In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 423

In the matter of Order 113 of the Rules of the Supreme Court 1985

And in the matter of the property situate at 24 The Glebe Road in Pembroke Parish in the Islands of Bermuda

BETWEEN:-

CYNTHIA SUZANNE PATRICIA SWAN

Plaintiff

-and-

SHERLYN SWAN-CAISEY
(on behalf of herself and any other person or persons residing with her)

First Defendant

-and-

REX DARRELL

Second Defendant

JUDGMENT

(In Court)

Date of hearing: 22nd and 23rd April 2014

Date of judgment: 17th June 2014

Mr Paul A. Harshaw, Canterbury Law Limited, for the Plaintiff
Mr Bruce Swan, Apex Law Group Limited, for the First and Second Defendants

Introduction

1. The Plaintiff, Cynthia Swan ("Ms Swan"), holds legal title to the property known as 24 The Glebe Road in Pembroke ("the Property"). She was born in Bermuda and has Bermuda status within the meaning of the Bermuda Immigration and Protection Act 1951. By an originating summons dated 13th November 2013, Ms Swan seeks an order for possession of the Property pursuant to Order 113 of the Rules of the Supreme Court 1985 ("RSC") against both Defendants, whom she claims are trespassers.

2. The Property consists of an upper and a lower apartment. The First Defendant, Sherlyn Swan-Caisey ("Ms Swan-Caisey"), occupies the upper apartment and pays no rent to the Plaintiff. She claims that she is in lawful occupation of the Property, in which she asserts a proprietary interest. The Second Defendant, Rex Darrell ("Mr Darrell"), occupies the lower apartment, ostensibly as a tenant of Ms Swan-Caisey, to whom he pays rent. Whereas Ms Swan-Caisey opposes Ms Swan's application, Mr Darrell takes a neutral position and will abide the order of the Court. I had the benefit of affidavit evidence from Ms Swan and both oral and affidavit evidence from Ms Swan-Caisey and Mr Darrell.

History

3. In order to resolve this dispute it is necessary to trace the history of the ownership of the Property. A convenient date to begin is 10th April 1951, when the Property was conveyed to Charles Kingsley Swan Senior ("Charles Swan") by his mother.

4. Charles Swan was married to Madge Swan. The couple had four children: Charles Kingsley Swan Junior ("Kingsley Swan"), Alfred Swan, Shirleen Swan and Sherlyn Swan (now Ms Swan-Caisey). Charles Swan died in 1959. After Charles Swan's death, Madge Swan started a second family and gave birth to two further children. They included Dwaine Swan. I was greatly assisted by affidavit and oral evidence from both Alfred Swan and Dwaine Swan. The children all grew up as one family and the Property was their home.

5. Charles Swan died intestate in 1959. Today, what happens to the property of someone who dies intestate is governed by statute, namely the Succession Act 1974. But that did not come into force until 1st September 1974. At the date of Charles Swan's death, intestate succession was governed by the common law principle of primogeniture, under which the eldest son succeeded to all estates and interests in the deceased parent's land. This was subject to the widow's right of dower, ie a life estate in one third of the real property of her deceased husband. See Wylie, Irish Land Law, Fourth Edition, at para 4.162.

6. Thus upon Charles Swan's death, his eldest son, Kingsley Swan, inherited the Property. This was subject to the right of Madge Swan, as his widow, to a life estate in one third of the Property.

7. As Kingsley Swan had not yet attained the age of 21 years at the date of his father's death, in the eyes of the law he was still a minor. See section 2(1) of the Minors Act 1950. That section was subsequently amended to lower the age of majority to 18, with effect from 1st November 2001, by section 7(1) and Schedule 2 of the Age of Majority Act 2001. During his minority his mother, by reason of section 10(a) of that Act, was his guardian. Kingsley Swan came of age on 6th June 1968.

8. In 1967 Kingsley Swan left Bermuda to attend university in the United States. While at university he married Ms Swan. The couple continued to live in the United States except for a brief period when they returned to Bermuda to secure Bermudian status for their daughter. Madge Swan

remained in the Property until her death in 2011. For all or part of that time one or other of the children was also living there.

