



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 394

**BETWEEN:**

**MARSHALLE AUGUSTUS**

**Plaintiff**

**- and -**

**THE ESTATE OF WENDELL GIBBONS**

**Defendant**

## JUDGMENT

*Trespass, declaratory relief, permanent injunction, adverse possession*

**Date of Hearing:** 15 March 2023

**Date of Judgment:** 31 March 2023

**Appearances:** Craig Rothwell, Cox Hallett Wilkinson Limited, for Plaintiff

**JUDGMENT of Mussenden J**

### **Introduction**

1. The Plaintiff Ms. Augustus is and was at all material times the owner in fee simple of the land and premises situated at 19 Limehouse Lane (“19LL”), Hamilton Parish.

2. The Defendant is the owner in fee simple of 15 Limehouse Lane (“**15LL**”), Hamilton Parish, which is situated near to 19LL. At the time of the commencement of this litigation on 19 November 2009, the named defendant at that time, Mr. Wendell Gibbons (“**Wendell**”), was alive. He passed away in 2012. I made an order dated 16 December 2021 for the Writ to be amended to name his estate (the “**Estate**”) as the Defendant.

### **Limehouse Lane and the Disputed Property**

3. Limehouse Lane was formerly known as Claytown and was occupied by the Gibbons family. Mr. Evelyn Gibbons (“**Evelyn**”) purchased properties on Limehouse Lane for himself and for some of his seven children. All of the property lots are in very close proximity. Over time, Evelyn’s descendants in the Gibbons clan inherited or acquired various lots on Limehouse Lane.
4. There is one lot of land, 11 Limehouse Lane, (“**11LL**”) which is the disputed subject matter of this case. 11LL is situated adjacent to 19LL and touches upon 15LL at a point. 11LL has a barn on it (the “**Barn**”). The dispute arises as both the Plaintiff and the Defendant claim ownership of 11LL.

### **Background and Pleadings**

#### **The Writ and Statement of Claim**

5. By a Specially Indorsed Writ of Summons issued on 19 November 2009, the Plaintiff commenced the present action. The Statement of Claim set out that the Defendant entered the premises, commenced construction on a shed on the premises, wrongfully occupied the premises by depositing materials and equipment on the premises and caused or permitted a trespass to the premises and an interference with the Plaintiff’s comfort, convenience and quiet enjoyment of her premises.

### Relief Sought

6. Thus the Plaintiff sought: (i) a declaratory judgment that there has been a trespass by the Defendant his servants or agents onto her property 11LL; (ii) an injunction restraining the Defendant his servants or agents from trespassing on her premises; (iii) an order that the Defendant remove materials and equipment situated on her premises; and (iv) damages.

### The Defence and Counterclaim

7. Wendell filed an affidavit sworn 12 January 2010 in support of an application to set aside an order made on 23 November 2009. He exhibited a draft Defence and Counterclaim which were never filed as part of the proceedings.

### The Litigation after 2021

8. It appears that the matter went to sleep from 2011 until January 2020 but really until May 2021 when Cox Hallett Wilkinson (“**CHW**”) for the Plaintiff, came on the record and proceeded to have the matter set for trial. The Estate did not engage in the proceedings once they had recommenced in 2021. However, counsel for the Plaintiff Mr. Rothwell took steps to have two adult sons of Wendell, namely Iman Gibbons (“**Iman**”) and Kevin Bean-Walls (“**Kevin**”) served with the Summons for Directions dated 19 November 2021. Process Server Mrs. Evernell Davis swore affidavits that she personally served both Iman and Kevin with the Summonses but they did not attend the directions hearing. On 16 December 2021 an Order for Directions was made to advance the proceedings to trial.
9. Thereafter, Mr. Rothwell appears to have included Kevin by email in correspondence with the Court and the Notice of Hearing dated 19 December 2022 for a one day trial on 15 March 2023 was issued to Kevin by email. Mr. Rothwell also caused Mrs. Davis to post on 7 March 2023 a letter from CHW dated 6 March 2023 on the door of 11LL addressed to the Occupier informing them of the proceedings and attaching the Notice of Hearing.

