[2021] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 115/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**GLEN COBOURNE**	**APPELLANT**
AND	**MARLENE COBOURNE**	**RESPONDENT**

Lord Anthony Gifford QC, Mrs Emily Shields and Miss Marissa Wright instructed by Gifford, Thompson & Shields for the appellant

Respondent not appearing or represented

11 February 2020 and 7 May 2021

BROOKS JA

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

MCDONALD-BISHOP JA

[2] This appeal challenges the decision of a judge of the Supreme Court ('the learned judge'), made on 22 October 2018, on an application brought by Mr Glen Cobourne ('the appellant'), for default judgment to be entered on a claim he brought against his former spouse, Mrs Marlene Cobourne ('the respondent'). The appellant sought orders regarding the ownership of residential property situated at Oaklands in

the parish of Saint Andrew and registered at Volume 1288 Folio 432 of the Register Book of Titles ('the property').

[3] The order of the learned judge that is the subject of this appeal is:

> "1. Judgment on this claim is entered in favour of the [respondent]; ..."

[4] Two central questions have emerged for examination from the grounds of appeal filed. The first question is whether the learned judge employed the proper procedure as stipulated by Part 12 of the Civil Procedure Rules, 2002 ('the CPR') for the grant of default judgment on the claim in question. The second is whether he correctly applied the substantive law regarding the acquisition of title to property by one registered co-owner from another co-owner by operation of the statute of limitations.

[5] The appellant contends that in denying the application for default judgment and entering judgment for the respondent, the learned judge erred in procedural and substantive law.

[6] There was no response from the respondent to the appeal. However, there was evidence before the court, which served to establish that she had notice of the hearing of the appeal.

[7] The background to the appeal will now be briefly outlined.

The factual background

[8] The facts that gave rise to the claim in the Supreme Court are extracted from the amended particulars of claim ('the particulars of claim') that were filed on 6 October 2016 (pages 43-64 of the record of appeal). The most pertinent facts, for present purposes, are as follows.

[9] The appellant and respondent were husband and wife. They got married in Jamaica in 1999. A few months later, in 2000, they bought the property, which was transferred to them as tenants in common. The parties purchased the property with the aid of a mortgage from the National Housing Trust ('the Trust') by using the respondent's and her brother's contributions to the Trust. The appellant contributed cash towards the purchase, which represented roughly two-thirds of the purchase price. Later, the respondent contributed $100,000.00 towards repairing the roof. They lived together at the property until 13 June 2000, shortly after which, at different times, they migrated to the United States of America ('USA').

[10] On 13 June 2001, the respondent executed an irrevocable power of attorney, primarily granting the appellant the power to sell the property. The appellant was empowered to, among other things, pay rates and taxes on her behalf and to pay and recover all sums, which might be due and owing to her. On the same date, the respondent also executed a document entitled, "Authority of Marlene Cobourne" ("the written authority"), in which she directed that the sum of $100,000.00 plus interest be paid to her as the "sum representing the value of her entire interest in the property".

[11] In September 2001, the respondent moved from the home the parties shared in the United States of America (USA) and never returned. On 17 August 2006, a final decree of dissolution of the marriage was handed down by the Superior Court of Gwinnett County in the State of Georgia in the USA. The appellant had not seen the respondent since September 2001, when she left the matrimonial home.

[12] On 8 January 2016, the respondent lodged a caveat at the Office of Titles ('titles office') against any dealing with the property. In support of the caveat, she submitted a declaration to the Registrar of Titles in which she indicated her intention to revoke the power of attorney on the basis that, among other things, she was young and inexperienced when she granted it to the appellant.

The proceedings in the Supreme Court

[13] Consequent to the lodging of the caveat, the appellant commenced his claim in the Supreme Court by claim form filed on 20 September 2016 and amended on 6 October 2016 (pages 32 - 42 of the record of appeal).

[14] The core of the appellant's case, as disclosed in the particulars of claim, is that he is the sole proprietor of the property as he had acquired the respondent's interest by way of adverse possession in accordance with the provisions of the Limitation of Actions Act, which, interchangeably, will be referred to as the statute of limitations. He grounded his claim on three bases of mixed fact and law: (i) he has been dealing with the property as a sole proprietor since 2002 and has dispossessed the respondent; (iii)

the respondent had discontinued possession; and (iii) the respondent's title to the property has been extinguished by operation of the statute of limitations.

[15] Upon filing the claim, the appellant sought leave to serve the respondent with the claim form and particulars of claim outside the jurisdiction. Leave was granted and the appellant effected service in keeping with the order of the court. The respondent failed to file an acknowledgement of service or a defence to the claim within the time limited for her to do so by the CPR. As a result, on 11 April 2018, the appellant filed a without notice application for court orders, by which he sought the following orders, in so far as is relevant to the appeal:

> "1. Judgment be entered against the [respondent] in default of an acknowledgment [of] service and/or defence in terms pleaded in the Amended Claim Form filed on the 6th day of October 2016:
>
> l. A Declaration that the [appellant] is the sole proprietor of the property known as Lot 55, part of Oaklands in the parish of Saint Andrew and registered at Volume 1258 Folio 432 in the Register Book of Titles;
>
> ll. An order that caveat No. 1980761 which was lodged on the title to the said property at the instance of the [respondent] on 6th January 2016, be removed; and
>
> lll. An Order that the Registrar of Titles do rectify the said title by entering the name Glen Cobourne as the sole proprietor of the said property..."

