



[2024] JMSC Civ 196

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016HCV03826**

<b>BETWEEN</b>	<b>NEVA MAY GORDON</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>DAVID SAMUEL MERRICK</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>VALERIE MAY GORDON</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>AND</b>	<b>BERNICE GORDON</b>	<b>4<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>JENNIFER BUELA BANGURA</b>	<b>5<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>ANTHONY COX</b>	<b>DEFENDANT</b>
<b>IN OPEN COURT</b>		

Mr. Leonard Green and Mr. Nyron Wright instructed by Chen, Green & Company for and on behalf of the Claimants

Mrs. Tamara Powell-Francis of Counsel for and on behalf of the Defendant

**Dates Heard: July 24, September 26, 27 & 28, 2023 and January 16, 2024**

**Civil Practice & Procedure – Adverse Possession – Whether the Defendant adversely possessed the property – Whether the Claimant is entitled to the entire legal and beneficial interest in the property – Equitable Remedy – Does the Defendant have a beneficial interest in the property – Constructive Trust.**

**PALMER HAMILTON, J**

## BACKGROUND

[1] At the outset, it is prudent for me to make note of the fact that Utilda Reid and Marjorie Cox, who were the Claimant and Defendant respectively, are now both deceased. By way of Court Order, Neva May Gordon, David Samuel Merrick, Valerie May Gordon, Bernice Gordon and Jennifer Buela Bangura were substituted as Claimants. Anthony Cox was also substituted as the Defendant. For ease of reference the parties will be referred to by their names. However, for the purposes of this judgment I will also use the words Claimant and Defendant which cover the deceased parties and those who are standing in their shoes.

## THE CLAIMANTS' CASE

[2] By way of a Claim Form, the Claimant claimed against the Defendant for the following Orders:

- (1) The Defendant has no legal or equitable interest in the property registered at Volume 1493 Folio 10 of the Register Book of Titles and which is registered solely in the name of the Claimant.*
- (2) The Registrar of Titles shall discharge and remove Caveat number 1971798 which was lodged by the Defendant against the Certificate of Title registered at Volume 1493 Folio 10 of the Register Book of Titles.*
- (3) The Defendant shall vacate and give up possession of the property registered at Volume 1493 Folio 10 of the Register Book of Titles within 30 days of the making of Order (2) above.*
- (4) Such further and other relief as this Honourable Court may deem just.*
- (5) Costs.*

[3] The Claim Form was supported by a Particulars of Claim. It is not in dispute that the parties are siblings and that they have a brother named Gerald Reid who died in 1995. The Claimant's case concerns property known as all that parcel of land part of Jeffery Town in the parish of St. Mary registered at Volume 1493 Folio 10 of the Register Book of Titles (hereinafter referred to as 'the property' or 'the subject property'). Utilda Reid was the sole owner registered on the title and it is her position that a house was built on the said property by herself and her

deceased sister Evelyn Reid with the permission of Gerald Reid. It was further alleged that after the house was completed, Marjorie Cox sought and obtained permission of Utilda Reid to live in the said house with her family.

- [4] This was a temporary arrangement as Utilda Reid also asserted that she had locked 2 rooms in the said house for her exclusive use and she stored her furniture, clothes and other personal items. Utilda Reid further alleged that Marjorie Cox refused to leave the property despite Utilda Reid's requests for Marjorie Cox to do so. Utilda Reid further alleged that in 1998 she sent her youngest son, David Merrick to live in the house and to oversee the premises. Utilda Reid also alleged that she had sent money to Marjorie Cox each year, by way of cheque or other means to pay the land taxes and for the house to be repaired.
- [5] Utilda Reid caused a Notice to Quit to be served on Marjorie Cox and Marjorie Cox thereafter lodged Caveat number 1971798 alleging, among other things, that the property had been acquired by adverse possession. It was further alleged that since Marjorie Cox began to occupy the premises as a licensee Utilda Reid herself has stayed at the said property on her annual visits to Jamaica and Marjorie Cox had never done, or attempted to do, any act to exclude Utilda Reid from the property. It was Utilda Reid's position that the said Notice to Quit terminated the licence of Marjorie Cox to occupy the property and she had wrongfully remained in possession of same.
- [6] I must also note here that Gerald Reid died testate and Utilda Reid obtained a Grant of Probate in his estate. The last Will and Testament of Gerald Reid appointed Utilda Reid as the sole executrix and the sole beneficiary of the subject property.
- [7] David Merrick and Neva May Gordon were the only witnesses on the Claimants' case.

