

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 89/2014

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)**

BETWEEN WINNIFRED FULLWOOD APPELLANT

AND PAULETTE CURCHAR RESPONDENT

Leroy Equiano for the appellant

Ms Marjorie Shaw and Miss Terry-Joy Stephenson instructed by Brown and Shaw for the respondent

12 March and 19 June 2015

PANTON P

[1] I have read, in draft, the judgment of McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

BROOKS JA

[2] I too have had the opportunity of reading, in draft, the judgment of my learned sister McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA (AG)

Introduction

[3] This appeal essentially raises the question as to the extinction and acquisition of title by operation of the Limitation of Actions Act (“the Act” or the “statute of limitations”). In particular, it concerns the right of a co-owner of registered property to obtain an order for recovery of possession of the property that had been in the exclusive possession of a co-owner and a third party for a continuous period of 24 years before the commencement of court proceedings to recover possession.

[4] On 29 May 2013, Mrs Paulette Curchar, the respondent, commenced proceedings in the Supreme Court against Miss Winnifred Fullwood, the appellant, for, *inter alia*, recovery of possession of residential property situated at 1 Saint Mary Avenue, Independence City in the parish of Saint Catherine and registered at Volume 1062 Folio 35 of the Register Book of Titles (“the property”). She also sought an order for removal of a caveat lodged by Miss Fullwood against the property.

[5] On 2 October 2014, Lindo J (Ag), after hearing the evidence of the parties, and the submissions of counsel acting on their behalf, granted the order for recovery of possession of the property and removal of the caveat as claimed by Mrs Curchar. Miss Fullwood is aggrieved by the order and, consequently, has filed this appeal.

The background

[6] The parties were their own historians and the evidence adduced by them before the learned trial judge has revealed some material disputed facts as well as some areas of common ground between them. An attempt will be made to broadly summarize both the undisputed as well as the disputed facts in an effort to provide an insight into the background to the case that was before Lindo J (Ag) and which led to the decision appealed against.

[7] Mr Huntley Curchar and Mrs Curchar were married in 1968 and the union has produced three children who are now adults. One of their children is a daughter, Andrea Curchar, whose name features prominently in the proceedings although she is not a deponent in the case. In 1973, they acquired the property as joint tenants. In 1976, they obtained a mortgage from the Victoria Mutual Building Society to improve the property.

[8] Mr and Mrs Curchar along with their children resided on the property until Mrs Curchar and the children migrated to the United States of America ("the USA") at some point between the early and mid-1980s. Mr and Mrs Curchar later separated and were eventually divorced on the petition of Mrs Curchar. Mrs Curchar later remarried. After migrating to the United States, she never returned to the premises for any purpose whatsoever although she visited Jamaica and would pass the premises from time to time. She received no rental or any other income from the property and she had no belongings there.

[9] Miss Fullwood started living in the premises in 1985 with Mr Curchar at his invitation. She lived with him, cared for him and assisted in the maintenance of the property. In September 2009, Mr Curchar died; he left no will. Miss Fullwood continued to live on the property after his death.

[10] On 25 May 2010, Miss Fullwood was served with a notice to quit and in or around January 2011, she was summoned to appear before the Saint Catherine Resident Magistrate's Court to respond to a plaint brought against her by Mrs Curchar for recovery of possession. The outcome of those proceedings is not disclosed on the evidence but it could be assumed that no order was made against Miss Fullwood given the commencement of subsequent proceedings in the Supreme Court.

[11] In or around August 2012, Miss Fullwood lodged a caveat preventing dealing in respect of the property. She asserted in the caveat an interest in the property pursuant to the Property (Rights of Spouses) Act ("PROSA") on the basis that it is the family home and that she was the common law spouse of Mr Curchar, deceased. Up to that time, she had brought no formal claim to be declared the spouse of Mr Curchar for purposes of PROSA or any other relevant enactment. Miss Fullwood refused to deliver up possession to Mrs Curchar, which led to the filing of the claim in the Supreme Court.

The dispute before the learned trial judge

Mrs Curchar's case

[12] In her claim filed in the Supreme Court and in her evidence proffered in support of it, Mrs Curchar, essentially, contended as follows. Upon the death of Mr Curchar, she is entitled to possession of the property because she had not abandoned or relinquished her interest in it since acquiring it jointly with Mr Curchar. She asserted that Miss Fullwood, in her application for the caveat had wrongfully and knowingly misrepresented to the Registrar of Titles that Mr Curchar was the sole registered proprietor of the property.

[13] She relied on documentary evidence to bolster her evidence that although she had left the property in 1985 and had later divorced Mr Curchar, they had remained civil to each other. She would send monies for him to do whatever he wanted with it as the "man of the house" and to meet the mortgage repayments. She had discharged the mortgage for the property in 2010. She also sent barrels to him and assisted in defraying the expenses for his funeral.

She denied Miss Fullwood's claim to being the common law spouse of Mr Curchar although she does not know if they were romantically involved. She contended that Miss Fullwood was a tenant of the property with her consent and a paid caregiver to Mr Curchar until his death. Miss Fullwood has no interest whatsoever in the property.

Miss Fullwood's case

[15] Miss Fullwood, in response to the claim, relied on the Limitations of Actions Act by way of her defence. The gist of her case is captured and outlined as follows. Mrs Curchar had left the property for over 24 years up to the time of Mr Curchar's death. She and Mr Curchar had occupied the property as man and wife for all that time to the exclusion of Mrs Curchar. They shared the property with two children they had adopted, one of whom is a child with special needs.

[16] Also relying on numerous documents to advance her case, Miss Fullwood contended that Mrs Curchar, in fact, had left the property for the USA from 1982 and has never returned or made any contribution to anything pertaining to the property or Mr Curchar. She relied on a letter purportedly written by Mr Curchar and addressed to the US embassy in 1984 in which Mr Curchar stated that Mrs Curchar had left with the children from 1982 and that he did not know her whereabouts and that she had taken his passport and he was seeking assistance from the embassy to locate her. Mrs Curchar had accepted that the letter was in the handwriting of Mr Curchar. She, however, maintained that she left in 1985.

[17] Miss Fullwood further contended that Mrs Curchar had abandoned the property when she failed to return there and to assist with mortgage repayments, property taxes and the general preservation of the property. She claimed that over the years when Mr Curchar was unable to pay the mortgage, property taxes and water bills, she had to pay them or give him loans to do so

without any assistance from Mrs Curchar. She exhibited receipts purportedly signed by Mr Curchar evidencing her claim. Those receipts have remained unchallenged.

[18] She also deposed that when Mr Curchar became ill in 2004, she had to take care of all his medical and living expenses. She would only receive money from Andrea Curchar (the daughter) for Mr Curchar after he became ill. She paid the majority of the funeral expenses and she caused the body to be buried as evidenced in the death certificate that was exhibited.

