

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2007-1437

BETWEEN

**DESMOND VINCENT WARNER
JEAN ANNE NOLA WARNER
(The Legal Personal Representative of the Estate of
MARY PETERS also called MARY BENIOT also
Called MARY PETER, deceased)
Claimants**

AND

**ANASTASIA BIANCA THOMAS and
TREVOR SMITH
Defendants**

BEFORE THE HONOURABLE MR JUSTICE GREGORY DELZIN

Appearances

Mr. Gregory Armorer for the Claimants
Mr. Colin Selvon for the Defendants

JUDGMENT

1. This claim is for an order for possession of land located at Balthazar Street, Tunapuna and a declaration of ownership of the fee simple interest together with an injunction in favour of the Claimants who are the executors and legal personal representatives of Mary Peters. The Claimants plead that Mary Peters owned

the land by deed registered as No 4294 of 1942. By her will she bequeathed the property to Martha Warner who was also the legal personal representative of Mary Peters. Martha Warner died on the 6th October 1986 and by Grant of Probate the Claimants are the legal personal representatives of the estates of Martha Warner and, by extension, Mary Peters. The Claimants are therefore in law vested with the estates of both Martha Warner and Mary Peters. The Claim arises and is to be determined in the context of a Defence and Counterclaim that essentially relies on adverse possession of the subject land by the Defendants and the deceased husband of the 1st Defendant, Fred Thomas. The First Defendant is the surviving wife of Fred Thomas and the Second Defendant is the son of the First Defendant but it is not pleaded that Fred Thomas is his father.

2. It is alleged at paragraph 7 of the Statement of Case that Fred Thomas was a tenant of the parcel of land and that he died on the 25th November 2004. By paragraph 7 it is further alleged that Mr. Thomas was the tenant of Martha Warner the “second deceased” who died on 6th October 1986. It is also alleged that from the date of death of Martha Warner Mr. Thomas refused to pay rent to Joyce Warner who was beneficially entitled to the premises by the will of Martha Warner. Accordingly, by this averment, it is specifically accepted that the tenant remained in possession of the premises and refused to pay rent for a period of 18 years.

3. It is not in dispute by the pleadings and no evidence was led to the contrary, that the 1st Defendant is the wife of Mr. Thomas by marriage and that the 2nd

Defendant is her son. The Claimants dispute that the 1st Defendant lived at the premises since the death of Fred Thomas paying infrequent visits and only resided thereon after seeking to establish sanitary services to the property. It is not in dispute that the 2nd Defendant is the son of the 1st Defendant and now lives on the premises through the permission of the 1st Defendant.

4. The Claimants further rely on a written acknowledgement signed by the 1st Defendant, and dated the 20th June 2006, by which the 1st Defendant agreed to vacate the premises on the 20th July 2006. In breach of this agreement, the Claimants allege that the Defendants have remained in occupation and have since sought to demolish the old premises and erect a new structure on the property.

5. The 1st Defendant admits signing the document but claims that it was signed under duress, thereby disputing the validity of the agreement.

6. The 1st Defendant counterclaims for a declaration that she is entitled to an interest in the said parcel through her predecessor in title, her husband, Fred Thomas, who she alleges was in adverse possession of the premises for over 16 years at the date of his death. She further claims that she moved into the premises after her marriage on the 5th July 2001, and enjoyed undisturbed possession thereafter.

7. By the witness statement of Desmond Warner, admitted into evidence, he admits Fred Thomas refused to pay rent to Joyce Warner and only paid rent up to the death of Martha Warner in October 1986. (See paragraphs 11 and 12 of “DW1). Mr. Warner also did not deny nor was it in dispute that Mr. Thomas lived on the premises until he died in 2004. Accordingly there is in law an admission that Mr. Thomas occupied the premises without paying rent and undisturbed for more than 16 years prior to his death..

8. Accordingly, in order to maintain an action to recover land occupied in the accepted factual matrix, the Claimants must prove, on a balance of probabilities that the provisions of the Real Property Limitation Act Ch 56:03 do not apply.

9. Section 3 of CHAPTER 56:03. REAL PROPERTY LIMITATION ACT states:-

s 3. No land or rent to be recovered but within 16 years after right of action accrued

No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

In order to determine whether there is a right to bring an action to recover the land by the Claimants, several issues need to be determined.

10. The issues are: (1) what was the nature of the tenancy,

(2) whether Fred Thomas was in adverse possession when he refused to pay rent and remained in undisturbed possession until his death in 2004 and

(3) what is the current state of the title of the Claimants.

