[2017] JMSC Civ.114

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 04106

BETWEEN	**JENNIFER DIXON (Administrator Ad Litem of the Estate of Barrington Dixon, Deceased)**	**CLAIMANT**
AND	**ANGELLA RUNTE**	**1ST DEFENDANT**
AND	**ANTHONY DePAUL**	**2ND DEFENDANT**

Ms. Catherine Minto instructed by Nunes, Scholefield DeLeon & Co., for the Claimant.

Ms. Marjorie Shaw and Ms Deneve Barnett for First Defendant.

Ms. Lilieth Deacon instructed by Taylor, Deacon & James for Second Defendant.

February 19, 2015 and July 24, 2017

Sale of land - Undated contract for sale of land between claimant and first defendant - Prior agreement for sale of land between the first defendant and second defendant – Undated contract repudiated by first defendant – Caveat entered by claimant –Whether claimant entitled to specific performance - Caveat entered by second defendant prior to signing of agreement for sale between claimant and first defendant – Claimant's claim for specific performance – Whether statute-barred - Whether claimant entitled to order for adverse possession – The Limitation of Actions Act - Laches – whether claimant's inaction defeated by doctrine - Whether first defendant and deceased husband trustees of second defendant's shares in property – whether second defendant is beneficially entitled to 50% share in property – Whether second defendant

relinquished interest in property – Whether second defendant ought to have filed ancillary claim to protect his interest.

Coram: Morrison, J.

[1] The delay in the delivery of this judgment is well regretted for its breached expectations of timeliness. The pull of responsibility must, however, be shared by the defaulters as I was only put in receipt of the First Defendant's written submissions as well as the Amended List of Authorities of the Second Defendant on the 23rd March 2016. As to the latter I can discern no responses from the other parties as to the applicability of the said authorities to his claim. I shall therefore proceed without any further preface to the delivery of the judgment.

[2] Let me advert, at the very outset, to the fact that counsel on behalf of the First Defendant submitted, by way of a preliminary point, that this court has no jurisdiction to hear this matter.

[3] That this is so, she contends, is based on Sections 3, 4(d) and 25 of the Limitations of Action Act (LOAA) especially where these sections are applied to, first, the completion date of the contract, being the 31st day of March 1989; second, the serving by the Claimant on the First Defendant of a Notice of Making Time of the Essence dated 12th April 1989 and the Claimant's filing of another suit on October 16, 2007 (some eighteen years after the filing of the Originating Summons).

[4] The essence of the First Defendant's complaint is that the Claimant well knew that he had a right to enforce the claim and which such right had begun to accrue by the filing of the Originating Summons. Therefore, according to the First Defendant, the fact that the Claimant initiated proceedings by way of the filing of the Originating Summons does not preserve his right of action to the current claim before this court as the right of action began to accrue from October 13, 1989. For the above submissions the First Defendant relied on the first instant judgment of **Chang v Chang**, Claim No. 2010 HCV 03675, delivered by Her Ladyship Ms. Carol Edwards.

[5] Ms Minto for the Claimant, in counterpoint, has thrown down the gauntlet in her effort to undercut the First Defendant's submissions. First, she submits that, in respect of whether the Court has the jurisdiction to hear this matter, no authority was cited by the First Defendant who relied on LOAA as going to jurisdiction. Second, that there is no order or direction by the Court for the trial of the preliminary point. Third, that the Court cannot strike out a matter of this kind on the pleadings alone as there is a factual basis on which the limitation became operational. Fourth, and in any case, a party who seeks to have such a claim struck out by way of a Without Notice Application, must do so in writing and which application must not only be supported by affidavit evidence but also must be in conformity with the legally recognized rubric for such applications. The Claimant relied on the authority of **Ronex Properties v John Ltd. Laing Construction & Others** [1983] 1 Q.B.D 398 in respect of the limitation defence.

[6] Like the Claimant, I too am of the view that the First Defendant's proferred authority of **Chang v Chang**, supra, is inapplicable to the current scenario. What **Chang v Chang** was concerned with is the division of property under the Property (Right of Spouses) Act and, in particular, its application to the flexibility of its limitation periods, where such limitation periods go to the jurisdiction of the court to begin to hear cases under its auspices.

[7] The case of **Ronex Properties Ltd v John Laing Construction Ltd. & others**, supra, makes the point that the Statute of Limitations merely barred a plaintiff's remedy and not his cause of action and that since a limitation defence, when pleaded, might be subject to exceptions, then a defendant could never apply under Rules of the Supreme Court to strike out a claim against him as disclosing no reasonable cause of action merely because he might have a good limitation defence.

[8] This is how the point was made by Donaldson, L.J:

> *"Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous,*

vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no course of action is disclosed."

[9] In light of the above authority I had no difficulty in ordering that the preliminary point as raised by the First Defendant be dismissed and that the matter proceed to trial.

[10] I think it well to insert here the obvious facts that before the hearing of this claim both the original Claimant, Dr. Barrington Dixon, the Purchaser, and one of the joint owners of the disputed property, Mr. Charles Runte, died. In the case of the former, Mrs. Jennifer Dixon, his wife, was appointed Administrator Ad Litem for his estate, while in the case of the latter, Mrs. Angella Runte, the First Defendant, has maintained this suit in her own right.

[11] I shall now set out, for the sake of ease of understanding, what I consider to be the background facts.

BACKGROUND FACTS

[12] Before his death, Dr. Barrington Dixon entered into An Agreement for The Sale of Land, "The Agreement", with the Vendors. The land in dispute is referred to as, all that parcel of land at Pointe, Hanover, registered at Volume 538 and Folio 85 of the Register Book of Titles. It turns out that the Volume and Folio numbers as recorded in the agreement were erroneous. This discrepancy has spawned its own issue. The completion date for the sale of the land was the 31st day of March 1989. However, subsequent to the signing of the agreement Dr. Barrington Dixon requested changes to the agreement in respect of the deposit component of The Agreement. In consequence, there are issues surrounding the "wh-words" as to who, when and what changes were made to the Agreement. Mr Dixon paid the deposit as per the agreement. There came a time when the Runtes became uncommunicative in their personal capacities as Vendors and the Purchaser had to essay through Mr. Runte's Attorney-at-Law, Mr. Wenthworth Charles, to have the agreement brought to its climax. In this the

Purchaser failed. Dr. Dixon caused a caveat to be lodged against the property.

[13] By Originating Summons dated 13th October 1989 Dr. Barrington Dixon sought legal relief against the Defendants, Charles Runte and Angella Runte, whereby he asked the court to declare that the Agreement for Sale of the disputed property, "is subsisting" and, that the court direct, inter alia, that the balance of the purchase price be paid into court until further orders.

[14] On the 21st day of March 1990, the Purchaser was granted leave, on an Ex-Parte Summons, to effect service of the Originating Summons and supporting affidavit on the Defendant by way of service on their Attorneys-at-Law, Messrs. Wentworth S. Charles and Company. Service of the order was effected on the said firm of Attorneys-at-Law.

[15] There was a further order made on 16th November, 1990 that the Originating Summons was to be continued as if begun by Writ. It does not appear that this order was obeyed. There then follows a period of the relative inactivity. Then in 2006, Mrs. Angella Runte made contact with the Claimant and promised to complete the sale. It should be noted, parenthetically, that the above Agreement, was preceded by an earlier Agreement between the Second Defendant and Mr. and Mrs. Runte and Charles Runte in respect of the said property at Point in Hanover registered at Volume 1154 Folio 270 of the Register Book of Titles. Incidentally, this Agreement reflects that it is in respect of a splinter title from the parent title which is registered at Volume 538 Folio 85. The Second Defendant had in the meantime caused a caveat to be lodged against the said land.

[16] I propose to now set out the claim in full in order to highlight the facts in issue.

THE CLAIM

"The CLAIMANT, BARRINGTON DIXON**,** claims against the DEFENDANT ANGELLA RUNTE,...in respect of an agreement evidenced by memoranda in writing dating back from 1986 and acts of part performance whereby the Defendant a surviving Joint Tenant and her husband Charles Runte, deceased

agreed to sell the Claimant all that parcel of land at Pointe Hanover, registered at Volume 1154 and Folio 270 of the Register Book of Titles. The Defendant has failed to complete the said sale notwithstanding efforts of the Claimant to do so he, having entered into exclusive possession against their interest since on or about April 1, 1987.

WHEREFORE THE CLAIMANT seeks the following Orders/Declarations:

1. An Order that, on proof of the payment of the balance of the mortgage into Court, the Defendant specifically performs the agreement to sell all that parcel of land registered at Volume 1154 and Folio 270 of the Register of Titles.

2. Alternatively a declaration that the Claimant is entitled to all that parcel of land contained in Certificate of Titles registered at Volume 1154 and Folio 270 of the Register Book of Titles by virtue of adverse possession.

3. An Order that the transfer and any other document, including an application to note death of joint proprietor, required to complete the sale be signed by the Registrar of the Supreme Court on behalf of the Defendant on proof of the payment of the balance of the mortgage into Court.

4. An Order that on proof of the payment of the requisite taxes and duties, the Registrar of Titles is entitled to cancel the existing Certificate of Title and issue a new one pursuant to s. 158(2) of the Register Book of Titles.

5. An injunction restraining the Defendant her servants and/or agents from interfering with the Claimant's quiet possession of all that parcel of land registered at Volume 1154 and Folio 270 of the Register Book of Titles.

6. Such further and/or other relief that this Honourable Court may deem just.

7. Costs".

[17] The Claim and the Particulars of Claim are dated October 10, 2007.

[18] The Particulars of Claim are also set out in full. Again, I do so as issues of fact have arisen between the Claimant and the First Defendant.

1. "The Claimant is and was at all material times the purchaser in possession of all that parcel of land registered at Volume 1154 and Folio of the Register Book of Titles, hereinafter referred to as the land.

2. The Defendant is and was at all material times the vendor and surviving joint tenant of the said land, ...

3. The Claimant is a purchaser in possession of the land by virtue of memoranda in writing dated from 1986, Receipt dated October 5, 1987

   and letter dated November 23, 1987 duly signed by the Defendant or Charles Runte, deceased whereby the parties agreed to sell and purchase the land for the sum of $440,000.00 subject to a vendor's mortgage of $300,000.00 at the rate of 12½% per annum...

4. It was a term of the agreement that the Claimant enter into possession on the payment of the deposit as agreed based on the handwritten amendments to the Agreement aforesaid by the parties. The Claimant paid the deposit and accordingly entered into possession by the 23rd day of November 1987 that is from on or about April 1, 1987.

5. It was a term of the Agreement that is should have been completed on or before the 31st March 1989.

6. The Claimant in an effort to complete the sale caused a Notice Making Time of the Essence to be served on the Attorney-at-Law having carriage of sale, Mr. Wentworth Charles in letter dated April 12, 1989 which was returned by the said Attorney to the Claimant's Attorneys-at-Law in the letter dated May 22, 1989 aforesaid...

7. The Claimant did not make the last sixteen (16) mortgage payments because from November 23, 1987 up to and including May 22, 1989 to the date hereof. Mr. Wentworth Charles, Attorney-at-Law for the Defendant having carriage of sale advised that he had no instructions in the matter notwithstanding the terms of the letter of November 23, 1987 aforesaid...

8. The Claimant has complied with all the terms of the agreement with the exception of sixteen (16) payments on account of the mortgage as set out in the letter of November 23, 1987.

9. In an attempt to complete the matter the Claimant caused an Originating Summons **Suit No. E. 335 of 1989** to be issued against the Defendants on the 13th October 1989 at that time Mr. Charles Runte was alive...

10. The Originating Summons was served on the Attorney-at-Law having carriage of sale by an Order of substituted service granted on t he 21st day of March 1990...

11. There was a further Order made on the 16th November 1998 for the said Originating Summons to be continued as if begun by Writ but does not appear that the said Order was complied with...

12. In the early 2006 the Defendant made contact with the Claimant and promised to complete the sale and that she had given her son Power of Attorney to do so.

13. Since that time the son contacted the Claimant and was referred to the Claimant's Attorneys-at-Law Messsrs. Grant, Stewart, Phillips & Co.

14. The son and the Defendant's Attorney-at-Law Mr. Wentworth Charles met with the Claimant's Attorney-at-Law aforesaid and intimated that the Defendant was no longer prepared to be bound by the said Agreement for Sale.

15. The Claimant contends that he has a legally binding contract as a result of which he also carried out certain acts in performance of the said contract by entering into possession of the land since 1987, maintaining it and paying the taxes therefore with the exception of three (3) years, 1996 – 1997, paid on May 1, 2002 and 2004-2005, 2007-2008 both paid on the 13th March 2007 when someone apparently with a view to claiming ownership of the land paid the taxes.

16. That someone also placed an empty container on the land in or about April 2007.

17. On the 23rd August 2007 the Claimant caused the said container to be removed from the property and re-fenced it, a fencing that was originally on the property having fallen into disrepair...

18. On or about the 5th September 2007 the Claimant observed that the fence was torn down and the container was returned to the property. The fence was subsequently repaired to enclose the container on the property.

19. The Claimant fears that the Defendant her servant and/or agents are trying to dispossess him from the property.

20. The Claimant contends that he is entitled to an Order of Specific Performance for the transfer of the land having paid the deposit, mortgage and taxes and entered into possession which latter also represent sufficient acts of part performance.

21. In the alternative the Claimant contends that he has acquired title by adverse possession he having entered into possession since 1987 in

accordance with the memoranda in writing between the parties to the exclusion of the registered owners and pursuant thereto maintained the property and paid the taxes."

[19] **The Claimant then goes on to repeat the remedies which he is seeking:**

"1. An Order that, on proof of the payment of the balance of the mortgage into Court, the Defendant specifically performs the agreement to sell all that parcel of land registered at Volume 1154 and Folio 270 of the Register Book of Titles.

2. Alternatively a declaration that the Claimant is entitled to all that parcel of land contained in Certificate of Titles registered at Volume 1154 and Folio 270 of the Register Book of Titles by virtue of adverse possession.

3. An Order that the transfer and any other document, including an application to note death of joint proprietor, required to complete the sale be signed by the Registrar of the Supreme Court on behalf of the Defendant on proof of the payment of the balance of the mortgage into Court.

4. An Order that on proof of the payment of the requisite taxes and duties, the Registrar of Titles is entitled to cancel the existing Certificate of Title and issue a new one pursuant to s. 158(2) of the Register Book of Titles.

5. ...

6. ...

7. ..."

[20] There then follows certain attachments which, for present purposes, need not be itemised as they are all included in the Bundle of Documents that was received into evidence. However, it is to be particularly noted from paragraph 3 that the Claimant describes himself as a "purchaser in possession", which is a critical issue of fact on which, partly, the fulcrum of this case turns.

THE FIRST DEFENDANT'S DEFENCE

[21] I shall now set out the First Defendant's Defence in extensor.

1. The Defendant denies that the Claimant was at all material times, or at all, in possession of all that parcel of land registered at Volume 1154 Folio 270 of the Register Book of Titles.

