[**2020**] **JMSC Civ 19**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVSION

CLAIM NO. 2017 HCV 03453

IN THE MATTER of ALL **THAT** parcel of land part of **ONE HUNDRED AND ELEVEN RED HILLS ROAD** formerly part of **MOLYNES** in the parish of **SAINT ANDREW** being lot numbered **TWENTY-ONE** on the plan of One Hundred and Eleven Red Hills Road aforesaid deposited in the Office of Title on the 30th day of September, 1958 of the shape and dimensions and butting as appears by the said plan and being all the land comprised in Certificate of the Title registered in Volume 959 Folio 548 of the Register Book of Titles, known as lot 27 Hillview Terrace, Kingston 19, Saint Andrew.

AND

IN THE MATTER of the Partition Act

BETWEEN	**ELSA MCCRAE**	**CLAIMANT**
AND	**DERRICK LINDO**	**DEFENDANT**

IN CHAMBERS

Patrick Bailey instructed by Patrick Bailey and Co for the Claimant

Samuel Smith for the Defendant

Heard: January 15 and 16, 2020 and March 6, 2020.

Dispossession by co-owner - limitations of actions act -factual possession - what constitutes animus possidendi.

T. HUTCHINSON, J (AG.)

INTRODUCTION

[1] This is a Claim which was brought by way of Fixed Date Claim Form filed on the 31st of October 2017 in which the Claimant Mrs Elsa McCrae seeks the following orders;

1. A declaration that the Claimant is entitled to 50 % of the legal and beneficial interest in all that parcel of land part of One Hundred and Eleven Red Hills Road formerly part of Molynes in the parish of St Andrew being lot numbered 21 on the plan of One Hundred and Eleven Red Hills Road registered at Certificate of Title Volume 959 Folio 548 known as 27 Hillview Terrace, Kingston 19.

2. An order that the joint tenancy be severed and that there be a sale of the property by private treaty pursuant to Section 3 and 4 of the Partitions Act.

3. An order that the Property be valued by a Valuator agreed upon by the Parties herein and that the cost of the valuation be shared equally between the parties.

4. An order that the Claimant's Attorneys-at-Law have carriage of sale.

5. An order that all costs and expenses incidental to the sale including but not limited to payment of Transfer Tax, Stamp Duty, Real Estate Commission and Attorney's Fees for the Attorney with the carriage of sale be taken from the proceeds of sale.

6. An order that the net proceeds of the sale be distributed as 50% to the Claimant and 50% to the Defendant.

7. An order that the Registrar of the Supreme Court be empowered to sign any and all documents to effect any and all orders of this Honourable Court including any document to effect the sale and transfer of the Property if the Defendant is unable or unwilling to do so.

8. Costs.

9. Any other relief this Honourable Court deems just in the circumstances.

CLAIMANT'S CASE

[2] In her affidavit filed October 31st, 2017 the Claimant outlined that in respect of the disputed property she is a registered Joint Tenant of same along with the Defendant. Her evidence in chief also revealed that they divorced in the year 2000 and she re-married in 2004.

[3] In respect of 27 Hillview Terrace she deponed that the purchase price for same was $630,000 and she was the person who paid most of the said sum, she said the balance of $50,000 was paid by way of a mortgage obtained by the defendant and herself from Bemans Ltd.

[4] In respect of the circumstances under which she left the home, the Claimant averred that she had continually been physically assaulted by the Defendant during their marriage and in 1996 they had a violent confrontation before their 15-year-old son following which she left the property with only her personal items. She said she never moved back but the children continued to reside at the house.

[5] On her account, she continued to contribute to the maintenance of the household by sending clothes for the children, money to purchase food for them and tuition for their school fees. She deponed that when the children were younger she would see them either at school or when the Defendant was not present at the property.

She said that in 2002 she resumed visiting the children at the property on an intermittent basis when the Defendant was present, she said they would acknowledge each other but she was still intimidated by him.

[6] According to Mrs McCrae in 2010 the Defendant's common law spouse moved into the house. She said that her visits to the property remained limited but she would still visit her adult daughters who resided there. She stated that she was told by her daughters that the Defendant continued to threaten physical violence towards her and she remained in fear while in his presence at the house. Her affidavit outlines that in March 2015 her grandson was born and she started staying overnight at the house but would ensure that the door was properly closed to prevent the defendant from entering.

[7] She stated that she always asserted her interest in the property as joint registered owner but was too intimidated and frightened by the Defendant's violent nature to be able to effectively use and enjoy her half share in the property. She deponed that she always had the registered title for the property until it was taken in her car which was stolen in 1998. She said in assertion of her rights she recommenced paying property taxes for the disputed property and she has paid taxes for the years 2016 to 2018.

