JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 8/003

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.(Actg.)

BETWEEN:	**IRIS LUNGRIN**	**DEFENDANT/APPELLANT**
AND:	**PAUL MONELAL & OLIVE VALENTINE**	**PLAINTIFFS/RESPONDENTS**

Leon Green instructed by Leon Green and Company for the Appellant

Jacqueline Samuels-Brown instructed by Yvonne Ridguard for the Respondent

July 8, 9, 10, 2003 and April 2,2004

DOWNER, J.A:

Introduction

The issue on appeal is whether the Resident Magistrate for Portland, His Honour Mr. Bertram Morrison, ruled correctly that Paul Monelal and Olive Valentine the plaintiffs/respondents on appeal were entitled to recover a parcel of land which they claimed as part of their property. The order of the court below, in so far as material, states:

> "1. Judgment for the Plaintiff, the Defendant to vacate premises part of Titchfield Trust Lands in the parish of Portland, being part of the Lot numbered 453 on the Plan of Titchfield Trust Lands, deposited in the Office of Titles on the 1st day of March 1960 and

> being the lands registered at Volume 1062 Folio 938 of the Register Book of Titles, on or by the 13th day of May 2002."

It is arguable that the order of the Court recognized that the appellant was in possession. So the crucial question ought to have been, how long had she been in possession and on what terms? Iris Lungrin, the defendant, (the appellant) was aggrieved by that order and has instituted proceedings in this Court to reverse it.

The History

In order to appreciate the two important issues of law which emerged on appeal it is necessary to recount what happened during the lifetime of Elma Ivey, the initial registered owner of the entire estate in fee simple. She purported to transfer a square of land, a part of her estate to the appellant by way of a deed of gift. This deed, at page 30 of the Record was never stamped or registered, although it was signed by her and the appellant, Iris Lungrin. The purported gift was made on 30th January 1976 because the appellant cared for Elma Ivey who was getting on in years.

In this context the following statement of principle by Lord Westbury L.C. in **Dillwyn v Llewellyn** E.R. Vol. XLV 1285 at 1286 is important. It states:

> "About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to

> claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage settlement of B., A. would be bound to complete the title of the parties claiming under the settlement. So if A. puts B. in possesssion of a piece of land, and tells him, 'I give it to you that you may build a house on it., and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement not binding originally for the want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance. The early case of **Foxcroft v. Lester** (2 Vern. 456), decided by the House of Lords, is an example nearly approaching to the terms of the present case."

It is also important to cite two paragraphs from the case of **Goomti Ramnarace v Harrypersad Lutchman** Privy Council Appeal No. 8 of 2002 delivered 21st May 2001. Lord Millett said:

> "18. In the present case the appellant was allowed into occupation of the land as part of a family arrangement and at least in part as an act of generosity. But not wholly so, for the appellant testified that the intention of the parties was that she would buy the land when she could afford to do so, and the judge accepted her evidence. Her uncle was generous in that he allowed her to remain indefinitely and rent-free pending her purchase, and in that he did not press her to negotiate. But a tenancy at will commonly arises where a person is allowed into possession while the parties negotiate the terms of a

> lease or purchase. He has no interest in the land to which his possession can be referred, and if in exclusive and rent-free possession is a tenant at will. In **Hagee (London) Ltd. v. AB. Erikson and Larson** [1976] QB 209 at 217 Scarman LJ described this as one of the "classic circumstances" in which a tenancy at will arose."

It will be essential to ascertain if the appellant, Iris Lungrin, was a tenant at will. What is not in dispute is that the appellant was given permission to live on the land and it seems she put up a structure from 1978 for her accommodation.

The transfers from Elma Ivey, recorded in the Register Book of Titles Volume 1062 Folio 938 were firstly to the executors, then to the beneficiaries then to the respondents, Paul Monelal and Olive Valentine as purchasers. Here is how the transfers were recorded at page 19A of the Record:

> "Transfer No.16527 entered the 27th day of July, 1987, all estate and Interest, of ELMA IVY to WESLEY DRYDEN, of 12 Boundbrook Road, Port Antonio, Portland, Stevedore and LAWRENCE FERGUSON, of 20 Boundbrook Avenue, Port Antonio, Portland, Banana Selector, on the 26th day of March, 1980.
>
> for Registrar of Titles
>
> Transfer No. 461743 registered the 27th day of July. 1987, to BEATRICE GRANT and CARROL GALLIMORE, of 6 Norman Road, Port Antonio, Portland, cook and Nurses Aid respectively as Tenants-in-common. Consideration in pursuance of the devise contained in the will of ELMA IVY deceased.
>
> for Registrar of Titles

> Transfer No. 895079 registered on the 12th day of March, 1996 to PAUL FELIX MONELAL and OLIVE VALENTINE both of 3 Richmond Hill Road, Port Antonio, Portland, Seaman and ....Assistant respectively as Joint Tenants. Consideration money Two Hundred Thousand Dollars.
>
> For Registrar of Titles."

The Certificate of Title reads as follows at page 19 of the Record:

> "Certificate of Title under the Registration of Titles Law, Chapter 340
>
> ELMA IVY
> of 1 Boundbrook Crescent, Port Antonio in the Parish of Portland, Housewife
>
> is now the proprietor of an estate in fee simple subject to the incumbrances notified hereunder in ALL THAT parcel of land part of TITCHFIELD TRUST LANDS in the parish of PORTLAND being the Lot numbered FOUR HUNDRED AND FIFTY-THREE on the Plan of Titchfield Trust Lands aforesaid deposited in the Offices of Titles on the 1st day of March 1960 of the shape and dimensions and butting as appears by the Plan and being part of the land comprised in Certificate of Title registered at Volume 968 Folio 492 which said parcel of land was transferred by Transfer numbered 60009 produced for registration on the 14th day of February 1970 and this Nineteenth day of February One Thousand Nine Hundred and Seventy."

This brief history is enough to state the first issue of law debated by counsel. The issue was whether the respondents, as registered owners, were entitled to recover possession from the appellant on the basis that they could successfully resist the claim by the appellant that she had acquired a title to the disputed parcel of land by adverse possession. That part of the land

claimed by the appellant was described thus in the "deed" at page 26 of the Record:

"S C H E D U L E

Description of land) ALL THAT parcel of land part only of Lot N0. 453 of TITCHFIELD TRUST LANDS situate at 6 Norman Road, Port Antonio in the Parish of Portland comprising approximately One Square AND BEING part of the lands comprised in Certificate of Title registered at Volume 1062 Folio 938."

This is how the Resident Magistrate stated the law on the issue of adverse possession at pages 33-34 of the Record:

> "**Moses v. Lovegrove** [1952] 1 ALL E.R. 1979 is cited as authority for the principle that where one occupies land with the permission or agreement or grant of another then that possession is not adverse to that other. In that case Romer LJ was of the opinion that if one looks to the position of the occupier of land and finds that his right to occupation is derived from the owner in the form of permission or agreement, or grant, it is not adverse.
>
> This opinion as espoused was obiter dicta but certified into principle in the case of **Hughes v. Griffin and another** (1968) 1 All E.R. 460 in which the leading judgment was delivered by Harman L.J. after making reference to the obiter dicta of Romer L.J. as quoted above he said, 'those observations were no doubt obiter but they are of persuasive authority... I think they were right"

The learned Resident Magistrate continued his reasons by stating:

> ". . . the deed of gift being a grant of land to the Defendant that her possession of the land cannot be regarded as adverse and thus time could not have begun to run against Elma Ivey. It follows that time did not begin to run against the Plaintiffs until March 1991 that is the conclusion of the purchase of the land."

It was common ground in this Court that the deed dated 30th January, 1976, failed. As for the contract of sale it was entered into on 9th November, 1989, and the transfer was registered 12th March 1996.

An essential but missing step in the learnend Resident Magistrate's analysis is his failure to consider if the appellant, Iris Lungrin, was a tenant at will by operation of law. A caveat was lodged 31st July, 1995, by the appellant. There was an earlier caveat of March 1991 lodged by the respondents. As for the second issue of law it was never expressly raised in the Court below despite section 150 and 151 of the Judicature (Resident Magistrates) Act. However Mr. Green, for the appellant, submitted in this Court that having regard to the evidence adduced by both parties concerning the structure on the land, built by the appellant, the Resident Magistrate ought to have found that she had an equity in view of the rule in **Ramsden v Dyson.**

The relevant evidence is to be found at page 14 of the Record where Olive Valentine the respondent said:

> "Carol Gallimore was the owner of the land. Edgar Hall was the agent, Mr. Grossett was the lawyer who did the sale.
>
> The land was bought for $200,000.00. A sum of $100,000 was paid on 9/11/89 and the other $100,000.00 on 15/3/92
>
> By consent agreement for sale, tendered and admitted in evidence as Exhibit 6 I signed the agreement for sale. My son did not sign the agreement as he was not there at that time. I did not know Miss Lungren before I bought the land.
>
> Carol Gallimore told me that she was living on the land before I bought the land. Carol told me that she got the spot to make a board house and not a concrete structure. When I paid for the land I saw the structure the Defendant had on the land. It was a board house when I bought it. Today the structure is mixed board and concrete. She has now built a sewer pit. I did not agree to her getting a spot on the land to lease as I had to put it to my son. She had never come to me about it."

Carol Gallimore was a beneficiary under the will of Elma Ivey.

As for the evidence of the appellant, Iris Lungrin she said at page 15 of the Record:

> "I live at 6 Norman Road and it belongs to me. The area is ¼ of an acre. I have a house on the land. I put up this house. The land was given to me by my cousin. She is Elma Ivey nee McLean. I took care of my cousin. Ivy gave me one square of land she gave it to me from January 1976. We both went to Mr. Grossett and signed a paper."

