[2026] JMSC Civ 130

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE PROBATE DIVISION

CLAIM NO SU2025FD03391

BETWEEN	**KEVIN DeMERCADO (Representative of the Estate Tyrone Owen DeMercado)**	**CLAIMANT**
AND	**FAYE DeMERCADO**	**DEFENDANT**

IN CHAMBERS

Mr. Keith Bishop instructed by Bishop & Partners appearing for the Claimant

Mrs. Judith Cooper- Batchelor instructed by Chambers, Bunny and Steer appears for the Defendant.

Heard: 26th day of May, 2026, 2nd day of October, 2026 and the 16th day of October, 2026.

Matrimonial Property - Division of Matrimonial Property – Joint Tenancy – Adverse Possession - The Statute of Limitations, S. 3, 14 and 30.

A. Martin-Swaby, J

[1] This Claim was initiated on the 06th day of September 2010. After the conclusion of a first trial of the claim in the year 2012, the decision at first instance was overturned by the appellate court and the matter was remitted for a re-trial to be conducted. Unfortunately, the Claimant, Tyrone Demercado, died within months of the remittal of the matter to this Court.

[2] Consequently, his son Kevin Demercado, has been appointed by this Court to represent his estate for the purpose of continuing these proceedings. Therefore,

the Claimant's case was received entirely on paper and consists of two Affidavits filed by him on the 06th day of September 2010 and on the 18th day of October 2016 some four months prior to his death.

[3] The Claimant sought orders for the division of matrimonial properties located at 85

Dorado Drive Kingston 17 "the Harbour View property" and 5 Sunset Avenue Cherry Gardens Kingston 8 "the Cherry Gardens property" both in the parish of St. Andrew.

[4] The claimant and defendant are the registered proprietors of both properties which they hold as joint tenants. By way of background, both parties entered into marriage on 21st June 1959. They separated in the year 1982 and the marriage was dissolved on or about the year 1991/1992. It was a fruitful marriage as they bore three children. One such child of the union, Mr. Mark DeMercado, gave evidence in this matter in support of the Defendant's (his mother's) case.

[5] It is not in dispute that shortly after the marriage, the parties acquired the Harbour View property in the year 1961 whereas the Cherry Gardens property was acquired in 1974. The Harbour View property served as their matrimonial home during the early years of marriage. The evidence is that the Defendant's father gifted the parties with a deposit towards its acquisition shortly after their marriage when the Defendant was pregnant with the couple's first child.

[6] At this property, the Claimant opened a printery which was conducted on the verandah of the premises. This was a thriving business. The Claimant was the proverbial bread winner in the family and the Defendant was the supportive homemaker. The Defendant's case is that the family were well provided for and were happy. As the business grew, the parties acquired the Cherry Gardens property in the year 1974 due to the health challenges experienced by the children of the marriage consequent on the chemicals used in the printery business. This property served as the new matrimonial home until the unfortunate deterioration of the marriage in the year 1982.

[7] It is not in dispute that the Claimant left the Cherry Gardens home in the year 1982. The Defendant describes his departure as an abandonment of the family to reside with his then new family which consisted of a spouse who happened to be the Defendant's cousin and a child born to the newly established couple. The Defendant's case is that after the Claimant abandoned (her words) the family, she locked him out of the house and he stopped providing for her and their three children, one of whom was still attending school.

[8] Consequent on his departure from the property, the Defendant asserts that she is entitled to the entire interest in the Cherry Gardens property as the Claimant's title has been extinguished by virtue of the Statute of Limitations. She is claiming no interest in the Harbour View property as she has had no association with that property since their separation in the year 1982.

[9] The Claimant's case is that he never abandoned the Cherry Gardens property, the joint tenancy was never severed in relation to both properties. Consequently, he is entitled to his one-half share in both properties.

