[2014] JMSC Civ.126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011HCV06112

BETWEEN	**HERBERT KEITH COCKINGS**	**CLAIMANT**
A N D	**GRACE GERTRUDE COCKINGS**	**DEFENDANT**

Mr. John Givans instructed by Antonica Coore for Claimant.

Mr. Samuel Smith for Defendant.

HEARD ON: 3rd June, 2014 & 28th July, 2014

Matrimonial Property-claim for 50% share in house and land-Limitation of Actions Act-whether property rights extinguished- severance of joint-tenancy-effect of unregistered transfer of title-illegal purpose of transfer-whether illegality a bar to resulting trust.

CORAM: DUNBAR-GREEN, J (Ag.)

[1] By way of Fixed Date Claim Form filed 29th September 2011, the claimant/ancillary defendant, Herbert Cockings, seeks against the defendant/ancillary claimant, his former wife, Grace Gertrude Cockings, the following declarations and orders, inter-alia:

(i) an order for severance of the joint tenancy in property known as 10 Sharrow Drive, Kingston 8, in the parish of St. Andrew (Sharrow) being Lot 2B and registered at Volume 1382 Folio 891 of Register Book of Titles and land part of Maverly called Queen Hill in the parish of St. Andrew registered at volume 1448 Folio 912 of the Register Book of Titles;

(ii) a declaration that the claimant is entitled to a half interest in each of the said properties;

(iii) an order that the properties be appraised by a reputable valuator to establish their current market values;

(iv) an order that the properties be sold at their current market values and that the net proceeds of sale divided equally between the claimant and the defendant;

(v) the defendant to have first option to purchase the claimant's half interest in both properties, such option to be exercised within 45 days of the date of the orders herein; and

(vi) in the event the defendant fails to sign the Instrument of Transfer or any other relevant document so as to allow for effect to be given to the Court orders herein, the Registrar of the Supreme Court shall be empowered to sign the said Instrument of Transfer and relevant documents.

[2] The defendant/ancillary claimant in Ancillary Claim filed 25th October 2011 seeks the following declarations and orders, inter-alia:

(i) a declaration that the Instrument of Transfer executed by the ancillary defendant in favour of the ancillary claimant dated 15th January 1994 purporting to transfer all his interest and estate in the residence at Sharrow is valid and effective;

(ii) further or in the alternative, a declaration that any interest or estate that the ancillary defendant may have had in the said residence has been extinguished, the ancillary claimant has acquired title by possession and is solely and exclusively entitled to the residence known as 10 Sharrow Drive; and

(iii) a declaration that the ancillary claimant is solely and exclusively entitled to the property called the Queen Hill Lot in that all the interest and estate of the ancillary defendant in the said land has been extinguished, and the ancillary claimant has acquired title by

exclusive and absolute possession thereof for in excess of twelve years.

[3] The claimant/ancillary defendant (hereinafter referred to as the claimant) has relied on affidavits dated 27th September 2011 and 16th July 2012. In response, the defendant/ancillary claimant (hereinafter referred to as the defendant) has filed affidavits dated 24th October 2011 and 18th September 2012. The defendant also relied on Mr. Christopher Cocking's affidavit dated 17th September 2012. All the affiants were cross-examined at the trial.

Factual Background

[4] The facts are highly disputed and the parties have made several allegations against each other. I have had regard to all of these facts and disputes but will not rehearse each of them in this judgement as some of the issues amount to no more than minutiae. I will, however, set out in detail the more important facts, issues and arguments. The germane facts, as this Court sees them, and in some order of chronology, are as follows:

(i) the parties met sometime around 1971 at Gaynstead High School where the claimant was a 22 year old teacher and the defendant a 17 year old student;

(ii) they got married in 1973;

(iii) their daughter, Kristie was born in 1974 and their son, Christopher, in 1977;

(iv) by the mid 1970's, the parties had bought a house in Waterford, St. Catherine. The claimant was still a teacher and the defendant, a student at Mico College;

(v) in 1979, the claimant left teaching and went to work at Life of Jamaica (LOJ) as a life underwriter. The defendant worked as a teacher at Maverley Primary School. The claimant earned $2500 monthly and the defendant $300.00 monthly;

(vi) in 1983, the claimant resigned his job under questionable circumstances;

(vii) in 1983 the Queen Hill Lot was purchased and the names of both parties entered on the title as joint tenants;

(viii) in November, 1984 the parties divorced. The proceedings were brought in the United States of America (USA) by the claimant. He had taken up residence there as an illegal alien subsequent to his resignation from LOJ in 1983.

