

[2015 Gib LR 8]

MARTINEZ v. NO NAMED DEFENDANT

SUPREME COURT (Jack, J.): October 10th, 2014

Land Law—title—adverse possession—arguable that adverse possession requires ouster of paper owner—use of land by one holder of undivided share not adverse to that of another holder of undivided share in same property—lease of whole property to one joint owner arguably not adverse possession because one of two joint tenants able to grant lease

Civil Procedure—parties—defendant—by CPR, r.8.2A, claim to be issued against named defendant unless Practice Direction allows otherwise—if no evidence of claimant’s search for proper defendant, case may be adjourned to continue search, with time limit specified

The claimant applied for a declaration *contra mundum* that he was the sole legal and beneficial owner of all of the undivided estate in fee simple in a property, and for an order directing the Registrar of Land Titles to register him as such.

The property comprised seven undivided shares, three of which were conveyed to the claimant and his brother in 1970, and another in 1978. His brother died in 1981, leaving his interest in the property to the claimant. The owner of the other three undivided shares was unknown. In 1998, the whole property was leased to a company owned by the claimant and his daughter.

The claimant submitted that he was entitled to the whole of the legal and beneficial interest in the property by virtue of the doctrine of adverse possession. He and his brother had been in possession of the property since 1970, with the result that the title of all other persons, if any, who might have alleged an interest in the property would have been extinguished under the Limitation Act 1960. He submitted that the actual possession of a person in joint ownership of land could give rise to a claim for adverse possession without any ouster of the other joint owner.

Held, adjourning the application:

(1) It was arguable that adverse possession under the Limitation Act 1960 required an ouster of the paper owner, particularly given the absence of a section equivalent to s.12 of the (UK) Real Property Limitation Act 1833. On this approach, the joint owner claiming adverse possession would have to have interfered with the other joint owner’s use or enjoyment of the land for the requisite period to gain title to the whole of

the property through adverse possession. The claimant's submission that the actual possession of a person in joint ownership of land could give rise to a claim for adverse possession without any such ouster of the other joint owner could not be decided without adversarial argument (para. 20; para. 23; paras. 27–28).

(2) The claimant had done nothing to oust the owner of the other three undivided shares. Use of land by one holder of an undivided share in property was not adverse to that of another holder of an undivided share in the same property. It was arguable that even the grant of the lease in 1998 was not inconsistent with the rights of the owner of the other three undivided shares, based on the fact that one of two joint tenants or tenants in common could grant a lease (paras. 24–25).

(3) The Land Titles Act 2011 made no provision for the type of order sought by the claimant, as the Gibraltar Land Register gave no form of title guarantee. It was possible that a declaration by the court that the claimant was the owner of the whole of the fee simple could be registered, but further argument was required before this could be accepted (para. 38; para. 42).

(4) The claim was not properly constituted in that the claim form named no defendant. Under the Civil Procedure Rules, r.8.2A, this was only permissible in cases set out in a Practice Direction, but there was no Practice Direction covering this case. Further investigations into the ownership of the “missing” three one-seventh shares should be carried out, with a view to adding the owners to the suit as defendants (para. 43).

(5) The claimant had not taken sufficient steps to discover who might own the other three undivided shares. The application would be adjourned with liberty to the claimant to apply to restore the claim for further directions after undertaking further investigations. If no such application were made by October 30th, 2016, the claim would be dismissed (para. 32; para. 34; para. 36; para. 43; para. 45).

