



[2017] JMSC Civ. 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 04703

IN THE MATTER of estate of **JOSCELYN SEYMOUR ELLIOTT**, Retired Engineer, late of 8 Lancelin Avenue, Kingston 10, in the parish of Saint Andrew, deceased, testate.

AND

IN THE MATTER of the **Limitation of Actions Act**.

AND

IN THE MATTER of ALL THAT parcel of land part of NUMBER FIFTY MOLYNES ROAD, situate in the parish of Saint Andrew being the lot numbered SIX on the plan of part of No. 50 Molyne's Road aforesaid deposited in the Office of Titles on the 3rd day of July 1953 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being the land comprised in Certificate of Title registered at Volume 750 Folio 23 of the Register Book of Titles.

BETWEEN

GILLIAN BAUMGARTNER-MARIK
(Executrix of the estate of Joscelyn Seymour Elliott,
deceased, testate)

CLAIMANT

AND

AGNES MERINDA ELLIOTT
(b.n.f. ERIC SYMONS)

DEFENDANT

IN CHAMBERS

Mr. Courtney M. Williams and Mr. Jonathan Morgan instructed by DunnCox for the Claimant

Ms. Vivienne Washington instructed by the Kingston Legal Aid Clinic for the Defendant

Heard: 27th - 29th May 2015, 29th - 31st July 2015, 9th and 11th November 2015 and 5th May 2017

Registered Property – Joint Tenants – Extinction of title – Limitation of Actions Act

MCDONALD J

[1] On the 11th of November 2015, an Order was made for the parties to file and exchange written submissions along with authorities by the 11th of January 2016. It is noted that these submissions were filed by the Claimant and Defendant on the 2nd of February 2016 and the 26th of February 2016, respectively. Regrettably, this Court only became aware of same in November 2016, which in part accounts for the delay. Nonetheless, I am indeed grateful to learned counsel for their submissions which were of assistance to the Court.

The Claim

[2] The Claimant is the daughter of the deceased, Joscelyn Elliott, and Executrix of his estate. By way of Fixed Date Claim Form filed on the 26th of August 2013, she is claiming against the Defendant, Agnes Elliott, the wife of the deceased (who appears by next friend, Eric Symons) for the following orders, declarations and/or reliefs:

- 1) A declaration that the estate of the late JOSCELYN SEYMOUR ELLIOTT is entitled to the entire legal and beneficial interest in ALL THAT parcel of land part of NUMBER FIFTY Molynes Road, situate in the parish of Saint Andrew being the lot numbered Six on the plan of part of No. 50 Molynes Road deposited in the Office of Titles on the 3rd day of July 1953 and being the land comprised in Certificate of Title registered at Volume 750 Folio 23 of the Register Book of Titles (hereafter “the Property”).
- 2) That the Defendant holds the Property on a resulting trust for the estate of JOSCELYN SEYMOUR ELLIOTT, deceased, testate.

- 3) That the Registrar of Titles be directed pursuant to Section 158(2)(a) of the **Registration of Titles Act** to cancel the Certificate of Title for the Property and to issue a new Certificate of Title in the sole name of JOSCELYN SEYMOUR ELLIOTT, deceased, testate.
- 4) Alternatively, that the Registrar of the Supreme Court be empowered to sign the relevant documents to transfer the Property in the sole name of JOSCELYN SEYMOUR ELLIOTT, deceased, testate.
- 5) Such further and other relief as the Court thinks fit.

[3] The grounds on which the Claimant is seeking these orders are that:

1. The names duly endorsed on the certificate of title for the property are JOSCELYN SEYMOUR ELLIOTT and AGNES MIRANDA ELLIOTT as joint tenants.
2. The Defendant abandoned the property in 1968 and has never expressed any interest in its affairs since then.
3. The late JOSCELYN SEYMOUR ELLIOTT has been in exclusive possession of the property since 1968 and has enjoyed the rents/profits and managed the property as if he were the sole owner.
4. The actions of the late JOSCELYN SEYMOUR ELLIOTT have been in direct denial of and inconsistent with the registered interest of the Defendant.
5. Pursuant to sections 3 and 30 and other relevant provisions of the **Limitation of Actions Act**, the Defendant's right to the property has been extinguished.

[4] For clarity, it should be noted that the Claimant who is the daughter of the deceased, Mr. Elliott, is not the daughter of the union between Mr. Elliott and the

Defendant, Mrs. Elliott. It should be further noted that Mr. Elliott made a will on the 24th of February 2011, and although the Claimant is bringing the claim in her representative capacity, as Executrix of the deceased's estate, she is the sole beneficiary of his estate. A grant of probate was obtained in February 2014.

- [5] Mr. Elliott and Mrs. Elliott remained married up until his death on the 5th of March 2013. It is noted that prior to his death, Mr. Elliott initiated divorce proceedings on the 17th of February 2012 (Claim No. 2012M423), on the basis that the Defendant ought to be presumed dead, however no decree was ever granted. A copy of the Amended Petition for Presumption of Death and Dissolution of Marriage filed on the 30th of March 2012 was exhibited as **GB-M4**, in which Mr. Elliott stated that he believes that Mrs. Elliott is deceased because, *inter alia*, they own properties jointly in Jamaica and Mrs. Elliott has not been in contact with him about the upkeep and maintenance of these properties.

The Claimant's Case

- [6] The Claimant is in essence contending that the Defendant, a registered joint owner of the disputed property, has been divested of her rights in the said property i.e. her interest has been extinguished by the operation of law; more particularly the **Limitation of Actions Act** ('LAA'). The Claimant claims that Mr. Elliott enjoyed the disputed property as his own since 1968, when he was abandoned by the Defendant. During that time he was the sole person responsible for paying the various outlays for the upkeep of the property and enjoyed the profits without interference from the Defendant.
- [7] The Claimant's case is supported by two (2) affidavits sworn to by the Claimant herself, filed on the 26th of August 2013 and the 26th of February 2015. There also two (2) affidavits sworn to by her Aunt, Gertrude Frize, filed on the 26th of February 2015 and the 7th of August 2015 and one (1) affidavit sworn to by an acquaintance of the deceased, Basil Jones, filed on the 27th of February 2015.

While these five (5) affidavits stand as the parties' evidence in chief, the parties also gave evidence in person as they were all cross-examined.

- [8] It is undisputed that Mr. and Mrs. Elliott jointly acquired property situated at 8 Lancelin Avenue, Kingston 10 ("the disputed property") after their marriage which took place on the 16th of May 1943 and the disputed property served as their matrimonial home. The copy of the Certificate of Title exhibited as **GB-M3**, reflects that the disputed property was transferred (on what appears to be the 10th of June 1955) in the names of Joscelyn Seymour Elliott ("the deceased") and Agnes Merinda Elliott, the Defendant, as joint tenants.
- [9] It is the Claimant's contention that in 1968, for reasons unknown, Mrs. Elliott left the disputed property and has never returned. The Claimant states that Mr. Elliott told her that in 1968 Mrs. Elliott went to the United States of America to vacation with her sister. However, Mrs. Elliott's sister informed Mr. Elliott that Mrs. Elliott never arrived at her home and that she did not see her. Thereafter Mr. Elliott tried unsuccessfully to make contact with Mrs. Elliott. In fact, Mr. Elliott up until the time of his death (on the 5th of March 2013) had not seen Mrs. Elliott since her departure in 1968.
- [10] It is noted that after years of searching, Mr. Elliott obtained a telephone number for Mrs. Elliott in or about 1984. The Claimant states that Mr. Elliott attempted to speak with Mrs. Elliott about the state of the disputed property. However, when Mrs. Elliott found out that it was Mr. Elliott on the telephone she hurriedly hung up and they did not really communicate. According to the Claimant, that was the last time Mr. Elliott ever heard from Mrs. Elliott. The Claimant further notes that forty-five (45) years has passed between Mrs. Elliott's departure (1968) and the filing of this Claim (2013), which is also the same year that Mr. Elliott died.
- [11] The Claimant contends that during these forty-five (45) years, Mrs. Elliott never visited the disputed property and Mr. Elliott had exclusive possession and quiet enjoyment of the disputed property without interference from her or anyone. Mr.

Elliott paid for the property taxes, repairs and upkeep from his own resources without any assistance from the Defendant. The Claimant alleges that Mr. Elliott treated and understood the disputed property to be his own since Mrs. Elliott's whereabouts were unknown to him for an inordinate length of time.

