



[2018] JMSC Civ 145

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

**CLAIM NO. 2017 HCV 00835**

**IN THE MATTER OF ALL THAT parcel of land part of LANQUEDOC in the parish of SAINT MARY containing by survey One Rood Thirty Perches and Five-tenths of a Perch of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and the land formerly comprised in Certificate of Title registered at Volume 132 Folio 22 of the Register Book of Titles and now being land comprised in Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles**

**A N D**

**IN THE MATTER of an Application by DAWN DAVIS for a declaration that the subject property is solely and exclusively owned by her pursuant to the *jus accrescendi* principle**

**A N D**

**IN THE MATTER of Sections 139, 140 and 142 of the Registration of Titles Act**

<b>BETWEEN</b>	<b>DAWN DAVIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DELROSE GRAY</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mr. Anthony A. Williams and Mrs. Sharon Usim instructed by Messrs. Usim Williams & Co. for the Claimant**

**Miss Georgia McFarlane instructed by Messrs. Brown, Findley & Co. for the Defendant**

**Heard: October 30, 31 and November 1 and 21, 2018**

**Land - Joint Tenancy – Extinction of title of registered owner – Limitation of Actions Act, 1881, sections 3, 4, 14 and 30**

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

**INTRODUCTION**

- [1] The instant matter essentially raises the question of the extinction and acquisition of title by the operation of the Limitation of Actions Act, 1881 (“the Act of 1881”). It concerns the right of a surviving co-owner of registered land, in whom ownership is vested as a joint tenant, to obtain an order for recovery of possession upon the death of the other co-owner.
- [2] By way of a Fixed Date Claim Form, filed on 16 March 2017, the Claimant, Mrs. Dawn Davis, seeks the following Orders against the Defendant, Miss Delrose Gray: -
- (1) A Declaration that the Claimant is the sole and exclusive owner in fee simple of all that parcel of land part of Lanquedoc in the parish of St. Mary containing by survey One Rood Thirty Perches and Five-tenths of a Perch of the shape and dimensions and butting as appears by the Plan thereof annexed and the land formerly comprised in Certificate of Title registered at Volume 132 Folio 22 and now being comprised in Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles (“the subject property”);
  - (2) A Declaration that the Registrar of Titles remove Caveat numbered 2017721 and any other Caveat lodged against the said Title by the Defendant, her servants and/or agents;
  - (3) That the Registrar of Titles shall be empowered to endorse the Duplicate Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles in the sole and exclusive name of the Claimant consequent on the fact of the death of Roderick Davis (“the deceased”);

- (4) That the Defendant vacates and delivers up vacant possession of the subject property within thirty (30) days of the date of this Order to the Claimant or the Claimant's Attorneys-at-Law;
- (5) That the Defendant deliver up possession of the said Duplicate Certificate of Title within thirty (30) days of the date of this Order to the Claimant or the Claimant's Attorneys-at-Law;
- (6) That in the event that the Defendant and/or the Executors of the Last Will and Testament of Roderick Davis fail and/or neglect and/or refuse to deliver up the said Duplicate Certificate of Title then the Registrar of Titles shall dispense with the former Title and issue a new Title in the sole and exclusive name of the Claimant;
- (7) That the Defendant be restrained from, in any way whatsoever, preventing the Claimant from having access to the subject property;
- (8) That the Last Will and Testament of the deceased, Roderick Davis, purporting to give, bequeath and devise the subject property to the Defendant is null and void as it pertains to the disposition by the deceased of the subject property to the Defendant;
- (9) A Declaration that the Defendant provides within sixty (60) days of this Order a detailed Statement of Income and Expenditure to the Claimant accounting for the rental income earned from the bar and the cellular tower and to remit the net income to the Claimant within sixty (60) days of this Order;
- (10) That the costs of this suit be borne by the Defendant;
- (11) Such further and/or other relief as this Honourable Court deems fit.

