JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 123/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A

BETWEEN	**MYRA WILLS**	**PLAINTIFF/APPELLANT**
AND	**ELMA ROSELINA WILLS**	**DEFENDANT/RESPONDENT**

David Batts & Suzan Foster instructed by **Ingrid Lee-Clarke of Pollard, Lee-Clarke & Campbell** for Appellant

Leighton Pusey instructed by **Grant, Stewart & Phillip** for Respondent

14th, 15th, 16th, December 1998
& 1st March,1999

RATTRAY, P.

The plaintiff/appellant Myra Wills nee Foster is the widow of the late Alexander George Wills who died on the 28th of December, 1992. She was married to him on the 22nd day of January 1986. The deceased Mr. Wills was previously married in or about the year 1935 to Elma Roselina Wills the respondent which marriage terminated by divorce on the 24th day of May 1985. During the currency of the marriage to Elma Roselina premises 5 Cassia Park Avenue now known as 6 Newleigh Avenue was on the 17th October, 1952 acquired in the joint names of the deceased George Alexander Wills and his wife Elma Roselina. The title to these premises is registered at Volume 836 Folio 35 of the Register Book of Titles.

On the 25th of November, 1964 the late George Alexander Wills acquired premises 84 Sunrise Crescent, St. Andrew registered in his name at Volume 986 Folio 295 of the Register Book of Titles. On the 22nd of February, 1966 these premises were transferred by George Alexander Wills into the names of himself and Elma Roselina, his wife. On the 14th September, 1966 a mortgage to secure Two Thousand Six Hundred Pounds with interest was duly registered against the property. This mortgage was discharged on the 6th of March 1972. It is these two properties which are the subject of the Originating Summons taken out by the plaintiff/appellant. In this Summons she sought from the court a declaration that during his lifetime the deceased Alexander George Wills acquired an absolute title against Elma Roselina Wills in respect of these premises. In so doing she relies upon the provisions of sections 3,4,9 and 14 of the Limitation of Actions Act of Jamaica.

The plaintiff/appellant maintained in an affidavit that in 1973 at the request of the deceased Alexander George Wills, she went to live at premises 84 Sunrise Crescent where the deceased resided "in order to nurse, take care of him and be his companion". She purports, on what she was told by her late husband to establish his separation from his former wife Elma sometime between 1970 - 1972. In support of this allegation of separation she exhibits a letter from the Canadian Immigration Authorities to her husband dated 9th August, 1974 relating to his being sponsored by his son for immigration into Canada in which the Attaché among other documents sought requested "separation papers". This of course does not assist in any way in establishing a separation of the deceased Alexander George Wills from his then wife the respondent Elma Roselina Wills.

She further alleges that Elma Wills migrated to the United States of America and lived there for upwards of 25 years. During that time the Newleigh Avenue property was rented out as well as the Sunrise Crescent property. In 1992 a recovery of possession action was

brought against the Newleigh Avenue tenants. It is noted that the particular claim recites George and Myra Wills as the plaintiffs, and describes them as the registered owners. Myra of course was not the registered owner of the property but Elma was. She relies on allegations that her husband rented out 6 Newleigh Avenue and a flat at 84 Sunrise Crescent and the proceeds used for his exclusive use and benefit. In the absence of George, being now deceased, in relation to the use of the proceeds this is hearsay. It is also hearsay when she states that the joint owner, that is the respondent received no income from the property for over an 18 year period. The matter seems to have come to a head when as stated in the affidavit she maintains that she was "advised by my attorneys-at-law and verily believed that the joint tenant has instructed attorneys who have contacted my said attorneys and advised the latter that I have no interest in either of the properties and have also contacted the tenants at 6 Newleigh Avenue and advised them not to pay any further rental to me but to pass same to the joint tenant said attorneys and that they intend to serve a notice to put on me to leave 84 Sunrise Crescent at the end of April 1993."

Exhibited to the affidavit of one Mavis Evadney Allen who purports to support her contention is a letter dated 18th June, 1963 from Elma to the deceased Alexander George Wills in which she writes:

> "From I leave there in 64 I havn't receive any support after so much ill-treatment.
>
> I want my porsion (sic) of the places which is half - also some of the rent from I leave. I have to do it this way for its the only way out as I can see, this is my conclusion."

