IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

DECLARATION OF TITLE

In the matter of the Title to Land (Prescription and Limitation) Act, Chapter 60:02

-and-

In the matter of the Rules of the High Court (Declaration of Title) Chapter 3:02

-and-

In the matter of Sublot "A", being part of Area B Plantation Uitvlugt known as De Groote-en-Klien, situate on the West Coast of Demerara in the county of Demerara, Guyana, the said Sublot "A" containing an area of 0.1298 (nought decimal one two nine eight) of an acre, and being shown on a plan by L. G. Arokium, Sworn Land Surveyor, dated 22 October, 2009, and recorded in the Guyana Lands and Surveys Commission on the 30th October, 2009, as plan No. 46393.

-and-

In the matter of an application by way of petition by Lavern Thorne.

Before Ms. Nicola Pierre, Commissioner of Title:

March 31, April 5, July 28, August 29, September 7, November 11, December 16, 2016.

Appearances:
Mr. K Bess for the Petitioner

Mr. Hubert Rodney for the Opposer

DECISION

The Proceedings

By petition dated October 15, 2010, Lavern Thorne sought a declaration of title to Sublot "A", being part of Area B Plantation Uitvlugt known as De Groote-en-Klien, situate on the West Coast of Demerara in the county of Demerara, Guyana, the said Sublot "A" containing an area of 0.1298 (nought decimal one two nine eight) of an acre, and being shown on a plan by L. G. Arokium, Sworn Land Surveyor, dated 22 October, 2009, and recorded in the Guyana Lands and Surveys Commission on the 30th October, 2009, as plan No. 46393.The petition was supported by Affidavits sworn by Etta Thorne, Ulric Thorne, Fraulein Alleyne, and Holice Thorne on October 13, 2010,

On December 14, 2010, Egerton Mortimer Maxwell filed a Notice of Opposition and Affidavit in Support.

Lavern Thorne filed an Affidavit in Reply sworn June 24, 2011.

The action came on for trial on March 31, April 5, July 28, August 29, September 7, November 11, December 16, 2016.

Counsel for the opposer made oral submissions on September 7 and December 16, 2016. Counsel for the petitioner addressed orally on September 7, 2016.

The Evidence

The petitioner's case as set out in her petition is that the property was owned and occupied by her great aunt Lucille Watts who died in 1984 and that subsequent to Lucille's death the petitioner's parents, Ulric and Marsha,

took possession of the property until their death, after which she herself took and maintained sole and exclusive possession and occupation without let or hindrance.

The petitioner's siblings Etta Thorne, Ulric Thorne, Fraulein Alleyne, and Holice Thorne, all swore affidavits in support stating that they all grew up on the property and that Laverne remained in sole exclusive possession, after they moved out and their parents died.

The opposer Egerton Mortimer Maxwell in his Affidavit in Support of Opposition sworn December 13, 2010, stated that Lucille Watts was the legal title holder of the property claimed; Lucille bequeathed lot 20 to Ivy Maxwell her mother; Ivy died 15.2.1986; Ivy was survived by two children, namely Ulric Thorne the petitioner's father and Egerton Maxwell, the opposer; that Ivy left a will leaving lot 20 Section AA, De Groot-en-Klyne to him Egerton; that in 1992 he obtained letters of Administration to her estate; that the petitioner's parents went into possession with his consent, occupied pursuant to a family relationship and agreed to maintain the building; that he was never served with a copy of the petition and had notice solely from the newspapers.

The petitioner in her Affidavit in Reply stated that Ivy Maxwell was her great-grandmother and that the opposer was her father's half-brother; that Lucille Watts was no longer the transported owner of the property and that there was never any agreement between her parents and anyone, nor her and anyone, to maintain the building and that she did repairs without anyone's consent.

Lavern Thorne testified on March 31, 2016. She said she claims lot 20 Bus Shed Street also known as Anchor Street; that the property was owned by her great aunt Lucille Watts who died in 1984; that she Lavern has lived on the property

since 1984 and has paid the rates due and secured and paid for electricity and water to the property since the years 2000-2001; that there were two buildings on the land and one was demolished in 2015 as it was leaning and a danger. She said that Mortimer Maxwell also known as Mortimer Mingo the opposer had not lived on lot 20 since 1984 and had never been paid rent for the property, either by her or her parents.