10. The Estate did not file anything in preparation for trial and no counsel ever appeared on its behalf.

**Table of Old and New Lot Numbers**

11. The Court was provided with a helpful table showing old lot numbers, new Limehouse Lane address numbers and the current owners as set out below. I will use the new Limehouse Lane numbers for simplicity but sometimes it will also be necessary to refer to the old lot numbers.

Old Lot Number	New Limehouse Lane Address Number Referred to in this Judgment as "LLxx"	Current Owner
1	15	Estate of Wendell Gibbons
3	17	Glenn Brangman
4	19	Marshalle Augustus
5	5	Estate of Wendell Gibbons
6A	11	Marshalle Augustus (disputed)
6B	9	Percy Gibbons

**The Vesting Deeds and Lot Plans**

12. The Plaintiff's List of Documents disclosed several vesting deeds and plans as follows:

- a. The 1945 Plan (the "**1945 Lot Plan**") which identifies the owners at that time. It shows that:
  - i. Evelyn owned 19LL (Lot 4) and he owned 11LL and 9LL as Lot 6 which was not yet subdivided into Lots 6A and 6B.
  - ii. Evelyn's daughter Hilda owned 17LL (Lot 3).
  - iii. There was a right of way from the road named Limehouse Lane to 15LL (Lot 1) (the "**ROW**") which passed through Evelyn's 19LL (Lot 4) and Hilda's 17LL (Lot 3). The ROW is not in issue in this matter.

- b. The Vesting Deed dated November 1984 (the “**1984 Vesting Deed**”) transferred both 19LL (Lot 4) and 11LL (Lot 6A) to three of Evelyn’s children, namely Hilda, Clement and Louise. The Lot Plan dated December 1983 (the “**1983 Lot Plan**”) was a part of it and shows that:
  - i. Lot 6 was now subdivided into 11LL (Lot 6A) and 9LL (Lot 6B).
  - ii. Both 19LL (Lot 4) and 11LL (Lot 6A) were now the same parcel of land, thus being owned by Hilda, Clement and Louise.
- c. Two Vesting Deeds and Voluntary Conveyances dated 8 February 2007 (“**Glenn’s 2007 Conveyances**”) which transferred Glenn Brangman’s (“**Glenn**”) 2/3 share (from his grandmother Hilda and from Evelyn’s son Clement) in the property described as both 19LL (Lot 4) and 11LL (Lot 6A) to the Plaintiff.
- d. The Conveyance dated 27 November 2007 (“**Frederick’s 2007 Conveyance**”) which transferred Evelyn’s grandson Frederick Gibbons’ 1/3 share in the property described as both 19LL (Lot 4) and 11LL (Lot 6A) to the Plaintiff.
- e. A Capital G Bank Limited Mortgage dated 27 November 2007 for the Plaintiff secured by the Mortgaged Property described as both 19LL (Lot 4) and 11LL (Lot 6A) and referencing Glenn’s 2007 Conveyances and Frederick’ 2007 Conveyance.

### **The Trial – Preliminary Points Involving Mr. Bean-Walls**

13. The matter came on for trial on 15 March 2023. Mr. Rothwell provided the Court with an email dated 14 March 2023 that he had received from Kevin along with some attachments. The email from Kevin appears to be a reply email to the Plaintiff’s email which had attached the Plaintiff’s Skeleton argument.

14. Kevin’s email stated as follows:

*“Re Augustus versus Randall Gibbons estate. The following are documents (attached) on file at the office of the land valuation as of March 14, 2023. They show the Gibbons estate at all times acted in good faith with lawful documentation with respect to any development at 15 Limehouse Lane, and adjacent vacant lot of land at 11 Limehouse Lane. As these records show all the above-mentioned properties are registered and are*

*legally owned by Mr. Gibbons and his heirs. Our wish and our prayer is that Mrs. Augustus would reconsider her position with this action and cease it immediately.*

