[2018] JMSC Civ 147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 03534

IN THE MATTER of the division of property between Valrie June Quallo and Alford Hanson Quallo pursuant to the Property (Rights of Spouses) Act, 2004

A N D

IN THE MATTER of premises known as Lot No. 156, Seville Heights, St. Ann's Bay in the parish of Saint Ann and being land comprised in Certificate of Title registered at Volume 1170 Folio 127 of the Register Book of Titles

BETWEEN	**VALRIE JUNE QUALLO**	**CLAIMANT**
AND	**ALFORD HANSON QUALLO**	**DEFENDANT**

IN CHAMBERS

Mrs. Jennifer Hobson-Hector for the Claimant

Mr. Gordon Steer and Mrs. Kaye-Anne Parke instructed by Messrs. Chambers Bunny & Steer for the Defendant

Heard: October 9 and November 23, 2018

Matrimonial Property – Claimant's entitlement to an interest in the family home – Whether claimant's interest in family home has been extinguished – Property (Rights of Spouses) Act, 2004, section 6, Limitation of Actions Act, 1881, sections 3, 4, 14 and 30

CORAM: ANNE-MARIE A. NEMBHARD, J (AG.)

INTRODUCTION

[1] By way of a Fixed Date Claim Form, filed on 24 August 2016, the Claimant, Mrs. Valrie June Quallo, seeks the following Orders against the Defendant, Mr. Alford Hanson Quallo: -

(1) A Declaration that the Claimant is entitled beneficially to a one half interest in the property located at Lot 156 Seville Heights, St. Ann's Bay in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1170 Folio 127 of the Register Book of Titles ("the subject property");

(2) Further and in the alternative an Order for Sale of the subject property and distribution of the net proceeds of sale between the parties in equal shares;

(3) Further, that the subject property be valued by a Valuator agreed between the parties within thirty (30) days of the date of this Order, failing which the Registrar of the Supreme Court be empowered to appoint a competent Valuator;

(4) That, in the event of refusal by the Defendant to sign any document of transfer upon sale within a period of twenty-one (21) days of receipt, the Registrar of the Supreme Court be empowered to sign;

(5) That the Claimant's Attorney-at-Law on record shall have carriage of sale;

(6) That each party is to bear his own costs;

(7) Interest;

(8) That there be liberty to apply;

(9) Such further or other relief as this Honourable Court deems fit.

BACKGROUND

[2] Valrie Quallo and Alford Quallo were married on 20 December 1975 and the union produced two (2) children. During the period 1978 to 1980 they lived with their children at Mile End, in the parish of St. Ann, with Mrs. Quallo's parents. Mr. Quallo entered into an agreement to purchase the subject property and the Quallos subsequently lived there as man and wife until Mrs. Quallo migrated. The subject property is registered solely in the name of Mr. Quallo. Mrs. Quallo filed a Petition for Dissolution of Marriage on 28 February 2011.

THE CLAIMANT'S CASE

[3] Mrs. Quallo contends that she and Mr. Quallo entered into an agreement to purchase the subject property, which was facilitated by a mortgage loan in the amount of Thirteen Thousand Dollars ($13,000.00), from the National Housing Trust ("NHT"). The monthly payments of Thirty Dollars ($30.00), which was fixed for a period of twenty (20) years, were made by way of salary deduction from Mr. Quallo's salary. The subject property was transferred on 15 March 1983 and was registered solely in the name of Mr. Quallo.

[4] From around 1985 to around 1989, Mr. Quallo worked as an electrician at the Eden II Hotel and Mrs. Quallo worked for Stephanie Hoilett in the beauty shop located at the same hotel. Mrs. Quallo maintains that, from her salary, along with tips received from visitors to the hotel, she contributed to the household expenses and assisted in the support of the children.