11. The Claimants oppose the Defendants' Counterclaim of the plea of adverse possession by the averment that the possession of the Defendants was without animus possedendi. (See paragraph 2 of the Defence to the Counterclaim).

The nature of the tenancy

12. In order to determine the question of adverse possession and the application of the Real Property Limitation Act the first step would be to identify the nature of the undisputed tenancy. Fred Thomas paid rent, on the evidence, up until October 1986 and thereafter remained in possession without paying rent up to the date of his death in 2004.

13. It is trite law that a tenant who holds over without paying rent, does so either as a tenant at will or tenant at sufferance dependent on whether there can be implied consent by the landlord, consent being required for the creation of a tenancy at will. Consent may be implied by acquiescence.

See : **Meye v Electric Transmission Limited [1992] Ch. 290.**

The question of the nature of the tenancy affects the calculation of the time period that must elapse in undisturbed adverse possession sufficient to claim the benefit and protection of the Real Property Limitation Act.

14. S.8 of the Real Property Limitation Act Ch 56:03 states:-

CHAPTER 56:03. REAL PROPERTY LIMITATION ACT

s 8. Tenant at will

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

15. In **Goomti Ramnarace (2001) 59 WIR 511 at paragraphs 6 to 19** the Privy Council discussed the concept of a tenancy at will as opposed to a licence in much the same context as the present. The learning informs both the law on determining the nature of the tenancy and the approach of the Court to the evidence adduced. As a result, it is in my view necessary to refer to the judgment in extenso.

*“[9] The Ordinance substantially reproduces the provisions of the English Real Property Act 1833. The limitation period for an action to recover land is sixteen years, and the period starts when the right to bring the action first accrues to the person bringing the action, or someone through whom he claims; s 3 of the Ordinance (corresponding to s 2 of the 1833 Act). Neither the Ordinance nor the 1833 Act contains any reference to the concept of adverse possession, which became enshrined in the English statute by s 10(1) of the Limitation Act 1939, but this was no more than a statutory enactment of the case law on the earlier English Limitation Acts (see *Moses v Lovegrove* [1952] 2 QB 533 at 539, per Sir Raymond Evershed MR). In these circumstances, their lordships do not doubt that the concept is incorporated into the Ordinance also.*

[10] Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful

title, or with the consent of the true owner. Section 8 of the Ordinance however (reproducing s 7 of the 1833 Act) provides that, where a person is in possession of any land as tenant at will, the right of the true owner to bring an action to recover the land 'shall be deemed to have first accrued' at the expiration of one year from the commencement of the tenancy, at which time the tenancy 'shall be deemed to have determined'.

[11] It follows that if a tenancy at will is determined during the first year the owner's right of action accrues immediately; otherwise it accrues automatically by virtue of s 8 at the end of the first year, and any later determination of the tenancy is ineffective for limitation purposes unless a new tenancy is created; see Day v Day (1871) LR 3 PC 751. This decision was unfortunately overlooked in Seesahai v Mangaree (1959) 1 WIR 363 and Chootoo v Joseph (1971) 18 WIR 134, where events after the expiry of the first year (in the former case requests by the owner to the occupier to leave the land, and in the latter the death of the owner) were held to determine the tenancy at will and start time running afresh. This was contrary to the Ordinance; in each of the cases the tenancy at will had already been determined for limitation purposes by the operation of s 8 of the Ordinance, and the determination of the tenancy for other purposes (such as a claim for mesne profits) could not interrupt the running of time. Their lordships consider that these cases were wrongly decided.

[12] The effect of ss 3 and 8 of the Ordinance taken together is that, if no action is taken by the true owner, his title is extinguished after the expiration of seventeen years from the commencement of the tenancy even though the possession of the occupier is permissive throughout; see Lynes v Snaith [1899] 1 QB 486. It was the deliberate policy of the legislature that the title of owners who allowed others to remain in possession of their land for many years with their consent but without paying rent or acknowledging their title should eventually be extinguished.

