

to the commencement of this action of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823 and ALL THAT parcel of land part of Brampton in the parish of Manchester and being the land comprised in Certificate of Title registered at Volume 1290 Folio 130.

2. A declaration that by virtue of the claimant's absolute possession for a period of twelve years and upwards immediately prior to the commencement of this action, the defendants as representatives of the estate of Ivy Foster or otherwise have discontinued possession and/or dispossessed of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823 and ALL THAT parcel of land part of Brampton in the parish of Manchester and being the land comprised in Certificate of Title registered at Volume 1290 Folio 130.
3. A declaration that the claimant has exclusive possession of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823 and ALL THAT parcel of land part of Brampton in the parish of Manchester and being the land comprised in Certificate of Title registered at Volume 1290 Folio 130 to the exclusion of the defendants and the whole world.
4. An Order directing the Registrar of Titles to cancel the Certificate of Titles registered at Volume 1060 Folio 823 and Volume 1290 Folio 130 of the Register Book of Titles.
5. An Order directing the Register of Titles to issue new Certificates of Title in respect of ALL THAT parcel of land part of Brumalia,

Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823 and ALL THAT parcel of land part of Brampton in the parish of Manchester and being the land comprised in Certificate of Title registered at Volume 1290 Folio 130 in the name of the claimant.

6. Costs

7. Such further relief as this Honourable Court deems fit.

THE CLAIMANT'S CASE

- [1]** The registered proprietor of the properties in question is Mrs. Ivy Foster who died on the 24th November 2004. Mrs. Foster had resided in England for many years and returned to Jamaica in her golden years. Unfortunately she began to exhibit symptoms of dementia while in her eighties and went to reside with the claimant, who is her cousin, and eventually returned to England for treatment.
- [2]** The claimant contends that while Mrs. Foster was residing with her she asked her to oversee the properties and told her that when she dies the properties would be hers. Based on this, the claimant's evidence is that she considered the properties to be hers even before the death of Mrs. Foster. She engaged a Mr. Glenton Jones in a service tenancy, to reside on the property at Knowles Road and bush and maintain it from 2004 after the death of Mrs. Foster. There is no evidence concerning when this conversation with the deceased took place or the state of her mental health at the time.
- [3]** The claimant asserts that she has been paying the electricity bill at Knowles Road and property taxes for both properties and she exhibited receipts evidencing the payments. At her sole expense, she has bushed and maintained Knowles Road. She provided an agreement between herself and Mr. Jones, drafted when Mr. Jones was leaving the property, concerning his cleaning the land in exchange for unpaid occupation. She also exhibited receipts from Mr.

Isaac Lodge for bushing of the grounds at Knowles Road after Mr. Jones left the property in 2017.

- [4] Her evidence is that she gave permission to a Mrs. Reid to farm on the land at New Green, which is an open lot.
- [5] The claimant denies that in 2009 she met with the 1st defendant at the Knowles Road property where she was told about a Will for Mrs. Foster and was angry and upset as the executors sought to take over the property. She denies causing Mr. Jones to chain up the gate and whilst allowing the defendants to come on the premises, refused to allow them to enter the dwelling house on the property. She claims she only learned of the Will and the Probate when her attorney showed it to her after she commenced these proceedings. The claimant contends that the Will was made by the defendants and the signature on the will is not that of Mrs. Foster. However she offered no proof of these allegations. She claims that the properties belong to her and she has been in open undisturbed possession of them for upwards of twelve years as the deceased had given them to her. She has therefore filed this claim for Declarations to establish her absolute ownership.

THE DEFENDANT'S CASE

- [6] The defendants, both Reverend gentlemen of the Bible Way Churches World Wide UK, filed a joint affidavit in response to the claimant's affidavit and only the 1st defendant gave evidence at the trial. He asserts that he was the pastor and friend of the deceased for over 25 years. The deceased was an executive member of the board of the church in Cambridge, UK and he was her main support for many years as her relatives were in Jamaica.
- [7] On July 31, 2001 Mrs. Foster made and published her last Will and Testament and appointed the 1st and 2nd defendants her executors. The claimant is a beneficiary under the will as co-owner of Knowles Road.

