[2017] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 5/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**TANYA EWERS (Executrix of the estate of Mavis Williams)**	**APPELLANT**
AND	**MELROSE BARTON-THELWELL**	**RESPONDENT**

Douglas Leys QC and Miss Kenik Brissett instructed by LeySmith Lawyers for the appellant

Leonard Green and Miss Sylvan Edwards instructed by Chen Green and Company for the respondent

11, 12 and 31 July 2017

BROOKS JA

[1] On 21 September 2015, a judge of the Supreme Court refused an application by Ms Tanya Ewers for an extension of time within which to file a defence to a claim brought by Mrs Melrose Barton-Thelwell. The claim was not, however, against Ms Ewers, but rather against Ms Ewers' mother, Ms Mavis Williams. Ms Williams had filed an acknowledgement of service to Mrs Barton-Thelwell's claim, but had failed to file a defence. Ms Williams died over a year after filing the acknowledgment of service.

[2] The learned judge ruled that Ms Ewers had no basis on which to file a defence, as she could not be properly treated as a defendant. The learned judge also granted Mrs Barton-Thelwell permission to enter judgment in the claim, in default of defence. The orders made were:

> "1. That the Application for extension of time to file defence by Tanya Ewers is refused.
>
> 2. That permission is granted for judgment to be entered in default of a defence.
>
> 3. The Applicant Tanya Ewers pays the claimant's costs for this Application."

[3] The judgment which Mrs Barton-Thelwell sought would have had Ms Williams declared as having been dispossessed of title to registered land. It would have also barred Ms Williams from pursuing any action to recover possession, or otherwise assert the rights of owner, by virtue of being registered as the proprietor of that land. That prohibition would have resulted from the operation of section 3 of the Limitation of Actions Act.

[4] Ms Ewers obtained permission from this court to file notice and grounds of appeal on behalf of the estate of Ms Williams, as the representative of that estate. It is in that capacity that she has had the appeal argued before us. She contends that the learned judge's ruling was wrong. It is Ms Ewers' contention that the learned judge ignored:

a. the rules of the Civil Procedure Rules (CPR) which allowed her to file a defence on behalf of the estate, and

b. the provisions of rule 21.7 and 21.8 of the CPR that provide for the substitution of a personal representative for the estate of the deceased person.

[5] The main issues for resolution by this court are whether the learned judge was entitled to refuse Ms Ewers' application to file a defence on behalf of Ms Williams' estate and whether it was appropriate to allow a judgment to be entered against a person who was already dead, without substituting someone for that deceased person.

The factual background

[6] Ms Williams and Mr Fitzhobern Thelwell were involved in a common-law relationship as man and wife when they were registered along with Mr Ian Thelwell, Mr Fitzhobern Thelwell's son (hereafter called Ian), as joint tenants of premises situated at Culloden in the parish of Westmoreland (hereinafter called "the premises"). That was in 1988. Mr Thelwell and Ms Williams were living together at the premises at the time.

[7] At some point thereafter, the couple separated and Ms Williams left Mr Thelwell at the premises. It is unchallenged that Mrs Barton-Thelwell went to live with Mr Thelwell at the premises in 1994 as his common-law wife. She bore him two children thereafter, one in 1995 and the other in 1996. She and Mr Thelwell married in 2000.

[8] Ian died in 1999 and Mr Thelwell died in 2005. The law regarding the right of succession for joint tenants that would normally have operated, is that on Ian's death, Ms Williams and Mr Thelwell would have automatically acquired Ian's interest in the premises, and would have become the remaining joint tenants. Similarly, on Mr Thelwell's death, Ms Williams would have automatically become the sole registered proprietor. Indeed, it was on those bases that, on 12 April 2010, she secured registration of the respective deaths on the registered title and, on 3 May 2010, had a new title for the premises issued in her sole name. It appears that she may falsely have claimed that the duplicate certificate of title was lost, but that is not a material fact for these purposes.

[9] Apparently, still operating on the basis that the usual law of succession applied, Ms Williams, in February 2011, filed a plaint in the Resident Magistrate's Court for Westmoreland. In that claim, she sought recovery of possession of the premises from Mrs Barton-Thelwell.

[10] In May 2011, Mrs Barton-Thelwell filed the claim in the Supreme Court. In it, she claimed that Ms Williams' automatic right to succession had been lost by virtue of Mr Thelwell's occupation of the premises, from 1994 to 2005, together with her occupation thereafter, to the exclusion of Ms Williams, for a period in excess of 12 years. Mrs Barton-Thelwell claimed the relief offered by the Limitation of Actions Act that Ms Williams, being out of occupation for a period in excess of 12 years, was barred from taking any action to recover possession of the premises. Mrs Barton-Thelwell further claimed that she was the beneficial owner of the premises.