[13] The law was settled to this effect until well after the end of the Second World War. Thereafter developments took place in England which had no counterpart in Trinidad and Tobago. Section 7 of the 1833 Act was re-enacted by s 9(1) of the Limitation Act 1939. But in the 1960s and 1970s, largely under the influence of Lord Denning MR, the courts began to develop the idea of a non-contractual licence to occupy land. While in some respects such a licence was capable of providing a valuable means of giving legal effect to informal arrangements for the occupation of land, it was capable of being exploited by landlords who wished to circumvent the operation of statutory provisions which gave security of tenure to their tenants. It also undermined the basic policy of the Limitation Acts. Since the licence was consensual, the occupation of the licensee did not constitute adverse possession; and, since it was not a tenancy at will, it fell outside s 9(1) of the 1939 Act. Accordingly, time did not run in favour of a licensee so long as the licence endured; see Hughes v Griffin [1969] 1 WLR 23. For many years the operation of the Limitation Acts was further stultified by the doctrine of implied licence which attributed the presence of a trespasser on vacant land not required by the true owner to a licence. In Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd [1975] QB 94 at 103, Lord Denning MR even said that it did not lie in a trespasser's mouth to assert 'that he used the land of his own wrong as a trespasser'. This was entirely contrary to the policy of the statutes, and was later described as 'Lord Denning's original heresy'; see Buckinghamshire County Council v Moran [1990] Ch 623 at 646, per Nourse LJ.

[14] The difficulty of distinguishing between a tenancy at will and a licence led to a change in the law in England following a recommendation of the Law Reform Committee (Cmnd 6923) in 1977. The committee commented that the distinction between a tenancy at will and a gratuitous licence

was 'at best tenuous', and recommended that, whether the land be occupied under a tenancy at will or a gratuitous licence, time should not begin to run in favour of the occupier until the tenancy or licence had actually been determined. The committee's recommendation was given effect by s 3(1) of the Limitation Amendment Act 1980, which repealed s 9(1) of the 1939 Act. At the same time the opportunity was taken to abolish the doctrine of the implied licence.

[15] Not long afterwards, orthodoxy was restored by the decision of the House of Lords in *Street v Mountford* [1985] AC 809. This re-affirmed the principle that the distinguishing feature of a tenancy is that it grants the tenant exclusive possession. Lord Templeman expressly approved the reasoning of Windeyer J sitting in the High Court of Australia in *Radaich v Smith* (1959) 101 CLR 209 at 222 where he said:

'What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second.'

[16] A tenancy at will is of indefinite duration, but in all other respects it shares the characteristics of a tenancy. As Lord Templeman observed ([1985] AC at p 818), there can be no tenancy unless the occupier enjoys exclusive possession; but the converse is not necessarily true. An occupier who enjoys exclusive possession is not necessarily a tenant. He may be the freehold owner, a trespasser, a mortgagee in possession, an object of charity or a service occupier. Exclusive possession of land may be referable to a legal relationship other than a tenancy or to the absence of any legal relationship at all. A purchaser who is allowed into possession before completion and an occupier who remains in possession pending the exercise of an option each has in equity an immediate interest in the land to which his possession is ancillary. They are not tenants at will; see *Essex Plan Ltd v Broadminster* (1988) 56 P & CR 353 at 356, per Hoffmann J.

[17] A person cannot be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations. A tenancy is a legal relationship; it cannot be created by a transaction which is not intended to create legal relations. This provides a principled rationalisation of the statement of Denning LJ in *Facchini v Bryson* on which the Court of Appeal relied in the present case. Before an occupier who is in exclusive occupation of land can be treated as holding under a licence and not a tenancy there must be something in the circumstances such as a family arrangement, an act of friendship or generosity or such like, to negate any intention to create legal relations.

[18] In the present case, the appellant was allowed into occupation of the land as part of a family arrangement and at least in part as an act of generosity. But not wholly so, for the appellant testified that the intention of the parties was that she would buy the land when she could afford to do so, and the judge accepted her evidence. Her uncle was generous in that he allowed her to

remain indefinitely and rent-free pending her purchase, and in that he did not press her to negotiate. But a tenancy at will commonly arises where a person is allowed into possession while the parties negotiate the terms of a lease or purchase. He has no interest in the land to which his possession can be referred, and if in exclusive and rent-free possession is a tenant at will. In Hagee (London) Ltd v A B Erikson and Larson [1976] QB 209 at 217 Scarman LJ described this as one of the 'classic circumstances' in which a tenancy at will arose.

[19] Whether the parties intended to create legal relations, and whether there was any genuine intention on their part to negotiate a sale of the land when the appellant could afford to buy it, were questions of fact for the judge. Although he made no express findings in this regard, there was evidence which he accepted from which he could properly conclude that the appellant entered into possession as tenant at will.

16. In the *Meye* case (supra) at pages 293-294 Bennet J stated:-

“ I take it that it would be a question for a jury in such a case, whether there was the consent of both parties that the tenant should remain in possession after the termination of the expired tenancy. If the tenant under such circumstances remained in possession without saying anything, I should say that a jury ought to conclude that he consented to continue in possession as tenant. If the tenant remained in possession, but made some statement inconsistent with his remaining as tenant - for instance, if he said that the property belonged to him, or if he defied the landlord to do his worst, and said that would not go out till he was turned out - in that case I should think the jury would say that he did not consent to remain in as tenant, and was a mere trespasser.”

