

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE



SVGHCV2017/0070

BETWEEN:

FELIX DEROCHE

CLAIMANT

AND

MARC RICHARDSON

AND

AXIS LTD

AND PLUMBING DESIGN & INSTALLATION LIMITED

DEFENDANTS/
ANCILLARY CLAIMANTS

AND

ANDRE DEROCHE

FOURTH DEFENDANT/
ANCILLARY DEFENDANT

AND

ANDRE DEROCHE

SECOND ANCILLARY
CLAIMANT

AND

FELIX DEROCHE

SECONDARY ANCILLARY
DEFENDANT

Appearances:

Mr. Stanley John Q.C. with Mr. Akin John for the Claimant/First Ancillary Defendant

Mr. Jonathan Lewis for the First, Second and Third Defendants/First Ancillary Claimant

Mr. Joseph Delves for the Second Ancillary Defendant and Fourth Defendant/Second Ancillary Claimant

2019: March 12
June 4



JUDGMENT

Byer, J.: In the words of Roddy Doyle "*when you grow up on an island what matters is how you stand to the sea*". In this case and on this island of Canouan, what mattered, it appeared to this court was how one stood up to family and who after that is left to fall and fail.

Background

[1] The claimant claimed by way of Amended Fixed Date Claim the following reliefs:

(1) A declaration that the First, Second and/or Third Named defendants, Marc Richardson, Axis Ltd and/or Plumbing Design & Installation Limited are not entitled to possession of the property on Canouan which is the subject matter of these proceedings (hereinafter referred to as the "subject Property");

(2) An injunction restraining the First, Second and Third defendants whether by themselves their servant's agents or otherwise howsoever from entering on and also from erecting any structures on the subject Property;

(3) Damages for trespass;

(4) Costs and

(5) Further or other relief.

[2] The basis of the claimant's claim is that he became entitled to possession of the subject Property under and by virtue of a Deed of Conveyance made 11 February, 2011 and registered at the Registry of Deeds as Deed No. 2785 of 2011, whereby Olga Michelle DeRoche conveyed the entire legal and beneficial title therein to him for an estate in fee simple absolute in possession.

[3] It appeared from the documentary evidence adduced at trial that title to the property was previously vested via a Crown Grant No. 39 of 1996 dated 5 July, 1996 in Lawrence DeRoche and the said Olga Michelle DeRoche his wife as co-owners.

[4] By Amended Defence filed on 12 December, 2017, the First and Second defendants deny ever being in possession of the subject Property.

[5] However, the Third defendant admits that it entered into possession of a small portion of the subject Property as a tenant of the Fourth defendant Andre DeRoche, pursuant to a purported commercial lease agreement.

[6] Subsequently, the First, Second and Third defendants then joined the Fourth defendant to these proceedings by way of an Ancillary Claim filed on 6 February, 2018 wherein the facts contained in the Amended Defence were substantively repeated and an order sought for the said Andre

DeRoche to indemnify it, in the event that the Court found that the claimant has proper title to the subject Property.

- [7] The Fourth defendant duly filed a Defence to the Ancillary Claim and made a Counterclaim against the claimant Felix DeRoche on 17 April, 2018. By this document he stated that pursuant to a purported commercial lease dated 1 April 2016, the Third defendant was in occupation of the subject Property between May, 2016 and July, 2017 as his tenant and he was the landlord.
- [8] The Fourth defendant further asserted, that an undivided half share in the subject Property was granted to him by way of a Deed of Assent numbered 1703 of 2004 and dated 10 May, 2004 and made between Carlyle Dougan, Executor of the Estate of Lawrence (Larry) DeRoche deceased and himself conveying the interest of the said Larry DeRoche by way of the Last Will and Testament of the said Larry DeRoche. Additionally, the Fourth defendant pleaded that the remaining undivided half share therefore belonged to Michelle DeRoche, Larry DeRoche's surviving widow [*and the Claimant's predecessor in title*] and that the said Michelle DeRoche had agreed to sell her undivided half share to the Fourth defendant.
- [9] The Fourth defendant pleaded further that in or about 1996, during the lifetime of Larry DeRoche, on the representations of the said Larry DeRoche, he made investments in the subject Property to the tune of \$100,000.00 and that he was never reimbursed for these expenditures.
- [10] In light of those facts as pleaded, the Fourth defendant sought relief from the Court *inter alia*, as follows:
- (1) A declaration that the subject Property was owned by Larry DeRoche and Michelle DeRoche as Tenants in Common;
 - (2) A declaration confirming his ownership of the subject Property and
 - (3) Damages for breach of contract, interference of contract or loss of rental income.
- [11] In response the claimant filed a Defence and Counterclaim to the Ancillary Claim/Counterclaim on 15 May 2018. In this document the claimant once again asserted his title to the subject Property by virtue of Deed 2785 of 2011. Further, he pleaded that his predecessors in title Larry DeRoche and Michelle DeRoche owned the subject Property as joint tenants and that the joint tenancy having not been severed during Larry DeRoche's lifetime, Michelle was therefore entitled to the entirety of the subject Property.
- [12] Accordingly, he prayed for:
- (1) Cancellation of the Fourth defendant's purported Deed No. 1703 of 2004;
 - (2) An account of all monies received by the Fourth defendant in respect of the illegal occupation of the subject Property by the First, Second and/or Third defendants and

(3) A permanent injunction restraining the Fourth defendant from entering the subject Property.

[13] The Fourth defendant filed a defence to the Claimant/Second Ancillary Defendant's Counterclaim on 15 October, 2018 denying the Fourth defendant's entitlement to the reliefs being sought.

[14] Therefore in this court's mind, the issues for its determination must surround the circumstances of the deeds to the claimant and the Fourth defendant. The First to Third defendant's fate rests solely on that determination.

[15] That being said, it is clear to this court that the issues for determination are as stated by both counsel for the claimant and the Fourth defendant which this court will consolidate for ease of reference.