## THE DEFENDANT'S CASE

- [8] By way of an Amended Defence and Counterclaim, Marjorie Cox admitted that the property was registered in Gerald Reid's name, however she further stated that he had never lived on the said property even up to the time of his death. Marjorie Cox strenuously denied that Gerald Reid died testate and thought it unimaginable and impossible that he would have made such a will and she listed several reasons. Marjorie Cox further stated that the purported last Will and Testament of Gerald Reid was forged. However, I will not embark on that road in this judgment as Counsel should be aware that an allegation of fraud ought not to be taken lightly and it must be specifically pleaded and strictly proven by those who assert its existence. (see **Linel Bent (Administrator of the estate of Ellen Bent, deceased) and Linel Bent (Administrator ad litem of the estate of Elga Isaacs, deceased) v Eleanor Evans (unreported) Claim No. C.L. 1993/B 115 delivered on February 27, 2009.**)
- [9] Marjorie Cox further alleged that when her brother, Gerald Reid, migrated he handed the duplicate Certificate of Title for the subject property to her and told her that it was hers. Marjorie Cox further alleged that Utilda Reid had always known that the duplicate Certificate of Title was given to her by Gerald Reid and remained in her possession. Marjorie Cox maintained throughout her Amended Defence that her sister, Evelyn Reid was the one who constructed the house on the subject property in which Marjorie Cox and her family resided. Marjorie Cox further alleged that Utilda Reid did not contribute to the construction of the said house and no permission was sought nor obtained from Gerald Reid for the construction of the said house.
- [10] Marjorie Cox denied that she sought and obtained permission from Utilda Reid to live at the subject property. It was further alleged that since 1980, when Marjorie Cox went to live at the subject property she remained in open, continuous, peaceful, undisturbed and undisputed possession in excess of 12 years. Marjorie Cox stated that she gave permission to David Merrick to reside at the subject

property as he had nowhere else to go. It was also stated that Marjorie Cox had been solely responsible for the payment of property taxes for the subject property.

[11] Marjorie Cox further alleged that Utilda Reid at all material times knew of these acts of improvement and has never objected nor prevented her from doing same. Marjorie Cox asserted that whatever dealings she had with the said property by way of improvements or otherwise were done without reference or discussions with Gerald Reid, Marjorie Cox or anyone else.

[12] On the Counterclaim the following Orders are being sought:

- (1) A Declaration that the Defendant is the true owner of the lands registered at Volume 1493 Folio 10 of the Register Book of Titles containing 857.4286 square metres and situated at Jeffery Town in the parish of Saint Mary having remained in sole, open, continuous, peaceful, undisturbed and undisputed possession of the said lands in excess of twelve years.*
- (2) An Order that the duplicate Certificate of Title registered at Volume 1493 Folio 10 of the Register Book of Titles in the sole name of the Claimant be cancelled by the Registrar of Titles and a new title issued in the name of the Defendant.*
- (3) Further and/or in the alternative a Declaration that the Defendant has an equitable interest in property situated at Jeffery Town P.A. in the parish of St. Mary registered at Volume 1493 Folio 10 of the Register Book of Titles by virtue of proprietary estoppel*
- (4) An order that the Defendant be allowed to remain in the same property.*
- (5) Any further or other relief this Honourable Court deems just.*
- (6) Costs and Attorney's Costs.*

[13] A Reply to Amended Defence and Counterclaim was done by Utilda Reid and she denied what Marjorie Cox alleged in her Amended Defence and Counterclaim. Utilda Reid maintained that herself and her sister were the ones who sent monies to build the subject property and even sent monies to have the property tax paid.