[8] She was cross examined and responded that she had been living with the Defendant in Cooreville Gardens in 1978 where she did Youth Service for a year. She stated that the following year she travelled to Haiti and that was the year she began working as an ICI. In support of this she placed 3 passports into evidence, the first was issued in 1984 and makes reference to the fact that she had previously travelled on another passport which had been issued on the 13th of August 1981. This would have been 2 years after she said she started traveling to Haiti. In respect of those earlier trips no documentary evidence has been placed before the Court.

[9] In respect of the three passports produced, one was issued in 1984, another in 1986 and the third in 1988 all being valid for 10 years. When asked to explain why it was that she had received a new passport every two years which covered an overlapping period the Claimant was unable to provide an explanation and when pressed by Counsel she resorted to saying that she didn't know. In response to questions from the Court in respect of the endorsement in the passports issued in 1986 and 1988 which stated that the bearer was formerly known as Elsa May Archer, a name which was different from her maiden name as well as her married name, her explanation was that she had done a deed poll after her marriage.

[10] The Claimant insisted that she had been a higgler at time of her marriage and in challenging her on this point Counsel handed her the marriage certificate which stated her occupation as an accounting clerk. In response to this challenge she stated that she could have been working as an accounting clerk and buying and selling at the same time.

[11] Mrs McCrae testified that the first two children were born in 1981 and 1984 respectively but she had already been travelling as an ICI around that time. She brought the Court's attention to the endorsements in the first of the 3 passports which showed a number of trips to Panama and the USA between 1984 and 1986. She also gave evidence of going to Canada in 1979, before their marriage, to visit her sister and she said that it was then that she was given money by her sister which she used to start her business. It was noted that there is a Canadian visa stamped in her passport but the endorsement shows that it was issued in July 1985 and valid for 5 weeks.

[12] It was suggested to her that her buying and selling didn't begin until 1994 and she pointed to the endorsements in all 3 passports exhibited as 2a, 2b and 2c as proof that she had been making these trips to the USA and Panama before that period.

[13] In response to questions and suggestions about the Defendant's business, which he contended was the source of the funds used for the purchase of the disputed

property, she stated that although she would go by the business place she didn't know if the Defendant owned more than one truck or if the trucks in the business were all owned by his father.

[14] It was suggested to her that she had been unemployed when the property was bought in 1990 and she denied that this was true. Under further cross examination she reluctantly admitted that she had pursued a course in telephone operating but denied that it had been paid for by the Defendant. She agreed with Counsel's suggestion that she had done the course to make herself more marketable but denied that the purpose of same had been for her to get a job.

[15] Mrs Mccrae testified that when she started buying and selling in the 1980s she was 19 or 20 years old and at the time when the house was purchased she was the one who paid almost all of the purchase price. She also said that the deposit was paid by her. When questioned about this she was able to state the full purchase price but she had challenges in recalling the sum paid as the deposit. She later volunteered that it was $200,000 but accepted Counsel's suggestion that it could have been $94,500. She also accepted that it could be true that this sum was in fact paid by Mr Lindo to the Attorney.

[16] Under further cross examination, she denied the suggestion that she hadn't been aware of the impending purchase of the house until she was told about it by the Defendant. She insisted that she had been looking for a house and had been told about this property by a friend. She insisted that she had paid down $200,000 which she had borrowed from her friend Freda in addition to the loan of $50,000 from Bemans Ltd which she later repaid. In response to Mr Smith's question she stated that the sale was an all cash sale but when asked to explain why she had stated in her affidavit that the sale was financed by cash and a mortgage she responded that she had gotten mixed up.

[17] It was suggested to her that she had stolen $25,000 from the Defendant which she used to purchase a property in Eltham and she denied this. She testified that she

had purchased this property during the marriage paying down $10,000 of her own money but the property itself cost either $89,000 or $90,000. After being shown some documents she agreed the total cost for the Eltham property was in fact $6,500 but immediately denied that this could be so as 'it sounded too cheap'.

[18] Mrs McCrae agreed that she lived at that house after leaving 27 Hillview Terrace but insisted that it was not immediately after. In response to questions about the other house she denied that it was sold in 2015 insisting that this could not be correct as she was still living there in 2017 she was shown a document by Mr Smith and accepted that this was in fact the case.

[19] Mrs McCrae was then asked about a previous claim which she had brought in 2015, after her house in Eltham had been sold by the Credit Union, in which she had sought similar orders. She acknowledged that she had filed this claim and also agreed that it had been abandoned. When asked if she had said in that claim that it was the Defendant who paid the deposit while she paid the legal and transfer fees she stated that she couldn't recall but eventually agreed that she had said this in her affidavit. It was also accepted by her that it was correct that it was the Defendant who had paid the deposit. When asked if it meant she had not been truthful in her previous response she replied probably not. She was asked about the instrument of transfer and she agreed that at the time it had been signed it referred to her as a housewife but she insisted that she had been a business woman as well.