In support of her claims Lavern Thorne tendered plan no.46393 dated October 22, 2009 by L.G. Arokium, Sworn Land Surveyor [Ex A], death certificate serial numbered 0136203 evidencing the death of Lucille Watts on February 13, 1984 [Ex E, receipts for payment of rates due on lot 20 for the years 1999-2010 the property of Marshal Thorne [Ex F1-3], receipt from the Guyana Electricity Corporation issued to Lavern Thorne for the customer deposit on services to lot 20 Anchor Street, Uivlugt [Ex G].

In cross examination when questioned about the description of the property claimed she confirmed that she had commissioned the plan 46393[exhibit A] and at that time had known the property to be called lot 20 but did not object to the description 'Sublot A' given by the surveyor on the plan, and that she knew the street to be called Bus Shed Street unofficially and Anchor Street officially.

She admitted that she went to live at the property in 1987 when she was ten years old and the occupants on her arrival were her parents Ulric and Marsha Thorne and her siblings. She admitted that both Ivy Maxwell and Lucille Watts had died before she moved in with her parents on lot 20 but confirmed that both Ivy and Lucille had lived at lot 20 until their respective deaths in 1986 and 1984.

She further admitted that Ivy Maxwell lived on the property and her parents went to live with Ivy in 1984. They occupied with Ivy until her death in 1986, and remained there until their deaths, Ulric's in 1989 and Marsha's in 2006. Of her siblings she said she cannot recall when all left the property but that Holice removed in 2005, and that Etta and her family still reside there. The dilapidated building was torn down in 2015 by Malaysia another sister.

Fraulein Alleyne testified on April 5, 2016 and adopted the statements in her affidavit sworn October 13, 2010 as her evidence in chief. In cross-examination she said that she knew Mortimer Mingo also known as Egerton Maxwell, the opposer, that he was her father Ulric's brother; that Ivy Moore is grandmother to Ulric and Mortimer; that in 1984 when she was aged 14 she moved with her parents to lot 20; Lucille and Ivy were in residence at that time and that her father and Mortimer took Lucille to the hospital when she fell ill; that after that visit she did not again see the opposer at the house until he came for the burial arrangements for Ivy; Ulric Thorne died May 28, 1987; Marsha died May 31, 2006; Ivy Maxwell died 1986; Laverne after their deaths continued to live at the property along with the other siblings; that "my grandmother and aunt gave permission to my father and mother to live there and after they died we continued living there, so we took possession."; that Holice still resided at lot 20; Malaysia left in 2016.

In re-examination she said that they had no arrangement with the opposer to remain on the land.

Egerton Maxwell testified on July 28, 2016, and adopted the contents of his Affidavit in Support of Opposition sworn December 13, 2010. He stated that Ivy Maxwell held lot 20 by transport 3113 of 1969; the lot 20 referred to is the same as Sublot A claimed by Lavern; Ivy in her will bequeathed lot 20 to him

and Ulric; he has probate to the estate of Ivy; that Ulric entered lot 20 under a family arrangement that he would live there and take care of Ivy; that after Ivy's and Ulric's death Ulric's family remained in residence; then the children alone after Marsha died; that he did not object to their presence.

In support of his claims he tendered transport 3113 of 1969 for lot 20, Area AA, De-Groot-en-Klyne, passed by Ivy Maxwell to Lucille Watts on October 27, 1969 [Ex J]; Last Will and Testament of Ivy Maxwell executed January 7, 1986 [Ex H] in which she bequeathed to her grandsons Egerton Mortimer Maxwell and Ulric Thorne her house and land at lot 20, followed by a proviso that "when I am dead. . . the one who take care of me whilst I am sick, and stand my funeral expense, the property both house and land to be given to him only" and the furniture to the other; Probate No. 572 of 1987 appointing Egerton Mortima Maxwell Executor in the estate of Ivy Maxwell [Ex H2]; Statement of Assets and Liabilities in the estate of Ivy Maxwell listing as an asset, lot 20 Area AA, De Groot en Klyne [Ex H3]; Oath leading to grant in the estate of Ivy Maxwell sworn by Egerton Maxwell [Ex H4]; Certificate of death of Ivy Maxwell on February 15, 1986, as reported by Egerton Maxwell [Ex H5].

