[2019] JMSC Civ.178

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2017 HCV 64022**

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| **BETWEEN** | **ARVA BARNES** | **1st CLAIMANT** |
| **AND** | **EVERTON HALL** | **2nd CLAIMANT** |
| **AND** | **LAUNA CAMPBELL** | **DEFENDANT** |

Emile Leiba and Jordan Chin instructed by DunnCox for the claimants

Ms Georgia McFarlane and Ms Peta-Gaye Moncrieffe instructed by Brown Findlay & Co for the defendant

Heard: May 27, 29 and September 6 2019

Land law– Recovery of possession – Adverse possession – Whether claim filed after expiry of limitation period – When does right to bring claim accrue – Whether claimants dispossessed defendant – Whether defendant in legal possession of property. Limitation of Actions Act ss. 3 and 30. Registration of Titles Act ss. 68 and 88.

**EVAN BROWN J.**

**INTRODUCTION AND BACKGROUND**

**[1]** The claimants commenced this claim on 22 November 2017 by the filing of a Fixed Date Claim Form (FDCF). Ten orders are sought in their FDCF. The principal order is set out at number one. That is, "[a]n Order for Recovery of Possession of property known as ALL THAT parcel of land part of Pembroke Hall in the parish of SAINT ANDREW being lot numbered TWO HUNDRED AND SIXTY FOUR on the part of PEMBROKE HALL aforesaid deposited in the Office of Titles on the 26th day of February 1962 of the space

and dimensions and butting as appears by the plan and being part of the land comprised in Certificate of Title registered at Volume 972 Folio 58 and being the (sic) ALL THAT land registered at Volume 979 Folio 667 of the Register Book of Titles". At number two, the claimants seek "[a]n Order that the Defendant vacate the said land forthwith". The "civil address" of this property is 33 Potosi Avenue. I will refer to the property below as 33 Potosi Avenue.

**[2]** Orders three and four sought mesne profits and interest thereon at the Bank of Jamaica's average weighted lending rates, respectively. At the end of the trial it was conceded that there was no evidential support for orders three and four. Order five, which would have called upon the defendant to show cause why caveat number 2032813 should not be removed, was abandoned at the end of the trial, apparently for its superfluity with order six.

**[3]** The sixth order is one that caveat number 2032813 lodged on the 6th day of June 2017 by the defendant on the said land be removed forthwith. Order seven is to direct the Registrar of Titles to reflect the removal of that caveat from the relevant Certificate of Title. Order eight is for "[a]n Order for Damages to be Assessed and paid to the Claimant pursuant to Section 143 of the Registration of Titles Act for damages caused to the Claimant as a result of the wrongful lodgement of the said Caveat". Order nine is for costs and attorney's cost to the claimant. Finally, order ten is the usual omnibus, catch all, "such further and other relief" as the court deems fit.

**Case for the claimants**

**[4]** The claimants relied on two affidavits filed by the first claimant and one filed by Tashika Beckford. Miss Beckford did not attend the trial and so was not cross-examined. The first claimant, however, was cross-examined. In her affidavit filed on 22 November 2017, Miss Barnes said that the subject property is owned by herself and her brother Everton Hall, as tenants-in-common. They purchased the land from Orlando Barrington Robinson and Beverley Charmaine Robinson. The Certificate of Title, which is exhibited to this affidavit, records the property as having been transferred to them on 2 June 2005.

At the time they became the owners, the land had a small concrete house on it which, it is alleged, was built by the Director of Housing. Indeed, the Certificate of Title speaks to Director of Housing as the first registered owner of the property.

**[5]** She visited 33 Potosi Ave nue “during the process of the sale” and observed the defendant residing in the house. She advised the defendant of the pending change in ownership. The defendant expressed disbelief as Mr. Robinson had not advised her of his intention to sell the property.

**[6]** Although the land was transferred to the claimants on 2 June 2005, it was not until 2006 that they received their letter of possession. By letter dated 13 June 2006, the firm of attorneys-at-law who represented her, purported to enclose the duplicate Certificate of Title as well as individual letters of possession, to the Jamaica Public Service Company Limited (JPS) and the National Water Commission (NWC).

**[7]** Subsequent to the receipt of the letter of possession Miss Barnes made a second visit to 33 Potosi Avenue. She again saw and spoke with the defendant. Miss Barnes advised the defendant that the property had changed hands. The defendant again expressed disbelief but said she would need time to remove her belongings. Miss Barnes told the defendant that until she removed she would be charged rental of $2,000.00 per month. Miss Barnes’ request for the defendant’s name to serve her a notice to quit was met with a flat refusal. She only became aware of the defendant’s name approximately 12 years later, in July 2017, when she received a notice from the Registrar of Titles advising of the lodgement of the caveat numbered 2032813.

**[8]** Miss Barnes made further visits to 33 Potosi Avenue in 2006, 2007, 2009, 2011 and 2014. In the 2007 visit, she again told the defendant that she would have to vacate the premises and advised of the impending arrival of a notice. The defendant told Miss Barnes she had no money to pay rent, when Miss Barnes raised the question. On all these occasions the defendant refused to give Miss Barnes her name. During the 2014 visit, the defendant appeared to Miss Barnes to be “very thin and even feebler” than on previous visits. Miss Barnes was moved with sympathy “and did not have the heart to

throw her out of the premises". According to Miss Barnes, she allowed the defendant to remain on the land "out of the goodness of [her] heart". The defendant's physical condition drove her to cease asking the defendant to vacate the premises or to pay rent and to permit her to remain on the land.

**[9]** In 2015, Miss Barnes received a telephone call from someone who identified herself as the defendant's daughter. The caller enquired whether Miss Barnes would be willing to sell the property to her and her sister as they, along with their mother, had been living there for a number of years. That enquiry received a negative reply.

