[2024] JMSC Civ.185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE MATRIMONIAL DIVISION

CLAIM NO. SU2023FD01459

IN THE MATTER of the Property (Rights of Spouses) Act, 2004 Sections 5(1)(b); 6; 11; 13 and 23.

AND

IN THE MATTER of the Limitation of Actions Act

BETWEEN	**GIDEON AUGUSTUS BULLOCK**	**CLAIMANT**
AND	**INELDA BULLOCK**	**DEFENDANT**

IN CHAMBERS

Ms. Catherine J. Minto, Attorney-at-Law, for the Claimant.

Ms. Marjorie Shaw instructed by Brown & Shaw, Attorneys-at-Law, for the Defendant.

June 21 and 22, 2023 and January 19, 2024

Division of Matrimonial Property – Properties located in Jamaica, Spouse residing overseas – the Limitation of Actions Act – whether registered co- owner dispossessed – The Property (Rights of Spouses) Act – whether applicable if co-owner dispossessed.

S. WONG-SMALL, J

BACKGROUND

[1] Gideon Augustus Bullock (hereinafter referred to as 'the Claimant') and Inelda Bullock (hereinafter referred to as 'the Defendant') met whilst attending university from which they graduated as a medical doctor and a registered nurse respectively. They were married on August 3, 1974 and shortly thereafter, moved to the Bahamas where they lived and worked. They returned to Jamaica in 1976 and the Claimant started his practice in which the Defendant also worked between 1976 to 1987, in Bog Walk, St. Catherine and later expanded it to St. Mary. The marriage produced four (4) children in addition to a foster child, born between 1975 and 1987, who are now all adults.

[2] Between 1981 and 1987, five (5) properties were purchased by the parties. These (hereinafter referred to as "the properties") are agreed by the parties as follows;

- Bog Walk/Bybrook, St. Catherine, (Volume 597 Folio 42) (hereinafter Bog Walk)
- Lot 18A Forest Hills, also known as 149A Red Hills Road, St. Andrew (Volume 1112 Folio 257), the family home. (hereinafter Red Hills Road)
- Oracabessa, St. Mary (Volume 1105 Folio 55) (hereinafter Oracabessa)
- Gibraltar, St Mary (Volume 1138 Folio 313) (hereinafter Gibraltar) and
- Forest Hills St. Andrew (Volume 1168 Folio 308) (hereinafter Mayfair)

The parties were registered on the titles as joint tenants in respect of four of the properties while Oracabessa, was registered in the maiden name of the Defendant only.

[3] In 1991, the Defendant was recruited and migrated to the United States of America (hereinafter referred to as 'USA') in order to work as a registered nurse. After this point, she only visited and never returned to reside or work in Jamaica.

[4] Consequent upon the Defendant's recruitment, the parties and their children all obtained green cards. The children, all minors at this time, lived with the Claimant in Jamaica until they completed high school with the exception of a daughter who also studied medicine at the University of the West Indies. Subsequently, they migrated to the USA., except for the fostered child, who still resides at the family home. The Claimant subsequently received his citizenship in 2000.

[5] The parties' marriage later broke down, and the Claimant initiated divorce proceedings in 2021. The Defendant unsuccessfully challenged the Petition for the Dissolution of Marriage on the ground that the parties did not separate until 2021. However, the Court ruled that the parties separated in 1994, and the Decree Absolute was granted on October 10, 2023.

THE CLAIM

[6] By way of Fixed Date Claim Form filed on November 9, 2021, the Claimant sought the following orders:

1. *A Declaration that the Defendant's interest in the following properties has been extinguished by virtue of the operation of the Limitation of Action's Act, namely:*

    a. *The family home known as All that parcel of land part of **FOREST HILLS** in the parish of **SAINT ANDREW** being the Lot numbered EIGHTEEN BLOCK A on the Plan of Forest Hills and being the lands registered at Volume 1112 Folio 257 of the Register Book of Titles.*

    b. *All that parcel of land part of **BYBROOK ESTATE** in the parish of **SAINT CATHERINE** containing by survey One Acre Eight Perches and Six tenths of a perch and being the lands registered at Volume 597 Folio 42 of the Register Book of Titles.*

c. *All that parcel of land part of **GIBRALTAR** in the parish of **SAINT MARY** containing by survey Two Acres One Rood Sixteen Perches and Six-tenths of a Perch and being the lands registered at Volume 1138 Folio 313 of the Register Book of Titles.*

d. *All that parcel of land part of **FOREST HILLS** in the parish of S**AINT ANDREW** being the **Strata Lot numbered EIGHTEEN** on Strata Plan numbered Two Hundred and Thirty-Three and One Hundred and Seventy-seven undivided 1/3496 shares in the common property therein, and being the lands registered at Volume 1168 Folio 308 of the Register Book of Titles.*

e. *All that parcel of land part of land situated at **ORACABESSA** in the parish of **SAINT MARY** containing by survey Five Thousand and Thirteen Square Feet and Five tenths of a Square Foot and being the lands registered at Volume 1105 Folio 55 of the Register Book of Titles.*

2. *A Declaration that on the extinguishment of the Defendant's title and interest in the aforesaid properties, that the Defendant's title and interest has passed to the Claimant.*

3. *Accordingly, a Declaration and Order that the Claimant is the sole legal, equitable and beneficial owner of the properties set out at paragraph 1, herein.*

4. *Further and/or alternatively a Declaration that the equal share rule under section 6 of the Property (Rights of Spouses) Act be varied and displaced in respect of the family home known All that parcel of land part of **FOREST HILLS** in the parish of **SAINT ANDREW** being the Lot numbered EIGHTEEN BLOCK A on the Plan of Forest Hills and being the lands registered at Volume 1112 Folio 257 of the Register Book of*

Titles, as it would be unreasonable and unjust in all circumstances to apply the said rule.

5. *Further and/or alternatively a Declaration that the Defendant holds the property known All that parcel of land part of land situated at **ORACABESSA** in the parish of **SAINT MARY** containing by survey Five Thousand and Thirteen Square Feet and Five tenths of a Square Foot and being the lands registered at Volume 1105 Folio 55 of the Register Book of Titles, on Trust for the Claimant.*

6. *An Injunction to restrain the Defendant by herself, or through her servants and/or agents or anyone acting on behalf from entering on, molesting or interfering with the Claimants use and occupation of the properties set out at paragraph 1 herein, pending the outcome of the matter.*

7. *An Order that the Registrar of the Supreme Court be empowered to execute all documents necessary to effect a transfer to the Claimant, of the Defendant's extinguished interest in the properties set out at paragraph 1 herein, within twenty-one (21) days of the relevant documents being presented to the Registrar for her execution.*

8. *Alternatively, an Order directing the Registrar of Titles pursuant to section 158(2)(a) of the Registration of Titles Act to cancel the certificate of title for the properties set out at paragraph 1 herein, and to issue new titles in the sole name of the Claimant GIDEON AUGUSTUS BULLOCK.*

9. *An Order that time be extended pursuant to Section 13 of the Property (Rights of Spouses) Act to permit the Claimant to make this claim and to bring this action under the Property (Rights of Spouses) Act if the Court finds that cohabitation has ceased more than 12 months prior to the commencement of this claim and/or that the application is necessary.*

10. *Liberty to Apply.*

11. Attorney's Costs.

12. Such further and/or other relief as this Honourable Court deems fit."

[7] The Defendant disputes the claim in the properties and disagrees that she has been dispossessed of her interests therein by the Claimant. In relation to Oracabessa, she claims that it is her property, purchased with her money and the assistance of a loan and that the Claimant is using it with her permission.