- [12] Further, Mr. Elliott had the responsibility of paying the balance of the mortgage due for the period between 1968 and 1970. He also rented a portion of this property. His last tenant was a Mr. Oakley Stephens who would pay \$20,000.00. This arrangement was said to last for an extended period, however no dates were provided by the Claimant. According to the Claimant these actions are in direct denial and inconsistent with the interest of Mrs. Elliott.
- [13] The Claimant also claims that around March 2012, Mr. Elliott was desirous of selling the disputed property and since he was still unable to contact Mrs. Elliott he made an application to presume Mrs. Elliott dead. Exhibited as **GM-M4** is the application signed by Mr. Elliott on the 30th of March 2012, in which he stated that he was unable to make contact with Mrs. Elliott for over seven (7) years.
- [14] According to the Claimant, it was upon the death of Mr. Elliott that it became known that Mrs. Elliott is alive and has been living in Jamaica, since the day she left the disputed property. Mention was made of a letter dated the 22nd of April 2013, which was received by Messrs. DunnCox on behalf of the Defendant. It was also subsequently learned that Mrs. Elliott is suffering from severe senile dementia and is being cared for by her relative, Mr. Eric Symons (her duly appointed next friend).
- [15] The Claimant contends that in 2012 her father, Mr. Elliott, attempted to sell the property to Mr. Oakley Stephens, his tenant, who would have allowed him to stay at the house until he passed. The sale was thwarted because *“the court – the lawyer found out that Mrs. Elliott was alive.”* Also in 2012 Mr. Elliott filed a Petition for presumption of death of Mrs. Elliott. The Claimant said that her father told her that his reason for making this application was because he wanted to sell

the house. She said the intention of her father was to have the home for himself. She stated *“My father lived there for such a long time, he was always there at the house and paid for everything at the house. It was his house.”*

- [16] The Claimant also spoke to receiving a telephone call from one Eric Symons who she did not know. She recalls that Mr. Symons told her that her father was ill and in need of assistance.
- [17] As previously mentioned, the Claimant is also relying on the evidence of her aunt Mrs. Gertrude Frize and Mr. Basil Jones, both of whom were purportedly friends of Mr. Elliott.
- [18] Mrs. Frize contends that she met Mr. Elliott in 1964 when he did some electrical work for her. Some years later, Mr. Elliott fathered a child, Gillian, with her sister, Ivy Brown, born on the 11th of May 1969 and that she and Mr. Elliott forged a close friendship up until his death. Mrs. Frize said that when she met Mr. Elliott he passed himself off as a single man and she became aware of the existence of Mrs. Elliott some six (6) months after meeting Mr. Elliott, through a house guest whose step-mother worked at the same place as Mrs. Elliott at Caymanas Estates. The informant told her that Mrs. Elliott was no longer at the matrimonial home and told her that she had stopped working there when she left the home in 1964.
- [19] There is no evidence that Ivy Brown lived with Mr. Elliott at the disputed property at any time. It is the evidence of Mrs. Frize that her sister never went there between 1964 –1969. She visited him long after Gillian was born. Mr. Elliott confided in her that Mrs. Elliott had abandoned him and their matrimonial home. Mrs. Frize advised him to get legal advice from a nephew of hers, who according to her told Mr. Elliott to place a notice in the newspaper about the *“problem with his wife”*. According to Mrs. Frize, this notice, which disclaims responsibility as regards debts etc., was placed in the Sunday Gleaner in 2006 and Mrs. Frize

recalls having seen the said notice personally. This notice was however not exhibited or produced before this Court.

[20] According to Mrs. Frize, Mr. Elliott never re-established contact with his wife, save for a brief telephone call in or about 1980. Mr. Elliott obtained a number for Mrs. Elliott and called her whilst seated in Mrs. Frize's home. Mr. Elliott informed Mrs. Frize that, *"he successfully made contact with the Defendant, but when he explained to her that he was planning to sell the property and that he had finished paying the mortgage, she then realised it was him on the telephone and proceeded quickly to hang up, explaining before hanging up that she didn't want anything to do with him, their matrimonial home or the relationship."* In cross-examination Mrs. Frize said that when he was finished he hung up and Mr. Elliott told her that she said she wanted nothing to do with him, his house or his affairs. She never heard the other side of the conversation.

[21] It is noted that Mr. Elliott spoke of this telephone call in the Amended Petition for Presumption of Death and Dissolution of Marriage filed. He stated that it took place in 1984 and that the call was made to a United States number. He did not provide any further details of this exchange.

[22] Further, Mrs. Frize stated that she and the Claimant were the ones that principally assisted Mr. Elliott with his personal affairs and managed the disputed property. More specifically, Mrs. Frize said that she was in touch with Mr. Elliott on a daily basis and he would inform her of his medical needs. She would often send him supplies and send assistance in the form of helpers, which she paid for from her own resources or those provided by the Claimant. Reliance is being placed on a number of Western Union and MoneyGram receipts which shows sums being sent by the Claimant to Mrs. Frize from March 2005 to August 2013.

[23] Mrs. Frize stated that she would contact rental agencies on behalf of Mr. Elliott to make arrangements for him to find tenants. Neither Mrs. Elliott nor her agent were a part of these transactions and at no time did Mrs. Elliott share in the rental

income. Mr. Elliott organised all the repairs, rental and maintenance of the disputed property to the exclusion of Mrs. Elliott. Mrs. Frize further stated that she assisted Mr. Elliott with fibreglass work as this was something she did at her factory and that she paid for cleaning and security services. It is noted that no documentary evidence has been advanced in support of either contention.

[24] In her Affidavit, Mrs. Frize states that she had no knowledge of Mr. Symons until he was sent to her by the deceased to provide an estimate for electrical works. In cross-examination, she said that after Mr. Symons left Mr. Elliott told her *“the man brought him the telephone number of his wife at Mistletoe Apartments.”* She also said he brought him a number for his ex-wife. This information was brought before he made the call. She is not aware that Mr. Elliott ever visited at Mistletoe Apartments.

[25] She further stated that she had no idea that Mr. Symons had a connection to Mr. Elliott or the Defendant as neither Mr. Elliott nor Mr. Symons made that revelation. She contends that she finds this *“entirely strange”* as it would have been helpful information in locating the whereabouts of Mrs. Elliott. Mrs. Frize contends that Mr. Symons’ claim regarding Mrs. Elliott’s entitlement to the disputed property began subsequent to the death of the deceased (i.e. in 2013).

[26] Mr. Jones regards himself as a close friend and former neighbour of Mr. Elliott. He explained that he was never a physical neighbour of Mr. Elliott but a neighbour in the biblical sense. Mr. Jones noted that he was a funeral director of Jones Funeral Parlour, a family business, from which he retired in 2006. In connection with this business, Mr. Elliott gave him permission to park two (2) of his hearses at the disputed property and he would go there on Wednesdays, Saturdays and Sundays to collect them. He claims that he met Mr. Elliott in 2007 when he assisted his friend, Ms. Downer, with renting from him. Ms. Downer was only Mr. Elliott’s tenant for six (6) to seven (7) months as she left due to leaks which made her uncomfortable. After Ms. Downer started renting, Mr. Jones said he would visit regularly and he and Mr. Elliott became good friends, very close,

and had long conversations. According to him, they would talk about '*personal stuff, everything*'. Mr. Jones recalls that Mr. Elliott was very active for his age and that he (Mr. Jones) was fascinated by his efforts to carry out his own maintenance.

[27] Mr. Elliott reportedly told Mr. Jones about his family, stating that he had two (2) children and that he was married but did not know where his wife was as she left ages ago. Mr. Elliott told Mr. Jones that he did not believe his wife to be dead as he thought somehow he would have known. Mr. Jones formed the impression that Mr. Elliott was particularly distressed about his wife's disappearance. It was his information that they were never in touch, even though deep down he knew that Mr. Elliott wanted to find her because he spoke about her all the time.

[28] Mr. Jones also claimed to be the Mr. Elliott's main source of transportation up until his death in March 2013. He would take Mr. Elliott to the supermarket, wholesale, barber, doctors and to buy his medication. On one occasion when Mr. Elliott injured his foot, it was he who took him to the hospital where he spent a couple days. On discharge he brought him back home. Mr. Jones recalls that it was at the time Mr. Elliott damaged his foot that his daughter, Gillian, gave him full responsibility to take care of him. He said all the things he was doing for Mr. Elliott are the things Mr. Symons said he was doing for him in his Affidavit. Mr. Jones observed that when he met Mr. Elliott the disputed property was in a bad state and was in need of cleaning, the house was not properly maintained and at one point there was no stove. According to Mr. Jones he brought someone to clean the yard and he reached out to Mrs. Frize to get in touch with the Claimant. The Claimant sent money to purchase the stove and would send money from time to time to assist with bills. The Claimant also assisted with the providing of a helper for Mr. Elliott (the rent from the disputed property assisted with the payment of this helper, Ms. Christine Gonzalez.)

[29] On a visit to Jamaica, the Claimant gave Mr. Jones permission to collect the rent of \$20,000.00 which would pay Ms. Gonzalez, the electricity bill and buy food.

According to Mr. Jones, the Claimant would supplement the rent when it was short. Mr. Jones recounts that whenever Mr. Elliott had a need and the Claimant was contacted she would try to assist. Mr. Jones recalls that Mr. Elliott became ill and went into the hospital in January or February of 2013, where he died and it was the Claimant who made the funeral arrangements.

[30] Mr. Jones claims that over the six (6) year period that he knew Mr. Elliott, he never met Mr. Symons. He claims that he would be at the disputed property everyday in the six (6) to seven (7) months when Ms. Downer lived there and at least two to three times per week after she moved out. Mr. Elliott never told Mr. Jones about Mr. Symons or that he knew anyone connected to his wife.

[31] According to Mr. Jones he met Mr. Symons in court when he sought to recover monies on behalf of the Defendant for rent owed by the former tenants. Mr. Symons however called him once, four (4) days after the death of Mr. Elliott and informed him that Mr. Elliott has a wife and that he was her nephew and he had a Power of Attorney to take care of the disputed property which belonged to the Defendant. Mr. Jones was advised by the tenants that Mr. Symons said that rents should be paid to him as there is a new owner.

