[2023] JMSC Civ. 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03140

BETWEEN	**CLAUDETTE MARKLAND**	**CLAIMANT**
AND	**RICHARD NEMBHARD**	**FIRST DEFENDANT**
AND	**RICARDO NEMBHARD**	**SECOND DEFENDANT**
AND	**AKEEM NEMBHARD**	**THIRD DEFENDANT**
AND	**SHARON ALEXANDER**	**FOURTH DEFENDANT**

IN CHAMBERS (VIA ZOOM)

Mrs. Joan Thomas instructed by E.D. Davis and Associates, Attorneys-at-Law for the Claimant.

Ms. Kayon Atkinson instructed by Charles Williams for the First Defendant.

Heard: March 2 and March 28, 2023.

Land - Limitation of Actions Act - Whether defendant acquired right to possessory title - Initial possession by virtue of family arrangement - Whether claimant entitled to declaration that she is beneficiary and part owner of property - Claimant's entitlement a chose in action.

PETTIGREW COLINS J.

INTRODUCTION

[1] The claim involves property registered at Volume 1263 Folio 157 of the Register Book of Titles, being all that parcel of land part of Lot 5, Cassava Piece in the parish of St. Andrew, bearing civic address 17 Cassava Piece. The claimant is the daughter and Administrator of the estate of Leonard Markland who died on October 30, 2016. Mr Leonard Markland is one of the joint title holders of the property. The claimant is also the Executor of the estate of Oswald Markland who died on January 2, 1996. He is another joint title holder of the said property. The claimant is also a beneficiary of both estates.

[2] The property had two structures; a one room concrete structure as well as a four-room dwelling. The four defendants reside at the disputed property. The first defendant has been residing at the property since his early childhood years. The second and third defendants are the children of the first and fourth defendants. The claimant seeks recovery of possession of the property from the defendants, in addition to a declaration that she is a lawful beneficiary and owner of the property.

[3] Although there are four defendants, the second, third and fourth defendants did not give evidence in the matter because they failed to file their affidavit in compliance with the order made at first hearing and they were not granted permission to file their affidavits out of time.

THE CLAIM

[4] The claimant filed a Fixed Date Claim Form on July 2, 2021, in which she sought the following orders and declarations:

> 1. *"A declaration that the Claimant is one of the lawful beneficiaries and owner of the property being all that parcel of land part of Cassava Piece in the parish of St. Andrew, being Lot number 5 and registered at Volume 1263 Folio 157.*
>
> 2. *An order for the recovery of possession from the 1st, 2nd, 3rd and 4th Defendants of the portion of property located at Lot Number 5*

Cassava Piece in the parish of St. Andrew registered at Volume 1263 Folio 157 with civic address being 17 Cassava Piece Road being occupied by the said Defendants.

3. *Costs*
4. *Further or other relief as this Honourable Court shall deem fit."*

[5] On July 2, 2021, the claimant filed a Notice of Application for Court Orders, seeking an interim injunction in order to enjoin the defendants from continuing construction at the premises and in essence to prevent them from dealing with the property. That injunction was granted ex parte, and after an inter partes hearing, was extended pending the outcome of the claim.

FACTS NOT IN DISPUTE

[6] It is not in dispute that the first defendant has been residing at the premises since he was a small child. The first defendant does not dispute that Leonard Markland is a title holder of the subject property or that up to the time of his death, Mr Markland maintained some control over the property. It is not disputed by the first defendant that the claimant is the administrator and executor of the estates of Leonard Markland and Oswald Markland respectively. Also not disputed, is the claimant's statement that she is a beneficiary of both estates.

FACTS IN DISPUTE

[7] The first defendant disputes that he was ever a tenant at the subject property. It is disputed that a fourth bedroom of the house occupied by the defendants was ever tenanted. There is dispute over who built the one-bedroom structure and who has had control over it since the death of the first defendant's 'adopted' mother in 2007. There is also dispute as to whether Mr Leonard Markland secured the first defendant's permission to allow Mr Chang to occupy one of the rooms of the four

bedroom. It is challenged that the first defendant has dealt with the property for some twenty-nine years as his own and that no one has ever challenged his ownership of the property.