### **BACKGROUND**

- [3] On 15 January 1972 Mrs. Davis and the deceased were married and the union produced two (2) children. On 25 February 1982 they purchased the subject property which became their matrimonial home. The purchase of the subject property was financed by a loan from the National Housing Trust (“NHT”) and was obtained in two (2) parts; the first, a loan on the open market in the name of the deceased and the second, a home improvement loan in the name of Mrs. Davis. A single storey structure was later constructed on the subject property with the assistance of a loan obtained by Mrs. Davis only.
- [4] During the period February 1982 to July 1994 Mrs. Davis and the deceased occupied the subject property. Mrs. Davis asserts that she left the subject property in 1994 when she left the Island of Jamaica destined for the United States of America. She contends that she was forced to leave the subject property as a consequence of certain threats that were issued against her by the deceased.
- [5] The deceased died on 11 July 2016, leaving behind his Last Will and Testament in which he purports to bequeath the subject property to Miss Gray, who lived there with him from 1999 until his death in 2016.

### **THE CLAIMANT’S CASE**

- [6] Mrs. Davis contends that the deceased had several extra-marital relationships during the course of their marriage and in 1992 the relationship between them reached ‘rock bottom’. The deceased moved out of the matrimonial home but would return there whilst Mrs. Davis was at work and remove furnishings and equipment. Mrs. Davis subsequently changed the locks to the outer doors of the dwelling house on the subject property preventing the deceased from accessing the interior of the matrimonial home.
- [7] The deceased became very angry that the locks had been changed and left messages, intended for Mrs. Davis, with her neighbour that she did not own

anything inside the home and that she should vacate the subject property. In the same message he cautioned that if she did not vacate the subject property, he would 'burn the house down.' Mrs. Davis was again threatened by the deceased when he telephoned her at work, in June 1994, and demanded that she leaves the subject property. The deceased stated that Mrs. Davis should make a list of her 'financial contributions to the property and he would take a loan to pay me off.' When she refused, the deceased said 'if he could not live in the house he would put a stick of dynamite under it and burn it down.'

- [8] Mrs. Davis reported these threats to the police who advised her that they could not guarantee her safety. Thereafter, she became 'extremely fearful' for her safety and commenced making arrangements to leave the country. Mrs. Davis left Jamaica on 16 July 1994. Prior to leaving she consulted an Attorney-at-Law because she wanted to protect her interest in the subject property. She instructed her Attorney-at-Law to lodge a caveat against the Certificate of Title for the subject property.
- [9] When Mrs. Davis left Jamaica the subject property was vacant as the deceased was then living elsewhere. Prior to leaving, Mrs. Davis spoke to the deceased and advised him of the total amount that he was to pay to NHT each month in respect of the mortgage payments in respect of the subject property. The deceased returned to the subject property approximately seven (7) months after Mrs. Davis left Jamaica.
- [10] When Mrs. Davis left Jamaica she was still owing a balance on her mortgage loan in respect of the subject property and continued to make her payments whilst abroad. She did this until she had paid the loan in full, in or around December 1997. It was when she made her final payment that she was alerted that the deceased was in arrears in respect of his mortgage payments. Mrs. Davis made a payment in the sum of Ten Thousand Eight Hundred Dollars (\$10,800.00), towards those arrears. She eventually paid the deceased's portion of the mortgage loan in full in 1998.

- [11] Mrs. Davis contends that she remained in contact with Ms. Waugh of the National Water Commission and with the Office of the Collector of Taxes to ensure that the utility bills and the property taxes, in respect of the subject property, were being paid by the deceased. Mrs. Debbie Evering-Pryce also kept her abreast of what was happening on the subject property during the period of her absence.
- [12] Towards the end of 1994, after having settled to some extent in her new life, Mrs. Davis wrote to the deceased informing him that she had paid the electric and water bills, as well as, the property taxes in respect of the subject property and gave him her permission to use her portion of the income generated from the rental of the shop constructed on the subject property to pay the property taxes and for the general upkeep of the subject property.
- [13] In 2008 Mrs. Davis spoke with the deceased whilst she was on a visit to Jamaica. She raised with him the fact that the subject property was no longer insured, now that the mortgage loans had been paid in full. Mrs. Davis suggested that the subject property be insured but the deceased disagreed, instead proposing that he purchase her share in the subject property. Mrs. Davis refused this offer.
- [14] Mrs. Davis again visited the subject property in August 2015, at which time she again checked on the status of the subject property. Mrs. Davis, having been advised that the property taxes in respect of the subject property was in arrears for some three (3) years, advised the deceased accordingly. He indicated to her that the shop was not operating and that he had no money with which to pay the property taxes. Mrs. Davis indicated that she would pay the said arrears but would not be in a position to do so until 2 August 2016. On 2 August 2016 Mrs. Davis made a payment in the sum of Twenty-one Thousand Two Hundred and Ninety-five Dollars (\$21,295.00). She also made a payment of Four Thousand Dollars (\$4,000.00) towards an outstanding water bill.