[20] It was suggested to her that the property at 27 Hillview Terrace, had almost been sold for arrears when she failed to service the mortgage taken out to aid in her business, this was strenuously denied and she insisted she had been sending money from abroad to pay the mortgage. She denied that the Defendant had to sell his property in Coorevile Gardens to raise funds to clear these arrears but subsequently accepted that this may have happened, she maintained however that she had paid as well.

[21] It was suggested to her that she had been a drug trafficker and she accepted that this was true but insisted that the Defendant knew this. She agreed that she moved out of the house in 1996 and hasn't lived there since, but insisted that she would visit there, in her words, 'she would go and come.'

[22] In response to questions as to the circumstances under which she left the home she agreed that on the day she was told to leave she went to the Marverly police station and made a report that she had been beaten by her husband who also chased her with a gun. She agreed that when the matter went to Court she had told the Judge that this report wasn't true. She insisted however that it was her husband's lawyer who told her to say this and testified that he told her if she didn't it would cause her husband to lose his firearm.

[23] It was suggested to her that she hadn't been truthful about spending time at the house after her grandson was born and she stated that she spent a few days there with her daughter when her grandson was a baby in about 2015. When asked the about the period of time she stayed there she said it was 3 or 4 nights but later accepted it could have been 2.

[24] She testified that in relation to that visit she had told her daughter to ask Mr Lindo if she could spend the time she then changed her response to state that she had in fact told her daughter to tell Mr Lindo she was coming. When she was asked by Mr. Smith if she had in fact told her daughter to ask for permission for her to come she responded that she had. When asked if she received permission she replied that she went to the house so she must have. When asked if this permission was communicated to her she replied 'I guess so'.

[25] She was asked about the individuals who occupied the house and stated that the defendant and his common law wife occupied same along with their children, she then added, 'you could call it they were in charge of the place.' She agreed that the defendant had 3 children with his common law wife and acknowledged that she could have lived at the house from 2003 and not 2010 but added that she

wasn't sure of the time. It was suggested to her that Mr Lindo has been in sole occupation and possession all this time and she agreed. She also accepted that the house had been maintained solely by him. Mrs McCrae also acknowledged that she had gotten married again in 2004 and set up house with her new husband.

[26] She denied the suggestion that she didn't care about the premises thereafter and replied that she had bedroom furniture there that she wanted to retrieve but she was scared to go to the house because of fears for her safety. These items she stated were a king size bed, barrels and a curio cabinet. She acknowledged that she began to think about retrieving these items and asserting her rights in about 2015 but said it could have been 2014 or even 2013. She insisted that even though it was the Defendant who paid the property tax it was paid on some occasions by her elder daughter.

[27] In her affidavit filed in September 2015, the Claimant stated that after the divorce, the Defendant resided at the property while she had to live elsewhere. She also stated therein that although she lived elsewhere she would still exercise her proprietary rights by seeing to the property's upkeep and maintenance. She deponed that in July 2014 she took up residence in the property in order to quell a dispute between the Defendant and her adult daughter. She also outlined that the balance on the purchase price of $675,000 was paid by a mortgage which had been obtained by her and the Defendant and all the property taxes, repairs and maintenance of the property has been done at her sole expense with no contribution made by the Defendant.

DEFENDANT'S CASE

[28] In putting forward his defence, Mr Lindo swore to an affidavit which was filed on April 26th, 2018. In it he accepted that the Claimant and himself were the registered owners of the disputed property. He deponed that sometime before their marriage they lived at a property owned by him and his sister in Cooreville Gardens until they moved into the family home in 1990. It is his account that he began to look for

alternate housing as the space at Cooreville Gardens was too small for his growing family. He avers that the property was acquired solely by him from his own resources and he received no contribution from the Claimant.

[29] According to Mr Lindo at the time the property was purchased he was working as a haulage contractor while the Claimant was an unemployed housewife who lacked the means to make any contribution towards same. He denied that he and the Claimant obtained a mortgage of $50,000 and he also denied that the Claimant paid most of the money towards the purchase price.

[30] It is his evidence that he was the one who paid the entire purchase price of 630,000 to Silvera and Silvera, the attorneys handling the sale and that he paying down a deposit of $94,500 followed by the balance of $540,000. He said the purchase was funded by way of $200,000 obtained from the sale of a truck, a loan of $200,000 from his friend Freda Williams and the balance from his saving account at NCB. He outlined that the loan of $50,000 was given to him by the lawyers to assist with renovations of the house as he was unable to finance this after the purchase. He said that the Claimant only knew of this loan when she signed the transfer and that is why she is mistaken as to what the sum was for. He avers that he put the Claimant on the title on his Attorneys advice, and it never was his intention to give her half or any other beneficial interest in the property.