(ix) the defendant remained in Jamaica until early 1985 when she went to live in the USA;

(x) on 1st May, 1985 the defendant married Thomas Edwards Hunter, an American citizen;

(xi) in 1985 the claimant also got married, divorced and then re-married. On 14th March, 1985 he married Alisa Gaskin, an American citizen. He divorced her on 29th July 1985, and on 9th December 1985 married another American citizen, Tina Louise Elya;

(xii) in 1986, the claimant obtained resident alien status (a Green Card). He travelled to Jamaica, on occasion, from 1986 up to January 1987;

(xiii) between 1986 and 1987, the Sharrow residence was bought and the family moved in sometime in January 1987, shortly after which the claimant returned to the USA;

(xiv) the title for the Sharrow residence carries the names of the parties as joint tenants;

(xv) in March, 1987, the claimant was arrested in the USA for drug trafficking and was imprisoned up to October 1989;

(xvi) in April 1987, two mortgages were registered on the Sharrow title in favour of Victoria Mutual Building Society and

Jamaica Citizens Bank. The parties' address for the mortgage was the same, 19 Ebenezer Avenue, New Haven, St. Andrew, Jamaica;

(xvii) in November 1987 the parties obtained a second mortgage from Victoria Mutual Building Society. They used the same address for this mortgage, 1805 W.Blue Heron Boulevard, Apartment H201, Riviera Beach, Florida 32404. The mortgage instrument also refers to the mortgagors as "Herbert Keith Cockings and Grace Gertrude, his wife";

(xviii) between October 1989 (date of first release from prison) and 1996 the claimant did not visit Jamaica;

(xix) sometime in or around 1990 the Waterford property was sold;

(xx) in January 1994, the claimant signed an Instrument of Transfer whereby he transferred his interest in the Sharrow residence to the defendant;

(xxi) in summer 1996, the claimant was again arrested in the USA for drug-related offences and imprisoned until 2003;

(xxii) in 2003, the claimant was deported to Jamaica. He was received at the Central Police Station by the defendant and taken to the Sharrow property where he still resides;

(xxiii) in April 2004, the claimant lodged a caveat, as joint-owner, against the Sharrow property;

(xxiv) in April 2004, the claimant also executed a revocation of Power of Attorney which he had purportedly given to the defendant in 1994 at about the time he had executed the Instrument of Transfer.

(xxv) in November 2004, both parties obtained a loan from Jamaica National Building Society (JNBS) for the purpose of carrying out repairs to the roof of the Sharrow residence;

(xxvi) in 2005, the defendant filed an application in the Supreme Court for rectification of the record in relation to the Queen Hill property. This was consequent on that property being transferred to purchasers in pursuance of a fraudulent transaction which did not involve either party;

(xxvii) in relation to that 2005 action, the Fixed Date Claim Form, signed by the defendant and dated 21st October 2005, sought Orders including "That the transfer registered be cancelled, and that Herbert Keith Cockings and Grace Gertrude Cockings be restored as the registered owners of the property". The defendant's supporting affidavit, at paragraph 2 stated, "My husband and I are joint tenant owners of all that parcel of land being lot 106 Queen Hill…"; and

(xxviii) on December 2009 the parties wrote a letter to JNBS requesting consent to add their children's names to the Sharrow title, as Joint-tenants. The letter stated, inter-alia, "We, the undersigned Herbert Keith Cockings and Grace Gertrude Cockings, joint-owners of 10 Sharrow Drive, Kingston 8 (volume number 1051 and folio number 919) wish to advise you that we wish to add our children's names, Kristy Ann-Marie Cockings and Christopher St. George Cockings, to the title as joint tenants…". The letter was signed by both parties.

Evidence in Dispute

[5] The disputed facts, allegations and counter-allegations are as follows.

Claimant's Version

[6] The parties decided to divorce in 1984 to further their plan to become American citizens. He said they both agreed that consequent on their divorce they would each

marry an American citizen in what is commonly referred to as a “business marriage” for the sole purpose of acquiring a “green card” and ultimately US citizenship. The events which followed were in fulfillment of that plan. Both parties, despite marrying American citizens, remained in an intimate relationship until sometime after his return to Jamaica in 2003.

[7] The claimant deposed that subsequent to the parties’ divorce in 1984, the family spent summer holidays together in the USA. The parties, therefore had a strongly-bonded relationship over a considerable period, even after they ceased to be husband and wife, except for the years spent in prison and between 1992 and 1994 when there were some challenges between them. For the duration of their relationship, save for the prison years, he had been the main bread winner and contributed greatly to the acquisition of their properties. It was his evidence that the only “wife-like” person he lived with in the USA was the defendant. All his marriages took place while they lived together in the USA.

[8] He averred that he did not return to Jamaica between 1987 and 2003 because of his imprisonment and out of fear that had he travelled to Jamaica during the periods he was out of prison, his “green card” might have been revoked. The claimant said that at the time of his earlier arrest the defendant assured him that she would “hold the fort” and at the time of the second, she was actually staying with him in Florida, U.S.A.

[9] He said the family’s life-style was financed from drug dealing and that the defendant was complicit as she “cooked” crack and supported his involvement with drugs. Through his drug earnings he supported the household and totally funded the defendant’s hair dressing salon on Cargill Avenue, Jamaica, between 1985 and 1988. He also provided support from a carpet business which he operated in the USA between 1990 and 1992.