In cross examination he admitted that he did not repair the property after Ivy died and insisted that there was an arrangement between himself and his brother that the brother would repair as long as he lived there "I was paying a rent, he wasn't". He admitted he had not lived at lot 20 since 1983, that Lucille Watts did not have any children and that he relied on his entitlement under Ivy's will. He said that he had no arrangement with Lavern the petitioner, that he never objected to the petitioner and her siblings living there, nor made any demands of them. He admitted that the second house on the

property had fallen down in 2015 and he was told it had been removed after but had not gone to the property to verify that.

As a result of the oral evidence of the opposer, as supported by transport numbered 3113 of 1969 [Ex J] that the property owned by Ivy and Lucille in which the petitioner lived and now claimed is properly described as *lot 20, Area AA,* De-Groot-en-Klyne, and not Sublot "A", being part of Area B Plantation Uitvlugt known as De Groote-en-Klien, as described by the petitioner, the petitioner sought leave on November 11, 2016 to amend the petition for the sole purpose of correcting the description of the property. Leave to amend was granted and on December 16, 2016, plan numbered 65326 dated 28.10.2016 by L. G. Arokium, Sworn Land Surveyor was admitted [Ex H]. This plan showed the same physical occupation but described the properly correctly.

Counsel's submissions

Counsel for the opposer submitted that the evidence showed that the property was "family property" owned by Ivy and Maxwell, there was family connection and that the evidence of the opposer that Ulric occupied under a family arrangement could not be gainsayed by the petitioner who was a minor at the time her family went to live with Ivy. He argued that the petitioner's parents went onto the land by way of a license; and occupied together with Ivy until her death, not exclusively; that Ulric's license extended to Marsha until her death; that there is no proof of animus as the petitioner had not said she intended to exclude the opposer from the land; the petitioner was guilty of non disclosure in not stating in her petition that her uncle Egerton Mortima Maxwell had an interest in the property and that she herself had an interest as the daughter of Ulric.

Counsel for the petitioner submitted that there was no material non-disclosure and any facts omitted were accidental and ignorance not in an attempt to mislead the court, that the petitioner admitted under cross-examination that Ivy lived and lot 20. He further submitted that the acts of the petitioner and her predecessors in occupying, cleaning, maintaining, repairing and paying taxes were enough to establish animus; that the opposer's evidence of a family arrangement were uncorroborated and self-serving; that even if there were an arrangement it ended on Ulric's death and could not encompass his wife Marsha; therefore time ran in favour of the petitioner and her predecessors in possession from the date of Ulric's death in May, 1989. He further submitted that the petitioner acted as an owner would and possessed the property to the exclusion of the opposer who himself admitted that after Ivy's death in 1986 he did not enter the property. Counsel for the petitioner attempting to negative consent unfairly and unbecomingly sought to rely on half of a statement made by the opposer "*At no time whatsoever did she (Ivy) or anyone else acting on her behalf or with her authority consent to or give permission, leave or license to Ulric Thorne, deceased, and or his wife Marsha Thorne, deceased, to enter on to the land at Lot 30-31, Bushed Street, Uitlugt West Coast Demerara. . .*" he did not bring to the courts attention the remainder of the statement "*. . . and to occupy same to the exclusion of me or herself.*"

My Findings

It is uncontested that Ivy Maxwell was the mother of Lucille Watts and the grandmother of Ulric Thorne and Egerton Mortimer Maxwell, that Lucille and Ivy lived at lot 20 when Ulric, Marsha and their children moved in in 1984 and

that Lucille died in 1984 and Ivy died in 1986. It is also uncontested that sublot 'A' claimed by the petitioner is the same land as lot 20; that no rent was paid by Ulric, Marsha, nor the petitioner, to Egerton Mortimer Maxwell and that the opposer himself did not occupy lot 20 since 1986.

