[2018] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 03899

BETWEEN	**GLEN COBOURNE**	**CLAIMANT**
AND	**MARLENE COBOURNE**	**DEFENDANT**

IN CHAMBERS

Emily Shields and Jutina Wilson, instructed by Gifford, Thompson & Shields, for the claimant

The defendant, not present and unrepresented

HEARD: July 31 & October 22, 2018

CLAIM FOR MARITAL PROPERTY – ADVERSE POSSESSION – OWNERS OF PROPERTY OWN SAME AS TENANTS-IN-COMMON – WHETHER CLAIMANT HAD POSSESSED PROPERTY IN CIRCUMSTANCES EXCLUDING THE DEFENDANT FROM POSSESSION – PRESUMPTION OF POSSESSION IN FAVOUR OF BOTH TITLE HOLDERS – APPLICATION FOR AN EXTENSION OF TIME UNDER PROPERTY (RIGHTS OF SPOUSES) ACT – FACTORS TO BE CONSIDERED BY COURT UPON APPLICATION FOR AN EXTENSION OF TIME TO APPLY TO COURT FOR DIVISION OF PROPERTY

ANDERSON, K., J

The nature of the Claim

[1] The claimant herein sought orders to be declared the sole legal owner of a property jointly owned between himself and the defendant, his former wife, who is now residing in the United States of America (USA). On September 20, 2016, the claimant filed his claim. In that claim, he sought the following orders:

1. *'A Declaration that the Claimant is the sole proprietor of the property known as Lot 55, part of Oaklands in the parish of Saint Andrew and registered at Volume 1258 Folio 432 in the Register Book of Titles.*

2. *An Order that Caveat No. 1980761 which was lodged on the title to the said property at the instance of the Defendant on 6th January 2016, be removed.*

3. *An Order that the Registrar of Titles do rectify the said title by entering the name Glen Cobourne as the sole proprietor of the said property.*

4. *In the alternative, and [sic] Order that the Claimant do have leave to apply to the Court for a division of the Oaklands property pursuant to section 13 of the Property (Rights of Spouses) Act.*

5. *Such further or other relief as may be just.*

6. *Costs'*

[2] Accompanying that claim, was the claimant's Particulars of Claim within which, he averred that he and the defendant were married in Jamaica on October 21, 1999, and that, on August 17, 2006, parties were divorced by a decree of the Supreme Court of Gwynett County, USA.

[3] He further averred that, prior to the marriage, the parties agreed that they would migrate to the United States. The parties, further to that agreement, lived together in Jamaica until June 13, 2000, then in the United States, until about September 9, 2001. The claimant's averments continued that, in June 13, 2001, the defendant executed a Power of Attorney granting the claimant power to:

(i) 'initiate and complete, on the defendant's behalf, sale of Lot 55, part of Oaklands in the parish of Saint Andrew, Volume 1258 Folio 432, hereafter referred to as 'The Oaklands Property.'

(ii) execute all such documents necessary to give effect to that sale on her behalf and to retain such professional personnel as required to give effect to the said sale,

(iii) do all such acts necessary to carry out the power given, and

(iv) pay, and /or recover all sums of money that are or may become due or owing to the defendant in respect of premises and to pay all the relevant taxes and rates due on the premises on her behalf.'

The Oaklands property was registered in their names, as tenants-in-common, on February 15, 2000.

[4] The claimant further averred that prior to February, 2002, the tenant of the Oaklands property paid rent into a joint account from which the defendant withdrew money. The claimant's averments continued that, at that time, the claimant closed this account and directed that all payments of rent should be paid into an account which solely bears the claimant's name. The claimant also averred that the defendant's only cash contribution to the purchase or maintenance of the Oaklands property came in the form of a $100,000.00 cash payment she made towards the repair of the roof in or about April, 2000.

