) plus clearing a pathway to the western boundary of Lot 14 where he would clean his bike. This occurred when he went 16 in 1974. He also recalled building a playhouse in the middle of Lot 14 around 1968 when he 10 years old, but I am not satisfied that this structure was either (a) sufficiently permanent to constitute an act of ownership by the child's grandparents, or (b) erected more than 20 years before possession was interrupted in any event.

84. There was no basis for the Court to properly infer that the Steedes cleared a portion of the disputed land in a manner that signified an assertion of ownership over the entire disputed land. Nor was it open to the Court to conclude that any semi-permanent structure was erected wholly or substantially on any part of the disputed land so as to constitute an assertion of ownership by the Defendants' predecessors in title over all of the disputed land. The Defendants' adverse possession claim is in respect the entire disputed land, not a narrow boundary slice of it. So proof of acts of possession in the boundary area of the disputed land would not automatically constitute an assertion of ownership over the entire area concerned.

85. The third potential category of possessory acts was the asserted use of the land for recreational and social purposes by adult members of the Steede family. This evidence was somewhat marginal to the main thrust of the case, which was that pre-teen children played on the hillside and erected very temporary play-houses and that (for one five year period) a teenager erected a semi-permanent shed in which older children socialised. At all material times the age of majority was 21, because the Age of Majority Act 2001 did not became operative until November 1, 2001 lowering the age to 18 years. There was no or no convincing evidence that adult members of the Steede family used the disputed land on any sustained basis, as opposed to (perhaps) every Good Friday or occasionally.

86. I have also taken into account the fact that the disputed land was a hillside running down from the Steedes house on the top of the hill. It is true that it was at all material times probably more closely connected on its southern boundary to their property than to the Plaintiff's property below the cut-off at the bottom of the hill. But the best available evidence suggests that the boundary was never cleared between Lots 12 and 11 at the top of the hill and lots 14 and 13 on the hillside so as to make the disputed land obviously appear to be connected to the house on the hill. The area of clearance appears to have been immediately around the house on the hill and to the east, which was by common accord treated as the front of the Steede house. I am unable to place any material reliance on the mere proximity of the disputed land to the Steede property, in the absence of positive evidence of acts of ownership by or under the direction of adult family members on the disputed property itself.

87. Accordingly, the claim to factual possession is not proved and must be dismissed.

Findings: animus possidendi (the intention to possess)

88. The law does not assist trespassers to such an extent that an adverse possession claim can be made out merely by demonstrating that the claimants were in fact "*dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so.*" In addition, "*the courts will require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess,*

but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that has intended to exclude the owner as best he can, the courts will treat him as not having had the required animus possidendi and consequently as not having dispossessed the owner": *Powell -v- MacFarlane* (1977) P & CR 452 at 471-472.

89. Both counsel presented their respective cases on a "winner takes all" basis, which is essentially vindicated by the findings I have reached on factual possession above. Nevertheless, the facts of this case require the Court to distinguish the position between Lots 13 and 14 as far as the intention element of the Defendants' claim is concerned. It is true that in the vast majority of cases where the adverse possession claim relates to land under common paper ownership, both factual possession and the requisite intention need only be demonstrated in respect of part of the common parcel of land to extinguish the true owner's title to the whole. It is also true that the two lots here were not physically divided and that there is no clear basis on the evidence for construing the Defendants' factual possession as being limited to one lot or the other.

90. But the crucial factual distinctions in the present case are that I find as a fact that (a) the Defendants' predecessors in title only believed they had a valid paper title to Lot 14, and (b) although there is some (ultimately insufficient) evidence that Defendants' predecessors in title "*not only had the requisite intention to possess, but made such intention clear to the world*", this evidence is not sufficiently clear as regards any material portion of the entire disputed land.

91. In light of Kelvin Steede's evidence (and the related Deed of Conveyance), I am satisfied when Betty Steede's grandparents purchased Lots 11 and 12 in 1958, they believed they were purchasing Lot 14 as well. It is true that Kelvin Steede's actual evidence appeared to be that he believed that his parents were told that both hillside lots came with the two lots and house on the hill. If this was his recollection, I find that it was inaccurate. He admitted that he was told that one lot belonged to "Mr. Peets"; this is consistent with the fact that the 1958 Lot plan attached to the 1958 Deed actually showed lot 13 as being owned by "*Louis Peterson*" and showed Lot 14 only as being conveyed together with Lots 11 and 12. He also described very vividly the real estate agent describing the hillside lot the Steede's were purchasing with the hilltop house during a pre-sale visit to the property as "*not even large enough to build a shed on*". This somewhat sarcastic exaggerated statement sounds like the sort of observation that might plausibly be made in relation Lot 14, shown on the lot plan as being between $1/18^{th}$ of an acre and $1/20^{th}$ of an acre. It makes no sense in relation to both lots which had a combined acreage of only slightly less than the $1/8^{th}$ of an acre standard lot size, and which with excavation could likely be easily converted into a building lot (as occurred 30 years later).

