JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 104/2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (AG.)

BETWEEN	**BARBARA SPENCE (Suing by daughter and Next friend Shree-Ann Simon**	**APPELLANT/DEFENDANT**
AND	**KARL SPENCE**	**1ST RESPONDENT/DEFENDANT**
AND	**ELSIE TAYLOR (Executrix of Estate Edgar Milton Spence)**	**2ND RESPONDENT/DEFENDANT**
AND	**HORACE ANTHONY SHIRLEY**	**3RD RESPONDENT/DEFENDANT**

Marvalyn Taylor-Wright, instructed by Taylor-Wright & Co., for the Appellant

Lawton Heywood, for the 1st respondent, the 2nd & 3rd respondents unrepresented

June 19, 20 2006 & July 27, 2007

HARRISON, P.

This is an appeal from the judgment of Mrs. Justice Marva McIntosh on 6th October 2004 when she found:

> "(i) There is no evidence to support the claim of adverse possession as a result of the First Respondent being dispossessed or discontinuing his possession and the presumption of advancement applies.

(ii) The interest of Edgar Milton Spence in estate 11 Dyna Avenue, Kingston 20, in the parish St. Andrew was extinguished by his death and he was incapable of disposing of this property in his will therefore on his death the property passed to the joint tenant, Karl Spence.

(iii) Judgment for the First Respondent

(iv) Costs of this Application to the 1st Respondent to be agreed or taxed."

I have read in draft the judgment of my brother Cooke, J.A. I agree with his reasoning and conclusion. Hereunder are my comments.

The relevant facts have been fully set out in the judgment of Cooke, J.A., and therefore I need not rehearse them.

The appellant, inter alia, challenges the finding of the learned trial judge that the presumption of advancement applies in respect of the purchase by the deceased Edgar Milton Spence of the property at 11 Dyna Avenue in the parish of St. Andrew in his own name and that of his son Karl Spence, the first respondent.

The term presumption of advancement is the term used to designate a gift by a man to his spouse or to his child or to someone to whom he stands in *loco parentis.* This presumption of a gift is one that arises as a matter of law, consequent on the legal obligation imposed on a man to support his wife and children. However, like so many other such presumptions, it is capable of being rebutted by even the slightest of evidence. This Court, in the recent case of ***Cecillia Mitchell Davy v Riley Adolphus Davy*** SCCA No. 19/04 dated 30th

March 2007, considered the said presumption which arose between a husband and his wife. The latter claimed that the presumption arose, but also maintained, contradictorily, that she had contributed to the construction of the house on the property, which was bought by the husband who placed both names on the title. It was held that no presumption of advancement existed. We said, at page 2 of the judgment:

> "Where a husband transfers property into his wife's name or the wife's name and his, he is presumed to intend to make a gift of such property to her, in the absence of a contrary intention. This is known as the presumption of advancement. It is based on the concept of a man's obligation to support his wife. It applies also to his obligation to support his children or anyone in loco parentis to him."

The changes in social and economic patterns over the years, in respect of female spouses, in particular, have reduced the importance and effect of the said presumption, and the ready reliance thereon, by disgruntled spouses. Recognizing the said shift Lord Hodson, in ***Pettitt v Pettitt*** [1970] AC 777, at page 811, said:

> "In old days when a wife's right to property was limited, the presumption, no doubt, had great importance and to-day, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement."

He maintained further at page 814 that:

> "These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence; ..."

Unlike the spouse, there has been no shift in substance or effect of the presumption as it relates to a child or a person to whom the donor stands in loco parentis. Neither has a gift to a child by its parent ever been seen as unable to attract the said presumption because the child has attained adulthood. In the case of ***In re Gooch*** [1980] 62 L.T. 384, it was said:

> "... a father purchased in his son's name stock in a certain company more than sufficient to qualify the son to be a director of the company, but the father kept the relative certificates in an envelope on which he had written 'belonging to me'; legal presumption of gift rebutted."

See also ***Warren v Gurney et al*** [1944] 2 All ER 472, where, however the presumption of advancement to a daughter who was a spinster, was rebutted, on the evidence of contemporaneous declarations by the father.

In the instant case the presumption of a gift from the deceased to his son, the first respondent, arises. There is no evidence led to displace that presumption. The fact, relied on by the appellant, that the "first respondent never shared in any [of] the rent and/or profits derived ..." from the property, was admitted by the first respondent. However, in response, he said in his affidavit dated 21st February 2003:

> "... it was clearly understood that all rents earned from the property was to be used for my father's maintenance."

