

NMLS

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION  
CLAIM NO. HCV 0144/2003

BETWEEN	VIOLET MCFARLANE	1 <sup>st</sup> CLAIMANT
AND	IGOL CAMPBELL	2 <sup>ND</sup> CLAIMANT
AND	HOMESE LIMMOTH	3 <sup>RD</sup> CLAIMANT
AND	ROBERT VALENTINE	4 <sup>TH</sup> CLAIMANT
AND	JAMES DRUMMOND	5 <sup>TH</sup> CLAIMANT
AND	BASIL CLAYTON	6 <sup>TH</sup> CLAIMANT
AND	TENLLOYD REID	7 <sup>TH</sup> CLAIMANT
AND	ESMERELDA CLAYTON	8 <sup>TH</sup> CLAIMANT
AND	JAMES ANDERSON	9 <sup>TH</sup> CLAIMANT
AND	COSMOND BREMMER	10 <sup>TH</sup> CLAIMANT
AND	LUCILLE ARTHURS	11 <sup>TH</sup> CLAIMANT
AND	OLIVER REID	12 <sup>TH</sup> CLAIMANT
AND	JOHN EUGSTER	1 <sup>ST</sup> DEFENDANT
AND	KATHLEEN EUGSTER	2 <sup>ND</sup> DEFENDANT

CONSOLIDATED  
WITH CLAIM NO. 1470 OF 2003

BETWEEN	TIMOTHY CLARKE	1 <sup>ST</sup> CLAIMANT
AND	ASHLEY YONKER & DOUGLAS MCLEOD	2 <sup>ND</sup> CLAIMANT
AND	LINDSAY PALMER	3 <sup>RD</sup> CLAIMANT
AND	ROSEMARIE MYRIE	4 <sup>TH</sup> CLAIMANT
AND	TREVOR MCKENZIE	5 <sup>TH</sup> CLAIMANT
AND	WILLIBALD GOLDNAGL	6 <sup>TH</sup> CLAIMANT
AND	WILLIAM STEWART	7 <sup>TH</sup> CLAIMANT
AND	WESLEY SLOWLEY	8 <sup>TH</sup> CLAIMANT

AND	BEVERLEY WILSON	9 <sup>TH</sup> CLAIMANT
AND	THERESA MESSNER	10 <sup>TH</sup> CLAIMANT
AND	JESS BEACH	11 <sup>TH</sup> CLAIMANT
AND	AUDLEY WALLACE	12 <sup>TH</sup> CLAIMANT
AND	KENNETH PLUMMER	13 <sup>TH</sup> CLAIMANT
AND	WILTON BREMMER	14 <sup>TH</sup> CLAIMANT
AND	GEORGE BREMMER	15 <sup>TH</sup> CLAIMANT
AND	PAULINE WALKER	16 <sup>TH</sup> CLAIMANT
AND	MAURICE PARKINSON	17 <sup>TH</sup> CLAIMANT
AND	JOHN EUGSTER	1 <sup>ST</sup> DEFENDANT
AND	KATHLEEN EUGSTER	2 <sup>ND</sup> DEFENDANT

**CONSOLIDATED**

**WITH CLAIM NO. HCV 2864 OF 2006**

BETWEEN	ROSEMARIE CHUNG	1 <sup>ST</sup> CLAIMANT
AND	GRACE SMITH	2 <sup>ND</sup> CLAIMANT
AND	DWAYNE MCKENZIE	3 <sup>RD</sup> CLAIMANT
AND	KARIBE MCKENZIE	4 <sup>TH</sup> CLAIMANT
AND	JOHN EUGSTER	1 <sup>ST</sup> DEFENDANT
AND	KATHLEEN EUGSTER	2 <sup>ND</sup> DEFENDANT

**CONSOLIDATED**

**WITH CLAIM NO. HCV 00039 OF 2006**

BETWEEN	LOUISE BROWN	CLAIMANT
AND	JOHN EUGSTER	1 <sup>ST</sup> DEFENDANT
AND	KATHLEEN EUGSTER	2 <sup>ND</sup> DEFENDANT

**Mrs . Antoinette Haughton-Cardenas who originally appeared for the Claimants, except for Ms. Ashley Yonker, up to the close of the presentation**

of their case, and until the 11<sup>th</sup> September 2009. Mr. Terrence Ballantyne assumed conduct of the matter for the Claimants except for Ms. Ashley Yonker, as of the 14<sup>th</sup> of December 2009 .