[5] The decree of the Supreme Court of Gwynett County the State of Georgia, U.S.A, however, which dissolved the marriage, stated that the defendant testified that there was no marital property to be divided, except one 1997 Dodge Caravan. Nevertheless, on January 8, 2016, the defendant lodged a caveat on the title of the Oaklands property, claiming to be the registered owner of that property. Prior to the lodgement of that caveat, on December 24, 2015, the defendant made a declaration to the Registrar of Titles, confirming her joint ownership of the Oaklands property, while denouncing the Power of Attorney, signed by her, for the reasons that: (i) she had signed the said Power of Attorney whilst she was young and inexperienced, and (ii) that the said Power of Attorney was not registered.

[6] Also, there was a document attached to the Particulars of Claim headed *"Authority of Marlene Cobourne,*" dated June 13, 2001. That document purports to authorize/direct the claimant to pay to the defendant, the sum of $100,000 with interest at 12% percent per annum, from the February 15, 2000. That sum, according to that document, would represent the defendant's full interest in the said property.

[7] On October 6, 2016, the claimant filed an affidavit in this matter, in respect of a previous application (of which, this court has taken judicial notice). In that affidavit, he deponed at paragraph 2 that he was the true owner of the Oaklands property. Further, he stated at paragraph 4, that he has been in possession of same for more than twelve years, as the defendant, his former wife, separated from him since September, 2001. Also, in that said paragraph, the claimant stated: '*The Defendant is my former wife from whom I separated in September 2001 when she left the home in which we lived in the State of Georgia in the United States. I have not seen her since. On 8th January 2016 she lodged a caveat on the title to the property which is registered in our names as tenants in common.'*

[8] Additionally, the claimant stated at paragraph 3 of the said affidavit that: '*I believe that I have a realistic prospect of success in this claim as the Defendant has abandoned all possession of the property for more than 12 years*.' The claimant stated further in paragraph 4 that the defendant's given address in the United States, as disclosed in her declaration to the Registrar of Titles, was 4000 Dunwoody Park, Apartment 3213, Atlanta, Georgia.

[9] On June 8, 2017, the claimant was granted permission by the court to serve his claim, along with all accompanying documents, upon the defendant in the U.S.A, through agents acting on his behalf. Those agents were able to serve the claim along with all accompanying documents, upon the defendant, on July 14, 2017 in accordance with the order of the court.

The application

[10] Up until the time of this hearing, the defendant has not acknowledged service of the claim, nor has she filed a defence to same. Upon the failure of the defendant to file a response, the claimant then, on April 11, 2018, filed this application, which is now before me for consideration. In the application, the claimant sought the following orders:

1. *'Judgment be entered against the Defendant in default of an acknowledgement service and/or defence in terms pleaded in the Amended Claim Form filed on the 6th day of October 2016:*

    I. *A Declaration that the Claimant is the sole proprietor of the property known as Lot 55, part of Oaklands in the parish of Saint Andrew and registered at Volume 1258 Folio 432 in the Register Book of Titles.*

    II. *An Order that Caveat No. 1980761 which was lodged on the title to the said property at the instance of the Defendant on 6th January 2016, be removed.*

    III. *An Order that the Registrar of Titles do rectify the said title by entering the name Glen Cobourne as the sole proprietor of the said property*

2. *Costs;*

3. *Such further and/or other relief that this Honourable Court may deem fit.'*

The issue for determination

[11] The issue for my determination is: whether, in these circumstances, the claimant should obtain judgment on the claim on this claim, in respect of which, the defendant has neither filed an acknowledgment of service, nor a defence.

Law and analysis

[12] It is clear, by the nature of the claim, that this claim is unopposed and therefore undefended as the defendant named herein has not responded to this claim. It follows then, that what is before this court are uncontradicted allegations of fact, set out in the claimant's particulars of claim. If the claimant proves those allegations, upon a balance of probabilities, then, those allegations will be acted on, by this court. That though, does not necessarily mean, that even if those allegations are duly proven, the claimant will be awarded judgment in his favour in respect of this claim.