2. *Save and except that it is admitted that by virtue of undated Agreement for Sale in or about November 1986 the Claimant was the proposed purchaser of land for the sum of $440,000.00 which said contract was subject to a Vendor's mortgage of $300,000.00 at the rate as alleged, and that the Defendant denies that the Claimant was ever in possession of the said land the subject of the Agreement for Sale, the Defendant makes no admission in relation to paragraph 3 of the Particulars of Claim.*

3. *The Defendant specifically denies the Claimant was upon execution of the Agreement for Sale, or at all, ever put in possession of the property the subject of the undated Agreement for Sale.*

4. *The Defendant asserts that the amendments made by the Claimant to the said undated Agreement for Sale specifically in relation to the issue of possession was not canvassed, or agreed upon, with the Defendant or her deceased husband prior, or subsequent to, their execution of the said contract, or at all.*

5. *The Defendant makes no admission in respect of paragraph 4 of the Particulars of Claim.*

6. *The Defendant specifically denies that the Claimant was either put into possession or entered into possession of the aforesaid premises on the 1st day of April, 1987 at all.*

7. *The Defendant makes no admission in relation to paragraph 6, 7, 8, 9, 10, 11, 12, 13, 14, and/or 15 of the Particulars of Claim.*

8. *The Defendant, further or in the alternative maintains that if, which is not admitted, the Claimant has a legally binding contract with the parties as alleged or at all, the Defendant's (sic) claim for the enforcement of the said contract is statute barred pursuant to the provisions of the Limitation of Actions Act.*

9. *The Defendant maintains that she has, from and since about 1984 when she jointly acquired the aforesaid property, maintained open and undisputed ownership and possession of the said premises.*

10. *The Defendant maintains that through her agents and/or servants, as she is entitled to do, caused a container to be placed on the land in or about April 2007.*

11. *Upon entering the property of the Defendant for the purpose of removing the Defendant's container, or otherwise, the Claimant committed a trespass against the Defendant.*

12. *The Defendant maintains that through her agents in Jamaica the property the subject of this claim, has since or about sometime in the year 1984 until the present time has been maintained by her and has been in her exclusive possession and control.*

13. *The Defendant maintains that it is the Claimant who has attempted recently to dispossess her of the said property.*

14. *The Defendant maintains that the Claimant is barred from the remedy solicited in paragraph 20 of the Particulars of Claim.*

15. *Further, and or in the alternative, the Defendant denies that the Claimant has acquired title by possession, adversely or otherwise and specifically denies that pursuant to the aforesaid agreement, or at all, the Claimant has been in possession, exclusive, or otherwise, maintained the property, or prior to 2002 paid taxes for the said property.*

16. *The Defendant maintains that the Claimant is not entitled to the relief as claimed or at all.*

17. *Save as except that which is specifically denied or admitted the Defendant joins issue herein".*

[22] As to the First Defendant's pleadings it is crucial that I bear in mind the following critical observations.

> First, she admits to entering into and executing agreement for the sale of the property in question with Dr. Dixon for the sum of $440,000.00. There was a vendor's mortgage included in the agreement in the sum of $300,000.00.
>
> Second, she makes no admission in relation to the cheques which were tendered by Dr. Dixon towards the purchase price, nor for that matter, to the receipts which were issued by her and her deceased husband for the sums of money paid by Dr. Dixon to them. Certainly, at least one such receipt was given under her hand and at least two of the cheques were honoured by Dr. Dixon's bankers and were made payable to her.
>
> Third, she has offered no response or defence to the Claimant's

pleadings that it was a term of the agreement that is should have been completed on the 31st of March 1989.

Fourth, the First Defendant makes no admission to the Claimant's assertion that he has complied with all the terms of the agreement that he was able to despite her absence from Jamaica and her uncommunicativeness with Dr. Dixon.

Fifth, Dr. Dixon has a legally binding contract.

Sixth, that both her and her husband failed to complete the agreement and that they took no steps to see to the completion of the Agreement.

Seventh, that the Claimant caused a Notice Making Time of the Essence to be served on Mr Wentworth Charles, the attorney-at-law for Mr. Runte who had carriage of sale.

Eighth, that the First Defendant contacted the Claimant in early 2006 and promised to complete the sale and in respect of which she gave her son a power of attorney so to do.

[23] The First Defendant's traverse of the Claimant's Particulars of Claim throws into relief issues surrounding whether the Claimant was ever in possession of the subject land; whether the Claimant has a legally binding contract "with the parties as alleged"; or, if he is deemed to have had such a contract whether it is statute-barred by virtue of the LOAA. The First Defendant has also raised the issues of whether the Claimant has acquired title by adverse possession of the land as well as to query whether the equitable doctrine of laches applies against the Claimant.

[24] As in the case of the other litigants I now turn to the Defence of the Second Defendant, so called, in order to engage the facts that are in issue.

THE SECOND DEFENDANT'S "DEFENCE"

[25] In traversing the Claimant's Particulars of Claim and in establishing his claim against the First Defendant, the Second Defendant advances that-

"1. *The 2nd Defendant denies that the Claimant was at all material times a purchaser in possession as alleged in paragraph 1 of the Particulars of Claim.*

2. *In answer to paragraph 2 of the Particulars of Claim the 2nd Defendant says that the 1st Defendant is and was at all material times a trustee of the beneficial interest of the 2nd Defendant in the said property.*

3. *The 2nd Defendant was at all material times beneficially entitled to one half interest in the said property and that this interest was at all material times protected by Caveat.*

4. *The 2nd Defendant says that if which is denied the Claimant was a purchaser in possession as alleged in paragraph 3 of the Particulars of Claim then the Claimant purchase subject to the 2nd Defendant's interest in the said property which was at all material times protected by Caveat.*

5. *The 2nd Defendant says that the Claim relates to all that parcel of land registered at Volume 1154 Folio 27 of the Register Book of Titles (hereinafter the said land). The said land was purchased jointly by the 1st Defendant, Charles Runte and the 2nd Defendant. The 1st Defendant and Charles Runte were entitled to a 50% share and the 2nd Defendant to the remaining 50%. The 2nd Defendant contributed 50% of the purchase price.*

6. *Contrary to the agreement aforesaid Charles Runte and the 1st Defendant had the land transferred into their joint names rather than into the name of a company the parties had intended to form. The 2nd Defendant therefore had lodged on his behalf a Caveat which gave notice to all the world of his said interest in the said land.*

7. *The 2nd Defendant says that the 1st Defendant holds 50% of the said land on an expressed resulting and/or constructive trust of which the caveat constituted notice to the world.*

8. *The 1st Defendant and Charles Runte have purported to sell or attempted to sell the said property without the 2nd Defendant's knowledge or consent. The Caveat lodged by the 2nd Defendant has never been warned and he was not aware of the alleged sale of the complainant.*

9. *The 2nd Defendant says that the said premises are quite valuable and the purchase price on the alleged sale agreement is far lower than the market price the property would otherwise fetch.*

10. *The 2nd Defendant makes no admission to paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 or 19 of the Particulars of Claim.*

11. *The 2nd Defendant says in answer to paragraph 20 of the Particulars of Claim that the Claimant is not entitled to specific performance of the alleged or any sale of the said land as the said or any purported sale was subject to the interest of the 2nd Defendant. Any and any alleged order for specific performance will extinguish and/or otherwise adversely affect the interest of the 2nd Defendant.*

12. *The 2nd Defendant says further or in the alternative that the Claimant and the 1st Defendant or either of them is or are liable to account to the 2nd Defendant for the value of his interest in the said property and any or any*

    alleged loss or damage suffered in consequence of the purported or any alleged sale of the said land.

13. *The 2nd Defendant denies the allegation in paragraph 21 of the Particulars of Claim and say further that if the Claimant was in possession then he entered with the permission and consent of the intended vendor and with knowledge of and subject to the 2nd Defendant's beneficial interest.*

14. *Save as is hereinbefore expressly admitted the 2nd Defendant denies each allegation in the Particulars of Claim as if the same was hereinbefore set forth and traversed seriatim".*

[26] Here it will be readily appreciated that this Defendant is among other things, relying on the Caveat which he had lodged against the land after learning that his partnership agreement with the Runtes had been breached. The issue thus germinated is as to the effect of the Caveat vis-à-vis the Claimant.

[27] I shall now reproduce as far as legibility will allow, the Agreement for the Sale on the land.

"This Agreement is made the .....day of ....., 1986 between Charles Runte, Businessman, and Angella his wife, both of 7 Cousins Cove, Green Island Post Office in the parish of Hanover, (hereinafter called the Vendor) of the One Part and Barry Dixon, Medical Doctor, c/o Cornwall Regional Hospital. Montego Bay in the parish of Saint James, (hereafter called the Purchaser) of the other part, WHEREBY it is agreed that the Vendors shall sell and the Purchaser shall purchaser ALL THAT parcel of land more particularly described in the Schedule hereto upon the terms set out herein

SHEDULE

DESCRIPTION OF PROPERTY:	ALL THAT parcel of land part of POINT In the Parish of Hanover containing by surveys Nineteen Acres Nine Perches and Two-tenths of a Perch of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 538 Folio 85.
PURCHASE PRICE:	FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).
HOW PAYABLE:	A deposit of Two Hundred Thousand Dollars ($200,000.00) on signing of this Agreement. The Purchaser authorised the payment of the deposit to the use of the Vendors.
BALANCE:	The Balance Purchase Money shall be paid on Completion in exchange for duplicate Certificate of Title duly registered in the name of the Purchaser.
COMPLETION:	On or before the 31st day of March 1989.
POSSESSION:	Vacant possession on completion of Deposit.

TITLE:	Registered Title free from all encumbrances save and except any Restrictive Covenant endorsed thereon.
COST OF TRANSFER:	To be borne equally between the parties hereto. Transfer Tax to be borne by the Vendors.
TAXES, WATER RATES AND INSURANCE:	To be apportioned as at the date of Possession.
CARRIAGE OF SALE:	WENWORTH S. CHARLES & CO., Attorneys-at-Law 20 ½ Duke Street, Kingston
SPECIAL CONDITIONS:	This Agreement is subject to the Purchaser obtaining a Mortgage from the Vendors in the in the sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) at an interest rate of 12 ½ on security of the above described premises on or before the expiration of .....from the signing hereof, the raising of which loan must be confirmed in writing by the Purchaser or the Purchaser's Attorneys-at-Law to the Vendors' Attorneys-at-Law. In the event

of the agreement hereto being rescinded all moneys paid hereunder by the Purchaser shall be refunded without interest and free from deductions SAVE AND EXCEPT that the Purchaser hereby agrees to pay to the

Vendors' Attorneys-at-Law fees in the sum of for professional services rendered in respect of work incidental hereto and the purchaser hereby irrevocably authorises the Vendor to deduct the amount of such fee from deposits paid to the Vendor and pay the same to the Vendors' Attorneys-at-Law on termination of this Agreement, and in the event that the Purchaser has been given possession, he will quit and deliver up the lands to the Vendor.

The cost for preparing this Agreement for Sale is fixed at $500.00 and shall be borne by the Vendor and Purchaser equally and each party shall pay their share thereon the signing of this Agreement.

SIGNED by the said CHARLES RUNTE

In the presence of: _____

CHARLES RUNTE

_____

SIGNED by the said ANGELLA RUNTE _____

In the presence of

ANGELLA RUNTE

SIGNED by the said BARRY DIXON _____

In the presence of:"

[28] Here I am led to make a few observations. There are certain markings on the

face of the Agreement which show that amendments were made to this document. The amendments are either decipherable in parts or not at all. However, the Agreement is signed by all concerned parties and reflect their acknowledgment of the fact of the amendments.

[29] A few facts can be briefly stated:

> First, The Agreement for Sale (The Agreement) was prepared by Mr. Wentworth S. Charles of Wentworth S. Charles and Company, Attorneys-at-Law, and not the parties themselves. In this respect one needs only advert to the letter from the said Attorneys-at-Law dated April 5, 1988.
>
> Second, Mr. Wentworth S. Charles was the Attorney-at-Law for Charles Runte. However, it seems that in reality he was acting for both Runtes.
>
> Third, Dr. Barrington Dixon had no independent legal advisor.
>
> Fourth, The Agreement is undated and unstamped and was made in 1986.
>
> Fifth, The Agreement is in respect of property registered at Volume 538 Folio 85 of the Register Book of Titles. By way of parenthesis, I ask, can the Vendors be deemed to be deceitful or did they have any fraudulent intent by having inserted an erroneous Volume and Folio number in the Agreement? I will revisit this point later on.
>
> Sixth, the Notice of Making“, Time being of the Essence” was not an original term of the Agreement.
>
> Seventh, at the time when the Agreement was executed a deposit was paid by Dr. Barrington Dixon.
>
> Eighth, the terms of the Agreement were altered or varied.

Ninth, after the execution of the Agreement Dr. Barrington Dixon made payments on account, by way of cheque, or cash to Charles Runte/Angella Runte. Receipts evidencing payments are dated April 1987 through to November 1987.

Tenth, In November 1987 Charles Runte wrote to Dr. Barrington Dixon in which he Charles Runte instructed Dr. Barrington Dixon that further payments by the latter were to be made to Mr. Wentworth S. Charles, his Attorney-at-Law.

Eleventh, between April 1988 and July 1988 the Claimant's Attorney-at-Law corresponded with Mr. Charles Runte's attorney-at-law on sixteen (16) occasions.

Twelfth, through letter dated April 21, 1988 the Claimant's Attorney-at-Law wrote to Mr. Charles Runte's attorney-at-law in which they advised that after investigating title bearing Volume No. 1154 Folio 270 of the Register Book of Titles it revealed that a caveat had been lodged against the title by the Second Defendant.

Thirteenth, Dr. Barrington Dixon on July 18, 1988 filed a caveat against the title for the said property.

[30] The evidence in support of the Claimant's plaint is constituted partly by the original Agreement for Sale with the amendments thereto which was in the First Defendant's possession and which was she subsequently disclosed in her List of Documents under the Rules of the Supreme Court of Jamaica.

[31] Also, there is evidence in the form of the original receipts and endorsed cheques as is pleaded by the Claimant.

[32] Further, there is evidence in the form of correspondence between the attorneys-at-law for the Claimant and the First Defendant pointing to attempts to complete the sale and of the First Defendant's canvassing a settlement of the claim.

Furthermore, there is evidence in the form of the Notice Making Time of the Essence given by the Claimant to the First Defendant.

[33] In addition, there is evidence in the form of the pleadings, affidavit of attempted service on the First Defendant and the Minutes of Order in the prior suit of E335 of 1989 which shows that the Claimant acted with urgency in prosecuting the claim.

[34] It has to be borne in mind that Dr. Barrington Dixon did not give direct evidence in this case owing to this demise. He did, however, give a witness statement before his passing. It is dated the 18th day of July 2012. There are also affidavits sworn by him in relation to certain procedural matters having to do with his earlier suit. It is against this background Dr Dixon's evidence will have to be assessed. Also, certain documents, correspondences and pleadings will have to be looked

at through the lens of their relevance. In fact, I observe that none of the latter referenced documents were ever challenged, except for certain of the receipts and cheques.

[35] By way of consent between the parties a supplemental bundle of documents filed by the Claimant and served on both Attorneys-at-Law for the First and Second Defendants by the Claimant was tendered and received in evidence.

[36] Also, received into evidence, were two affidavits of Dr Dixon (referred to earlier) dated the 28th September 1989 and the 28th April 2004.

[37] As to the First Defendant she gave oral testimony and issues surrounding her credibility arose. Mr Nollis McNeish gave evidence on behalf of the First Defendant. Again an issue arose as to his credibility.

[38] As to the Second Defendant, Mr Anthony DePaul, gave evidence in his own behalf. His evidence has raised other issues which enjoins all the other parties at bar.

[39] The resolution of the factual issues as has been raised by the pleadings of the

Claimant and the First Defendant and, on the evidence led, is to ask and answer the following:-

a. Whether the First Defendant and/or Charles, Runte and Mrs. Angella Runte agreed to changes made in and to the Agreement for Sale;

b. Whether the First Defendant and/or Charles Runte were aware of, knew of, or authorized or ratified the said changes made in and to the Agreement of Sale;

c. Whether it was a term of the Agreement for Sale that Dr. Barrington Dixon would be put in possession of property upon payment by him of the sum of One Hundred and Forty Thousand Dollars ($140,000.00) on account of the Agreement for Sale;

d. Whether Dr. Barrington Dixon did in fact assume possession of the land;

e. Whether Dr. Barrington Dixon paid to the First Defendant and/or Charles Runte a further sum of One Hundred Thousand Dollars ($100,000.00) on account of the said Agreement for Sale;

f. Whether a mortgage was executed by the First Defendant and/or Charles Runte in favour of Dr. Barrington Dixon;

g. Whether Dr. Barrington Dixon was in fact in possession of the said property;

h. Whether the First Defendant maintained open and undisputed ownership;

i. Whether the First defendant was at all times in possession of the said property and had done acts to demonstrate that she is the owner of the property;

j. Whether Dr. Barrington Dixon breached the Agreement for Sale;

k. Whether the Second Defendant has an interest in the said property;

l. Whether Dr. Barrington Dixon was aware of the Second Defendant's interest in the said property according to the lights of the caveat registered thereon; and

m. Whether the Second Defendant has since 1984, or thereabouts, shown any interest in the said property.