The Defence

[32] The Defendant, Mrs. Elliott, is almost a centenarian. As previously stated she is suffering from severe senile dementia and is being cared for by her relative, Mr. Eric Symons. Mr. Symons has exhibited to his Affidavit filed on the 10th of February 2014 at **ES-6** a letter from a Dr. Renisford A. Beckford, M.D. dated the 13th of January 2014 which confirms her condition and indicates that she would be unable to give evidence because of "*the state of Senile Dementia she has developed.*" Also exhibited to Mr. Symons' Affidavit at **ES-1** is a Power of Attorney dated the 5th of April 2004 (duly stamped and registered) in which Mrs. Elliott has given Mr. Symons the following powers –

2. *To state, settle, adjust, compound, submit to arbitration, compromise all actions, suits accounts reckonings claims and demands [sic] whatsoever which are now or hereafter shall or may be pending between me and any person or persons whomsoever in such manner in all respects as my Attorney shall think fit.*

3. ...

4. *To commence, carry on or defend all actions and other proceedings touching my properties and affairs or any part thereof or touching anything in which I or my estate may be in any wise concerned and in particular property situate at Lot 10, Mistletoe Cottages in the parish of St. Andrew registered at Volume 1109 Folio 608 in the Register Book of Titles.*

[33] It is noted that in a separately filed claim (2014HCV03038) made pursuant to the **Mental Health Act**, an order was granted by my sister Lindo J on the 16th of September 2014 which provided, inter alia, -

1. *The management of the property and affairs of AGNES MERINDA ELLIOTT of 3 Barnes Avenue, Ensom City, Spanish Town in the parish of Saint Catherine be granted to ERIC SYMONS and MAUREEN SYMONS.*

10. *ERIC SYMONS and MAUREEN SYMONS are entitled to commence, prosecute and/or defend any legal proceedings by or on behalf of the said AGNES MERINDA ELLIOTT.*

[34] A few days later on the 22nd of September 2014, Lindo J granted another order appointing Eric and Maureen Symons next friend of Mrs. Elliott. It read as follows –

1. *That Mr. Eric Symons and Mrs. Maureen Symons are appointed next friend of Agnes Merinda Elliott for the purposes of defending this claim, pursuant Rule 23.5(1) of the Civil Procedure Rules 2002 subject to the filing and serving of an affidavit exhibiting a copy of the Formal Order in Claim No. 2014 HCV 03038 or before September 24, 2014.*

[35] There is no doubt therefore that Mr. Symons has the requisite authority to defend the instant claim on behalf of the Mrs. Elliott. Mrs. Elliott herself has not given any evidence in this matter. Her case is supported by four (4) affidavits sworn to by Mr. Symons, filed on the 10th of February 2014, the 22nd of May 2015 (two (2) affidavits filed) and the 3rd of November 2015. Mr. Symons attended the trial and was also cross-examined. It is noted that there were other affidavits sworn to in support of Mrs. Elliott's case, namely affidavits by a housekeeper - Phyllis

Francis, a neighbour - Parline Daley and the wife of Mr. Symons - Maureen Symons, however the first could not be used as evidence at trial pursuant to **Civil Procedure Rule 30.1(5)**, and the latter two were withdrawn by the Defendant. Accordingly, I have not considered the portions of the affidavits filed in support of the Claimant's case which respond to the assertions contained in any of the three (3) affidavits which do not form part of the evidence.

The Defendant's case

[36] The Defendant's case, which has been advanced by her grand-nephew, Mr. Symons, is that Mrs. Elliott never abandoned or relinquished her interest in the disputed property. There are several facts which are in dispute, it is contended that Mr. And Mrs. Elliott separated in 1984 and not in 1968 as the Claimant alleges. The Defendant moved out of the matrimonial home which is now the disputed property as a result of the interference of the Claimant's mother, Ivy Brown, and Gertrude Frize. When Mrs. Elliott left the matrimonial home she went to reside at a property referred to as Mistletoe Cottage, however she maintained an interest in the disputed property. She would pay the property tax for both Mistletoe Cottage and the disputed property and she did so up until 1990. Exhibited as **ES-5** are what appear to be three (3) receipts showing payment of property tax by Mrs. Elliott for the periods 1986-87, 1987-88, 1986-87, 1988-89. It is noted however that the Valuation No. 105C5W50005 on all these receipts corresponds to the property referred to as Mistletoe Cottage and not the disputed property. As such there is no evidence to support the contention that Mrs. Elliott paid property taxes for the disputed property.

[37] Contrary to the Claimant's assertion, Mrs. Elliott maintained contact with Mr. Elliott and even sent her helper/caregiver, Ms. Francis, to assist him also. In or about 2000, Mrs. Elliott came to live with Mr. Symons and his wife in Ensome City, Spanish Town. Mr. Elliott would telephone Mr. Symons for assistance at which time he and the Defendant would speak. He said Mr. Elliott would "*reach out*" to Mrs. Elliott by telephone and he reached her for maintenance, not

financial but hands on things. It is contended that at all times Mr. Elliott was aware of Mrs. Elliott's whereabouts.

- [38]** Mr. Symons asserts that the Claimant's Aunt, Mrs. Frize, also knew of him as Mr. Elliott informed her (by telephone, in his presence) that he was his wife's grand-nephew. In 2010, Mr. Symons conducted some repairs for Mrs. Frize. He has exhibited a copy of the invoice which is dated the 14th of September 2010 and Mrs. Frize has not disputed that he conducted these repairs. Mr. Symons contends that the deceased was quite aware of the Mrs. Elliott's whereabouts up to that time.
- [39]** Mr. Symons states that some time in 2012 when he was visiting Florida he called the Claimant to inform her of her father's health and home condition and to inform her that he needed assistance. Upon his return he visited Mr. Elliott, observed that his condition was the same and he called Mrs. Frize and telephoned the Claimant a second time. Mr. Symons contends that nothing was done to assist Mr. Elliott. It is Mr. Symons evidence that he used to carry Mr. Elliott to the Doctor, he said that he would not go into the chambers where the Doctor does the examination. He does not know the name of the Doctor, according to him he was not privy to the name of the Doctor.
- [40]** Mr. Symons recalls an instance in which Mr. Elliott had a cut on his leg and he used newspaper as a bandage as there was no one to take him to the Doctor. He gave evidence that he would take Mr. Elliott to get food and his medication for his diabetes and blood pressure at which time Mr. Elliott would say that he was not getting any help from his daughter (the Claimant). Mr. Symons stated that to his knowledge the Claimant never visited Mr. Elliott and it was not until the funeral that he (Mr. Symons) met her.
- [41]** According to Mr. Symons, the housekeeper that replaced Ms. Francis, who he referred to as "Ms. G" would call him regularly to get food and grocery items for Mr. Elliott as well as his medication. Mr. Symons stated that he did this because

his grand-aunt (the Defendant) would ask him to look out for Mr. Elliott even though they were separated.

[42] Mr. Symons gave evidence that during his visits to the disputed property, Mr. Elliott would frequently ask him to call Mrs. Elliott and that they would speak over the phone. According to Mr. Symons they would talk about what maintenance the house might need throughout the years. Mrs. Elliott would ask Mr. Symons to fix what he could at the disputed property. Mr. Symons said that he would do minor repairs such as fixing broken pipes, using zinc to prevent the rain from getting in, changing doors and replacing broken window parts. Mr. Symons stated that the repairs were minor because neither Mrs. Elliott nor Mr. Elliott had a lot of money. In evidence-in-chief, Mr. Symons said that after Mrs. Elliott left in 1984 he started to do maintenance work at the property. It is noted that in cross-examination he said that he started to do maintenance at the disputed property from the 1970's. During these visits "*he did not get direct maintenance*" but he was asked to assist on behalf of Mrs. Elliott. This maintenance involved minor repairs. When shown paragraph 16 of his Affidavit – he was asked by counsel for the Claimant whether he would classify the removal of an entire roof to re-zinc it as a minor repair, to which he responded – "*this in particular is a major repair.*"

[43] Although no date is given, it appears sometime after the death of Mr. Elliott, Mr. Symons is claiming to have made further repairs including putting in a new ceiling, repairing the verandah. Mr. Symons claims that he has purchased tiles and items to carry out further repairs. He emphasised that the reason for these repairs is because Mrs. Elliott has an interest in the disputed property and she always asked for assistance to take care of her property. Although Mrs. Elliott is unwell now, Mr. Symons continues to carry out her wishes pursuant to the Power of Attorney granted in 2004. In cross-examination Mr. Symons said that he was partially responsible to fund these major repairs and get proper workmen to do the work. He placed no affidavit from any workman, no quotations, receipts, or invoices for material or pictures before the Court. He did not think it necessary because based on the title, his grand-aunt would be the beneficiary after the

death of Mr. Elliott. Further, he said the receipts and invoices were lost or got dirty.

[44] It is firmly denied that Mrs. Elliott lived in the United States for many years. A copy of the pages of her passport was exhibited in support of same. Regrettably the stamps and markings are difficult to read and as such the Court is unable to confirm the dates when Mrs. Elliott travelled.

[45] It is also firmly denied that Mr. Elliott did not know the whereabouts of Mrs. Elliott during his lifetime. It was conceded that Mrs. Elliott was not accustomed to visiting the disputed property. The explanation given was due to the reasons she parted from Mr. Elliott, that being Mr. Elliott's infidelity. However, without any reference to a definite period, Mr. Symons stated that the Defendant always instructed him to assist with the maintenance.

Issues to be determined

[46] The principal issue to be determined is whether the title of the Defendant, a registered joint tenant of the disputed property had been extinguished by the operation of the **Limitation of Actions Act**.

[47] To determine the principal issue, the Court must consider the following –

1. When did the Defendant leave the disputed property;
2. Whether the Defendant was dispossessed by the deceased, Mr. Elliott;
 - a. Did Mr. Elliott have sufficient degree of physical custody and control over the disputed property ('factual possession')
 - b. Did Mr. Elliott have an intention to exercise such custody and control over the property for his benefit ('intention to possess')

3. Whether the circumstances in 2 a. and b. (above) existed for at least 12 years after the Defendant left/ceased to be in factual possession and if so for what period; and
4. Whether the Defendant left anyone to act on her behalf and for her benefit in regards to the property, and if so for what period.