Has the claimant has obtained full ownership of the Oaklands property by possession?

[13] Outlined above, as it relates to the service of the claim, I am of the view that the claimant's claim, inclusive of all supporting documents, has been properly served on the defendant. The question to be determined, therefore, is whether or not the claimant may obtain judgment for a declaration to be granted that he has become the sole owner of the Oaklands property by virtue of the defendant's alleged absence from the property. The burden of proof rests on the claimant to establish, on evidence, upon a balance of probabilities, that he has obtained sole legal interest in the said property. This is so as, it is accepted that the Oaklands property was registered in the names of both parties as tenants in common, outlined at paragraph **[3]**. As a tenant in common, the claimant is, by law, a joint legal owner of the Oaklands property, and in this case, a joint legal owner along with the defendant, of the said property.

[14] It therefore falls to be determined whether or not he, being a legal co-owner with the defendant, has obtained sole legal ownership of the said property by possession, and has ousted the legal entitlement of the defendant, to that property. In that regard, counsel for the claimant, Mrs. Shields, made oral submissions before this court that the claimant has obtained full and sole ownership of the Oaklands property by virtue of the operation of the **Limitation of Actions Act**. In support of that proposition, counsel relied heavily on the Privy Council Judgment, **Wills v Wills** (2003) UKPC 84. That case will be discussed further on, in this judgment.

[15] There is a strong presumption that possession is retained by the defendant, as paper owner, in the absence of evidence to the contrary. In that regard see: **Powell v McFarlane** (1977) 38 P & CR 452, at p. 470. That is to say, as a result of the defendant's name being registered as a co-owner of the Oaklands property, there is a presumed fact, in favour of the defendant, that she also retains possession of the same property. The claimant must surmount that presumption,

by adducing cogent evidence sufficient to rebut that presumption, in order to be successful in this claim.

[16] As stated on the face of the claimant's Statement of Case, the defendant was not in occupation of the Oaklands property and as such, the issue of the effect of the **Limitation of Actions Act,** necessarily arises. In that regard, see: **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, paragraph 29. That position was further made abundantly clear by section 68 of the **Registration of Titles Act**, which states:

> *'68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application of same,…and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall,* ***subject to the subsequent operation of any statute of limitations,*** *be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.'* (Emphasis mine)

[17] In **Winnifred Fullwood v Paulette Curchar,** *op. cit,* McDonald-Bishop, J.A, at paragraph 30, commented on 68 of the **Registration of Titles Act** as follows:

> *'It is evident from that provision (as well as section 85 of the Registration of Titles Act) that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else.'*

It follows then that, by the operation of section 68 of the **Registration of Titles Act**, the defendant's title to the Oaklands property is subject to the relevant provisions of the **Limitation of Actions Act**, and, if certain conditions exist, the defendant could be dispossessed pursuant to the provisions of that Act. Indeed, that was the essence of the submissions which was briefly advanced before this court, during the oral submissions of lead counsel for the claimant, when this

matter came before this court, on July 31, 2018. The relevant provisions of the **Limitation of Actions Act** will now be examined.

[18] A close examination of **Limitation of Actions Act** reveals that, pursuant to section 3, a registered owner of property may be barred from bringing an action to recover possession of same, while, pursuant to section 30 of the said Act, the legal interest of that registered owner may be extinguished. Section 3 states as follows:

> *'3. No person shall make an entry, or bring an action or suit to recover any land …, but within twelve years next after the time at which the right to make such entry, or bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make any such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.'*

Section 30 of the said Act states as follows:

> *'30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land…, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.'*

[19] A question which arises at this juncture is, whether or not, the above provisions can properly apply to the circumstances of the present case where the parties are tenants in common and thus, joint owners, of the Oaklands property. In other words, can the claimant, as a joint owner, rely on sections 3 and 30 of the **Limitation of Actions Act**, as operating together, to oust the defendant's interest in the Oaklands property and vest full legal ownership of that property in him? In seeking to determine the answer to that question, section 14 of the **Limitation of Actions Act** is pivotal. Section 14 reads as follows:

> *'14. When any one or more of several persons entitled to any land or rent as ...joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, or such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any*

> *person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.'*

The effect of this section is to modify the common law principle of title by possession, to make provision that the possession of one co-owner is not to be treated as the possession of the other co-owner(s). Thus, by this section, a co-owner can obtain full ownership of land, against another co-owner, by possession.