I find that Ulric and Marsha moved in with the consent of Lucille and Ivy and that that Ulric Thorne died May 28, 1987, and his wife Marsha died May 31, 2006, and that their children remained in sole occupation of lot 20 thereafter.

I also find that Lucille left lot 20 to Ivy, and that Ivy left lot 20 to Ulric Thorne and Egerton Mortimer Maxwell.

Law

The Title to Land (Limitation and Prescription) Act, Chapter 60:02, as amended by Act no. 6/2011 provides-

> 3. Where the Court is satisfied that the right of every other person to recover land or any undivided or other interest in land has expired or been barred and the title of every person to the land has been extinguished, title to the land may, subject to subsection (2), be acquired-
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> (a) by sole and undisturbed possession, user or enjoyment for not less than 12 years;
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> (b) if possession, user or enjoyment is established to the satisfaction of the Court; and

(c) if possession, user or enjoyment was not taken or enjoyed by fraud or by some consent or agreement expressly given for that purpose.

In *Toolsie Persaud Limited vs. Andrew James, Shivlochnie Singh and the Attorney General of Guyana* [2008] CCJ 5 (AJ) at paras 27 and 28 the Court explained the concept of possession-

"[27] We endorse the following remarks of Lord Browne-Wilkinson in the leading case, *JA Pye (Oxford) Ltd v. Graham* [2003] 1 AC 419 at [36]et seq 'Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Act. The question is simply whether the defendant squatter has disposed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner . . . except in the case of joint possessors, possession is single and exclusive, therefore if the squatter is in possession the paper owner cannot be….'

[28] Thus, the position is that a claimant to land by adverse possession needs to show that for the requisite period he (and any necessary predecessor) had -

(i) a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances ("factual possession"), and

(ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone

engaged with him in a joint enterprise on the land ("intention to possess").”

The petitioner's parents were in sole occupation of lot 20 since 1986. Two important circumstances existed however, namely, Ulric and Marsha entered into possession with consent, and Ulric is a beneficiary of Ivy entitled to a share in lot 20.

Family arrangements:

When, if at all, could time start running in favour of the petitioner and her predecessors in possession? When Ulric, Marsha and the children moved in with Lucille and Ivy they became the licensees of Lucille and Ivy, and occupied under a family arrangement, at least with Lucille and Ivy. The opposer claims that he was a part of that family arrangement and that Ulric went into occupation because he needed a place to live, Ivy needed looking after and they had agreed upon Ulric's occupation as a family. There is no evidence whatsoever to contradict the opposer's claim that they continued in occupation with his consent. The opposer points out that at the time of Ivy's death, the petitioner and her sister Fraulein, the sole witnesses, were minors and unlikely to be privy to the arrangements of the adults.

The petitioner through her counsel however submits that that license ended with the death of Ulric in 1989 and that Marsha's occupation was therefore adverse. The evidence is that after Ulric's death in 1989, Marsha continued in occupation with her children until her death in 2006. Marsha had entered into occupation at the same time as Ulric with the same permission as Ulric. When, if at all, was any license granted her to occupy terminated, thereby

creating a tenancy at will, at the expiration of which time could run in her favour?

It is undisputed that Marsha and her children were in sole and exclusive possession since 1989. Exclusive possession raises an inference of a tenancy but the law traditionally is that family arrangements do not create tenancies but mere licenses with no personal interest in the land even where the claimant is in exclusive possession- *Cobb v Layne* [1952] 1 All ER 1199; The existence of the family relationship itself, from which may be inferred an act of friendship or generosity, is often found to be an 'exceptional circumstance' that negatives any intention to create a tenancy- Lord Denning in *Facchini v. Bryson* (1952) 1 TLR 1386 at 1389; In *Romany v. Romany* (1972) 21 WIR 491 at 494, Georges JA in the Trinidad Court of Appeal said "where one family member helps another in a period of difficulty over accommodation there is usually no intention to create legal relationships so there can be no tenancy at will but merely a license."