This fact was not seen by the learned trial judge as capable of rebutting the presumption. I agree. The benevolence of a son in permitting his father to retain the rental from a property owned "jointly" should not be seen in an

adverse light as a rebuttal of the presumption. This fact of mutual agreement, by itself, is a recognition that the first respondent specifically claimed an entitlement to a portion of the rental, and his deceased father Edgar acknowledged the first respondent's right to receive it.

This acknowledgement of the first respondent's right to the rental and the continuing receipt of it by the deceased, besides not rebutting the presumption, refutes any allegation of being evidence of an intention on the part of the deceased father to adversely possess the property. The deceased received the first respondent's portion of the rental by the permission and agreement of his son.

The further contention that the will of the deceased Edgar Spence dated 24th June 1998 made five (5) days before his death on 29th June 1998, was some evidence of a rebuttal of the presumption, was rightly seen by the learned trial judge as not being so. The learned trial judge correctly found that:

> "(ii) The interest of Edgar Milton Spence in estate 11 Dyna Avenue, was extinguished by his death and he was incapable of disposing of this property in his will therefore on his death the property passed to the joint tenant Karl Spence."

A will speaks from death. The deceased on death had nothing to give, *nemo dat quod non habet.*

It must be noted that the affidavit evidence of Shree-Ann Simon dated 15th July 2002 in support of the originating summons on which the claim of Barbara Spence is based, is deficient and inadmissible, in several respects.

Section 408 of the Judicature (Civil Procedure Code) Law (the law in force at the time of the filing of this affidavit) reads:

> "**408.** Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this Law, an affidavit may contain statements of information and belief, with the sources and grounds thereof." (Emphasis added)

Several of the material paragraphs of the affidavit are introduced by the phrases, "that I am informed by the applicant and do verily believe" or "... I am advised by the applicant and do verily believe...", which phrases are admissible only in interlocutory applications. The originating summons filed by the appellant, sought a declaration that she was entitled to "the beneficial interest in all that parcel of land part of Marverley." This was not an interlocutory proceeding. Therefore the said paragraphs so introduced were hearsay and inadmissible. Those offending paragraphs should have been struck out from the affidavit. As a consequence the available evidence before the learned trial judge in support of the appellant's case was virtually non-existent.

This appeal ought to be dismissed.

COOKE, J.A.

1. On the 9th January, 1980, the disputed property at 11 Dyna Avenue, Kingston 19, Saint Andrew was conveyed to Edgar Spence and Karl Spence as joint tenants. The latter is the oldest of four children fathered by Edgar. Karl went to the United States of America at age seventeen in 1971. Thus at the time of the conveyance he would have been approximately twenty-six (26) years old and had qualified as a chemical engineer. The property was subject to a mortgage which was discharged on the 10th April 1996. All the financial obligations pertaining to the acquisition of the property were fulfilled by Edgar. All the documents relevant to the purchase of the property were sent to Karl in the United States for his requisite signature.

2. On 28th September 1985, Edgar and the appellant were married. Their matrimonial home was 11 Dyna Avenue. At the time of the marriage the appellant's daughter Shree-Ann Simon was fifteen (15) years old and she lived at the matrimonial home until she got married, the date of which is uncertain. The appellant had sued by this daughter as a "next friend", as unhappily the former is now confined to a nursing home suffering from schizophrenia, the onset of which was evident in 2002. The daughter was the sole witness on behalf of the appellant in the court below where a declaration was sought in these terms:

> "...the Applicant is solely entitled to the beneficial interest in all that parcel of land part of Marverly now known as Queensbury in the parish of Saint Andrew registered at Volume 1097 Folio 777 of the Register

> Book of Titles under and by virtue of the last Will and Testament of the deceased Edgar Milton Spence on the basis that the said deceased had acquired during his lifetime sole beneficial ownership of the whole property by adverse possession and/or by the equitable principles of the Resulting Trust."

3. On the 24th June 1998 Edgar had executed a will in which he gave and bequeathed:

> "My dwelling house situated at 11 Dyna Avenue Meadowbrook Estate Kingston 19.
>
> In the Parish of Saint Andrew, and all items of furniture belonging to me in the said house, to my wife Barbara Sonnia Spence, of 11 Dyna Avenue Meadowbrook Estate Kingston 19."