[20] This provision has been applied by the Privy Council in **Wills v Wills**, *op. cit.* In that case, a married couple 'G' and 'E', had acquired two properties in Jamaica, which were conveyed to them as joint tenants. The parties separated in the early 1970s, and 'E' went to live permanently in the USA, leaving nothing behind except her wedding ring. The joint tenancy was never severed. After 'E' had left, 'G' formed a new relationship with 'M', whom be eventually married, having divorced 'E.' None of the rental income was accounted to 'E' and 'G' kept all to herself. The last occasion on which 'E' visited Jamaica was in 1976. 'G' died intestate in 1992, and 'M' obtained letters of administration in G's estate. 'E' argued that she obtained the properties as a surviving joint tenant, whilst it was argued by 'M' that 'E's title to the properties in Jamaica, had been extinguished by the operation of the **Limitation of Actions Act**.

[21] At paragraph 14 of the judgment, the Privy Council stated that section 14 of the **Limitation of Actions Act** corresponded with section 12 **of English Real Property Limitation Act** (1833) as amended by the **Real Property Limitation Act** (1874). At paragraph 15, the Privy Council upheld the explanation of Lord Upjohn in **Paradise Beach and Transportation Co Ltd v Price-Robinson** [1968] AC 1072, on the effect of section 12 of the **Real Property Limitation Act,** as follows:

> *'…the effect of [section 12] was to make the possession of co-tenants separate possessions from the time that they first became tenants in common and that time ran for the purposes of s. 2 from that time.'*

The Privy Council concluded, at paragraph 29, that:

> *'[E] no doubt wished to maintain her claim to co-ownership, not least because she expected to outlive [G] and hoped to take by survivorship. But such an intention, however amply documented, cannot prevail over the plain fact of her total exclusion from the properties. After 1976 at the latest [G] occupied and used the former matrimonial home and enjoyed the rent from the rented properties as if he were the sole owner, except so far as he chose to share his occupation and enjoyment with [M]. The judge's conclusion was wrong in law, and the Court of Appeal was wrong to uphold it. Neither court had the benefit of the full and clear guidance which the House of Lords has since given in the Pye case. But that decision was not making new law; it was clarifying what has been the law in England since the 1833 Act, and in Jamaica since the Limitation of Actions Act of 1881.'*

[22] Further, their Lordships added the following at paragraph 32:

> *'Their Lordships do not therefore see the outcome of this appeal as likely to cause trouble for the large number of Jamaican citizens who work overseas and contribute to their families' welfare and the island's economy. Most of them will come home on a fairly regular basis, will retain the bulk of their possessions at home, and will not (on coming home) be treated as guests in their own houses. But if (as must sometimes happen) a Jamaican working overseas forms new attachments and starts a new life, and entirely abandons the former matrimonial home, he or she will (within the ample period of 12 years) have to consider the legal consequences of that choice.'*

It is clear, from the case of **Wills v Wills**, *op. cit*., that (1) the joint possession of co-owners of property is deemed separate, pursuant to section 14 of **Limitation of Actions Act,** from the time that they first became tenants in common; and (2) that time can run against a co-owner who has abandoned ownership of that property, pursuant to section 3 of **Limitation of Actions Act.**

[23] This principle was applied in a recent decision of our Court of Appeal in **Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton** [2017] JMCA Civ 26. At paragraph 37, Brooks JA, with whom the other members of the panel agreed, stated:

> *'Although their Lordships* [in **Wills v Wills**] *sought to say that that case turned on its own facts, the principle concerning the physical possession by one joint tenant being able to extinguish the title of another joint tenant, who is dispossessed, or has given up possession, is of general application. Section 14 of the Limitation of Actions Act was relied upon by their Lordships on the point. Similarly, it is also a general principle, that it is the intention of the joint tenant in possession, rather than the intention of the dispossessed joint tenant, that is relevant for the purposes of determining the sufficiency of possession for extinguishing of the title of a holder of the paper title. Their Lordships relied on JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419 for that principle.'*

Applying the foregoing to the present case, it is clear that the claimant, being a joint owner as tenant in common with the defendant, can obtain a declaration of full ownership of the Oaklands property, if certain conditions exist.

[24] What then should the claimant satisfy in order to prove that he has obtained full title of the Oaklands property by possession to the exclusion of the defendant? To prove title by possession, two elements, need to be established. These are: '(1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess')' Per Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd and Another v Graham and Another** [2002] 3 ALL ER 865, page 876.

[25] The claimant therefore must show that he: (i) has a sufficient degree of physical custody and control of the Oaklands property, and (ii) with the requisite intention to exercise such custody of same for his own use and benefit, and all this (iii) for the requisite statutory period of not less that twelve years.

[26] What constitutes 'sufficient degree of physical custody and control' would clearly vary from case to case. As stated by Sampson Owusu, in the text **Commonwealth Caribbean Land Law,** at pp. 283-284:

> *'The character and sufficiency or degree of user necessary to constitute possession so as to pass title under the statue therefore*

> *depends on many factors and thus renders the concept a relative term. It is a question of fact depending on all the circumstances of the case, not only on the physical characteristics of the land, the appropriate and natural uses to which it can be put, but also the conditions and the habits and ideas of the people of the locality, and even to a greater extent, the course of conduct reasonably expected of an owner of that type of property having due regard to his interests. Consequently, acts of possession which may amount to possession in one case may be wholly insufficient to constitute possession in another.'*

In so far as the intention to exercise custody and control on one's own behalf and for one's own benefit is concerned, this is required to be proven as a separate element by one who seeks title by possession. As stated in **Powell v McFarlane,** *op. cit.,* at p. 471, there should be an:

> *'Intention in one's 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 possessor. So far as is reasonably practicable and so far as the process of the law will allow.'*

[27] In the present case, as stated earlier, the claimant filed an affidavit on October 6, 2016, in a previous application in this claim, of which this court has taken judicial notice. This court has taken judicial notice of the contents of all documents filed herein, pertaining to this matter which is now under consideration, and as such, will consider the content of that affidavit.

[28] The claimant at paragraph 4 of that said affidavit, deponed that he and the defendant separated in September 2001, that is, fifteen years prior to the filing of this claim. Further, the claimant averred in his Particulars of Claim, without substantiating same with any documentary evidence attached thereto, that in February of 2002, he had directed that all rental income generated by the Oaklands property be paid into an account which bears his sole name. Prior to February, 2002, he averred, the rental income was paid into a joint account bearing both his name and that of the defendant.

[29] This uncontradicted averment, to my mind, demonstrates at the very least, that the claimant intended to make it public that he is the person, whom the tenants are to regard as the sole owner of the Oaklands property. There was nothing else, on the face of his claim, to even remotely demonstrate that that intention has in any way changed. Therefore, in my view, the claimant would have shown the requisite intention to possess the property for his own use and benefit to the exclusion of the claimant.

[30] That though, only satisfies one element of that which the claimant must prove, in order to be successful in proving this claim of his. He also had to prove sufficient acts of ownership which demonstrate a degree of physical custody and control of the Oaklands property for his own use and benefit and that his user of the Oaklands property, for his use and benefit, was adverse to the ownership interest of the defendant: See: **JA Pye (Oxford) Ltd v Graham** [2003] 1 AC 419, 438, per Lord Browne-Wilkinson. Additionally, by virtue of the claimant and defendant being co-owners of the said property, the claimant is further tasked with the burden of rebutting the presumption that the defendant retains possession. It follows then, that if his possession was concurrent with that of the defendant, then the claimant would have failed in prove that his user of that property, was for his sole use and benefit.