17. In the matter at hand there is no evidence of inconsistent conduct or statements by Fred Thomas in the manner set out in **Meye**. He simply did not pay rent to the beneficiary of the landlord's estate and no action was taken to remove him. Given the fact that it is accepted that Fred Thomas was a tenant, it is indeed a simple conclusion that having held over without paying rent, for such an extended period, with no effort being made during the life time of the landlord to exclude him from the premises, that his occupation was with the implied consent of the landlord.

18. As a result, I hold that Fred Thomas, upon the cessation of his payment of rent, held over as a tenant at will. Taking into consideration the learning in the *Goomti* decision two necessary conclusions follow:-

- (a) That the tenancy determined one year after the commencement of the tenancy at will and

- (b) That the time began to run one year after Fred Thomas's last payment of rent, that is, October 1987, and not October 1986, when Martha Warner died.

If I am wrong in my finding of the nature of the tenancy, and that he was indeed a trespasser, the result would only be that the period of occupation required by the Act is reduced by one year. Given that the period is eighteen years, it would make no difference to my conclusions.

Adverse Possession and Animus Possedendi

19. The second issue is whether a tenant holding over without paying rent is in adverse possession. The Claimant pleaded that the Defendants did not have the requisite animus possidendi to establish adverse possession and therefore time does not run against the tenant holding over.

20. In my respectful view, it is implicit in the Goomti Ramnarace judgment (ante) that it was clearly the intention of Parliament in enacting the Real Property Limitation Ordinance and indeed it seems to be accepted, that a tenant at will holding over was capable of occupying land adversely. Indeed the purpose of section 8 of the Ordinance was to create a cap on the time period in which a claim for possession could be made, thereby accepting that the nature of the occupancy by a tenant at will was adverse to the interest of the landlord and could be determined by an action for possession.

21. The issue was definitively answered by the Trinidad and Tobago Court of Appeal in **Richardson v Lawrence (1966) 10 WIR 364**, a self explanatory extract of which is highlighted below at page 236 of the reported judgment.

"In reply to that claim John Ebenezer Lawrence set up by way of defence that the land was his. Comment has been made in the course of the argument that his brother Francis Lawrence said in evidence before FRASER, J, that it was then, and then only for the first time, that is, in the course of the petty civil court proceedings, that he had ever heard his brother making any such assertion. It is, however, to be observed that he had paid no rent from 1937, that the action was brought in 1955, eighteen years after the last payment, that throughout those eighteen years he had been in undisturbed possession of the land enjoying the rents and profits therefrom and paying the rates exigible in respect thereof, and that in all probability he would have known or would have been advised when he was seeking to defend the action in the petty civil court that by reason of his undisturbed possession over a period upwards of sixteen years he had acquired a good possessory title, thereby extinguishing whatever title the Richardson family may at any time have had.

It was argued yesterday that there was no adverse possession for more than one reason. The principal reason was that the Richardsons had continually claimed to be the owners of the land. Before 1833 in England adverse possession was a term of art. PRESTON AND NEWSOM ON LIMITATION OF ACTIONS (3rd Edn) at p 87 makes the point amongst others that:

'possession which was adverse could be made ineffective by a 'mere entry' or a 'continual claim' by the true owner, and these might be purely formal acts not amounting to a recovery of possession of the land.'

Consequently, prior to the year 1833 in England the continual claim being made by Nora Richardson as the administrator of her husband's and her father in law's estates would have negatived the accrual of any adverse possession on the part of John Ebenezer Lawrence. But the Real Property Limitation Act, 1833, changed all that, and our Real Property Limitation Ordinance, Cap 5, No 7, follows that substantially. Thus, s 11 of our Ordinance provides that

'No person shall be deemed to have been in possession of any land within the meaning of this Ordinance merely by reason of having made an entry thereon; and no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.'

There is also the decision in 1837 in Nepean v Knight ((1837), 2 M & W 894, Murp & H 291, 7 LJEx 355, 150 ER 1021, Ex Ch, 32 Digest (Repl) 496, 1065) where ((1837), 2 M & W at pp 910/911) DENMAN, LCJ, stated as follows:

'The learned judge told the jury it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely showing that seven years since he was last heard of expired within twenty years next before the commencement of the action: on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of the opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which it was up to May, 1814. Upon this counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years; that it did not appear that there was an adverse

possession of twenty years; and under the learned judge's direction, they found their verdict for the lessor of the plaintiff.'

Here I pause to make this observation that the same sort of argument was addressed to us, namely, that it was only because after the death of Christopher Richardson in 1937 it was not clear to whom the rent became payable that no rent thereafter was paid. It was therefore contended that adverse possession or possession by which might be acquired a prescriptive title could not run against the true owners. But DENMAN, LCJ, continued:

'It seems the statute of the 3 & 4 Will 4, c 27 (which is the Real Property Limitation Act 1833) was not adverted to at the trial, but only on the case being argued before the court. We are all clearly of opinion that the second and third sections of that Act (which came into operation on 1 January 1834, seventeen days before this action was commenced) have done away with the doctrine of non adverse possession, and except in cases falling within the fifteenth section of the Act, the question is whether twenty years have elapsed since the right accrued, whatever be the nature of the possession.'

The law under our Ordinance is as it was under the Real Property Limitation Act. Hence, so long as there has been a want of actual possession by the person who might be entitled to it and an actual possession, whether adverse in the old sense or not, on the part of somebody who would not really be entitled to it, and that actual possession continues for the prescribed period, possessory title is acquired under the statute. That was made clear in Smith v Lloyd ((1854), 9 Exch 562, 2 CLR 1007, 23 LJEx 194, 22 LTOS 289, 2 WR 271, 156 ER 240, 32 Digest (Repl) 505, 1115) ((1854), 9 Exch at p 572) where PARKE, B, said:

'The statute applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession, whether adverse or not, to be protected to bring the case within the statute.'

Let us look further at the provisions of the Ordinance itself. By s 3 of the Real Property Limitation Ordinance it is made clear that

'No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.'

In the instant case, the appellant Nora Richardson is seeking to claim this land through her husband Christopher Richardson, and he in turn through his father Samuel Richardson. Consequently, if she is to succeed, she must be shown to have brought her action within 16 years after the right accrued in the first instance, whether to Samuel Richardson or to Christopher Richardson or to herself. It accrued to Christopher Richardson from the moment after the last payment of rent was made in 1937. Now, s 4 (a) of the Ordinance continues in this wise:

'The right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as is hereinafter mentioned, that is to say:

(a) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.'

That paragraph makes it yet more abundantly clear that the time when the right to make an entry or distress or to bring an action first accrued was the last time when rent was paid by John Ebenezer Lawrence, namely in the year 1937."

22. Thus the test for adverse possession and indeed for an "animus possedendi" is not founded on mala fides as such but by factual possession that excludes the true owner. Accordingly, a tenant not paying rent and remaining in possession, thereby acting inconsistently with the right of the true owner is acting adverse to the interest of the true owner

23. This point was recently accepted by the Caribbean Court of Justice in adopting the reasoning in *Richardson v Lawrence* and the recent English decisions in ***Toolsie Persaud Limited v Andrew James Investments Ltd and others (2008) 72 WIR 292 at 302 et seq :-***

"First point: what is the requisite intent to possess?"

[24] *The Court of Appeal was clearly correct in holding that the requisite intention to possess is present when the claimant in factual possession of the land is intending to make full use of it in the way an owner would. Indeed, it was once thought that animus possidendi necessarily involved an intention to own or to acquire ownership of land or to exercise acts of ownership over it³. Slade LJ, however, in *Buckinghamshire CC v Moran*⁴ made it clear that although '[t]here are some dicta in the authorities which might be read as suggesting that an intention to own the land is required ... I agree with the judge that "What is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess", that is to say an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title'.*

[25] *This last clause has raised problems in some minds where the factual possessor has mistakenly believed himself to be the owner with the paper title, because he cannot have the intention to exclude himself. However, the cited passage is not part of an Act of Parliament. The*

intention to exclude the world at large (including the true owner if other than the factual possessor) is what is required. An intention to have exclusive control of the land, mistakenly believing oneself to be the true owner, suffices.

[26] As Saville LJ (later Lord Saville of Newdigate) stated in *Hughes v Cork*⁵--

'The learned Judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot, ex hypothesi, have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say, doing something illegal, could acquire such a title, while those who did not realize that they were doing anything wrong would acquire no rights at all. I can see no reason why, as a matter of justice or common sense, the former but not the latter should be able to acquire title in this way. What the law requires is factual possession i.e. an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else.'