## **SUBMISSIONS**

[14] I wish to thank all Counsel involved in this matter for their written submissions which provided invaluable assistance to the Court in deciding the issues raised in this

claim. I also wish to make it known that I carefully considered all the submissions and authorities before me whether they have been referred to or not.

## **ISSUES**

[15] In light of the Amended Counterclaim, I am of the view that the first issue to be considered is whether Marjorie Cox can successfully maintain a claim for adverse possession. If the claim for adverse possession is successful, then there would be no need to consider whether or not Marjorie Cox acquired an equitable interest in the subject property. However, if Marjorie Cox is not successful in the claim for adverse possession, then I must determine whether Marjorie Cox had acquired an equitable interest in the subject property.

## **LAW**

### **INDEFEASIBILITY OF TITLE**

[16] Since there is a Certificate of Title for the subject property, the starting point in my view is sections 68 and 70 of the Registration of Titles Act (hereinafter referred to as the RTA). Learned Counsel for the Claimants and the Defendant both saw it fit as well and that was the starting point in their submissions. It is clear from the evidence that Utila Reid was registered on title and that she had effected a transfer to the Claimants, who I should note are her children.

[17] Sections 68 and 70 state that:

*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 the 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 seized or possessed of such estate or interest or has such power.*

*70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the Certificate of Title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Registrar Book constituted by his Certificate of Title, but absolutely free from all other incumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:*

*Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.*

[18] Section 68 of the RTA clearly indicates that a legal title obtained by a registered proprietor is indefeasible. The concept of indefeasibility of title simply indicates that the duly registered title is conclusive in determining which parties have interest in the property. The legal interest as dictated by the title is often reflective of the beneficial interest in the property, unless it can otherwise be proven.

[19] In **Gardener and Another v Lewis (1998) 53 WIR 236**, a Privy Council decision on an appeal from the Jamaican Court of Appeal, Lord Browne-Wilkinson made

reference to sections 68, 70 and 71 of the RTA, and the consequences of registration as laid in these sections. His Lordship stated:

*From these provisions it is clear that, as to the legal estate, the certificate of registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that land has been included in title because of a "wrong description of parcels or boundaries"; see section 70.*

### **ADVERSE POSSESSION**

[20] Even though the law provides for indefeasibility of title, it has been established that it does not affect a legitimate challenge in equity to the legal owner. Therefore, where a person pleads the Statute of Limitations, then one must prove that he/she has title that is not extinguished by the statute.

[21] I wish to adopt the principles of law regarding adverse possession as stated by Henry-McKenzie J in **Manfas Hay and Maisene Myrie-Hay v Clover Thompson and Jonathan Pendergast** [2022] JMSC Civ 159. She stated that:

*[54] Under the concept of adverse possession, the basis of title to land is possession. The effect of this is that a person who is in possession as a mere trespasser or squatter can obtain a good title if the true owner fails to assert his superior title within the requisite limitation period. In order to prove this title to land by adverse possession, it must be shown that there is both factual possession and the requisite intention to possess. In **Powell v McFarlane** (1979) 38 P & CR 452, 470- 472 Slade J stated the principles of possession as follows:*

- (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner*
- (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual*



possession and the requisite intention to possess (“*animus possidendi*”).