- [15] The deceased died on 11 July 2016. On 1 August 2016 Mrs. Davis met with Miss Gray, along with her children and those of the deceased, to discuss plans in respect of the subject property moving forward. At that meeting Mrs. Davis was advised that the first floor of the second structure on the subject property was being operated by Miss Gray as a general merchandise store and that the second floor, which was added by the deceased, had been recently rented for Nine Thousand Dollars (\$9,000.00) per month. Mrs. Davis also observed a cellular tower erected on the subject property and was told that it had been placed there as a result of a contract between communications company FLOW, the deceased and Miss Gray (“the FLOW contract”).
- [16] Mrs. Davis and Miss Gray signed to a temporary agreement whereby the latter agreed to pay to the former the proceeds from the rental income and Mrs. Davis allowed Miss Gray to occupy the subject property until 31 December 2016.
- [17] On 2 August 2016 Mrs. Davis attended at the head office of NHT in order to obtain the Certificate of Title to the subject property but was advised that same had already been given to the deceased, who collected same on 9 November 1998.
- [18] Mrs. Davis maintains that she never abandoned her interest in the subject property and has cited a number of ‘acts’ on her part as being indicative of this. These acts include: -
- (i) her causing a caveat to be lodged against the Certificate of Title for the subject property;
  - (ii) her continuing to pay her portion of the mortgage loan until same had been paid in full in 1997;
  - (iii) her consistently paying the property taxes and water bill in respect of the subject property;

- (iv) her telephoning the deceased whilst she was overseas to inform him that his portion of the mortgage payments was in arrears;
- (v) her promising to pay the deceased's portion of the mortgage payments that had fallen into arrears after he advised her that he did not have the money to pay it as the shop was no longer operating;
- (vi) her engaging her daughter to keep her abreast of what was happening in relation to the subject property;
- (vii) her continuing to contribute to the general upkeep of the subject property by instructing the deceased to use her portion of the rental income to do same;
- (viii) her declining the offer of the deceased to sell her share in the subject property to him;
- (ix) her visiting the property twice whilst she was visiting Jamaica and discussing matters relating to the subject property with the deceased;
- (x) her having a discussion with the deceased in relation to insuring the subject property;
- (xi) her drafting a temporary agreement to the effect that Miss Gray would vacate the subject property by 31 December 2016 and hand over to her the proceeds of the rental income generated from the rental of the shop constructed on the subject property and the income collected pursuant to the FLOW contract. This temporary agreement was executed by Miss Gray;
- (xii) her preparing a letter of demand in respect of the subject property, dated 23 January 2017 and addressed to Miss Gray.

### **THE DEFENDANT'S CASE**

- [19] Miss Gray, in response to the Fixed Date Claim Form, relied on the Act of 1881 by way of her defence. The gist of her case is captured and outlined as follows. In 1994, Mrs. Davis abandoned her interest in the subject property and the deceased took sole possession of same. From 1999, Miss Gray and the deceased exercised sole, quiet, undisputed, undisturbed and continuous possession of the subject property until the death of the deceased on 11 July 2016. The deceased improved the subject property and did all other acts consistent with ownership of the subject property up until the time of his death.
- [20] Miss Gray asserts that she is the spouse of the deceased and a beneficiary under his Last Will and Testament. She started living on the subject property after she began a relationship with the deceased in 1999.
- [21] Miss Gray contends that in 1999 the deceased rented out the bar that he constructed on the subject property and both of them used the rent collected for their own use and benefit without accounting to Mrs. Davis for same.
- [22] The deceased did not permit Mrs. Davis to enter the dwelling house on the subject property on her visit there in 2015. She had to remain outside under a naseberry tree. Mrs. Davis did not enter the said dwelling house until after the death of the deceased.
- [23] Miss Gray, along with the deceased, used their money to pay the property taxes and the household bills without any contribution from Mrs. Davis. The latter did not send money from abroad nor did she make any contribution to the maintenance of the subject property.
- [24] Miss Gray and the deceased also used their monies to carry out extensive renovations to the subject property. They renovated the dwelling house, shop and bar on the subject property without Mrs. Davis' knowledge or consent. They reroofed the dwelling house, constructed a patio, tiled the dwelling

house, the shop and the bar, refurbished the kitchen, including changing the kitchen counter, replaced the windows, renovated the garage and repaired the gate to same.