He died on the 27th June 1998. It will be readily observed that this will was executed more than eighteen years after the conveyance of 9th January 1980. By letter dated 29th October, 1997 the following letter was sent to Karl.

> "Dear Mr. Spence,
>
> Re: 11 Dyna Drive, Kingston 19
>
> We write on behalf of Mr. Edgar Spence, your father who has employed us to see about his property abovementioned.
>
> He has informed us that your name is on the Title with himself as Joint Tenants but in fact you had made no contributions thereto and he alone paid for the property.

> He has completed paying for this on his own and now needs the Title.
>
> If you will comply then we are attaching hereto a letter of authority to be sent to the Lawyers to have the release of the Title to us.
>
> If you do not comply then your father will have to obtain relief by way of a Court Action.
>
> We trust you will not cause him to spend extra money to do this.
>
> Yours faithfully,
> Elsie A. Taylor & Company
>
> Pre:[sic] Elsie A. Taylor (Mrs.)
> Encl."

Elise Taylor, an attorney-at-law is the 2nd respondent/defendant. She took no part in the proceedings in the court below. This letter of 27th October, 1997 was not the only communication originating from her to Karl. I now reproduce a letter from Karl to Taylor-Wright & Company which deals with a further communication. This letter is dated April 12, 2002.

> "Dear Sir/Madam,
>
> On visiting Mrs. Elsie Taylor on the 8th day of April, 2002. [sic] I was presented with your letter of 4th day of April, 2002. In it you mentioned that Mrs. Barbara Spence was locked out of her home by Mr. Horace Shirley. Your other allegations include my father's request of Mrs. Taylor to remove my name from the Title; I executed Documents to remove my name from the Title; the property is now virtually abandoned and I have little or no dealings with the property, I should have no objection to honouring my father's intentions to Transfer the property to Mrs. Spence.

I must quickly say that the above assertions are inaccurate. Mrs. Spence, because of her mental/emotional challenges, left the residence on her own accord, unannounced. It was several months later when we realized she was gone. Several months afterwards I had Mr. Shirley vacate the premises. After he left, neighbours began entering the property and we had to secure the premises for fear of vandalisation and/or theft.

If my father expressed a desire to remove my name from the title, or Transfer it to Mrs. Spence, it was never in writing. Further, he never indicated this to me during our visits with each other in 1996 (the year the mortgage was discharged) and also in 1997. In october [sic] 1997 eight (8) months prior to his death, I received a letter from Mrs. Taylor requesting me to remove my name from the Title. I did not respond because I thought the timing of this was very strange given my father's worsening condition. He was in excruciating pain and had difficulty moving about. His conversation with me at the time, centered only on his medical condition. Never, during these last eight (8) months, did we discuss any matter regarding the Title.

Contrary to your letter I have always concerned myself with the property before and even moreso after my father's death. At the time of his death I (out of respect) agreed for Mrs. Spence to live in the premises as long as she didn't remarry or take another mate. However, the circumstances have now changed and it would not be wise nor safe for her to live in the home by herself. She would be a danger to herself, the property, and any prospective tenants.

At present, the property is in need of substantial repairs to both the interior and exterior. This has been estimated to be a considerable sum. Additionally, considerable sums have been paid to cover owed water, electricity and Tax bills. There is also a substantial estate duty to be paid. Mrs. Spence during her two (2) full years of living at the residence

> (and while employed) never contributed any monies to its upkeeping.
>
> As sole owner, I have accepted the responsibility for the above expenses so as to not allow for further deterioration of the premises. Consequently, the issue regarding the Title is very much straightforward. My father never drafted a Will and so your claim that Horace Shirley and Mrs. Elsie Taylor are executors of his estate is un-founded. Further, the property could not be part of his estate.
>
> Though I cannot allow Mrs. Spence to occupy the premises for reasons cited above, with due respect to her as my father's widow, I wouldn't mind contributing some funds periodically to her general welfare only after I am able to amortize the majority of the debt incurred to accomplish the present repairs and the other incidental expenditures I have now inherited.
>
> Respectfully,
> **KARL SPENCE**."

Counsel for the appellant is the principal of Taylor-Wright & Company.