[19] Miss Fullwood contended that she has acquired a beneficial interest in the property by virtue of her position as Mr Curchar's common law spouse and it was Mr Curchar's desire that she should benefit from the property. She relied on a document headed "Declaration of Assets" purportedly written and signed by Mr Curchar before a Justice of the Peace in seeking to substantiate the evidence of her contribution to the property and the welfare of Mr Curchar and the desire of Mr Curchar that she should benefit from the property. She also exhibited a form purportedly signed by Mr Curchar and witnessed by a Justice of the Peace in 2009 for the purposes of his pension payments in which he described her as his common law spouse and assigned her to be his agent.

[20] She maintained that she and Mr Curchar had together enjoyed exclusive occupation and possession of the property free from molestation in any form from Mrs Curchar or anyone else acting on her behalf or claiming through her for

24 years before the death of Mr Curchar. Mrs Curchar therefore, has no valid title to claim recovery of possession as her title had been extinguished by the operation of the statute of limitations in favour of Mr Curchar through whom she is entitled to share in the beneficial interest of the property by virtue of her being his spouse. For that reason, she said, Mrs Curchar has lost all rights and or claim to the property and cannot lawfully bring a claim to recover possession from her.

The findings of the learned trial judge

[21] Having heard and seen the parties, Lindo J (Ag) proceeded to make her findings and those findings on the critical issues were recorded by counsel for the parties and, in summary, are as follows:

- (i) Miss Fullwood started living at the premises with Mr Curchar's permission. Whatever she did in relation to the premises were permitted by Mr Curchar and were for her enjoyment.
- (ii) Monies and barrels were sent by Mrs Curchar to Miss Fullwood for the benefit of Mr Curchar. Monies were sent for the funeral. This shows that Mrs Curchar had not abandoned the property. There was insufficient evidence to find that she had abandoned the property or had been dispossessed by either Mr Curchar or Miss Fullwood.
- (iii) There has to be clear and affirmative evidence by a person claiming possession. That person not only had to have the required intention but

- had to make such intention clear.
- (iv) The onus of proof that is on the person seeking to dispossess the title owner is a heavy one. Miss Fullwood (the defendant) has not satisfied the court on a balance of probabilities that Mrs Curchar had been dispossessed by Mr Curchar or by her.
 - (v) Miss Fullwood occupied the premises with the permission of Mr Curchar. On the authorities looked at, and the evidence, she was a licensee. However, Mrs Curchar seems to have revoked the licence when Miss Fullwood was served with the notice to quit. It is accepted that the occupation/possession by Miss Fullwood was attributed to her licence and cannot be treated as adverse possession.
 - (vi) Miss Fullwood had not satisfied the court that she enjoyed a spousal relationship with Mr Curchar. The evidence and exhibits regarding the payment of taxes serve to negate her assertion that a common law relationship existed.
 - (vii) After the competing versions, exaggerations and distortions by both parties were taken into account, it is found, on a balance of probabilities, that Mrs Curchar was more credible than Miss Fullwood. Mrs Curchar had established that she had not been dispossessed.

The appeal

[22] Miss Fullwood filed two grounds of appeal against the learned trial judge's findings and resultant order as follows:

- "1. The Judgement [sic] given by the Court is unsupported by the evidence presented in the case.
2. The learned Trial Judge erred in her findings that the Claimant was not dispossessed by the Defendant after not having had contact or exercised any rights of ownership over the subject property over a period in excess of twelve (12) years."

[23] The findings of fact that were challenged were that Mrs Curchar was not dispossessed of her legal rights of ownership in relation to the property by Miss Fullwood and that Miss Fullwood was a licensee. The finding of law that was challenged was that Miss Fullwood did not acquire the property by virtue of adverse possession.

[24] The orders sought on appeal are as follows:

- "1. ...
2. This Appeal should be allowed with cost [sic].
3. A declaration that the Respondent has no legal rights to the property.
4. The Registrar of Titles is to remove the Respondent's name from the Certificate of Title.
5. The Appellant is entitled to remain in possession of the property.

6. The Appellant is entitled to make the necessary application to assert her interest in the property.”

Issues

[25] The ultimate and overarching question that arises for resolution in this appeal is whether the learned trial judge was correct to grant an order for recovery of possession to Mrs Curchar based on the evidence that was before her and in the light of the law applicable to the case. In other words, the fundamental question that emerges for resolution when the two grounds of appeal are fused and considered together (as they have been) is whether, in law and in fact, the judgment of the learned trial judge is supported by the evidence to properly ground an order for recovery of possession in favour of Mrs Curchar, a registered co-proprietor, who has not been in occupation of the property for over 12 years prior to the filing of her claim.

[26] Within this broad issue, however, and based on the case advanced by each party and the submissions of counsel on their behalf, two subsidiary, but important questions, have automatically emerged for consideration and those are:

- (i) whether the title of Mrs Curchar, a registered joint tenant of the property had been extinguished by the operation of the Limitation of Actions; and

(ii) whether Miss Fullwood, a non-owner, who had lived on the property with the permission of Mr Curchar, the other joint tenant could in her own right raise the statute of limitations by way of defence to say that Mrs Curchar had been dispossessed in the absence of a declaration from the court that she is a spouse or a personal representative of the estate of Mr Curchar, the deceased co-tenant.

The relevant law

(i) The approach to be employed in treating with the learned trial judge's decision

[27] Given the nature of the grounds of appeal that have been pursued and the complaint concerning findings of facts of the learned trial judge, it seems useful to be reminded from the very outset of the requisite approach of an appellate court in such cases where a trial judge sits alone. The oft-cited dicta of their Lordships of the House of Lords in **Watt (or Thomas) v Thomas** [1947] AC 484 have provided the necessary guidance as to the approach that is warranted in the consideration of this appeal. Some of the relevant principles as derived and synthesized from the speeches of Viscount Simon and Lord Thankerton at pages 486 to 488 will now be outlined.

- (i) An appellate court has the jurisdiction to review the record of the evidence that was before the trial judge in order to determine whether the conclusion originally reached upon that evidence cannot stand. The jurisdiction, however, must be exercised with caution.

- (ii) If there is no evidence to support a particular conclusion arrived at the trial (which is a question of law), the appellate court will not allow the conclusion arrived at to stand. However, if the evidence as a whole can reasonably be regarded as justifying the conclusion, and especially if that conclusion has been arrived at on conflicting testimony, the appellate court should bear in mind that it has not enjoyed the opportunity which had been afforded the trial judge to see and hear the witnesses. Therefore, the view of the trial judge on matters concerning issues of credibility is entitled to great weight.

- (iii) If there is no question that the trial judge had misdirected himself where a question of fact had been

tried by him, an appellate court even if disposed to come to a different conclusion on the evidence, should not do so unless it is satisfied that the advantage enjoyed by the trial judge to see and hear the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

- (iv) The appellate court may take the view that without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the evidence. Where the appellate court is satisfied that the trial judge had not taken proper advantage of his having seen and heard the witnesses because the reasons given by the trial judge are not satisfactory, or it unmistakably appears to be so from the evidence, then the matter is at large for the appellate court.
- (v) Ultimately, the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration. Also, the value and importance of

having seen and heard the witnesses will vary according to the class of case and perhaps the individual case in question.