9. Alfred Swan gave evidence that when Kingsley Swan went to university the two of them discussed his going overseas and whether Alfred Swan could carry on the responsibility of overseeing the home and family on his departure. Ie taking care of things, carrying out repairs, and overseeing his mother's and siblings' welfare. Alfred Swan told Kingsley Swan that was fine. He said in evidence that he didn't come to that arrangement because he thought he owned the property or any part of it. He said that he fulfilled his part of the arrangement by taking care of his mother and ensuring that the house was all right.

10. Alfred Swan managed the Property from 1967 to 1971 or 1972. During that time he had a new cesspit dug as the old one was overflowing, took care of some plumbing problems, painted the house and roof, and had an embankment that was adjacent to the Property removed as it was causing dampness on the side of the Property. Kingsley Swan never sent money for any of the expenses incurred in relation to the Property as they had agreed that Alfred Swan would take care of any repairs. The work was carried out for the benefit of the family as it was the family home and the cost of repairs was something for which Alfred Swan had taken responsibility.

11. While Alfred Swan was managing the Property his aunt and uncle were staying downstairs. They paid a little rent to Kingsley Swan. Alfred Swan said that he figured that this was Kingsley Swan's business as at the time Kingsley Swan was the sole owner of the Property. Alfred Swan said that his mother never paid any rent and neither did his siblings. Instead of paying rent he just kept the house going.

12. Charles Swan had mortgaged the Property. Kingsley Swan repaid the outstanding mortgage, which was in the sum of $4,800, and by a deed of reconveyance dated 21st (or possibly 24th – the handwritten date is not very clear) August 1973 the Property was reconveyed to him.

13. Dwaine Swan gave evidence that he used to live in the upstairs apartment at the Property with his mother. Although he didn't formally pay rent to her, he used to help her out financially and give her whatever she needed. During that time he decided to have the upstairs property rewired at a cost of around $12,000 and a new concrete bottom put in the water tank at a cost of around $800 – $1,000. He arranged and paid for these works.

14. In the late 1980s Dwaine Swan moved into the downstairs apartment. He moved out, but later moved back in. During his second stay in the downstairs apartment he got married, and his wife moved in with him. The couple left the Property after a couple of years sometime in the1990s. While Dwaine Swan was living in the downstairs apartment he used to pay his mother rent.

15. In 1998 Dwaine Swan wanted to purchase another property and approached Kingsley Swan about using the deeds of the Property to secure a mortgage for that purpose. Kingsley Swan was happy to oblige. Under the terms of the mortgage deed dated 1st July 1998, which secured a loan of $115,000, Kingsley Swan was identified as mortgagor and Dwaine Swan and his wife as guarantors. The lender was Gibbons Deposit Company Limited ("the Bank")[1]. The Property was conveyed to the Bank as security, to be reconveyed to the mortgagor upon repayment of the loan. Although Kingsley Swan was the mortgagor, it was Dwaine Swan, who had the benefit of the mortgage loan, who made the repayments.

16. Dwaine Swan stated that the family was very close and that this was the sort of thing that one of the siblings would do for another. He said that this was just the sort of family that they were. He stated in his affidavit that it was never suggested to him that the Property did not belong to the family.

17. Ms Swan-Caisey moved back into the Property in around 2000. She gave evidence that in June 2004, while Kingsley Swan was visiting Bermuda,

[1] Subsequently Capital G Bank Limited and, with effect from 22nd April 2014, Clarien Bank Limited.

they had a discussion as to what would happen to the family home. This was while they were sitting on the porch. She stated that Kingsley said he would establish a trust for the Property, as he had never really thought of it as his own, but that he was not sure how to create one. Ms Swan-Caisey stated that she provided him with a Bermuda College book on trusts written by Michael Mello QC.

18. Ms Swan-Caisey stated that in 1989 Kingsley Swan had been diagnosed with melanoma, and that in November 1994 this came back very aggressively. Kingsley Swan became very ill.

19. Ms Swan-Caisey said that in February 2005 she was due to fly to Atlanta to visit Kingsley Swan. She said that before she left she spoke to him on the phone and discussed the Property. Her evidence is that he told her that if she brought a letter or piece of paper to say what he wanted done with the Property he would sign it. Ms Swan-Caisey said she spoke to her lawyer in Bermuda, who told her that this would have to be done through Kingsley Swan's lawyer in Atlanta.

20. Ms Swan-Caisey said that, when she arrived in Atlanta the following day, Kingsley Swan was in no condition to see a lawyer. No trust deed was drawn up prior to his death on 9th September 2005.