**[10]** Apparently nothing else happened until Miss Barnes received notice of the caveat on 19 July 2017. That led her to visit the National land Agency (NLA). There she obtained copies of the caveat and an accompanying statutory declaration. Up to this time Miss Barnes had assumed the payment of the property taxes for 33 Potosi Avenue, even clearing the arrears for 2002 to 2005, a period antecedent to the change of ownership. She paid the property taxes for all subsequent years except, 2015/2016 and 2016/2017. When Miss Barnes tried to make payments for those years, she was advised that payments were already received. Documentary proof of these payments were exhibited.

**[11]** In her second affidavit, filed 28 September 2018, Miss Barnes admitted that she had no knowledge of the defendant's claim to have been residing at the property since 1994. Miss Barnes, however, contested the defendant's claim to making substantial improvements to an existing frame of a two-bedroom structure and the erection of perimeter walls and fences. Exception was specifically taken to the defendant's claim to have "done all acts and deeds consistent with ownership". In the opinion of Miss Barnes, her visits to the property revealed it to "be in a deplorable condition". She outlined several features of the house and premises which, if true, could support her characterization of the premises.

**[12]** The defendant's assertion that she had a contract with the JPS until about 2006 when her daughter, Shanique Earle's name was substituted, was roundly rebutted. Heavy reliance was placed on an exhibited letter from the JPS. That letter speaks to a contract

for the supply of electricity at 33 Potosi Avenue between the power company and the defendant on 21 February 1997. However, it was terminated on 3 August 1999. There was no other contract for service at 33 Potosi Avenue until 8 May 2017 between the JPS and Shanique Earle. Cross-examination would reveal that the state of affairs concerning the electricity and water supply to the premises came to the attention of Miss Barnes through the defendant's affidavit.

**[13]** In August 2018 Miss Barnes, in the company of her son and personnel from a security company, again visited 33 Potosi Avenue. The defendant was not present. Miss Barnes and her party entered the yard but were prevented from going inside the house by the defendant's "spouse". They took pictures of the yard.

**[14]** When she was cross-examined, Miss Barnes admitted to not knowing 33 Potosi Avenue before she purchased it. From there, she was challenged on her denial of the alleged improvements to the property. She explained that she used the original buildings without improvements and those with improvements to assess whether improvements had been made to 33 Potosi Avenue. From that comparative assessment she concluded that no improvements had been made to 33 Potosi Avenue.

**[15]** Miss Barnes disagreed with the suggestion that she did not go to the property in 2006. She also disagreed that she never spoke to the defendant in 2005 and went on to describe the defendant's attire when they met. She admitted she never asked any of the defendant's neighbours for her name.

**[16]** Cross-examining counsel asked Miss Barnes in what ways she exercised control over the property since 2005. This was her answer: "by visiting the house, speaking with Miss Campbell, asking her for the rent, asking her name to give her notice, keep reminding her of the rent and notice. When I saw her in 2014 I decided that this lady would soon be dead because of the state she was in".

**[17]** Miss Tashika Beckford swore to accompanying Miss Barnes to the premises in 2014. The defendant, two other adults and a small child were at the premises. She supported Miss Barnes in her description of the defendant as physically very thin. She

also confirmed Miss Barnes' evidence that she spoke to the defendant about not being able to collect rent from her, requesting the defendant's name and the defendant's refusal of that request as well as the general condition of the premises.

**Case for the defendant**

**[18]** The defendant and two witnesses wore to affidavits and were cross-examined. In her first affidavit, filed on 24 April 2018, Miss Campbell gave her address as 33 Potosi Avenue. She occupied the house on the premises with her spouse and three of her six children. However, all her children were raised at the property.

**[19]** She admitted that the claimants are the registered owners of the 33 Potosi Avenue and claims to have known the property for 23 years. She "took possession" of 33 Potosi Avenue in 1994. At that time there was the frame of a two-bedroom structure on the property. Absent from the structure were a door, roof, windows and floor. She added doors, windows, and roof and tiled the floor. She also repaired the bathroom and installed a toilet. In the kitchen, she installed cupboards and a sink. She also had the house rewired and put in plumbing. The land was overrun with grass and bushes 4-5 feet high. She cleared the land. She, therefore, asserted that since living on the property she has improved it and done all acts and deeds consistent with ownership.

**[20]** She attended on the tax office, enquired whether there was any outstanding property tax and made the payment. Miss Campbell said, however, that she did not pay for the years 2002-2008 for reasons of impecuniosity. Post 2008, she attempted to pay the property tax but was advised that someone else had done so. Her enquiries about the identity of the payer were rebuffed. She also sought to attend to the utilities, both of which had been disconnected from the premises. The bill from the NWC was in the name of one J. Lawrence. The NWC refused to substitute her name on the account. The JPS, however, had no such inhibition and placed her name on the account. In or about 2016, she requested of the JPS to replace her name with that of her daughter, Shanique Earle. The JPS acquiesced.

**[21]** The defendant stoutly denied the Miss Barnes' description of her as emaciated. She utterly denied ever seeing or hearing from the claimants. The defendant contended that if the claimants had made the necessary enquiries and inspections, they would have seen a finished and refurbished dwelling house and a family in residence. Additionally, visits to the tax office and the JPS would have revealed that she had been paying the property taxes and a contract for electricity service. The defendant's contention concerning the provision of electricity would be revised in her second affidavit.

**[22]** Miss Campbell denied that the claimants were ever put in possession. She countered that from 1994 she has "been in sole, open, quiet, undisturbed and continuous possession of the subject property until she was served with court documents in this matter in December, 2017". She neither paid rent nor was ever served with a notice to quit.