[10] It was claimant’s evidence that in 1986, upon receiving the “Green Card”, he travelled to Jamaica regularly and along with the defendant viewed several properties

and subsequently purchased the Sharrow residence. The property cost J$600,000 but the transfer represented the purchase price as $400,000 as he had paid $200,000 to the Attorney-at-Law to avert the payment of transfer tax on the real price.

[11] In that same year he had visited for Christmas and stayed at the defendant's mother's house with the rest of his family until he settled them into their Sharrow residence in January 1987, before returning to the USA. He also visited the Queen Hill property on that occasion.

[12] He challenged the defendant's claim that she was the sole purchaser of Sharrow. However, the Court takes careful note of his claim to have gifted the defendant two cars for a taxi business and his acknowledgement that she had made contributions to the family, at various times as a teacher, guidance counselor, salon operator and taxi operator. He also said that she secured employment in the USA at a children's home and had collected rent from the Sharrow property. Sometime between 1994 and 1996 he had also allegedly helped the defendant to purchase a house in her sole name in Fort Lauderdale.

[13] Apart from the claimant providing evidence of the defendant's early earnings as a teacher, a fact which obviously would be in his knowledge as a teacher himself, neither he nor the defendant quantified her earnings from the various businesses and endeavours she had undertaken.

[14] The claimant accepted that in 1994 he executed an Instrument of Transfer to pass his half interest in the Sharrow residence to the defendant. He said, "I read it. I knew the effect was to transfer my half interest…I signed it on that basis…we had a tacit agreement." This agreement, he explained, was for the defendant to hold the transfer instrument and register it only on his instructions, if he became aware that the United States government were about to confiscate any property in his name. He said he gave no such instructions, so the transfer has no effect.

[15] He denied that he extinguished his rights to both properties.

[16] Mr. Givans contended that the claimant's verbal evidence was buttressed by documents showing monies he had sent to the defendant and their son, Christopher. He relied on exhibits to the claimant's Affidavit filed on July 16, 2012. However, the Court has placed no weight on those documents having upheld the defendant's objections that they were not originals and their authenticity questionable.

Defendant's Version

[17] The defendant put forward several contrasting responses to the claimant's evidence.

[18] She said the claimant migrated to the USA sometime in 1984 within a year of acquisition of the Queen Hill property and had not visited that property between 1987 and 2003. In relation to Sharrow which was bought in 1987, the claimant never set foot in that residence until he was deported in 2003 and permitted to 'kotch' there.

[19] In the circumstances, she argued, the claimant's interest in Queen Hill had been extinguished by virtue of her acquiring title by possession for in excess of 12 years. As an alternative to her claim by way of transfer, the claimant had also abandoned Sharrow.

[20] It was she who had paid $70,000 to purchase the Sharrow residence using resources garnered from her various jobs. The balance of the purchase price of $400,000 was financed through two mortgages from Victoria Mutual Building Society and the Jamaica Citizens Bank. She denied that the claimant contributed to its purchase. He had no involvement except for a loan of $30,000 which he made towards closing costs, on condition that his name be put on the title as a joint tenant until the said loan was repaid. She had repaid him in late 1993 and thereupon he signed the Instrument of Transfer which she did not register because of various financial challenges.

[21] She denied any relationship with the claimant since their divorce in 1984. She had not lived with him nor received any help for herself, the children, the household or the businesses since he left Jamaica in 1983. She paid the mortgage loans from rental of flats at the Sharrow residence, credit union loans and profits from the businesses she was engaged in. She also sent her daughter to Nursing School and her son to University single-handedly. She and the claimant spoke, perhaps yearly while he was in prison, on the occasion he called to talk with Christopher.

[22] However, in cross-examination, she said that a maintenance order had been made against the defendant for the benefit of their children at the time of their divorce. She said further, that the claimant must have complied with the maintenance order because she had not taken him to court for breaching it.

[23] She admitted that she got married to an American citizen in 1985 but denied that it was pursuant to any plan between herself and the defendant. She said she lived at various addresses in the United States of America and stayed at different addresses when she visited to buy stock. She also lived with her American husband in West Palm Beach, Florida for six months. She denied that it was a business marriage.

[24] The defendant denied that they purchased Sharrow jointly but said that together they took out one loan "which was split in two". She also said she owned property in Florida but denied that the claimant made any contribution to its purchase.

[25] She denied having any knowledge of the defendant's illegal activities in the USA until he was arrested in 1987. She did not agree that Sharrow had been the claimant's principal place of abode between 1987 and 2003. She said that at the time of completion of the mortgage transaction, the claimant had already moved in with his wife in the USA and that he lived with his wife for the entire period he spent in the USA. On his return to Jamaica in 2003, her daughter persuaded her to give him a "kotch" at Sharrow, which licence expired in 2004.