- (3) *Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. .... Everything must depend on the particular circumstances, but broadly ... what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.*
- (4) *The animus possidendi,... was defined by Lindley M.R., in **Littledale v Liverpool College**, as “the intention of excluding the owner as well as other people.” What is really meant, ... is that the animus possidendi involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.*

[55] *This definition of possession was refined by Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd**. He said legal possession has two elements. The first element is factual possession, meaning, “a sufficient degree of physical custody and control.” The second element is the intention to possess. That is, “an intention to exercise such custody and control on one’s own behalf and for one’s own benefit.”*

[56] *Factual possession in this context must be exclusive, open, peaceful and adverse. Openness means that the possession of the claimant must be notorious and unconcealed so as to make the paper owner aware of the need to challenge the adverse possessor before expiration of the limitation period. See: **Lord Advocate v Lord Advocate** (1880) 5 App Cas 273. Possession being adverse means it must not be concurrent with that of the paper owner, that is to say, possession should not be with the consent of the paper owner. This was in **Ramnarace v Lutchman**.*

- [57] *The acts of possession must also be of such a nature as to amount to an ouster of the original owner of land and be inconsistent with his enjoyment of the soil for the purposes which he intended to use it. See: **West Bank Estate Ltd v Arthur** [1966] 3 WLR 150*
- [58] *It must not be equivocal or trivial but must be positive and affirmative evidence of the requisite intention to occupy and use the land as one's own. It is not necessary to show that there was deliberate intention to exclude the owner of the property. If the acts are equivocal and open to more than one interpretation the courts will find it more difficult to infer the intention to possess and consequently as not having dispossessed the owner. See: **JA Pye (Oxford) Ltd; Farrington v Bush** (1974) 12 JLR 1492; **Clevebert Hayles v Gloria May McFarlane** [2017] JMSC Civ 45*
- [59] *In the assessment of the sufficiency of the possession, important factors to be considered are the nature of the factual possession, the type of property in question and the common use of the property. See: **Clevebert Hayles***
- [60] *The dispossessor/adverse possessor is also required to prove or satisfy the court that there has been possession for the requisite limitation period. The **Limitations of Actions Act** outlines the relevant period and the consequence of its expiration in sections 3 and 30. Those sections read as follows:*
3. No person shall make an entry, or bring an action ...to recover any land... but within twelve years next after the time at which the right to make such entry, or to bring such action ..., shall have first accrued...
- ....
30. At the determination of the period limited by this Part to any person for making an entry, or bringing an action ..., the right and title of such person to the land ... for the recovery whereof such entry, action ...might have been made or brought within such period, shall be extinguished.
- [61] *Accordingly, it is against this background that Gilbert Kodilinye said after the limitation period has expired the paper owner who has slept on his rights will be barred from asserting them against the adverse possessor and his right will be extinguished. The trespasser/squatter will then have the best claim to the land and be able to acquire a good title which can no longer be disturbed.*

## **EQUITABLE TRUST**

- [22] I also wish to rely on the principles surrounding constructive trust as outlined by Edwards J in **Dean Hinds v Janet Wilmot**

(unreported) Claim No. 2009HCV00519 delivered on July 15, 2011. Edwards J stated that:

- [10] *Where a person in whom the legal title to land is not vested claims an interest in that said land, he must prove that the one in whom the legal title is vested, holds it as trustee on trust for his beneficial interest. This is the English Law of trust and the principles are applicable to this jurisdiction. Such a trust may be a constructive or a resulting trust.*
- [11] .....
- [12] *In the case of a constructive trust, this arises where at any time two or more persons have a common intention, expressed or implied by words or conduct, that one or more is to have a specific share in the property or an uncertain share to be ascertained in due course according to their contributions; so inducing that person(s) to act to their detriment in the reasonable belief that they are thereby acquiring the agreed interest: See Grant v Edwards (1986) 2 ALL ER 427. To establish this intention there must be evidence pointing to its existence.*
- [13] *The detriment or prejudice to one party makes it unconscionable for the other to deny him an interest in the property under an expressed or inferred declaration of trust. He will then get what is agreed: See Re Densham (1975) 3 ALL ER 726, where one party contributed only one ninth of the purchase price but there was an oral agreement that she was to have an equal share of the property. The court held that this agreement was valid. He may also rely on a constructive trust where he paid for capital improvements or carried out building works himself. However, equity will not assist a volunteer.*
- [14] *These principles, which were declared as far back as the majority judgment in Pettitt v Pettitt (1970) A.C. 777, have been consistently applied in this jurisdiction. See Trough v Trough (1981) JLR 409; Azan v Azan (1988) 25 JLR 502 and Chin v Chin SCCA No. 261/2001, unreported.*
- [15] *The law in this area was recently revisited by the H.L. in Stack v Dowden (2007) UK HL 17, where the House comprehensively examined the principles applicable to the equitable trust in domestic relationship and the way the law has developed since Pettitt v Pettitt, Gissing v Gissing, Lloyds Bank plc v Rosset (1991) AC 107 and Oxley v Hiscock (2004) EWCA Civ 546. These principles were adapted and applied by my brother The Honourable Mr. Justice Roy Anderson in his judgment in Plummer v Plummer, HCV 00864 of 2006, delivered June 15, 2009 (unreported).*