**[23]** The defendant admitted the telephone call made by her daughter to Miss Barnes. That phone call was made without her knowledge and approval. She instructed her daughters to desist from further conversation about her property.

**[24]** In 2017 she decided to apply for a registered title. That application was based on her enjoyment of "sole, exclusive, open and continuous possession over the subject property for a period of at least 12 years prior to making the said application". Pursuant to that decision, she obtained the services of a commissioned land surveyor. He surveyed the property and returned a survey diagram which was exhibited to her affidavit. She would go on to agree with counsel for the claimants that to date she had not put any application for the title in her name before the court.

**[25]** In her second affidavit, filed on 30 November 2018, the defendant asserted that the house at 33 Potosi Avenue would resemble the other houses as it was a precast frame. So, while she did not build the house "from scratch", her "blood, sweat and tears" went into building it. She populated the grounds of 33 Potosi Avenue with fruit trees. She had a garden on the property from which she sold suckers.

**[26]** In 2004 Hurricane Ivan caused extensive damage to the dwelling house and fruit trees. Most of the damage was repaired. She was in the process of renovating the dwelling house at the time of service of the court papers. Building materials purchased for this purpose were being stored on the property. Photographs were tendered in support of these allegations.

**[27]** The defendant admitted the claimants' charge that garbage was on the property. She explained that many of the children from the nearby Pembroke Hall school "use my property has (sic) their garbage bin". Additionally, higglers who sell at her gate without her permission "dumped garbage on the said property". That resulted in the recent intervention of the Kingston and St. Andrew Corporation (KSAC), removing the vendors and posting a no vending sign. A car was placed on the property to prevent the higglers and school children from going onto the property to pick fruits and litter.

**[28]** The defendant returned to the subject of the utilities. She reiterated that financial difficulties led to the disconnection of the electricity supply. However, her neighbour and supporting witness, Arlene Green, provided her with electricity in return for a small monthly sum. In respect of the water supply for the premises, the disconnection was brief. During the disconnection she bought water from another neighbour, Miss Rose McKenzie. She, however, cleared the arrears. No documentary proof of this was provided.

**[29]** At paragraph 19 of her second affidavit, the defendant appears to agree with Miss Barnes that the dwelling house at 33 Potosi Avenue was in a deplorable state. She said, "the dwelling house might be in a deplorable condition to the Claimants, but it is a home to my family and I, and it has been for over twenty years".

**[30]** When Miss Campbell was cross-examined, she was asked if she knew who the previous owners of 33 Potosi Avenue were. Her response was, "I always knew Everton Hall to be the owner, by himself". The names of the claimants' immediate predecessors in title were suggested to her and she replied that she did not know of them. Asked whether she would agree that she knew of the claimants as the owners from June 2005,

she said no but went on to say she did not know of Arva Barnes but knew of Everton Hall before June 2005. She however, did not know him to be Arva Barnes' brother. In the post luncheon session Miss Campbell said she had made a mistake when she said Everton Hall was the owner. What she meant was Mr R. Lawrence.

**[31]** Questioned further about the previous ownership of the property, Miss Campbell said she knew about Mr. Lawrence from the time she moved onto the property. That knowledge was obtained from questions posed to the neighbours. In answer to the suggestion that the owners of the property from 6 January 1994 to 2 June 2005 were Orlando Barrington Robinson and Beverley Robinson, she said she never knew about the Robinsons and added, "I only knew about Everton Hall". Her further evidence on the point was that from what she saw on the tax receipts and the bills, she "knew of Everton Hall as owner from 2005 until now".

**[32]** Miss Campbell was directed to paragraph 6 of her statutory declaration. In the declaration she said she was told that the claimants intended to sell the property. It was then suggested to her that when she signed the declaration she knew both claimants to be the owners of the property. Her response was that she acknowledged Mr. Hall as the owner but not Miss Barnes. She went on later under cross-examination to say that this statement in her declaration was incorrect.

**[33]** She was asked if she agreed that the property taxes for 2002-2017 were paid by Miss Barnes. She responded that she did not know of it. She volunteered that she personally paid the property taxes. Almost in the same breath, she agreed with the cross-examiner that Miss Barnes was paying the property taxes.

**[34]** Miss Campbell was later directed to paragraph 5 of her statutory declaration where she swore, among other things, that she had "been paying the property taxes from 1994 until now". Asked whether "from 1994 until now" meant she had been paying from 1994-2016, she said yes. However, she agreed with the claimant's counsel that that was incorrect, but added "because Miss Arva Barnes was paying taxes as well". She went on

to say she paid for 1994. She could not recall whether she had also paid for 1995 “as I wasn’t really the one paying it. It was my daughter”.

**[35]** Following on that, the court asked her whether she understood what the word “personally” meant. She responded that she did and elaborated, “when I said earlier I personally paid property taxes that wasn’t true”. She was invited to look at the exhibited tax receipt for 2002-2008. She agreed it was paid by the claimants. She agreed she did not pay the property taxes for 2008/2009. For the succeeding years up to 2017, her knowledge of who made the payments ranged between an inability to recall and ignorance.

**[36]** She suffered no memory lapse in answering questions about Miss Barnes asking her to pay rent for her continued occupation of 33 Potosi Avenue. She was consistent in her denial that Miss Barnes never visited the premises. She never lived at the premises between 2005 and 2017 with the permission of Miss Barnes. In fact, she never knew Miss Barnes. Consequently, she never refused to give Miss Barnes her name.

**[37]** Miss Campbell disagreed with defence counsel that Miss Barnes visited the property when she was present. That disagreement led to her being shown her affidavit of 30 November 2018 in which she said at paragraph 12 that the 1st claimant (Arva Barnes) visited the property. Asked whether she still maintained that she was never at the property when Miss Barnes visited, she answered in the affirmative. She then declared that the statement in her affidavit was incorrect.