21. Kingsley Swan had however made a will dated 23rd July 2003, which was drawn up by his American attorneys, in which he left the Property to his wife, Ms Swan:

> "*I give, bequeath and devise all the rest, residue and remainder of my property of every kind and description and wherever located, including any interest I may own at my death in the home located at 2 Glebe Road, Pembroke, Bermuda, to my beloved wife, SUZANNE SWAN, to be hers in fee simple, should she survive me.*"

22. Kingsley Swan died without altering or revoking the will.

23. On 24th January 2006 Ms Swan obtained a grant of probate in Georgia in the United States. On 20th August 2008 the will was resealed in Bermuda.

24. On 5th May 2008, Ms Swan-Caisey wrote to Ms Swan offering to buy the Property for $200,000. The offer prompted Ms Swan to have the Property valued by WJ Seymour Real Estate Ltd. The valuation date was 9th September 2005, the date of Kingsley Swan's death. The valuation was necessary to assess the amount of estate duty payable. The valuer assessed the value of the Property as of that date as $750,000. Ms Swan did not accept Ms Swan-Caisey's offer.

25. By now the $115,000 mortgage on the Property had been repaid. By a vesting deed and reconveyance dated 11th February 2009 Ms Swan therefore had the Property reconveyed to her.

26. On 20th May 2009 Ms Swan's then attorneys, Terra Law Limited ("Terra Law"), wrote to the occupants of the Property, who were Madge Swan and Ms Swan-Caisey, seeking vacant possession. Madge Swan's attorneys, Mello Jones & Martin, replied by a letter dated 19th August 2009:

> "*We … can now confirm that we have received full instructions from our client and her daughter Mrs. Sherlyn Swan-Caisey …*
>
> *We are instructed that our client's son, Mr Charles Kingsley Swan (deceased), made numerous representations to our client and his siblings over the years that he desired for our client to benefit, for her life, from rent free occupation of the upper unit in the Property as well as receive the benefit, for her life, from the rent of the lower unit in the Property.*
>
> *Consequently, our client has lived rent free in the upper unit and has received the rent for the lower unit of the Property for many years prior to the death of her son.*"

27. Ms Swan gave evidence that she was unaware of any such representations by her late husband, but that she chose to let the matter rest and permitted Madge Swan to remain at the Property and keep the rents.

28. Madge Swan died in February 2012. Ms Swan instructed Terra Law to seek vacant possession. It is not clear whether the law firm wrote to Ms Swan-Caisey, but on 4th October 2012 they did write to Mr Darrell alleging that he was a trespasser and instructing him to vacate the property within ten days.

29. Mr Darrell referred the letter to Ms Swan-Caisey's attorneys, Apex Law Group Ltd ("Apex"). Further correspondence ensued between the respective attorneys for Ms Swan and Ms Swan-Caisey. This included a letter from Apex enquiring whether Ms Swan would object to Ms Swan-Caisey continuing to occupy the Property during the course of her life. By letter dated 21st August 2013, Terra Law replied that Ms Swan had no interest in entering into such an arrangement. As the parties have failed to resolve the matter amicably, it has ended up in court.

30. Ms Swan-Caisey gave evidence that she had moved back into the Property in order to take care of it and look after her mother, Madge Swan, who needed constant care during her final years. She has put together a schedule of the monies which she spent on it prior to her mother's death, which is supported by receipts. These included maintenance work and improvements, such as a new pressure tank and a concrete walkway over the mud yard around the lower apartment, totalling a little less than $25,000.

31. Ms Swan-Caisey also paid monthly rent of $800 per month to her mother, yard care at $200 per month, and land tax from April 2001 – April 2009. Taking these further expenses into account, the total amount which Ms Swan-Caisey spent in relation to the Property is not far short of $133,000.

32. On top of that, Ms Swan-Caisey paid building insurance for a few years, taking over payments under a longstanding policy which had previously been made by her mother, and contents insurance, but she no longer maintains these policies.

33. Mr Darrell is a friend of Ms Swan-Caisey. At her invitation, on the death of Madge Swan, he moved into the lower apartment with his wife. There is no formal tenancy agreement but he pays Ms Swan-Caisey $500 rent per month. Her evidence is that this money is a contribution to the cost of maintaining the Property rather than a sum paid to obtain exclusive possession of the apartment. While acknowledging this distinction, upon

which, for present purposes, nothing turns, I shall continue to use "rent" as convenient shorthand for the monthly payments.