The Issues

- (i) That through Crown Grant No. 39 of 1996 dated 5 July, 1996 Larry DeRoche and Michelle DeRoche held title to the subject Property as Joint Tenants and not Tenants in Common.
- (ii) That if title to the subject Property was held as Joint Tenants by Larry DeRoche and Michelle DeRoche, whether the Joint Tenancy was or was not severed.
- (iii) Whether Andre DeRoche was entitled to a beneficial interest in the subject Property in that whether Carlyle Dougan had any title to convey to Andre via the deed of assent.
- (iv) Whether or not the claimant is barred by the Limitation Act CAP 129 from claiming recovery of possession of the subject Property in that occupation/possession of Michelle DeRoche's title to her half share was extinguished by the Fourth defendant's occupation.
- (v) Whether or not the First and Second defendants were in occupation of the subject Property between April, 2016 and July, 2017 or at any time whatsoever.
- (vi) Whether or not the Third defendant's admitted occupation of the subject Property between April, 2016 and July, 2017 amounted to trespass entitling the claimant to damages.
- (vii) Whether or not the Fourth defendant is entitled to damages for breach of contract and/or interference of contract and/or loss of rental income beginning July, 2017 and continuing until determination of the suit.
- (viii) Whether the Fourth defendant must indemnify the Third defendant.

Issue #1: That through Crown Grant No. 39 of 1996 dated 5 July, 1996 Larry DeRoche and Michelle DeRoche held title to the subject Property as Joint Tenants and not Tenants in Common.

Issue #2: That if title to the subject Property was held as Joint Tenants by Larry DeRoche and Michelle DeRoche, whether the Joint Tenancy was or was not severed.

- [16] In this court's opinion these two issues are so closely inter-related that it makes the most sense to deal with them together.
- [17] The contention of the claimant on these issues is that the root of title of Larry and Michelle DeRoche (the owners) was obtained through a Crown Grant No. 39 of 1996 dated 5 July 1996. The claimant submitted that the document that conveyed the interest to the owners clearly did not use words of severance which by law must have given rise to a tenancy in common. The submission of the claimant was that this court is being asked a very specific question with regard to the creation of the joint tenancy and the same can be answered only if the Court is satisfied that the four unities that support that creation were present. Counsel identified these four unities as the unity of possession, unity of title, unity of interest and unity of time. All of these, counsel submitted existed with the owners and as such the initial grant was to the owners as joint tenants.
- [18] The claimant therefore submitted that there being no issue as to whether the initial title created a joint tenancy it was also pellucid, that there had been no action on the part of the owners that severed it during the lifetime of Larry DeRoche.
- [19] In support of these submissions, counsel for the claimant identified three ways in which a joint tenancy could have been severed. These he identified as:
1. An act by either party interested in operating his own share;
 2. By mutual agreement and
 3. By a course of dealing as between the parties that they considered the property to be held as tenants in common¹.
- [20] Upon an examination of the evidence, counsel for the claimant therefore submitted that there was no evidence which lent itself to the conclusion that any of these factors existed and as such it was clear that there had been no severance. Therefore, at the date of death of Larry, he still held the property as joint tenant with Michelle, his wife.
- [21] The Fourth defendant (who was the only defendant who submitted closing submissions to this court) admitted that the initial conveyance to the owners amounted to a joint tenancy but the nub of his argument was that the joint tenancy had been severed by Larry during his lifetime.

¹ Paragraph 4.5 of the submissions of the Claimant filed 28/3/19

[22] Interestingly enough, Counsel for the Fourth defendant agreed with the submission made on behalf of the claimant as to the manner in which a joint tenancy can be severed. Counsel for the Fourth defendant submitted to this court that bearing that in mind it must also be recognised that the law also seeks to take into consideration several other factors in making a determination that there was in fact severance.

[23] The factors identified by Counsel for the Fourth defendant which the court must also consider were as follows:

1. That equity leans against the presumption of joint tenancies but favours the creation of tenancy in common².

2. In looking at whether severance took place, a differentiation must be made between severance by mutual agreement and severance by virtue of a course of dealing between parties. The Fourth defendant submitted that although both propositions require an examination of the intention of the parties, the real question must be how the parties dealt with the property³.

3. When one looks at the intention of the parties and as to whether they severed the joint tenancy where there is no specific act, it would be more readily inferred where the parties are married or where there is evidence that the relationship has broken down⁴.

4. Although Counsel for the Fourth defendant accepted that a will cannot be the instrument to sever the joint tenancy, he submitted that mention of property in a will purportedly held in joint tenancy can be used as evidence of a course dealing consistent with individual entitlements⁵.

5. Counsel for the Fourth defendant also submitted that the courts in considering if a joint tenancy was severed are more likely to find severance where the parties plainly and openly deal with the property in terms of individual entitlements⁶.

[24] It is on the basis of these factors and the evidence that was led before this court, the Fourth defendant submitted that the joint tenancy had been severed and therefore Larry was entitled to deal with the subject Property in the manner that he had, including bequeathing his share in the same to the Fourth defendant.