[11] In June 2011, Ms Williams filed an acknowledgment of service to that claim, but failed to file a defence. Ms Williams' plaint in the Resident Magistrate's Court was adjourned without a date, apparently, as a result of the existence of the claim in the Supreme Court. Ms Williams died in February 2013, not having filed a defence to that claim.

[12] Mrs Barton-Thelwell did not seek to secure a judgment on her claim and in December 2013, Ms Ewers filed an application seeking to extend the time within which to file a defence on behalf of Ms Williams' estate. It was after that application was brought to her attention that Mrs Barton-Thelwell applied to strike out Ms Ewers' application and to seek a judgment in absence of a defence. Ms Ewers' application was struck out, but was later re-instated.

The applications before the Supreme Court

[13] Ms Ewers, nonetheless, filed a new application for extension of time. Mrs Barton-Thelwell's response was to file a fresh application asking for Ms Ewers' application to be struck out and for permission to enter judgment in default of defence. The two applications came before the learned judge in March 2015.

[14] In her first affidavit in support of her application, Ms Ewers stated that failure to file a defence within the required time was due to Ms Williams being ill. The long delay between Ms Williams' death and the filing of the application for the extension of time was due, Ms Ewers stated, to clinical depression that Ms Ewers suffered due to her mother's death.

[15] She asserted that her mother had contributed to the acquisition of the premises and that the reason that she left the premises was Mr Thelwell's abusive behaviour. Ms Ewers deposed that she witnessed Mr Thelwell verbally and physically abusing Ms Williams during the time that they cohabited (see paragraph 7 of her affidavit filed on 4 March 2015).

[16] Mrs Barton-Thelwell deposed in an affidavit in support of her application, that from the day she moved to the premises in 1994, to February 2011, when she was served with a plaint for recovery of possession, Ms Williams did not come to the premises or make any effort to assert her title. Mrs Barton-Thelwell said that the premises were not only home to her and her family, but that she also conducted business there. She deposed that she and Mr Thelwell used their earnings from the premises to support their family and advance their interests. None of their earnings, she said, were ever claimed by, or shared with, Ms Williams.

[17] According to Mrs Barton-Thelwell, Mr Thelwell had "chased" Ms Williams from the premises (paragraph 6 of her affidavit). She said that Ms Williams "would never dare to present herself on the property as [Mr Thelwell] had a hostile and explosive temper..." (paragraph 7). She further said at paragraph 9 that "[a]t no time at all did [Mr Thelwell] allow [Ms Williams] to come on the land...hence [Ms Williams] received no benefit from the land by way of rental or any other payment and reaped no thing [sic] from the trees planted thereon nor did she ever seek to make any claim that she was so entitled".

[18] The learned judge, having heard the applications, made the orders referred to above. By this appeal, Ms Ewers has sought to have those orders set aside.

The grounds of appeal and the orders sought

[19] The grounds of appeal filed on behalf of Ms Ewers are as follows:

> "i. The learned judge erred in law in giving a restricted to [sic] meaning to the meaning of the 'Defendant' within the context of the Civil Procedure Rules (CPR) with the result that it precluded the executrix of the estate of the Appellant/Defendant from continuing the action on her behalf.
>
> ii. By ruling and accepting that an executor/Executrix has the capacity to carry an action in the absence of a grant of probate upon the death of the testator dies [sic] the learned judge erred in law and not allowing the executrix Tanya Ewers to act as defendant in the continuing lawsuit against her deceased mother.
>
> iii. Alternatively the learned judge erred in ignoring the provisions of 21.7 and 21.8 of the CPR (albeit cited to her) and in particular rules 21.7 (3) and (4).
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> iv. The learned judge in ignoring the provisions of the said sections failed to appreciate that the nature and intendment of the application, which was an application for executrix to file the defence on behalf the estate of the Defendant.
>
> v. In refusing to extend the time for filing the defence and ignoring the provisions of rules 21.7 and 21.8 of the CPR the learned judge did not further the overriding objective of the CPR.
>
> vi. The learned judge erred by not giving the appropriate weight to the fact that the executrix was suffering from depression resulting from the death of her mother and that the estate had a good defence to the action in law and on the facts.

vii. The learned judge placed undue reliance on the facts and in particular found fault on part of the Appellant/Defendant's actions prior to her death and to the executrix despite the fact that there was no prejudice to the Respondent/Claimant who took no action after the Appellant/Defendant's death to proceed to a judgment in default of defence."

[20] Ms Ewers sought the following orders:

"a. An order setting aside the decision of the learned judge and extending the time for filing the defence by the executrix on [sic] part of [Ms Williams'] estate.

b. An order setting aside permission for [Mrs Barton-Thelwell] to file for judgment in default of defence.

c. Costs of the Appeal and of the court below to [Ms Williams] to be taxed or agreed."

