[2019] JMSC Civ. 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 01571

BETWEEN	**CARLTON FRANCIS**	**CLAIMANT**
AND	**BEATRICE EDWARDS**	**1st DEFENDANT**
AND	**SYLVANUS EDWARDS**	**2nd DEFENDANT**
AND	**SHANIEL EDWARDS**	**3rd DEFENDANT**
AND	**LILIETH D. LAMBIE THOMAS & CO.**	**4th DEFENDANT**

IN CHAMBERS

Mr. Anthony Williams instructed by Junior M. Gonzales for the claimant.

Mr. Ludlow Black and Ms. Michelle Thompson instructed by HS Rose & Co. for the 1st, 2nd and 3rd defendants.

Ms. Judith Clarke, Mrs. Lelieth Thomas and Ms. Jamila Thomas instructed by Lelieth Lambie Thomas & Co. for the 4th defendant.

Heard: 10th -12th of December, 2018 and April 24, 2019

Whether property held on trust - Whether joint tenancy severed - Admissibility of statements contained in document purporting to be affidavit which was not properly executed - Whether claimant's interest in property extinguished by virtue of provisions of limitation of actions act - Whether it was necessary to bring claim against Attorney-at-law in possession of duplicate certificate of title

PETTIGREW-COLLINS, J (AG.)

BACKGROUND

[1] The claimant Mr. Carlton Francis filed his Fixed Date Claim Form (FDCF) on the 14th of March 2014 seeking to recover possession of premises at 19 Grants Crescent, Lot 71 Hampton Green, Spanish Town in the parish of St. Catherine registered at Volume 967 Folio 468 of the Register Book of Title from the 1st, 2nd and 3rd defendants. He is also seeking an order that the 4th defendant immediately delivers up the Duplicate Certificate of Title in respect of the said property to his Attorneys-at-Law. Further, he is seeking to recover costs against the defendants. On the other hand, the 1st defendant, Beatrice Edwards (hereinafter referred to as "Beatrice" or Mrs. Edwards) is asking the court to reject the orders sought by the claimant, and alternatively, counterclaims against the claimant for the following orders:

(a) That the legal interest of the Claimant held in the property registered at Volume 967 Folio 458 is held on trust for the deceased Osmond Brown and Cecelia Brown and that the claimant has no beneficial interest therein.

(b) That the 1st Defendant as the duly appointed executrix and beneficiary of the estate of Cecelia Brown is entitled to possession of the property known as Lot 71 Hampton Green St. Catherine and as such is authorized to place persons thereon and in particular the 2nd and 3rd Defendants.

(c) That in the alternative the legal interest noted on Certificate of Title registered at Volume 967 Folio 458 as belonging to the Claimant has been superseded by the deceased acquisition of proprietary rights by virtue of adverse possession of the said interest, the deceased having exercised all rights to the said property without molestation for in excess of 12 years.

(d) That in the further alternative, the actions of the deceased during her lifetime severed the legal joint tenancy between the registered proprietors.

(e) Such further and other relief as this honourable court deem just.

[2] I shall during the course of this judgment on occasions refer to individuals by their first names. No disrespect is intended. This is being done merely as a matter of convenience.

[3] The following matters are not in dispute and will therefore not necessarily be repeated in the presentation of the evidence of individual witnesses.

(i) That the claimant is registered as a joint tenant with Osmond Brown and Cecilia Brown (Mrs. Brown) in respect of the property in dispute.

(ii) That Osmond Brown died on the 4th of September 1999 and Cecilia Brown on the 23rd of December 2011.

(iii) That the 1st, 2nd and 3rd defendants are in possession of the property in dispute and that the 2nd and 3rd defendants are in actual occupation at the instance of the 1st defendant.

(iv) That the 4th defendant is in possession of the Duplicate Certificate of Title for the property in dispute.

CLAIMANT'S CASE

CLAIMANT'S EVIDENCE IN CHIEF

[4] The evidence in chief of the claimant, Carlton Francis is primarily contained in his Affidavit in Support of his Fixed Date Claim Form which was filed on the 14th of March 2013. Certain aspects of his affidavit were struck out. In the said affidavit, he deponed that the property was purchased in 1987 as a result of the input of himself and his uncle, and it was for this reason that the property was transferred in both their names. However, according to him, it was his suggestion that Mrs. Brown's name should be included. The claimant also stated that neither Mr. nor Mrs. Brown had ever challenged that they were all joint owners of the property.

[5] Mr. Francis went on to say that when Mr. Brown was alive he would visit the property at his convenience primarily to see Mr. Brown. However, he said that upon the death of Mr. Brown, he eventually stopped visiting the property because of the acrimonious relationship between himself and Mrs. Brown. He further said that in about 1999 he authorised his sister Olive Smith and her husband, Leonard Smith to visit the property occasionally on his behalf. He asserted that he never abandoned the property, so much so that he assisted with improving the property

by building a washroom and a storeroom, and by providing a water tank. He said that the improvements to the property were done about two to three years after the purchase of the property.

[6] According to the claimant, neither Mr. nor Mrs. Brown could read and as such they relied on him for assistance with their affairs where reading was concerned, and while they could sign their names, they were unable to read any words attached to their signature.

[7] The claimant also stated that he did not know Beatrice. He said he was informed by his sister that Beatrice was in occupation of the property.

CLAIMANT'S CROSS EXAMINATION

[8] Contrary to his evidence in examination in chief in which he said the property was purchased as a result of the input of himself and his uncle, during cross examination, the claimant averred that he purchased the property using his uncle's money. He gave evidence that prior to living in Jamaica, Mr. and Mrs. Brown lived in London, but they returned to Jamaica before the purchase was completed, and they lived with him for three months. He denied that his name was only placed on the title for security reasons and that he had title because of mere convenience in the event of Mr. and Mrs. Brown's death. However, he later gave evidence that Mrs. Brown asked him to remove his name from the title but he refused.

[9] The claimant denied the suggestion that Beatrice was once his domestic helper, and stated that he did not know that there was a period during which Sylvanus and Beatrice lived three doors away from him. However, when it was suggested to him that when Sylvanus was a child he carried him to school, he said he had a pickup and that he offered rides to children.

[10] The claimant averred that he permanently migrated in 2006, but prior to that he travelled back and forth to Jamaica.

[11] He also stated that he assumed that the title to the disputed property was in a lawyer's possession after having a conversation with Mrs. Brown. He said he asked his sister to enquire about the title and she told him that the 4th defendant has it. According to the claimant, if the 4th defendant had the title it would have had to be Mrs. Brown who gave it to them because his uncle had died. He said Mrs. Brown informed him of dealings between herself and the 4th defendant, but he did not become aware that the 4th defendant was the Attorney at Law for Mrs. Brown until the claim was brought.

EVIDENCE IN CHIEF OF CLAIMANT'S WITNESSES

[12] Jeffrey Haye and Olive Smith were witnesses on behalf of the claimant, and their evidence in chief is contained in their individual affidavits filed on March 14, 2013. Their affidavit evidence was that Mrs. Brown was their aunt and that Mr. Haye lived with Mrs. Brown at the property from 1992 until 2011. Olive stated that she would frequently visit the property with her husband, and that Beatrice would occasionally visit as well. Mr. Haye also averred that he met Beatrice whilst living at his aunt's house. According to him, she attended the same church as Mrs. Brown. He said when he met her she was married and lived with her husband and children in Mercury Gardens, Spanish town in the parish of St. Catherine, but she eventually migrated and lived abroad. According to Mr. Haye, upon the death of Mrs. Brown, Beatrice changed all the locks on the house, barring members of the family from entering the property. He further stated that prior to Mrs. Brown's death, there were several accounts totalling approximately $2,000,000.00 held by them jointly, and upon her death he discovered that his name had been replaced by that of Beatrice.

