[2019] JMSC. Civ. 21

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015HCV02250**

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| **BETWEEN** | **EARNESTINE ROBERTS** | **CLAIMANT** |
| **AND** | **DAVE GEORGE PARKINSON** | **DEFENDANT** |

**TRIAL IN CHAMBERS**

**Ronald Paris, instructed by Paris and Co. for the Claimant.**

**George Traile, instructed by Phillip, Traile and Co. for the Defendant.**

**Heard: November 23, & 24, 2017 and February 6, 2019**

**Limitation of Actions Act; sections 3, 4, 14 and 30 – Adverse Possession – Whether joint tenancy has been severed – whether there was a partnership to operate jointly owned property for mutual benefit**

**PALMER, J.**

**The Claim**

**[1]** Earnestine Roberts, by her claim filed on April 23, 2015, sought the following orders:

1. *A declaration that by the service of a notice of severance dated the 18th of September 2013 enclosing a Transfer signed by the Claimant and served on the Defendant's Attorneys-at-Law, Phillip Traile & Co. the beneficial joint tenancy of the residential property known as 25 Appleton Hall (hereinafter "the property") formerly held by the Claimant and the Defendant has been validly and effectively severed...;*

2. *A declaration that the said property is held by the Claimant and the Defendant on trust for themselves as beneficial tenants in common in equal shares;*

3. *An order that the property be sold and that the Claimant or some other person to be determined by the Court be appointed to have conduct of the sale of the property;*

4. *A declaration that the other property acquired by the parties and situate at Lima in the Parish of Saint James consisting of 10 acres of land was purchased by the Defendant in the name of Appleton Castle Ltd. (the shareholders and directors of which are the Defendant and the Claimant's deceased husband, Kenneth Roberts) with monies provided him by the Claimant and her deceased husband and which property is more particularly described in certificate of title registered in Volume 1311 Folio 427 and more particularly set out in the Particulars of Claim filed herewith;*

5. *A declaration that there be an account or inquiry as to what sums are due the Claimant and the estate of her deceased husband Kenneth Roberts from the Defendant by way of occupation rent or compensation for use and occupation of the respective properties;*

6. *An order that the defendant do account to the Claimant for any sums found to be due her and to the estate of the Claimant's deceased husband;*

7. *Any necessary or consequential accounts inquiries and directions;*

8. *Further and other relief;*

9. *An order that the Defendant do pay the Claimant's costs of this Claim.*

**[2]** The matter was commenced by way of a Fixed Date Claim Form with Particulars of Claim filed in support. Trial was ordered in chambers, at the commencement of

which, Counsel for the Claimant informed the Court that she was no longer pursuing the remedies as outlined in paragraphs 4 and 5 of the Claim. During the cross-examination of the Defendant however, Counsel for the Claimant indicated a contrary position in respect of the abandoned aspects of the Claim. It was clear when the trial began that the remedies sought in paragraphs 4 and 5 of the Claim were unequivocally abandoned and this decision therefore will only consider those aspects of the claim that relate to the property at 25 Appleton Hall, St. James.

**The Evidence**

**[3]** The Claimant is a citizen of the United States of America, a retired Beautician and the widow of Kenneth Roberts, Businessman, who died on May 2, 2007. The Defendant is a Tennis instructor/Businessman and sometime between the late 1980’s to early 1990’s, during the couple’s regular visits to the Island of Jamaica, they became friends with Mr. Parkinson.

**[4]** Mr. and Mrs. Roberts desired to purchase property in Jamaica and due to their close relationship with Mr. Parkinson, sought to include him in their plans. According to the Particulars of Claim, the Claimant and her deceased husband took Mr. Parkinson as a trustworthy business partner for their investments in Jamaica. Mrs. Roberts suggested that Mr. Parkinson was without any obvious financial means to contribute to any investments and when the first purchase of property was made in December 1993, that it was the Claimant’s husband who provided the money to purchase it. It is the purchase of Lot 25, Appleton Hall, Montego Bay in the parish of St. James, described in Certificate of Title registered in Volume 1149 Folio 796 of the Register Book of Titles (“Appleton Hall”), around which the remaining issues in the Claim revolve.

**[5]** When initially purchased, the property was registered in the names of Mr. and Mrs. Roberts, Mr. Parkinson and Tanya Marie Dunkley; Mr. Parkinson’s girlfriend at the time. When the relationship with Ms. Dunkley ended, Ms. Dunkley was made to sign a document transferring her interest to the remaining three (3) joint tenants.

In cross-examination Mr. Parkinson indicated that he had the transfer document prepared on the advice of Counsel who now acts for the Claimant, Mr. Paris, whose chambers acted for him at the time of these events. His girlfriend was 'persuaded' to sign the transfer with the threat of court action, an approach Mr. Parkinson said he made on the advice of his then Counsel.