The analysis

[21] The grounds of appeal all focus on the learned judge's decision to refuse Ms Ewers' application for an extension of time in which to file a defence. An analysis of that decision necessarily involves, firstly, an assessment of the capacity in which Ms Ewers sought to act and secondly, an assessment of whether the application satisfied the criteria required of applications for extension of time. These factors will be assessed in turn.

a. Ms Ewers' standing to make the application

[22] Having considered the applications, the learned judge ruled that it was not open to Ms Ewers, without more, to file a defence to Mrs Barton-Thelwell's claim. The learned judge, accepted as correct, a proposition that an executor, such as Ms Ewers, named in a will could file a defence to a claim, without having first been granted probate for the

estate. She based that conclusion on the principle, set out in **Chetty v Chetty** [1961] 1 AC 603, which recognised an executor's right to institute a claim, without first having been granted probate. She found, however, that Ms Ewers could not be treated as a defendant to the claim.

[23] Mr Green, on behalf of Mrs Barton-Thelwell, sought to support the learned judge's approach. Learned counsel argued that Ms Ewers could not have been allowed to file a defence to the claim because she was not the defendant and there were no directions which enabled her "to carry on the proceedings in a representative capacity as is required under Part 21.2 of the CPR" (paragraph 9 of skeleton submissions). Learned counsel also sought to argue that without a grant of probate, Ms Ewers did not have the standing to file a defence.

[24] Although there is no counter-notice of appeal against the learned judge's acceptance of the principle allowing an executor to file a defence, without first being granted probate, it is not a correct statement of the law. As will be demonstrated below, a representative, which could be a named executor, first has to be appointed by the court to act for a deceased defendant, before that person can act on behalf of the estate of that defendant. Rule 21.7(4) requires the court to appoint a representative before the case can proceed. A second comment to be made at this stage is that, unfortunately, the learned judge did not seem to have fully appreciated that Ms Ewers was asking for permission to file the defence on behalf of Ms Williams' estate. Paragraph 2 of Ms Ewers' application asked for:

> "permission to be granted for a Defence **to be filed on behalf of Estate of the Defendant by the executor Tanya Ewers** and the same be served on the Defendant [sic] within a period of seven days from the date of the Order of this Honourable Court." (Emphasis supplied)

[25] Although there was no application before the learned judge for Ms Ewers to be appointed the representative of Ms Williams' estate, the learned judge was entitled under rules 21.7 and 21.8 of the CPR to grant permission to Ms Ewers, or some other person, to represent Ms Williams' estate. The learned judge was entitled to do so of her own motion. Rule 21.7 states:

> "(1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
>
> (2) A person may be appointed as a representative if that person -
>
> (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and
>
> (b) has no interest adverse to that of the estate of the deceased person.
>
> (3) The court may make such an order on or without an application.
>
> (4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.
>
> (5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed

were an executor or administrator of the deceased person's estate."

Rule 21.8 states:

> "(1) Where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.
>
> (2) An order under this rule may be made on or without an application."

[26] Assuming that the applicant satisfied the criteria for the extension of time to file a defence, the learned judge, at the time of appointing the representative, could also have granted an extension. If the latter order were not sought at that time the representative could have applied at a later date for an extension of time.

[27] Mr Green, on behalf of Mrs Barton-Thelwell, is not on good ground in his submission that only a person who had previously been appointed the personal representative, that is by a grant of probate or letters of administration, of Ms Williams' estate was entitled to file a defence on behalf of the estate. Rule 21.7 of the CPR, dealing generally with the appointment of persons to represent the estates of deceased persons, does not require a person to be so appointed, to have previously been appointed as the personal representative of the deceased person. The practical thing for the learned judge to have done, in those circumstances, was to have exercised the powers granted by rules 21.7 and 21.8 of the CPR, so that the proceedings could have been carried on. The learned judge was in error not to have done so.

[28] Ms Ewers, based on the content of her affidavits, her relationship to Ms Williams and her position of executrix named in the will, would have satisfied the requirements for representing the estate, as set out in rule 21.7 (2), quoted above.

(b) The satisfaction of the criteria required to extend time

[29] This court has accepted that for applications for extension of time, within which to file a defence, a broad approach should be used. That approach should take in the circumstances of the particular case. In **Fiesta Jamaica Limited v National Water Commission**, [2010] JMCA Civ 4, Harris JA, with whom the rest of the court agreed, said at paragraph [15] of her judgment:

> "The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in a application for extension of time to appeal in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.** [(2000) Times, 7 March; All England Official Transcripts (1997-2008) (delivered 18 January 2000)]."

In his judgment, Lightman J said, in part, at paragraph 8:

> "**It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account**. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are

> there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties." (Emphasis supplied)

[30] In applying that guidance to this case, the first consideration is the question of delay. Apart from finding that Ms Ewers was not a defendant for the purposes of the claim, the learned judge's main, if not only, reason for refusing to grant an extension of time to file a defence, was Ms Williams' inordinate delay in filing a defence, and her failure to apply to extend the time within which to file the defence.