- [25] In 2007 the deceased entered into the FLOW contract without Mrs. Davis' knowledge or consent and the monies received were used by Miss Gray and the deceased to the exclusion of Mrs. Davis. Mrs. Davis did not become aware of the FLOW contract or of the cellular tower erected on the subject property, until after the death of the deceased.
- [26] On the day following the funeral service that was held for the deceased, Mrs. Davis visited Miss Gray at the subject property where she asked the latter to sign to a lease agreement. Miss Gray signed same as she was emotionally distressed and deeply in grief. Miss Gray contends further that her signing to that agreement was not an acknowledgement of Mrs. Davis' title to the subject property and that at the time that this agreement was signed, Mrs. Davis' title to the subject property had been extinguished by the operation of the Act of 1881.
- [27] In 2016 Miss Gray lodged a caveat against the Certificate of Title for the subject property.
- [28] Finally, Miss Gray contends that Mrs. Davis abandoned her interest in the subject property and only became interested in same on the death of the deceased. At the time of the death of the deceased Mrs. Davis had left the subject property for in excess of twenty (20) years. Miss Gray contends further that she occupied the subject property together with the deceased to the exclusion of Mrs. Davis.

### **THE ISSUES**

- [29] The following are identified as the issues for the Court's determination: -

- (1) Is Mrs. Davis the sole legal owner of the subject property by virtue of the principle of jus accrescendi, the right of survivorship, consequent on the death of the deceased?
- (2) Has Mrs. Davis' paper title to the subject property been extinguished by the deceased or by his successors in title by virtue of section 30 of the Act of 1881?
- (3) What are the legal requirements to establish that Mrs. Davis' paper title to the subject property has been extinguished?
- (4) Where does the burden of proof lie?
- (5) Does the Act of 1881 apply in the instant case?
- (6) What is the effect, if any, of the Last Will and Testament of the deceased which purports to bequeath the subject property to Miss Gray?

### **THE LAW**

- [30]** The provisions of the Act of 1881 compare very closely with those of the English Real Property Limitation (No. 1) Act of 1833 ("the Act of 1833"), as amended by the Real Property Limitation Act of 1874 ("the Act of 1874"), which reduced the statutory period from twenty (20) years to twelve (12) years. The Act of 1833 simplified the law by, among other things, abolishing the highly technical doctrine of adverse possession and the converse notion of non-adverse possession and by changing the law as to the possession of co-owners. (See – Section 2 of the Act of 1833 and section 3 of the Act of 1881.)
- [31]** One of the necessary reforms was the abolishing of the common law doctrine that the possession of one tenant in common was the possession of all. The effect of this reform was that one co-owner, whether joint tenants or tenants in

common, could extinguish the title of the other. (See – Section 12 of the Act of 1833 and section 14 of the Act of 1881.)

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

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

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

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

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

*“The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say –*

*(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance*

*of possession, or at the last time at which any such profits or rent were or was so received;*

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

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

*“When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.”*

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

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

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

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

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

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

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

[42] All of those decisions stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also stated that the court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is

not invariably either necessary or sufficient evidence of possession. Nevertheless, the decisions must be read in the light of the important decision of the Court of Appeal in **Buckinghamshire County Council v Moran** [1990] Ch 623 and the House of Lords decision in **Pye (J A) Oxford Limited v Graham** [2003] 1 AC 419.