Court's Considerations and Analysis

² Paragraph 25 of the Fourth Defendant's submissions filed 22/3/19

³ Paragraph 26 of the Fourth Defendant's submissions filed 22/3/19

⁴ Paragraph 27 of the Fourth Defendant's submissions filed on 22/3/19

⁵ Paragraph 28 of the Fourth Defendant's submissions filed on 22/3/19

⁶ Paragraph 29 of the Fourth Defendant's submissions

- [25] Having viewed the submissions by both parties and in particular the Fourth defendant, it certainly appears to this court that it is not disputed that the initial acquisition of the land in Canouan by the owners was in fact pursuant to a joint tenancy. I therefore find that there is no need for this court to make a finding to that effect, but simply to affirm the same.
- [26] What is of more importance however is the question as to whether that joint tenancy was severed during the lifetime of Larry DeRoche, carving out his interest in the said subject Property separate and apart from his wife Michelle?
- [27] In order to determine this, it is imperative that the evidence that was elicited at trial and was before the court must be examined.
- [28] It is accepted by both sides that there are certain ways in which a joint tenancy can be severed. These were enunciated in the case of **Williams v. Hensman**⁷. In that case the learned Vice Chancellor Sir W. Page Wood stated that these were⁸:
- a. An act by anyone of the persons interested operating on his own share. That is *“the right of each joint tenant is a right of survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing of course at the same time his own right of survivorship”*; (ground A)
 - b. By mutual agreement; (ground B)
 - c. By any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. Thus *“when the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention with respect to the particular share declared only behind the backs of the other persons interested”*. (ground C) (My emphasis added)
- [29] From the evidence, it appeared to this court that there were two acts that the Fourth defendant could have relied on to establish the first way set out above. One was evidence as set out in the witness statement of the Fourth defendant. In the witness statement, he made mention of having given a lawyer in St. Vincent instructions on the behalf of Larry to prepare a deed of gift to himself. He said this⁹:
- “Around 1996 or 1997 or so, I had an attorney prepare a deed of gift from Larry to myself, with Larry having a life interest in the property. He never got around to signing a deed of gift to me. As time passed, he eventually refused to sign the deed of gift unless I included a young teenage girl name*

⁷ [1861] 1 J& H 546

⁸ At page 558

⁹ Paragraph 27 of the Witness Statement of the Fourth Defendant

Kadean Baptiste (who now lived with him) in my development plans as partner in whatever business I chose to operate from the property.”

This deed remained unexecuted by Larry.

- [30] The second act that appeared from the evidence that may have amounted to an act by Larry operating his own interest was that by his Last Will and Testament dated 31 December 1997 he purported to devise his interest to the Fourth defendant.
- [31] In this court's mind it must be noted immediately that while it is accepted that a will is of no effect until the testator's death and that it cannot operate as an alienation of the interest of the joint tenant as the severance must be *inter vivos*¹⁰, this court however accepts that the fact that Larry made mention of this property in his will in this manner must be taken into consideration by this court, (an issue I will return to in a different context later in this judgment) whatever the limitations of that assistance. Therefore, despite taking into account this consideration, this court is satisfied that neither this act nor the purported instructions given to an attorney to prepare an unexecuted deed of gift lead to the inescapable conclusion that Larry considered the tenancy severed. Therefore, I find that the ground "A" of the **Williams v Hensman** case has not been met.
- [32] Having said so I must also go on to examine the other two means identified by the court in the **Williams v. Hensman** case¹¹ in which a joint tenancy can be severed.
- [33] With regard to ground "B", that is, by mutual agreement, both parties agree that there was no such agreement and therefore this ground does not have to detain this court.
- [34] Ground "C" is however an entirely different matter.
- [35] The claimant has submitted that there was no evidence before the court that supported a course of dealing on the part of Larry that would have led to severance of the joint tenancy. The Fourth defendant on the other hand, states as is expected, the complete opposite.
- [36] In this regard, the Fourth defendant drew the court's attention to some of the evidence that was led which he contended was not only uncontroverted but was also substantiated by Larry's instructions that were issued with regard to his dealing with the subject Property.
- [37] The Fourth defendant relied on the following evidence:
- 1) The devise in the will of Larry that (the Fourth defendant) was entitled to and should receive Larry's half share in the property; (documentary evidence)
 - 2) That the Fourth defendant and Larry had a good relationship throughout Larry's lifetime to the point that Larry had allowed him to invest in the property; (evidence of the Fourth defendant)

¹⁰ Megarry's Manual of The Law of Real Property (6th Ed) by David Hayton at page 325

¹¹ Op cit

3) That Michelle and Larry were separated for many years previous to his death, and that he, Larry considered the subject Property to be his while the property in the United States to be Michelle's; (evidence of the Fourth defendant)

4) That upon Larry's instructions a deed of gift, that remained unexecuted, gave the Fourth defendant the subject Property; (evidence of the Fourth defendant)

5) That Michelle acknowledged that she only had a half share in the subject Property when she agreed to sell the Fourth defendant her share¹². (evidence of the Fourth defendant)

[38] The finding of whether this evidence relied on by the Fourth defendant amounted to a course of dealing highly suggestive of severance is one that can only be determined on a finding of fact by this court.

[39] The Canadian case of **Hansen Estate v. Hansen**¹³ gave some useful guidance as to the nature of the test to determine whether the course of dealing relied on, amounted to the severing of a joint tenancy. The court held that the court is required to make a determination based on the totality of the evidence, as to whether the parties intended to treat the joint tenancy at an end. The decision of the court given by Winkler C.J.O noted that the test "*does not require proof of an explicit intention communicated by each owner to the other(s) to sever the joint tenancy. Rather it requires that the co- owners knew of the other's position and that they all treated their respective interests in the property as no longer being held jointly*".

[40] Therefore in this court's mind, it would be entirely improper to simply dismiss the wealth of evidence that was led by the Fourth defendant.

[41] It was clear in this court's mind, that the claimant although historically would have been the party who knew Larry the longest, that there were periods during Larry's lifetime when the claimant was no more than a passing visitor to his life.

[42] The claimant gave his evidence before the court largely in terms of generalisations and responses to the tune of "as far as I am aware" especially with regard to the state of the relationship between the owners. What he was however able to say, is that during the majority of the time that Larry worked on the property or did anything to the same, Michelle was not there, yet he consistently maintained that it was a joint venture as between the owners.

[43] When this is weighed against the evidence of the Fourth defendant, whose evidence was not by and large challenged, the court accepts on a balance of probabilities that the Fourth defendant's knowledge and interaction with Larry, gave him the true perspective as to how Larry dealt with the subject Property.

[44] In this regard, I therefore accept on a balance of probabilities the version of events as given by the Fourth defendant.