Cases cited:

- (1) *Farran v. Beresford* (1843), 10 Cl. & F. 319; 8 E.R. 764, referred to.
- (2) *Farrell v. Gleeson* (1844), 11 Cl. & F. 702; 8 E.R. 1269, referred to.
- (3) *Freckleton v. Freckleton*, Jamaican Supreme Ct., July 25th, 2006, HCV 01694 of 2005, unreported, considered.
- (4) *J.A. Pye (Oxford) Ltd. v. Graham*, [2003] 1 A.C. 419; [2002] 3 W.L.R. 221; [2002] 3 All E.R. 865; [2003] 1 P. & C.R. 10; [2002] H.R.L.R. 34; [2002] UKHL 30, considered.
- (5) *J.A. Pye (Oxford) Ltd. v. United Kingdom (Application 44302/02)* (2007), 46 E.H.R.R. 45; [2008] 1 E.G.L.R. 111; [2007] R.V.R. 302; 23 B.H.R.C. 405; [2007] ECHR 44302/02, referred to.
- (6) *Leigh v. Jack* (1879), 5 Ex. D. 264, considered.
- (7) *Lowsley v. Forbes*, [1999] 1 A.C. 329; [1998] 3 W.L.R. 501; [1998] 3 All E.R. 897; [1998] 2 Lloyd's Rep. 577, referred to.

- (8) *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894; 150 E.R. 1021, referred to.
- (9) *Paradise Beach & Transp. Co. Ltd. v. Price-Robinson*, [1968] A.C. 1072; [1968] 2 W.L.R. 873; [1968] 1 All E.R. 530, considered.
- (10) *Sheldon v. RHM Outhwaite (Underwriting Agencies) Ltd.*, [1996] A.C. 102; [1995] 2 W.L.R. 570; [1995] 2 All E.R. 558; [1995] 2 Lloyd's Rep. 197, referred to.
- (11) *W.T. Lamb & Sons v. Rider*, [1948] 2 K.B. 331; [1948] 2 All E.R. 402; (1948), 64 T.L.R. 530, considered.
- (12) *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and B.P. Ltd.*, [1975] Q.B. 94; [1974] 3 W.L.R. 387; [1974] 3 All E.R. 575; (1974), 29 P. & C.R. 214, referred to.
- (13) *Williams Bros. Direct Supply Ltd. v. Raftery*, [1958] 1 Q.B. 159; [1957] 3 W.L.R. 931; [1957] 3 All E.R. 593, considered.

Legislation construed:

Civil Procedure Rules, r.8.2A:

“(1) A practice direction may set out circumstances in which a claim form may be issued under this Part without naming a defendant.

(2) The practice direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued.”

Limitation Act 1960, s.12(3): The relevant terms of this sub-section are set out at para. 13.

s.13(1): The relevant terms of this sub-section are set out at para. 20.

s.18: The relevant terms of this section are set out at para. 20.

s.23: “. . . [A]t the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.”

s.28(1): “If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired:

Provided that—

. . .

- (c) no action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he claims . . .”

Limitation Act 1980 (c.80), s.21(1):

“No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

. . .

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- (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.”

S. ffrench Davis for the claimant;

J. Lennane observing on behalf of the Attorney-General and the Registrar of Land Titles.

1 **JACK, J.:** This is a claim for a declaration that the claimant, Clive Mario Martinez, is the sole legal and beneficial owner of all of the undivided estate in fee simple in the property known as 36 Governor’s Street, Gibraltar, being Freehold Property No. 378 in the Land Titles Register maintained by the Registrar of Land Titles pursuant to the provisions of the Gibraltar Land Titles Act 2011, and that the title of all other persons, if any, who might have alleged an interest in the said property has been extinguished by reason of the operation of s.23 of the Limitation Act. He further seeks an order directing the Registrar of Land Titles to register him as the owner of the entire and undivided fee simple.

2 The claim form names no defendant. The declaration is sought *contra mundum*.

The facts

3 By a deed of conveyance made on December 10th, 1970, in consideration of £728. 11s. 5d., Daniel Sanchez Rey conveyed three undivided one-seventh shares of the property, described therein, to Clive Martinez and his brother, Joseph John Martinez. Mr. Rey, who resided at 5 Calpe Road, Gibraltar, was acting as attorney on behalf of eight heirs of Ernest A. Dallas. Ernest Dallas was said to have died on March 28th, 1957. The deed recited that there was a mortgage over one-sixth of the premises, which had been granted by Helen Dallas to David M. Benaim, on August 2nd, 1905, to secure 2,825 pesetas (or £72. 8s. 8d.), and that the mortgage was to be paid off at completion. The deed was witnessed by Ana Marie Balloqui of 38 Keightley House, Gibraltar.