[28] It is with this important injunction in mind that the grounds of appeal have been considered. I will now turn to the relevant law that is applicable to the substantive issues that arise for resolution on this appeal.

(ii) **Claim for recovery of possession**

[29] Slade J in the oft-cited case of **Powell v McFarlane** (1977) 38 P & CR 452 explained that in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession. However, the fact that Mrs Curchar was not, on the face of her statement of claim, in occupation of the property the issue of the effect of the statute of limitations on her claim necessarily arises, and even more so, in the face of Miss Fullwood's defence. This means that the certificate of title standing in her name cannot be taken as conclusive evidence of her title, without more.

[30] This is made clear by section 68 of the Registration of Titles Act, which reads:

"68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application of same,...and every certificate of title issued under any of the provisions herein

contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, **subject to the subsequent operation of any statute of limitations**, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power." (Emphasis mine)

It is evident from that provision (as well as section 85 of the Registration of Titles Act) that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else.

[31] 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."

The closely related provision, section 30, then, reads:

"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."

It is clear from these provisions that they may operate together to bar the registered owner of property from making any entry or bringing any claim to recover the property after the expiration of 12 years if certain circumstances exist.

[32] Apart from those provisions that have arisen for consideration, it should also be noted that an added dimension to the facts of this case is that Mrs Curchar was a co-owner of the property with Mr Curchar as joint tenants. It means that in the ordinary course of things, and in the absence of severance of the joint tenancy during the lifetime of Mr Curchar, the rule of survivorship would have operated to vest the entire property in Mrs Curchar upon the death of Mr Curchar. It would follow then that no one claiming through Mr Curchar would have any legitimate claim to the property.

[33] Despite Mrs Curchar's purported position as the sole surviving joint tenant, sections 3 and 30 of the Act would, nevertheless, arise for contemplation in the light of section 14 which provides as follows:

"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 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.”

In effect, section 14 renders the possession of co-tenants as separate possessions from the time that they first became joint tenants (See **Culley v Doe d Taylerson** (1840) 11 Ad & El 1008). Therefore, it has modified the common law doctrine of non – adverse possession as it affects the rights of co-tenants. It means then that a co-tenant can obtain title by possession against the other co-tenant. As Sampson Owusu, Commonwealth Caribbean Land Law at page 305, explained:

“The co-tenant in possession of the entire property is, therefore, for the purpose of the provision...not in a different position from a stranger in possession of separate property so far as regards the undivided interest of his co-tenant. [SEE *Glyn v Howell* [1909] 1 Ch 666,677.]”

[34] Sections 3, 14 and 30 were the focus of attention by the Privy Council in the well-known case **Wills v Wills** [2003] UKPC 84. That case, both in the reasoning and conclusion of their Lordships, clearly demonstrates, by reference to earlier authorities that had construed the Real Property Limitation Act 1833 of England (on which our statute is modeled) and similar legislation, that a co-tenant in possession of jointly owned property can, in law, dispossess another co-tenant who had not been in possession for the requisite limitation period of 12 years.

[35] Prior to **Wills v Wills**, it was made abundantly clear by Wilfred Green MR in **Re Landi, Georgi v Navani** [1939] 3 All ER 569; 572, that the operation of the statute is triggered when the occupation by the co-tenant of the entirety is “for [his] own benefit”. The Privy Council was to subsequently endorse this view in **Paradise Beach and Transportation Co Ltd and Others v Price-Robinson and Others** [1968] 1 All ER 530 in which Lord Upjohn in delivering the opinion of the Board, usefully explained the significance of the changes that were brought about by the 1833 Act. In speaking to equivalent provisions to section 14 of our Act, he noted that the separate possession of the co-tenant only would start when the occupation is “for [his] own use and benefit”. At page 534, he then opined:

“...It seems...clear from the language of the Act and the authorities already referred to that,...where the right of entry has accrued more than twenty years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants’ possession...”

[36] So it is well settled on strong and binding authority that the combined effect of sections 3, 14 and 30 of the Act is that Mrs Curchar, a registered proprietor of the property, can lose her right to recover possession of it on the basis of the operation of the statute of limitations against her. The core live issue before Lindo J (Ag), therefore, was whether Mrs Curchar had a title that had not been extinguished by the operation of the statute of limitations thereby giving her the necessary *locus standi* to file a claim for recovery of possession in 2013.

The validity of the paper title on which she relied to bring her claim against Miss Fullwood was a fundamental pre-requisite for the success of her claim.

The burden of proof

[37] Based on the submissions of Miss Shaw, counsel for Mrs Curchar, an important question that arises as a proper starting point is this: on whom did the burden lie to establish the validity of Mrs Curchar's title on her claim for recovery of possession? Miss Shaw's argument in this court and in the court below was that the burden was on Miss Fullwood to establish her *locus standi* to rely on the statute of limitations as a defence. According to her, the *locus standi* of Mrs Curchar to bring the claim was irrelevant. Miss Fullwood was not a spouse or personal representative of Mr Curchar, she argued, and so she could not rely on the statute of limitations in her own right as she had no *locus standi* to do so. Learned counsel's contention was that Miss Fullwood was not a person who could avail herself of the protection afforded by the Act as that was only open to Mr Curchar's estate for which she was not the administrator.

[38] An examination of the relevant law as it relates to a claim for recovery of possession by a paper owner has rendered that argument of Ms Shaw quite untenable as a matter of law. I say so for the following reasons. 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.

According to the Lord Chancellor, Earl Cairns at pages 58 and 59:

“...The *Statute of Frauds* must be pleaded, because it never can be predicated beforehand that a Defendant who may shelter himself under the *Statute of Frauds*, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the

Statute of Frauds will be inapplicable. With regard also to the *Statute of Limitations* as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicated that the Defendant will appeal to the *Statute of Limitations* for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the *Statute of Limitations* or not. **But with regard to real property it is a question of title. The Plaintiff has to state his title, the title upon which he means to rely, and the *Statute of Limitations* with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other was [sic] he may have it..."** (Emphasis added)

In the same case, Lord Penzance at page 64 treated with the distinction this way:

"...The *Statute of Limitations* as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of, or it may not be taken advantage of, according to the volition of the Defendant. **But the *Statute of Limitations* applying to real property, as has been pointed out, does more than that; it goes to the root of the Plaintiff's claim..."** (Emphasis mine)

[41] The 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 chooses 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.

[43] It follows then that all that Miss Fullwood needed to have said was that she was in possession of the property or that the property does not belong to Mrs Curchar because she has been dispossessed. She required no *locus standi* to say that because the statute itself says that a claim not brought within the requisite period of limitation is barred and the claimant's title is extinguished simply by operation of time he had been out of possession. This is quite separate and apart from the question as to the legal capacity of the person in whose favour it is extinguished. It is for that reason that a trespasser or a squatter may benefit from the statute.