CLAIMANT'S EVIDENCE

[8] The claimant filed two affidavits in this claim. The first was that filed in support of the claim on July 2, 2021. A second affidavit was filed on May 13, 2022. The claimant averred in her first affidavit that the first and fourth defendants are tenants at the disputed property. However, in her affidavit in response to the first defendant's affidavit, she admitted that the first defendant had lived at the property for an extended period since the 1970s, and in cross examination stated that he had lived at the property since he was four or five years old. The claimant stated that the defendants have been tenants at the property from the early 1990's. The terms of the tenancy agreement that has been in place since 2007, according to the claimant, is that the defendants were allowed to occupy two of the rooms from the four-bedroom dwelling and in lieu of paying rent, was required to care for the claimant's mentally challenged cousin, who lived in a third room of that same house.

[9] According to the claimant, the arrangement whereby the defendants would take care of Mr Chang (the mentally ill cousin) in lieu of rent, ended in 2017, and the defendants were then required to pay rent. It is the further evidence that the defendants did not pay rent, resulting in multiple notices to quit being issued to them between 2019 and 2021. These various notices were exhibited. She stated that in 2021, she returned from the United States of America and observed that the first defendant had commenced construction of a permanent structure on the property.

[10] In the affidavit in response filed on May 13, 2022, the claimant averred that the defendants never paid taxes for the property at any given time. She stated that the

defendants have always resided at the property by way of permission or as tenants. Miss Markland alleged that she is not aware of one Oliver Sharpe who the first defendant claimed was his uncle, who built the one-bedroom house. She said however, that in the 1970's a man known as Mr Shaw visited with the first defendant, who he claimed was his nephew. She stated that this man never resided at the property or owned any building there. Mr Shaw, she said, stopped visiting the property in or around 1975.

[11] The claimant's assertion is that her grandparents had constructed the four-bedroom board house and her grandmother constructed the one room concrete structure on the property. The four-bedroom she said was the family home where her father and his siblings were raised. It is two rooms of that four-bedroom house which is occupied by the first defendant and his family. The fourth room, she said, was always occupied by tenants and she was the one who collected the rent. The claimant denied that the first defendant occupied the property undisturbed.

[12] During cross examination, the claimant stated that Suzette Anderson was the sister of Sharon Alexander (the fourth defendant) and that Miss Anderson stayed at the property from 2007 to 2012, as a tenant of Leonard Markland. She also gave evidence that one Kevin Cargill rented the one - bedroom concrete structure after Ms Anderson's departure. Ms Markland stated that the dilapidated room the first defendant spoke of was occupied by one Mr. Rennie until his death.

[13] Her evidence is that her father originally entered the agreement with the defendants to care for her cousin Mr Chang for the reduced rent of $2500.00 and then in 2013 or 2014, she entered into an agreement with the defendants to take care of Mr Chang in lieu of rent.

[14] She gave evidence that at no time did she have any agreement with the second and third defendant, neither did they pay her rent at any time. The claimant also asserted that in 2007, Mr Leonard Markland served the first defendant notice to

vacate the property. The claimant, it is noted, never said in any of her affidavits that Mr. Markland had served the first defendant with notice to quit.

THE FIRST DEFENDANT'S EVIDENCE

[15] The first defendant filed two affidavits in the matter, one on February 11, 2022 and another on June 13, 2022. The first defendant contended that he is the proprietor of Lot 5, by right of possession, and that he has resided there for the past 52 years. He said that he started to reside at the property when his uncle Oliver Sharpe brought him there, and he was later informally adopted by the claimant's aunt. He said that his uncle built the one-bedroom concrete structure with verandah and there was no opposition to the construction as the land was considered family land.

[16] The first defendant stated that his uncle gave him the one room house before he died some 29 years ago. He said he has lived on the property and treated it as his home and no one has assisted with the maintenance of his house and the surrounding environs; that he maintained the property at his own cost. He said further, that no one has attempted to come onto the property without his permission and that 2019 was the first time that that there was any attempt to disrupt his quiet enjoyment of the property. The first defendant said that he has remained undisturbed in that house until 2019.

[17] The first defendant's evidence regarding the one bedroom and the four bedroom houses will be more fully addressed when undertaking the analysis. He also said that he has added a one - bedroom house with an inside bathroom. He did not say when this construction took place.

[18] The first defendant vehemently denied that there was ever any agreement for rent. In his affidavit, the assertion was that the fourth room of the four room house occupied by himself and the fourth defendant was never rented and was in a dilapidated state for years and was not habitable. He denied that this fourth bedroom was at any time rented to someone else or that the claimant at any time collected rent from any of the rooms on the four-bedroom dwelling. He said, that

the second defendant's sister stayed with them for a short while. He did not state what room she occupied.

[19] His affidavit evidence was that Mr. Rennie lived in a separate board house on the property that was not under his control. In cross examination, however, when he was asked if when he said no one else occupied that four room house (in the context, apart from himself and his family) if it was not true, his response was "I say Mr. Rennie but nobody pay rent there".