*Thank you,*

*Sincerely Kevin Bean-Walls.”*

15. The attachments to Kevin’s email were as follows:

- a. A two-page extract showing signatures and property description from one of Glenn’s 2007 Conveyances.
- b. A partial extract of a “Notice to the Registry General” stamped as received by the Registry General on 26 July 2006 (the “**2006 Registry General Notice**”). It was authored by an unidentified attorney stating that “... we hereby give you notice that the person(s) hereinafter mentioned became entitled to an interest in the parcel of land situate in Hamilton Parish ...”. It went on to describe details including: (i) the date of acquisition as 7 September 2005; (ii) the names of the persons as Wendell Gibbons and Iman Ato Gibbons; (iii) the address as 15LL; (iv) the nature of interest acquired as fee simple as joint tenants; (v) mode of acquisition as voluntary conveyance; (vi) the name of the person from whom acquired as Wendell Gibbons; (vii) the assessment number as “lot of land only”; (viii) a partial description of the property as the land situated at Lot 6A (11LL).
- c. A Lot Plan dated 17 March 2005 (the “**2005 Lot Plan**”) drawn by Mainline Precision Company showing various lots on Limehouse Lane including Lot 1 (LL15), Lot 3 (LL17), Lot 4 (LL19), Lot 6A (LL11) and Lot 6B (LL9).
- d. Extract of a Trott & Duncan law firm document entitled “Part II Schedule” dated 16 November 2009 setting out the property as a Vacant Lot, Limehouse Lane, Hamilton Parish; an entry dated 23 September 2005 as a voluntary conveyance – Wendell Gibbons to Wendell Gibbons and Malik Sekov Gibbons.

16. Mr. Rothwell submitted that the trial should proceed and that Kevin could cross-examine the Plaintiff’s witnesses and give evidence if he so desired. I queried Kevin if he was prepared to assist the Court in this way and he agreed to do so. He explained that he was

aware of the claim, he had tried to resolve the matter, he was not prepared to pay any liabilities and he was not interested in 11LL.

### The Trial – Evidence

17. The trial took place with the witness statements standing as the evidence in chief. Glenn and Ms. Augustus gave evidence as witnesses for the Plaintiff. They are cousins.
18. Mr. Rothwell filed a Notice to give in evidence the statements written and made by Mildred Outerbridge (“**Mildred**”) who is deceased. The written statement made on 31 October 2009 set out that permission was granted from her mother Hilda and her Aunt Louise to Wendell to use the Barn for a period for storage only. In or around January 2010 Mildred made an oral statement to the Plaintiff setting out the circumstances in which permission was made and the historical use of the land for storage by 17LL and 19LL. The transcript of the oral statements states: *“I, Mildred Albertha Outerbridge, do verify that permission was granted from my mother Hilda Outerbridge and Aunt Louise Gibbons to Wendell Gibbons to use the barn for a period for storage only. Signed Mildred A Outerbridge.”*
19. Kevin gave evidence on behalf of the Estate in order to assist the Court.

### Evidence not in dispute

20. There was evidence that generally was not in dispute.
21. 19LL – This property was the family homestead and where Evelyn and his wife lived with their five sons John, Percy, Gerald, Clement and Leonard and two daughters Louise and Hilda. Once Evelyn and his wife died, by the 1984 Vesting Deed 19LL and 11LL were passed to Louise, Clement and Hilda in equal 1/3 shares. At one point Glenn inherited 1/3 share from his grandmother Hilda and then he purchased another 1/3 share from Clement (or Clement’s daughter Lillette) at which point he owned a 2/3 share. Eventually in 2007,

the Plaintiff purchased the 2/3 share from Glenn and the other 1/3 share from Louise's son Frederick Gibbons ("**Frederick**") making her the rightful owner of 19LL.