Ms. Althea Grant for Ms. Ashley Yonker.

Mr. Kent Gammon for the Defendants.

Heard : 20, 21, 22, 23, 27, 28, 29, 30 July 2009, 1, 2, 3, 4, 7, 8, 10, 11 September 2009, 14, 15, 16, December 2009, 17, 18, 19, 24, March 2010, 14, 16, June 2010, 28<sup>th</sup> January 2011.

ADVERSE POSSESSION- INDIVIDUAL CLAIMS TO POSSESSION OF MANY DISTINCT PORTIONS OF LAND WITHIN LARGE EXPANSES OF REGISTERED LAND-SECTIONS 3, 30 OF LIMITATION OF ACTIONS ACT- CLAIM TO OVER 12 YEARS POSSESSION BUT NO APPLICATION TO BECOME REGISTERED UNDER SECTION 85 OF REGISTRATION OF TITLES ACT - REGISTERED OWNERSHIP OF LAND CHANGING - SECTIONS 68, 70, 71, 85, 161 OF REGISTRATION OF TITLES ACT - WHEN DOES TIME BEGIN TO RUN- CONCLUSIVENESS AND INDEFEASIBILITY OF REGISTERED TITLE- MEANING OF "SUBSEQUENT OPERATION OF ANY STATUTE OF LIMITATIONS"

**Mangatal J:**

1. This a consolidated suit in which there were originally some thirty four Claimants. However, some of the Claimants did not come to court to give evidence, and some have died since the proceedings were initially filed. At the end of the trial, a case was presented on behalf of eighteen Claimants. The claim is based upon the law of adverse possession in respect of two properties at Old Hope/ Little Bay, and at Brighton, in the Parish of Westmoreland.
2. This matter was initially set down for 10 days of trial. On the first day of trial, the 20<sup>th</sup> of July 2009, Mr. Gammon made an application to

strike out the claims as disclosing no reasonable cause of action. It is desirable that such applications be made at a much earlier stage than at trial. It would, for example, be more appropriate for such an application be made at a case management conference or at a pre-trial review, so that such points can be considered on their own and early on. Without all the parties, in this case, the many Claimants and the Second Defendant by way of video conference, being assembled and geared up for trial. I dismissed the application. However, I will say something about this legal argument later in this judgment since the arguments were based upon law and have been repeated and expanded upon somewhat by Mr. Gammon, as is his right, in his Closing address.

3. At the commencement of the matter, I also struck out three of the Claims upon being informed by Mrs. Haughton-Cardenas who appeared at the time, that these Claimants were now deceased. On that basis, Louise Brown's claim was struck out in Claim No. HCV 00039 of 2006, and in fact, that Claim was therefore struck out in its entirety and no longer arises for consideration as Louise Brown was the only Claimant in that Suit. Violet McFarlane, who it is said died in tragic circumstances, and Esmeralda Clayton's claims, in Suit HCV 0144 of 2003 were also struck out for the same reasons. I ordered judgment for the Defendants for recovery of possession of the portions of land formerly occupied by these deceased persons and claimed by them. At this time, since the following Claimants also did not give evidence, I strike out their claims:

**HCV 0144 OF 2003**

- a. Robert Valentine;
- b. Basil Clayton;
- c. Tenlloyd Reid;
- d. James Anderson;
- e. Cosmond Bremmer;

f. Lucille Arthurs;

g. Oliver Reid;

**HCV 1470 OF 2003**

h. Willibald Goldnagl;

i. William Stewart;

j. Theresa Messner;

k. Wilton Bremmer;

l. George Bremmer;

m. Pauline Walker;

**HCV2864 OF 2006**

n. Karibe McKenzie

Further, I order in favour of the Defendants on their Counterclaims in two of the Suits, recovery of possession forthwith in respect of the portions of land occupied by these persons. I have itemized and detailed this order at the end of my judgment.