The Applicable Law

[48] The fact that a person is a registered owner of property and their name appears on a certificate of title is not by itself conclusive evidence which means that such a person cannot be dispossessed by another including a co-owner. Regard must be had to section 68 of the **Registration of Titles Act** which provides –

*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 for the same, or in the proceedings previous to the registration of the certificate; 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 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 added)*

[49] With reference to the said section 68, McDonald-Bishop JA opined at paragraph [30] of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37,

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.

[50] The relevant statute of limitations is the **Limitations of Actions Act** which provides –

3. 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 any 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.

4. 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;

14. 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.

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

- [51] Both sections 3 and 30 of the **Limitation of Actions Act**, set out above, operate together to bar a registered owner from making any entry on or bringing any action to recover property after twelve (12) years if certain circumstances exist.
- [52] Section 14 of the **Limitation of Actions Act** makes it clear that the possession of each co-tenant is separate as of the time they first become joint tenants. This means that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant.
- [53] Therefore, the result of sections 3, 14 and 30 is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against them. This means that in the case of joint-tenants, 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. This is precisely what the Claimant in the instant case is seeking to do.

[54] In **Lois Hawkins (Administrator of the Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McIniss** [2016] JMSC Civ 14, which is somewhat similar to the instant case, my brother Sykes J has provided a most concise and useful summary of the relevant law. I would therefore adopt paragraph [12] of his judgment –

*[12] 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 [sic] 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 co-tenant;

(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;

(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. (emphasis added)

[55] With regards to dispossession and more specifically the intention a dispossessor must have, it is clear that there is a distinction between a dispossessor who is a trespasser and one who is a co-owner. I would also conveniently adopt paragraphs [13] and [20] of the judgment of Sykes J from **Lois Hawkins** (supra) on this point -

*[13] It is fair to say that in this area of law the analysis of and interpretation of the evidence is influenced by whether the person claiming to extinguish the title is a co-owner or a trespasser. The law seems to require more of a trespasser than a co-owner. **The difficulty in co-owner cases, where the dispossessing co-owner has been in possession, is in identifying the point in time when the relevant intention was formed. The difficulty arise [sic] because more often than not the intention is an inference from the act of possession.** (emphasis added)*

[20] Despite the clarity with which the law has been stated, the problem is in the application because in cases of extinction of title there is rarely, if ever, a declaration by the dispossessor that 'I intend to dispossess whomever is the owner.' It is more often than not a matter of inference from the act of possession and the conduct of the dispossessor after being in possession.

[56] Counsel for both parties brought a number of relevant authorities to the Court's attention and I have considered the submissions presented and authorities cited. I have no intention of reiterating them in their entirety but I will refer to them as necessary to explain my reasoning and findings in this matter. I find it most useful to have particular regard to the cases which focus on dispossession of one co-owner by another co-owner, namely **Lois Hawkins** (supra), **Wills v Wills** [2003] UKPC 84, **Winnifred Fullwood v Paulette Curchar** (supra), and **Freckleton v Freckleton** (unreported), Supreme Court, Jamaica, Claim No. 2005HCV01694, judgment delivered 25 July 2006.

- [57] The issues raised in the well known case of **Wills v Wills** concerned the acquisition and extinction of title to land under the **Limitation of Actions Act** in the context of whether one co-owner had acquired title by possession from the other co-owner.
- [58] In **Wills v Wills**, Mr. Wills and his first wife owned two properties as joint tenants. One property was used partly as their residence and partly let, the other property consisted of units which were let. Many years into the marriage the first wife left Jamaica and went abroad. Mr. Wills later met a woman by the name of Myra, with whom he eventually began to live. During that period the first wife visited Jamaica and stayed at the residence with Mr. Wills and Myra. Eventually a decree absolute was granted and Mr. Wills married Myra. Although the first wife did visit Jamaica again a number of years later she did not visit the properties. She also left no possessions there, save for a wedding ring. Mr. Wills and Myra managed the properties and did not account to the first wife for any of the rental income. Mr. Wills died intestate. The first wife then gave notice to the tenants that they should pay rent to her. Myra brought proceedings pursuant to the **Limitation of Actions Act** 1881.
- [59] The trial judge, in dismissing Myra's claim, found on the evidence that the first wife had not abandoned her claim to the properties. The Court of Appeal dismissed the appeal on the grounds, *inter alia*, that Mr. Wills had acknowledged the first wife's title and that he had not established separate possession. Myra appealed to the Privy Council, where her appeal was allowed. The Privy Council held that the courts below had proceeded on the incorrect supposition that it was the first wife's state of mind, taken with the husband's actions, which was decisive of the case. However, her intentions could not prevail over the plain fact of her total exclusion from the properties. On the facts the first wife had been dispossessed of the properties.
- [60] Their Lordships in **Wills v Wills**, emphasised that the appeal turned ultimately on its own facts; and although separation and divorce are commonplace, the

facts were unusual. Additionally, their Lordships did not foresee the outcome as likely to cause trouble for a large number of Jamaicans who work and reside abroad (see: paragraphs [31]- [32]). A point which McDonald-Bishop responded to in **Fullwood v Curchar** –

*[101] It is enough to note that despite Ms Shaw's valiant attempt at pointing out what she perceived to be fundamental areas of distinction on the facts of **Wills v Wills**, in advancing her arguments that the case is unhelpful to Miss Fullwood, it is hard to accept that contention. The circumstances of this case do fit neatly within the four corners of **Wills v Wills** with respect to the finding that Mrs. Curchar's interest had been extinguished in favour of Mr Curchar through whom Miss Fullwood is claiming her right to possession. I find particularly interesting the observation of Lord Walker at paragraph 32...*

*[102] Mrs Curchar is one of those paper owners for whom **Wills v Wills** does pose a serious problem or for whom it has caused trouble. She is one who went overseas as far back as 1985; formed new attachments to include remarrying; started a new life with another spouse; never returned to the property, not even as a guest; retained none of her possessions there; undertook no obligations for payment of the mortgage installments and property taxes; made no contribution to the preservation of the property; and from all indications had entirely abandoned the property for more than 24 years before seeking to recover possession. Regrettably, she is one of those who will have to deal with the unfortunate legal consequences of her choice. Time has run against her.*

[61] The case of **Freckleton v Freckleton** was relied on by counsel for the Claimant. The facts resemble that of **Wills v Wills** and **Fullwood v Curchar**, save for it was the husband's title that was extinguished. In **Freckleton**, the parties were married in 1965, they acquired two (2) properties together one of which included a house in Beverly Hills. This Beverly Hills house was purchased with the assistance of a mortgage in 1979, and the parties were registered as joint tenants. The marriage broke down shortly thereafter and in 1981 Mr. Freckleton left and did not return. Mrs. Freckleton remained in possession and continued to pay the mortgage which she eventually paid off in 1994. Mr. Freckleton assisted with the mortgage for one (1) year after his departure, but stopped in 1982. This was the same year Mr. Freckleton fathered child and the parties divorced. Mr. Freckleton migrated in 1984 and did not visit the Beverly Hills home nor did he contact Mrs. Freckleton. It was noted that Mr. Freckleton did not pay any taxes, make any contributions or show any interest after the property was damaged by hurricane Gilbert in 1988. Mrs. Freckleton even changed the locks. It was held

that Mrs. Freckleton's possession became exclusive in 1984 and accordingly that Mr. Freckleton's title was extinguished twelve (12) years later in 1996. Regard was had to the character of the house and the fact that Mrs. Freckleton was living at the Beverly Hills house, she paid the taxes, executed repairs and even changed the locks.

Analysis

[62] A great deal of time was spent, by both parties, advancing their respective contentions in relation to (1) whether Mr. Elliott and the Defendant maintained contact after the Defendant left the disputed property and/or whether Mr. Elliott knew where she was; and (2) who bore the responsibility for looking after Mr. Elliott. Counsel for the Claimant, Mr. Williams submitted that apart from issues of credibility these questions are irrelevant to the principal issue, i.e. whether the title of Mrs. Elliott has been extinguished by Mr. Elliott. While I would agree that perhaps an inordinate amount of time was spent on these issues, for reasons indicated earlier, since this Court did not have the benefit of testimony from Mr. Elliott or Mrs. Elliott, these issues are relevant. It is the actions and intentions of those parties, in particular Mr. Elliott's, that this Court must consider and their dealings with one another (or lack thereof) which will impact the outcome.

(1) When did the Defendant leave the disputed property

[63] In cases of this nature, where the Court does not have the benefit of testimony from the parties regarding their own actions and intentions, the evidence which is provided by others on their behalf often leaves many loose ends about certain details. One such loose end is when Mrs. Elliott left the disputed property.

[64] While it is undisputed that up until the deceased's death, in March 2013, he was in factual possession of the disputed property after Mrs. Elliott left, the parties disagree on the time in which she left. The Claimant contends that Mrs. Elliott left in 1968 and that the deceased was in factual possession by himself for forty-five (45) years. On the other hand, Mr. Symons alleges that she left in 1984 which

would mean that the deceased was in factual possession by himself for twenty-nine (29) years.