22. 17LL – This property was nearby and it was given to Hilda who had married Stuart Outerbridge. They lived at 17LL with their children and then their grandchildren. Hilda is the Plaintiff's grandmother and the Plaintiff was born and raised in 17LL living there until 1978. Glenn inherited 17LL from Hilda and lived there since he was a child.
23. 15LL – This property was nearby and was given to Gerald who had children with Sadie. They lived there with their children including Wendell. Wendell lived there for some time but eventually got married and moved away returning to live there some years later after his mother Sadie's death. Wendell now owns 15LL, which enjoys the ROW right of way.
24. 9LL – This property was given by Evelyn to his son Percy. Evelyn had earlier bought another nearby plot on Limehouse Lane which had erected thereon a house and the Barn. It is not in dispute that at some point Evelyn gave 9LL, that is, part of the lot with the house on it to Percy.
25. G&D Body Shop - In or around the 1980s, Wendell started a garage business named G&D Body Shop ("**G&D**") at one of the properties on Limehouse Lane. It is disputed on which lot G&D started and operated G&D as Wendell asserted that it was 11LL and 5LL together whilst witnesses for the Plaintiff assert that G&D operated from 15LL and 5LL. I will return to this disputed issue later. What is not in dispute is that Wendell started using the Barn at 11LL to store items related to G&D. He obtained a Capital G Bank loan dated 27 October 2009 relying on a set of deeds that showed the Barn as being part of 15LL. I have reviewed the exhibited Capital G Bank facility letter dated 27 October 2009. Whilst it refers to the "property situated at Limehouse Lane", nowhere does it state the exact property by a number. Thus it is not possible to know what property or properties Capital G Bank considered as the "property situated at Limehouse Lane".
26. The Dispute - In or about 2009 Wendell started construction on the Barn. He placed equipment and material on 11LL. Thereafter, litigation commenced. The Plaintiff obtained an Order dated 23 November 2009 to prevent Wendell from continuing all construction



and to cease from trespassing on her property at 19LL. Wendell had the Order set aside on 19 January 2010. He argued that he had acquired 11LL by adverse possession having used it for the previous 35 years for G&D.

27. In attempt to resolve the dispute, Wendell and the Plaintiff agreed to a swap of lots at Limehouse Lane (the “**Swap Agreement**”). The Plaintiff was to give up all her rights to 11LL in exchange for Wendell giving her a lot of land directly north of 19LL (the “**Northern Lot**”). That agreement fell through as Wendell could not prove that he owned the Northern Lot. Subsequent attempts to execute the Swap Agreement failed also due to lack of proof of ownership of the Northern Lot. Kevin confirmed in evidence in chief at trial that there were attempts to resolve the issues by swapping the same size of land in the Northern Plot for 11LL.

28. Since Wendell’s death in 2012, his sons Iman and Kevin continue to use 11LL recently renovating the Barn into a studio apartment and renting it to tenants.

#### Evidence in Dispute and Factual Findings

29. Although the Estate did not file a witness statement, there were various main areas of evidence that were in dispute which I have gleaned from the Affidavit of Wendell sworn on 12 January 2010, in support of his application to set aside the injunction, as set out below.

#### 11LL

30. The Plaintiff stated that she is the owner of 11LL. She stated that Evelyn kept the part of the lot with the Barn to be used by the owners of 17LL and 19LL. I note here that once Evelyn and his wife died, by the 1984 Vesting Deed, both 19LL and 11LL were passed to Louise, Clement and Hilda in equal 1/3 shares.

31. However, Wendell stated that he is the owner in fee simple of 11LL. Wendell stated that as he had used 11LL for so long he went to T&D and had them draw up a deed of 11LL to his benefit. I note that deed was drawn up in September 2005. Kevin in his evidence in

chief at trial stated that around 1974/75 his father Wendell moved his garage business to Limehouse Lane when he started to put materials and supplies there on 11LL. He stated that he was aware that the Gibbons family owned most of the properties on Limehouse Lane, split up amongst family members. Later on in the 2000s his father wanted to improve the facilities so his father asked him to obtain title deeds for 11LL and for the Northern Lot. Kevin stated that he did not know many of his father's family and he was not aware of any other family members claiming ownership of 11LL. In any event, around 2008 he was able to obtain legal title for 11LL and the Northern Lot. In 2009 his father started construction work on 11LL having used the title deeds that he obtained.

32. In my view, I am not satisfied that Wendell was and is the owner in fee simple of 11LL. It is clear to me that the 1945 Lot Plan, the 1984 Vesting Deed, the 1983 Lot Plan, Glenn's 2007 Conveyances and Frederick's 2007 Conveyance show the root of title that: (a) as early as 1983 Lot 6 was subdivided into 11LL and 9LL; (b) the 1984 Vesting Deed conveyed both 19LL and 9LL together; and (c) subsequent conveyances show 19LL and 11LL were conveyed together. Thus, in my view, it was not lawfully possible in or about 2008 for Wendell to have obtained title deeds for 11LL. In my judgment I find that the Plaintiff is and her predecessors in title were the owners in fee simple of 11LL.