4. This case has evolved in a meandering and unusual way. It certainly became obvious during the trial that in a matter such as this, involving as it did so many Claimants, more preparation and organization of the matter and identification of the issues involved would have been helpful, indeed, necessary. The bundles filed were confusing and incomplete and did not contain a complete record of what orders have been made to date. In addition, while hearing the matter, numerous applications were being filed along the way for my consideration alongside the trial issues. Some of these should have been made at case management conferences or pre-trial review so that the trial of this matter could have progressed more smoothly. That was not to be.
5. The Defendants John and Kathleen Eugster are the registered owners of all that parcel of land part of Old Hope in the Parish of Westmoreland, registered at Volume 1352 Folio 183 of the Register Book of Titles, containing by survey over four hundred and fifty one acres of land. The Old Hope property was formerly registered at

Volume 924 Folio 89. The Defendants are also the registered owners of all that parcel of land part of Brighton in the Parish of Westmoreland, registered at Volume 1081 Folio 693 of the Register Book of Titles, and containing by survey over four hundred and sixteen acres of land. Combined, these properties consist of over eight hundred and sixty seven acres of land. Copies of the Titles registered at Volume 1352 Folio 183 and Volume 1081 Folio 693 were admitted into evidence by consent as Exhibits 1 and 2. Copies of the title registered at Volume 1081 Folio 693 and of the former title to the Old Hope property were attached to the Particulars of Claim in Claim HCV 0144 of 2003 and indicate that the Defendants purchased these two properties from Mr. George Barber for a total consideration of US \$ 1 Million. The Transfer of the two properties to the Defendants as joint tenants was registered on the 14<sup>th</sup> of May 2002.

6. Mr. John Eugster, died it is said, in tragic circumstances, on January 19<sup>th</sup> 2004. On the 14<sup>th</sup> of July 2009 an order was made substituting Kathleen Eugster his wife, for the First Defendant John Eugster, as his Personal Representative, Probate of his estate having been granted to her on the 1st day of September 2006. Although none of the headings in these Claims has been formally amended, it is noted that the appropriate order was made. Hereafter, to avoid obscurity, and subject to context, any reference in this judgment to "the Defendants" should be taken and understood to mean Kathleen Eugster, in her capacity as representative of her late Husband, the First Defendant's estate, and Kathleen Eugster in her personal capacity as the Second Defendant.
7. Each of the Claimants say that they have occupied separate parcels of land located within these vast properties for varying periods of time in excess of twelve years. They say that they have been in sole, exclusive, open and undisturbed possession of the respective plots of land. They rely upon **section 3 of the Limitation of Actions Act 1881**.

8. After the close of the Defendants' case on the 16<sup>th</sup> of June 2010, I ordered the parties to file written submissions by the 30<sup>th</sup> of July 2010. The submissions filed on behalf of the Claimants represented by Mr. Ballantyne, were filed a few days late, on August 3<sup>rd</sup> 2010. I have allowed them to stand as I considered it just so to do, particularly having regard to the late stage at which Mr. Ballantyne assumed conduct of this matter on behalf of so many Claimants.
9. There have been countless weeks of evidence taken in this case, but at the end of the day, in looking at all of the submissions and cases referred to, I have come to the considered view that the case largely turns on a point of law.

**The First Issue-Whether the Claimants have a right to claim an interest based upon Adverse Possession Against the Defendants, the Defendants having become the Registered Owners in May 2002-Would the 12 year time period begin to run again after the Defendants became the registered owners- Or are the Claimants entitled to calculate the periods of possession alleged by them against the previous owner George Barber**

10. Although in his application to strike out made on the first day of trial, Mr. Gammon raised similar points, I must indicate that the law was not as clear to me as it is now. This was partially because I did not have then all of the cases and authorities which have now been cited to me by the parties. I have now had the chance to examine the issue in great detail. In particular the fairly recent Privy Council decision in **Bryan Clarke v. Alton Swaby** Privy Council Appeal No. 13 of 2005, delivered the 17<sup>th</sup> January 2007, has greatly assisted me in coming to my determinations in this case and I have now had a better chance to absorb the facts of the case.
11. **Sections 3 and 30 of the Limitation of Actions Act** state as follows:
  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 have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing same. ...*

*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.*

12. **Section 85 of the Registration of Titles Act** reads as follows:

*85. Any person who claims that he has acquired a title by possession to land which is under the operation of this Act may apply to the Registrar to be registered as the proprietor of such land in fee simple or for such estate as such person may claim.*

13. Jamaica operates a land registration system known as the Torrens system and this is embodied in the **Registration of Titles Act**. This system decrees that save with very limited exceptions, notably fraud, the registered title is indefeasible and conclusive evidence of ownership. **Sections 68, 70, 71 and 161 of the Registration of Titles Act** are very instructive, the side note to section 68 stating "Certificate of Title conclusive evidence of Title". They state:

*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. ( My emphasis).*

.....

*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 the case of fraud, hold the same as the same may be described or identified in the certificate, subject to any qualification.....and such incumbrances .....*

*71. Except in the case of fraud, no person contracting or dealing with, 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.*

....