The Claim

[10] The following orders are sought in the Amended Fixed Date Claim Form filed on the 13th day of January, 2021;

- *A Declaration that the Claimant and Defendant are each entitled to a half share in the property situate at 85 Dorado Drive, Kingston 17, in the parish of St Andrew and registered at Volume 964 Folio 102 of the Register Book of Titles.*
- *A Declaration that the Claimant and Defendant are each entitled to a half share in the property situate at 5 Sunset Avenue, Cherry Gardens, Kingston 8, in the parish of St. Andrew and registered at Volume 1058 Folio 223 of the Register Book of Titles.*
- *The parties to agree a valuation for the said properties at paragraph 1 and 2 above failing which this Honourable Court appoint C.D. Alexander Company Realty Limited, as Valuator for the premises.*

- *An order that the said property situate at 85 Dorado Drive, Kingston 17, in the parish of St. Andrew and registered at Volume 964 Folio 102 of the Register Book of Titles be sold.*

- *An order that the Claimant have first right of refusal to purchase the Defendant's half share in the said premises mentioned at paragraph 4 above.*

- *An order that the said property situate at 5 Sunset Avenue, Cherry Gardens, Kingston 8, in the parish of St. Andrew and registered at Volume 1058 Folio 223 of the Register Book of Titles be sold.*

- *An order that if the Defendant refuses to sign the Registrar be empowered to sign the relevant transfer documents on the Defendant's behalf.*

- *An order that the Claimant's Attorneys-at-Law have Carriage of Sale."*

[11] The Defendant in her Affidavit filed on the 29th day of December, 2010 counterclaims for the following reliefs;

- *A declaration that the Claimant Tyrone Owen Alloysius DeMercado holds his registered one- half share and interest in the dwelling house and premises registered at Volume 1958 Folio 223 of the Register Book of Titles in Trust for the Defendant Fay Marie DeMercado, housewife of 5 Sunset Avenue, Kingston 8 in the parish of Saint Andrew.*

- *An order that the Registrar of the Supreme Court be and is empowered to execute a transfer of the one-half share and interest of the aforesaid dwelling house at 5 Sunset Avenue, Kingston 8 in the parish of Saint Andrew now registered in favour of the Claimant, Tyrone Owen Alloysius DeMercardo to the Defendant Fay Marie Demercado.*

- *A declaration that the Defendant, Faye Marie DeMercado holds her registered one- half share and interest in the premises at 85 Dorado Drive, Kingston 17 in the Parish of Saint Andrew in trust for the Defendant Tyrone Owen Alloysius DeMercado.*

- *An order that the Registrar of the Supreme Court be and is empowered to execute a transfer of the one-half share and interest of the Defendant Fay Marie DeMercado in the premises at 85 Dorado Drive, Kingston 17 in the parish of Saint Andrew to Tyrone Owen Alloysius DeMercado absolutely.*

The Harbour View Property -

[12] I wish to dispose of the division of the Harbour View property before embarking on the more contentious issue surrounding the Cherry Gardens property. The Defendant, by the orders sought in the counterclaim and the evidence placed before this court, is not interested in realising her registered interest in this property. She has in effect stated that she has long abandoned her interest in this property and as such, the court will award her registered interest in this property in its entirety to the Claimant's estate.

[13] The contentious issue which must be determined is the treatment by this Court of the Cherry Gardens property. Therefore, I will now outline the issues which are to be determined in this regard.

ISSUES

1. Whether the Claimant's title to the Cherry Gardens property, he being registered as a joint owner of the property, has been extinguished by the operations of the Limitations of Actions Act?

2. Whether the defendant had factual possession of the disputed property for a period of at least 12 years after the right of re-entry first accrued to the Claimant and had demonstrated an intention to possess?

Evidence & Findings:

[14] Having already outlined the matters which are not in dispute, the focus of the summary of the evidence will be on the issues which are joined between the parties.