[31] He said in 1991 he obtained a mortgage of $200,000 on the property to repay the loan from Freda and in 1992 both he and the Claimant borrowed $450,000 from Eagle Merchant Bank to bankroll the higglering business with the intention that this sum would be repaid by her. He said he discovered that the Claimant had not been servicing the loan and the amount had grown to $700,000 resulting in the property being at risk of being sold. He said at this point a decision was taken that she would go to the USA to work and send money to service the loan but no monies were sent and as a result of this he had to sell the house in Cooreville Gardens to clear the arrears.

[32] He outlined that the Claimant returned to Jamaica shortly after she went to the United States and 2 or 3 months later she left for the airport in Kingston with their youngest daughter where she was held with cocaine by the police. He said she was convicted and fined 1.5 million dollars. In spite of this arrest and conviction Mr Lindo said the Claimant continued to work in the drug trade and was again arrested for cocaine in Holland. He asserted that she was also arrested in Miami but this was denied by her and she has stated that she was offered voluntary deportation and her visa revoked.

[33] He said that their relationship ended as he was uncomfortable because he was not sure if she had drugs in the house. He was also concerned about her association with unsavoury persons. He said the Claimant left the property on his insistence that she leave. He said this was in 1996 and he made this demand after he received a call from someone threatening to kill the Claimant as she was given $75,000 to buy drugs and failed to hand over the drugs or return the money.

[34] He said as far as he is aware the Claimant never returned to the property and if she did, she did so clandestinely. He asserted that he had been in sole possession of the property bearing all the burdens and benefits as after the Claimant left in 1996 she made no contribution. Mr Lindo deponed that in 2003 his girlfriend Tka Young came to live with him at the property and she still resides there currently. He noted that three children have been born to them while living together there.

[35] It was his recollection that in 2015 he was asked by his daughter if her mother could spend a night at the property with the baby and he told her no as his common law wife lived there as well and that could not be allowed.

[36] He was cross examined and it was suggested to him that the Claimant had been travelling as an ICI from in the 80's and he replied that he remembered that he first saw her with a passport about 1992 or 1994. He stated that he didn't remember taking her to the airport at Norman Manley in the 80's. He maintained that she

started travelling about 1992 or 1994 but accepted that he never looked in her passport.

[37] He was shown her passports and he agreed that they show travel in and out of the jurisdiction but maintained that he didn't know of those travels. He denied knowing that she was a frequent flier or benefiting from this. He also denied knowing of her trips abroad and of her returning with goods for sale in the 1980s.

[38] Mr Lindo denied being physically violent towards the Claimant and insisted that she had the title as it was given to her by their son to whom it had been handed for safe keeping.

CLAIMANTS' SUBMISSIONS

[39] It was submitted by Mr Bailey, Counsel for the Claimant, that the main issue to be determined by the Court isn't when the Claimant had the deed poll done to change her name to Archer but whether she was forced to leave the family home due to physical and mental abuse occasioned by the Defendant's violent conduct.

[40] He submitted that the Claimant's possession of the paper title showed that she never relinquished her interest in the property. Counsel contended that the Defendant's assertion that the title was given to her by their son is a recent fabrication as that claim does not appear in his affidavit.

[41] In respect of the cases relied on by the Defendant Mr Bailey submitted that they can be distinguished as those individuals left the disputed property voluntarily.

DEFENDANT'S SUBMISSIONS

[42] It was submitted by Mr. Smith on behalf of the Defendant that the Defendant has gained absolute title to the Hillview property by way of his sole possession of same for in excess of 12 years and any interest that the Claimant might have had by virtue of being registered as joint owner of said property has been extinguished since she was dispossessed in 1996. The Court was also asked to note that the

Claim filed on 31st of October 2017 was brought 21 years after the Claimant had vacated the property. Counsel also submitted that the evidence in the 2017 affidavit in support is contradictory to that which is contained in the 2015 affidavit which had been filed in support of the abandoned claim.

[43] The Issues for consideration have been outlined by Mr Smith as follows;

a. Whether one joint tenant can acquire interest of the other by possession

b. In what circumstances could this be obtained legally

c. Whether Defendant had obtained possession and extinguished interest of Claimant

d. Whether time for filing this action has expired under the Limitation Act and the interest of the Claimant be transferred to the Defendant.

[44] In putting forward his submissions on behalf of the Defendant, Mr Smith referred to and relied on the relevant provisions of The Limitations of Actions Act as well as the principles outlined in ***Wills v Wills [2003] UKPC 84, Paradise Beach Transportation Company v Cyril Price-Robinson [1968] A.C. 1072, J.A.Pye (Oxford) Ltd v Graham 2002 3 All ER 865 and Freckleton v Freckleton 2005HCV01694.***

[45] In examining these cases, Mr Smith submitted that in ***Wills v Wills*** the Court decided that one co-owner of property may acquire title by possession of the interest of the other. It was also pointed out that this principle was echoed and adopted in our Supreme Court decision of ***Freckleton v Freckleton***.