[31] As it relates to the factual possession of the Oaklands property, there were averments in the claimant's Particulars of Claim, which were made, to show that the property was or still is, rented premises and that the claimant has been solely receiving rental income from the said property. That being the case, the claimant then would not be physically residing on the premises. As the authorities demonstrate however, the question of possession in these matters, is a relative term and depends on many factors. It is a question of fact, depending on the circumstances. Further, as pointed out in **Powell v McFarlane,** *op. cit.,* there is a strong presumption, without evidence to the contrary, that possession is retained by the paper owner. There is, therefore, a strong presumption that possession is

retained not only by the claimant, but also by the defendant, who is registered as joint owner of the said premises.

[32] In light of that strong presumption of possession in favour of the claimant, as well as, the defendant, the claimant must bring compelling evidence, sufficient to rebut the said presumption of the joint retention of possession of the Oaklands property by both himself and the defendant.

[33] In that regard, the claimant averred that since February, 2002, he has directed that all rental income, was to be paid to him directly. The question at this juncture then is whether the claimant's act of directing that the rental income of the Oaklands property, to be paid to him directly, without more, was a sufficient act of ownership, adverse to the interest of the defendant, sufficient to extinguish her title. In my view, this act alone was insufficient to extinguish the title of the defendant, especially having regard to the existing Power of Attorney executed by the defendant, in June 13, 2001, which authorized the claimant to, *inter alia*, collect all sums due or owing to the defendant in respect of the Oaklands property.

[34] The claimant has not adduced any evidence to prove that, in February, 2002, the said Power of Attorney was revoked by the defendant, and that he could properly and legally direct the tenants of the Oaklands property to make all rental payments solely to him. The sole document, in this case, which suggested that the defendant desired to revoke that Power of Attorney, was her Statutory Declaration to the Registrar of Titles on December 24, 2015. This document, in my view, taken at its highest, were it sufficient to revoke that Power of Attorney, would only demonstrate that the claimant was in fact dealing with the Oaklands property as the defendant's representative up until December 24, 2015, and that, the defendant was simply revoking the claimant's authority to act as her agent, while not yielding up her interest in the said property. In any event, if the Power of Attorney was revoked on December 24, 2015, then clearly, sections 3 and 30 of the **Limitation of Actions Act** would not have taken effect, because then, the statutory time period of limitation, would not nearly have expired.

[35] The failure of the claimant to prove the revocation of the Power of Attorney, to my mind, showed that the claimant may have acted in breach of the said Power of Attorney, and in breach of his duty as a trustee of the rental income, in respect of which sums, the defendant was entitled equally to a share of. In my view, the claimant cannot rely on his unilateral action of choosing to divert the rental income from their joint account, and his unilateral direction that such sums be paid to his sole account, as sufficient acts of ownership for his own use and benefit. The claimant's user of the Oaklands property, in light of the said Power of Attorney, could not, in law, be viewed as being for his own use and benefit, adverse to the defendant's interest, but in actuality, was usage concurrent with that of the defendant, at the very least, up until December 24, 2015 – when the defendant purportedly revoked the Power of Attorney.

[36] There was a further averment, by the claimant, that the defendant has abandoned ownership of the Oaklands property, as it was stated in the decree of the Gwynett County Court that the defendant gave evidence that there was no other marital property as between the parties, other than a 1997 Dodge Caravan. For that averment to have been accepted as sufficient to dispossess the defendant, and rebut the presumption that she retains possession of the Oaklands property, the claimant would have had to have supplied this court with documentary evidence of that testimony in the form of a court transcript. I am satisfied in that view as, at the very least, the defendant's lodging of a caveat on the title of the said property in January, 2016, demonstrated that she still considers herself to be a legal owner of it.