*Why indeed, should a mala fide user of land to the exclusion of everyone else be better off than a bona fide user in the same circumstances? What is crucial is that it is obvious enough to the paper owner that if he does not take steps to stop this exclusionary user then he will lose his ownership after 12 years have expired (or 30 years if the owner is the State or the Government). The possession of a mala fide user of the land is clearly 'adverse' possession, but where there is want of actual possession by the true owner, ordinary possession by another to the exclusion of the true owner fits the modern notion of adverse possession, as made clear by Wooding CJ in *Richardson v Lawrence*⁶ and Crane JA in *Gobind v Cameron*⁷.*

[27] We endorse the following remarks of Lord Browne-Wilkinson in the leading case, *JA Pye (Oxford) Ltd v Graham*⁸.

'[M]uch 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 Acts⁹. The question is simply whether the defendant squatter has dispossessed 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 ...

'[T]here are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").'

[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').

[29] *This latter requirement serves to make it clear that the factual possessor is not merely the landowner's licensee or tenant or trustee or co-owner but is independently in possession, so that it is obvious to any dispossessed true owner (or any true owner who has discontinued possession of his land) that he needs to assert his ownership rights in good time if he is not to lose them. Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to be the owner e.g. due to a misleading plan or a forged document or a compulsory acquisition order subsequently held to be ineffective to vest the land in the State. Indeed, in *Blanchfield v A-G*¹⁰, Lord Millett, giving the judgment of the Privy Council, stated that if the State had not been able to rely upon certain Land Acquisition Ordinances for its ownership and possession, 'it would have had to prove that it had been in adverse possession of the land for the statutory period before the proceedings were commenced'.*

[30] *Although the Court of Appeal in these proceedings stated, 'It is also clear law that possession for the purpose of the acquisition of prescriptive title must be possession nec vi, nec clam, nec precario' (not by physical violence, nor by stealth, nor by permission), in our exposition of the law we have deliberately eschewed this Latin phrase. The reason is that s 3 of the Limitation Act focuses upon 'sole and undisturbed possession' that was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose. While it remains true that prescriptive possession must be openly enjoyed so that the true landowner can know that he must take action to recover his land, and must not be pursuant to the landowner's permission, it can be based upon a forcible taking and retention of the land, so that the 'nec vi' portion of the phrase has become an anachronism."*

24. When looked at from the perspective of factual adverse possession as defined by the dicta above, the question of the necessity for a separate animus possidendi in a tenant holding over not paying rent cannot arise because the test is not the intention of the tenant but whether his factual possession is adverse to the true owner.

25. In **Williams v Jones et al [2002] EGLR 69** The English Court of Appeal in determining whether the Limitation Act applied to a tenant holding over in possession without paying rent held that:

*"Upon the determination of the tenancy, the effect of para 5 of Schedule 1 to the 1980 Act was that the matter did not have to be looked at afresh, by a straightforward application of the approach in *Powell*, without regard to the fact that the tenant was a tenant holding over. The distinction between a "trespasser case" and a "former tenant case", was that, in the former, animus possidendi would be required in order to establish that the paper owner was dispossessed. That was not necessary in a "former tenant case", because the freeholder had allowed the tenant into possession, and he would normally continue in possession. The respondent's acts had to be assessed in the light of why he occupied the property; the grazing of his sheep were not equivocal acts. He had been in continuous possession, and, as para 5 applied, he did not have to satisfy the *Powell* requirements of adverse possession."*

The argument put before the Court in that matter is much the same as that argued by this pleaded case and paragraphs 5 and 8 of the Schedule of the 1980 Limitation Act in England. Paragraphs 5 and 8 of the Act read as follows:

5.--(1) Subject to sub-paragraph (2) below, a tenancy from year to year or other period, without a lease in writing, shall for the purposes of this Act be treated as being determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which in accordance with this sub-paragraph the tenancy is determined.

(2) Where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent.

...8.--(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.

At paragraph 15 of the judgment the argument of counsel is reflected as follows:-

"Second, as a matter of law, the effect of para 5 was only to deem the tenancy to be at an end for the purposes of the Limitation Acts, so that the paper owner could not object to time running on the sole ground that an ex-tenant was there by grant. The possession obtained by operation of law by the creation of the tenancy expired with the expiry of that tenancy. Thereupon, the tenant had to establish possession by corpus and animus in the same way as any other person, and he had to do so under the rules envisaged under para 8 of the Schedule, as had been understood in the well-known judgment of Slade J (as he then was) in Powell v McFarlane, recently upheld, in all material matters, by the House of Lords in JA Pye (Oxford) Ltd v Graham [2002] UKHL 30*.*

The Court of Appeal responded to the argument as follows"-

"[17] In the light of those submissions, my conclusions are as follows.