[46] In relation to statute, Mr Smith observed that Section 14 of the *Limitation of Actions Act* makes it clear that possession of one co-owner is not deemed to be possession of all or any co-owner. He submitted that this opened the door for one co-owner through exclusive and sufficient possession of the concurrently owned property for

the requisite period of 12 years to extinguish the interest and estate of the other co-owner who has abandoned or been ousted from the property

[47] Mr Smith also noted that in the ***Paradise*** case, Denman CJ underscored the point that the effect of section 12 of the UK Act, which mirrors Section 14 of the Jamaican Act, makes possession of a co-tenant separate possession from the time they became tenants in common or joint tenants. Therefore, if one joint owner gained exclusive possession by virtue of ouster or discontinuance of possession time would start to run from the date of the ouster or discontinuance.

[48] Counsel acknowledged that the onus is on the person claiming that he has dispossessed the other. It was also observed that if the law is to attribute possession to a person who cannot establish paper title to possess the interest held by a joint owner whose title he claims to have extinguished he must be shown to have factual possession coupled with the requisite intention to possess (animus possidendi) throughout his 12 years of exclusive possession.

[49] Factual possession, Counsel submitted, signifies an appropriate degree of physical custody and control and must be a single and conclusive possession. The existence of an animus possidendi was also noted as being crucial, ie, an intention to exclude the paper owner as well as the world at large. Counsel submitted that an individual seeking to do so must have an intention in their own name and for their own behalf to exclude the world at large as well as the owner with the paper title so far as is reasonably practical and as far as the law will allow.

[50] It was highlighted by Mr Smith that he relied on the 2 requirements for legal possession stated by Wilkinson J in ***Wills v Wills***;

a. Sufficient degree of custody and control; (factual possession)

b. An intention to exercise such custody and control on one's own behalf and for one's own benefit.

[51] The Court was also asked to note that the relevant intention is not that of paper title holder.

[52] In the instant case, Counsel asserted that the Claimant had been excluded for over 21 years and the Defendant has been in sole factual possession with the requisite animus possidendi as such the claim is barred by the passage of time and should fail.

[53] In concluding his submissions, Mr Smith noted that the payment of taxes by the Claimant in 2016 to 2018 is irrelevant as time had already run. Counsel also pointed out that on her own admission the Claimant asked her daughter to get permission from the Defendant for her to come to the house. He submitted that this is not consistent with an exercise of ownership and/or possession by the Claimant but was more of a recognition as to who was in charge.

Issues to be determined

[54] In addressing the claim and orders sought, it is clear that the principal issue to be determined is whether the title of the Claimant, a registered joint tenant of the disputed property had been extinguished by the operation of the Limitation of Actions Act as contended by the Defendant.

[55] To determine the principal issue, the Court must consider –

1. 1. When and under what circumstances did the Claimant leave 27 Hillview Terrace;

2. 2. Was the Claimant dispossessed by the Defendant, that is;

    a) did the Defendant have physical custody and control over the disputed property (factual possession) and;

    b) did the Defendant have an intention to exercise such custody and control over the property for his own benefit (animus possidendi) and use.

THE APPLICABLE LAW

[56] It is settled law that the fact that an individual's name appears on a certificate of title as a registered owner of property is not by itself conclusive that such a person cannot be dispossessed by another including a co-owner.

This statement of law is seen in Section 68 of the Registration of Titles Act which provides;

> *No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of entry thereof in the Register Book, and shall subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power. (emphasis added)*

[57] In the recent decision of ***Winnifred Fullwood v Paulette Curchar [2015] JMCA Civ 37*** McDonald-Bishop JA in dealing with this provision stated as follows at paragraph [30],

> *It is evident from that provision (as well as section 85 of the Registration of Titles Act) that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else. (emphasis added)*

[58] The sections of the Limitations of Actions Act which are relevant to this issue are sections 3, 4, 14 and 30 and these provide 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 any 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.*
>
> *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.*

[59] The effect of sections 3 and 30 of the Limitation of Actions Act is to bar a registered owner from making any entry or bringing an action to recover property after twelve (12) years where their right to do so has been extinguished. Section 14 of the Act makes it clear that the possession of each co-tenant is separate as of the time they first become joint tenants. This means that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant.

In ***Lois Hawkins (Administrator of the Estate of William Walter Hawkins,*** **Deceased, Intestate) v Linette Hawkins McIniss [2016] JMSC Civ 14**, Sykes J (as he then was) examined the legislation and the case law on the area, most notably **Fullwood v Curchar** and stated the relevant propositions as follows;

> *(i) The fact that a person's name is on a title is not conclusive evidence 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 tenancy 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) 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;

(viii) 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;

(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.

[60] In ***Wills v Wills***, which has been cited by Counsel for the Defendant, Mr. Wills and his first wife became the owners of two properties as joint tenants. One property was used partly as their residence and partly let, the other property consisted of units which were rented.