THE ISSUES

[40] Reduced and refined to their narrowest the legal issues as between the Claimant and the First Defendant are:

1) Whether the Claimant is entitled to an order for specific performance of the Agreement for Sale;

2) Whether the Claim is statute-barred being a claim for specific performance; and, should the claim for specific performance fail , in the alternative;

3) Whether the Claimant is entitled to an order for adverse possession; and

4) Whether the Claim fails pursuant to the equitable doctrine of laches

[41] As between the Claimant, the First Defendant and the Second Defendant the legal issues are-

5) Whether the Claimant is entitled to an order for Specific Performance where there is a caveat on title prior to the signing of the Agreement for Sale between the Claimant the First Defendant and her deceased husband;

6) Whether the Second Defendant Mr. Anthony DePaul is entitled to a 50% share in the property pursuant to the partnership agreement between Charles Runte and himself; and if so,

7) Whether the First Defendant and her deceased husband were Trustees of the Second Defendant's fifty percent share in the property registered at Volume 1154 Folio 270.

[42] I propose to deal with these issues compendiously under the rubric of the law on specific performance through the lens of LOAA, the law of adverse possession, the law on laches and, finally, the law on caveats.

THE ARGUMENTS/SUBMISSIONS

[43] As for the Claimant first, she has through a series of questions asked rather searchingly, whether:-

a) a purchaser who had entered into a binding agreement for the sale of the land and who did all that was required of him under the terms of payments thereunder; second,

b) such a purchaser who was stymied by the Vendors and/or his attorney-at-law from making the final payments in order to complete the sale of the said land due to the wilful disappearance of the said Vendors and of the Vendors' Attorney-at-law refusal to collect any payments;

c) being thwarted by the Vendors from obtaining early relief from the Court due to the Purchaser's inability to locate the Vendors or to comply with a court order requiring him to produce the original agreement for sale;

d) a purchaser who had his hopes revived in 2006 when the First Defendant/Vendor made contact with him in which it was communicated to the Purchaser of her intention to complete the said sale only for it to be repudiated by the First Defendant/Vendor

could now be left without any remedy at all which in the circumstances as described would be manifestly unjust and contrary to the principles of Equity.

[44] The Claimant also submitted on the issue of the credibility of the First Defendant and her witness, the First Defendant's limitation defence to the claim for specific performance, the claim for adverse possession and whether the Second Defendant's claim can defeat that of the Claimant's.

[45] From the Claimant's List of Authorities filed on January 9, 2015, and February 17, 2015, the following authorities were relied on –

a) The Registration of Titles Act (RTA), Sections 63, 139 and 140.

b) **Helga Stoeckert v Paul Geddes** SCCA 50/98 judgment delivered on 1/3/99

c) **Registrar of Titles, Johore, Johore Bahru v Temenggony Securities Ltd**; [1977] AC 302

d) Eng Mee Yong & Ors. v Letchumanan s/o Velayutham (P.C) [1980] AC 331

e) **Williams v Greatex** [1956] 3 ALL E.R. 705

f) **Abrikian et al v Wright et al** (unreported Supreme Court Judgment) CL A083 of 1994 delivered June 16, 2005.

g) **Amritt & Amritt v Duncan Bay Development Company; Limited** (unreported Supreme Court Judgment) Suit No. E 356 of 1998 delivered August 13, 2001.

h) **McCoy et al v Glispie** (unreported Supreme Court Judgment), [2012] JMSC Civ. 80

i) **Chang v Chang** (unreported Supreme Judgment), Claim No. 2010 HCV 03675 delivered November 22, 2011.

j) **McConnell v Huxtable**, 2014 ONCA, 86

k) **Williams v Thomas** [1909] 1 Ch. 713.

l) **Emily Rose Hilton v Sutton Stem Laundry (A firm)** [1945] ALL 2 E.R. 425.

m) **The Limitations of Actions Act** (LAA).

n) **The Administrator General v The Attorney General**, (unreported Supreme Court Judgment), Suit No. CL 1996 A 102.

o) **Lindsay Petroleum Co. v Hurd** (1874) LR 5 PC 221.

p) **Recreational Holdings (Jamaica) Ltd. v Lazarus & Another**, [2014] JMCA Civ. 34.

q) **J. A. Pye (Oxford) Ltd, & anor. v Graham & anor.** [2002] 3 WLR 221.

r) **Ronex Properties v John Laing Construction Ltd**. [1982] 3 ALLER 961.

s) **Hasham v Zenab** [1960] AC 316

t) **P&O Nedlloyd BV v Arab Metals Co**. **et al** [2006] EWCA Civ. 1717.

u) **Halsbury's Laws of England**, Vol. 47 (2014) paragraphs 254 and 260.

v) **DG Barnsley; Barnley's Conveyancing Law & Practice**, (3rd Ed.) Butterworths 1988, p546.

[46] The First Defendant's submissions range over a wide swathe of issues. They are dissonant to that of the Claimant's. Let me say at once that it is no devaluation of the cited cases on my part should I fail to discuss each and every one as referred to by counsel on all sides. If anything at all, such omissions to do so reflect the constraints of time and space.

[47] The first Defendant argues that, since the claim was filed in October 2007, some thirty one (31) years after the execution of the Agreement for Sale then this Court does not have any jurisdiction to grant the relief of specific performance it being statute-barred.

[48] For this proposition the First Defendant relies on Sections 3, 4 and 25 of the LOAA; the Canadian case law authority of **McConnel v Huxtable** ONCA 86; **William v Thomas** [1909] 1 Ch. 713 and; **Emily Hilton v Sutton Steam Laundry** (1945) ALLER 425.

[49] Another issue raised by the First Defendant is whether the Claimant's right of accrual was preserved, or survived, having regard to the initiation of an earlier suit, namely Suit No. E 335 of 1989, which was "neither discontinued nor otherwise pursued". Again, the First Defendant pressed in aid Section 13 of the LOAA in maintaining that the Claimant's right to "her property" has not only been statute-barred but also that such right has been extinguished. Accordingly, the First Defendant argues, this court has no jurisdiction to determine that matter or to grant the relief being sought, even if the issue of jurisdiction is only recently raised. She stressed that the pleaded defence is a bar to the relief sought. As to the issue of jurisdiction, and as noted earlier, the First Defendant relied on the first instant case law authority of **Chang v Chang**, Claim No. 2010 HCV 03075, unreported, and; **Ronex Properties Limited v John Laing Construction Limited** (1983) QB 398.

[50] Yet still another issue raised by the First Defendant is that the First Defendant is at a significant disadvantage in defending the claim as it was brought almost two decades after the Agreement for Sale was executed. Thus, the First Defendant argues, it would be unfair to grant the Claimant the orders sought in light of his delay in pursuing the matter. In other words, the First Defendant has raised the equitable defence of laches. For this the First Defendant summoned aid of the old case law authority of **Smith v Clay** (1767) 3 Bro. C.C. 639 and; **Lindsay Petroleum Company v Hurd** (1874) L.R. PC 221.

[51] Still, further, is the issue of adverse possession as raised by the First Defendant. The First Defendant maintains that she and her late husband have been in possession since they acquired the property. She advances that, "as owner a fence has been erected, she has appointed a caretaker, paid taxes and maintained the property". The First Defendant reposed on the following list of authorities:-

a) **Recreational Holdings Jamaica Limited v Carl Lazarus** & **The Registrar of Titles** [2014] JMCA CIV. 34,

b) **Wills v Wills**, PCA 50/2002

c) **JaPye (Oxford) Limited 7 Others v Graham Anor**. [2002] UKHL 30

d) **Buckinghamshire County Council v Moran** [1989] 2 ALL ER 225

e) **Textbook authority of the Elements of Land Law**, 5th Edition by Grey and Grey;

f) **Bryan Clarke v Alton Swaby,** (2007) UKPC 1.

[52] I am to remark here that I see nothing in the closing submissions of the First Defendant in response to that of the Second Defendant's list of authorities. Further, I have only since March 2016 received the First Defendant's List of Authorities though apparently it was filed in February 2015 and which list, incidentally, omits the hard copy of the **Recreational** case authority being relied on by her.

[53] I come now to the Second Defendant's closing submissions that was filed on March 31, 2015.

[54] Here, the Second Defendant says that by agreement dated the 10th day of March 1984, he entered into an agreement with the First Defendant and Mr Charles Runte to purchase property at Point, Hanover, the purchase price being Forty-Two Thousand United States Dollars (US$42,000.00). The property being is described as all that parcel of land part of Point in the parish of Hanover registered at Volume 454 Folio 27 of the Registrar Book of Titles, it being "a

Splinter title from the parent title registered at Blume 538 Folio 85 of the Registrar Book of Titles".

[55] According to the Second Defendant, the agreement was subsequently reduced to writing and that it was a term of the agreement that all three parties would enter into a partnership to develop the property and that it would be registered in the name of a company that was to be formed by them. Further, it was agreed that the Second Defendant would hold a 50% interest in the property and that the First Defendant and her husband would hold the remaining 50% for themselves.

[56] In furtherance of the agreement, according to the Second Defendant, he paid the sum of $21,000.00 in United States Dollars to the Runtes on the 23rd day of July 1984. The First Defendant and her husband registered the property in their joint names solely thereby deviating from the agreement and the Second Defendant was only able to discover this irregularity, or departure, from their agreement, in November 1984. In consequence, the Second Defendant caused a Caveat to be lodged against the property. The Caveat bearing number 97071 was granted on the 13th November 1984 by the Registrar of Titles.

[57] The Second Defendant says that while on a visit to Jamaica in 2008, he was apprised of proceedings brought in the Supreme Court of Judicature of Jamaica by the Claimant Dr. Barrington Dixon which touched on and concerned the subject property. The claim, he noted, was brought by Dr. Barrington Dixon against the First Defendant for the completion of a purported sale of the very property which took place in or about 1986 and which carried the Volume and Folio numbers of the parent title instead of the splinter title. In consequence and, in order to protect his interest, Mr. Anthony DePaul successfully applied to be added as a Defendant/Intervenor in the proceedings. (On this aspect of the claim I shall offer a few comments later).

[58] Regarding the above, Mr Anthony DePaul has asked this court to declare whether –

a) the Runtes held the property on constructive trust for him,

b) a constructive trustee can claim trust property by way of adverse possession;

c) a constructive trustee can sell such property for his or her of both benefit; and,

d) specific performance can be granted in circumstances where it is found that there is a previous competing interest in the property.

[59] The Second Defendant recruited the authorities of **Bonner Homes Group PCC v Luff Developments** [2000] Ch. 372; **Persad v Persad** (1979) High Court Trinidad and Tobago, No. 1, 827 of 1973 (unreported); **Baden SocieteGenerale pour Favorise le Development du Commerce et de l'industrieen France** SA (1982) [1992] 4 AU ER 161 and; **Thomas v Dering** (1837), Keen 729/48 ER 488.

[60] I desire to make one comment here. I have not seen a copy of the Agreement for Sale among the bundles supplied to the Court.

THE EVIDENCE

EVIDENCE OF DR. BARRINGTON DIXON

[61] Here I begin with the affidavit evidence of the then affiant Dr. Barrington Dixon, dated 28th day of September 1989. It was made in support of his application to the Supreme Court under the Vendor's and Purchaser's Act pursuant to his being advised by his then attorneys-at-law "that it is possible for this Honourable Court to make an Order…" so as to allow him to pay the balance of the purchase price

into Court and to have the title issued in his name. I propose to re-produce this and other documents of Dr Barrington Dixon's in full as he through the circumstances of fate was not available for cross-examination.

[62] "I BARRINGTON DIXON, being duly sworn, MAKE OATH AND SAY as follows:-

1. That I reside and have my true place of abode at Spring Gardens, Saint James and my postal address at P.O. Box 194 Reading P.O. in the parish of Saint James.

2. That on or about December 1986 I entered into a written Agreement For Sale with respect to certain lands registered at Volume 1154 Folio 270 (hereinafter referred to as “the land”) whereby I agreed to purchase and the registered owners agreed to sell the land for the sum of Four Hundred and Forty Thousand Dollars ($440,000.00). That at the time of executing the Agreement for Sale I was unrepresented by legal counsel.

3. That now produced before me and attached hereto … is a copy of the said Agreement for Sale.

4. That pursuant to the said agreement I paid a deposit of One Hundred and Forty Thousand Dollars ($140,000.00) plus and additional Twenty Thousand Dollars ($20,000.00) to cover closing costs and incidentals. Pursuant to an addendum to the agreement dated April 1, 1987, the Vendors granted a mortgage for the balance of the purchase price that being Three Hundred Thousand Dollars ($300,000.00) at an interest rate of 12½% per annum amortized over two (2) years.

5. That pursuant to the terms of the mortgage I have paid the amount of One hundred and Ten Thousand Dollars ($110,000.00) representing approximately seven (7) months payments that is, up to and including payments for the month of November 1987. That now produced before and attached hereto … are cheques and or receipts evidencing the said payments.

6. That in the month of November 1987 I received a letter from Mr. Charles Runte one of the Vendors by which he requested further payment be directed to his Attorney-at-law Mr. Wentworth Charles. That now produced before me and attached hereto … is a true copy of the said letter.

7. That shortly after receiving [the letter in paragraph 6] I spoke with Mr. Wentworth Charles who informed that he not heard from his clients since preparing the Agreement for Sale, he did however confirm that he was in possession of the Title for the said land.

8. That based upon what was told to me by Mr. Wentworth Charles I did not make any further payments but attempted without success to contact Mr. Runte through members of his family as he suggested in his letter [the letter in paragraph 6].

9. That having become alarmed at the situation I retained the law firm Perkins, Grant, Stewart, Phillips and Company who I understand

have communicated with Mr. Wentworth Charles. My said attorney have informed that Mr. Charles has been unable to locate either of the Vendors.

10. That I have been informed by both Mr. Charles and my own Attorneys-at-Law that Caveat numbered 97071 has been lodged by Mr. K. C. Burke, Attorney-at-law on behalf of Mr. Anthony DePaul who claiming to be an equitable joint owner of the subject land. The said caveat was lodged on the 14th day of July 1989. That now produced before me and attached hereto … is a true copy of the said Caveat.

11. That now produced before me and attached hereto … are the following letters;

    a. Leltter from Perkins, Tomlinson, Grant, Stewart & Co., to Wentworth Charles dated 21st April, 1988;

    b. Letter from Wentworth Charles to Perkins, Tomlinson, Grant, Stewart, & Co., dated 19th May 1988.

    c. Letter from Perkins, Tomlinson, Grant, Stewart, & Co., to Wentworth Charles dated 19th May, 1988;

    d. Letter from Perkins, Tomlinson, Grant, Stewart, & Co., to Wentworth Charles dated 23rd June, 1988;

    e. Letter from Wentworth Charles to Perkins, Tomlinson, Grant, Stewart, & Co., 28th June, 1988.

    f. Letter from Perkins, Tomlinson, Grant, Stewart, & Co., to Wentworth Charles dated 11th July, 1988.

    g. Letter from Wentworth Charles to Perkins, Tomlinson, Grant, Stewart, & Co., dated 20th July, 1988;

    h. Letter from Perkins, Grant, Stewart, Phillips & Co., to Wentworth Charles dated 29th December 1988.

    i. Letter from Perkins, Grant, Stewart, Phillips & Co., to Wentworth Charles dated 20th February, 1989;

    j. Letter from Perkins, Grant, Stewart, Phillips & Co., to Wentworth Charles dated 12th April, 1989;

k. Letter from Wentworth Charles to Perkins, Grant, Stewart, Phillips & Co., dated 22nd May, 1989.

12. That pursuant to my instructions my Attorneys-at-Law, Messrs, Perkins, Grant, Stewart, Phillips & Co., lodged a caveat against the title of the land on 14th July, 1988. That now produced before me and attached hereto … is a true copy of the said Notice.

13. That pursuant to my instructions on April 12, 1989 my Attorneys-at-Law served Notice requiring completion of sale and Making Time of the Essence the same being served upon the Vendors c/o Mr. Wentworth Charles, the Vendors' Attorney-at-Law having carriage of sale. That now produced before and attached hereto … is a true copy of the said Notice.

14. That I am informed by my Attorney-at-Law and do verily believe that Mr. Anthony DePaul, does not object to the sale of the subject land to myself for the purchase price agreed upon, but seeks a half share of the sale proceeds arising there from.

15. That I am now severely prejudiced by not being able to obtain title for the subject land. I have through my Attorneys-at-Law indicated my willingness to pay the full amount of the balance of the Purchase Price, that being One Hundred and Seventy Thousand Dollars ($170,000.00) however, although Mr. Charles has possession of the Certificate of Title and although he is named as the Attorney-at-Law having carriage of sale, he has refused to accept payment for the same by stating that he has no instructions to do so.