[65] While I am mindful of the reasoning of McDonald–Bishop JA at paragraph [55] of **Fullwood v Curchar**, wherein it was opined that *“the resolution of the dispute as to the exact year she left, would not have been material. This is so because on whichever case is accepted, it is clear on Mrs Curchar’s best case, that she would have left the property for more than 12 years before she sought to recover possession.”* With regards to the instant case, it is my view that a finding with regards to the exact year when Mrs. Elliott left is material and can be made. Having regard to Mr. Symons’ own evidence in cross-examination that he started carrying out repairs on Mrs. Elliott’s behalf in the *‘late 1970’s’* and in particular the Claimant’s date of birth, i.e. the 11th of May 1969; I find on balance that Mrs. Elliott left the disputed property in 1968, as alleged by the Claimant.

(2) Whether the Defendant was dispossessed by Mr. Elliott

a. Factual Possession

[66] Even if I am wrong with regards to my finding that Mrs. Elliott left the disputed property in 1968, there is no dispute that between 1984 up to 2013, Mr. Elliott was in factual possession of the disputed property, i.e. while he resided there he had a sufficient degree of physical custody and control over it. Similar to **Lois Hawkins**, the Court need not be detained by this part of the requirement. The focus is on whether Mr. Elliott had the requisite intention and for what period. The requisite intention being an intention to possess and not necessarily to own (see: **JA Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; **Wills v Wills** (supra) and **Fullwood v Curchar** (supra)).

b. Intention to Possess

[67] I bear in mind that the intention to possess (i.e. an intention to exercise such custody and control on one’s own behalf and for one’s own benefit – *the animus*

possidendi) is critical as, in law there can be no possession without it. As previously stated, there is almost never a declaration by a dispossessor that he intends to dispossess his co-owner, therefore it becomes a matter of inference from the act of possession and the conduct of the dispossessor after being in possession. The difficulty in the application of the law was recognised by Sykes J in **Lois Hawkins**, whose dictum is set out at paragraph [55] herein.

- [68] The Claimant has not brought any evidence that Mr. Elliott made a declaration that he intended to dispossess Mrs. Elliott or use the disputed property for his own benefit, as such the court must carefully examine Mr. Elliott's conduct particularly between 1968 and 2013. It is useful to have regard to considerations such as mortgage payments, attempts to dispose of the disputed property, property taxes, rental income and repairs; however the Court is mindful that these considerations are by no means determinative. I would also adopt the reasoning that, *'the more unequivocal the nature of the physical possession the easier it will be to infer the intention to possess and conversely, the more equivocal the nature of physical possession the more difficult or the less easy to infer the intention to possess.'* (see: **Lois Hawkins** paragraph [24]).

Mortgage Payments

- [69] Having regard to the certificate of title, Mr. and Mrs. Elliott were not only registered as joint tenants on the 7th of June 1955, a mortgage was also registered in their joint names. It is the Claimant's case that after Mrs. Elliott left, Mr. Elliott continued to pay the mortgage for the period between 1968 to 1970. However, there was no documentary evidence provided in support of this. Mrs. Frize gave evidence that she recalls sometime in the late 1980's, Mr. Elliott informed Mrs. Elliott by telephone that he had finished paying off the mortgage. Having regard to the certificate of title, the mortgage appears to have been discharged on the 17th of March 1970. Based on the finding made in relation to when Mrs. Elliott left the disputed property, it is plausible that Mr. Elliott would have assumed payment of the mortgage for the final two (2) years while he alone

lived at the disputed property. Notwithstanding, that the Claimant has provided no documentary evidence, since this assertion was not challenged by the Defendant, I find on balance that Mr. Elliott made the mortgage payments for the period between 1968 to 1970.

[70] However, as stated before, this by itself is not determinative of the issue as to whether Mr. Elliott formed the requisite intention. The Court is mindful that there is no evidence as to how Mr. and Mrs. Elliott went about satisfying their mortgage obligations for the period between 1955 and 1968 when they both lived at the disputed property. Implicit in the Claimant's contention is that Mr. and Mrs. Elliott paid the mortgage jointly until 1968, when Mrs. Elliott left, and Mr. Elliott thereafter assumed the responsibility of making the mortgage payments by himself. The Court is not in a position to arrive at such a conclusion. What is clear is that the parties would have been approaching their fifties in 1968, that being two (2) years before the mortgage would have been discharged; however there is no evidence as to when either of the parties retired, nor is there any evidence of their income during their working years or income from pension.

[71] In the circumstances, it seems to me that the payment of the mortgage for the final two (2) years is an equivocal act. As such, the Court cannot in trying to ascertain whether Mr. Elliott formed the requisite intention, particularly in or about 1968, rely on the conduct of Mr. Elliott (i.e. the payment of the mortgage) as an act of possession. The Court is mindful that it is standard in some unions for certain financial obligations to be borne by one party for the benefit of both parties. Where such an arrangement exists the liabilities may or may not be registered in both names and the parties will usually have discussions between themselves, a form of accounting to each other. In the instant case, the mortgage was registered in both Mr. and Mrs. Elliott's name. It also appears that there was some discussion/accounting if the Claimant's evidence is to be accepted in relation to the telephone call made by Mr. Elliott in the late 1980's. It is the Claimant's evidence that Mr. Elliott explained to Mrs. Elliott that, '*he was planning to sell the property and that he had finished paying the mortgage*'.

[72] At paragraph 5 of the Claimant's Skeleton Submissions, counsel for the Claimant, Mr. Williams, submitted as follows –

*In or around 1984, and after searching for many years, the Deceased finally made telephonic contact with the Defendant and **proceeded to enquire about her intentions in relation to the disputed property**. In no uncertain term, [sic] the Defendant tersely explained to the Deceased that she was not interested in him or the disputed property and so the Deceased carried on with his life with the assistance from the Claimant and his friends in his later years. (emphasis added)*

On balance, it seems that Mr. Elliott's attempt to enquire about Mrs. Elliott's intentions or to explain/account to Mrs. Elliott, in or around 1984, is demonstrative of his recognition of her interest in the disputed property. While it is noted that according to the Claimant, Mrs. Elliott hung up the telephone after stating that she did not want anything to do with Mr. Elliott, their matrimonial home or the relationship; this Court is mindful not to proceed on the incorrect supposition that it is the Mrs. Elliott's state of mind, and not Mr. Elliott's which when taken with Mr. Elliott's actions, is decisive of the case (see: paragraph [29] of the dictum of Lord Walker of Gestingthorpe in **Wills v Wills**). As such, even if the Claimant's evidence was to be accepted on this point, it is Mr. Elliott's intention that is critical not Mrs. Elliott's. In the round, it is difficult for the Court to infer an intention to possess by virtue of the payment of the mortgage as this act without more is equivocal.

Attempts to dispose of the disputed property

[73] Prima facie, the act of taking steps to dispose of the disputed property is unequivocal in nature. It would be quite easy for the Court to infer that (i) Mr. Elliott had the requisite intention to possess in or about February of 2011 when he made his will, devising the disputed property to the Claimant; and (ii) the said intention continued in 2012 when he attempted to sell the property to Mr. Stephens.

(i) Disposal by will

[74] It should be noted that the only named asset contained in the said will was the disputed property. It should be further noted that Mr. Elliott would have had the benefit of legal advice when he gave his instructions to prepare his will; as the said will was prepared by Messrs. DunnCox. In the circumstances, it is reasonable to presume that Mr. Elliott must have expressed to his Attorneys-at-Law that he believed Mrs. Elliott to be dead and would have been duly advised that the rule of survivorship would operate giving him the entire interest in the dispute property, thereby allowing him to devise same to the Claimant. It is unthinkable that the will would have been prepared in respect the disputed property as an attempt to *'usurp the principle of survivorship of joint tenancy'* as Mrs. Washington submitted.

[75] In any event, the Amended Petition for Presumption of Death and Dissolution of Marriage filed on the 30th of March 2012, which was also prepared by Messrs. DunnCox, confirms that Mr. Elliott must have expressed to his Attorneys-at-Law that he believed Mrs. Elliott to be dead. It is similarly unthinkable that the Petition would have been filed if this were not so.

(ii) Disposal by sale

[76] Based on the Claimant's evidence, Mr. Elliott expressed his desire to sell the disputed property from as far back as the late 1980's. Further, according to the Claimant, Mr. Elliott sought to give effect to his desire to sell the disputed property sometime in 2012. The disputed property was to be sold to his tenant, Mr. Stephens, who would have allowed Mr. Elliott to stay at the house until he passed. The Claimant claims that the sale was thwarted because *"the court – the lawyer found out that Mrs. Elliott was alive."* In the same year, 2012, Mr. Elliott filed a 'Petition for Presumption of Death and Dissolution of Marriage'. The Claimant said that her father told her that his reason for making this application was because he wanted to sell the house.

[77] On this point counsel for the Defendant, Mrs. Washington, submitted that –

...the fact that the Agreement for Sale was “thwarted” on the basis that the Defendant’s signature was required, served as an acknowledgment by the deceased and the world at large of the ownership rights of the Defendant and even at that stage in 2012, the Defendant’s title was still in tact [sic] and she was not dispossessed. This I suggest would serve to defeat the Claimant’s claim to adverse possession.

[78] There appears to be some merit in Mrs. Washington’s submission. It seems to me that Mr. Elliott was of the view that he could only sell the disputed property with Mrs. Elliott’s consent (which is evinced by his enquiry by telephone, in or about 1984, as to her intentions) or on the basis that she was dead and that he acquired her interest (which accords with his the Petition filed on the 30th of March 2012 and the Claimant’s evidence of his motive for filing the Petition). When Mr. Elliott learned that she was not in fact dead, it seems to me that he reverted to his original view that he could not sell the disputed property without Mrs. Elliott’s consent. There is no evidence that he instituted any claim or took any further action relating to the disputed property prior to his death in March 2013. Nor that he further amended his Petition for Dissolution of Marriage. This to me is quite telling.