[18] (1) Ms Bridget Williamson, for the respondent, strongly argued that, during the currency of the tenancy, a tenant necessarily and by definition had possession as against his landlord. At the moment when para 5 operated to determine the tenancy, that possession became adverse against the landlord for the purposes of limitation. The strongest authority for that view is to be found in the judgment of Russell LJ, agreed in full by Davies LJ, in this court in Hayward v Chaloner [1968] 1 QB 107, at p122F. I will read that passage. In so doing, I will substitute for Russell LJ's references to the then legislation references to the relevant paras of the Schedule,

which are in the same terms as the statutory provisions to which Russell LJ was referring. The lord justice said, at p122F:

I have no doubt that for this purpose the possession of a tenant is to be considered adverse once the period covered by the last payment of rent has expired so that paragraph 8(1) does not bear further upon paragraph 5. Nor do I doubt the applicability of paragraph 5 to the present case just because the freeholders were content that the rector should not pay his rent and did not bother to ask for it for all those years. In Moses v Lovegrove, in this court it was assumed on all hands when paragraph 5 apparently operates, adverse possession starts: see especially Lord Evershed, and Romer LJ. The principle clearly accepted was that once the period covered by the last payment of rent expired, the tenant ceased to be regarded by the Limitation Acts as the tenant.

[19] (2) *However, since Ms Williamson conceded in terms that para 8 applies to every case covered by the Schedule, she is not able to rely upon Russell LJ in his literal terms. Hayward was a case where there was found to be actual possession on the part of a former tenant throughout the 12-year period, so the issue argued in our case, that the claimant did not have anything that could properly be called "possession" at all, and possessed because, and only because, of his status as a tenant, did not arise. I think that the proper way of approaching Russell LJ's observation is to concentrate upon his reference to adverse possession. Russell LJ did not have the benefit of the exposition of this expression that is now to be found in the speech of Lord Browne-Wilkinson in Pye, at paras 35 to 38. However, I cannot think that the lord justice made the error there identified of thinking that, for possession to be adverse, there must be a positive act of ouster or dispossession. And, in any event, as Ms Williamson pointed out, that latter case of ouster or dispossession is addressed in the Schedule to the Limitation Act by para 1, and not by para 5, para 1 specifically directing itself to what occurs where there has been an act of dispossession or discontinuance. Rather, Russell LJ pointed out that upon the determination, at least for Limitation Act purposes, of the tenancy, the possession held by the tenant moves from being possession with the landlord's consent to being possession held without his consent, and thus, for limitation purposes, adverse.*

[20] (3) *I agree that this analysis does not exclude the possibility that a tenant might have so feeble a connection with the land (the example given in argument was of a man who has gone off to Australia leaving the front door of the demised premises open) that, upon the determination of the tenancy, he could not be said to be in possession at all. But that, in my view, would have to be an extreme case. The judge specifically found that it did not arise here, by his findings at p28 of his judgment, which I have already set out.*

[21] (4) *It follows from that analysis that Mr Adrian Cooper, for the appellant, was, in my judgment, wrong in his argument that, upon the determination of the tenancy, the matter ought to be looked at afresh, by straightforward application of the approach in Powell, without regard to the fact that the tenant was a tenant holding over. Such an approach would plainly be inconsistent with what this court said in Hayward. I consider, therefore, that Mr Cooper's predecessor in representing the appellant was, in fact, correct when he said:*

The true distinction between a "trespasser case" and a "former tenant case" is that in the former, animus possidendi is required in order to establish that the paper owner has been dispossessed. That is not necessary in a "former tenant" case, because as the freeholder has permitted the tenant into possession, he will normally continue in possession, just as he did before the payment of rent stopped."

I adopt the reasoning of the Court of Appeal in Williams v Jones and hold that as

a matter of law, it is not necessary for a former tenant holding over to prove animus possidendi in order to claim the benefit of the Real Property Limitation Act.

The Title of the Claimants

26. Section 22 of the Real Property Limitation Act further states:-

s 22. Extinguishment of right

At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

27. Accordingly on the evidence and law several conclusions can be drawn.

1. From the date of death of Martha Warner, Fred Thomas remained in possession as a tenant at will, the said tenancy determining one year thereafter. Upon its determination Fred Thomas continued in undisturbed possession adverse to the interest of the owner and refusing to pay rent to anyone until his death in 2004.
2. More than 17 years elapsed from the 6th October 1986 which was the date of death of Martha Warner and the last day on the evidence that Fred Thomas paid rent and until November 2004 when Fred Thomas died in occupation of the premises.