How is it decided whether there is a tenancy at will or a licence? In coming to a decision that a son had been a licensee and not a tenant at will able to claim adverse possession of land he was put into possession of by his mother, even though he remained on it for more than thirty years after her death in 1939, Justice Worrel in *Edwards v Braithwaite* (1978) 32 WIR 85 looked at the manner in which the claimant had gone into occupation and whether there was ever any interference with the occupation so as to disturb the original license. Justice Worrel supporting his approach, pointed to - *Cobb v Lane* [1952]1 ALL ER 1199 Somervell LJ "The modern cases establish that, if there is evidence of the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in

deciding what the intention of the parties was." And Roskill LJ at 1248 "in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties show that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest." ; In *Booker v Palmer* [1942] 2 All ER674 at 676 Greene MR- "There is one golden rule which is of very general application, namely the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

Ulric and Marsha went into possession with the consent of Lucille and Ivy, under a family arrangement which negatives the presumption of a tenancy which may arise by exclusive possession. The opposer says that he was a party to that family arrangement. No evidence has been led from which may be inferred that the original license he claims came from him as well, was ever terminated. There was no evidence to show any interference with Marsha's possession as a licensee. It is uncontested that the opposer never attempted to take possession away from the petitioners.

I refer to "Mantha Ramamurti's The Law of Adverse Possession" 5th edition, 2009, Chapter IX, page 339, paragraph 23 entitled "Family Relationship rebuts presumption of adverse holding" -

> "It is a general principle that members of a family may not acquire adverse possession against each other in the absence of a showing of a clear, positive and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner a sufficient length of time to bar him under the statute of limitations

from asserting his rights - [*D'Ferro v. American Oil Co*, 5 Ha. 206 F.2d. 648] Stronger evidence of adverse possession is required where there is a family relation between the parties than where no such relation exists - [*McGuire v Wallis,* 231 Ark 506, *Staggs v. Story* 220 Ark. 823].It has been held that where one seeks to acquire title by adverse possession against his brothers and sisters, such a claim should not be sustained except upon a clear preponderance of the evidence - [*Lynch D. Lynch*, 236 S.C. 612]. The existence of a family relationship between the parties will prevent, or rebut, a presumption of adverse holding - [*Lynch D. Lynch; Whitaker v. Jeffcoat*, 128 S.C. 404; *Metze v. Metze*, 231 S.C.154]."

In the Guyanese case of Bisnauth v. Shewprashad [2009] CCJ 8, (2009) 79 WIR 339, where a son prescribed against his mother's property, the Caribbean Court of Justice held [para 11] that "the familial relationship raised a presumption of an intention not to create legal relations. The relationship supported inferentially the status of licensor and licensee."

In *Mathan v. Kujal* (2014) 85 WIR 383, the petitioner applied for land owned by her deceased husbands deceased father, in which property she had lived with her deceased husband and her deceased father-in-law whilst they were alive. Her brothers- and sisters- in -law opposed. The Court of Appeal overturned the declaration granted her by the Commissioner of Title finding that she went into possession with permission and that there was nothing on the record from which could be inferred a termination of that permission by her in-laws.

The fact that the petitioner's predecessors were put in possession by a family member, who was the person with legal dominion over the land, negatives any presumption of adverse possession. He who alleges must prove. It is for

the petitioner to prove that the continued possession was without the consent of, and adverse to the interest of the opposer.

This is even more difficult to prove in light of the fact that Ulric, on Ivy's death was legally entitled to a half share in the property according to Ivy's will. Could Ulric and his descendants adversely possess property in which he has an interest? Could his heirs at law adversely possess property in which he, and then they, on his death have an interest?

Co-owners:

On the death of Ivy, Ulric himself became entitled to a half interest in the property. On his intestate death Marsha became entitled to 1/3 of his half share and the petitioner and her siblings to share the remaining 2/3 of his half share equally. They were all entitled under the law of intestate succession to an undivided share in the property. Their occupation was then referable to lawful title. In *Thomas v. Thomas* (1855) 25 LJ Ch. 159, 161, Wood VC stated "Possession is never considered adverse if it can be referred to a lawful title."

Section 10 of the Title to Land (Prescription and Limitation Act) Chapter 60:02 provides at subsection 1 that "No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereinafter in this section referred to as "Adverse Possession")..."