[15] The Claimant asserts in his Affidavit filed in September 2010 that he paid all the mortgage in relation to this property. His evidence is that he made all mortgage payments whereas the evidence of Mark Demercado (witness for the Defendant) is that the Claimant made most of the mortgage payments.

[16] I accept on a balance of probabilities that the Claimant paid most if not all the mortgage in relation to the property. It was observed that when the Defendant's witness was asked whether his father (the Claimant) had paid the entire mortgage for the Cherry Gardens property, the court took note of the fact that the witness took a lengthy pause and then said *"no not all".* Counsel then taxed him as to whether he paid most of the mortgage for this property, he agreed.

[17] That being said, it was important to examine the Certificate of Title in respect of the Cherry Gardens property to be able to contextualize this estimated period in which the mortgage in question was paid. This Certificate of Title which is exhibited to the Affidavit of Tyrone DeMercado filed on the 06th day of September, 2010 reads as follows;

> *"Mortgage No. 253656 dated the 12th and registered on the 19th of June, 1973 from the abovenamed TYRONE OWEN DeMERCADO and FAY MARIE his wife all the estate in the land comprised in this Certificate to NORTH AMERICAN LIFE ASSURANCE COMPANY of 72-76 Harbour Street, Kingston to secure Thirty Thousand Dollars with interest.*
>
> *Discharge No. 724871 entered the 22nd day of JULY, 1992 of Mortgage No. 253656."*

[18] This is an important fact to be considered in this matter concerning the effect of the payment of the mortgage on the issue of whether the Claimant exercised his right to possession or was dispossessed. The mortgage was taken out in 1973 on or about the time of acquiring the property. It was then discharged in July 1992, some 10 years after the parties separated. Further, in this judgment, I will examine the implications of the mortgage payment period on the Claimant's case that he did not abandon the property or fail to exercise his rights as title owner in respect of the property.

[19] At this juncture, I will note that there is a further mortgage which was taken out on the said property in the year 2003/2004. However, on the unchallenged evidence, this mortgage was taken out solely for the benefit of the Defendant in her pursuit of medical treatment and the Claimant's only association with this mortgage was

to sign the documents to facilitate the receipt of the financing for the benefit of the Defendant.

[20] In continuing on the evidence, in the Affidavit filed in September 2010, the Claimant further asserts that he made proposals to the defendant and had several conversations regarding the division of the properties. The proposal was for the claimant to purchase her half share in the Harbour View property, the defendant to buy his half interest in the Cherry Gardens house or for the property to be sold and the proceeds of sale divided between them equally. His evidence is that the defendant rejected all these proposals.

[21] In his Affidavit filed in October 2016, the Claimant further deponed that there was no agreement between the parties that the claimant would upon leaving the matrimonial home keep the business premises for himself and the defendant would keep the home at Cherry Gardens. He stated that the defendant left the house in the 1970s to reside in Tampa Florida and subsequently returned to the matrimonial home in 1982 where they both lived with their son Troy until he (the Claimant) moved out.

[22] He denies the claims made by the defendant that he was locked out of the house in Cherry Gardens and forbidden to enter. It is his evidence that after he moved out, he was welcome to visit. That he visited on several occasions. Examples of this was on 28th August 1993 which was the day of Troy's wedding and after his son passed away. He also explained that at other times he was invited by the defendant to spend the night. On these occasions, he was careful to leave before the children and neighbours could see him. He also averred to the occasions where he would be in the nearby environs and would stop by and check in especially after Tyrone was buried.

[23] He stated that over the years he would make checks to ensure that the property taxes were paid on both properties. The claimant made it clear in his evidence that

he never disputed the defendant's half interest in the properties and likewise he never abandoned his interest in the matrimonial home.

[24] The defendant's case is diametrically opposed to that of the Claimant's case. Her case was presented through the reception of her Affidavit as her evidence in chief. She was also cross examined. Her son Mark DeMercado was also called as a witness.

