



[2021] JMSC Civ.134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV00458

IN THE MATTER of all that parcel of land part of REIDS PEN and part of SALT POND PEN now called WEST CHEDWIN, GREATER PORTMORE in the parish of SAINT CATHERINE being Lot numbered ONE HUNDRED_AND NINETY EIGHT_on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the 3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350

AND

IN THE MATTER OF THE ESTATE OF SYLVESTER FRANCIS, Labourer, late of 5 Avening Drive, Etobicoke Ontario, Canada, Deceased.

BETWEEN

**ICYLINE FRANCIS
(Estate Trustee of the Estate of Alfred Sylvester
Francis, Deceased)**

CLAIMANT

AND

JASMINE MARIE FRANCIS

DEFENDANT

Ms. Shantel Jarrett instructed by Zavia Mayne & Co. for the Claimant

Ms. Tedesha Cowell and Mr. Munroe Wisdom for the Defendant

Heard: June 16, 2021 and July 16, 2021

Joint Tenants – Whether the Co-Owner was dispossessed – S. 3 and 30 of the Limitation of Actions Act – Claimant must show factual possession as well as the intention to possess – The Co-Owner is deceased.

CARR, J. (AG.)

Introduction

[1] Alfred Francis (“**Alfred**”) and the Defendant Jasmine Francis (“**Jasmine**”) are registered as joint tenants on property located at West Chedwin Greater Portmore (**West Chedwin Property**). The Claimant, Icyline Francis (“**Icyline**”) is Alfred’s daughter. The parties share the same last name. For ease of reference and to avoid confusion, I will refer to them by their Christian names throughout the judgment. It is not intended to be disrespectful.

[2] Alfred died on the 11th of November 2016 leaving a will appointing Icyline as one of his estate trustees. A copy of the Certificate of Appointment issued by the Ontario Superior Court of Justice was exhibited to her Affidavit. At the time of his death he and Jasmine were divorced. Icyline seeks a declaration from the court that her father dispossessed Jasmine of her interest in the West Chedwin Property prior to his death. The property she contends forms part of his estate and is for the benefit of his named beneficiaries under his will.

The Claim

[3] By an amended Claim Form filed on February 14, 2020 she seeks the following orders:

1. A Declaration that the entire property forming part of all that parcel of land part of **REIDS PEN** and part of **SALT POND PEN** now called **WEST CHEDWIN, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY EIGHT** on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the 3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350, forms part of the Estate of **ALFRED SYLVESTER FRANCIS**, deceased.

2. A Declaration that the beneficiaries of the Estate of Alfred Sylvester Francis, namely Marcia Francis, Icyline Francis, Paula Lloyd, Evadene Francis, Kelsey Sylvester Francis, Jelonni Alvester Francis, Aretha Tina Francis, Vanessa Francis and Jeffrey Junior Francis are entitled to one hundred percent (100%) beneficial interest of all that parcel of land part of **REIDS PEN** and part of **SALT POND PEN** now called **WEST CHEDWIN, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY EIGHT** on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the 3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350.

3. A Declaration that the Defendant has no legal or equitable interest in all that parcel of land part of **REIDS PEN** and part of **SALT POND PEN** now called **WEST CHEDWIN, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY EIGHT** on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the

3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350.

4. An injunction restraining the Defendant whether by herself, her servants, agents or otherwise from disposing, transferring, dealing with all that parcel of land part of **SALT POND PEN** now called **WEST CHEDWIN, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY EIGHT** on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the 3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350.
5. An injunction restraining the Defendant by herself, her servants and/or agents from interfering with the quiet possession of the beneficiaries of all that parcel of land part of **SALT POND PEN** now called **WEST CHEDWIN, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY EIGHT** on the plan of part of Reids Pen and part of Salt Pond Pen now called West Chedwin, Greater Portmore aforesaid deposited in the office of Titles on the 3rd day of August, 1993 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Register Book of Titles registered at Volume 1271 Folio 350.
6. Costs.
7. Such further and other relief as this Honourable Court deems just.

Issues

[4] Was the defendant dispossessed of her interest in the property by the deceased prior to his death?

Submissions on behalf of the Claimant and the Defendant?

Claimant

[5] Ms. Jarrett, Counsel on behalf of the Claimant, argued that Alfred returned to Jamaica in 2004 after his retirement. He then occupied the West Chedwin Property exclusively up until his death. It was submitted that Jasmine never visited the property nor did she have any dealings with it during the period up to his death. It was argued that in those circumstances Alfred had acquired the full possessory title to the land and as such Jasmine's interest in the land had been extinguished, based on the operation of the Limitation of Actions Act. Counsel relied on the seminal case of **Winnifred Fullwood v. Paulette Curchar**¹ which was cited in the case of **Lois Hawkins v. Linette Hawkins McIniss**².