Elma Wills in her affidavit maintained that she made contributions to the mortgage payments at 84 Sunrise Crescent and that 6 Newleigh Avenue was purchased from pooled resources of herself and her husband and that she contributed to mortgage payments over the years. She maintains that she had resided in the United States of America since 1967

with the consent of her husband and lived with her daughter, True. She visited Jamaica on occasions and lived at 84 Sunrise Crescent with her husband. She continued with the mortgage payments on the properties. Her husband and herself lived together in the United States of America for 6 months in 1978, 3 months in 1979 at their daughter's house as husband and wife. Her husband obtained permanent residence status in 1981 and they lived together as husband and wife from 1981 to 1984 when he returned to Jamaica. She exhibited her late husband's United States Social Security Card and "Green Card" to support her claim of his residence in the United States of America.

In 1985 she was served with divorce papers, which she did not contest. Notwithstanding this, they afterwards lived together in the United States between 1985-1988. She exhibited a letter dated 3rd January, 1985 addressed to her husband in New York from his Attorney-at-law Mr. Norman Samuels which reads:

> "Your wife has entered an appearance in this matter, however she is not interested in fighting the divorce. She wants a portion of the properties which she list as follows:
>
> 1. 6 Newleigh Avenue
>
> 2. 84 Sunrise Crescent
>
> 3. 5 acres of land at Kitson Town
>
> Kindly let me know at your earliest convenience whether you in fact own these properties and if so your attitude towards an amicable settlement."

She also exhibited a letter from her Attorneys-at-law to herself which reads as follows:

> "The Attorney-at-law acting on your husband's behalf has made an offer to you of $25,000 to satisfy your claims to premises 84 Sunrise Crescent and 6 Newleigh Avenue. Please indicate in writing whether you are willing to accept that sum as a full and final settlement of your claim. ..."

Her lawyers advised her not to accept the offer "... as you are on the face of it entitled to a half share of these properties." She maintains in her affidavit that "George and I did not

separate until after he served me divorce papers in 1985 and up to 1986 we still had relations."

With respect to the proceeds from the rentals she stated:

> "The proceeds of the said rentals were used by George but this was because I had permitted it because he was up to 1985 my husband, he was the father of my children and I wished him to have an income from which he could meet the properties expenses and his needs."

There is exhibited in the affidavit of Myra, a notice in the Daily Gleaner of 16th February, 1984 by George Wills to the effect that Elma had left home without his consent and he was therefore not responsible for any debt or debts she may contract. In April 1994 the respondent brought an action in the Resident Magistrate's Court Kingston for the recovery of the possession from the appellant of the premises 84 Sunrise Crescent, Kingston 19.

What were the findings of the trial judge Orr, J on the Originating Summons with respect to the facts? He stated as follows:

> "From the available evidence it is clear that the respondent has not abandoned her claim to an interest in the properties. The correspondence between the respective attorneys indicate that this claim was recognized by both parties. Her decision to await the death of the deceased in order to benefit as survivor of the joint tenancy is further proof of her intention not to discontinue possession. The applicant also claimed as tenant at will of the deceased. No evidence has been produced to establish this relationship."

The learned trial judge cannot be faulted for having come to these findings.

The claim is made under sections 3, 4, 9 and 14 of the Limitation of Actions Act. Section 3 reads 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."

In the present case therefore, the right to make an entry or bring an action to recover the properties would be as dictated by section 4(b) of the Act which reads as follows:

> "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) ...
>
> (b) when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; ..."

If therefore the plaintiff/appellant is claiming the estate or interest of the deceased husband time is deemed to have commenced running in her favour at the date of his death that is 28th of December, 1992, which is less than two months before she brought her action in this matter.

Section 9 is irrelevant since the appellant was not a tenant at will. Likewise is section 14 which relates to coparceners, joint tenants and tenants in common.

It is relevant too, to note that the application to the court is not made on behalf of the estate of the deceased in which case the proper person to make such application would be the Executor/Administrator of the estate. The applicant claims on her own behalf.

The appellant has placed much reliance on the judgment of Lord Upjohn in **Paradise Beach and Transportation Co Ltd and Others vs. Cyril Price Robinson and Others** [1968] A.C. 1072 in which it was held on the Interpretation of the Bahamian Statute similar to the Jamaica Limitation of Actions Act that (1) where a right of entry has been accrued longer

than the Limitation Period in the Statute (in Jamaica that is 12 years) the co-tenants claim is barred and his title extinguished whatever may be the nature of their co-tenants' possession. (2) That the qualification in section 12 of the Bahamian Legislation (section 14 of the Jamaican Act) that the separate possessions of a co-tenant's only commenced when such possession was for his own benefit was primarily a question of fact and "... though the law may sometimes imply that one co-tenant is in possession for another co-tenant e.g. a father for his infant but not adult son ... otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession."