4 The property was described as being—

“... [A]ll that small piece or parcel of ground with the buildings erected thereon situated on the west side of Governor’s Street and measuring thereto eighteen feet or thereabouts bounded on the north and west by part of the Freehold Properties 376, 377, 378 and 380, on the south by Freehold Property 379 and on the east by Governor’s Street aforesaid and containing in the whole six hundred superficial feet or thereabouts as more particularly shown coloured red on the plan hereto annexed and being part of Freehold Properties 376, 377,

378 and 380 (R. Nos. 463 and 464) in the General Plan of the city of Gibraltar.”

5 No copy of the plan is exhibited by the claimant in the current proceedings, nor is any explanation given as to why 36 Governor’s St. is described in the form of declaration sought as “Freehold Property number 378,” whereas on the basis of the parcels schedule, which I have set out, 36 Governor’s St. consists of parts of a number of different freehold titles.

6 The 1970 deed does not seem to have been registered timeously. As a result, an application was made to Unsworth, C.J., who, on June 8th, 1972, allowed the deed to be registered out of time.

7 By a deed of conveyance made on July 31st, 1978, in consideration of £1,700, Mariquita Cecilia Bush de Masjuan, Beryl Aida Bush, Diana Harriet Austin and Drusilla Dallas Robinson conveyed a one-seventh undivided share in the property, described in the same way as in the 1970 deed, to the claimant and his brother. The signatures of all the transferors were witnessed and the names and addresses of the witnesses are all readily legible.

8 Joseph John Martinez died on August 7th, 1981. His widow, Francisca Martinez, obtained letters of administration of his estate and, by a deed of conveyance made on October 31st, 1997, in consideration of £45,000, conveyed the deceased’s interest in the four undivided one-seventh parts of the property, described as in the earlier deeds.

9 The claimant’s evidence is that, after he and his brother purchased their three-sevenths of the property in 1970, they converted it into three apartments with a shop on the ground floor. They let the flats out on short-term contracts under the style “Governor’s Inn (Apartments).” He says that in 1978 they were approached by the owners of the one-seventh share and were able to purchase it. He says that “neither the agent through whom my brother and I came into contact with the property nor any other person who I have since met has been able to give me any indication of any person who they believed might be interested in the unaccounted for three-sevenths.”

10 By a lease dated August 1st, 1998, the whole property was demised to a company, Photofinish Ltd., owned by the claimant and his daughter, for a term of five years.

11 The claimant placed advertisements in the *London Gazette* and the *Gibraltar Gazette*, on or around August 18th this year, notifying his intention of making this application.

12 I shall consider below what conclusions I draw from the evidence.

The claimant's submissions

13 Mr. French Davis submits that the claimant is entitled to the whole of the legal and beneficial interest in 36 Governor's St. by virtue of his and his brother's possession of the property since 1970. Section 12(3) of the Gibraltar Limitation Act 1960 provides that—

“No action shall be brought by any other person [i.e. other than the Crown or a spiritual or eleemosynary corporation sole] to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person . . .”

14 Section 28(1)(c) of the Act extends time where a person holding an interest is a minor or under a disability, but for a maximum period of 30 years. Thus, so long as the claimant and his late brother, he argued, had possession from 1984, the limitation period must have expired. Once the period of limitation expires, the title of the person is extinguished: see s.23.