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

*“Reading the judgments in Leigh v Jack, 5 Ex D 264 and Williams Bros Direct Supply Ltd v Raftery [1958] 1 QB 159, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the wasteland do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession.”*

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

*“The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy led directly to the heresy in the Wallis's Cayton Bay line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell*

*LJ survived this statutory review but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases.”*

- [45] Sykes, J (as he then was) in **Valerie Patricia Freckleton v Winston Earle Freckleton** Claim No. 2005 HCV 01694, judgment delivered on 25 July 2006, stated that between 1968 and 2003, the Judicial Committee of the Privy Council, the House of Lords and the Court of Appeal of England and Wales have established the legal principles that are applicable in matters dealing with the extinction of a title by a co-owner. These cases, he stated, are **Paradise Beach & Transportation Company Limited v Price-Robinson** [1968] AC 1072 (PC), **Buckinghamshire County Council v Moran** [1990] Ch 623 (CA), **Wills v Wills** 64 WIR 176 (PC), and **Pye (J A) Oxford Limited v Graham** [2003] 1 AC 419 (HL). In the midst of these cases there is the judgment of Slade, J in **Powell v McFarlane** (1977) 38 P & CR 452 at page 470, in which he stated the intention that must exist in the mind of the party who is claiming to have dispossessed the registered owner.
- [46] In **Paradise Beach & Transportation Company Limited v Price-Robinson** (supra), an appeal from the Supreme Court of the Commonwealth of the Bahamas, by a will dated 22 November 1912, a testator devised land to his children and grandchildren as tenants in common. Before he died two of his daughters farmed the land on his behalf.

- [47]** On 23 October 1913, the father died and his daughters continued farming until the early 1920s when they erected a house on the land. The daughters farmed the land until they died in 1962 and after their deaths, the land was occupied by one Mr. Cyril Price-Robinson and others, successors in title to the daughters. It is these successors who were the respondents in the appeal to the Board. The appellants claimed to be successors in title to those persons who, along with the daughters, would have been entitled to the land under the will of 22 November 1912.
- [48]** On appeal, the appellants argued that they were entitled to that portion of the land as would have devolved to their predecessors in title. For them to succeed they would have had to establish that their predecessors in title, at some point, entered in possession of the land. Had that occurred it would have prevented the daughters from dispossessing the other tenants in common.
- [49]** The appellants commenced an action in 1963 against the daughters' successors in title, in which they claimed their undivided share. The basis of the claim was that the father's will devised to their predecessors in title and the daughter's predecessors in title as tenants in common. The appellants argued that the daughters did not acquire title to the appellants' share because all the daughters had done was to continue farming, an activity in which they were engaged before the testator died. This activity, the appellants submitted, was insufficient to dispossess the other tenants in common. The daughters had not done anything 'adverse' to the possession of the appellants' predecessors in title and therefore time had not begun to run against them. This meant that the daughters had not extinguished the title of the other title holders. Since the daughters died in 1962 and the action was commenced in 1963, it followed that the respondents (the daughters' successors in title) could not acquire a better title than the daughters had.
- [50]** The appellants' submissions were founded on the idea that the daughters had to do some 'hostile' act to show that they intended to exclude the appellants'

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

- [51] The finding of the trial judge, which was upheld on appeal, was that the daughters had been in possession for their own use and benefit and that they and their successors in title had been in exclusive possession since their father had died. This was in excess of the twenty (20) years required by the relevant legislation in the Bahamas and consequently the paper title of the other co-owners, albeit tenants in common, had been extinguished.
- [52] Lord Upjohn, speaking for the Board of the Privy Council, made a number of important conclusions. These were, firstly, that the Bahamian statutes were the Real Property Limitation (No. 1) Act, 1833 (c. 124) (Statute Law of the Bahama Islands, rev. 1957) and the Real Property Limitation Act, 1874 (c. 216) (Statute Law of the Bahama Islands, rev. 1957) and are identical to the Act of 1833 and the Act of 1874. Secondly, that Denman, CJ had definitively interpreted the United Kingdom statutes in the two important cases of **Nepean v Doe d. Knight** (1837) 2 M. & W. 894 and **Culley v Doe d. Taylerson** (1840) 11 Ad. & E. 1008. Thirdly, agreeing with the decisions of Denman CJ in the two cases cited above, that, the purpose of sections 2 and 3 of the 1833 Act of the Bahamas was to rid the law of the doctrine of non-adverse possession.
- [53] Sykes, J in **Freckleton v Freckleton** (supra), at paragraph 10, stated as follows: -

*“When the limitation statute of James I (21 Jac 1, c 16) was passed, judges found it difficult to accept that a paper owner might lose his*