Discussion

Constructive trust

34. Ms Swan-Caisey claims an interest in the Property on a number of grounds. First, she submits that Kingsley Swan held the Property on a constructive trust for himself and his siblings, including, of course, herself.

35. The law in this field has been developed through a line of decisions by the Court of Appeal of England and Wales, the House of Lords, and the UK Supreme Court, culminating, for the present at least, in Stack v Dowden [2007] 2 AC 432 and Jones v Kernott [2012] 1 AC 776. Although these cases largely concern cohabitees, the principles which they develop are equally applicable to other forms of domestic co-ownership.

36. The starting point is that the beneficial interests are the same as the legal interests. Thus, where there is sole legal ownership there is sole beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. See the judgment of Baroness Hale in Stack v Dowden HL at para 56.

37. The first issue is whether there was a common intention that the person who is not the legal owner should have any beneficial interest in the property at all. If she does, the second issue is what that interest is. The parties' common intention must be deduced objectively from their conduct. See the joint judgment of Lord Walker and Baroness Hale in Jones v Kernott [2012] 1 AC 776 UKSC at para 52.

38. As stated by Lord Diplock in Gissing v Gissing [1971] AC 886 at 906 B – C:

"*the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party*".

39. It was formerly understood that in the absence of express discussions between the parties, "*however imperfectly remembered and however imprecise their terms may have been*", it was necessary for the non-owner to have made direct contributions to the purchase price, whether initially or by payment of mortgage instalments, in order to justify an inference of the necessary common intent. See the judgment of Lord Bridge in Lloyds Bank plc v Rossett [1991] 1 AC 107 at 132 F – 133 A.

40. Lord Bridge was not suggesting that a direct contribution to the purchase price gave rise to an irrebuttable presumption of a common intention that the contributor should have an interest in the property. He was merely suggesting that a direct contribution was evidence – indeed, the only evidence – from which, absent stronger evidence to the contrary, the necessary common intention could properly be inferred.

41. Lord Bridge's observations were made *obiter*. In Stack v Dowden Baroness Hale stated, *obiter*, at para 63 that there was undoubtedly an argument for saying, as had the Law Commission in its 2002 report Sharing Homes, that Lord Bridge had set the hurdle rather too high in certain respects.

42. Lord Walker went further, stating at para 26 that in his opinion the law had moved on. He suggested at para 34 that the court should take a broad view as to what contributions to the acquisition of the property should be taken into account, while remaining sceptical of the value of alleged improvements which were really insignificant.

43. Lord Neuberger stated at para 139 that he agreed with Lord Walker that, subject to other relevant facts justifying a different conclusion, the fact that one party carried out significant improvements to the home would justify an adjustment of the beneficial interest in his favour. He suggested that in such

a case, the cost could be seen as capital expenditure which differed from the regular outgoings relating to the use of the property, and was not dissimilar in financial effect from the cost of acquiring the property in the first place. However, his Lordship added, to qualify, any work must be substantial: decoration or repairs, unless they were very significant, would not do.

44. I am satisfied that, as Lord Walker said, the law has indeed moved on from Lloyds Bank plc v Rossett, and that a common intention of joint ownership can properly be inferred from significant improvements to the property paid for by the person asserting a beneficial interest.

45. That person must further show that he has acted to his detriment or significantly altered his position in reliance on the common intention. See the judgments of Lord Diplock in Gissing v Gissing at 905 C – D and Lord Bridge in Lloyds Bank plc v Rossett at 132 G. The financial contributions to the property which raise an inference of common intention will, by their very nature, count as detriment.

46. It is true that the requirement of detriment was not mentioned by the court in Stack v Dowden, other than by Lord Walker at para 19 when, in the course of tracing the development of the law in this area, he quoted from Lord Diplock's judgment in Gissing v Gissing. Lord Walker described the judgment at para 21 as having dominated the law in this area. Neither is the requirement mentioned in Jones v Kernott. However this was no doubt because both cases concerned properties in joint names, so the existence of a beneficial interest was not in issue. There was no suggestion by any of their Lordships in either case that the requirement of detriment no longer applied.