[5] In 1989 Mrs. Quallo was employed to Beverley Hoilett and Marcia Campbell in Brown's Town in the parish of St. Ann. That business was later sold to her [Mrs. Quallo] in 1991 for Twenty Thousand Dollars ($20,000.00). She subsequently purchased a hydraulic styling chair, a dryer with an attached chair and a shampoo chair.

[6] Mrs. Quallo also contends that she contributed to the maintenance and improvement of the subject property in different ways. In this regard, Mrs. Quallo asserts that she hired a compressor to drill the rocks that were in the backyard of the subject property and hired workmen to remove the stones that were there in order that the drilling might proceed more quickly and at a reduced cost.

[7] Mrs. Quallo asserts that in 1992 the parties were living happily with their children. In 1993 she collected Ten Thousand Dollars ($10,000.00) which she used to purchase two thousand building blocks, binding wires, one ton of steel, one load of stone dust, one load of grit and a load of sand, to be used in the construction of an addition/expansion to the house located on the subject property.

[8] On 23 June 1993, Mrs. Quallo travelled to the United States of America ("the USA"). During her absence from the Island, Mr. Quallo managed her business and paid her staff. Mrs. Quallo contends that all the profit from her business went towards the addition/expansion of the said house. While in the USA Mrs. Quallo would send One Thousand United States Dollars (US$1,000.00), on a monthly basis to Mr. Quallo, to be used towards the said addition/expansion.

[9] On her return to Jamaica in March 1994, Mrs. Quallo returned to work in her business, allowing her staff to proceed on vacation leave. At this time, the said addition/expansion included a front room, a veranda, a garage, a kitchen and a dining room, all of which were completed, including the roof, with the exception of a room to the back. Mrs. Quallo returned to the USA on 3 May 1994.

[10] Mr. Quallo received the sum of Fifty Thousand Dollars ($50,000.00), by way of a settlement from the Plantation Inn Hotel, which, on Mrs. Quallo's recommendation, was used to pay the mortgage loan, in respect of the subject property, in full.

[11] In August 1996 Mrs. Quallo sent the sum of Four Thousand United States Dollars (US$4,000.00) to Mr. Quallo with her employers, Mr. and Mrs. Artz. This said sum was used towards the said addition/expansion. Mrs. Quallo maintains that she continued to support the construction of the said addition/expansion by employing her brother to work on the construction site and by paying her brother-in-law for the making of the kitchen cupboards. The house was expanded to include a basement, a kitchen, a bathroom and a bedroom on the first floor while the second floor consisted of three (3) bedrooms, two (2) bathrooms, a laundry room, a kitchen and a dining room. The said addition/expansion was completed in or around 1996.

[12] Mrs. Quallo contends that she telephoned Mr. Quallo, whilst she was abroad, to enquire of the progress of the said addition/expansion and to enquire of him of the reason that her name did not appear on the Certificate of Title for the subject property. She was asked by Mr. Quallo whether she intended to leave him, to which she responded that, having contributed this much money towards the said addition/expansion, it would be unfair for her name to be omitted from the Certificate of Title for the subject property.

[13] Mrs. Quallo further contends that she telephoned Mr. Quallo subsequent to that, at which time he told her that she had 'no place there' and that if she were to come there she should bring her casket.

[14] Finally, Mrs. Quallo contends that their daughter migrated to the USA to further her studies and that during that time she [Mrs. Quallo] was solely responsible for maintaining her [their daughter]. Additionally, Mrs. Quallo continued to send money to Mr. Quallo to be used to support their son, who, at that time, was attending high school.

THE DEFENDANT'S CASE

[15] Mr. Quallo, in response to the Fixed Date Claim Form, relied on the Limitation of Actions Act, 1881 ("the Act of 1881") by way of his defence. The gist of his case is captured and outlined below.