*land by the simple fact of another person being in possession without any 'hostile' act by the dispossessor. The judges engrafted on the statute a requirement that there must be something in the nature of an ouster of the paper owner by the person claiming title to the land by possession. According to the law that developed the dispossessor must not only occupy the land with the animus possidendi, he must go further to actively bar the paper owner. It was said that the dispossessor had to use the land in such a manner that was clearly and obviously inconsistent with the title of the paper owner. It was this development that became known as 'adverse possession'. If the dispossessor was in possession with the necessary animus possidendi but did not commit any 'hostile' acts inconsistent with the paper owner's title in order to show that he was ousting the paper owner, he was said to be in 'non-adverse possession'. The practical result of this was that the animus possidendi, coupled with possession, was not enough to extinguish the paper owner's title. The dispossessor must use the land in such a manner as to make it clear that he was behaving like the owner and that use, when examined, must show that he ousted the paper owner. Anything less was insufficient to dislodge the paper owner's title."*

**[54]** At paragraph 18 he stated: -

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

**[55]** At paragraph 19 Sykes, J stated: -

*"The legal position now is that a registered owner of land or indeed any other owner may now have his title extinguished by his lack of vigilance. If the registered owner wishes to prevent this happening he*

*simply needs to heed the advice of Slade J in **Powell**, that is to say, do some “slight” acts either by himself or on his behalf so that it will negative the burgeoning “right” of the dispossessor. Whether that “slight” act will be sufficient depends on the facts of each case. There can be no catalogue of “slight” acts.”*

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

### **ANALYSIS**

- [57] Mrs. Davis and the deceased are the registered owners of the subject property which they hold as joint tenants. By way of a Fixed Date Claim Form, filed on 16 March 2017, Mrs. Davis seeks to recover possession of the subject property from Miss Gray, on the basis of the principle of the right of survivorship.
- [58] In considering the issues that arise in the instant case, the Court has had regard to the pronouncement of Slade, J in **Powell v McFarlane** (supra), that, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession.
- [59] The indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is, however, subject to the subsequent operation of any statute of limitations. (See – Section 68 of the Registration of Titles Act.)
- [60] Where a claimant brings a claim to recover possession of land, he must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title and not on the weakness of the defendant’s. (See – The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609.)

- [61] The authorities have established that, where a person, against whom the claimant brings an action to recover possession of land, pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute. (See – The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 606.)
- [62] McDonald-Bishop, JA in **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, at paragraph 42, stated that, a claimant, in a case for recovery of possession, must state the basis of his claim, which is his title to the property. Once that has been done, the statute of limitation will come into play and may operate to bar a stale claim, regardless of whether or not the statute is expressly pleaded by a defendant in possession. The statute automatically arises for consideration once the title to land is being relied on to ground the claim and its operation is not dependent on whether the defendant chooses to avail himself of it.
- [63] The authorities have established that a co-tenant in possession of jointly owned property, can, in Law, dispossess another co-tenant who has not been in possession for the relevant limitation period of twelve (12) years. Mrs. Davis contends that she never abandoned her interest in the subject property and that she has not been dispossessed by the deceased. In this regard, she commends for the consideration of the Court, certain acts of ownership that she avers that she has exercised over the subject property since her departure from the Island in 1994. These acts have already been delineated at paragraph 18.
- [64] In an effort to substantiate her claim, Mrs. Davis has produced a number of receipts in evidence for the Court's consideration. These receipts corroborate her testimony that she continued to contribute to the subject property, subsequent to her departure from the Island in 1994, by continuing to make her mortgage payments, as well as those of the deceased which had fallen into arrears, until both mortgage loans had been paid in full in 1997 and 1998, respectively.

- [65] Mrs. Davis maintains that she consistently paid the property taxes and outstanding water bills in respect of the subject property and has produced the pertinent receipts in evidence to substantiate her claim. She contends further that she telephoned the deceased from abroad to inform him that his portion of the mortgage payments had fallen into arrears; that she engaged her daughter to keep her abreast of what was happening in relation to the subject property; that she contributed toward the general upkeep of the subject property and that she visited the subject property to discuss matters relating to it with the deceased.
- [66] The Court finds that the primary purpose of the subject property is its use as residential property and secondly, as a means of generating income from the operation of a shop and bar which have been constructed on it. In what better way could Mrs. Davis have demonstrated her desire to preserve her interest in the subject property but by seeking to preserve the subject property itself by ensuring that the mortgage payments were made and made in full? Prior to her departure in 1994 she seeks legal advice in her attempt to preserve her interest in the subject property and causes a caveat to be lodged against the Certificate of Title in respect of it. She makes arrangements with Mrs. Debbie Evering-Pryce to keep her abreast of all that was happening in respect of the subject property. She engages the deceased in respect of insuring the subject property. On her return to Jamaica she visits the subject property and engages the deceased in discussions pertaining to the preservation, care and maintenance of the subject property.
- [67] Miss Gray, on the other hand, asserts that it is the deceased who made the mortgage payments in full but has failed to provide the Court with any documentary evidence to support this assertion. She contends further that Mrs. Davis made no contribution towards the maintenance of the subject property and that she [Mrs. Davis] made no payments in respect of any outstanding utility bills.