**[6]** According to the Claimant, the business plan was that they would finance the construction of a building at the subject property, which was to be managed by Mr. Parkinson on behalf of them all as an income generating asset, so that all three (3) parties would obtain a financial return on that investment. The Claimant and her husband sent approximately US$523,000.00 to the Defendant for the completion of the building with the agreement that the Defendant would pay to the Claimant and her husband US$1,000.00 per month as the return on their investment. When the building was completed, it was comprised of seven (7) self-contained apartments, but in breach of the agreement, Mr. Parkinson has paid nothing. It was revealed in the evidence of the Defendant that other apartments were added over time, and even up to the time of the trial there was on-going construction.

**[7]** On or about October 10, 1994 a company was incorporated in the name of Parkinson & Roberts Transportation Co. Ltd. for the purposes of operating a rental car business, but that business never did much business as it only ever owned two (2) cars. A second company was incorporated in the name of Appleton Castle Ltd. on January 12, 2002, with funds which according to the Claimant were exclusively from the Claimant's and her husband.

**[8]** Sometime thereafter the parties formed another limited liability private company called Appleton Castle Ltd. and that company purchased ten (10) acres of land at Lima in the parish of St. James on January 12, 2002 with funds the Claimant stated that she and her husband provided. The Claimant also alleged that her husband gave the Defendant US$50,000.00 to invest in a chicken farm on half acre of land owned by the Defendant's step father and mother.

**[9]** Neither the Claimant nor her husband had ever received any monetary return from the Defendant from any of the investments made by the Defendant with monies provided to him by the Claimant and her husband whether before or since her husband's death. As far as the Claimant is aware, the Defendant is still operating the chicken farm on his family land. Despite those aspects of the Claim being abandoned, the evidence was relevant to the extent that they illustrate the nature of the relationship between the Mr. Parkinson and Mr. and Mrs. Roberts.

**[10]** The relationship between the Claimant, her husband and the Defendant broke down before the death of Mr. Roberts, according to Mrs. Roberts. So much so that by notarized letter dated March 6, 2007, her husband wrote to the Defendant requesting that he pay to them the agreed return on their investment, but this was to no avail. The Claimant then retained Counsel from Mississippi; Blalock Law Firm, to write the Defendant, and by letters dated May 23, 2012 and July 20, 2012, sought to determine the partnership and to have an accounting provided by him for monies due to them. Brad J. Blalock offered the Defendant three (3) options to terminate their partnership, but the Defendant did not to respond.

**[11]** By letter dated September 2013 the Claimant's Attorneys-at-Law wrote to the Defendant's Attorneys-at-Law seeking to sever the joint tenancy in respect of the subject property and enclosing a form of Transfer signed by the Claimant converting the joint tenancy to a tenancy-in-common. The Defendant did not sign the Transfer and responded in writing through his Attorneys-at–law to indicate in no uncertain terms his unwillingness to cooperate with the Claimant's desire for severance. Accordingly, the Claimant asserts that from the course of dealing of the parties as outlined, their dealings were that of a partnership. She seeks an order that the parties hold the subject property as tenants-in-common and consequently, that the Court make orders that the property be sold on the open market and the proceeds divided equally or that the Defendant purchases the Claimant's interest.

**[12]** Mr. Parkinson denied that the Claimant was party to any discussions he had with her late husband, Kenneth Roberts, and that she simply doesn't know what those

discussions involved. He stated that Mr. Roberts was never interested in having any business in Jamaica and that the Five Hundred and Seventy Thousand Dollars ($570,000.00) received from him was a gift. He stated at trial that when the subject property was bought, Mr. Roberts had initially wanted to keep it a secret from his wife. It was later that Mr. Roberts came to him insisting that his wife's name be added to the title when she found out about the secret 'gift'.

**[13]** Mr. Parkinson said that at no time was there any agreement between himself and Kenneth Roberts to construct any building on the property at Appleton Hall and that he initially used the said property for a block-making operation. He stated that it was from his own resources that he modified the original structure and converted a major part of the building into self-contained apartments.

**[14]** Mr. Parkinson also gave details of the heavy involvement of the chambers of Paris & Company, in particular Counsel currently on record for the Claimants, in the forming and incorporation of the companies in which Mr. Parkinson and Kenneth Roberts were engaged. He went as far as to suggest that the knowledge lent to the cross-examination of him was acquired from when he was his own Attorney-at-Law.

**[15]** Mr. Parkinson denied receiving any money whatsoever from the Claimant and stated that he had no reason to pay any money to Kenneth Roberts as he had indicated to him on many occasions that whatever money he gave to him, was a gift. Further the Defendant stated that it was his intention to rely on the provisions of sections 3 and 30 of the Limitation of Actions Act at the trial of this claim for its full effect and import.

