

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 74/2012

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MR JUSTICE F WILLIAMS JA (AG)**

BETWEEN	TYRONE OWEN A DeMERCADO	APPELLANT
AND	FAYE MARIE DeMERCADO	RESPONDENT

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the appellant

Rudolph Smellie instructed by Watson & Watson for the respondent

12, 14 October 2015 and 13 May 2016

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA (Ag) and agree with his reasoning and conclusion. There is nothing that I could usefully add.

P WILLIAMS JA (AG)

[2] I too have read in draft the judgment of my brother F Williams JA (Ag) and agree with his reasoning and his conclusion. I have nothing to add.

F WILLIAMS JA (AG)

[3] In this matter, the appellant challenges the Supreme Court judgment in his claim against his former wife for division of two properties acquired in their joint names during the currency of the marriage. By that judgment, the following orders were made:

"This Court will declare as follows:

- A. The Claimant, Tyrone Owen Alloysius DeMercado holds his registered one-half share and interest in the dwelling house and premises of 5 Sunset Avenue, Kingston 8 in the parish of Saint Andrew registered at Volume 1958 Folio 223 of the Register Book of Titles in Trust for Respondent Faye Marie DeMercado.
- B. The Respondent Faye Marie DeMercado holds her registered one-half share and interest in the premises at 85 Dorado Drive, Kingston 17 in the parish of Saint Andrew in trust for the Claimant Tyrone Owen Alloysius DeMercado.

And Orders:

1. The Registrar of the Supreme Court be and is empowered to execute a transfer of the one-half share and interest of the aforesaid dwelling house at 5 Sunset Avenue, Kingston 8 in the parish of Saint Andrew now registered in favour of the Claimant, Tyrone Owen Alloysius DeMercado to the Respondent, Faye Marie DeMercado absolutely.
2. The Registrar of the Supreme Court be and is empowered to execute a transfer of the one-half share and interest of the Respondent Faye Marie DeMercado in the premises at 85 Dorado Drive, Kingston 17 in the parish of Saint Andrew to Tyrone Owen Alloysius DeMercado absolutely.
3. Costs to be the Claimant's to be taxed if not agreed."

The initial claim

[4] The claim began with the filing on 6 September 2010 of a fixed-date claim form by the appellant, Mr DeMercado. In that claim, he sought the following orders:

- "1. A Declaration that the Claimant and Defendant are each entitled to a half share in the property *situate* at 85 Dorado Drive, Kingston 17, in the parish of St Andrew and registered at Volume 964 Folio 102 of the Register Book of Titles.
2. A Declaration that the Claimant and Defendant are each entitled to a half share in the property *situate* at 5 Sunset Avenue, Cherry Gardens, Kingston 8, in the parish of St. Andrew and registered at Volume 1058 Folio 223 of the Register Book of Titles.
3. The parties to agree a valuation for the said properties at paragraph 1 and 2 above failing which this Honourable Court appoint C.D. Alexander Company Realty Limited, as Valuator for the premises.
4. An order that the said property *situate* at 85 Dorado Drive, Kingston 17, in the parish of St. Andrew and registered at Volume 964 Folio 102 of the Register Book of Titles be sold.
5. An order that the Claimant have first right of refusal to purchase the Defendant's half share in the said premises mentioned at paragraph 4 above.
6. An order that the said property situate at 5 Sunset Avenue, Cherry Gardens, Kingston 8, in the parish of St. Andrew and registered at Volume 1058 Folio 223 of the Register Book of Titles be sold.
7. An order that if the Defendant refuses to sign the Registrar be empowered to sign the relevant transfer documents on the Defendant's behalf.
8. An order that the Claimant's Attorneys-at-Law have Carriage of Sale."

The notice and grounds of appeal

[5] By notice and grounds of appeal filed 29 May 2012, the appellant challenges the orders made at first instance and asks that this court will make the following order:

"a. That the order made by Mr. Justice Donald McIntosh made on the 11th May 2012 be set aside and there be judgment for the appellant in terms outlined in the Appellant's Fixed date Claim Form."