It is clear from the case cited that there can be separate possession of a co-tenant which would disbar the right of the other co-tenant by virtue of that right being extinguished by the passage of the relevant period of time. However, as a question of fact, a court could find that there is an acknowledgment of the title of the absent co-tenant by the co-tenant in possession and in such a case there would not be established a separate possession on the part of that co-tenant. The question of fact therefore to be determined by the judge was whether there was any proof of agency or acknowledgment of title on the part of the person in possession to wit Mr. George Alexander Wills. As a question of fact the learned trial judge found that "from the available evidence it is clear that the respondent has not abandoned her claim to an interest in the properties. The correspondence between the respective attorneys indicate that this claim was recognized by both parties. Her decision to await the death of the deceased in order to benefit as survivor of the joint tenancy further proves of her intention not to discontinue possession." There was evidence on which the learned trial judge could have so concluded as a question of fact.

In this event therefore the separate possession of the deceased George Wills relied upon by the appellant was not established. Consequently, the trial judge was correct in concluding that "the applicant has failed to discharge the onus of proving that the respondent

has been effectively dispossessed or has discontinued possession of the properties. The appeal is therefore dismissed with costs to the respondent to be agreed or taxed.

BINGHAM, J.A.:

Having read in draft the judgments prepared by the learned President and Langrin, J.A. (acting), I wish to state that I am in agreement with their reasoning and the conclusions arrived at, that the appeal be dismissed.

The facts and circumstances in this matter disclosed a situation in which the properties to which the appellant sought to establish a title, based on adverse possession, was at all material times, certainly up to the death of her husband Alexander George Wills on 28th December, 1992, vested in the deceased and the respondent as joint tenants in fee simple. This situation would remain unaltered unless the appellant could show that there had been an ouster of the respondent's title as the co-owner during the lifetime of the deceased. Although the evidence revealed that following the separation of the deceased and the respondent in 1974, the respondent left Jamaica to live in the United States of America, and the deceased was in the receipt of the rent and profits from the properties jointly owned by the parties up to the deceased's death in 1992, that by itself was not sufficient in law to amount to an ouster, or an abandonment of the respondent's title. In fact, the evidence was decidedly to the contrary. There were the letters written by the respondent in which she expressed her complaint about the fact that she was being deprived of her share of the income being derived from the rental of the two houses.

There was the further evidence of an offer made by the deceased through his attorney, Norman Samuels, to the respondent following the decree nisi in 1985, offering her twenty-five thousand dollars to acquire her half share in the two properties. This offer was refused by her on the advice of her attorneys.

The respondent was then content to rest her "fortunes" and abide the occasion when she could benefit by way of succeeding to the entire properties by way of her right of survivorship. Having re-asserted her claim over time, was further evidence which negatived any question of abandonment on her part.

Learned counsel for the appellant sought to rest his submissions on the decision of the Board of the Privy Council in ***Paradise Beach and Transportation Co. Ltd. & others v. Cyril Price and others*** [1968] A.C. 1072. As that case shows, for the possession of one co-owner to amount to an ouster of the title of the other co-owner, the nature of the possession by the co-owner in occupation in the absence of some arrangement between the parties or the existence of a relationship of trustee and cestue que trust, would only arise where the occupation is exclusively for the co-owner's own benefit.

In this case, time would only start to run in favour of the appellant after the deceased's death in 1992. As early as 1993, written instructions were given to the tenants to cease paying rent to the appellant. This was

followed by an originating summons in February 1993 seeking recovery of possession of 84 Sunrise Crescent, which would rule out any question of the limitation period of 12 years necessary to support the appellant's claim.

When Orr, J. concluded, therefore, that, on the evidence before him, the respondent had not been dispossessed nor had she discontinued possession of the two properties, this decision, given the facts before him and the law applicable, was right and ought not to be disturbed.

LANGRIN, J.A. (Ag).

This is an appeal from the judgment of Chester Orr J in the Supreme Court whereby he dismissed the appellant's claim under an Originating Summons to be entitled to the following declarations:

1. That by virtue of sections 3,4,9 and 14 of the Limitation of Actions Act of Jamaica 1881 the deceased Alexander George Wills, being in sole possession of properties registered at Volume 836 Folio 35 and Volume 986 Folio 295 to the exclusion of Elma Roselina Wills the joint tenant registered on the Certificate of Title for the said properties during his life time acquired an absolute Title against the said Elma Roselina Wills;

2. That:

   (a) the legal separation between the deceased and Elma Roselina Wills with respect to their marriage;