*161. No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say, -*

- (a) the case of a mortgagee as against a mortgagor in default;*
- (b) the case of an annuitant as against a grantor in default;*
- (c ) the case of a lessor as against a lessee in default;*

*(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee **bona fide** for value from or through a person so registered through fraud;*

*(e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*

*(f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any such case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

*and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding.*

14. The combined effect of sections 3 and 30 is that a registered proprietor may lose the right to recover his land if someone else has been in possession of it in a particular way for 12 years, a concept we refer to as adverse possession. Under section 85 of the Registration of Titles Act any person who claims that he has acquired a title by possession to land which is under the operation of that Act may apply to the Registrar to be registered as proprietor of the land in fee simple. If the steps set out are successfully completed, then under section 87 of the Registration of Titles Act the Registrar will cancel the existing certificate of title and issue a new certificate of title in the name of the applicant.
15. In the present case, none of the Claimants have made an application under section 85 in order to be registered as proprietors.
16. It is to be noted that except in the case of fraud on the part of the

person registered as proprietor, and subject to the subsequent operation of any statute of limitations, the combined effect of sections 68, 70 and 71 of the Registration of Titles Act is that the certificate of title is conclusive evidence of his proprietorship of the land in question. Although in the Particulars of Claim filed on behalf of the Claimants in each of the Suits, an allegation is made that the transfer of the properties to the Defendants was fraudulent, this was only a bare allegation. It is trite law that an allegation of fraud must be particularized and not lightly made. In any event, on the 22<sup>nd</sup> of July 2009, Mrs. Haughton-Cardenas, who was then Counsel for the Claimants, during her Opening Address to the Court, expressly indicated that fraud is not an issue in this case and would not be pursued.

17. As pointed out in the Privy Council's decision in **Pottinger v. Raffone**, Privy Council Appeal No. 64 of 2005, delivered 17<sup>th</sup> April 2007, at paragraph 19, per Lord Roger of Earlsferry :

*19..... No certificate is to be impeached or defeasible by reason of, or on account of, any informality or irregularity in the application or in the proceedings leading up to registration (section 68). The certificate is evidence both of the particulars which it contains and of the entry in the Register Book and is-subject to the subsequent operation of any statute of limitations- conclusive evidence that the person named in the certificate is the proprietor (section 68). ... ( My emphasis).*

18. After setting out in full, section 161 of the Registration of Titles Act, his Lordship continued at paragraph 20 as follows:

*20.....The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor, then the production of the certificate of title in his name is an absolute bar and estoppel to those proceedings, any rule of law or equity to the contrary notwithstanding. The only situations where a certificate is not a complete bar to proceedings are those listed in paragraphs (a) to (f). For*

*present purposes the only relevant paragraph is (d), proceedings by a person deprived of any land by fraud against the person registered as proprietor of the land through fraud.*

19. As indicated above, in this case there is no proper allegation or evidence against the Defendants that the Claimants have been deprived of any land by fraud on the part of the Defendants, or indeed of their predecessor in title George Barber, or that the Defendants have been registered as the proprietors of the land through fraud.
20. The real question therefore is what is the effect of the interplay between the relevant provisions of the Limitation of Actions Act, and the Registration of Titles Act? To me, the crux of the question is whether the meaning of section 3 of the Limitation of Actions Act is that these Defendants, are claiming a right of entry through George Barber, or did their right to make entry arise independently of him, and at a later time than did his own right to make entry? This is where I have found the decision in **Clarke v. Swaby** very helpful.
21. In **Clarke v. Swaby**, a claim was made by Swaby against his stepfather Clarke for recovery of possession of a property in the Parish of Westmoreland . Mr. Swaby's Aunt was the owner for many years and her formal registration as proprietor occurred in 1968. The Aunt died in December 1981. By her will she appointed Swaby as her executor and devised the property to him beneficially. In July 1993 Swaby was registered as the proprietor of the property. Before her death the Aunt had allowed her sister, Swaby's mother, to reside rent-free on the property. Swaby's mother at some point married Clarke and they, Mr. and Mrs. Clarke, lived on the property for many years. Swaby commenced proceedings against Clarke in April 2000 for recovery of possession in a Resident Magistrate's Court for the Parish of Westmoreland. Clarke relied upon a special defence under section 3 of the Limitation of Actions Act. The Resident Magistrate found

that Clarke occupied as a licensee and had obtained no proprietary rights. The Court of Appeal dismissed Clarke's Appeal, as did the Privy Council. The Privy Council's essential basis for rejecting Clarke's claim was that under the law in Jamaica, as is the case in England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence and not to an adverse claim (Paragraph 11).