[25] It is her evidence that after the claimant abandoned their family she locked him out of the house and prohibited him for entering. She explains in her Affidavit what is tantamount to a bitter deterioration of her marriage. Her evidence is that the Claimant started a family with a cousin of hers. She asserts that both parties drifted apart and were divorced on or about the year 1990. She indicated that they both came to an understanding that where the value of the matrimonial home increased, she would benefit from it, and he would benefit from the increase of the Harbour View property. Following this she would have agreed to not pursue any claim for alimony or shares in the printery business.

[26] I pause here to consider as tribunal of fact whether in the context of such a bitter end to a marriage, I can accept what the Claimant asserts in his further Affidavit filed in 2016 that he would visit the Defendant and engage in private matters and also attend on the premises on several occasions. Do I accept this or do I believe the Defendant when she states that she locked the Claimant out of the house and in essence declared him *persona non grata*. I believe the Defendant on this point, having observed her in the witness box and I reject the Claimant's evidence on this point.

[27] I also bear in mind that these assertions which were made by the Claimant concerning his visits to the property and engagement in private matters were rather belated. They were never mentioned in his 1st Affidavit and were only made in 2016 after the Court of Appeal overturned the decision of the 1st instance judge.

Unfortunately, the Claimant could not be cross examined on these critical points and I am constrained to place little value on these assertions.

[28] In continuing, during cross-examination the defendant indicated that their son Tyrone Demercado died on Mother's Day in the year 1994. She denied that the Claimant stayed at her house for some four days. In fact, when counsel suggested that the Claimant came and spent four days at the house after Tyrone's death, the Defendant rejected this emphatically. Her demeanour conveyed much disquiet with such a suggestion. Her evidence is that he only attended the house once. She maintained that the claimant never asked her about his ½ share in the Cherry Garden's property and she never asked him about her ½ share in the home at Dorado Drive.

[29] The defendant also maintains in evidence that her occupation of the Cherry Gardens property had been adverse to the claimant's registered interest for more than 28 years during which she solely exercised the rights and responsibilities of ownership. This must be considered in the context of the evidence regarding the mortgage period and any findings which may be made concerning when time would begin to run against the Claimant. This will be dealt with below in the exploration of the law and analysis to be applied to this fact.

[30] Mr. Mark DeMercado supports the Defendant concerning certain material facts. He indicates that when his parents separated in 1982 his father's assistance whether financial or otherwise ceased and the defendant had exercised exclusive control and possession of the Sunset Avenue property for approximately 28 years, paying all associated expenses and taxes. His father had controlled the Harbour View property, retained the profits from the business conducted there and overall dealt with this property as if he solely owned it as he had independently mortgaged it in 1987 without the defendant's knowledge or acknowledgement.

[31] He averred that in 2003, his father agreed to mortgage the Cherry Gardens property to assist in financing his mother's urgent medical treatment, and that he

the witness subsequently repaid the loan. He maintains that his mother made her position clear that she wanted full ownership of the matrimonial home and his father understood this.

[32] He also gave evidence that the claimant had been unable to enter the Sunset Avenue house for over 28 years without his mother's permission. However, during cross-examination he agreed that as he worked outside of the home it was possible that his father did return when he was not there, and the neighbours possibly did not see him.

The Value of the Claimant's Affidavits

[33] The issues in this case are largely matters of credibility. I have had the benefit of observing the Defendant and the Defendant's witness in this matter. Unfortunately, due to the Claimant's death, the court did not have the benefit of observing him in the witness box and I must approach the Affidavits filed by him and which were received in evidence with care.

[34] It must also be noted that in his 1st Affidavit which was deposed at the time of the initiation of the claim, there was hardly any material therein which addressed his dealings with the property after his separation from the Defendant in 1982. The peculiarity of this case is also that this was the sole Affidavit which was relied on during the first trial of this claim on the 24th day of April, 2012. The only thing stated in the first Affidavit concerning the Claimant's dealing with the Cherry Gardens property amounted to his evidence that he paid the mortgage in relation to the property and that he had several conversations with the Defendant in relation to the latter purchasing his half share in the Cherry Gardens property or that the property be sold and the proceeds divided equally and that the Defendant refused all such offers.