THE CLAIMANT'S CASE

[8] The Claimant stated that after the Defendant travelled to the USA to work in 1991, she decided to stay. The marriage broke down thereafter in 1994 when he discovered that she was involved in an extramarital relationship. Having discovered same, he confronted the Defendant and she told him to leave her alone and let her live her life. They have been separated since that time and have not lived under the same roof or had any marital interactions thereafter. Subsequently, in 1996, he started another relationship which produced a child, born May 28, 1997 and which is still ongoing up to the time of this claim.

[9] As it relates to the properties generally, he maintains that they were all bought from the income from his medical practice and that the Defendant made no contribution to their acquisition, repair or improvement. At the time of purchase, he had her name added to the Titles because she was his wife, they had young children and he wanted her to be able to sell the properties and provide for the family if anything happened to him.

[10] Specifically, in relation to the properties he stated as follows;

Bog Walk

He bought this property where he first opened his practice on August 1,1980 for fifty thousand dollars. He paid a fifty percent cash deposit upon taking possession in October 1980 and the balance by way of a loan he took out for six months. He

solely paid this mortgage from his income as a doctor. The Defendant did not contribute to any of this.

[11] He has operated his medical practice and solely maintained the property for the past 41 years since it was purchased. Between 1981 and 1983, he completed major renovations and repairs to convert the building to a doctor's surgery. In 2004, he refurbished the building and did roof repairs and up to present, he paints and repairs to upkeep the building as required. He has been paying, and continues to pay, the property tax for it up to present. He has also had exclusive and undisturbed possession from the Defendant and or her agents for more than 30 years and has occupied it on his own behalf, and for his own use and benefit during this time.

Oracabessa

[12] The Claimant second practice is situated at this property since or about 1976 when he first rented it from the previous owner. In 1981 the property became available for sale at the cost of twenty-five thousand Dollars ($25,000.00). As he was already in the process of purchasing other properties and he did not want to "send up any red flags with the Tax Experts" or lose this property with the patients, he purchased it in the Defendant's maiden name, Inelda Smalling, on July 14, 1981.

[13] After purchasing it in 1981, he demolished the building and erected a new building to use as his surgery. Further, in 2020, he carried out renovations and improvements including repainting, retiling, updating and replacing of bathroom and other fixtures, windows, fans and air conditioning units. In addition, he has also paid the property taxes which are paid up to date. The Defendant did not contribute any money to its purchase, repair, maintenance or improvement.

[14] For over 40 years, he has worked between Bog Walk and this property from Monday to Saturday of each week, and has solely repaired, maintained and improved the property. He has enjoyed exclusive possession and occupation free from interference and disturbance from the Defendant and or her agents for the

past 30 years, He further noted that he has occupied the property on his own behalf I'm for his own use and benefits throughout the period. The Defendant has no real interest in the property and did not visit it again after she stopped working there until May 2021.

Gibraltar.

[15] In or about June 1981, he agreed to buy this property from the owner who was migrating for seventy-five thousand Dollars ($75,000). After he paid the deposit and a further payment, the balance was paid by mortgage secured by him for 2 years. The Defendant did not contribute to its purchase or repairs nor did she assist with the mortgage.

[16] While he was renovating Oracabessa, he initially operated his doctor's surgery from this property. Thereafter, he operated a drapery factory for several years with friends and subsequently rented it and collected all the income, rent and profit and used it for his own benefit without the interference of the Defendant for the past 30 years.

[17] He has solely and at his own expense, repaired and improved the property over the years and paid the property tax. At the time he took possession of it, it was in need of significant repairs because of its age. He replaced the roof, floor and electrical wiring. He also renovated it twice, first to operate the factory and thereafter to convert it for residential use.

Mayfair

[18] This property was purchased in or about December 1981. He solely paid the deposit and the balance of mortgage payments. Upon completing the payments, he received the Title in their joint names. Since its acquisition, this property has been rented except for the occasional times when a tenant leaves. The Claimant stated that though they hold the legal interest jointly, he has been in sole control of the property for the past 30 years or more; and he has never shared the income,

rent, or profit with the Defendant. In addition, he pays for the repairs which are not done by the tenants, and he has been paying the strata maintenance fees and property tax.

Red Hills Road

[19] This property which was acquired in February 1981 was used as the family home. In or about April 1983, he engaged an architect to design the building and prepare the drawings and the plans were approved in May 1983. He sourced a contractor to build the family home. which was completed in 1984. He used his income and a demand loan from Bank of Nova Scotia (hereafter referred to as “BNS”) to offset the construction cost. In 1985 he refinanced a part of the BNS loan by obtaining a mortgage of two hundred and fifteen thousand dollars ($215,000.00) from Jamaica Mutual Life Assurance Society. He paid the mortgage until it was discharged in 1999.

[20] They moved into the property and occupied it as husband and wife from about late 1984 or early 1985 up to the point where the Defendant migrated in 1991. Since then, he has been occupying and maintaining the house for the past 30 years, doing repairs and paying the property tax.

[21] He has had exclusive and undisturbed possession from the Defendant and or her agents since 1994. The Defendant does not possess a key for the property and whenever she visited Jamaica and wanted to stay there, she had to ask his permission to get access to the house. While there, she would occupy one of the children’s bedrooms and was never allowed in the matrimonial bedroom which was kept locked.

[22] When she travelled to Jamaica after 1994, it was usually to attend an event or funeral and on these occasions, she did not always stay at the family home. When she was stayed there, it was with his permission. From 2020, his girlfriend moved into the property permanently with him.

[23] The Defendant herself had little to no personal items at the family home after 1991. When she migrated, she took majority of her belongings with her to the USA. Particularly, in the initial stage of her relocation, he assisted her by having some of these shipped to the USA and stored, at his expense. After their youngest child migrated in 2006, many years passed before the Defendant came back to Jamaica.

[24] He explained that during the marriage, he solely financed the household. During this time, he opened a joint account in their names to which he solely made deposits from his earnings, paid all the bills and maintained the household. The money that was used to buy some of the properties also came from this account, While the Defendant had a bank account in which she put her money, she used it for her own benefit and purposes.

[25] This did not change when the Defendant migrated. Their children, who were all minors were left with him. He continued to pay the bills and household expenses including the helpers who assisted him in caring for the children and the persons who transported the children to and from school, things he was unable to do because of his work schedule and the nature of his job.

[26] At no point thereafter did the Defendant contribute to the bills or the children's expenses. She also did not assist with the running of the household or contribute in any way to the household expenses or the financial well-being of the family.

[27] As such, he was also solely responsible for their children's tuition and other educational expenses from Preparatory School to University, including financing medical school for their daughter and the other children's studies in the USA. He further noted that even whilst the children were in the USA attending college, he still had to be sending them money, paying their tuition, rent and their general expenses. He also bought them cars and paid their car insurance.

[28] As it relates to the properties, the Claimant further stated that after the Defendant's migration to the USA in 1991, she showed no interest in the properties. She has never paid or contributed to the mortgages, property taxes, maintenance and repairs, or the general upkeep and preservation of any of them. He also denied that he had any agreement with the Defendant whereby he would work and maintain the properties in Jamaica and the children, or him using the rent and profits from any of the properties to maintain them and the children.

THE DEFENCE'S CASE

[29] The Defendant states that between the late 1970s and in or about 1989, she and the Claimant worked together in his medical practices in Bog Walk and Oracabessa as a team lending support to each other. During this time, she was solely employed in the medical practice and received no salary. She provided her professional, managerial and administrative services in the Claimant's practice such as grooming and training staff, arranging for the restocking of and payment for supplies, travelling with and providing whatever support she could for him. At the same time, she took the lead in caring for the children, monitoring their education and day to day welfare, execution of household duties and preparation of meals.

[30] During this period the properties were purchased from the income of the practice in their joint names. It was also used to discharge their mortgage obligations, improve and maintain the properties as well as meet their business and personal expenses and the needs of their family. In addition, the cost of renovations and payment of property tax came from their joint enterprise and savings account.

[31] As it relates to the specific properties she stated as follows;

Bog Walk and Oracabessa

Both of them agreed to secure the Bog Walk property with their joint income. It was purchased first and transferred in both their names in 1981. As it relates to

Oracabessa, however, she stated that the Claimant had no interest in the building due to its condition, but she appreciated the value of the clientele the previous Doctor had created which the Claimant inherited. She therefore approached the owner and he agreed to sell it to her. She paid the purchase price from her income, a University Superannuation Fund as well as aid from her father. Consequently, Oracabessa was hers and registered in her name solely.

[32] Additionally, the initial and substantial renovation to the Oracabessa property was funded primarily from a BNS Loan and the assistance of her father. Since its acquisition, Oracabessa has been occupied by the Claimant with her permission up to 2021. The Claimant's continued maintenance of the property was in lieu of a contractual relationship and was an implicit term of his continued permission to occupy the Oracabessa property.

Gibraltar

[33] The Claimant used funds from the joint account and their pooled resources to purchase this property. After the acquisition, their joint resources were also used to renovate it.

Mayfair

[34] The Defendant stated that the deposit and all other payments came from the joint account and revenue generated by her and the Claimant's joint efforts.

Red Hills Road

[35] The Defendant stated that she identified the property in an advertisement and brought it to the attention of the Claimant. They withdrew money from the joint account for the purchase price and half costs. Also, in 1983 they secured life insurance policies from Life of Jamaica for five hundred thousand dollars ($500,000.00) that was utilized as collateral along with their savings account to fund, design, and construct the family home.

[36] In relation to this property, all other payments were made from the joint resources on their behalf. However, she noted that in order to supplement the financial demands created by the purchase of the land and construction of the family home, she started a juice business at home and sold juices to the clientele of the Claimant's practice.

[37] In or about 1989, due to the demands of performing this role as well as working in the Claimant's practice, it was agreed that she would discontinue working there. At this time as well, in an effort to supplement their income which was depleted by construction of the family home, she went to work at the University Hospital. Thereafter, with the Claimant's support, she sought recruitment to work in a hospital in the United States. Her application was successful and subsequently, the whole family was issued with permanent resident immigration papers.

[38] Upon her migrating to the USA in 1991, she and the Claimant reached an agreement as to how their family and the properties would be managed. The Claimant would work and maintain the properties along with their children in lieu of maintaining her while she would live off the salary she earned. He would have primary responsibility for managing the household, purchasing food, paying of utilities and giving lunch money to the children.

[39] They also agreed that he would manage the properties and she expressly gave him permission to use the income collected from them as he saw fit and to apply it to defray outstanding bills and the general financial needs of the family. In addition, she gave him permission to represent her interests in Jamaica while he gave her authority to secure and represent his in the USA. In this respect, she continued to file income tax for the Claimant and manage his civic obligations as a permanent resident and then citizen.

[40] She stated that their partnership as a couple was not interrupted by the distance and while they travelled to and fro, they continued to share marital relations. After her migration, she normally travelled to Jamaica 2-3 times per year and always

stayed at the family home and shared the same bedroom with him. In addition, she always stayed at the family home for notable events such as the graduations of their children and the wedding of their daughter at which time, she and the Claimant entertained family members and guests there.

[41] Similarly, the Claimant stayed with her and their children in the United States whenever he travelled there such as when he was being sworn in as a citizen, for their daughter's marriage and their son's graduation from university. He also did so on numerous occasions including when he was called for jury duty, when he travelled for medical attention and to update his driver's licence.

[42] It was also agreed that the children would remain in Jamaica with the Claimant until they finished secondary school. However, she maintained her involvement with their care and education by keeping close contact with their teachers, coaches, and tutors. She also purchased foods, clothing, school equipment, books and uniforms for them and sent money towards the payment of their school fees and special school and personal events. She also assisted with the educational expenses of her daughter to finish medical school, and to secure qualifications to practice in the USA. Even after the children became adults they continued to pool their resources and made long term decisions together.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[43] In support of the claim that the Claimant has dispossessed the Defendant of her interest in the properties, Counsel Ms. Minto relied on **section 68 of the Registration of Titles Act**, as interpreted by **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, as now well settled law that a registered proprietor can lose his/her title to land, and the right to possession of any such property *as a* result of the operation the **Limitations of Actions Act** ("**the LAA**"); specifically, sections 3, 4, 14, and 30.

[44] She specifically relied on **sections 3 and 30** of the **LAA** which operate to bar a registered owner from bringing an action or asserting his/her rights to property and

possession, 12 years after the right to bring an action first accrued, as his/her title would have become extinguished. She also noted **section 4** as it relates to rental properties and provides that the 12 years' limitation period will begin against the proprietor on the date when he/she last received profits or rent from the land.

[45] She also relied on **section 14** and highlighted that possession of each co-owner is separate from the time they first became joint tenants. Furthermore, that the receipt of entirety of the rent by one owner is not deemed to be the receipt of rent for and on behalf of the other owner. She noted that this section of the **LAA** is a crucial provision to be considered in the instant case as one co-owner who is in physical possession or collecting the entirety of rent for 12 years can obtain the entire title and extinguish the title of the other co-owner.

[46] Counsel also highlighted the applicable principles and standard of proof where a co-owner is seeking to dispossess another of joint property. In this respect she relied on **Lois Hawkins (Administrator of the Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McInnis** [2016] JMSC Civ 14 where Sykes J (as he then was) summarized these and noted that it is rarely that the dispossessor will express his/her intentions to dispossess, *"…it is more often than not a matter of inference from the act of possession"*.

[47] Counsel further relied on **Icyline Francis v Jasmine Francis** [2021] JMSC Civ 134, stating that the only intention which has to be demonstrated is an intention to occupy and use the land as one's own. She noted that similar principles are expressed in **Wills v Wills** [2003] UKPC 84 and applied in **JA Pye (Oxford) Ltd v Graham** [2002] UKHL 30 where it was expressed that the two elements necessary to establish dispossession in cases such as this are; (1) a sufficient degree of custody and control (factual possession) and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess).

[48] Counsel also relied on **Valerie Patricia Freckleton v Winston Earle Freckleton (unreported)**, Supreme Court, Jamaica, Claim No. HCV 01694 OF 2005, judgment delivered July 25, 2006, where it was illustrated that the payment of taxes, execution of repairs, and even changing the locks are sufficient acts of control and possession by one co-owner. Then lastly she noted that the burden of proof rests on the Defendant to prove that her title has not been extinguished as noted by Sykes J in **Lois Hawkins** (supra).

[49] It was submitted that the Defendant abandoned the properties and was consequently dispossessed from 1991 when she migrated She went overseas, formed other relationships, as well as purchased properties in her name only. Counsel also stated that based on the Defendant's actions, the Claimant entered into a relationship in 1996 and had a child born in 1997. Counsel further noted that the parties' marriage ended several decades ago, a fact determined by the Court when it was held in the divorce proceedings that the parties separated in 1994.

[50] Counsel also submitted that any professional partnership that was between the parties also ended when the Defendant migrated as she admitted that she did not return to work with the Claimant thereafter. The claim that he was occupying these properties with her permission or pursuant to a family arrangement was not supported by credible evidence.

[51] In relation to Bog Walk and Oracabessa, Counsel submitted that **sections 3 and 4** of the **LAA** should apply to these two properties. The Claimant is the registered owner of Bog Walk and denies that he occupies Oracabessa with the permission of the Defendant or by any family arrangement. She further stated that the Claimant's evidence is clear as to the reason the Defendant's name was placed on the Oracabessa title.

[52] Additionally, she noted that the Defendant has made just mere assertions and provided no proof that she acquired Oracabessa via a loan from the Bank of Nova Scotia, the University Superannuation Fund, and assistance from her father. At the

same time, she pointed out that the Defendant has not shown that she has not been dispossessed. She has provided any proof that she has paid mortgage, property tax, or made any contribution to the maintenance, renovations, improvements or repairs of these properties.

[53] The Defendant also gave no evidence of occupying, visiting, or entering either of the properties for a period of 30 years after she migrated, neither has she shared the income from the businesses Counsel therefore submitted that the Claimant has established that he had factual possession and intention to exercise such custody and control on his own behalf for his own benefit in respect of both properties which is sufficient as a matter of law to dispossess the co-owner or registered owner in respect of Oracabessa.

[54] As it relates to Mayfair, Ms. Minto submitted that **sections 4 and 14** of the **LAA** are instructive as they together provide that a co-owner can extinguish the title of the other co-owner by collecting and retaining the entirety of the rent. She noted that this property has been used solely for rental from it was purchased and that it is an undisputed fact that the Claimant has been collecting rent and retaining all of it for his own benefit and use since the Defendant migrated.

[55] He also unequivocally disputed that there was an agreement to use the rent for maintaining any marital household which had long ceased to exist after the children grew up and migrated and the Claimant started a new household. Counsel pointed out that the Defendant has given no credible evidence of entering this property since her migration, collecting rent, making any claim to her title in the property or doing anything to assert her interest in it for more than twelve years.

[56] Counsel highlighted that it was under cross-examination that the Defendant first stated that she had effected renovations to this property in 2016, but without any proof as to cost, type of works done, or any photograph of such renovations. Counsel also rebutted this claim by relying on the evidence of the Claimant showing that it was the tenant who effected renovations in 2016.

[57] Where Gibraltar is concerned, it was submitted that the Claimant has rightfully dispossessed the Defendant by having physical possession for over 33 years and collecting the entirety of the rent. Counsel stated that the Defendant has not given any evidence as to any steps she has taken to assert ownership of this property. While the Defendant stated that she erected a fence, she could not say the date or even the year. Also, she noted that while there is a lease agreement signed by both parties in 2002, there is no evidence that the Defendant benefitted from the income.

Counsel also noted that the Claimant was challenged under cross-examination for not paying the property tax on time. However, relying on **Baumgartner-Mark v Elliot** [2017] JMSC Civ 58 counsel submitted that the payment of property tax is an unequivocal act of intention to dispossess and it was of no moment whether or not it was paid on time, once it is paid up in full by the Claimant. She also pointed out that in **Valerie Patricia Freckleton v Winston Earle Freckleton**, the Court held that Mrs. Freckleton's actions of paying the taxes and evicting a tenant from a property which was not the family home was sufficient to establish possession in the circumstances to extinguish the title of the other co-owner.

[58] As it relates to Red Hills, the family home, the Court has found that the parties separated in 1994. She therefore relied on **Fiona Kadesha Alfred v Mario Alfred** [2022] JMSC Civ 50 and **Fay Veronica Wint-Smith v Donald Anthony Smith** [2018] JMSC Civ 62 to establish that the accrual of time for the purposes of the **LAA** commences at the date of separation and pointed out that no argument could therefore be made that actions and improvements to the family home after separation were for the Defendant's benefit based on any marital partnership or agreement.

[59] Counsel stated that in order to determine if the defendant has abandoned or has been dispossessed of her interest, it was necessary to examine the factual evidence. This showed that after the Defendant migrated she created a new life for herself in the USA and was acting as a single woman. Counsel pointed to her

acquisition of property in her name as a single woman from 2002 onward and contrasted this to property jointly acquired in 1992 and 1993 prior to their separation in relation to which she was described in documents as a married woman.

[60] It was noted that she gave no explanation for this and that it did not support the marital partnership and mutual agreement which the Defendant claimed. Counsel described it as a preposterous defence that she was to benefit from the Claimant's earning and preservation of the properties in Jamaica while he would not benefit from her earnings and acquisitions in the USA.

[61] Counsel further noted while this arrangement could have been credible when the Defendant migrated in 1991 and the children were young and living in Jamaica, it was also incredulous that it continued after the last child migrated in 2006, the parties separated and Claimant started a new household.

[62] She also pointed out that the Defendant did not dispute that she made no contributions to mortgage payments, property taxes, maintenance or upkeep of the family home after she left in 1991. It was in cross examination that she claimed to have contributed USD $4,000. 00 to the painting of the house for their daughter Renee's wedding in 2004. Counsel noted that even if this was accepted, there was a twelve-year window in which she did nothing as it would have taken place seventeen years before the filing of the claim.

[63] Counsel also submitted that her periodic visits to Jamaica without more were insufficient without more to defeat the claim of dispossession. She pointed out that the cases of **Wills, Curchar and Freckleton** established that periodic visits were insufficient and an owner must show that some contribution was made to maintain or preserve the property. She also relied on **Dawn Davis v Delrose Grey** [2018] JMSC Civ 145 where the Court held that Mrs. Davis who had migrated had not been dispossessed because she had demonstrated sufficient numbers of acts by herself on her own behalf which negatived dispossession. These included;

consistently paying property taxes, outstanding water bills, her portion of the mortgage and contributed to the general upkeep of the property. She provided proof of the payments and also lodged a caveat against the title to preserve her interest.

Counsel noted since the Claimant denied the supposed arrangement that the Claimant was preserving the property for their joint benefit and that they were in constant communication and discussions about it, more was needed than just her say so. She pointed out that unlike **Alfred** (supra) where the Claimant provided letters and emails that there were discussions and agreement between herself and her husband, the Defendant provided no evidence. Similarly, unlike **Davis** (supra), she did not provide any receipts or documentary evidence in support of her averments.

[64] It was also noted that the Defendant's evidence of the arrangement had contradictions and inconsistencies as it relates to the responsibilities of the parties. as she asserted that she contributed to the household and the children's schooling in Jamaica despite indicating that under their arrangement that would have been the responsibility of the Claimant. Also, it seemed that the Claimant was not aware of this arrangement as he continued to provide for the children after they migrated sending money to them for living and educational expenses which was supposed to be the responsibility of the Defendant.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[65] Ms. Shaw submitted that the issues before the Court are confined to the **LAA** and or the provisions of **PROSA,** Counsel relied on **Suzette Ann Marie v Quentin Chin Chong Hugh Sam** [2018] JMCA Civ. 15 and **Claudette Crooks-Collie v Charlton Collie** [2022] JMCA Civ. 7, and noted that with the provisions of **PROSA** especially section 4, the presumptions of common law and equity are no longer applicable to transactions between spouses in respect to properties between them. As such, no claim in equity can properly be brought for a property in the alternative.

[66] Counsel submitted further that there can be no variation of the equal share rule because none of the **section 7** of **PROSA** factors arose on the existing facts. She further referred to **Collie** (supra) where the principles noted by Brooks JA (as he then was) in the case of **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ. 47 were reviewed by Edwards JA, stating that *"…The Court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists."*

[67] Counsel identified as the salient issues;

1. Whether, or not, the Claimant has demonstrated, by the production of unequivocal evidence that he has dispossessed the Defendant of her interest in all the five properties.

2. Whether the parties had consensus or an agreement regarding the use and occupation of the properties.

3. Whether if the **LAA** operated against the Defendant would the provisions of **PROSA** still be relevant.

4. How should the properties registered in the names of the parties, jointly and or severally, be divided.

[68] As it relates to the family home Red Hills, it was submitted that the Claimant evidence of factual and or exclusive possession, as defined in **Powell v McFarlane** (1977) 38P & CR for 12 years or more was undermined by the depreciated condition of the home prior to his partner and daughter moving in and his admission that he spent days of the week at his girlfriend's apartment. It was also similarly affected by the fact that the property was being shared with their adult adopted son. It was also their submission that the Defendant visited the family home on numerous occasions since 1991 which meant that he did not have uninterrupted occupation.

[69] Counsel further submitted that in relation to Bog Walk and Oracabessa, there was unequivocal evidence that they were purchased with the intention that they would be utilized specifically for the Claimant's medical practice. Counsel stated that the parties' cordial and co-operative interaction with each other to include respectful separation of significant events enjoyed with his partner and her family on one hand from those enjoyed with the Defendant and their immediate family members and friends after their separation is behaviour from which it could be reasonably concluded that the Defendant consented to the use and management of the properties until it was withdrawn in May 2021.

[70] The Court was asked to find that the Defendant did not have the intention to own the entire legal interest in any of the properties to the exclusion of the Defendant. It was noted that from the inception, the Claimant intended the Defendant to enjoy a one-half interest in the disputed properties and that this intention never changed over the years, which is the reason the Claimant failed to take steps earlier to disentitle the Defendant prior to May 2021.

[71] Counsel submitted that the mostly financial based evidence provided by the Claimant in his affidavits as to the absence of contribution to acquisition, failure to show interest, collect rental or discharge expenses and his attack on her credibility as to how Oracabessa was obtained would be relevant only if acquisition was being addressed from principles of trust which is not applicable to this case.

[72] It was noted that the Claimant's evidence of the Defendant's contributions or absence of interest and the endurance of his extra-marital affair was aimed at destroying the existence of collaboration, enterprise and partnership and therefore the existence of consent or permission. However, in looking at this evidence, it is important that the Court look at the documents provided in relation to two periods; between 1981 when the properties were purchased and 1994 when their marriage broke down as well as 1994 to filing of the claim.

[73] Ms. Shaw submitted that upon examination of the Claimant's documentary evidence in relation to these periods, they did not factually support the Claimant's assertions that for 12 years after 1994, he continuously and solely bore the expenses claimed by him. In addition, they did not support his claim for the post separation period as the costs for acquisitions, mortgages and improvements were largely discharged by 1994 and were not thereafter undertaken until 2020.

[74] As it relates to rental proceeds, he has not established that the Defendant was excluded from the use or benefit of any rental generated from any of the two rental properties, Gibraltar and Mayfair since 1994. Likewise, he has not demonstrated that he solely benefited and utilized rent collected to the exclusion of the Defendant.

[75] Counsel also pointed out that the Claimant has not proved that the Defendant's access to any income or rent generated from either property did not remain through their joint accounts. She noted that under cross-examination the Claimant did not deny that one joint account still exists. Furthermore, Counsel pointed out that the Defendant's participation in the execution of a lease agreement for Gibraltar in 2002 at the Claimant's invitation, solidifies the Defendant's assertion that the parties maintained communication, consensus and partnership despite their physical separation. In addition, the invitation vitiates the existence of the requisite intention to dispossess.

[76] Counsel further submitted that the provisions of **PROSA** were applicable in this matter should the Claim under the **LAA** fail. Counsel stated that based on the fact that an application was made by the Claimant to extend time under **PROSA** and it was granted, the Court would still have jurisdiction to make orders pursuant to section 23 of **PROSA** in relation to the jointly owned properties. The Court would thereafter only be required to determine their respective share in relation to Oracabessa, the property registered in the sole name of the Defendant pursuant to Sections 14, 15 and 23 of **PROSA**. She relied on **Raymond Johnson v Angella**

Johnson [2023] JMCA Civ. 10, **Fay Wint-Smith v Donald Smith** [2018] JMSC Civ. 62 and **Fiona Kadesha Alfred v Mario Raphael Alfred** [2022] JMSC Civ 50.

[77] Further, even where the **LAA** has been triggered rendering the Claimant the sole owner, **PROSA** would still be relevant in relation to the properties. The Court should partition or divide them in equal shares using the provisions of **PROSA** as this would be manifestly just and fair in the circumstances. Counsel relied on **Carlene Miller v Ocean Breeze Suites and Inn Limited, Harold Miller and Anor** [2015] JMCA Civ 15 and **Miller and Anor v Miller and Anor** [2017] UKPC 21 in support.

[78] She argued that the Privy Council in **Miller** has ruled that the objective of sections 14 and 15 of PROSA was to attain fairness in the circumstances of each case and an equal division of these properties would attain that objective. Counsel outlined several reasons why an equal division of the properties would be fair in this case. These included that they are assets of the marriage, acquired in 1981 during the marriage and prior to the Defendant migrating to the United States with the intention that each would hold equal shares in the properties.

[79] In addition, they utilized their professional expertise and engaged in joint enterprises and also secured mortgages which were utilized toward the acquisition of the properties all of which were discharged prior to the cessation of the Defendant's engagement in the Claimant's practice. Counsel also raised the age of the parties who are now both in their seventies, the length of the marriage, approximately twenty years at the date of separation and forty-seven years at the time the claim was filed.

[80] Counsel also submitted that as the Forest Hills property was indisputably the family home, pursuant to sections 2 and 6 of **PROSA,** the Defendant has an entitlement to a half share whether or not it is owned solely by the Claimant to be determined at the time of separation. This entitlement is not altered by an unfavourable ruling under the **LAA**.

THE ISSUES

[81] The issues which arise for the Court's determination are as follows:

1. Whether the Defendant's interest in the disputed properties has been extinguished by the operation of the Limitation of Actions Act.

2. Whether the provisions of PROSA are applicable to the present case.

LAW AND ANALYSIS

Whether the Defendant's interest in the disputed properties has been extinguished by the operation of the Limitation of Actions Act.

[82] In this matter the Claimant principally seeks an order or declaration that the Defendant has abandoned and or has been dispossessed of her interest in the properties by the operation of the Limitation of Actions Act. The applicable sections of the Act are **sections 3, 4(a), 14 and 30**. The provisions of these sections are as follows:

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

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

(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while

entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;

…

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

…

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

[83] It is now well established law that Sections 3, 4(a) and 30 of the LAA operate to bar a registered owner from entering or bringing any suit or asserting his/her rights to rent, profits, property or possession 12 years after he discontinued possession or was dispossessed. By Section 30 in particular, that person's title is extinguished. Further, Section 14 makes it clear that the interest of a co-owner is also subject to the provisions of the LAA as the possession of each one co-owner is separate from the time they become co-tenants.

[84] The Claimant case is that he has dispossessed the Defendant and/or she has discontinued in possession of the properties. In **Powell v McFarlane and another**

(1979) 38 P & CR 452, 468, the distinction between these two concepts was explained. Dispossession refers to a situation where one person comes in and puts the other out of possession while discontinuance refers to a situation where the person in possession abandons it and another then takes possession.

[85] In order to fully comprehend the meaning of these concepts, it is necessary to also identify what is meant by possession. In **J A Pye (Oxford) Ltd. V Graham and another** [2002] UKHL 30, at paragraph 40, Lord Brown-Wilkinson identified that possession had two elements;

1. *A sufficient degree of physical custody and control ('factual possession');*

2. *An intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess')*

It was also established in **Pye** (supra) that the intention is that of the person in possession and not of the person claimed to have been dispossessed.

[86] Against this background, in determining the issue of whether the Claimant has dispossessed the Defendant or whether the Defendant has abandoned possession, I must first begin with whether the Claimant has established the requisite physical custody and control of the properties as well as an intention to exercise this custody and control on his own behalf and for his own benefit.