¹² Witness Statement of the Fourth Defendant

¹³ 109 O.R.(3d) 241

- [45] Therefore, in this court's mind, it is not about whether the unities that characterize the joint tenancy had indeed been destroyed but rather whether the requisite intention to sever the joint tenancy had been evinced by the parties¹⁴.
- [46] In looking at the evidence and in particular the clear evidence of the manner in which Larry dealt with the subject Property (without this court making a determination as to the source of the funds to do so), the uncontroverted fact that he made the Fourth defendant his "man-of-business", that there was no evidence of him going to the United States or Michelle visiting during a substantial period of their lives and marriage even with the reports of her serious illness; even the evidence of the Fourth defendant himself as to his exhibited resistance to the inclusion of a young lady in a purported deed of gift that was to be executed by Larry, despite Larry's marriage still remaining in existence all point to the conclusion in this court's mind, that he, Larry, no longer considered that he was required to consult Michelle while dealing with the property and that he could manage the Subject Property as his own without reference to her.
- [47] I also accept that this was indeed the position, when one considers what happened upon the death of Larry. As I previously stated in this judgment, it is without doubt that a will cannot sever a joint tenancy. Any acts of severance must be done *inter vivos*. However, in looking at this issue in another way, I accept the submission of counsel for the Fourth defendant, that this fact in which Larry made the devise in his will to the Fourth defendant of his half share, in this court's mind can be read with the totality of the evidence as referred above that Larry did indeed deal with his share as his own. This position in this court's mind is even more evident when one considers the written acknowledgment of Michelle's to the Fourth defendant and her legal counsel that her entitlement was confined to a one half share only of the subject Property.
- [48] I therefore find that based on the indicators identified above that the joint tenancy between the owners was severed during the lifetime of Larry and that the holdings of the subject Property were in fact as tenants in common as between the owners.
- [49] I therefore grant the relief sought by the Fourth defendant in his Ancillary Claim¹⁵ brought against the claimant herein and declare that the joint tenancy between Larry and Michelle DeRoche was terminated during the lifetime of the said Larry DeRoche.

¹⁴**Sampaio Estate v Sampaio** 90 D.L.R (Fourth) 1222

¹⁵ The relief as follows:

1. A declaration that Larry DeRoche and the said Michelle DeRoche purchased the following land (hereafter called the said land) as tenants in common:
ALL THAT LOT PIECE OR PARCEL OF LAND situate on the acquired Estate of Canouan in the State of Saint Vincent and the Grenadines being SEVENTEEN THOUSAND FOUR HUNDRED AND TWENTY TWO SQUARE FEET (17,422 sq ft) in extent numbered Plan Number GR2/148 or howsoever otherwise the same may be known distinguished or described together with all buildings and erections thereon.
2. Alternatively, a declaration that is the said land was purchased as joint tenants by Larry DeRoche and Michelle DeRoche, that the joint tenancy was determined during the life time of Larry DeRoche.
3. A declaration that the Second Ancillary Claimant is the legal owner of an undivided half share in the said land and a beneficial owner of an undivided half share in the said land.

[50] Having made that declaration, the question must now be what is the position of the claimant and his, if any, entitlement to this land.

[51] However before I address my mind to that issue, I need to deal with one issue very shortly.

Issue #3: Whether Andre DeRoche is entitled to a beneficial interest in the subject Property in that whether Carlyle Dougan had any title to convey to Andre via the deed of assent.

[52] Having found that the joint tenancy had been severed during the lifetime of Larry, he was therefore entitled to devise the said parcel to the Fourth defendant. However, at the time of death of Larry he was only entitled to his one-half share in the said property and that is all that he could have conveyed to the Fourth defendant. Carlyle Dougan as the Executor of the said estate of Larry was therefore entitled to convey that share to the Fourth defendant.

[53] The Deed of Assent dated 10 May 2004 is therefore valid and the Fourth defendant is entitled to a half share of the said property by virtue of this document. The prayer contained in the counterclaim of the claimant filed on 15 May 2018 for an order cancelling the said Deed of Assent is therefore refused.

[54] The declaration sought by the Fourth defendant that he is legally entitled to an undivided half share is therefore granted.

Issue #4: Whether or not the Claimant is barred by the Limitation Act CAP 129 from claiming recovery of possession of the subject Property, in that possession/occupation Michelle DeRoche's title to her half share was extinguished by the Fourth Defendant's possession and occupation.

[55] This issue deals with not only whether the Fourth defendant can rely on the tenets of adverse possession as against the entitlement of the claimant but in doing so, this court is required to also examine the alternate proposition of the Fourth defendant, of whether he has established a beneficial interest in the portion of the subject Property that was retained by Michelle, before she conveyed the same to the claimant.

[56] Let me be clear, having determined that the owners had severed the joint tenancy during the lifetime of Larry, it cannot be disputed that when Michelle purported to convey her interest in the said property to the claimant, all he would have been entitled to receive was what she herself was entitled to, that is, an undivided half share in the said property. It is this half share that the Fourth defendant has now laid claim to, either in his own right as per the shield of the Limitations Act or as

4. Damages for breach of contract and/or interference of contract and/or loss of rental income of \$800.00 per month beginning on June 2017 and continuing until determination of the suit.

5. A permanent injunction restraining the Second Ancillary Defendant, his agents servant or howsoever otherwise, from entering the said Land.

6. Such further or other relief as the Honourable Court deems fit in the circumstances

7. Costs

a beneficiary of a trust established, as he claimed, as a result of entering into an agreement with Michelle for the purchase of her said interest.

[57] The submission of the claimant was therefore by necessity, two-fold.

[58] In relation to the issue as to whether the Fourth defendant is entitled to a beneficial interest pursuant to a purported Agreement for sale, the claimant submitted that the Fourth defendant cannot rely on this document. The submission of the claimant to the court was three-fold:

1) The Fourth defendant having failed to register the agreement pursuant to statute meant that he having ran afoul of statutory provisions rendered him incapable of relying on the same;

2) Further that the agreement itself was not executed pursuant to statute and

3) That there was in fact nothing in the agreement or otherwise that showed that the "offer" of Michelle to the Fourth defendant had in fact been accepted by the Fourth defendant amounting to the creation of a binding contract.