Defendant

[6] Mr. Wisdom and Ms. Cowell, on behalf of the Defendant submitted that Jasmine's interest in the property could only have been extinguished if the Claimant could prove that Alfred not only had factual possession but that he also had the intention to possess the property as his own. Counsel agreed that Alfred was a frequent visitor to the property subsequent to his retirement and as such would have been in physical possession. Their focus was on the issue of intention. It was argued that the court could not infer that he had the intention to possess based on the sparsity of the evidence which was presented.

¹ [2015] JMCA Civ. 37

² [2016] JMCA Civ. 14

Analysis and Discussion

[7] Section 68 of the Registration of Titles Act (“**RTA**”) provides that a certificate of title is conclusive evidence of title. The courts usually will not look behind a registered title where there is a dispute between parties as to the ownership of property. The fact that Jasmine and Alfred are the registered proprietors of the West Chedwin Property therefore cannot be challenged. The section however makes a title subject to the operation of any Statute of Limitations. **Section 3 of the Limitation of Actions Act (“LOAA”)** provides the time frame within which a person can bring a claim to reenter upon lands, recover possession, or for rent :

“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.”

[8] In the event that an owner fails to act within twelve years to recover possession of their property their title to the land shall be extinguished, this is set out in **Section 30** 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 responsible might have been made or brought within such period shall be extinguished”.

[9] The effect of the operation of the statute is that, if a person occupies lands undisturbed for the requisite term of twelve years they may be entitled to possession, in spite of the lands being registered to another person. This principle is commonly referred to as adverse possession. The law is well settled, and in the Privy Council decision of

Wills v. Wills³, it was held that the two elements necessary to establish possession in cases such as this, are, (1) a sufficient degree of custody and control (factual possession) and, (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess). It is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The only intention which has to be demonstrated is an intention to occupy and use the land as one's own.

[10] That the sections are applicable to co-owners of property is not in doubt. This principle was affirmed in the Court of Appeal decision of **Fullwood v. Curchar**⁴. To put it succinctly the fact that persons own property together as joint tenants does not mean that their title cannot be challenged upon the death of one of the owners. Although they own the property as one, for the purposes of the RTA and Sections 3 and 30 of the LOAA their share is distinct.

[11] As the question of possession is solely a factual one, the analysis will be focused on the evidence of the parties in this case. Icyline relied on two affidavits in support of her application whereas Jasmine, filed a single affidavit on her own behalf, and an Affidavit from her son Jeffrey Francis ("**Jeffrey**"). All the affidavits filed were admitted and stood as the evidence in chief of the witnesses. Both Icyline and Jasmine were subjected to cross examination. No question was posed to Jeffrey.

[12] The gravamen of the submissions of Counsel on behalf of Icyline is that, Alfred was in exclusive possession of the West Chedwin Property for in excess of twelve years, and he had the intention to hold such property as his own during that period. Jasmine did not visit the property, neither did she contribute to any improvements made there. She failed to exercise her rights over the property during the twelve-year period and as a result her legal and equitable interest has been extinguished.

³ [2003] UKPC 84

⁴ *Supra.* 1

[13] It is a legitimate argument, but for a single fact, Alfred is deceased. How then does Icyline satisfy this court as to these elements? Reliance was placed on her father's actions over the years to show that he had exclusive possession **and** the requisite intention. She gave evidence as to her father's conversations with her, however very little weight can be attached to these declarations as they are self-serving. Additionally, as Alfred is not alive to confirm them, they cannot be challenged by anyone. She did however give evidence as to the fact of possession and the acts which she suggests support his intention to possess.

Factual Possession

[14] Icyline averred that her father married Jasmine in 1992, in Canada. In 1993, they were registered as joint tenants by way of instrument of transfer on the title for the West Chedwin Property. The couple divorced in 1999 and thereafter her father returned to Jamaica and resided at the property. Alfred exercised sole enjoyment and ownership. He made significant improvements to the property at his own expense, completed the mortgage payments, and paid the taxes. She contends that he rented the property and that the income was used for his sole benefit. All of this he did up until his death in 2016.

[15] Jasmine contradicted the evidence as to the date of Alfred's return. She claimed that he returned to Jamaica in 2004. The date of return is significant, it is this date which the parties are alleging would start time running in accordance with the LOAA. It is important to note that following Jasmine's affidavit, Icyline filed an affidavit in response confirming that it was in fact 2004 that Alfred returned to Jamaica. She went on to say that she and her siblings would frequently visit him at the West Chedwin Property up until his death in 2016.

[16] There is therefore on Icyline's own evidence a discrepancy as to the date of Alfred's return. How does the court treat with this conflict? The accepted date as per the parties is now 2004. The difference in the date, on the evidence of Icyline, raises two questions for the court to consider. Is it that she was not speaking the truth in her first affidavit or was she not as aware of her father's dealings as she originally posited? I find

and accept that it is in fact the latter. The fact that she was quick to accept the year 2004 in her second affidavit suggests that she was not deliberate in her actions of mentioning 1999. It instead supports a finding that Icyline was not as close to her father as she believed. This finding is further supported by another discrepancy. At first the impression was given that Alfred resided at the property upon his return in 1999. In cross-examination Icyline admitted that the property was rented during the nineties and that subsequent to the divorce that was still the case. It is clear that she was not as au fait with her father's affairs as she would have first set out in her affidavit.