**The issues**

**[16]** In view of the position taken by the Claimant at the commencement of the trial, the issues were reduced to the following:

(1) Whether the Claimant's interest in 25 Appleton Hall had been extinguished by virtue of the provisions of sections 3, 4, 14 and 30 of the Limitations of Actions Act 1881;

(2) Whether the Defendant by virtue of his actions in relation to 25 Appleton Hall acquired a possessory title to the Claimant's interest of the property at Appleton Hall registered at Volume 1149 Folio 796;

(3) Whether the joint tenancy between the Claimant and the Defendant severed by letter dated 18th September 2013.

**Submissions**

**[17]** Citing ***Culley v Doe d. Taylorson*** (1840) 11Ad & E 1008, it was accepted in the submissions on the behalf of the Defendant that the import of the English Limitations of Actions Act 1833, the equivalent to section 3 of the Jamaican Act, was that the general rule is that no action for recovery of land could be brought after the expiration of the period from the time when the right first accrued. Time under the Act begins to run against the owner of land and in favour of the person who takes possession adverse to him immediately upon the former discontinuing his possession or being dispossessed. A party who fails to commence their claim before the expiration of the limitation period is statute barred from pursuing it thereafter (***Re Atkinson & Horsells Contract*** (CA) 1912 2 Ch 1 at page 9). At the point of the expiration the registered owner loses the right to recover and the Defendant gains the right to have a new title registered in his name.

**[18]** The effect of section 3 of the Limitation of Actions Act, it was submitted, would be to put an end to all questions and discussions as it regards possession of land, adverse or not. Section 3 of the Act states when the right shall have accrued when the person became entitled to such possession. Section 30 of the Act states that at the end of that limitation period that the right and title of the such person to the land will have been extinguished. (See ***Re Atkinson & Horsell Contract*** (CA) (1912) 2 Ch. 1 per Lord McNaughten which upon the expiration of the limitation

that the 'rightful owner's' right is forever extinguished and the possessory owner acquires absolute title).

**[19]** It was submitted that from the time of the *inter vivos* transfer on December 2, 1994 to the Defendant that twelve (12) years had long expired by the time the clam had been filed in 2015. The fact of the Claimant's failure to commence a claim within that period, it was submitted, is fatal to the Claimant's claim.

**[20]** The Claimant, it was submitted had, by the time the Claim was filed, already acquired a possessory title to the property. This applies whether the land is registered or unregistered land; or involves joint tenants or tenants in common. It was submitted that for a claim of adverse possession to be successful, the land concerned must be in possession of some person in whose favour the period of limitation can run.

**[21]** The possessor must show that he has been in open, visible and continuous possession, exclusive of the paper owner. Relying on the authority of ***David Bent v Mekvina Williams*** RM Civil Appeal No. 64/75 (March 2, 1976) it was submitted that it is not enough for the owner to be out of possession but that the adverse possessor must take possession for time to begin to run. Where the intruder takes possession to the exclusion of the true owner, the latter will not succeed in interrupting the running of time simply by entering without remaining in possession, suing for rent without recovering payment or protesting the trespass. In ***Clement v Jones*** (1908) 8 CLR 133 it was held that acts consistent with adverse possession include occupying the lands, refusing to pay or account for rent collected when demanded and resisting the owner's entry. If one cannot retake land in those circumstances peacefully then the proper course it to institute proceedings to recover possession of rent.

**[22]** It was further submitted, relying on ***Re Hobbs, Hobbs v Wade*** (1887) 36 Ch. D. 553, that the Claimant, having never taken possession of the Appleton Hall property, nor having collected any rental income from it, was in no better

possession that the Claimant in ***Re Hobbs***. In ***Re Hobbs*** a party who had held a half share of land and other rental income had had his interest extinguished after twelve (12) years. Mrs. Roberts in her affidavit evidence stated that she was excluded from possession and the collection of any profits or income.

**[23]** It was clear from the actions of the Defendant, it was submitted, that he had the *animus possidendi*, as defined by Slade J, to in his own name and on his own behalf, to exclude the world at large to include the holder of the paper title. This exclusive occupation, it was submitted, was admitted to by the Claimant and her son in their respective affidavits, which confirmed the Defendant's possessory title. In support of this position reliance was placed on ***Wills v Wills*** (PC Appeal no. 50 of 2002 delivered December 1, 2003) where and ex-wife's claim failed as she had been totally excluded from the properties of her ex-husband who had retained all the income from the properties and the income therefore for his own use. The ex-wife had also not visited any of the properties for more than twelve (12) years prior to the claim. The Court further held that there did not exist a fiduciary duty for her ex-husband to hold the property in trust for her.