   (b) the bringing into the said properties of the Plaintiff/Appellant Myra Wills and consequent physical exclusion of Elma Roselina Wills;

   (c) the collection of all rents and absolute possession of the said properties by the deceased for his exclusive use and benefit;

   (d) the non-occupation and non-possession of the said properties by the said Elma Roselina Wills for upwards of twelve (12) years;

all have the effect at Law by virtue of Section 4 (a) of the Limitation of Actions Act as a discontinuance of possession by or in the alternative a dispossession of the said Elma Roselina Wills;

(3) That the Plaintiff/Appellant having been in possession and occupation of the aforesaid properties for upwards of twelve (12) years as a Tenant-at-will to the exclusion of the said Elma Roselina Wills, the latter is now barred by virtue of Section 9 of the Limitation of Actions Act from taking any action to repossess the said properties.

The facts as found by the learned judge of which there was adequate evidence show that the appellant is the widow of Alexander George Wills deceased who died on December 28, 1992. The deceased had been previously married to the respondent in 1935.

The deceased and the respondent acquired the relevant properties and in 1966 a joint tenancy was established between them. In 1967 the respondent left the matrimonial home to the United States of America but made several visits to her husband in Jamaica, the last being in 1974. The parties were divorced by a decree absolute dated 13th June, 1985.

The learned judge in his written judgment examined the claim of the appellant and found that she has failed to discharge the onus of proving that the respondent has been effectively dispossessed or has discontinued possession of the properties.

The appellant claimed that the deceased George Wills has been in exclusive possession of the lands since the desertion of the respondent on January 5, 1974 or

for more than twelve years before the action was brought and that the title of the respondent is barred by the relevant Statute of Limitations.

The nature of the exclusive possession of the deceased husband was demonstrated quite clearly by an averment in the affidavit of the appellant in which she stated in her affidavit:

> "18. That the Respondent has not from 1971 until the death of my late husband made any contribution whatsoever towards the maintenance of the subject properties and she was precluded from receiving any benefit from either of the subject properties. In fact, when the Respondent visited the house at 84 Sunrise Crescent in 1976, she attacked my late husband with a machete alleging that she had not gotten anything from the properties. I had to intervene to prevent anything serious from happening and there were several arguments and quarrels between my late husband and the Respondent about this same subject which I witnessed"

A letter dated June 18, 1983 written by the Respondent to her late husband informed him that she intended to put the matter in the hands of her Solicitor and stated inter alia:

> "From I leave there in sixty four I haven't received any support after so much ill-treatment. I want my portion of the places - half also some of the rent from I leave. I have to do it this way for it is the only way out as I can see..."

On January 3, 1985 the respondent's Attorney wrote to the deceased requesting a portion of the relevant properties in view of the impending divorce.

The deceased's Attorney replied to the respondent as under:

"January 20, 1987

Mrs Elma Roselyn Wills
605 Overlook Place
Englewood
New Jersey 07631
U.S.A.

Dear Madam:

Re: Suit No. D.W. 029 of 1984 -George Alexander Wills
vs Elma Roselyn Wills

The Attorney-at-law acting on your husband's behalf has made an offer to you of Twenty Five Thousand Dollars ($25,000) to satisfy your claims to premises at 84 Sunrise Crescent and 6 Newleigh Avenue.

Please indicate in writing, whether you are willing to accept that sum as a full and final settlement of your claim.

We note that you are registered on the titles of the above-mentioned properties as a joint tenant. This means that the courts will presume that you have a 50% interest in those properties. However, this presumption may be rebutted by direct evidence or contribution.

It is our advice that , at this stage, you do not accept the offer of Twenty-Five Thousand Dollars ($25,000) as you are on the face of it, entitled to a half-share of these properties.

Please let us have your instructions in this matter as quickly as is possible.

Yours sincerely
RATTRAY, PATTERSON, RATTRAY

Walter Scott".

The respondent states that she instructed her Attorney to refuse the offer because "it was too low". In 1991 she received further advice from her attorneys and as a result decided to await her share as the survivor of the joint tenancy.

On the 21st April, 1994 the respondent filed a claim in the Resident Magistrates Court against the appellant for Recovery of Possession.

The essence of the argument by Mr. Pusey, counsel for the respondent is that although the deceased George Wills had been in exclusive possession since January 5, 1974 for the purpose of the relevant statute of limitation time has not yet started to run in favour of the appellant.

The relevant provisions are to be found in the Limitations of Actions Act and are 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;
>
> ...

> **14.** When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share of shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them".