[59] The claimant further contended that the one act that the Fourth defendant relied on as evidencing an "acceptance" was the payment of a deposit of \$10,000.00 purportedly to the attorney for Michelle. The claimant contends that there having been no supporting evidence led is with regard to this payment the agreement was not finalized and there could not amount to a binding contract as between the parties. Additionally, counsel for the claimant submitted, that in any event, the Fourth defendant having purportedly made this payment in 2016, some 9 years after the initial "agreement" and after Michelle had written to her attorney in July 2009 that the Fourth defendant had two months to complete the transaction, by necessity it meant that by the time the Fourth defendant may have made any payment, Michelle was entitled to consider that the offer to the Fourth defendant had long expired. Michelle was therefore entitled in 2011 to convey the property to the claimant.

[60] With regard to the plea in the alternative that the Fourth defendant had established a right to the property by virtue of adverse possession the claimant submitted that the Fourth defendant's occupation and possession of the property was always with the permission of either Larry before his death or with the permission of Michelle after his death. His possession, therefore according to the claimant, was never with the intention, to oust the entitlement of the owners.

[61] The Fourth defendant on the other hand claims that his occupation of the said property has been uninterrupted and without interference since the death of Larry in 2001. He sought, by his counsel's submissions it appears, to rely on this occupation as laying his foundational right to then enter into the lease with the Third defendant and that having done so, the claimant not having taken steps to assert his rights until 2017 to oust his occupation were of no moment. The Fourth defendant therefore contended that by 2017, he had been in exclusive occupation without reference to anyone that the claimant was barred from claiming any interest in the land by reliance on his deed from Michelle as Michelle's entitlement to the subject Property had been ousted by his occupation. The Fourth defendant further contended that even though it was true that he had been willing to pay

Michelle for her share, this act did not in any way affect his claim under the Limitations Act he having exhibited at all times his the requisite intention to possess.

Court's Considerations and Analysis

[62] In looking at this issue, it was clear to the court that the Fourth defendant, despite submissions to the contrary was seeking to "have his cake and eat it too".

[63] The facts that this court accepted on a balance of probabilities, with regard to the occupation of the property by the Fourth defendant are that:

1) Before the death of Larry, the Fourth defendant occupied the said property at the invitation of Larry;

2) The Fourth defendant dealt with and possessed the same solely with reference to Larry's ownership and

3) Larry having died in 2001, the Fourth defendant's occupation did not cease but continued on the basis of the initial invitation and the financial investment this court accepts he made.

In fact, although not raised by the parties it was of note to this court that in the witness statement of the Fourth defendant he admitted that he was in fact "dispossessed" of the premises shortly before Larry's death¹⁶. I therefore accept that the Fourth defendant never, either before or immediately after Larry's death possessed the property with the requisite intention. I am fortified in that view by the evidence of the Fourth defendant on cross examination as to why he never pursued the action against Larry for the monies he said he invested in the subject Property at the time he was dispossessed. He told this court that he did not bother when he realized that Larry had in fact devised his interest in the said property to him¹⁷. So, in this court's mind, the Fourth defendant never formed the *animus possidendi* to occupy or possess the premises in his own right.

[64] Once the Fourth defendant received his deed for Larry's half share, he would have possessed the subject Property or at least his half share based on his deed.

[65] Therefore, the only person who he could have been seeking to dispossess was Michelle.

[66] In the evidence that was elicited at trial the Fourth defendant does not deny that upon the death of Larry he commenced negotiations with Michelle for her half share in the property. Indeed the evidence of Kemmie Jones, the witness for the Fourth defendant, clearly shared that when this witness lived on the subject Property there was a sign erected that stated that the Fourth defendant and Michelle were in fact the owners of the property and any inquiries were to be directed to them. There was no indication as to when this sign was removed, if it was removed, but certainly up to 2017 when this witness left the property there was no indication that the existence of this sign had ceased.

¹⁶ Paragraph 28 of the Witness Statement of the Fourth Defendant

¹⁷ Paragraph 32 of the Witness Statement of the Fourth Defendant

[67] It therefore is of some consternation to this court that the Fourth defendant seeks to maintain his position of “adverse possession” from as early as 2001.

[68] The cases on the requirements of adverse possession are indeed numerous and especially so in this region where it appears the abandonment of property is almost second nature, as is the corollary of usage of land that does not belong to the possessor.

[69] Courts in this jurisdiction have repeatedly made it clear what is required to establish a right under the various limitation acts to someone else’s property. One such case was that of **Hector Caesar Luke v Bernard Alexander**¹⁸ in which Rawlins J as he then was stated the following:

“[15] *What are the basic principles which they state for the purposes of this case? The Court will, prima facie, ascribe possession to the paper owner of land or a person who can establish title through the paper owner. The court can only ascribe possession to a person who does not have paper title if that person has factual possession and animus possidendi, the requisite intention to possess the land. Factual or physical possession means a single and conclusive possession, or exclusive physical control of the land. The acts that constitute a sufficient degree of exclusive physical control will depend upon the circumstances, particularly the nature of the land and the manner in which land of that nature is commonly used and enjoyed. The animus possidendi, has been described as the intention to possess the land to the exclusion of all other persons, including the owner with the paper title, so far as is reasonable and so far as the process of law will allow....”*

[70] Thus it is clear that the requirement is that the intention must be to exclude all others. It is not necessarily an intention to own, it is an intention to possess¹⁹ that is, even as against a squatter.

[71] However in this court’s mind this was not the intention of the Fourth defendant. The Fourth defendant has submitted, relying on the authority of the **Pye v Graham** case²⁰ that even with the Fourth defendant having offered to buy the half share of Michelle, that this did not amount to an acknowledgment that by the Fourth defendant that he had not possessed the subject Property in his own right. I however find that this does not afford the Fourth defendant any protection. The intention to be determined is; what was the intention in holding/possessing/occupying the property? Indeed, it is true, that if a squatter was on land that he possessed and the owner came to offer to sell the land, if he intended all along to possess it, that is to keep out the owner, then certainly if the same is offered to him for purchase, then that would not interrupt his intention. In the case at bar, I do not find that the Fourth defendant however ever had that intention.