[35] It cannot be ignored that it was only after the Court of Appeal delivered judgment following its review of the decision of the 1st instance judge that the Claimant filed a Further Affidavit. The written judgment of the appellate court was delivered on

the 13th day of May, 2016 and the further Affidavit was filed on the 18th day of October, 2016. This Affidavit disclosed detailed accounts of his attending the Cherry Gardens home on several occasions as well as engaging in intimate matters with the Defendant and spending some four days at the premises after his son Tyrone's death.

[36] I must bear in mind that none of these details were included within his 1st Affidavit and the 2nd Affidavit coming after a detailed written judgment of the Court of Appeal cannot in the circumstances of this case carry significant weight especially where the Claimant could not be cross examined.

[37] In any event, if I am wrong in the caution exercised in respect of the further affidavit, I have considered it as against the other evidence in this case and I do not believe the Clamant that he did all the things deposed to in the 2nd Affidavit. With such a bitter separation, I do believe the Defendant that she locked him out of the house and that he could only enter with her permission and he only attended the house for Troy's wedding and then on the occasion of Tyrone Junior's death. I do not believe that he went to the premises on occasions for intimate exchanges between the parties nor that he stayed at the property for several days after Tyrone Junior's death.

[38] However, even if he did the things he said he did in the Further Affidavit, an important question is whether they would be enough to demonstrate a re-entry by him on the premises and to stop time from running for the purposes of dispossession. This will be determined when the law and analysis is discussed further in this judgment.

[39] In summary, I find the following facts proved to the requisite standard;

1. The parties separated in the year 1982. After which, the Defendant locked the Claimant out of the house and his access was subject to her permission;

2. The Claimant, though not in physical possession, continued to pay the mortgage and discharged the mortgage in the year 1992;

3. That the Defendant remained in control of the Cherry Gardens premises from 1982 when the parties separated and up to the time of the initiation of this claim in the year 2010;

4. That he only visited the premises to attend his son Troy's wedding in the early 1990's and then on the occasion of the death of Tyrone Demercado Junior's death. By the time of Tyrone Junior's death, the parties had divorced and I do not accept that he continued to attend the premises to engage in private matters.

LAW & ANALYSIS

Adverse Possession – Joint Tenants

[40] I bear in mind that the parties to this claim acquired both properties as joint tenants.

[41] The Claimant asserts that he is entitled to one half share in both properties. Further, that the court has no basis to disturb the joint tenancy arrangement endorsed on the title between the parties. On the contrary, the Defendant asserts that the Claimant's interest in the property has been extinguished by operations of the Statute of Limitations. She has raised the limitation defence in answer to this case.

[42] In considering the competing positions, my starting point is the consideration of the indefeasibility rule as contained in section 68 of the Registration of Titles Act. As such I bear in mind the approach to be taken by the Court in circumstances where properties are registered pursuant to the Registration of Titles Act.

[43] Section 68 states as follows;

> *"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 of same, and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power."*

[44] The Court's understanding of the above rule is that the Certificate of Title once granted under the Registration of Titles law may be received and acted upon as conclusive evidence of the proprietorship as reflected therein. It cannot be impeached by reason of any flaw or irregularity in the application for same. However, this is expressly subject to the operation of the Statute of Limitations. Therefore, in applying that rule to the case at bar, the fact that the Certificates of Titles which have been placed before me disclose that the Claimant and Defendant are joint tenants in respect of the subject properties, this is conclusive evidence that they are seized of the interest which is declared in the Certificate. However, this is subject to the Limitation of Actions Act.