- [8] The executors obtained a grant of Probate of the Will in England on December 17, 2007 and Resealed the Probate in Jamaica on December 19, 2008 and that same year sought to take possession of the properties.
- [9] The defendants denied the assertions made by the claimant. They assert that the claimant is a mere key holder for the properties as she was overseeing the property when the deceased was ill.
- [10] In 2007 the 1st defendant came to Jamaica and located the property at Knowles Road. He maintains that he took no action to possess the property as he was taking steps to Re-seal the Probate to have authority to take possession. He returned to Jamaica in 2008, went to Knowles Road where his access was challenged by Mr. Jones, who summoned the claimant and her husband.
- [11] He spoke to the claimant and told her about the Will and Probate and told the claimant that he was taking possession of the property. The claimant refused to co-operate and was upset that the property was not devised to her. Mr. Jones, however, co-operated and took Mr. Williams to the New Green property and later to the home of the claimant.
- [12] After some discussions at the claimant's home, the claimant instructed Mr. Jones to put a chain on the gate of the property and not to allow the 1st defendant to enter.
- [13] In 2013 the 1st defendant returned to the property in the company of Andrade Forrester, his witness, and a Justice of the Peace to take steps to renovate the property. His access was again challenged by Mr. Jones. The assistance of the police was obtained and the 1st defendant was advised to give a notice to quit to Mr. Jones, which he did. Mr. Jones asked to be allowed to reap crops he had planted on the property. He left the property, according to the claimant, in 2017. The chain was removed from the gate. Rev. Williams, supported by Mr. Forrester, asserts that there was no evidence that Mr. Jones or anyone else lived on the property at Knowles Road on any of their visits. Water and electricity

supplies were disconnected from the property and the house was in need of repair.

- [14] The defendants contend that the claimant did not maintain the property. Neither did she pay more than one electricity bill for the property in 2004. The house was in a dilapidated state, the electrical fixtures and fittings and water supply were disconnected and it was overgrown in bush. The roof was badly damaged and infested with duck ants, and rat bats lived in the roof. They supplied pictures for the court which are not time or date stamped.
- [15] They maintain that they obtained the property tax liabilities and settled the taxes in 2017 from agents of Tax Administration of Jamaica. They exhibited receipts evidencing the payment of taxes. These receipts, it should be noted, pre-dated the receipts exhibited by the claimant.
- [16] In relation to the claimant's assertion that Lot 1 New Green was occupied by her agents, they assert that the place was overgrown with bush when they visited it with no signs of occupation. They also settled property taxes for that property in 2017 and exhibited receipts.
- [17] The 1st defendant asserts that he visited Knowles Road in the years 2008, 2013, 2017, 2018 and 2019 and was never allowed to enter the dwelling house but entered the premises. The defendants assert that they never relinquished their duties as executors but rather asserted their right to possess the lands when the 1st defendant visited Jamaica but because of the aggressive nature of Mr. Jones were unable to do so.

THE ISSUES

- [18] The issue to be decided is whether the claimant has gained absolute ownership of the properties by being in open, undisputed possession of them for upwards of twelve (12) years from November 22, 2004 to the time of filing of her Fixed Date Claim Form on May 7, 2018 and so has extinguished the paper title of the estate.

THE CLAIMANT'S SUBMISSIONS

[19] The claimant succinctly submits that having been let into possession by the deceased during her lifetime, upon her death she remained in open, undisturbed possession, exercising rights as owner after the consensual entry was determined by the death Mrs. Foster. Counsel relied on the decision of the Court of Appeal in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No. 461**, [2013] JMCA Civ 45, a judgement delivered by Morrison JA, as he then was, to support the basis for establishing adverse possession, that is physical possession and intention to possess and the test for adverse possession, that is, that the claimant's possession was inconsistent with the paper title holder's title. Counsel argued that the executors of the estate of the paper title holder did nothing to interrupt the running of time required by Section 3 of the Limitation of Actions Act (12 years), to ground absolute title in the claimant. He asserts that the 1916 decision of Privy Council in **S.M.K.R. Meyappa Chetty v S. N. Supramanian Chetty**, [1916] 1 AC 603, an appeal from the Supreme Court of Singapore that,