[31] The learned judge said that she noted that Ms Williams was the last surviving joint tenant on the certificate of title and that, being out of possession of the premises, although she had ample time to do so, she took "no steps to actively participate in the suit after the acknowledgement was filed" (paragraph [16] of the judgment).

[32] As part of her reason for refusing the application to extend the time within which to file the defence, the learned judge ruled that there had been no expansion on, or medical support for, the reason given for the delay. Ms Ewers only stated that Ms Williams was ill during the period that she had failed to file a defence. The learned judge was entitled to consider that statement and reject it as not being a good reason. The learned judge seemed, however, to have accepted Ms Ewers' explanation for her own delay in filing the application. That was a matter with which she was also entitled to consider in that way.

[33] Although, in refusing Ms Ewers' application, the learned judge was exercising her discretion, it seems that the validity of the exercise must be questioned. The learned

judge seems to have given undue weight to the length of the delay and does not appear to have given much, if any, weight to two crucial criteria. Firstly, the learned judge did not consider the merits of Ms Williams' case. Secondly, the learned judge also did not demonstrate that she took into account the justice of the case, balancing the potential loss to Ms Williams' estate against the potential loss to Mrs Barton-Thelwell.

[34] In the present case it is undeniable that the delay, both before and after Ms Williams' death, was inordinate. That, by itself, may not be sufficient to shut out a defendant. The court must also consider the other factors mentioned by Lightman J, which include the issue of whether the proposed statement of case has merit to warrant it being advanced. In this case, the similarity of the circumstances of this case, to the circumstances in the landmark case of **Wills v Wills** [2003] UKPC 84, are sufficiently striking to warrant closer examination of these circumstances. Based on the absence of those considerations, it is within the authority of this court to say that it is entitled to look at the matter afresh and exercise its own discretion in the circumstances.

[35] In **Wills v Wills**, their Lordships held that a woman, who was a joint tenant of property with her former husband, lost her title to that property when she failed, for a period in excess of 12 years, to exercise any proprietary interest in it. Her former husband, by virtue of his exercise of sole dominion over the property for that period, acquired the entire interest in the property. The displaced woman was therefore, prohibited by virtue of the Limitation of Actions Act, from recovering the property from the husband's widow. Section 3 of the Limitation of Actions Act provides:

> "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."

[36] Their Lordships, in **Wills v Wills**, made an important statement at paragraph 29 of their judgment, which is relevant to the present case. They said:

> "[The first wife] no doubt wished to maintain her claim to co-ownership, not least because she expected to outlive [the husband] and hoped to take by survivorship. But such an intention, however amply documented, cannot prevail over the plain fact of her total exclusion from the properties. After 1976 at the latest [the husband] occupied and used the former matrimonial home and enjoyed the rents from the rented properties as if he were the sole owner, except so far as he chose to share his occupation and enjoyment with [the second wife]."

[37] Although their Lordships sought to say that that case turned on its own facts, the principle concerning the physical possession by one joint tenant being able to extinguish the title of another joint tenant, who is dispossessed, or has given up possession, is of general application. Section 14 of the Limitation of Actions Act was relied upon by their Lordships on the point. Similarly, it is also a general principle, that it is the intention of the joint tenant in possession, rather than the intention of the dispossessed joint tenant, that is relevant for the purposes of determining the sufficiency of possession for extinguishing of the title of a holder of the paper title. Their Lordships relied on **JA Pye (Oxford) Ltd v Graham** [2003] 1 AC 419 for that principle.

[38] Section 14 of the Limitation of Actions Act allows a co-owner, such as a joint tenant, to acquire a possessory title against his fellow co-owners. The section overrides the common law principle that the possession of one joint tenant is the possession of all. The section states:

> "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 or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, **such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them**." (Emphasis supplied)

[39] Section 30 of the Limitation of Actions Act operates as a complement to section 3. Whereas section 3 operates to bar a holder of a paper title, who is not in possession, from entering the property or bringing any claim to recover possession or rent, section 30 operates to extinguish that person's title. It states:

> "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."

[40] In her characteristically thorough judgment in **Fullwood v Curchar** [2015] JMCA Civ 37, McDonald-Bishop JA (Ag) (as she then was) also addressed the effect of the Limitation of Actions Act in circumstances similar to those as existed in the present

case. The learned judge of appeal explained the manner by which sections 14 and 30 of the Limitation of Actions Act also applied, along with section 3, to prevent a joint tenant, who had relinquished possession of the property for over 12 years, from recovering possession.

[41] The first difference between the present case on the one hand and **Wills v Wills** and **Fullwood v Curchar** on the other is that in both of those cases, the dead husband had been in possession of the property, to the exclusion of the joint tenant, for in excess of 12 years. In this case, Ms Williams was out of possession for 11 years before Mr Thelwell died. The limitation period, had therefore not yet run.