[45] The Defendant, having raised the limitation defence, I must pay careful attention to this Act in this case. The most applicable provisions of this Act to the case at bar are contained in sections 3, 14 and 30. These provisions cumulatively assist the court in appreciating the exception to the indefeasibility rule as expressed in section 68 of the Registration of Titles Act and to determine whether or not the operation of the statute extinguishes the title of the Claimant. I will therefore go through them in details.

[46] I will start with section 14 of the Limitation of Actions Act which specifically addresses the issue of possession as it relates to joint tenants and tenants in common. It reads as follows;

> *Where 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."*

[47] Section 3 of the Limitations of Actions Act states as follows;

> *"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 claim or suit, shall have first accrued to the person making or bringing the same."*

[48] Section 30 of the Limitations of Actions Act states as follows;

> *"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."*

[49] I must consider the relationship between sections 3, 14 and 30 of the Limitations of Action Act. This is important as sections 3 and 30 treat with the principles governing adverse possession in the literal context of the title holder's right of reentry or recovery of land which is in the possession of a stranger and the time within which such claims for recovery of possession or rights of re-entry should be brought or exercised. Section 14 treats specifically to the nature of the tenancy enjoyed by persons who hold land as joint tenants, tenants in common or coparceners and the effect of one tenant enjoying more than his or her undivided share of the property for his/ her benefit or for the benefit of another person outside of the cotenant.

[50] In considering the relationship between the provisions, I have found the decision in **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ. 37 to be helpful. The facts in that case concerned whether one Mr. Curchar had dispossessed his wife Mrs. Paulette Curchar, they being joint tenants of the subject property in that

case. In that case, Mrs. Curchar was not in possession at the time she initiated proceedings to recover possession of the property from Ms. Fullwood (Mr.

Curchar's spouse) who remained on the property after his death. McDonald Bishop JA in commenting on the import of section 14 stated the following at paragraph 33 of the judgment;

> *"Despite Mrs. Curchar's purported position as the sole surviving joint tenant, sections 3 and 30 of the Act would nevertheless, arise for contemplation in light of section 14…In effect, section 14 renders the possession of co-tenants as separate possessions from the time that they first became joint tenants (see Culley v Doe d Taylerson (1840) 11 Ad & El 1008). Therefore, it has modified the common law doctrine of non-adverse possession as it affects the rights of co-tenants. It means that a co-tenant can obtain title by possession against the other co-tenant. As Sampson Owusu, Commonwealth Caribbean Land Law at page 305 explained;*
>
> *"The co-tenant in possession of the entire property is therefore, for the purpose of the provision…. not in a different position from a stranger in possession of separate property so far as regards the undivided interest of his co-tenant."*

[51] On the basis of the above provisions, it is evident that a joint tenant may be dispossessed and prevented from bringing or making an entry to recover property after the expiration of 12 years in circumstances where his co-tenant has during that period enjoyed exclusive factual possession of the entire property, its rents, and profits for his own benefit or for the benefit of another person other than his co-tenant and has an intention to possess to the exclusion of the co-tenant.

Burden of Proof

[52] On the basis of the reasoning in **Fullwood v Curchar**, the burden of proof rests on the Claimant as joint owner who seeks the realization of his interest, to prove that his claim for the acknowledgment and realization of his interest in the Cherry Gardens property is not barred by the Statute of Limitations. He must demonstrate that he has brought his claim within twelve years after the time at which the right of re-entry first accrued. An important issue will be when time began to run against the Claimant.

[53] The Defendant, having raised the limitation defence, bears the burden of proving that she enjoyed factual possession of both her undivided share and the undivided share of the Claimant for a continuous period of at least 12 years prior to the initiation of the claim by the Claimant in the year 2010. In addition to this, it must be proven that she had an intention to possess the entire property to the exclusion of all other persons including the Claimant, the true title owner (see Commonwealth Caribbean Land Law, Sampson Owusu page 291.)