- [68] The Court accepts the evidence of Mrs. Davis and finds that she has demonstrated a sufficient number of acts by herself and on her behalf that negative the right of the deceased to dispossess her. The Court also finds that Miss Gray is unable to speak from her own knowledge to what obtained in relation to the subject property prior to her going there to live in 1999.
- [69] The Court finds that the purported Last Will and Testament of the deceased, taken at its highest, would serve to demonstrate the intention of the deceased in respect of the subject property but does not change the complexion of this case, having regard to the legal principles discussed above.
- [70] The Court also finds that Miss Gray has failed to establish, in monetary terms, what, if any, contribution she has made to the subject property. Any contribution made by Miss Gray toward the preservation and improvement of the subject property could not have been from her own money, as her evidence is that she was not working and that she was spending the deceased's money to maintain the subject property.

### **CONCLUSION**

- [71] In concluding, the Court finds that Mrs. Davis has succeeded in demonstrating, on a balance of probabilities, that she never abandoned her interest in the subject property and that she has not been dispossessed by the deceased. She has proven that her title to the subject property has not been extinguished by the deceased and consequently, Miss Gray, as his successor in title, cannot assert that Mrs. Davis' title to the subject property has been extinguished by virtue of section 30 of the Act of 1881.

### **DISPOSITION**

- [72] It is hereby ordered that: -

- (1) The Claimant, Mrs. Dawn Davis, is declared to be the sole proprietor in fee simple of all that parcel of land part of Lanquedoc in the parish of St. Mary containing by survey One Rood Thirty Perches and Five-

tenths of a Perch of the shape and dimensions and butting as appears by the Plan thereof annexed and the land formerly comprised in Certificate of Title registered at Volume 132 Folio 22 and now being comprised in Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles (hereinafter referred to as “the subject property”);

- (2) The Registrar of Titles shall remove Caveat numbered 2017721 and any other Caveat lodged against Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles by the Defendant, her servants and/or agents;
- (3) The Registrar of Titles is empowered to endorse the Duplicate Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles, in the sole name of the Claimant, Dawn Davis;
- (4) The Defendant is to vacate and deliver up vacant possession of the subject property on or before 30 June 2019 to the Claimant or the Claimant’s Attorneys-at-Law;
- (5) The Defendant is to deliver up possession of the Duplicate Certificate of Title registered at Volume 1003 Folio 290 of the Register Book of Titles within thirty (30) days of the date of this Order to the Claimant or the Claimant’s Attorneys-at-Law;
- (6) In the event that the Defendant and/or the Executors of the Last Will and Testament of Roderick Davis fail and/or neglect and/or refuse to deliver up the said Duplicate Certificate of Title then the Registrar of Titles shall dispense with the former Certificate of Title and issue a new Certificate of Title in the sole name of the Claimant, Dawn Davis;
- (7) The Defendant, her servants and/or agents are restrained from, in any way whatsoever, preventing the Claimant from having access to the subject property;

- (8) The Last Will and Testament of the deceased, Roderick Davis, purporting to give, bequeath and devise the subject property to the Defendant is declared to be null and void as it relates to the disposition by the deceased of the subject property to the Defendant;
- (9) The Defendant is to provide, within One Hundred and Twenty (120) days of this Order, a detailed Statement of Income and Expenditure to the Claimant accounting for the rental income earned from the bar and the cellular tower erected on the subject property and is to remit the net income to the Claimant within One Hundred and Twenty (120) days of this Order;
- (10) Costs to the Claimant to be taxed if not sooner agreed;
- (11) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.