4. On the 6th October, 2004, the court below refused the declaration sought [para. 2 supra]. It is this refusal which has occasioned this appeal. That court *inter alia* held that "the presumption of advancement applies". The correctness of that finding has been challenged. It was submitted that:

> "a presumption of advancement is based on the father's duty to provide for his wife or child" and since
>
> "At the time of the purchase of the property the 1st Respondent was not in need of being provided for. He is described on the title as a chemical engineer at the time of the purchase."

According to the appellant, there was no room for the operation of presumption of advancement. I do not accept this submission. The correct general approach has been stated by Jessel, M.R. in **Bennet v. Bennet** [1879], 10 Ch.D. 474 at p. 476 where he said:

> "The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, or in the joint names of the person and the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other; and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift.
>
> In other words, the presumption of gift arises from the moral obligation to give.
>
> That reconciles all the cases upon the subject but one, because nothing is better established than this, that as regards a child, a person not the father of the child may put himself in the position of one in *loco parentis* to the child, and so incur the obligation to make a provision for the child...
>
> So that a person in *loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child. It is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else.
>
> But the father is under that obligation from the mere fact of his being the father, and therefore no evidence is necessary to shew the obligation to provide for his child, because that is part of his duty. In the case of a father, you have only to prove the fact that he is the father, and when you have done that the

> obligation at once arises; but in the case of a person in *loco parentis* you must prove that he took upon himself the obligation."

There is certainly no requirement that "need" which would lead to insuperable problems of assessment, is a precondition for the determination as to whether or not the presumption is valid. I should say that that "child" includes an adult child as is the situation in this case.

5. I am of the view that the presumption of advancement is applicable in this case. So do the circumstances indicate that the presumption of advancement has been rebutted? The appellant relies on two factors. Firstly, that Edgar kept "the rent receipt for himself". One room of the dwelling house at 11 Dyna Avenue was apparently rented. Secondly:

> "...the deceased has devised the whole interest in the property indicating that he never intended a gift to his son and in fact Mrs. Elsie Taylor's letters to the 1st Respondent complain of the 1st Respondent [sic] failure to contribute to the price of the property and claims the title on pain of court action."

As to the first factor I do not regard the fact that Edgar "kept the rent for himself" as in anyway being, in the circumstances, inconsistent with the presumption of advancement. The money received from the rental from the one room could hardly have been substantial. Karl said in evidence that it was always the understanding that Edgar would enjoy the rental receipt and that as between his father and himself he would eventually "inherit" the disputed property.

6. As to the second factor, this is what I consider to be the crux of this appeal. Did the will rebut the presumption of advancement? The answer to this question lies in the application of the authoritative principles enunciated in **Shephard v. Cartwright** [1955] A.C. 431. I now take the liberty of reproducing the headnote of this case which is an accurate précis:

> "In 1929 a father, with an associate, promoted several private companies and caused a large part of the shares for which he subscribed to be allotted in varying proportions to his three children, one of them being then an infant. There was no evidence as to the circumstances in which the allotments were made, nor whether any share certificates were issued. The companies were successful and in 1934 the father and his associate promoted a public company which acquired the shares of all the companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares. The children signed the requisite documents at the request of their father without understanding what they were doing. He received the cash consideration and at various times sold, and received the proceeds of sale of, their shares in the new company. He subsequently placed to the credit of the children respectively in separate deposit accounts the exact amount of the cash consideration for the old shares and round sums in each case equivalent to the proceeds of sale of the new shares. Later he obtained the children's signatures to documents, of the contents of which they were ignorant, authorizing him to withdraw money from these accounts, and without their knowledge he drew on the accounts, which were by the end of 1936 exhausted, part of the sums withdrawn being dealt with for the benefit of the children but a large part remaining unaccounted for. He died in 1949. In an action against his executors:-

> *Held,* that the shares registered in the names of the children were an advancement, since, when shares were so registered there was a presumption of advancement. The acts and declarations of the parties before or at or immediately after the time of purchase, constituting part of the same transaction, were admissible in evidence for or against the party who did the act or made the declaration; subsequent declarations were admissible as evidence only against the party who made them and not in his favour. No inference as to the intention of the deceased at the time of the vesting could be drawn from his manner of dealing with other property which, before or after the transaction in question, he had transferred to one or other of the children, since such evidence was not admissible. Further, the fact that the children acted under their father's guidance without knowledge or inquiry precluded the admission in evidence of their conduct as constituting admissions against their own interest." (Emphasis mine)

7. In applying the principles set out in **Cartwright** (supra) the answer to the question posed in para. 6 is in the negative. The will executed on the 24th June 1998 clearly did not constitute part of the transaction of the conveyance of 9th January 1980. It was a wholly independent transaction. Therefore no reliance can be placed on the will as a factor to be considered in the fruitless attempt to rebut the presumption of advancement. The ground challenging the finding of the court below that "the presumption of advancement applies," fails. Consequently the criticism of the appellant that the court below was in error in rejecting the claim to the disputed property "on the equitable principles of the Resulting Trust" is without merit.