- [16] *In Stack v Dowden* the Law Lords recognized and affirmed that the starting point of the equity was that sole legal ownership equaled sole beneficial ownership. The principle is that where there is sole legal ownership it is incumbent on the party claiming an equitable interest to show that he had any interest at all and if so what that interest amounted to.
- [17] Lord Hope at paragraph 8 said “where title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor”. The party claiming otherwise must, therefore, show that there is: a. A beneficial interest; and b. The nature of that interest.
- [18] To ascertain whether there is a beneficial interest it is necessary to ascertain whether there was an expressed agreement as to the beneficial interest, the contributions each party made to the purchase price if any, or, whether a common intention could be inferred from any words or conduct of the parties and from any substantial contributions to repairs, renovations and or improvements to the property, made by the claimant. This is to be done against the background of the relationship of the parties at the time and their whole course of dealing in relation to the property.
- [19] Baroness Hale put it this way:
- “The search is to ascertain the parties shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.”
- [20] Her Ladyship was quick to point out that the search was only for what the parties must have intended and that in pursuit of that, the court must be mindful not to abandon the search in favor of a result it considered fairer.
- [21] Referring to the speech of Chadwick LJ in *Oxley v Hiscock* (2004) EWCA Civ 546, (2005) Fam 211, Lord Walker stated at paragraph 36:
- “That summary was directed at cases where there is a single legal owner. In relation to such cases the summary, with its wide reference to “the whole course of dealing between them in relation to the property”, is in my opinion a correct statement of the law, subject to the qualifications in paragraphs 61ff of Lady Hale’s opinion. I would only add that Chadwick LJ did not refer to contributions in kind in the form of manual labor on improvements, possibly because that was not an issue in the case. For reasons already mentioned I would include contributions in kind by way of manual labor, provided that they are significant.

[22] *Lord Neuberger of Abbotsbury held the view that beneficial interest in the home although generally determined at acquisition, may possibly be altered post acquisition. He generally recognized however, that compelling evidence was required, before it could be inferred, that subsequent to the acquisition of the property, the parties intended to change the beneficial interest. Such compelling evidence could be discussions and statement of actions of the parties subsequent to the acquisition from which such an intention might be inferred. Significant improvements to the house may justify an adjustment to the beneficial interest, such improvements by necessity having to be substantial in order to qualify. Decorations or repairs would not qualify unless significant.*

[23] *Lord Neuberger observed at paragraph 141 that; “consistently, with what has already been discussed, I am unconvinced that the original ownership of the beneficial interest could normally be altered merely by the way in which the parties conduct their personal and day to day financial affairs. I do not see how the fact that they have lived together for a long time, have been in a loving relationship, have children, operate a joint bank account and share the outgoings of the household, including in respect of use and occupation of the home, can of themselves, indicate an intention to equalize their original unequal shares.”*

[24] *At paragraph 143 he went on further to say: “even payments on decorations, repairs, utilities and council tax, although related to the home, are concerned with its use and enjoyment as opposed to its ownership as a capital asset.”*