[20] The first defendant denied entering into any agreement to care for the claimant's mentally challenged cousin Mr. Chang in lieu of rent. He said that he viewed Mr. Chang as family. He also stated that he was asked permission by the claimant's father, Mr. Leonard Markland to allow Mr. Chang to stay in the backroom of the four room house.

[21] Based on the first defendant's account, he seeks the following declaration and order:

> *1) "A Declaration that I have right of possession for the area I have occupied for over 20 years at Lot Number 17 Cassava Piece Kingston 8 in the parish of St. Andrew registered at Volume 1263 Folio 157.*
>
> *2) An Order that the Claimant should desist from activities that prevents me from having quiet enjoyment of my property.*
>
> *3) Costs to the Defendant*
>
> *4) Further or other relief as this Honourable Court shall deem fit."*

[22] In cross examination, Mr Nembhard gave evidence that his date of birth is September 6, 1967 and that he has resided at Lot 5 from he was 2 years and 6 months old. His further evidence was that he occupied the property with the permission of Mr Leonard and Oswald Markland. He went on to state that until 2007, when Louise Brown died, he was residing at the said property with permission. Surprisingly, the first defendant, when asked by counsel for the

claimant if his occupation of the property was always with permission for all 52 years, he agreed that it was with permission.

[23] He stated that he did not have anything in writing from his uncle gifting the property to him. His evidence is that his uncle and not the claimant's grandmother built the one-bedroom concrete structure. He asserted that he was never required to pay the taxes or rent. He confirmed that Mr Chang resided in the same four room board building in which he resides, and that he only occupies two of the four rooms. He eventually admitted that Mr Rennie also resided on the property in the same house where he resided.

THE ISSUES

[24] The primary issue in this case is whether the claimant's right to recover possession of the disputed property has been barred by the operation of **sections 3 and 30** of the **Limitation of Actions Act**. In other words, did the defendants or any of them acquire the right to a possessory title in respect of the disputed property. The second issue which arises is whether the claimant is entitled to a declaration that she is a lawful beneficiary and one of the owners of the disputed property.

THE LAW

[25] The provisions of the **Limitations of Actions Act** are applicable where a party claims that he has been in sole, open, continuous and undisturbed possession of property and that he has thereby acquired a possessory title to the property in question. **Sections 3, 4(a)** and **30** of the **Act** state as follows:

> *3. "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such*

action or suit, shall have first accrued to the person making or bringing the same."

4. "The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-

> *(a) When the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;…*

30. "At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[26] It is apt to address who has the burden of proof. It is the claimant who seeks to recover possession of the property from the defendants who are in possession. The maxim 'he who asserts must prove' is applicable. At paragraphs 38 to 42 of the Court of Appeal judgment in **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, McDonald Bishop JA gave a detailed and masterful exposition of the relevant law on this issue. The following appears at paragraphs 38, 39, 40, 41 and 42:

[38]" …The English authorities that have treated with the English 1833 Act have proved to be quite instructive in treating with this issue. They have unequivocally established that when a claimant brings a claim to recover possession, he "must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendant's" (emphasis added): The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609.

[39] Even more importantly in the context of this case, the authorities have also established that where the person against whom the claimant has brought the action pleads the statute of limitations, then, the claimant must prove that he has a title that is not extinguished by the statute: The Laws of England, The Earl of Halsbury, Volume 24 paragraph 606 and ***Dawkins v Penrhyn*** *(Lord) (1878) 4 App Cas 51.*