[16] Mr. Quallo disagrees that he and Mrs. Quallo entered into an agreement to purchase the subject property. He contends that he had been employed to the Hyatt Hotel since 1973 and that during the course of his employment there he made his contributions to the NHT. There came a time when the NHT was building houses in Seville Heights, in the parish of St. Ann, and, on his enquiry, he was advised that he qualified to purchase one of them. Mr. Quallo contends that he advised Mrs. Quallo that he was purchasing one of these houses and that that purchase was made by him alone. He asserts that he purchased the subject property for Twelve Thousand Five Hundred and Fifty-Two Dollars and Seventeen cents ($12,552.17) and obtained a loan from the NHT in the amount of Thirteen Thousand Two Hundred and Forty-Three Dollars and Sixty-Five cents ($13,243.65). The monthly mortgage payments were in the amount of Fifty-Four Dollars and Twenty-Nine cents ($54.29).

[17] Mr. Quallo asserts that Mrs. Quallo left Jamaica in 1992, at which time no addition/expansion had yet been made to the subject property. The said expansion/addition was made in 1998.

[18] Mr. Quallo discharged the mortgage on the subject property on 24 November 1995.

[19] Mr. Quallo denies that Mrs. Quallo sent him any barrels at all. He denies receiving any money or any suitcases from Mr. and Mrs. Artz and maintains that every person who worked on the construction of the said addition/expansion was paid by him only.

[20] Mr. Quallo contends that he gave Mrs. Quallo the money to purchase the business from Mrs. Hoilett and Miss Campbell. This money was taken from a joint account that he and Mrs. Quallo had with the St. Ann’s Bay branch of the National Commercial Bank. It is that business that he sold in 1993. Mr. Quallo also stated that in 1994 he sold all the equipment used in that business.

[21] Mr. Quallo contends further that, since her departure from the Island in 1992, Mrs. Quallo has not returned to the subject property and that she has abandoned her interest in it.

THE ISSUES

[22] The issues for the determination of the Court are identified as follows: -

(1) Was the subject property the 'family home' of Mr. and Mrs. Quallo, as is defined by the Property (Rights of Spouses) Act, 2004 ("the Act of 2004")?

(2) Does Mrs. Quallo have an interest in the subject property and if so, has that interest been extinguished by virtue of the operation of section 30 of the Act of 1881?

THE LAW

[23] Section 2 of the Act of 2004 provides the definition of the term 'family home' and reads, in part, as follows: -

"2-(1) In this Act –

> *…'family home' means the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit…"*

[24] Section 6 of the Act of 2004 reads as follows: -

"6 – (1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home –

> *(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*

(b) on the grant of a decree of nullity of marriage;

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home."

[25] Under section 6 of the Act of 2004 contribution is not a factor once the property is found to be the 'family home' as contemplated by section 2 of the Act of 2004.

[26] The effect of this was expressed by Morrison JA (as he then was) in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, as follows: -

> *"…it introduces for the first time the concept of the 'family home', in respect of which the general rule is that, upon the breakup of the marriage, each spouse is entitled to an equal share."*

[27] Section 13 of the Act of 2004 provides that a spouse shall be entitled to apply to the Court for a division of property on the grant of a decree of dissolution of a marriage or termination of cohabitation or on the grant of a decree of nullity of marriage or where a husband and wife have separated and there is no reasonable likelihood of reconciliation or where one spouse is endangering the property or is seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property earnings.

[28] Any application made under section 13 (1) (a), (b) or (c) of the Act of 2004, shall be made within twelve (12) 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.

[29] For the purposes of sections 13 (1) (a) and (b) and 14 of the Act of 2004 the definition of 'spouse' shall include a former spouse.

[30] Section 14 (1) (a) of the Act of 2004 reads as follows: -

(1) Where under section 13 a spouse applies to the Court for a division of property the Court may –

(a) Make an order for the division of the family home in accordance with section 6 or 7, as the case may require."

[31] The provisions of the Act of 1881 compare very closely with those of the English Real Property Limitation (No. 1) Act of 1833 ("the Act of 1833"), as amended by the Real Property Limitation Act of 1874 ("the Act of 1874"), which reduced the statutory period from twenty (20) years to twelve (12) years. The Act of 1833 simplified the law by, among other things, abolishing the highly technical doctrine of adverse possession and the converse notion of non-adverse possession and by changing the law as to the possession of co-owners. (See – Section 2 of the Act of 1833 and section 3 of the Act of 1881.)