**[24]** Though it does not appear to have been a disputed issue at trial, it was submitted relying on ***Panton v Roulstone*** (1976) 24 WIR pg. 462 at 469, that the right of survivorship or *jus accrescendi* applies upon the death of one joint owner where there is property held by parties as joint tenants. Upon the death of Kenneth Roberts on May 2, 2007 his interest in the property was accrued to the remaining joint tenants.

**[25]** The Claimant's position is that the joint tenancy was severed by the September 18, 2013 letter, as well as by a course of dealing between herself, her deceased husband and the Defendant. ***Williams v Hensman*** (1861) 70 ER 862 at page 867, Page-Wood VC identified three (3) types of circumstances which will amount to severance of a joint tenancy: (i) Act of joint tenant operating upon his own share; (ii) Mutual agreement and (iii) Course of Dealing.

**[26]** It was submitted for Mr Parkinson that the Claimant has satisfied none of these criteria and as such there has been no severance of the joint tenancy. Further it was submitted that had the Claimant brought her claim within the limitation period, then this would have sufficed as an act operating on the share (See ***Re Draper's Conveyance*** [1967] All ER p. 853). As it regards the second criterion, severance by mutual agreement, there is certainly no written evident that there was any. There was also, it was submitted, no evidence of any course of dealing to suggest that there was severance by a course of dealing. The acts of the Defendant it was submitted was in direct contradiction to any assertion that here was a mutual course of dealings between the parties, sufficient to amount to a severance.

**[27]** The September 18, 2013 letter, it was further submitted was a unilateral declaration that did not operate to sever the joint tenancy between the parties. In any event, Counsel submitted, even if there were such acts capable of severing the joint tenancy, this would still not preclude the operation of sections 3 and 30 of the Limitation of Actions Act.

**[28]** It was submitted for the Defendant that the attempt by the Claimant to suggest that the relationship between the parties was in the nature of a partnership is unfounded and unsupported by any evidence from Claimant as she admitted in cross–examination that she never personally gave the Defendant any monies in respect of the Appleton Hall property or any of the properties purchased. It was further submitted that from the evidence of Mr. Parkinson in cross-examination, it was clear that the construction and subsequent rental of the property was done with no input from the Claimant and were directed by unilateral decisions of the Defendant.

**[29]** It was also submitted that the issue of an accounting of the profits for the said Appleton Hall property is subsumed under the issue of extinction of title and further there was no evidence before the court of any income generated from rentals, and based on the foregoing that the Defendant denied that the Claimant entitlement to

the relief claimed in the Fixed Date Claim Form and Particulars of Claim and judgement should be given in his favour with costs to be agreed or taxed.

Severance of the joint tenancy

**[30]** Counsel for the Claimant cites the case of ***Williams v Hensman*** (1861)70 ER 862 where it was said at page 867 by Vice -Chancellor Page-Wood:

> *"A joint tenancy may be severed in three ways: in the first place an act of any one of the persons interested operating upon his own share may create a severance as to that share… Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund losing of course at the same time his own right of survivorship."*

**[31]** It was submitted that Morrison JA, as he then was, in ***Carol Lawrence et ors v Andrea Mahfood*** SCCA No. 159/2009 cited with approval the principle set in ***Burgess v Rawnsley*** [1975] 3 All E.R.142 that:

> *"… an oral agreement for the sale of his interest by one joint tenant to the other will suffice to effect a severance even though that agreement may be unenforceable for the want of writing."*

Morrison JA went onto say that:

> *"… in order to effect a severance by this method there must be an agreement … However, an agreement to sever need not be expressed but can be inferred from a course of dealing (see per Browne LJ at pg 444) which was Page Wood's third method, although, … this method ... covers acts of the parties including negotiations which although not otherwise resulting in any agreement, indicate a common intention that the tenancy should be regarded as severed".*

**[32]** Counsel for the Claimant submitted that the instant case is almost on all fours with ***Lawrence*** except that in this case the Defendant's, the other joint tenant, having objected to the Form of Transfer used by the Claimant's Attorney to effect the severance, then chose to return same while enclosing what she regarded as the

appropriate form. The letter ended inviting Counsel to have the Claimant execute the correct document and to have it returned for the Defendant's signature. This, it was submitted for the Claimant demonstrated evidence of a mutual agreement or common intention to sever the joint tenancy.

**[33]** It was submitted for the Claimant citing Brooks JA at paragraph 90 to 92 of his judgement in ***Sunshine Dorothy Thomas and Ors v Beverley Davis*** SCCA No. 52/2016 that:

> *"the execution of an instrument of transfer by Mr Brown without more would have been sufficient to sever the joint tenancy … to be effective unilateral severance must be an irrevocable act which would prevent the actor from being able to claim survivorship of another joint tenant's interest."*

It was further submitted that the learned judge concluded that Mr Brown's execution of the instrument of transfer which purported to sever the joint tenancy with Ms. Davis, did have that effect when he brought it to her attention.