47. If the evidence shows a common intention to share beneficial ownership combined with the necessary detriment then the court must quantify the parties' respective interests. If it is not possible to ascertain, whether by direct evidence or inference, what their actual intentions were as to the shares in which they should own the property, then, as stated by Chadwick LJ in Oxley v Hiscock [2005] Fam 211 EWCA at para 69:

"*… each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.*"

48. This passage was approved in Jones v Kernott by Lord Walker and Baroness Hale at paras 51 – 52, Lord Collins at paras 61 and 64, and Lord Wilson at paras 83 – 84.

49. I need only add that, as stated by Baroness Hale in Stack v Dowden at para 62, the parties' intentions may change over the course of time, producing what Lord Hoffmann described in the course of argument in that case as an "*ambulatory*" constructive trust.

50. Turning to the facts of the present case, Charles Swan died intestate. Therefore, under the common law rules of intestacy which were applicable at the time, Kingsley Swan inherited the Property absolutely, subject to his mother's one third life interest. Any constructive trust could only have arisen once he had reached the age of majority.

51. One searches in vain for evidence of a common intention that there should be such a trust. Neither Alfred Swan nor Dwaine Swan has applied to be joined as a party to these proceedings in order to assert an interest in the Property. Indeed it was clear from the evidence of Alfred Swan that he regarded himself as managing the Property on Kingsley's behalf. Moreover, while the uncle and aunt were staying in the downstairs apartment, Kingsley Swan was the person to whom they paid rent. On that topic, the fact that as adults Dwaine and Ms Swan-Caisey both paid rent to Madge Swan while they were living at the Property is evidence, although not in itself conclusive, that during that time they did not regard the Property as belonging to them.

52. So far as there was any common understanding, it was that Kingsley Swan was content that his mother and siblings should have the use of the Property while he was in the United States but that while doing so they would be responsible for its upkeep. The maintenance and improvements to the Property carried out by the siblings are to be understood in this light.

53. The surest guide to Kingsley Swan's intentions is to be found in his will, in which he left the Property to Ms Swan. I do not regard the phrase "*any interest I may own at my death*" as indicating any doubt on his part that, subject to the mortgage, the Property belonged to him. The words sound like a standard formula. When the will was executed, the legal title to the Property was held, pursuant to the mortgage, by the Bank: that too may help to account for the phrase. Had Kingsley Swan intended that his siblings should have an interest in the Property, then he could easily have provided for that in the will.

54. As to Ms Swan-Caisey's evidence of her two conversations with Kingsley Swan about putting the Property in trust, I must treat this uncorroborated evidence with caution. Assuming, however, that both conversations did take place more or less as she described them, they take the matter no further. Representations by Kingsley Swan that he intended to place the Property in trust prospectively were not sufficient to give rise to a constructive trust or demonstrate that there was one already in existence.

55. The constructive trust argument therefore fails at the first hurdle. There were no discussions or conduct from which a common intention capable of giving rise to a constructive trust can properly be inferred.

Proprietary estoppel

56. Further or alternatively, Ms Swan-Caisey asserts that Kingsley Swan's two conversations with her about putting the Property into trust give rise to a proprietary estoppel in her favour.

57. The relevant principles were summarised by Baker JA, giving the judgment of the Court of Appeal, in Terceira v Terceira [2011] Bda LR 67 at para 15:

> "*The three main elements necessary to establish a claim to proprietary estoppel are (1) a representation made or assurance given to the claimant, (2) reliance by the claimant on the representation or assurance and (3) some detriment incurred by the claimant as a consequence of that reliance. See Lord Walker of Gestingthorpe in Thorner v Major and ors [2009] UKHL 18 para 29. But as Lord Scott of Foscote pointed out in the same case at para 15 the representation or assurance would need to be sufficiently clear and unequivocal, the reliance by the claimant would need to be reasonable in all the circumstances and the detriment would need to be sufficiently substantial to justify the intervention of equity.*"

58. In the instant case I accept that, on Ms Swan-Caisey's account, the two conversations, taken together, contained a clear and unequivocal representation by Kingsley Swan that he intended to create a trust. However the conversations did not contain a clear and unequivocal representation as to the terms of the intended trust, still less that Kingsley Swan intended that the Property should be held on constructive trust pending the preparation and execution of a trust instrument. It would obviously have been unreasonable for Ms Swan-Caisey to rely after Kingsley Swan's death on his representation that he had intended to create a trust as, once he was dead, he was no longer capable of doing so.