Property Taxes

[79] Again, the Claimant has alleged that Mr. Elliott bore the sole responsibility for the payment of the property taxes. To this end, a print out of an account summary was exhibited as **GB-M7**. Regrettably, this summary does not assist the court as it merely shows that property taxes were paid in full for the tax years 2008/09, 2009/10, 2011/12, 2012/13 and in part for 2013/14. It does not show who made these payments. Elsewhere in her evidence the Claimant asserts that she assisted with the payment however there is no evidence of such, save for the Western Union/Moneygram receipts of sums which she sent to Mrs. Frize which purportedly benefited her father, Mr. Elliott in part.

[80] Since there is no evidence that the payments were indeed made exclusively by Mr. Elliott (with or without contributions from the Claimant) the consideration of the payment of property taxes does not advance the Claimant's case. This point was challenged by the Defendant, however the Court notes that Mr. Symons' rebuttal that the Defendant paid the property taxes for both Mistletoe Cottage (where she moved to) and the disputed property was not supported by documentary evidence. As previously mentioned, all the receipts exhibited by Mr. Symons bear a valuation number which corresponds to the Mistletoe Cottage property and not the disputed property.

[81] Again, it is plausible that Mr. Elliott would have paid the property taxes while he lived at the disputed property, particularly since he had formed a desire to sell the disputed property from as far back as the late 1980's. However, even if the Court were to accept that Mr. Elliott paid the property taxes, the Court faces a similar difficulty as it did with respect to the payment of the mortgage for the final two (2) years (i.e. 1968-1970). Not only is payment of property taxes not determinative of the issue as to whether Mr. Elliott formed the requisite intention, in this case it is equivocal. The Court is also mindful that there is no evidence as to how Mr. and Mrs. Elliott went about satisfying their property tax obligations when they both lived at the disputed property. Just like the mortgage, it could have been that the property tax was paid by Mr. Elliott for the benefit of himself and Mrs. Elliott. In which case the payment of the property tax would also be an equivocal act.

[82] On this point, Mrs. Washington submitted as follows:

Evidence was led by the Claimant that the deceased carried out certain actions by himself without any reference to the Defendant, such as the renting of the property and the collection of rental income, none of which was shared with the Defendant as well as the payment of property taxes. On the basis of the foregoing, the Claimant will want the court to accept that the payment of taxes and collection of rent by the deceased are sufficient reasons to ground her claim of adverse possession but this notion was dispelled in Farrington v Bush 12 JLR 1492 [sic] where it was made clear that acts such as the payment of taxes and collection of rent are not sufficient to ground a claim for adverse possession. I submit however that if the deceased who was living at the joint property, the onus would have been on him, if he was so minded, to establish to the world at large in no uncertain way, his intention to dispossess the Defendant but no such thing

was done and the Claimant is not in any position to prove that the Defendant was in fact dispossessed.

[83] In **Farrington v Bush** (1974) 12 JLR 1492, the Appellant called in aid certain acts, namely, monthly visits to the property, getting the land cleared, putting up a notice warning persons not to trespass, putting down markers on the boundary and registering the land under an invalid conveyance. The Court found that these acts failed to establish possession because the Appellant was of the mistaken view that he had been made owner under the invalid conveyance and as such, his acts could have been performed qua owner as much as they could have been with intent to exclude/dispossess the true owner. The acts relied on by the Claimant in **Farrington v Bush**, do not include the collection of rent nor the payment of property taxes. I therefore cannot accept Mrs. Washington's submission that this case makes it *'clear that acts such as the payment of taxes and collection of rent are not sufficient to ground a claim for adverse possession.'* In any event I am mindful of the dictum of Morrison JA in **Recreational Holdings (Jamaica) Limited v Carl Lazarus and The Registrar of Titles** [2014] JMCA Civ 34, wherein doubt was expressed as to whether certain statements by Graham-Perkins JA in **Farrington v Bush**, represent the modern law of adverse possession (see: paragraph [37]).

[84] As previously stated I find the evidence relating to the payment of property taxes lacking, and unlike the payment of the mortgage, the Defendant has challenged the Claimant's assertion in this regard. In the circumstances, I do not regard the purported payment of property taxes as an unequivocal act from which I can draw an inference that Mr. Elliott formed the requisite intention. To determine the significance of this act, other factors will have to be considered.

Rental Income

[85] It is undisputed that Mr. Elliott rented a portion of the disputed property during the period after the Defendant left. The Claimant has not provided the Court with a definitive period in which Mr. Elliott rented the property, which is curious since it

is Mrs. Frize's evidence that she assisted with acquiring tenants. It is noted that she spoke to a former employee of hers renting the property for about three (3) years from 2004. Mr. Jones did give evidence that his friend Ms. Downer rented for six to seven months in 2007. The Claimant alleges that there was another tenant, Mr. Oakley Stephens, who was the last tenant who paid \$20,000.00 per month. Again no period of time is given, which should have been readily known since Mr. Jones was assigned the task of collecting the rent by the Claimant.

[86] Nonetheless, it was contended that Mr. Elliott never accounted to the Defendant for any of the rental income. This contention was not challenged by the Defendant, however an explanation was provided that she was aware of the rental arrangement and was involved with the decisions regarding the upkeep and maintenance. However this explanation is nullified and discredited by him in cross-examination when counsel for the Claimant referred him to paragraph 9 of his Affidavit in response to the Affidavit of Mrs. Frize filed on the 22nd of May 2015 which read:

"Paragraph 9 can neither be admitted nor denied save and except that the Defendant was aware at all material times that the matrimonial home was rented and agreed that the deceased would use the rental proceeds to assist in the maintenance and upkeep of the said matrimonial home..."

For completeness, paragraph 9 of the Affidavit of Mrs. Frize, to which Mr. Symons responded, filed on the 26th of February 2015 read:

"On a number of occasions I contacted rental agencies on his behalf and made arrangements for people to be interviewed in connection with him renting a portion of the subject property. The Defendant and/or any purported agent acting on her behalf were never a part of these transactions and therefore the Defendant never shared in any proceeds from any of the rental arrangements."

In relation to Mr. Symons, when he was confronted with this specific contention in cross-examination, he said:

"I agree, I did not say that."

Even though he requested the opportunity to refresh his memory from the Affidavit and the evidence was right before him.

[87] The court must consider that both Mr. and Mrs. Elliott would have been in their seventies when Mrs. Frize's tenant (who may or may not have been the first) began renting the premises in 2004. Although no evidence was given as to when Mr. Elliott or the Defendant retired, I accept Mr. Symons contention that they were both of modest means. Since the collection of rent was Mr. Elliott's only source of income which went towards the payment of the domestic helper and buying food and medication for him, and it was sometimes not enough, as acknowledged by the Claimant, hence her need to send monies to supplement this income; the Court cannot conclude that not sharing the rental income is by itself a determinative act evidencing an intention to possess the disputed property exclusively. Particularly if the parties were in contact, and there was an agreement for Mr. Elliott to use the entire rental income for his livelihood, then it could not be said that the collection of rent is demonstrative of his intention to possess. To determine the evidential significance of this act other factors will have to be examined.

Repairs

[88] It is undisputed that the disputed property was in a suboptimal state of repair in the years in which Mr. Elliott resided there by himself. Mr. Symons attributes this to the lack of financial resources on the part of Mr. Elliott and the Defendant.

[89] It is the Claimant's case that all the repairs and upkeep (albeit suboptimal) were done by Mr. Elliott. This is directly challenged by Mr. Symons who contends that he carried out repairs, although minor, on behalf of the Defendant. These repairs supposedly commenced in the late 1970's.

[90] There is no documentary proof that Mr. Symons carried out these repairs, nor is there any positive assertion that these repairs were funded by the Defendant.

[91] Mr. Symons could not produce evidence of the major repairs as "*they were not properly filed*" or "*some were lost and some got dirty.*" He stated further in his evidence that he could have recovered copies of the receipts from the hardware

stores that he visited and that he could have produced affidavits from the alleged workmen who carried out the works on his behalf, but offered no explanation as to why he failed to do so, even though he was of the view that it could have affected the Defendant's case. In the circumstances I reject the evidence of Mr. Symons that he carried out any major work at the disputed property on behalf of the Defendant but I accept that he carried out minor repairs.

- (3) Whether the circumstances in 2 a. and b. (above) existed for at least 12 years after the Defendant left/ceased to be in factual possession and if so for what period

[92] The relevant period for examination is 1968 to 2013, some forty-five (45) years. Mr. Elliott's physical possession of the disputed property is not in dispute. The issue for this Court to resolve is whether Mr. Elliott had the *animus possidendi* – the intention to possess the disputed property and treat it as his own. If he did in fact have this intention, then the Court is tasked with determining when he formed the said intention and whether it continued for a period of at least twelve (12) years.

[93] Based on the evidence, the court concludes that between 1968 and 1984 Mr. Elliott did not have the requisite intention. On the Claimant's case, Mr. Elliott was searching for Mrs. Elliott during this period. Further, the Claimant's own evidence shows that, in or about 1984, when Mr. Elliott finally made contact with her, he used the brief opportunity to seek Mrs. Elliott's input or as counsel Mr. Williams puts it, he '*proceeded to enquire about her intentions in relation to the disputed property*'. To my mind this the evidence suggests that he was also accounting to her by informing her that he finished paying the balance of the mortgage, an act which I do not regard as unequivocal for the reasons previously discussed.