22. Lord Walker of Gestingthorpe, in delivering the Judgment, stated at paragraph 12:

*Adverse possession by a squatter for at least twelve years, and the lawful owner's loss of both remedy and title (see section 30 of the 1881 Act as amended) after the running of that period, are two indivisible sides of the same coin.*

23. At paragraph 15, in discussing the judgment of the Court of Appeal, Lord Walker indicated that the Court of Appeal had fallen into error in considering that in relation to Clarke's adverse possession claim, time did not start running against Swaby until he became registered proprietor in 1993. Said he:

*...That was in their lordships' view an error, since from 1983 Mr. Swaby (as executor of (the Aunt) and as beneficial owner of the property) had been in a position to give a notice to quit to Mr. Clarke, and the formality of registration did not start time running again.*  
(My emphasis).

24. In my view, this is a very important aspect of the judgment as relates to the instant case. The reason time did not start to run again or to run anew in Swaby's case when he became registered proprietor, was because he already in 1983 had acquired the right to give Clarke notice to quit both as his Aunt's executor and as beneficial owner of the property. The obvious implication seems to me to be that had Swaby

been registered as proprietor in 1991, without any other prior connection as executor or beneficiary, irrespective of whatever length of time had already run in Clarke's favour against the Aunt and her estate, time would have begun to run again from the date of Swaby's registration as the proprietor in counting the twelve year period. The Privy Council in my judgment have helped to make it crystal clear that only a time period of adverse possession subsequent to a particular registration can be counted against that particular registered proprietor. Such a person has a right to make entry and to give Notice to Quit in his own right, and is not a person making a claim through the previous registered proprietor. This is because of the paramountcy of registration accorded by the Torrens Title system and the scheme established by our Registration of Titles Act.

25. In the leading House of Lords decision **J A Pye (Oxford) Ltd and Another v. Graham and Another** [2003] 1 A.C. 419, applied to our jurisdiction by the Privy Council in the local decision in **Wills v. Wills** Privy Council Appeal No. 50 of 2002, delivered 1<sup>st</sup> December 2003, at paragraph 26, Lord Browne-Wilkinson makes the following interesting observation:

*26. It is to be noted that the right of action to recover the land is barred whenever 12 years have elapsed from the time when any right of action accrued: it does not have to be a period immediately before action brought. In the case of unregistered land, on the expiration of the limitation period regulating the recovery of land, the title of the paper owner is extinguished : 1980 Act, section 17. In the case of registered land, under section 75 (1) of the Land Registration Act 1925 on the expiry of the limitation period the title is not extinguished but the registered proprietor is deemed to hold the land thereafter in trust for the squatter.*

26. In Jamaica, we do not have the equivalent of Section 75(1) of the English Land Registration Act 1925 which expressly deems that the

proprietor for the time being would hold the land in trust for the squatter. Further, under section 70(1)(f) of the English Act, rights acquired under the Limitation Act are overriding interests and a purchaser would take subject to such interests- see **Halsbury's Statutes of England 3<sup>rd</sup> Edition, Volume 27**, pages 843-851. In Jamaica, the law is completely different. The English Act was not at all based upon the Torrens system of land registration. However, it seems to me that in Jamaica also, whilst an unregistered title may be extinguished under section 30 of the Limitation of Actions Act, a registered Title is not. I do not know whether it could be said under our Act that the registered owner against whom the right has accrued, would hold the land in trust thereafter for the squatter without some express legislation to that effect. However, section 70 of the Registration of Titles Act indicates that, notwithstanding the existence of any estate or interest that would but for the Act have priority, except in the case of fraud, the registered proprietor holds the land as owner as described in the title. Indeed, the sidenote to section 70 reads "Preferential and prior rights defeated in favour of registered proprietor". Section 71 also indicates that even knowledge residing in the persons about to take a transfer of the existence of any trust or unregistered interest does not affect the situation since such knowledge shall not of itself be imputed as fraud. So in Jamaica, in my judgment, it would therefore seem, that even if the Claimants could successfully argue that they had acquired rights by way of adverse possession against the Defendants' predecessor in title George Barber, (and I am not at all deciding that they have), the highest that their case could be taken would be to say that Mr. Barber thereafter held the land in trust for them. It must be clearly understood that I am not deciding that Mr. Barber did hold the land in trust for them or that that is the law in Jamaica, I am merely expanding on the possible arguments most favourable to the Claimants. However, even if that were so, and the Defendants had knowledge of this trust

situation or of the circumstances which the Claimants rely upon to support their claims by way of adverse possession, that would not avail the Claimants, since notice of such an interest would not affect the Defendants and would not require them to have been put on enquiry. Any such knowledge would not affect the conclusiveness of the Defendants' registered Titles or the validity of their registration as proprietors of the lands, because registration is paramount under the Torrens system, any rule of law or equity to the contrary notwithstanding. (My emphasis).