She further stated at page 16 of the Record:

> "I have a three apartment concrete house on the land. I have a little board shop out by the gate. You sent me a notice about a board shop not about

concrete structure. I got a notice from you in 1994 in which I was not to put up any structure on the land.

Suggestion: The house you have there now has not always been made of concrete

Answer: Yes.

I built the board shop somewhere about 1995. I am not sure. I don't agree with you that when your clients purchased the land that they did not know that I had an interest in the land."

As for the finding of the Resident Magistrate on this aspect, it was submitted that in the light of the evidence the following findings at page 32 of the Record were significant:

"...

3. At the time of the acquisition of the land by the Plaintiff the Defendant was then living on a part of the said land to the knowledge of the Plaintiffs

4. By way of an unstamped and (unregistered) deed of gift dated 30/1/78 Elma Ivey the predecessor in title of the disputed land gave to the Defendant Iris Lungren one square of land being part of the land comprised in Certificate of Title registered at Volume 1062 Folio 938.

5. In 1993 or earlier the parties to this action along with Ms. Carol Gallimore met at Mr. Ian Grossett's office and conducted a "round-table" discussion in which the second plaintiff enquired of the Defendant's presence on the land. That, Ms. Gallimore responded by saying that Elma Ivey her mother gave Iris Lungren permission to be on the land as she had been looking after her mother. That Mr. Ian Grossett participated in the discussion and confirmed what Ms. Gallimore had said. That consequently the Plaintiffs lodged a

> Caveat on March 1991 to protect their interest (Exhibit 3) and the Defendant countered by doing the same in 1995 (Exhibit 4)."

With respect to evidence conducted at the "round-table" here is the evidence of Paul Monelal, the first respondent, at page 11 of the Record:

> "I knew Lungren was living there when I bought the land. When I got the title for the land she was still on the land. I spoke to Miss Carol Gallimore about Miss Lungren. Present were Mr. Grossett, Barbara Ellis (my cousin and agent) and Miss Lungren. It was like a round table talk. She was around the table. I spoke normally. I wanted to know concerning that I had bought the place whether she was going to stay on or get off. Gallimore told me that Lungren used to take care of her mom before she passed away and that her mom allowed her to stay in a board structure at the back. I don't recall if Lungren said anything in response to what Gallimore said. Under the terms of the agreement I was to have possession in 1993 or 1994. I got possession of the place before I got the title."

Under cross-examination the appellant Iris Lungrin gave the following evidence at pages 15-16 of the Record:

> "I remember going to a round-table meeting with Paul Monelal at Mr. Grossett's office in 1994. Carol was there. Mr. Grossett was present. Barbara was not there.
>
> Suggestion: At that meeting Galimore told Monelal in your presence that you were taking care of Mrs. Elma and that she allowed you to stay in a board structure at the back on the land
>
> Answer: No.
>
> They did not discuss what position I hold on the land. My occupancy of the house on the land was not

discussed. Miss Valentine had invited me to be at the meeting. She was then working at the Port Antonio Infirmary. Mr. Grosett told Paul that a part of that land is mine so that a part of the land had to be cut off.

Not so that Galimore said at the meeting. I was taking care of Miss Elma and that she allowed me to stay in a board building to the back of the land. I have never spoken to Miss Olive about this land.

Suggestion: Mr. Grossett never told Mr. Monelal in our presence that a part of the land belonged to you.

Answer: Yes, he said so."

It is against this background that the issues of law raised in the Amended Grounds Of Appeal must be considered.

The grounds of appeal

Grounds 1 and 3 of the Amended grounds of appeal read at page 3 of the Record:

"1. The Learned Magistrate erred in law by failing to give any or any adequate consideration to the defence, namely, that the Plaintiff's action was barred by operation of Section 3 of the Limitation of Actions Act.

. . .

3. The Learned Magistrate erred in law in holding that time for the purposes of the operation of the said Act did not begin to run against the Plaintiffs/Respondents until March 1991."

Before considering the statutory provisions and authorities I would like to pay tribute to the research and outstanding advocacy of Mr. Leon Green and Mrs. Jacqueline Samuels-Brown which have been of great assistance to me

in this difficult area of law. Mr. Green based his submissions on sections 3, 4,9, and 30 of the Limitations of Actions Act ("the Act") and section 68 of the Registration of Titles Act. The submissions of counsel for the appellant would have been more compelling if **Chisholm v. Hall** (1959) 1 W.I.R. 413; [1959] 7 J.L.R. 164 on the issue of possesory title had been cited on her behalf.

An excellent statement of principle on this aspect of the law is to be found in the opinion of Lord Browne-Wilkinson at page 6 of **Charles Gardener and Inez Walker v Edward Lewis** Privy Council Appeal 25 of 1997, or (1998) 53 W.I.R. 236 at 240 which runs thus:

> "On the other side, it may be that, when the facts are known, the appellants obtained registration of their title on the grounds that they had acquired title by adverse possession against Alice Gardener during her lifetime or against her estate after her death. On that basis, the appellants would have obtained a title paramount to that of Alice Gardener and therefore paramount to any claims arising under her will. On this view, the appellants' registered title would be unchallengeable save on the grounds that they had obtained it by fraud."

The Certificate of Title referred to earlier shows that the parcel of land of which the disputed square is a part, was registered on 14th February 1970, in the name of Elma Ivey. Consequently, sections 68-70 of the Registration of Titles Act are applicable. Section 68 reads:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the

> provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

The crucial phrase in relation to the issue to be decided in this case is:

> ".. . and shall, subject to the subsequent operation of any statute of limitations."

To appreciate this phrase section 70 of this Act is pertinent. I will refer to my judgment in **Anita Grant v Crystal Court Development Co. Ltd. and Ors.** S.C.C.A. No. 77/89 (unreported) delivered November 28, 1991, which reads at pages 11-13:

> "(Section 70) 69. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Law might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Law shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title

> or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this law under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment of user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessment, quit rents or taxes, that have accrued due since the land was brought under the operation of this law, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument." (Emphasis supplied)

To interpret properly the effect of Section 70, Sections 68 and 70 must be harmonized. The emphasized words in Section 70 resolves the seeming ambiguity in Section 68 and so gives the scope of the statutes of limitation as regards registered land. The scope has been set out with precision by Lord Jenkins at p. 175 in **Chisholm v. Hall** (supra) and it is necessary to quote it as it explains the effect of the emphasised words in Section 70. It also governs this case.

> 'The scheme of section 69 now (70) is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any

> rights of that description, but from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certification, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers section 88 which provides that the transferee shall be 'subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor.' This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor, and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the 'deeming' provision of section 69 now (70) is applicable'."

Since "incumbrance" and "adverse possession" are adverted to in this judgment it is helpful to cite section 3 of the Registration of Titles Act, in part, which reads:

> "...incumbrance shall include all estates, interests, rights, claims and demands which can or may be had, made or set up, in, to, upon or in respect of the land adversely and preferentially to the title of the proprietor".

Also relevant since it shows the incumbrances which bind a registered owner such as the appellant is section 26 which reads:

> "26. A person registered under this Act as proprietor of any land with an absolute title shall be entitled to hold such land in fee simple, together with

> all rights, privileges and appurtenances, belonging or appurtenant thereto, subject as follows –
>
> (a) to the incumbrances (if any) entered on the certificate of title; and
>
> (b) to such liabilities, rights and interests, as may under the provisions of this Act subsist over land brought under the operation of this Act without being entered on the certificate of title as incumbrances, but free from all other estates and interests whatsoever including estates and interests of Her Majesty, her heirs and successors, save only quit rents, property tax or other impost, charged generally on lands in this Island, that have accrued due since the land was brought under the operation of this Act."

As to section 26(b) above it refers to sections 70 and 88 as regards to incumbrances not entered on the certificate of title. There will be references to these two sections again later in this judgment.

It would be inappropriate to leave this aspect of the Registration of Titles Act without referring to how Lord Jenkins in **Chisholm v Hall** (1959) 1 W.I.R. 413 reconciles sections 68 and 70 of that Act, then sections 67 and 69. The first method of reconciliation appears at pages 420-421. The second at page 421 is shorter and equally effective. It reads:

> "But the same conclusions can in their Lordships' view be reached by another route. The critical words in s. 67 – 'subject to the subsequent operation of any statute of limitations' – contain the first of the only two references to limitation to be found in the law. The reader is thus invited to look further to see what provisions is made later in the Law in regard to the operation of any statute of limitations, the brief

> reference to limitation in s. 67 being in itself of doubtful import. Looking further, the reader comes to s. 69 and he there finds a provision to the effect that the land included in any certificate is to be deemed to be subject to any rights acquired over such land since the same was brought under the operation of the Law under any statute of limitations, notwithstanding that such rights may not be specifically notified as incumbrances in such certificate. Having reached this point, is he not justified in concluding that the reference to limitation in s. 67 is a mere reference forward to the provision in regard to limitation contained in s. 69, and that "subsequent" in s. 67 is no more than a short way of saying what is said by s. 69 in the words "since the same [i.e., the land] was brought under the operation of this Law"? In their Lordships' view this construction, which can be compendiously described as making the word "subsequent" in s. 67 means subsequent to the date of issue of the first certificate issued in respect of the land in question, can legitimately be adopted for the purpose of reconciling the provisions of the two sections."