[44] This means, therefore, that Mrs Curchar's right to possession of the property was subject to the statute of limitations and so it was incumbent on her, in discharging both the evidential and legal burdens placed on her as claimant, not to only state at trial the title on which she was relying but to prove on the evidence that it was a subsisting one by virtue of the fact that she had been in possession within the period of limitation, or in other words, that her title was not extinguished by operation of law.

[45] The authorities from which sound guidance have been provided, have therefore, established that the strength of Miss Fullwood's defence to the claim was not the primary and pivotal element to be considered by the learned trial

judge but rather the strength of Mrs Curchar's title to the property and her right to possession of it. So, Mrs Curchar's *locus standi* to bring the claim was the relevant and material issue contrary to what Ms Shaw had advanced. The burden of proof was, therefore, on Mrs Curchar and not on Miss Fullwood as the defendant to establish her claim.

[46] It is evident, however, that Ms Shaw's argument had gained traction with the learned trial judge. It has not escaped our attention, albeit that it was never raised as a distinct ground of appeal, that the learned trial judge had cast the burden of proof on Miss Fullwood, as defendant, to prove that Mrs Curchar, as the claimant, had no right to recovery of possession. So, she did not see the burden as being one that was on Mrs Curchar to establish her *locus standi* to bring the claim. Counsel's agreed notes of the learned trial judge's findings read in this regard:

"There has to be clear and affirmative evidence by person claiming possession. Not only had to have the required intention but had to make such intention clear.

Onus of proof on person seeking to dispossess Title Owner is a heavy one. Defendant in this case has not satisfied on a balance of probability that Claimant had been dispossessed by deceased and neither has she shown that she has been dispossessed by the Defendant." (Emphasis added)

[47] This position would have been contrary not only to the principle of law of general application that 'he who asserts must prove' but also against the relevant

authorities dealing with claims for recovery of possession. It was thus a clear reversal of the burden of proof and an error of law that cannot be ignored because the question of the burden of proof is so fundamental to every case so as to affect the ultimate decision arrived at by a tribunal of fact on evidence presented before it.

[48] Therefore, while the error was not presented by Miss Fullwood as a ground of appeal, it cannot be overlooked within the context of the ground of appeal pursued which has challenged the conclusion on the facts of the learned trial judge. The error as to the burden of proof may well have substantially informed the learned trial judge's conclusion that Mrs Curchar was entitled to recover possession of the property. It means then that if the learned trial judge had misdirected herself on the relevant law that should have been applied to the facts before her, which would include the burden of proof, then it is properly within the jurisdiction of this court to interfere, it being a fundamental error of law rather than a pure finding of fact based on the view she would have taken of the witnesses' credibility. It would have had nothing to do with any advantage she might have had over this court in her having seen and heard the witnesses.

Analysis of the findings and conclusion of the learned trial judge

[49] The reasoning and conclusion of the learned trial judge will now be evaluated after an examination of the important aspects of the evidence that was before her. This will be done in an effort to see whether, notwithstanding

the error as to the burden of proof, she was correct in her findings and judgment given that Mrs Curchar was entitled to recover possession of the property. As indicated earlier, the grounds of appeal are inextricably bound up and so they have been examined together under various sub-headings within the context of the case in an effort to attain a measure of clarity in analysing the findings of the learned trial judge.

Whether Mrs Curchar had abandoned/relinquished/discontinued possession of the property

[50] In granting the order for recovery of possession, the learned trial judge found that there was insufficient evidence that Mrs Curchar had (i) abandoned the property or (ii) that she had been dispossessed by either Mr Curchar or Miss Fullwood. In the light of this finding, it would be useful to provide a reminder of the meaning of the concept of 'possession' before determining whether the learned trial judge was correct in coming to those findings on the evidence.

[51] According to the relevant authorities, the concept of possession, in its fullest and legal sense, consists of two constituent elements: (1) factual possession, which is a sufficient degree of physical custody and control over the property in question, and (2) the intention to exercise such custody and control over the property on one's own behalf and for one's own benefit (*the animus possidendi*). So, 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. The requisite intention is an intention to possess and not necessarily the intention to own. See, for instance, **JA Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; [2002] 3 All ER 865 and **Wills v Wills**.

[52] Although our statute has made no reference to the concepts of “discontinuance of possession” or “dispossession”, it is accepted on the authorities that, in actuality, they would be relevant concepts for consideration in determining the question whether Mrs Curchar’s title had been extinguished by virtue of the statute of limitations. In other words, they are relevant considerations in determining whether she is entitled to recover possession from Miss Fullwood.

[53] With regard to ‘dispossession’, in particular, Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd v Graham**, stated that that means nothing more than simply whether the person against whom possession is sought has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. By ‘ordinary possession’ is meant possession as defined, meaning factual possession with the intention to possess for one’s own benefit and on one’s behalf.

[54] So according to the authorities, dispossession means nothing more than the taking of possession in that legal sense. It does not require any confrontational act or hostile take over or even what was termed as ouster at

common law. For that reason, Lord Browne-Wilkinson urged in **JA Pye (Oxford) Ltd v Graham**, that reference to the concept of 'adverse possession', should be avoided as it only serves to add confusion and complication. The only question is whether the defendant in a claim for recovery of possession by the paper owner, had been in possession in the ordinary sense of the word for the requisite limitation period.

[55] In resolving the question whether Mrs Curchar had discontinued or had been dispossessed, the evidence that was presented by Mrs Curchar will now be examined. The evidence of Mrs Curchar revealed that up to the time she filed the claim, she was living in the USA and had been living there since 1985. Albeit that Miss Fullwood had exhibited a letter, purportedly written by Mr Curchar, to show that she had left the property from 1982, the resolution of the dispute as to the exact year she left, would not have been material. This is so because on whichever case is accepted, it is clear on Mrs Curchar's best case, that she would have left the property for more than 12 years before she sought to recover possession.

[56] The evidence also disclosed that for the continuous period of almost 28 years before the claim was brought, Mrs Curchar had left no one to act on her behalf and for her benefit on the property. To compound it all, she never once visited the property, even though she visited Jamaica. According to her, she would pass the property on her visits. Also, there is no evidence that she had

any of her possessions on the property or that she was in receipt of any rental or other income from the property.

[57] Although she sought to claim that Miss Fullwood was a tenant who she had agreed to being on the premises, she gave no cogent evidence to substantiate that fact. She exhibited no correspondence between herself and Mr Curchar in relation to his occupation of the property with Miss Fullwood. In any event, her assertion that Miss Fullwood was a tenant was, evidently, rejected by the learned trial judge who found instead (whether rightly or wrongly) that Miss Fullwood was a licensee at the instance of Mr Curchar. Miss Fullwood's occupation was, therefore, not attributed to her and could not have been attributed to her.