In *Thomas v. Thomas* (1855) 25 LJ Ch. 159, 161, Wood VC stated "Possession is never considered adverse if it can be referred to a lawful title."

"Joint owners of land are entitled to make reasonable use of ALL the land so held proportionate to the share of each therein. Each owner is entitled to

access to the whole of the land, and to an interest in every square inch of it, proportionate to his share and to everything upon it." - per Dalton CJ (Ag.) in *re Downer* (1919) LRBG 165.

The petitioner, as an heir of Ulric, entitled to a share in the property, is entitled to make reasonable use of all the property. She, as a beneficiary, is in a position of a co-owner. Her possession and that of Marsha is referrable to a lawful title. Can time run in their favour?

By reason of section 12 of the UK Real Property Act and the 1874 Real Property Limitation Act, reproduced in Jamaica, Trinidad and the Bahamas, a co-owner in possession of the entirety of a property, or rent for the entirety, for their own sole benefit for the statutory period, was not deemed to be in possession on behalf of his co-owners and can prescribe against them. That section was never reproduced in Guyana. The Guyanese position is that set out in the decisions of our courts over the years.

In *re Downer* (1919) LRBG 165 Acting Chief Justice Dalton held that whilst title to a specific or definite portion of land held in undivided ownership could be acquired by prescription, title to an undivided share or interest in land held in joint ownership could not.

In *re Benjamin* [Petition No. 25 of 1933] Van Sertima J held that there are three sets of circumstances in which there can be granted title by prescription to an undivided interest in land, one of which he opined was "(a) Where one or more of the co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner or co-owners."

In *Dennis Li v. Lucy Walker* [1968] LRBG 341, the Guyana Court of Appeal comprising Luckhoo C, Bollers CJ and Cummings JA agreed that a co-owner can prescribe but held that "(iii) a co-owner can only prescribe against his fellow owner if he can prove that there was an ouster for the statutory period, and in the present case there was no evidence of any deliberate defiance by the respondent of her co-owners' title on which evidence of ouster could be based…"

In *Joyce Natalie Whyte v. Bebe Amena Ali*, Civil Appeal No. 13 of 1975 (unreported) the Guyana Court of Appeal comprising Chancellor J.O.F. Haynes, and Justices of Appeal D. Jhappan and K.M. George, questioned the accuracy of Justice Van Sertimas' finding in *Re Benjamin* that where one or more of the co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner(s) he may prescribe, on the ground that the cases upon which he based his decision were decided with reference to section 12 of the UK Real Property Act and the 1874 Real Property Limitation Act. George J.A. however went on to cite with approval the qualified formulation requiring proof of ouster, put forward in *Dennis Li v. Lucy Walker* [1968] LRBG 341 by Chancellor Luckhoo, where the learned Chancellor said -

> "I agree with what Van Sertima J. said in Re Benjamin (supra) at p. 169 (as far as it goes): " That one or more co-owners can acquire by prescription title to the undivided shares of another co-owner out of possession for the prescribed period."
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> The words "out of possession" bring into play the idea of ouster or dispossession which Blackstone in his commentaries defines as:
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> > "a wrong or injury that carries with it the amotion of possession; for thereby the wrongdoer gets into actual occupation

of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession and damages for the injury sustained."

(See 3 Bl. Com. 167 cited in 3 Strouds Judicial Dictionary, 3rd ed. At p. 2043)

In Murray v. Hall, (1849) 7 C.B. 441 and Jacobs v. Seward (1872) L.R. 5 H.L., it was held that one co-owner of land can only bring an action against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass. In the instant case there is no evidence of an ouster, that is to say, a deliberate defiance by the respondent of the other co-owner's title to the land."

In *Joyce Natalie Whyte v. Bebe Amena Ali*, George JA went on to say that "Accordingly the crucial issue to be resolved in this Appeal is *whether there is any or any sufficient evidence that the possession of lot 3 by the respondent and her predecessors in title all of whom were only entitled in undivided half share, was of such a nature as to amount to ouster of those who were entitled to the remaining undivided half share* under the will of Elizabeth Ellen Whyte." In that case the court found the co-owners had not been ousted - "In the present case what we have is simple evidence of exclusive possession; and I do not think that the possession is of such a prolonged duration as to raise the inference that the owners who were out of possession had been ousted."