16. That I am advised by my Attorneys-at-Law that it is possible for this Honourable Court to make an Order pursuant to Section 7 of the Vendors and Purchasers Act, the effect of which will allow me to pay the balance of purchase price into Court and to have title issued in my name.

17. …"

[63] In his second affidavit dated the 28th April 2008 given in support of the Notice of Application and, again, eliding unessential and repetitious matters, this is what Dr. Barrington Dixon depones to:

[64] "… That at the time of this agreement I was not represented by an Attorney-at-Law. I was handed a written agreement by the vendors. We then discussed and

agreed to amendments to the typed version of the agreement include:

a) A variation of the purchase price from Five Hundred Thousand to Four Hundred and Forty Thousand Dollars.

b) The deposit payable would be One Hundred and Forty Thousand Dollars ($140,000.00).

c) I would receive vacant possession on payment of the deposit.

That I attach a copy of the agreement … The word "deposit inserted in the agreement is in my handwriting. The other handwritten amendments were made by either or both vendors and I signified my agreement by executing the document.

That pursuant to this agreement, I paid a total deposit of One Hundred and Forty Thousand Dollars ($140,000.00) plus an additional Twenty thousand Dollars to cover the closing costs and other incidentals, directly to the Vendors. I attach hereto … copy cheques dated October 31, 1986 and December 14, 2006 as well as receipt dated December 14, 1986 from the Defendant evidencing these payments.

That further pursuant to an Addendum to our agreement dated April 1, 1987, the Vendors granted a vendors mortgage to me for the balance of the purchase price being Three Hundred Thousand Dollars ($300,000.00) at an interest rate of 12½% amortised over two (2) years. This addendum was made by the vendors who initialled the agreement.

That pursuant to the Addendum, I made mortgage payments totalling One Hundred and Ten Thousand Dollars ($110,000.00) to the vendors representing seven payments up to and including the month of November 1987. That I attach hereto … copy cheques and receipts evidencing the said payments which I made

pursuant to the vendor's mortgage.

That I made no payments after November 1987 as by letter dated November 23, 1987 Mr. Charles Runte requested that all further payments be directed to his Attorney-at-Law Mr. Wentworth Charles. That I attach a copy of his letter …

That shortly after receiving the letter at [paragraph 8], I spoke to Mr. Wentworth Charles in order to confirm that he would be collecting the remaining mortgage payments. However, he informed that he had not heard from his clients since preparing the Agreement for Sale, some months earlier. He did however confirm that he was in possession of the original duplicate Title for the said property.

That based on what was told to me by Mr. Wentworth Charles and the uncertainty created by the discussion, I attempted without success to contact Mr. Runte through members of his family as he had suggested in his letter of November 23, 1987.

That I then retained the law firm of Perkins Grant, Stewart, Phillips and Co. who then communicated with Mr. Wentworth Charles on my behalf. I am advised by my said Attorneys-at-Law and do verily believe that Mr. Charles had been unable to locate either of the Vendors, and that he also confirmed that he had no instruction from either of the Vendors and would not be collecting any payment on their behalf.

That I attach hereto … the following letters;

a. Letter from Perkins, Tomlinson, & Co., Grant, Stewart to Wentworth Charles dated 21st April, 1988;

b. Letter from Wentworth Charles to Perkins, Tomlinson, Grant, Stewart & Co., dated 25th April, 1988.

c. Letter from Wentworth Charles to Perkins, Tomlinson, Grant, Stewart, & Co., dated 28th June, 1988.

That hereafter instructed my Attorneys-at-Law, Messrs, Perkins, Grant, Stewart, Phillips & Co., to lodge a caveat against the title of the property on 13th July, 1988. That I attach hereto … a copy of the said Caveat.

That I later discovered that another caveat, Caveat numbered 97071 was also lodged by a Mr. Anthony DePaul against the Title on 14th day of November, 1984. That I attach hereto … letter from Mr. DePaul's Attorney-at-Law, K. C. Burke, to the Registrar of Titles and a copy of the Declaration of Anthony DePaul which accompanied the Caveat.

That I have received no notice, warning or claim from Mr. DePaul or on Mr. DePaul's behalf in relation to his caveat or purported interest. I was however informed by my Attorneys-at-Law Messrs, Perkins, Grant, Stewart, Phillips & Co., and do verily believed that they have been in contact with the Attorney-at-Law for Mr. Anthony DePaul and that Mr. DePaul did not object to the sale of the property to me for the purchase price agreed upon, and that there was an agreement between Mr. DePaul and the vendors by which Mr. DePaul is to receive half of the sale proceeds from property. That I attach hereto … Letter from Perkins, Tomlinson, Grant, Stewart, & Co., to Wentworth Charles dated 23 June, 1988;

That on or about April 12, 1989 Notice requiring completion of sale and making Time of the Essence was served on the Vendors c/o Mr. Wentworth Charles, the Attorney-at-Law having carriage of sale. That I attach hereto … a copy of the said Notice and letter from Perkins, Grant, Stewart, Phillip & Co., to Wentworth Charles dated 12th April, 1989 ending the notice.

That after hearing nothing further from the vendors on October 13, 1989 an Originating 'Summons was issued against the Vendors for specific performance of the agreement. I attach a copy of the said Originating Summons …

That after the said suit was filed, there were discussions between my Attorneys-at-law, and the said Wentworth Charles in an attempt to resolve the matter. That further sometime in July 1998, Mr. Charles advised of Mr. Runte's willingness to settle the matter. I attach letter of July 20, 1998 from Mr. Charles.

However, to date, the sale has not been completed and I verily believe that Mr. Charles Runte is now deceased.

That early in 2006 I received a call from the defendant and she informed me that she was now prepared to complete the agreement for sale and that she had given her son power of attorney to do who would be contacting me to effect completion. However, her son late intimated to me that he was no longer prepared to be bound by the Agreement for Sale.

That in or about June 2007, I retained the services of Nunes, Scholefield, DeLeon & Co., as my new Attorneys-at-Law and a new claim was filed herein.

That I am advised by my Attorneys-at-Law and do verily believe that no Defence has been filed in this matter although service was acknowledged and a fourteen (14) day extension was granted to the Defendants on January 28, 2008. I attach hereto a copy of the Consent to file defence out time …

That in light of the foregoing I verily believe that I am entitled to a judgment on this claim.

That I am now severely prejudiced by not being able to obtain title for the said property. I have through my Attorneys-at-Law long indicated my willingness to pay the full amount of the balance of Purchase Price not totalling One Hundred and Seventy Thousand Dollars ($170,000.00).

That further, I have paid all taxes to date in relation to the property save for three years 1996 – 1997; 2004 – 2005; and 2007 – 2008. I attach proof of payment of taxes …"

[65] Finally, I reproduce Dr. Barrington Dixons's witness statement which was received into evidence and treated as his witness summary. In it further details emerged alongside the staple facts alleged in his two previous affidavits to which I have already alluded:

[66] 1. "My name is Barrington Dixon. I reside and have my true place of abode at Spring Gardens in the parish of Saint James. I am a medical doctor and the Claimant herein.

<u>Circumstances leading to the sale</u>

2. I know the Defendant Angella Runte. She was a patient of mine for several years. Sometime in or about September 1986 Mrs. Runte attended the Cornwall Regional Hospital where I was working, for medical treatment. I believe she was the last patient I saw that day. So, when I was leaving the hospital I asked if she needed a lift home because I was heading the same direction. I was heading to Negril and her home was en route.

3. As we travelled along, Mrs. Runte and I started talking. She mentioned that she was in financial difficulties and that she had a beach front property that she was considering selling. She informed me that the property was by her and her husband and that it was located at Point in Hanover.

4. To the best of my recollection we stopped at the property the same day, because we would have pass the property on the way. We came out of the vehicle and walked to an area which had a small cove. Mrs. Runte showed me the general boundaries and I told her that I liked the property and that I was interested in purchasing it. I cannot now recall if we discussed the sale price or any other details that day, but, I do recall that Mrs. Runte told me that she would have an attorney prepare a sale agreement for my execution.

5. Sometime after that Mrs. Runte and her husband came by my office. It was the first time I was meeting Mr. Runte. They handed me an agreement for sale for my execution. It was type printed and there were no amendments to the document at that time. When I read the agreement, I requested certain changes in relation to the "purchase price", "deposit", and "possession". We then discussed and agreed to the following changes to the agreement for sale:

Purchase Price	:	Four Hundred and Forty Thousand Dollars ($440,000.00)
Deposit	:	The sum of Forty Thousand deposit on the signing of the agreement. And there would be a remaining $100,000.00 (One Hundred Thousand) payable as deposit.
Possession	:	Vacant possession on completion of payment of deposit.

We also inserted a completion date of the 31st day of March 1989.

6. We then signed the agreement for sale and I was given a copy. Now shown to me is a copy of the agreement for sale for which I will be seeking to rely on at the trial … The insertion of the word "deposit" in the agreement in my handwriting, but the other changes are either under the hand of Mrs. Runte and /or her husband. Although all the changes were made in my presence, I cannot now recall who what; but these changes were discussed and agreed upon and I recognise that the word "deposit" is in my handwriting.

7. After we signed the agreement I paid a deposit of One Hundred and Forty Thousand Dollars ($140,000.00) and a further payment of Twenty Thousand Dollars ($20,000.00) towards closing costs and incidentals on the following days:

- $40,000.00 - October 31, 1986
- $100,000.00 - December 14, 1986

- $20,000.00 - December 14, 1986

8. Now shown to me are the cheques which were tendered and receipts issued in relation to these payments which I will be seeking to relay on at trial …

9. That pursuant to an Addendum which was made to the agreement for sale (and which is reflected in the copy agreement … the Runtes granted me a mortgage for the balance purchase prices of $300,000.00 at an interest rate of 12½% per annum over a period of two years. The Addendum was initialled by Mrs. Runte and her husband in my presence. I requested two years to pay off the balance purchase price with interest because I did not have all the money at the time. I then made the following payments towards the mortgage:

- $15,625.00 - April 1, 1987
- $16,250.00 - July 6, 1987
- $15,625.00 - July 20, 1987
- $15, 625.00 - August 1987
- $15,625.00 - September 1987
- $15,625.00 - October 1987
- $15,625.00 - November 1987

10. Mrs. Runte and/or her husband would come by my office monthly to collect these payments. Now shown to me are the cheques which were tendered and receipts issued to me in relation to these mortgage payments which I will be seeking to have tendered …

Issues affecting Completion

11. Then in about November 1987 I received a letter from Mr. Runte requesting that all further mortgage payments be made to his Attorney-at-Law Mr Wentworth Charles. Now show to me is a copy of the letter I received from Charles Runte which I will seek to rely on …

12. After receiving this letter I contacted Mr. Wentworth Charles at his office and he informed me and did verily believe that he not heard from the Runtes since preparing the agreement for sale more than a year earlier.

13. I was alarmed by what Mr Charles told me and therefore before making any further payments, I first attempted without success to contact the Runtes through family members of their family. I then retained the Mr. Herbert Grant of Perkins, Tomlinson, Grant, Stewart & Co., Attorney-at-

Law to communicate with Mr. Charles on my behalf in relation to the payment of the balance purchase price in exchange for the title.

14. Thereafter, I received copies of several letters, notices and other documents which my Attorney-at-Law sent to Wentworth Charles. And, I was also provided with copies of the responses from Wentworth Charles. I attach copies of these letters, notices and other documents …

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated April 12, 1988.

    - Letter from Wentworth S. Charles & Co. to Perkins, Tomlinson, Grant, Stewart & Co. dated April 25, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated May 19, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated June 23, 1988.

    - Letter from Wentworth S. Charles & Co. to Perkins, Tomlinson, Grant, Stewart & Co. dated June 28, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated July 11, 1988.

    - Caveat Forbidding Registration of any Change in Proprietorship or of any Dealing dated July 13, 1988 and deposited by Barrington Dixon.

    - Letter from Wentworth S. Charles & Co. to Perkins, Tomlinson, Grant, Stewart & Co. dated July 20, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated April 12, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated December 29, 1988.

    - Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated February 20, 1989.

    - Notice Requiring completion of Sale and making Time of the Essence of the Contract dated April 12, 1989.

- Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated April 12, 1989 enclosing Notice Making Time of the Essence.

- Letter from Wentworth S. Charles & Co. to Perkins, Tomlinson, Grant, Stewart & Co. dated May 22, 1989.

- Letter from Perkins, Tomlinson, Grant, Stewart & C., to Wentworth S. Charles & Co. dated June 7, 1989.

15. Mr. Wentworth Charles did not facilitate a completion of the sale although I was prepared to pay him the balance purchase price as directed by Mr. Runte and although I serve Notice Requiring Completion of Sale and Making Time of the Essence.

Legal Action

16. Therefore, I instructed my Attorneys-at-Law to file a suit in the Supreme Court to allow me to pay the remainder of the purchase price into court and for the property to be transferred to me. Now shown to me is the suit that was filed Court on October 13m 1989 and my Affidavit in support which I will be seeking to rely on …

17. That after the suit was filed I encountered several difficulties in proceeding with the matter as the Runtes could not be located for service and Mr Charles would not agree to accept on their behalf. Now shown to me are letters dated November 24, 1989 and December 14, 1989 form my attorney to Mr. Wentworth Charles …

18. That I even paid someone to search for the Runtes but they could not be located. And, the Runtes made no attempt to contact me to complete the sale. Now shown to me is the Affidavit in relation to the attempts to serve the Runtes dated October 26, 1990 which I will be seeking to rely on …

19. I did however manage to serve the Attorney-at-Law for the Caveator Mr. K. C. Burke with the suit. I was made to understand that here was a written agreement between the Runtes and the Caveator Mr. DePaul to share the proceeds of the sale of the property to me. Now shown to me is a copy of the stamped copy of the Originating Summons and Affidavit in Support of the Caveator's attorney as Exhibit 23.

20. I first learnt of the Caveator Anthony DePaul more than a year after I signed the agreement for sale. However, I was advised by my attorney Herbert Grant and did verily believe that the Caveator was not in fact objecting to the sale but was seeking a half of the proceeds of the sale

based on an agreement he had with the Runtes. I was strengthened in this belief by the fact that the Caveator filed no defence or objections to the 1990 suit and made no appearance at several court hearings, and, filed no separate suit or claim against me.

21. That I also got an Order for Substituted service of the Runtes on Mr. Wentworth Charles, and, although he was served he still did not participate. Now shown to me is a copy of the Order for substituted service and Affidavit of Service of May 8, 1990 …

22. That Mr. Charles still did not respond or appear at any of the many court hearings, and the matter was delayed for a number of years by several applications as well as orders from the Court including the application for substituted service; order directing that I serve the Caveator through his attorney and an Order requiring that I produce the original agreement for sale which was not in my possession and therefore I could not comply the Court Order. Now shown to me is a copy of the Record of Proceedings for me to produce the original agreement for sale which I will be seeking to rely on …

23. That the Court also ordered that my suit be treated as if commenced by Writ of Summon and Statement of Claim. Now shown to me is a copy of the Record of Proceedings as well as letters dated March 5 and 23, 1999 to Mr. Wentworth Charles in relation to that Order which I will be seeking to rely on as …

24. In about 1998 Mr. Runte reappeared and wanted to resolve the matter. Now shown to me is a copy of a letter dated July 20, 1998 from Mr. Wentworth Charles in relation to a settlement … I also spoke to Mr. Runte personally in relation to his failure to complete the sale. He had been in prison, overseas.

25. That several other letters passed between our attorneys in relation to a settlement. I attach copies of these letters as … and which I set out below:

    - Letter from Grant, Stewart, Phillips & Co. to Wentworth Charles and dated February 15, 2001

    - Letter from Grant, Stewart, Phillips & Co. to Wentworth Charles dated September 27, 2001.

    - Letter from Grant, Stewart, Phillips & Co. to Wentworth Charles dated November 4, 2004.

- Letter from Grant, Stewart, Phillips & Co. to Wentworth Charles dated July 19, 2005.

- Letter from Wentworth Charles to Grant, Stewart, Phillips & Co. dated July 25, 2005.

26. There is one further letter of August 26, 2005 from Grant Stewart Phillips & Co to Wentworth Charles but his letter is stamped "without prejudice".