Application

[54] In applying the principles to the case at bar, it is my considered view that an important question is whether the Defendant has been in exclusive possession or receipt of the benefit of the entire property, or more than her undivided share for her own benefit or benefit of others outside of the Claimant at least twelve years prior to the initiation of proceedings by the Claimant.

[55] This claim having been initiated in the year 2010, I must consider the period between 1982, the date of separation through to the year 2010. If this question is answered in the affirmative, by virtue of section 14, 3 and 30, the Court should treat this benefit or enjoyment of the property during the material period as being for her sole benefit to the exclusion of the Claimant who is also entitled to the property as a joint tenant. Additionally, and a consequence of this, the Claimant's title would be extinguished.

[56] In this case, the Defendant has raised the limitation defence; her case is that she has been in exclusive possession of the entirety of the property for her own enjoyment and benefit for approximately 28 years. To make a finding on this point, I wish to consider the definition of possession for the purpose of dispossession. On this point I have found the authority of **JA Pye (Oxford) Ltd v Graham and Another** [2002] 3 ALL ER 865 to be very helpful. Lord Bingham reasoned at paragraph 40 of the judgment that there are two elements necessary for legal

possession; physical custody and control to a sufficient degree and an intention to exercise that custody and control on one's own behalf and for one's own benefit.

[57] Therefore, in pleading the limitation defence, there is a requirement to show actual physical control of the entire property or more than her (the Defendant's) undivided share for her own benefit or for the benefit of other persons other than the Claimant and the intention to possess. If the Claimant has also been in possession or exercised his right to possession or re-entry during this period, her limitation defence must fail.

[58] In the case at bar, having accepted that the Defendant was in fact in physical control of the property after their separation in the year 1982, I also find that she demonstrated an intention to possess to the exclusion of the Claimant by locking him out of the property and preventing him from gaining access to the premises without her permission.

[59] I compare this act as equating to the squatter who fences the property and places the gate under lock and key. It is an exercise of a sufficient degree of control and is an unequivocal and affirmative action which demonstrates an intention to control the thing possessed. I also accept that the Claimant stopped contributing to the running of the home and the care of the family. This was unchallenged by the Claimant and demonstrates that he also distanced himself from this property.

[60] However, I must consider that he paid the mortgage and the mortgage remained in existence and was not discharged until 1992. I infer that mortgage payments were made between 1982 and 1992 when the mortgage was discharged. During that period, it cannot be said that his payment of the mortgage is of no value in these proceedings. The payment of the mortgage may be considered to be an exercise of his continued association with and contribution towards with the property and may be useful in determining whether during that period though he physically left the property, he continued to contribute in a meaningful way to the property and thereby treated it as his own.

[61] This act will inure to his benefit in these proceedings. Therefore, I regard his payment of the mortgage as preventing time running between 1982 and 1992. Consequently, I do not believe that 1982 is the starting point when time begins to run against him for the purposes of sections 3, 14 and 30 of the Limitations Act when applied cumulatively. I find that time begins to run in 1992 when the mortgage is discharged.

[62] Based on the evidence, when this mortgage is discharged in 1992, the Claimant remains out of physical possession and control of the property. At this juncture, and even before whilst he paid the remainder of the mortgage, he had the right of re-entry or to initiate suit for recovery of possession or realization of his undivided interest in the property. However, his case is that he discussed the division of the property with the Defendant and made several requests that the property in question be divided or that the Defendant purchases his share; that he visited the property at the time of Troy's wedding and once at the time of Tyrone's death (his case for four days, Defendant's case on one occasion). My understanding of these assertions is that he is claiming that he demonstrated an intention to realize his one-half undivided interest and did not abandon same and that he also exercised his right of re-entry.

[63] On the first issue of his intention to realize his interest, I am guided by the decisions in **Fullwood v Clachar** and **Ja Pye (Oxford) Ltd**, that if I consider the intentions of the party who is not in possession (the Claimant), I will fall into error. The authorities make it clear that it is the intention of the party in possession and against whom the claim for recovery of possession or in this case realization of interest, whose intention is important for the purposes of determining the issue of dispossession.