Mr. David Batts, counsel for the appellant submitted with force that it is now well settled law that possession of land by one co-tenant, whatever be the nature of the co-tenant's possession, whether adverse or not will extinguish the other co-tenant's title if such possession continues for the prescribed period whilst the other co-tenant is out of possession. He argued that the fact that the deceased and respondent have separated since 1964 together with the fact that the deceased brought the appellant on to the said properties in 1973 and then enjoyed exclusive possession of the properties for his sole benefit, the respondent had been effectively physically excluded and dispossessed or not in possession of the properties in dispute with the result that the deceased enjoyed sole possession and occupation of the said properties for a period of upwards of 12 years.

He sought to rely for his proposition on the decision of the Privy Council in ***Paradise Beach and Transportation Co. Ltd & Others vs Cyril Price and Others*** [1968] A.C. 1072. In this decision the Board was required to consider sections 1,3 and 12 of the Real Property Limitation Act of Bahamas which are in pari materia with Section 3,4 and 14 of the Limitation of Actions Act of Jamaica save for the period of Limitation.

Lord Upjohn stated at pg. 1084:

> " It seems to their Lordships clear from the language of the Act and the authorities already referred to that subject to the qualification mentioned below where the right of entry has accrued more than 20 years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants' possession. That right of entry (ignoring immaterial facts as to the widow and Nehemiah) accrued in 1913. ...
>
> The qualification mentioned above rises upon section 12 of the Act of 1833. The 'separate possessions' (to adopt the phrase of Denman C.J) obviously only start when the occupation is 'for nor his or their own benefit'. That is the crucial question as Lord Greene M.R. pointed out ***In re Landi*** [1939] Ch. 828, 834;55 T.L.R. That is primarily a question of fact though the law may sometimes imply that one co-tenant in possession for another co-tenant, e.g. a father for his infant but not adult son, see ***In re Hobbs*** [1887] 36 Ch. D.553; otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession".

The section referred to is identical to section 14 of the Limitation of Actions Act.

On the issue of exclusive use for the sole benefit of one co-tenant the case of ***In re Hobbs, Hobbs vs Wade*** [1887] 36 Ch.D.553 is apposite. It was held that as to the share of the property to which the infant son had become entitled in possession on the death of his mother, the father must be deemed to have entered into receipt of the rents as bailiff for his infant son and that consequently that son's title was not defeated. With respect to the other surviving son it was found that no presumption of agency could arise (he not being an infant) and that in the absence of evidence that prior to the expiration of the limitation period, the father had received the rents, as agent for that son or had acknowledged his title, or had accounted to him for the rents the title of that son was extinguished.

In the case of a husband and wife where one spouse is entitled to a joint interest in the property the right of action does not accrue for limitation purposes until

the parties are divorced. This is so because a fiduciary relationship exists between a husband and wife. A Court of Equity will impose upon him all the liabilities of an express trustee. The principal liability of such trustee is that he must discharge himself by accounting to his *cestue que trust* for all such money or property without regard to lapse of time. A trustee must not allow his duty and his interest to conflict. The failure of the husband to account to his wife for the rent and profits despite her prodigious efforts can only be regarded as dishonest conduct. Courts are generally astute not to reward dishonest conduct. Breach of a fiduciary obligation in equity's eyes strikes against the very nature of equity itself. If the law were otherwise a number of families in Jamaica would lose their co-ownership in lands unfairly. A dishonest spouse who remains on the property while the other spouse goes abroad to increase the family welfare could easily claim an interest under the Limitation Act after a lapse of 12 years.

I agree with the learned judge that from the available evidence it is clear that the respondent has not abandoned her claim to an interest in the properties. The correspondence between the respective parties as well as her visits to the matrimonial home indicate that this claim was recognised. The respondent's decision to await the death of the deceased in order to benefit as survivor of the joint tenancy is further proof of her intention not to discontinue possession.

The onus of proof was on the appellant to show that the respondent had abandoned her interest and that he had dispossessed her. The appellant has however failed to discharge either the onus of proving that the respondent has been effectively dispossessed or has discontinued possession of the properties.

In the result I am of the opinion that for purposes of the Limitation of Actions Act, time began to run in favour of George Wills, deceased when he divorced Elma Roselina Wills on 13th June, 1985 and therefore entered into possession of the whole property at which time the interest of Elma Roselina Wills respondent in the trust property became an interest in possession. The husband died December 28, 1992 and on February 22, 1993 an originating summons was filed. In accordance with the provisions of the Limitations of Actions Act this appeal must be dismissed since the period of twelve years had not expired.

I would therefore dismiss the appeal with costs to be agreed or taxed.