[32] One of the necessary reforms was the abolishing of the common law doctrine that the possession of one tenant in common was the possession of all. The effect of this reform was that one co-owner, whether joint tenants or tenants in common, could extinguish the title of the other. (See – Section 12 of the Act of 1833 and section 14 of the Act of 1881.)

[33] The question then became simply whether the requisite number of years had elapsed from the time the right of entry of the paper owner accrued, regardless of the nature of the possession of the person claiming title, by extinction of the paper owner's title.

[34] The Act of 1833 did not create a title in the dispossessor. What it did was to prevent the paper owner from asserting his title after the lapse of the requisite period of time. (See – Section 34 of the Act of 1833 and section 30 of the Act of 1881.)

[35] Section 3 of the Act of 1881 reads as follows: -

"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make

such entry, or to 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 such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

[36] Section 4 of the Act of 1881 reads, in part, as follows: -

"The right to make an entry 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 shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued 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;

(b) *when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;"*

[37] Section 14 of the Act of 1881 reads as follows: -

"When any one or more of several persons entitled to any land or rent as coparceners, 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, of 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."

[38] Section 30 of the Act of 1881 provides as follows: -

"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 or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[39] The Laws of Jamaica and England have since diverged in some important respects. Under the English 1925 property legislation every type of co-ownership of land must take effect behind a trust for sale. The effect of that is, broadly speaking, that co-owners hold the legal estate as trustees and cannot obtain title by possession against one of themselves or any other beneficiary who is not a trustee. (See - **Re Landi (dec'd)** [1939] Ch 828.)

[40] Despite the abolition of the technical doctrine of adverse possession the phrase continued to be used as a convenient shorthand for the sort of possession which can, with the passage of years, mature into a valid title, that is, possession which is not by licence and is not referable to some other title or right.

[41] In **Moses v Lovegrove** [1952] 2 QB 533 at 539, Sir Raymond Evershed MR, speaking of the Limitation Act of 1939 of England, is quoted as saying as follows: -

"The notion of adverse possession, which is enshrined now in s 10, is not new; the section is a statutory enactment of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier limitation statutes."

[42] Both in England and in Jamaica, the Courts did, in the second half of the last century, display some tendency to give the expression a more technical

meaning and to require proof that the squatter used the land in a manner inconsistent with the owner's intentions. In England the beginning of the tendency can be seen in the decision of the Court of Appeal in **Williams Bros Direct Supply Limited v Raftery** [1958] 1 QB 159. The more important English case is the decision of the Court of Appeal in **Wallis's Cayton Bay Holiday Camp Limited v Shell-Mex and BP Limited** [1975] QB 94, in which the leading judgment was given by Lord Denning MR, with a strong dissent from Stamp, LJ. In Jamaica, the most important decision is that of the Court of Appeal in **Archer v Georgiana Holdings Limited** (1974) 21 WIR 431. All three decisions relied heavily on the well-known, but now controversial, decision of the Court of Appeal in **Leigh v Jack** (1879) 5 Ex D 264.

[43] All of those decisions stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also stated that the court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient evidence of possession. Nevertheless, the decisions must be read in the light of the important decision of the Court of Appeal in **Buckinghamshire County Council v Moran** [1990] Ch 623 and the House of Lords decision in **Pye (J A) Oxford Limited v Graham** [2003] 1 AC 419.

[44] In **Buckinghamshire County Council v Moran** (supra) each member of the Court approved the following passage from the dissenting judgment of Stamp, LJ in Wallis's case, at page 110: -

> *"Reading the judgments in Leigh v Jack, 5 Ex D 264 and Williams Bros Direct Supply Ltd v Raftery [1958] 1 QB 159, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner*

cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the wasteland do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession."