CROSS EXAMINATION OF CLAIMANT'S WITNESSES

[13] None of the Attorneys-at-Law for the defendants cross examined Mrs. Olive Smith. During cross examination Mr. Haye agreed with Mr. Black, Counsel for the 1st 2nd and 3rd defendants, that Mr. and Mrs. Brown were devout Christians and

that Mrs. Brown would read from the Bible. This evidence starkly contradicts the claimant's assertions in his evidence in chief and cross examination, that neither Mr. nor Mrs. Brown could read.

[14] Whereas in his evidence in chief Mr. Haye said he lived at the disputed property until 2011, during cross examination he averred that he lived at the property until 2010. He said during that period he became familiar with Beatrice Edwards, the 1st defendant because she visited the property regularly.

[15] He said he knew Sylvanus Edwards because they attended the same church. He said during the time he spent living at the house, Beatrice and Mrs. Brown had a close relationship.

EVIDENCE IN CHIEF OF 1ST DEFENDANT,

[16] The first defendant's evidence in chief is contained in her affidavit in response to the Fixed Date Claim Form and Affidavit of Carlton Francis filed on December 31, 2013, and her further affidavit filed on the June 23, 2015. It was her evidence that she is the executrix of the estate of Mrs. Brown who made a Will dated December 2010, and that probate was granted to her on March 17, 2014.

[17] It was Mrs. Edwards' evidence that she had a long and close relationship with Mrs. Brown from 1986 until her death. She further deponed that during the time of their friendship, she became aware of Mrs. Brown's business transactions, including her purchasing the property, her banking, her finance and things that she would have done to the property. Additionally, contrary to the claimant's evidence, she stated that Mr. and Mrs. Brown were literate and she often saw them reading the Bible, books and magazines.

[18] According to Beatrice, she had not seen the claimant at any time at the property. She further stated that his failure to visit the property for over 17 years showed that he had no interest therein, and Mrs. Brown acquired his interest by adverse possession. She said that the claimant's sister did not visit the property. She

refuted the claimant's evidence that he was involved in the erection of a store room on the property in question, and said that it was her husband who erected it. She further stated that to her knowledge, over the years Mrs. Brown was fully in charge of taking care of the property taxes, doing repairs on the kitchen, plumbing, tiling and painting the house, and she also arranged for her (Beatrice's) husband to build the washroom.

[19] Mrs. Edwards also gave evidence that in 2010 Mrs. Brown gave instructions to Mrs. Lambie-Thomas to prepare a document to have the claimant's name removed from the title for the property, but the claimant could not be located despite the efforts of both Mrs. Brown and herself to locate him. Mrs. Edwards further stated that after the death of Mr. Brown, Mrs. Brown executed documents for the purpose of transferring the property to herself and Beatrice. She said as Mrs. Brown's executrix, she took possession of the property and instructed her son Sylvanus and his wife Shaniel to occupy and take care of the premises.

[20] She denied the claimant's evidence in chief that he did not know her and that he had never seen her and affirmed what had been suggested to the claimant which is that she resided approximately 3 houses from where he and his former wife resided and at one point she was a helper at his house, and further, that he gave her children rides to school. She stated that it was between 1984 and 2002 that she resided in close proximity to the claimant.

FIRST DEFENDANT'S CROSS EXAMINATION

[21] During cross examination Mrs. Edwards averred that when Mr. and Mrs. Brown decided to purchase the property in dispute, she knew nothing about it. She stated that where she lived during that time was not close to the property in dispute and she was not able to say the exact time Mr. Francis stopped living at Mercury Gardens.

[22] She said she started visiting the Browns in December 1986 because her sister worked for them as a house cleaner, and she would visit the Browns about 3-4 days per week for fellowship, encouragement and mentoring.

[23] She said she has been living overseas since 2002, but she travels to Jamaica very often. When asked about the Jamaican address she gave as her place of abode in her affidavit filed on December 31, 2013, she said that was her true place of abode in Jamaica.

[24] When asked if she was in a position to say whether Mr. Francis paid taxes she said she is aware of one occasion that he paid taxes after Mrs. Brown's death because she went to pay the taxes and was told it was already paid. It was her evidence that she became aware that Mr. Francis' name was on the title through Mrs. Lambie-Thomas when a transfer of title was being done.

[25] Contrary to her evidence in chief in which she said she never saw Olive Smith at the disputed property, during cross examination she said that in 1987 when the Browns just returned from England, Mr. and Mrs. Smith visited the property frequently, however, she is unable to recall anything about the frequency of their visits after 1987. She stated that she was also unable to respond to the suggestion that the reason she did not or could not have seen Mr. and Mrs. Smith between 1992 and 2011 was because she was living overseas.

[26] She said when she started living in Cayman between 2002-2005, whenever she visited Jamaica she stayed at both Hampton Green and Mercury Avenue. She said she stayed at Hampton Green because she was close with Mrs Brown and she assisted her with seeking a helper. She said they developed a mother and daughter relationship and based on that relationship she also stayed at Hampton Green and ministered.

[27] She said in relation to the construction of the washroom that she is not sure whose money was used to finance it, but she was told. She also said she has no knowledge of Mr. Francis contributing towards its construction. She also said she

is aware that there is a water tank on the roof but she is unaware of who purchased it or caused it to be installed. She said the only thing she was knowledgeable about concerning the construction of the washroom or store room is that her husband and Mr. and Mrs. Brown took care of acquiring materials. She also said based on what she saw physically when she went to the property, she never saw Mr. Francis involved in any activity of building.

EVIDENCE IN CHIEF OF 2ND DEFENDANT

[28] The evidence in chief of the 2nd defendant, Sylvanus Edwards (hereinafter referred to as "Sylvanus") and son of the 1st defendant, Beatrice Edwards is set out in his affidavit filed on November 12, 2013.

[29] He gave evidence that he has known Mr. and Mrs. Brown for more than 23 years and that he would visit their house almost every weekend, Christmas holidays and he never saw nor met Mr Francis during any of his visits. He further stated that the only time he can recall seeing Mr Francis was when he was 6 years old and Mr Francis gave him and his brother a ride in his van.

[30] Sylvanus averred that he attended the same church as Mr. and Mrs. Brown and when he visited them at the property he would see them reading a book or a Bible and Mrs Brown imparting the word of God to people who came to visit.

[31] It was his evidence that his mother and Mrs Brown had a very good relationship, and that Mrs Brown referred to her as her daughter sent from God. He said Mrs Brown advised and counselled his mother on personal issues.

[32] According to Sylvanus, when his mother started traveling overseas, she communicated with Mrs Brown constantly. He spoke of his mother's frequent visits to Jamaica in order to take care of Mrs. Brown. He further stated that Mr. Francis never visited Mrs. Brown while she was ill and he never saw Mr. Francis at the premises at any time.

CROSS EXAMINATION OF 2ND DEFENDANT

[33] During cross examination Sylvanus gave evidence that he lived in a community called Mercury Gardens before moving to Hampton Green, the property in dispute, and he moved because his mother had asked him to live there and take care of the place. He said the first time he went to the property was when he was a child about ages 3 – 6.

[34] Sylvanus says he knows neither Olive Smith nor Leonard Smith, but he knows Mr. Haye from primary school in the 90's.

EVIDENCE IN CHIEF OF THE 3RD DEFENDANT

[35] The evidence in chief of the 3rd defendant, Shaniel Edwards is contained in her Affidavit which was filed on the 12th of November 2013. In that affidavit she averred that she was the wife of Sylvanus and the daughter in law of Beatrice. She said she met Sylvanus in about 1999 and met his mother afterwards.

[36] She also that she met Mr. Brown but she had a closer relationship with Mrs. Brown and would occasionally visit her at the property with her husband especially while Mrs. Brown was ill. She said she never saw nor met Mr Francis during any of her visits.

[37] It was Shaniel's evidence that she recalls seeing Mrs. Brown with her Bible but she does not recall seeing her read it.

[38] She said she resides at the property in dispute at the request of her husband and mother in law.

CROSS EXAMINATION OF 3RD DEFENDANT

[39] During cross examination Shaniel gave evidence that she has no knowledge as to how the disputed property was acquired and that she does not know whose name is on the title.