[37] Lastly, there was another averment by the claimant pursuant to a document attached to his Particulars of Claim which is headed '*Authority of Marlene Cobourne'* dated June 13, 2001. That document contained, what appears to be, instructions directing the claimant to pay the sum of $100,000 to the defendant, at 12% percent per annum from February 25, 2000, as representing the value of her entire interest in the Oaklands property. This document, to my mind, does not assist the claimant in his claim for a declaration of sole ownership, as it only

demonstrates the defendant's has not given up her interest in that property, and that, if such interest should have been disposed of, at that time, then the defendant would have considered this as the appropriate step.

[38] For these reasons, I am of the considered view that the claimant has failed to rebut the presumption that the defendant no longer retains possession of the Oaklands property. Having so concluded, I will next go on to consider the claimant's alternative application.

Application for leave to apply under the Property (Rights of Spouses) Act

[39] The alternative application sought by the claimant is for an Order that he be granted leave to apply to the Court for a division of the Oaklands property pursuant to **section 13** of the **Property (Rights of Spouses) Act**, (PROSA). **Section 13 (1) of PROSA** empowers a spouse to apply to the court for division of property upon the grant of either a decree of dissolution of marriage, termination of cohabitation, nullity of marriage, separation between spouses or where one spouse is endangering the property or seriously diminishing its value. By virtue of **section 13(2)**, an application under **section 13(1)** must be made within twelve months of the occurrence of one of the 'triggering events,' listed in **section 13 (1)**, or such longer period, as the Court may allow.

[40] An application, pursuant to **section 13(2) of PROSA** shall be made within twelve months of the triggering event. Where such an application is made, beyond the stipulated time period, it follows therefore that the claimant would be statue barred from bringing a claim pursuant to **PROSA**, unless that claimant has obtained the leave of the court, to pursue said claim. **Section 13(2)** states as follows:

> *'An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.'*

The claimant must therefore make an application to the court, for permission to extend time for his claim to be brought pursuant to PROSA. In that regard see:

Annette Brown v Orphiel Brown [2010] JMCA Civ 12, at paragraph 77, per Morrison JA (as he then was), where his Lordship stated as follows:

> *'On an application under section 13(2), it seems to me, all that the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as the merits of the case (on a purely prima facie basis), delay and prejudice, and also taking into account the overriding objective of the Civil Procedure Rules of "enabling the court to deal with matters justly" (rule 1.1(1)).'*

All, or at least some of the factors relevant to the exercise of a discretion of this sort, ought to be evidenced on affidavit, in support of such an application. The factors such as merits of the case, the reason for the delay and whether a good reason has been advanced, must be assessed by the court hearing an application to extend time.

[41] In the present case, the parties were divorced on August 17, 2006, and the claimant's claim was filed on September 20, 2016, just over ten years following the dissolution of the marriage. By the requirements of **section 13(2) of PROSA**, the claimant was required to file a claim under **section 13(1) of PROSA** by August, 2007. There was no evidence as to what was the cause of the claimant's failure to file an application within that time, and equally, there was no evidence, even remotely, explaining the reason for his failure to file this application, prior to September 20, 2016. **Section 13(2) of PROSA**, requires the court to 'hear the applicant,' however, the applicant, in this case, has not placed any material to show to this court, any reason(s) at all, much less, any good reason or reasons to grant an extension of time, for him to file his application, pursuant to **PROSA**. The application by the claimant for his claim to be brought, pursuant to **PROSA** is accordingly refused.

Conclusion

[42] In the circumstances, that the claimant has failed to rebut the presumption that possession was retained by himself and the defendant jointly, and has also failed to place any or any sufficient evidence, before this court, for an extension of time to be granted wherein he may bring an application for division of property pursuant to **PROSA**.

Orders

1. Judgment on this claim is entered in favour of the defendant.

2. No order as to costs.

3. The claimant shall file and serve this order.

…..……..
Hon. K. Anderson, J.