#### The Barn

33. It is not disputed that over the years, the Barn was used by various family members to store various things including fishing pots, other equipment and that the outside area was used for parking cars. However, there is some dispute over who stored what items in what period of time. In my view, it is not necessary to resolve that issue in detail other than to find as I do that the Barn was used for storage by various people, in particular by both the owners of 19LL and Wendell for his business for G&D. Further, the evidence shows as follows:

- a. The Plaintiff in her evidence in chief at trial stated that her family used the Barn to store items – her mother stored dolls there, fishing gear was stored there, and her uncle Vernon who lived at 17LL stored tyres there. She recalled that Wendell came to the Barn when he had stored bits and pieces there.

- b. Wendell stated in his affidavit that the Barn was used by his father to store motorcycles up to when he died in 1947. Also, he recalls going fishing with his grandfather who used the Barn to store fishing equipment until he died in 1957. Wendell also states that he has used the Barn for storing materials.
- c. Kevin stated that he knew that 11LL was used for storage by everyone and that he had seen different items in the Barn.
- d. Visitors to Hilda at 17LL would park in front of the Barn;
- e. After Hilda died in 1997, Hilda's son Vernon 'Billy' Outerbridge ("Billy") and Glenn started using the Barn for storage;
- f. Billy stored fishing pots in the Barn. He also stored his boat and car in front of the Barn; and
- g. In the 1980s the Plaintiff's mother Mildred and other occupants of 19LL used the Barn for storing memoirs.

The use of 11LL and the Barn by G&D

34. Wendell stated in his affidavit that he lives at 15LL, which is not disputed. However, he stated that he has carried out his business G&D from 5LL and 11LL for 35 years (that is, 35 years prior to the affidavit date of 2010) for repairing cars, storage and parking related to G&D. I note that in Wendell's draft Counterclaim it stated that he commenced carrying on G&D "in or about 1974 or 1975" from land at "5LL, 11LL and/or 15LL". He exhibited three Bermuda Yellow Pages listings showing G&D's address as 11 Limehouse Lane. He recalls that he renovated the Barn in the 1970s in order to better use it for G&D, such renovation being the repair of a wall of the north-east section. He also repaired the windows, doors and roof of the Barn. Wendell stated that he paid the land tax for 11LL and exhibited a copy of the land tax demand notice dated 30 June 2009 addressed to him. Wendell stated that no one has ever questioned his right to use 11LL for G&D or disturbed him. Further, he stated that all of this is known to the Plaintiff.
35. However, Glenn, in his evidence in chief at trial, stated that Wendell's timeline and use of the building was not correct as Wendell used the Barn only with the permission of Hilda and Louise and any such use was a shared use with others on Limehouse Lane who were

storing fishing gear there. He knew this because he lived across the pathway from 11LL and the Barn. He also stated that he was always connected to the Barn as his grandmother Hilda would send him to the bank for property deeds, he was involved in surveys of the property, he had control of it when it was handed down and he had no issue with Wendell sharing use of the Barn when Wendell asked to use it. Glenn stated that Wendell was not correct to say that he used 11LL for his business as such use was never part of the agreement to use the Barn for storage. Further, Wendell was aware of the ownership of 11LL because Glenn had discussed it with him in the 1990s and early 2000s.

36. I address these disputed issues of the use of 11LL and the Barn by Wendell for G&D below.

### **The Issues**

37. There are two main issues in this case, namely: (a) whether Wendell Gibbons had been given permission to use 11LL or not prior to 2009<sup>1</sup>; and (b) whether Wendell Gibbons' use of 11LL constitutes possession required under the law.