[40] She said she does not know Mr Francis but she knows Jeffrey Hayes as she saw him at the property in question first in about 2006. She further stated that she does not know Olive Smith or Leonard Smith.

EVIDENCE IN CHIEF OF LELIETH DELORES LAMBIE-THOMAS

[41] The evidence in chief of the 4th defendant, Lelieth Delores Lambie-Thomas & Co. is primarily contained in the Affidavits of Lelieth Delores Lambie-Thomas which were filed on May 21, 2013 and June 9, 2015. She stated that she is a partner in the 4th defendant. In the earlier affidavit she averred that Mrs. Brown consulted her in relation to matters concerning the property in dispute.

[42] Her further evidence is that since the death of Mrs. Brown, she has been instructed by Beatrice, executrix for the estate of Mrs. Brown to retain the said duplicate Certificate of Title, and not to deliver same to the Attorneys-at-Law acting for the claimant.

[43] She said she met Mrs. Brown sometime in 2010 and in that same year, Beatrice who had been her client for some years and who was living in the USA at the time, came to visit her. She said during the visit Beatrice told her about a lady who wanted to give her a property, however, the lady's nephew's name was also on the title. The 4th defendant said she told Beatrice that steps needed to be taken to have his name removed and if he refused to sign then a claim could be brought for a declaration that he had no interest in the property, or alternatively, that any interest he had had been adversely possessed.

[44] She stated that after she met with Beatrice in 2010, in the same year, she received a call from Mrs. Brown. She said Mrs. Brown told her that she wanted her to draft a Will. According to the 4th defendant, Mrs. Brown was unable to visit her office and as such arrangements were made and she visited Mrs. Brown at her home.

[45] She said when Mrs. Brown learnt she was a Christian she invited her to have a time of prayer and worship with her. She said Mrs. Brown read from the Bible and prayed for her and her family and told her about her ministry.

[46] Mrs. Lambie- Thomas also said she took instructions from Mrs. Brown to prepare a Will and Mrs. Brown informed her that she wanted to give her property to Beatrice and she advised Mrs. Brown to do a transfer as well as to add Beatrice's name to the title. Thereafter she said Mrs. Brown told her about a nephew in law, Carlton Francis whose name was also on the title. She said Mrs. Brown told her that when she returned from England with her husband, they stayed with Mr. Francis for a short period of time and that herself and her husband bought their own home, the property in dispute. The 4th defendant also stated that Mrs. Brown informed her that they put Mr. Francis' name on the title and he assured them that whenever they were ready for his name to be removed, he would do so. She said Mrs. Brown further informed her that Mr. Francis would visit the property but when he and his wife divorced, he stopped visiting. According to the 4th defendant, Mrs. Brown told her that Mr. Francis stopped visiting before Mr. Brown became ill and while he was ill he did not visit for many years nor did he attend Mr. Brown's funeral.

[47] Mrs. Lambie-Thomas further stated that Mrs. Brown informed her that after Mr Brown died, she made every attempt to contact Mr. Francis to have his name removed from the title. According to Mrs. Lambie-Thomas, Mrs. Brown told her she wanted Beatrice to carry on the ministry she had in her home over the years and that Beatrice had been a daughter to her and had been involved in the ministry she had over the years, and that she was the only person besides herself and her husband who had spent money on their house. Mrs. Lambie-Thomas' evidence was that Mrs Edwards was overseas when she went to Mrs. Brown's house to take the instructions.

[48] Mrs. Lambie Thomas further averred that she advised Mrs. Brown that if Mr. Francis did not want to remove his name she could bring a claim in the court for

a declaration that he had no interest in the property or alternatively a declaration that any interest he had had been adversely possessed by Mrs. Brown and her husband.

[49] She said Mrs. Brown gave her the Duplicate Certificate of Title to the property in dispute and Mr. Brown's death certificate. She said she then advised Mrs. Brown that her husband's death would have to be noted on the title.

[50] Thereafter, Mrs. Lambie-Thomas averred that a will and two transfers were prepared based on Mrs. Brown's instructions. She said one transfer was prepared for Mr. Francis to sign to have the property transferred to Mrs. Brown and Beatrice Edwards and the other was prepared for only Mrs. Brown to sign to transfer all her interest to Beatrice and herself, in the event Mr. Francis could not be located or would not sign.

[51] She said the application to note the death of Mr. Brown was also prepared based on Mrs. Brown's instructions and about two or three weeks after her visit to Mrs. Brown's house, she returned to Mrs. Brown's home with a Justice of the Peace so that Mrs. Brown could to sign all the documents and the justice of the Peace witness her signature.She said she instructed Mrs. Brown to read the documents to ensure that they were what she had instructed her to do and to sign if she was in agreement.

[52] It was Mrs. Lambie-Thomas' further evidence that the claim in relation to Mr. Francis was never brought as Mrs. Brown could not locate him. She further averred that she sent the transfer that was signed by Mrs. Brown and Beatrice to the Land Administration Management Program (LAMP) so that they could be exempted from paying the relevant government duties.

[53] She said sometime in September 2011, she was asked by Mrs. Brown to visit her urgently to take a statement from her, however, when she finally went, the statement was typewritten in the form of an affidavit. She said she went back to

Mrs. Brown's house with the same Justice of the Peace who went before and Mrs. Brown read the document in both their presence and signed it.

[54] Mrs. Lambie-Thomas also deponed about her relationship with Mrs. Brown as well as in relation to certain things she said Mrs. Brown told her about the relationship between Mrs. Brown and Beatrice. Quite apart from the fact that much of what was told to her is hearsay, those matters are not relevant to the outcome of this case.

[55] According to Mrs. Lambie-Thomas affidavit evidence, she attended Mrs Brown's funeral and Mr Francis did not even send a card or flowers, but shortly after the funeral Beatrice, gave her a letter from Attorneys-at-Law Kinghorn & Kinghorn regarding the property.

[56] Mrs. Lambie-Thomas also stated in her affidavit that Mrs. Brown told her that herself and her husband, Mr Brown worked hard to buy their property and that she wants the will of God to be accomplished in her house and she was certain that Beatrice would see to it that that is done.

CROSS EXAMINATION OF MRS. LAMBIE-THOMAS

[57] During cross examination Mrs. Lambie-Thomas gave evidence that her practice includes conveyancing and she has done transfers between joint tenants passing property between themselves. She also affirmed that in relation to transfers between joint tenants, those transfers are done by the joint tenant selling their interest or transferring it by way of gift or by way of severance. She also said that it is customary for both joint tenants to sign as transferors. She clarified that by customary she meant that that is the legal requirement.

[58] She further averred that if one joint tenant wants to sever the joint tenancy by putting another person's name on the title in place of his name, the person severing the joint tenancy may sign without the other joint tenant and even without the knowledge of the other joint tenant.

[59] Counsel for the claimant asked Mrs. Lambie-Thomas whether if the instrument of transfer is taken to the Titles Office in the format she described, it can be properly registered. She said the Registrar of Titles will effect the transfer. Counsel then asked if there will be any reference on the transfer that it is a severance. She replied by stating that the Registrar knows that the procedure is only to transfer the joint tenant's half share to him or herself and the person whose name is being put on the title, and the other party's name remains, unless he has abandoned his interest.

[60] She further asserted that in the present case, the procedure of preparing an instrument of transfer in the name of Cecelia Brown to Beatrice Edwards and Cecelia Brown adopted by her, effected a 'proper' severance.

[61] She also said that her client instructed her to prepare an affidavit, and that Mrs. Brown said before her, God the father, God the son and God the holy spirit that Mrs. Edwards had been a daughter to her over the years and had been involved in the ministry she had over the years, and that Mrs. Edwards had spent money on the improvements of her house and she was the only person besides herself and her husband who had spent money on Mrs. Brown's house.

[62] I will say at this stage that much of what Mrs. Lambie Thomas said in her affidavit in relation to what Mrs. Brown told her is hearsay and is therefore not admissible as to the truth of the contents. The obvious exception of course would be those aspects that would amount to Mrs. Brown making declarations against her interest in the property. No reliance whatsoever is being placed on those aspects of Mrs Lambie Thomas' evidence.