[58] Despite the clear evidence which shows that Mrs Curchar was not in physical contact with the property, she, nevertheless, relied on evidence of some acts purportedly done by her in order to show that she did not abandon the property or discontinue possession of it. She stated that although she had divorced Mr Curchar, the relationship between them had remained civil. So, she and the children would send money and barrels for his benefit. She said she assisted him financially with his medical needs after he was diagnosed with lung cancer and she also assisted in meeting the funeral expenses when he died in 2009.

[59] She exhibited several Western Union receipts on which she relied to prove that she sent money for the benefit of Mr Curchar. The receipts, however, are in the name of Andrea Curchar (their daughter), as sender, and either Miss Fullwood or Mr Curchar, as receiver. So, none of them bears her name. Andrea Curchar did not give any evidence in the case to substantiate Mrs Curchar's assertions that she had sent money for Mr Curchar.

[60] She also gave evidence too that she met monthly mortgage obligations until April 2010 when the mortgage was discharged and endorsed on the certificate of title. She, however, produced no documentary proof of assisting with the mortgage repayments except for a payment made by her to an attorney-at-law to endorse the discharge of the mortgage in 2010 after the death of Mr Curchar, which was admitted by Miss Fullwood. She produced no record of any contribution to the mortgage repayments for the years between 1985 and 2009, which would have been up to the time of Mr Curchar's death. Simply put, there was nothing to substantiate her assertions that she was assisting with the mortgage repayments during any time for 12 years before bringing her claim after she had left the property.

[61] The learned trial judge had made no declaration, at least expressly, that she had accepted or rejected Mrs Curchar's evidence that she assisted with mortgage repayments after she had left the property. So, there is nothing to suggest that she had used that particular bit of evidence to arrive at her

conclusion that Mrs Curchar had not abandoned the property. The learned trial judge is recorded by counsel (in their agreed notes) to have found that:

“Monies and barrels were sent to the Defendant for the Deceased by the Claimant. Monies were sent for the funeral.

Shows that Claimant had not abandoned the property
Not so. Not sufficient evidence to find that she had abandoned or had been dispossessed.”

[62] There are several things that are found to be manifestly wrong with this finding of the learned trial judge that would seem to justify the complaint that it is not supported by the evidence, even if she had accepted that Mrs Curchar assisted with the mortgage by this means. I begin firstly with the finding that monies and barrels were sent by Mrs Curchar to Miss Fullwood for Mr Curchar. Miss Fullwood had accepted that she had received monies and a barrel for Mr Curchar but not from Mrs Curchar. She said she received them from Andrea Curchar. This assertion of Miss Fullwood is substantiated by the documentary evidence relied on by Mrs Curchar herself. Quite apart from the fact that the receipts relied on were not in the name of Mrs Curchar but of Andrea Curchar who was not a witness in the proceedings, most importantly, as Mr Equiano pointed out, the receipts only showed monies being sent between 2004 and 2009. That seems to be consistent with Miss Fullwood’s evidence that the daughter started to send money to assist in meeting Mr Curchar’s medical expenses after he became ill in 2004.

[63] Even if, however, one were to accept that Mrs Curchar was the one who sent the monies, the payments are not shown to be connected to the property in any way. There was nothing in such acts that could be seen as being referable to any act of possession of the property by Mrs Curchar. In fact, even if her actions in sending monies (even to include mortgage repayments) and barrels could, for argument sake, be taken as acts of possession, they would have been acts on her part coming more than 12 years after she had left the property. Also, in relation to mortgage payments, her only proof of any contribution was a payment made in 2010 to an attorney-at-law to have the discharge of the mortgage endorsed on the certificate of title. By this time, Mr Curchar had not only died but he had already discharged the mortgage from 2001. So no money could have been going for Mr Curchar's benefit in 2010. In any event, that would have been 25 years or so after Mrs Curchar had left the property.

[64] Similarly, quite apart from the fact that the receipts evidencing contribution to the funeral expenses were not in the name of Mrs Curchar, the money for the funeral expenses would also not have been in connection to the property or being in any way referable to her possession of it. It would have been simply to bury Mr Curchar. Also, that money would have been sent in 2009; being 24 years after she had left the property and had not returned. So, even if one were to accept Mrs Curchar's documentary evidence as being properly supportive of her claim, she would have had done the things she sought

to rely on after the limitation period had expired. Those things could not avail her in advancing her case that her claim is not statute-barred.

[65] The simple fact is that Mrs Curchar would have done nothing that could amount to possession of the property within the relevant limitation period to properly ground a finding that she had not discontinued possession for the purposes of the statute of limitations. The learned trial judge's finding that those acts of Mrs Curchar were sufficient to prove that she had not abandoned the property or discontinued possession of it is manifestly against the weight of the evidence and the applicable law. Consequently, the learned trial judge's ultimate finding that the evidence was insufficient to lead to the conclusion that she had abandoned the property or discontinued possession is unsustainable in the light of the evidence and as such is, regrettably, plainly wrong.

[66] There is clear and indisputable evidence that Mrs Curchar had discontinued or relinquished possession or had abandoned the property for well over the 'ample period of 12 years'. In actuality, her discontinuance was for at least twice the period of limitation. On that basis, her claim for recovery of possession from Miss Fullwood would automatically be barred by section 3 of the Act. This is separate and distinct from any other argument that her title would be extinguished (under section 30) and transferred to the person entitled to the possessory title. It would also be so without reference to Miss Fullwood's defence in reliance on the statute of limitations.

[67] Mrs Curchar would, simply, not have had the *locus standi* to bring the claim even though she is the holder of the paper title because she would not have managed to surmount the hurdle placed in her way by section 3 of the Act. The learned trial judge's finding that her claim was not barred and her decision to grant recovery of possession on Mrs Curchar's stale claim were palpably wrong which, without more, would justify this court's interference with her decision.

[68] Despite the conclusion that seems justifiable on the evidence that Mrs Curchar had discontinued her possession of the property, I have, nevertheless, considered the additional or, at least, alternative position taken by Miss Fullwood that Mrs Curchar's claim was barred because she was dispossessed. The learned trial judge in the face of that contention had found that Mrs Curchar was not dispossessed by either Mr Curchar or Miss Fullwood. The ground of appeal filed was that she erred in so finding in relation to Miss Fullwood. Mr Equiano, however, during the course of his submissions, had incorporated the argument that she would have erred in her finding that Mrs Curchar had not been dispossessed by Mr Curchar. This is not an objectionable argument to be taken on appeal given the issue for resolution, the evidence led at trial and the ultimate finding of the learned trial judge that Mrs Curchar was not dispossessed and was entitled to recover possession of the property.

[69] Ms Shaw had submitted, in advancing Mrs Curchar's case, that only Mr Curchar's estate could assert the right to say Mrs Curchar had been dispossessed and it was not a right, she said, that was open to Miss Fullwood. It is an undisputed fact, however, that Miss Fullwood had occupied the property with Mr Curchar. Mr Curchar's status as not only joint tenant with Mrs Curchar, but also joint occupier with Miss Fullwood was, therefore, highly relevant to both the claim and the defence and was, inevitably, a relevant matter for consideration. The legal significance of his occupation of the property was integral to resolving the dispute between the parties. It is no wonder for that reason that the learned trial judge saw it necessary, in coming to her findings, to declare that Mrs Curchar was not dispossessed by Mr Curchar. She, herself, had made a finding in relation to Mr Curchar.