[17] The evidence as to possession was also contradicted by Jasmine on another aspect. She indicated that Alfred never resided at the West Chewin Property when he returned to Jamaica. In support of this she exhibited a letter which indicated that he used an address in Clarendon. The address which is noted at the foot of the letter, which was copied to Alfred, is Mount Airy District Whitney P.A. Clarendon. She was supported by the affidavit of the couple's son Jeffrey who averred that his father resided in Clarendon with his then common law spouse while he was in Jamaica. Although he was present for the trial he was never cross examined and as such his evidence remains unchallenged.

[18] It cannot be said based on the evidence presented that Alfred exercised control over the property to the exclusion of Jasmine. The uncontroverted evidence is that the property was used primarily for investment. It was rented from in the 1990's, and I find as a fact that the income was used to offset the mortgage. Further, I accept the evidence of Jasmine and Jeffrey that Alfred's true residence while he was in Jamaica was in the parish of Clarendon.

[19] It would be remiss of me to leave this aspect of the discussion without addressing a critical piece of the evidence. The letter previously referred to was sent along with the title to Jasmine by Myers Fletcher and Gordon Attorneys-at-Law. It belies the suggestion that Alfred exercised control over the property to the exclusion of Jasmine. It can be construed from that letter that subsequent to the discharge of the mortgage, Alfred instructed his attorneys to send the title to Jasmine so that her name could be endorsed

thereon as a joint tenant. Given these facts I cannot find that factual possession has been established on the evidence.

The Intention to Possess

[20] At paragraph 11 of her first affidavit Icyline alleges that her father, subsequent to the divorce, made several attempts to have Jasmine's name removed from the title of the property. There was no evidence to support this. She also alleged that her father paid the mortgage on his own, however the document which she attached in support of that proposition bears the names of both the registered owners. There is therefore no evidence before this court to substantiate her contention that the mortgage payments were solely completed by her father. Jasmine indicated that the income which was generated from the rental of the premises was used to offset the mortgage payments. Although she admitted that she did not withdraw any money from the account which held these funds, she did not agree that she did not have access to it. She accepted that her ex-husband had the primary responsibility for the West Chedwin Property, however she said that this was their agreement.

[21] Mr. Francis left a will. In that will he did not mention the West Chedwin Property. Icyline averred that it is a part of his residual estate. The will does not specifically name any property, instead Alfred made a general gift of all his real and personal property to his Trustees. It is well established that where parties own property as joint tenants the law provides that upon the death of one of the owners the property devolves to the other. All that is required is that the death is noted on the title. Alfred, therefore, could not have made a gift of the West Chedwin Property in his will. If it was indeed his intention to solely possess the West Chedwin Property it is the view of this court that he would have made some attempt to sever the joint tenancy in his lifetime.

[22] Jasmine in her evidence spoke to her relationship with Alfred after the divorce. She denied that there was any animosity between them. Further and most telling was the letter exhibited to her affidavit. The letter was dated April 30, 2014 and I have extracted the most relevant section which outlined the following:

“Re: Lot 3W – 198 Greater Portmore, St. Catherine – Alfred Sylvester Francis & Jasmine Marie Francis

We refer to the captioned property and have been advised by the Housing Agency of Ja. Ltd. that the mortgage debt over the said property was settled on July 27, 2012, therefore, only registration of the Transfer of Title in the above names is required.

Please return the signed documents to us for processing, as soon as possible – and, by copy of this letter to Mr. Alfred Francis we are confirming that he will collect the signed documents from you on his return visit to Canada by the end of May, and deliver same to our office on his return to Jamaica by mid-June.”

[23] This document is in stark contrast to the claim of Icyline. It supports Jasmine’s case in two aspects. Firstly, there was no attempt to have Jasmine’s name removed from the title since her name was not endorsed thereon until the 15th of November 2017. The letter instead alludes to the fact that Alfred was an active participant in having her name endorsed on the title in as late as April 2014. Secondly, it also leaves the court in doubt as to Icyline’s contention that the couple was estranged. The end of the letter speaks to the parties meeting to collect the documents prior to his return to Jamaica. There is nothing contained in this letter that supports Icyline’s claim that Alfred had the intention to possess the land for his own use and benefit.

Conclusion

[24] It is plain upon an examination of the evidence, that Alfred did not have exclusive custody or control of the West Chedwin Property, neither can it be established that he had an intention to possess that property to the exclusion of Jasmine. The letter presented by Jasmine remains unchallenged and is sufficient to satisfy this court that Alfred’s true intention was to ensure that Jasmine’s interest in the property was acknowledged and protected. In the circumstances therefore the claim must fail.

Order

1. Judgment for the Defendant on the claim.
2. Costs to the Defendant to be agreed or taxed.