¹⁸ DOMHCV 2001/0161 at paragraph 15

¹⁹ J. A. Pye (Oxford) Ltd v Graham [2002] UKHL 30 at paragraph 42

²⁰ OP cit at paragraph 46

- [72] Indeed, I find from the start of the Fourth defendant's possession that he behaved and conducted himself with the knowledge of the other owner. His intention to acquire Michelle's share in this court's mind evidenced his lack of intention to possess to her exclusion as is required. All of the acts of the Fourth defendant in this court's mind amounted to the intention to lawfully acquire Michelle's interest and belies the relief prayed for on his behalf in this regard.
- [73] I therefore do not find that the Fourth defendant has acquired the share of Michelle by way of dispossession and therefore the claimant is not barred by virtue of the provisions of the Limitations Act from claiming the interest that he was entitled to as conveyed by Michelle.
- [74] However this court must still address its mind to whether the Fourth defendant in any event acquired a beneficial interest in the said property.
- [75] The genesis of this claim is the "agreement" that the Fourth defendant stated he had entered into with Michelle.
- [76] It is therefore necessary to examine the provisions of this document upon which he relies:

*"295 Maple Street Apartment 5C
Brooklyn, NY 11225*

October 23, 2007

*Mr. Andre Deroche
Canouan Island
St. Vincent & the Grenadines*

Dear Mr. Deroche,

As per our telephone conversation, I am, prepared to sell you my 50% share of the property at Balance Village in Canouan which we now own jointly. I understand that you are sourcing bank financing for this purchase and would like this letter to serve as confirmation of my willingness to sell my share to you for the sum of US\$40,000.00 (forty thousand United States dollars) payable by bank draft. I understand that the signing of the documents necessary for you to receive title and the transfer of the amount of the purchase price will be done simultaneously and will take place in Brooklyn New York.

Please do your best to expedite all the necessary to bring this transaction to a close as soon as possible.

*Regards,
Michelle Deroche" (My emphasis added)*

- [77] When one closely examines this document it is clear that it meets the requirements of an agreement in that the parties are clear, the property is clear and the purchase price is clear.

[78] Indeed, even the share that Michelle is selling is clear. The unfortunate matter is that this document was never registered.

[79] The provisions of the Registration of Documents Act CAP 132 (RDA) clearly provide for all documents that relate to the transfer of title to be registered as a mandatory requirement²¹. Section 5 (2) then goes on to state that if any such document is not registered then it “**shall be deemed fraudulent and void as to the real estate affected by such a document against any subsequent purchaser...for valuable consideration without notice...**”.

[80] Thus it is clear in this court’s mind that if indeed there had been a valid agreement, it could have been argued on the part of the Fourth defendant that a relationship of trustee and beneficiary would have been created between Michelle and himself²². However, having failed to register the said agreement the provisions of the RDA make it clear that this purported agreement is now “fraudulent and void” and ineffective as against the claimant’s deed from Michelle. The question however must be, how does the failure to register the agreement affect the efficiency of the agreement against Michelle. In order to consider this it is important to look at the chronology of events that occurred between Michelle and the Fourth defendant:

i) By the letter of 2007, Michelle agreed to sell the Fourth defendant her share to the subject Property.

ii) By letter dated 21 July 2009. Michelle intimated to Carlyle Dougan, that the Fourth defendant some two years later had still failed to complete the transaction and that she was prepared to give him a further two months to do so. That extended period would have expired on 21 September 2009.

iii) By Deed dated 11 February 2011, the claimant paid \$10,000 to Michelle for her interest in the said property.

iv) In 2016, the Fourth defendant alleged he paid \$10,000 to Carlyle Dougan for Michelle’s interest in the subject Property.

²¹ Section 5 RDA

²² **Lysaght v Edwards** [1876] 2 ChD 505 at 507 “That being so, the next point I have to consider is, what is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly, it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.Now, what is the meaning of the term “valid contract?” “Valid contract” means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser — a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor.”

[81] This court determines that by 2016 when the Fourth defendant purportedly made this payment, that any offer that had been made by Michelle had long expired and therefore the payment and the agreement were ineffective to create a relationship of beneficiary and trustee as between the Fourth defendant and Michelle. Further, the Fourth defendant's case is far from assisted by his failure to produce to this court any evidence of the payment having been made to Mr. Dougan. This too was unfortunate.

[82] I therefore find that the Fourth defendant having not established this payment nor having shown to this court on a balance of probabilities that the payment had been made and received in furtherance of the agreement as between himself and Michelle, the Fourth defendant's prayer for a declaration of beneficial ownership is also denied.

Issue #5: Whether or not the First and Second Defendants were in occupation of the subject Property between April, 2016 and July, 2017 or at any time whatsoever.

Issue #6: Whether or not the Third Defendant's admitted occupation of the subject Property between April, 2016 and July, 2017 amounted to trespass entitling the Claimant to damages.

[83] These two issues deal solely with the First to Third defendants.

[84] The Third defendant by its principal Marc Richardson admitted in evidence that it had been in occupation of the property by way of a lease agreement entered into with the Fourth defendant. This court having now determined that the Fourth defendant does and did in fact have a lawful right to the property, I do not find that there was any trespass on the part of the Third defendant. The issue that has to be considered with regard to that lease agreement must now be resolved as between the claimant and the Fourth defendant and this court will undertake that exercise later in this judgment.

[85] However with regard to the First and Second defendants I accept the evidence of the witness Marc Richardson that in replying to the letter sent by counsel for the claimant, correspondence sent to the Second defendant, in replying Mr. Richardson replied from the email account ascribed to the Second defendant. This court also accepts on all the evidence that was before it that on a balance of probabilities, despite the indication in the reply of Mr. Richardson that in fact, the Second defendant was never in occupation of the premises.