The grounds of appeal:

[6] The following are the grounds of the appeal:

- "a. The learned Judge erred in law in holding that the detailed enquires made by him as to the number of children, their dates of births and mother's name were relevant although the information did not assist the Court in resolving any of the issues before the Court and thus was obviously more prejudicial than probative.
- b. The learned [judge] erred in law in holding that there was a trial when in fact there was [no] trial as the Appellant did not presented [sic] his case to the Court, in the usual manner by going through the affidavits and cross examine [sic] the Respondent and the Respondent's witness.
- c. The learned judge erred in law in holding that the Appellant agreed that there was no issue which required cross examination but the Appellant's clear recollection was that he did not have any issues with the aspects of the Respondent's affidavit raised by the learned judge.
- d. The learned Judge erred in law in holding that there was never any indication in any one of the affidavits of [sic] Respondent's that there were issues of facts although it was abundantly clear that the Respondent had contradicted several things said by the Appellant and mentioned additional things.

- e. The learned Judge erred in holding that there is no answer by the Appellant to the evidence of the Respondent that from the time of the separation of the parties in 1982, the Claimant was locked out of the house in Cherry Gardens and forbidden to enter notwithstanding the right of the Appellant to test the veracity of this evidence in cross examination as well as to answer questions in cross examination on the matter.
- f. The learned Judge erred in law in holding that the Appellant, Tyrone Owen Alloysius DeMercado holds his registered one-half share and interest in the dwelling house and premises of 5 Sunset Avenue, Kingston 8 in the parish of Saint Andrew registered at Volume 1958 Folio 223 of the Register Book of Titles in trust for [sic] Respondent Faye Marie DeMercado although there is no basis in law based on the evidence for this finding and notwithstanding overwhelming evidence that the parties have always been in discussions and that the Appellant has never relinquished his share in the aforesaid premises.
- g. The learned Judge erred in law in holding that the Respondent Faye Marie DeMercado holds her registered one-half share and interest in the premises at 85 Dorado Drive, Kingston 17 in the parish of Saint Andrew in trust for the Claimant Tyrone Owen Alloysius DeMercado although there is no basis in law based on the evidence to allow the judge to come to this conclusion."

Background

[7] The parties were married on 21 June 1959, when the appellant was 20 years of age and the respondent was 19 years of age. They separated in 1982 and obtained the decree absolute for the dissolution of their marriage in 1991, in which year the appellant also re-married.

[8] During the marriage they acquired two properties, the division of which is the bone of contention in this matter.

[9] The first of the two properties was bought in 1960 with the parties' names endorsed on the certificate of title. It is registered at volume 964, folio 102 of the Register Book of Titles and is known as 85 Dorado Drive, Kingston 17, Harbour View, St Andrew (the Harbour View house). That property is now used for commercial purposes. The other, bought in 1973, is registered at volume 1058, folio 223 of the Register Book of Titles and has the civic address 5 Sunset Avenue, Cherry Gardens, Kingston 8 in the parish of St Andrew (the Cherry Gardens house). The names of both parties are also endorsed on the certificate of title for this property.

[10] The Cherry Gardens house was used as the matrimonial home from the time of its purchase until the marriage broke down and the parties separated. This property is now occupied by the respondent and one of the adult children of the parties.

[11] During court proceedings the respondent fell ill and was taken to the hospital. She was unable to return to court for cross-examination on her affidavit evidence. The court directed that written submissions be filed in the matter. In accordance with that direction, written submissions were filed by counsel for both parties. On that footing the judge proceeded to make the declarations and orders set out in paragraph [3] hereof.

The evidence in the court below

[12] In the court below there were three affidavits: (i) the affidavit of the appellant, Tyrone DeMercado sworn to on 3 September 2010; (ii) the affidavit of the respondent, Fay DeMercado sworn to on 28 December 2010; and (iii) the affidavit of Mark DeMarcado (a son of the parties), sworn to on 28 December 2010.

The appellant's evidence

[13] In his affidavit, the appellant speaks to the acquisition of the two properties, stating that, although he made all the mortgage payments for both properties, the common intention was for joint ownership, as the parties were married at the time – hence the said properties being registered in the names of them both.

[14] At paragraph 9 of his said affidavit, he depones that he is not disputing the respondent's half interest in the said two properties. However, his difficulty is that the respondent has refused to give him his half interest, despite the parties having had several conversations about the said properties (see paragraph 7 of the said affidavit). She has refused the proposals he had made as follows: (i) for him to buy her half share in the Harbour View house; and (ii) for her to buy his half interest in the Cherry Gardens house or for that property to be sold and the proceeds of sale divided between them equally.

