JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 55/1997

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN:	**BLUE HAVEN ENTERPRISES LTD.**	**PLAINTIFF/ APPELLANT**
AND:	**DULCIE ERMINE TULLY (Executrix of Estate CYRIL LORENZO SHIRLEY AND MIMILI HERMINTRUDE SHIRLEY DECEASED)**	**1ST DEFENDANT/**
AND:	**ERIC CLIVE ROBINSON**	**2ND DEFENDANT/ RESPONDENT**

Raphael Codlin and Judith Cooper instructed by Raphael Codlin and Co. for the appellant

John Vassell Q.C., and Nerine Small instructed by Dunn Cox for the 2nd Respondent

Maurice Frankson for Dulcie Tully who announced that they were not proceeding with an appeal

September 25, 26, 27, 28, 29 October 2, 3, 4, 5, 6, 2000, and April 11, 2003

DOWNER, J.A.

INTRODUCTION

The property, the subject matter of this prolonged litigation, is a coffee orchard of ninety-five acres in the parish of Portland. Dulcie Ermine Tully, the

first defendant, is the executrix of the estate of Cyril Lorenzo Shirley and his wife, the original owners of the property. Ms. Tully agreed to sell the property to Eric Clive Robinson and then purported to cancel the agreement which was dated 14th November, 1985. The agreement is exhibited at page 138 of the Record. In the litigation of this issue between Ms. Tully and Robinson, the latter was successful. See **Dulcie Tully et al v Eric Robinson** (1992) 29 J.L.R. 268. Ms. Tully invoked the jurisdiction of the Privy Council by way of Petition for special leave. Robinson was successful in having the Petition dismissed 10th March, 1993: see page 157 of the Record.

As a result of further decisions by the Supreme Court and this Court, in his favour, Robinson, the second respondent in this appeal, secured a registered title to the land. It was registered at Volume 1278 Folio 155 on the 21st day of July 1995. He also obtained an order of possession for the orchard against the appellant, Blue Haven Enterprises Ltd. A point worth emphasizing is that Robinson has been at pains to seek the assistance of the Court at every stage of these proceedings, firstly, against Ms. Tully and then against the appellant hereinafter referred to as "Blue Haven".

How did the appellant come to be in possession?

When Ms. Tully, the first defendant, purported to cancel the agreement for sale with Robinson, the second respondent, she entered into an "agreement" dated 5th January 1988 with Dr. White and his nominee, for the sale of the property. Dr. White was given a letter of possession. He made extensive

improvements to the property. More particularly, Dr. White planted coffee, built a coffee storage tank, constructed a road, cleared foot-paths and built houses for workers. All this was done on unregistered land on the strength of a contract. There was no conveyance to Blue Haven. The inference to be drawn is that Blue Haven the appellant was confident that it would receive a registered title in due course. This introduction of the parties to this appeal and the property in dispute is sufficient background to consider the issues. Perhaps it should also be added that Blue Haven Enterprises Ltd. was incorporated on 28th July 1988. This company was the nominated transferee on the Instrument of Transfer at page 22 of the Record. This Instrument purported to transfer the property to the appellant company for $450,000. Blue Haven therefore became a rival claimant to the legal and equitable interest to the property in dispute.

Proceedings in the Court of Appeal

Langrin J., as he then was, heard the action between Blue Haven Enterprises Ltd., the Executrix and Eric Clive Robinson. Blue Haven sought specific performance of its agreement, damages and declarations against the first respondent. With respect to Robinson an account was sought. See pages 32-34 of the Record for Statement of Claim. The order of the Court below at page 163 of the Record was as follows:

> "1. That the Plaintiff's claim against the Second Defendant be dismissed.
>
> 2. That there be judgment for the Plaintiff against the First Defendant in the sum of

> $20,000,000.00 as damages with costs to be agreed or taxed.
>
> 3. That the Second Defendant's costs be paid by the First Defendant, such costs to be taxed if not agreed."

No appeal has been instituted against that part of the order which made an award of $20,000,000.00 with taxed or agreed costs against the Executrix.

The starting point in this appeal ought to be the fact that the respondent Robinson holds a registered title and was put in possession by a Court Order in January 1997. On the other hand, the appellant relies on the following Notice dated September 29, 1988 at page 51 of the Record. This was issued by Mr. Fraser the lawyer on behalf of the first defendant:

"TO WHOM IT MAY CONCERN

> This is to certify that OSWALD PERCIVAL WHITE and/or his Nominee is entitled as of the date hereof to possession of ALL THAT parcel of land part of SHIRLEY CASTLE in the Parish of Portland containing by survey 95 acres 2 Roods and 33.64 Perches butting and bounding as appears by the Plan bearing Survey Department Examination Number 203830 and prepared by Mr. Donald J. Marks, Commissioned Land Surveyor."

This notice ought to have been withdrawn once Gordon J. awarded an injunction to Robinson on 11th January 1989. It seems there was a failure by Mr. Fraser, Ms. Tully's lawyer to inform Mr. Ross the lawyer for Blue Haven of the litigation between Ms. Tully and Robinson.

It was primarily on the basis that Robinson holds the registered title to the property that Langrin J. dismissed Blue Haven's claim. Before he obtained the registered title he had secured an injunction from Gordon J. which led to an order of specific performance and an order for possession of the property from Edwards J.

The basis of the appellant's case in this Court was reliance on a claim for an equitable interest. The property being unregistered land originally, there was a failure to register a conveyance between Tully and Robinson. The equity Blue Haven Enterprises Ltd., claimed was acquired because Dr. White paid Ms. Tully and was put in possession. The issue of registration is raised because the property was not brought under the Registration of Titles Act until 20th November 1991: see page 87 of the Record.

The basis of the appellant's case in this Court was the Rule in **Ramsden v. Dyson** and the doctrine of resulting trusts.

The relevant grounds of appeal at pages 2-3 of the Record read thus:

> "2. The Learned Judge misdirected himself when he failed to deal adequately, or at all, with the right of a bona fide purchaser for valuable consideration without notice of a prior interest in the land.
>
> 3. The Learned Judge did not address submissions made to him to the effect that where competing equities are equal, the position of the possessor is the better.
>
> 4. The Learned Judge misdirected himself when he held that the Second Defendant/Respondent was the person with whom the Plaintiff/Appellant was

required to have the dealings before the Plaintiff/Appellant's claim could be valid.

5. The Learned Judge misdirected himself in dealing with the rule in **Ramsden vs. Dyson** when he held that two of the basic ingredients in that rule were missing not proved by the Plaintiff/Appellant, yet he did not mention which two of those ingredients are missing.

6. The Learned Judge misdirected himself when he held that, the property having been sold to the Plaintiff/Appellant by the First Defendant/Respondent at the time when the First Defendant/Respondent was the legal owner of the property, nothing passed to the Plaintiff/Appellant although the Plaintiff/Appellant did not know of the Second Defendant/Respondent's interest."

In the face of the registered title in favour of Robinson, the appellant could not claim a legal title. So it was sought to have recourse to equity in order to establish an equitable interest.

To reiterate, Dr. White was given a letter of possession to the property by the lawyer for the first defendant. That letter was dated September 29, 1988. It is important to note that the agreement between Robinson and Ms. Tully was dated November 4, 1985.

The appellant relied on the provisions of sections 2 and 6 of the Record of Deeds, Wills and Letters Patent Act for the proposition that since the original agreement between Ms. Tully and Robinson was not registered, then Blue Haven, the appellant, had an equitable interest. That contention was given short shrift by Mr. Vassell Q.C. He stated that when section 2(1) of that Act was considered the deed which ought to have been registered would have

been a conveyance of the land by Ms. Tully to Robinson. That section reads as follows:

> "2.-(1) A deed made in due form of law and within three months after the date thereof acknowledged by the party or parties that grant the same or proved by the oath of one sufficient witness or more in accordance with law, and, recorded at length in the Record Office within the said three months, shall be valid to pass the same without livery, seisin, attornment, or any other act or ceremony in the law whatsoever.
>
> (2) No deed made after the year 1681 without such acknowledgement or proof and recording, shall be sufficient to pass away any freehold or inheritance, or to grant ~~any lease~~ for above the space of three years."

Then section 6 reads as follows:

> "6. All and every deed or deeds which shall be made or executed within this Island for any lands, tenements, or hereditaments whatsoever shall be duly proved or acknowledged, and recorded, within ninety days after the date or dates of such deed or deeds, otherwise to stand void and of no effect against all other purchasers or mortgages *bona fide* for valuable consideration of the said lands, tenements or hereditaments, who shall duly prove and record their deeds within the time prescribed by this Act from the dates of their respective deeds."

It was contended on behalf of the appellant Blue Haven, that Robinson should have registered his contract for sale with Ms. Tully and so Blue Haven would not be able to claim a legal title. However, Robinson holds a registered title pursuant to the order of the Court below. The better argument would be that, had the appellant Blue Haven secured a conveyance and registered it,

section 6 above would have availed him against all other claimants for the legal title.

The words "livery, seisin, attornment" in section 2(1) shows that Mr. Vassell's contention is correct. Section 2(2) reinforces this contention. Had the lawyers for the appellant Blue Haven sought a conveyance of the unregistered land and registered it pursuant to the above Act, this case would have taken a different turn. This aspect of conveying unregistered land is expounded in the thesis **Jamaica Land Law** 1948 at pp 58-63 by V.B. Grant who became Attorney-General during the years 1962-1972. It was also adverted to in **Harris v. Johnson McLaren and Williams** (1971) 12 J.L.R. 175, and **Hepsy Dixon v. Effie Frederick** (1974) 12 J.L.R. 1495.

The other basis on which the appellant's claim was grounded was correctly disposed of by Langrin J. thus at page 176 of the Record:

> "In my judgment and in light of my findings of fact there is no act or default of the prior equitable owner such as to make it equitable as between himself and the subsequent equitable owner that he should not retain his initial priority. Accordingly the second defendant's priority cannot be displaced by the plaintiff's subsequent equitable interest."

The rule in **Ramsden v. Dyson** (1866) L.R. 1 H.L. 129 was relied on by Mr. Codlin to show that Blue Haven had acquired an equitable interest. The law on this issue has been developed in **Dillyn v Llewellyn** (1862) 4 Dc GF and J 517, **Willmott v Barber** (1880) 15 Ch.D. 96, **In Re Basham** (1987) 1 All E.R. 405 **Inwards v Baker** [1965] 1 All E.R. 446 and **A.G. of Hong Kong**

v Humphrey's Estate Queens Gardens Ltd. [1987] 2 All E.R. 387. Langrin J. summarised the effect of these cases thus at page 177 of the Record:

> "The persons estopped in those cases and against whom the reliefs were granted were the owners of land who themselves encouraged the expenditure. None of the cases deal with a third party such as Robinson being estopped. The submission of Mr. Codlin about the equity running with the land into the hands of Robinson is misconceived."

It is appropriate to quote the following passages from Lord Templeman's opinion in the **Hong Kong** case from [1987] 1 A.C. 114 at page 121:

> "From **Ramsden v Dyson** (1866) L.R. 1 H.L. 129 the statement of principle enunciated by Lord Kingsdown in his dissenting judgment has received judicial approval and extension. Lord Kingsdown said, at p. 170:
>
> > 'If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation'."