[26] She had opened a bank account with the claimant in 2004 as a pre-condition for a loan because his name was on the Sharrow title which was being used to secure the loan. However, she claimed he converted the proceeds of that loan to his own use.

[27] Christopher Cockings did not contribute much to support the defendant's case. Most of his evidence, by admission, contained information which the defendant had related to him. He said, however, that the claimant had driven him to university and sent him monies from prison to save for him. He could not say whether it was the claimant who had bought him, what was apparently, his first car. He said in evidence, "It was in my name – that's all I cared about at the time. I never cared about who financed it."

[28] It was also the evidence of Christopher that he and the claimant had shared a residence in the USA while he, Christopher, studied there in 1996. He said he became aware of the claimant's association with drugs only after he was arrested but had known him to be a gambler who would steal his money.

The Issues

[29] The claims and counter-claims can be distilled into the following three issues on which the Court is to adjudicate:

(i) whether the claimant's interest in the properties at Sharrow Drive and Queen Hill has been extinguished by virtue of the **Limitation of Actions Act (The Limitation Act)**;

(ii) whether non-registration of the Instrument of Transfer in the Sharrow property affects the vesting of full ownership of the residence in the defendant; and

(iii) whether illegality on the part of the claimant would be a bar to a finding of a resulting trust, in relation to the transfer.

The Analysis

[30] The uncontroverted evidence is that the properties were registered in the names of the parties as joint tenants. They were purchased in 1983 and 1987 when the parties were about to divorce and had been divorced, respectively. Given the wide variance in the evidence adduced and as there are a number of different considerations involved, it is prudent to deal with the properties separately.

The Queen Hill Property

[31] Before dealing with the facts, I will state the applicable law.

[32] In **Wills v Wills (2003) PCA No.50 of 2002** the Privy Council held that one co-owner may acquire title by possession of the interest of the other co-owner in land they jointly own. This case explains the effect of s.3 of the **Limitation Act** which provides that a co-owner may acquire title by adverse possession over the interest of the other if he remains in possession with the requisite intention for twelve years.

[33] In **Powell v McFarlane (1977) 38 P & CR 452** Slade J defined possession as "…bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land." This was cited with approval by Browne-Wilkinson LJ in **JA Pye (Oxford) Ltd. v. Graham [2002] 3 ALL ER 865 para 32,** save for the reference to 'adverse possession', a concept which has questionable presence in modern law.

[34] **Wills** (supra) is also authority for the proposition that it is the dispossessor's intention and not that of the owner which is the relevant factor to be considered in determining whether title had been gained by the dispossessor, having extinguished the owner's title (paras. 21-22). The Privy Council made it clear that although the **Limitation Act** uses the term "adverse possession", the decision of the House of Lords in **Pye** applies in Jamaica (para 21).

[35] In **Pye** (supra), the House of Lords held that it is the dispossessor's intention which is determinative of whether a true owner's claim has been extinguished. Lord Browne-Wilkinson, at paragraph 45, said, "The suggestion that the sufficiency of the requisite possession can depend on the intention of the true owner whose interest is claimed to be extinguished and not that of the squatter, is heretical and wrong".

[36] Against this background, I agree with counsel for the claimant that for the defendant to succeed she must show the following:

(i) she has been in possession of the property *nec vi, nec clam, nec precario* for twelve continuous years;

(ii) she had the animus possidendi, that is, the intention to exclude and deny the title of the other co-owner and the world;

(ii) the other co-owner has abandoned possession leaving her in sole possession; and

(iv) her acts in relation to the properties were incompatible or inconsistent with the due recognition of the claimant's title.

[37] Although, I must say, as pointed out by the Caribbean Court of Justice, the old mantra of "*nec vi, nec clam, nec precario*", usually translated as possession of a thing not by force, nor by stealth nor by consent (or, also, more positively, as of right), is unnecessary in establishing whether a person in possession of land has acquired ownership of it (**Bisnauth v Shewprashad [2009] CCJ 8** (AJ), para 34).

[38] The evidence is that this property was bought by the parties on 24th April, 1983 when they were married. There is no issue regarding contribution. The presumption, therefore is, that without more, the parties would have a half share in the property.

[39] The defendant submits however, that the claimant's right to any entitlement in this property had been extinguished because between 1987 and 2003 the claimant never visited the property nor did any acts consistent with ownership, and that she had demonstrated by her conduct in paying taxes and terracing and bushing the property

that the claimant's interest in the property had been extinguished by her sole occupation and possession to the exclusion of all, with the requisite intention to possess same as sole owner.

[40] By the claimant's admission he did not visit the Queen Hill property between 1986 and 2003. He migrated to the USA about 1984 and except for a visit to the property in 1986 he had never been there. The claimant contends, however, that although he was not in physical occupation, he had frequently sent monies to the defendant to help with the maintenance of their properties. However, he did not particularise his contribution nor did he provide any contemporaneous documentary evidence.