[15] He does not wish, he further deponed, for his interest in each property to go to her on his death, given that she is registered as a joint tenant and so able to benefit from the right of survivorship.

The respondent's evidence

[16] In her affidavit, the respondent confirms the joint acquisition and ownership of the two properties, although the details that she gives vary from the account given by the appellant. Those variations, however, are not important for present purposes.

[17] The substance of her position in relation to the two properties is set out in paragraphs 18, 19 and 20 of her affidavit, set out hereunder, so far as is material:

- "18. After he left the home, the Claimant was locked out of the house and forbidden to enter and we drifted along thereafter for several years until I filed for divorce and we were divorced in 1990....
19. ...It was the clearly understood intention of both of us that he would get the increase from the business and the business premises and I would get the increase from the family home at Sunset Avenue and he would get the increase from the Dorado Drive property.
20. Further and apart from my equity it has been understood that the nature and character of my occupation of the family home has been adverse to any title registered in favour of the Claimant for a period in excess of Twenty-eight years as he has been excluded from any participation in the house without my permission. During the period, I have solely exercised all duties and rights of ownership."

[18] In paragraph 23 of her said affidavit, she claims a right to the absolute fee simple in the appellant's one half interest (there is no mention in the affidavit of which of the two properties that claim relates, although it might safely be assumed that it relates to the Cherry Gardens house). She also claims a life interest in the appellant's

half share, in the alternative. More significantly, at paragraph 23 (iii), she states as follows:

"(iii) Alternatively and in any event if the Honourable Court does not find that an agreement or equity result [sic] in my favour then the registered interest of the Claimant would certainly have expired by virtue of the character of my occupation of the subject premises to the exclusion of the Claimant for the past 28 years and upwards on the facts deponed by me."

[19] At paragraph 24 of her said affidavit, she characterizes the contents of the previously-mentioned paragraphs (and others) of her affidavit as "my counterclaim"; and she seeks declarations and consequential orders in respect of the two properties in accordance with the claims made in paragraph 23 of her affidavit.

[20] The essence of the declarations sought by the respondent was to the effect that the appellant holds his one-half interest in the Cherry Gardens house on trust for her and that she holds her one half interest in the Harbour View house on trust for the appellant. The orders prayed for sought to empower the Registrar of the Supreme Court to execute transfers of the said half interest in each of the said properties.

[21] Of at least equal significance is her alternative prayer at paragraph 24 D of her said affidavit, in which she prays:

"D. Further and alternatively, the Defendant counterclaims pursuant to Sections 85 to 89 of the Registration of Titles Act for a declaration that the registered one-half share of Tyrone Owen Alloysius DeMercado has been extinguished by virtue of the

adverse possession of the subject premises by Fay Marie DeMercado for a period in excess of 12 years."

Affidavit of Mark DeMercado

[22] The affidavit of Mark DeMercado (the son who resides with the respondent), was given in support of the respondent's position.

[23] The most-relevant parts of his affidavit are to be found in paragraphs 13, 14, 15 and 20. These paragraphs read as follows:

"13. The status quo was therefore that:-

- (i) My mother has solely controlled Sunset Avenue residence for the past 28 years paying all associated bills and taxes and we have always assumed that she would live there for the rest of her life having lived there for forty years;
- (ii) My father has controlled the Harbour View property and business retaining all profits and paying all bills.
- (iii) ...
- (iv) My father did not assist in maintaining the house, my mother or us after he left the family home in 1982 although my younger brother was in school.

14. My mother fell ill in 2003 and my father agreed to sign a mortgage of the Sunset House for a loan of \$683,000.00 which I repaid. The loan on the family house was taken out to assist in defraying the cost of triple by-pass surgery urgently required to save my mother's life. At the time she was referred to a hospital overseas as the specific procedure was not offered locally.

15. My father without my mother's acknowledgement had also mortgaged the Harbour View property in 1987. This mortgage was discharged this year.

....

20. My father has been unable to set foot in the house for over 28 years without my mother's permission so my mother has at the least acquired adverse possessory rights of his one-half of the title."

The issues in the case

[24] The issues that arise for determination in this case are as follows:

- (i) whether the appellant was denied his right to cross-examine and, if so, whether the denial of that right resulted in an unfair trial.
- (ii) whether there was a finding of adverse possession by the court below;
- (iii) if so, whether there was enough evidence establishing adverse possession in favour of the respondent; and
- (iv) whether there was sufficient evidence before the learned judge for him to have properly declared that the parties held their respective shares in trust for the other in respect of each of the two properties.

Issue (i) whether the appellant was denied his right to cross-examine and, if so, whether the denial of that right resulted in an unfair trial.

Submissions for the appellant

[25] On behalf of the appellant it was contended that the appellant was deprived of the opportunity of testing the evidence of the respondent, as the learned judge deprived him of the right of cross-examining the respondent and her witness.

[26] The contention further was that the proceedings took the form of informal enquiries being made of the parties by the learned judge without the parties being sworn, and so responses to those enquiries ought not to be given any weight.

[27] It was further submitted that the way in which the proceedings were conducted amounted to a breach of the appellant's rights under the Charter of Fundamental Rights and Freedoms and that is implicit in the use of the phrase "fair hearing" in section 16(2) of the Charter.

[28] In seeking to develop the point relating to the right of cross-examination, the appellant's counsel made reference to rule 39.3 of the Civil Procedure Rules (the CPR), which states that "[t]he court may limit examination, cross-examination or re-examination of any witness". It is to be noted (contended the appellant's counsel) that the rule does not provide for the court to do away with cross-examination altogether, as it is an essential ingredient in a fair trial.

[29] Reference was also made by counsel for the appellant to a number of cases, including: (i) **Hobbs v Tingling (C.T.) and Company Limited** [1929] 2 KB 1, which

highlighted the important role of cross-examination in a trial; (ii) **Lascelles Chin v Audrey Ramona Chin (Jamaica)** [2001] UKPC 7, in which the Privy Council, in also highlighting the importance of the role of cross-examination, decried the inability of the learned trial judge in that case to have decided the critical issue of whether Mrs Chin was a joint owner of a company. That inability was due to the fact that there had been no cross-examination of the deponents; and (iii) **Pameleta Marie Lambie v Estate Leroy Evon Lambie (Deceased)** [2014] JMCA Civ 45. In respect of the **Lambie** case, counsel for the appellant sought to rely primarily on the court's observation at paragraph [39] that: "Litigants and trial judges, alike, should always give serious consideration to the utility of cross-examination in cases of such nature where there is marked and substantial divergence on the facts".

The respondent's submissions

[30] On behalf of the respondent, reference was made to the record of proceedings in which the learned judge is said to have stated the following:

"At the start of the hearing Mark DeMarcado was sent outside as an order had been made for the parties to attend for cross examination. Upon enquiry the Court was informed that there were no issues arising from the Affidavit Evidence which required cross examination."

[31] That part of the record was given emphasis, although it was also pointed out that elsewhere in the record, counsel for the appellant had indicated that he wanted to cross-examine the respondent; but that, as the respondent was unable to return to court on account of illness, written submissions were submitted and the matter concluded.

[32] It was also submitted that it was not a case of deprivation of a right to cross-examine; but, instead, a matter of (i) such a right not arising, as there was no dispute as to facts, and/or of (ii) such a right being waived, as it was accepted that there was no such dispute by both counsel.

[33] It was also submitted that this issue would be best resolved along with the substantive issue of whether there was sufficient evidence for the finding of adverse possession in this case.

[34] **Odger's Principles of Pleading and Practice**, 20th edition, pages 134-135, was also prayed in aid by counsel for the respondent with a view to showing that the appellant had not, as required by rules of pleading, traversed the contention of the existence of adverse possession, entitling the court below to have made the finding of adverse possession that it did.

Discussion

[35] There might well be some substance in the submission on behalf of the respondent that the issue of cross-examination might be better ventilated along with the issue of proof of adverse possession. The importance of cross-examination will, therefore, be explored, where necessary, when that issue (that is, adverse possession) is being addressed. Nevertheless, it would still be useful to give the matter of cross-examination some consideration in relation to this issue.