[42] The second difference is that, in those cases, the claimant was the joint holder of the paper title. In this case, that person is the defendant. The latter difference may not be critical, in that, in applying for permission to file a defence, the onus or burden, that would normally be on a claimant, in the case of a claim, rests on the applicant, who has to show an entitlement to file a defence.

[43] The facts of the present case require the statement of two important principles of law. The first principle is that where one of two, or more, joint tenants dies, his interest automatically devolves to the survivor or survivors on title. That person cannot purport to devise his interest by a will. If the deceased person could not claim the benefit of the operation of the Limitation of Actions Act, the normal principle would apply, if no other factor intervened. In other words, in the absence of any additional factor, the principle that was crystallised in **Wills v Wills** would not apply.

[44] The second principle is that the benefit of the limitation of actions point that was crystallised in **Wills v Wills** and **Fullwood v Curchar**, may be claimed by a connected successor to the possession of the deceased joint tenant. That claim may be made even if the deceased joint tenant had not excluded the other joint paper owner for a period of 12 years, but the connected successor extended the time of exclusion, to complete the 12-year period. In other words, the connected successor may "tack" his own possession, which excludes the surviving joint tenant, to the possession that the paper owner in possession had before his death, so as to claim the benefit of the operation of the Limitation of Actions Act.

[45] Mrs Barton-Thelwell claims the benefit of the second principle. She asserts that Ms Williams was excluded from the property for at least 17 continuous years. 11 of those years was by virtue of Mr Thelwell and Mrs Barton-Thelwell, first as his paramour (licencee perhaps), then as wife. The next six years' exclusion was by Mrs Barton-Thelwell in her own right.

[46] Mr Leys submitted that **Wills v Wills** did not apply to the present case. Learned Queen's Counsel also sought to say that the Limitation period had not run when litigation commenced in respect of these premises. Mr Leys submitted that when Mr Thelwell died, his possession of the premises would only have been adverse to Ms William's title for, at best, 11 years. Learned Queen's Counsel submitted that on Mr Thelwell's death, time stopped running against Ms Williams, for the purposes of the

Limitation of Actions Act and Mrs Barton-Thelwell's occupation thereafter commenced a separate accumulation of time.

[47] Mr Leys is not on good ground with that submission, and it is not surprising that he did not supply authority to support it. Textbooks and case law support the principle that the continuous exclusion of the owner of the paper title, albeit for periods of less than 12 years, by successive connected occupants, may operate to oust the title of the owner of the paper title, if those periods add up to 12 years or more. The principle describes the "tacking" of the periods of trespass. Megarry and Wade, the learned authors of The Law of Real Property, seventh edition, at paragraph 35-021, state the principle thus:

> "...a squatter has a title based on his own possession, and this title is good against everyone except the true owner. Accordingly, if a squatter who has not barred the true owner sells the land he can give the purchaser a right to the land which is as good as his own. The same applies to devises, gifts or other dispositions by the squatter, and to devolution on his intestacy: in each case **the person taking the squatter's interest can add the squatter's period of possession to his own**. Thus if X, who has occupied A's land for eight years, sells the land to Y, A will be barred after Y has held the land for a further four years." (Emphasis supplied)

[48] Sampson Owusu, the learned author of Commonwealth Caribbean Land Law, opined at page 272 that:

> "A squatter who does not remain in adverse possession for the full limitation period acquires title which is therefore transmissible to his heirs on intestacy or devisee or which can be alienated by him to another person whose title matures if the paper owner is kept out of the property for the whole limitation period...."

[49] The learned authors of Elements of Land Law, fifth edition, state the same principle at paragraph 9.14 of their work:

> "For the purposes of establishing the expiration of the limitation period in unregistered land, immediately consecutive periods of adverse possession may be aggregated: the statutory period can be accumulated by possession on the part of a series of squatters."

[50] The two most directly relevant authorities on this point are **Allen v Matthews** [2007] EWCA Civ 216; (2007) 2 P and CR 441; and **Toolsie Persaud Ltd v Andrew James Investments Ltd and Others** [2008] CCJ 5 (AJ); (2008) 72 WIR 292. Admittedly, however, in both those cases the existence of the principle is assumed rather than analysed. In the former case, at paragraph [85], Lawrence Collins LJ said, in part:

> "A person seeking to establish title to land by adverse possession must show that for the requisite period of time (1) he had factual possession of the land; (2) he had the requisite intention to possess (animus possidendi); and (3) his possession of the land had been "adverse" within the meaning of the Act. In relation to factual possession the test is whether 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. As to intention, what is required is not an intention to own or even to acquire ownership, but an intention to possess to the exclusion of all others, including the owner with the paper title. See *Powell v McFarlane* (1977) 38 P&CR 452, 471; *Buckingham County Council v Moran* [1990] Ch. 623, 639-643; *J.A. Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419, paras 32, 41. As in *Lambeth London Borough Council v Bigden* [2000] EWCA Civ 302, (2001) 33 HLR 43, it is not necessary for the adverse possession to be by one person for the whole of the period. **As long as the period of adverse possession is continuous, the**

> **adverse possession of successive squatters may be aggregated**." (Emphasis supplied)

[51] In **Toolsie Persaud**, the appellant relied on the prior possession of the State, from which it had secured title, to add to its own possession, in order to attain the number of years required to satisfy the limitation period. The Caribbean Court of Justice said at paragraphs [47] and [48]:

> "...Although the contract [between the State and the appellant] contemplated title passing by transport, the position can be equated to that in *Ramlakhan v Farouk* where the purchaser had taken possession of the vendors' land as of right, having paid them the full purchase price for their possessory rights. In that case the Court of Appeal accepted in obiter dicta that a vendor's possessory rights (even if for less than the statutory period) could be transmitted to benefit a purchaser, although on the facts of that case, the purchaser was able to rely upon over 12 years undisturbed adverse possession in her own right.
>
> **[48] It follows that the appellant can rely upon having established in July 1989 the 12 years of seamless undisturbed adverse possession of the State and itself needed to extinguish the first and the second respondent's paper titles under s 13 of the Limitation Act**...." (Emphasis supplied)

[52] Based on that assessment, Mrs Barton-Thelwell could properly claim the benefit of tacking her possession to that of Mr Thelwell's. By continuing in possession of the premises as one of the named executrices and beneficiaries of Mr Thelwell's estate, she was entitled to rely on the combination of his possession along with hers to accumulate the required period of 12 years, in order to defeat Ms Williams' paper title.

[53] There is another factor to be considered in respect of merit. Although it is true that Ms Williams did stay away from the property, it cannot be ignored, as Mrs Barton-Thelwell states, that Mr Thelwell had "chased" Ms Williams from the property and that she did not "dare to present herself" there, because of his "hostile and explosive temper". Queen's Counsel, Mr Leys, submitted that that factor would have prevented Mr Thelwell from being in "ordinary possession" of the premises. That situation, Mr Leys submitted, would mean that time would not run against Ms Williams for the purposes of the Limitation of Actions Act.

[54] That submission should only briefly detain this court. In other circumstances that may have been a factor to be considered when deciding the merits of the defence and the justice of the case. Both the law and the facts of this case are against Ms Ewers.

[55] The learned authors of Elements of Land Law, cited above, point out at paragraph 9.1.51 that whereas a possessor cannot rely on "unreasonable violence in order to maintain himself in possession", an aggressive stance in defence of possession, may "reinforce, rather than weaken, the adverse possessor's claim".

[56] On analysing the facts, in this brief consideration, it must be remembered that it is Mr Thelwell's intention, and not Ms Williams', that is the determinant mental element, in considering the acquisition of a possessory title (**Wills v Wills**). However, other factors are also relevant, namely the absence of force, permission and secrecy.

[57] The evidence certainly amply demonstrated an intention by Mr Thelwell to keep possession for himself and to oust Ms Williams from the premises. There is no dispute

that Mr Thelwell's possession of the premises was open and undisturbed. It also was, from the evidence, without any permission by Ms Williams.

[58] There was no admissible evidence concerning whether force was used to eject Ms Williams from the premises. Mrs Barton-Thelwell's statement in that regard is hearsay, as Ms Williams' departure from the premises pre-dated her arrival there. Similarly, Ms Ewers was not present at the time of Ms Williams' departure and Ms Ewers did not purport to give any evidence as to any force used by Mr Thelwell thereafter. In any event, Ms Williams should not have sat on her rights for the period of time that she did.

[59] Looking at the evidence presented in support of the application, there is a marked absence of any evidence from Ms Ewers concerning this important element of merit. She has adduced no evidence to counter the time for which Mr Thelwell had sole, undisturbed occupation (along with Mrs Barton-Thelwell) of the property. Nor has Ms Ewers adduced any evidence concerning Ms Williams' reason for allowing that situation to exist. Even the reason given for leaving the premises was based on a hearsay statement. On this consideration, Ms Ewers would have grave difficulty resisting Mrs Barton-Thelwell's claim.

[60] In considering the issue of prejudice, which is the next issue relevant to considering an extension of time, it does not seem that there was any prejudice caused to Mrs Barton-Thelwell by the delay. She was enjoying occupancy of the property and indeed, she did nothing about pressing for judgment until Ms Ewers had finally sought

to advance a defence to the claim. The learned judge did not consider this aspect in her judgment, but the omission was not critical in this case.

[61] Based on that analysis, this court would arrive at the conclusion that there should be no extension of time within which to file a defence on behalf of Ms Williams' estate.

[62] Before considering the orders that should be made, it will be necessary to address the questions of the representation of Ms Williams' estate and the judgment that the learned judge had authorised Mrs Barton-Thelwell to enter.