It is now appropriate to turn to the relevant sections of the Act to determine whether the appellant Iris Lungrin, has acquired a possessory title so as to entitle her to rely on section 30 of the Act to extinguish the respondent's title to the parcel of land in issue. It will be necessary to refer again to section 30.

Section 9 of the Act reads:

> "When any persons shall be in possession or in the receipt of the profits of any land, or in the receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry, or bring an action for the recovery of such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of

> one year next after the commencement of such tenancy at which time such tenancy shall be deemed to have determined:
>
> PROVIDED always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this section, to his mortgagee or trustee."

The first aspect to be decided is the critical phrase "a tenant at will" as Mr. Green submits that the appellant is such a tenant. Referring again to **Goomti Ramnarace v. Harrypersad Lutchman** paragraph 11 reads:

> "11. It follows that if a tenancy at will is determined during the first year the owner's right of action accrues immediately; otherwise it accrues automatically by virtue of section 8 at the end of the first year, and any later determination of the tenancy is ineffective for limitation purposes unless a new tenancy is created: see **Day v Day** (1871) LR 3 PC 751."

It is evident that the deed of gift was ineffective but the appellant, Iris Lungrin, remained in occupation of the land and put up a structure as the donor intended. There are circumstances where a tenancy at will may be inferred. In **Vida Bowes v Allan Spencer** (1976) 14 J.L.R. 215 at page 218 Graham- Perkins J.A. said:

> "Speaking of s. 7 of the Real Property Limitation Act 1833, whose provisions are identical to those of s. 9 of our Limitation of Actions Act WILDE, C.J., said in **Garrard v. Tuck** ([1847-49] C.P. 8 C.B. at p.489):
>
> 'The object of that section appears to be, to fix a definite period, at the end of which the right of entry of the lessor *as against his tenant at will,* shall be deemed to have accrued; and it provides

> that no *cestui que trust,* shall be deemed to be a tenant at will within the meaning of that clause, which is equivalent to saying that the right of entry of a trustee against his *cestui que trust,* shall not be deemed to have first accrued at the expiration of one year after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time'."

Watkins J.A. at page 219 said:

> "In **Melling v. Leak**(4) ((1855), 16 C.B. at p.669) the effect of **Garrard v. Tuck** (3) was stated thus:
>
> 'The case of **Garrard v. Tuck** (1847-49),8 C.B. 231; 18 L.J.C.P 338; 14 L.T.OS. 547, 13 Jur. 871; on appeal 8 C.B, 254; (1850), 8 C.B. 258; 19 L.J.C.P. 232 certainly supports the doctrine that a *cestui que trust* who is let into possession of the trust estate by the trustee becomes his tenant at will, and the right of entry under the 2nd section of the statute, 3 & 4 Wm. IV, c. 27, accrues only on the determination of such tenancy at will'."

On the basis that the appellant Iris Lungrin became a tenant at will by operation of law on 30th January 1976, by 30th January 1989 any action for possessiosn by Elma Ivey or her successors in title after the latter date would have failed. The summons to appear to the plaint was filed on 14th November 1996 and served on the appellant, Iris Lungrin on 19th November 1996.

Section 30 of the Act would have applied in favour of the appellant in the circumstances of this case. That section reads:

"Extinguishment of Right

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

Mrs. Samuels-Brown did not accept this analysis as she submitted that the appellant Iris Lungrin was a mere licensee. However I find that by building a house on the land she had an equity. She contended that even if she was a tenant at will, there is another factor which must be considered namely, that the respondents lodged a caveat to protect their interest on 14th March 1991 since they had acquired an equitable interest pursuant to the contract of sale dated 9th November, 1989. That contract of sale at page 29 of the Record had a special condition:

"SCHEDULE

Special conditions)	That the purchasers will Lease Iris Williams the House spot which she is at present occupying

The relevant caveat reads as follows at page 20 of the Record:

"CAVEAT AGAINST THE REGISTRATION OF ANY CHANGE IN PROPRIETORSHIP OR OF DEALING

TO: THE REGISTRAR OF TITLES

TAKE NOTICE THAT WE PAUL FELIX MONELAL and OLIVE VALENTINE of 3 Richmond Hill, Port Antonio in the parish of Portland, claim to have an estate or interest, to wit an agreement to purchase ALL THAT parcel of land being the Lot numbered 453 on the plan to Titchfield Trust deposited in the Office of Title on the 1st day of March 1960 and being the lands registered at Volume 1062 Folio 935 and we forbid the registration of any person as transferee or proprietor and of any instrument affecting such estate or interest until after notice of the intended registration or dealing be given to me or unless such instrument be expressed to be subject to my said claim.

WE APPOINT the office of Daley, Walker & Lee Hing of Nos. 114-120 Tower Street, Kingston, Attorneys-at-Law as the place at which Notices and proceeding relating hereto maybe served.

Dated this 14th day of March 1991.

SIGNED by the said OLIVE VALENTINE for herself and PAUL FELIX MONELAL being his duly authorized agent.

OLIVE VALENTINE

At

Port Antonio

PAUL FELIX MONELAL

On the day of March 1991

Before me

JUSTICE OF THE PEACE PORTLAND
Winston B....."

Of equal importance is the Declaration in support at page 21 of the Record:

"DECLARATION IN SUPPORT OF CAVEAT

We PAUL FELIX MONELAL and OLIVE VALENTINE do solemnly and sincerely declare:

1. That we reside and have our true place of abode and postal address at 3 Richmond Hill, Port Antonio P.O. in the parish of Portland.

2. That on the 9th day of November 1989, we agreed with BEATRICE GRANT and CARROL GALLIMORE the registered proprietors of the lands the subject of the Caveat herein, to purchase the said lands for a consideration of $200,000.00 on the terms and conditions copy of as per Agreement for the enclosed excepting for the first conditions stated in the special condition.

3. That in consideration of the said Agreement for Sale we paid the vendor $100,000.00 and a further $1,000,000 to the Vendors Attorneys on the 1st day of March 1989.

4. That the Vendor failed and/or refused to give us possession of the said lands.

5. That we are advised by IRIS WILLIAMS a tenant on the land that she has a beneficial interest in a part of the said land.

6. That we had our Attorney write the Vendors' Attorney on the 20th of March 1990 demanding either the Title of day (sic) encumbrances or a refund of our monies with interest thereon.

7. That the Vendor failed to pay us back the said monies up to December 1990 and we thereafter agreed with their Attorneys that we would buy the land notwithstanding our previous recission.

8. That the Vendors agreed to proceed with the sale and gave us a letter dated January 14 that we were the Purchaser of the land enclosed herewith.

> 9. That the Vendor by letter dated the 6th day of March 1991, sought to terminate the agreement which breach is not acceptable to us.
>
> 10. That we believe that the Vendor has resold the premises.
>
> 11. That we intend to institute a suit for specific performance of the contract if the Vendors do not complete the sale within a reasonable time."

Perhaps it is of some importance to state that sections 139-143 of the Registration of Titles Act which authorise the lodging of a caveat and state its effect, make no mention of the Statute of Limitations. In these circumstances it is instructive to cite the words of Lord Wilberforce in **Rose Hall Ltd v Elizabeth Lovejoy Reeves**(1975) 13 J.L.R. 30 at page 35:

> "One final argument may be mentioned. The respondent had, as has been stated, registered a caveat on December 11, 1967, with the Registrar of Titles, Jamaica. This of course had the effect of preventing any dealings with the land while it remained effective. The appellant's contention was that this caveat was void, since at the date when it was lodged, the appellant had no interest to protect: consequently the rights of the parties should be dealt with as if it had never existed. Their Lordships cannot accept this. In the first place the concept of a void caveat is novel and difficult to comprehend and was not explained by the appellant. A caveat is simply a fact – it may be justified in law or not – and whether it is either, must be decided through the procedure laid down in the Registration of Titles law. Even if which appears probable, it could have been removed, prior to August 22, 1968, or subsequently, it was not so removed. Its existence, moreover, only had the effect that on September 13, 1968, when the transfer of North Western was presented, the Registrar refused to register the latter. But by that time the amending Act of 1968 had taken effect.

> Their Lordships therefore cannot accept that the lodging of the caveat, valid or invalid, has any bearing on the critical issue in the case."

Although this passage in its context makes no reference to the Statute of Limitations it is applicable, because it demonstrated that the purpose of a caveat is to prevent the Registrar from permitting dealings in the land while the caveat is in place. It does not stop time from running in favour of the appellant and has no bearing on the critical issue in the case. In any event the appellant was entitled to call on the Registrar for registration of her possessory title from 30th January 1989. A further feature to note was that the respondents in their Declaration in support of their caveat dated 14th March 1991, stated:

> "That we are advised by Iris Williams a tenant on the land that she has a beneficial interest in a part of the said land."

Prior to that the contract of sale dated 7th November, 1989 had a special condition which obliged the respondents to lease the appellant the disputed parcel of land.

They were therefore purchasers for value with notice of an interest by the appellant Iris Lungrin. It is obvious that Iris Williams was written in mistake for Iris Lungrin. The error was repeated in the following letter at page 23 of the Record:

> "October 11,1999
>
> Miss Iris Williams
> 6 Norman Road

Port Antonio
Portland

Dear Madam,

Re: Lands situate at 6 Norman Road – Portland

We represent Paul Monelal and Olive Valentine the owners of the captioned lands, who instructs us that without their permission you have erected a concrete shop on their premises.

Be advised that you are to desist from putting up any further structure on the said land as well as remove the existing structure which you have built within 30 days of the date hereof. Failure to comply with the aforegoing will cause our client to commence Court proceedings against you.