3. By October 2002 the right and title of the Claimants to the land was extinguished pursuant to s.22 of the Real Property Limitation Act CH 56:03.
4. At the date of institution of this action, in May 2007 an action for recovery of possession was statute barred by s.3 of the Real Property Limitation Act CH 56:03.

The extinguishment of the title by operation of law under s. 22 above also materially affects the claim that the document signed by the 1st Defendant in effect acknowledged the title of the Claimants by the 1st Defendant agreeing to vacate the premises in favour of a superior title holder.

28. Section 15 of the Real Property Limitation Act Ch 56:03 states:-

s 15. Effect of acknowledgment of title

When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the

time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

The document, annexed as “DVW/JANW6” to the witness statement of the Desmond Warner, admitted as “DW1” is dated 20th June 2006, is not addressed to anyone in particular. It does not expressly acknowledge ownership of the land in anyone and importantly is in my view, incapable of re-activating a title or right in land which by operation of law was extinguished by s.22 of the Real Property Limitation Act CH 56:03. In my view, once the period of time under the Act expires, as it has done in this case, there is no question of an acknowledgement of the title of the landlord because by operation of law, such title has ceased to exist prior to the alleged document being signed.

29. In *Richardson v Lawrence* 1966 10 WIR 234 at 239 Wooding CJ stated:

“ It follows therefore that no rent was paid from 1937, no claim was made until 1955, no acknowledgment of any kind was given by John Ebenezer Lawrence, the younger of the two respondents, who alone claims the land by the prescriptive title which it has been shown that he has acquired. Consequently s 22 of the Ordinance becomes relevant:

'At the determination of the period limited by this Ordinance to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.'

It means that sixteen years after 1937 the title of the Richardsons, whoever of them may then otherwise have been entitled, was finally extinguished. Accordingly, by 1955, which was eighteen years after 1937, the title of the Richardsons had already been extinguished and John Ebenezer Lawrence was quite right or quite rightly advised when he stated to his brother in that year that the land was his and not the Richardsons' any longer.”

The Counterclaim

30. The Defendants have sought declarations that title in the premises be vested in them and injunctive relief barring the Claimants from interfering with their continued possession.

The Claimants dispute the claim of the Defendants on the factual basis that the 1st Defendant did not actually reside at the premises but merely visited. Based however on my conclusion that the Claimants title has been extinguished by the previous occupation of Fred Thomas, the husband of the First Defendant and the fact that the Claimants have not adduced any positive evidence that significantly casts doubt on the evidence of the First Defendant, it is in a sense, immaterial whether the First Defendant visited or not, because her title is really based on that of Fred Thomas and not on a duty to prove adverse possession in her own right. However, no evidence has been adduced of a Grant of Probate or Letters of Administration in the estate of Fred Thomas. It is not in dispute that the First Defendant is his wife and therefore entitled to a beneficial interest in the premises on an intestacy. I accept as fact that the First Defendant has been in possession of the premises since the death of her husband and that she lived on the premises with him during their marriage. As confirmed in the Goonti case ante, her occupation of the premises could not therefore have been adverse to the interest of her husband, since her occupation was not by tenancy but with his consent by way of license through marriage. Therefore any declaration of ownership of the premises would flow from the Estate of Fred Thomas.

The 2nd Defendant did not appear at the trial and did not provide any sworn testimony at trial and as such is not entitled to relief.

31. I therefore grant the following orders:

1. A Declaration that the First Defendant is entitled to possession of that parcel of land situate at No 18 Balthazar Street measuring 50 feet by 70 feet and bounded on the North by land of Jemima Harris on the South by lands of John Bethelmy now Antonio Govia, on the East by lands of Zoe Atwell and others and on the West by Balthazar Street, which said piece or parcel of lands form part of the lands mentioned and described in the first part of the schedule to the Deed dated 30 July 1942 and registered as No. 4294 of 1942 (hereafter referred to as the said lands);

2. An injunction restraining the Claimants either by themselves, their agents and/or servants from interfering with the First Defendant's occupation of the premises;

3. The Claim is dismissed and the Counterclaim of the 2nd Defendant is dismissed.

4. The Claimants to pay the First Defendant costs in the sum of \$15,000.00 ;

5. The Second Defendant to pay the Claimants' costs in the sum of \$15,000.00

As an addendum I wish to note that this judgment was prepared without the written submissions of the Claimants who by order dated 11th November 2008 were required to file submissions by 4:00 p.m. on the 16th January 2009. Submissions of the Claimants were filed on the 11th March 2009 in the absence of an application to extend time and after the Claimants' Attorney were informed of the date of delivery of judgment.

Gregory Delzin
Judge

Dated: 12th March 2009