Representation of Ms Williams' estate

[63] It was pointed out above that the learned judge did not address in her judgment, her entitlement to appoint a representative for Ms Williams' estate. It was also pointed out in the relevant discussion above that Ms Ewers was an appropriate person to be so appointed. An order to that effect should be made.

The validity of the judgment for which was permission for entry was granted

[64] The learned judge's order stated at paragraph 2, "[t]hat permission is granted for judgment to be entered for the claimant in default of defence". There are two major difficulties with the learned judge's order granting Mrs Barton-Thelwell permission to enter judgment in the claim. The first is that it breaches the requirement that the case should only proceed when there is a representative in place for a defendant who has died.

[65] Rules 21.7 and 21.8 of the CPR, when read together, do contemplate that the case would not continue until a representative is appointed for the estate of the person, especially a defendant, who has died. Rule 21.7(4) and 21.8(1) particularly, make that clear. The former states:

> "Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule."

While rule 21.8(1) supplements that position and shows that orders are needed "to enable the proceedings to be carried on".

[66] Indeed Mr Green, in his skeleton arguments, tacitly conceded that the learned judge was in error to have made orders that did not address the absence of a representative. He submitted at paragraph 16, that the order made by the learned judge, should properly have read "that permission is granted for judgment to be entered for [Mrs Barton-Thelwell] at such time when this court appoints a personal representative for and on behalf of the estate of the deceased Defendant, Mavis Williams, for the purposes of carrying on these proceedings".

[67] The second major difficulty with the learned judge's order lies in the uncertainty of what Mrs Barton-Thelwell could do with it. Rule 12.10(4) of the CPR requires that a judgment in default, in cases not involving money or goods, should be in a form that the court approves. It states:

> "Default judgment where the claim is for some other remedy [apart from a claim for money or goods] shall be in such form as the court considers the claimant to be entitled to on a particular claim."

[68] Was the learned judge, therefore, approving the relief claimed by Mrs Barton-Thelwell in her particulars of claim or did she intend that Mrs Barton-Thelwell would have to apply to another judge for approval of the terms of the default judgment? Save for the other difficulties mentioned above, the learned judge would have been entitled to approve the terms of a judgment that she was approving for entry. In the absence of her doing so, this court, if it sees it fit to do so, is entitled to make those orders.

[69] As part of her judgment, Mrs Barton-Thelwell sought an order that she was beneficially entitled to the premises. The relevant part of paragraph 15 of the particulars of claim states:

> "That in light of the foregoing it is [Mrs Barton-Thelwell's] respectful application that this Honourable Court will be moved to make orders and declarations in the terms set out as follows:-
>
> …
>
> (c) That [Mrs Barton-Thelwell] is beneficially entitled to an interest in **ALL** THAT parcel of land with residential buildings thereon part of **CULLODEN** in the parish of **WESTMORELAND** … under and by virtue of the Last Will and Testament of the deceased, **FITZHOBERN ROY** THELWELL, who died on July 26, 2005.
>
> …" (Emphasis as in original)

[70] Mrs Barton-Thelwell was not entitled to such an order. Whereas she was entitled to claim protection from Ms Williams by virtue of section 3 of the Limitation of Actions Act, Mrs Barton-Thelwell could not properly claim to be the beneficial owner of the premises, by virtue of Mr Thelwell's estate.

[71] In considering the orders to which Mrs Barton-Thelwell is entitled by way of a default judgment, it is necessary to revisit the point of law that Mr Thelwell's estate could not include an interest in the premises. His interest died with him, by virtue of the right of survivorship vested in Ms Williams. Mr Thelwell, on his death, had no interest that could be transmitted to anyone, since he had not excluded Ms Williams for a period of 12 years. His interest expired when he expired. Mrs Barton-Thelwell could neither lawfully be an executrix of his estate in respect of these premises, nor a beneficiary thereof.

[72] It should be noted that in **Wills v Wills**, their Lordships considered the second wife's position in the context of her late husband's estate. In dictating the order to be made their Lordships said:

> "…there should be a declaration that the appellant, **in the capacity of her late husband's personal representative**, is solely and exclusively entitled to the two properties…" (Emphasis supplied)

Their Lordships declaration was only applicable in that case as an interest in the premises was vested in Mr Wills before he died. That was because he had occupied the disputed premises for in excess of 12 years before his death. That situation does not apply in the present case.

[73] Mrs Barton-Thelwell had an interest in the premises by way of two routes. Firstly, she had an interest by virtue of her continuous possession, firstly, along with Mr Thelwell from 1994 to 2005, and then on her own, for the period 2005 to 2011. In **Wills v Wills**, their Lordships spoke of the second Mrs Wills as living at the disputed

premises, "first as a licencee and then as [her husband's] wife" (paragraph 27). At paragraphs [69] and [70] of her judgment in **Fullwood v Curchar**, McDonald-Bishop JA (Ag) spoke of the woman who was in possession, as having derived her right to possession from being a "joint occupier" of the disputed premises. That possession deprived the surviving joint tenant of her title. The second route was by way of her being able, as a connected person, to tack her independent adverse possession of the premises from 2005, to Mr Thelwell's adverse possession for the period 1994 to 2005.