[41] The claimant also relies on the fact of his being incarcerated for at least nine years and a purported "tacit agreement" with the defendant that it was better for him not to visit Jamaica after his release from prison, as a bar to any claim by the defendant to a possessory title.

[42] However, **Rains v Buxton (1880) 14 Ch D 537** clearly illustrates that the dispossessed paper owner need not have knowledge that another is in possession. At page 539 of the report, Fry J said:

> *It appears to me that when actual possession by the plaintiff's predecessors in title commenced, the Defendants' predecessor in title must be deemed either to have been dispossessed or to have discontinued the possession. In my view, the difference between dispossession and the discontinuance of possession might be expressed in this way - the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed into possession by other persons...*

[43] This foreshadowed the later exposition in **Wills** (supra) and **Pye** (supra) that it is the dispossessor's intention which matters.

[44] The animus possidendi was defined by Slade J in **Powell v McFarlane (supra)** as “the intention in one’s own name and on one’s own behalf to exclude the world at large including the owner with the paper title in so far as the law will allow” (pp.471-472).

[45] Mr. Givans submits that the defendant could not have formed the view (the animus) that she was the owner of the Queen Hill property to the exclusion of the claimant because during the period of his imprisonment, 1987 to 2003, the parties were in regular communication and had undertaken joint dealings with respect to their matrimonial home. I understand him to be saying that the animus in relation to the matrimonial home (which I will deal with next) also applies to Queen Hill.

[46] Mr. Givans further submits that the defendant could not have believed that the property was now hers merely because the claimant was convicted and sent to prison and therefore unable to do anything to the property. Except for not coming to Jamaica between 1987 and 2003 there was nothing in the claimant’s conduct to suggest that he had abandoned the property thereby leading the defendant to regard it as hers.

[47] I accept that it is would be a huge leap from reality to assert, as the defendant does, that the claimant’s failure to visit Queen Hill was because he had no interest in the property and had abandoned it. It is clear that even were the claimant to have desired to visit the property between 1987-1989 and 1996-2003, he would have been prevented from doing so due to the involuntary act of imprisonment. I also find plausible his explanation that he did not visit between 1989 and 1996 for fear that if he returned to Jamaica he would have been prevented from re-entering the USA because of his conviction. However, as I have already established, the claimant’s conduct is not determinative of whether the defendant can be found to have dispossessed him.

[48] It is the defendant’s evidence that she paid property tax, terraced the land to mitigate against soil erosion, and bushed the lot. There is dispute as to the origin of the resources which were used but I find that neither party has supplied any cogent evidence to sustain their assertions one way or the other.

[49] The relevant issue is whether those actions in relation to the land were such that the defendant could be said to have dispossessed the claimant. In **Farrington v Bush (1974) 12 JLR 1492,** Graham-Perkins JA said:

> *…there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner…In this context, an equivocal act means an act of such a nature as to provide an equal balance between an intention to exclude a true owner from possession and an intention merely to derive some enjoyment or benefit from the land wholly consistent with such use as the true owner might wish to make of it.* (p.1493).

[50] In **Farrington (supra)**, the claimant relied on monthly visits to the property, getting the land cleared, putting up a "No Trespassing" sign, putting in markers on the boundary and registering the land under an invalid conveyance. These actions failed to establish possession because the claimant was of the mistaken view that he had been made owner under the invalid conveyance and as such, his acts could have been performed qua owner as much as they could have been with intent to dispossess the true owner.

[51] I have considered that in 1994, the defendant made arrangements with the claimant for him to execute a power of attorney over his properties in Jamaica. Although the Power did not particularise the properties, the inference, based on the evidence, is that it would have included Queen Hill. Ultimately, the claimant did not execute the Power. But it does beg the question: why would the defendant have behaved in that manner if she had any intention to represent to the claimant, as co-owner, that she was in sole possession and control of that property?

[52] I find that the claimant acted as she says in relation to Queen Hill but her actions were equivocal, and on the facts lean towards 'use as owner" than with "intention to establish title" at the exclusion of the claimant. In other words, the actions by the

defendant over the land were those which would be expected of any owner. Moreover, following the exhortation of the Privy Council in **Wills** (supra), the Court should not be ready to infer possession from relatively trivial acts (para 19).

[53] On the basis of all the facts, although the defendant was in physical control of the property for the entire period the claimant was absent, there was no display of a particular mental element directed towards the claimant to establish that she had it in mind to possess the land in her own name or on her own behalf to the exclusion of all others, particularly the claimant (**Farrington,** supra; and **Powell,** supra).

[54] Counsel for the defendant asked the Court to consider s. 16 of the **Limitation Act** in determining whether the defendant had dispossessed the claimant. S.16 provides, in part:

> When an acknowledgement of title of the person entitled to land has been given to him…in writing signed by the person in possession…then such possession..of or by the person [giving the acknowledgement] shall be deemed to have been the possession…of or by the person to whom …such acknowledgement was given…and the right of such last mentioned person…to bring an action to recover such land…shall be deemed to have first accrued at…the time at which such acknowledgement…was given.