27. In my judgment, the Claimants' adverse possession claims, they not having applied and become under section 85, registered as proprietors, have no validity and are not made out against these Defendants because the Defendants did not become the registered proprietors until May 2002. The twelve year time period did not elapse between that time or any service of Notice to Quit by the Defendants, or of the filing of their Defences and Counterclaims in the instant suits. Indeed, twelve years has not even at the present date yet elapsed. In my view, the reckoning of time could not commence until May 14<sup>th</sup> 2002. That is because it is only as at that date that these Defendants acquired the right to make an entry or had the right to give notice to quit. Their right to make entry is independent of, and distinct from any such rights residing in their predecessor in title, George Barber. Alternatively, the date 28<sup>th</sup> November 2001 may arise for consideration. By Notice dated 28<sup>th</sup> November 2001, Exhibit 3, George Barber wrote to "ALL PERSONS ON THE LITTLE BAY AND BRIGHTON PROPERTIES" .

*These properties are being sold. You must vacate the property or make arrangements with the new owner, Mr. John Eugster, if you wish to remain on the property.*

*This notice is effective this 28<sup>th</sup> day of November 2001.*

28. Exhibit 29, which is a letter from George Barber to John Eugster dated

March 27, 2002 also speaks to giving Mr. Eugster certain rights of entry in respect of the properties. In Claims 0144 of 2003 and 1473 of 2003, the Claimants plead that on or about a day in March 2002 John Eugster came to the properties and sought to give notice to the Claimants to move when he advised that the sale of the properties was now completed.

29. Even if any of these earlier dates are used, the requisite twelve year period would not have accumulated in any of the Claimants' favour. I am, however of the view that May 14<sup>th</sup> 2002 is the correct date to use. Based on the evidence before me, that is the date when it is clearest and least controvertible that the Defendants acquired the right to make entry or give notice. In sum, as a matter of law, none of the Claimants can claim to have dispossessed these Defendants and their claims therefore fail.
30. In light of my determination that there is no basis for the claims of adverse possession, it is unnecessary for me to resolve the subsidiary dispute that arose between Ms. Ashley Yonker and Mr. Douglas McLeod, the Second Claimants in Claim 1470 of 2003, as to the question of which of them was really in possession of the lands claimed.
31. The other side of the same coin, is that the Defendants' rights of entry and to possession remain live and unaffected by any adverse claims. In Claims HCV 0144 of 2003, and HCV 1470 of 2003, there are Counterclaims for recovery of possession of the respective parcels of land occupied by the Claimants in those Suits. In the remaining Suit, Claim HCV 2864 of 2006, involving Claimants Rosemarie Chung, Grace Smith, and Dwayne McKenzie, there is no claim for recovery of possession.
32. Those Counterclaims, according to Part 18 of the Civil Procedure Rules 2002, ought to have been filed as Ancillary claims, with Ancillary Claim Forms and Particulars of Ancillary Claims. However,

under Rule 26.9 of the C.P.R., the Court has a general power to rectify matters where there has been a procedural error. Rule 26.9 subparagraphs (3) and (4), read as follows:

*26.9(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*

*(4) The court may make such an order on or without an application by a party.*

33. To my certain knowledge, Rule 26.9 has been utilized to set things right when a claim is begun by Fixed Date Claim Form when it should have been begun by Claim Form. It seems to me that it would be appropriate and just to use this Rule similarly to treat these two Counterclaims as if they were begun by Ancillary Claim Form and Particulars of Ancillary Claim. There is no prejudice to the Claimants that could be occasioned by this use of the Court's powers to rectify procedural errors.