### **Whether Wendell Gibbons had been given permission to use 11LL or not prior to 2009.**

### **The Law**

38. The burden is on the defendant to establish title by adverse possession against the paper title. Section 16 of the Limitation Act 1984 (the "1984 Act") sets out the 20 year requirement to prove adverse possession stating

*"No action shall be brought by any person to recover any land after the expiration of 20 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

39. Part I of the First Schedule to the 1984 Act contains provisions for further determining the date of accrual of rights of action to recover land. Paragraph 8(4) of Part I provides as follows:

*“In determining whether a person occupying any land is in adverse possession of the land the court shall take in account whether or not the owner of the land had actual knowledge that the person occupying the land was in possession thereof adverse to his interest.”*

40. In *Ramnarace v Lutchman* [2001] 1 UKPC 25, Lord Millett said: “[10] Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner.”
41. In *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, Lord Brown-Wilkinson said: “[36] In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. [37] It is clearly established that the taking or continuation of possession by the squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act.”
42. In *Buckinghamshire County Council v Moran* [1990] Ch 623 Lord Slade LT said: “[636] Possession is never ‘adverse’ within the meaning of the 1980 Act if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in ‘adverse possession’ as against the owner of the paper title.”
43. In *Robert Moulder v Paul Slaughter and Janet Slaughter* [2007] Bda LR 41, Mantell JA approved of the following reference from “*Elements of Land Law*”: “a subsisting element of leave or license from the paper owner clearly negates the otherwise adverse quality of possession enjoyed by a claimant.”

44. The Courts have been willing to infer assent on the part of the owner where the owner was aware of his use of the land by the squatter and there was a close family relationship between the owner and the squatter. In *Morris v Pinches* (1969) 212 EG 1141 the defendant was the plaintiff's nephew and the nephew made use of the land with his uncle's assent. In *Ellett-Brown v Tallishire Ltd* [1990] Lexus citation 1831 was a similar context where the owner and squatter were neighbors on good terms.

#### Plaintiff's Submissions

45. Mr. Rothwell submitted that Wendell Gibbons was given permission by various owners of 19LL to use the Barn on a rent free basis to store vehicle parts from around the 1980s.

#### Defendant's Submissions

46. Wendell's position was that no one ever questioned his right to use 11LL for G&D and he has used 15LL, 5LL and 11LL since he moved his garage business to Limehouse Lane. Kevin's position is that he assisted his father in obtaining title deeds in 2008, in effect negating the need for any permission from anyone to use 11LL.

#### Analysis – Whether Wendell Gibbons had been given permission to use 11LL or not prior to 2009.

47. In my view, Wendell Gibbons was given permission by the owners of 19LL and 11LL to use 11LL prior to 2009 for several reasons. First, I have found above that the Plaintiff is and her predecessors were the owners in fee simple of 11LL. On that basis of ownership, it is necessary to determine whether there is evidence that the owners at the relevant times gave permission to Wendell to use 11LL and the Barn. The key ownership periods are when Louise, Hilda, Glenn and the Plaintiff owned 19LL. I find it significant that Evelyn first owned 19LL in May 1923 and since that time 19LL was occupied by him and/or his descendants. It is also significant that by the time of the 1945 Lot Plan being drawn, Evelyn also owned Lot 6 which was not subdivided yet and which had the Barn on it and a house

which later was given to Percy. To my mind it is clear on the evidence that that the owners of 19LL enjoyed rights over the Barn and 11LL, including using the Barn for storage.

48. I am not satisfied to any degree that when Wendell moved G&D to Limehouse Lane in 1974-75 that he moved to 11LL without the permission of the owners who lived right there. It seems logical to my mind that, as he stated in his affidavit, he would move to his own properties 5LL and 15LL as he saw fit. However, the same logic would not apply to 11LL, and thus to my mind, in order to use 11LL and the Barn, Wendell would seek permission to do so. Thus, I prefer and accept the evidence of Glenn, that a few years after G&D moved to Limehouse Lane, that is, in the 1980s, Louise, as 1/3 share owner of 19LL, was the first person to give Wendell permission to use the Barn to store vehicle spare parts. I also accept Glenn's evidence that after Louise died on 23 January 1997, his grandmother Hilda, also a 1/3 share owner of 19LL, then gave Wendell permission to use the Barn. I also accept his evidence that after Hilda died on 23 September 1997 he, as a 1/3 share owner of 19LL, gave Wendell permission to use the Barn. Thus, per Part 1 of the First Schedule to the 1984 Act, I find that the owners of 11LL did not have actual knowledge that Wendell was occupying 11LL adverse to their interest as they were giving him permission to use it.