[61] The first wife migrated and resided abroad for many years. Except for one visit in 1976, at which point her husband was now sharing the matrimonial home with his then girlfriend who later became his wife, Mrs Wills did not visit the house again up to the time of her ex-husband's death in 1992. On the passing of Mr Wills she sought to have the tenants pay the rent to her and this resulted in an action being brought by the second wife seeking orders that the first Mrs Wills had been dispossessed.

[62] The trial judge, in dismissing the Applicant's claim, found on the evidence that the first wife had not abandoned her claim to the properties. The Court of Appeal dismissed the appeal on the grounds, inter alia, that Mr. Wills had acknowledged the first wife's title and had not established separate possession. On appeal to the Privy Council, the appeal was allowed.

[63] The Privy Council held that the courts below had proceeded on the incorrect supposition that it was the first wife's state of mind, taken with the husband's actions, which was decisive of the case. The Court ruled that her intentions could not prevail over the plain fact of her total exclusion from the properties especially in circumstances where Mr Wills had been in sole physical custody and control with the requisite intention. On the facts the first Mrs Wills had been dispossessed.

[64] The case of ***Freckleton v Freckleton*** has also been cited and relied on by counsel for the Defendant. In that matter it was the husband's title that was extinguished. In that situation the parties got married in 1965 and acquired two (2) properties together as joint tenants one of which included a house in Beverly Hills. This Beverly Hills house was purchased with the assistance of a mortgage in 1979. The marriage broke down shortly thereafter

[65] Mrs. Freckleton remained in possession and continued to pay the mortgage which she completed paying in 1994. Mr. Freckleton assisted with the mortgage for one (1) year after his departure, but made no further payments after 1982. He fathered a child in the same year and the parties divorced shortly after. Mr. Freckleton migrated in 1984 and did not visit the Beverly Hills home thereafter neither did he contact Mrs. Freckleton. He paid no taxes, neither did he make any contributions or show any interest when the property was damaged by hurricane Gilbert in 1988. The Court found that in those circumstances Mrs. Freckleton's possession became exclusive in 1984 and accordingly Mr. Freckleton's title was extinguished twelve (12) years later in 1996.

[66] Mr Smith also referred to and relied on the decision of J***A Pye (Oxford) Ltd etal v Graham etal etal [2002] 3 All ER 865*** in which the principle was outlined that legal possession required (i) a sufficient degree of physical custody and control (factual possession), and (ii) 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 noted in that decision that the necessary intention was one to possess, not to own the property, and an intention to exclude the paper owner only so far as was reasonably possible.

[67] The final decision which has been cited and relied on is ***Paradise Beach & Transportation Company Ltd v Cyril-Price-Robinson etal*** where in treating with the issue of the dispossession of a co-owner Lord Upton MR stated thus;

> *The "separate possessions" (to adopt the phrase of Denman C.J.) obviously only start when the occupation is "for his or their own benefit." That is the crucial question as Lord Greene M.R. pointed out in in re Landi. That is primarily a question of fact though the law may sometimes imply that one co-tenant is in possession for another co-tenant, e.g., a father for his infant but not adult son.*

ANALYSIS AND DISCUSSION

When and under what circumstances did the Claimant leave the residence

[68] A review of the evidence provided by the Claimant and by the Defendant reveals that between the parties there is great disagreement as to how the property in question was acquired and which individual made the greater financial contribution towards its acquisition. What is not in dispute however is that the property was registered in the names of the parties as joint tenants and they are both agreed that it was the principal place of residence from 1990 when it was first acquired until 1996 when the Claimant moved from the residence.

[69] In respect of this area of disagreement I note that this is not an application under the Property Rights and Spouses Act in which the Court would have to give consideration to whether or not this was the family home, the presumption of an entitlement to equal shares and the question of contribution of the respective parties to the acquisition and maintenance of the home. What the Claimant is seeking instead are declarations in equity that by virtue of her joint ownership of the disputed property as well as other factors on which she relies, the Court should grant her a fifty percent interest in the house located at 27 Hillview Terrace.

[70] It is not in dispute that the parties separated in 1996 when Mrs McCrae moved out of the dwelling house, the point on which the parties disagree is the exact circumstances under which the Claimant left. It is Mr. Bailey's contention on behalf of the Claimant that this is an issue of utmost importance as it was violence that drove the Claimant away from the residence and this would have been the main factor in her staying away from same. He has argued that it was in those circumstances that the Defendant was able to exercise the acts of sole physical custody and control on which he now relies.

[71] In examining the merit of this submission I note that it was the evidence of the Claimant that she had been the victim of unrelenting abuse meted out to her by the Defendant and on an unknown day in 1996 he attacked her before their son

and this resulted in her leaving the matrimonial home. She outlined that even after she left the home she was informed by her daughter that the Defendant would make threats of physical violence against her.

[72] Mrs McCrae has said that it was fear that caused her to leave the property and it was fear for her safety that kept her from exercising her proprietary rights. She insisted that she had endured years of beatings by the Defendant and that he had a firearm which he used to chase and threaten her but she also accepted that she later withdrew this report.