Then at page 122 Lord Templeman said:

> "In **Holiday Inns Inc. v. Broadhead** (1974) 232 E.G. 951, 1087, Robert Goff J. summarized the position as follows:
>
> > 'the authorities clearly establish that there is a head of equity under which relief will be given where the owner of property seeks to take an

> unconscionable advantage of another by allowing or encouraging him to spend money, whether or not on the owner's property, in the belief, known to the owner, that the person expending the money will enjoy some right or benefit over the owner's property which the owner then denies him. ... The authorities also establish. . . that this relief can be granted although the agreement or understanding between the parties was not sufficiently certain to be enforceable as a contract, and that the court has a wide, albeit of course judicial, discretion to what extent relief should be given and what form it should take'."

Then Lord Templeman demonstrated how Oliver J. stated the principle thus at pages 123:

> "In **Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.** (Note) [1982] Q.B. 133, Oliver J. reviewed all the authorities and in language to which he adhered in the Court of Appeal in **Habib Bank Ltd. v. Habiib Bank A.G. Zurich** [1981] 1 W.L.R. 1265, 1285, concluded, at p. 151:
>
> > 'the more recent cases indicate, in my judgment, that the application of the **Ramsden v. Dyson,** L.R. 1 H.L. principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour'."

There is no doubt that the appellant Blue Haven acted to its detriment in this case but that does not create an equity against Robinson. So the following passage at page 124 by Lord Templeman is appropriate to the circumstances of this case:

> "Their Lordships accept that the government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly the government must show that the government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the government fail on both counts."

In this context there is a finding by Langrin J. at pages 170-171 of the Record. It reads thus:

> "Mr. Robinson testified that he is the registered proprietor of lands registered at volume 1278 Folio 155 since 21st July, 1995. He purchased lands from Mrs. Tully in 1985. There was an agreement for sale. In 1985 when he purchased the land it was in ruinate and he intended to start planting 75 acres of coffee. There was litigation between himself and Mrs. Tully in respect of the agreement for sale and it was 2 weeks after the order of Gordon J. in January 1989 that he visited the property where he observed that someone had just begun planting coffee. He wanted to stop anyone from planting coffee on the land. He saw one Mr. Dillon on the property whom he asked who was planting the coffee. Mr. Dillon said he did not know. Mr. Robinson testified that he told him that what they were doing is illegal because there was a Court order making him the owner of the land. Mr. Dillon refused to give his employer's name and Mr. Robinson asked

> him to give his employers a note. Robinson wrote a note including his telephone number and address and requested him to give the note to his employer. The conversation with Mr. Dillon lasted about half an hour. About one month later he returned to the property and spoke to Mr. Dillon who said he had delivered the message to Dr. White. Robinson said he never heard from Dr. White and he would have expected Mrs. Tully to inform Dr. White of the litigation in the case."

Then further at page 171 of the Record the learned judge made the following finding:

> "Mrs. Enid White, a party to the sale agreement testified that her husband and herself started planting coffee in 1989. There were 44½ acres of coffee planted by them. In 1990 31½ acres were planted and finally in 1991 ten acres were planted.
>
> Mrs. Tully had not informed Dr. White that the property was sold to anyone else."

Mr. Ross, the Attorney-at-Law for Blue Haven, gave this evidence at page 296 of the Record:

> "Q Was a transfer sent to you in respect of this matter?
>
> A. By Mr. Fraser, yes, ma'am.
>
> Q. And was it executed by the parties? Exhibit 3, M' Lord
>
> A. It was ultimately executed, yes.
>
> Q. Could you show the witness Exhibit 3?
> (EXHIBIT 3 PASSED TO MR. ROSS)
>
> Q. Do you see your signature Mr. Ross?
>
> A. Yes.

Q. As being the witnessing part (sic) to Oswald White and Percival White?

A. Yes.

Q. And Enid White?

A. Yes, ma'am.

Q. And is that executed under the common seal of Blue Haven

A. Yes, it is.

Q. M' Lord, I am applying for that to be admitted as exhibit 6.

HIS LORDSHIP: No objection, Mr. Vassell?

MR.VASSELL: No, M'Lord."

An important point to note is that it does not seem that Mr. Fraser the lawyer for Ms. Tully informed Mr. Ross the lawyer for Blue Haven of the litigation between Robinson and Ms. Tully. There was an injunction obtained by Robinson, the terms of which read at page 310 of the Record:

> "That the Defendant is restrained from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale or from pursuing further any existing contract of sale in relation to the said land otherwise than to the Plaintiff."

This injunctive relief was awarded by Gordon J. on the 11th January 1989. It is exhibited at pages 152-153 of the Record. There was no appeal against this part of the order.

The following extract at pages. 312 –313 from the cross-examination of Mr. Fraser the attorney-at-law for Ms. Tully is instructive:

"Q. Now, Mr. Ross told us in court that you did not disclose to us the existence of this proceeding or of this Order when you were concluding the Agreement for sale between Tully and Dr. White. Is that correct?

A. The original Agreement for sale? I did not, sir.

Q. Do you understand the Order at number two to be a permanent injunction? Do you understand that to be a permanent injunction?

A. Until overturned.

Q. It is not an Interlocutory Order?

A. That is correct.

Q. And no appeal was filed against that Order?

A. No, sir. It is not correct to my recollection

Q. Let's look at the Notice and Grounds of Appeal. If you look at thirty-one to thirty-two of what you have there.

HIS LORDSHIP: Would a mere appeal cure that?

MR. VASSEL: No. The point I am making, this was not even appealed from that Order, was not even appealed. In fact, what had happened, M'Lord, it was not pursued in the Court of Appeal. The thing is there.

HIS LORDSHIP: In other words, that paragraph was appealed.

MR. VASSELL: It appears so. When we come to look at it, M'Lord, you will see none of the grounds and you will see the grounds are not directed at that. But at all events, the appeal was dismissed. It wouldn't matter when exactly."

In this context it is helpful to cite the Notice and Grounds of Appeal to demonstrate that there was no appeal against the injunctive order. The grounds read as follows at page 155 of the Record:

> (i) The Learned Trial Judge erred in law in granting the amendment applied for after the oral judgment was delivered after the hearing of the Summons
>
> (ii) The Learned Trial Judge erred in law in interpreting the agreement entered into by the parties and their legal advisers.
>
> (iii) In interpreting the said agreement the Learned Trial Judge wrongfully accepted and applied extrinsic evidence in aid of such interpretation.
>
> (iv) The Learned Trial Judge erred in law in holding that **Whitmore v Whitmore** was authority applicable to the facts of this case and in failing to consider the authorities to which his attention was drawn on behalf of the Defendant/Respondent to wit:- RE TERRY AND WHITIE CONTRACT, 1886 32 Chancery 14,
>
> **PHANG SANG V SUDEAL,** Supreme Court Civil Appeal No. 71, of 1984, inter alia."

Mr. Fraser was probably in contempt of court so he must count himself lucky. He was under a duty to inform Mr. Ross the attorney-at-law for Blue Haven of the injunction awarded by Gordon J. in January 1989. As stated previously he should also have informed Mr. Ross of the litigation between Ms. Tully and Robinson which led to the issue of the injunction.

Anyone planting a significant amount of coffee as was done on this property must be presumed to be the agent of Dr. White or Blue Haven.

Robinson could not be expected to do more than he did. He spoke to Dillon whom he saw planting coffee to inform him to desist as it was illegal. There was no duty on Robinson to seek out Dr. White or Blue Haven. When he spoke to Dillon it was on the basis of the injunction issued by Gordon J. He subsequently secured an order for specific performance and vacant possession from Edwards J. on January 13, 1993, and was put in possession pursuant to that order on 18th January 1994. There is no evidence to suggest that Ms. Tully's lawyers sought to put Robinson on terms when he sought an order for specific performance. It was arguable that this being a discretionary remedy that there ought to be some compensation payable by Robinson to Ms. Tully. Had that been done, then there would have been a fund to compensate Blue Haven.

To my mind, the fact that these statements were made to Dillon was admissible: see **Subramaniam v Public Prosecutor** [1956] 1 W.L.R. 965 at 970. The relevant extract reads thus:

> "evidence of a statement made to a witness by [another] person . . . may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement is made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

Further 12 (3) of the Court of Appeal Rules, 1962 reads:

> "(3) Except with the leave of the Court the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal."

Mr. Codlin however cited **Jacker v The International Cable Co.** (1888-89) Times Law Report Vol. 5 where Lord Esher M.R. said:

> "That the point of practice arose where the action was tried by a Judge without a jury, where the Judge was the judge of the facts. The point was this – supposing certain evidence wrongly admitted before the Judge at the trial, either after objection taken or by inadvertence or otherwise, was this Court bound to take notice of ~~it~~ for the purpose of its decision, because it was admitted, ~~even without objection~~, before the Judge? His Lordship was of opinion that they were not bound to notice it. If counsel did not object to the evidence at the trial, and it was put in, it was the duty of the Judge to reject it when he came to give his judgment, and this Court would do so; or if it were objected to and admitted, this Court was bound to reject it. They were not bound to admit it, and their duty was to arrive at a decision upon legal evidence.
>
> Lord Justice Fry concurred.
>
> Lord Justice Lopes said that in cases where evidence was improperly admitted before a Judge without a Jury, it was the duty of this Court to disregard it, though it had been received without objection, as they ought to decide the case upon legal evidence."

This case suggests that the reception of evidence is a matter within the inherent jurisdiction of the Court. Consequently, there is no need for a ground of appeal for the Court to reject inadmissible evidence. As the evidence of

Robinson's communication to Dillon was admissible, this case did not assist the appellant.

Here is the affidavit evidence on this aspect of the matter at page 11 of the Record. It comes from Enid White:

> "23. That in the latter part of 1992 my late husband came home and told me that Mr. Dillon, one of our employees on the farm, had told him that he, Mr. Eric Robinson, had told him to tell us that he, Mr. Robinson, did not like the way we were developing his land.
>
> 24. That I was present in a room with my late husband, shortly after he told me the foregoing. He immediately called Miss Tully and told her that someone was saying that he had a claim on the land. I picked up the extension and I heard Miss Tully tell my late husband it was just some disgruntled person who was trying to buy the land but that he had been given back his money and he had no claim on the land. That prior to that information I had no knowledge of any other person making any claim against the land. That I do not believe my late husband had any knowledge about any prior claimant, because I would have expected him to communicate that knowledge to me in the way that he did in late 1992.
>
> 25. That in September 1992 my late husband and I learnt for the very first time that there was Court proceedings between the first and second defendant over the land Blue Haven Enterprises Limited developed. This information was communicated to us by the said Mr. Reginald Fraser Jnr., the Attorney-at-Law for the second defendant.
>
> 26. This information was communicated to us by letter dated September 21, 1992 when Mr. Reginald Fraser Jnr., could not make title to the said Blue Haven Enterprises Limited."