[94] It is alleged that just before hanging up, Mrs. Elliott explained that she didn't want anything to do with him, the matrimonial home or the relationship. Mr. Williams submits that in response to this '*terse explanation*', Mr. Elliott carried on with his

life with the assistance of the Claimant and his friends. This evidence was clearly placed before the Court to prove Mr. Elliott's intention. However the Court has some reservations in treating with this alleged conversation between Mr. and Mrs. Elliott, particularly with the portions that supposedly came from Mrs. Elliott.

[95] Firstly, Mrs. Frize acknowledges that she never heard other side of the conversation, (i.e. what Mrs. Elliott said). According to Mrs. Frize, she vividly remembers that the telephone call took place in her home, in her presence. As such, she would have heard what Mr. Elliott said to Mrs. Elliott but as she already acknowledged she did not hear Mrs. Elliott's response. She is therefore recounting what she says Mr. Elliott told her that Mrs. Elliott said. In the circumstances the Court cannot place any reliance on this portion of the conversation (i.e. the response from Mrs. Elliott) as it seems to be self-serving and further it could not be tested by cross-examination.

[96] As such, I do not accept that Mr. Elliott formed the requisite intention based on what Mrs. Elliott supposedly said in 1984. The result is that there is a dearth of evidence between 1984 and 2004.

[97] As mentioned previously, the Claimant has not provided the Court with a definitive period in which Mr. Elliott rented the property, which is curious since it is Mrs. Frize's evidence that she assisted with acquiring tenants. The Claimant was however able to identify some of the tenants, through her Aunt, Mrs. Frize. I note that while no evidence came from any of these tenants themselves, Mrs. Frize advanced that her former employee began renting in 2004, and that this took place until 2007. Mr. Jones gave evidence that his friend Ms. Downer rented for six to seven months in 2007. The Claimant alleges that there was another tenant, Mr. Oakley Stephens, who was the last tenant. Although no dates were given in respect of Mr. Stephens, it would appear that since Mr. Stephens was the last tenant, who was also trying to buy the disputed property, then he was there sometime between 2007 to 2013. Again it is curious that the dates were not

given since by this time Mr. Jones was appointed by the Claimant to collect the rent.

[98] The effect of the paucity of evidence is that the Court cannot conclusively determine what Mr. Elliott's intention was for the period of twenty (20) years between 1984 and 2004. I accept that he rented a portion of the disputed property in 2004 and that this is an act which does tend to support that Mr. Elliott had the requisite intention to exercise such custody and control over the property for his benefit. I accept that this continued until his death in March 2013.

[99] The rental of the disputed property, coupled with the attempts to dispose of the property are unequivocal acts which would allow the Court to infer that Mr. Elliott had the intention to possess. While the precise dates cannot be identified, I find that these unequivocal acts took place from about 2004 to about 2012, when the sale was thwarted. Again no date or even a month was given. I have placed no reliance on the notice which Mr. Elliott was said to have placed in the newspaper in 2006, but if this did in fact occur it would be consistent with what seems to be his intention to possess during the 2004 to 2012 period. I so find that based on the evidence advanced, Mr. Elliott had the requisite intention for this period which amounts to approximately eight (8) years.

[100] Notwithstanding the fact that I have found that Mr. Elliott had factual possession for forty-five (45) years, the evidence only supports that he had the requisite intention for approximately eight (8) years, which is shy of the twelve (12) years required by the Act.

(4) Whether the Defendant left anyone to act on her behalf and for her benefit on the property, and if so for what period

[101] Even though I have found that the Claimant failed to prove that Mr. Elliott had the requisite intention for a period of at least twelve (12) years, for completeness I will address the issues raised by the Defendant. Namely, that (1) Mr. Elliott was at all times aware of her whereabouts, (2) that they remained in contact

personally and through Mr. Symons, and (3) that she still maintained a presence through him.

[102] It was advanced on behalf of the Defendant that the parties separated in 1984, for the reasons stated above, I did not accept this and I found that they stopped living together in 1968. Notwithstanding the divergence in the dates, Mr. Symons states that at all times Mr. Elliott knew where Mrs. Elliott was residing after they separated and that they remained in close contact. Mr. Symons also claims that he was a regular visitor to the disputed property and he states that after the Defendant moved he remained in touch with Mr. Elliott. He admitted that Mrs. Elliott never visited the disputed property but that he facilitated telephone calls in which they would discuss the maintenance and upkeep. Based on the evidence, the Court is not in a position to make a finding as to whether Mr. and Mrs. Elliott remained in close contact for the entire period in which they separated or whether they had regular telephone conversations as Mr. Symons alleges. I accept however that Mr. Elliott and Mr. Symons were in contact, and by virtue of this contact Mr. Elliott would have been in a position to communicate with Mrs. Elliott or at the very least know where she was. I am certain of this particularly in or about 2010 when Mr. Elliott recommended Mr. Symons to Mrs. Frize to carry out some works. This was supported by **ES2** an invoice dated the 14th of September 2010. Further, Mrs. Frize does not dispute this, even though she does not mention any specific date she confirmed that Mr. Elliott sent Mr. Symons to her to provide an estimate for electrical works.

[103] As previously stated, it seems that in or about 2010 when Mr. Symons was recommended by him to Mrs. Frize, Mr. Elliott would have been in a position to know where Mrs. Elliott was. It would be extremely unlikely that Mr. Symons a known relative of Mrs. Elliott, who would have been caring for her (and purportedly acting as her Attorney under the Power of Attorney) would have been in touch with Mr. Elliott but never mentioned where she was; or that Mr. Elliott would not have inquired. I bear in mind the evidence from the Claimant's witness, Mr. Jones who said that Mr. Elliott told him that he did not believe his wife to be

dead as he thought somehow he would have known. Also, Mr. Jones' evidence that although they were never in touch, he surmised that Mr. Elliott wanted to find her because he spoke about her all the time. I am mindful that Mr. Elliott could have been in contact with Mrs. Elliott and Mr. Symons without disclosing this to Mr. Jones. Mr. Jones stated that Mr. Elliott never told him of the existence of Mr. Symons or that he knew anyone connected to his wife, yet Mr. Symons and Mr. Elliott were clearly in touch in or about 2010. It is however not unheard of for people to compartmentalize their relationships.

[104] I accept that Mr. Symons might not have personally informed Mrs. Frize of his connection with Mrs. Elliott, however he may have found this unnecessary since he contends that Mr. Elliott advised her of their kinship via the telephone. Even if Mr. Symons is not credible on this point, I accept that he was in contact with Mr. Elliott and that he visited the disputed property periodically. He was able to give details in relation to the state of the disputed property, Mr. Elliott's living conditions, as well as the state of his health. In particular he was able to recount an injury Mr. Elliott suffered to his leg, a detail which was confirmed for the most part by Mr. Jones. He also stated that he contacted the Claimant who confirmed that Mr. Symons called her in or about 2012 regarding Mr. Elliott's condition.

[105] I also accept that Mr. Symons assisted Mr. Elliott on behalf of Mrs. Elliott, and that he carried out minor repairs at the disputed property. These repairs may not have been known to Mr. Jones since Mr. Elliott never told him about Mr. Symons, however it is noted that Mr. Jones mentioned that Mr. Elliott could not do much because of his age. Mr. Jones also stated that Mr. Elliott would try unsuccessfully to carry out his own maintenance, in particular he would try to repair the pipes, one of the first things Mr. Symons stated that he (Mr. Symons) would try to fix. Both Mr. Jones and Mr. Symons also agree that the disputed property was in need of repair.

[106] While Mr. Symons has not assisted the Court with precise dates, he maintains that he would visit the disputed property from when Mrs. Elliott lived there and in

cross-examination he said that he started to do maintenance at the disputed property from the 1970's. He admitted that the disputed property was in need of maintenance and the repairs he did were minor as neither of the parties had much money. I accept that he is being truthful in this regard. Based on the evidence it is clear that Mr. Symons was involved in Mr. Elliott's life, at the very least from 2010, when Mr. Elliott recommend him to Mrs. Frize until Mr. Elliott died in March 2013.

[107] As previously mentioned, Mr. Symons admitted that Mrs. Elliott did not visit the disputed property. He speculates that this was because of the reasons she separated from Mr. Elliott, but that she always instructed him to assist with the maintenance throughout the years. Although the Court did not have the benefit of evidence from Mrs. Elliott, it is clear that she reposed some amount of trust and confidence in Mr. Symons. She purportedly appointed him to take care of her affairs under a Power of Attorney in 2004 and went to live with him when she moved from Mistletoe Cottage. Based on the report from Dr. Beckford it is clear that Mrs. Elliott's health began to deteriorate from about 2003 when she fractured her hip and was rendered unable to walk. Apart from Mr. Symons' speculation that Mrs. Elliott did not visit the disputed property because of her strained relationship with Mr. Elliott, as a result of the infidelity, in the circumstances visits to the disputed property may have been physically challenging, and perhaps even impossible at least from 2003 onwards. In any event I accept that Mr. Symons visited the disputed property from about the late 1970's and continued to do so on Mrs. Elliott's behalf.

[108] Counsel, Mr. Williams took issue with the Power of Attorney. He submitted as follows –

It is trite law that where a donor of a Power becomes mentally impaired then that Power no longer exists as the donor is incapable of ratifying the acts of her agent (the donee). The evidence before this Honourable Court is that the Defendant has been suffering Severe Senile Dementia since at least 2003. This was the conclusion of her doctor. It may be reasoned then that the Defendant lacked the mental capacity to grant the Power in the first place or if she had lucid intervals when the Power was created, the Power ceased to exist when she became

severely mentally impaired. Again, the conclusion from this fact is that Mr. Symons [sic] authority to act on behalf the Defendant ceased to exist for many years when he was purportedly acting on her behalf . It means therefore that the alleged maintenance works were never carried out on behalf of the Defendant as no lawful authority extended from her for Mr. Symons to act.