[25] *The principles can therefore be summarized as follows:*

- I. Evidence of a common intention can either be expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.*
- II. Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See Nourse, L.J.  
in Turton v Turton (1987) 2 ALL ER 641 at p.684.*
- III. In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property may be evidence from*

*which the court could infer the parties’ intention:  
Grant v Edwards (1986) 3 WLR 120, per Lord*

*Brown-Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and/or show that the claimant has acted to his detriment on reliance on the common intention.*

IV. *The claimant must have acted to his detriment in direct reliance on the common intention.*

## **ANALYSIS**

[23] Learned Counsel for the Claimants submitted that Marjorie Cox was not and has never been in factual or physical possession of the property as their occupation of the property was not exclusive, peaceful, nor was it adverse. Therefore, the elements required to ground a claim for adverse possession have not been satisfied. Learned Counsel for the Claimants submitted that the period within which Marjorie Cox is alleging to have had physical possession of the property, no attempts were made by Marjorie Cox to exclude Utilda Reid from the property as such Utilda Reid's enjoyment and use of the property pursuant to her legal right, ran concurrently with Marjorie Cox's period of occupancy. It was contended that Utilda Reid stored personal items in locked rooms of the house situated on the property, visited the property herself on her visits to Jamaica, sent persons to oversee the property and sent money for the payment of property taxes and property maintenance. It was further contended by Learned Counsel for the Claimants that considering that the Defendant was not paying rent, there was no exclusive possession and that permission was granted by Utilda Reid for Marjorie Cox to occupy the property. Marjorie Cox's occupation amounts to her being a mere licensee of Utilda Reid. This therefore makes Marjorie Cox incapable of having possession that is adverse to that of Utilda Reid being the paper owner. Learned Counsel for the Claimants relied on the cases of **Clevebert Hayles v Gloria May McFarlane** [2017] JMSC Civ 45 para 25 and **John Sarju v Michael Sarju and Anor** [2022] JMSC Civ 126.

[24] Learned Counsel for the Claimants concluded by submitting that the evidence adduced by the Defendant is incapable of establishing any other conclusion other

than that Marjorie Cox occupied the property as a licensee of Utilda Reid and the serving of the Notice to Quit terminated the said license and she was therefore required by law to vacate the property.

- [25] Learned Counsel for the Defendant submitted that Utilda Reid nor her children can escape the effect of the operation of the Statute of Limitation as any right or title acquired by Marjorie Cox against Gerald Reid would be binding upon them. Learned Counsel for the Defendant relied on the case of **Ramnaran v Lutchman** [2001] 1 W LR 1651, 1654 and submitted that time begins to run against the owner entitled in possession from the time another takes adverse possession. It was further submitted that as against the current owners, time would have started running any time after first registration of title when Marjorie Cox began to take action in relation to the subject property. The actions, Learned Counsel contended, demonstrated Marjorie Cox's intention to possess and utilize the subject property and they started in 1980 when construction of the dwelling house started on the property.
- [26] Learned Counsel for the Defendant contended that Gerald Reid never lived at the property and there were no dealings whatsoever by him with this property and that it can be concluded that from his actions, he had discontinued possession of the property. In fact, it was further contended that, the act of delivering the duplicate Certificate of Title to Marjorie Cox is cogent evidence of an intention to completely abandon the property at the time when he migrated. Learned Counsel for the Defendant relied on the case of **Tanya Ewers v Melrose Barton – Thelwell** [2017] JMCA Civ 26 and submitted that the general principle is that it is the intention of the adverse possessor and not that of the dispossessed owner that is relevant for the purposes of determining the sufficiency of possession for extinguishing of the title of a holder of the paper title. Therefore, one must look at the various acts undertaken by Marjorie Cox which speaks to legal possession by her for a period of 12 years or more.