8. Another ground of appeal was that the Court below was in error in not deciding that the title of the 1st Respondent (Karl) was not extinguished in favour of the deceased (Edgar) under the Limitations of Actions Act". The essence of the appellant's contention was that Edgar had dispossessed Karl for more than 12 years (the requisite period under Section 3 of the Limitation of Action Act) and accordingly had by adverse possession acquired the interest of Karl in the property. Great reliance was placed on **Wills v. Wills** [2003] UKPC 84 a decision of the Judicial Committee of the Privy Council. In that case the parties while then married, lived at 84 Sunrise Crescent which was their matrimonial home. This property also contained a flat which was rented. In 1966 the wife became joint tenant of this property. The parties were divorced on 24th May, 1985. The husband (George) died intestate on the 28th December, 1992. The wife (Elma) left Jamaica in 1964 to stay with her daughter in the Untied States of America. This was not on a permanent basis. Subsequently to her leaving, the husband developed a relationship with Myra which eventually culminated in marriage on the 22nd January, 1986. Before this marriage the husband and Myra had lived together at Sunrise Crescent. In determining the question as to whether the wife could retain her interest as a joint tenant, Their Lordships' Board had this to say in paras. 28 and 29:

> "28. ...the issue does in the end come down to reasonably simple terms. It was established by the evidence that Elma never set foot in Sunrise Crescent after 1976. She never received any rental income, either from the flat at Sunrise Crescent or from Newleigh Avenue, for a longer period. From 1976 at

latest, Myra was living with George at Sunrise Crescent, and joining with him in managing the rented property, to all appearances as if they were co-owners as man and wife. In 1991 Elma visited Jamaica but did not go to Sunrise Crescent because George did not invite her. She never positively challenged Myra's evidence that none of her possessions (except her abandoned wedding ring) was to be found at Sunrise Crescent after 1971. In the Court of Appeal counsel for Elma conceded (as recorded in the judgment of Langrin JA (Ag)) that George had been in exclusive possession since 5 January 1974. Was there, in these circumstances, any possible basis for the conclusion that Elma had not discontinued her possession, or been dispossessed, more than 12 years before the issue of the originating summons?

29. In their Lordships' opinion the courts below reached that conclusion only because they proceeded on what Lord Browne-Wilkinson in *Pye* called the "heretical and wrong" supposition that it was Elma's state of mind, and not George's, which (together with George's actions) was decisive. Elma no doubt wished to maintain her claim to co-ownership, not least because she expected to outlive George and hoped to take by survivorship. But such an intention, however amply documented, cannot prevail over the plain fact of her total exclusion from the properties. After 1976 at the latest George occupied and used the former matrimonial home and enjoyed the rents from rented properties as if he were the sole owner, except so far as he chose to share his occupation and enjoyment with Myra. The judge's conclusion was wrong in law, and the Court of Appeal was wrong to uphold it. Neither court had the benefit of the full and clear guidance which the House of Lords has since given in the *Pye* case. But that decision was not making new law; it was clarifying what has been the law in England since the 1833 Act, and in Jamaica since the Limitation of Actions Act of 1881."

Pye" is in reference to **J.A. Pye [Oxford] Ltd. and Others v. Graham and Another** [2002] UKHL 30.

9. The appellant submitted that the authority of **Wills** (supra) is applicable to this case for the following reasons:

(i) Karl had not occupied the property.

(ii) Karl was never the recipient of any rental from the property.

(iii) Karl only visited the home as a guest. His evidence was that he visited the property once apart from the occasion of the funeral.

(iv) the property was used by Edgar and his wife as their matrimonial home and quite clearly he intended it to be a continuing provision for her.

As to the date of accrual i.e. when time begins to run for the purpose to the calculation of the twelve year period that was when the co-ownership took effect that is, January of 1980.