Yours faithfully,

Yvonne D. Ridguard
Attorney-at-Law

c.c. Paul Monelal & Olive Valentine
c.c. Ian Grossett"

In the circumstances it is imperative to cite in part section 88 of the Registration of Titles Act which reads:

"... Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant."

So the respondents were able when making requisitions on title to ascertain if any part of the estate they were purchasing was subject to a possessory title in view of section 70 of the Registration of Titles Act. Section 88 of that Act also obliges purchasers to make requisitions on title to ascertain if there are equities on the estate which will bind him as they did bind his predecessors in title. See **Charles Gardner and Inez Walker** (supra) for the gloss on section 88.

The following passage in the judgment of the learned Resident Magistrate must be examined critically. It reads at page 34 of the Record:

> "It is significant also and indeed serious consequences arise from the non-registration of the deed of gift on the Register of Titles. In this respect I embrace the decision in **Barclays Bank DCO v. Administrator General for Jamaica** (1970) 11 J.L.R 542 which is very instructive. The head-note among other things contains the questions of law. What happens when there is no knowledge in a third party of the prior interest of another whether the prior interest is to be postponed to that of a third party. Indeed in the cited case reference was made to the significance of registration in that it operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged (in the caveat).
>
> The effect of the failure to register by Lungren results in her interest being postponed to that of the Plaintiff's as their caveat was first in time to hers.
>
> When one examines Exhibit 6 (the agreement) for sale of the disputed property) under the rubric "Special conditions" one finds that the conditions of the sale was "that the purchaser will lease Iris Williams the house spot which she is at present

> occupying (Emphasis mine). It is to be observed that the reference to "Iris Williams" is a typographical error which should have read Iris Lungren. When Exhibit 6 is Juxtaposed alongside that of Exhibit 4 (Deed of Gift) which is unstamped and unregistered then plainly Exhibit 6 which was stamped and registered must be preferred. This all the more so bearing in mind the "round-table" discussion at which Iris Lungren was present.
>
> On a balance of probability the Plaintiffs claim succeeds. The Plaintiffs are to have their costs which is to be agreed or taxed."

The learned Resident Magistrate in this passage took no account of the appellant's position as a tenant at will, by operation of law. No account was taken of the effect of section 9 of the Act. The effect of that section was stated thus by Harman L.J in **Hughes v Griffin** [1969] 1 All ER 460 at 463:

> "Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession. It can run in favour of a tenant at will, because by virtue of s.9 of the Act a tenancy at will is put an end to at the end of the year and the tenant is deemed to be in adverse possession at the end of that time, so that in 13 years he acquires title to the land in question."

The circumstance which gave rise to a tenancy at will by operation of law in the instant case where there was a void deed is similar to the circumstance in **Day v Day** Vol. 111 1869-71 L.R. P.C. 751 at 758 where the ruling of the Board was:

> "He did not execute any deed of conveyance to his Son, and consequently it was admitted on both sides that the estate of the latter at the commencement was in law, a tenant at will."

Another example of a tenant at will by operation of law is where a tenant takes possession under a void lease. See **The Law of Real Property** by R.E. Megarry Q.C. and H.W.R. Wade second edition pages 625- 626 and page 967.

I find that Iris Lungrin the appellant was a tenant at will and made out a good defence to the action for recovery of possession. By virtue of section 9 of the Act she has established that she was a tenant at will. After13 years of her tenancy at will in January 1989 she was entitled to the declaration sought, and that she is the owner in fee simple of the aforesaid square of land. She may of course apply for a registered title. If she does, then section 91 of the Registration of Titles Act is applicable and may require the disputed parcel of land to be "described and identified by a plan, or diagram" by a Commissioned Land Surveyor.

The basis of the appellant's claim pursuant to sections 3 and 4a of the Act

To appreciate the alternative submission of Mr. Green it is necessary to refer to sections 3 and 4(a) of the Act. Section 3 reads:

> "3. 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 distress or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Then section 4(a) reads:

> "4. The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say –
>
> (a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

The learned Resident Magistrate's reasoning or the record of his reasoning is not as clear as ought to be expected. In recounting the submissions of counsel for the appellant he said at page 33 of the Record:

> **"When did time begin to run?**
>
> Is it in 1976 or 1978 as Mr. Green asserts or is it in 1991 as alleged by Miss Ridguard? The Defendant submitted that a right accrued to Elma Ivey in 1976 when she discontinued possession and such possession to the defendant who built a house thereon and began living in same in 1978. That's the Plaintiffs claim to possession."...

I think the submission was that time began to run in favour of the appellant in 1976 when Elma Ivey discontinued possession and that the possession was then in the appellant from 1976.

He rejected this submission and accepted the submission of Ms. Ridguard who then appeared for the plaintiffs by finding at page 33 of the Record:

> " . . . Section 3
> of the statute of Limitations would have had to come through Elma Ivey as the section infra says 'which the persons or someone through whom he claims in while entitled thereto have been disposed or have discontinued possession.'
>
> The contrary review expounded by the Plaintiff is that Elma Ivey having given to the Defendant disputed possession of the land by way of a deed of gift that she hold same on trust for the Defendant and as such had no right to recover it from her.
>
> That being the case no time could begin to run under the Limitation of Actions Act in favour of the *cestui que* trust against Elma Ivey, her beneficiaries or her executors'."

I think the error was made by the learned Resident Magistrate when he assumed that the deed of gift was effective and further that a trust arose therefrom. The better view is that this deed of gift failed because it was not stamped, the appropriate transfer tax was not paid so as to transfer the estate. On the other hand the failed deed is evidence that Elma Ivey intended to discontinue possession of the square of land and that she did so discontinue is evidenced in the Resident Magistrate's finding that the appellant lived on part of the land when it was bought by the respondents. Once he found that she lived there the necessary implication is that he accepted Mr. Green's submissions that she built a house and started to live there in 1978. Elma

Ivey died in 1980. There was no challenge by her, her executors or the beneficiaries under her will with respect to the appellant's possession. The appellant was in possession because Elma Ivey discontinued possession in 1976 and she was in physical occupation from that time. She demonstrated her intention to possess by building a house and living there. There is an excellent gloss on section 4(1) of the Act in Preston and Newsom on **Limitation of Actions** 3rd edition which reads thus at page 99:

> **"A. Interests in Possession**
>
> 1. THE GENERAL RULE
>
> (I) *Dispossession and Discontinuance*
>
> Interests in possession are dealt with generally by the Limitation Act, 1939, s. 5 (1) (following the Real Property Limitation Act, 1833, s 3, first branch):-
>
> > 'Where a person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.'
>
> Both provisions obscure the fact that time does not begin to run in either case until someone other than the true owner obtains possession (see p. 86). The rule is thus stated by Fry, J.: 'the difference between dispossession and the discontinuance of possession might be expressed in this way: the one is where a persons comes in and drives out the others from possession, the other case is where the person in possession goes out and is ***followed in by others.'*** **(Rains v. Buxton** (1880), 14 Ch. D. 537, at p. 539). To constitute discontinuance, possession must be abandoned by a person while he is entitled to

possession **(Cannon v. Rimington** (1852), 12 C.B. 1)."

Rains v Buxton was approved of in **Arthur Et ux v Georgian Holdings Ltd.** (1974) 12 J.L.R. 1421 at 1426. This is an appropriate time to cite the definition of possession of land by Slade J. in **Powell's** case referred to with approval at paragraph 32 in **J.A. Pye (Oxford) Ltd. and others v. Graham and another**[2002] U.K.H.L. 30 delivered 4th July 2002:

> "32. In **Powell's** case Slade J was considering the Limitation Act 1939. however, apart from paragraph 8(4) of Schedule 1 to the 1980 Act the statutory provisions applicable in the present case are identical in the 1939 Act and the 1980 Act. Slade J first addressed himself to the question what was the meaning of possession and dispossession in the statutory provisions. After noticing that possession and dispossession were not defined in the 1939 Act he continued, at p 469:
>
> > 'Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession. In the absence of authority, therefore, I would for my own part have regarded the word 'possession' in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's license or

> consent; likewise I would have regarded a person who has 'dispossessed' another in the sense just stated as being in 'adverse possession' for the purposes of the Act'."

On the basis of the foregoing analysis I find that the learned Resident Magistrate was incorrect in his reasoning and conclusion, and ground 1 of the Notice and Grounds of Appeal has been successful.

Ground 3

An additional ground was filed during the course of the hearing which reads thus:

> **"ADDITIONAL GROUND**
>
> Having found as a matter of fact that the deed of gift Exhibit VII was a grant of land to the Defendant and in the light of the uncontroverted evidence that the Defendant built her dwelling house on the land the Learned Resident Magistrate ought to have applied the principle laid down in cases such as **Dillwynn v Llewellyn** (1862) 4 D.J. and F. 517: **Inwards v Baker** (1963) 2 Q.B. **Ramsden v Dyson** (1866) L.R. H.L. 129 and ruled that the Defendant is entitled to have the legal title conveyed to her by the Plaintiff." (Emphasis supplied)

The wording of this ground is odd since the Resident Magistrate's findings that there was a deed of gift cannot be supported. The emphasized part of the ground can be supported. Mr. Green relied on the necessary implications and expressed findings of the Resident Magistrate and the three cases to support his submissions that a proprietary estoppel was raised in favour of the appellant. He further contended that the appellant was entitled

to rely on the establishment of a proprietary estoppel although he did not raise it in the Court below.

It is first necessary to ascertain whether he could have raised the issue in the Court below. Section 151 of the Judicature (Resident Magistrate's) Act reads:

> "151. It shall be lawful for the Magistrate to allow any defendant to set up any of the defences mentioned in section 150 although he has not given the notice required by the said section:
>
> Provided, that where it shall appear to the Magistrate that Plaintiff is taken by surprise by any such defence, or that it is otherwise unjust to allow the defendant to avail himself of any such defence without having given notice thereof, he shall allow such defence only on such terms as to him may seem just."

A special defence mentioned in section 150 is "any equitable estate". Here is section 150:

> "150. No defendant shall be allowed, except as provided by section 151, to set off any debt or demand claimed or recoverable by him from the plaintiff, or to set up, by way of defence, infancy, coverture, or any statute of limitations, or his discharge under any statute or law relating to bankrupts or insolvents, or a justification in actions of libel or slander, or any defence of "not guilty by statute", or any equitable estate, right, or ground of relief, unless such notice thereof as is directed by the Resident Magistrate's Court Rules, or practice for the time being in force, shall have been given to the Clerk of the Courts; and, in the case of a defence of "not guilty by statute", the defendant shall name in such notice the particular Statute under which the defence arises; and in every case in which the practice of the Court shall require such notice to be given, the Clerk

> of the Courts shall communicate the same to the plaintiff, by causing the same to be delivered at his usual place of abode or business, or posting the same to the plaintiff's address for service; but it shall not be necessary for the defendant to prove on the trial that such notice was communicated to the plaintiff by the Clerk." (Emphasis supplied)

This Court may exercise all the powers of the Court below in disposing of an appeal. The issue of a new point of law raised for the first time in this Court was dealt with in **Anita Grant v Crystal Court Development Co. Ltd. and Ors.** S.C.C.A. 77/89 delivered November 28, 1991 by Carey P (Ag.) at pp 6-7 by Downer J.A. at pp 15-17 and Bingham J.A. (Ag.) at pp 26-27. It was on this basis that we heard the submissions on the issue of proprietary estoppel in this appeal. Three authorities were relied on to support the appellant's claim. They were **Dillwyn v Llewellyn,** (supra) **Inwards v Baker** [1965] 1 All E.R. 446 and **Etheline Bourke (Administration) Estate Ruth Christine Bourke Deceased) v. Arthur Roberts** (1980) 17 J.L.R. 6.

The evidence that the appellant Iris Lungrin built a house during the period 1976-1978 on the parcel of land was not disputed and the learned Resident Magistrate so found. It is in this context that the following passage from the decision by Lord Westbury in **Dillwyn v Llewellyn** is relevant at pages 1286-1287:

> "The Master of the Rolls, however, seems to have thought that a question might still remain as to the extent of the estate taken by the donee, and that in this particular case the extent of the donee's interest depended on the terms of the memorandum. I am not of that opinion. The equity of the donee and the

> estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum, except as that shows the purpose and intent of the gift. The estate was given as the site of a dwelling- house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal. No one builds a house for his own life only, and it is absurd to suppose that it was intended by either party that the house , at the death of the son, should become the property of the father. If, therefore, I am right in the conclusion of law that the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting, the memorandum signed by the father and son must be thenceforth regarded as an agreement for the soil extending to the fee-simple of the land. In a contract for sale of an estate no words of limitation are necessary to include the fee-simple; but, further, upon the construction of the memorandum itself, taken apart from the subsequent acts, I should be of opinion that it was the plain intention of the testator to vest in the son the absolute ownership of the estate. The only inquiry therefore is, whether the son's expenditure on the faith [523] of the memorandum supplied a valuable consideration and created a binding obligation. On this I have no doubt; and it therefore follows that the intention to give the fee-simple must be performed, and that the decree ought to declare the son the absolute owner of the estate comprised in the memorandum."

Then in **Inwards v Baker** (supra) Lord Denning M.R. said at page 448:

> "The defendant appeals to this court. We have had the advantage of cases which were not cited to the country judge, cases in the last century, notably **Dillwyn v. Llewelyn** [1861-73] All E.R. Rep. 384; (1862), 4 De G.F. & J. 517 and **Plimmer v. Wellington Corpn.** (1884), 9 App. Cas. 699. This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by LORD KINGSDOWN in **Ramsden v.**

> **Dyson** (1866),L.R. 1 H.L. 129 at p. 170. It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity."

The principle adumbrated in the above cases was applied in **Etheline Bourke v Arthur Roberts** (supra) where Henry J.A. at page 8 said:

> "Counsel for the plaintiff/defendant supports the judgment on the basis that it does substantial justice between the parties. He submits that there are two equities – one based on the agreement Ex. 2 and the other on the building of the house of Ruth Bourke, that there is abundant evidence that the defendant/appellant had notice of both and that any legal estate vested in him by the conveyance Ex. 3 was therefore subject to the prior equitable interest of Miss Bourke and that it is for the court to say in what way the equity can be satisfied. This, he submits, the learned Resident Magistrate did in her judgment. He cites in support of his submissions **Inwards v. Baker** 1965 1 All E.R. 446 **Wakeman v. McKenzie** (1968) 2 All E.R. 783. **Inwards v. Baker** is authority for the proposition that where an occupier of land is induced or encouraged by the owner to spend money on that land in the expectation that he will acquire an interest in it, equity will not allow that expectation to be defeated. That principle was recognized by the Privy Council in **Plimmer v. Wellington Corporation** (1884) 9. A.C. 699 which expressly approved the statement of it by Lord Kingsdown in **Ramsden v. Dyson** (1866) L.R. 1 H.C. 129 as follows:
>
> > 'If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of

> such land with the consent of the landlord and without objection by him, lays out money upon the land, a Court of Enquiry will compel the landlord to give effect to such promise or expectation'."

It seems that this was a case of unregistered land but the same principles apply in the case of transfers by virtue of section 88 of the Registration of Titles Act. Lord Jenkins adverts to this in **Chisholm v. Hall** (supra). The caveat lodged by the respondents on 14th March, 1991 refers to dealings by others with the land after the appellant had acquired a possesary title. The caveat did not affect the provisions of section 88 of the aforesaid Act. The effect of the section was to bind the respondents as regards the appellant's equity. The previous owners were also bound. The equity was a "requirement and liability" within the intendment of section 88 of the Registration of Titles Act.

In the light of the above authorities I find that this additional ground was also successful. The equity can best be satisfied by having the fee simple in the parcel of land transferred to the appellant.

Conclusion

During the course of the excellent submissions from counsel on both sides I found it difficult to decide as to which side was correct. Despite the forceful presentation by Mrs. Samuels-Brown for the respondents in the end I am compelled to admit that when the law is applied to the findings of the Resident Magistrate, Mr. Green's contentions were bound to prevail. So I would

allow the appeal, and set aside the order of the Court below. In the Court below the appellant by way of counter-claim sought:

> "(a) A declaration that the Defendant is the owner of an estate in fee simple in possession [or of an equitable estate] of the said 1 square chain of land.
>
> (b) Rectification of Certificate of Title
>
> (c) An order requiring the Plaintiff to transfer the 1 square chain of land to the Defendant and consequential orders.
>
> (d) Costs."

At this stage I am prepared to grant a declaration that the appellant is the owner of the estate in fee simple for the parcel of land in dispute. Before the court's powers pursuant to section 158 (2) of the Registration of Titles Act can be invoked, it seems that certain preliminaries such as survey of the parcel of land in issue ought to be instituted. So there should be liberty to apply.

PANTON, J.A.

1. The appellant seeks to overturn the decision of His Honour Mr. Bertram Morrison who, on April 8, 2002, ordered that on or by May 13, 2002, she should vacate a square chain of land occupied by her, and which land forms part of Titchfield Trust Lands, Portland.

2. There is no dispute that the respondents are the registered owners of property identified as part of Titchfield Trust Lands, Portland, numbered as lot 453 and registered at Volume 1062 Folio 938. The square chain in issue is part of these lands. The whole property goes back in time to Elma Ivy in whose name the property was registered on February 14, 1970. After her death, the property passed to her executors Wesley Dryden and Lawrence Ferguson who were recorded as owners on March 26, 1980. There followed a transfer by them, in keeping with the will of the deceased, to Beatrice Grant and Carol Gallimore, beneficiaries. They, on March 12, 1996, registered a transfer to the respondents as joint tenants.

3. The evidence presented by the appellant to the Resident Magistrate indicates that the appellant has been living on the square chain of land since 1976. The appellant's oral evidence was that she was given the land in January, 1976, by Elma Ivy who was her cousin. They attended at the offices of Mr. F.V. Grossett, attorney-at-law, and there signed a document which was exhibited. It shows that there was an agreement between the appellant and the deceased Ivy for the land to pass to the appellant as a gift. The appellant, who used to care

for the deceased Ivy, built a house on the land during the period 1976 to 1978. She lived there until about the year 2000 when she moved to another residence. Her daughter-in-law now occupies the house with her permission. In about the year 1994, the appellant had sought subdivision approval from the Parish Council with a view to having her portion separated from the whole.

4. The respondents' case is that they entered into an agreement on November 9, 1989, to purchase the entire property. They entered into possession on January 1, 1990. The agreement for sale between them and the beneficiaries of the estate of Elma Ivy called for the respondents to lease to the appellant the house spot that she was then occupying. Subsequent to the receipt of the registered title by the respondents, there was a "round table talk" involving the parties to this suit, as well as one of the beneficiaries and Mr. Grossett, the attorney, who, incidentally, drafted both agreements that have been referred to. In short, the attorney has acted for both sides in this dispute. The purpose of the "round table talk" was, it seems, to persuade the appellant to vacate the land. The respondents have, understandably, based their claim on the fact that they have a registered title to the property. On the face of it, they would perhaps have felt that they had a very strong claim especially when it is considered that the appellant did not bother to register her interest in the square chain.

5. The appellant, on the other hand, relied at the trial on the fact that she had been in open undisputed possession as owner since 1976, she having "acquired the same by gift from ...the deceased".

Alternatively, the appellant asserted that the respondents' right to bring the action had been extinguished by the lapse of time. The appellant also counter-claimed for a declaration that she is the owner in fee simple of the square chain of land, and sought rectification of the certificate of title as well as an order requiring the respondents to transfer the square chain of land to her.

6. The learned Resident Magistrate found that "by way of an unstamped and uncertified deed of gift dated 30/1/78 Elma Ivy the predecessor in title of the disputed land gave to the defendant Iris Lungren one square of land being part of that comprised in certificate of title registered at volume 1062 folio 938". There seems to be an error here as to the date of the "deed of gift", as the document, exhibit 7, is actually dated 30th January, 1976. The Resident Magistrate also found that the appellant was living on the land at the time the respondents acquired the property. Having made those findings of fact, he then held that "the deed of gift being a grant of land to the defendant...her possession of the land cannot be regarded as adverse and thus time could not have begun to run against Elma Ivy. It follows that time did not begin to run against the plaintiffs until March 1991, that is, the conclusion of the purchase of the land".

7. Mr. Leon Green, for the appellant, submitted that the findings of fact made by the Resident Magistrate should have led him to conclude that the appellant was entitled to the legal estate, and to take steps to be registered. Mrs. Jacqueline Samuels-Brown, for the respondents, on the other hand submitted that the findings meant that the appellant had a mere licence as she had occupied the land with the permission of the deceased Elma Ivy in exchange for looking after her. Sections 70 and 71 of the Registration of Titles Act, she submitted, dispose of any suggestion that the appellant has any interest in the property. Although she said that she was not conceding that the appellant has an equity in the property, Mrs. Samuels-Brown, in answer to the Court, did concede that the "deed of gift" indicates an intention of the giver to part with an equitable interest. She went on to say that even if there was an equity in favour of the appellant, it would be enforceable against those persons with whom she had a relationship, not against the respondents who are protected by the Registration of Titles Act.

8. The grounds of appeal relied on were as follows:

- The learned Resident Magistrate erred in law by failing to give any or any adequate consideration to the defence namely that the plaintiff's action was barred by operation of section 3 of the Limitation of Actions Act.

- The learned Resident Magistrate erred in law in holding that time for the purposes of the operation of the said Act did not begin to run against the plaintiffs/respondents until March, 1991.

- Having found as a matter of fact that the deed of gift Exhibit VII was a grant of land to the defendant and in the light of the uncontroverted evidence that the defendant built her dwelling house on the land the learned Resident Magistrate ought to have applied the principle laid down in cases such as **Dillwyn v. Llewelyn** (1862) 4 DE G.F. & J. 517; **Inwards v. Baker** [1965] 2 Q.B.29 and **Ramsden v. Dyson** (1866) L.R. 1 H.L. 129 and ruled that the defendant is entitled to have the legal title conveyed to her by the plaintiff.

9. The respondents filed a counter-notice of appeal seeking to have the judgment of the learned Resident Magistrate affirmed on grounds other than those stated by him in his reasons for judgment. Respectfully, I do not think that there is any merit in these grounds. My reasons for so saying are set out in paragraphs 10 and 11 herein. The following are the grounds filed by Mrs. Samuels-Brown:

- The learned Resident Magistrate ought to have accepted and found that the defendant was a mere licencee for the reasons that:

  (i) The evidence of the defendant that she was given the land by the original owner was sharply contradicted by the matters set out in her statutory declaration in support of her application for registration of a caveat. In her said declaration she claimed to have purchased the land. The defendant's evidence was accordingly discredited and ought not to have been accepted by the learned Resident Magistrate.

  (ii) The learned Resident Magistrate ought to have accepted the evidence for and on behalf of the plaintiffs that at the

> "round table talk" the vendor stated, without any demurrer by the defendant who was also present, that the defendant had been "allowed" to stay on the land because she used to take care of the vendor's mother.

10. ***The credit of the appellant***

There is clear support for the appellant's position that a "gift" had been made to her by Miss Ivy. This support is in the form of the agreement which was admitted as exhibit 7 in the proceedings. This was a document prepared by an attorney and bears the signature of the appellant and Miss Ivy. In the column marked "terms of payment", it unequivocally states "gift". The contents of the statutory declaration made nearly twenty years later in respect of the caveat are therefore absolutely irrelevant. The important thing, as I see it, is that exhibit 7 shows that there was a clear intention on the part of Miss Elma Ivy to part with a portion of her land to the appellant who was willing to receive same and who immediately went into possession and occupation of it.

11. ***The "round table talk"***

I am rather surprised that the respondents have sought solace in the supposed utterance of one of the vendors at the discussion that took place in their attorney's office. There is no basis for any solace in this regard as it is inaccurate for ground (ii) above to say that the vendor said without demurrer that the appellant had been allowed to stay on the land because she used to take care of the vendor's mother. Firstly, Miss Gallimore did not give evidence and, secondly, the learned Resident Magistrate never made any finding that

there was no demurrer by the appellant. The evidence of the respondent Monelal reads thus:

> "Gallimore (that is, the vendor being referred to) told me that Lungrin (the appellant) used to take care of her mom before she passed away and that her mom allowed her to stay in a board structure at the back. **I don't recall if Lungrin said anything in response to what Gallimore said**". (page 11 of the record)

It is clear that the evidence does not support the ground. In fact, the evidence is to the contrary because when the suggestion was put to the appellant in cross-examination, she denied it emphatically. Page 15 of the record discloses the following exchange:

> "Suggestion: At that meeting Gallimore told Monelal in your presence that you were taking care of Mrs. Elma and that she allowed you to stay in a board structure at the back on the land.
>
> Answer : No".

12. I find that there is merit in Mr. Green's contention that given the finding made by the learned Resident Magistrate as to exhibit 7, he ought to have held that the appellant was entitled to have the legal estate in the square chain of land conveyed to her. The headnote in the 1862 case of **Dillwyn v. Llewelyn** (English Reports Volume XLV Chancery XXV page 1285) reads:

> "A father placed one of his sons in possession of land belonging to the father, and at the same time signed a memorandum that he had presented the land to the son for the purpose of furnishing him with a dwelling-house. The son, with the assent and approbation of the father, built at his own expense a

> house upon the land and resided there. **Held** that this was not a mere incomplete gift, but that the son was entitled to call for a legal conveyance, and not merely of a life-estate, but of the whole fee-simple".

The Lord Chancellor Lord Westbury reasoned thus:

> "So if A puts B in possession of a piece of land and tells him, "I give it to you that you may build a house on it," and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement not binding originally for the want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance". (p.1286)

13. The circumstances in **Dillwyn v. Llewelyn** are not dissimilar to those in the instant case. Here, there was a "gift" of land. The transaction indicating an intention to part with possession and ownership of a square chain of land was documented and signed by persons described as donor and donee. There was no registration of the interest or the transaction. Over a period of two years thereafter, the donee proceeded to expend money in the building of a dwelling-house on the property. There was no reneging or resiling by the donor. The executors as well as the beneficiaries of Miss Ivy's estate were fully aware of the presence and occupation of the appellant. The respondents themselves were also fully conscious of the appellant's presence; they saw the structures built by her on the land. A clear proprietary estoppel has been established in favour of the appellant. In that situation, the beneficiaries had no authority to purport to

transfer the square chain of land to the respondents, and the latter received the transfer at their peril given the knowledge they had. The learned Resident Magistrate was therefore, in my view, in error in failing to appreciate the significance of exhibit 7 particularly when coupled with the fact that the appellant had built on the land in keeping with the intention and obvious blessing of Miss Ivy. In my view, this disposes of the appeal which ought to be allowed.

14. In allowing the appeal, I would make an order in keeping with that which was sought in the counter-claim. In particular, I would make a declaration that the appellant is the owner of an estate in fee simple in respect of the square chain of land, and is entitled to have it transferred to her by the respondents. The appellant is to have the costs of the proceedings here and in the Court below.

15. The Limitation of Actions Act was put forward as an alternative position by the defence. Consequently, I shall comment thereon. Section 3 of the Limitation of Actions Act, so far as relevant, reads:

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

Section 30 of the said Act reads:

> " At the determination of the period limited by this Part to any person for...bringing any action or suit,

> the right and title of such person to the land...for the recovery whereof such ...action or suit...might have been...brought within such period, shall be extinguished".

The learned Resident Magistrate made no findings as to the activities of the appellant on the land. However, the evidence indicates that she built at least two structures thereon, a dwelling-house and a shop. The evidence further reveals that she had been in continuous and undisturbed possession from 1976 until the 1990s when the respondents wrote to her. She not only had undisturbed possession but also the intention to possess and to own. When, therefore, the respondents entered into the agreement in November 1989, that is, nearly fourteen years after the appellant had entered into possession, the right of their predecessor in title, Miss Ivy, had already been extinguished. This is the result of combining the interpretation of sections 3 and 30 of the Limitation of Actions Act. By the time the respondents instituted proceedings in 1996, the appellant had been in possession for twenty years.

16. In concluding, I need only say that I am in agreement with my learned brothers that the appeal should be allowed. My reasons, it would have been noted, are primarily based on the issue of proprietary estoppel which crystallized long before sections 3 and 30 of the Limitation of Actions Act became relevant.

COOKE, J.A. (Actg.):

This appeal concerns one square of land which is contained in property described as lot numbered Four Hundred and Fifty-three and being a parcel of land part of Titchfield Trust Lands. The property is registered at Volume 1062 Folio 938 of the Register Book of Titles by transfer No. 895079. On 12th March 1996, the plaintiffs/respondents became the registered owners of this land. In 1970 Elma Ivey was the registered owner of the land. The defendant/appellant is the cousin of Ivey who is now deceased. Apparently the defendant/appellant "took care of her cousin" and was rewarded by being "given" the one square of land which is now the subject of dispute. There is a document made on the 30th January 1976 on the face of which it is a deed of gift whereby Ivey "gave" the appellant the disputed square of land. There is no contention as to the authenticity of this document. However, it was not valid to pass the property. The appellant has been in occupation of the land since 1976, and has constructed a house thereon.

This one square of land abuts the roadway and it would appear that in addition the appellant put up a modest wooden structure to house a shop. By plaint 360/96 the plaintiffs/respondents brought an action in the Resident Magistrates' Court for the parish of Portland claiming Recovery of Possession from the appellant of a part of the lands registered at Volume 1062 Folio 938, of the Register Book of Titles.

The defence was:

(i) that the defendant had acquired the square of land by gift, and

(ii) the plaintiff's action was statute barred and their right of action, if any, extinguished by virtue of Sections 3 and 30 of the Limitation of Actions Act.

It would appear that the defendant concentrated all her efforts on (ii) above. After a hearing the learned Resident Magistrate ordered as follows:

> "(1) Judgment for the Plaintiff, the Defendant to vacate premises part of Titchfield Trust Lands in the parish of Portland, being part of the Lot numbered 453 on the Plan of Titchfield Trust Lands, deposited in the Office of Titles on the 1st day of March 1960, and being the lands registered at Volume 1062 Folio 938 of the Register Book of Titles, on or by the 13th day of May 2002.
>
> (2) That the Defendant pays the Plaintiff's costs of $20,000.00".

It is from this judgment that there is now this appeal. As amended, the grounds are:

> "1. The Learned Resident Magistrate erred in law by failing to give any or any adequate consideration to the defence, namely, that the plaintiff's action was barred by operation of section 3 of the Limitation of Actions Act.
>
> 3. The Learned Resident Magistrate erred in law in holding that time for the purposes of the operation of the said Act did not begin to run against the plaintiffs/respondents until March 1991."

There was a further ground of appeal which will be dealt with subsequently. In the resolution of this aspect of the appeal, it is necessary to set out sections 3, 9 and 30 of the Limitation of Actions Act. Section 3 governs the time period during which actions may be brought to recover land. It is in these terms:

> "3. 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 not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Section 9 deals with when time begins to run in respect of a tenant at will as regards the limitation period. Mr. Green, for the appellant, placed much reliance on this section as he submitted that the appellant was a tenant at will by the latest in 1978, so that time would, on his calculation, have begun to run about or at the latest the 30th of January 1979. If this is correct then the appellant would be entitled to the benefit of section 9. This section states:

> "9. When any person shall be in the possession or in the receipt of the profits of any land, or in the receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry, or bring an action for the recovery of such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy at which time such tenancy shall be deemed to have determined:

> Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this section, to his mortgagee or trustee."

Then there is section 30 which pertains to the extinguishment of the right to recover possession after the limitation period has come to an end - in effect after twelve years. This section is as follows:

> "30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

The document purporting to be a deed of gift, which conveys one square of land from Ivey to the appellant, is wholly ineffective. Section 2 of The Record of Deeds, Wills and Letters Patent Act provides that:

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

There is no evidence that the requirements stipulated in 2(1) above have been satisfied. There is no proof by the oath of any witness and there has been

no recording in the Record Office. Accordingly, the document was insufficient "to pass away any freehold." The question which now arises is this: what was the status of the appellant who entered upon the one square of land and has remained in occupation thereon erroneously believing that she was the beneficiary of a gift? As already said, for the respondent, Mr. Green contended that Iris became a tenant at will. Mrs. Samuels-Brown would regard her as a licensee. If it is the latter, then the Limitation of Actions Act would be inoperative: see **Moses v Lovegrove** [1952] 1 All E.R. 1979 and **Hughes v Griffin** [1969] 1 All E.R. 460.

It would seem to me that it is impossible to describe a person occupying land as a tenant at will if there is no relationship of lessor/lessee or landlord/tenant. In this case there is nothing in the surrounding circumstances which could even faintly suggest that the parties intended to establish legal relations indicative of a tenancy at will. As far as Ivey was concerned she was making an outright gift. As for the appellant, she accepted this gift, with no doubt, great gratitude. **Goomti Ramnarace v Harrypersad Lutchman** is a judgment of their Lordships' Board of the Judicial Committee of the Privy Council (Privy Council Appeal No. 8 of 2000). The advice was delivered on the 21st May 2001, by Lord Millett. In paragraph 17 he said:

> "17. A person cannot be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations. A tenancy is a legal relationship; it cannot be created by a transaction which is not intended to create legal relations. This provides a principled rationalization of

> the statement of Denning LJ in **Facchini v Bryson** on which the Court of Appeal relied in the present case. Before an occupier who is in exclusive occupation of land can be treated as holding under a licence and not a tenancy there must be something in the circumstances such as a family arrangement, an act of friendship or generosity or suchlike, to negative any intention to create legal relations".
> (Emphasis mine)

The reference to the statement of Denning, L.J. in **Facchini v Bryson** [1952] 1 T.L.R. 1386 is to be found at paragraph 8 of the advice at page 1389 where he said:

> "In all the cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement, an act of friendship or generosity, or suchlike, to negative any intention to create a tenancy."

The learned Resident Magistrate in his reasons for judgment in dealing with the issue of adverse possession had this to say:

> "Thus I hold one (sic) balance of probability, that the deed of gift being a grant of land to the Defendant that her possession of the land cannot be regarded as adverse and thus time would not have begun to run against Elma Ivey. It follows that time did not begin to run against the Plaintiffs until March 1991 that is the conclusion of the purchase of the land".

This excerpted passage shows that the learned Resident Magistrate failed to appreciate that there was no effective deed of gift. If there was, the appellant's possession of the disputed land could not be challenged at any time. It is difficult to understand how the appellant's possession, if legal and by way of a deed of gift, could be terminated at the conclusion of the purchase of the land.

The learned Resident Magistrate incorrectly did not direct his attention to the proper status of the appellant while she occupied the land. It is my view that Iris was at all material times a licensee. She was put into possession by Ivey who contemplated an act of generosity. I would therefore hold that the appellant can find no comfort in The Limitation of Actions Act. These two grounds of appeal are without merit.

As indicated earlier, there was another ground. This was filed during the hearing. It is now listed below:

Additional Ground

> "Having found as a matter of fact that the deed of gift Exhibit VII was a grant of land to the Defendant and in the light of the uncontroverted evidence that the Defendant built her dwelling house on the land the learned Resident Magistrate ought to have applied the principle laid down in cases such as **Dillwyn v Llewellyn** (1862) 4 De G F and J 517; **Inwards v Baker** [1965] 2 Q.B. 29 and **Ramsden v Dyson** (1866) L.R. 1 H.L. 129 and ruled that the Defendant is entitled to have the legal title conveyed to her by the Plaintiff."

I have had the opportunity of reading the draft judgment of Downer, J.A. I am in agreement with his comments pertaining to the wording of this ground as well as to whether this court should have given audience to this complaint. I will therefore proceed to consider if proprietary estoppel can avail the appellant.

Three questions now fall for determination:

(1) Does the doctrine of proprietary estoppel avail the appellant as against Ivey?

(2) If the answer to (1) above is in the affirmative, does this estoppel bind the successors in title of Ivey in respect of the land registered at Volume 1062 Folio 938 in the Register Book of Titles?

(3) If the answer to (2) above is also in the affirmative, what would be the appropriate remedy for the appellant?

In respect of the first question, an acceptable working formulation in respect of proprietary estoppel is to be found in the work of **Hanbury and Martin Modern Equity** (16th Edition) at page 893. It reads:

> "This doctrine is applicable where one party knowingly encourages another to act; or acquiesces in the other's actions to his detriment and in infringement of the first party's rights. He will be unable to complain later about the infringement, and may indeed be required to make good the expectation which he encouraged in the other party. Unlike other estoppels, therefore, this doctrine may, in some circumstances, create a claim and an entitlement to positive proprietary rights".

See **Dillwyn v Llewellyn** [1861-73] All ER. Rep. 384; **Inwards v Baker** [1965] 2 Q.B. 29 and **Pascoe v Turner** [1979] 1 W.L.R. 431.

It does appear that the learned Resident Magistrate found that the appellant had built a house on the disputed land and had been living there since 1978: (See page 33 of record). It is not disputed that the appellant went into possession since 1976. Ivey died in 1980. Therefore, the house was under construction during her lifetime. There is no evidence of Ivey in any way at all

objecting to this construction. In view of the fact that Ivey intended to give the square of land to the appellant one would not have expected even the slightest reticence on the part of Ivey as to the building by the appellant of her house on the square of land. It would seem incontestable that the appellant expended financial resources in the construction of the house. Further, it is an inescapable inference that this expenditure by the appellant was in reliance on the representation by Ivey that she was making a gift of the square of land to her. Quite clearly this expenditure was to the detriment of the appellant. It would have been quite unconscionable for the appellant to deny Iris her equity in the square of land. I would answer question (1) in the affirmative.