15 Mr. French Davis dealt with the suggestion that the possession of a person in joint ownership of land could not be such as to give rise to adverse possession. This, he submitted, has not been the law since the Real Property Limitation Act 1833 and he relied on *Paradise Beach & Transp. Co. Ltd. v. Price-Robinson* (9), a decision of the Privy Council on appeal from the Bahamas, and *Freckleton v. Freckleton* (3). So long as the claimant and his brother had actual possession, that sufficed for time to run. The *Freckleton* decision in turn cited the House of Lords decision in *J.A. Pye (Oxford) Ltd. v. Graham* (4). Thus, in the current case, the title of anyone entitled to the other three undivided one-seventh shares had, he submitted, been extinguished.

16 As to bringing the claim by way of a Civil Procedure Rules, Part 8 claim without naming a defendant, the claimant had no means of identifying who might hold those shares. Accordingly, it was appropriate, he submitted, to make the declaration requested, in order that the claimant would have good title to sell. The claimant is now 72 years old and wishes to resolve matters once and for all.

Limitation

17 In considering Mr. French Davis' submissions, I shall start with limitation. The law of limitation in Gibraltar is governed by the Limitation Act 1960. In interpreting this Act, there may, in my judgment, be an issue as to whether the court's task is to consider the law as the legislator in 1960 would have understood it to be, or whether the interpretation of the Act is something free-standing as at today's date (it may be of importance

that the 1960 Act was a consolidation Act: see *Sheldon v. RHM Outhwaite (Underwriting Agencies) Ltd.* (10) ([1996] A.C. at 140)).

18 The significance of the point is this. In *Pye* (4), the House of Lords determined that, for time to run in favour of a squatter, it was not necessary that there be an ouster of the paper owner ([2003] 1 A.C. 419, at para. 38):

“The word ‘ouster’ is derived from the old [pre-1833] law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a ‘dispossession’ of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession the paper owner cannot be. If the paper owner was at one stage in possession of the land but the squatter’s subsequent occupation of it in law constitutes possession the squatter must have ‘dispossessed’ the true owner . . .”

19 In so deciding, the House of Lords overruled a series of cases including *Williams Bros. Direct Supply Ltd. v. Raftery* (13), *Wallis’s Cayton Bay Holiday Camp Ltd. v. Shell-Mex and B.P. Ltd.* (12), and *Leigh v. Jack* (6), which decided (5 Ex. D. at 273) that “adverse” possession required that “acts must be done which are inconsistent with [the paper owner’s] enjoyment of the soil for the purposes for which he intended to use it . . .” Instead, the House of Lords reverted to the law as it was understood to be directly after the passing of the Real Property Limitation Act 1833. At that time, it was held in *Nepean v. Doe d. Knight* (8) that the relevant sections of that Act “have done away with the doctrine of non-adverse possession” (2 M. & W. at 911; 150 E.R. at 1028).

20 The potential difficulty for Mr. French Davis’s argument in the current case is that in 1960, when the Gibraltar legislator was enacting what was then an Ordinance, the relevant law had most recently been stated in the *Williams Bros.* case. Arguably, the terms used in the Gibraltar legislation, such as s.13(1) (“Where the person bringing an action to recover land . . . has . . . been *dispossessed*” [Emphasis supplied.]) and s.18 (“No right of action . . . shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (. . . ‘adverse possession’) . . .” [Emphasis supplied.]) of the Limitation Act, is a recognition of the *Leigh v. Jack* line of authority.

21 A similar point as to the legislator’s intention at the time of making legislation arose in relation to the limitation period for the enforcement of judgments under the (UK) Limitation Act 1980. The 1833 Act introduced a 20-year limitation period for actions on a judgment: see s.40. Shortly after the passing of the 1833 Act, the House of Lords, in two appeals, held

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that execution of a judgment was an action on a judgment and that judgments could only be enforced within the limitation period: see *Farran v. Beresford* (1) and *Farrell v. Gleeson* (2). There was a series of 19th-century cases to the same effect. The wording of the 1833 Act was carried over into the (UK) Limitation Act 1939. However, in *W.T. Lamb & Sons v. Rider* (11), the English Court of Appeal held that execution after the expiry of the limitation period (by this time reduced to 12 years) was *not* barred by the 1939 Act.