> *[40] In **Dawkins v Penrhyn**, their Lordships usefully noted the distinction between the operation of the Statutes of Fraud and the statute of limitations as to personal actions, on the one hand, and the statute of limitations as to real property, on the other. Albeit that the discourse was within the context of the issue of pleadings, it, nevertheless, has proved quite instructive in treating with the question as to the legal implication of the statute of limitations with respect to a claim for recovery of possession.*
>
> *[41The position had not changed even with the repeal of the 1833 Act. In Halsbury's Laws of England, 3rd edition, volume 24, at paragraph 373 in referring to the English 1939 statute of limitations, the learned editors reiterated that in an action for recovery of possession of land, the claimant "must on the face of his pleadings show, and must at the trial prove, a legal title to possession not barred by the statute" (Emphasis added). They went on to note further that except where a defendant is in possession by virtue of a lease or tenancy granted by the claimant or his predecessor in title, the defendant need not plead the statute, but may simply plead that he is in possession. Also, they noted that in cases in which the title to land incidentally comes in question, for example in the cases of trespass to land, there is no reason for pleading the statute, the proper mode of taking advantage of it by the defendant is a plea that denies that the land belongs to the party dispossessed.*
>
> *42. These authorities have forcefully brought home the point that a claimant in a case for recovery of possession must state the basis of his claim which is his title to the property and once that is laid on the table (so to speak) then the statute of limitations will come into play and may operate to bar a stale claim regardless of whether or not the statute is expressly pleaded by a defendant in possession. So, the statute automatically arises for consideration once the title to the land is being relied on to ground the claim and its operation is not dependent on whether the defendant choses to avail himself of it. A defendant may simply exploit the advantage afforded by the statute without any express reliance on it. This is understandably so because as the authorities have established, the statute goes to the root of the claim or to the right to bring the claim and not to the remedy. It is thus a hurdle that is set up by law in the path of the claimant that can affect his claim rather than one to be set up by a defendant to defeat the claim.*

[27] It is therefore Miss Markland who must establish on a preponderance of the probabilities that the owners' title has not been extinguished by operation of the relevant provisions of the Act. In other words, she must rebut Mr Nembhard's claim that he has acquired the right to a possessory title. Miss Markland must therefore show her possession or occupation and/or that of her predecessor in title or the possession or occupation by someone who occupied the property with her permission or on her behalf or with the permission or on behalf of her predecessors in title during the limitation period. This she is required to do, in order to counter

Mr Nembhard's assertion that he has been in possession for twelve years or more and that this possession was uninterrupted, open and without permission.

[28] As to the nature of the possession that is required on the part of the party claiming to have extinguished the title of the title holder, that matter was discussed in some detail in **JA Pye (Oxford) v Graham** [2003] 1 AC 419. At paragraph 31 of the judgment, Lord Browne-Wilkinson, expressly approved the definition propounded by Slade J, in the case of **Powell v McFarlane** (1979) 38 P & CR 452. At paragraph 32, Lord Browne-Wilkinson reproduced the exposition of Slade J, found at page 469 of the judgment:

> *"Possession of land, however, is a concept which has long been familiar and of importance to English lawyers because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent…. In the absence of authority, therefore I would for my own part have regarded the word 'possession' in the 1939 Act 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; likewise, I would have disregarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent; likewise I would have regarded a person who has 'dispossessed' another in the sense just stated as being in 'adverse possession' for the purposes of the Act."*

[29] At paragraphs 39 and 40, Lord Brown-Wilkinson continued:

> *"39. What then constitutes "possession" in the ordinary sense of word?*
>
> *Possession*
>
> *40. In Powell's case Slade J said, at 38 P & CR 452, 470:*
>
> *"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
>
> *(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual*

possession and the requisite intention to possess ("animus possidendi")."
…

1. *A sufficient degree of physical custody and control ("factual possession");*

An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").

[30] At paragraph 41 of Judgment Lord Browne- Wilkinson stated:

"In Powell's case (1977) 38 P&CR 452 at 470–471 Slade J said:

'(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question 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 … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.'

I agree with this statement of the law which is all that is necessary in the present case. The Grahams were in occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. The Grahams farmed it in conjunction with Manor Farm and in exactly the same way. They were plainly in factual possession before 30 April 1986."

[31] At paragraph 37, Lord Browne-Wilkinson also said:

"It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act."

[32] At page 14 of the judgment in **Powell v McFarlane** (supra), Slade J had the following to say:

> *"An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large, by his actions or words, that he has intended to exclude the owner as best as he can, the court will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."*

[33] In **Bryan Clarke v Alton Swaby** Privy Council Appeal No. 13 of 2005, it was authoritatively laid down at paragraph 11 of the judgment that:

> *"….. it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim: see the opinion of the board in* ***Wills v Wills*** *[2003] UKPC 84, citing the board's earlier opinion (delivered by Lord Millett in* ***Ramnarace v Lutchman*** *[2001] 1 W LR 1651, 1654*
>
> *"Generally speaking adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner."*

[34] Based on the provisions of section 3 of the Act, the limitation period for an action to recover land is twelve years, and as reinforced in the case of **Goomti Ramnarace v Harrypersad Lutchman** Privy Council Appeal No. 8 of 2000, the period starts when the right to bring the action first accrues to the person bringing the action or someone through whom she claims. That case is also authority for the proposition that service of the notices to quit by the claimant without more will be insufficient to stop time running in favour of the defendants.