AFFIDAVIT OF CECILIA BROWN

[63] It is the evidence of Mrs. Lambie-Thomas that Mrs. Brown gave an affidavit in November 2011. That document purporting to be the affidavit of Mrs. Brown, was tendered and admitted in evidence as an exhibit. In that document, Mrs. Brown averred that herself and Mr. Brown returned to Jamaica from England in 1986

without a place of their own to stay, and that they stayed at the home of Mr. Francis for three months. She said during their stay at Mr. Francis' home, herself and Mr. Brown purchased the property in dispute. She said that they purchased the property using their own money but they decided to add Mr. Francis' name to the title for security reasons in the event anything should happen to them, and because they did not have any children. She said they moved into the house sometime in 1986.

[64] Mrs. Brown averred that after herself and Mr. Brown purchased the house, Mr. Francis visited frequently but after a while his visits became less frequent until he eventually stopped visiting. She said Mr. Brown became ill until he died in 1999 and throughout that time, Mr. Francis did not call or visit and he did not attend Mr. Brown's funeral.

[65] She said she met Beatrice about 24 years ago sometime in 1986 through their Christian affiliate and Beatrice became more than a daughter to Mr. Brown and herself. Mrs. Brown said since she met Beatrice, Beatrice would travel to the Cayman Islands occasionally and upon her return to Jamaica, she would visit her regularly. She said when Beatrice moved to the USA she (Mrs. Brown) became ill in 2006, and Beatrice left her job and returned to Jamaica and cared for her for two months. Mrs. Brown stated further that Beatrice was the only person who took care of her and she also helped to care for Mr. Brown before and during his illness, and when Mr. Brown died, she helped in making his funeral arrangements.

[66] According to Mrs. Brown, upon Beatrice's return to the USA, Beatrice left someone to care for her. She further stated that Beatrice visited her in Jamaica every three to six months and on one occasion she visited her three times in two months. Mrs. Brown said Beatrice had even refused and resigned jobs that prevented her from visiting with her.

[67] She said she expressed to Mr. Francis that she wanted his name removed from the title and he assured her that she did not have to spend all that money to remove his name because he did not want anything, and that whatever she wanted to do with the property he would see to it that it was done. She said since then she had not seen or heard from him and she later learnt that he was living overseas.

[68] She said she was not influenced by anyone to give the property to Beatrice and that she was in her sound mind and that she is sure this is what her husband would have wanted.

ISSUES

[69] The issues which arise given the factual matrix are as follows:

(i) Whether the claimant held the property on trust for Mr. Osmond Brown and Mrs. Cecilia Brown.

(ii) Whether or not the provisions of the Limitations of Actions Act apply to dispossess the claimant

(iii) Whether or not the joint tenancy between the claimant and Mrs. Cecilia Brown has been severed.

(iv) The admissibility of the affidavit of Mrs. Cecilia Brown.

(v) Whether the claimant is entitled to judgment against the 4th defendant.

[70] As a matter of convenience, issue (iv) will be addressed first. I have read and considered all the submissions made in this matter but I shall only make reference to the submissions as I deem necessary in order to resolve the issues.

ADMISSIBILITY OF THE DOCUMENT PURPORTING TO BE THE AFFIDAVIT OF CECILIA BROWN AND ITS CONTENTS

[71] Notwithstanding the objection by counsel for the claimant, the court ruled that the document was admissible and it was therefore a question of the weight to be

assigned to the document. It is appropriate to start with the provisions of Section 31E of the Evidence Act which makes admissible subject to the provisions of Section 31G, a statement, whether made orally or in a document or otherwise, by a person, whether or not called as a witness in proceedings. By virtue of subsection (1), the statement is admissible as evidence of the facts stated therein, if direct oral evidence given by that person of those facts would have been admissible. Subsection (2) provides that the party who intends to tender such statement in evidence shall give at least 21 days' notice to the other party or parties before the date of hearing. In accordance with subsection (3), the person to whom notice is given may require that the witness be called. However, based on the provisions of subsection (4), the party who intends to tender the statement is not obliged to call the witness if it is proven to the satisfaction of the court that the witness is inter alia, dead. Section 31E(6) permits the court to dispense with the requirement for notification in accordance with Subsection (2).

[72] In this particular instance, it is not in dispute that notice to tender into evidence the affidavit of Mrs. Brown was not given in the way of a formal "Notice of Intention to Tender into Evidence Hearsay Documents" as is often done. It is beyond dispute that Mrs. Brown is deceased. Her death certificate was exhibited in this case. The purported Affidavit of Cecilia Brown was exhibited to the Affidavit of Beatrice Edwards which was filed on the 31st of December 2013. The claimant would therefore have had more than sufficient notice that the defendants intended to rely on this affidavit. The **Evidence Act** does not set out the format of the notice to be given, and I find that having exhibited the document to the affidavit in this instance is sufficient notice. The nature of these proceedings (by way of Fixed Date Claim form supported by affidavit which incidentally was not ideal in all the circumstances) is perhaps what informed the procedure adopted by the defendants in terms of how the notice was given.

[73] Counsel for the claimant also took the position that the document purporting to be an affidavit does not conform to the formalities required for the proper execution of an affidavit as required by Rule 30.4 of the Civil Procedure Rules.

Even if I accept that this assertion is correct and even if I were to find that the document is defective in a material particular in terms of satisfying the requirements for being an affidavit that does not mean that the document should not be admitted in evidence.

[74] It is readily apparent however, that the document has not been tendered on the basis that it is necessarily an affidavit; it is being tendered on the basis that it consists of statements made by Mrs. Brown and that those statements would have been admissible as to the truth of the contents if Mrs. Brown had been alive and was giving that same evidence from the witness box. Counsel for the 1st, 2nd and 3rd defendants in written submissions directed the court's attention to the case of **Fenella Kennedy-Holland and others v Dawn Paris and others** claim no.2008 HCV 01916 to demonstrate the point.

Having determined that the document was admissible as to the truth of its contents, the court must consider what weight is to be assigned to the document. This court must be mindful that there was no opportunity to cross examine Mrs. Brown, and that this fact, of necessity, will affect the weight to be given to the contents of the document.

WHETHER THE CLAIMANT HELD THE PROPERTY ON TRUST FOR THE BROWNS

[75] One of the alternative claims of the 1st, 2nd and 3rd defendants is that the claimant held the property on trust for the Browns, as he had not contributed to the purchase price of the disputed property. The accepted evidence is that the claimant did not contribute to the purchase price because although he said otherwise in his affidavit, he admitted as much in cross examination.

[76] Counsel on behalf of the 1st, 2nd, and 3rd defendants directed the court to the decision in **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] 2 ALL ER 961 which is authority for the proposition that where there are two parties and one party pays the whole purchase price of the property, but the title is put in the second party's name as well as that of the first,

the second party will hold the property on bare trust for the first party. Further, that in the absence of evidence, equity will presume that someone putting money into the purchase of an asset intends to take a proportionate share, up to the entire value if he pays the full price. Further, that when someone transfers the legal title to a property gratuitously to another, it is argued that equity presumes that he intends to create a bare trust in his favour.

[77] Counsel for the claimant cited the case of **Griffiths v Griffiths** (1981) 16 Barbados LR 291 and **Bank of Nova Scotia Trust Co. (Caribbean) Limited v Smith Jordan** (1970) in WIR 522. He observed that the following principles were established in these two cases:

> *"that if property is purchased by one person A, and transferred in the names of A and B, then B holds the property upon trust for A as a resulting trust, but the presumption of a resulting trust is rebuttable based on the intention of the parties."*

[78] Has the claimant provided evidence to rebut the presumption that the property purchased using moneys belonging to Mr. and Mrs. Brown, but transferred to Mr. and Mrs. Brown as well as himself, was being held on a resulting trust by him in favour of Mr. and Mrs. Brown?