**[38]** Miss Arleen Green, who gave her address as 31 Potosi Avenue, testified on Miss Campbell’s behalf. She met Miss Campbell in 1994 when the latter moved into 33 Potosi Avenue. Miss Green confirmed Miss Campbell’s evidence concerning the physical state of land and structure at Miss Campbell’s arrival. Miss Green also supported Miss Campbell’s assertion that she enclosed the property in the manner earlier outlined. Miss Green also spoke to the subsequent destruction wrought on the property by Hurricane Ivan. She knew Launa Campbell as the owner of 33 Potosi Avenue who, in her opinion, maintained the property as best as she could.

**[39]** Miss Green also spoke to Miss Campbell's integration into the Potosi Avenue community and the raising of her family on the property. She was aware of Miss Campbell's perennial financial problems and confirmed the disconnection of the utilities along with the ameliorating efforts in that regard.

**[40]** Miss Green also supported Miss Campbell's evidence concerning how the garbage came to be on 33 Potosi Avenue. The school children also littered Miss Green's property. It was at Miss Green's instance that the KSAC removed the vendors and erected the no vending sign.

**[41]** Miss Green had only seen Miss Barnes once, in October 2018. On that solitary occasion Miss Barnes asked her to be a witness for her but she declined. Miss Green retreated from this position under cross-examination. In addition to the occasion in October, she had also seen Miss Barnes at 33 Potosi Avenue. The cross-examination of Miss Green also revealed that she was absent from 31 Potosi Avenue for several months during the period 2005 to 2017. She therefore admitted that Miss Barnes could have made visits to 33 Potosi Avenue without her knowledge.

**[42]** Before Miss Campbell commenced living at 33 Potosi Avenue, Miss Green became aware that the previous owners were the Robinsons. That information came to her from her grandmother. Her grandmother also mentioned the name Lawrence.

**[43]** Miss Green said she was familiar with the interior of the house at 33 Potosi Avenue. There was only a curtain at the doorway. That was the situation for as long as she could remember, that is before 2005.

**[44]** The evidence of Leroy Grant, construction worker of 65 Potosi Avenue was to a like effect as Miss Green's. He had been living at that address from 1965. He asserted in his affidavit that when the scheme was first built half of the houses were incomplete structures, precast concrete frames. Such was the situation at 33 Potosi Avenue. When Miss Campbell took up residence there in 1994 she, therefore, added doors, windows and a roof. She also tiled the floor and repaired the bathroom, installing a toilet in it. Cupboards and a sink were installed in the kitchen. The house itself was rewired and

plumbing installed. Notwithstanding these assertions, when asked, under cross-examination, if when Miss Campbell moved onto the property if he knew of it having a structure with walls and a roof, his answer was “yes”.

**[45]** The land, which had been abandoned from in the 1970s, was bushed and perimeter walls and fences erected.

**[46]** He confirmed the damage to the house during the passage of Hurricane Ivan. He assisted with the repairs to the roof. He supported the defendant in her assertion that she raised children on the property. He too spoke to the situation with the utilities, Miss Campbell’s financial challenges in that regard and her neighbours’ assistance. He expressed shock at the news that other persons were claiming to be the owners of the property.

**[47]** While Mr. Grant said in his affidavit that he had never seen Miss Barnes at the property, cross-examination whittled away the foundation of this assertion. Mr. Grant was away from home, on an average of 12 hours per day. He, therefore, agreed that it was possible that Miss Barnes could have visited 33 Potosi Avenue and he would not have seen her.

**[48]** Mr. Grant could not recall the names of the claimants’ immediate predecessors in title. Prior to Miss Campbell moving onto the property, he knew the owner to be Lawrence. He, however, knew nothing of the transfer of the property to the claimants.

**Issues**

**[49]** The overarching issue is whether the claimants’ right to bring the claim for recovery of possession has been time barred by virtue of the provisions of the ***Limitation of Actions Act***. The parties also made the incidence of the burden of proof an issue for determination.

**Claimants’ submissions**

**[50]** Counsel for the claimants filed written submissions. Oral submissions were also made at the end of the case. The question of adverse possession was addressed frontally. It was submitted that the claimants' right of action accrued in June 2006 when they were given possession. This action for recovery of possession was brought in 2017 which therefore means, the submission asserted, the limitation period of 12 years has not yet accrued. That submission was based on sections 3 and 4 of the ***Limitation of Actions Act*** and ***Baker (Almarie) v David Rance and Cargill Brown*** (unreported), Supreme Court, Jamaica, Cl. No. 2005 HCV 00149 judgment delivered 7 August 2007 (***Baker v Rance and anr***).

**[51]** Relying on extracts from ***J A Pye (Oxford) Ltd and another v Graham and another*** [2002] UKHL 30, it was submitted that the defendant failed to show the requisite intention to possess the land. The evidence advanced in support of that contention was that the defendant was first given permission to be on the land by Mr. Robinson. From that permission, it was said, that the defendant understood and acknowledged the claimants were the new owners from whom she would now either seek consent to remain or pay rent. It was urged that the defendant never intended to exclude the registered owners from the property but merely did not have sufficient funds to pay rent. The claimant, it was said, gave the defendant permission to remain on the land in 2014, based on sympathy for the defendant.

**[52]** ***Wills v Wills*** [2003] UKPC 84 was prayed in aid to make two points. First, possession is not adverse if it is with the consent of the true owner. Second, unlike in ***Wills v Wills***, in the case at bar the claimants exercised their ownership by making frequent visits to the property and dealing with it as an owner from 2005. These visits and assertions of owners were sufficient to break any continuing period of adverse possession, it was argued. It was further submitted that permission from the owner may be expressed or implied. ***Smart v London Borough of Lambeth*** [2013] All ER (D) 109 (Nov) was cited in support.