[87] Upon an examination of the evidence, there is no doubt that the Claimant has exercised possession of the properties from the date of their purchase to present for his own use and benefit. In relation to the properties, he is a joint tenant with the Defendant in respect of four, Bog Walk, Gibraltar, Red Hills Road (family home) and Mayfair. Of these, he has been in physical custody and control of two, the family home at which he resides and Bog Walk from which he operates his practice on a daily basis. Mayfair and Gibraltar are rental properties and it is not disputed that he rented both and collected the rent therefrom. Further, in relation to

Gibraltar, he initially temporarily conducted his practice from there and also used it to run a drapery business.

[88] In relation to the fifth property Oracabessa, which is registered in the name of the Defendant, it is also not disputed that he has been in physical custody and control of the property as this is the other property from which he operates his practice daily from prior to its acquisition to present. It is also not in dispute that he solely controls the profits from the operation of his practice here and at Bog Walk.

[89] It is settled law that the fact of possession by an owner is something from which the requisite intention can be inferred. In **Lois Hawkins** (supra) Sykes J, (as he was then) referred to the judgement of Slade J in **Powell** at page 472, where his Lordship stated;

> *"The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to the Possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment,* ***is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance off possession."***

[90] Having established that the Claimant has possession in the fullest and legal sense, the question now becomes whether he has dispossessed the Defendant in respect of all of the properties. In **Fullwood v Curchar** [2015] JMCA Civ 37 at paragraph 53 McDonald Bishop JA (Ag), stated that;

> *"With regard to 'dispossession', in particular, Lord Browne-Wilkinson in* ***JA Pye (Oxford) Ltd. V Graham****, stated that that means nothing more than simply whether the person against whom possession is sought has dispossessed the paper owner by going into ordinary possession for the requisite period without the consent of the owner. By 'ordinary possession' is meant possession as defined, meaning factual possession with the intention to possess for one's own benefit and on one's behalf."*

[91] In **Lois Hawkins** (supra), Sykes J indicated that this area of law was no longer in doubt as a result of the decision in **Fullwood** particularly paragraphs 29 to 45 from which he identified the following propositions:

i. *The fact that a person's name is on a title is not conclusive evidence such that such a person cannot be dispossessed by another including a co-owner;*

ii. *the fact of co-ownership does not prevent one co-owner from dispossessing another;*

iii. *sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing any action to recover property after 12 years if certain circumstances exist;*

iv. *in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenant dies, the normal rule of survivorship would apply and the co-owner takes the whole;*

v. *however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant;*

vi. *the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other co-owner to resist any claim for possession;*

vii. *……*

viii. *…….*

ix. *Dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit;*

x. The relevant intention is that of the dispossessor and not that of the dispossessed;

xi. In determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists, it makes the extinction of title claim stronger but it is not a legal requirement;

xii. The question in every case is whether the acts relied on to prove dispossession are sufficient."

[92] In determining whether the Claimant has dispossessed the Defendant and or the Defendant has abandoned possession, I am guided by the above stated principles and the dicta in **Wills v Wills** that each case must be decided on its own facts. I therefore paid particular attention to the evidence on which the Claimant relied in proof of his claim, particularly the acts on which he has relied from which his intent can be inferred.

[93] Upon an examination of his evidence, the Claimant is relying on the acquisition of the properties from the income of his practice, the payment of mortgages, use of the properties and the income therefrom for his own use and benefit, renovation, repair, improvements and maintenance at his cost, payment of taxes and for security at his cost and the rental of the properties and the collection of the rent for his sole benefit. It is the agreed evidence that the Claimant solely financed the family from the time the parties acquired the properties up to 1991 when the Defendant migrated and thereafter. The question is whether these can be acts from which his intent to dispossess can be inferred and if so, at what point.

[94] Having already stated that there is no doubt that the Claimant was in ordinary possession, the question is when is it that his intent to dispossess the Defendant began? In **Lois Hawkins** (supra**)** at paragraphs 13 and 20**,** Sykes J highlighted the difficulties that arise in relation to determining when the intent to dispossess a co-owner starts in this manner;

> "..The difficulty in co-owner cases, where the dispossessing co-owner has been in possession, is in identifying the point in time when the relevant intention was formed. The difficulty arises because more often than not the intention is an inference from the act of possession"
>
> "…Despite the clarity with which the law has been stated, the problem is in the application because in the cases of extinction of title there is rarely, if ever, a declaration by the dispossessor that "I intend to dispossess whomever is the owner". **It is more often than not a matter of inference from the act of possession and the conduct of the dispossessor after being in possession.**" (emphasis added).

[95] The Claimant in his evidence did not indicate a particular date at which he would have developed the intention to dispossess. He has identified and the Court has found that the parties separated in 1994. I find that there was a change in the relationship and the conduct of the parties as a result of the breakdown of the marriage.

[96] The evidence of the parties indicates that up to 1991 the parties operated as a family unit in their personal and professional lives. It is agreed evidence that they worked together in the practice for more than a decade, travelling from Kingston to Bog Walk and Oracabessa daily. It was also agreed that the Defendant was not paid a salary but had access to a joint bank in which the earnings from the practice were placed. It was further agreed that this account financed the purchase of some of the properties and the expenses of the family and the practice were paid from it as well. This continued after the Defendant ceased working in the practice, up to her migration and subsequently.

[97] I therefore do not accept Counsel's submissions that the relevant time was 1991 when the Defendant's migrated. The evidence establishes that up to that time period they were operating as a family. I do not accept the Claimant's evidence that he was not in support of the Defendant's migration in 1991 to work as a nurse.

It is not disputed he and the children were issued with ‘green cards’ as a result, a process which would have required his knowledge, participation and consent.

[98] In addition, his evidence is that he assisted the Defendant significantly in this move, procuring her a place to live, a car and a phone. He also paid out of pocket to have her personal belongings shipped for her and it was not disputed that when she left, he and the children went with her, stayed a few weeks and then returned. In addition, subsequent to her migration up to 1993, it was established that the parties bought properties in their joint names in the USA. These actions do not suggest opposition but one hundred percent support.

[99] Similarly, despite the Claimant’s assertions to the contrary, I do not accept his evidence that there was no intention for the Defendant to have an interest in the properties save on his death for the benefit of their children. All the properties were acquired and paid for during the period when they functioned as a family unit.

[100] I also do not accept that the Defendant’s only contribution and role in his practice between 1976 and 1987 was in the position of a secretary. It is incomprehensible and unbelievable that the Defendant, a registered nurse, undertook on a daily basis for over ten years, to travel over this great distance to perform the functions of a secretary when the Claimant had persons employed in that capacity at the respective locations. This is especially so since on the Claimant’s evidence he also paid for two helpers to assist with the children and the preparation of meals during this time.

[101] In relation to these facts in issue, I preferred the Defendant’s evidence as more credible than the Claimant’s. I therefore find that she worked in her professional and an administrative capacity in the Claimant’s practice between 1976 to about 1987. I also accepted her evidence that he was supportive of her migrating to work in the United States. I also find that at the time of purchasing the properties, the parties operated as a family and the properties were purchased for the beneficial

interest of both the Claimant and Defendant equally. I also find that up to 1991 when the Defendant migrated, they were so operating.

[102] It is therefore clear to me that the Claimant cannot rely on payment for the costs of acquiring the properties, mortgages, renovations and repairs as well as the payment of taxes prior to 1994 as acts from which his intent to dispossess the Defendant can be inferred. However, I accept the Claimant's evidence that after 1994, the marital relationship ceased and that he started a new life without the Defendant. I accept his evidence that in 1996 he entered into a new relationship which currently subsists. I make this finding because it is not disputed that the mother of his child born in 1997 is his current partner.

[103] In addition, while he continued to assist his children and provide funds for them after 1994, his resources were no longer accessible to or used for the benefit of the Defendant. That being said the Claimant's physical possession and actions in relation to the properties subsequent to 1994 are facts from which his intention to dispossess can be inferred.

[104] Notwithstanding these findings, I am mindful of the dicta in **Lois Hawkins** (supra) and therefore considered whether there was any act by or on behalf of the defendant to negative discontinuance of possession.

Bog Walk and Oracabessa.

[105] The Defendant admitted that after her migration, she never worked with the Claimant again and it is an undisputed fact that the Defendant never visited any of the practices since she stopped working with the Claimant in 1987 until 2021, that being over 30 years later. In addition, the Defendant has not provided any evidence to show that she has asserted her right to occupy or control Oracabessa property as the legal owner, nor has she asserted any form of control or custody as the co-owner of Bog Walk. While Counsel pointed out that the Claimant had not provided any proof that she did not receive any of the profits or no longer had any access to their joint account, the Defendant provided no proof that she benefitted from the

profit generated from these properties either directly or through any joint account since 1994 when they separated.

Mayfair and Gibraltar

[106] Based on the evidence before the Court, it is blatantly clear that the Defendant has taken no interest in the Mayfair property and it has been a rental property to the sole benefit of the Claimant. In her affidavit she mentioned only that it was bought from their joint account. The Defendant exhibited no knowledge of the renting of the property, the identity of the tenant or of the rent payable. Under cross-examination she sought to claim for the first time that she effected repairs to this property in 2016. However, no proof of this was provided to the Court.

[107] In contrast, the Claimant provided evidence by way of receipts that these repairs were actually undertaken by the tenant, subsequent to which by an arrangement between them, the sum was recovered from the rent. It is also the uncontested evidence that the Claimant is the one who has been leasing the property and collecting the rent which is not shared with the Defendant. In these circumstances, I have no difficulty in accepting the evidence of the Claimant and find as a fact that the Defendant has not exercised any rights in relation to this property and did not affect repairs to it in 2016.

[108] In regard to Gibraltar, the last time the Defendant acted on her right over that property was 2002 according to an exhibited lease agreement signed by the parties and a tenant. Except to say that she built a fence and that the property was found to be in a state of disrepair when she visited in 2019, there has been no evidence regarding any act done by the Defendant to assert her rights over this property. It is also noteworthy that the Claimant has given uncontested evidence that she received no benefit from the rental of this property which was rented up to 2020.

[109] In the circumstances, I am inclined to use the date of the lease as the last time the Defendant acted upon her right. It is clear on the Claimant's evidence that he has

been collecting the rent and using it for his own benefits. Since the date of the lease in 2002, there have been 19 years, and all that is required to dispossess 12 years. Likewise, I am guided by **Fullwood v Curchar** (supra) that, any 12 years' period of disinterest or failure to contribute is sufficient to extinguish one's title or interest in property.

[110] These are also properties that the Claimant has undertaken their maintenance, repairs, and improvements since they have been purchased, after 1994, and after 2002 based on the evidence put before this Court. He has also been paying the property taxes and they are paid up to date. As such, **sections 4(a) and 14 of the LAA** are applicable; thereby extinguishing the title of the Defendant.

Red Hills (Family Home)

[111] There is no doubt that this property was the family home. In **Wint-Smith v Smith** [2018] JMSC Civ 62, Pettigrew-Collins J (Ag.) (as she was then) dealt with the question of whether the limitation period could run during the course of a marriage. In addressing the issue, she stated:

> *"This Court has not been directed to any case law which suggests that limitation can run during the subsistence of a marriage where the parties have not been separated and I would be rather surprised if such a decision were to be unearthed. The union of marriage entails two individuals in a legal relationship in which there is expected to be a high level of bonding, the essence of which is that the two have become one. Further, the promulgation of the PROSA brought about a new and different approach towards deciding matters of property rights between spouses. Section 4 makes it clear that the rules have common law and equity are no longer applicable in determining matters of division of property between spouses. Thus, even if factually as a Claimant asserts, she has had sole control over the property for the requisite 12 years without the Defendant's involvement, I do not accept that limitation would have run for the purposes of the Limitation of Actions Act so that she would have acquired her husband's interest in the property by virtue of his title to the property becoming extinct."*

[112] Accordingly, the date of separation of the parties is crucial in determining whether the Claimant has been dispossessed in relation to this property. It is accepted that a marriage can still exist even if one party migrates if that is how they have agreed

to live their lives as noted in **Dalfel Weir v Beverly Tree** [2014] JMCA Civ. 12; where Phillips JA stated of the parties that:

> *"...they had so arranged their lives so that the respondent would habitually and from time to time return to Jamaica and spend weeks there. She may have been ordinarily resident in the United States but she maintained her marriage here in Jamaica by regular visits where she stayed with the appellant…"*

[113] In this case the date of separation of the parties has been judicially considered and determined to be 1994. The Defendant claimed that since 1991, she travelled to Jamaica on numerous occasions and stayed at the family home. During these visits she and the Defendant had marital relations which continued up to 2021. She also sent money to the Claimant including USD$4000.00 in 2004 to paint the house for their daughter's wedding.

[114] The Defendant's evidence that marital relations continued until 2021 has already been rejected by this Court. The exhibiting of the Defendant's passport was not helpful, as it was never disputed that she travelled to Jamaica on numerous occasions since 1991. What the Claimant disputed is that she visited and stayed with him whenever she travelled to Jamaica and no evidence was provided to rebut same.

[115] Further, the Claimant's evidence that she did not have a key to the family home was not challenged nor was his assertion that she had to advise him when she was coming and he would arrange for her to have access. As with other assertions made by the Defendant, no other evidence was provided of the money sent to be used on the house. In any event, more than 17 years would have elapsed since this contribution.

Whether there existed an agreement between the parties regarding the use and occupation of the disputed properties.

[116] In her evidence before the Court, the Defendant's main defence to the Claim is that her interest in the properties was maintained through a professional and

marital partnership with the Claimant and an agreement between them that he would manage and maintain the properties, their children, and the household in Jamaica while she maintained herself from her salary in the USA. This included express permission from her for him to use the income collected from the properties as he saw fit and to apply it to defray outstanding bills and the general financial needs of the family.

[117] It also included permission for him to represent her interests in Jamaica and authority to her to secure and represent his in the USA. In effect, any action taken by the Claimant in relation to the properties would be attributable to her as well. There was also an agreement that the Claimant would use Bog Walk and Oracabessa for the purposes of the practice. She also continued to benefit from a JMMB Fund Managers joint account.

[118] Suffice it to say that no proof was provided by the Defendant of the professional and marital partnership or of this agreement particularly as to when it was made and especially when this “express permission" was given for the use of the funds from the properties. Any marital partnership would have ended in 1994 with their separation and the evidence before the Court of their professional relationship did not support the assertions of the Defendant as she admitted that this ended in 1991.

[119] Although she claimed that she would purchase and send medical supplies after her migration, no proof was provided. Further, as this evidence was given in cross examination for the first time, I have grave difficulty in accepting or relying on it.

[120] On these facts in issue, I did not find the Defendant to be a credible witness. I found her to be evasive and the evidence provided by her in support of the alleged agreement that he would manage her business here while she managed his business in the USA lacked cogency. The fact that the Claimant’s mail was sent to her address in the USA is insufficient. It is quite common for persons in Jamaica

to use the addresses of American residents without there being any business or personal relationship between them.

[121] Similarly, she provided no or very little proof in support of the claims she made. While she claimed that she filed tax returns for the Claimant, only one such filing for 1996 was exhibited in support of this. There were no details provided in relation to the joint bank account that she claimed they continued to share including the account number to conclusively establish its existence. Most importantly, she did not provide any evidence of her accessing it or any other account over the years. In any event, the existence of such an account without more would have been insufficient proof of continued marital relationship or the agreement between the parties alleged by the Defendant.

[122] She also provided no support for her evidence that whenever the Claimant visited the USA for family events, jury duty and to renew his driver's licence he always stayed with her. The Claimant denied this particular claim and provided evidence of visits he made for these family events and where he stayed at these times. In addition, he also provided evidence that while he was called for jury duty twice, he never travelled there as he was excused on both occasions on medical grounds. Although he agreed that the correspondence in relation to his jury duty and other mail was sent to the Defendant's address, the rest of his evidence was not challenged by the Defendant.

[123] As it relates to Bog Walk and Oracabessa, I also do not accept that there was an agreement that the Claimant would use these for his practice. As joint owner of Bog Walk the Claimant needed no permission to continue this practice there.

[124] Where Oracabessa is concerned, I do not accept her evidence that the claimant occupies it with her permission. Apart from there being no evidence of when this permission was given, I have difficulty accepting her evidence as it relates to the circumstances of the acquisition of the property. The Defendant gave conflicting and contradictory evidence as to the source of the funds used to purchase and

renovate it. She stated that she used money from the University Superannuation Fund, a loan from BNS, and got assistance her father. However, she provided no proof of any of these.

[125] I considered that she stated that all her documents were left in a cabinet at the family home. However, I do not accept this explanation. I noted that it was only on the second round of cross-examination that she raised for the first time that she had documents to support any of these claims and that they were among those left in this cabinet. Also, she did not state what these documents were. The only document that she spoke of specifically in this respect was her father's Will.

[126] As to the source of the funds used to purchase and renovate the property, I noted that when she was questioned as how she was able to get a loan from the Bank of Nova Scotia since she was not paid a salary, the Defendant contradicted her affidavit evidence that she worked solely with the Claimant at this time and stated that she also worked part time at two other hospitals. Similarly, she contradicted her own evidence that she had used her father' land title as collateral for the loan as she later denied that she ever said so.

[127] I found her to be evasive and her evidence lacking in credibility so much so that the end of cross examination, I was wholly unconvinced that she had purchased the property from her own resources with the assistance she had claimed. I found the Claimant to be a more credible witness on this issue. I accepted his evidence in relation to the purchase of the property notwithstanding that it amounted to an admission to an attempt to hide an asset from the Tax authorities. However, it provided a plausible explanation as to the reason for the property being registered in the Defendant's maiden name although it was purchased some eight years after their marriage. As a result of this, I do not believe the Defendant purchased and renovated the property from her own resources. As I find that she is not credible, I do not accept that the property was being used by the Claimant with her permission.

[128] I also reject and do not find credible, her claim that she was unaware that the Claimant had moved on with his life with his current partner. While she claimed to not know of her until May 2021, the evidence suggests otherwise. In her evidence she indicated that she was told of the Claimant staying at a Brompton Avenue apartment and that she knew of the child of the relationship. It is very difficult to accept that she was also not told who the Claimant was living with or who was the mother of the child and that she did not make those inquiries herself.

[129] In addition, the Claimant provided photographic evidence of interactions by their son Rajiv with his partner and her daughter both in Jamaica and in the USA. Further, staff members at the family home told her about the developments there in 2021. It is also impossible to believe that through either of these sources, she was not made aware of the identity of the Claimant's partner.

[130] Evidence was placed before the Court that suggested that she accepted and was acting upon the fact that the marriage had ended and she was living a separate life from the Claimant. Having examined the transfer documents and deeds exhibited of the properties purchased by the parties in the USA, it is noted that she is described as 'married' in respect of their jointly owned properties. However, subsequent to 1993 when they last purchased property together, the Defendant purchased properties in respect of which she is described as a "single woman". This clearly does not suggest that she was securing and representing the Claimant's interests in the USA.

[131] It is clear from the evidence that subsequent to the breakdown of the marriage in 1994, the Defendant failed to exercise her rights in relation to all the properties except in the case of Gibraltar. Her first attempt to do so was in 2021 by which time, the Claimant would have dispossessed her. The authority of **Fullwood v Curchar** (supra) dealt with a similar situation where parties migrate and do not assert their rights in relation to jointly owned matrimonial property which allows the co-owner to act on their share thereby extinguishing their title. As McDonald-Bishop JA (Ag) (as she then was) noted at para 102:

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

Likewise, I find that time has run against the Defendant and that the Defendant's title in the respective properties has been extinguished by the operation of the **LAA**

Whether the provisions of PROSA are relevant

[132] As a result of the above stated ruling, I do find that PROSA is relevant. I note firstly that where **PROSA** is applicable, common law and equity cannot be applied as an alternate pursuant **to section 4 of PROSA**. As such, the declaration sought at paragraph 5 of the Fixed Date Claim Form cannot be granted.

[133] It was submitted that the claim under the **LAA**, if successful, can only be applied to the properties owned jointly; as such, this Court would need to rely on section 14 of **PROSA** to determine the Oracabessa property. The provisions of the **LAA** are clear and the case law is well established as it relates to dispossession of the legal owner of property, which in the case of Oracabessa, is the Defendant.

[134] Furthermore, the provisions of **PROSA** would only be applicable had I found that the Claimant did not dispossess the Defendant in all or specific properties. Then sections 6, 13, 14, 15 and 23 of **PROSA** may have been applicable to the circumstances. This stance is clearly evident in all the cases relied on by Counsel in this part of her submissions. In both **Wint-Smith** and **Alfred**, the Court firstly determined the applicability of the **LAA**, and having found that it did not apply, proceeded to deal with the matters under **PROSA**. Having found that the Claimant has dispossessed the Defendant in relation to this property as well, I find that the provisions of **PROSA** are not applicable to it.

CONCLUSION

[135] For the reasons contained herein, I make the following orders: -

1. The Defendant's interest in the following properties has been extinguished by virtue of the operation of the Limitation of Action's Act, namely:

    a. The family home known as All that parcel of land part of **FOREST HILLS** in the parish of **SAINT ANDREW** being the Lot numbered EIGHTEEN BLOCK A on the Plan of Forest Hills and being the lands registered at Volume 1112 Folio 257 of the Register Book of Titles.

    b. All that parcel of land part of **BYBROOK ESTATE** in the parish of **SAINT CATHERINE** containing by survey One Acre Eight Perches and Six tenths of a perch and being the lands registered at Volume 597 Folio 42 of the Register Book of Titles.

    c. All that parcel of land part of **GIBRALTAR** in the parish of **SAINT MARY** containing by survey Two Acres One Rood Sixteen Perches and Six-tenths of a Perch and being the lands registered at Volume 1138 Folio 313 of the Register Book of Titles.

    d. All that parcel of land part of **FOREST HILLS** in the parish of **SAINT ANDREW** being the **Strata Lot numbered EIGHTEEN** on Strata Plan numbered Two Hundred and Thirty-Three and One Hundred and Seventy-seven undivided 1/3496 shares in the common property therein, and being the lands registered at Volume 1168 Folio 308 of the Register Book of Titles.

    e. All that parcel of land part of land situated at **ORACABESSA** in the parish of **SAINT MARY** containing by survey Five Thousand and Thirteen Square Feet and Five tenths of a Square Foot and being the lands registered at Volume 1105 Folio 55 of the Register Book of Titles.

2. The Defendant's title and interest has passed to the Claimant.

3. The Claimant is the sole legal, equitable and beneficial owner of the properties set out at paragraph 1, herein.

4. The Registrar of Titles pursuant to section 158(2)(a) of the Registration of Titles Act is to cancel the certificates of title for the properties set out at paragraph 1 herein, and to issue new titles in the sole name of the Claimant GIDEON AUGUSTUS BULLOCK.

5. Costs to the Claimant to be taxed if not agreed.

6. Liberty to Apply.

7. The Claimant's Attorney at law is to prepare, file and serve the order.