[70] So, the issue whether Mr Curchar had dispossessed Mrs Curchar is by no means a matter that is being raised on appeal for the first time and which did not form part of the findings of the learned trial judge. In fact, she found that Miss Fullwood was a licensee of Mr Curchar but did not go on to consider the ramification of that by reference to the position of Mr Curchar as a joint tenant through whom Miss Fullwood would have derived her right to possess the property (as distinct from owning it). Miss Fullwood would, therefore, be entitled to include in her grounds of appeal the finding of the learned trial judge that Mr Curchar did not dispossess Mrs Curchar. It arose at trial and is an inevitable issue that must arise on appeal because of the nature of the claim. There can be no

prejudice to Mrs Curchar because that was her case as presented in the court below when she said that she had not relinquished possession of the property or had not been dispossessed. The written submissions filed on her behalf, as well as the oral arguments before this court, have adequately addressed the standing of Mr Curchar.

[71] Mr Equiano was, therefore, permitted, by virtue of rule 2.15 of the Court of Appeal Rules ("the CAR") and in the interests of justice, to argue the point that the learned trial judge erred in law in her finding that neither Mr Curchar nor Miss Fullwood had dispossessed Mrs Curchar.

[72] It is, indeed, true, as noted by Mr Equiano, that although making a finding pertinent to Mr Curchar that he had not dispossessed Mrs Curchar, the learned trial judge had not demonstrated the reasoning that would have led her to such a finding. She made no reference to any authority in stating her reasons for judgment. She focused almost predominantly on Miss Fullwood's capacity as to whether she was Mr Curchar's common law spouse as she was alleging and the nature of her possession. The learned trial judge did not make any reference, in the light of section 14 of the Act and the relevant authorities, to Mr Curchar's position as a joint tenant in possession of the entire property for his own use and benefit and to the prejudice of Mrs Curchar.

[73] By failing to demonstrate that she had considered Mr Curchar's position in the light of the implication of the statute of limitations for Mrs Curchar's claim,

the learned trial judge, regrettably, would have omitted from her consideration relevant material that would have affected both the claim brought by Mrs Curchar and the defence of Miss Fullwood. Her focus on the evidence before her was, in reality, a very narrow one.

[74] In the light of this inadequate treatment of the evidence by the learned trial judge, the question as it would stand on this appeal is whether the conclusion that Mrs Curchar is entitled to recover possession on the ground that she had not been dispossessed at all is supported by the evidence and should be allowed to stand or did the learned trial judge err in such a finding as contended by Miss Fullwood? I will now examine the case in relation to the legal position of Mr Curchar as a paper owner in his own right and through whom Miss Fullwood is claiming her right to possess the property.

Whether Mrs Curchar was dispossessed by Mr Curchar

[75] Given the finding of the learned trial judge that Mr Curchar did not dispossess Mrs Curchar, it is absolutely necessary to examine Mr Curchar's dealings with the property while bearing in mind the meaning of the concept dispossession. In treating with Mr Curchar's position vis-à-vis the land, as a joint tenant it is obvious that he would have been entitled to possession of the property jointly with Mrs Curchar. He was the one in possession. He would not have been in the position of a squatter, so all that he would have had to establish as paper co-owner was that he had been in possession of the entirety

of the property for his own use and benefit and on his own behalf because, as already indicated by reference to section 14, the possession of one joint tenant is not the possession of the other.

[76] Mrs Curchar cannot benefit from Mr Curchar's possession of the property. It is for that reason that Mr Curchar's separate possession would have triggered the operation of the Act from the date he assumed exclusive possession for his own use and benefit and on his own behalf. The only other pertinent question would be whether he had continued in possession in this way for at least 12 years after Mrs Curchar had ceased being in possession.

[77] Lord Browne-Wilkinson, in **JA Pye (Oxford) Ltd v Graham** at paragraph [41] (in re-stating with approval the seminal statement of law enunciated by Slade J in **Powell v McFarlane**, particularly, as it relates to what constitutes possession), usefully noted that factual possession signifies an appropriate degree of physical control, that is single, and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. He noted that the question of what constitutes a sufficient degree of exclusive physical control must depend on all the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. What must be shown, he said, is that the person in possession had been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so. The intention that is

required is not an intention to own but rather an intention to possess. The occupation of the property by Mr Curchar must be assessed against this background of the law.

[78] The evidence shows that for 24 years or so prior to his death, Mr Curchar was in possession of that property in the ordinary sense of the word entirely for his own use and benefit and that of Miss Fullwood who he invited to share it with him. He did so openly and without any disturbance or interference from Mrs Curchar and with no acknowledgment of her title. He shared no income from it with Mrs Curchar.

[79] Miss Fullwood had exhibited, among other things, a document entitled "Declaration of Assets" which she presented as being written and signed by Mr Curchar in 2001. That document would have been prepared 16 years or so after Mrs Curchar had left the property. It was, purportedly, witnessed by a Justice of the Peace who affixed his signature to the document. In that document Mr Curchar stated in part:

"I Huntley E Curchar been [sic] of sound mind and body this day declare that Winnifred T Fullwood is and has been a benefactor to me for the past seventeen years (17 years)
I was married to Paulette M McNeil who had deserted me from May 1982.
From that time I have not heard from her, even though I was told by our children and relatives of hers that she has married and lives in the U.S.A.
Suffice it to say I have no knowledge of any divorce between us.

Ms Fullwood has been at the forefront of all my doings pertaining to the house I live [sic]
She has made the arrangements for all paying of bills.
She has as [sic] to write this in the process of paying the NWC Twenty Thousand Dollars (\$30,000) [sic] for overdue water rates.
The Victoria mutual Building Society Twelve thousand dollars (\$12,000) for overdue mortgages.
She has spent Thousands of Dollars to make the premises secure. eg., Grill works all around the house that I live in.
At present I am not well and is seeing the doctor because of Miss Fullwoods [sic] generous dealings toward me.
Please note that I am declaring all my earthly positions [sic] in her care and protection if I should be deceased of [sic] infirmed. So be it."

[80] Ms Shaw had made the suggestion to Miss Fullwood at trial that she had "cooked up" the document, which Miss Fullwood had denied. Despite counsel's exhaustive effort to discredit Miss Fullwood as to the authenticity of the document, which failed, Mrs Curchar did not bring any evidence to contradict or rebut it. Neither did she allege that the signature was not Mr Curchar's. She had already attested to being able to recognise his signature. The document was in evidence for the assessment of the learned trial judge but there is no mention of it in her recorded findings of fact.