**[34]** Even the fact of the Claimant having filed the Fixed Date Claim Form seeking the Orders therein, together with the Claimant's Affidavit in Support and the Defendant's affidavit in response has effectively severed the joint tenancy even if the Claimant had not done so already. Reliance was placed on the authority of ***Re Draper's Conveyance Nihan v Porter and Another*** 1969 1 Ch. 486 Per Plowman J (page 491) to support the proposition that a declaration by one of a number of joint tenants of his intention to sever, operates as a severance. The Court in ***Re Draper*** expressed the view that the summons issued by the wife in the Divorce Division coupled with the affidavit in which she swore in support of that summons did operate to sever her beneficial joint tenancy.

**Analysis**

**[35]** The methods regarding the Severance of a joint tenancy are indeed correctly stated by both parties. The judgement of Page-Wood VC in the case of ***Williams v Hensman*** has been regarded as "the touchstone on the topic" (***Sunshine Dorothy Thomas et al v Beverley Davis*** SCCA No. 52/2016, para 79.) Regarding their interpretation Counsels for the parties correctly indicated that methods 1 and 2 do not apply to this case as there was no irrevocable act by the Claimant preventing her from claiming any interest in the land at all as required by method 1 and no evidence of a mutual agreement to sever as required by method 2.

**[36]** By method 3 according to Harrison JA in ***Carol Lawrence v Andrea Mahfood*** paragraph 26, quoting Lord Denning in ***Burgess v Rawnsley***, stated:

> *"...this method is not a mere sub-heading of the second, [but covers] … acts of the parties, including … negotiations which although otherwise not resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed."*

The instant case may fall under this 3rd method. While there is no recognition of the "notice" sent by the Claimants attorney in Mississippi to the Defendant in a letter dated May 23, 2012, asked him to immediately sever his one-third interest. It formed part of the communication between the parties, which had been preceded by others. In her Affidavit the Claimant wrote at paragraphs 14 and 15 that the relationship between the Claimant her husband and the Defendant had broken down before the death of her husband, so much so that by notarized letter dated March 6, 2007 her husband wrote the Defendant requesting that he pay them the agreed return on their investment of US$523,000.

**[37]** The letter dated March 6, 2007 showed that the Claimant's husband was asking for and expected returns. It did not state the name of the property in question, though it did say the payments were to be made by Appleton Castle, but it showed that it was not true that everything he gave to the Defendant was a gift as he was here asking for his return on his investment. The returns were not being honoured

and he was clearly dissatisfied with the Defendant. Mr. Roberts died, but the issues however continued, and the Claimant commenced her own discussions. It is noted however, that the letter dated May 23, 2012 is captioned: "Re: Payment and or/sale of Real Estate known at Appleton Castle". This appears to be relating to the house and farm at 25 Appleton Hall property. It shows that the parties were having a strained relationship and that at this point at least the Claimant was demonstrating an intention or at least a mind-set to separate her interests from the Defendant. It refers to numerous requests for the Defendant to honour the agreement failing which, the property was to be sold and proceeds distributed. This pointed to a method of severance in by a course of dealing through the negotiations and exchanging of letters regarding 25 Appleton Hall. The mind-set of the Claimant was to go her own way since the Defendant was not fulfilling his part of the agreement made.

**[38]** The Claimant's attorney sent a form for the severance of the joint tenancy to the Defendant's Attorney. The letter dated September 18, 2013 from the Claimant's attorney to the Defendant's attorney spoke to the enclosed transfer that was to be signed. This form was not signed by the Defendant and the Defendant's attorney sent it back to the Claimant's. In that return letter dated April 3, 2014 the Defendant's Attorney wrote to the Claimant's attorney indicating not that there was any issue taken with the severance but that the if that was the insistence of the Claimant that it would be at her cost. The indication was that the correct document would be sent for execution by the Claimant and later by the Defendant. The clear inference was that, had the correct transfer form been sent, the Defendant would have been willing to sign it.

**[39]** The Defendant stated in his affidavit at paragraph 16 and 17 says that he had been and still was in sole occupation, control and possession of the said property at Appleton Hall and reaping the rents and profits arising therefrom and had never accounted or given the Claimant or her late husband any income generated from the rental of the units on the property. He stated that he has treated the property

as if he was the sole owner to the exclusion of the Claimant, her deceased husband and anyone else.