59. In any event, I am not persuaded that Ms Swan-Caisey did in fact act in reliance on her purported conversations with Kingsley Swan, whatever she understood them to mean. Neither am I persuaded that her occupation of the Property, in purported reliance on those conversations, was to her detriment. The rent which she paid to Madge Swan was not high. Since her mother's

death not only has she been living at the Property rent free, but she has been receiving a modest rent from Mr Darrell.

60. As Ms Swan-Caisey has therefore failed to establish the requisite representation, reliance, or detriment, the claim based on proprietary estoppel also fails.

Adverse possession

61. In the further alternative, Ms Swan-Caisey asserts a claim to the Property by way of adverse possession. Her claim is governed by the Limitation Act 1984, specifically sections 18 and 16(1), and para 8 of the First Schedule. The effect of these provisions is that if another person is in adverse possession of land for 20 years then the owner's title to the land will be extinguished unless, within that period, the owner has brought an action to recover the land.

62. The classic exposition of the law on this topic remains the judgment of Slade LJ (as he then was) in Powell v McFarlane (1979) 38 P&CR 452 Ch. It was cited with approval by the Court of Appeal in Wilkinson, Outerbridge & Brewer v Mackie [1990] Bda LR 7 at 10 – 11. Slade J stated at 470 - 472:

"*It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:*

(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi').

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or

on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The animus possidendi , which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary, case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

... An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

63. I was not addressed on the question of whether, even where the occupier is a trespasser, the owner needs to do more to stop the limitation clock running in the case of adverse possession of domestic premises than she does in other

cases of adverse possession. I understand that this issue has been the subject of detailed submissions in an action pending before the Chief Justice: Rawlins v Russell, Civil Jurisdiction 2013: 81 However it is unnecessary for me to consider the issue in order to rule upon Ms Swan-Caisey's claim for adverse possession.

64. It is submitted for Ms Swan-Caisey that Madge Swan and the siblings collectively occupied the Property – presumably from the time that Kingsley Swan left Bermuda to study in the United States – with the intention of excluding him from it. This is an extraordinary submission and one without evidential foundation. Indeed it is in tension with the evidence of Ms Swan-Caisey: her account of her discussions with Kingsley Swan about putting the Property in trust – a proposal with which, on her evidence, she acquiesced – sits unhappily with her maintaining that at the time Kingsley Swan no longer had any disposable interest in it.

65. Ms Swan-Caisey is driven to these desperate straits because she has only been living continuously in the Property for the past 13 years. That is too short a time for her to acquire adverse possession. Moreover, during her mother's lifetime she was staying in the lower apartment and paying rent to her mother. Payment of rent is inconsistent with dealing with property as an occupying owner might have done. As was Ms Swan-Caisey's letter to Ms Swan offering to buy the Property from her.

66. The earliest date from which possession of the Property can be ascribed to Ms Swan-Caisey is the date of her mother's death. She has paid no rent since then, and, since receiving Terra Law's letter of 4th October 2012 instructing her to vacate the premises, she has occupied the Property as a trespasser. It is unnecessary to consider whether that letter, and subsequent similar letters from Ms Swan's attorneys, negatived Ms Swan's discontinuance of possession as the commencement of a possession action in November 2013 undoubtedly did so.

67. As neither Ms Swan-Caisey nor a group of which she forms part have been in adverse possession of the land for 20 years, the owner's title to the Property has not been extinguished. Therefore the claim for adverse possession fails.

Summary

68. Ms Swan is entitled to an order for possession of the Property. I shall hear the parties as to the appropriate terms of the order if these cannot be agreed.

69. In making this finding I am conscious that the common law has worked a harsh result: one that would not have been arrived at had the Succession Act 1974 been in force at the date of Charles Swan's death. The constructive trust for which Ms Swan-Caisey contended would have been fairer. On the other hand, Ms Swan-Caisey, together with other siblings, has already benefited from the use of the Property. Now it is the turn of Ms Swan.

70. On the question of costs, I see no reason for departing from the principle that they should follow the event. My provisional view is therefore that Ms Swan-Caisey should pay Ms Swan's costs on the standard basis, to be taxed if not agreed. As Mr Darrell has maintained a neutral stance, it is my provisional view that with respect to him I should make no order as to costs. If any party wishes to try and persuade me otherwise they have liberty to apply. Any such application must be lodged within seven days of the date of this judgment.

DATED this 17th day of June, 2014

Hellman J