[81] While the document cannot be taken as having any force to qualify as Mr Curchar's last will and testament, it did give an indication of his state of mind in relation to both Mrs Curchar's and Miss Fullwood's relationship with him and the

property. It was undisputed evidence that was before the learned trial judge for consideration and for her to accord such weight as she would have considered fit. However, the learned trial judge had not indicated how she had treated with this document, if at all, because she had not examined, in any detail, Mr Curchar's place in the scheme of things. Based on **Wills v Wills**, it was Mr Curchar's state of mind as registered co-owner and his action in relation to the property that would have been the relevant consideration and not Mrs Curchar's or indeed, Miss Fullwood's who had his permission to reside with him. All this was material evidence that should, at least, have been taken into account in determining whether Mrs Curchar was dispossessed by Mr Curchar.

[82] Miss Fullwood had also exhibited unchallenged documentary evidence of foreclosure notices and notices of court action in relation to arrears in the mortgage payments, property taxes and water rates for the property. The loans that she made to Mr Curchar were to assist him in making these payments. The learned trial judge, seemingly, accepted those documents as authentic but, surprisingly, viewed evidence of the loans as negating a spousal relationship between Miss Fullwood and Mr Curchar. Unfortunately, she did not view them for what they could have reasonably meant and what they did mean in the context of other evidence that both Mr Curchar and Miss Fullwood lived on the property and saw the need to save it and preserve it for their own enjoyment and benefit.

[83] Then there was a bit of evidence elicited in cross-examination of Miss Fullwood by Ms Shaw with respect to the loans to meet the mortgage payments, which would have provided an insight into Miss Fullwood's state of mind concerning the property. She stated then that although she assisted with the mortgage payments, she never considered herself to be the owner of the place. She said: "**I cannot be the owner. It is Mr. Curchar's place**" (emphasis added). The following exchange then took place between Ms Shaw and her:

- Q. When you paid the Mortgage allegedly, you paid it on his behalf?**
- A. For both of us. To save the place and to prevent it from being sold.**" (emphasis added)

[84] All the evidence seems to show that Mr Curchar's occupation of the property with Miss Fullwood was, from all indication, a single and exclusive possession exercised by them jointly for themselves and on their own behalf without any regard for the interest of Mrs Curchar. It serves to demonstrate the joint factual possession of the property by them and their intention to possess it, which was a pertinent consideration in the context of whether Mrs Curchar was dispossessed. So, the learned trial judge's concentration on whether the evidence of the loans manifested a spousal relationship between Mr Curchar and Miss Fullwood was unfortunate as it seems to result from a very narrow view taken of the evidence.

[85] There was enough evidence before the learned trial judge as to the state of mind and conduct of Mr Curchar towards the property that would have been demonstrative of not only factual possession, in the sense of physical custody and control for his own benefit (and not of Mrs Curchar) but an intention to possess for his own use and benefit and to share it with Miss Fullwood whatever her relationship with him might have been. That is all that is required for dispossession once the requisite limitation period is satisfied.

[86] It seems clear on whatever view is taken of the evidence that was presented before the learned trial judge, that it cannot be challenged that Mr Curchar had dispossessed Mrs Curchar in the ordinary sense of that word and for the purposes of the statute of limitations. The learned trial judge's finding to the contrary is against the weight of the evidence or is not supported by the evidence and, as such, is not sustainable.

[87] It means then that Mrs Curchar's claim would have been barred under section 3 of the Act, her title would have been extinguished under section 30 and as a result her interest would have passed to Mr Curchar, the other paper owner who was in control of the entirety of the property after she had left. Once that occurred, Mrs Curchar's title and concomitant interest in the property could not have been revived. As Lord O' Hagan stated in **Dawkins v Penrhyn (Lord)** at page 66, the statute of limitations "**operate as a complete transfer of title**

from one person to another, and as an absolute extinction of a right”.

(Emphasis added)

Miss Fullwood’s position

[88] It means that with Mrs Curchar’s title and rights to the property having been absolutely extinguished, she would have had no viable claim against anyone on the property, including Miss Fullwood, by the time she brought the claim in 2013. Based on this inevitable conclusion, the capacity in which Miss Fullwood was in possession of the property when proceedings were brought in 2013 would have been irrelevant because Mrs Curchar would not have been able to surmount the legal hurdle to prove that her claim was not barred by statute and her title extinguished in favour of Mr Curchar.

[89] Therefore, the learned trial judge, without advertent to the nature of Mr Curchar’s possession and the effect of his possession as co-tenant on Mrs Curchar’s title, would have erroneously concentrated on Miss Fullwood’s relationship with Mr Curchar. This is so because whatever the nature of her relationship with him, their joint possession was, in effect, a single and exclusive one over all the property to the exclusion of Mrs Curchar. Her possession was Mr Curchar’s possession because she was not a paper owner but a person who had derived the right to occupy the property from him. Her possession could not be attributed to Mrs Curchar’s and so Mr Curchar would have been in separate

possession as paper owner from 1985 to 2009; that would be for a period of 24 years. The statute of limitations would have operated to bar Mrs Curchar's claim.

[90] So, while the learned trial judge might not have been wrong to find that she was a licensee, that was, however, not determinative of the claim in favour of Mrs Curchar because she was not Mrs Curchar's licensee, expressly or impliedly. She would have been Mr Curchar's. Her possession was, therefore, to be attributed to Mr Curchar against whom she could not claim a possessory title. There would have been no need for the court to assess whether Miss Fullwood had separately and distinctly dispossessed Mrs Curchar, once it was established that Mr Curchar had done so. Dispossession by Mr Curchar was the crux of the matter and what would have been, and was, determinative of Mrs Curchar's claim against Miss Fullwood.

[91] In actuality, there was absolutely no relationship between Miss Fullwood and Mrs Curchar whose title she did not acknowledge. For all intents and purposes, therefore, Mrs Curchar was in the position of a stranger to Miss Fullwood in so far as the property is concerned. As such, she would have had no *locus standi* to revoke Miss Fullwood's licence while she resided with Mr Curchar over the 24 years she occupied the premises with him. That position would not have changed when Mrs Curchar filed the claim in 2013 for recovery of possession because by that time, her legal position to institute proceedings for recovery of possession would have been worse. This is so because, by 2009, at

the time of death of Mr Curchar, at least, her claim would have been barred and her title already extinguished by Mr Curchar's possession as joint tenant for much longer than the period of limitation.

[92] The law is that where the right of entry of a co-tenant has accrued more than 12 years before action was brought, that co-tenant not in possession is barred and his title extinguished whatever the nature of the other co-tenant's possession. This was what would have transpired in this case. Mrs Curchar's claim was barred by operation of law, her title was extinguished and once it was extinguished, it could not have been revived. Her title was, therefore, not subsisting when she filed the claim against Miss Fullwood in 2013.