**[40]** Besides the issue of the form being the correct one, the costs associated with the severance was the last concern that the Defendant had, as raised in the letter of his Attorney, before signing. Despite not signing the document it is clear that from their dealings with the property, that at that time the Defendant acted as if there was a common intention for the joint tenancy should be regarded as severed. I therefore find, in according with method 3 stated in ***Williams v Hensman***, that through a course of dealing there was a common intention that the joint tenancy that previously subsisted between the parties, should be regarded as severed.

**[41]** The Claimant's attorney argued that since the relationship between the parties was that of a monetary investment made by the Claimant and her deceased husband in the fidelity and honesty of the Defendant to convert their investment into an income generating property with the intention of mutual profit from their investment, then their relationship was in essence a partnership carried on in common between themselves with a view to profit. Clearly it is undisputed that only the Defendant has profited from the enterprise and this court is asked to right the wrongs committed by the Defendant and balance the scales of Justice.

**[42]** On this issue the Defendant submits through his Counsel that the attempt by the Claimant's attorney to suggest that the relationship between the parties was in the nature of a partnership is unfounded and unsupported by any evidence from Claimant as she admitted in cross–examination that she never gave the Defendant any monies in respect of any of the properties purchased.

**[43]** The Encyclopaedia of Terms and Precedents 5th Edition, Volume 19, in the Preliminary note posits that:

> *"A joint venture may be defined ... as any arrangement whereby two or more parties cooperate in order to run a business or to achieve a commercial objective."*

In relation to partnership, the Partnership Act of 1890 defines it thus:

> *"The relationship which subsists between persons carrying on a business in common with a view of profit."*

**[44]** The authors of ***Company Law, 3rd Edition***, John Lowry and Alan Dignam at page 4 posit that:

> *"A partnership can come about by oral agreement, it can be inferred by conduct or it can be formal written agreement specifying the terms and conditions of the partnership. There is no formal process of becoming partners – if you believe as partners the law will deem you are partners, even if you have no idea what a partnership is."*

**[45]** Counsel for the Claimant pointed out in his submissions, the case of ***Khan v Miah*** (2000) 1 WLR 1232 (HL), that once the judge found that the assets had been acquired, the liabilities incurred and the expenditure laid out in the course of the joint venture and with the authority of all the parties the conclusion followed inevitably. There is no doubt that the names of the parties are on the title for 25 Appleton Hall as joint tenants. It is not disputed that the price was $570,000 and that Defendant had not contributed to the purchase price. There is no written agreement presented to the court to show that the parties were more than joint tenants.

**[46]** The evidence of the Claimant is that:

> *"The business plan of my husband and myself was that we would finance the construction of a building on 25 Appleton Hall under the management of the Defendant which upon completion would be utilized by the Defendant as an income generating asset so as that all three joint owners would obtain a financial return on that investment. My husband and I then sent approximately $523,000 in United States currency to the Defendant for the completion of the building with the agreement that the Defendant from the proceeds of his utilization of the building pay $1,000 in United States currency per month as our return on our investment. The Defendant duly completed a substantial building on lot 25 Appleton hall and began*

*residing there with his family and they still reside there. The building also contained apartments available for individual or separate rental."*

**[47]** The Defendant has stated that there was never any agreement between him and the Claimant and her deceased husband about a "business partnership, or the construction and management of a building at Lot 25 at Appleton Hall." He says at paragraphs 13-17 "that the said property at Appleton Hall was used initially by him for block making and the income from same and other business ventures was used to construct a house on the said land..." and from his own resources he modified the original residence and converted a major part of the building into self-contained apartments which he rents.

**[48]** He said in his Defence that the Claimant's husband told him that all that he had given him was a gift and even called him before he died to remind him of this. The explanation of the gift being a tip was given by the Defendant as to why the Claimant's husband would have given what would have been in 1993 a substantial gift. This was to say the least incredible. No estimate of the earnings from businesses (other than as a tennis instructor) in which the Defendant was involved, was given to show that he could generate the amount of money needed to construct a building of the nature built at Appleton Hall.

**[49]** The Court has not seen any receipts from the Claimant and the Defendant says it was all given as a gift by her husband. Why then was the husband asking for returns on a gift? The Court accepts that there was in equity a partnership among these parties regarding the purpose and use of the Appleton Castle property and that the construction of the building was done with the authority of the parties. The Defendant was clearly not of the means to fund the construction of the building and I find the Claimant's account that the funding came substantially from her and her husband to be preferable. Her evidence was that she did not give the Defendant the money but they had talked about building the house and she was told what was happening by her husband.

**[50]** There was clearly discussion regarding the nature of the business or the project which the parties had in mind, which accounts for why the Claimant's husband insisted that the Claimant's name be added to the title for the property. It was clear that given their trust and regard for the Defendant that he was an obvious choice as the person who would undertake the day-to-day operation of the business, which was done with the authority of all the parties.