[36] One important consideration, in my view, comes from the fact that on 10 October 2011, Gayle J made an order for cross-examination of the parties. At the time of the making of this order, there would have been on the file all the affidavits in the matter, as the appellant's affidavit in support of his claim was filed on 6 September 2010; with the respondent's affidavit and that of Mark DeMercado both filed on 29 December 2010. With all the affidavits in the matter before Gayle J at the time that he made the said order, it is likely that the contents of the affidavits would have informed his decision to make the order for cross-examination when the matter was adjourned to 24 April 2012 – the date on which it was dealt with and the orders complained of made. In making the order that he did, Gayle J had the option, as would any judge, of ordering the filing of further affidavits to clarify and crystallize the issues in the case; however, instead, he made the order for cross-examination.

[37] Another important consideration in relation to this issue is to be found in paragraphs [5] and [10] of the court's judgment delivered on 11 May 2012. (Paragraph [5] has already been set out at paragraph [30] of this judgment; but will be repeated here for ease of reference.) They read as follows:

"[5] At the start of the hearing, Mark DeMercado was sent outside as an order had been made for parties to attend for cross examination. Upon enquiry the Court was informed that there were no issues arising from the Affidavit Evidence which required cross examination.

...

[10] The Court suggested that the attorneys should put their submissions in writing as there were no issues of fact to be determined. It was at that stage that Claimant's

attorney indicated that his client had wanted him to cross examine the Respondent. There was never any indication in any one of the affidavits of [sic] Respondent's that there were issues of facts."

[38] Counsel for the appellant has sought to challenge this version or sequence of events. He maintains that at all material times it was the intention of the appellant to cross-examine the respondent and the other deponent on her behalf.

[39] To look at the affidavit of Mark DeMercado first, there are at least three matters of interest to a discussion of this issue in paragraphs 14, 15 and 16 of his said affidavit.

[40] To take paragraph 15 first, that paragraph indicates that the appellant had somehow, in 1987, managed to mortgage the Harbour View house jointly owned by the parties, without the respondent's input or acknowledgement. As the parties are registered as joint owners on the certificate of title, such an averment amounts to an allegation of fraud on the part of the appellant. It is a bald allegation, unsupported by evidence or particulars and one that would provide fertile ground for cross-examination and an opportunity to test the credibility of the deponent.

[41] In relation to paragraph 16, his contention in relation to his mother and the Cherry Gardens house is that:

"...She wants the one-half interest of my father in this property transferred into her name (or preferably into the names of her children Mark and Troy in equal shares)."

[42] Could this be construed as an acknowledgement that the appellant does in fact have a one-half share in the said property and that his interest therein has not been

extinguished as a result of adverse possession? To my mind this is another aspect of the affidavit evidence that could have benefitted from clarification (at the very least) through cross-examination.

[43] In respect of paragraph 14 of the affidavit where it is contended that the appellant had agreed to sign and did sign with the respondent documents for the obtaining of a mortgage loan for surgery that the respondent urgently needed, exploration through cross-examination of the circumstances of the signing by the appellant might also have assisted the court. This is so especially in light of the appellant's contention of ongoing attempts to have discussion with the respondent concerning the division of the properties.

[44] Whilst making these observations, there can be no denying the unfortunate failure on the part of the appellant to reply to many of these very pointed and specific contentions by the respondent and the parties' son.

[45] In asking the court to regard the instances of the appellant's failure to address these contentions as amounting to admissions by the appellant, counsel for the respondent referred to that part of **Odgers'** at page 134, where it is stated:

"The pleader must either admit or deny every material allegation of fact in the pleading of his opponent: and he must make it absolutely clear which facts he admits and which he denies. To ensure this, rule 12 provides that any allegation of fact is deemed to be admitted unless traversed..."

[46] It was argued by counsel for the respondent that the respondent's contention (of her locking the appellant out of the Cherry Gardens house as a ground for her claim of adverse possession), not having been answered by the appellant, it should be viewed as having been admitted.

[47] Although it is regrettable that the appellant did not answer some of these contentions and averments of the respondent, I entertain some uncertainty that there can be any hard-and-fast application of the rule as to traversing pleadings mentioned in **Odgers'** to the circumstances of this case. One reason for this and as to why I think that the reference to **Odgers'** can be used as no more than a loose analogy is to be found in the difference between "pleadings" (treated with in **Odgers'**) and the form of proceedings utilized in the instant case.