27. Then in about 2006 I received a call from Mrs. Runte. She informed that she would like to complete the sale and that she had given her son a power of attorney to do so and that I would be hearing from him. Her son contacted me by phone a few times, but on each occasion, he either at an airport or about to leave Jamaica. He subsequently showed up at my office to discuss the matter. After the discussions, I told him that he would hear from me, and I brought my attorney up to speed so that he could guide me. We were unable to resolve the matter, but I am still ready and willing to complete the sale in the terms we agreed. I have paid Two Hundred and Seventy Thousand Dollars ($270,000.000 to date. I have also paid the property taxes. Now shown to me are the receipts in relations to property taxes which I will seek to rely on …

28. I took possession of the property after I finished paying the deposit in December 1986 as greed with Mrs. Runte and her husband. I went on the property and I blocked off the entrances to prevent trespassing, and I erected a fence. I attach the relevant titles … The agreement for sale presented to me only mentioned the main title at Volume 538 Folio 85. It was not until more than a year after I signed the agreement that I learnt that the portion I was buying had been cut off and was on a separate title. I also maintained the property by making arrangements for the property to be cleaned and cleared of bushes from time to time.

29. In or about 2007 someone cut the fence and placed an empty container on the property. I go the assistance of the Lucea Police to remove the container form the property and this was done in my presence a Justice of the Peace which I will be seeking to rely on … I replace the fence thereafter. This was the only time that someone, interfered with the fence I erected after I paid the deposit".

[67] To summerise the above, Dr. Barrington Dixon, maintains that he entered into an agreement with Mr. and Mrs. Runte with respect to his purchase of certain lands registered at Volume 1154 Folio 270 of the Register Book of Titles for $500,000.00. Significantly, crucial amendments were made to the agreement,

namely a variation of the purchase price, downwards to $440,000.00; the deposit would now be $140,000.00; and that he would receive vacant possession on payment of the deposit.

[68] He duly paid the deposit of $140,000.00 and a further sum of $20,0000.00 and, crucially, took up possession of the land. Further, that the Vendors granted to him a mortgage for the balance of the purchase price of $300,000.00 of which he paid $110,000.00. Subsequently, he received a letter from Mr Runte who requested that further payments by him be directed to Mr. Wentworth Charles, Attorney-a-Law for the Vendor and from whom he was to learn that latter was in possession of the original duplicate certificate of title.

[69] Mr. Wentworth Charles declined to accept payments from Dr. Dixon he not having heard from his clients since preparing the Agreement for Sale. Consequently, Dr. Barrington Dixon failed in his attempts to contact both Vendors, particular, Mr. Runte. He became alarmed and sought and obtained the services of a firm of attorneys-at-law. He was to learn that a caveat was lodged against the property by Mr. Anthony DePaul, the Second Defendant on the 14th of November 1989. Dr. Barrington Dixon, in turn, caused a caveat to be lodged against the said property on 14th July 1988. Dr. Barrington Dixon filed suit against the Runtes so as to allow him to pay the balance of the purchase price into court and for the property to be transferred to him. The Runtes could not be located for service of the suit to be effected on them. Neither would Mr. Wentworth Charles accept service until an order for substituted service was made by the court. Other orders were made by the court including an order that Mr. Wentworth Charles produce the original agreement for sale. It that the latter was not in the possession of Mr Wentworth Charles, attorney-at-law for the Runtes.

[70] In 1998 Mr Charles Runte emerged from concealment and proposed a settlement through a letter via Mr. Wentworth Charles. In 2006 The Claimant received communication from Mrs. Runte who wanted to complete the sale through her son to whom she gave a power of attorney which she subsequently

withdrew. The Claimant filed a second claim the first suit having been abandoned due to his failure to produce the original Agreement for Sale.

THE EVIDENCE OF ANGELLA RUNTE

[71] Her testimony is comprised of her witness statement that was received in evidence as her evidence-in-chief, and her cross-examination thereon. In summary, she agreed that both she and her husband agreed to sell the relevant property to Dr. Barrington Dixon they being the owners at the time of agreeing to sell the land. She also agreed that she signed a written agreement to sell the property to Dr. Barrington Dixon. When shown the Agreement for Sale by Miss Minto in cross-examination, she agreed that her signature and that of her husband's were on the Agreement for Sale. She agreed with the Claimant's counsel that the Agreement for Sale did not reflect the correct Volume and Folio numbers of the relevant land. Crucially, she agreed that the original Agreement for Sale was in her possession; that amendments were made to the Agreement for Sale in respect of the reduction of the purchase price and as to the reduction of the deposit; to the staggering of the payments of the deposit and of the grant of a Vendor's mortgage by herself and Mr Runte to Dr. Dixon in the amount of$300,000.00; that the amendments to the Agreement For Sale appear on the said Agreement For Sale that was in her possession.

[72] Mrs. Angella Runte had a series of "don't recall" answers in response to questions put to her in cross-examination. First, to the question posed to her as to, whether Dr. Dixon was to get vacant possession on his paying the sum of $140,000.00; second, whether she returned any of the monies paid to her by Dr. Dixon; third, whether she contacted Dr. Dixon and demanded that he complete the Agreement for Sale.

[73] Further, Mrs. Runte gave candid and conclusive answers in cross-examination to questions of negative import. First, that she did not inform Dr. Dixon that Mr. Wentworth Charles was Charles Runte's attorney-at-law and not hers; second, she did not take steps to cancel the Agreement for Sale; third, she did not

contact Dr. Dixon with a view of telling him that Mr. Anthony DePaul, the Second Defendant, had paid down on the property; fourth, she did not inform Mr. Anthony Depaul that Dr Dixon had paid down monies in respect of the property; fifth, none of the denominated United States Dollars of $20,000.00 was returned to Mr. DePaul.

EVIDENCE OF NOLLIS McNEISH

[74] In respect of the perimeter fence to the property this witness maintains that it was put up by Mr. Charles Runte, "he believes", in 1984. When confronted in cross-examination he agreed that he had given a statement dated the 19th January 2008 where he said that he was the caretaker of the property yet in it he crucially omitted to mention that he bushed the property or of there being a fence to the property. Further, that the perimeter fence erected by Mr. Runte was replaced by Dr. Barrington Dixon.

EVIDENCE OF ANTHONY DePAUL

[75] This witness says he signed an agreement with both Mr. Charles Runte and Mrs Angella Runte in 1984 and that he made a payment to them of $20,000.00 in United States currency. The agreement, he says, was for the Vendors and himself to become joint partners of the property. Having lodged a caveat against the property to protect his interests in it, he did not do anything to protect his interest in the property. He had put up a chain-link fence after he had signed the agreement. The chain-link fence was to the road-side of the property but that it was dismantled "many years ago". According to this witness, the chain-link fence did not last long. Crucially, this witness, has roundly contradicted and set at nought the evidence of Mr. Nollis McNeish that the perimeter fence to the property was put in by Mr. Charles Runte.

THE COURT'S APPROACH IN DECIDING THE CASE

[76] After hearing the evidence, I remind myself that, I must decide where the truth lies, decide any points of law, and give judgment. I am to be guided by any

inherent probabilities, contemporaneous documentation or records, and circumstantial evidence tending to support one account or the other, and impressions made as to the character and motivations of the witnesses: See Baroness Hale of Richmond in R.B. (Children) Care Proceedings; Standard of Proof [2008] UKHL 35, [2009] (ACII at [32]

[77] Also, it is essential to evaluate a witness's performance in the light of the entirety of his or her evidence. Witnesses, it is to be remembered, oftentimes do make mistakes but those mistakes do not necessarily affect other parts of their evidence.

[78] Further, witnesses can regularly lie. However, lies by themselves do not mean necessarily that the entirety of that witness's evidence is rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. Alternatively, a witness may lie because the case is a lie.

[79] Furthermore, it is essential that a witness is challenged with the other side's case. This involved putting the case positively. After that confrontation of the witness with the other side's case is done it is for the judge, or the trier of facts, to assess the witness's oral response and demeanour, and the likely veracity of the response in the overall context of the litigation: per Peter, J in **EPI Environmental Technologies plc** [2004] EWHC 2945 (Ch), [2005] 1 WLR R [74].

[80] In adopting the above principles which, incidentally, are not new, I am re-affirming the judicial approach in deciding between witnesses.

[81] In the context of the above and as already noted, Dr. Dixon died before the trial of his claim commenced. It is the law that in cases under the Law Reform (Miscellaneous Provisions) Act, most causes of action vesting in an individual, such as Dr. Dixon, survive his death for the benefit of his estate. Hence, the substitution of Mrs. Jennifer Dixon as Administrator Ad Litem of the estate of Dr. Dixon.

[82] It is in this context that, Dr. Dixon's witness statement and his two extant affidavits which he gave concerning certain interlocutory applications in certain

aspects of his claim are quite relevant in determining the outcome of this case. Dr. Dixon having met this demise and this court being cognizant of rule 29.2 of the **Civil Procedures Rules**, it is for this court to say what weight is to be attached to Dr. Dixon's previously mentioned witness statement and affidavits by particularly noting the fact that he could not have been confronted under cross-examination by the other parties nor could their respective cases have been put to him for this Court to see how he would have reacted.

FINDINGS OF FACT AND REASONS

[83] In arriving at my findings of fact I have taken into account the principles which I have foreshadowed above and how to judge the adjudicative material before me. First and foremost, I have had the advantage of seeing and hearing the witnesses with the exception of Dr. Dixon. Taking all the above in the sweep of things, I am to say that, where there are conflicts on the evidence as to issues of fact, I prefer the evidence adduced on the Claimant's case to that of the First Defendant and her supporting witness. I find that the First Defendant was not forthright or forthcoming on certain critical issues of fact. I find that her supporting witness, Mr. Nollis McNeish, gave his evidence with the convenient art and design of an accommodating witness whose manifest intention was that of giving loyal support to the position and posture of Mrs. Runte.

[84] What cannot be gainsaid is that Dr Dixon entered into an agreement for the sale of the disputed land with the Vendors, Mr. Charles Runte and Mrs. Angella Runte, that the agreement is in respect of land registered at Volume 538, Folio 85 of the Register Book of Titles; that Dr. Dixon entered into possession of the land; and crucially, he replaced the fence ostensibly erected by Mr. Runte and erected his own.

[85] It has to be borne in mind that the original agreement, with the amendments thereto, was in the possession of the First Defendant and which she was to

subsequently disclose in her List of Documents to the Court. Absolutely, no evidence was presented by the First Defendant to show that the original

[86] agreement was ever in the possession of Dr. Dixon. Significantly, and I infer that it was more likely than not, that The Agreement was executed by all parties in the presence of each other.

[87] I find that the amendments were done with the concurrence of all the parties and, if not, at the very least, that the amendments were ratified by the Runtes. The law on this issue, though unaddressed by the parties can be tersely stated:

[88] A material alteration to a document made by or with the approval of one party without the consent of the other will preclude the party responsible for the alteration from suing on the document: see **Suffell v Bank of England (1882) 9 QB D 555**. However, where alterations and additions are made with the consent of the signatories, to a document already signed, the existing signatures will be taken as authenticating the document, in the altered form if the signatories so intend: see The Law Relating to the Sale of Land in Victoria, 3rd Edition, p. 79, which is governed by the Torrens System of Land registration.

[89] It seems also, under the Torrens System of land registration that, the consent to so make the alterations or additions to a document already signed, may be given orally or even by conduct. Also, an unauthorised alteration to such a signed document will bind the parties if they subsequently assent thereto, even though the assent be merely oral: see **Koenig Blatt v Sweet [1923] 2 Ch. 314**.

[90] Further, the acceptance of the alterations by the parties carries with it an acceptance of the signatures as being signatures to the document in its altered form: See **Koenig Blatt v Sweet,** supra.

[91] It is a proven fact that Dr. Dixon made payment as per Agreement For Sale, to both Mr. and Mrs. Runte and that by letter dated November 23, 1987, under the signature of Charles Runte, the latter advised Dr. Dixon to make the “remaining sixteen (16) payments directly to Mr. Wentworth Charles’ office the first of each

month", as he like Mr. Runte had "suggested and requested at the beginning of our new contract". This latter letter was, I find, the key event which puts to flight all doubts about the amendments made to the Agreement for Sale as well as to questions surrounding whether Dr. Dixon did all that was required of him in the performance of his obligations thereunder.

[92] Not only that, the letter served to notify Dr. Dixon that both Runtes did in fact take up residence in the United States of America at an unspecified address, albeit Mr. Charles Runte termed it "temporarily". It is again worthy of note that Mr. Charles Runte in his letter used the expression "our new contract". By this expression the word as used, "new", I interpret in the context of the contract to mean the amended terms which appear on the face of the document. In other words, the facts in issue as to the "wh-words" must be interpreted to mean that the Runtes had approved or, ratified the amendments.

[93] I find that the Runtes after receiving the full amount as pleaded by the Claimant became designedly uncommunicative and thereby thwarted the efforts of Dr. Dixon in making the final payments to them or to their attorney-at-law. Because of the Runtes self-imposed concealment, Dr. Dixon was forced to cause a Notice Requiring Completion of Sale and Making Time of the Essence of the Contract, ("The Notice") to be issued. This Notice was addressed to Charles Runte and Angella Runte, in care of Wentworth S. Charles, attorney-at-law.

[94] The next significant action in this unfolding summary of facts is that Mr. Wentworth Charles, attorney-at-law for the Runtes, issued a letter to the Claimant's Attorney-at-law. The letter speaks for itself: … "Again, we have no instructions to act in this matter. We merely afford you a discussion out of courtesy".

[95] I find that there is some internal inconsistency on the part of Mr Runte to Dr. Dixon for the latter to, "Make cheques payable to Wentworth Charles, 20½ Duke Street, Kingston", while at the same time Mr Wentworth Charles' position is that he has no instructions to act in the matter. It certainly lends credence to the tacit

view that Mr. Runte by being purposely and deliberately uncommunicative with respect to Dr. Dixon and, in light of the above referenced facts affecting his questioned sincerity, that he Mr. Runte and, for that matter, the Runtes were treading on the edges of sharp practice or else they had blanched over their bona fides in not completing the sale to Dr. Dixon. Certainly, at the very least, their actions or inactions, bespeak indirection.

[96] I find that the Claimant did not sit idly by, "like patience on a monument smiling at grief," as he sought the intervention of the Court by his filing of a suit against both Runtes in order to get some legal redress. It was an obstacle course for Dr. Dixon as, not only did he experience difficulties in locating and serving the Runtes but the Court required of him that he produce the original Agreement of Sale which was then in the possession of the First Defendant and for whom there was no forwarding address. Accordingly, that suit had to be terminated by the Claimant. Surely, on the basis of the above the Runtes could not in all conscience seek to benefit from their own dubious manoeuvres, the Claimant argues.

[97] Notwithstanding, the Claimant's attorneys-at-law were to receive a letter dated July 25, 2005 from the Vendor's attorney-at-law which letter canvassed a proposed settlement. Following which, the First Defendant, Mrs. Runte, through her son proposed a settlement of the matter which she subsequently withdrew for reasons which smack of disingenuity. She was determined not to be bound by the terms of the Agreement. She initiated steps in the year 2007 to develop the land herself and, as a latent afterthought, hastily proceeded to pay up the back taxes due on the property. Her self-assertion in this regard cannot overwhelm the truth of her purposed unavailability and by her being uncommunicative with regard to the Claimant.

REASONS

[98] I am cognizant of the fact that Dr. Dixon is deceased. Against the above, I am forced to repeat that did not give evidence in this case. However, as observed

elsewhere, it is the law that the witness statement of a litigant or a witness can be treated as his or her witness summary if such a one is unable to attend: See Rule 29 of Civil Procedures Rules. Equally trite is the principle that, in respect of an affidavit generated for use or which has been given used by a litigant or witness in an aspect of the court's proceedings, it is permissible for the said affidavit to be used in other aspects of the said proceedings of which the trial of the case is but one such aspect.

[99] Accordingly, the witness statement of Dr. Dixon dated the 18th July 2012 and his affidavits of 28th September 1989 and the 28th April 2008 were received and admitted into evidence without demur.

[100] Therefore, the question which presents itself is, what weight should this Court accord to the affidavits and witness summary in light of his unavailability for cross-examination?

[101] To answer the above I begin by stating that no challenges were mounted against the above documents by the opposite parties. Dr. Dixon's evidence, though unchallenged, for obvious reasons was, nevertheless, clear, consistent, cogent, cohesive and credible. Accordingly, I accord and give his statement and affidavits preponderable weight.