[79] The intention of the parties must be ascertained as at the time the purchase was made and the property transferred to the parties. This is so because when real property is acquired, as Sykes J as he then was puts it in the case of **Grace Mc Calla v Eric Mc Calla** et.al, Claim No. 2005 HCV 2335 at paragraph 66 of his judgment:

> *"the equitable interest is not in a state of suspension waiting to descend at some future appointed time. The beneficial interest vests in someone at the time of acquisition."*

[80] The court therefore has to look at the events at the time of the purchase of the property and not as they unfolded in later years when the nature of relationships might have changed and became acrimonious. It is the evidence of Mr. Francis that the relationship between himself and Mrs. Brown became acrimonious and

that after the death of Mr. Brown he did not visit the property. In the document admitted in evidence which purported to be the affidavit of Mrs. Brown, Mrs. Brown stated that Mr. Francis' name was included on the title in the event anything happened to them and because they were childless. From all indications, Mr. Francis was considerably younger than the Browns. Mrs. Brown also stated as Mr. Francis stated in his affidavit, that when she and Mr. Brown first came back to Jamaica, they resided with Mr. Francis for three months. This is indicative of a very close relationship.

[81] Counsel for the claimant submitted that at the material time the disputed property was purchased, it was the clear intention of Mr. and Mrs. Brown to reward Mr. Francis for his loyalty, integrity and honesty in purchasing the said property for them and without swindling them. There is no direct evidence to support this assertion, and it is not so clear cut that this is a reasonable inference that could be drawn.

[82] It is to be noted however, that there is no evidence that Mr. Brown took any steps in his lifetime to remove the claimant's name from the property or that he even expressed a desire to do so, or to divest the claimant of his interest in the property. It was well after the death of Mr. Brown that Mrs. Brown, the other remaining joint tenant sought to assert that the claimant had no beneficial interest in the property. I will say at this stage that I do not accept as was stated in Mrs. Brown's purported affidavit, that the claimant had told her that she did not have to spend money to remove his name from the property and that whatever she wanted to do with the property, he would see to it that it was done. Against the background of the Brown's childlessness and the fact that there is no evidence of Mr. Brown taking steps or expressing any intention to do so, it may be inferred that the Browns intended that the claimant should acquire a legal and beneficial interest in the property in dispute at the time the property was transferred to the three of them. Mrs. Brown's statement in her purported affidavit that Mr. Brown and herself included the claimant's name on the title for security reasons, and in the event that "anything should happen to them", must be viewed with

scepticism. I am of the view that because the relationship between the claimant and Mrs. Brown became strained, Mrs. Brown sought to divest the claimant of his interest in the property. This court therefore disagrees that the claimant's legal interest held in the disputed property was being held on trust for the Browns and refuses to make an order accordingly.

WHETHER JOINT TENANCY WAS SEVERED

[83] I now consider the question of whether or not the joint tenancy between the claimant and Mrs. Brown was severed.

[84] There are four unities that must be present before a joint tenancy can be said to exist. These are the unities of possession, interest, title and time. **Williams v Hensman** (1861) Volume 70 ER 862 (**Andrea Mahfood v Carol Lawrence (Executor of the Estate if Joseph Anthony Lawrence**) and others Claim No. HCV 1378/2006). In the instant case there is no dispute as to whether a joint tenancy existed between Mr. Francis and the deceased, Mrs. Brown. The issue that arises however, is one of severance, and whether the joint tenancy was severed by the actions of Mrs. Brown before her death.

[85] The methods of severance of a joint tenancy were outlined by Sir Page Wood V-C in **Williams v Hensman** (1861) Volume 70 ER 862 at 867 when he said:

> *"A joint tenancy may be severed in three ways:*
>
> 1. *An act of anyone of the persons interested operating upon his own share. Mummery LJ in **Marshall v Marshal**l 1998 EWCA Civ 1467 states that (at page 3) that this category of severance would occur where one joint tenant disposes of his share to a third party by way of sale or security…*
>
> 2. *By mutual agreement.*
>
> 3. *By any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy in common (mutual conduct)."*

[86] The facts of the instant case must therefore fall within at least one of the above mentioned categories in order for the court to find that the joint tenancy has been severed (per **Andrea Mahfood v Carol Lawrence** (Supra).

[87] Ms. Michelle Thompson has submitted on behalf of the 1st, 2nd and 3rd defendants that severance has occurred by virtue of Mrs. Brown executing a transfer of the property in dispute to the 1st defendant, and that by doing so she engaged in a course of dealings as described in the case of **Andrea Mahfood v Carol Lawrence** (Supra).

[88] In **Marshall v Marshall** 1998 EWCA Civ 1467 Mummery LJ at page 3 of the judgment, had this to say regarding course of dealing as a method of severance

> *"the course of dealing may include aborting negotiations between the joint tenants for a rearrangement of their interests, if that course of dealing, even though it does not lead to a contractual agreement, indicates a common intention on the part of the joint tenants that the joint tenancy should be regarded as severed." Without further reference to Mummery LJ's exposition, it is clear that the method by which severance could have occurred is not by virtue of a course of dealing between the parties as the evidence does not disclose any involvement between the claimant and Mrs. Brown in respect of the disputed land."*

[89] The evidence discloses that Mrs. Brown did certain acts and caused certain acts to be done with respect to the property in dispute. That matter will be addressed in more detail later in this judgment when dealing with the question of whether the claimant has been dispossessed, but in summary, two transfers were executed and in one of them, Mrs. Brown sought to transfer her interest in the property to herself and the 1st defendant Mrs. Edwards. The consideration for the transfer was natural love and affection.

[90] Did the act of executing the transfer document result in severance by virtue of alienation? In the case of **Brynhild M. Gamble v Hazel Hankle** (1990) 27 JLR 115 the plaintiff sought to recover possession of an estate in which she had been registered as joint tenant in fee simple with her late husband. She tendered a copy of her husband's death registration as proof of his death. She also tendered in evidence an indenture whereby her deceased husband and joint tenant purported to convey to the defendant the land in question by way of a deed of gift. The plaintiff claimed that by virtue of jus acrescendi when her husband died she became the sole proprietor and the deed of gift was ineffectual because the

document had not complied with the provisions of the Registration of Titles Act. The plaintiff further contended that even if the joint tenancy was severed, Section 63 of the Registration of Titles Act (RTA) operated to make the deed of gift of no effect since it had not been registered. Wolfe J (as he then was) found that the deed of gift evidenced a dealing with an interest in land which manifested a clear intention on the part of the deceased husband to sever the joint tenancy and create a tenancy in common, therefore, the right of jus acrescendi had been extinguished. Further, that Section 63 of the RTA did not operate to make the unregistered instrument void, but it merely postponed the passing of the interest created by the instrument until the instrument was registered. Until the instrument was registered, the plaintiff held the estate in the land upon trust for the defendant to the extent of the other joint tenant's share. Further, that the defendant was entitled to call upon the plaintiff to execute a transfer to the defendant of the share of the deceased husband.

[91] Section 88 of the RTA requires that the transfer be in one of the forms A, B, or C in the 4th schedule. It further states that upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he is able to transfer or dispose of with all rights and privileges passes to the transferee. From a perusal of the document of transfer exhibited, it appears that the document conforms with the relevant form referred to in Section 88. There is no dispute that the instrument of transfer was never registered and therefore could not have operated to pass any interest to Beatrice. However, the execution of the transfer in the circumstances in my view operated to sever the joint tenancy.

[92] Counsel for the claimant conceded this point and observed that although the instrument of transfer was never lodged at the National Land Agency to perfect the severance of the joint tenancy, it nevertheless met the equitable requirement since equity regards as done that which ought to have been done. Assuming that the claimant's title was not extinguished, the effect of severance is that the property would be held by Cecilia Brown and the claimant as tenants in common,

and Mrs. Brown was therefore at liberty to dispose of her share of the property by Will as she purported to do. Probate of the will of Mrs. Brown was duly granted. A copy of the probate was tendered and admitted in evidence in this case.