22 When the (UK) Limitation Act 1980 reduced the limitation period to a 6-year period, it acted on the basis that *W.T. Lamb v. Rider* was correct: see Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (Cmnd. 6923) at para. 4.14 (1977). This, the House of Lords determined in *Lowsley v. Forbes* (7) ([1999] 1 A.C. at 342), meant that the legislature had to be taken to have approved *W.T. Lamb v. Rider* in preference to the earlier line of authority (even though the House of Lords authorities from 1843 and 1844 overrode the Court of Appeal decision in *Lamb v. Rider*).

23 I do not decide that this argument is right. I merely say that these points are fairly arguable. It would, unless no alternative is possible, be inappropriate, in my judgment, to decide these points without adversarial argument.

24 This is particularly the case where, as here, the person making the claim is the holder of an undivided share of land and the person against whom he is making the claim is another holder of an undivided share of land. The reason is that the use of the land by one holder of an undivided share is not (or at least not automatically) adverse to that of another holder of an undivided share.

25 Arguably, not even the grant of the lease in 1998 to Photofinish Ltd. was inconsistent with the other holders' rights. It is well established that one of two joint tenants or tenants in common can grant a lease: see *Littleton's Tenures*, §289, at 134–135 (1903 ed.); *Co. Litt.*, at 185a and 186b (1628); and the citation of authority in Sodergren, "Consequences of a Lease to a Third Party Made by One Joint Tenant," 66 *California Law Review* 69 (1978).

26 Mr. French Davis relied on the Privy Council's opinion in *Paradise Beach* (9). In this case, the deceased had devised some land to various children as tenants in common at law. The land was, from 1913 onwards, farmed exclusively by two daughters, who were only two of the many devisees. The Privy Council held that, by 1962 when the daughters died, those two devisees had possessed the land to the exclusion of the other devisees and, accordingly, their estates were entitled to the whole title to the land by prescription.

27 The potential difficulty in his reliance on this case is that the relevant Bahamian legislation contained an express provision (copied from s.12 of the 1833 UK statute), which provided:

“ . . . [W]hen any One or more of several Persons entitled to any Land or Rent as Coparceners, Joint Tenants, or Tenants in Common, shall have been in Possession or Receipt of the Entirety, or more than his or their undivided Share or Shares of such Land or of the Profits thereof, or of such Rent, for his or their own Benefit, or for the Benefit of any Person or Persons other than the Person or Persons entitled to the other Share or Shares of the same Land or Rent, such Possession or Receipt shall not be deemed to have been the Possession or Receipt of or by such last mentioned Person or Persons or any of them.”

28 There is nothing in the Gibraltar legislation which corresponds to this provision. In my judgment, it is arguable that the absence of a section corresponding to s.12 reinforces the argument that the legislator was seeking to follow the *Williams Bros.* (13) case. This may also be a reason for distinguishing *Freckleton v. Freckleton* (3).

29 Nor is there anything particularly surprising if the legislator did take the view that time should not invariably run against a tenant in common who was out of possession. In English law, tenancies in common at law were abolished by s.1(6) of the Law of Property Act 1925. Thereafter, a tenancy in common could only take effect initially under a trust for sale and subsequently (after the passing of the Trusts of Land and Appointment of Trustees Act 1996) under a trust of land. Since the holders of the fee simple would be trustees, no limitation period would run in their favour against one of the tenants in common in equity: (UK) Limitation Act 1980, s.21(1)(b).

30 One other matter not argued by Mr. French Davis is what the effect might be if the “missing” three undivided one-sevenths were the subject of a settlement. By s.14 of the 1960 Act, it is only when a reversionary interest falls into possession that time starts running in favour of a squatter. Thus, in the current case, if the three undivided one-sevenths were held on trust for someone for life (or if a life interest at law had been granted), with reversion to someone else, it is only when that person inherits that time begins to run. It is perfectly imaginable that a life tenant who was holding the three undivided one-sevenths in 1970 might still be alive.