[74] The learned judge was, therefore, in error, in granting Mrs Barton-Thelwell permission to enter default judgment in the manner in which she did and particularly in respect of the terms of paragraph (c).

Conclusion

[75] The learned judge was in error in deciding that Ms Ewers could not have been allowed to have filed a defence on behalf of Ms Williams' estate. The court was entitled, by rule 21.8, even of its own motion, to appoint Ms Ewers the representative for the estate and thereby empower her to file a defence, if the estate had a meritorious defence. Unfortunately, however, there was no meritorious defence available to Ms Williams' estate.

[76] The learned judge also erred because she seemed to have based her decision to refuse to extend time, almost solely on the undue delay by Ms Williams. Based on that finding, this court is entitled to rule that the learned judge had not exercised her discretion properly. It is therefore entitled to conduct the exercise anew.

[77] This court is entitled to find, at the end of that exercise, that the learned judge's decision should not be disturbed. In addition, to the delay, there was the absence of a meritorious defence. Ms Ewers had failed to dispute the existence of circumstances that would prevent the application of the principles to be extracted from **Wills v Wills** and **Fullwood v Curchar**. There is no basis for allowing a defence to be filed on behalf of Ms Williams' estate.

[78] The learned judge made a further error. She failed to expressly set out the terms of the judgment to which she deemed Mrs Barton-Thelwell entitled. In particular, Mrs Barton-Thelwell's claim to be named the beneficial owner of the premises, by virtue of Mr Thelwell's estate, was misconceived. Mr Thelwell's estate acquired no interest in the premises on his death.

[79] It is for those reasons that the appeal should only be allowed in part. The orders should however be adjusted to allow Ms Ewers to be alerted of all steps taken in respect of the claim and to put Mrs Barton-Thelwell's rights in the proper context.

Costs

[80] Although Ms Ewers has had partial success in her appeal, the effect of the order that she sought to have set aside, from her perspective, remains unaffected. She should therefore not obtain an award of costs. Mrs Barton-Thelwell should also receive no costs as she failed to obey the order of the court in respect of the filing of full written submissions and authorities. In light of those factors, there should be no order as to costs.

MCDONALD-BISHOP JA

[81] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasons and conclusion and have nothing to add.

STRAW JA (AG)

[82] I too have read the draft judgment of Brooks JA and agree with his reasons and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal is allowed in part.

2. The order refusing the application to extend time within which to file a defence is affirmed.

3. Ms Tanya Ewers is hereby appointed the representative of the estate of Mavis Williams for the purposes of claim 2011 HCV 003288 and all future process shall be served on her.

4. The name of the defendant in claim 2011 HCV 003288 is hereby changed to "Tanya Ewers (executrix of the estate of Mavis Williams, deceased)" and all future process shall be so intituled.

5. The order permitting the respondent to enter judgment in claim 2011 HCV 003288, is hereby set aside, and the judgment that the claimant is entitled to enter shall, instead, be in the following terms:

    1. There shall be judgment for the claimant on the claim in default of defence.

    2. It is ordered and declared that:

a. Mavis Williams was, from 1994, physically excluded and dispossessed by the deceased, Fitzhobern Roy Thelwell, during his lifetime, and thereafter by Mrs Melrose Evadnie Barton-Thelwell, from all that parcel of land with buildings thereon, part of Culloden in the parish of Westmoreland being the land registered at Volume 1439 Folio 839 (formerly Volume 1213 Folio 729) of the Register Book of Titles (hereafter called "the premises"), from 1994 or thereabouts, and her estate remains dispossessed up until the present time.

b. That the estate of the said Mavis Williams, and any person on behalf of her estate, stand barred, pursuant to the provisions of the Limitation of Actions Act, from pursuing any action or claim against any person or persons, including the Claimant, Melrose Evadnie Barton-Thelwell, who is or are beneficially entitled to title to the premises.

c. The said Melrose Evadnie Barton-Thelwell, is legally and beneficially entitled to all the interest in fee simple in the premises.

d. The estate of Mavis Williams is not legally entitled to the absolute or any interest in the premises.

e. The said Melrose Evadnie Barton-Thelwell shall be entitled to make an application to the Registrar of Titles under section 158 of the Registration of Titles Act for the cancellation and replacement of the certificate of title registered at Volume 1439 Folio 839 (formerly Volume 1213 Folio 729) of the Register Book of Titles.

3. Costs to the claimant to be agreed or taxed.

6. No order as to costs in the appeal.