**[27]** I agree with Learned Counsel for the Defendant that it is not the intention of the dispossessed owner that is relevant but it is the intention of the adverse possessor. However, case law has made it clear that the possession must not be equivocal or trivial but there must be positive and affirmative evidence of the requisite intention to occupy and use the land as one's own. Having examined the evidence before me and taking into consideration that all the persons who are better able to speak to what occurred are now all deceased, I am of the view that it is more probable than not that Marjorie Cox got permission to occupy the subject property. In the Amended Defence and Counterclaim, Marjorie Cox was clear when she accepted that Utilda Reid had a room at the property with her personal items in it. Marjorie Cox made reference to her sister, Evelyn Reid, being the one who sent monies for the construction of the house and being invited by Evelyn Reid to move into the house on the property.

**[28]** Licence need not be by the express acts of the paper owner as it can be implied from the circumstances of the case. I agree with Learned Counsel for the Defendant that the paper title owner was not the one who gave the permission for Marjorie Cox to live on her land. However, I do not find favour with the submissions made regarding the cogency of the evidence of the giving of the title to Marjorie Cox by her brother. On the fact of it, I will accept that the title was in the care of Marjorie Cox as there was a letter exhibited from a credit union which stated that a loan was taken out about 13 years after Gerald Reid had migrated and he had signed the mortgage schedule giving authorisation for the property to be used as security. However, I must note here that the documents exhibited show that the loan was applied for and granted after the death of Gerald Reid. While that is not one of the issues for determination, I find it strange that Marjorie Cox and her son were able to achieve this after the death of Gerald Reid. The act of giving the title to the property Marjorie is equivocal as it can be open to more than one interpretation. It could be implied that he was giving her the title for her to benefit beneficially, or that he was inviting her to stay at the property or even just for safe keeping. I find it difficult to infer that Marjorie Cox intended to possess the property



and as a result this does not support the claim that she dispossessed the owner. It is impossible to rely on this bit of evidence as Gerald Reid is not here to say what he intended by giving Marjorie Cox the title.

- [29]** In the Amended Defence, Marjorie Cox did not deny that Utilda Reid had left personal items at the subject property. Even if Utilda Reid, Gerald Reid or Evelyn Reid did not visit the property that alone is not enough the Defendant's claim for adverse possession. There is no corroborating evidence to support what the Defendant is claiming in her Amended Counterclaim. It is very unfortunate that the original Claimant and Defendant both passed away as this has left the Court in an unfavourable position. I must be mindful that a lot of the evidence before me is coming from the children of the deceased and as Learned Counsel for the Defendant so rightly submitted, even though she was making reference only to the Claimants' witness, I agree that the knowledge of the parties is limited. What is clear from the parties' evidence is that Marjorie Cox is the one who lived at the premises once it was completed and the other siblings had resided overseas.
- [30]** The issue surrounding the utilities being in the name of Marjorie Cox, is also in my view, not enough to support a claim for adverse possession. Whether Neva May Gordon could speak to there being a water bill for the property or not is of no moment. This, without more, is not sufficient to prove positive and affirmative evidence of the requisite intention to occupy and use the land as one's own.
- [31]** There is not enough evidence to support Utilda Reid's position that she sent her son, David Merrick, to oversee the subject property. As the evidence is that he did not return to Jamaica voluntarily and in cross-examination he stated that he always wanted to go back to America. I find it more probable than not that he sought permission to stay at the house on the subject property as based on his further evidence that he did in fact return to the United States of America on more than one occasions it is clear that he had no plans to remain in Jamaica. However, this is also not sufficient to support the Defendant's claim for adverse possession as

there must be more than simply giving permission for him to stay at the property when he was in Jamaica.