31 I should also add for completeness that there might be an issue as to whether the construction of the 1960 Act for which Mr. French Davis argued was compatible with s.6 of the 1969 and 2006 Constitutions of Gibraltar (protection from deprivation of property). Article 1 of the First Protocol to the European Convention of Human Rights might also have

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application, although it is right to say that the Grand Chamber of the European Court of Human Rights determined that the legislation in question in *Pye* (4) was not incompatible with art. 1: see *J.A. Pye (Oxford) Ltd. v. United Kingdom* (5).

Assessment of the evidence

32 I have set out the claimant's evidence that no one had given him or his brother any indication of who might own the missing three undivided shares. I do not consider this bland statement to be satisfactory. Presumably, when he and his brother purchased the first three undivided one-seventh shares from the heirs of Ernest A. Dallas, some investigation of title was carried out. He gives no indication what his understanding was of how these heirs came to have a share in the property. Likewise, when he and his brother purchased the further one-seventh share in 1978, presumably some investigation of title took place.

33 He says virtually nothing about either of these purchases. Who, for example, were his solicitors? Who was the estate agent? Who was Daniel Sanchez Rey? Mr. Rey lived in Calpe Road in Gibraltar. Did the claimant or his brother know him? How did the four ladies who made the 1978 conveyance come to be in contact with them?

34 So far as appears from the evidence, no attempt has been made to investigate who might hold the outstanding three undivided one-sevenths (apart from the advertisements in the two *Gazettes*). Mr. French Davis tells me, in argument, that he and other solicitors before him have, in fact, carried out extensive further investigations of title, but none of the deeds or the results of the investigations have been put in evidence. He says that he has the wills of Helen Dallas and Ernest Dallas, but again these are not in evidence.

35 On the evidence he has produced, Helen Dallas may be the original freeholder (although Mr. French Davis says she may only have held four-sevenths). Ernest A. Dallas may well have been her son (and Mr. French Davis says that this is the case). The four women who made the 1978 conveyance may have been granddaughters through another of Helen Dallas's children (and again Mr. French Davis says this is the case). It is not an unreasonable surmise that the other three-sevenths are held by other grandchildren (although Mr. French Davis says this may not be the case). The claimant has not put in evidence any evidence of his attempts to trace the descendants of Helen Dallas. For example, a simple internet search reveals a Drusilla Dallas Robinson, born in 1928, living in Somerset, who had been a founding director of the Sedgemoor Citizens' Advice Bureau, a company limited by guarantee. Companies House in Cardiff is likely to have documents showing her precise address. She is almost certain to be the eponymous maker of the 1978 deed of conveyance and might well

know who held the other three undivided one-sevenths. She is likely to know who the other children of Helen Dallas were and may be in contact with them or their children. Likewise, perusal of the Gibraltar telephone directory reveals an A.M. Balloqui living in Gibraltar, who may well be the witness to Mr. Rey's signature on the 1970 deed.

36 Further, this failure to put evidence before the court extends to the search for deeds in the Gibraltar Land Titles Registry. The 1905 mortgage has not been exhibited, only deeds relating to Freehold Property No. 378 have been, whereas the 1970 deed suggests that the property is part of Freehold Properties 376, 377, 378 and 380. These other property numbers should be searched as well. There are, as Mr. French Davis concedes, other deeds going back to the 19th century. The court needs to be satisfied that adequate investigations have been carried out as to the other three undivided one-sevenths.

The procedure

37 The claimant has an understandable wish to regulate the position at 36 Governor's St. Mr. French Davis suggests that a declaration as sought in this action is appropriate, with a consequential order against the Registrar of Land Titles.