[102] On the contrary, the inconsistencies on the First Defendant's case are stark and staring. She has by her evidence in cross-examination at a considerable factual remove from her witness statement. To the suggestions that were to put her in cross-examination, I am prone to think that she must have had copious draughts of Lethean waters or else her "don't recall" answers were artful dodges to the questions posed to her. Here, I need not multiply the many instances of her doing so, save one. She testified that she did not consent to early possession, as per her witness statement and in her pleadings. Yet, in cross-examination she says she cannot recall whether this term was agreed to. This answer is, in my view, stunningly inexplicable especially in view of the fact that her witness statement was filed some four months before the trial. Even more shocking is

the effulgent fact that the matter of early possession is in the very agreement which was in her possession and control. Curious it is, then, that she could recall all other amendments in the agreement yet on the vital issue of possession that most affects her defence she cannot recall, even though all amendments were ostensibly made at the same time. I make bold to say, she had "a mighty good remembering but an awfully poor forgetting" of that single-most important fact.

[103] As noted earlier, there other inconsistencies in her evidence as to the circumstances surrounding the execution of the agreement relating to the amendments and the sums of money that she had received. As to the latter, she wavered even in the face of written receipts for the same. Her wavering, I am to think, was another signal failure on the test of her credibility.

Is there a limitation for claims in specific performance?

[104] On the above, the First Defendant's submissions are as follows:

> Given that the Claimant's assertions that the terms of the agreement were modified so that the Runtes sold him the land for Four Hundred and forty thousand Dollars ($440,000.00) subject to a Vendor's Mortgage in the sum of Three hundred thousand dollars ($300,000.00); that Dr. Dixon entered into possession on April 1, 1987; that completion was set to be on or before March 31, 1989; that as a result of him being unable to honour his mortgage obligations in accordance with the terms of the agreement what with the Runtes being purposely uncommunicative he caused a Notice requiring completion and making Time of the Essence dated April 12, 1989 to be issued and failing which legal proceedings would be instituted, then, as the claim was filed in October 2007 some thirty one (31) years after the execution of the Agreement For Sale, or alternatively, after the making of the oral agreement between the parties, then this court has no jurisdiction to grant the relief of specific performance it being statute-barred.

[105] Here, the Claimant disagrees with the First Defendant's submissions. And just

here we touch the vital point of whether Dr. Dixon had entered into possession. With the above in mind I now turn attention to the pertinent sections of LOAA. Section 3 of the Act says:

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

[106] It is to be particularly noted that the above section (as per the side note thereto) grants a right of entry on the bringing of an action to recover land or rent but that such right is limited to a twelve year period. All that this means is that Section 3 applies to claims in law for land in contradistinction to claims in equity, which cannot be prosecuted after the lapse of twelve years by taking into account the time when the right shall have first accrued.

As to Section 25, it lays down that,

> *No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to be same as he shall claim therein in equity".*

[107] It is plain as a clear day to see that Section 25 deals with claims in equity in contrast or contradistinction to claims in law.

[108] As to when the right shall be deemed to have accrued I now turn to Section 4. It reads:

> *"The right to make an entry or bring an action to recover any land or rent shall be deemed to have first been accrued at such time as hereinafter is mentioned, that is to say –*
>
> *a) …*
>
> *b) …*

c) *when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured*

d) *by any instrument (other than a will) to him, or some person through whom he claims by a person, being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have firs accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;*

e) *...*

f) *When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of a forfeiture or breach of condition, then such right shall be deemed to have first accrued then such forfeiture was incurred, or such condition was broken".*

[109] The First Defendant has advanced the Canadian case-law authority of **McConnel v Huxtable**, supra, to support her argument that Section 25 relates to the time period of twelve years as given by Section 3.

[110] In the **McConnell** case (for short) the Ontario Court of Appeal found that the statutory period of limitation under their Real Property Limitation Act applied to a claim for unjust enrichment. There the Claimant had sought a remedial constructive trust in property owned by her and her common-law spouse. The court found that Section 4 of the Canadian legislation could apply to such a claim. The court in its dicta restricted its finding to the application of the statutory limitation period where an equitable interest is sought, (as in the case at bar) that a constructive trust had been created in favour of the Claimant.

[111] The reasoning behind such thinking, the force of which I take notice and acknowledge, is that such a person is or had been an express trustee from the date of the unlawful holding of the property in dispute. The remedies available for such a breach of constructive trust are analogous to the remedies available

for the breach of an express trust and, accordingly, the equitable remedy for a breach of a constructive trust is the same as for a common law remedy for breach of an express trust in its incidence of the limitation period.

[112] I venture to say that what I discern is that when it comes to claims for specific performance different considerations apply in contradistinction to claims at law. Section 25 of our Jamaica LOAA applies where the entitlement to an equitable remedy is the same as that which would be given by law. Accordingly, the limitation period is applied by way of analogy. However, it is to be particularly noted that, specific performance is not the same as an equitable remedy for an existing breach of contract.

[113] In the Eastern African case of **Hasham v Zenab,** supra, the facts which are taken from the head note reads: A contract which was, signed by the defendant on February 19, 1954, for the sale of a 2-acre plot of land in Nairobi by the plaintiff provided, among other things, for payment of a deposit immediately and for the balance of the purchase price to be paid on the presentation of documents of title which were to be executed by both parties within six months from the date of contract. The defendant repudiated the contract shortly after signing it on the basis that she had never agreed to sell the whole 2 acres but only area of half an acre. Weeks before the last day for completion the plaintiff instituted proceedings in which specific performance was claimed. The defendant's contention in opposing the claim was that the plaint was issued prematurely and that the plaintiff should have waited until there had been a failure on her part to perform the contract within the stipulated time even though she had initially intimated her intention to do so.

[114] It was held by the august Privy Council and the House of Lords, sitting together, that the plaintiff was entitled to an order for specific performance. Their Lordships found that there was a fallacy in the argument of the defendant which consisted for her equating the right to sue for specific performance with a cause of action in equity. In the Court's judgment all that was required was for the plaintiff to show circumstances which would justify the intervention by a court of

equity, that is to say, that the purchaser (plaintiff) had an interest in the land and could get an injunction to prevent the vendor (defendant) from disposing of the property. Their Lordships' views were founded upon a consideration and an adoption of Canadian case law authorities, the **American Restatement of the**

Law of Contract and on the seminal textbook authority **Williams on Vendor and Purchaser**.

[115] I think it is pertinent that I here repeat the submissions of the Claimant's attorney-at-law views which I adopt as to how equity developed in the Old Courts of Chancery. A summary of the doctrine of equity and its development as re-traced is as follows:-

> At first, the observation is made that no fixed period of limitation was assigned to claims in equity. The regnant thinking was more in keeping with the principles of equity being applied by way of the discretionary doctrines of laches and acquiescence. As such the Court of Chancery did not consider itself as being fettered in dispensing equity for those litigants who sought its intervention. However, the law did not stand still. It developed and in so doing it was deemed desirable that period of limitations should be imposed for certain claims in equity so as to allow for certainty. Instead of fixing a limitation period for all claims in equity the Court in not favouring a fetter on the judges of Chancery, introduced the progressive concept of allowing certain claims in equity which were similar to those at law to apply, by way of analogy, to the Section 3 limitation. It was in this context that a consideration that the "at law" limitation was added to Section 25 provided that the claim in equity was similar to a claim at law and thus could be applied by way of analogy. Accordingly, by parity of reasoning the same period of limitation would be applicable to both.

[116] It is now well settled that there is no analogous claim "at law' to a claim in equity

for specific performance. Accordingly, on a claim for specific performance of an agreement to sell land, the claim will only be defeated if the Court finds that the Claimant is guilty of laches or acquiescence.

[117] The point is well made in **P & O Nedlloyd BV v Arab Metals Co.,** supra. I shall here quote, in *aliquot*, parts of it:

> *"It is not surprising that equity should apply by analogy the limitation periods applicable claims at law for an account and for damages for breach of duty, whether in contract or tort, to claims for an account and for equitable compensation. In each case the same facts give rise to a claim, whether at law or in equity, and the same kind of relief is obtainable. A claim for specific performance raises different considerations, however, both because relief comparable to that available from the courts of equity was not available from the common law courts and because the facts needed to support a claim for specific performance are not in all respects the same as those necessary to support a claim for breach of contract. The latter point is demonstrated by* ***Hasham v Zenab*** *[1960] AC 316 … All that was required was the existence of circumstances that would justify the intervention of a court of equity. The fact that the common law courts could not grant a coercive remedy comparable to a decree of specific performance strongly suggests that there is no case in which "the remedy in equity is correspondent to the remedy at law" or "the suit in equity correspondence with an action at law". At most it can be said that there are some cases in which the facts giving rise to a claim at law for damages for breach of contract will also be sufficient to justify the intervention of equity. I find it a little surprising, therefore, that the question whether equity would have applied a statutory limitation period by analogy to a claim for specific performance should have occasioned such a divergence of view among the commentators. It is possible to find dicta in many of the older cases which are capable of supporting different conclusions on this question, but, in the end I do not think that it is necessary to look further than the decisions to which I have already referred in order to reach a satisfactory answer."*

[118] His Lordship continued…

> *"...one can well see why equity took the view that the limitation period applicable to a claim at law should also apply to a claim in equity. To hold otherwise, even at a time in the 19th century when the jurisdictions of the common law courts and the courts of equity were separate, would have undermined the statutory provisions; in the modern legal world, in which the same courts apply the rules of both law and equity, the consequences would be even more anomalous and unacceptable, However, in cases where the facts capable of supporting a claim for equitable relief differ from those capable of supporting a claim at law, or where the equitable remedy differs in a material respect from the that available at law, there is*

not the same reason to deprive the court of the power to grant equitable relief in an appropriate case by adopting the statutory limitation period by analogy…"

[119] To rejoin, according to Moore-Bick, LJ of the Court of Appeal,

> *"No doubt it is true that most claims for specific performance are made in response to an existing breach of contract, but as* ***Hasham v Zenab*** *[1960] AC 316 shows, an accrued right of action for breach of contract is not a necessary precondition to obtaining relief of that kind. It is therefore wrong in principle to treat specific performance as merely an equitable remedy for an existing breach of contract. Moreover, since a claim for specific performance may be made as soon as the contract has been entered into, it is very arguable that, if the limitation period were to be applied by analogy, it would be necessary to regard the cause of action as accruing at that moment with the unfortunate result that the claim could become time-barred before any need for relief has arisen. This lends further support to the conclusion that the application of the limitation period by analogy is not appropriate in relation to claims for specific performance".*

[120] Further, His Lordship said,

> *"quite apart from these considerations, however, whatever may be said about the undesirability of allowing a claim for specific performance to be brought more than six years after a breach of contract has occurred, the absence of a corresponding legal remedy makes it impossible in my view say either that the remedy in equity is "correspondent to the remedy at law" or that "the suit in equity corresponds with an action at law".*

[121] He concludes that authorities do not support the conclusion that the application of a limitation period by analogy ousts the discretion of the court to grant a remedy where the circumstances would make it unjust to withhold it."

[122] His Lordship went on to accept the mined quoted principle thus:

> *"The court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that at limitation period should be applied to it also. In this latter case the limitation period is said to be applied by way of analogy, and the principles that govern cases of this kind are that if there is a sufficiently close similarity between the exclusive equitable right in question and legal rights to which the statutory provisions applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the*

absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with comparable legal rules".

[123] Continuing, His Lordship says,

> *"In my view that question must be answered by reference to the nature of the remedy and the circumstances in which it is available. Both factors point to the conclusion that claims for specific performance fall outside the scope of the principle identified by Lord Westbury in* ***Knox v Gye*** *LR 5 HL 656 and applied by this court in* ***Cia de SegurosImperio v Heath*** *(REBX) Ltd [2001] I WLR 112: the remedy is available in circumstances were no cause of action exists at law, so the factual circumstances giving rise to a claim need not be the same as those which would support a claim for* ***…*** *breach of contract, and no comparable remedy is available at law. It follows that despite the powerful arguments put forward by Colman J in favour of holding that the same limitation period applies to claims for specific performance as to claims for damages for breach of contract, I think he was wrong in reaching the conclusion that* ***P & O's*** *claim was time-barred as a result of the application by analogy of the limitation period contained in section 5 of the Limitation Act 1980. Moreover, with all respect to the judge this is not in my view such an implausible position when one bears in mind that in general under English law limitation bars the remedy and not the right itself. Nor does it mean that claimants can delay with impunity, safe in the knowledge that, although their claims for damages may become time-barred, their right to obtain specific performance can still be asserted. As one can see from the cases mentioned earlier, one can find many examples of the court's refusing relief by way of specific performance as a result of delay far shorter than is necessary to bar a claim for damages. The equitable doctrine of laches, to which I shall turn in a moment, provides the court with ample power to refuse relief when delay on the claimant's part would make it inequitable to grant it ..."*

[124] It is plain that the First Defendant's reliance on the decisions in the **McConnell** case and of the case of **Williams v Thomas**, supra, must fail as neither decisions dealt with the principle of specific performance. **McConnell**, as already noted, dealt with constructive trust while **Williams** dealt with the assignment of a dower to the widow of the deceased land owner. The Court in **Williams** applied the principles of laches, to the extent that the Court considered and determined the case in the widow's favour on the basis, among other things, that the widow had been asserting and enjoying one part of her right as dowry over the years. The Court held the Act did not apply at all. Further, that the claim by the dower to her rights to a portion of her husband's lands bore "no

analogy to an action for possession of land, or even to an action for the completion of title to specific lands, as in a foreclosure action".

[125] The decisions in **Chang** v **Chang**, (supra), **Administrator General v Attorney General**, **Emily Hilton Sutton Steam Laundry (a Firm) (2)** all indicate that where the cause of actions were specifically created by statute the court had to strictly comply with the provisions as to limitations in those statutes. Where the Court's jurisdiction is derived from statute as opposed to common law or equity claims, the provision in the statute must be strictly adhered to or the Court will be deemed not to have the requisite jurisdiction.

[126] I am thus driven to conclude, in agreement with the Claimant, that there is no

fixed limitation in equity as there is no analogous claim at law to make Sections 3 and 25 of LOAA an automatic bar to specific performance. The Court will consider the circumstances of each case including whether there was acquiescence on the claimant's part or of any change in the defendant's position during the interval that will bring prejudice to the defendant. The court will apply the principle of laches and acquiescence.

[127] The point was made in **Amrit**, supra, which cited with approval the dictum in the Privy Council decision of **Lindsay Petroleum Company v Hurd,** [1874] L.R. 5 P.C. page 221 at page 239:

> *"The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct, done that which might fairly be regarded as equivalent to a waiver of time or where by his conduct and neglect he has, though perhaps not waving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if he remedy were afterward to be asserted, in either these cases lapse of time and delay are most important. But in every case if an argument against relief which would otherwise be just if sounded upon mere delay: that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in*

such cases are, the length of the delay and the nature of the acts done during the interval".

[128] The documents, correspondences and pleadings show the acts done by Dr. Dixon during the interval, including the filing of his previous suit. At no point in time did the Claimant sit idly by and assent to the breach. The Claimant prosecuted his concerns by letters from his attorneys-at-law in trying to secure a completion of the sale. The response of Mr. Wentworth Charles was the that could be of "no further assistance". There was virtually nothing else the Claimant could have done. The previous suit before the Court was stymied as he could not produce the original agreement as ordered by the Court, the latter being in the possession of Mrs. Runte.

[129] Further, there has been no change in the First defendant's position, during the interval that can cause her prejudice. She became inaccessible and uncommunicative for twenty (20) years in the period between 1987-2007. Furthermore, after emerging from self-imposed concealment she indicated a willingness to settle and complete the sale between 2005 and 2006. The first time that she attempted to repudiate the agreement and to do something to the property and effect a change in her position was in 2007 when she tried to upend the Claimant by paying the property taxes for the land and when she applied to the Parish Council for commercial development. All the receipts being relied on by the First Defendant relate to matters that took place in 2007. This was the same year that the suit was filed and therefore the First Defendant cannot now lay any claim to her being prejudiced. She was thwarted in taking any further steps as Dr. Dixon prevented any such manoeuvre by removing a container that she had by stealth caused to be placed on the property.