[86] This court in coming to this determination, considers that this misunderstanding was however due to the manner in which Mr. Richardson treated with the allegation in so far as it concerned a wholly different entity as was identified in the email. I am of the view that this could only have happened because of the casualness with which parties who are involved in several entities providing different services tend not to have clear demarcations as to the corporate identities. Thus, this court accepting that Marc Richardson is the principal for the Second defendant **and** the Third defendant responded in the person of the Second defendant but was in fact acting at the time for the Third defendant.

[87] I therefore do not find that the First defendant (in his personal capacity) or the Second defendant were in occupation of the property and therefore have not committed any trespass. The Third defendant having been placed there at the instance of one of the owners of the property, their occupation of the property also did not amount to trespass.

[88] I therefore determine that the claimant is not entitled to his declaration that the defendants are not entitled to be in possession of the said property, I will issue no injunction to stop their return to the subject Property as they have already vacated the same and the claimant is not entitled to damages for trespass.

Issue #7: Whether or not the Fourth Defendant is entitled to damages for breach of contract and/or interference of contract and/or loss of rental income beginning July, 2017 and continuing until determination of the suit.

[89] In looking at this issue the claimant submitted that based on their supposition that the Fourth defendant had no entitlement to the property the claimant submitted that by extension the Fourth defendant could not have entered into any lease agreement with any party. However, the claimant did concede that if in fact this court found that there existed a valid contract between the Fourth defendant and Third defendant, the claimant obviously not a party to it. Thus, it was clear as far as the claimant was concerned that he could certainly not have therefore breached any contract and by extension would not have been liable for any breach.

[90] On the relief sought by the Fourth defendant seeking a prayer that the claimant in the alternative should be liable for interference of the contract as between the Fourth defendant and the Third defendant, the claimant contended that there is no evidence to substantiate this prayer. The claimant submitted that the acts of the claimant in notifying the Third defendant that he was the owner (which this court has now determined that he is in fact a co-owner with the Fourth defendant) were in fact lawful. At the time that he made such representation, he was in possession of a deed that vested the property in him, he was therefore lawfully acting within the parameters as the owner. There was no evidence, upon the submission of the claimant that the claimant at any time had prevented the Third defendant from carrying out their obligations under the lease and therefore no evidence that the claimant had intended to cause any loss to the Fourth defendant.

[91] When this court addressed its mind to the submissions of the Fourth defendant it did not appear that he had submitted on this prayer although the same was contained in his ancillary claim against the claimant.

[92] In fact the only evidence led on this issue by the Fourth defendant was as contained in the witness statement of the Fourth defendant at paragraph 44 thereof where he stated: *"The rent was \$9600.00 per year plus sales tax, or \$800.00 per month. As set out below, because of the action of Felix, the tenant moved out without paying rent for the months of May, June, or July 2017. So that*

money, \$2400.00 still needs to be paid by Plumbing Design & Installation Ltd". All he claimed therein was the sum that would have been due for May, June and July 2017.

Court's Considerations and Analysis

- [93] This relief is sought is at the instance of the Fourth defendant. It was for him to prove his case. On the evidence that was led I accept that the Fourth defendant has not proven his case on a balance of probabilities for damages for breach of contract or interference of contract.
- [94] The law as submitted by the claimant is clear. The claimant was not a party to any agreement, lease or otherwise with the Fourth defendant or the Third defendant²³. The Fourth defendant is simply not entitled to any damages for breach of contract. That prayer is therefore denied.
- [95] With regard, to the claim for interference of contract. There was no evidence led, in this court's mind that established that the claimant had fallen within the parameters that establish this tort. In the case of **Alfa Telecom Turkey Ltd v Teliasanora Finland OYJ**²⁴ George-Creque JA (as she then was) had this to say about the requirements to establish this tort quoting from the case of **OBG Ltd v Allan and Meretxz Investments NV v ACP**²⁵:

"There is a crucial difference between cases where the Defendant induces a contracting party not to perform his contractual obligations and cases where the Defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the Defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the Defendant acts independently of the contracting party. The Defendant's liability is a 'stand – alone' liability. Consistently with this, tortious liability does not arise in prevention cases unless the preventative means used were independently unlawful." (My emphasis added)

And then she continued at paragraph 20:

"The question of intention is relevant to both torts. In an inducement case there must be an intention to procure a breach of contract whereas in an unlawful means case, there must

²³Chitty on Contracts 29th Ed para 18-004: "Who are the parties? Normally, the answer to this question is obvious enough: the parties to the agreement are the persons from whose communications with each other the agreement has resulted. There may, indeed be factual difficulties in identifying these persons; but such difficulties do not generally raise any questions of legal principle. Problems as to the legal analysis of established or admitted facts can, however, arise in situations in which there is clearly an agreement, while it is doubtful exactly who the parties to it are; and difficulty in deciding who the parties to a particular contract are may also arise when there are several contracts which affect the same subject matter and involve more than two parties..."

²⁴ BVIHCVAP 2008/012

²⁵ [2007] UKHL 21

be an intention to cause loss. As Lord Hoffman said in *OBG* at paragraph 52 of his judgment:

"The ends which must have been intended are different. South Wales Miners Federation v Glamorgan Coal Co. Ltd [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same".