WHETHER OR NOT THE PROVISIONS OF THE LIMITATIONS OF ACTIONS ACT APPLY TO DISPOSSESS THE CLAIMANT

[93] The appropriate point of commencement in addressing a matter where one co-tenant or a person claiming through a co-tenant claims that he or she has dispossessed another of land are the provisions of sections 3, 4a, 14 and 30 of the Limitations of Actions Act. Those sections state 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 rents 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.*
>
> *30. at the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.*

[94] It is now beyond dispute that the combined effect of sections 3, 4 and 30 is that a proprietor of land, whether registered or unregistered, may lose his right to recover possession of land by virtue of the operation of these sections if an individual who has no title to the land has been in possession for a period of twelve years or more to the exclusion of the title owner. For example, see the case of **Recreational Holdings 1 (Jamaica Limited (Appellant) v Lazarus (Respondent)** (Jamaica-2016 UKPC).

[95] Although at common law the possession of one co-tenant was the possession of the rest, the effect of section 14 of the Limitation of Actions Act is that one joint tenant may dispossess another (**Wills v Wills** Privy Council Appeal 50/2002). In the case of **Lois Hawkins (Administrator of the Estate of William Walter Hawkins, Deceased Intestate) v Linette Hawkins McInnis** [2016] JMSC Civ 14) Sykes J as he then was, gave a very helpful summary of the law in paragraph 12 of his judgment. I will not reproduce the paragraph in its entirety as the essence of parts of his summary has been or will be dealt with elsewhere in this judgment. He said:

> *(i) "the fact that a person's name is on the title is not conclusive evidence that such a person cannot be dispossessed by another including a co-owner;*
>
> *(ii) …*
>
> *(iii) …*
>
> *(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) …*
>
> *(vi) …*
>
> *(vii) When a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished, thereby proving good standing to bring the claim.*

> *(vii) The reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place.*
>
> *(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" (and I would add, to the exclusion of the person said to be dispossessed)*
>
> *(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.*

[96] In paragraph 13 he said "it is fair to say that in this area of law the analysis and interpretation of the evidence is influenced by whether the person claiming to extinguish the title is a co-owner or trespasser. The law seems to require more of a trespasser than a co-owner. 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."

[97] In the normal course of things, the claimant would have become the sole owner of the property upon the death of Cecilia Brown, had the conduct of Cecilia Brown in her lifetime not operated to sever the joint tenancy.

[98] It is the claimant in this case who must satisfy the court as to the validity of his title and as to his *locus standi* to bring the claim. In the case of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37 at paragraph 37 of the judgment, Mcdonald-Bishop JA (Ag) as she then was, had the following to say in regard to the matter of *locus standi*:

> *"even more importantly in the context of this case, the authorities have also established that where the person against whom the claimant has brought the action pleads the statute of limitation, then the claimant must prove that he has a title that is not extinguished by the statute: The Laws of England, The Earl of*

> *Halsbury, Volume 24 paragraph 606 and* ***Dawkins v Penrhyn*** *(Lord) (1878) 4 App Cas 51."*

[99] Later at paragraph 40, her ladyship in addressing the distinction between the operation of the **Statute of Fraud** and the **Statute of Limitation** observed that "in the same case, Lord Penzance at page 64 treated with the distinction this way:

> *"the Statute of Limitation as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of, or it may not be taken advantage of, according to the volition of the Defendant.* ***But the Statute of Limitations applying to real property, as has been pointed out, does more than that; it goes to the root of the Plaintiff's claim****…"* (Emphasis that of Mc Donald Bishop JA)

[100] In the case of **Valerie Patricia Freckleton v Winston Earle Freckleton** Claim No. HCV 01694 of 2005. Sykes J. as he was then observed at paragraph 19 of his judgment that:

> *"The legal position now is that a registered owner of land or indeed any other owner, may now have his title extinguished by his lack of vigilance. If the registered owner wishes to prevent this happening he simply needs to heed the advice of Slade J. in* ***Powell****, that is to say, do some "slight" acts either by himself or on his behalf so that it will negative the burgeoning "right" of the dispossessor. Whether that "slight" act will be sufficient depends on the facts of each case. There can be no catalogue of "slight" acts.*

Later at paragraph 30, he said the following:

> *"…. a joint tenant need not adduce the same type of evidence needed by a trespasser who wishes to extinguish title. Similarly, in* ***Wills,*** *the conduct relied on by the Board to establish possession in one joint tenant sufficient to extinguish the title of the other consisted of: (a) not accounting to the other joint tenants for rent received and (b) the joint tenant in possession did not invite the other to the house when she visited Jamaica".*

[101] We are here dealing with a case of co-ownership. It is not in dispute that Cecilia Brown was always in possession of the property up to the time of her death. Therefore, there was never any question as to whether or not she had a sufficient degree of physical control and custody over the property and the necessary intention to exercise such custody and control for her benefit. The question is whether she intended to exercise such custody and control to the exclusion of the claimant. It is clear that at some point she intended to do so. It is not

particularly easy to determine in the circumstances of this case when she formed such an intention. She was not of course available to give evidence in these proceedings and her purported affidavit was not prepared with a view to it being used for evidential purposes in these proceedings.

[102] In the instant case, one has to look to some unequivocal act or acts on the part of Mrs. Brown that would clearly show that she intended to possess the property to the exclusion of the claimant. That intention was ultimately evidenced by her conduct of devising the property to Mrs. Edwards and attempting to transfer same to her. In her last will and testament she purported to give the disputed property in its entirety to the 4th Defendant Beatrice. The device in relation to the property reads as follows:

> *"I give and devise my premises situated at lot 71 No.19 Grants Crescent, Hampton Green, Spanish Town in the parish of St. Catherine registered at Volume 967 Folio 558 to Beatrice Caroline Edwards in fee simple"*

The words "my premises" in my view suggested that she viewed the property as belonging to her.

[103] With regard to the transfer, a detailed examination will be conducted to determine if it can be said that Mrs. Brown evinced the necessary intention to dispossess the claimant by virtue of her conduct. Ordinarily, the words used in a formal transfer document in the column next to where a transferor is required to give his/her full name, address and occupation are to the following effect:

> *"Do HEREBY TRANSFER to the Transferee(s) named herein for the consideration stated below all my/our estate and interest <u>in the land</u> comprised in above-described Certificate of Title, subject to the encumbrances stated below and the restrictive covenants (if any) endorsed on the said Certificate of Title."*

[104] In this particular instance, Mrs. Brown used the following words: "DO HEREBY TRANSFER to the Transferees named herein for the consideration stated below all my/our estate and interest <u>in the part of the land</u> comprised in above-described Certificate of Title, subject to the encumbrances stated below and the restrictive covenants (if any) endorsed on the said Certificate of Title."

[105] The words used by her in my view could be interpreted to mean that she was transferring her interest in her portion of the land. This seems to be a recognition on her part that she did not hold the entire interest in the property. Such apparent recognition however, must be viewed against the background of the following:

i) The contents of her affidavit in which she declared that the property was only put in the claimant's name as a matter of convenience.

ii) The fact that she made a will purporting to give the entire property to Beatrice.

iii) Mrs. Lambie-Thomas' evidence at paragraph 34 of her affidavit filed on the 9th of June 2015, where she stated that

> "…I also had two transfers prepared. One was done which included Carlton Francis to sign to have the property transferred to Mrs. Brown and Beatrice Edwards and one was done where only Mrs. Brown signed to transfer all her interests to Beatrice Edwards and herself. This was done in case Carlton Francis could not be located or would not sign."

[106] Mrs. Lambie-Thomas must have acted based on instructions given to her by Mrs. Brown. The intention to be inferred from the preparation of the two different transfers is that Mrs. Brown intended that the interest in the entire property was to be transferred to Beatrice. The claimant's name of course still appeared on the Certificate of Title to the property. Mrs. Lambie-Thomas as an Attorney-at-Law and inferentially her client Mrs. Brown would have recognized that in order for the entire interest in the property to be transferred to the 4th Defendant, Beatrice, the claimant would have had to sign the transfer document or court action would have had to be taken either to compel him to sign or in order to obtain a declaration that he had no interest in the property. In fact, in paragraph 27 of her affidavit, Mrs. Lambie-Thomas stated that she advised Mrs. Brown that if the claimant did not want to remove his name (presumably from the title for the property) she could bring a claim in the court for a declaration that the claimant

had no interest in the property or as an alternative, a declaration that any interest he had, had been adversely possessed by her and her husband.