[48] In **Halsbury's Laws of England**, 4th edition, volume 36, paragraph 1, the nature and purpose of pleadings are defined as follows:

"1. Meaning of 'pleading'. The term 'pleading' is used in civil cases to denote a document¹ in which a party to proceedings in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing². In legislation concerning the procedure of the Supreme Court, 'pleading' includes any petition or summons³ and also the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to it⁴, and of the reply of the plaintiff to any counterclaim of a defendant.

...

5. ...'Pleading' also describes the act of drafting or settling any of these documents⁸."

[49] In practice, failure to file a pleading either in a timely manner or at all, might result in adverse consequences to the party in default.

[50] Oftentimes where pleadings have been filed and closed, the parties seek to establish their respective cases through the giving of evidence.

[51] **In Halsbury's Laws of England**, 4th edition, volume 17(1), at paragraph 402, it is stated that "evidence" is:

"**402. Proof of facts.** Evidence is the usual means of proving or disproving a fact or matter in issue. "

[52] In rule 30 of the CPR, the use of affidavits is discussed. Rule 30.1(1) states that:

"(1) The court may require or permit evidence to be given by affidavit instead of, or in addition to, oral evidence." (Emphasis added).

[53] So that, the conclusion to be drawn from this discussion is that, strictly speaking, the cited passages in **Odgers'** refer to pleadings and not to affidavit evidence. An affidavit does not become a pleading simply by the deponent's reference to a part of it as a "counterclaim", as the respondent did in this case.

[54] Where the issue of cross-examination is concerned, I am minded to accept the guidance of the Eastern Caribbean Court of Appeal in the case of **George Blaize v Bernard LaMothe and the Attorney-General of Grenada** HCVAP 2012/004, judgment delivered on 9 October 2012. In the judgment of the court, delivered by Baptiste JA, it was stated at paragraph [15] that:

"[15] Cross-examination is undoubtedly a potent weapon in the arsenal of a lawyer and is a fundamental aspect of the judicial process. In an adversarial system such as ours, it provides a means whereby the case of the other party can be effectively challenged and undermined. It is also important to the judicial process that a party has the right to explain and comment on all the "evidence adduced or observations submitted, with a view to influencing the court's decision."

[55] In relation to the contention that information obtained by way of the learned judge's informal questioning of the parties was used in arriving at the court's decision, there is clear proof for this contention in paragraph [14] of the decision, where it is stated:

"14. Claimant's attorney opines that the enquiries at the start of the proceedings were irrelevant. On the contrary the information confirms the basis for the uncontested evidence relative to Claimant's exclusion."

[56] I agree with the submission made by counsel for the appellant that the use of any such information, it not being either affidavit evidence or sworn *viva voce* evidence, would have been improper and, by itself, brings into question the correctness of the court's ultimate decision.

[57] In light of all these considerations, I am of the view that there is merit in the submissions of counsel for the appellant that cross-examination would undoubtedly have been of assistance in this case in distilling the issues for the court's consideration, have helped to ascertain where the truth lay, clarified averments of doubtful meaning, all of which would have helped to guarantee that the proceedings in the court below

were fair both in substance and appearance. In my view, therefore, the appellant ought to succeed on this issue of the appeal (encompassing grounds a, b, c, d and e).

Issues (ii) and (iii)

(ii): whether there was a finding of adverse possession by the court below; and (iii) if so, whether there was enough evidence establishing adverse possession in favour of the respondent.

Issue (ii)

Submissions for the appellant

[58] Counsel for the appellant questioned whether there was in fact a finding by the court below that the respondent had obtained title to the Cherry Gardens house by way of adverse possession. It was the appellant's submission that the matter of adverse possession was, at best, hinted at in the judgment. The further submission was to the effect that the practical result of the declaration granted, however, was to declare both parties' interests in the properties and then to assign the shares in a manner not prayed for by either of the parties.

[59] It was submitted on behalf of the appellant that that finding is incongruous with the declaration made, which is in keeping with the finding of the existence of a trust.

Submissions for the respondent

[60] On behalf of the respondent, it was submitted that the court below did more than just "hint" at a finding of adverse possession. Rather, the court below clearly so held on the basis of the law and evidence before it, it was submitted. It was further submitted that the making of the declaration in terms of each party holding his/her

share in trust for the other was merely a convenient way of ruling on the true entitlements of the parties. It was admitted, however, that it perhaps would have been better for the court below simply to have declared that the respondent was solely and exclusively entitled to the Cherry Gardens house.