In **Peter Perry v Carol Baugh et al** [2018] JMCA Civ 12, Brooks JA decided that squatters who occupied various different sections of a parcel of land, while the title holder

was in possession of a different section of the same parcel, had acquired the right to possessory title in respect of the portion of land occupied by each of them. Therefore, the title of the registered owner was extinguished in respect of those portions occupied by the squatter.

ANALYSIS

[35] This court makes the observation that matters were advanced in submissions by the first defendant in relation to which there was no evidence. For example, it was said that Miss Louise Brown was involved in a relationship with Mr Markland and that the defendant resided with Mr. Markland and Miss Brown. Further, it is said that Mr Leonard Markland is the “adopted” father of the first defendant and that part of the property was given to the first defendant by Mr. Markland. Counsel also raised the issue of compensation to the first defendant for the first time in submissions. Since these submissions are not grounded in evidence, no consideration will be given to them.

The one room admittedly constructed by the first defendant

[36] The first defendant has said that he added a one-bedroom structure with an inside bathroom. It is not entirely clear when he is saying that this construction took place. The issue was not clarified in cross examination. It is presumed that that is the construction that the claimant said she observed upon her return from the United States. Even if this assumption is incorrect, nothing in my view turns on that incorrect assumption since it was for the defendant to assert when the construction took place.

The one room with the verandah

[37] In respect of the one - bedroom concrete structure with the verandah, Mr Nembhard stated that his uncle Oliver Sharpe built this one-bedroom on Lot 5, where he lived during all of his life while attending school. He said that his uncle died more than 29 years ago and that his uncle, prior to his death, gave him that house where he currently resides with his spouse and children. For the avoidance of confusion, it is the said Lot 17 that was referred to as Lot 5. The duplicate certificate of title indicates that the lot is numbered 5 on the deposited plan. I reject the evidence of Mr Nembhard that the one room house or any structure for that matter, was constructed by, or at the instance of Mr Oliver Sharpe at the disputed property. I accept that Mr Oliver Sharpe is the same individual known to Miss Markland as Mr Shaw. My finding is that Mr Sharpe was only a visitor to the property who had a romantic interest in Miss Brown and that he never resided there, and he never owned or controlled any of the buildings at the property.

[38] Mr. Nembhard also said that he used a board house with two bedrooms and a kitchen and an outside bathroom before he went into the house that his uncle built. He said that his aunt Louise had that house. Mr Nembhard's evidence in cross examination differed significantly on the matter of when he stopped living in the one room concrete structure. In cross examination, he said that he and Miss Louise Brown lived in the house his uncle built. He said that after his uncle died, he and Miss Louise lived in that same one-bedroom concrete structure. Mr Nembhard was then asked if he and Miss Louise and his children all lived in the one bedroom. He explained that he never had children as yet. He was then directed to paragraph 7 of his June 13, 2022 affidavit, where he said that the one-bedroom concrete structure had never been used for storage and that he always lived there with his family after Louise died. He thereafter said that it was after she died that he lived in that house.

[39] The claimant's evidence on that matter was that after Mr Nembhard had been away from the property for some time, he returned in 2019 and secretly occupied the concrete room without permission. That is clearly a reference to the one-bedroom concrete structure with the verandah. The evidence from Miss Nembhard

is also that it was this concrete house which was rented to different individuals after Miss Louise Brown died in 2007.

[40] I accept Miss Markland's evidence that Suzette Anderson, sister to Mr Nembhard's spouse Sharon Alexander (the fourth defendant), stayed at the property from 2007 to 2012 as a tenant of Leonard Markland. My understanding from the evidence is that she occupied the one room structure. She stated that Kevin was the last tenant in that house and he left in 2015, and that after Kevin left, the room was used for storage for a time. She stated that one Yvonne was permitted to stay in that house with her children from 2016 to 2018.

[41] Given the defendant's conflicting evidence regarding his occupation of the one - bedroom concrete structure with verandah, this court accepts Miss Markland's evidence on the matter over that of Mr Nembhard. It is probable that Mr Nembhard occupied the one room concrete house as a child when he lived with Miss Brown.

[42] Even if it is correct that one of his sons now occupies that structure, that has happened only in recent years, more probable than not, since 2019, and it is only since then that Mr Nembhard or any member of his family in any way exercised any control over the one-bedroom concrete structure. Even if my understanding that it was the one room with verandah that Miss Anderson occupied as a tenant, is incorrect, it makes no practical difference, given my finding, that the evidence does not lend to a finding that Mr Nembhard had exclusive possession of the one-bedroom structure for the required period of twelve years or more.