[55] In **Pottinger v Raffone 2007, PCA No. 64, 2005,** the Privy Council found that engagement in negotiations between the squatter and owner, and even the drafting of a sale agreement, was not inconsistent with the squatter being in possession for purposes of acquiring title. The Court rejected the argument that the draft agreement constituted a signed acknowledgment of title which, by reason of section 16 of the **Limitation Act,** would have been fatal to the squatter's claim. At paragraph 40 of the Judgement, the Court cited, with approval, the dictum of Lord Browne-Wilkinson that a squatter's willingness to pay for his possession, if asked by the owner, is not inconsistent with his

having the requisite possession for the purposes of the Limitation Act (**Pye** para. 46**,** supra).

[56] Mr. Smith, counsel for the defendant, relied on that case to make the point that when the defendant brought an action for restoration of title in Queen Hill, the very fact that the Court documents were not directed to the claimant, meant that those documents could not be claimed to be an acknowledgement as contemplated by s. 16 of the **Limitation Act**. Neither would an unsigned agreement for the sale of Queen Hill.

[57] I agree with counsel, applying **Pottinger** (supra) that the existence of the unsigned sale agreement, particularly as it bore no relation to the defendant, is of no relevance to s.16. However, in considering this submission, the Court must give the ordinary meaning to the words 'when an acknowledgement of title is given to him". It seems to me that it should not matter how the defendant comes to the knowledge of that acknowledgement. The Court documents are public records, so if, as obtained in the instant case, the defendant's affidavit acknowledged the claimant as joint tenant, it was written notice not just to the claimant, but others as well, that the defendant acted in the name of two owners, herself and the claimant whom she acknowledged as co-owner.

[58] Among the reliefs sought in the Fixed Date Claim Form was that both parties be restored as joint tenants. So, were it the case that prior to the action the defendant had been in sole possession, the effect of her claim would have been to restore both their interests as joint tenants. This is antithetical to any intention that she was sole owner or at least had severed the prior period of sole occupancy now that she had restored his title. In other words, the Fixed Date Claim Form and Affidavit brought to an end the time that had run prior.

[59] I therefore do not agree with Mr. Smith that the Affidavit and Court documents would need to be served on the claimant to satisfy s.16 of the **Limitation Act.**

[60] Nonetheless, having already found that there was no animus possidendi to rebut the strong presumption that possession is retained by the paper owner (**Powell v McFarlane, supra**), the Fixed Date Claim Form and Court documents serve only to buttress my conclusion that the defendant did not intend to occupy the property at the exclusion of the claimant.

[61] The defendant did not succeed in showing that the true owner had gone out of possession, that he had left the property vacant with the intention of abandoning it (**Archer v Georgiana Holdings Ltd. 21 WIR 431**) or that she had done acts in relation to the property which were incompatible or inconsistent with due recognition of the claimant's title (**Goomti Ramnarace v Harry Persad Lutchman (2001) 59 WIR 511];**

[62] Accordingly, I conclude and find that the claimant's interest in Queen Hill has not been extinguished and he is therefore entitled to a half interest in the property.

Was the claimant's interest in Sharrow extinguished by the Limitation Act?

[63] The claimant, by his own admission, had not been to the Sharrow property between 1987 and 2003. His reasons for not doing so are the same as those for Queen Hill.

[64] The transfer was registered on 10th April 1987 in the names of Herbert Keith Cockings and Grace Gertrude Cockings both of 19 Ebenezer Avenue, New Haven, St. Andrew as joint tenants.

[65] The title reveals that the mortgages had been discharged, save for that in favour of Jamaica National Building Society. I accept that those payments were made by the defendant and certainly for the years 1996 to 2003 she had done so without the claimant's support. His own evidence of receiving a measly 60 cents per hour for work done while in prison, from which he had been sending money to Christopher, supports this finding.

[66] I also accept that the defendant extended the Sharrow residence, albeit the extent of the renovation is in dispute. I believe that she paid the taxes and maintained the property in the absence of the claimant. She also collected rent which was used, as she said, to defray expenses related to the property and otherwise, until sometime after May 2004 when she began sharing some of the proceeds of rent with the claimant, consequent on a letter from his Attorney-at-Law.

[67] Any question as to how she was able to single-handedly perform all those tasks can be answered by the claimant's own evidence that at some point he had gifted the defendant two cars for a taxi business and that she had made contribution to the family, from her various occupations. Undoubtedly, there is sufficient evidence of the defendant's ability to use the various resources at her disposal, whether generated entirely of her own accord.

[68] Having said that, neither party has impressed me as a reliable witness. I find them both lacking in candour, selective with the truth and obfuscatory.

[69] I find that the parties continued a relationship beyond their divorce and believe the claimant's evidence that they had arranged to marry American citizens to get residential status in the USA. The quick marriages to US citizens by both of them in Florida, consequent on their divorce, and the transient character of those marriages, are consistent with a plan to engage in 'business marriages'.

[70] Their close relationship continued up to 1994 when the defendant arranged for the claimant to execute a Power of Attorney and the Transfer was done. Accordingly, there was no evidence up to then of any abandonment. In any event, only seven years would have run since the purchase of Sharrow. The issue of extinction of title would not have arisen then.

[71] I find no credible evidence since 1994 to suggest that the defendant had the animus possidendi. Except for the 7 years following, when the claimant was imprisoned, the two parties did joint transactions in relation to Sharrow. Together, they negotiated and received a loan from Jamaica National Building Society in November 2004 for the

purpose of repairing the Sharrow property. Since 2004, the defendant has also been sharing the proceeds of rental of parts of the property with the claimant. They also wrote a letter, jointly, in 2009 requesting consent from Jamaica National to add their children's names to the titles, as joint-tenants. I find these actions to be inconsistent with the intention to dispossess the claimant.

[72] Accordingly, the claimant's half interest in sharrow has not been extinguished by virtue of the **Limitation Act.**

[73] I now turn to consider the effect of the non-registration of the Instrument of Transfer.

Was the transfer effective?

[74] The Instrument of Transfer was executed by the parties on 15th January 1994. It provides in part: "In consideration of the natural ,love and affection which the transferor has for and bear towards the transferee the transferor hereby transfers to the transferee in fee simple all the estate and interest which he is entitled to in the said land to the said transferee…all that parcel of land…known as Sharrow…"

[75] For an examination of this issue, I turn to the principles noted and applied by Wolfe J. as he then was in **Brynheld M. Gamble v Hazel Hankle (1990) 27 J.L.R 115, 117.** In that case, the plaintiff sought to recover possession of lands part of King Street, Clarendon, for which she had been registered as a joint-tenant in fee simple with her late husband. The plaintiff claimed that upon the death of her husband she became the sole proprietor of the land by virtue of the principle of *jus acrescendi*. This claim was challenged by the defendant to whom the late husband's interest had been devised prior to his death by way of a deed of gift. It was argued by the plaintiff that the said deed of gift was of no effect, it not having been registered in accordance with the fourth schedule of the **Registration of Titles Act.**

[76] Relying on the principles established in **Williams v Hensman (1861) 1 John and Hem 546, 547,** the learned judge held inter alia:

> It is patently clear that section 63 of the Registration of Titles Act does not operate to make the unregistered instrument void. The section only postpones the passing of the interest created by the instrument until the instrument is registered.

He therefore found that the deed of gift had the effect of severing the joint tenancy which existed between the deceased and the plaintiff.

[77] In **Williams v Hensman (supra)**, Sir William Page Wood, V.C. outlined the ways in which a joint tenancy may be severed, as follows:

> A joint tenancy may be severed in three ways: in the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share…secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common…" (p.557)

[78] Applying **Gamble (supra)** and **Williams v Hensman (supra)**, I hold that the transfer instrument, duly executed by the claimant, is not void and has the effect of severing the joint tenancy.

[79] I therefore accept the defendant's claim that the transfer was intended to pass the claimant's legal and beneficial interest to her, and applying **Gamble (supra)**, I find that the claimant herein is deemed as continuing to hold his interest in trust for the defendant until such time as the defendant brings an end to the "postponement" of her interest by registering the transfer.

Was the Transfer a Sham?

[80] If the intent of the parties in executing the transfer were otherwise than a genuine intention to vest the claimant's interest in the defendant, then the equitable outcome would be a resulting trust in favour of the claimant.

[81] This calls for a clinical examination of the reason and intent behind the execution of the transfer, the conduct of the parties and all relevant circumstances of the case. The defendant's reliance on illegality to oust any resulting trust is but one matter for examination, meaning that the existence of 'unclean hands' by itself is not necessarily a bar to whether a resulting trust can be proved.

[82] The defendant's explanation for not registering the transfer is impecuniosity. She says that she has been financially challenged by having had to pay the mortgages, educate her two children, maintain the properties and the household and most recently endure the expenses associated with her daughter's illness. On the contrary, the claimant says the transfer was for the purpose of avoiding his property being confiscated by the authorities because of his conviction and the illegal activities that he was still engaged in at the time of the transfer.

[83] The defendant maintains that the reason for the transfer was her repayment of $30,000 she had borrowed towards the closing costs for the purchase of Sharrow on condition that the claimant's name be added to the title, pending repayment. Yet again, there is no documentary evidence to substantiate this claim.

[84] If the claimant, who has the burden of proof at this juncture, is to succeed in the argument that the parties had not intended for him to pass his legal and beneficial interest in the property, he would have to do so without the need to rely on the illegal purpose of the transfer.