**[51]** Counsel for the Defendant argued that based on the Statute of Limitations, in particularly sections 3, 4, 14 and 30, that the Claimant's right to the property has been extinguished. He argues that the property in question was a gift to the Defendant and so the time ran on the limitation clock from the time he received the deed of gift in 1994 extinguishing the Claimant's rights in 2006. The Court does not accept that the property or the sum given by the Claimant's husband to purchase it was a gift to the Defendant. There are far simpler ways to have conveyed a gift and there would have been absolutely no reason to have added any other name than the Defendant's had that been so.

**[52]** Counsel for the Claimant states in his submissions that the Defendant has been residing in the premises since its completion and has created residential tenancies of the apartments built by him thereon in accordance with the plan agreed upon by the parties at the beginning of their relationship / partnership and common venture. However, in breach of the agreement of the parties and thus the point of separation/ disintegration, of the common venture occurred when the Defendant has failed to give the Claimant or her deceased husband any funds representing a return on their rather substantial investment in the Defendant.

**[53]** Section 3 of the Limitation Act states:

> *"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."*

**[54]** Section 4 states:

*"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 such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;*

*(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,*

*(c) when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims by a person, being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;*

*(d) when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest,*

*and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;*

*(e) when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken. "*

**[55]** Section 14 states:

*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.*

**[56]** Section 30 states that:

*"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."*

**[57]** Sykes J (as he then was) provides a concise and useful summary of the relevant law in the case of ***Lois Hawkins (Administrator of the Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McIniss*** [2016] JMSC Civ 14. He said the following in paragraph 12 of his judgment:

*The law in this area is no longer in doubt. It was most recently expounded by the Court of Appeal in* ***Fullwood v Curchar*** *[2015] JMCA Civ 37. This court cannot improve on the clarity, precision and*

*exposition of McDonald Bishop JA (Ag). The court will simply refer to paragraphs [29] to [54]. From these passages the following propositions are established:*

*(i) the fact that a person's name is on a title is not conclusive evidence such that such a person cannot be dispossessed by another including a co-owner;*

*(ii) the fact of co-ownership does not prevent one co-owner from dispossessing another;*

*(iii) sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing any action to recover property after 12 years if certain circumstances exist;*

*(iv) in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenancy dies, the normal rule of survivorship would apply and the co-owner takes the whole;*

*(v) however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other cotenant;*

*(vi) the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other co-owner to resist any claim for possession;*

*(vii) when a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished thereby proving good standing to bring the claim m;*

> *(viii) the reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place;*
>
> *(ix) dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit;*
>
> *(x) the relevant intention is that of the dispossessor and not that of the dispossessed;*
>
> *(xi) in determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists, it makes the extinction of title claim stronger but it is not a legal requirement;*
>
> *(xii) the question in every case is whether the acts relied on to prove dispossession are sufficient."*

**[58]** The evidence, as espoused above, supports the conclusion that the relationship of the Claimant, her deceased husband and the Defendant was as partners. They acquired the property as joint tenants which was used for the construction of a building, the subsequent rental of which was to generate income for them. It was clear that the intention was always for the Defendant, who resides in Jamaica, to manager of the property on behalf of them all. On many occasions the Claimant and her husband also stayed there as they were all entitled to as owners. No evidence was given as to how long or how often they stayed when they were there.

**[59]** It is contrary to the intention of the parties that while they are addressing the joint venture and were working together to achieve common goals, albeit from different parts of the world, that a limitation clock regarding any of them pursuing sole and exclusive interests, would start to tick from the time the property was transferred into their respective names. The Defendant began to manage the execution of the project simply because the Claimant and her husband resided abroad and he, their trusted partner, still resided in Jamaica. It is clear that when the letters were exchanged by the Attorneys regarding the severing of the joint tenancy that all

parties were still clear that the property was for their joint benefits. For the Defendant to then take the view that once they left the country and he proceeded to take steps in their venture on all their behalves, to be interpreted as Claimant abandoning her interest is contrary to the joint nature and intention of a partnership and to the clear intention of the parties. The fact that the parties returned at will and without noticed and spent time at the property during the period makes it clear also that despite what the Defendant may have planned to do secretly, that he wished to convey to the Claimant and her husband, that the agreed plan was being executed.

**[60]** According to Mr. Parkinson's Counsel, he had been in open, exclusive and undisturbed possession of the said land from the date of transfer of the property in 1994 to present. It was not accepted that the Defendant always had exclusive, undisturbed possession as the evidence of the Claimant's son, was that the Claimant, herself and her son would visit and stay overnight at times during and after the construction of the home. The Defendant himself would take them there and he and his family would be present at the home. He recalls visits from the 1990's. The last time that he recalls was in 2005. This would have indicated to the Defendant that the Claimant and her husband were very much interested in their ownership of the property.