**[53]** It was submitted that ***SS Global Ltd v Sava*** [2008] All ER (D) 242 (Nov) established that the burden of proving dispossession is on the person who claims to have

dispossessed. To discharge this burden, the submission ran, the dispossessor's evidence has to be unequivocal as to his assumption of factual possession and his intention to possess.

**[54]** In his oral submissions, Mr. Leiba asked the court to consider, on a balance of probability, which version is more likely than not. The significant aspect of the case turns on credibility. Conflicts between the claimant and the defendant should be resolved in favour of the former, he urged.

**[55]** Learned counsel sought to distinguish the instant case from ***Winnifred Fullwood v Paulette Curchar*** [2015] JMCA Civ 37 (***Fullwood v Curchar***). Whereas the appellant relied on numerous documents to advance her case, in this case the defendant has put forward little or no documents for the relevant period. Acts by the defendant, for example putting the electricity in her daughter's name, are all very belated. The next point of distinction is that Mrs Curchar made no visits to the property and payments relied on were not related to the property. This is quite distinct from where a party, as here, pays the property taxes.

**[56]** The registered proprietor need only to maintain "slight acts" of possession. The acts of payment of property taxes and visits to the premises are sufficient to fall in this description, it was submitted. ***Dawn Davis v Delrose Gray*** [2018] JMSC Civ 145 was cited in support.

**Defendant's submissions**

**[57]** Counsel for the defendant submitted that the claimants' title has been extinguished by operation of the ***Limitation of Actions Act***. Sections 3 and 4 of that were cited, together with ***Fullwood v Curchar*** . It was contended that the claimants failed to exercise any rights of ownership over the property for 12 years. The defendant has, therefore, enjoyed exclusive occupation and possession of the property, free from molestation from the claimants or anyone acting on their behalf during the relevant period.

**[58]** The second issue raised by counsel for the defendant was whether the claimants discontinued possession of 33 Potosi Avenue by failing to do sufficient acts of ownership between 2005 and 2017. It was contended that for 12 years the claimants left no one to act on their behalf and for their benefit on the property. The claimants, it was said, only "paid the property taxes for a few years". They did nothing further. They did not check on the light or water until after the claim was filed. Doubt was cast on the first claimant's alleged visits to the property. The claimants' failure to collect rent from the defendant and serve her a notice to quit was attributed to failure to visit the premises. Furthermore, they made no contribution to the upkeep and maintenance of the property during the 12 years. All told, the claimants abandoned the property and thereby discontinued their possession of it.

**[59]** The third issue raised by learned counsel for the defendant was whether the claimants were dispossessed by the defendant. Here it was submitted that the defendant exercised sole and exclusive possession of the property for herself and in her own behalf, without regard for the interests of the claimants. The defendant had both factual control of, and an intention to possess, the property.

**[60]** Lastly, it was submitted that the burden of proof lies on the claimants, relying on ***Fullwood v Curchar.***

**Law and analysis**

**[61]** In the area of land law, the basic principle is the relativity of title. To quote the learned author of ***Commonwealth Caribbean Property Law*** 4th edition at page 223, "[a]ll titles to land are relative in the sense that a person's title, including a documentary (or 'paper') title, is good in so far as there is no other person who can show a better title". In as much as it is true that the law abhors a vacuum, so the law leans in favour of the person in possession of land. So that, possession "gives ownership good against everyone except a person who has a better, because older, title" (***Newington v Windeyer*** (1985) 3 N.S.W.L.R. 555, 563E-F as cited in ***Commonwealth Caribbean Land Law*** at page 267).

**[62]** Even a certificate of title issued under the ***Registration of Titles Act***, which is otherwise conclusive evidence that the person named therein is the proprietor of the relevant land, has been made subject to the operation of any statute of limitations (***Registration of Titles Act***, section 68). The ***Registration of Titles Act***, in section 85, makes provision for the registration of a person, who claims to have acquired title to land subsisting under its operation, as the proprietor. The cumulative effect of this is that an indolent 'paper' owner may be ousted by a trespasser who remains in possession for the requisite limitation period.

**[63]** By virtue of section 3 of the ***Limitations of Actions Act***, the right to "make an entry, or bring an action or suit to recover any land or rent" must be made within 12 years after any of those rights first accrued, either to the person making the claim or the person through whom the former claims. Upon the expiration of this limitation period, "the right and title of such person to the land or rent … shall be extinguished" (see section 30 of the ***Limitations of Actions Act***). The compound effect of these two sections is to operate in bar of the right of a documentary or 'paper' owner to bring an action for recovery of possession after the lapse of 12 years (see ***Fullwood v Curchar***, *supra*, at para 31).

**[64]** The first question to be resolved is a legal one, on whom does the burden of proof lie? As a general rule, in civil claims "he who asserts must prove" (Adrian Keane & Paul McKeown ***The Modern Law of Evidence*** 12th edition at page 104). The legal burden, that is the obligation to prove the essential issues in the case, rests on the party asserting their affirmative. This claim is primarily one for recovery of possession. The claimants, in order to show themselves entitled to recover possession from the defendant, must show themselves to have a better title than the defendant. Therefore, a fact in issue is whether the claimants had a subsisting and better title at the filing of the claim. On this understanding of the claim before the court, the legal burden lies squarely on the claimants.

**[65]** I am, therefore, constrained to agree with the submissions of learned counsel for the defence. ***Fullwood v Curchar*** which was cited in support bears directly on the point.