[85] The case of **Tinsley v Milligan 1993 ALL E.R. 65,** on which the claimant relies, is authority that an illegal purpose will not necessarily bar the equitable relief of resulting

trust. In that case both parties accepted that the house in question was owned jointly, but at the time of purchase it was conveyed in the sole name of Mr. Tinsley so that Miss Milligan could benefit from the department of Social Security. Subsequent to a falling out between the parties, Mr. Tinsley brought an action against Miss Milligan for possession and ownership of the house. Mr. Tinsley contended that, applying the common law principle ex turpi causa non oritur actio, Miss Milligan was barred from denying his ownership of the house because the purpose of the arrangement whereby the house had been registered in the sole name of Mr. Tinsley had been to facilitate the fraud on the Department of Social Security and therefore her claim to joint ownership was tainted by illegality.

[86] Lord Browne-Wilkinson said at page 91:

> "The respondent established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and the appellant that they owned the house equally. She had no need to allege or prove why the house was conveyed in the name of the appellant alone, since the fact was irrelevant to her claim; it was enough to show that the house was in fact vested in the appellant alone. The illegality only emerged at all because the appellant sought to raise it. Having proved these facts, the respondent had raised a presumption of resulting trust. There was no evidence to rebut that presumption."

[87] **Tinsley** must, of course, be read in light of its own set of facts. The significant distinguishing element between **Tinsley** and the instant case is that joint ownership was never in dispute, in the former, so Miss Milligan did not have to rely on the illegal purpose of the transfer to establish her interest.

[88] However, in the instant case, a dispute as to joint-ownership is a central issue. Consequently, the claimant would have had to rely on the illegal purpose for the transfer

and also his criminal activities as the source of his alleged contribution, in order to rebut the defendant's claim that he had lent her the money and was not a genuine co-purchaser. It is for this reason that he has volunteered the illegal purpose of the transaction and grounded his case entirely on his criminal conduct.

[89] Three approaches can be distilled from the authorities in deciding on the treatment of illegality in cases requiring equitable considerations (see **Law Commission Consultation Paper No. 189 (2009): The Illegality Defence, pp. 86-111**).

[90] In the **"Non Reliance Approach",** if the claimant must lead evidence of a contrary intention to obtain a beneficial interest, he will not be permitted to rely on his illegality. This was the decision by the majority in **Tinsley.**

[91] In the **"Pure Hands"** approach articulated in the dissenting judgment of Lord Goffe in **Tinsley, t**he transferor must not have engaged in any illegal conduct if he seeks to enforce a resulting trust. If the transferor has even so much as attempted to carry out an illegal purpose he will not have clean hands and cannot be permitted to come to equity. If the 'pure hands' approach is applied it would only be on the basis that both parties are not found to be culpable.

[92] In **the "Not quite Clean Hands" approach,** the transferor can recover property so long as the illegal purpose has not been carried out (**Martin v Martin [1959] HCA 52**).

[93] From these cases, the proposition emerges that a party who seeks to establish a resulting trust by relying on his illegal intent behind execution of a transfer, will likely find the Court reluctant to help him based on the requirements of justice and public policy.

[94] I adopt the opinion of McLachlin J (as she then was) in **Hall v Hebert (1993) 101 DLR (4th)** 129 at 165 that:

> . . . to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to 'create an intolerable fissure in the law's conceptually seamless web': Weinrib - "Illegality as a Tort Defence" (1976) 26 U.T.L.J. 28 at p. 42.We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.

[95] From the foregoing considerations, I conclude that since the claimant has come to equity with 'bare-faced' reliance on illegality, the Court will not assist him. Accordingly, I find that the defendant is entitled to register the transfer.

[96] I have found no cogent evidence in support of the claimant's assertion that the defendant participated in his criminal activities. The parties are therefore not in *pari delicto* and as such there is no basis for the Court to consider the issue of unjust enrichment.

The Orders

[97] I make the following orders and declarations on the Fixed Date Claim Form:

(i) a declaration that the claimant is entitled to a half interest in the Queen Hill property;

(ii) an order that the property be appraised by a reputable valuator to establish its current market values;

(iii) an order that the property be sold at its current market value and that the net proceeds of sale be divided equally between the claimant and the defendant;

(iv) the defendant shall have first option to purchase the claimant's half interest in the property, such option to be exercised within 45 days of the date of the orders herein; and

(v) in the event either party fails to sign the Instrument of Transfer or any other relevant document so as to allow for effect to be given to the Court orders herein, the Registrar of the Supreme Court shall be empowered to sign the said Instrument of Transfer and relevant documents.

[98] I make the following declaration on the Ancillary Claim/Counter-claim:

That the Instrument of Transfer executed on 15th January 1994 by the ancillary defendant to pass his half interest in Sharrow to the ancillary claimant is valid and effective.

[99] Each party will bear one half of the costs of the other party as agreed or taxed.

[100] Stay of Execution granted.

[101] Leave to Appeal.