- [96] Thus I agree with counsel for the claimant that in order to prove that the claimant had interfered with the contractual obligations of the Third defendant, the Fourth defendant needed to show that the claimant had acted in such a manner as to prevent the Third defendant from performing their obligations, that the act used must have been unlawful and that he (the claimant) intended that the Fourth defendant would suffer loss.
- [97] On the basis of the evidence before the court, I do not find that the actions of the claimant amounted to anything akin to preventing the Third defendant from performing their obligations to the Fourth defendant. On the contrary it was clearly the choice of the Third defendant not to involve themselves in any litigation or litigious circumstances that may have resulted as between the claimant and the Fourth defendant once they were apprised of the issue regarding ownership of the property²⁶. Further, all that the claimant did was to notify the Third defendant of the prevailing fact at the time, that as far as he was concerned he had sole ownership to the property. On any interpretation this cannot be considered an unlawful act. Finally, the intention to cause loss was additionally wholly absent on the facts that were presented to this court.
- [98] As has been said within the criminal arena and which is just as appropriate here, intention can only be gleaned from the circumstances surrounding the actions of the individual, as one cannot enter into the mind of another and see intention. That being said, it is clear in this court's mind, that when the claimant approached the First defendant to inquire of the nature of the possession of the First defendant's company, it is accepted from the factual matrix on a balance of probabilities that he was unaware as to the manner in which the First defendant had obtained possession of the property. This finding in this court's mind is substantiated by the evidence that was elicited from the claimant that it was in fact not until 2016 when he realized that persons were in actual occupation of the property, and that they were there under the authority of the Fourth defendant²⁷. The Fourth defendant did not present any other version of these events to this court and as such I am fortified in determining that the Fourth defendant has failed to establish any intention on the part of the claimant that could amount to an intention to cause him loss with regard to the lease agreement with the Third defendant.

²⁶ See the correspondence that flowed from Marc Richardson to counsel for the Claimant in that regard and the evidence of the Fourth defendant as to the decision of the Third defendant to leave the premises.

²⁷ Paragraph 12 and 13 of the Witness Summary of the Claimant

- [99] I therefore find that the Fourth defendant has not made out his claim for interference of contract and that prayer is denied.
- [100] With regard to the prayer for loss of rental income, the only evidence led by the Fourth defendant in this regard was in relation to the period May, June and July 2017. The Fourth defendant having failed to register the said lease in this court's mind resulted in the same being void as to enforcement against his lessee. However the actual fact is that the Third defendant had taken occupation of the property pursuant to the agreement and commenced paying a rental sum of \$800.00 per month. Therefore, despite the lack of enforceability under the terms of the lease agreement, there was a tenancy established between the Fourth defendant and the Third defendant under which the Third defendant had obligations. That is the payment of rental sum.
- [101] The evidence of the First defendant on behalf of the Third defendant made clear to the court that he had taken a decision upon notification of the issue surrounding title to pay the monies for rent into an escrow account pending the determination of the matter between the claimant and the Fourth defendant. The sole claim of the Fourth defendant in this regard is for the payment of the rent for May, June and July 2017. This court finds that he is entitled to these sums and shall be paid the same by the Third defendant.
- [102] The Third defendant is therefore to pay the sums due for May, June and July 2017 into the office of the Fourth defendant to be held for the purposes of the account sought by the claimant by his counterclaim to the ancillary claim.
- [103] The prayer sought for an account of monies collected by the Fourth defendant pursuant to the rental arrangement with the Third defendant is therefore granted and it is to be provided to the claimant within 42 days of today's date.
- [104] The claim by the Fourth defendant for damages for loss of rental income is therefore also granted in part.

Issue # 8: Whether the Fourth Defendant must indemnify the Third Defendant

- [105] In light of the findings above, the court makes no determination in relation to the above issue as there is no circumstance requiring the same. The ancillary claim of the First to Third defendants is therefore dismissed in its entirety.

The order of the court is therefore as follows:

Amended Fixed Date Claim Form

1. The declaration that the defendants are not entitled to possession of the claimant's property is denied.
2. An injunction to prevent the defendants their servants or agents from entering or erecting structures on the property is refused.
3. Prayer for damages for trespass is dismissed.

Amended Ancillary Claim Form (by the First, Second and Third Defendants)

1. The prayer that they be indemnified by the Fourth defendant is dismissed in its entirety.

Counterclaim of the Fourth Defendant/ Ancillary Defendant

1. Prayer for the payment of the rent for the period May to July 2017 as against the Third defendant is granted.

Ancillary Claim of the Fourth Defendant as against the Claimant

1. The declaration that Larry DeRoche and Michelle DeRoche purchased the property as tenants in common is refused.
2. The declaration that the joint tenancy was determined during the lifetime of Larry DeRoche is granted.
3. The declaration that the Fourth defendant is the legal owner of half the property is granted but the declaration that the Fourth defendant is the beneficial owner of the other half of the property is denied and the court finds that the claimant and the Fourth defendant own the said property in equal shares.
4. The deed of conveyance to the claimant is therefore to be rectified to reflect that his ownership is to a one half undivided share of the said property and that said conveyance is to be executed by the Registrar of the High court pursuant to this court order.
5. The prayer for damages for breach of contract and/or interference of contract and/or loss of rental is refused.

6. The prayer for the injunction restraining the claimant, his servants and agents or howsoever from entering the land is refused

Counterclaim of the Claimant as against the Fourth Defendant

1. The prayer for the Deed of Assent dated the 10/5/04 to be set aside is refused.
2. The prayer for an account of all money received by the Fourth defendant from the First, Second or Third defendants for their occupation of the land is granted and the same is to be provided to the claimant within 42 days of today's date.
3. The prayer for an injunction against the Fourth defendant is refused.

As to the Issue of Costs

1. The claimant was only partially successful on their counterclaim and wholly unsuccessful on their claim I award them prescribed costs on an unvalued claim pursuant to Part 65.5.CPR 2000 on their counterclaim discounted by 25% for the partial success. This said sum is to be paid by the Fourth defendant.
2. The Fourth defendant having been largely successful on his ancillary claim and wholly on his counter claim against the First, Second and Third defendants I award him prescribed costs on an unvalued claim pursuant to Part 65.5. CPR 2000 on the ancillary claim, this sum is to be paid by the claimant and the sum of \$360.00 on the sum of \$2,400.00 awarded for the outstanding rental sums due to the Fourth defendant, is to be paid by the Third defendant.
3. The First, Second and Third defendant were wholly unsuccessful on their claim, however it was by the adding of the Fourth defendant through their claim that the issues between the claimant and the Fourth defendant were determined. However, despite this and their claim having been dismissed in its entirety I make no order as to costs for or against these defendants.



Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar