



[2018] JMSC Civ 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV05642

BETWEEN **ALFRED LLEWELLYN SMITH JNR.** **1ST CLAIMANT**
(Administrator of Estate
Alfred Llewellyn Smith Snr)

AND **DONALD ANTHONY SMITH** **2ND CLAIMANT**
(Administrator of Estate
Alfred Llewellyn Smith Snr)

AND **LOUISE SMALL** **DEFENDANT**

Ms. Aisha M. N. Mulendwe for the Claimants

Mr. Leymon Strachan for the Defendant

February 03, 04 & 13 and July 24, 2015 and November 27, 2018

Amendment sought by claimants after initial closing submissions – Facts on which amendment based already known – Defendant not caught by surprise – Principles that should guide court in determining application – Scope of powers in the Registration of Titles Act (ROTA) to correct “errors” – S. 153 (ROTA) inapplicable in the circumstances as issue is validity of Title itself not the manner in which Certificate evidencing Title was obtained – Doctrine of Adverse Possession – More than 12 years unchallenged open possession – Doctrine of Proprietary Estoppel – Unconscionable for defendant to wait 8 years after a party has acted to its detriment before seeking to enforce her right

D. FRASER J

BACKGROUND

[1] Alfred Llewellyn Smith Snr. was the father of the claimants who are now administrators of his estate. Mr. Smith Snr. was the registered proprietor of 27 Burley Road Kingston 10, registered at Volume 463 Folio 4 of the

Register Book of Titles ("27 Burley Road"). He lived at 27 Burley Road with his family, including the claimants in the family home, the entrance to which faces Burley Road.

- [2] Mr. Smith Snr. had several tenants at his premises including the defendant Ms. Louise Small who lived in a separate converted garage that faced 4B Dumbarton Avenue. Mr. Smith Snr. obtained approval for subdivision of his premises into two lots on October 14, 1987 and subsequently in 1988/89 obtained a Court Order modifying covenants which were endorsed on the title on November 22, 1989.
- [3] The premises was divided as follows: 1) a larger **Lot 2**, the remainder of 27 Burley Road which retained its civic address as 27 Burley Road and its registration on the parent Certificate of Title Volume 463 Folio 4, and 2) the smaller **Lot 1** with civic address of 4B Dumbarton Avenue for which a new splinter title registered at Volume 1226 Folio 308 was issued on March 22, 1990, in his name.
- [4] Later in 1990, Mr. Alfred Llewellyn Smith Snr. entered into an agreement to sell to Ms. Louise Small and Ms. Leila Lafayette for consideration of One Hundred and Eighty thousand dollars (\$180,000.00) one of the two lots described as Lot 2. The sale was completed by transfer No.626445 endorsed on Certificate of Title Volume 463 Folio 4. Lot 2 was therefore transferred into the names of the defendant Ms. Louise Small and Ms. Leila Lafayette, while Lot 1 remained in the name of Mr. Smith Snr.
- [5] Despite the conveyance of Lot 2 to the defendant Ms. Small in June 1990, she remained in possession and controlled as owner, the property at Lot 1 with civic address at 4B Dumbarton Avenue in which prior to the sale, she was a tenant. This she continued to do even after Lot 2 was transferred to her sole ownership by Ms. Lafayette as a gift. In the case of Mr. Smith Snr. even after the transfer of Lot 2 to Ms. Small and Lafayette and then

solely to Ms. Small, he remained living there in his family home until his death on May 21, 2000.

- [6] On September 20, 2001 the claimants, Alfred Smith Jnr. and Donald Smith were appointed administrators of their father's estate. Whilst carrying out their obligations they discovered that Lot 2, 27 Burley Road, where their father had lived up to his death in 2000, was in fact the property that had been transferred to the defendant. The claimants contended that this was an error; that their father intended to sell and the defendant to purchase Lot 1. Further that both parties had thought that was what occurred and had acted accordingly after the sale.
- [7] The claimants therefore sought to have the situation rectified by a transfer by way of exchange between themselves and the defendant. The defendant however claimed that there was no error and refused to engage in such a transfer.

THE CLAIM AND COUNTERCLAIM

- [8] Based on the posture of the defendant the claimants commenced action against the defendant by Fixed Date Claim Form (FDCF) filed September 12, 2011, supported by affidavits. The defendant subsequently filed affidavits in response. On January 30, 2013 it was ordered that the FDCF should be treated as a Claim Form and that affidavits filed by or on behalf of the claimants were to be treated as Particulars of Claim. The affidavits filed by or on behalf of the defendant were to be treated as her defence. Due to the defendant's ill health, by virtue of a Power of Attorney, her son Richard Parchment appeared on her behalf at the trial.
- [9] The claimants sought the following declarations and orders in their FDCF:
- i. That the late Alfred Llewellyn Smith Snr., late of 27 Burley Road, Kingston 10 is the rightful owner of premises known as 27 Burley Road, Kingston

10 in the parish of Saint Andrew registered at Volume 463 Folio 4 of the Register Book of Titles.

- ii. That the Defendant Louise Small of 281 Edgecombe Avenue, Apartment #4B, Manhattan, New York 10031 U.S.A. and 4B Dumbarton Avenue, Kingston 10 in the parish of Saint Andrew is the rightful owner of the premises known as 4B Dumbarton Avenue, Kingston 10 in the parish of Saint Andrew registered at Volume 1226 Folio 308.
- iii. That the entry/endorsement of LOUISE SMALL as the registered proprietor on Certificate of Title registered at Volume 463 Folio 4 and the entry/endorsement of ALFRED LLEWELLYN SMITH Snr., as the registered proprietor on certificate of title registered at volume 1226 Folio 308 have been made in error.
- iv. That certificate of title registered at volume 463 Folio 4 is wrongfully retained by Louise Small.
- v. The Registrar of Titles be directed to call in Certificate of Title registered at Volume 463 Folio 4 from the Defendant and Certificate of Title registered at Volume 1226 Folio 308 from the Claimants forthwith.
- vi. That should the parties fail and/or refuse to deliver the said Certificates of Title to Registrar of Titles within Thirty (30) days of the date of the Court Order, the Registrar of Titles be empowered to cancel the Certificate of Title registered at Volume 463 Folio 4 and/ or Volume 1226 Folio 308 and issue new Certificates of Title.
- vii. The Registrar of Titles correct the endorsement of ownership on the said Certificate of Title registered at volume 463 Folio 4 by removing Louise Small therein endorsed, and instead endorse Alfred Llewellyn Smith Snr., therein.
- viii. The Registrar of Titles correct the endorsement of ownership on the said Certificate of Title registered at volume 1226 Folio 308 by removing Alfred Llewellyn Smith Snr., therein endorsed and instead endorse Louise Small therein.
- ix. The Registrar of Titles is directed to deliver to the 1st and 2nd Claimants the corrected and/or new Certificate of Title for 27 Burley Road Kingston 10 aforementioned duly endorsed in the name of Alfred Llewellyn Smith Snr.,

- x. The Registrar of Titles is directed to deliver to the Defendant the corrected and/or new Certificate of Title for 4B Dumbarton Avenue, Kingston 10, aforementioned duly endorsed in the name of Louise Small.
- xi. Costs for the Claimants to be agreed or taxed
- xii. Liberty to apply

[10] The defendant counterclaimed for recovery of possession of Lot 2, 27 Burley Road, damages for trespass and mesne profits.

[11] After the hearing/close of the evidence/closing submissions, counsel were invited by the court to make further submissions on the legal bases on which the claimant sought to obtain the transfer of the Title for Lot 2 to them and the transfer of the title to Lot 1 to the defendant. At the resumed hearing the claimant sought an amendment of the claimants' Statement of Case to include the following additional declarations and orders:

- i. That Claimants have been in open peaceful quiet undisturbed possession of all that land known as 27 Burley Road registered at volume 463 folio 4 of the Register Book of Titles in excess of twelve (12) years and have therefore acquired possessory title to 27 Burley Road registered at volume 463 folio 4 of the Register Book of Titles and the Defendant's Title to such land has been extinguished by the effluxion of time pursuant to section 30 of the Limitations of Actions Act of Jamaica 1881 thus barring the Defendant from possession of the said land.
- ii. That the Defendant Louise Small by virtue of her non occupation and non possession of the property comprised in certificate of title registered at vol. 463 Fol. 4 of the Register Book of Titles and the Claimants having since 1990 been in sole undisturbed, undisputed and uninterrupted possession of the property comprised in certificate of title registered at vol. 463 Fol. 4 of the Register Book of Titles in its entirety, the Claimants by virtue of s/c 3, 4 & 30 of the Limitation of Actions Act of Jamaica 1881 have acquired an absolute title against the Defendant in respect of the property comprised in certificate of title registered at vol. 463 Fol. 4.
- iii. A Declaration that on her counter claim the Defendant is not entitled to possession of 27 Burley Road registered at volume 463 folio 4 of the Register Book of Titles claimed in her counter claim by virtue of the Limitation of Actions Act by virtue of her non occupation and non possession of the property comprised in certificate of title registered at

vol. 463 Fol. 4 of the Register Book of Titles and the Claimants and their predecessor Alfred Llewelyn Smith Snr. having been in sole undisturbed, undisputed and uninterrupted possession of the entirety over a period of twelve years.

- iv. An order that the Registrar of Titles cancel the entry endorsing Louise Small the registered proprietor in the Register Book of Titles for Land known as 27 Burley Road Kingston 10 registered at vol. 463 Fol. 4 of the Register Book of Titles and instead enter Alfred Llewelyn Smith Snr. as the registered proprietor in the certificate of title registered at Vol. 463 Fol. 4 of the Register Book of Titles or in such manner as appears proper to the court.
- v. And/or in the Alternative, a Declaration that by estoppel by acquiescence, and estoppel by encouragement, the Defendant is estopped from asserting her right to the title to land known as 27 Burley Road registered at Volume 463 Folio 4 of the Register Book of Titles.
- vi. Further and other orders as this Honourable Court may deem just.

[12] The amendment also sought a reduction in the time for delivery of the respective Certificates of Title to the Registrar after the date of any Court Order from within 30 days to within 7 days. Additionally the proposed amended claim form omits the following orders previously sought:

- i. The Registrar of Titles correct the endorsement of ownership on the said Certificate of Title registered at volume 463 Folio 4 by removing Louise Small therein endorsed, and instead endorse Alfred Llewelyn Smith Snr., therein.
- ii. The Registrar of Titles correct the endorsement of ownership on the said Certificate of Title registered at volume 1226 Folio 308 by removing Alfred Llewelyn Smith Snr., therein endorsed and instead endorse Louise Small therein.

THE ISSUES

[13] The following issues arise for determination:

- i. Should the amendments sought by the claimants be granted?

- ii. Is there a basis on the ground of error for the entry/endorsement of the names of Louise Small and Alfred Llewellyn Smith Snr. on the respective titles on which they have been endorsed to be amended so that the entitlements to the respective properties are exchanged?
- iii. If the amendment sought is granted, can the claimants rely on:
 - (1) the doctrine of adverse possession pursuant to the **Limitation of Actions Act?**; and/or
 - (2) the doctrine of proprietary estoppel
- iv. Should the counter claim or any part thereof succeed?

THE EVIDENCE

[14] The evidence for the claimants came from them supported by documentary evidence, and from Charmaine Lewin, a tenant at 27 Burley Road.

The History and Subdivision of the Land

[15] The witness statement of Alfred Llewellyn Smith Jnr. received as his evidence in chief indicates that he and Donald Smith, two of the children of the late Alfred Smith Snr¹. who died on May 21, 2000, jointly obtained Letters of Administration² on September 20, 2001. He outlined that at different periods during his childhood and for a part of his adult life, he lived at 27 Burley Road Kingston 10 with both parents and his siblings including Donald Smith. During this time, his late father converted the garage at 27 Burley Road into self-contained premises which he rented to various tenants over time.

¹ Copy Death Certificate – Exhibit 1.

² Copy Letters of Administration – Exhibit 2.

- [16] In outlining the history of his father's dealings with the property he continued that in 1972³ his father remodeled the family home converting it into three separate units. His father continued to occupy the front right hand section and rented the other two sections to separate tenants up to his death.
- [17] His father in July 1984 submitted an application to subdivide 27 Burley Road into two unequal plots. Firstly, a larger plot labelled Lot 2 on the subdivision plan which housed the large family home that was still occupied by the Smith family with continued access from Burley Road. Secondly a smaller plot labelled Lot 1 which contained the tenanted converted garage premises also known as 4B Dumbarton Avenue that continued to be accessed from Dumbarton Road.
- [18] The subdivision received approval on or about October 14, 1987 and a Court Order subsequently obtained, modifying covenants on Certificate of Title Volume 463 Folio 4⁴ of the Register Book of Titles. These modifications were noted on the Title on November 22, 1989⁵.
- [19] Alfred Smith Jnr's statement continued to indicate that on March 22, 1990 the Registrar of Titles issued a splinter title for 4B Dumbarton Avenue with Certificate of Title registered at Volume 1226 Folio 308⁶. It should be noted that the description of the resulting two parcels of land is significant and will feature in the court's subsequent analysis.
- [20] The parent title registered at Vol. 463 Fol. 4 on which Lot 2 remained after the subdivision, bears this description:

³ Actually a perusal of the Title shows that Mr. Alfred Smith Snr. acquired 27 Burley Road on June 19, 1968.

⁴ Copy of Title - Exhibit 5.

⁵ The copy Application to Surrender by Alfred Llewellyn Smith dated June 21, 1989 together with the copy Approved Sub-division plan of land part of Eastwood Park Saint Andrew dated July 2, 1984, copy approval and conditions for subdivision of premises part of Burley Road, registered at Vol. 463 Fol. 4 stamped 14/10/87 and copy pre-checked plan of part of Eastwood Park prepared by H. G. Bell Commissioned Land Surveyor were together received as Exhibit 3.

⁶ Copy Title – Exhibit 4.

ALL THAT parcel of land known as Number Twenty-seven Burley Road part of Eastwood Park in the parish of Saint Andrew being the **lot numbered One** Block C on the plan of Eastwood Park aforesaid deposited in the Office of Titles on the 7th of June 1945, of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered in Volume 434 Folio 58. (Emphasis added)

- [21] The splinter title registered at Vol. 1226 Fol. 308 bears the following description:

ALL THAT parcel of land part of Eastwood Park known as TWENTY-SEVEN BURLEY ROAD in the parish of SAINT ANDREW containing by survey Two Thousand Five Hundred and Sixty-one Square Feet and Six-tenths of a Square Foot of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 463 Folio 4.

- [22] On the back of the splinter title (Vol. 1226 Fol. 308) there is drawn a plan referred to as follows: *“The above figure shaded red represents — 2,561.60 square feet of land part of Eastwood Park known as part of Number Twenty-Seven Burley Road Saint Andrew. This is the plan referred to in the annexed Certificate registered in the name of Alfred Llewellyn Smith in Volume 1226 Folio 308.”* The figure shaded red was labeled Lot 1.

- [23] It is noteworthy that after the subdivision Lot 1 and Lot 2 reflected in Certificates of Title registered at Vol. 1226 Fol. 308 and Vol. 463 Fol. 4 respectively were each in the name of Alfred Llewellyn Smith Senior Snr. and each contained as part of its description that it was “...known as Number Twenty-seven Burley Road...”

The Sale of one of the Subdivided Lots

- [24] Mr. Alfred Smith Jnr in his statement indicated that sometime in 1990 his father sold to the defendant, Lot 1, the converted garage house with civic

address 4B Dumbarton Avenue. There is however no evidence that he Mr. Smith Jnr. was a part of the discussions/negotiations or was present at the execution of any of the documents. Mr. Alfred Smith Jnr's assertion strikes at the heart of one of the key findings the court will have to make. Which lot did Mr. Alfred Smith Senior intend to sell and the defendant intend to buy when they entered into contract? The fact is the actual legal transfer⁷ dated June 21, 1990 and registered on June 27, 1990 effected the transfer of 27 Burley Road, the family home, to Leila Lafayette and the defendant Louise Small and not 4B Dumbarton Avenue.

[25] The evidence of Mr. Smith Jnr. is also that unfortunately no record of the sale and transfer exists at Nunes Scholefield, Deleon & Co as the relevant file was shredded.

The Actions of Mr. Alfred Smith Snr., the claimants and the Defendant after 1990

[26] The evidence of Mr. Smith Jnr is that Ms. Lafayette and the defendant Ms. Small took possession of 4B Dumbarton Avenue later in 1990. Further that by instrument of transfer No. 741089⁸ submitted August 21, 1992 and registered November 23, 1992 Ms. Lafayette transferred Lot 2 into the sole ownership of the defendant by way of gift. The Declaration of Value⁹ from the defendant in support of that transfer indicating that the premises was worth \$180,000 was rejected by the Stamp Commissioner who assessed the value at \$450,000. A subsequent appraisal by M. C. Ohanele Realty Services¹⁰ dated July 5, 2006 placed the 1990 value of Lot 2 at \$650,000 and that of Lot 1 at \$200,000.

[27] Mr. Alfred Smith Jnr's evidence is also that from 1990 the defendant had tenants in Lot 1 (4B Dumbarton Avenue) and in or about 1998 allowed her

⁷ Copy Instrument of Transfer – Exhibit 6

⁸ Copy Instrument of Transfer – Exhibit 7.

⁹ Copy Declaration of Value – Exhibit 8.

¹⁰ Copy Appraisal – Exhibit 14.

son Mr. Richard Parchment to occupy that premises and also stayed there when she visited Jamaica. Further that the defendant and or her son remodeled and extended the front of the premises at Lot 1.

[28] Concerning Lot 2 (27 Burley Road), Mr. Smith Jnr. indicated that his father, his brother and fellow claimant and himself openly improved, renovated, generally maintained the premises, paid land taxes,¹¹ collected rent¹² and openly did all acts of a lawful owner. He further indicated that in 1998 one of the three apartments at 27 Burley Road became vacant and it remained so up to the death of his father. He Smith Jnr. repaired and renovated this vacant apartment as well as the one previously occupied by his father.

[29] He maintained that at no time from 1998 did the defendant or her son Richard Parchment claim or seek to take possession/occupation of Lot 2 nor did they ask or claim rent received from the premises even though he frequented the premises.

[30] In the statement of Charmaine Lewin received as her evidence in chief she states that she is a tenant of the Smiths from 1997 at 27 Burley Road and paid rent to Alfred Smith Snr. up to his death and since then, to the date of her statement in October 2013 to Alfred Smith Jnr. She also speaks to seeing the defendant's son Richard Parchment staying at 4B Dumbarton Avenue, the defendant coming home to spend time there sometimes and Mr. Parchment adding a bathroom to the section of the premises he occupied. She notes that she had never seen Mr. Parchment or the defendant over 27 Burley road and that neither had ever asked her for rent or possession. She also corroborates the renovations spoken of by Mr. Smith Jnr.

¹¹ Copies of property tax receipts – Exhibits 23 and 24

¹² 5 Copy Rental receipts – Exhibits 9 – 13.

- [31] Mr. Smith Jnr. also indicated that while raising Letters of Administration he discovered that Lot 2 on which his father's house stood, had been transferred to the defendant. He spoke with Mr. Parchment who admitted it was an error. That Mr. Parchment attended with him on Attorney-at-law Ms. Audrey Allen and admitted the error in both of their presences.
- [32] That subsequently in 2005 a Transfer by way of Exchange¹³ was executed by the claimants and sent to the defendant for execution, but was not.
- [33] The evidence of Donald Smith largely mirrored that of Alfred Smith Jnr.
- [34] Counsel for the defendant in very brief cross-examination did not make any substantive challenge to the evidence led on behalf of the claimants. The most significant evidence which emerged was that Mr. Donald Smith indicated that he was not present in the Island at the time of the sale but that whatever was in his statement could be substantiated.
- [35] The evidence of the defence came from a short statement from Richard Parchment. At trial paragraphs 2 and 4 of his statement were expunged before the statement was received as his evidence in chief due to concerns that they contained hearsay material. However on reflection, as they refer to conversations with the defendant on the subject matter of the claim, and he at trial appeared on her behalf by virtue of a Power of Attorney, I am now disposed to include the contents of those paragraphs. Additionally it should also be noted that his statement also contains evidence of conversations with Mr. Smith Snr. now deceased, relative to the subject matter of the claim, which was admitted.
- [36] Mr. Parchment's statement indicated that when his father died in 1998 and he had to vacate where he had been residing with his father, his mother the defendant advised him that she had purchased a house at 27 Burley

¹³ Copy Transfer by Way of Exchange – Exhibit 16.

Road and he should go and speak to a Mr. Smith who would give him possession and he should reside there.

[37] He further indicated that instead Mr. Alfred Smith gave him possession of a house at 4B Dumbarton Avenue for his occupation until the tenants at 27 Burley Road vacated that premises. He then advised his mother that he was occupying 4B Dumbarton and not 27 Burley Road and she agreed with it, indicating that he should move to 27 Burley Road when it became vacant.

[38] He further recorded in his statement that at his mother's request he went to Mr. Alfred Smith for possession in 1999 who indicated he would give possession as soon as the tenants who together with him occupied that premises vacated it; but that Mr. Smith died in the year 2000 without having given possession of 27 Burley Road.

[39] Mr. Parchment was not cross-examined.

Issue 1 – Should the amendments sought by the claimants be granted?

[40] In support of the application for the amendments sought, counsel for the claimants maintained that the defendant would not suffer prejudice as the claimants had already outlined and pleaded the claims sought to be included although not in the conventional way. These claims were particularised in the claimants' affidavits in support of their case which being affidavits could only have spoken to facts, not law.

[41] Concerning the claim for adverse possession she submitted:

- i. Paragraphs 5, 12 & 17 of the claimants' affidavit in support of FDCF clearly asserted the claimants' possession and occupation of 27 Burley Road registered at Vol. 463 Fol. 4 before, during and after the sale transaction, up to the date of filing these proceedings on September 12, 2011. It is noteworthy that the Transfer on Certificate of title at Vol. 463 Fol. 4 was registered on June 27, 1990;

- ii. Paragraphs 7,11,12,13 and 15 of the Affidavit in Response to the affidavit of Louise Small persistently reiterated open possession by the claimants of 27 Burley Road registered at Vol. 463 Fol. 4, and their openly doing all acts a lawful owner would have done in the premises, undisturbed, unrestricted and unmolested. Acts such as open renovation and maintenance as well as the payment of taxes and the collection of rent. In particular at paragraph 15 (b) & (c) the claimants pleaded that the late Alfred Smith snr. was and remained in lawful undisturbed possession of 27 Burley Road for upwards of ten years, openly renting two of three apartments on the said premises, collecting and utilizing the said rents as he saw fit, without accounting to nor giving any of the said proceeds of rent, nor being required to account to the defendant.
- iii. Paragraph 7 of the claimants' Affidavit in Response to Richard Parchment's Affidavit /Particulars of Claim, indicated that by doing nothing over twenty years, the defendant's title would have been relinquished. Paragraph 9 denied that permission was given by Louise Small to Alfred Llewellyn Smith to occupy 27 Burley Road, and at paragraph 17 the Claimants pleaded that the defendant had failed to prove and/or establish that she had exercised any rights over any land, except the one she has always been in possession of, 4B Dumbarton Avenue.

[42] Concerning the reliance on proprietary estoppel she advanced that:

- i. The Claimants' affidavit/Particulars of Claim in support of the Fixed Date Claim Form, at paragraph 15, pleaded the efforts made to inform the Defendant of their claims, without success. Claimant's affidavit in Response/Particulars of Claim clearly claimed to have engaged Richard Parchment in settling their claim to 27 Burley Road including the attendance on Audrey Allen, attorney-at-law, the preparation of Instrument of Transfer By way of exchange, and the failure of the Defendant to respond and/or do anything.
- ii. Paragraphs 7,11,12,13 and 15 of Affidavit in Response to affidavit by Louise Small persistently reiterated open possession of 27 Burley Road at vol. 463/fol. 4 by the Claimants, and openly renovating, maintaining same as also paying taxes, collecting rent and openly doing all acts a lawful owner would have done in the premises, undisturbed, unrestricted and/or unmolested. The premises would have been significantly enhanced solely, by the claimants while the defendant stood by silently and did nothing to inform the claimants of her interest.
- iii. Paragraph 4 of the claimants affidavit in response to Louse Small clearly exhibit the disparity in the sizes and values of the two premises, 27 Burley

Road being much larger 8,531.4ft.sq and much more valuable \$650,000.00 than 4B Dumbarton Avenue, 2,561.60ft.sq and much less in value, \$200,000.00, in 1990, and in July 2006, their values were \$5,500,000.00 and \$3,500,000.00 respectively. The defendant would be unjustly enriched, should the court find in her favour.

[43] Counsel therefore submitted that neither the factual basis for the amendments sought nor the legal consequences alleged were fresh on the pleadings, especially when bearing in mind that all affidavits sworn by the claimants, subsequently deemed Particulars of Claim, outlined facts supporting the proposed amendments. Furthermore, no new allegation had been raised, and no further evidence was being sought to be adduced by the claimants. The court also observes that all the evidential material originally contained in the affidavits of the claimants were reproduced in witness statements that were filed in January 2014 after the court's order that the matter should proceed as if commenced by claim form.

[44] Counsel further submitted that the defendant was very clear, as expressed in the affidavits in support of her defence, and by her counsel's written submissions, that the claimants had raised issues of error, limitation, estoppels, rectification of title and unjust enrichment; issues the defendant's attorney at law was aware of and to which he had responded. Counsel relied on Rule 20.4(2) of the Civil Procedure Rules 2002 as amended up to 2011 which states: "*Statements of case may only be amended after a Case Management Conference with the permission of the Court*". Reliance was also placed on two judgments of this court ***Shaquille Forbes (An Infant b.n.f Kadina Lewis) v Ralston Baker & Attorney General of Jamaica*** HCV02938/2006 (March 10, 2011) and ***National Housing Trust v Y. P. Seaton & Associates Company Limited*** 2009HCV05733 (March 31, 2011).

[45] Counsel for the defendant stoutly resisted the application, maintaining that the court is one of pleading, the Case Management Conference had passed, the trial had proceeded on the pleadings filed and the defence

had already been put forward. Therefore to permit an amendment this late in the proceedings would be prejudicial. He relied on the cases of **Leymon Strachan v Gleaner Company Limited and Dudley Stokes** Motion No. 12/99 (December 6, 1999) and **Jamaica Public Service Ltd v Rose Marie Samuels** [2010] JMCA App 23.

Analysis

[46] In the **Shaquille Forbes** case having referred to the case of **Rohan Collins and Sonia Collins v Wilbert Bretton (on behalf of Claudette Davis-Bonnick)** E227 of 2002, (May 26, 2003), I continued at paragraph 61 – 63 as follows:

The **Collins** case is helpful. It clearly demonstrates by analogy the principle that, in an appropriate case, amendments can be permitted even when all that remains is for judgment to be delivered...The defendants were in no way misled concerning the nature of the evidence to be relied on... The amendment sought was merely to ensure that the particulars of claim accurately reflected the particulars of injury and special damages on which all parties were focused throughout the hearing. The amendments therefore did not yield to the claimant any unexpected advantage nor did they in any way prejudice the defence being advanced.

[47] In **National Housing Trust v Y. P. Seaton & Associates Company Limited** at paragraph 21 the dissenting opinion of Bowen LJ in **Cropper v Smith** (1884) 26 Ch D 700 was referred to. It has been repeatedly cited with approval in numerous subsequent decisions. It was noted that at page 710 Bowen LJ stated:

Now, I think it is well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can

be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace...it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right...

I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such disadvantage as that it cannot be cured by the application of that healing medicine..." [Emphasis added]

[48] At paragraph 22, I referred to the Jamaican case of ***The Attorney-General v. Maurice Francis*** Unreported SCCA 13/95 (March 26, 1999), where the Court of Appeal affirmed the decision of the trial judge who granted an amendment to pleadings which was requested at the close of submissions.

[49] In that case Langrin, J.A. (Ag) (as he then was) observed at page 11:

It is settled law that at the trial of an action leave to amend may be granted when to do so will not cause injustice to the other side and on proper terms as to cost and the adjournment of the trial if necessary. The discretion of the Court is based on considerations of prejudice and injustice.

At page 12 the learned judge went on to state further that:

It may be useful to point out that the facts on which the amendment is based were already in evidence and had not been challenged... That being so the appellant could not have been caught by surprise.

[50] At paragraph 23 I also outlined a quotation from Peter Gibson L.J. in ***Cobbold v London Borough of Greenwich*** (Unreported August 9, 1999) (United Kingdom) Civil Procedure 2009 (the White Book), Volume 1 at 17.3.5 where he said:

The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.

- [51] In the rejoinder/answer by counsel for the defendant to this application he first relied on the case of ***Leymon Strachan v Gleaner Company Limited and Dudley Stokes***. Counsel sought assistance from dicta from Panton JA where he addressed the criteria to be met where a party applied for an extension of time to file an appeal. The case was appealed to the Judicial Committee of the Privy Council (***Strachan v The Gleaner Company of Jamaica & Anor*** [2005] UKPC 33) which settled the law in relation to other matters in particular that a) a judge does have jurisdiction to set aside a default judgment after damages have been assessed; and b) if a judge of the Supreme Court wrongfully holds that he has jurisdiction to make an order, only the Court of Appeal has jurisdiction to reverse that finding. A judge of coordinate jurisdiction has no power to set aside the order.
- [52] The case however has no relevance to the instant application to amend and I accept the submission of counsel for the claimant to that effect. While the application is late and the issues the court has to consider include prejudice as in the case where an extension of time is sought to file an appeal, the case law on applications to amend has evolved separately from that addressing applications to extend time to appeal. Also in applications to amend no formal extension of time is required. While there is some conceptual overlapping in the issues addressed in applications for extension of time and for amendment, the court has to be guided by the cases that specifically considered the principles applicable to amendments sought. It follows that counsel for the defendant's reliance

on *Jamaica Public Service Ltd v Rose Marie Samuels* [2010] JMCA App 23 which considered and approved *Leymon Strachan v Gleaner Company Limited and Dudley Stokes* on the question of extension of time to file an appeal is similarly largely unhelpful.

[53] This application has come at a late stage in the proceedings; after initial closing submissions when the court invited the parties to make further submissions to clarify points of law being relied on. Of significance is the unchallenged contention of counsel for the applicant that the factual basis of the claim has not changed and that the success of the application would not require the case to be re-opened for any further evidence to be adduced. I say unchallenged with the caveat that there is some suggestion coming from the defence that the defendant had granted Mr. Alfred Smith Senior a verbal licence of some sort to remain in the property at 27 Burley Road until his death. That however will be a question of fact for the court to resolve and does not affect the point that the body of evidence before the court will not need to be added to in any way if the amendments sought are granted.

[54] It is clear from the submissions of counsel for the claimant which I accept that the factual bases underpinning the legal issues relating to the doctrines of adverse possession and proprietary estoppel with which the amendments are primarily concerned were raised by the claimant in their affidavits and also (on perusal) their witness statements, ordered after the matter was converted to continue as if brought by Claim Form. It is also equally clear that those issues were answered by the evidence filed on behalf of the defendant and addressed in the initial closing submissions of the defendant.

[55] It was counsel for the defendant who at paragraphs 15 and 17 – 18 of those submissions contended respectively that no limitation was pleaded by the claimants as there was no limitation to the defendant's title to 27

Burley Road and that there was no evidence of proprietary estoppel given that at no time did the defendant promise the claimants or their agents any right to the land registered to her. It was indeed telling that all the objections raised to the amendments sought by counsel for the defendant were procedural and not substantive. The reason is clear. Issues were already joined on the substance of the claim. It may well have been the submissions of counsel for the defendant as well as questions from the court that prompted the application for amendment on the resumed hearing at which further submissions had been invited.

[56] Whatever the motivation, the application has been made. Applying the principles outlined above it seems to me that the amendments are necessary to permit the case to be framed in a way that will lead to a decision on the real matters in controversy (*See Bowen LJ in Cropper v Smith* (1884) 26 Ch D 700 at 710). They will facilitate the real dispute between the parties being adjudicated upon. (*See Peter Gibson LJ in Cobbold v London Borough of Greenwich.*) The facts on which the amendments are based and sought are already in evidence. The defendant has not been caught by surprise. (*See Langrin J.A. (Ag) in The Attorney-General v. Maurice Francis at para. 12*).

[57] What of the potential prejudice to the defendant? Do the amendments serve the overall interests in the administration of justice? As there was no need for further evidence and the defendant appreciated the issues raised by the amendments sought and has already addressed them the risk of prejudice has not been substantiated. The administration of justice will be advanced if the amendments are granted as the overriding objective of enabling the court to deal with the case justly will be met. It is only fair however that the defendant be awarded costs of the application as counsel had to meet and respond to the submissions which went further than the initial invitation by the court to make further submissions after closing submissions had initially been received. (*See Bowen LJ in*

Cropper v Smith (1884) 26 Ch D 700 at 710; Peter Gibson LJ in *Cobbold v London Borough of Greenwich*; and Langrin J.A. (Ag) in *The Attorney-General v. Maurice Francis* at para. 11). Accordingly the amendments are granted as prayed with costs of and occasioned by the application awarded to the defendant.

Issue 2 – Is there a basis on the ground of error for the entry/endorsement of the names of Louise Small and Alfred Llewellyn Smith Snr. on the respective titles on which they have been endorsed to be amended/corrected so that the entitlements to the respective properties are exchanged?

[58] The initial basis on which counsel for the claimants sought to recover possession of Lot 2 was through reliance on sections 80, 153 and 158 of the **Registration of Titles Act (ROTA)**. Section 80 deals with the Registrar's power to amend, section 153 addresses the procedure in cases of error or misdescription in certificate of title or its being in possession of the wrong person and section 158 concerns the power of a court or judge to direct cancellation or correction in any certificate of title or instrument. These sections are set out below:

80. On the occasion of the registration of a certificate of title to registered land or at any time thereafter the Registrar, after such enquiry and notices, if any, as he may consider proper and upon the production of such evidence and the compliance with such requests, if any, as he may think necessary to require or make, may-

(a) amend the description of the land by the omission of any general words of description or in such other manner as he may think proper;

(b) omit such entries or portions of entries as he is satisfied no longer affect the land or the title thereto;

(c) insert, amend or delete the name of any road and the number by which any land on such road is designated;

(d) substitute the correct name, address or occupation of any person whose name, address or occupation was incorrectly entered

153. In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination.

158. (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar-

(a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and

(b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require, and the Registrar shall give effect to that direction.

(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar -

(a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or

(b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge.

[59] Counsel relied on the cases of ***Nigel Thomas and Merlene Lewis (Executors of the Estate of Ethline Dayes) v William Johnson and Kathleen Johnson*** (1997) 34 J.L.R. 712; ***Alaric Pottinger v Traute Raffone*** [2007] UKPC 22; and ***In the matter of Dennis Singh and Josephine Singh*** 2007HCV00364 (Heard February 18, 2008).

[60] Counsel for the defendant submitted that the cases relied on by the claimants largely provided greater assistance to the defendant than to the claimants. He started by submitting that it was not in dispute that the defendant was a bona fide purchaser for value and relied on ***Frazer v Walker*** [1967] 1 AC 569 and section 161 of the **ROTA**. He also relied on ***Alaric Pottinger v Traute Raffone*** and ***In the matter of Dennis Singh and Josephine Singh*** to undergird his submission that the defendant's certificate of title was not wrongfully or fraudulently obtained and that section 153 of the **ROTA** could not assist in this situation where the challenge was to the title itself and not to the certificate of title.

Analysis

[61] In ***Thomas v Lewis*** the Judicial Committee of the Privy Council considered the effect of section 153 of **ROTA**. At page 720 Gault J writing for the Board stated at page 720 that:

Section 153 appears in a separate part of the Act under the heading 'Procedure and Practice'. It is unlikely that the legislature would have intended by such a section directed to the procedure for requisitioning outstanding instruments and certificates to confer power on the registrar to determine proprietorship of land and interests therein when the registrar's powers to amend the primary record, the register, are so confined. The true scope of the section is better appreciated if it is kept in mind that a certificate of title issued by the registrar is just that, a certificate as to the title recorded in the register.

[62] In the subsequent case of *Pottinger v Raffone* Lord Rodger of Earlsferry approved Gault J's interpretation of section 153 in the course of providing extensive guidance on the effect of section 153, as well as other sections of the **ROTA**. At paragraphs 23 to 25 he stated:

[23] Section 153 is not concerned with the fundamental matter of the validity of the title of a proprietor whose name appears on the register. Rather, it provides the Registrar with what are, essentially, administrative powers to deal with significant, but less fundamental, problems relating to the certificates which evidence that title.

[24] The duplicate certificate of title which the proprietor receives from the Registrar is a most important document since, subject to the exceptions in s 161, it is incontrovertible proof of his title to the land in question. It should be accurate, there should be only one copy in circulation and that copy should be kept safe. In a perfect world nothing would go wrong. But the legislation is realistic: it recognises that things may go wrong and provides mechanisms for putting them right. If a certificate is lost or destroyed, then under s 82 the Registrar may cancel it and register a new certificate in duplicate. A clerical error may have been made when the certificate was prepared - eg the lands or their boundaries may have been mis-described or a name may be inaccurate. Or indeed some entry may have been made on the certificate as a result of wrongful or fraudulent conduct. Or the Registrar may have issued a duplicate certificate when he ought not to have done. Or someone may have tricked the proprietor into parting with the duplicate certificate and so have obtained it by fraud. Or someone may have managed to obtain the duplicate certificate from the proprietor without his consent - and, so, wrongfully. Or someone

may have found the duplicate certificate and wrongfully kept it without the owner's permission. Section 153 gives the Registrar power to deal with all these and similar situations:

After outlining section 153 he continued in paragraph 24:

In any of the circumstances envisaged in the section the Registrar can require the person who has the certificate of title which is causing the problem to deliver it up to be cancelled or corrected or to be given to the proper party. If the person concerned fails to cooperate, he can be required to attend court. In that event, under s 154, the court has the same powers as it has under s 82 to deal with certificates which have been lost or destroyed.

[25] Therefore, when s 153 refers to a certificate of title being "fraudulently or wrongfully obtained", it is referring quite specifically to the certificate rather than to the title. It is envisaging the kind of case where someone has got hold of a certificate of title either wrongfully, say, without the owner's consent, or by some fraudulent device. It follows that, contrary to Smith JA's view, the section does not give the Registrar the far-reaching power to annul a proprietor's title on the ground that the title has been "wrongfully obtained". This interpretation of the scope of the Registrar's powers is confirmed by a variety of considerations.

[63] After outlining four such considerations Lord Rodger concluded thus at paragraph 31:

It follows that s 153 has no role to play in the present dispute where what is under challenge is Mr Pottinger's title to the lots as the registered proprietor and only secondarily, and as a consequence, the certificates evidencing that title. As is plain from s 161, Mr Pottinger's title to the lots is unassailable unless Ms Raffone can establish that he was registered as proprietor through fraud.

[64] It is clear from these authorities that section 153 cannot assist the claimants in this matter. The challenge of the claimants is to the title itself and not just to the certificate that represents the title. On the facts of the instant case there was nothing fraudulent or wrongful about the way in

which the actual certificate of title for Lot 2 was obtained by the defendant. The error alleged by the claimants is that by inadvertence the wrong parcel of land was transferred as sold to the defendant. The certificate of title was duly and regularly obtained in the course of those dealings. The concern is therefore not the way the certificate was obtained but in relation to the underlying error alleged, which affects the validity of the title itself that the certificate represents — a situation section 153 was not designed to address.

- [65] Based on the evidence the court can infer and surmise how the error alleged by the claimants could have arisen. Firstly many persons would probably easily assume that the parent title of a splinter title would normally be in relation to Lot 1 and the splinter title in relation to Lot 2. Secondly and more importantly however, in this case the description on the parent title the remainder of which became Lot 2 after the splinter title was issued included the following, “*ALL THAT parcel of land known as **Number Twenty-seven Burley Road** part of Eastwood Park in the parish of Saint Andrew being the **lot numbered One** Block C on the plan of Eastwood Park aforesaid deposited in the Office of Titles on the 7th of June 1945...*” (Emphases added). Further, the diagram which showed which parcel was Lot 1 and which was Lot 2 was annexed to the back of the splinter title and not to the back of the parent title. Therefore unless both titles were consulted and carefully compared as against the diagram on the back of the splinter title an error such as is alleged could easily have been made.
- [66] The reasonableness of how the error may have occurred however does not assist the claimants under this head given the explanation of the limitations on the manner in which section 153 of the **ROTA** can be employed.
- [67] The matter of ***Dennis Singh and Josephine Singh*** also does not assist the claimants. In that case the court was requested under section 158 (2) (b) of the **ROTA** to add Josephine Singh to the title issued in the sole

name of Dennis Singh on the basis that through some error the Instrument of Transfer did not reflect the fact that his wife should have been included on the title as a joint tenant. Daye J in denying the application held at page 8 that, *“An order to amend this entry would amount to transfer of interest. The provision of the Act did not intend a Court to exercise such a power.”*

[68] Accordingly, the claimants’ action must fail under this head.

Issue 3 (i) – Can the claimants rely on the doctrine of adverse possession pursuant to the Limitation of Actions Act?

[69] There is no dispute that from before the sale transaction with Ms. Small in 1990 and thereafter until his death on May 21, 2000, Mr. Alfred Smith Snr. and his family resided on the property of what is now Lot 2 at 27 Burley Road. From the witness statements of the claimants, the Smiths occupation of that property dated from at least the early 1970’s and possibly from before given that the endorsement on the Title shows Mr. Smith Snr. acquired it in 1968. Initially it was one property known as 27 Burley Road. However, after Mr. Alfred Smith Snr. obtained permission to subdivide the property it was divided into two unequal lots with the large family home still occupied by the Smith family described as Lot 2 in the subdivision plan and the tenanted converted garage premises described as Lot 1 in the subdivision plan of the original 27 Burley Road, also known as 4B Dumbarton Avenue that was accessed from Dumbarton Avenue

[70] In particular at paragraphs 28 – 30 in the review of the evidence on behalf of the claimants, the extensive acts of undisturbed and unchallenged ownership said to be exercised by Mr. Alfred Smith Snr. together with and by the claimants, in particular Alfred Smith Jnr. after his death, are outlined in some detail and relied on by the claimants to establish their claim of adverse possession.

The Law on Adverse Possession

The Limitation of Actions Act

[71] Section 3 of the Act bars the right to recover land, either by entry or by action, after 12 years. It provides:

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

[72] Section 30 outlines the effect of the expiry of the limitation period stipulated in section 3 as follows:

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

Case Law

[73] The law on adverse possession was reviewed and declared in a detailed and comprehensive judgment by Morrison JA, (as he then was), in the case of ***Recreational Holdings (Jamaica) Limited vs Carl Lazarus and The Registrar of Titles*** [2014] JMCA Civ 34.

[74] It is not important for our purposes to rehearse the facts of that case which are quite dissimilar from the instant matter. It will be sufficient to extract the guiding principles for application. After reviewing several sections of the **Registration of Titles Act**, the **Limitation of Actions Act**, a wide span of local and English case law and the learning from academic writers, at paragraph 55 Morrison JA noted that:

The important factor on all the authorities is that the squatter's possession, in order to ground a claim for adverse possession, must be (i) inconsistent with and in denial of the title of the true owner; and (ii) such that the owner is entitled to recover possession against the squatter.

Immediately preceding that observation he had also concluded that:

[A]dverse possession cannot be claimed by a person whose possession was obtained and continued by virtue of the consent, grant or otherwise from the true owner whom he claims to have dispossessed.

[75] Concerning the effect of sections 3 and 30 of the **Limitation of Actions Act** Morrison JA at paragraph 92 approved the finding of the learned trial judge who at paragraph 10 of the first instance judgment had said in part:

[S]ection 30 of [the Limitation of Actions Act], makes it clear that as regards private land, if a party has been in open and undisturbed possession of the same, for a period in excess of twelve years, then the previous owner's right to that land, which he would otherwise have been the lawful owner of, is extinguished as soon as that twelve (12) year period of open and undisturbed possession has expired.

Analysis

[76] On the facts of the instant case it is clear that Mr. Alfred Smith Snr. and family had occupied his house at 27 Burley Road at least from the 1970s and likely before. It is also clear that after the transfer of Lot 2 in 1990 which the claimants insist was inadvertent and in error for all the reasons previously outlined, Mr. Alfred Smith Senior remained on Lot 2 and continued to reside there until his death in 2000. After his death the claimants after discovering what they considered to be a clear error entered into discussions with Mr. Parchment with a view to a Transfer by Exchange being effected. This course of action was being pursued up to 2005 after which it became clear that the defendant was not prepared to resolve the matter in that fashion.

[77] Mr. Parchment in his evidence indicated that on the instructions of his mother the defendant he was sent to a Mr. Smith who should have given him possession of 27 Burley Road, but instead gave him possession of 4B Dumbarton Avenue "until the tenants at 27 Burley Road vacated that premises." He also indicated that in 1999 he went to Mr. Alfred Smith for possession of the house and he said that, "he would give possession as soon as the tenants who together with him occupied that premises vacated it." By this evidence the defendant maintained that after 1998 and certainly by 1999 Mr. Alfred Smith Senior would have been residing on the property at Lot 2 by some sort of verbal licence from the defendant's agent her son Mr. Parchment.

[78] I unreservedly reject the evidence put forward on the defendant's case. For the defendant's case to have credence it would require the suspension of common sense and an acceptance that both Mr. Alfred Smith Snr. and the defendant Ms. Small for several years acted in a manner contrary to all logic and business acumen. Why do I say this?

[79] It does not make sense for Mr. Smith Snr. to have sold his home (Lot 2) to the defendant. It housed his home for upwards of two decades. The sale price also strongly suggests that the intention was for him to sell and for Ms Small to buy the smaller Lot 1 she already occupied. Further if Mr. Smith Snr. had sold Lot 2, why would he not have exchanged dwellings with Ms. Smith? Instead the status quo remained. Each carried out the acts of an owner in relation to the property they occupied and which it is clear to the court each thought he/she owned. Each improved the properties they occupied. Mr. Smith rented his property and never accounted to Ms. Small for any rental income. Ms Lewin his tenant speaks to renting from him since 1997 and of seeing the defendant's son Mr. Parchment living at 4B Dumbarton Avenue and the defendant coming to stay with him. Evidence which supports that was given by the claimants. She also spoke to Mr. Parchment about adding a bathroom onto the

premises at 4B Dumbarton Avenue. Ms Lewin indicated she and her husband paid rent to Mr. Smith Snr. until he died and then to Mr. Smith Jnr. thereafter. Up to the time of giving her statement in 2013 she was still a tenant of the Smiths at 27 Burley Road.

[80] In the context of all that evidence on the claimant's case, I have no difficulty rejecting the evidence of Mr. Parchment of the conversations he allegedly had with the defendant in which he claimed she directed him to go to Mr. Smith who would give him possession of 27 Burley Road. I also reject his evidence that in 1999 Mr. Smith Snr. promised to give him possession of 27 Burley Road when the tenants left. I find his evidence manufactured and calculated to interrupt the term of years of unchallenged, undisturbed possession that would vest the property in the Smith family, by virtue of the operation of the doctrine of adverse possession. Rather I accept the evidence of the claimants that initially when the error was brought to his attention by them, Mr. Parchment was willing to have the error corrected. However that willingness for whatever reason later evaporated leading to this action being filed.

[81] With the documentary evidence supporting the conclusion that at least up to 2005 there was contemplation between the parties of a Transfer by Exchange, from 1990 when the sale was conducted that would be a period of 15 years. That would be beyond the 12 years of unchallenged open possession necessary to trigger the operation of sections 3 and 30 of the **Limitation of Actions Act**. Accordingly, I am prepared to hold that the claimants as successors in title to Mr. Smith Snr. have re-acquired Lot 2 by virtue of the operation of the doctrine of adverse possession. Though it has not been claimed similarly the defendant or her successors in title would through the same doctrine have acquired Lot 1.

Issue 3 (ii) – Can the claimants rely on the doctrine of proprietary estoppel?

The Law on Proprietary Estoppel

[82] In ***Annie Lopez v Dawkins Brown and Glen Brown*** [2015] JMCA Civ 6, Morrison JA, (as he then was), carried out a review of the law on proprietary estoppel. Having set the historical context of the development of the law in this area by referring to the seminal case of ***Ramsden v Dyson*** (1866) LR 1 HL 129 and also ***Crabb v Arun District Council*** [1975] 3 All ER 865, Morrison JA continued at paragraph 68 as follows:

The modern law of proprietary estoppel is aptly summarised by the authors of Gray & Gray in this way (at para. 9.2.8):

“A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:

- representation (or an ‘assurance’ of rights)
- reliance (or a ‘change of position’) and
- unconscionable disadvantage (or ‘detriment’).

An estoppel claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are inter-dependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn.”

[83] Then at paragraphs 69 and 70 he referred to two extracts from the judgment of Lord Scott in the case of ***Yeoman’s Row Management Ltd and another v Cobbe*** [2008] UKHL 55 to demonstrate how the concept of unconscionability should be viewed. At paragraph 16 of that case Lord Scott said:

My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a 'proprietary estoppel equity' as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.

He continued at paragraph 28:

Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so.

[84] Morrison JA at paragraph 71 then referenced the case of ***Attorney-General of Hong Kong and another v Humphreys Estate (Queen's Gardens) Ltd*** [1987] 2 All ER 387 which he said "*makes it clear it is important in every case in which a claim based on proprietary estoppel is made to have regard to the particular facts of the case.*"

[85] Then at paragraph 73, Morrison JA concluded his review with this summary statement of principle:

Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity.

And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action.

[86] Turning to the facts of the instant case, much of the narrative utilised in my analysis under the head of adverse possession is relevant here, but without the strictures of the need to satisfy a twelve year limitation period of exclusive possession. The sale price, which was more in keeping with the value of Lot 1, would suggest that the parties intended to contract in relation to Lot 1 and not Lot 2. The conduct of the parties after the sale which saw them remaining in exclusive possession of the properties they were in prior to the sale, rather than a switch, which an intended sale of Lot 2 would have made likely also supports the contractual intention suggested.

[87] Apart from the continued occupation, the other actions of Mr. Smith Snr. such as rental of Lot 2 without any evidence of accounting to the defendant for such income, which rental arrangement continued with Alfred Smith Jnr. after his death, the maintenance and payment of taxes by the Smiths in relation to Lot 2 and the repair and renovation of apartments on Lot 2 by the claimants after Mr. Smith Snr's death, show that the Smiths were operating on the basis of an understanding that they were owners of Lot 2, and were acting to their detriment if that was not the case. This all occurred in a context where for several years the defendant from time to time came to reside at Lot 1 and, even on the evidence of the defence, never before 1998 raised any question as Mr. Smith Snr.'s ownership of Lot 2.

[88] The first indication of any challenge to the ownership of Lot 2 comes from the evidence of Mr. Parchment that after his father died in 1998 and he needed a place to live his mother the defendant advised him to go to Mr.

Smith Snr. at 27 Burley Road who would give him possession of the premises. Further Mr. Smith having given him possession of 4B Dumbarton Avenue until the tenants vacated 27 Burley Road, his mother agreed with that position and said he should move to 27 Burley Road when it became vacant.

[89] Though I have already rejected the evidence of the defence, for the purpose of this analysis I will demonstrate how, even if it was true, it would support the claimants' reliance on the doctrine of proprietary estoppel. I consider that there is no indication of any agreement at the time of the sale for each party to remain in the respective lots they were occupying though the effect of the sale would mean that the ownership of Lot 2 (27 Burley Road) passed to the defendant and hence she would be entitled to possession of that property. Further, given the defence position there is no indication that the tenancy arrangement of the defendant on Lot 1 (4B Dumbarton Avenue) was ended at the time of the sale of Lot 2 as would have been expected. The evidence given on the claimants' case suggests that after the sale, the defendant had a tenant on Lot 1 and that from time to time she came and stayed there. This was not challenged by the defence.

[90] The evidence on the defendant's case starts in relation to the year 1998, a full eight years after the sale, when it was alleged that on the advice of the defendant, Mr. Parchment went to Mr. Smith Snr. to get possession of 27 Burley Road. The clear inference from this evidence is that the defendant was asserting a right of ownership over Lot 2 that she knew about. Mr. Parchment's evidence is that instead of getting possession of Lot 2 he was given possession of 4B Dumbarton Avenue. On what basis would Mr. Smith have been able to do that? The answer would likely be that it was because he was the owner of 4B Dumbarton Avenue. However that would mean that after the sale not only did Mr. Smith remain in possession of Lot 2 at 27 Burley Road, but he also at some point assumed possession of the

property at 4B Dumbarton Avenue previously rented to the defendant. The result of her purchase would therefore have meant she had gone from being the beneficiary of a tenancy to a purchaser not in possession without a tenancy.

[91] Even on that unlikely state of affairs, it would have been unconscionable for the defendant to sit back and wait 8 years after the sale to assert her right to ownership over Lot 2, in a context where the evidence suggests she knew Mr. Smith Snr. was exercising all the rights of ownership — including renting and maintaining the premises, and paying taxes, thereby acting to his detriment if the property was not his own.

[92] The far more reasonable and logical conclusion is the one I have already arrived at, which is, that based on the circumstances of the parties before the sale and the price agreed, among other factors including the way the properties were described on the two Titles, everyone concerned intended and thought that the splintered property, (which was Lot 1 but believed to have been Lot 2), was the property that had been sold to the defendant and all parties organized their affairs on that basis — most notably the status quo of occupation and exercise of exclusive rights of ownership mirrored that understanding. On this view of the facts it would also be unconscionable for the defendant to seek to hold onto legal ownership of Lot 2 when the clear intention in the sale transaction would have been thwarted by an unfortunate error. Therefore, on any interpretation of the facts the defendant is bound by a proprietary estoppel in favour of the claimants.

What then should be the remedy?

[93] In *Annie Lopez v Dawkins Brown and Glen Brown* having concluded that the learned trial judge was correct to hold that the appellant was bound by a proprietary estoppel in favour of the respondents, Morrison JA

went on to consider what in the circumstances should be the appropriate remedy.

[94] In doing so he referred to **Gray & Gray** (6th edn, para. 9-066) where it is said:

It is a recurrent theme in estoppel cases that the court must preserve some kind of proportionality between the detriment that has been incurred by the estoppel claimant and the remedy eventually awarded...As Robert Walker LJ indicated in *Gillett v Holt* (2001), it is the function of the court in each case to identify the 'maximum extent of the equity' founded on estoppel and then 'to form a view as to what is the minimum required to satisfy it and to do justice between the parties'. The court may never award estoppel claimants a greater interest in law than was within their induced expectation...but may in some circumstances award rather less...

[95] He went on to cite ***Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington*** (1884) 9 App Cas 699, at page 714, where it was stated that "*...the court must look at the circumstances in each case to decide in what way the equity can be satisfied*". Further he referred to ***Jennings v Rice and others*** [2002] EWCA Civ 159 in which Aldous LJ highlighted the importance of proportionality in the determination of the appropriate remedy. At paragraph 36 he stated:

[O]nce the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.

[96] What is the remedy that the claimants' seek? In the midst of all the declarations and other orders prayed the claimants merely want the legal position to reflect the factual *status quo* which has existed since the sale in 1990. They want their occupation of 27 Burley Road essentially the continuing family property, to be theirs by legal title. They also desire that

4B Dumbarton Avenue be legally vested in the defendant which is what they contend and I have found was intended to be sold to and purchased by her.

[97] This is a situation therefore where the 'maximum extent of the equity' founded on estoppel and the 'minimum required to satisfy it and to do justice between the parties' coincide. In all the circumstances of this case the only way that justice can be done is for the legal entitlements of the respective parties to be exchanged in keeping with what I find was the original intention of the Mr. Smith Snr. and the defendant.

Issue 4 – Should the counter claim or any part thereof succeed?

[98] This can be addressed summarily. What I have held in relation to the claim necessarily means the counter claim for recovery of possession of Lot 2, 27 Burley Road, damages for trespass and mesne profits must fail.

CONCLUSION

[99] Given the findings on the claim and counterclaim I make the following **Orders:**

1) It is hereby declared:

- i. That Mr. Alfred Smith Snr. (now deceased) and the claimants his sons and successors in title have been in open peaceful quiet undisturbed possession of all that land known as 27 Burley Road registered at Volume 463 Folio 4 of the Register Book of Titles in excess of twelve (12) years since 1990 and have therefore acquired possessory title to 27 Burley Road registered at Volume 463 Folio 4 of the Register Book of Titles and the defendant's Title to such land has been extinguished by the effluxion of time pursuant to sections 3 and 30 of the **Limitations of Actions Act** of Jamaica 1881.
- ii. That the claimants are also entitled to acquire title to 27 Burley Road registered at Volume 463 Folio 4 of the Register Book of

Titles, through the defendant being bound by a proprietary estoppel in their favour.

- iii. That the claimants are entitled to the transfer to them of the fee simple ownership of 27 Burley Road registered at Volume 463 Folio 4 of the Register Book of Titles by the defendant or her personal representative.
- iv. That the defendant is entitled to the transfer to her or her personal representative of the fee simple ownership of 4B Dumbarton Avenue, Kingston 10 in the parish of Saint Andrew registered at Volume 1226 Folio 308, by the claimants.
- v. That the transfers whether by way of exchange or otherwise to be effected in keeping with the declarations in paragraphs iii and iv, should be done at the same time.

2) It is ordered that:

- i. Within 30 days of the date of this order, the claimants and the defendant or her personal representative shall produce their respective Certificates of Title and complete and have submitted to the Registrar of Titles all necessary documentation for a registrable transfer of their respective interests in compliance with the orders of the court.
- ii. If either party fails to comply with order number 2(i), that party shall be required to submit the relevant Certificate of Title to the Registrar of the Supreme Court who shall have the power to complete and have submitted to the Registrar of Titles all necessary documentation for a registrable transfer of the interest reflected in that Certificate of Title, in accordance with the orders of the court.
- iii. Each party is to bear the costs of the transfers equally.
- iv. Counsel for the claimants shall have carriage of both transfer transactions.

3) The counter claim of the defendant is refused.

4) Costs of and occasioned by the application for amendment of the Claim Form to the defendant.

5) All other costs in the claim awarded to the claimants to be agreed or taxed.