[130] It is fitting that I interject at this point the modern approach. Delay of itself is not a bar to specific performance unless the defendant has been prejudiced thereby. The First Defendant has not produced one jot or little of evidence of her having to adjust her life style in any way over the last twenty years by acting on the belief that Dr. Dixon had abandoned the agreement. Accordingly, any preconceived

claim to prejudice, even it were forthcoming, would have been disingenuous

When does time begin to run under LOAA?

[131] The right of action accrues when either one or both parties repudiate the agreement: See **P & O Nedlloyd BV v Arab Metals Co**., (supra).

[132] The First Defendant has submitted that the repudiation of the Agreement occurred when the Notice Making Time of the Essence expired in May 1989. However, I can discern no evidence that there was any such repudiation by Dr. Dixon at that date. Charles Runte himself had given express instructions by his letter of November 23, 1987 that the last sixteen payments on the mortgage for December 1987 through to March 1989 were to be paid to his attorneys-at-law in furtherance of the agreement. The Vendor had not any express words or

conduct, repudiated the agreement at that date, but had left it to Dr. Dixon to advance the sale while they were away. It was the attorney-at-law who refused to accept the payments, attributing his refusal to do so to the Runtes failure to advise him.

[133] I am to say that even if the repudiation occurred when the Notice had expired, the entry by the surviving Vendor into settlement discussions with the Claimant between 2005 and 2006 to complete the sale, amounted to an acknowledgement of the existence and continuation of a valid Agreement at that date. This acknowledgment would thereby revive the Claimant's rights to sue on the Agreement, which the First Defendant repudiated in 2007. It is eminently demonstrated that the repudiation took place at that date. That this is so is evident from the fact that the First Defendant had taken steps in 2007 to apply to develop the property and had paid the taxes in respect of the disputed property. There were no evident acts before that date.

[134] The fact that repudiation would be treated as having taken pace, on a breakdown of settlement discussions and that the limitations would begin to run from that point, is supported by the case law authority of **Amritt and Amritt v Duncan Bay**

Development, supra, where Roy Anderson J said:

> *"As long as the parties are continuing to discuss giving effect to the Agreement for Sale, it seems to me that there has been no repudiation. If that were not so, then a defendant could merely carry on a protracted attempt at settlement of a dispute until the limitation period has passed and then rely on the limitation statue. I do not accept that this could be a correct view of the law".*

[135] The First Defendant admitted in questions put to her in cross-examination that she did in fact make contact with Dr. Dixon with a view to complete the sale. She could not, however recall the date or the means by which it was done. As noted elsewhere this court accepts Dr. Dixon's evidence that this occurred in 2006 pursuant to the exhibited letter dated July 25, 2005 from Mr. Wentworth Charles, attorneys-at-law to Dr. Dixon's attorney-at-law, in which the former canvassed a settlement proposal.

[136] Further, this letter was followed by a "without prejudice correspondence", from Mr. Dixon's attorney-at-law. In passing, it is to be observed that although the Claimant was unable to tender the without prejudice correspondence in evidence, given the rules of evidence in relations to the non-admissibility of "without prejudice" correspondence, the correspondence was nevertheless disclosed in the Claimant's List of Documents.

[137] Again, this July 25, 2005 letter is extremely critical, as in two previous letters Mr. Wentworth Charles stated that he could "be of no further assistance" to Dr. Dixon and, that he has no instructions to act in this matter". Therefore, he could only have written this letter in 2005 because the First Defendant had by then resurfaced and was now giving him instructions. Charles Runte had by that date joined the band of the silent majority.

[138] More to the point, what the evidence reveals is, that on a breakdown of these discussions, what followed was the payment of the property tax by the First Defendant for the first time in twenty years in March 2007 and her application to the Parish Council for a new commercial development also in March 2007 and the placing of the container on the property in April 2007.

[139] These dates and timelines are therefore not coincidental. It ushers in the re-emergence of Angella Runte after twenty years of silence. She has disclosed no documentary proof which shows her dealing with the property between 1987 and 2006. Therefore, the dates and timelines show that the settlement discussions could only have taken place in 2006 because that it is when she resurfaced.

[140] Time would therefore start to run on a breakdown of the discussion in 2007, the same year that the First Defendant openly repudiated the agreement, and which is the same year that this suit was filed.

Is the Limitation period ousted where the purchaser takes possession?

[141] It is the law, that laches will not defeat a claim where the claimant is in possession and is the equitable owner, and he has brought the claim merely to clothe himself with the legal estate. In the **Amrit** case, supra, there is a telling extract taken from Snell's Equity:

> *"Even when time is not of the essence of the contract, the plaintiff may have been guilty of such delay as to evidence an abandonment of the contract on his part, thereby, precluding him from obtaining specific performance, he must have shown himself "ready, desirous, prompt and eager": (See **Milward v Earl Thanet**, (1801) 5 Vesey 720n, per Arden M.R.) Where, however, the plaintiff has been let into possession under the contract and has obtained an equitable interest so that all he requires is a mere conveyance of the legal estate, even many years delay in enforcing his claim will not prejudice him",*
>
> *"Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court…"*

[142] In **Williams v Greatrex** [1956] 3 ALL E.R. 705 the facts are that, buy an agreement in writing dated May 1946, the purchaser agreed to buy from the defendant an area of land which was intended to be laid out in building plots, and to erect houses on the plots. The purchaser on his payment of the deposit and by his giving notice, was to be entitled to enter on a plot in order to build on it, and the defendant was to convey the plot on payment to him of the balance of

the purchase price. In June of the same year buildings were carried out on two plots and the conveyances were executed. However, the defendant refused to initial a correction of the conveyance in consequence of which proceedings were initiated to compel him to hand over the said conveyances. Subsequently, the purchaser, in October 1946 paid a deposit on two more plots and was given a receipt but the defendant did not present the purchaser's cheque for the deposit. Notwithstanding, the purchaser entered on the said plots, put in the foundations of a house and built certain infrastructure walling in all four plots.

[143] In April 1946 the defendant told the purchaser that neither the buildings on the latter two plots nor the land belonged to him. The purchaser was ordered by him to get off the land. The purchaser, through unconnected reasons, discontinued work on the latter plots.

[144] However, towards the end of 1948 the purchaser erected a garage and a shed on the said plots. In 1953 it was discovered that the whole was subject to a charge to a bank and the purchaser had to bring an action against the defendant to procure the release of the first two plots form the charge. In 1955 the purchaser restarted building working on the latter two plots. In December of the same year the defendant entered into a contract for the sale of the said plots to a third party. The purchaser, being aggrieved, brought an action against the defendant for specific performance and for sale of the said plots to a third party.

[145] It was held by the Court of Appeal that the purchaser was entitled to specific performance in spite of the ten years' delay as, first, the time for completion specified in the contract was not of the essence of the contract. Second, the purchaser was not barred by laches since he had an equitable title to the said plots in virtue of the fact that he had entered into possession of them on the basis of the terms of the contract. Third, the purchaser had not abandoned the contract.

[146] In the course of his judgment, Denning, LJ, with whom his brethren said,

> *"It is said by counsel for the vendor that time was of the essence of the contract of May 1946, and that, if the purchase of any plots was not completed within the two years then stated there could be no further claim in respect of any plots. He said that it was a commercial transaction and that, therefore, time should be considered of the essence".*

Denning, LJ in rejecting that proposition said he could not agree to that argument as the parties had put forward the period of two years as their target for completion. Says Lord Denning: "Our legal procedures is well adapted to meet such a situation. If either side wanted to bring the other side up to the work, all he had to do was to give him reasonable notice requiring him to complete. Neither side did so and therefor time is not by itself a bar to an action".

[147] As to the argument based on delay, or laches, His Lordship said "… when the deposit was paid, there was a binding contract – binding on the vendor – whereby he let the purchaser into the land for the purpose of erecting the buildings. It was binding even though the vendor kept the cheque in his pocket. It was a contractual licence which the vendor could not repudiate at will. It created an equity. The purported repudiation by the vendor … was entirely inoperative". For, according to the Court of Appeal, the purchaser did not accept the repudiation, though he had stopped building, he had not taken down his fence, he still remained in possession of the land, he having an equity to remain there.

[148] According to Denning, LJ, in answer to the proposition that the vendor, having repudiated the contract, then the purchaser ought to have taken the vendor to court, especially in view of the fact that time had elapsed without is doing so,

> *"Once the purchaser went into possession of the land, having eh contractual right to be there, he had not only an equity to be there … He had the benefit of a contract to sell him these two plots. That was not only and equity: it was an equitable interest in the land".*

The law then is as laid down by the Court of Appeal is that the fact of possession is enough and that laches or delay is not a bar to the action.

[149] Hodson, LJ was content to rely on an extract from Fry on Specific Performance:

'Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got an equitable estate, so that he object of his action is only to clothe himself with the legal estate time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court …".

Does the claimant have a valid claim to adverse possession?

[150] Here I begin by quoting Section 3 of LOAA. It reads:

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

[151] It seems then on the basis of this section that a claimant has 24 years from the date when possession was no longer pursuant to a valid contract. That this is so stems from the fact that LOAA prescribes a limitation period of 12 years next from the date on which the right of action accrued, for actions to be filed for the "recovery of land" which include declaratory relief for adverse possession.

[152] For adverse possession, this "right of action" only accrues when one has been in undisturbed occupation adverse to the owner for 12 years. It at the 12 year mark that a squatter can sue for possession. In other words, a squatter cannot sue for adverse possession at say, years 1, 2,3 … or the 11th year of his possession. It only at year 12 that this right of action arises.

[153] The statute then goes on to give a further twelve years that is to say, "12 years next after the right has accrued to file the action." This amounts to 24 years from the date when possession was no longer pursuant to a valid and binding agreement and this would be when the contract was repudiated.

[154] In this case, in order for Dr. Dixon to succeed under adverse possession, it is

irrelevant that he was first let into possession under some agreement with the owner. Had the agreement subsequently lapsed, but he nevertheless continued in possession without any interference from the owner, then, his possession would be adverse to that of the owner's title.

[155] Further, the fact that Dr. Dixon was willing to and even offered to make payments during the period, does not in any way serve to defeat the accrual of his right in law.

[156] In **JaPye (Oxford) Ltd and another v Graham and another** [2202] UKHL 30, 47, the facts are:

Between 1975 and 1977 the first claimant acquired a substantial area of farmland that included the disputed land. It had always been the claimant's intention to hold the disputed land until planning permission could be obtained for development. In 1982 G and his parents acquired the farmland. The father was granted a grazing licence to use the disputed land in 1983 and licence to cut hay in 1984. A request for a further licence in 1985 was unanswered, and there was not communication between G (and his father) and the first claimant until 1997. Between 1985 and 1994 G carried out agricultural operations on the disputed land and used for grazing purposes. It was farmed together with the rest of the farmland. In 1985 the second claimant, a wholly-owned subsidiary of the first claimant, acquired the disputed land by a transfer. G and his wife were the registered proprietors of the disputed land in 1992. In June 1997 G registered cautions against the claimants' title claiming title to the disputed land by adverse possession. He later died. In April 1998 the claimants issued an origination summons seeking cancellation of eh cautions and other relief. In January 1999 the claimants commenced proceedings against the defendants, administrators of G's estate, seeking possession of the disputed land.

[157] The Court held, *inter alia*, in giving Judgment for the defendant that:

"…an order made by a squatter to an owner to pay rent or take a tenancy

> *is an acknowledgement of the owner's right to require the squatter to vacate the land (if the limitation period is still running), but it is not inherently inconsistent with the squatter being in actual possession of the land, or with the squatter having the requisite animus possidendi. Once any licence under which a squatter has occupation expires, if the squatter remains in occupation, his possession is capable of being "adverse". The mere fact that a squatter communicates his preparedness to take a licence does not by and of itself, prevent time running in the squatter's favour. However, that fact may assist an owner whose contention is that the squatter did not have the requisite animus possidendi at and around the time the request was made. The earliest date when the limitation period began to run in favour of the defendant was 31 August 1984, when the hay-cutting licence had expired": See also* ***Recreational Holding (Jamaica) Ltd (Appellant) v Lazarus (Respondent) (Jamaica)*** *P.C. No. 0089 of 2015*

[158] In the case at bar, no contention is made by the First Defendant that Dr. Dixon did not possess the required animus. It is implied from his continuing in possession after the repudiation of the agreement, without making any further payment on the sale and is not affected by the fact that his attorney-at-law was offering to make payment. The First Defendant's contention is that Dr. Dixon breached the agreement and that the matter is statute-barred. It cannot now be maintained that Dr. Dixon was not let into possession. Further, it cannot now be disputed that Dr Dixon installed his own fence. It is the evidence of Mr DePaul whose disinterested evidence on this point shows, that the fence which was installed by Mr. Runte was torn down a year after it was installed. Having regard to the fact that Mr. Runte and his wife left the island within a matter of months of the sale and that Mr Runte died overseas and no evidence was led to show that he had returned to this jurisdiction, the fence being referred to by the Caretaker, Mr. Nollis McNeish, as being on the property today is, in all probability, not the same fence which was initially erected by Mr. Runte. In fact the evidence of Mr. Anthony DePaul completely contradicts that of Mr. McNeish in respect of the fence and is preferred on that score to that of Mr. McNeish.

[159] The fact is that Dr. Dixon had full possession and control of the property throughout the years. That this is so is borne out by the fact that he not only paid the land taxes but also from the fact of him getting the police to remove the container which Mrs. Runte had placed on the land.

[160] Another curious fact is that Mr McNeish gave no evidence of his being on the land when the container was removed. His witness statement glaringly omits any mention of him even knowing of the removal of the container from the property or him being present or anywhere near the land at the time of its removal. Mrs. Runte's clear record of inaction with respect to the land between 1987 through to 2007 rather supports the fact of possession by Dr. Dixon.

[161] As is noted elsewhere in this judgment, the Second Defendant was added to the proceedings pursuant to an order of Brooks, J (as he then was) which said order was unsuccessfully challenged in the Court of Appeal. The order in part reads:

> "1. Mr. Anthony DePaul shall be added as a Second Defendant to the claim;
>
> 2. Mr. Anthony DePaul shall file and serve his defence to the claim any ancillary claim on or before 12th October 2008 …"

[162] It will suffice here to remind that Mr. Anthony DePaul's interest in the disputed property is by virtue of an agreement dated the 10th day of March 1984 between himself and Mr. and Mrs. Runte for the purpose of property at Point, Hanover, registered at Volume 538 Folio 85 of the Register Book of Titles. The purchase price was in the amount of US$42,000.00. The agreement which was subsequently reduced to writing revealed that all three parties would enter into a partnership to develop the property and that the partnership would be registered in the name of a company to be formed. Further, that Mr. Anthony DePaul would hold 50% of the property and the First Defendant and her husband would hold the remaining 50%. Mr Anthony DePaul paid the sum of US$12,000.00 pursuant to the agreement.

[163] The First Defendant and her husband registered the property in their joint names only. In consequence Mr. Anthony DePaul caused a Caveat to be lodged against the property. However, having learnt about the Claimant's "purported purchase" of the subject property, Mr Anthony DePaul did nothing further.

[164] What essentially the Second Defendant seem to be relying on is the purport and affect of the Caveat. In this regard, I recur to the cast of the submissions and

arguments of the Second Defendant:

a) Whether the Runtes held the property on a constructive trust for him;

b) Whether a constructive trustee can claim property by way of adverse possession;

c) Whether a constructive trustee can sell trust property for his/her benefit;

d) Whether Barrington Dixon had actual knowledge of Mr DePaul's interest in the property; and,

e) Whether specific performance can be granted in circumstances where it is found that there is a previous competing interest in the property for which specific performance is being sought.

[165] The Claimant in responding to the above has pointed out, first, that a Caveat is not a claim, action or interest in land.

[166] This I accept is the law and I will seek to add no gloss to it.

[167] Second, the Claimant has pointed to the fact that there is no claim before this Court by the Second Defendant, and therefore, by extension, there is no claim on which the Court can pronounce judgment on the Declarations and Orders being sought by the Second Defendant. This is, in my view, a formidable point.

[168] In this regard, the Claimant trenchantly advances that the Second Defendant has not cited any authority which would empower this Court to make the declarations. Neither has the Second Defendant, according to the Claimant, cited any authority where he court has created, declared, or found that a constructive trust existed in favour of a defendant, who had no claim before the court.