[64] On the second issue of whether the actions taken by the Claimant, if believed, would have been sufficient re-entry, I am persuaded that they would be inadequate. Attending Troy's wedding or visiting the property when their son Tryone Jnr. died is incapable of amounting to a re-entry. I have formed this view

on the basis of the decision of the Court of Appeal in **Thomas Broadie and Donald Broadie v Derrick Allen** RMCA No. 10/2008 decision dated the 3rd day of April, 2009. The effect of this decision is that the actions of the Claimant in the case at bar are incapable of amounting to an effective re-entry by him.

[65] In **Broadie**, at paragraph 32 of the judgment of Harris JA, the court considered whether certain acts of the title owner could be considered to be an effective reentry by him thereby preventing time from running against him in the extinguishing of his title. These acts consisted of him attending the land and telling the Appellant who was in possession, to vacate the premises and informing him of his intention to build on the land. Harris JA indicated that this was insufficient.

CONCLUSION

[66] The Claimant's title was extinguished by the time he initiated proceedings in September 2010. His right of re-entry to the property or to initiate proceedings for the recovery of possession of realization of his interest commenced in the year 1992 when the mortgage was discharged by him. He sat on his right for eighteen years.

[67] To award the Claimant a 50% interest in the Cherry Gardens property after eighteen (18) years of undisturbed exclusive possession by the Defendant would be unjust in the circumstances of the case at bar. Therefore, the orders sought by the Claimant in the Amended Fixed Date Claim Form are refused and the following orders are made;

1. All legal rights and ownership of the Claimant Tyrone Demercado Snr., of ALL THAT parcel of land located at 5 Sunset Avenue Cherry Gardens Kingston 8 in the Parish of Saint Andrew registered at Volume 1058 Folio 223 of the Register Book of Titles are extinguished.

2. Faye Marie Demercado is the legal and beneficial owner of ALL THAT parcel of land located at 5 Sunset Avenue Cherry Gardens Kingston 8 in the Parish of Saint Andrew registered at Volume 1058 Folio 223 of the Register Book of Titles absolutely.

3. The estate of Tyrone Demercado Snr. is to transfer the registered undivided one half interest of Tyrone Demercado Snr. in respect of ALL THAT parcel of land located at 25 Sunset Avenue Cherry Gardens Kingston in the Parish of Saint Andrew registered at Volume 1058 Folio 223 of the Register Book of Titles to the Defendant Faye Marie Demercado.

4. The Registrar of the Supreme Court is empowered to sign all documents and/or Transfer Instrument(s) (if any) on behalf of the estate of Tyrone Demercado Snr. in order to facilitate the transfer of ALL THAT parcel of land located at 5 Sunset Avenue Cherry Gardens Kingston 8 in the Parish of Saint Andrew registered at Volume 1058 Folio 223 of the Register Book of Titles to the Defendant, should the Claimant's estate, fail and/or refuse to sign the documents within fourteen (14) days of the date of this Order.

5. A declaration that the Defendant, Fay Marie DeMercado holds her registered one- half share and interest in the premises at 85 Dorado Drive, Kingston 17 and registered at Volume 964 Folio 102 of the Register Book of Titles in the parish of Saint Andrew in trust for the Claimant Tyrone Demercado Snr.'s estate.

6. An order that the Registrar of the Supreme Court be and is empowered to execute a transfer of the one- half share and interest of the Defendant Fay Marie Demercado in the premises at 85 Dorado Drive, Kingston 17 in the parish of Saint Andrew to the Claimant Tyrone DeMercado Snr's estate absolutely.

7. Cost is awarded to the Defendant to be taxed if not otherwise agreed.

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A. Martin-Swaby, J

Puisne Judge