38 So far as the order against the Registrar of Land Titles is concerned, the difficulty, in my judgment, is that the Land Titles Act 2011 makes no provision for such an order. It must be remembered that the Registry is a registry of deeds. Unlike the Land Registry in England and Wales, the Gibraltar Register gives no form of title guarantee; all it does is create a definitive collection of deeds and wills affecting land in Gibraltar.

39 Historically, there were similar registries in England and Wales. Yorkshire had three deeds registries for each of the Ridings. Middlesex had one. The Middlesex Registry Act 1708 established the latter (it was closed by the Middlesex Deeds Act 1940). The Yorkshire Registries Act 1884 replaced the earlier statutes going back to the Yorkshire (West Riding) Land Registry Act 1703 (2 & 3 Anne, c.4) (it was closed by the Law of Property Act 1969). None of these Acts made provision for any guarantee of title. Instead, by rendering void any conveyance which was not registered, it allowed greater security than was afforded by ordinary unregistered conveyancing because deeds could not be lost (or suppressed by the unscrupulous).

40 The 1884 Act is the probable inspiration for the Land (Titles) Ordinance 1888 in Gibraltar. The 1888 Ordinance was replaced by the Land Titles Act 1990 and now by the Land Titles Act 2011.

41 Mr. French Davis submits that it was appropriate to make an order against the Registrar of Land Titles, effectively by analogy with the

position in the United Kingdom. In England and Wales, he submitted, the Land Registrar would be willing to certify title based on the evidence the claimant presented in the current claim. I do not accept that. The scheme under the (UK) Land Registration Act 2002 is more nuanced than this bald presentation by Mr. French Davis would suggest. Under s.9(1) of that Act, on first registration of a freehold, the Registrar can register the land with either absolute, qualified or possessory title. The full title guarantee (which means the Land Registry indemnifies someone who suffers through error) is only given when absolute title is granted. There is provision for qualified and possessory titles to be upgraded (usually after 12 years): see s.62. If the current case were to be heard in England (and if legal tenancies in common were possible in that jurisdiction), the Registrar would be likely to register only a qualified or possessory title.

42 Because there is no provision in the Gibraltar legislation for registration of the claimant as the owner of the whole of the fee simple, in my judgment I have no power to make such an order. If, however, a declaration were granted as sought by the claimant, then it might be that the court's order itself could be registered. Section 2 of the 2011 Act defines "deeds" as including "all instruments in writing other than wills or testamentary writing . . ." "Instrument" itself is a wide term, which encompasses any "formal legal writing": see *Jowitt's Dictionary of English Law*, 3rd ed. (2010). It is noticeable that the (UK) Law of Property Act 1925 defines "instrument" by saying that it "does not include a statute, unless the statute creates a settlement": see s.205(1)(viii). This implies that a statute might otherwise be an instrument and shows the breadth of the term. However, I would need further argument before accepting that a court order was capable of registration at the Registry.

43 The claim form names no defendant. Under the CPR, r.8.2A, that is permissible in cases set out in a Practice Direction. There is, however, no relevant Practice Direction which appears to cover the current case. It follows that the claim is not currently properly constituted. Further investigations into the ownership of the missing three undivided one-sevenths are required, so that the owners can be added as additional defendants. Alternatively, if it were established that the missing three undivided one-sevenths belong to the estate of Helen Dallas, then it might be possible to make a representation order under the CPR, rr. 19.7 or 19.7A, possibly with an order under the CPR, r.19.8A making the judgment binding on non-parties.

Conclusion

44 In my judgment, therefore, this matter is not ready for determination. Once further investigations into ownership of the other three undivided one-seventh shares have concluded, then it may be possible to nominate a representative defendant. In addition, since an order is sought in relation

to the filing of any court order made in the current proceedings, it may be appropriate to add the Registrar or the Attorney-General as an additional party.

45 In these circumstances, I propose to adjourn the case generally with liberty to the claimant to apply to restore the claim for further directions. If no such application is made by October 30th, 2016, the claim will stand dismissed.

Orders accordingly.