[169] Accordingly, by virtue of the above, the absence of an ancillary claim, and the omission by the Second Defendant to file one, then the pleas of inadvertence by the Second Defendant, cannot avail him at all. Viewed as such, the Claimant close, first, that there is no basis on which Dr. Dixon's claim can be defeated by a defence of constructive trust. That this is so, she maintains, even if this Court were to find that Dr. Dixon was not a bona fide purchaser for value without notice

and that though he had notice of the constructive trust that trust had long been extinguished through the operation of LOAA. That being the case there was therefore no legally sustainable competing claim against Dr. Dixon.

[170] Second, given the assertion submission of Mr. DePaul, that the constructive trust arose in 1984; that he discovered the breach of the said trust by the Runtes in November 1984; that the limitation period for a breach of constructive trust is 12 years, then Mr. DePaul's claim should have been filed by the latest by 1996, that is 1984 plus the 12 years limitation period allowed by LOAA.

[171] Third, the Claimant rebukes Mr. DePaul's submission that his claim that a constructive trust had arisen it being based on the assertion that it would have so accrued to him in 2007 when he first became aware of the purported sale of the land to the Claimant, is not maintainable. This argument flounders against the principle that time begins to run from the date of the breach of the constructive trust in 1984 and not from the date of sale of the land to a stranger to the trust.

[172] I am to say that the range of arguments offered in counterpoint by the Claimant comport with the requirements of the law and I adopt them in determination of the points as raised.

[173] As to the submissions being relied on by the Second Defendant as establishing a constructive trust between himself and the First Defendant and a stranger to the trust in the form of the Claimant, I now turn to the case law authorities as supplied by the second Defendant.

[174] In **Bonner Holmes v Luff Developments**, supra, the injured party filed an action where a declaration was sought that a constructive trust was created in his favour. In granting the declaration the Court ordered the First Defendant to give shares in the company – not land – to the Plaintiff. The Court adopted and embraced dicta in an earlier case, **Pallet of Morgan**, that it is not the Courts role to give the parties something which was not agreed between them.

[175] In the instant case, as is noted elsewhere, the Second Defendant has not filed an action or suit in staking his claim. Even so it is useful to highlight that what Mr. DePaul is seeking is a direct interest in the property whereas what his agreement with the Runtes was about were shares in a joint venture company. Thus, applying the derived **Bonner Holmes** principle, I am to say that it is not my role or indeed the Court's to give to Mr DePaul something which was not agreed between them.

[176] Again, the principle which the Second Defendant has sought to mine from the case law authority of **Thomas Dering**, supra, is I think, inapposite. In that case the Vendor had a life interest in property that was subject to sale which meant he had no power, under law, to sell, he having no fee simple interest in it. Simply put, he could not convey what he did not possess. Thus, the consent of the

trustee was required. It is not unsurprising that in those circumstances the Court found that the Vendor could not have completed the sale and accordingly refused to grant specific performance.

[177] To pass from the above it is to noted that in the instant case the Runtes were possessed of a fee simple interest in the property and had the authority and power not only to sell the property but also to complete the sale without the need to refer to the Second Defendant. Even moreso, Mr. DePaul is not even a trustee of the property in addition to which he has not filed a claim for this Court to so declare him.

[178] I agree with the Claimant's submissions that the Second Defendant's defence must fail. With respect to the First Defendant I have discerned no response by her to the claim of the Second Defendant that both she and her deceased husband had the land for him in their capacities as constructive trustees.

[179] In returning to the submissions of the Second Defendant and his reliance on the decision in **Rose Marie Samuels v J.P.S**., (supra), I am to say that, the principle enunciated therein, that is the pleas of inadvertence, cannot avail him at all.

[180] In **Baden v SocieteGenerale Pour Favoiser, le Development du commence et de l'industrieen France SA** (**Baden**) (supra), the court was occupied with the concern of what is required of a bank when it receives trust fund.

[181] The facts in brief were: the plaintiff issued a writ against the defendant Societe Generale on which they sought a declaration that they were entitled to recover a certain sum of money which the defendant bank had held for its customer in a trust account but which it had misapplied by having it transferred to another bank. The plaintiffs who claimed that the moneys belonged to them as liquidators and to others asserted that in making the transfer the defendant bank became a constructive trustee in respect of the money and were liable to them for the trust money.

[182] Peter Gibson J concluded that it is trite law that the plaintiffs must establish that the defendant owed the plaintiffs a duty of care; that the defendant committed a breach of that duty and that loss resulted from the breach of that duty. Accordingly, where a bank, such as the defendant is on notice that its customer is a beneficiary in respect of moneys in an account with the bank it owes a duty of care to the persons beneficially interested in those moneys as soon as the bank is put on such notice. In the course of a very lengthy and involved judgment Peter Gibson, J had to deal with one of the submissions made by the plaintiffs that the defendant by transferring the money from the trust account with it to another bank became a constructive trustee and was therefore liable to account to the plaintiffs for the sums of money that was transferred. The judge said that it is clear that a stranger to a trust such as the bank to which the funds were transferred may make itself accountable to the beneficiaries under the trust in certain in circumstances in equity.

[183] He accepted a quote from **Snell's Principles of Equity, 20th edition** (1982), pp 194-195; a person receiving property which is subject to a trust … becomes a constructive trustee if he falls within either of two heads, namely – (i) that he received trust property with actual or constructive notice that it was trust property and that the transfer to him was a breach of trust; or (ii) that although he receive

it without notice of the trust, he was not a bona fide purchaser for value without notice of the trust, he was not a bona fide purchaser for value without notice of the trust, and yet, after he had subsequently acquired notice of the trust, he dealt with the property in a manner inconsistent with the trust.

[184] In applying the above principle Peter Gibson J said that the plaintiffs had to prove (a) the existence of a trust in respect of the sum of money that was received by that other bank from the defendant, (b) the fraudulent and dishonest design on the part of the directors of that second bank who gave instructions to the defendant bank to so transfer the funds; (c) the assistance of the defendant bank in that design; (d) the defendant's bank knowledge of (a), (b) and (c). The knowledge according to Peter Gibson J, must be actual knowledge or knowledge which it would have obtained but for shutting its eyes to the obvious or wilful and

recklessly refraining from making such inquiries as the reasonable banker would have made from the circumstance know to the defendant bank or would have obtained from enquiries which the reasonable banker would have made, the onus being on the plaintiffs to establish that the defendant bank possessed that knowledge.

[185] He concluded that the defendant bank owed a duty in respect of the funds which it had transferred to the second bank by virtue of the trust account designation placed by the second bank on the account; that the second bank recognized that it was fiduciary and that others were beneficially interested in that account which it knew from certain agreements. However, Peter Gibson J found that though the defendant had come under a duty of inquiry that duty did not subsist up to the time when it made the transfer to the second bank.

[186] In the instant case the question is whether the Claimant is a stranger to the trust and is thus accountable to the Mr. Anthony DePaul under the trust. Such a stranger is required to conduct a search. Accordingly, part of what **Baden** lays down is how such a search is to be conducted. The short answer is that the search is to be conducted of the parent title itself.

[187] In the instant case the parent title itself, as gleaned from the documents supplied, shows certain undeflected facts in respect of titles splintered from it:-

a) The transfer number;

b) The date of the transfer;

c) The area of land that is cut off;

d) The price paid for that cut-off area of land or whether it was a fit or an exchange;

e) The grantee or recipient of the splinter title;

f) The volume and folio number of the splinter title;

g) The signature of the Registrar of Titles; and

h) Any other remarks of the Registrar

[188] Perhaps through oversight or otherwise the Registrar of Titles failed to endorse on the parent title a separate title which ought to have reflected that it was splintered off to the Runtes. Thus, the search done by Dr. Dixon of the parent title, as attested to by him and as mentioned in the agreement for sale availed him nought. However, this cannot be divorced from the actions of the First Defendant and her deceased husband because they as Vendors wittingly or unwittingly failed to disclose the correct Volume and Folio numbers for their title. It will not escape attention that that though the description of the property on the title is correct, the Vendors failed to disclose that their portion had been cut off and had now formed part of a separate title at Volume 1154 Folio 270 of the Registrar Book of Titles and not that of its parent title which is registered at Volume 530 Folio 85.

[189] While I am prepared to say that as between the First Defendant and the Second Defendant that there existed a trust between them in respect of the money paid over by the latter to the former, I fail to see how the stranger to the trust, the Claimant, for the reasons advanced in paragraphs 158-159 could be made accountable to Mr. Anthony DePaul.

[190] The Second Defendant's only recourse is against the First Defendant for the money which he had entrusted was entrusted to Mr. and Mrs. Runte. I say nothing as to its recoverability.

[191] I come now to the question of whether the Caveat as lodged by the Second Defendant against the property in question can be regarded as a claim in law.

[192] To answer this question I go to Sections 63 and 139 of the Registration of Titles Act. Section 63 deals with the effect of registration or non-registration of instruments as affecting lands brought under the Act. It reads:

> *"When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual is to pass any estate or interest in such land, or render*
>
> *such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument.*
>
> *or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the /registrar for registration, the Registrar shall Registrar and endorse that instrument which shall be presented by the person producing the certificate of title."*

[193] Section 139 deals with Caveat against dealings. It reads:

> *"Any beneficiary or other persons claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form of the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat.*

[194] As will become apparent a person in the position of the Second Defendant who is claiming a right to land, under an unregistered instrument, (such as the caveat) has no estate or interest in the land. What he has by virtue of the caveat is a claim to some estate or interest, and the lodging of the caveat forbids the

registration of any instrument affecting the estate or interest in which the caveator has a claim, for a certain period.

[195] What the Caveat does it to afford the Caveator some statutory protection of his unregistered interest until the status of his claim is judicially determined. It does not purport to give the Second Defendant any interest in land. The status of such a caveator was made clear by the Judicial Committee of the Privy Council in **Registrar of Titles**, **Johore, Johore Bahru v Temenggong Securities Ltd and Another** (supra), it reads at p. 300:

> *"The purpose of a private caveat is to preserve the status quo pending the taking of TIMEOUS steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts. If the person whose land or interest in bound by the caveat applies to registrar for its removal, the registrar must remove it at the expiry of a month unless the court upon the application of the caveator orders otherwise. Any person aggrieved by a private caveat may apply to the court at any time for an order for its removal. The registrar's function in relation to the entry and removal of private caveats are ministerial only. He is not concerned to enquire into the validity of the claim on which an application for a private caveat is based; and a person who secures the entry of a private caveat without reasonable cause is liable to compensate anyone who suffers loss or damage as a result of such entry".*

[196] In **Eng Mee Yong and others and V Letchumanan s/o Velayutham (P.C.),** supra, is confirmation of the above principle by Lord Diplock:

> *"The caveat under the Torrens System has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. The Lordships accepts this as an apt analogy with its corollary that caveats are available, in appropriate case, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless, their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued ex parte by the registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all".*

[197] Lord Diplock went on to say:

> *"In the Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e., the caveatee)*

> *and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat …"*

[198] Here it will be observed that the Second Defendant does not fall within the foregoing categorisation as he is not a registered proprietor and the agreemet was for the land was to be placed in the name of a company to be formed. He therefore falls within the second limb of that distinction, and therefore he is obliged to bring an action against the Caveatee in order to establish his claim to the land.

[199] The Claimant has sought to rely on the Court of Appeal decision in the case of **Helga Stoeckert v Paul Geddes**, (supra), which also illustrates the point relating to the nature of the caveat and the position in which the undeclared interest of a caveator places him in a suit.

[200] In response to question of whether the Caveator has a caveatable interest, Langrin, J.A. (Ag) as he then was, and with whom the rest of the court agreed cited Lord Diplock dictum referred to above.

[201] To date the Second Defendant has not taken any steps to have the Court declare or determine his claim to an interest in the land in question. This could only be done by an ordinary action brought by the Caveator against the Caveatee for that purpose.

[202] No such action is before this court. What the Second Defendant has done is to use his witness statement as a cause of action. It is only by virtue of that document, that he is seeking relief from the court for a 50% share in the subject property.

[203] The failure by the Second Defendant to file the action or an ancillary claim is telling. He ought to have known that it would be met by a limitation defence that the action is statute barred or is defeated by laches. It is now thirty (30) years since the Second Defendant became aware of the breach by the First Defendant

and her husband of the alleged partnership agreement.

[204] Further, his witness statement does not disclose any reason for his failure to take legal action.

[205] Finally, argues the Claimant, the agreement entered into by the Second Defendant with the Runtes did not provide for him to get an interest in the property. In this respect the Claimant says that it is important to look at the terms of the said partnership agreement. It is submitted that it specifies that –

a) First, it is the intent of the parties therein to enter into an agreement for the purchase and development of a certain parcel of land located in the country of Jamaica for the purpose of subsequent development thereof.

b) Second, the parties shall enter into a partnership for the purchase and development of [the land].

c) Third, the parties hereto have made a capital contribution for the purchase of the said parcel in the amount of US$42,000.00 as follows:

I. Charles Runte and Angella Runte $21,000.00

II. Anthony DePaul $21,000.00

d) Fourth, it is the intention of the parties hereto to form a corporation in the Country of Jamaica.

e) Fifth, the amount and the value of the aforesaid capital shares of stock shall be determined by the parties hereon and Charles Runte and Angella Runte shall be entitled to receive one half (½) of the capital shares of stock and Anthony DePaul shall receive the remaining one half (½) share of capital stock.

f) Last, it is acknowledged by the parties hereto that all capital contributions for the purchase of and development of the aforesaid parcel of land shall be borne equally by the parties hereto and any subsequent proceeds or profits shall be divided equally hereto.

[206] This Claimant in her continuing observation makes the point that there was no intention that the land should be purchased in the names of the parties or for either of the parties to hold an interest in the land.

[207] The Second Defendant's interest was expressly stated to be an interest in company shares, interest in the proceeds of sale or the proceeds of a development or joint venture partnership. The Agreement specifically identifies the Second Defendant's share in the investment not by reference to an interest in land, but by reference to shares in the capital stock of the company, that is one half (½) capital stock to the Second Defendant and the remainder to the First Defendant and her husband.

[208] Again I find that that these arguments of the Claimant to be compellingly clear and formidable and I accept them as definitive if not, determinative of the Second Defendant defence. I do not see anything from the other parties to suggest these facts or derivative facts are untenable.

[209] In the final analysis I am to say that my interpretation of the law accords with that of the Claimants. Thus, on the issue of specific performance and taking into account the application and ramification of the Limitation of Actions Act I accept the Claimants submission.

[210] In respect of the submissions and on the facts concerning adverse possession, I accept that Dr. Dixon had the necessary *animus* as was reflected by his continuing in possession of the land after the repudiation of the agreement by the First Defendant, (the fact of his not making any further payment on the agreement and that he as offering to make payments thereunder notwithstanding)

[211] In respect of the claim by Mr. Anthony DePaul against the claimant I am to say that there is no claim before this court through which I can grant the relief which he seeks.

[212] As to Mr. DePaul's claim against the First Defendant I find that there was no intention that the land should have been purchased in the joint names of the Runtes and himself in order to vest him with an interest in the said land. Mr. Anthony DePaul's interest was one that was in the prospective formation a company by the Runtes and himself.

[213] Up to the time of the delivery of this Judgment I am yet to receive from one side, at the request of this court, responses in respect of certain submissions and case law authorities made by the Second Defendant. A note to the Registrar to that effect has failed, in one party only, to chair the courtesy of a reply.

[214] Accordingly, whatever claim he has against the First Defendant cannot be in relation to the land and must find its expression in some other legal recourse

1) I therefore say that on proof of the payment of the balance of the mortgage by the Claimant into court, the Defendant is to specifically perform the agreement to sell all that parcel of land registered at V.1154 Folio 270 of the Register Book of Titles.

2) In the alternative I hereby declare that the Claimant is entitled to the land as described above in virtue of the principle of adverse possession.

3) I also order that the transfer and any other document including an application to note the death of Mr. Charles Runte, the joint proprietor required to complete the sale be signed by the Registrar of the Supreme Court on behalf of the Defendant subject to the proof of payment of the balance of the mortgage into Court by the Claimant.

4) I order that on proof of payment of the outstanding taxes and duties on the said land the Registrar of Titles is entitled to cancel the existing Certificate of Titles and to issue a new title pursuant to the Registration of Titles Act.

5) The successful Claimant is to have her costs agreed or taxed against both respective defendants.