49. Second, I accept the hearsay evidence of the Plaintiff's mother Mildred in her written statement that Wendell was given permission by the consecutive owners of 17LL, Hilda and Glenn to use the Barn for storage. I find her statements to be curious because the Plaintiff's case is that 11LL and the Barn were part of 19LL. Thus, the owners of 17LL were never in a position of ownership to grant Wendell use of the Barn. However, as noted above, they were also the owners of 19LL and could give Wendell such permission in that capacity. Also, I accept Mildred's hearsay oral statement that Louise as a 1/3 share owner of 19LL and her mother Hilda gave Wendell permission to use the Barn for storage. Further, I accept her evidence that Wendell never conducted his business from the Barn.

50. In light of these reasons, I find that Wendell had been granted permission to use 11LL and the Barn prior to 2009, that is, in the 1980s. In applying the case authorities as cited above, such a finding that the title owners gave consent to Wendell starting in the 1980s leads to

the conclusion that Wendell has failed to establish title by adverse possession against the paper title.

### **Whether Wendell Gibbons' use of 11LL constitutes possession required under the law.**

#### The Law

51. In the extract *Adverse Possession*, 2002, Stephen Jourdan stated: “*In Treloar v Nute [1976] 1 WLR 1295, the squatter stored materials such as timber and stone on the disputed land. This was said by the Court of Appeal to be of very little weight. This is right in principle, as there can be an easement of storage, provided the owner is not wholly excluded from use of the place where the things are stored. And if the squatter's use of the land can be referred to the exercise of an easement, it will not be treated as manifesting the animus possidendi.*”

52. In order to constitute possession, the control of the disputed land must be single and exclusive. In *Powell v McFarlane* (1977)38 P & CR 452 Slade J said: “*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 cannot both be in possession of the land at the same time.*”

53. In *JA Pye (Oxford) Ltd v Graham*, Lord Hope of Craighead said: “*The general rule, which English law has derived from the Roman law, is that only one person can be in possession at any one time. Exclusivity is the essence of possession.*”

#### Plaintiff's Submissions

54. Mr. Rothwell submitted that the evidence showed that Wendell Gibbons did no more than store vehicle parts on 11LL as his main garage business was at 15LL. Further, the evidence showed that the Barn was used by other members of the family for storage as well. Thus,



the Defendant failed to satisfy the element of having exclusive possession and there was no adverse possession of 11 LL until 2009 when the renovations started.

### Defendant's Submissions

55. The Defendant has not offered any submission that Wendell had exclusive possession of the Barn or 11LL.

### Analysis – on whether Wendell Gibbons' use of 11LL constitutes possession required under the law

56. In my view, Wendell's use of 11LL does not constitute possession under the law for several reasons. First, Wendell did not enjoy exclusion possession of 11LL or the Barn before 2009 when they renovated the Barn. As found above, in my view various members that lived in the properties at Limehouse Lane before 2009 stored items in the Barn or on the property long before 2009. This included the residents of 19LL, the residents of and visitors to Hilda at 17LL, Billy and Glenn. Kevin himself stated that various people used the Barn for storing items.

57. Second, relying on Jourdan in *Adverse Possession*, the owners of 19LL and 11LL were never excluded from the Barn or 11LL by Wendell or anyone else for that matter prior to 2009. Further, in applying the principles in *Powell and McFarlane*, there was never single and conclusive possession by Wendell of 11LL and the Barn.

### Conclusion

58. In summary I have made the following findings:

- a. The Plaintiff is and her predecessors in title were the owners in fee simple of 11LL.
- b. Wendell Gibbons was given permission by the owners of 19LL and 11LL to use 11LL prior to 2009.
- c. Wendell's use of 11LL does not constitute possession under the law.

59. In light of these findings, I am satisfied that I should grant the relief prayed for in the Writ by the Plaintiff, namely:

- a. A declaratory judgment that there has been a trespass by the Defendant his servants or agents onto her property 11LL;
- b. An injunction restraining the Defendant his servants or agents from trespassing on her premises;
- c. An order that the Defendant remove materials and equipment situated on her premises; and
- d. Damages.

60. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 31 March 2023



**HON. MR. JUSTICE LARRY MUSSENDEN**  
**PUISNE JUDGE OF THE SUPREME COURT**