[73] A review of Mrs McCrae's 2015 affidavit reveals that nowhere in that document does she speak of being assaulted by the Defendant or even being in fear of him. In fact, at paragraph 6 she stated that in July 2014 she took up residence in the house in order to quell a dispute between her daughter and the Defendant. Given the importance of this allegation of violence to her cause of action, it is most unusual that the Claimant did not see the need to have it included in her later affidavit.

[74] Additionally, if the Court were to accept that she was speaking the truth when she said that she moved into the house in order to settle this dispute with no apparent concerns for her own safety, it begs the question whether she was also speaking the truth when she stated in her 2017 affidavit and later in her evidence in Court that she was afraid of the Defendant as he had been physically violent to her.

[75] This concern as to the veracity of her account is exacerbated when one carefully examines the evidence contained in her 2017 affidavit and her evidence in Court. According to her affidavit evidence the Claimant began visiting the premises in 2002 to see the children. On those occasions she would see the Defendant and they would acknowledge each other. What is noteworthy is that in spite of the Defendant's alleged propensity for violence and numerous threats towards her nothing happened and she was not barred from making these visits.

[76] Under cross examination she stated she that although she moved from the house in 1996 she could still be found there, as she would ‘go and come’. This approach was certainly not in keeping with someone who was seeking to avoid the accused because of fears he would harm her.

[77] The contradictions in her account worsened as in response to a suggestion that she had moved from the house and had no further interest in same she insisted that she still maintained an interest in the property as she still had items there that she wished to retrieve. She was asked why it was that she never collected these items given her ‘visits’ to the property and she replied that she never collected them as she didn’t go to the house because of fears for her safety.

[78] With these conflicting positions outlined in her affidavits as well as her viva voce evidence, the Court was left with a challenge in accepting the Claimant’s account as to the circumstances under which she left the home. This situation was not improved by her admission that she had given a statement in which she had acknowledged that her report of being chased by the defendant who was armed with a gun was not true. This admission added to the Court’s impression of her as someone who was not averse to giving one account and then providing another if it seemed better suited to the circumstances.

[79] Mr Lindo on the other hand has strenuously denied that he was ever physically abusive to the Claimant, a position which he maintained while under robust cross examination. He acknowledged that he ‘ousted’ the Claimant from the property but said it was in circumstances where her continued presence in the home posed a threat to the family because of her drug dealing associations and the threats that were being made against her at that point in time. He acknowledged that she had made a report of violence against him but he said that this was made on the very day he insisted that she pack her belongings and move out of the premises. He has asked the Court to accept that this report was clearly motivated by malice as it was later withdrawn by the Claimant at the police station and also at Court.

[80] In contrast to the evidence of the Claimant, I found that the Defendant's account remained consistent even under robust cross examination. As I examined his demeanour his concern for his family which he said was the reason why he took that decision was evident and his robust denial of ever inflicting physical violence on the Claimant struck me as genuine outrage at the suggestion. I did not believe the Claimant's account that these episodes of violence had occurred and I did not accept her account that this was what drove her away and kept her from exercising her proprietary rights in respect of the property.

Was the Claimant dispossessed by the Defendant

[81] The second issue that must now be determined by the Court is whether the orders sought by Mrs. McCrae can be granted on the basis that she has not been dispossessed by the Defendant in the intervening years. It is accepted that the combined effect of Sections 3, 14 and 30 of the Limitations of Actions Act is such that in certain circumstances the title of a registered co-owner of property can be extinguished with the effluxion of time. In order to come to a decision on this question, the Court must embark on a careful examination of the respective cases of the parties insofar as they touch and concern the issue of possession.

[82] It is the Claimant's case that although she moved from the property she never surrendered her proprietary interest in same. To this end, she held on to the title for a period of two years after leaving the house but lost possession of same when her car was stolen. She has also pointed to the property tax receipts showing payments made for the years 2016 to 2018. She has also sought to rely on her visits to the property to see her children and grandchild as well as her assertion that she left a number of items at the house when she moved out in 1996.

[83] The Defendant on the other hand contends that the Claimant has been dispossessed as for 21 years he had been in sole physical possession of the property seeing to its upkeep and maintenance, assertions which the Claimant accepted as true even while maintaining she had not been dispossessed. He has

also pointed to the fact that since 2003 he moved his partner into the property and they have had 3 children who were born between 2008 and 2012. The Claimant has agreed that his partner as well as their children all reside at the property, her sole point of contention is that she wasn't certain of the year his partner moved in. In describing their occupation of the premises however she stated, 'You could call it that they were in charge of the place.'