Discussion

[61] I will at once say that I am of the view that the court below did in fact make a finding of adverse possession, the court observing at paragraphs [12] and [13] that:

"[12] There is no answer by the Claimant to the evidence of the Respondent that from the time of the separation of the parties in 1982, Claimant was locked out of the house in Cherry Gardens and forbidden to enter. Nor is there an answer to Respondent's evidence that during their marriage Claimant purchased other properties in his own name [solely].

[13] There is insurmountable evidence of adverse possession for a period of about 30 years..."

[62] I have decided to treat with these two issues together for two reasons: First, although arguments were directed to the court on the question of whether a finding of adverse possession was made by the court below; a perusal of the grounds shows that that question is not included among the grounds of appeal. Second, since the substantive issue of adverse possession features so prominently in this appeal, it is best to give some detailed consideration to it, rather than focus on what would in any event have been a subsidiary issue.

[63] It is best, therefore, to now focus attention on the sufficiency or otherwise of the evidence of adverse possession.

Issue (iii): whether there was enough evidence establishing adverse possession in favour of the respondent

Appellant's submissions

[64] For the appellant it was submitted that the respondent's evidence spoke to her locking the appellant out of the "house", whereas she would have to have shown that she had locked him out of the entire premises.

[65] Counsel for the appellant cited in support of this submission the case of **Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd** [1975] 1 QB 94, per Lord Denning MR at page 103 C to D:

"...The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner..."

[66] Also cited were: (i) **Wills v Wills** (2003) 64 WIR 176, in support of the proposition that in an adverse-possession claim it was the state of mind of the person seeking to establish adverse possession (rather than that of the person opposing it) that was decisive; (ii) **JA Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; and (iii) **Fullwood v Curchar** [2015] JMCA Civ 37.

[67] Counsel for the appellant sought to rely and placed great emphasis on the **JA Pye** case with a view to establishing the principles that were said to have been enunciated in that case. The more important of these principles are reflected in the following quotations:

"...There is no effectual possession without the two elements: physical control of the land and the intention to possess." (Per Lord Browne-Wilkinson, at page 425).

[68] Also at paragraph 425 of the judgment, Lord Browne-Wilkinson is quoted as stating:

"...The intention to exclude is negative where the squatter has offered to pay rent, or has obeyed an instruction from the owner not to do some act on the land, or has asked the owner to take some action with regard to the property in exercise of his rights as owner." (Emphasis added).

[69] Against the background of these quotations, it was submitted that the evidence of adverse possession is sparse. Additionally, that there was insufficient evidence that would allow any judicial officer to make an informed decision in keeping with the law on physical control and intention to possess. Further, the appellant's uncontroverted evidence as to his discussions with the respondent ought to have been accorded more weight.

[70] This court is entitled (it was further submitted) to set aside the judgment of the court below and to correct factual findings.

Respondent's submissions

[71] On behalf of the respondent it was submitted that a key finding of fact and law by the court below was the finding that there was no answer by the appellant to the respondent's averment that he was locked out the house from 1982 and forbidden to enter. The appellant therefore failed to discharge the onus that shifted to him to show

not only that he had in fact made an entry to the premises; but also that that was done to re-assert his possession.

[72] The respondent also cited the case of **Wills v Wills**, as well as the case of **JA Pye**, on which the former decision (**Wills v Wills**) was based. It was contended that these cases illustrated the need for the person seeking to establish adverse possession to demonstrate: (i) a sufficient degree of physical custody and control (that is, factual possession); and (ii) an intention to exercise such custody and control for oneself and for one's own benefit (that is, the intention to possess).

[73] The case of **Wills v Wills** also clearly established two further points, namely that: (i) (in agreement with the appellant), what was relevant in considering the question of state of mind was the state of mind of the party remaining in possession and not that of the excluded party; and (ii) the possession of co-owners was to be seen as separate, meaning that the possession of one could run adversely against that of the other. In order to demonstrate this, dicta of Lord Walker of Gestinghope were quoted (such as those at paragraphs 28 to 29), referring to the "...total exclusion from the properties..." of the party challenging the claim to adverse possession (in that case, Elma, the estranged wife).