The learned judge's decision

[16] The learned judge was satisfied that the claim form with the particulars of claim was served on the respondent. He proceeded to identify the question to be determined by him in these terms at paragraph [13]:

> "... The question to be determined, therefore, is whether or not the [appellant] may obtain judgment for a declaration to be granted that he has become the sole owner of the Oaklands property by virtue of the [respondent's] alleged absence from the property..."

[17] Considering that question he had identified, the learned judge proceeded to consider sections 3, 14, and 30 of the Limitations of Actions Act in conjunction with the relevant principles of law enunciated in several cases. He, mainly, had regard to dicta from such cases as **Powell v McFarlane** (1977) 38 P & CR 452; **JA Pye (Oxford) Ltd and Another v Graham and Another** [2002] 3 All ER 865; **Wills v Wills** [2003] UKPC 84; **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37; and **Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton – Thelwell** [2017] JMCA Civ 26.

[18] Having applied the applicable law to the facts he considered material to the question he had to determine, the learned judge made these critical findings of fact (as summarised):

i. The uncontradicted averment that since 2002, the appellant had directed that all rental income from the property be paid into an account in his sole name demonstrates that he intended to make it

public that he was the person whom the tenants were to regard as the sole owner of the property. There was no evidence that this intention had changed. The appellant had shown the requisite intent to possess the property for his use and benefit to the exclusion of the respondent.

ii. The appellant's act of directing that all rental income from the property be paid directly to him was not a sufficient act on his part that would constitute factual possession of the property by him. This act was insufficient to extinguish the respondent's title, especially having regard to the power of attorney that the respondent executed in 2001.

iii. The appellant had adduced no evidence that the respondent revoked the power of attorney and that he could properly and legally direct the tenants of the property to pay the rent solely to him.

iv. The respondent's statutory declaration to the Registrar of Titles in support of the caveat was the only document that suggested that the respondent desired to revoke the power of attorney. That declaration, "taken at its highest", would only demonstrate that the respondent had given authority to the appellant to act as her agent while not yielding up her interest in the property. The statutory

declaration was evidence that the respondent had not given up her interest.

v. The appellant failed to rebut the presumption that the respondent retains possession of the property.

The appeal

[19] The appellant, being aggrieved by these findings, launched his appeal on 12 grounds, lettered (a) to (l). During the hearing before this court, four grounds, (e), (g), (h) and (i), were abandoned. The eight grounds that remained for the consideration of the court are these:

> "**PROCEDURAL GROUNDS**
>
> (a) The learned judge erred in treating the [appellant's] application for default judgment as a final hearing of the claim;
>
> (b) The learned trial judge erred in awarding judgment to a defendant who had not entered any appearance whatsoever either by filing an acknowledgement of service or defence – on an application for judgment in default by the claimant;
>
> (c) The learned trial judge erred in treating the [appellant's] application for default judgment as a trial of the claim upon seeing that the affidavits before him on behalf of the [appellant] dealt only with the issue of service of the claim form and the particulars of claim – contrary to Rule 12.10(4)of the [CPR];
>
> (d) The learned trial judge should have, in keeping with the overriding objective, allowed the [appellant] on the application for default judgment – especially since no appearance had been entered by the [respondent] – to put in evidence [an] affidavit in support of the default

judgment application in accordance with Rule 12.10(5) of the CPR:

(e) ...

(f) The learned trial judge erred in using as evidence in the [appellant's] application for default judgment, an affidavit filed and used by the [appellant] in support of a previous application which was before the Supreme Court though in the same claim – paragraph 27;

MERIT GROUNDS

(g) ...

(h) ...

(i) ...

(j) The learned judge erred in his articulation of the law on factual possession that the use and benefit to which the [appellant] attached to the disputed property need to be 'adverse' to the ownership interest of the [respondent];

(k) The learned judge erred in using an attachment in the Particulars of Claim – 'Authority of Marlene Cobourne' - dated June 13, 2001, in which she gave instructions for the claimant to pay her $100,000 at 12% interest per annum from February 25, 2000 as evidence that the respondent had not given up her interest in the property;

(l) The learned judge misconstrued the application of the law related [sic] to adverse possession by a registered owner of another to the facts of this case."

[20] As is seen, the grounds of appeal are conveniently divided under two headings: procedural grounds and merit grounds. This categorisation is maintained for the purposes of my review and analysis.

Analysis and findings

The procedural grounds - (grounds (a), (b), (c), and (d)

(i) *The learned judge's requirement for evidence in proof of the facts pleaded*

[21] A claimant may obtain a judgment without a trial by way of an application by him for a default judgment. The court's jurisdiction to grant a default judgment is set out in Part 12 of the CPR. The immediately relevant portion of Part 12 states:

> "12.1 (1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant-
>
> (a) has failed to file an acknowledgement of service giving notice of intention to defend in accordance with Part 9; or
>
> (b) has failed to file a defence in accordance with Part 10.
>
> (2) Such a judgment is called a '**default judgment**'." (Emphasis as in original)

[22] Rules 12.10(1), (2), and (3) deal with the entry of default judgment in respect of claims for a specified sum of money, an unspecified sum of money, and the delivery of goods, respectively. Given the claim that the appellant brought, rules 12.10(4) and (5) would have applied to the application for default judgment on that claim. These rules deal with applications for default judgment for claims other than for money and goods. They read:

> "(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the particulars of claim.

> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply."

[23] Based on the above-stated rules, the learned judge was to have satisfied himself that the conditions precedent for the grant of the default judgment were satisfied. Those preconditions were that the respondent was properly served with a valid claim form and particulars of claim in accordance with the rules of court, and had not filed an acknowledgement of service indicating an intention to defend the claim or a defence within the time limited for her to do so by the rules. He should also have been satisfied that the respondent had not applied for an extension of time to comply with the rules. The learned judge, having considered the affidavit evidence filed by the appellant, stated that he was satisfied with the service of the claim and the failure of the respondent to file an acknowledgement of service or defence within the time limited for her to do so. There is, therefore, no question that the circumstances existed for the application to be made by the appellant for a default judgment to be granted and the learned judge correctly found that to have been so.

[24] Once those preconditions were met, as they were, the learned judge was to proceed to an assessment of the particulars of claim to determine if it disclosed a reasonable cause of action upon which he could have granted default judgment in the terms sought by the appellant in his claim.

[25] In addressing the question as to the approach to be adopted in assessing the appellant's case for the grant of the default judgment, the learned judge at paragraph [12] reasoned:

> "It is clear, by the nature of the claim, that this claim is unopposed and therefore undefended as the defendant named herein has not responded to the claim. **It follows then, that what is before this court are uncontradicted allegations of fact, set out in the claimant's particulars of claim**. **If the claimant proves those allegations, upon a balance of probabilities, then, those allegations will be acted on, by this court. That though, does not necessarily mean, that even if those allegations are duly proven, the claimant will be awarded judgment in his favour in respect of this claim**." (Emphasis supplied)

Then at paragraph [13], he continued, in part:

> "…**The burden of proof rests on the [appellant] to establish, <u>on evidence</u>,** upon a balance of probabilities, that he has obtained sole legal interest in the said property." (Emphasis supplied)

[26] It is noted that the learned judge did not explicitly state that he required an affidavit in support of the particulars of claim. However, he did speak to the need for 'evidence' to substantiate the 'uncontradicted allegations', which could only mean in the context of the hearing of the application, that an affidavit would have had to be filed in which the appellant would depose to matters contained in the particulars of claim.

[27] However, the rule is clear that the entitlement to the default judgment was to be informed by and adjudged on the facts averred in the particulars of claim and nowhere else. Thus, there is no requirement for evidence verifying the contents of the particulars of claim before a default judgment may be entered. There is also no requirement for an

affidavit of merit containing a rehearsal of the particulars of claim. In the absence of any provision for affidavit evidence in proof of an assertion contained in the statement of case, the certificate of truth was sufficient to give the particulars of claim the force of law for the purposes of an application for a default judgment. The judgment should have been entered on what was disclosed in the particulars of claim, which would have been what was served on the respondent and to which no intention to defend had been indicated.

[28] The rationale for the default judgment to be entered, based on what was disclosed on the particulars of claim, is obvious. This is because the case that would have been served on the respondent for a response to be filed by her, in accordance with the rules of court, would have been comprised within the four walls of the particulars of claim (along with any document on which the claimant seeks to rely, which is annexed to it). So the court would be acting on the premise, until the contrary is proved, that the respondent, having seen that case set out in the particulars of claim (with supporting documents, if any), does not intend to challenge or resist it. The failure of the respondent to respond to the particulars of claim upon service of it is tantamount to an acceptance or admission of the facts pleaded in it until the contrary is shown.

[29] In Blackstone's Civil Practice 2004, at paragraph 20.7, the learned authors, in explaining the application procedure for default judgment under similar provisions in the

Civil Procedure Rules, 1998 of England and Wales ('the English CPR'), stated, among other things:

> "There will be a hearing, and **judgment will be entered for what it appears to the court that the claimant is entitled to on the statement of case** (CPR r.12.11(1)). **In other words, the court will consider the merits of the claim, albeit only as they appear in the particulars of claim**." (Emphasis supplied)

[30] It is, therefore, not at all clear what proof of the facts pleaded in the particulars of claim or what evidence in proof of the pleadings was required by the learned judge in the light of the clear dictates of rule 12.10(4). The learned judge's requirement for supporting evidence is, indeed, questionable within the framework of rule 12.10(4), in the face of his assertions that the claim was "unopposed" and that the particulars of claim comprised "uncontradicted allegations of facts". The hearing of the application for the default judgment was not a trial of the claim. The appellant was only entitled to the judgment on the merits of the particulars of claim and nothing else. It, therefore, follows that it was open to the learned judge to treat the pleaded facts as uncontradicted and, accordingly, as admitted, for the purposes of the default judgment. It was then for him to consider whether the appellant was entitled to judgment on those uncontested facts.

[31] In my view, the learned judge was not correct in his assertion that the burden of proof rested on the appellant to establish, "**on evidence**, upon a balance of probabilities", that he has obtained sole legal interest in the said property (emphasis supplied). This requirement of the learned judge for evidence in proof of the pleaded

facts, on a balance of probabilities, shows what appears to be a misapprehension of the law that he had to treat the claim as if there were a trial. The appellant is justified in his complaint that the learned judge had treated the application as a trial or final hearing of the claim in requiring evidential proof of the facts pleaded on a balance of probabilities. Grounds (a) and (c) are meritorious.

*(*ii) *The learned judge's use of an affidavit filed in earlier proceedings*

[32] Similarly, the learned judge's approach in considering affidavit evidence, which the appellant did not file for the purposes of the application for default judgment, and on which the appellant did not rely during the hearing before him, also cannot be accepted. In his earlier application to serve the respondent with the claim outside of the jurisdiction (which was already disposed of), the appellant relied on an affidavit sworn to on 6 October 2016. In filing his subsequent application for default judgment, he placed no reliance on that affidavit. The learned judge, however, at paragraphs [7], [8], [27] and [28] of his judgment considered paragraphs 3 and 4 of that affidavit on the basis that he was entitled to take judicial notice of all the documents filed in the matter.

[33] There is nothing from the learned judge's reasoning which has established the legal basis for his reliance on the contents of the earlier affidavit. Given the requirements of the law for the grant of the default judgment in the circumstances of this case, that earlier affidavit would have been irrelevant to the proceedings before the learned judge, and therefore, inadmissible. Once the learned judge was satisfied that the conditions for the grant of a default judgment had been satisfied on the affidavit

furnished by the appellant in support of the application, his focus was to have been on the facts contained in the particulars of claim. That would have been the material document for his scrutiny as it relates to the merits of the claim. The previous affidavit did not form part of the appellant's particulars of claim. Therefore, the consideration of it by the learned judge, in considering whether default judgment should have been granted on the merits of the claim, constituted a procedural misstep. The complaint of the appellant in ground of appeal (f) that he erred in this regard is also justifiable.

(iii) *The entry of judgment on the claim for the respondent*

[34] Based on the provisions of rule 12.10(4), the learned judge was required to assess the particulars of claim to ascertain whether the appellant was entitled to the default judgment. If he were not so satisfied, then the application for default judgment would have had to be refused. Instead of denying the application, the learned judge entered judgment for the respondent. It is my considered view that the learned judge erred in doing so. He ought not to have entered judgment for the respondent who, having been served (as he had accepted), had not seen it necessary to acknowledge service and to, otherwise, respond to the claim.

[35] The only application before the learned judge was for default judgment to be entered against the respondent under Part 12 of the CPR. Part 12 does not allow judgment to be entered in favour of a defendant. A default judgment can never be in favour of a defendant. So, it is not entirely clear as to the type of judgment entered for the respondent. It should be noted that while other provisions of the CPR do allow judgment to be entered in favour of a defendant in certain specified circumstances,

none of those circumstances existed to avail the respondent. If the learned judge had formed the view that the particulars of claim disclosed no reasonable grounds for bringing the claim against the respondent (a belief that he clearly held), then he could have exercised his case management powers under rule 26.3(1)(c) and strike out the claim after giving the appellant a reasonable opportunity to make representation in that regard (rule 26.2(2) of the CPR). He had no legal basis in the circumstances to grant judgment for the respondent.

[36] It seems necessary to also state that the action of the learned judge in granting judgment in favour of the respondent on the uncontested claim was as much an error of procedure as it was of substantive law. This error in respect of the substantive law will be demonstrated upon consideration of the 'merit grounds' of appeal. It is sufficient to state for present purposes, however, that there is merit in the appellant's complaint that the learned judge erred, procedurally, in entering judgment for the respondent on the claim. The learned judge also erred in requiring evidence in proof of the matters in the particulars of claim. He also fell in error when he took account of the earlier affidavit, which was not relied on by the appellant in support of his application for default judgment. The appellant, therefore, succeeds on the procedural ground (b).

[37] I do not consider it necessary to consider ground (d) in detail. The appellant complains that given the non-participation of the respondent, the learned judge, in keeping with the overriding objective, should have allowed him to file affidavit evidence in support of the default judgment application instead of entering judgment for the

respondent. As already established in the analysis above, it was not a requirement of the law that an affidavit to prove or supplement the facts pleaded in the particulars of claim was to be filed by the appellant. Therefore, it would not have been a proper exercise of the learned judge's discretion to afford time for an affidavit to be filed, replicating the particulars of claim or proving facts pleaded in the particulars of claim. As already explained, only the facts pleaded in the particulars of claim were necessary for the purposes of determining whether to grant the default judgment. This ground does not assist the appeal.

[38] Except for ground (d), the appellant has successfully established that the learned judge erred on the procedural grounds. I will now examine the grounds of appeal relating to the merit of the claim.

The merit grounds - grounds of appeal (j), (k) and (l)

(i) The appellant's statement of case

[39] Based on the stipulations of the relevant rules of the CPR and the substantive law applicable to claims of acquisition of property by adverse possession, the learned judge was required to determine whether the appellant was entitled to be declared the sole owner of the property as he has claimed. To grant the default judgment, he had to be satisfied, on the particulars of claim, that the respondent's title to the property had been extinguished, by operation of the statute of limitations, in favour of the appellant. The extinction of the title would have had to be due to either the appellant having dispossessed the respondent or the respondent having abandoned possession of the property for a continuous period of over 12 years. Therefore, to succeed on the claim

for the grant of the default judgment, the appellant needed to have satisfied the learned judge, on the strength of the facts pleaded in the particulars of claim, that he was entitled to the judgment he was seeking.

[40] In his particulars of claim, the appellant made several significant averments in support of his claim that he had dispossessed the respondent of her interest in the property or that the respondent had abandoned possession of the property, thereby leaving him as sole owner. The appellant relied, among other things, on documentary evidence in the form of the power of attorney and the written authority of the respondent that were executed in 2001. He also relied on a document, entitled "Final Judgment and Decree" from the Superior Court of Gwinnett County, Georgia, dated 17 August 2006.

[41] This was the gravamen of the appellant's pleaded case that he had acquired the property by adverse possession as extrapolated from the particulars of claim:

> (a) When the parties migrated to the USA in 2001, the property was rented to a tenant (paragraph 6).
>
> (b) On 13 June 2001, the respondent executed the power of attorney and the written authority. By those documents, she granted the appellant the power to sell the property, among other things, and directed that the appellant should pay her the sum of $100,000.00 with interest at 12% per annum from 15 February 2000 to the date of

payment, as the sum representing the value of her entire interest in the property (paragraph 8 and documents GC3 and GC4 annexed).

(c) In the divorce hearing in the Superior Court of Gwinnett County, Georgia, the respondent testified that there was no marital property to be divided except for a 1997 Dodge Caravan (paragraph 10, GC1 annexed).

(d) Before February 2002, the rent was paid into a joint account from which the respondent would withdraw money. In or about February 2002, the appellant closed the joint account and directed that all rental payments should be paid to an account in his sole name (paragraph 11).

(e) From February 2000 to the date of the filing of the claim in 2016, the appellant has paid all instalments, which were due under the mortgage; arranged for the letting of the property to various tenants; received all rents from the tenants; arranged for and paid for all repairs necessary to maintain the property; and paid all property taxes (paragraph 12).

(f) Between February 2002 and December 2015, the respondent did not (a) visit the property; (b) make any objection to the various acts carried out by the appellant as set out in the preceding paragraph; (c) communicate with the appellant about the property; (d) make any attempt to exercise any purported right of ownership over the property; (e) receive any rent from any tenant of the property; and make any payment relating to the property. She also left no possessions of her own at the property or exercised any right of ownership over it (paragraph 13).

[42] Further, in paragraphs 14 to 16 of the particulars of claim, the appellant averred actions taken by the respondent in lodging the caveat at the titles office in January 2016. In addition, he spoke to declarations made by the respondent to the Registrar of Titles in support of the caveat that, among other things, she was young and inexperienced when she granted the power of attorney and that she was revoking it.

[43] The appellant challenged the respondent's declarations as being false or mistaken for reasons set out by him in paragraph 16 of the particulars of claim. He then continued at paragraphs 17 and 18:

"17. On 24th December 2015, when the [respondent] requested the lodgment of a caveat, she had no interest in the Oaklands property, since by reason of the matters set out in paragraphs 8 to 13 above the

> [appellant] had been in exclusive and undisturbed possession of the Oaklands property, and the profits thereof, for more than 12 years, and the [respondent] had discontinued her possession and/or had been dispossessed for more than 12 years. The [appellant] relies in particular on sections 3, 4 and 14 of the Limitations of Actions Act.
>
> 18. In the premises the [appellant] is entitled to a Declaration that he is the sole proprietor of the Oaklands property and to an Order that the said caveat be removed."

ii. *The applicable law*

[44] The particulars of claim have established that the parties are the registered proprietors of the property as tenants in common. The Registration of Titles Act is, therefore, applicable to the claim. As it relates to the ownership and possession of registered property, section 68 provides, in part:

> "...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 supplied)

[45] In commenting on this provision, this court in **Fullwood v Curchar** stated at paragraph [30] that:

> "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 the possession of his property is subject to a

> subsequent operation of the statute of limitations which could pass title to someone else."

[46] In advancing his claim to be declared sole proprietor of the property, the appellant sought to establish that the respondent's interest in the property is subject to the subsequent operation of the statute of limitations. Therefore, he contends, her name on the certificate of title, as a registered co-owner, is not to be taken by the court as conclusive evidence that she is in possession of the property because he has acquired her interest by adverse possession. He relies on sections 3, 4 and 14 of the Limitations of Actions Act for his proposition. These provisions are given due consideration.

[47] Section 3 of the Limitation of Actions Act states:

> "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."

[48] Section 4, in so far as is immediately relevant, follows in these terms:

> "4. The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-
>
> (a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in

> receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;
>
> (b)..."

[49] Further, section 14 provides:

> "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."

[50] Although the appellant had not explicitly raised section 30 of the Act in his particulars of claim as a section on which he relies, that section is also vital to the claim as it complements and supplements sections 3 and 4. It provides:

> "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."

[51] In **Fullwood v Curchar**, this court, in examining the effect of the sections stated above, in the light of the ground-breaking decision of the Privy Council in **Wills v Wills**, at paragraph [34] said:

> "... 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."

[52] The learned judge also rightly considered the provisions of the statute and the relevant authorities noted by him (including the two in the preceding paragraph) and concluded that a co-owner can dispossess another co-owner. Having established that incontrovertible statement of the law, he then proceeded to begin his consideration of the claim on the premise that "... there is, a strong presumption that the possession is retained not only by the appellant, but also by the respondent, who is registered as joint owner of the said premises" (see paragraph [31] of the judgment). He drew on the case of **Powell v McFarlane** in support of that proposition. He then reasoned:

> "[32] In light of the strong presumption of possession in favour of the [appellant], as well as, the [respondent], the [appellant] must bring compelling evidence, sufficient to rebut the said presumption of the joint retention of possession of the Oaklands property by both himself and the [respondent]."

[53] In **JA Pye (Oxford) Ltd v Graham**, it was held that there are two elements to be satisfied concerning a claim for adverse possession. They are: (1) a sufficient degree of physical custody and control ("factual possession"); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). It was made clear on the authority of **Wills v Wills**, in paragraph 14, that

the "highly technical doctrine of adverse possession (and the converse notion of non-adverse possession)" had been abolished by the English Real Property Limitation Act (1833 3 & 4 W IV C27), which corresponded very closely to our Act. Their Lordships, however, noted in paragraph 17 of their judgment that:

> "Despite the abolition of the technical doctrine of adverse possession the phrase continued to be used as a convenient shorthand for the sort of possession which can with the passage of years mature into a valid title – that is, possession which is not by licence and is not referable to some other title or right ..."

[54] Importantly too, their Lordships also noted the instructive dictum of Lord Millett in **Ramnarace v Lutchman** [2001] 1 WLR 1651, that:

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title, or with the consent of the true owner."

[55] In paragraph [19] of his judgment, the learned judge, seemingly, appreciated that section 14 had modified the common law principle of title by possession. He specifically noted that the section provides that "the possession of one co-owner was not to be treated as the possession of the other co-owner(s)". Despite that recognition on his part, he adhered to the principle enunciated in **Powell v McFarlane** that there is a presumption of joint possession arising from co-ownership.

[56] However, the learned judge had facts before him that would have shown, on the face of it, that the respondent was not in possession of the property or, directly or indirectly, in receipt of the rental. Those are the crucial incidences of ownership that

had to be present to avail the respondent in light of section 14 of the Limitation of Actions Act. The uncontested case before the learned judge was that the appellant was in exclusive and undisturbed possession of the property for 12 years and that for that period, he collected the rent from the premises for his sole use and benefit and without any account given to the respondent or anyone claiming through her. Section 14, of which the learned judge had taken particular note, would have reduced the evidential efficacy of the presumption of joint possession of the property by the parties in the face of undisputed facts being advanced to the contrary.

[57] Following the guidance provided by the common law principles, as distilled from the authorities he had cited, the learned judge was to ascertain whether he was satisfied on the pleaded facts that the appellant was in factual possession of the property with the necessary intention to possess the property to the exclusion of the respondent. In other words, he ought to have satisfied himself on the particulars of claim that the appellant was, in fact, in possession of the property (within the meaning of the law) and that his possession was inconsistent with or in denial of the title of the respondent.

[58] The learned judge, having regard to the applicable law, found quite correctly that the appellant's intention to possess the property was established on the pleadings. He opined at paragraph [29] of the judgment that the appellant's direction that the rent be paid to an account in his sole name "would have shown the requisite intention to possess the property for his own use and benefit to the exclusion of the [respondent]".

[59] After finding that the appellant's intention to possess the property was established, the learned judge went on to conclude that there was insufficient evidence of factual possession that was strong enough to displace the presumption of joint possession, which arises on the fact of the parties being registered tenants in common. In expressing the basis for his conclusion, the learned judge proceeded to observe at paragraph [31] of the judgment:

> "As it relates to the factual possession of the [property], there were averments in the [appellant's] Particulars of Claim, which were made, to show that the property was or still is, rented premises and that the [appellant] has been solely receiving rental income from the said property. That being the case, the [appellant] then would not be physically residing on the premises. As the authorities demonstrate, however, the question of possession in these matters is a relative term and depends on many factors. It is a question of fact, depending on the circumstances. Further, as pointed out in **Powell v McFarlane**, op. cit., there is a strong presumption, without evidence to the contrary, that possession is retained by the paper owner ..."

[60] The learned judge further opined, at paragraphs [33] and [34] of the judgment, that the appellant's failure to prove that a power of attorney had been revoked showed that he might have acted in breach of the said power and in breach of his duty as a trustee of the rental income, which the respondent was entitled to share equally with him. He opined that the appellant's user of the property, in light of the power of attorney, could not be viewed, in law, as being for his own use and benefit, adverse to the respondent's interest, but, in actuality, was "usage concurrent with that of the [respondent], at the very least, up until December 24, 2015 – when the [respondent] purportedly revoked the Power of Attorney".

[61] The learned judge also viewed the written authority of the respondent as showing that she had not given up her interest in the property and the lodging of the caveat as demonstrating that the respondent "still considers herself to be a legal owner".

[62] With all due respect, I find that the reasoning and conclusion of the learned judge concerning the fact of possession of the property are flawed in several material respects, which would render his decision impeachable. I say so for reasons that will now be outlined.

[63] The learned judge had not considered or has not demonstrated in what way or on what basis it could be said that the respondent, as the absent co-owner, had retained possession within the provisions of section 14 of the Limitation of Actions Act. This consideration would have been critical in the light of the appellant's uncontroverted pleadings that for over 12 years, he alone had been in continuous and undisturbed possession of the property, by, among other things, leasing it to various tenants whom he selected, without the knowledge, consent, or objection of the respondent. He collected the rent from the tenants, which he used for his sole benefit, without sharing it with the respondent or accounting to her for it. For the purposes of section 14, a co-owner must be either in factual possession of the property or in receipt of profits or rent derived from it for his own benefit or the benefit of other person or persons other than another co-owner.

[64] It would have been clear that everything in the particulars of claim pointed to the appellant exercising sufficient acts of physical control and custody over the property as well as benefitting from the rent that he collected from the tenants whom he had let into possession.

[65] The learned judge relied heavily on the power of attorney and the written authority of the respondent. When the power of attorney is closely examined, however, it is seen that the primary power given to the appellant was for sale and transfer of the property. There was no express authority to rent it to any tenant and collect rental for her benefit. Even though the power granted to recover money due to her could be stretched to include rent, that interpretation seems inappropriate. This is so in the light of the terms of the written authority that accompanied the power of attorney for the respondent to be paid $100,000.00 with interest as of February 2000, as representing her interest in the property. The interest was to accrue from a specified date, which was before the execution of the document.

[66] The written authority bore no reference to rental and the use of rental income for the benefit of the respondent or for anyone claiming through her. The sum she claimed as representing her interest in the property bore a direct correlation to the monetary contribution she purportedly made to repair the roof. She neither spoke to nor sought any payment of rental income that would be derived from the property.

[67] Even if the respondent had every intention to have the appellant act as her agent, the pleadings would have disclosed that, contrary to the powers given in the

power of attorney and the written authority, the appellant has dealt with the property in a manner not expressly authorised by her. He acted in relation to it as if he was the only owner. This conduct was influenced, in part, by the reported declaration of the respondent during the divorce proceedings in Georgia that apart from a motor vehicle, there was no matrimonial property for division between them (the decree was annexed to the particulars of claim).

[68] Accordingly, the appellant never sold the property or paid the sum of $100,000.00 plus interest to the respondent as he was empowered or required to do. Instead, for over 12 years, he has granted possession of the premises to various tenants, as he alone deemed fit, and without consultation with or interference from the respondent. It stands as unchallenged on the pleadings that since 2002, the appellant acted without any regard for the rights and interest of the respondent in the property. Therefore, the possession of the property by the tenants after 2002 could not be treated as the possession of the respondent because they derived the right to possession from the appellant.

[69] Besides, the appellant was the owner in receipt of the entire rent from the property, which he took for his own benefit. He never accounted to the respondent for her share. The pleadings also disclosed that the respondent never visited the property during the period and had no personal possessions there. It also would have been revealed that up to the filing of the claim, she had not commenced any court

proceedings for the sale of the property (for which the power of attorney was given) or for any monies due and payable to her in relation to the property.

[70] It means that on the terms of the particulars of claim, the respondent was not in occupation of the property or receipt of rent or any other income from it, either directly or from anyone claiming through her, for 14 years prior to the commencement of the claim. Furthermore, she failed to bring a claim for possession of the property or her share of the rent proceeds, to which she would have been entitled. Section 4 of the Limitations of Actions Act makes it clear that a person who is entitled to rent from the property and who may be dispossessed of it must bring the claim within 12 years after the right of action first accrued. Based on the pleadings, the respondent would have sat upon her legal rights.

[71] The learned judge did not adequately consider the effect of all the acts done or not done in relation to the property by the parties. He opined that the appellant's unilateral action of diverting the rental income from their joint account, in the absence of proof of the revocation of the power of attorney, showed that the appellant might have acted outside the authority of the power of attorney and in breach of his duty as a trustee. The learned judge did not appreciate that the same conduct could equally and properly have been viewed as conduct that was adverse to or inconsistent with the respondent's interest in the property. It would have been no different from a squatter who illegally trespassed on property, without interference from the paper owner, but in total disregard for the paper owner's rights. The illegal act that is adverse to the rights

of the paper owner does not bar the operation of the statute of limitations. Instead, it may be strong evidence of the requisite intention required to prove possession on the part of the 'dispossessor'.

[72] Quite apart from failing to adequately assess the meaning and effect of the documents executed by the respondent and the parties' conduct concerning the property, the learned judge also erred in applying the relevant principles of law. In this regard, he noted, to his credit, that the authorities have demonstrated that "the question of possession in these matters, is a relative term and depends on many factors". However, he failed to show sufficient appreciation for the principle that what constitutes factual possession or the acts that would be sufficient to dispossess the paper owner is based on the circumstances, and the purposes for which the property was being used or might be used.

[73] In **Wills v Wills**, in which the parties who jointly owned the property in question were former spouses, as in the present case, the Privy Council considered several cases on the question of what constitutes possession for the purposes of the statute of limitations. Their Lordships held at paragraph 19 that:

> "... All of them rightly stressed the importance, in cases of this sort, of **the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also rightly stated that the Court should not be ready to infer possession from relatively trivial acts,** and that fencing, although almost always significant, is not invariably either necessary or sufficient as evidence of possession ..." (Emphasis supplied).

[74] In this case, the property was a residential property that was rented. The learned judge recognised this fact in paragraph [31] of his judgment. Before 2002, the respondent was seemingly involved in letting the property and sharing in the rental income through the joint account. For 14 years up to the filing of the claim, the property continued to be rented to various tenants, from time to time, by the appellant but without any consultation with the respondent. The fact that the appellant did not physically reside on the property cannot affect the fact that he was in physical custody and control of the property. As already established, he gave the tenants possession.