[84] In outlining his occupation of the premises, Mr Lindo also took issue with the Claimant's account that she would visit the premises to see the children. He denied that this had ever happened and asserted that if in fact she had made such visits it was done clandestinely. In relation to the events in 2015 he said that he recalled that his daughter had asked him if her mother could spend the night at the house to visit with the grandchild and he told her no, as it would not be appropriate with his new partner now living there. In respect of the items left at the house Mr Lindo has said the only item he knows of is the king size bed and it was now being used by him and his current partner.

[85] The importance of these portions of evidence along with all the other conduct which had been referred to is that Mr Lindo was no longer operating as a joint owner of the premises who had to show due deference and grant access to the other co-owner. Instead, he was operating as though he was the sole interest holder who occupied the property to the exclusion of others including Mrs McCrae to whom he refused to grant access.

[86] The acknowledgment by the Claimant that her daughter had in fact sought permission from her father for her to spend the night also speaks volumes as it provided critical support to the Defendant's position that he treated with the property as his own. He was the one who had physical custody and control over the property and he clearly displayed the requisite intention to exercise same to his own benefit and for his own use. He paid no regard to the Claimant's co-ownership as he never consulted with her on any issues related to the

maintenance or upkeep of the house, neither did he seek her permission to have his partner move in or to start his new family there.

[87] I believe that it was recognised by the Claimant that in order to prove her claim there may need to be some indication of her continued interest in the property given that for all intents and purposes she had remarried and established a new life after her departure therefrom. It appears that it was in these circumstances that she deponed in her 2015 affidavit that in spite of her departure she was the one who covered the upkeep, maintenance and property taxes for 27 Hillview Terrace all of which she had to accept in cross examination was not true.

[88] Additionally, I believe that this may also have been the reason for her indication that she moved back into the property in 2014, an assertion which I note was absent from her 2017 affidavit. Finally, this also seems to have been the reason which led to her to making payments of the property taxes for the years 2016 to 2018 an expense which it is clear she had never covered after her departure from the home in 1996.

[89] By the Claimant's own admission, after her marriage in 2004 she had embarked on making a new life with her husband and at some point she had been residing at her house in Eltham. It was not in dispute that she made no effort in this intervening period to bring any action to assert her interest in the house at Hillview Terrace or to have the Defendant compensate her for her interest there.

[90] She acknowledged that it wasn't until 2015 that she began to think about asserting her interest in the property and I note that it was the very year in which her house in Eltham had been sold by the Credit Union pursuant to powers of sale. Although the Claimant later sought to amend her respond to say that she actually began having these thoughts in 2014 or 2013, this adjustment to her answer did not assist her claim as this would have been 17 to 19 years after she had moved from the property.

[91] Although I have examined the position and intention of Mrs McCrae, I acknowledge that the authorities have made it clear that the relevant intention to be considered by the Court at this stage isn't that of the property owner but that of the dispossessor. I accept on a balance of probabilities that in 1996 Mr Lindo demanded that the Claimant vacate the home because of her drug activities. I also accept and believe on a balance of probabilities that having instructed her to move out she was thereafter denied access and could only visit the premises clandestinely if at all.

[92] I accept and believe that this was still the Defendant's approach to the Claimant in 2015 when their grandson was born and that when asked by his daughter if her mother could spend the night he refused to grant permission. I believe that his refusal was communicated to the Claimant and this was the real reason why she stayed in the room with the door closed so as not to be seen by Mr Lindo and not because she was in any fear of being attacked by him.

[93] I did not find Mrs McCrae to be a credible witness as her contradictory affidavits, her changing responses and her poor demeanour did not inspire confidence in her account. On the other hand, I found Mr Lindo to be a straight forward witness on whose account I could rely.

[94] I noted that in respect of the trips taken by the Claimant the passports produced seem to support her account that she would leave the country during the 1980s. She accepted however that she didn't always discuss her trips with Mr Lindo neither did she advise him of her travel itinerary. Mr Lindo on the other hand has said that there were occasions when the Claimant would go missing for days but she would tell him that she had gone to the country and he never pressed it.

[95] It is clear from her own account that Mrs McCrae was someone who not only operated independently of Mr Lindo but also sailed close to the sun in terms of her lifestyle. A fact which was brought into sharp relief by her admission of being a drug trafficker and the fact that she had travelled out of this jurisdiction on 3

separate passports over an overlapping period of time. As such I believe that it was not inconceivable that she may have hidden her travel history from Mr Lindo.

[96] Although the passports appeared to support the Claimant's assertion of her trips abroad during the 1980s this did not cause me to question the overall veracity of the Defendant especially in light of the Claimant's own concessions. In view of the foregoing I am unable to find that the evidence of the Claimant was such as to satisfy me on a balance of probabilities that the declarations sought by her should be granted.

DISPOSITION

[97] It is the Court's finding in light of all the circumstances that the Claimant has been dispossessed by the Defendant and accordingly the orders sought by her in her application filed on the 31st of October 2017 are denied. The effect of this finding is in light of the operation of statute the Claimant holds her interest on trust for the Defendant.