[107] It is therefore not inconceivable that although the transfer made reference to her giving an interest “in the part of the land”, it was not so worded because she was accepting that the claimant retained a beneficial interest in the property.

[108] She made her intention clear at the time of the execution of her purported affidavit. Her reference to the claimant’s absence during the illness and death of her husband, his non participation in carrying out repairs, and his failure to call or visit before and after the hurricane in 2004, are all matters in relation to which she would have felt aggrieved and she stated them to be among the reasons she was excluding him. Coupled with the claimant’s own evidence that the relationship between himself and Cecilia Brown was acrimonious, it is not difficult to conclude that she would have formed the requisite intention to dispossess the claimant.

[109] It cannot be disputed that those acts on the part of Mrs. Brown were sufficient to establish that she intended to dispossess the claimant. I shall return to the matter of whether or not the twelve years had elapsed between when Cecelia Brown formed the necessary intention to dispossess the claimant and the time when the claim was brought. I say the time when the claim was brought because there is no definite evidence that the claimant took any steps prior to the commencement of the claim that would have stopped time from running for the purposes of limitation. There is some evidence that he did on an occasion pay taxes however, there is no clear evidence as to when. In any event, I am rather doubtful that the payment of taxes by itself is an act sufficient to prevent time from running.

[110] The circumstances of this case are somewhat unique in that Mrs. Cecelia Brown and the claimant were joint tenants but the claimant was never an occupant of the disputed property. The property in question was always intended to be and in fact had been the dwelling house of Mr. and Mrs. Brown. The claimant occupied

his own dwelling house at the time of the purchase of the property, and from all indications it was never intended that the claimant would reside at the property or have direct control over same. As indicated before, this is one of those cases where the court cannot look only to some act or acts done by the claimant, or the absence of any act done by him in order to make a determination whether or not he has been dispossessed of the property.

[111] This case is distinguishable from the case of **Wills v Wills** (supra) and **Fullwood v Cuchar** (supra) in that in both those cases, the disposed party had at one time occupied the disputed property and on the factual circumstances of those cases, each had ceased to reside in the property and it was determined ultimately that each had either abandoned possession and/or had been dispossessed after the requisite twelve years had elapsed. In each of those cases, it was demonstrated that twelve years or more had elapsed since dispossessor/s had formed the necessary intention.

[112] I now turn to consider further whether the claimant had performed any acts of possession, or in other words negatived discontinuance of possession within the relevant twelve year period. It was the claimant's evidence that 2-3 years after the purchase of the property, he built an extension on the property. In his affidavit, he said the property in dispute was purchased in 1987. His evidence in relation to his instructions to his sister Mrs. Olive Smith to visit the property on his behalf was that those instructions were first given about the time of Mr. Brown's death which was in 1999. Counsel for the claimant alluded to the evidence of the addition to the property, payment of taxes and the visits by Mrs. Olive Smith as providing proof of acts of possession that someone such as the claimant in this case, being a joint tenant, needed to show in order to establish that he had not been dispossessed.

[113] In **Ocean Estates Ltd. v Pinder** 1969 2 W.L.R although not involving a case of co-ownership, it was held that the act of the claimant of causing an architect on three or four occasions to visit the disputed land which had been earmarked for

development for the purpose of producing a scheme for development, as well as the act of causing a surveyor to survey the land with a view to advising on its development, had the effect of preventing time from running. The court found that the defendant who claimed to have acquired a possessory title had not dispossessed the plaintiffs because the plaintiffs exercised powers of dominion over the land by virtue of those acts.

[114] The fact of having done an extension at the time he said he did clearly cannot assist the claimant. The extension would have been done well outside the limitation period. As it relates to the visits by Mrs. Olive Smith, this court accepts that if made during the relevant twelve years period, such acts would constitute sufficient acts of possession on the part of the claimant to negative dispossession. However, Mrs Smith surprisingly did not indicate in her evidence during what period of time these visits were made. Even more surprisingly, she did not say that these visits were made on the request of or on behalf of the claimant.

[115] Counsel for the claimant, Mr. Williams who took conduct of the case late in the day, apparently having recognized the lacuna in the evidence led on behalf of the claimant, was importunate during cross examination of Mrs. Edwards in seeking to establish through her that Mrs. Olive Smith visited the property between 1987 and 1996. Mrs. Edwards was clear that she first saw Mrs. Smith at the property in 1987 but in response to the suggestion that Mrs. Smith had been visiting the property on several occasions between 1987 and 1996 (when Mrs. Edwards left for the Cayman Islands) Mrs. Edwards' response was that she could not recall. It may be noted that even if it was established that visits were made by Mrs. Smith to the property at the instance of the claimant between 1987 and 1996, that fact would not have assisted the claimant. In relation to Mr. Leonard Smith, Mrs. Smith's husband, Mrs. Edward's evidence was that she saw him there in the earlier part, the same time she saw Mrs. Smith. Mrs. Edwards was also asked if "apart from 1987 when you visited Jamaica whilst being a green card holder, you have seen Olive and Leonard at the property?" her response was yes. Asked

when, she said 2012. Mrs. Edwards was clear that after she saw Mr. Leonard Smith on the property in 1987, she did not see him again until December 2011.

[116] There is nothing in the evidence that would cause this court to attribute Mr. Leonard Smith's presence at the property in December 2011 to a visit being made on behalf of the claimant. As indicated before, Olive Smith did not speak to visiting the property at the instance of the claimant. I therefore reject his evidence that Mrs. Smith's visits, were as a result of his instructions to her and likewise, the visits of her husband. The evidence was that Mrs. Brown died in December 2011. The more reasonable inference to draw is that he was there because of her death. Having very carefully examined the evidence, there is no direct evidence and no evidence from which an inference can be drawn that Mrs. Smith visited the property at the instance of the claimant in the twelve year immediately prior to the claim being brought. Her evidence was vague in that whereas she said that she visited the property frequently with her husband and we will recall that the claimant's evidence was that he first gave her instructions so to do in 1999, there is nothing on the evidence to say that she visited the property in the twelve-year period immediately prior to the commencement of this claim. The claimant's witness Jeffrey Haye who said he lived at the premises from 1992 to 2010 did not give any evidence about seeing Mrs. Olive Smith visit the property.

[117] Counsel for the claimant also asserted that the claimant paid taxes for the disputed property. The only evidence of the payment of taxes by the claimant came from the 1st defendant. Her evidence however was that it was on an occasion after the death of Mrs. Brown when she went to pay taxes, she discovered that it had already been paid. The evidence was not clear as to when precisely this happened. The onus was on the claimant to establish when this was done as such conduct would in my view amount to "a slight act" of the type required of a cotenant to disprove dispossession. The evidence of the claimant himself failed to demonstrate that he had exercised even a "slight act" of possession whether by himself or through an agent within the requisite twelve year period immediately prior to the bringing of the claim. Aspects of the contents

of Cecilia Brown's affidavit confirmed the claimant's evidence that he had not attended Mr. Brown's funeral nor visited the property subsequent to the death of Mr. Brown.

[118] Time would have begun to run in favour of Mrs. Brown and the 1st defendant dispossessing the claimant in respect of his interest in the disputed property as at the point in time when the claimant last exercised an act of possession, whether in person or through an agent, once Mrs. Brown had formed the necessary intention to dispossess him. He who asserts must prove. The claimant has not established that there was any act on his part sufficient to stop time from running prior to the commencement of this claim.

[119] This finding is not however conclusive of the issue of whether or not the claimant's title has been extinguished thereby causing him to lose the right to bring a claim for recovery of possession.

