WILLS v WILLS - Another point of view:

1. I respectfully disagree with learned Queen’s Counsel’s recent critique of the decision of the Judicial Committee of the Privy Council in the matter of **PCA 50/2002 Wills v Wills** (JamBar January 2004 Volume 12 No. 1). There was no revolutionary development and the case has not "completely redefined" the area of law known as adverse possession. I do not agree that in the "Jamaican cultural context" the decision could be seen as a red flag to squatters inviting them to come forth and capture.

2. It was the common law which imported into the early Limitation Statutes a concept of adverse possession. It was then held that in order to establish a time bar in claims related to land the possessor had to demonstrate that his possession was "adverse" to the legal owner and one element of this was that his use of the land must be inconsistent with the legal owner's intended use... The United Kingdom Limitations Act of 1833 (which Jamaica dutifully copied in 1881) abolished that requirement by Sections 3 and 4 which stated categorically that the right accrued twelve (12) years after dispossession or discontinuance of possession. Lord Browne-Wilkinson's analysis is worthy of repetition in full:

"The root of the problem is caused by the concept of 'non-adverse possession'. This was a concept engrafted by the common law and equity onto the limitation statute of James I (21 Jac I, c16). Before the passing of the Real Property Limitation Acts 1833 (3 & 4 Will 4, c27) and 1874 (37 & 38 Vict c 57), the rights of the paper owner were not taken away save by a 'dissinsein' or an ouster and use of the land by the squatter of a kind which was clearly inconsistent with the paper title. Such inconsistent use was called adverse possession: see Professor Dockray, 'Adverse Possession and Intention' [1982] Conveyancer 256, 260. Under the 1833 Act (sections 2 and 3 of which were substantially to the same effect as the 1980 Act, section 15(i) and Schedule I, paragraph 1) the right of action was barred 20 years after 'the right...to bring such action shall have first accrued' and 'such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession'. Soon after the passing of the 1833 Act it was held that the second and third sections of that Act...have done away with the doctrine of non-adverse possession, and......the question is whether 20 years have elapsed since the right accrued, whatever the nature of the possession': Denman, CJ in **Nepean v Doe d Knight (1837) 2 M & W 894 911**. The same statement of the now law was made in **Culley v Doe d Taylorson (1840) 11 Ad & E r105**, where Denman, CJ said: 'The effect of [section 2] is to put an end to all questions and discussions, whether the possession of lands, etc, be adverse or not; and, if one party has been in the actual possession for
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20 years, whether adversely or not, the claimant, whose original right of entry accrued above 20 years before bringing the ejectment, is barred by this section.

The same was held to be the law by the Privy Council in a carefully reasoned advice delivered by Lord Upljohn in Paradise Beach and Transportation Co. Ltd. v Price-Robinson [1968] AC 1072; see also Professor Dockray [1992] Conveyancer 258.

From 1833 onwards, therefore, old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions. From 1833 onwards the only question was whether the squatter had been in possession in the ordinary sense of the word.’ J A Pye (Oxford) v Graham [2003] IAC 419 @ 433.

3. The fact is therefore that the decisions of the Jamaican Court of Appeal to which Miss Phillips refers in her article followed erroneous English decisions. In Leigh v Jack [1879] for example the English judges used dicta which had the effect of suggesting that the possession had to be adverse to the legal owners intended user. This common law requirement had by 1879 been abolished by statute. That decision be it noted was correct on its particular facts as:

(a) the legal owner had carried out work on the fence within the limitation period;

(b) the possessor knew of the legal owners’, intended use and for that reason had not used the land inconsistently with that intended user.

It was therefore possible to infer that the squatters only intended to possess until the land was needed by the legal owner. See analysis of Lord Browne-Wilkinson in JA Pye (Oxford) v Graham [2003] IAC 419 @ 438c. Several other cases, however, relied on the misleading dicta in Leigh v Jack and thereby reintroduced the idea of ‘adverse’ possession.

4. Wills v Wills applied JA Pye v Graham and reaffirmed the law that, for a possessor to successfully rely on the Limitation Statutes and thereby defeat the claim of the legal owner, he must demonstrate twelve (12) years possession. ‘Possession’ means:

(a) A sufficient degree of physical custody and control (factual possession);

(b) An intention to exercise such custody and control on his own behalf and for his own benefit (intention to possess).

(c) That the taking or continuation of possession is without the actual consent of the legal owner. Note that an initial consent does not necessarily preclude a possessory title as in Pye where although initially given possession, the possessor was then told to leave and never did. The relevant time ran from the refusal to leave. The legal owner’s failure to take action was fatal.

5. Be it noted that the nature of the property may still be relevant, per Lord Walker of Gestingthorpe, Wills v Wills:

“All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also rightly stated that the Court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably necessary or sufficient as evidence of possession.”

Their Lordships also approved Lord Browne-Wilkinson’s words in the Pye case @ 438c, “The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner.”

6. The Wills case cannot be appreciated unless one acknowledges the concept of the Limitation of Action. The legislature has determined that after twelve (12) years a person’s failure to exercise a right in relation to land will give a Defendant a complete defence to any claim brought subsequently. That policy decision was no doubt appropriate for England in the period leading up to the Industrial Revolution. It assisted with the freeing up of the land and its liberation from a post feudal stranglehold.

Is it relevant in today’s Jamaica? It may well be, given the need for land and housing and the tendency of some to abandon their holdings for a better life overseas. However, such questions are to be resolved by the legislature not by judicial misinterpretation of clear statutory provisions.