The four room house

[43] I accept Miss Markland's evidence that her grandparents had constructed the four-bedroom board house and the one room concrete structure on the property. I also accept that the four bedroom was the family home where her father and siblings were raised.

[44] It is Miss Markland's evidence that the fourth room of the four-bedroom board structure was rented to tenants, the last of whom was Mr Rennie Dixon who was the tenant from 1990 to 2015, but that he lived there rent free until his death in 2020 because he became indigent.

[45] Although Mr Nembhard admitted in cross examination that he and his family occupied only two rooms of that four-bedroom house, he denied that there were tenants there. When he was asked about Mr Rennie (as he referred to Mr Rennie Dixon) he said that Mr Rennie built Mr Markland's house and he admitted that Mr Rennie lived in the house but said no one paid rent there.

[46] This court rejects the evidence that Mr. Markland sought permission from Mr. Nembhard to house Mr. Chang in the four-bedroom house. Mr. Nembhard, in response to a question put by this court, stated that it was Mr. Leonard Markland who was responsible for Mr. Chang's well-being up to the time of Mr. Markland's death and that it is now Miss Markland who is responsible for him. I find it ludicrous that Mr. Leonard Markland would have felt the need to ask permission of Mr. Nembhard to allow his mentally ill nephew for whom he was financially and otherwise responsible, to reside in the four room house. This is especially so where Mr Markland was responsible for the property and in circumstances where he was a part owner.

Did the first defendant acquire the right to a possessory title

[47] When asked his age, Mr. Nembhard said that he was 55 years old and that he was born on September 6, 1967. It was Mr Nembhard's evidence that until 2007, when Louise Brown died, he was residing at the said property with permission. Based on the submission of his attorney, the clear inference that should be drawn from that evidence is that as at 2007, when his informally adopted mother Miss Brown died, he ceased to reside at the property with permission. That is not an inference to be drawn in circumstances where there is no evidence to suggest that Miss

Brown was in a position to give any permission, except allowing Mr. Nembhard to reside in her household.

[48] In any event, an inference that Mr Nembhard resided in the property without permission is contradicted by Mr Nembhard's own evidence that his occupation was always with permission for all 52 years. I consider it important to reproduce this aspect of the evidence as it unfolded:

Q. Your occupation of the property was as the son of Miss Louise Brown?

A. By Leonard Markland and Oswald Markland

Q. You were there as the son of Louise?

A. Yes.

Q. When you say by Leonard Markland and Oswald Markland, you were there with their permission as well?

A. Yes.

Q. Up until 2007 when Miss Louise Brown died, you were there with her permission?

A. Yes.

Q. You recall when Mr Leonard Markland died?

A. Six to seven years ago.

Q. When you say you were also there with the permission of Mr Leonard Markland, that was up to the time of his death?

A. Yes.

Q. Would it be correct to say that your occupation of the property has always been with permission?

A. Yes. Fifty two years worth of permission.

[49] Even if I should assume for a moment that Mr Nembhard misunderstood what was being asked of him, that assumption would not change my position. It was also Mr Nembhard's evidence that Mr Leonard Markland was in control of the property until he died. The uncontroverted evidence is that Mr Leonard Markland died October 30, 2016. When asked if he had ever paid water bills in respect of the property, Mr. Nembhard explained that he would pay the bill to Mr Leonard Markland because it was Mr Markland who controlled the place and he used to pay the water bills. Then he went on to say "we used to give him the money through everything inna fi him name".

[50] Having regard to Mr Nembhard's own evidence, a cause of action against Mr Nembhard never accrued in Mr Leonard Markland's lifetime, as Mr Markland exercised control over the property.

[51] On the authority of **Goomti Ramnarace v Harrypersad Lutchman** (supra), time could not have started to run as long as Mr Nembhard remained in possession of the property with the permission of the owner. On Mr Nembhard's own evidence, time could not have begun to run in 2007 when Miss Brown died, since he remained at the property with permission of Mr Markland, one of the co - owners. It is not clear from the evidence of either side what was Miss Brown's tenure on the property. What is apparent however, is that the land was brought under the Registration of Titles Act in 1993, with Mr Leonard Markland and Mr Oswald Markland being two of the original registered owners. Miss Brown is not named on the duplicate certificate of title as one of the owners. Miss Brown was therefore, on the face of it, not in a position to give Mr Nembhard any kind of authority over the property. What is evident, is that she was in occupation at the same time that Mr Leonard Markland remained in control of the property.