At paragraph 38 of the judgment the Court of Appeal said, after an examination of the law and English authorities:

> *"… They have unequivocally established that when a claimant brings a claim to recover possession, 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, not on the weakness of the defendant's**".*

That the burden is on the claimants is even more so where, as here, the defendant raises the question of the extinction of the claimants' title by the effluxion of the limitation period. I quote again from the judgment of McDonald-Bishop JA (Ag) (as she then was), at paragraph 39:

> *"**where the person against whom the claimant has brought the action pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute**".*

**[66]** Respectfully, the reliance placed by counsel for the claimants on ***SS Global v Sava***, *supra*, to advance a reversal of the burden onto the defendant is misconceived. In that case Christos Sava applied to HM Land Registry to change the register in respect of certain land he had been using for farming activities including the grazing of sheep. He alleged that he had enjoyed an uninterrupted period of 12 years possession by 13 October 1991. That is, Sava claimed to have dispossessed the owner. The adjudicator decided in his favour. That decision was appealed to a judge who found that Sava had not established that he was in factual possession of the land by 13 October 1991. Dissatisfied with the decision of the judge, Sava appealed to the English Court of Appeal. It was against that factual background that it was said that the burden was on Sava to prove that he had assumed factual possession of the land, with the requisite intention to possess it to the exclusion of the world at large.

**[67]** Firstly, ***SS Global v Sava*** was not a claim for recovery of possession, which distinguishes it from the case at bar. Secondly, Mr. Sava was the applicant or titular claimant. So that, consonant with the general principles, he was the one asserting the affirmative of the crucial facts in issue. The incidence of the burden of proof would, accordingly, fall on him. If that is a fair understanding of what was before that court, then

it is palpable that ***SS Global v Sava*** did not lay down the proposition articulated by counsel for the claimants. ***SS Global v Sava*** did not usher in a shift, and a seismic one it would have been, in the incidence of the burden of proof in cases of adverse possession. Having decided that the claimants bear the burden of proof, I turn my attention to the pivotal subset of the overarching issue.

**[68]** The predicate disputed question of fact for resolution is whether the limitation period of 12 years elapsed between when the claimants' right to bring the claim accrued and the date the FDCF was filed. If, as a matter of fact, 12 years had not expired, the question of adverse possession would be rendered moot resulting in the collapse for the defence. On the other hand, if 12 years had passed the claim would fall to be decided according to the principles undergirding what is loosely referred to as adverse possession.

**[69]** As was said above, the claimants contended, through their counsel, that the relevant limitation had not expired at the time the FDCF was filed (22 November 2017). The court was asked to say the right to bring the claim accrued as at the date of the letter of possession, citing ***Baker v Rance and anr***, *supra*. Counsel for the defendant submitted that time started to run against the claimants at the registration of the transfer of the property to them on 2 June 2005 and not 13 June 2006, the date of their letter of possession.

**[70]** ***Baker v Rance and anr,*** was an application to strike out by the 1st defendant and an application for summary judgment by the 2nd defendant. Those applications were filed after the claimant filed a FDCF, on 25 April 2005, seeking a number of declarations, the essence of which was to invoke sections 3, 4, 9 and 14 of the ***Limitation of Actions Act***, barring the defendants' title and conferring title upon her. . At the time of the hearing, the claimant asserted an antecedent possession of the land for 22 years; that is, from 1983.

**[71]** The disputed land (8 acres) was sold to the defendants by the claimant's grandfather under an agreement for sale dated 25 August 1981. The agreement excluded the vendor's dwelling house and the half an acre surround land. On 28 November 1997,

specific performance of that agreement was granted. That claim for specific performance was filed in 1984.

**[72]** The court found that the right to enter the disputed land was not among the bundle of rights conferred by the agreement for sale. The remedies available under the agreement for sale were a claim for damages, specific performance, and rescission or apply for a vendor and purchaser's summons under section 49 of the Law of Property Act, 1925. The court therefore decided that the defendants' right of entry first accrued on 28 November 1997. In allowing the applications, the court also made an order for the recovery of possession forthwith.

**[73]** In my view, the principle to be distilled from ***Baker v Rance and anr*** is that the right of action accrues to a purchaser where a third person is in possession of the premises on the date he becomes the proprietor. Hence, the right of entry accrued on the date the order for specific performance was granted. As at that date the purchasers were entitled to have the property transferred to them as the new proprietors. If that is correct, then ***Baker v Rance and anr*** is not authority for the proposition that the right of action for the claimants in the instant case accrued on 13 June 2006. The question of the transfer of the property was apparently not an issue in that case. To that question I will now turn my attention.

**[74]** Under section 88 of the ***Registration of Titles Act*** (***RTA***), the proprietor of land may transfer his estate, right or interest in that land. Section 88 of the ***RTA*** is in part quoted below:

> *"… Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant".*

So that, upon the registration of the transfer of the land, the transferee not only gets the estate to which the transferor was entitled, but also all his “rights, powers and privileges”. The transferee also becomes encumbered with all the previous proprietor’s “requirements and liabilities”.

**[75]** For present purposes it is only necessary to say, among the bundle of rights with which a proprietor of land is endowed are the right either to make an entry or bring an action or suit to recover any land or rent. Assuming that to be an accurate statement of the law, then it is logical to conclude that in circumstances where a stranger is in occupation of the purchased premises, the purchaser’s right to bring a claim for recovery of possession accrues on the date of the registration of the transfer. In other words, where the land is in the possession of a stranger at the time of purchase, once the purchaser has been placed in the position of proprietor, time begins to run. In this case, therefore, time began to run against the claimants on 2 June 2005.

**[76]** The claimant’s testimony was that she visited 33 Potosi Avenue early to mid-2005 while the sale was being conducted. A reasonable purchaser is required to inspect the land and make such enquiries as a judicious purchaser would because she stood to be deemed to have constructive notice of rights reasonably discoverable: ***Commonwealth Caribbean Property Law*** 4th edition at page 246. That visit was apparently in fulfilment of that duty. On that visit to the property Miss Barnes discovered that the house on the property was being occupied by the defendant. Miss Barnes therefore had notice of the defendant’s occupation of the property. Therefore, even if that visit antedated the registration of the transfer of ownership of the property, the visit in 2005 was proximate to the date of registration to make it manifestly fair, logical and legal for the right to make an entry or claim recovery of possession to have first accrued at the date of the registration of the transfer.