There is evidence that Robinson visited his property fifteen times between June 1989 and December 1993 as was his right. He had already done his duty and the only inference that could be drawn was that a volunteer had continued to expend money on his property as a gift. There is no evidence, that Robinson had "acquiesced" in the activities of Blue Haven in developing the property. There is no evidence that he encouraged Dr. White or Blue Haven. That Robinson was enriched is evident but not unjust. There is no room for the intervention of equity so that Blue Haven could have relied on the remedy of restitution.

In this context once Langrin J. accepted the evidence that Dillon was told that the property belonged to Robinson, and that he had a Court Order to prove it, that would displace any equity which could have been claimed by Blue Haven. In the **Master or Keeper, Fellows and Scholars of Clare Hall v. Harding,** 6 Hare 272, at 292 Sir James Wigram, the Vice Chancellor said:

> "Under this agreement £1600 was expended by Rowntree in building upon the property. Henry Harding was aware that the expenditure was going on, but did not object to it, nor caution Rowntree or the Plaintiff against the consequences of such expenditure, except so far as the claim he had made to the entirety of the property, which was made before the expenditure was commenced (and which claim was never withdrawn), was notice that the expenditure was made at the peril of the parties making it."

As for acquiescence Buckley L.J. stated the test thus in **Shaw v Applegate** [1978] 1 All E.R. 123 at 131:

> "So I do not, as at presently advised, think it is clear that it is essential to find all the five tests set out by Fry J literally applicable and satisfied in any particular case. The real test, as I say, I think must be whether on the facts of the particular case the situation has become such that it would be dishonest, or unconscionable, for the plaintiff, or for the person having the right sought to be enforced, to continue to seek to enforce it."

On this basis there was no dishonesty or unconscionable conduct by Robinson.

The other relevant ground of appeal reads at page 6 of the Record:

> "7. The Learned Judge misdirected himself when he held that a resulting implied or constructive trust cannot be justified for the following reasons:-
>
> (i) The Plaintiff/Appellant has an unassailable right to a judgment against the First Defendant Respondent for all the damages of loss which has been suffered.
>
> (ii) The Second Defendant/Respondent had been deprived of developing the property which he bought in 1985 from the First Defendant/Respondent.
>
> (iii) The Plaintiff/Appellant acted most imprudently, and precipitously in laying out vast sums on the land when all he had was a letter or possession to unregistered lands.
>
> (iv) The Plaintiff/Appellant has not shown that he would not have planted the coffee on the lands had he been aware of the previous purchaser.
>
> (v) Finally, particularly in matters affecting right of property it is important that certainty in the law be preserved even

> in the face of a decision which appears to be hard as against one of the parties."

Langrin J disposed of this ground of appeal in two passages which ought to be affirmed. They read as follows at pages 179 and 180 of the Record. The first reads as follows:

> "In so far as a resulting trust is concerned, no relationship has been alleged or proven between the plaintiff and the second defendant from which a resulting trust or indeed any trust could be said to arise. The Plaintiff is a rival claimant who sets up only his rival claim and nothing else against the second defendant."

The second passage reads:

> "3.The plaintiff acted most imprudently, and precipitately in laying out vast sums on the land when all he had was a letter of possession to unregistered lands."

There is an impressive authority to support the above contention of the learned judge in the form of **Assets Company, Limited v. Mere Roihi** [1905] A.C. 176 at 204-205 where Lord Lindley said:

> "Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships'

> opinion, to do the very thing which registration is designed to prevent. Their Lordships cannot give effect to the ingenious arguments addressed to them on this point; nor can they adopt the case of **Solicitor-General v. Mere Tini** 17 N.Z.L.R. 773 as an authority which ought to be followed in these appeals."

There is another point of law raised by Mr. Vassell and it is worth mentioning. In **Mears v Callender** [1905] 2 ChD. 388 at 395, Cozens-Hardy J. said of tenants:

> "Now at common law it is plain that the defendant could not cut down or remove the orchard trees or claim compensation."

In **Saunders (Inspector of Taxes) v. Pilcher** [1949] 2 All E.R. 1097 at 1103 Singleton, L.J. said:

> "In **Evans v. Roberts,** (1826), 5 B. & C. 829 Bayley, J. (5 B. & C. 835), says:
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> > 'In Tidd's Practice, p. 1039, it is laid down that under a *fieri facias* the sheriff may sell *fructus industriales,* as corn growing, which goes to the executor, or fixtures which may be removed by the tenant; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir.'
>
> It is sufficient for this purpose to repeat that no case can be found in which fruit growing on trees has been treated as *fructus industriales."*

Jenkins L.J. put it thus at 1105:

> "When the owner in fee simple of a farm in hand sells for a like estate to a purchaser the common practice, of course, is for the contract to contain special provisions in regard to such things as growing crops, and, generally, they are either expressly reserved to the vendor with a right to gather them or the

> purchaser is required to take and pay for the crop when ripe at a valuation. Where, however, the contract is silent as to such matters, and there is simply an out and out sale of a farm in hand from an absolute owner to a purchaser, then, I apprehend, the crops in the ground, whether they be *fructus industriales* or *fructus naturales,* pass with the land in the ordinary way. It is, however, unnecessary to deal further with that aspect of the matter. For, in my judgment, this part of the case is shortly answered by saying that these cherries were *fructus naturales."*

Then Tucker L.J. said at page 1107:

> "It is clear on the documents that this was simply a sale and conveyance of land which carried with it the fruit trees and the fruit on the trees. I am in complete agreement with what has been said by my brethren with regard to the point as to *fructus industriales* and *fructus naturales.* It is far too late to argue now that cherry trees are *fructus industriales."*

On this basis Mr. Vassell contends that once the Court ordered that the registered title be made out in the name of Robinson as a result of the litigation between Robinson and Ms. Tully, then the land together with coffee trees went to Robinson, the second defendant respondent. Quite apart from the injunction obtained very early in the litigation between Robinson and Ms. Tully, Robinson also obtained from Edwards J. an order of specific performance to carry out the contract for sale of the land. The appeal against that order was dismissed on January 13, 1993.

Mention has been made of the litigation between Robinson and Ms. Tully to emphasise that Robinson has fought a long and difficult legal battle to establish his right to the property. It was during the time that the legal battle

was being fought that Mr. Fraser sought to sell the property to the appellant Blue Haven Enterprises Ltd. That proposed sale was a failure. It failed because the property was previously sold and transferred by a Court Order to Robinson. The issue of a second sale ought not to have been contemplated during the litigation between Ms. Tully and Robinson. Once Gordon J, granted an injunction on 11th January 1989, the "agreement" between Blue Haven and Ms. Tully should have been cancelled.

Conclusion

It is appropriate to say that I have read the judgment in draft of my brother Walker J. A. and I agree with it. The appellant Blue Haven Enterprises Ltd. (the nominee of Dr. White) has sought the intervention of equity to secure restitution for expenditure of funds which it incurred by developing a coffee orchard at Chancery Hill, Mamie Hut, and Shirley Castle in Portland. There was considerable litigation between Ms. Tully the first defendant and Robinson the second defendant respondent. On every occasion Robinson was successful. He prudently waited until his litigation was completed before spending money on the property. Had Mr. Fraser, the lawyer for Ms. Tully informed Mr. Ross of the litigation between Ms. Tully and Robinson this unfortunate case might not have occurred. Blue Haven and its principal share-holder, Mrs. White have my sympathy. But they were imprudent to have embarked on such vast expenditure on unregistered lands without the protection of a conveyance.

In the Court below Blue Haven Enterprises Ltd. secured an award against Ms. Tully for $20M. That aspect of the matter was uncontested and there is no appeal against that order. As far as Blue Haven is concerned, Robinson was an innocent bystander. There was no legal or equitable relationship between him and Blue Haven Enterprises Ltd. To Robinson, the appellant Blue Haven Enterprises Ltd. was a volunteer. Equity does not help a volunteer. Langrin J. decided the matter in the Court below correctly. So this appeal must be dismissed. The order below is affirmed and the appellant must pay the costs of the second defendant/respondent which are to be taxed if not agreed.

WALKER, J.A:

A chronology of the protracted litigation between the parties which commenced more than a decade ago and involves a plethora of judgments and orders of the Supreme Court and this Court is necessary to fully understand this appeal. Here are the material events.

By an Agreement for Sale dated 14th November, 1985 Mrs. Dulcie Ermine Tully agreed to sell and the respondent, Mr. Robinson, agreed to purchase lands forming part of Chancery Hill, Mammie Hill and Shirley Castle in the parish of Portland ("the property"). The contract between the parties was subject to special conditions, the first of which prescribed as follows:

> "It is understood and agreed between the parties hereto that the lands which are being conveyed under the provisions of this Agreement are those hereinbefore described and the parties further agree that the purchase price herein is payable without reference to the quantum of land being conveyed, and that the said purchase price will not be variable in any manner whatsoever in the event that a subsequent survey of the said lands discloses an increase or decrease in the area of the same stated herein".

By letter dated 27th January, 1987 Mr. Robinson's attorneys wrote to Mrs. Tully's attorney, Mr. Fraser, in the following terms:

"Re: Sale – Land at Shirley Castle, Portland
Dulcie Tully to Eric Clive Robinson

We refer to various discussions between yourself and our Mrs. Causewell.

Your client has sold our client 130 acres "more or less" on terms that the purchase price is payable "without reference to the quantum of lands being conveyed." The meaning and effect of these words in a contract of sale of land has been widely considered in the authorities and academic works, and the position is that their effect depends upon the degree of divergence between the actual acreage and that stated in the contract.

The authorities are clear that having regard to the degree of divergence in this case, our client is entitled, at his option, to rescind and claim back the deposit expenses such as the $8,000.00 he has spent on surveyor's fees, and compensation or to claim specific performance of the agreement with compensation in the form of an abatement of the purchase price – in this case by roughly $2,000.00 per acre for each of the 36 acres. Our client elects the latter option.

Please confirm to us within ten (10) days that your client agrees to approach the completion of the sale on this basis."

To this letter Mr. Fraser responded by letter dated April 22, 1987 as follows:

"I write further to your letter of the 27th January, 1987, the delay in replying to which is regretted, and to my recent telephone conversations with your Mr. Vassell.

I have advised myself as to my client's legal position in this matter and taken instructions from my client. I do not agree with your conclusions of the effect of the legal authorities on the instant

> case, having regard to the provisions of the Agreement for Sale herein and to all the other circumstances of the matter.
>
> I accordingly enclose herewith Notice Making Time of the Essence which is self-explanatory, and you should be advised that my client intends to enforce the provisions thereof.
>
> I accordingly look forward to hearing from you."

Accompanying this letter was a Notice of even date addressed to Mr. Robinson making time of the essence of the contract and requiring payment of the balance of the purchase price within 30 days of the date of the Notice. Thereafter by letter dated 21st May, 1987 Mr. Robinson's attorneys wrote directly to Mrs. Tully in these terms:

> "Re: Sale of Land part of Chancery Hill, Mammie Hill and Shirley Castle, Portland Yourself to Clive Robinson"
>
> "We act for the Purchaser, Mr. Clive Robinson, and enclose our cheque in the sum of of $149,000.00 being what our client considers to be the balance purchase price in this matter. You have our undertaking to pay to your Attorney-at-Law the half-costs transfer as soon as we are advised of the amount.
>
> We would have sent this cheque to your Attorney, but when we telephoned his office, he was out."

This letter was copied Mr. Fraser who by letter dated May 22, 1987 replied to Mr. Robinson's attorneys thus:

> "Sale of lands at Shirley Castle, Portland- Dulcie E. Tully to Eric C. Robinson

> Reference is made to previous correspondence in this matter ending with your letter of the 21st May, 1987 to my client, a copy of which was received by me today.
>
> My client does not accept that the sum of $149,000.00 tendered with your letter under reference represents the balance Purchase Price in this matter.
>
> In accordance with the Notice dated April 22, 1987, and sent with my letter to you of that date, my client considers the Agreement For Sale in respect of the above lands, made between my client and yours and dated November 11, 1985 to be at an end, and hereby rescinds the same.
>
> I accordingly return herewith your said cheque for $149,000.00 and also enclose herewith my cheque in the sum of $40,000.00, representing the refund in full of the deposit paid herein by your client.
>
> The above rescission and refund are made without prejudice to any rights which my client might seek to enforce against your client in respect of his breaches of the Agreement for Sale abovementioned."

This manoeuvre on the part of Mrs. Tully spurred Mr. Robinson into legal action which took the form of an originating summons filed in Supreme Court suit No. E. 160 OF 1987. On that summons Mr. Robinson sought relief:

> 1. For a Declaration that upon a proper construction of a contract of sale of lands part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland dated 14th November, 1985 and entered into between the plaintiff as purchaser and the defendant

as vendor, the plaintiff is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract less such sum as he is adjudged entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain, namely 94½ acres.

2. For an injunction to restrain the defendant from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale."

The summons was heard by Gordon J (as he then was) who on January 11, 1989 ordered inter alia as follows:

"1. Declared that upon a proper construction of a contract of sale of lands part of Chancery Hill, Mammie Hill and Shirley Castle, in the Parish of Portland dated 14th November, 1985 and entered into between the Plaintiff as purchaser and the defendant as vendor the plaintiff is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract viz. $260,000.00 less the sum of $71,000.00, the amount to which the plaintiff is entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain, namely 94½ acres.

2. That the defendant is restrained from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale or

> from pursuing further any existing contract of sale in relation to the said land otherwise than to the plaintiff."

Subsequently this order was appealed and on July 13, 1992 that appeal was dismissed and the order of Gordon J affirmed by this Court. Following upon his success in this appeal Mr. Robinson sought specific performance of the contract with Mrs. Tully and other pertinent relief. He did so by Writ of Summons dated September 10, 1992 filed in Supreme Court suit no. C.L. 1992/R149. On January 13, 1993 Mr. Robinson obtained a summary judgment in this suit. That judgment given by Edwards J was expressed in the following terms:

> "1. Specific performance of the agreement for sale between the plaintiff and the defendant referred to in the Statement of Claim in the terms of the Minute of Order as follows:
>
> (a) Declared that the agreement for sale between the Plaintiff and Defendant dated the 14th November, 1985, referred to in the Statement of Claim ought to be specifically performed and carried into execution.
>
> (b) That upon the Plaintiff's Attorneys-at-law re-tendering to the Defendant's Attorneys-at-law the sum of $189,000.00 in payment of the purchase price less the sums referred to at (c) hereunder, the Defendant is ordered to execute and return to the Plaintiff's Attorneys-at-Law a conveyance of the property and to proceed forthwith to make the necessary application and taking the necessary steps to obtain the registered title for the property in the name of the plaintiff.

(c) That the Plaintiff is entitled to deduct from the purchase price any amount outstanding for water rates and property taxes in respect of the said premises and the cost of this action and of Suit No. E 160 of 1987 in the Supreme Court and of Suit No .C.A. 30 of 1989 in the Court of Appeal when taxed or agreed.

(d) That the Plaintiff's Attorneys-at-Law should, when re-tendering the amount payable under 2 above give to the defendant's Attorneys-at-Law its personal undertaking to:-

(i) pay its share of the cost of obtaining registered title and should forward to the Plaintiff's Attorneys-at-Law surveyor's diagram required for the said application.

(ii) That if the Defendant's Attorneys-at-Law fail to forward the conveyance aforesaid and to apply for registered title within 30 days or to confirm to the plaintiff's Attorneys-at-Law within the said 30 days their instructions and intentions to make the said application, within an acceptable time suitable for proceeding in that regard, the plaintiff's Attorneys-at-Law shall be at liberty to make the said application and the Defendant shall hand over all papers, execute all documents and do all acts reasonably required by her by the Plaintiff's Attorneys-at-Law to

proceed with the application.

(e) That the Defendant is ordered to give to the plaintiff vacant possession of the premises upon the re-tendering of the purchase price aforesaid.

(f) That an enquiry be made as to damages suffered by the plaintiff by reason of the delay in completion and the amount of such damages be paid by the Defendant to the Plaintiff.

(2) Vacant possession of the said property forthwith.

(3) Damages for delay in completion to be assessed and the said assessment be stayed pending the outcome of the defendant's appeal to the Privy Counsel (sic)."

On March 10, 1993 the Privy Council dismissed a petition by which leave was sought to appeal the judgment of Gordon J given on January 11, 1989. On September 30, 1993 the order for a stay which formed part of the summary judgment awarded Mr. Robinson on January 13, 1993 was discharged by a judge of the Supreme Court. Thereafter on January 18, 1994 under the authority of a Writ of Possession issued by the Supreme Court, Mr. Robinson was let into possession of the property. On June 13, 1994 Mrs. Tully's appeal against the summary judgment awarded Mr. Robinson on January 13, 1993 was dismissed by this Court.

In the meantime, and while Mr. Robinson's originating summons was still pending, Mrs. Tully executed another Agreement for Sale by

2. I am the widow of OSWALD PERCIVAL WHITE, late of 24 Widcome Road, St. Andrew, Consultant, deceased, who was shot and killed on the 18th day of June, 1993.

3. I am the sole executrix named in the will of OSWALD PERCIVAL WHITE, deceased, a copy whereof is exhibited herewith as 'ELW 1' which has been sent to Attorneys-at-Law in the State of New York, United States of America for them to obtain probate there and which will be re-sealed in this jurisdiction.

4. I have personal knowledge of the facts and matters relating to the purchase by the said Oswald Percival White, deceased, of land part of Shirley Castle in the parish of Portland containing approximately 96 acres, being the lands comprised in Certificate of Title registered at Volume 1241 Folio 605 of the Register Book of Titles which lands are the subject of this action. I therefore make this Affidavit from my personal knowledge and from information given to me by my late husband the said Oswald Percival White which I believe to be true.

5. At the time of his death Oswald Percival White was a bona fide purchaser in possession of the said lands, having been put in possession in or about September, 1988, under an Agreement of Sale made between himself and the Defendant herein, Dulcie Ermine Tully, on or about the 5th day of January, 1988. At the time of the agreement and of taking possession Oswald Percival White had no notice of any prior purchaser of the said lands. Nor was any person in occupation of the lands.

6. At the time of the Agreement of Sale the lands were unregistered. The lands were subsequently brought under the Registration

of Titles Act in 1992, following which the Agreement of Sale was re-executed in May, 1992, and pursuant thereto an instrument of transfer duly executed by the Vendor was delivered to Oswald Percival White in the name of his nominee Blue Haven Enterprise Limited.

7. ...

8. From entering into possession of the lands in or about November 1988, the said Oswald Percival White continued in uninterrupted possession up to the time of his death and since then his estate and nominee have been in possession.

9. Upon entering on to the said lands Oswald Percival White cleared the lands and established a large coffee plantation involving considerable expenditure. There presently exists on the land coffee and other crops.

10. Oswald Percival White first heard of these proceedings after the Summary Judgment was entered herein when his Attorney-at-law, Mr. John Ross, advised him in September, 1992, that the Vendor's Attorney-at-law had just advised that the Vendor was unable to complete the contract as there was a Court Order against the Vendor for specific performance of another agreement of sale for the very same land. Oswald Percival White thereupon instructed his Attorney-at-law to lodge the caveat referred to in paragraph 7 and exhibited herewith as 'ELW' 6".

This motion was dimissed by Ellis J on January 27, 1994. On December 7, 1994, on Mr. Robinson's application, an Order was made by Harrison J. (Ag) in Supreme Court suit No. C.L. 1992/R149 whereby the Registrar of

Titles was directed to cancel the existing certificate of title to the property and to issue a new title to the property in Mr. Robinson's name.

On May 10, 1994 the appellant, as successor in title to Dr. White, filed the Supreme Court action which has given rise to the present appeal. Therein Mrs. Tully was named as the first defendant and Mr. Robinson as the second defendant and the appellant (as plaintiff) claimed against the first defendant for specific performance of the contract for the sale and purchase of the property, and against the second defendant for:

> "1. A declaration that the said lands are held in trust by the Second Defendant on behalf of the plaintiff.
>
> 2. Alternatively, that all crops growing on the lands, when the Second Defendant took possession thereof, that were planted by the Plaintiff, constitute an equitable interest in the said lands on behalf of the Plaintiff.
>
> 3. An order that the Second Defendant account to the Plaintiff for all such proceeds.
>
> 4. An order under Section 459 of the Judicature (Civil Procedure Code) Law that the Second Defendant preserve and give account of all crops which were growing on the lands at the time when the Second Defendant took possession thereof, pursuant to a Court order.
>
> 5. An order that the Court grant to the Plaintiff all such further or other relief which, in the opinion of the Court, is just and equitable."

On May 30, 1995 on a summons filed in this action Bingham J (as he then was) ordered as follows:

> "1. Caveat numbered 730303 be removed from Certificate of Title registered at Volume 1241 Folio 605, the subject of this action.
>
> 2. The Registrar of Titles be ordered to carry out, within 21 days of the date of this Order, the Order of the Supreme Court made earlier herein in which she was directed to cancel Certificate of Title registered at Volume 1241 Folio 605 and issue new Certificate of Title in the name of the Second Defendant.
>
> 3. Further ordered that no steps be taken by the Second Defendant to sell, dispose of or otherwise deal with the property until the trial hereof.
>
> 4. Liberty to apply.
>
> 5. Leave to appeal granted to the plaintiff.
>
> 6. Stay of execution refused."

On June 20, 1995 an application lodged in this Court on behalf of the appellant was heard and dismissed by Patterson J.A. Finally, on July 21, 1995 Mr. Robinson was registered by Certificate of Title issued under the Registration of Titles Act as the proprietor of the property.

In due course of time the action that was commenced by the appellant was tried by Langrin J (as he then was) who at the conclusion

of the hearing dismissed the appellant's claim against Mr. Robinson while giving a judgment for the appellant against Mrs. Tully for the sum of $20,000,000 with costs to be agreed or taxed. The trial judge also awarded costs to Mr. Robinson to be paid by Mrs. Tully. It is against this judgment in favour of Mr. Robinson that the present appeal is taken.

The appeal raises two important issues. The first is whether Mr. Robinson's ownership of the legal estate in the property may legitimately be challenged at this point in time. The second is whether, if Mr. Robinson's title may not be successfully challenged, the facts and circumstances of this case raise an equity in favour of the appellant.

The first issue may be disposed of in short order. Founded as it is upon judgments and orders of the Supreme Court, Mr. Robinson's title to the property is in the words of Mr. Vassell Q.C. appearing for Mr. Robinson "of impressive legal pedigree". In the absence of fraud [and here there was no allegation or evidence of fraud] Mr. Robinson's title is indefeasible: see particularly ss. 68 and 70 of the Registration of Titles Act. The finding of the trial judge which was to this effect is,therefore, unassailable.

As to the second issue, **Ramsden v Dyson** [1865] L.R. 1 H.L. 129 may properly be regarded as the modern starting point of the law of equitable estoppel which is relevant. In that case the defendant had

improved the plaintiff's land in the belief that, if he did so, he would be granted a long lease. The plaintiff, his landlord, was not aware of that belief. The House of Lords held that there was no equitable jurisdiction either to enjoin the landlord from ejecting him or to grant him compensation for the value of his improvements which must have benefited the landlord. The principle of equitable estoppel is clearly stated in the dissenting speech of Lord Kingsdown, and here I would hasten to observe that the dissent in this case was not on the law but rather on the facts. At pp. 170-171 Lord Kingsdown said:

> "The rule of law applicable to the case appears to me to be this: If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in **Gregory v Mighell** [18 Ves. 328] and, as I conceive, is open to no doubt."

Again at pp. 140 – 141 Lord Cranworth L.C. put it this way:

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It

> considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.
>
> But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land ~~with the benefit of all the~~ expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

Subsequent to **Ramsden v Dyson** the Law of equitable estoppel was analysed in a judgment of Fry J in **Willmott v Barber** [1880] 15 Ch.D. 96, a decision which was cited before us by Mr. Vassell, Q.C. That judgment is generally regarded as a valuable guide to the matters which must be established in order that a plaintiff may ground this particular equity. FRY J said at pp 105 –106:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the

> plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

Against such a legal background, therefore, this Court ought not to find an equity established in favour of the present appellant unless it is prepared to go as far as to say that it would be unconscionable and unjust to permit Mr. Robinson to set up his proprietary rights against the appellant's claim. In order to determine that matter the Court must consider the history of the whole case in terms of the five *probanda* to which Fry J. referred above. In the present case I have no doubt upon the facts as found by the trial judge that the first four elements referred to by Fry J. do exist. The question which the trial judge needed to

resolve, and which must now concern this Court, is whether the fifth element is present: did Mr. Robinson as the undoubted owner of the legal estate in the property encourage the appellant in the expenditure of money for farming, coffee and other crops, or for any other act that he had done, whether directly, or indirectly by abstaining from asserting his legal rights? In Halsbury's Laws of England, 4th edn, para. 1027 at p. 933 the learned author treats with the principle of proprietary estoppel in this way:

> "The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories.

> This principle is a particular instance of estoppel by acquiescence, and differs from other estoppels in that it may give rise to a cause of action rather than being available merely as a defence; but whether the principle is called proprietary estoppel, estoppel by acquiescence or estoppel by encouragement has been said to be really immaterial".

Again in para. 1073 at p. 935 the author states:

> "If A spends money on B's land or otherwise acts to his detriment believing that the land belongs to A or that A has or will obtain some interest in the land and B, knowing of A's mistaken belief, stands by while the money is being spent or encourages the expenditure, B will not be heard to assert his title to the land so as to defeat A's expectation ~~at least~~ without compensating A for his expenditure. The principle also applies where A spends money or takes some other action in relation to his own land in the belief that he has been, or will be, granted some interest in or right over B's land when B will be compelled to give effect to the belief or expectation. The protection may take the form of requiring repayment of the money, or the refusal to the true owner of an order for possession, or of holding the person expending the money entitled to a charge or lien, or of finding a constructive trust.
>
> Where a person interested in property, whether as owner or incumbrancer, has stood by while another has purchased what he supposed to be a good title to the property, the person so standing by cannot afterwards set up his title against the innocent purchaser or a person deriving title under him.
>
> Similarly, the innocent purchaser of a chattel from a person having no title to it is entitled as against the true owner to an allowance for work done upon it while it is in his possession".

In **Goff and Jones** on the Law of Restitution 5 edn. Cap. 6 at p. 243 the learned authors suggest that:

> "The proper inquiry is whether 'in [the] particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment' rather than 'whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

As I understand the law, the duty of a proprietor of land whose proprietary rights are ~~being infringed~~ is not to remain wilfully passive but to assert his claim to proprietorship of the land in a distinct manner. In the present case in determining the sufficiency of Mr. Robinson's efforts to assert his claim to the property one has to bear in mind the fact that for the intervening years, amounting to nearly a full decade, between November 14, 1985, when he signed the contract with Mrs. Tully, and July 21, 1995 when registration under the Registration of Titles Act was finally achieved, Mr. Robinson's title to the legal estate in the property remained in dispute and the subject of continuous litigation. Be that as it may, looking at the evidence as accepted by the trial judge, Mr. Robinson asserted his rights to ownership of the property from as early as 1989 when he visited the property two weeks after Gordon J's order of January 11, 1989. On the occasion Mr. Robinson observed that the

property was planted in coffee. Then Mr. Robinson spoke to one Dillon who was the foreman on the plantation employed to Dr. White and the person who reported directly to Dr. White. At this time Mr. Robinson handed a note to Mr. Dillon with a request that the note should be delivered to Dr. White. The evidence on this point was given by Mr. Robinson ("CR") the course of examination by his counsel, Mr. Vassell ("JV"), and recorded by the trial judge in this way:

> "J.V: Tell us about your conversation with Mr. Dillon
>
> C.R.: I asked to see the person who was in charge and they referred me to Mr. Dillon and I asked him who was it that was planting coffee on the land and he said he was not at liberty to tell me the name of his employer. I said to him that what he was doing was illegal because the land belonged to me. He asked me how. I told him that there was a court order which was just awarded to me making me the owner of the place. He said he didn't know anything about that. I asked him if he would let me know his employer's name and address and he said no. I wrote a note ...
>
> J.V: Just a minute.
>
> C.R.: I put my telephone number and my address and I asked him to give that to the employer and he said he would.
>
> J.V.: And then did you speak to Mr. Dillon again?
>
> C.R.: I had about a half-hour conversation with him. I asked him how much coffee they

had planted. He said they had just started. I told him that I would return at some point in the future.

J.V.: what address did you give?

C.R.: My home address.

J.V.: Did you ever hear from Dr. White?

C.R.: Never.

J.V.: Did you go back there?

C.R.: Yes, I returned there, it might have been a month after.

J.V.: Did you speak to Mr. Dillon?

C.R.: Yes, I did.

J.V.: And what did you say to him?

Counsel (Mr. Codlin): Objection. May I ask that Mr. Robinson be out of hearing again. Anything that Dr White has said to Mr. Dillon is clearly hearsay. What Mr. Robinson says spontaneously to Mr. Dillon is understood. If Mr. Dillon is going to be called, no objection. Any statement made to Mr. Dillon by Dr. White cannot be repeated by Mr. Robinson unless Mr. Dillon is going to give evidence to support that.

(Mr. Robinson was called back to the stand).

J.V.: You said you spoke to Mr. Dillon, did he say anything about the delivery of the message?

C.R.: Yes, he said he delivered it."

Eventually nothing came of that effort to make contact with Dr. White through Mr. Dillon who, in the circumstances, must be regarded as having been the agent of Dr. White: See **Ramsden v Dyson** (supra); **Crabb v Arun District Council** (1976) 3 All ER 865.

Before us Mr. Codlin for the appellant sought to question the admissibility of the above evidence, relying on ***Jacker v The International Cable Company Limited*** (1888 – 89) Times Law Report, Vol. 5; 13. The short headnote to that case reads:

> "Where matter has been improperly received in evidence in the Court below, even when no objection has been there raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence."

Mr. Vassell countered by arguing that the evidence was properly admitted by the trial judge while adding that even if this were not so the appellant, not having complied with the provisions of s.12 (3) of the Court of Appeal Rules, 1962, could not now be heard on that matter. Section 12 (3) provides as follows:

> "**(3)** Except with the leave of the Court the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal".

It is factual that nowhere in the appellant's notice of appeal is there any complaint touching the admissibility of the evidence which the

appellant now seeks to impugn. But, notwithstanding **Jacker's** case, and whether or not this evidence was strictly admissible, it seems to me that without the leave of this court, and in this case no such leave was sought or obtained the appellant's complaint on this ground is not arguable on appeal. It follows, therefore, that the evidence which was admitted and acted upon by the trial judge must be allowed to stand.

The question now arises: having once asserted his right to ownership of the property, was Mr. Robinson required, as a matter of law, to do more than that? I do not think so. In ***The Master or Keeper, Fellows and Scholars of Clare Hall v Harding*** 6 Hare 272 a demurrer for want of equity was allowed to a bill which the report states:

> "alleged (amongst other things) that the Plaintiffs, believing themselves to be entitled under a devise to a dwelling house and shop entered into an agreement for a lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and re-building the premises, that the Defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced, that he knew also that the improvements were being made, and that the Plaintiffs and their tenant were acting under a mistake, and nevertheless, permitted the works to be carried on without any objection during their progress, and praying that the Defendant might be decreed to confirm the lease, and in the

> meantime be restrained from evicting the tenant".

It was held inter alia:

> "That the owner having once and recently given notice of his claim to the property was not in order to exclude any equity in respect of the expenditure on the ground of mistake by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on;
>
> That in order to exclude such equity it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title; nor, if the claim which he made exceeded what he was entitled to, was the party in possession justified in disregarding it or supposing it to be unfounded".

In the instant case immediately after his deposit was returned to him by Mrs. Tully's attorney, Mr. Robinson had in 1987 taken a positive step towards protecting his proprietary interest in the property. At that time Mr. Robinson had sought an injunction to restrain Mrs. Tully from selling, charging, or dealing with the property otherwise than in accordance with the terms and conditions of the contract of sale existing between them, or from pursuing further any existing contract for sale of the property otherwise than to him. That injunction was granted in terms of the orders of Gordon J, made on January 11, 1989.

Again, the decision of the Privy Council in ***Attorney General of Hong Kong and Another v Humphreys Estate (Queen's Gardens) Limited***

never executed. However, the government granted the group a licence, expressed to be revocable at any time without notice, to enter its property and allowed the group to demolish the existing buildings in preparation for redevelopment. By August, 1982 the group had paid the government $103,865.608, being the agreed difference in value between the two properties, and the basic terms of agreement in

principle had been agreed and had been substantially performed. The requisite documents were drafted but they were not executed because in April 1984 the group decided to withdraw from the negotiations and the plaintiff gave notice to the government determining its licence to occupy the flats. On an action by the plaintiff against the defendants in the High Court the judge ordered, inter alia, that the first defendant should pay $103,865,608 to the plaintiff and that the plaintiff was entitled to possession of the flats, and he dismissed the defendants' counterclaim holding that the plaintiff was not estopped from requiring the government to deliver up possession. The Court of Appeal of Hong Kong dismissed the defendants' appeal.

On the ~~defendants'~~ ~~appeal~~ ~~to~~ ~~the~~ Judicial Committee:-

Held, dismissing the appeal, that for the group to be estopped from withdrawing from the agreement in principle the government had to establish that it had taken possession of the flats and had spent money on them under an expectation or belief created or encouraged by the group that the group would carry out the agreement and transfer the flats to the government; but that since the evidence plainly showed that the group to the government's knowledge had retained the right to resile from the agreement, the government had failed to prove that the group had created or encouraged the government to expect that there would be no withdrawal by the group, or that the government had relied on such expectation; that, accordingly, although the government had acted to its detriment, in the circumstances, it being neither unfair nor unjust nor unconscionable for the group to refuse to proceed, no estoppel operated to prevent the group from exercising its legal right to refuse to

> execute the documents and to withdraw from the transaction".

In the present case the trial judge found that the plaintiff had not shown that Dr. White would not have planted coffee on the lands had he been made aware of Mr. Robinson's proprietorship. With this finding I entirely agree. It is a finding that was fully justified on the evidence which showed that Dr. White continued to plant coffee and other crops on the property even after becoming aware in September 1992 of the order made in favour of Mr. Robinson for specific performance of the contract between Mr. Robinson and Mrs. Tully. The unchallenged evidence of the appellant's own witness, Cecil Langford, was that when he re-visited the property in 1993 he found 24 acres of land planted in mature coffee as well as young coffee of an age of 1–3 years. Indeed, it appears to me to be an inescapable conclusion to be drawn from all the circumstances that, in persevering as he did, Dr. White was relying not on any acquiescence or encouragement on the part of Mr. Robinson, but rather on a personal conviction based upon misconceived assurances given him by Mrs. Tully that he, and not Mr. Robinson, was the rightful owner of the property. That Dr. White proceeded on such a basis is clear from the evidence of Mrs. White which was recorded as follows:

> "Q. Now, you said you had occasion to speak to Mrs. Tully in 1992?

A. Yes.

Q. Did Dr. White also speak to her?

A. He was the one who spoke to her, he told me to pick up the telephone.

Q. He told you to pick up the telephone?

A. Right.

Q. Both of you were at the same station, telephone station?

A. Yes.

Q. He told you to pick up the telephone?

A. Yes.

Q. Does that mean there were two stations wherever you were?

A. Yes .

Q. He spoke to Mrs. Tully?

A. Yes.

Q. You had spoken to her on the telephone?

A. He had, not...

Q. Did you hear him call her that day?

A. Yes.

Q. Did she reply?

A. Yes.

Q. What did he say to her?

A. He told her he had heard about Mr. Robinson, someone, came there saying he had purchased the land, and he wanted

to know how could that be and she told him.

Q. He wanted to know how could that be?

A. Yes.

Q. Take your time for me Mrs. White, his Lordship and the rest of us are writing. He said how could that be?

A. Right.

Q. Did she respond?

A. Yes, she said nonsense.

Q. She said nonsense.

A. Right. That he wanted to buy the land and she gave him time and he didn't come up with the money and she gave back his money or something to that effect, and he had no claim on that land. He was disgruntled, she said he was a disgruntled person.

Q. He was a disgruntled person?

A. Yes."

For the above reasons I should be prepared to conclude in agreement with the trial judge that as against Mr. Robinson the facts and circumstances of this case raise no equity in favour of the appellant. It was never in dispute that Dr. White expended large sums of money in the cultivation of coffee and other crops on the property. Nor is it in doubt that Mr. Robinson has gained a benefit from Dr. White's investment and industry. But the evidence as accepted by the trial judge showed that Mr. Robinson did not stand by, or remain wilfully

passive, while Dr. White cultivated the property. As has already been pointed out Mr. Robinson's title was continuously challenged by court action since 1985, for a part of that time to the personal knowledge of Dr. White, who, nevertheless, continued undaunted in his activities. Finally, when his title was assured by registration under the law, Mr. Robinson sought immediately to communicate that fact to Dr. White through Mr. Dillon. As matters now stand the appellant is not left without a remedy for it has a judgment for $20,000,000 against Mrs. Tully which, if still unpaid, remains enforceable at its option.

I would, therefore, dismiss this appeal with costs to the respondent, Robinson to be agreed or taxed.

HARRISON, J.A: (Dissenting)

This is an appeal from the judgment of Langrin, J. (as he then was), giving judgment for the appellant on April 18 1997, against the first defendant (Dulcie Tully) for the sum of $20,000,000 and dismissing the appellant's claim against the second defendant/respondent with costs to be paid by the first defendant.

The appellant Blue Haven Enterprises was the nominee of the late Dr Oswald White. Seeking lands to purchase for the purpose of planting Blue Mountain coffee, he entered into an agreement for sale with Mrs Dulcie Ermine Tully, executrix of the Estate of Cyril Shirley et ux on January 5, 1988 to purchase, by estimation 100 acres "more or less" of unregistered land part of Chancery Hill, Mammie Hill, Shirley Castle in the parish of Portland for $450,000. Completion was to be "on the issue of a registered title in the purchaser's name."

By letter dated September 29, 1988 signed by the vendor's attorney-at-law, Reginald Fraser, Dr White was put in possession of the said property. Dr White cleared the land and planted coffee trees thereon to the extent of 86 acres at the rate of 44½ acres by 1989, 31½ acres in 1990, and 10 acres in 1991. He expended several millions of dollars in the said operation.

Previously, the vendor Dulcie Tully, the first defendant had entered into an agreement for sale of the said property on November 14, 1985 with the second defendant/respondent Eric Clive Robinson, comprising "by estimation 130 acres more or less" for the sum of $260,000, completion to be "on the issue

of registered title in the name of the purchaser." It was a further condition of the agreement that "... the purchase price is payable without reference to the quantum of land being conveyed." The second defendant/respondent paid a deposit of $40,000. A subsequent survey revealed that the acreage of land was only about 94½ acres and not 130 acres. Consequently, by letter dated January 27, 1985 the second defendant/respondent's attorneys-at-law wrote to Mr. Fraser, offering to complete the contract "... with an abatement of purchase price ... by roughly $2,000 per acre for each of the 36 acres ..." In response, by letter dated April 22 1987, Mr. Fraser, disagreeing with Mr. Robinson's attorney-at-law, served on the second defendant/respondent a notice making time of the essence and requiring payment of the balance of the purchase price within 30 days. By letter dated May 21, 1987 copied to Mr. Fraser, the second defendant/respondent's attorneys-at-law sent to the first defendant a cheque for, "... $149,000 ... being ... the balance purchase price ... " However, by letter dated May 22 1987, the latter cheque as also a cheque for $40,000 representing a refund of the deposit, were returned by the first defendant's attorney-at-law to the second defendant/respondent's attorney-at-law, stating that the agreement was rescinded for breach by the purchaser.

Consequently, the second defendant/respondent, by an originating summons, sought and obtained a declaration in the Supreme Court by Gordon, J. (as he the was) on January 11 1989, that he was entitled to enforce the said contract with abatement of purchase price, subject to the payment of $260,000

"less the sum of $71,000 as compensation, being the abatement in purchase price, due to the deficiency in acreage, as found by survey."

Robinson, the second defendant/respondent visited the property in January 1989, two weeks after the order of Gordon, J. He observed that the property was planted out in coffee. He spoke to and conversed with one Mr. Dillon, the alleged foreman of Dr White. Robinson said in evidence in-chief, that Mr. Dillon refused to give him the name and address of his employer, that he told Mr. Dillon that he was illegally planting coffee on the land which was his Robinson's land and that he would return. He handed Dillon a note requesting that he give it to his employer. He returned to the property "... might have been a month after ..." He again spoke to Mr. Dillon who (under objection by counsel for the appellant) said he "delivered it."

The first defendant's appeal from the order of Gordon, J. was dismissed by the Court of Appeal. Her subsequent Petition for leave to appeal was also dismissed by the Privy Council on March 10, 1993. The second defendant/respondent had obtained summary judgment in his suit for specific performance on January 13, 1993 by order of Edwards, J., and by writ of possession was let into possession of the said property on January 18 1994, in pursuance of the agreement of sale dated November 11 1985.

The said property being unregistered land when agreement for sale dated November 4, 1985 (Robinson), and agreement for sale dated January 5, 1988 (White) were signed, was brought under the Registration of Titles Act in 1991.

The said lands were surveyed by Donald Marks, commissioned land surveyor, between February 9, 1988 and March 1 1988, and found to contain 95 acres 2 roods and 33.64 perches. He prepared a plan thereof. Registered Title to the said property was issued in the names of Dulcie Ermine Tully and Anthony Shirley on November 30, 1991 and registered at Volume 1241 Folio 605.

The agreement for sale between the first defendant/respondent and Dr White was re-executed in May 1992, and an instrument of transfer was delivered to Dr White in the name of his nominee Blue Haven Enterprises Ltd. The said transfer was never registered. On September 1, 1992 Dr White lodged a caveat forbidding any dealing with the estate.

Dr White was written to by the second defendant/respondent's attorney-at-law on February 18, 1993 advising him of the order of Edwards, J. Dr White met his death on June 18 1993.

On January 21, 1994 Enid White, the widow and executrix of Dr White, applied by motion to be added as a defendant to the suit brought by the second defendant/respondent in which the latter had obtained summary judgment, and to set aside the said order of Edwards, J. The affidavit of the said Enid White dated January 21 1994, in support of the said motion, recited the history of the transactions between the deceased Dr White and the first defendant including the fact that at the time that the agreement for sale dated January 5, 1988 was signed the said property was unregistered and was subsequently registered at Volume 1241 Folio 605, that Dr White paid the purchase price agreed, was put in

possession and that it was only in September 1992 that his attorney-at-law, John Ross, advised him of the court order for specific performance of an agreement for sale, clearly referring to the judgment of Gordon, J. which was affirmed by the Court of Appeal on July 13, 1992.

The motion was dismissed by Ellis, J. on January 27, 1994 and the subsequent appeal was dismissed by the Court of Appeal on June 13, 1994. On December 7, 1994 on the application of Robinson in Suit No C.L. 1992/R149, the Registrar of Titles was directed to cancel the existing certificate of title to the said property and to issue a new certificate in the name of the second defendant/respondent Robinson.

On May 10, 1995 the appellant issued a writ against the first defendant (Tully) claiming specific performance of the agreement for sale and against the second defendant/respondent seeking:

> "(1) A declaration that the land is held in trust by the second defendant on behalf of the plaintiff.
>
> (2) Alternately, that all crops growing on the lands when the second defendant took possession ... that were planted by the plaintiff, constitute an equitable interest in the said lands on behalf of the plaintiff.
>
> (3) An order ... to account ... for all such proceeds.
>
> (4) An order under section 459 of the Judicature (Civil Procedure Code) Law that the second defendant preserve and give an account of all (such) crops ...

(5)

(5) ... all such further relief ... which ... is just and equitable."

On May 30, 1995 the caveat lodged on the registered title by Dr White on September 1, 1992 was ordered by Bingham, J. as he then was, to be removed. Ultimately, on July 21, 1995 the second defendant/respondent was registered as proprietor to the said lands under the Registration of Titles Act.

As stated earlier, this appeal is from the judgment of Langrin, J. as he then was, giving judgment for the appellant against the first defendant and judgment for the second defendant/respondent against the appellant.

Mr. Codlin for the appellant argued that the agreement for sale between the first defendant and second defendant/respondent dated November 4, 1985 was not registered by the second defendant/respondent as required, under the Record of Deeds and Wills Act and therefore there was no notice to a subsequent purchaser. Dr White registered his agreement and therefore gained priority over the second defendant/respondent. The registered title given by the first defendant to the second defendant/respondent ought therefore, to be cancelled and registered in the name of the appellant, the nominee of Dr White. Furthermore, presumably in the alternative, the appellant is entitled to restitution having expended substantial sums on the property to the knowledge of the second defendant/respondent who stood by without notifying the appellant.

Mr. Vassell, Q.C. for the second defendant/respondent submitted that the registered title in the name of the second defendant/respondent is unassailable. The Record of Deeds and Wills Act is irrelevant, in that conveyances, and not

agreements for sale, require registration. Further, the second defendant/respondent, rather than standing by, notified the appellant by way of an oral message and a written note. However, if the court finds that the notice was insufficient, no expenditure after 1992 is recoverable.

A person who expends money on another's land, mistakenly believing it to be his own or that he has a legal right to do so, does not thereby acquire an interest therein by such expenditure. It is tantamount to a gift to the rightful owner. However, if the rightful owner stands by and watches such expenditure with the knowledge that the person so expending his money is mistaken as to his legal right, ~~and refrains~~ from so informing ~~him~~, ~~expecting~~ to benefit therefrom, a court of equity will estop such rightful owner, that is, will not permit the latter to benefit from such mistake, unless he compensates the other for the benefit conferred. This is the doctrine described as equitable or at times, proprietary estoppel.

In the case of **Ramsden v Dyson** [1865] L.R. 1 H.L. 129, this principle of equitable estoppel was explained. No estoppel was held to arise therein. Their Lordships in the House of Lords held that the defendant tenant had no equity in his favour to compel the plaintiff landlord to refrain from ejecting him or to compensate him for the improvements to the landlord's land. Lord Cranworth, L. C. for the majority, at page 140, said:

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me

> afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wholly passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.
>
> But it will be observed that, to raise such an equity two things are required, first, that the person expending his money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

The principle was explained further in **Willmott v Barber** [1880] 15 Ch. D. 96, formulating the test to be applied in order to determine whether or not an equity arises. The test is referred to as the five probanda. Fry, J. at page 105 said:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view, that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud, of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.

> Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature, as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

This statement of the principle of estoppel, in general terms embraces both encouragement or mere acquiescence by the true owner of the legal right being infringed.

In the later case of **Crabb v Arun District Council** [1976] 1 Ch. D 179, the plaintiff, whose land had a point of access and easement of way on the defendants' road, obtained the agreement of the defendants to grant to the plaintiff a second point of access and easement in relation to another part of the land in respect of the said road of the defendants. Subsequently, the defendants fenced the boundary between the plaintiff's land and the said road, erecting gates at both of the said points of access. After a period of 13 months, from the agreement of the defendants, the plaintiff sold the northern portion of land with the first point of access, without reserving any right of way over the

portion sold for the benefit of the land retained. He held the belief, due to the prior agreement with the defendants, that he could enforce a right of way and access to defendants' road for the benefit of the retained southern portion of the land. The defendants thereafter removed the gate of the second point of access and erected a fence, thereby land locking the portion retained by the plaintiff. The plaintiff brought an action for a declaration and injunction, claiming that the defendants were estopped by their conduct from denying him a right of access at the second point and a right of way over the road. The plaintiff's appeal against the judgment of the trial judge for the defendants was allowed. Scarman, L.J., referring to the judgment of Fry, J. in **Willmott v Barber** (supra) , at page 195 said:

> "... it is clear that whether one uses the word fraud or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust."

and continuing said:

> "The court therefore cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff. In order to reach a conclusion upon that matter the court does have to consider the history of the negotiations under the five headings to which Fry, J. referred."

and concluding at page 198 said:

> "It is for those reasons – the passage of time, the abstention and the gates - that I think the defendants cannot rely upon the fact that the plaintiff acted,

> without referring to the defendants, on his intention - an intention of which they had had notice ever since their agent was informed of it at the meeting in July 1967. I think therefore an equity is established."

In *THE LAW RELATING TO ESTOPPEL BY RREPRESENTATION*, by Bower & Turner 3rd edition (1977), the authors, in discussing the application of the doctrine, at page 288 said:

> "... when the third and fourth of Sir Edward Fry's probanda are considered acquiescence is fairly seen to exhibit the special characteristics of estoppel which arise from silence or inaction, as distinct from those based on positive words or equivalent conduct.
>
> ... there can be no estoppel arising from silence unless the representor is under a legal duty to speak, ... such a duty can arise only where there is actual knowledge by the representor (a) of his own rights and (b) of the fact that another is acting upon the mistaken assumption that he has no such rights."

It seems to me that, in the instant case, the fifth probanda of Sir Edward Fry, is also specifically applicable, namely:

> "... the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff ... the defendant the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing to call upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights."

In order to "assert his legal rights", the defendant must be seen to have given the plaintiff a clear, distinct and precise notice of his objection to the plaintiff of his misguided and mistaken acts, for example, expending money on the land. The notice, it must have been proved to have been brought to the attention of the plaintiff's representee, sufficiently to inform him of his mistaken acts and the particular legal rights of the defendant to the property in question.

The legal estate in unregistered land can only be effectively passed to the purchaser of such land by deed of conveyance, at common law. The Record of Deeds, Wills and Letters Patent Act, section 2 provides that such a deed duly executed by the parties thereto, or proven on oath and recorded within three months of execution shall be valid to pass the legal estate in law. An agreement for sale, being a contract, cannot convey the legal estate in land: (**Cockburn v Walters** (1923) Clarke's Report 122). A contract for the sale of unregistered land is not required to be registered, nor does registration provide any priority.

The existence of a valid contract for the sale of land entitles a purchaser who is not at fault to call for completion of the agreement or to enforce the said contract by action for specific performance.

Robinson at all material times since 1985 had a valid and enforceable contract for the sale of the said lands to him. The contract had never been validly rescinded. The effect of that valid contract is that the equitable interest in the land passed to him and remained with him: (***Cockburn v Walters***, supra).

In the instant case, both agreements for sale Tully/Robinson dated November 4, 1985 and Tully/White dated January 5, 1988 were signed by the parties agreeing that completion was to be "... on the issue of a registered title in the purchaser's name." No conveyance of unregistered land was therefore at any time contemplated by the parties. The attempt by the appellant to register the relevant agreement for sale dated January 1 1988, besides being ineffective and irrelevant, was misleading.

The second defendant/respondent held an equitable interest in the land and was always in existence. Dr White had mere possession. On July 21, 1995 pursuant to the order of Edwards, J, on January 13, 1993 ordering specific performance of his contract of sale, the second defendant/respondent was duly registered as proprietor of the said land under the Registration of Titles Act. There was no fraud in the said second defendant/respondent. His title is valid and indefeasible under the said statute. There is no virtue in the argument of Mr. Codlin for the appellant that the said certificate of title ought to be cancelled. That ground also fails.

On the facts of the case, Dr White assumed possession of the land in September 1988, and thereafter expended considerable sums of money in the planting of coffee. By January 1989 when the second defendant/respondent visited the said property, he observed that it was "planted out in coffee."

Counsel for the second defendant/respondent Mr. Vassell, Q.C. submitted that the doctrine of estoppel by acquiescence did not arise in favour of the

appellant because the relevant elements laid down in **Wilmot v Barber** (supra) were not present on the evidence. In particular the second respondent did not acquiesce in the appellant's expenditure on the property without informing him of his rights; but did inform the appellant's foreman Dillon, as Langrin, J. found, in January 1989 in meetings and conversations, of his interest and in writing a note to Dillon's employer. Dillon confirmed that "the message was delivered." The evidence was not contradicted. Mr. Vassell emphasized that these findings of the learned trial judge were not the basis of a ground of appeal.

The evidence relevant to the latter issue, as led before the learned trial judge, at page 466 of the Record is as follows:

> "J.V. (John Vassell) After the order of Mr. Justice Gordon, did you go to the land?
>
> C.R. (Clive Robinson) Yes.
>
> J.V. What did you see there?
>
> C.R. I visited the property approximately two weeks after the litigation. I saw on the diagram 6 marked sections. Section 1 and 6 were actually the centerpiece of the property. They had just started planting coffee there."
>
> J.V. Did you see anyone?
>
> C.R. Yes.
>
> J.V. Who?
>
> C.R. There were people working. I saw a Mr Dillon.
>
> J.V. What did you say to him?

R.C. May I ask that the witness leave the stand?

J.L. Yes. Mr. Robinson, please stay outside.

R.C. I submit to the court that the conversation between Mr. Dillon and Mr. Robinson is hearsay and ought not to be admitted. A foundation would have to be laid for that purpose so as not to waste the courts' time. There is no evidence before this court to show that Mr. Dillon had any right or duty to receive information or anything whatsoever from Mr. Robinson. If Mr. Dillon is going to be called to state his position, I will modify my objection. I respectfully submit that a mere conversation between Mr. Robinson and Mr. Dillon without more, is hearsay and ought not to be admitted unless proper foundation for it has been made.

J.V. It emerges from the cross-examination of Mr. Langford. Dillon was the person in charge of the day to day revenue of the land. It is very clear that that was the man on the spot. I think that alone renders admissible a conversation.

J.L. Let me see whether I find it in my papers. Mr Codlin made reference to the foundation.

J.V. The foundation is in the evidence already.
(Mr. Robinson was called back to the stand).

J.V. Tell us about your conversation with Mr. Dillon.

C.R. I asked to see the person who was in charge and they referred me to Mr Dillon and I asked him who was it that was planting coffee on the land and he said he was not at liberty to tell me the name of his employer. I said to him that what he was doing was illegal because the land belonged to me. He asked me how. I told him that there was a court order which was just amended to me making me the owner of the place. He said he didn't know anything

about that. I asked him if he would let me know his employer's name and address and said no. I wrote a note ...

J.V. Just a minute.

C.R. I put my telephone number and my address and I asked him to give that to the employer and he said he would.

J.V. And then did you speak to Mr Dillon again?

C.R. I had about a half-hour conversation with him. I asked him how much coffee they had planted. He said they had just started. I told him that I would return at some point in the future.

J.V. What address did you give him?

C.R. My home address.

J.V. Did you ever hear from Dr White?

C.R. Never.

J.V. Did you go back there?

C.R. Yes, I returned there, it might have been a month after.

J.V. Did you speak to Mr. Dillon?

C.R. Yes, I did.

J.V. And what did you say to him?

R.C. Objection. May I ask that Mr. Robinson be out of hearing again. Anything that Dr White has said to Mr Dillon is clearly hearsay. What Mr. Robinson says spontaneously to Mr. Dillon is understood. If Mr. Dillon is going to be called, no objection. Any statement made to Mr. Dillon by Dr White cannot be repeated by Mr.

> Robinson unless Mr. Dillon is going to give evidence to support that.
>
> (Mr. Robinson was called back to the stand).
>
> J.V. You said you spoke to Mr. Dillon, did he say anything about the delivery of the message?
>
> C.R. Yes, he said he delivered it."

The purpose of testimony of this nature is to satisfy the court that the fifth probanda in **Wilmot v Barber** (supra) did not exist. That is, that the second defendant/respondent did not abstain from asserting his legal rights. Rather, that he notified the appellant of his the second defendant/ respondent's interest.

In my view, whatever the second defendant/respondent said that the person Dillon is alleged to have said to him is hearsay and inadmissible. In addition, the evidence of what the second defendant/respondent is alleged to have said to Dillon, is self serving and consequently also inadmissible: **Corke v Corke & Cook** (1958) 1 All E.R. 224. A witness is not permitted to corroborate himself, except in certain specific instances, for example, the recent complaint in sexual cases. Furthermore, the second defendant/respondent's evidence of his utterances to Dillon cannot be classified as original evidence, because it would be useless in the context of this case if only to prove the fact that the statements were made. The statements were not purported to have been made to Dr White, the proper recipient of notice of the second defendant/respondent's interest. There was therefore no effective nor any notice to Dr White.

Of further significance is the evidence of the second defendant/respondent that he "... wrote a note ... (and therein) ... I put my telephone number and address ..." This is oral evidence of the contents of a document, without producing the original or giving an explanation of the absence of such original, to justify the reception of the secondary oral evidence. There is no evidence that a notice to produce the original was served on the appellant. Consequently, that evidence is wholly inadmissible. I agree in the context of the instant case, with the decision in **Jacker v The International Cable Co. Ltd.** (1888-89) 5 Times Law Reports 13, relied on by Mr. Codlin for the appellant. The headnote reads:

> "Where matter has been improperly received in evidence in the court below, even when no objection has been raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence."

I am aware, as Mr. Vassell, Q.C. properly submitted that Rule 12 (3) the Court of Appeal Rules, 1962 provides:

> "3 Except with the leave of the court the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal."

However where the question involved before an appellate court is the existence or absence of evidence essential to the proof of a specific legal principle such as, in this case, that of estoppel by acquiescence, no appellate court may properly ignore so fundamental an issue.

I respectfully disagree with the finding of Langrin, J., that Dr White received notice from the second respondent after the latter had observed the expenditure made on the said land.

In my view, the appellant may rely on the principle of estoppel by acquiescence against the second defendant/respondent.

The evidence does not disclose any sincere attempt by the second defendant/respondent to notify Dr White of the latter's continuing mistaken expenditure. The evidence of the second defendant/respondent was that, between January 1989 and December 1993 he visited the said property fifteen times. The cross-examination, at page 481 of the Record reads:

> "R.C. (Raphael Codlin) In short, your evidence is that between January 1989 and the end of 1993, you would visit that property about three times every year?
>
> C.R. (Clive Robinson) That would be a fair comment."

On his first two visits, in January 1989, and one month thereafter, the second defendant/ respondent spoke to the employee Dillon. In respect of his next thirteen visits up to the end of the year in 1993, there is no evidence from the second defendant/respondent that he attempted to speak or spoke to anyone on the said property.

One can only assume that the second defendant/respondent adopted the posture of the repeat visitor watching in silence.

In my view, the appellant may rely on the principle of estoppel by acquiescence against the second respondent.

The conduct of the second defendant/respondent in the light of all his knowledge, standing by and watching the expenditure of Dr White on the appellant's behalf in the improvement of the property, without the relevant notice to Dr White, will attract the appropriate treatment in equity. Equity demands that the unjust enrichment of the second defendant/respondent due to the mistaken belief of the appellant, in all good conscience entitles the appellant to restitution.

The authors of *THE LAW OF RESTITUTION* by Goff and Jones, 5th Edition in commenting on the decision in **Ramsden v Dyson** (supra) where the plaintiff landlord was not aware of the defendant's mistaken belief in improving the plaintiff's land, at page 242 said:

> "Only if the owner has 'acquiesced' in the improver doing what he did is the improver entitled to relief in equity. When, therefore, is he deemed to have acquiesced? When, in Lord Cranworth's words, is it 'dishonest in me to remain willfully passive ... in order afterwards to profit by the mistake which I might have prevented'? Or, in a more recent formulation, when is it unscionable for the owner to rely on his legal rights?"

In discussing the nature of the remedy appropriate in granting restitution to the person who mistakenly improves another's land, the said authors at page 245 commented:

> "... if the owner has been uncontrovertibly benefited by the improvements, the benefit which he has

> gained should normally be the market value of the services or the increased value of the land. If he has encouraged the improver to act as he did, the improver should be entitled to the higher of those two figures; the owner's conduct, in acting as he did, is unconscionable. Indeed, in our view, that should be the proper measure of his enrichment if he has simply stood by without protest; his conduct is also unconscionable. It is a distinct question whether the court should grant the improver a lien over the land to secure that sum. This may depend on a number of factors, such as whether the land is already encumbered or whether the owner is insolvent."

The measure of restitution to which a person who has mistakenly expended monies on the land of another, where the latter knowingly stands by aware of the other's mistake, and refrains from so advising that other, in order to benefit thereby, is a repayment of the amount expended or the increased value of the land. The option open to a court of equity will depend on the circumstances of the case and which approach will satisfy the detriment suffered by the improver, taking into consideration the level of benefit gained by the true owner of the land.

The evidence of Lenburke Hutchinson, the witness for the appellant, an agriculturist and graduate of the University of the West Indies, St Augustine, in agriculture, is, that in 1989 Dr White cleared the said land, which was in ruinate with cassia trees, bush and weed, and uncultivated for over 15 years. Dr White put in ditches to prevent erosion, pipes, built a house thereon and planted coffee to the extent of about 89 acres. He said that the cost of establishing the coffee

was about $25,000 per acre and the costs of maintenance after the first year, and fertilizing was about $15,000 per acre.

Mr. Cecil Langford, valuator and former Commissioner of Lands, also a witness for the appellant, stated that the cost of establishing Blue Mountain coffee in 1989 was about $30,000 to $32,000 per acre, not including overheads such as, buildings, offices, managers and supervisors. In 1991, he visited and inspected the appellant's said farm at Shirley Castle and saw 86 acres of coffee cultivated in various stages of growth ranging from mature to "recent plantings" of six months. He valued the land and crops at $9,523,000. In 1993 he revisited the said land and observed ~~that~~ the acreage of coffee cultivated was reduced to 69¾ acres, due to the fact that areas were then utilized for the building of a road and an office and that certain marginal lands in coffee had "gone off." A coffee house and a workers' cottage had then been built both of timber and with zinc roofs. Coffee was then being reaped for the crop year 1993-94. He valued the land and crops then at $19,144,000. Such Blue Mountain coffee land was then being sold at $50,000 per acre. The coffee then being reaped, he said, could have produced about 1700 bushels (3400 boxes) at a sale price of $3,200 per bushel.

The second defendant/respondent, an airline pilot by profession, said, in evidence, that the establishment cost of coffee in 1986-1987, was about $23,000 per acre and the maintenance cost per acre was about 50% to 60% of the establishment cost. This conservative opinion of the second

defendant/respondent supports the evidence of the appellant's witness Hutchinson in that regard, to some extent.

The second defendant/respondent having failed to notify Dr White in January 1989, I agree with the submission of Mr. Vassell, Q.C. that notice having been sent to Dr White's attorneys-at-law by Mrs Tully's attorneys-at-law in July 1992, the effective period of acquiescence would have been January 1989 to July 1992. It seems however, that the second defendant/respondent's attorneys-at-law wrote to Dr White on February 2 1993, advising him of the order of Edwards, J.

The appellant by its expenditure did not intend to make a gift to the second defendant/respondent. Therefore the appellant has a right to the restitution of the monies mistakenly expended by him because of the equity arising in his favour. A court will aid the appellant by compelling the second defendant/respondent to repay his unjust enrichment, because of his acquiescence in the face of his knowledge of the appellant's mistake.

Their Lordships in the House of Lords in **Lipkin Gorman (a firm) v Karpnale Ltd et al** [1992] 4 All ER 512 held that the plaintiff's solicitors were entitled to be refunded by the defendant club, monies stolen by a partner and gambled away at the club, less any winnings paid out by the said club, on the principle of unjust enrichment. Lord Goff at page 532 said:

> "The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and, even though the underlying principle of recovery is the principle of unjust

> enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."

The second defendant/respondent stated that when he took possession of the said property there remained 33 acres of coffee. Mr. Vassell, Q.C. submitted that the pleadings state the acreage of coffee was 60 acres. It seems to me that the actual phrase in paragraph 7 of the statement of claim, namely:

> "... White cleared the lands to the tune of about 60 acres and planted out the same with coffee ..."

is expansive enough to accommodate the evidence that 86 acres of coffee were established initially, but subsequently diminished to 69¾ acres in 1993.

There was evidence therefore before the learned trial judge to show that the appellant would have expended sums in the establishment of 86 acres of coffee, $25,000 per acre, totalling $2,150,000 over the period 1989 to 1991. The additional expenditure was the maintenance costs of $15,000 per acre for each of the years 1990, 1991 and 1992 namely:

(a)	1990	-	44½ acres costing	-	$667,500
(b)	1991	-	76 acres costing	-	$1, 40,000
(c)	1992	-	86 acres costing	-	$1,290,000

making a total of $3,097,500. These expenses were funded by the appellant through Dr White, in part by loans from the Coffee Industry Board, Century National Bank and the Agricultural Credit Bank and through overdraft facilities granted to the appellant. Although when the appellant was dispossessed in January 1994, and the acreage had by then been reduced to 69¾ acres under

cultivation in coffee, maintenance costs for 1992 could have involved the full acreage of 86 acres.

No deduction ought to be made for the earnings from coffee sales by the appellant of the two-thirds crops of coffee for 1993 to 1994. That was an entitlement. It was fully offset by the fact that the second defendant thereafter benefitted from the crop remaining to be reaped, in addition to an established coffee farm of 69¾ acres.

The total costs for the establishment of the coffee farm and maintenance costs due to the appellant is therefore $5,247,500 to be paid by the second defendant/respondent as restitution for his unjust enrichment.

I would allow the appeal and enter judgment for the appellant against the second defendant/respondent in the amount of $5,247,500 and costs both here and in the court below to be agreed or taxed.

ORDER

Downer, J.A.

By a majority [Downer, Walker, J.J.A; Harrison, J.A. dissenting] appeal dismissed. Order of the court below affirmed. Costs to the second defendant/respondent to be taxed if not agreed.