[52] Miss Markland in her dual capacity as executor of the Estate of Oswald Markland and administrator of the Estate of Leonard Markland, brought this claim on July 2, 2021, well before the time delimited by **section 3** of the **Limitation of Actions Act** expired. It is accepted, as was submitted by Mr Nembhard's attorney at law, that the giving of the various notices would not have interrupted the limitation and that time continued to run after the notices were issued. It is clear having regard to the textual content of **section 3** of the **Limitation of Actions Act** as well as the authority of **Goomti Ramnarace v Harrypersad Lutchman** (supra), that the bringing of the claim operated to stop time from running in favour of the defendants.

[53] Even if it could be said that the right to bring action or suit first accrued in 2016 upon the death of Mr Leonard Markland, the time period that has since elapsed would be woefully short to meet the requirement of the twelve years required by **section 3** of the **Limitation of Actions Act**. This court observes that no mention has been made of any of the other individuals whose names appear as registered owners. Nothing turns on that absence of information for the purposes of being able to make a decision in this case.

[54] There is another and equally fundamental problem. This court rejects Mr Nembhard's evidence that the fourth room of the four room house which he occupies has never been tenanted. I accept Miss Markland's evidence that that room has been the subject of different tenancies. The requirement in law is that a person claiming to have acquired the right to a possessory title, must be in exclusive possession of the subject property. An owner of land and a person claiming to have acquired title by possession cannot both be in possession of the land at the same time. Miss Markland has demonstrated that neither Mr Markland nor any member of his family has been in exclusive possession of the disputed property.

[55] My acceptance of the evidence that the fourth room of the four-room house was rented and that Mr Chang did not occupy his room with Mr Nembhard's permission negates the required exclusive possession of that four-room house. It cannot be

said that Mr Nembhard or any member of his family was ever in exclusive possession of that four-room house.

[56] The scenario in this case is quite distinguishable from that which obtained in **Peter Perry v Carol Baugh et al.** (supra). In that case, Brooks JA made the observation that in both the cases of **James Clinton Chisholm v James Hall** Privy Council Appeal No. 15 of 1956 and **Recreational Holdings 1 (Jamaica) Ltd v Lazarus (Jamaica)** [2016] UKPC 22, the possessory titles were acquired despite the fact that the paper title holder was in possession of the rest of the land. In **Powell v McFarlane** (supra), it was made clear that the question of what acts constitute a sufficient degree of exclusive physical control will depend on the circumstances and in particular, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In **Peter Perry v Carol Baugh et al** (supra), each of the respondents had either partly or completely constructed a house on the disputed premises while the appellant or persons claiming through him had continuously occupied a different portion of the same premises. Thus, that case involved the question as to whether time had run in respect of those distinct portions occupied by the various respondents. From all indications, the portion of land occupied by each respondent in that case, was divisible.

[57] Even if we were faced with a scenario whereby Mr Nembhard or any member of his family had been in undisturbed possession of any part of the property for the required twelve years or more, the configuration of the subject property does not admit of such divisibility whereby one could be said to be in exclusive occupation of a portion of the property; certainly not in respect of the four-room house. For the purposes of the **Limitation of Actions Act**, it would be difficult to accept that one could be in exclusive possession of part of a house. The scenario in this case does not meet the requirement for the degree of separation as existed in **Peter Perry v Carol Baugh et al** (supra) or for that matter, in the cases of **James Clinton Chisholm v James Hall** (supra) or **Recreational Holdings (Jamaica) Limited v Lazarus** (supra).

Is the claimant entitled to a declaration that she is a lawful beneficiary and owner?

[58] The claimant sought a declaration that she is one of the lawful beneficiaries and owner of the disputed property. In so far as Miss Markland seeks to have this court declare that she is a beneficiary and thus an owner of the property, she is not entitled to that declaration.

[59] In explaining the position of a personal representative as well as that of a beneficiary to an estate, Sinclair Haynes JA in the case of ***Sonia Edwards et al v Stephanie Powell*** [2016] JMCA Civ 33 at paragraph 27 of the judgment cited Halsbury Laws of England third edition, volume 16 where it is stated that:

> *"The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right. He has full control of all the items making up the estate and can give a good title to them. The beneficiaries have no specific interest in any of the property comprising the residue until the residue has been ascertained in due course of administration but they do have a general title to residue, and this general title is not affected by the completion of the administration, so that their interests remain the same before and after the administration is complete."*

[60] In **George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26, Harris JA as she then was, addressed the matter in some detail. At paragraph 23, she expounded as follows:

> *[23] In specifying that the assets of the estate shall be held on trust for sale, the law contemplates that the residue would not come into existence until all liabilities of the estate, as stipulated by the Act, are satisfied. On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see* ***Commissioner of Stamp Duties (Queensland) v Livingston*** *[1964] 3 All ER 692. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein: see Lord* ***Sudeley v Attorney General*** *[1897] AC 11; Re K (1986) Ch 180; and* ***Lall v Lall*** *[1965] 1 WLR 1249.*

[61] At paragraphs 24, 25 and 26, she said the following:

> *[24] In the Australian case of the **Commissioner of Stamp Duties (Queensland) v Livingston**, the Privy Council, although dealing with a case of testate succession, firmly established the principle that, in an unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate. In that case, a widow died prior to the administration of her husband's estate in which she was entitled to the residue. It was held that she had no beneficial interest in the husband's estate.*
>
> *[25] Viscount Radcliffe, at page 696 placed the principle in the following context: "What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests; but it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust on property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms."*
>
> *[26] In Re **Leigh's Will Trust** [1969] 3 All ER 432 Buckley J at 434 opined that in **Commissioner of Stamp Duties (Queensland) v Livingston** the following propositions were enunciated: "(i) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (ii) no residuary legatee or person entitled on the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (iii) each such legatee or person so entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (iv) each such legatee or person so entitled has a transmissible interest in the estate*

[62] Miss Markland has not given any evidence as to whether the liabilities of the estate, of neither Mr Leonard Markland nor Mr Oswald Markland, or that of any other joint registered owner of the property have been satisfied. Thus, this court is not aware of whether there are assets in either estate to be distributed.

[63] Further, the estate of each of the two deceased vests in Miss Markland in her capacity as the personal representative, and in no other capacity. Until the estate of each deceased has been fully administered, and it is determined that the property is available for distribution, it cannot be said if Miss Markland is one of the owners. This court does not know whether either estate has been fully administered. For example, Miss Markland has not proven that the preparation and filing of the revenue returns and payment of estate duties and the obtaining of the estate duties certificate have been done. Neither has she established that there has been an application and the registration on transmission. The legal ownership of the property passes to the beneficiaries only when the personal representative assents in favour of the beneficiaries. She has not established that these necessary steps have been taken.

[64] This court does not know the status of any of the other joint registered owners of the disputed property. It was not revealed in evidence if they are deceased or alive. Until the estate of each deceased owner is fully administered, a beneficiary has no legal or equitable interest in the assets of the estate, whether it is a case of testate succession as in the case of Mr Leonard Markland, or intestate succession as in the case of Mr Oswald Markland. Miss Markland's interest in either estate is in the form of a chose in action until full administration. Miss Markland's interest in the form of a chose in action may be invoked for the purposes of protecting the assets of the estate, or in order to seek to ensure the due administration of the estate. However, it has not been suggested, and certainly was not pleaded, that Miss Markland is invoking her right as a beneficiary for any of those limited purposes. Indeed, she does not have to, because on the one hand, she has, in her capacity as administrator in one instance and as executor in the other, asserted her right in order to protect the subject matter of this claim which is an asset in both estates.

The matter of the due administration of the estate of Leonard Markland lies solely in her hands, and in so far as she is one of two executors in the estate of Oswald Markland, the responsibility lies with both executors.

[65] Ultimately, since Miss Markland has not established her proprietary interest in the property, there would be no basis on which this court could make an order that she is an owner. Indeed, as it relates to the estate of Oswald Markland, this court does not know on what basis Miss Markland makes a claim as a beneficiary of that estate. Based on the provisions of the **Intestates Estate and Property Charges Act**, the residuary estate of an intestate is to be distributed in the manner specified in the Table of Distribution. As a niece of Mr Oswald Markland, Miss Markland would fall quite low in the chain of distribution. She would be required to establish by evidence that Mr Oswald Markland left: no spouse, no issue or parents, no brothers and sisters, no aunt and uncle and no grandparents before she would be entitled to benefit, based on the provisions of **section 4** of the **Intestates Estate and Property Charges Act**. Although she is named in the last will and testament as a beneficiary of the estate of Oswald Markland, for the reasons set out, this court declines to make the declaration sought.

[66] In light of the findings of this court, the order sought by the claimant is granted in respect of all four defendants. The declaration sought by her is refused. The declaration and order sought by the first defendant are refused. The claimant is entitled to her costs of this claim. All four defendants are liable for costs. Such costs are to be taxed if not sooner agreed.

....

Andrea Pettigrew-Collins
Puisne Judge