**[77]** Proceeding from the assumed correctness of that finding, the inevitable conclusion is that when the FDCF was filed on 22 November 2017 the limitation period of 12 years had run its course. This brings me to the core of the claim or what was above identified as the overarching issue. Succinctly put, has the claimants’ title been extinguished, and

thereby barring them by operation of law from bringing the claim for recovery of possession? In order to return an affirmative answer to this question, the claimants must be shown to have either relinquished or abandoned possession of 33 Potosi Avenue: ***Fullwood v Curchar***, *supra*, at paragraph 66.

**[78]** A review and assessment of the evidence elicited from and on behalf of the claimants catapults to the conclusion that no tangible effort was made to dispossess the defendant. The 1st claimant was confronted with an occupant who did not acknowledge her as the co-owner she declared herself to be. Her oral edict that rental of $2000.00 was to be paid was ignored. Her request for the occupant's name for service of a notice to quit was refused. It seems fair to conclude that Miss Barnes did not receive any cooperation from the defendant which was referable to an acknowledgement of her ownership of the premises. In the face of that admitted conduct on the part of the defendant, although I found Miss Barnes to be a generally credible witness, I cannot accept her affidavit evidence that the defendant acknowledged their ownership of the premises.

**[79]** The defendant's consistent refusal to pay rent and stubborn refusal to give Miss Barnes her name raised no red flags. Compounding the matter, in 2014 Miss Barnes, preferring to be ruled by her heart rather than her head, spurred by the pathos of the defendant's perceived physically debilitating appearance, ceased requesting rental and her name. I say this, *en passant*, the 1st claimant either naively or arrogantly assumed the prescience to anticipate the defendant's early demise back in 2014. Alas, perhaps like Hezekiah King of Judah, to whose life God added 15 years, God seems to have added to the defendant's years. The folly of that false prophecy, together with her misplaced sympathy, has come back to haunt Miss Barnes.

**[80]** I return to the visits, on which counsel for the claimants placed considerable weight. I accept that Miss Barnes visited the property as outlined in evidence. I accordingly regard Miss Campbell's denial of those visits as an overzealous effort to embellish her case. What then is the significance of the fact that Miss Barnes visited the premises during the limitation period?

**[81]** The most favourable view of the visits is that they have the legal colour of an entry upon the land. However, mere entry upon the land is insufficient: ***David Bent v Melvina Williams*** (1976), 14 JLR 122 (***Bent v Williams***). A reference to the headnote is adequately makes the point.

> *"In an action for recovery of passion of land a plaintiff must show, inter alia, that any act or acts done by him before his title is barred by virtue of the provisions of the Limitation of Actions Act amounted to a dispossession of the person from whom he seeks to recover possession and a resumption of possession by him. It is not enough to make a mere entry upon the land".*

The entry upon the land must be to take possession. Something effectual must be done by the paper owner to gain possession. Going on the land to ask for rent appears not to be of the character of effectual action to gain possession (***Bent v Williams*** at page 123, letter C).

**[82]** Failing an effectual entry upon the land, it was open to the claimants to file a claim for recovery of possession during the limitation period. Their failure to do so cannot be excused by the defendant's refusal to give Miss Barnes her name. To be fair, Miss Barnes did not offer this as an excuse. She retreated from actively seeking possession of the premises on what may be characterized as humanitarian grounds. As noble as that may be from a philanthropic perspective, it serves only to highlight an abject failure to dispossess the defendant and assume possession.

**[83]** That takes me to the question of whether the defendant had been in possession of 33 Potosi Avenue in the ordinary sense of the word. Possession can only be ascribed to Miss Campbell if she can show factual possession, together with the intention to possess the disputed property (see ***JA Pye (Oxford) Ltd v Graham***, *supra*; ***Fullwood v Curchar***, *supra*).

**[84]** I take first the question of the sufficiency of the defendant's physical custody and control of 33 Potosi Avenue. I accept that the defendant moved onto the property in 1994. I find that when she did so, it was without the permission of the then registered title owner. The transfer of the property from the Director of Housing to Ransford Alderman Lawrence and his wife Jessie Elaine was registered on 12 September 1962. Ransford Lawrence is

apparently the “Mr Lawrence” that the defendant testified to being aware of as the owner. The evidence does not disclose that she had any interaction with Mr. Lawrence. In any event, unless she moved onto the property before 6 January 1994, Mr. Lawrence had ceased being one of the registered owners of the property when she commenced occupying it. As at that date the Robinsons were now the registered owners, who she denied knowing.

**[85]** In denying that she knew the Robinsons, the defendant volunteered that she only knew about Everton Hall. The history of the ownership of the property, by itself, rendered that evidence to be untrue if, as I understood her, that was a reference to ownership at the time of her occupation. Everton Hall only became one of the owners in 2005. Miss Campbell would go on to say she knew of Everton Hall as the owner from 2005 to the present. Her later reference to Everton Hall made it clear that she laboured under some confusion. Consequently, I did not regard this as an indication that she was, generally, given to mendacity.

**[86]** In any event, I do not consider whether she knew the identity of the paper owner at the time she commenced occupying 33 Potosi Avenue an issue warranting exploration. The important point is whether the defendant commenced her occupation with the let or licence of the then owners. The evidence does not admit of a finding that she did. Indeed, the undisputed evidence of Leroy Grant is that 33 Potosi Avenue had been abandoned from the 1970s. Accepting that as a fact, there was no one exercising dominion over the property from whom the defendant could have sought permission.