**SECOND ISSUE-What is the Status of the Claimants and the Nature of their Occupation?**

34. The question in relation to the Counterclaims by the Defendants for recovery of possession then requires a resolution as to the status of the Claimants. The Defendants claim that some of the Claimants were tenants, put into possession by Mr. Wilton Brown, who was George Barber's caretaker for the properties. The Defendants say some other Claimants are licensees. There are other Claimants that they say that they have no knowledge of, as to what parts of the land they occupy, or the basis upon which they claim to be in possession. On the other hand, all of the Claimants deny that they were tenants or licensees and they all claim to have entered and remained upon the land without the permission of the owner or of Wilton Brown. This is consistent with their claims that they were in adverse possession.

35. I find that much of the evidence that the Defendants rely upon in this regard is really hearsay evidence. This evidence was admissible as I have earlier ruled, based upon exceptions and relevant provisions of the Evidence Act. However, this does not change the fact that it is not evidence of which the Defendants or their witness Mr. David Eugster, John Eugster's brother, have first-hand knowledge. Mr. Wilton Brown did not give any evidence before this Court and so there was no first hand account as to the status of any of the Claimants, except of course their own version. On a balance of probabilities, I am prepared to accept the Claimants' evidence that they entered upon and remained on the land without any permission or consent of the owner or caretaker. However, this means that each Claimants' status is really that of a squatter, or trespasser since they are on the property without any right or title thereto, and without any agreement, permission, or consent of the owner or his agent. Alternatively, the Claimants were impliedly tenants at will in respect of whom Mr. Barber expressly or impliedly intimated that he wished their occupation to be at an end. See Exhibit 3, and also Exhibit 26A, which is a letter from Mr. Barber to Mr. Brown where Mr. Barber indicated to Mr. Brown that he was previously instructed not to lease, rent or sell any of the property to anyone. After an intimation from Mr. Barber that the Claimants should cease occupying the premises, this would also mean that thereafter any tenancy at will was at an end and the Claimants then became trespassers. In my judgment, the better view is that the Claimants entered and remained on the land as squatters or trespassers without any permission whatsoever.

36. Since the Claimants have failed in their bid to establish a right by way of adverse possession, or to prove that any rights of ownership of the Defendants have been extinguished, as Trespassers, they have no right to occupy or to be in possession, or to have any property or structures on the relevant lands. The Defendants are entitled to possession of the

parcels of land occupied by the Claimants forthwith. However, in light of the length of time that most of these Claimants claim to have occupied these properties, I think it is just to order that the Claimants, (with the exception of Claimants Rosemarie Chung, Grace Smith and Dwayne McKenzie), vacate the relevant properties on or before the 28<sup>th</sup> of February 2011.

37. As regards the Claimants Rosemarie Chung, Grace Smith, and Dwayne McKenzie, the Defendants are also entitled to recover possession from them forthwith. However, there is no claim before me for that relief at this time. The Defendants have the right of self-help but they will have to decide whether they wish so to proceed, or to proceed by way of further court proceedings. I would encourage these Claimants to also vacate the parcels of land occupied by them by the 28<sup>th</sup> February 2011, since the Defendants have the right to possession.
38. Although there was a Counterclaim by the Defendants for mesne profits, there was really no attempt to quantify what would be the appropriate sum under this head. Nor were any submissions made in relation to this issue. Therefore, although the Defendants would be entitled to mesne profits, and that sum could potentially be quite large, I make no award in that regard. It would seem that the Defendants are more interested in gaining possession of these properties for which they paid a considerable sum of money, and in respect of which they have been unable to enjoy possession for many years.
39. As the Second Defendant and John Eugster were registered as proprietors of the lands in the capacity of joint tenants, upon John Eugster's death, the properties would now belong solely to Mrs. Eugster. However, to date I have no evidence that on the Titles Mr. Eugster's death has yet been noted or registered on Transmission. There will therefore be judgment for the Defendants on the Claims in

all three Suits, with costs to the Defendants to be taxed if not agreed.  
Judgment for the Defendants on the Counterclaims as follows:

**IN CLAIM NO. 0144 OF 2003**

(A) Against the Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Claimants, order for recovery of possession forthwith of all portions of the land respectively occupied by them at Brighton, in the Parish of Westmoreland, registered at Volume 1081 Folio 693 of the Register Book of Titles.

(B) In respect of the Brighton Property, registered at Volume 1081 Folio 693, order for recovery of possession on or before the 28<sup>th</sup> February 2011:

Against the Third Claimant Homese Limmoth for 0.57 acres as identified in surveyor's report dated the 20<sup>th</sup> October 2006, or any other portion of the said land occupied by her.