“....an executor derives title and authority from the will of his deceased and not from any grant of probate.”

allowed the executors to take action for recovery of possession of the properties, even before probate was extracted in the United Kingdom and ultimately Resealed in Jamaica. He further argued that the giving of a notice to quit to Mr. Jones, a caretaker employed by the claimant, could not stop time from running in favour the claimant, as stated in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No. 461** applying **Mount Carmel investments Ltd. v Peter Thurlow Ltd. and another** [1988] 3 ALL ER 129 where Nichols LJ at page 133 stated:

...we do not accept that, in a case where one person is in possession of property and another is not, the mere sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession.”

The defendant's title would therefore have been extinguished by the end of 2017 and absolute title vested in the claimant.

THE DEFENDANT'S SUBMISSION

[20] The defendants' submission on the law is not dissimilar from that of the claimant. Applying **JA Pye (Oxford) Limited v Graham**, (2003) 1 AC 419 counsel alluded to the need for a sufficient degree of physical custody and control (factual possession) and an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess) to establish adverse possession. Counsel emphasized that possession must be continual for 12 years pursuant to section 3 of the Limitation of Actions Act, must be adverse to the interest of the legal owner and must be exclusive, open, notorious and undisturbed. He quoted from **Kenneth Blaine v Junior Diggs-White and Janeth Diggs-White** [2016] JMSC Civ 162 at paragraph 27,

“In order to prevent an adverse possessor from acquiring an indefeasible title under Limitation of Actions Act, an individual so challenging the adverse possessor's action must show that before the expiry of the limitation period, he performed acts amounting to dispossession of the occupier and resumption of possession by him.”

Further he cited dicta by Lord Diplock in **Oceans Estates Ltd. v Pinder** [1960] 2AC 19,25 where he said,

“The slightest acts by the person having title to the land or his predecessors in title indicating his intention to take possession are sufficient to enable him bring an action for trespass against any defendant entering upon the land without any title.”

[21] In light of these dicta, counsel argued that by giving notice to the claimant of their intention to take possession of the land and requesting that she vacate it as well as giving a Notice to Quit in 2013 to Mr. Jones, before the expiry of 12 years, the defendants had done sufficient acts to establish their intention to retain possession and prevent any claim for adverse possession. This notice, counsel argues rebuts any claim for adverse possession. The House of Lords, he argued, held in **Ocean Estate Ltd** that mere entrance upon the property or entrance by an agent of the paper title owner was sufficient action to dispossess the adverse possessor. **Ocean Estate Ltd** also decided that what is required is an intention on the part of the title owner to dispossess the claim of the adverse possessor’s ownership of the property.

[22] Counsel further argued that the claimant came into possession of the property with the consent of the deceased and so no claim for adverse possession can be maintained as consent was granted. He relied on dicta in **Recreational Holdings Jamaica Ltd. v Carl Lazarus et al**, [2014] JMCA Civ 34 and **Seaton Campbell v Donna Rose-Brown et al** [2016] JMCA Civ. 157 and **Pye v Graham (supra)** for this proposition.

[23] The defendant’s counsel further argued that the claimant did not take possession of the properties. Knowles Road is a dwelling house which was never occupied by the claimant; while New Green is a vacant unoccupied lot. The claimant cannot therefore claim possession as defined by Lord O’Hagan in **Lord Advocate v Lovat** [1830] 5AC 273 in these terms:

“Possession must be covered in every case with reference to the peculiar circumstances...The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to its own interests – All must, under various conditions, be taken into account in determining the sufficiency of a possession.”

THE LAW

[24] The law relating to adverse possession is well settled. Section 3 of the Limitations of Actions Act (LAA) provides 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, 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.”