- [32]** The paying of the land taxes by Marjorie Cox, does help to support the claim for adverse possession. However, this by itself cannot be enough, especially in light of my earlier findings. There is nothing in this matter which points to an ouster of the original owner, that being Gerald Reid, and there is nothing which is inconsistent with his enjoyment of the soil for the purposes which he intended to use it. Especially if, without relying on speculation, he intended for his family to benefit while still retaining ownership. I remind myself that is not necessary to show that there was deliberate intention to exclude the owner of the property. However, it cannot be ignored that there is nothing which shows that the paper title owner was ousted from the property.
- [33]** Undoubtedly, Utilda Reid and Marjorie Cox would have been the best persons to provide evidence of the circumstances surrounding how Marjorie Cox came to be living at the property. As the Court, I can only place reliance on what is before me and given the circumstances of the case, I am of the view, that there is simply just not enough evidence to support a claim for adverse possession. In my judgment therefore, there was not enough evidence before me to reasonably make a finding that the Defendant adversely possessed the subject property. Therefore, the Defendant's Amended Counterclaim must be dismissed.
- [34]** The dismissal of the Amended Counterclaim is not the end of the matter. I must now consider whether the Defendant has a beneficial interest in the property, as the Defendant may have a personal claim in equity against the Claimant. However, it must be established that either proprietary estoppel or constructive trust is present. I see no need to consider whether proprietary estoppel can be established as it is trite law, that for this to apply, there must be an assurance, promise or representation giving rise to an expectation that one would have an interest in land. It is clear from the evidence before me that any finding made that there was an

assurance, promise or representation would be a finding in speculation. Therefore, I will consider whether a constructive trust has arisen.

- [35]** It is clear from the case law that in order to establish that a constructive trust has arisen, it must be shown that there was common intention that each party was to have a beneficial interest in the property and that in reliance on that common intention, one of the parties acted to his/her detriment. It is also clear from the case law that there need not be express words evidencing the common intention as it may be inferred from the conduct of the parties.
- [36]** I agree with the submissions of Learned Counsel for the Defendant that an interest in land based on a constructive trust in favour of the Defendant does not arise in this matter. There is not enough evidence to support a common intention that each party was to have a beneficial interest in the subject property. Even though Anthony Cox in his Witness Statement stated that Gerald Reid's name was put on the title for the subject property for a business transaction, there is no proof of that business transaction or what that business transaction entailed. In fact, the mere fact that a will was made, which on the face of it I must accept as the Defendant is not challenging the validity of the will, shows the intention of the paper title owner. I must accept as valid the will of Gerald Reid, which shows that he intended for the property to be given to Utilda Reid. I remind myself that the search is only for what the parties must have intended and in pursuit of that, I am mindful not to abandon the search in favour of a result that is considered fairer.
- [37]** I also agree with Learned Counsel for the Claimant that the receipts and invoices that show property tax payments and improvements to the subject property was done at a time when she was in occupation of the subject property and had the benefit of use and occupation. Without more, it is incapable of establishing a beneficial claim to ownership.
- [38]** There is a consequence to every action and it is unfortunate that this is the outcome. The Defendant is not challenging the validity of the will of Gerald Reid

and I therefore accept that it was the intention of Gerald Reid for his sister Utilda Reid to get the subject property. Section 68 of the Registration of Titles Act has not been disputed, therefore, the legal interest as dictated by the title is reflective of the beneficial interest in the subject property.

## **ORDERS & DISPOSITION**

**[39]** Having regard to the forgoing, these are my Orders:

- (1) Judgment for the Claimants.
- (2) The Defendant has no legal or equitable interest in all that parcel of land part of Jeffery Town in the parish of St. Mary registered at Volume 1493 Folio 10 of the Register Book of Titles.
- (3) The Registrar of Titles is hereby directed to remove Caveat number 1971798 which was lodged by Marjorie Cox against all that parcel of land part of Jeffery Town in the parish of St. Mary registered at Volume 1493 Folio 10 of the Register Book of Titles.
- (4) The Defendant's Amended Counterclaim filed March 29, 2019 is hereby dismissed.
- (5) Costs to the Claimants to be taxed if not agreed.
- (6) Claimants' Attorneys-at-Law to prepare, file and serve Orders made herein.