(C ) In respect of the Old Hope / Little Bay Property, registered at Volume 1352 Folio 183, order for recovery of possession on or before the 28<sup>th</sup> February 2011:

Against the Second Claimant Igor Campbell for 27.93 acres as identified in surveyor's reports dated 9<sup>th</sup> and 10<sup>th</sup> December 2006, or any other portion of the said land occupied by him;

Against the Fifth Claimant James Drummond, for 4.5 acres as identified in surveyor's report dated 10<sup>th</sup> December 2006, or any other portion of the said land occupied by him.

**IN CLAIM NO. 1470 of 2003**

(D) Against the Sixth and Seventh Claimants, order for recovery of possession forthwith of all portions of the land respectively occupied by them at Brighton, in the Parish of Westmoreland, registered at Volume 1081 Folio 693 of the Register Book of Titles or at Old Hope/ Little Bay, registered at Volume 1352 Folio 183 of the Register Book of Titles.

(E) Against the Tenth, Fourteenth, Fifteenth and Sixteenth Claimants order for recovery of possession forthwith in respect of all portions of the land respectively occupied by them at Brighton in the Parish of Westmoreland, registered at Volume 1081 Folio 693 of the Register Book of Titles.

(F) In respect of the Brighton Property, registered at Volume 1081 Folio 693 of the Register Book of Titles, order for recovery of possession on or before the 28<sup>th</sup> February 2011:

Against the Fourth Claimant Rosemarie Myrie for 8.9 acres as identified in surveyor's report dated the 20<sup>th</sup> of October 2006, or any other portion of the said land occupied by her;

Against the Fifth Claimant Trevor McKenzie for 2.4 acres as identified in surveyor's report dated the 20<sup>th</sup> of October 2006, or any other portion of the said land occupied by him.

( G) In respect of the Old Hope/ Little Bay Property, registered at Volume 1352, Folio 183, Order for Recovery of Possession on or before the 28<sup>th</sup> of February 2011:

Against the First Claimant, Timothy Clarke for three acres as claimed in evidence, or any other portion of the said land occupied by him;

Against the Second Claimants Ashley Yonker and Douglas McLeod for 10.5 acres as identified in survey report dated the 10<sup>th</sup> day of December 2006, or any other portion of the said land occupied by them or either of them;

Against the Third Claimant Lindsey Palmer for 3.99 acres as identified in surveyor's report dated the 10<sup>th</sup> day of December 2006, or any other portion of the said land occupied by him;

Against the Eighth Claimant Wesley Slowley for 0.7 acres as identified in surveyor's report dated the 10<sup>th</sup> of December 2006, or any other portion of the said land occupied by him;

Against the Ninth Claimant Beverley Wilson for 1.4 acres as identified in surveyor's report dated the 10<sup>th</sup> of December 2006, or any other portion of the said land occupied by her;

Against the Eleventh Claimant Jess Beach for 1.173 hectares as identified in surveyor's report dated the 9<sup>th</sup> day of December 2006, or any other portion of the said land occupied by her;

Against the Twelfth Claimant Audley Wallace for 8.1 acres as identified in surveyor's report dated 10<sup>th</sup> December 2006, or any other portion of the said land occupied by him;

Against the Thirteenth Defendant Kenneth Plummer for 2.62 Hectares as identified in surveyor's report dated the 10<sup>th</sup> of December 2006, or any other portion of the said land occupied by him;

Against the Seventeenth Claimant Maurice Parkinson for five acres of land as claimed by him in evidence or any portion of the said land occupied by him.

(H) Costs on the Counterclaims in Claims 0144 of 2003 and 1470 of 2003 to the Defendants to be taxed if not agreed.

40. I think that it may well be high time for our legislators to re-examine the Law of Adverse Possession, certainly in relation to registered land , and to effect legislative changes similar to those which have occurred in England. At paragraph 2 of the judgment in **Pye**, Lord Bingham of Cornhill spoke of the fact that as a result of the registered owner's inaction, the adverse possessors enjoyed the full use of the land without payment for twelve years. He stated:

*As if that were not gain enough, they are then awarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in any way at all. In the case of unregistered land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title to land lay. But where land is registered it*

*is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it. It is reassuring to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title through inadvertence.*

41. This matter has been plagued by violence and allegations of deaths linked to this land dispute, on both sides. That is a grave and unfortunate situation that is far too prevalent in this country. I trust that there shall be no more such occurrences and that this dispute can be concluded in a law-abiding and civilized manner.