I now turn to the second question. I will firstly advert to the Registration of Titles Act. Lot No. four hundred and fifty-three was registered in the names of the respondents on the 12th March 1996. Does this registration affect the appellant's equity in the square of land? An indication of the answer to the question just raised is to be found in the advice of the Judicial Committee of the Privy Council in **Charles Gardener** and **Inez Walker v Edward Lewis** (Privy Council Appeal No. 25 of 1997) delivered on the 22nd June 1998 and reported in 53 WIR 236. In this advice Lord Browne-Wilkinson had this to say (page 238 to 239):

> "The case is in a very unsatisfactory state. This is primarily due to the fact that the appellants have been maintaining an entirely erroneous view of the law applicable, viz, the view that the registration of their title gives them an unchallengeable title to the

whole of the eight acres not only at law but also in equity. They are mistaken.

The position is as follows. The Registration of Titles Act provides for a Torrens system of land registration in Jamaica. Under section 28, a person claiming to be the owner of the fee simple either at law or in equity can apply to have the land brought under the operation of the Act. If he does so, the application is examined by a referee and, if given provisional approval, notice of the claim is advertised. On the successful conclusion of that process a Certificate of Title is registered and a copy of the registered certificate provided to the registered proprietor.

The consequences of registration are laid down by sections 68, 70 and 71 of the Act which, so far as relevant, provide as follows:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.
>
> 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under

> the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> 71. Except in the case of fraud no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain

(1996 is obviously a typographical error: It should be 1976).

Answer - This is not the first time I am hearing about the fact but this is the first time I am hearing about a document containing those facts".

Then there is the evidence of Olive Valentine at page 14 of the record which is:

> "Carol Galimore told me that she (the appellant) was living on the land before I bought the land. Carol told me that she got the spot to make a board house and not a concrete structure. When I paid for the land I saw the structure the Defendant had on the land. It was a board house. When I bought it. (sic) Today the structure is mixed board and concrete."

Finally, there is the declaration signed by both respondents in support of a caveat they wished to lodge in respect of the land. This was when the respondents apprehended that the vendors were about to renege in respect of an agreement for sale for the land. This declaration is dated 14th March 1991. At this time only one-half of the purchase money of $200,000.00 had been paid. Paragraph 5 of this declaration is as follows:

> "That we are advised by Iris Williams a tenant on the land that she has a beneficial interest in a part of the said land."

It is clear that the name "Williams" is an error and properly the correct name is Lungren.

The evidence to which I have just referred leads me to the conclusion that the respondents at the time when they conducted and concluded the

negotiations for the purchase of the land had notice of the appellant's equity. Accordingly, they are bound by that equity.

And now to the third question. What is the extent of the equity of the appellant? The authorities indicate that the extent of the equity will depend on the circumstances of each particular case. Dependent on those circumstances the court strives to come to a just determination.

In **Inwards v Baker** (supra) a father in 1931 suggested to his son that the latter build a bungalow on land belonging to the father. The son accepted the invitation – built the bungalow and lived in it. The son was living there in 1951 when the father died. By a will dated 1922 the father left the land on which the bungalow was built to others. Proceedings were brought in 1963 by the trustees of the father, Mrs Inwards (his mistress) and his children of their relationship, to whom the father left his estate on death, to recover possession from the son. The Court of Appeal held that the son having built the bungalow with the father's encouragement was entitled to remain in the bungalow as long as he wished to stay.

In **Dillwyn v Llewellyn** (supra) a father encouraged his son to build a house on the father's land and signed a memorandum purporting to convey the land to his son; but it was not by deed. The father's will excluded the son as a beneficiary. The son had spent some £14,000.00 in building a house on the land. It was held that the son was entitled to a conveyance of the land.

circumstances, on the grounds that land has been included in the title because of a "wrong description of parcels or boundaries": section 70.

But it is clear that these provisions relate solely to the legal title to the land. Although the owner of the fee simple in equity is authorized to apply for first registration of the land, apart from that all trust interests, whilst continuing to exist, are kept off the register: see section 60. The land certificate is conclusive as to the legal interests in the land. But that does not mean that the personal claim (e.g. for breach of contract to sell or to enforce trusts affecting the registered land against the trustee) cannot be enforced against the registered proprietor. In **Frazer v Walker** [1967] A.C. 569 at page 585 Lord Wilberforce said:

> '... their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized in the courts of New Zealand and Australia: see, for example, **Boyd v Mayor, Etc., of Wellington** [1924] N.Z.L.R. 1174, 1223 and **Tataurangi Tairuakena v Mua Carr** [1927] N.Z.L.R. 688, 702.'

In their Lordships' view those principles are equally applicable to the Torrens system of land title applicable in Jamaica."

The passage quoted above indicates that registration in the names of the respondents is not a bar to the establishment of the equity of the appellant in

the square of land. However, the appellant has to demonstrate that her equity is binding on the respondents, the successors in title of Ivey. In determining this issue, the critical consideration is whether at the time of the purchase of the land the respondents had notice of the equity of the appellant: see **E.R. Ives Investment Ltd. v Hugh** [1967] 2 Q.B. 379; **Etheline Bourke (Administratrix Estate Ruth Christiana Bourke, Deceased) v Arthur Roberts** (1980) 17 J.L.R. 6. The respondents as purchasers would be bound by the appellants' equity if they had notice of that equity. So now, did the respondents have the requisite notice? To determine this, recourse must be had to the evidence.

On page 11 of the record the evidence of Paul Monelal runs thus:

> "I knew Lungren was living there when I bought the land. When I got the title for the land she was still on the land. I spoke to Miss Carol Gallimore about Miss Lungren. Present were Mr. Grosett, Barbara Ellis (my cousin and agent) and Miss Lungren. It was a round table talk. She was around the table. I spoke normally. I wanted to know concerning that I had bought the place whether she was going to stay on or get off. Gallimore told me that Lungren used to take care of her mom before she passed away and that her mom allowed her to stay in a board structure at the back. I don't recall if Lungren said anything in response to what Gallimore said."

Then at page 13 of the record there is this question and answer by Monelal under cross-examination:

> "Question – Have you ever been informed or told that Lungren was given the land by virtue of a document signed in 1996?

In **Pascoe v Turner** (supra) the claimant and defendant lived together in the claimant's home. Later the claimant purchased another house to which they moved. The relationship ended. The claimant told the defendant the house was hers and everything in it. The defendant to the claimant's knowledge, expended her own money on repairs, improvements and redecoration. She also spent money on furniture. The defendant was awarded a conveyance of the house.

The **Hanbury and Martin** work provides at page 896-897 illustrations of varying remedies awarded by the court:

> (a) Compensation for value of the improvements **Raffaele v Raffaele** [1962] W.A.R. 29;
>
> (b) Right to occupy until expenditure on improvements has been reimbursed **Dodsworth v Dodsworth** (1973) 228 E.G. 1115;
>
> (c) A non-assignable lease at a nominal rent determinable on death **Griffiths v Williams** (1977) 288 E.G. 947; and
>
> (d) A lien on land for the expenditure – **Unity Joint Stock Mutual Banking Association v King** 1858 25 Beav 72.

I will now deal with the circumstances in this case. These I consider the relevant factors:

(1) Ivey intended to give the appellant the square of land.

(2) The appellant believed she had been given this square of land.

(3) The appellant constructed a dwelling house thereon to be her home. She has been in occupation since 1976.

(4) The indications pointing to the appellant having an equity in the square of land were compelling. Indeed the respondents do not seem to have been oblivious to this. (See the discussion above pertaining to whether or not the respondents had notice and especially paragraph 5 of the declaration supporting the application for a caveat).

(5) The occupation of this square of land does not seem in any way to detract from the enjoyment of the rest of the land. No submissions to this effect were addressed to this Court. I cannot conceive that Ivey would have "given" the appellant a square of land which would have adversely affected the enjoyment of the remaining portion.

I do not think that it would be just to make an order for compensation to the appellant in respect of the assessed value of the dwelling house being regarded as an improvement to the land. This is based on my view that monetary assessment will not equate to the real value of the square of land to the appellant. It is hardly likely that financial compensation would allow the

appellant to secure comparable accommodation. Further, there is no evidence that the respondents are in a position to discharge such a financial obligation.

I do not favour allowing the appellant to remain as long as she wished. Although, curiously the only special condition in the agreement of sale signed by the respondents on the 9th November 1989, reads:

> "That the purchasers will lease Iris Williams" (Iris Lungren) "the house spot which she is at present occupying."

There is the evidence of the appellant which is as follows:

> "The plaintiff and her son (Olive Valentine and Paul Monelal) challenged my ownership of the land. They are the only persons who ever challenged my ownership. I now live at Boundbrook since two years ago as I can't have any peace over the land. My daughter-in-law now lives there at my house with my permission".

To make any order allowing the appellant to stay as long as she wished, or for her lifetime for that matter, would be sowing the seeds of actual or potential discord. Certainly a court should be most wary of doing this. In any event this would not be a just remedy.

The just remedy is for a declaration that the appellant is entitled to hold the square of land in fee simple. This was the intention of Ivey. In spite of the compelling indications that the appellant held an equity in the square of land, the respondents proceeded to purchase the land as if the appellant did not exist. It cannot be said that the respondents exercised the requisite care before concluding the purchase of the land. The equitable interest of the appellant

should have been determined before the transaction was concluded. Perhaps, this is a cautionary tale. I would allow the appeal. I agree with the order proposed by the court.

ORDER

DOWNER,J.A:

1. Appeal allowed
2. Order of the Court below set aside
3. Declaration that the appellant Iris Lungin is entitled to a registered title to the square chain of land claimed.
4. Liberty of apply.
5. Costs to the appellant both here and below. Costs in this Court fixed at $15,000.