[120] The court still has to consider whether the requisite twelve years had elapsed between when Mrs. Brown first formed the necessary intention to exclude the claimant from the disputed property and the time when the claim was instituted by the claimant. I shall revisit that matter shortly.

[121] It was the submission of counsel for the claimant that "the overwhelming evidence is that Beatrice never occupied the subject property during the alleged twelve years limitation period because at all material times she resided in Cayman" and thereafter, in the United States, and that therefore she has not satisfied the element of "factual possession" to displace the claimant, and neither did she possess the "animus possidendi". He further asserted that further or in the alternative, Beatrice was a mere licensee or occupier of the disputed property during the twelve years limitation period, and that such right to occupy conferred no estate or interest in the disputed property.

[122] To make the above arguments would be to ignore the fact of Mrs. Cecilia Brown's separate possession of the property as distinct from the possession of

the claimant, and the fact that Beatrice claims the property in question through Mrs. Brown. Beatrice's right to occupy the property derived from Mrs. Brown. It was therefore not necessary for Mrs. Beatrice Edwards to have been in "factual possession" or to have had the requisite "animus possidendi" for the requisite twelve years in order to be able to put forward a defence that the claimant is not entitled to possession because he has been dispossessed or he has abandoned possession of the property. What she must show is that the claimant has been dispossessed for the requisite twelve years or more, i.e. that the claimant had done nothing within the requisite twelve years that would show that he was exercising any act of possession over the property and that for that period of twelve years or more Mrs. Brown, or Mrs. Brown, and the first defendant after the death of Mrs. Brown, had the intention to exclude the claimant from the property. This twelve year period could have elapsed prior to the 4th defendant acquiring an interest in the property or during a combination of the period prior to her acquiring an interest and subsequent to her doing so. Mrs. Edwards need not have held an estate or interest in the property in order to be able to put forward a defence that the claimant had abandoned the property or was not entitled to possession of same.

[123] It is my view that as much as it is evident that Mrs. Brown did acts which made it abundantly clear that she intended to dispossess the claimant, there is no definitive evidence put forward from which this court can make a determination on a balance of probabilities that that intention was formed at least twelve years prior to the bringing of the claim. Whereas Mrs. Brown alluded to the claimant not attending Mr. Brown's funeral, not assisting with effecting repairs to the property after the hurricane in 2004 and not visiting at all subsequent to Mr. Brown's death, there is no evidence that at the time of any of those events she did any act that was indicative of an intention to possess the disputed property to the exclusion of the claimant. To demonstrate after the fact that she was aggrieved when those incidents had occurred is not sufficient to demonstrate that she formed the intent at the time of the occurrence of the incidents.

[124] It was critical that the defendants or any of them put forward evidence from which such conclusion could be drawn. As indicated before, we are here dealing with a case of co ownership and circumstances where the claimant had never been in occupation of the property and where it can reasonably be inferred that it was never intended that he would be in occupation, certainly not during the lifetime of the Browns. Therefore, that critical element of the dispossessor demonstrating the necessary intent for the requisite period would have had to be established, and it was not. The defendant's contention that "the legal interest noted on the certificate of title [in respect of the disputed property] as belonging to the claimant has been superseded by the deceased [Mrs. Brown's] acquisition of proprietary rights by virtue of 'adverse possession' of the said interest" therefore fails and the court declines to grant an order to that effect.

THE CASE AGAINST THE 4TH DEFENDANT

[125] Mrs. Lambie-Thomas' evidence that the duplicate Certificate of Title for the disputed property was given to her by Mrs. Cecilia Brown is unchallenged it is also not challenged that an Attorney/client relationship existed between Mrs. Brown and the 4th Defendant. It is difficult for this court to accept the claimant's evidence that he was not aware before the claim was brought that the 4th defendant was the Attorney at law for Mrs. Brown. It is also undisputed that the 1st Defendant is the Executrix of the estate of Cecilia Brown. It is evidence of Mrs. Lambie-Thomas which is accepted, that she was instructed by the Executrix not to deliver the Certificate of Title to the claimant's Attorney-at-Law.

[126] Counsel for the 4th Defendant very helpfully summarized the relevant law which I reproduce below.

1) The Attorney/client relationship is established where an Attorney accepts a client's officer of employment to render legal services.

2) The nature of the Attorney/client relationship is such that it creates a relationship of agent and principal with Attorney having a fiduciary duty towards the client. As a fiduciary, the Attorney has an obligation of loyalty-

Mothew v Bristol & West Building Society [1996] EWCA Civ 533 – and cannot act without the consent of the client.

3) Upon the death of a person, the Executor of an estate is the proper person to act on behalf of the estate – **Commissioner of Stamp Duties v Livingston** Priviy Council No. 51 of 1962, delivered October 7, 1964.

[127] It is abundantly clear that the 4th defendant had a fiduciary duty towards the client. Upon the death of Mrs. Brown, the 4th Defendant would have had to act on the instructions of the Executrix of Mrs. Brown's estate. In circumstances where those instructions were that the duplicate Certificate of Title was not to be handed over to the claimant's Attorney-at-Law, the 4th Defendant was obliged to act accordingly and could therefore not have handed over the title to the claimant's Attorney-at-Law. I accept the further submission of counsel for the defendant that it was not necessary for the claimant to have brought a claim against the 4th Defendant in order to have obtained the relief sought and that any order made against the 1st Defendant for recovery of possession and for delivery of the Certificate of Title could have been enforced against the 1st Defendant. One cannot envisage the 4th Defendant failing to hand over the title to the claimant if the 4th Defendant were to be made aware of any court order directing that the claimant is entitled to possession of the disputed property.

[128] It was therefore unnecessary to join the 4th Defendant in these proceedings, thereby causing the 4th Defendant to incur unnecessary expense and cost.

COSTS

[129] In accordance with Rule 64.6 of the Civil Procedure Rules (CPR), the general rule is that the court should order the unsuccessful party to pay the costs of the successful party. The court may however order that a party who is successful should pay all or part of the cost of an unsuccessful party. The court may even make no order as to costs. In determining who should be liable for costs, the court must have regard for all the circumstances. Those circumstances include; the conduct of the parties both before and during the proceedings, whether a

party has succeeded on particular issues even if that party is unsuccessful in the whole of the claim, whether it was reasonable for a party to pursue a particular allegation or issue, among other considerations. The court is permitted by virtue of Rule 64.6(5) to order among other things that a party pays a proportion of another party's cost.

[130] Having regard to my findings in relation to the 4th Defendant, I agree with the submission of her Attorney-at-Law that even if the Court makes an Order for the duplicate Certificate of Title to be handed over to the Claimant's Attorney-at-Law, the 4th Defendant should not be liable for any costs incurred by the Claimant in these proceedings. In any event, the court is not inclined to make such order having regard to my findings. I however, hesitate to say that the Claimant should be made to pay the 4th Defendant's costs in these proceedings at this point for the reason that I shall invite the parties to make submissions in relation to costs.

[131] Although the claimant has not succeeded in his request for an order for recovery of possession and for the 4th Defendant to be made to hand over the Duplicate Certificate of Title in respect of the disputed property, he has succeeded to the extent that the court must make an order declaring that he is entitled to 50% of the beneficial interest in the disputed property. As it relates to the 1st, 2nd and 3rd Defendants, it cannot be said that they are the unsuccessful parties as the court is obliged to grant one of the four orders sought by the 1st Defendant.

[132] Having regard to my findings, the court makes the following declarations and order:

I) The claimant Mr. Carlton Francis did not hold the disputed property on trust for Mr. And Mrs. Brown.

II) The claimant Mr. Carlton Francis has not been dispossessed of his interest in the disputed property.

III) The actions of Cecilia Brown (deceased) during her lifetime severed the legal joint tenancy in respect of the disputed property between the surviving registered proprietors, that being herself and Mr. Carlton Francis.

IV) The claimant is entitled to 50% of the legal and beneficial interest in the disputed property.

V) It was unnecessary for the claimant to have joined the 4th defendant in these proceedings.

VI) The parties are required to make oral or written submissions on costs.