[45] In **Pye (J A) Oxford Limited v Graham** (supra) Lord Browne-Wilkinson, after quoting from Bramwell, LJ in **Leigh v Jack** (supra), stated as follows: -

"The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy led directly to the heresy in the Wallis's Cayton Bay line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory review but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

[46] Sykes, J (as he then was) in **Valerie Patricia Freckleton v Winston Earle Freckleton** Claim No. 2005 HCV 01694, judgment delivered on 25 July 2006, stated that between 1968 and 2003, the Judicial Committee of the Privy

Council, the House of Lords and the Court of Appeal of England and Wales have established the legal principles that are applicable in matters dealing with the extinction of a title by a co-owner. These cases, he stated, are **Paradise Beach & Transportation Company Limited v Price-Robinson** [1968] AC 1072 (PC), **Buckinghamshire County Council v Moran** [1990] Ch 623 (CA), **Wills v Wills** 64 WIR 176 (PC), and **Pye (J A) Oxford Limited v Graham** [2003] 1 AC 419 (HL). In the midst of these cases there is the judgment of Slade, J in **Powell v McFarlane** (1977) 38 P & CR 452 at page 470, in which he stated the intention that must exist in the mind of the party who is claiming to have dispossessed the registered owner.

[47] In **Paradise Beach & Transportation Company Limited v Price-Robinson** (supra), an appeal from the Supreme Court of the Commonwealth of the Bahamas, by a will dated 22 November 1912, a testator devised land to his children and grandchildren as tenants in common. Before he died two of his daughters farmed the land on his behalf.

[48] On 23 October 1913, the father died and his daughters continued farming until the early 1920s when they erected a house on the land. The daughters farmed the land until they died in 1962 and after their deaths, the land was occupied by one Mr. Cyril Price-Robinson and others, successors in title to the daughters. It is these successors who were the respondents in the appeal to the Board. The appellants claimed to be successors in title to those persons who, along with the daughters, would have been entitled to the land under the will of 22 November 1912.

[49] On appeal, the appellants argued that they were entitled to that portion of the land as would have devolved to their predecessors in title. For them to succeed they would have had to establish that their predecessors in title, at some point, entered in possession of the land. Had that occurred it would have prevented the daughters from dispossessing the other tenants in common.

[50] The appellants commenced an action in 1963 against the daughters' successors in title, in which they claimed their undivided share. The basis of the claim was that the father's will devised to their predecessors in title and the daughter's predecessors in title as tenants in common. The appellants argued that the daughters did not acquire title to the appellants' share because all the daughters had done was to continue farming, an activity in which they were engaged before the testator died. This activity, the appellants submitted, was insufficient to dispossess the other tenants in common. The daughters had not done anything 'adverse' to the possession of the appellants' predecessors in title and therefore time had not begun to run against them. This meant that the daughters had not extinguished the title of the other title holders. Since the daughters died in 1962 and the action was commenced in 1963, it followed that the respondents (the daughters' successors in title) could not acquire a better title than the daughters had.

[51] The appellants' submissions were founded on the idea that the daughters had to do some 'hostile' act to show that they intended to exclude the appellants' predecessors in title. Since that had not been done, the appellants' title had not been extinguished. The appellants argued that despite the abolishing of the doctrine of non-adverse possession the daughters were not wrongfully in possession and title could not be extinguished unless and until there was a wrongful possession. This would have precipitated a right of entry. Only when the right of entry arose did time begin to run in favour of the daughters. That wrongful act not having occurred, time did not begin to run in their favour.

[52] The finding of the trial judge, which was upheld on appeal, was that the daughters had been in possession for their own use and benefit and that they and their successors in title had been in exclusive possession since their father had died. This was in excess of the twenty (20) years required by the relevant legislation in the Bahamas and consequently the paper title of the other co-owners, albeit tenants in common, had been extinguished.