Section 30 of the said LAA provides:

“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.”

[25] These provisions of the LAA have been severally interpreted and applied in the common law jurisdiction. In **Wills v Wills**, 64 WIR 176, **JA Pye (Oxford) Ltd. v Graham**, [2003] 1AC 419, **Paradise Beach Transportation Company v Cyril Price Robinson**, [1968] AC 1072, **International Hotels (Jamaica) Limited v Proprietors Strata Plan 461**, [2013] JMCA Civ 45, and **Recreational Holdings 1**

(Jamaica) Ltd. v Lazarus [2016] UKPC 22, to name the leading cases and the historical analysis by Sykes J (as he then was) in **Valerie Patricia Freckleton v Winston Earle Freckleton** in claim 2005 HCV 01694, the decision of Slade J in **Powell v McFarlene** [1979] 38P & CR 452 as amplified in **Buckinghamshire County Council v Moran**, [1990] Ch 623 affirmed and distilled the law on adverse possession. What constitutes possession was summarised by Morrison JA, after a discussion of the authorities, in **International Hotels (Jamaica) Limited v Proprietors Strata Plan 461** as follows:

- (a) The two elements necessary for legal possession are (1) a sufficient degree of physical custody and control ('factual possession'); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess').*

- (b) Factual possession signifies an appropriate degree of physical control, that is, single and exclusive exercised by or on behalf of several persons jointly. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. What must be shown is that the person in possession has been dealing with the land in question as an occupying owner might have expected to deal with it and that no-one else h*

- (c) *The intention required is not an intention to own but an intention to possess, that is, an intention in one's own name and on one's own behalf to exclude the world at large, including the owner of the paper title if he is not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow as done so.*
- (d) *The sufficiency of the squatter's possession depends on the intention of the squatter and not that of the paper owner of the land.*
- (e) *The willingness of the squatter to pay the paper owner for the use of the land if asked is not inconsistent with his being in possession in the meantime.*

[26] What is to be distilled is that for a party to successfully assert absolute title by adverse possession he must show undisturbed open notorious possession without consent for twelve years with the requisite intent to possess for his own benefit.

[27] Section 3 of the LAA has embedded in it factors that can disrupt the running of the period limited to twelve (12) years. It speaks to re-entry, or bringing of an action or suit to recover the land or rent. In **Oceans Estates Ltd. v Pinder** (1969) 2AC 17 Lord Diplock speaks to the ability of the title holder to bring an action for trespass and in **International Hotels (Jamaica) Limited v Proprietors Strata Plan 461** Morrison JA speaks to the written acknowledgement of the paper title holder's title by the person in possession as means to disrupt the running of time for adverse possession. The Privy Council

in **Ramnarace v Lutchman**, [2001] 1 WLR 1651 decided that giving of a notice to quit could not stop time from running while the squatter remained in possession. This is understandable as adverse possession is hinged on possession. Therefore acts that permit the squatter to remain in possession cannot suffice to disrupt the squatter's possession.

ANALYSIS AND CONCLUSION

[28] In the case at bar the claimant took possession of both properties upon the death of the paper title holder on November 24, 2004. She had her agent, Glenton Jones, maintain, at her expense, Knowles Road. The payment of electricity bill was transient and the water supply was disconnected. I find that he did not necessarily reside at the property for the entire period of his agency, but he maintained a presence there on behalf of the claimant until, according to the claimant, he left in 2017; neither did he maintain the dwelling house in a tenantable condition. His activities seemed to be limited to bushing. The house fell woefully into disrepair as evidenced by the picture exhibited by the defendant. It seems clear to me that when the claimant either decided to place her claim for declaration of absolute title before the court or when she learned of the payment of Property Taxes by the 1st defendant, she was energised to put the arrangements with Glenton Jones into writing and to pay outstanding property taxes in 2017. Whatever, the reason may be, she remained in possession of Knowles Road up to the filing of this claim.