The law seems to be therefore that as laid down by the differently constituted Courts of Appeal in *Dennis Li v. Lucy Walker* [1968] LRBG 341, and *Joyce Natalie Whyte v. Bebe Amena Ali*, Civil Appeal No. 13 of 1975 (unreported) that a co owner (or beneficiary) can prescribe against his fellow owner but only if he can prove there was an ouster in the sense of overt deliberate defiance of the co-owners title and sole defiant possession for the statutory period.

As between co-owners of personalty there is unity of possession, each is entitled to possession and use of the chattel and the mere enjoyment on one way or another by one co-owner cannot amount to conversion against the other. The assertion of exclusive rights is what is actionable.- *Winfield and Jolowisc on Tort*, 13th ed, p. 477. Time begins to run on the assertion of exclusive rights.

So the question then is, what constitutes ouster sufficient to start the period of limitation running?

The intention to exclude the co-owner must be overt, not a secret intention. In *Corea v Appuhamy* [1912] AC 230 at 236 the Privy Council said of the petitioner "His possession was in law possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of an ouster can bring about that result."

In *Fisher v Presser 1 Cowp.* 217 (as referred to in *Joyce Natalie Whyte v. Bebe Amena Ali*, Civil Appeal No. 13 of 1975 (unreported) Lord Mansfield at 218 said- " That possession of one tenant, as tenant in common can never bar his companion because such possession is not adverse to the right of his companion but in support of their common title, and by paying him his share he acknowledges his co-tenant. Nor indeed is a refusal to pay itself sufficient without denying him his title. But if upon demand by the co-tenant of his

moiety, the other denies his title, saying he claims the whole and will not pay, and continues in possession such possession is adverse and ouster enough."

Sole possession in and of itself does not suffice. In the Indian case of *Bhimmayya v Kundana Bibi* 22 CUT L.T. 51 it was said "It is well known that between co-sharers mere possession by one co-sharer would not constitute ouster unless there is some material to justify an inference that he either expressly or by implication refused to allow the other co-owner to be in possession or to participate in the enjoyment of the joint property."

The Indian Patna High Court in *Dipnarain Rai v. Pundeo Rai* AIR 1947 Pat 99 per Ray J- "As regards co-owners, the law is that there can be no adverse possession by one co-owner unless there has been a denial of title and an ouster to the knowledge of the others."

From what acts of the petitioner and her predecessors can we infer ouster of the opposer and a denial of his title? They did not refuse him rent, he did not ask for it. They did not evict the opposer, he had left voluntarily years ago when he got married. They did not prevent him from resuming residence, he had not attempted to occupy.

It was *after* the filing of this petition that any acts of denial or ouster took place. The act of filing the petition itself in 2010, the demolition of the building in 2015. Those are clearly acts of defiance, but performed after the relevant period.

It must be noted that even at the date of filing of the petition the petitioner did not make her open her intention to deny his interest. She did

not name the opposer as her uncle, and an heir of Ivy, as an interested party, and did not serve him.

In the words and by the test of George JA in Joyce Natalie Whyte v. Bebe Amena Ali, "the crucial issue to be resolved . . . is whether there is any or any sufficient evidence that the possession of *lot 20 by the petitioner* and her predecessors in title all of whom were only entitled in undivided half share, was of such a nature as to amount to ouster of those who were entitled to the remaining undivided half share under the will of *Ivy Marshall*."

In that case he found that the beneficiary out of possession had not been ousted - "In the present case what we have is simple evidence of exclusive possession; and I do not think that the possession is of such a prolonged duration as to raise the inference that the owners who were out of possession had been ousted."

In this case I find there was exclusive possession in the petitioner and her predecessors but that it was taken by consent and then continued whilst there existed a lawful right for them to occupy. Their possession was under those circumstances not of such a prolonged duration, nor of such a manner, from which can be inferred a denial of the opposer's interest such as to oust him.

<u>Order</u>

As a consequence of all of the above, I hereby dismiss the petition.

Nicola Pierre,
Commissioner of Title,
March 3, 2017.