[109] Aside from the Power of Attorney, Mr. Williams' submission raises another issue. Although neither of the parties addressed the Court on this point, I would make an observation based on the unique circumstances of the instant case. As Mr. Williams submitted, *'The evidence before this Honourable Court is that the Defendant has been suffering Severe Senile Dementia since at least 2003.'* It is noted that in Dr. Beckford's letter (dated the 13th of January 2014) he stated that he began treating Mrs. Elliott in 2003 and that her history includes Senile Dementia. More specifically he stated that –

'... the above named patient (Mrs. Elliott) has been under my care from 07/11/03 to the present. She has a medical history of Hypertension, Diabetes Mellitus and Severe Senile Dementia...

Her Senile Dementia has become progressively worse lately. She is usually unresponsive when spoken to and her memory loss is quite noticeable and most times she does not recognize me as her physician, in spite of seeing me every three months for her medical check up...

[110] It is not clear from Dr. Beckford's letter when Mrs. Elliott's Senile Dementia began. It is noted that when asked in cross-examination, Mr. Symons stated that he noticed that Mrs. Elliott had been suffering from a mental impairment from around 2012 but that he would have confirm by reference to Dr. Beckford's medical exam. He was also challenged in respect of his letter dated the 10th of October 2012, in which he stated that Mrs. Elliott was, inter alia, *"fully compos"*. Mr. Symons explained that he meant that in October 2012, she was *"fully capable of making decisions."* I have placed no reliance on Mr. Symons' estimation with regards to when Mrs. Elliott became mentally impaired, as he is not in a position to give this evidence.

[111] The issue of Mrs. Elliott's mental capacity is an important consideration since section 17 of the **Limitation of Actions Act**, may be applicable in the instant

case. Section 17 of the Act provides for an extension of the statutory period where persons entitled to recover property are under a disability. It states –

If at the time at which the right of any person to make an entry, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, idiocy, lunacy or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be), hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability or shall have died (whichever of those two events shall have first happened).

Conclusion

[112] The Court has been left in doubt as to the timeframe regarding Mrs. Elliott's mental incapacity. A consideration which could certainly affect the outcome. Even if the Claimant was able to prove that Mr. Elliott had the requisite intention for at least twelve (12) years, I am not of the view that the circumstances of this case fits neatly within the four corners of **Wills v Wills** as McDonald-Bishop JA found in **Fullwood v Curchar** (see: paragraph [101]). I am mindful that **Wills v Wills** must be relied on with some amount of caution. At paragraph [31] Lord Walker of Gestingthorpe emphasised that the case was exceptional and that the decision turned on its own facts which were unusual.

*[31] **Their Lordships think it right** (especially in view of the observations at the end of the judgment of Langrin JA (Ag)) **to emphasise that this appeal turns ultimately on its own facts; and although separation and divorce are sadly commonplace, the facts of this case are quite unusual.** Elma began to live apart from her husband in 1964 and (apart from some disputed evidence about occasional co-habitation in the United States) she lived completely apart from him from 1976 at the latest. She consulted lawyers in 1984 but she never seems to have taken action either to have the properties sold, or to rearrange their ownership by an exchange of beneficial interests, or even to obtain a proper written acknowledgement of her title (which could no doubt have been obtained if the alternative had been the threat of more drastic action). And yet Elma seems, from some of the evidence, to have been an independent-minded and forceful lady. **So it is an exceptional case.***

[113] In the instant case, there are substantial gaps in the evidence, primarily regarding dates and times. The parties were advanced in age and were never formally divorced as in the cases of **Wills v Wills**, **Fullwood v Curchar**,

Freckleton v Freckleton and **Lois Hawkins**. It is noted also that there is no evidence that Mrs. Elliott ever migrated abroad nor that Mr. Elliott moved another woman into the disputed property, common features in some of the cases referred to. It is also clear from this line of authorities, where the dispossessed spouse was said to be excluded from the properties in dispute, that either one or both of the spouses formed attachments which made it clear that it would have been impractical for the disposed spouse to ever return to live at the properties in dispute.

[114] It should be noted that in **Wills v Wills**, **Fullwood v Curchar**, and **Lois Hawkins**, the persons claiming that the former spouses'/co-owners' titles had been extinguished pursuant to the **Limitation of Actions Act** were all current spouses of the dispossessing spouses/co-owners, who lived at the properties that were in dispute. As such they were in the position of being able to give specific evidence about the property and how it was controlled and enjoyed together with precise time periods. In the instant case, neither of the spouses/co-owners gave evidence. The Claimant, herself is in a unique position. She is the child of the dispossessing spouse and she never lived at the disputed property. While this is by no means a bar to her claim, her evidence primarily comes what from what she recalls her father telling her. She also relies on the evidence of her Aunt, Mrs. Frize, who similarly never resided at the property and the evidence of an acquaintance of her father who knew him only for the last six (6) years of his life. The effect is that the Claimant is unable to assist the courts with precise time periods and evidence of continuous unequivocal acts of Mr. Elliott for a period of at least twelve (12) years between 1968 and 2013.

[115] In my view, the payment of (1) the mortgage from 1968 to 1970; and (2) the property taxes from 2008 to 2012 are not unequivocal acts which indicate that from 1968 to 2012 Mr. Elliott formed the intention to treat the disputed property as his own. Although there may be instances in which such payments, coupled with other acts, are indicative of an intention. In other cases the payment of these obligations is somewhat akin to the payment of utility bills, such as electricity and

water. Such payments, without more, can be made by residents of premises without any intention of regarding themselves as being in exclusive possession.

[116] By contrast, I find the rental of part of the disputed property, the collection of rent and the attempts to dispose of the disputed property to be far more unequivocal. In the circumstances I was able to find that Mr. Elliott was in factual possession with the intention to possess the disputed property for approximately eight (8) years between 2004 and 2012. I said 2012 because it is not clear what his intentions were after the sale was thwarted. The lack of precision is also an issue, I am mindful that as Sykes J said, *'The law requires twelve years not approximately twelve years for the extinction of title principle to have full effect. For this to happen the evidence needs to say with some degree of precision the month, in any particular year, when it is said that twelve years began.'* (see: paragraph [60] of **Lois Hawkins**). In this case, the Claimant was unable to adduce sufficient evidence. I did not accept 1968 as the time in which Mr. Elliott formed the requisite intention, nor did I accept 1984. The Claimant was unable to assist the courts with precise time periods and evidence of continuous unequivocal acts of Mr. Elliott, capable of showing *animus possidendi*, for a period of at least twelve (12) years between 1968 and 2013. As such her claim must fail.

[117] Finally, I found the following passage from the text **Commonwealth Caribbean Land Law**, by Sampson Owusu at page 309, to be persuasive and quite apt in the instant case –

The requirement of animus possidendi, an essential ingredient of the doctrine of adverse possession, was also not noticed in the opinion of the Privy Council in the case of Wills v Wills. There was no evidence led to establish that the deceased husband ever intended to exclude the former wife from the properties in issue. It was not clear when that intention, if any, was manifested. Was it after the visit in 1976 or the divorce in 1985?

The Privy Council could have benefited enormously from the decisions of Canadian courts on the construction of a similar provision with the same wording as those enacted in the Caribbean, which enact that the possession by one joint tenant or tenant in common is not deemed the possession of others. These Canadian decisions are instructive on the extent to which the provision affects

the doctrine of adverse possession of joint ownership of husband and wife. In Re Strong and Colby et. al. (1978) 87 DLR (3^d) 589 Robins J said:

But where, as here, possession was acquired during a marital relationship it seems to me that the spouse claiming possessory title of the matrimonial home finds greater difficulty in discharging the onus of establishing the requisite animus possidendi from the fact of possession alone than does a claimant in most other circumstances. A departing spouse may for a variety of readily imaginable reasons, and without any intention to abandon ownership in the matrimonial property, permit the other spouse to remain there for an indeterminate time, and, by the same token, the remaining spouse's possession is not necessarily referable to an intention to deprive the other of title.

This statement has been cited with approval and applied in various Canadian cases with inexhaustible enthusiasm, obviously because it seems to serve to further the important interest of social justice, protecting the matrimonial bond built on trust. It certainly approves itself to common sense and judgment...

Resulting Trust

[118] It is noted that although the Claimant was seeking a Declaration that Mrs. Elliott holds the disputed property on a resulting trust for the estate of Mr. Elliott, no submissions were made in this respect. Further there is no evidence of how the disputed property was acquired, as such the Court is not in a position to find that Mrs. Elliott did not contribute to the acquisition nor that she has no equitable/beneficial interest. Prima facie, as the parties were both registered on the certificate of title for the disputed property, the legal and beneficial estate would be presumed to be owned equally by both of them (see: **Stack v Dowden** [2007] 2 All ER 929). As Lord Neuberger of Abbotsbury put it, the '*conveyance into joint names, in the domestic consumer context, established a prima facie case of joint and equal beneficial interests unless and until the contrary was proved.*' I am not satisfied that the contrary has been proved in the instant case.

Disposal

[119] It is hereby ordered that the declarations and reliefs sought by the Claimant are refused. Costs are awarded to the Defendant to be agreed or taxed.