[29] I accept the defendant's evidence that the claimant had the gate at Knowles Road chained up. This equivocal act in relation to the executor of the paper title holder was a clear signal to the defendants of her intention to exert powers synonymous to that of an owner in possession.

[30] The same is not so true of New Green. The claimant asserts that at her sole expense she paid for the cleaning of a house at New Green and bushed the property. Initially Mrs. Reid was permitted by the claimant to cultivate the land at New Green. There is no evidence of this cultivation being in existence and

certainly no evidence that a dwelling house was ever erected on that land. When the 1st defendant visited this location it was a vacant lot that was overgrown. The payment by the claimant of the property taxes for New Green is not symptomatic of factual possession although there may have been an intention to possess it. Therefore, to my mind, there being no factual possession of New Green, I find that it was not in the possession of the claimant for the twelve (12) years required by the statute, although she may have occupied it through Mrs. Reid for some time.

[31] The 1st defendants and his witness, Andrade Forrester, asserts that they attempted to take possession of both properties from 2007. They placed great reliance on the fact that the 1st defendant was the Executor of the paper title holder. They visited the property on several occasions, were denied access and emphasised their paper entitlement as a defence to any claim of adverse possession. The 1st defendant gave a Notice to Quit to the claimant's agent, Mr. Jones. The 1st defendant claimed that he failed to act before 2008 because he had to Reseal the UK Probate in Jamaica to get legal authority. The upshot of this is that all that time the claimant remained in open, notorious possession, particularly of the Knowles Road property.

[32] The absence of Probate should not interfere with the executor's power to act to bring in the estate of the deceased in the face of strident retention of possession by the claimant of Knowles Road. The authority of an executor derives from the Will, not the probate as explained in **Chetty v Chetty**. In addition, administration *ad colligenda bona* could have been sought from the court if the belief was that the estate was in need of preservation.

[33] In my judgement it was open to the defendants to take steps to recover possession on behalf of the estate when the claimant asserted her possession. Her actions challenged their right to possession and ultimately their ownership, and should have been put to an end before the limitation period had run. Their

failure to take those steps in relation to Knowles Road is fatal to the indefeasibility of the paper title after the period of limitation ended in 2017.

[34] In relation to New Green, I find that the claimant was not in factual possession. The payment by her in 2017 of the Property Taxes was not enough to place her in factual possession and the period of time that the land was occupied by Mrs. Reid is not ascertainable. There is not sufficient evidence of her possessing the property for the limitation period to satisfy this court that she had actual possession. No one was on the land and it lay fallow and overgrown by vegetation, according to the evidence. She is therefore unable to establish a right to a declaration of absolute title by adverse possession as she was not in possession.

COST

[35] In relation to the cost of this claim, the claimant has been able to establish her claim in relation to one of the two properties claimed. For this reason it seems prudent that the cost allocation for these Declarations should be apportioned between the claimant and the executors and each bear their own cost.

[36] For these reasons the following Orders are made:

1. A Declaration that the claimant has been in open and undisturbed possession for a period of twelve years and upwards immediately prior to the commencement of this action of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823
2. A declaration that by virtue of the claimant's absolute possession for a period of twelve years and upwards immediately prior to the commencement of this action, the defendants as representatives of the estate of Ivy Foster or otherwise have been dispossessed of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the

land comprised in Certificate of Title registered at Volume 1060 Folio 823.

3. A declaration that the claimant has exclusive possession of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823 to the exclusion of the defendants and the whole world.
4. The Registrar of Titles is directed to cancel the Certificate of Title registered at Volume 1060 Folio 832 of the Register Book of Titles.
5. The Register of Titles is directed to issue a new Certificates of Title in respect of ALL THAT parcel of land part of Brumalia, Mandeville in the parish of Manchester and situated along Knowles Road and being the land comprised in Certificate of Title registered at Volume 1060 Folio 823. Costs
6. That ALL THAT parcel of land part of Brampton in the parish of Manchester and being the land comprised in Certificate of Title registered at Volume 1290 Folio 130 is part of the estate of Ivy Foster, deceased.
7. Each party to bear their own cost.