**[61]** Hence, when they visited the house the Defendant knew that they were there not just owners but investors, wanting an income. The 2005 date puts the disturbance of any exclusive possession before the 12-year mark. The Fixed Date Claim Form filed in this matter was dated April 23, 2015. The Defendant was not therefore able to claim that had dispossessed the Claimant and her husband for 12 years.

**[62]** He had a "degree of physical custody and control over the property in question only as per their agreement. Further, even outside of any consideration of a partnership he did not fully control the property exclusively and without disturbance as even by his own evidence he said the Claimant's husband would 'just show up' at times, behaviour more consistent with a co-partner than a person who had given

a substantial gift and was returning as a guest. He could not keep track of the visits made by the Claimant and her husband. No indication is given as to how long they would stay when they came, but by the Claimant's son's evidence they slept there. This was not challenged. They were not absentee owners in the early years.

**[63]** Hence, despite the Defendant's intention to exercise his exclusive custody and control over the property for his sole benefit, the earliest date at which he did so was 2005 which is the last date given in evidence that the Claimant was there. The interest of the Claimant was not extinguished by adverse possession as allowed by the Limitation Act as this matter was filed in 2015.

**[64]** With respect to the collection of the rent, the Defendant admits that he kept all the rent and profits for himself. The Claimant exhibited a letter from her US Attorney Brad Blalock dated May 23, 2012 to the Defendant asking for the "monies, interest and proceeds owed by you for the real property known as Appleton Castle. According to the Claimant neither she nor her deceased husband ever received any money from the Defendant. The Defendant admits that he never gave the Claimant or her deceased husband any of the rents or profits from the house but kept them for his own use. The uncontested evidence of the Claimant's son is that when he, the Claimant and her now deceased husband, visited the property in 2005 there were tenants there.

**[65]** The Defendant was asked in court what the house consists of, to which he responded that it was still under some construction, some modification had been done as it was a twelve (12) bedroom structure, laid out over three (3) storeys. He gave evidence that in 2005, ten (10) bedrooms had been completed.

**[66]** His evidence is that from 2005 or 2006 the premises was being rented out. The Defendant has kept all the monies earned for himself. Yet, according to the Defendant, even by the date of trial it had been at most twelve years since the rental had begun. During the period the Claimant and her husband had asserted their interests in collecting on their investments. Sums are due the Claimant and

the estate of her Kenneth Roberts from the Defendant by way of occupation rent for at least six (6) years prior to the date of filing of the Fixed Date Claim form. The Claimant and the Defendant are the holders of the title to Appleton Hall, the Claimant is due to have her share in the rental for the period from 2009 to 2015 as per the original business agreement. She would be Statute-barred for the period beyond the six (6) years for her portion of the rental.

**Conclusion**

**[67]** I agree that the joint tenancy was severed by the acts of the parties. The possession of the Defendant was only adverse when the Claimant's husband and the Claimant stopped going there, leaving him with full and exclusive possession in 2005 or thereabout and he was finally able to exercise his intention to keep the property to himself. The limitation clock started to tick in relation to possession of the property at this point. Around this period, he also rented the Appleton Hall property and kept the returns for himself.

**[68]** I view the ***Wills*** case as applicable with the qualification as to when the limitation period began. It began when the parties began to act contrary to the notion of the joint venture and if not, then when the Defendant had exclusive possession and control. This only happened around 2005 or 2006. The Limitation period had not yet expired as it regards adverse possession though as it regards a claim for any portion of the rent, the Limitation period would be shorter, as stated above. The Claimant has her right to the property and rental. The ***Wills*** case can be distinguished from the case at bar as the Claimant here stayed at the property at times with her family. When they did stay at Appleton Hall, they were not excluded by the Defendant regardless of whatever intention he had to do so.

**[69]** The court therefore orders:

1) *A declaration is hereby made that the joint tenancy of the residential property known as 25 Appleton Hall formerly held by the Claimant and the Defendant has been validly and effectively severed;*

2) *A declaration is hereby made that the said property is held by the Claimant and the Defendant on trust for themselves as beneficial tenants in common in equal shares;*

3) *An order is made that the property be sold and the proceeds divided equally between the Claimant and the Defendant or that the Defendant has the option to purchase the Claimant's interest and that the Claimant's Attorneys-at-Law are appointed to have carriage of sale of the property.*

4) *An order is made that the Defendant accounts to the Claimant for rent and profits from the 25 Appleton Hall property due to her between 2009 to present;*

5) *Costs awarded to the Claimant to be taxed if not agreed;*

6) *Defendant granted leave to appeal*