[75] Coupled with that fact, the appellant's receipt of the rent in the account in his sole name, with there being no accounting to the respondent or sharing of it with her, is also an important consideration in determining whether the appellant had sufficient custody and control over the property to satisfy the requirement for factual possession.

[76] It was open to the learned judge to reasonably conclude that the appellant had established, on his unchallenged pleadings, the sufficiency of possession of the property by him. The element of factual possession would, therefore, have been established in favour of the appellant.

[77] The learned judge further found that the acts done by the appellant were insufficient to prove factual possession, in the light of the documents executed by the respondent, which, he said, showed that she still considered herself owner and had not given up her interest. The intention or plans of the respondent were, however, not effectual in nullifying the appellant's factual possession and intent to possess the

property. The contents of those documents pointed to nothing that would have established possession on the part of the respondent. It was the appellant's intention that was important, and the learned judge correctly found that he possessed that intention. In **JA Pye (Oxford) Ltd v Graham**, Lord Browne Wilkinson made it abundantly clear that "[t]he suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong ..."

[78] However, even if evidence of the respondent's intention were necessary, none of the documents to which the learned judge had regard, including the declaration to the Registrar of Titles in 2015, revealed any intention on the part of the respondent to retain factual possession of the property. She authorised the property to be sold and the appellant to pay for her interest in it.

[79] Furthermore, her declaration in 2015 that she had an interest in the property would have come after the limitation period had expired. It was of no assistance to her for the purposes of sections 3, 4, 14 and 30 of the Limitations Act. Based on those statutory provisions, her title to the property would have extinguished in 2014.

[80] Another important fact, disclosed on the pleadings, is that the acts done by the appellant, which were plainly inconsistent with the respondent's ownership, were after the execution of the documents by the respondent in 2001. There is nothing on the particulars of claim, which points to an acknowledgement of the respondent's interest in the property since February 2002.

[81] It was established on the particulars of claim that the appellant was in undisturbed and exclusive possession and control of the property vis-à-vis the respondent. His pleadings suggested that he was dealing with the property in a way that a sole proprietor would, from February 2002 up to filing of the claim in 2016. In the circumstances, the learned judge was obliged to act upon those averments as if the respondent admitted them as true. The pleadings would have established that the appellant had successfully raised a case of adverse possession against the respondent, which stood unchallenged and uncontradicted at the material time.

[82] It is my humble view that the learned judge, having failed to properly assess the pleaded facts within the ambit of the applicable law, erred in his conclusion that the appellant had failed to rebut the strong presumption of the retention of joint possession by him and the respondent. There is, therefore, merit in the appellant's complaints on the 'merit grounds' that the learned judge failed to properly apply the law relating to adverse possession to the facts placed before him.

Conclusion and disposal of the appeal

[83] In disposing of the appeal, it is acknowledged that the learned judge was exercising his discretion in dealing with the application. Therefore, this court must exercise restraint and caution before disturbing his decision. See **Hadmor Productions Ltd v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at paragraphs [19] and [20].

[84] Having given consideration to the standard of review that must be applied in considering the appeal, I am satisfied that the learned judge erred in the exercise of his discretion in refusing to grant the default judgment. His decision was based on a misunderstanding and misapplication of the law, both in procedural and substantive respects. For these reasons, the court would be justified in interfering with the exercise of his discretion in refusing to grant the default judgment and entering judgment for the respondent.

[85] I would allow the appeal, set aside the impugned order of the learned judge (paragraph (1)) and enter default judgment in favour of the appellant on the claim. I would then proceed to make the necessary consequential orders in terms of paragraphs (1), (2) and (3) of the amended claim form as sought by the appellant in the amended notice of appeal as follows:

> (1) A declaration that the appellant, Glen Cobourne, is the sole proprietor of the property known as Lot 55, part of Oaklands in the parish of Saint Andrew and registered at Volume 1258 Folio 432 in the Register Book of Titles.
>
> (2) Caveat No 1980761, which was lodged against the certificate of title for the said property by the respondent, Marlene Cobourne, on 6 January 2016, be removed.

(3) The Registrar of Titles shall rectify the said certificate of title by entering the name Glen Cobourne as the sole proprietor of the said property.

[86] It is noted, too, from the notice of appeal, that the appellant has not indicated that he is seeking the costs of the appeal. In the circumstances, I propose that there shall be no order as to costs of the appeal unless the appellant files submissions within 14 days of this order for the consideration of whether an order for costs should be made.

F WILLIAMS JA

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

BROOKS JA

ORDER

(1) The appeal is allowed.

(2) The decision and judgment of the learned judge of the Supreme Court made on 22 October 2018 on claim no 2016 HCV 03899 are set aside.

(3) Judgment is entered on the said claim for the claimant, Glen Cobourne (the appellant), against the defendant, Marlene Cobourne (the respondent), in default of acknowledgement of service and defence.

(4) It is declared that the appellant, Glen Cobourne, is the sole proprietor of the property known as Lot 55, part of Oaklands in the parish of Saint Andrew and registered at Volume 1258 Folio 432 in the Register Book of Titles.

(5) Caveat No 1980761, which was lodged against the certificate of title for the said property by the respondent, Marlene Cobourne, on 6 January 2016, is ordered to be removed.

(6) The Registrar of Titles shall rectify the said certificate of title by entering the name Glen Cobourne as the sole proprietor of the said property.

(7) There shall be no order for costs unless the appellant files written submissions within 14 days of this order for an order to be made.