**[87]** The evidence that after Miss Campbell moved onto the property she cleared it of overgrown vegetation, enclosed it and made improvements to the existing structure remained largely unchallenged by admissible evidence at the end of the case. There was one discrepancy in the evidence of Leroy Grant concerning whether the structure had walls and a roof at the time of Miss Campbell’s initial occupation. His affirmative answer during cross-examination conflicted with his affidavit evidence and the case for the defence. I reject his evidence on the point and prefer that of the defendant and Miss

Green. I found Miss Green to have been a witness who appreciated the solemnity of the oath she took.

**[88]** Two bits of evidence gave me pause concerning the defendant's physical custody and control of 33 Potosi Avenue. Firstly, I have considered whether the dumping of garbage onto the property by vendors and children from the nearby school was an indication that the property was open to access by all and sundry. The defendant gave no evidence of any action that she took to abate the problem. The intervention of the municipal authorities was precipitated by representation from Miss Green.

**[89]** Miss Green's evidence was to the effect that the illegal dumping of garbage was not a problem peculiar to 33 Potosi Avenue. Her property was similarly misused. This fact is some evidence from which it may be inferred that the dumping of garbage was not unequivocally a question of open access to the public at large, but rather, sheer lawlessness. Consequently, I find that the illegal dumping of garbage onto 33 Potosi Avenue did not militate against the defendant's physical custody and control of the property.

**[90]** The second cause for pause is the absence of a solid door at the entrance to the dwelling at 33 Potosi Avenue. The entrance was guarded by a mere curtain. It seems more than passing strange that in all the renovations and additions asserted to have been made to the precast structure, the entrance remained so porous. At first blush, the curtained entrance appears to cast a shadow of doubt on the veracity of the renovations and additions. However, having seen the witnesses, I accept that renovations and additions were made to the structure.

**[91]** In my opinion, the curtain at the entrance provided sufficient indication to lawful visitors to the premises that permission was required to enter the concrete structure. If entry is premised on the grant of permission, then that is an exercise of custody and control over the dwelling itself. Accordingly, I do not find that the absence of hard door at the entrance to the dwelling undermines the sufficiency of the defendant's physical custody and control of 33 Potosi Avenue.

**[92]** I am constrained by the evidence and the credibility of the defendant and her witnesses to accept that when the defendant moved onto 33 Potosi Avenue she made the improvements described earlier. She did not just make the structure habitable, she enclosed the land by the erection of perimeter walls and fences. Having taken possession, the defendant lived and raised a family on the land. All these she did without any interference from any of the claimants' predecessors in title. Those are acts of possession which, in any sense of the words, can properly be described as either trivial or equivocal. When the claimants came into the picture, the defendant was, save for the visits, left to continue her quiet enjoyment of the property. She was neither made to pay rent nor served a notice to quit. The evidence therefore discloses a sufficient degree of physical custody and control of the land for present purposes.

**[93]** The law is that factual possession must be coupled with the *animus possidendi*. The *animus possidendi* has been defined by Slade J. in ***Powell v McFarlane and Another*** (1977) 38 P & CR 452, 471-472 (***Powell v McFarlane***) as:

> *"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 … so far as is reasonably practicable and as far as the processes of the law will allow".*

This intention must not remain shuttered in the bosom of the defendant, but must be made clear to the world. This can only be established by "clear and affirmative evidence".

**[94]** In this case, there are four acts which I find to be demonstrative of the defendant's unequivocal intention to, in her own name and on her own behalf, exclude the world at large and the documentary owners from the property. The first is her refusal to comply with the demand for rent for her continued occupation of the premises. By this act, the defendant showed that she was prepared to remain at 33 Potosi Avenue on her own terms. The second act was her refusal to disclose her identity to Miss Barnes. These were open acts of rebellion which should have telegraphed to Miss Barnes that the defendant had the intention to exclude her and her co-owner from 33 Potosi Avenue. The third act from which the defendant's intention to possess the property may be inferred, is the commissioning of its survey. Settling the boundaries of the land could have had no other perceivable purpose than to possess it to the exclusion of the world, including the

claimants. Perhaps the clearest statement of the defendant's *animus possidendi* is the lodgement of the caveat against the title for the premises (the fourth act).

**[95]** It is true that the paper owners could not have known about the survey and the lodging of the caveat unless they received notice of them. The survey of the land, however, was not something that was done in secret. At the very least, notices were served on the adjoining owners. Regular visits to 33 Potosi Avenue may have brought either the impending survey or the fact of its occurrence to the attention of Miss Barnes. However, by 2017, the year the survey was done, Miss Barnes had become resigned to await the defendant's departure from this world.

**[96]** Even without having the land survey and lodging the caveat, the defendant had done enough to make it clear to Miss Barnes that she was not acknowledging her title to 33 Potosi Avenue. That consistent refusal to pay rent and identify herself could not have been with any motive that was less than antithetical to her title to the land. That manifest intention could have been stymied by the taking of available legal advice (a lawyer acted for her in the sale of the property). So then, it is clear that the defendant had the *animus possidendi* to not only exclude the claimants, but to occupy and use the land as her own.

**Conclusion**

**[97]** So then, the claimants have found themselves in the position of persons who went to sleep on their rights. When they were stirred from their Rip-Van-Winkleish sleep by notice of the caveat, their world had changed. The limitation period had expired by the time their claim was filed. Consequently, their right and title to 33 Potosi Avenue had been extinguished. On the other hand, the defendant had exercised factual possession of the property with the requisite intention and now had a possessory title. The orders sought by the claimants are refused. I am, therefore, constrained to give judgment for the defendant. Costs are awarded to the defendant, to be taxed if not agreed