92. I find this recollected fragment of a conversation long ago, recalled by the former real estate agent Kelvin Steede, particularly convincing because it did not directly support his niece's present claim to both Lots 13 and 14 and contradicted the assertion in paragraph 2 of his witness statement that "*the Property ran down the hill taking in lots #13 and #14 Swansbay Hill.*" If he were deliberately colouring his evidence to support her present claim, he would have either (a) omitted any reference to the lot being acquired being ridiculously small, and (b) explicitly claimed to clearly recall the agent saying that his parents were acquiring both lots. More importantly still, what the agent showing the property allegedly said was wholly consistent with the 1958 Deed which was subsequently consummated.

93. I am accordingly satisfied that from the date the Steedes moved into their Swansbay Hill home, they reasonably believed that they owned Lot 14 and knew that they did not own Lot 13. It is accordingly inherently probable that they would have intended openly to use Lot 14 as if they owned it, and less probable that they would have treated Lot 13 in the same manner.

94. At the end of the day, however, the evidence of factual possession in respect of Lot 14 (despite what appeared to be an arguable case of factual possession on the witness statements) fell short of the requisite threshold necessary to bring the question of intent into play. Had the Defendants' evidence clearly supported even a borderline case of factual possession of Lot 14, I would have upheld their claim in respect of the intention to possess with respect to Lot 14 alone. As regards Lot 13, or the disputed land as a whole, the evidence falls well short of demonstrating that the land was used with the intention required to support an adverse possession claim.

95. The Defendants' case was not that Lot 14 was treated as their own because they believed they had good title to it all. Their case was that they considered the entire hillside to be Steede property, although the basis for this belief was not substantive enough to bolster what was ultimately a tenuous case on factual possession. This suggests that the use of the hillside by the children and grandchildren of the Defendants' predecessors in title was not to any material extent based on any conscious reliance on the purported transfer to them of Lot 14 under the1958 Deed of Conveyance. Had this been the case, a clear distinction would (or should) have been made between the two portions of the disputed land. That this distinction was not seemingly made clear to the then children concerned makes it less plausible that their use of the hillside as a whole involved acts which were manifestly acts of ownership as opposed to trivial trespasses which an owner of the undeveloped land would be likely to forgive.

Summary of findings

96. The Defendants have not proved that their predecessors in title were in factual possession of the disputed land (Lots 13 and 14) on the basis that the land was under common ownership and they entered into possession of any material part of

the disputed land for 20 years without interruption. This is not because I reject their evidence as a whole, but because the quality of use which I accept took place on the disputed (children playing and animals grazing) are not legally recognised forms of possessory acts in relation to vacant land which is not in any other physical way being treated as if it belongs to the claimants.

97. The erection of a shed which stood for around five years (or indeed a chicken coop which was in place for possibly a longer period) would have potentially qualified, but there was insufficiently clear evidence that this was erected on (or substantially on) a specific portion of the disputed land at all. The clearing of a portion of the disputed land would also have potentially qualified as an act of ownership from which the requisite intent to possess could have been inferred. But here again, there was no clear evidence of clearing the disputed land in a relevant manner.

98. I accept that the Defendants' predecessors in titled must have initially believed they had good title to Lot 14, but this finding was ultimately academic because of the lack of clear evidence that the shed was erected on this portion of the disputed land. In addition, there was some evidence that adults used the disputed land for social occasions from time to time. However, this evidence was not sufficiently clear in light of other evidence which strongly suggested that most of the Steede social activities took place at the top of the hill, on what was admittedly their own property in the cleared area around their family home.

99. Accordingly, the Plaintiff is entitled to a declaration that he is the owner in fee simple of Lots 13 and 14 and that the Defendants are trespassers to the extent that they have in the past or may in the future seek to enter the disputed land without the Plaintiff's permission.

100. I will hear counsel as to costs.

Dated this 27th day of January, 2009 _____

KAWALEY J