7. The Wills case is significant for several other reasons. Firstly, it demonstrates the undesirability of having such issues dealt with summarily and without viva voce evidence and opportunities for cross examination.

8. Secondly, it demonstrates the delays which characterize our system of justice. The trial judge reserved judgment for two (2) years on an Originating Summons filed in February 1993. It was heard in July 1994 with judgment delivered in November 1996. The Court of Appeal heard arguments on the 14th, 15th, 16th December, 1998 and delivered judgment on the 1st March, 1999. The matter was (Cont’d on page 11)

9. Thirdly, the Court of Appeal's attitude. That court purported to raise and determine issues not pleaded or raised by either side or by the judge in the court below. That court also erred when it relied on a letter of the 20th January, 1987 as an acknowledgment by the deceased husband of the first wife's entitlement when in fact that letter was not written by the deceased or by his attorney. In any event the Privy Council pointed to the obvious.

"Recognition of the existence of a disputed claim is not the same as acknowledgment that the claim is a good one."

The Court of Appeal also ignored Section 13 of the Act.

"No continual or other claim upon or near any land shall preserve any right of making an entry or of bringing an action."

10. The matters of fiduciary duty and estoppel were neither argued on appeal nor pleaded, nor were the parties given an opportunity to address them. The points first emerged when the Court of Appeal's judgment was delivered. It, in any event, would have been surprising if an estranged wife could rely on such an implication.

Per Lord Walker,

"There is no general rule that a husband stands in a fiduciary relationship with his wife. Such a relationship might become material if pleaded and proved on the petitioner's facts, but there was nothing to justify it being raised in this case."

11. The comments on the Wills v Wills case also ignore the clear justice of the case. The first wife left the matrimonial home and migrated to the United States in 1964. Although returning to Jamaica periodically, as and after 1976 she never returned to the matrimonial home and had no possessions there. Although writing a letter to complain about receiving no rent or support from her husband in relation to the property she did nothing to prosecute her claim. The possession of the joint owner (her husband) was therefore clearly to her exclusion. Indeed, she stated that on a visit to Jamaica in 1991 she had not been 'invited' to the matrimonial home and hence had not been there. On the evidence, there is no doubt that she had been dispossessed or had discontinued possession for the requisite period.

12. The position of the second wife was entirely different. She had lived with Mr. Wills since 1973. Initially as caretaker then as common law spouse and ultimately as wife. They got married in 1986. The husband died in December 1992 and the first wife began agitating for recovery from the second wife in or about April of 1993. An action for recovery of possession was commenced on the 21st April, 1994 against the second wife. Against this factual background therefore, the decision in Wills v Wills represents good law and good sense. It was a just result according to law.

13. Having said this, however, Miss Phillips is correct in that their Lordships appear to have dealt with the two (2) properties in the estate as if the same facts as to possession were applicable and did so without detailed analysis. This may have been due to a dearth of evidence. It was clear that for the entire period in question the husband collected the rent from the other property which was tenanted. It is fair to say that the same possessory analysis was apt.

14. Miss Phillips argues also that there has been some damage done to the rule of survivorship. The most important issue of law, which the Jamaican Court of Appeal had been asked to determine, was whether one joint owner could claim a possessory title against another. A similar question had been answered in the affirmative by the Judicial Committee of the Privy Council in Paradise Beach and Transport Co. v Robinson [1968] AC 1072 in relation to a tenancy in common. The attorneys for the second wife urged that different considerations applied to a joint tenancy due to unity of possession.

The Privy Council in Wills v Wills rightly assumed there is no valid basis for a distinction. Joint owners have separate legal interests and unless the other joint owner is in possession as your agent or acknowledges that he holds on your behalf, his possession is his own. The Court of Appeal of Jamaica appeared to accept the submission that the analysis in Paradise applied to both joint tenancies and tenancies in common. The Judicial Committee has adopted a similar position on an appeal from Brunei Hajjah v Hajji [1984] 4 PCC at 345.

15. The consequence of the Wills case for the practitioner is not very different from that which has always been in relation to the purchase of land. Persons expecting to inherit jointly owned property need to be advised to make enquiries of the person in possession. They are to be told that the fact of registration as joint owner does not preclude a possessory claim based upon a failure to collect rent or to exercise the right to possession.

16. Miss Phillips has raised also the issue of the status of the second wife to bring the action and the fact that Letters of Administration were not obtained until after action was brought. This was not a point in issue at any stage of the proceedings. Such a point would have been required to be taken at first instance and before the judge at trial. In any event, it must be noted that if, as Miss Phillips says, the grant of Letters of Administration takes
effect from the date of the grant and there can be no 'relation back', this would mean that beneficiaries of an Intestate's estate could do nothing to resist an unlawful claim pending the grant of Letters of Administration. I rather doubt that to be the case. The Originating Summons in the Wills case was brought pursuant to Section 531A and 532 of the Judicature Civil Procedure Code and claimed declarations in relation to 'the Estate of George Wills, deceased, intestate.' Be that as it may this was not an issue decided by the Judicial Committee. It may, however, be a signal that the Legislature should move to allow beneficiaries to bring or defend claims in the name of the Intestate's estate pending the grant of Letters of Administration.

17. In the final analysis therefore, Wills v Wills represents good law and a just result. A happy coincidence which unhappily is not always evident in judicial decisions.