[53] Lord Upjohn, speaking for the Board of the Privy Council, made a number of important conclusions. These were, firstly, that the Bahamian statutes were the Real Property Limitation (No. 1) Act, 1833 (c. 124) (Statute Law of the Bahama Islands, rev. 1957) and the Real Property Limitation Act, 1874 (c. 216) (Statute Law of the Bahama Islands, rev. 1957) and are identical to the Act of 1833 and the Act of 1874. Secondly, that Denman, CJ had definitively interpreted the United Kingdom statutes in the two important cases of **Nepean v Doe d. Knight** (1837) 2 M. & W. 894 and **Culley v Doe d. Taylerson** (1840) 11 Ad. & E. 1008. Thirdly, agreeing with the decisions of Denman CJ in the two cases cited above, that, the purpose of sections 2 and 3 of the 1833 Act of the Bahamas was to rid the law of the doctrine of non-adverse possession.

[54] Sykes, J in **Freckleton v Freckleton** (supra), at paragraph 10, stated as follows: -

> *"When the limitation statute of James I (21 Jac 1, c 16) was passed, judges found it difficult to accept that a paper owner might lose his land by the simple fact of another person being in possession without any 'hostile' act by the dispossessor. The judges engrafted on the statute a requirement that there must be something in the nature of an ouster of the paper owner by the person claiming title to the land by possession. According to the law that developed the dispossessor must not only occupy the land with the animus possidendi, he must go further to actively bar the paper owner. It was said that the dispossessor had to use the land in such a manner that was clearly and obviously inconsistent with the title of the paper owner. It was this development that became known as 'adverse possession'. If the dispossessor was in possession with the necessary animus possidendi but did not commit any 'hostile' acts inconsistent with the paper owner's title in order to show that he was ousting the paper owner, he was said to be in 'non-adverse possession'. The practical result of this was that the animus possidendi, coupled with possession, was not enough to extinguish the paper owner's title. The*

> *dispossessor must use the land in such a manner as to make it clear that he was behaving like the owner and that use, when examined, must show that he ousted the paper owner. Anything less was insufficient to dislodge the paper owner's title."*

[55] At paragraph 18 he stated: -

> *"The person who is claiming that the title of the paper owner has been extinguished has to establish that there was (a) occupation or physical control of the land and (b) an intention to possess. Intention to possess here means the statement [sic] of mind which says that the dispossessor has it in mind to possess the land in question in his own name or on his own behalf to exclude the world at large including the paper title owner so far as this is possible…"*

[56] At paragraph 19 Sykes, J stated: -

> *"The legal position now is that a registered owner of land or indeed any other owner may now have his title extinguished by his lack of vigilance. If the registered owner wishes to prevent this happening he simply needs to heed the advice of Slade J in* ***Powell****, that is to say, do some "slight" acts either by himself or on his behalf so that it will negative the burgeoning "right" of the dispossessor. Whether that "slight" act will be sufficient depends on the facts of each case. There can be no catalogue of "slight" acts."*

[57] At paragraph 20 Sykes, J stated the importance of appreciating that, whether the paper owner's title has been extinguished, depends on the factual possession and intention of the dispossessor and not on the intention of the paper owner.

ANALYSIS

[58] It is clear from the pronouncement of Morrison JA in **Brown v Brown** (supra) that there can be no dispute that the subject property was the 'family home' of the Quallos, as is defined by section 2 of the Act of 2004. Mr. Quallo does not

seek to deny this in any way and accepts that, by virtue of section 6 of the Act of 2004, Mrs. Quallo would be entitled to a one half share of the family home. He contends however, that Mrs. Quallo has abandoned her interest in the subject property and that by virtue of section 30 of the Act of 1881, she is now barred from making this claim.

[59] In its consideration of this issue the Court has had regard firstly, to the pronouncement of Slade, J in **Powell v McFarlane** (supra), that, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession.

[60] The indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is, however, subject to the subsequent operation of any statute of limitations. (See – Section 68 of the Registration of Titles Act.)

[61] Where a claimant brings a claim to recover possession of land, he must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title and not on the weakness of the defendant's. (See – The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609.)

[62] The authorities have established that, where a person, against whom the claimant brings an action to recover possession of land, pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute. (See – The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 606.)

[63] McDonald-Bishop, JA in **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, at paragraph 42, stated that, a claimant, in a case for recovery of possession, must state the basis of his claim, which is his title to the property. Once that has been done, the statute of limitation will come into play and may operate to bar a stale claim, regardless of whether or not the statute is expressly pleaded by a defendant in possession. The statute automatically

arises for consideration once the title to land is being relied on to ground the claim and its operation is not dependent on whether the defendant chooses to avail himself of it.

[64] Secondly, the Court has had regard to the evidence of Mrs. Quallo. In cross examination Mrs. Quallo testified that she filed divorce proceedings in 2011. When asked whether she stated in the documents filed as part of those proceedings, that, in 1993 she migrated to the USA, Mrs. Quallo stated that she 'might have said that'. She testified further that, when she migrated to the USA, she left from the subject property which was her home and which had been since she moved there on 2 May 1980.

[65] Mrs. Quallo's evidence then continued as follows: -

> *"Since I leave in May 1994 I never returned to Seville Heights. I had to stay in the United States of America until my documents were completed. Mr. Quallo has been living at Seville Heights. He pays the property taxes, the outgoings and everything concerning the house at Seville Heights. Since 1998, all decisions made regarding the house have been made by Mr. Quallo."*

[66] In reference to the subject property, Mrs. Quallo gave the following answers to the following questions: -

Question: *"It would be true to say, based on your documents, that between 1998 and 2013 you never entered those premises in Seville Heights?"*

Answer: *"No. Not until 2016."*

Question: *"You have not set foot in those premises since 1994?"*

Answer: *"Yes. I went away in 1994."*

[67] On the evidence adduced, there is a dispute between Mr. and Mrs. Quallo as to the year in which Mrs. Quallo left the subject property. Mrs. Quallo's evidence is that she left the subject property in 1994 and did not return there

until 2016. Mr. Quallo, on the other hand, avers that Mrs. Quallo left the subject property in 1992, when she migrated to the USA. From the timeline provided by Mrs. Quallo she physically left the subject property in 1994 and did not return until 2016. This would mean that she has been absent from the subject property for a total of twenty-two (22) years. In the documents filed as part of the divorce proceedings, Mrs. Quallo stated that the marriage ended in 1998 and she commenced divorce proceedings in 2011. Taking this timeline into account, Mrs. Quallo would have been absent from the subject property from 1998 until 2011, a total of thirteen (13) years. In light of that evidence, it is clear that Mrs. Quallo has not been in possession of the subject property for a period of time that exceeds the twelve (12) years contemplated by the Act of 1881.

[68] Even if the Court were to accept Mrs. Quallo's evidence, as to the contributions that she made to the subject property up until 1996, when, she asserts, the addition/expansion was completed, the Court still has to grapple with her evidence that, since 1994, she did not return to the subject property until 2016 and that, since 1998, Mr. Quallo has been solely responsible for all the decisions in respect of the subject property.

[69] The Court finds that, on the basis of any of the timelines that Mrs. Quallo provides for the Court's consideration, time would have begun to run against her and that, by virtue of the operation of section 30 of the Act of 1881, her interest in the subject property has been extinguished.

DISPOSITION

[70] It is hereby ordered that: -

(1) Judgment for the Defendant;

(2) The Defendant is entitled to the legal and beneficial interest in all that parcel of land being Lot No. 156, Seville Heights, St. Ann's Bay in the

parish of St. Ann and being the land comprised in Certificate of Title registered at Volume 1170 and Folio 127 of the Register Book of Titles;

(3) Each party is to bear his own costs;

(4) The Defendant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.