Discussion

[74] Section 85 of the Registration of Titles Act provides for the registration of title to land which has been acquired by possession while section 3 of the Limitations of Actions Act bars claims for entry, and recovery of any land or rent, after 12 years have

expired since the right to bring such an action first accrued. On the basis of those two pieces of legislation, a party may successfully acquire such interest in property where the requisite criteria have been fulfilled.

[75] On the face of the respondent's case and without the benefit of cross-examination and more helpful affidavit evidence, in particular from the appellant, it might appear, at first blush, that there is clear evidence of adverse possession, as was found in the court below.

[76] However, to my mind, there are several important factors to be considered that arise from the affidavit evidence, especially in the light of the guidance from **JA Pye (Oxford) Ltd and Others v Graham and Another** which details the necessary elements of adverse possession. Lord Browne-Wilkinson, at paragraph 40 stated that:

"To be pedantic the problem could be avoided by saying there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess'). What is crucial is to understand that, without the requisite intention, in law there can be no possession."

[77] Of greatest importance in this regard is the evidence contained in the affidavit of Mark DeMercado to the effect that the appellant had in 2003 signed a mortgage-loan document in relation to the Cherry Gardens house so that funds could have been borrowed to facilitate surgery that the respondent needed. To my mind (and although counsel for the respondent attempted to persuade the court to regard it as an act of ownership and not of possession), this act would fall within the statement of Lord

Browne-Wilkinson in **Pye** at page 425 that the respondent asked: "...the owner to take some action with regard to the property in exercise of his rights as owner", this brings into question the existence of the mental aspect of possession.

[78] It appears that this issue, which arises out of grounds e, f and g of the appellant's grounds of appeal, would have greatly benefited from clarification (through cross-examination) of the evidence on behalf of both parties, which in turn would have significantly aided the learned judge in discharging his duty as finder of fact. In that regard, I accept the submission of counsel for the appellant that there was insufficient evidence before the court for the learned judge to have properly found that the necessary elements of adverse possession had been established.

Issue (iv): whether there was sufficient evidence before the learned judge for him to have properly found that each party held his and her share in trust for the other in respect of each property

[79] The judgment of the court below contains no mention of the evidence on which the learned judge relied to base his order that each party held his or her respective shares in trust for the other in relation to each of the properties. While there is evidence from the respondent which may seem to give rise to elements of a trust, in the absence of affidavit evidence from the appellant addressing that issue and in light of the non-testing of the affidavit evidence through cross-examination, it is impossible to discern the process by which the findings or declarations based on the concept of a trust were arrived at. (See **Flannery v and another v Halifax Estate Agencies Ltd**

[2000] 1 All ER 373.)

Conclusion

[80] Given all the above, it is my view that the court below fell into error in several respects in dealing with the matter. The decision in my view should therefore be set aside. When viewed against the background of the appellant's averment that there had been ongoing discussions with the respondent about the division of the properties; and when considered with the fact that there was no cross-examination as to when and over what period these discussions would have taken place, then it will be seen that questions must arise about the extent to which the respondent might truly be said to have established her claim on the ground of adverse possession. And when these considerations are added to the questions already discussed which highlight further challenges posed by the absence of cross-examination, then it will be seen that there can be but one way for this court to resolve this appeal: that is by remitting the matter to the court below for the matter to be properly heard, with full latitude given for the affiants to be cross-examined on their affidavits.

[81] The following, therefore, are the orders that I propose in order to resolve the matter:

- (i) Appeal allowed;
- (ii) Decision of McIntosh J is set aside;
- (iii) Matter remitted to the Supreme Court for hearing on a date to be fixed by the Registrar of that court;

- (iv) Matter also to be fixed for pre-trial review by the Registrar of the Supreme Court;
- (v) Costs of the appeal to the appellant to be agreed or taxed; and the appellant and respondent to bear their own costs in the previous hearing in the court below.

PHILLIPS JA

ORDER

- (i) Appeal allowed;
- (ii) Decision of McIntosh J is set aside;
- (iii) Matter remitted to the Supreme Court for hearing on a date to be fixed by the Registrar of that court;
- (iv) Matter also to be fixed for pre-trial review by the Registrar of the Supreme Court;
- (v) Costs of the appeal to the appellant to be agreed or taxed; and the appellant and respondent to bear their own costs in the previous hearing in the court below.