[93] Miss Fullwood, as the defendant to that claim for recovery of possession, could have properly relied on the fact of extinction of Mrs Curchar's title, be it through discontinuance of possession by Mrs Curchar or dispossession by Mr Curchar, to defeat the claim. This was so regardless of her status on the property in 2013, because the statute of limitations goes to the root of Mrs Curchar's claim and not to Miss Fullwood's defence. Miss Fullwood was, in fact, saying in defence to Mrs Curchar: "you are a stranger to the land that is in my possession and you have no *locus standi* to claim to recover possession from me as a matter of law". That was within her legal right to assert because Mrs Curchar, having no subsisting title to the property, would, in effect, be a stranger

coming to take her off the property. Mrs Curchar would have had no better right to possession than she would have had.

[94] Miss Fullwood was quite entitled, given sections 3 and 30 of the Limitation of Actions Act, to use it as a 'shield' as she did in the defence of the claim because it was available for her protection regardless of the fact that it was not yet decided that she had any beneficial interest in the property as the spouse, personal representative and/or beneficiary of Mr Curchar.

[95] It is clear on the totality of the evidence that Mrs Curchar would have failed to prove, on a balance of probabilities, that her title had not been extinguished by the time she filed her claim in 2013. Indeed, even if the burden of proof was on Miss Fullwood to prove that Mrs Curchar had discontinued possession or had been dispossessed, the claim should have failed. Simply put, Mrs Curchar had not cleared that legal obstacle presented by the statute of limitations in barring her claim that was coming more than 12 years after her right to re-enter had accrued. As such, her claim for recovery of possession should have failed as a matter of fact and law.

[96] The learned trial judge would, therefore, have erred when she found that Mrs Curchar had established that she was not dispossessed or had abandoned possession and so was entitled to recover possession of the property from Miss Fullwood.

[97] It is considered fitting to indicate that while their Lordships in **Wills v Wills** have pointed out that the decision in that case had ultimately turned on the unusual facts of that case, I cannot help but to note that the facts of this case do closely resemble those of **Wills v Wills** that it would be difficult to avoid the *ratio decidendi* of **Will v Wills** in treating with the facts of this case.

[98] In **Wills v Wills**, the issue was whether one co-owner (the husband, Mr Wills), who had eventually died, had acquired title to real property, by virtue of possession, from the other co-owner (his first wife, Elma) who had left Jamaica to reside overseas. The properties in question were acquired by the parties during the course of their marriage. One was used as the matrimonial home. Mr Wills and Elma were, however, permanently separated from the early years of the 1970s and they divorced in 1985. Mr Wills continued to live in the former matrimonial home. He formed a new union with Myra who joined him in living in the former matrimonial home in 1976. She later became his wife. Mr Wills earned income from both properties that he managed with Myra. He retained all the earnings from the rented property for himself or for himself and Myra. Elma had nothing to do with either property after their separation, except for a single visit to the former matrimonial home in 1976. On her account, she spent nine months there on that visit. Apart from her wedding ring that she had left in the matrimonial home, she had no other possession on the property.

[99] Their Lordships in the Privy Council found, as important facts, that (i) Elma had not “set foot” in the former matrimonial home after 1976; (ii) she was never invited to the properties by Mr Wills when she visited Jamaica; (iii) she had no possession on the properties except for her wedding ring that she had left behind; (iv) Mr Wills and Myra never accounted to her for any of the rental income received; and (v) Mr Wills and Myra occupied and treated the properties, from all appearances, as if they were co-owners as man and wife. Their Lordships then concluded at paragraph 29:

“29. ...After 1976 at the latest, [Mr Wills] 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 Myra.”

[100] The critical aspect of their Lordships opinion, therefore, is that by virtue of Mr Wills’ exclusive possession of the properties, Elma’s interest had been extinguished after 12 years and Mr Wills had become the sole owner of the properties in question. This was so despite the fact that he had shared the former matrimonial home with Myra.

[101] It is enough to note that despite Ms Shaw’s valiant attempt at pointing out what she perceived to be fundamental areas of distinction on the facts of **Wills v Wills**, in advancing her arguments that the case is unhelpful to Miss Fullwood, it is hard to accept that contention. The circumstances of this case do fit neatly within the four corners of **Wills v Wills** with respect to the finding that Mrs

Curchar's interest had been extinguished in favour of Mr Curchar through whom Miss Fullwood is claiming her right to possession. I find particularly interesting the observation of Lord Walker at paragraph 32, where he stated in giving the opinion of the Board:

"32. Their Lordships do not therefore see the outcome of this appeal as likely to cause trouble for the large number of Jamaican citizens who work overseas and contribute to their families' welfare and the Island's economy. Most of them will come home on a fairly regular basis, will retain the bulk of their possessions at home, and will not (on coming home) be treated as guests in their own houses. But if (as must sometimes happen) a Jamaican working overseas forms new attachments and starts a new life, and entirely abandons the former matrimonial home, he or she will (within the ample period of 12 years) have to consider the legal consequences of that choice."

[102] Mrs Curchar is one of those paper owners for whom **Wills v Wills** does pose a serious problem or for whom it has caused trouble. She is one who went overseas as far back as 1985; formed new attachments to include remarrying; started a new life with another spouse; never returned to the property, not even as a guest; retained none of her possessions there; undertook no obligations for payment of the mortgage installments and property taxes; made no contribution to the preservation of the property; and from all indications had entirely abandoned the property for more than 24 years before seeking to recover possession. Regrettably, she is one of those who will have to deal with the unfortunate legal consequences of her choice. Time has run against her.

Conclusion

[103] After all the facts of the case are considered within the ambit of the applicable legal principles, I conclude that there is merit in the ground of appeal that the judgment of the learned trial judge that Mrs Curchar was entitled to recovery of possession of the property cannot be supported by the evidence and is thus unsustainable. The learned trial judge was, therefore, wrong to order that Miss Fullwood should give up possession of the property to Mrs Curchar and that the caveat lodged by her against the certificate of title be removed by the Registrar of Titles.

[104] There is a proper basis, as a matter of law, for this court to disturb the findings of the learned trial judge having paid due regard to the principles deduced from **Watt v Thomas**. Accordingly, I would allow the appeal and set aside the orders made by Lindo J (Ag) in favour of Mrs Curchar with costs to Miss Fullwood, who would, therefore, be entitled to remain in possession of the property unless she consents to give up possession or until further orders by a court of competent jurisdiction. Miss Fullwood's right to remain in possession emanates from the fact that Mrs Curchar had no legal right to recover possession from her by virtue of the operation of the Limitation of Actions Act that would have barred the claim. Miss Fullwood would also be at liberty to make any application as she deems necessary to establish her claim that she was the common law spouse of Mr Curchar and that she is entitled to a beneficial share in the property. Finally, any application to remove Mrs Curchar's name from the

Register Book of Titles, pursuant to section 158 of the Registration of Titles Act, ought properly to be pursued in the Supreme Court.

PANTON P

ORDER

1. The appeal is allowed.
2. The orders of Lindo J (Ag) made on 2 October 2014 are set aside.
3. Costs of the appeal and in the court below to Miss Fullwood to be agreed or taxed.