10. In **Wills**, (supra) there was no presumption of advancement in respect of the two disputed properties – Sunrise Crescent and Newleigh Avenue. These properties had been acquired by the husband and wife through the pooling of their resources. There was no gift by the husband to the wife. In this case Karl received a gift from his father. Since the presumption of advancement applies this gift took effect from the date of the conveyance i.e. 9th January, 1980. If, as in this case, there is nothing to challenge the fact that there was this gift, it is

the general understanding that a donor is not permitted to subsequently derogate from a gift. The will, as has already been demonstrated was ineffectual to disturb the outright nature of the gift. It is my view that neither Edgar nor anyone purporting to claim through him can use the provision of Limitations of Actions Act to deny Karl of his gift.

11. In any event, even if the Limitations of Actions Act was applicable, the appellant would be beset with insuperable difficulties. To succeed it would have to be established that Edgar had been in exclusive possession of the disputed property for twelve years and that during this period it was his intention to exclude Karl from enjoying any of the incidents of possession. I find it inconceivable to appreciate the submission that the date of accrual was as the time when "the co-ownership takes effect". This would mean, according to the appellant, that at the very time when the donor (Edgar) was making the gift he had the intention to exclude the donee (Karl) from possession of the very property the subject of the gift! It is inaccurate to state on the evidence of Karl that he made only two visits to the disputed property. He could not with any precision state when he visited his father at 11 Dyna Avenue. He recalled he came in 1985 and thereafter he would come "every two or three years". He came in 1987 or 1989 and he recalled he came in 1997. His visit in 1997 can be readily understood as by that time the ravages of cancer had been manifested on his father. The visits of Karl can be attributed to filial affection and as such to

describe his presence during those occasions as being that of "a guest" would be quite inappropriate. In respect of the contention that Edgar intended the disputed property to be a continuing provision for her (the appellant) a question immediately springs to mind. If this is so why did not Edgar take proceedings to rectify the title to 11 Dyna Avenue? It must not be taken that any such suggestion to attempt to alter the beneficial interest of Karl would meet with the approval of the law. Then there is the consideration that Karl had never "occupied the property". Well, at the date of the conveyance Karl lived abroad. It cannot be said that Edgar envisioned or anticipated that at the time of the conveyance that Karl would be living at that address. How could you then dispossess Karl? There would have to be uncontestable evidence that Karl's right to occupy the premises had been irrefutably denied by Edgar. This was not so in this case. As regards to the fact that Karl did not receive any of the rental income – this is inconsequential. This is not a situation where the disputed property had been acquired by pooled resources. Further the fact that Edgar kept the insubstantial rental monies by itself cannot be helpful in deciding whether Edgar had dispossessed Karl. It is my view that the ground of appeal which seeks to fault the court below for not acceding to the appellant's claim based on adverse possession fails.

12. By signed agreement dated 7th July, 1998 between Karl Spence and Barbara Spence the former stated that as "owner" of 11 Dyna Avenue he agreed:

> "to allow Mrs. Barbara Spence to occupy the said property until her death provided she does not remarry or take into [sic] reside with her another mate."

Karl resiled from this agreement. This is demonstrated from the fourth paragraph of his letter of April 12, 2002 (supra para. 3) the relevant part of this paragraph bears repeating. It said:

> "At the time of his death I (out of respect) agreed for Mrs. Spence to live in the premises as long as she didn't remarry or take another mate. However, the circumstances have now changed and it would not be wise nor safe for her to live in the home by herself. She would be a danger to herself, the property, and any prospective tenants."

In the court below the appellant unsuccessfully advocated that based on the agreement between Karl Spence and Barbara Spence (supra) the latter had acquired a life interest in the property at 11 Dyna Avenue. The stance of the appellant was based on what she considered as "equitable/promissory estoppel". Although there was a ground of appeal which challenged the decision in this regard, this ground was not actively pursued in this Court. The appellant, in the circumstances was unable to contest the proposition that the agreement only conferred on Barbara Spence the status of a licencee.

13. I would dismiss the appeal and award costs to the 1st respondent.

MARSH, J.A. (Ag.)

I have read in draft the judgments of Harrison, P. and Cooke, J.A.. I agree with their reasons and conclusions and have nothing further to add.

HARRISON, P.

ORDER

The appeal is dismissed. Costs to the first respondent to be agreed or taxed.