BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 37 of 2012

BETWEEN:

MARVA LINDAWESE BEST **Appellant**

AND

ERCILLE PAULINE KINCH **Respondent**

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge, Justices of Appeal

2017: February 7
2018: December 11

Mr. Norman Thomas QC for the Appellant
Mr. Edmund R. Hinkson for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] This appeal is a mesmerizing montage of ancestral Bajan socio economic, legal, historical and cultural memes.

[2] It concerns land purchased with money earned by a Barbadian in the construction of the Panama Canal, a Barbadian Silver Man, for which no grant

of representation had been obtained to the land for two generations. In those circumstances, the respondent, a granddaughter of the Silver Man, by a Barbadian foreclosure suit, a home grown legal fiction, obtained title to the land by a conveyance dated 15 November 1999 from the Registrar of the Supreme Court. The appellant instituted an action in the High Court against the respondent, her half-sister, for a declaration that that conveyance was fraudulently obtained and therefore void and, in consequence, for an order for the cancellation of the conveyance.

[3] The case was heard in the High Court before **Cornelius J** who, on 27 November 2012, delivered judgment in which she dismissed the claim of the appellant. This appeal before us is against that decision of **Cornelius J**.

FACTUAL BACKGROUND

Dramatis Personae

[4] The appellant/plaintiff, Marva Lindawese Best, resides at Briar Hall Road, Kendall Hill, Christ Church. She traces her paternal roots back to Livingstone Ethelbert Daniel (Livingstone). The respondent/defendant, Ercille Pauline Kinch, who resides in St Christopher, Christ Church is the half-sister of the appellant and also traces her paternal roots back to Livingstone.

[5] On 10 December 1927, Livingstone married Lamont Octavia Layne (Lamont). That marriage produced three children, namely, Hadley, Husford

and the respondent. Lamont died on 28 October 1932. Hadley died in the United States sometime in 1994 and Husford died on 30 May 1995. So that, the respondent is the only survivor of the marriage between Livingstone and Lamont.

[6] Meanwhile, two years after Lamont's death, on 11 October 1934, Livingstone remarried to Rose Deline Reid (Rose). That marriage produced three children, namely, Arlene Daphne Daniel-Brathwaite (Arlene), Warrington DeCourcey Daniel (Warrington) and the appellant.

[7] Livingstone died on 4 December 1982 and Rose on 24 March 1998, at the age of 89 years.

History of the Occupation of the Disputed Land

[8] The evidence is that Lamont's maternal grandfather, William Layne, was one of many Barbadians who had immigrated to work on the construction of the Panama Canal, the so-called "Silver Men." William Layne had used his earnings from Panama to purchase a plot of land situate at Briar Hall, Christ Church containing by admeasurement 1,762.7 square metres or thereabouts ("the land"). The dispute which has arisen before us is in respect of that land.

[9] William Layne married Constance Pinder Layne and had one child only, namely, Lamont, as we have already noted, the respondent's mother.

[10] William Layne died intestate and no one ever took out letters of administration

on behalf of his estate.

[11] After her marriage to Livingstone, Lamont and Livingstone lived in a single roof chattel house with a detached kitchen and a pit toilet on the land with the three children of their marriage until Lamont's death.

[12] After Lamont's death, Livingstone remained in occupation of the dwelling house on the land. Livingstone thereafter married Rose. Upon his marriage to Rose, Livingstone brought her to reside on the land with him and the three children of his union with Lamont.

[13] As already recited, the union between Livingstone and Rose produced three children. Of these, Arlene was born in Westmoreland, St. James and was raised by her maternal aunt in Upper Carlton, St. James. She never resided on the land. However, Warrington and the appellant were born and raised in the dwelling house on the land where Livingstone and Rose continued to live until Livingstone died in 1982. Rose continued to live there until her own passing in 1998.

[14] In the meantime, sometime in 1952, Livingstone requested the respondent to leave the dwelling house after she became pregnant. She moved to Scarborough, Christ Church where she lived thereafter with her child's father and eventual husband. In 1968, Warrington left the dwelling house when he immigrated to New York in the United States of America and, upon her

marriage to Lionel Best in 1974, the appellant also moved out of the dwelling house and went to live with her husband in Lodge Road, Christ Church.

[15] It is important to flag here that, even after Warrington's immigration to the United States, he maintained ties to the land in that he left his daughter, Wilma Daniel, residing in the dwelling house until she was served with a notice to quit by the respondent in April, 2008. Sometime in 1972, Warrington had had the dwelling house renovated into a three bedroom chattel house with a wall bathroom. Before his mother's death, sometime in 1994, Warrington had commenced paying an annual rent of $160.00 in respect of the land to the respondent.

[16] It is also important to flag here that, the appellant, in or about 2002 requested of the respondent to rent her, the appellant, lot 3 of the larger area of the land on which the appellant and her husband could move a chattel house which was given to the appellant's husband by his father. The respondent agreed to rent the lot to the appellant at an annual rent of $160.00. The appellant paid that sum until she was served a notice to quit by the respondent on 26 April 2008.

Foreclosure Action by the Respondent

[17] Sometime in 1984, after the death of her father but before the death of her stepmother, the respondent caused a plan of the land to be prepared by a land

surveyor. That plan proposed the subdivision of the land into four lots, namely, Lots 1, 2, 3 and 4. Thereafter, on 9 October 1991, the respondent made an application to the Chief Town Planner for permission to effect the subdivision. Permission was granted on 15 April 1992.

[18] On 19 February 1997, the respondent instituted foreclosure proceedings in the High Court under ***Order 31*** of the ***Rules of the Supreme Court of Judicature, 1982*** in fictional **Suit No. 260** of **1997** entitled **Roseanne Skeete v Ercille Pauline Kinch**. According to the respondent, the object of that suit was for her to obtain title to the land.

[19] In her supplementary affidavit dated 12 February 1999 and filed on 15 February 1999 in the foreclosure suit, the respondent averred that no one had "any prior or stronger right to ownership or occupation" of the land greater than hers. She deposed that her brother, Husford, who was residing in the dwelling house at the time of his death, "died intestate without ever having any children or any wife" and that she was "his sole surviving sibling". It may be noted that she did not make any mention of Hadley who had died in the United States in 1994.

[20] In her affidavit, the respondent deposed that her half-brother, Warrington, was occupying a portion of the land. She averred, however, he had been paying to her $40.00 "in land rent every three months in this regard since 1994."

[21] As part of the process of the application, a marshal attached to the Court Process Office in the Registration Department, on 19 December 1997, affixed a copy of the written notice on the land inviting persons having any claims, liens or charges against the land to file them in the Registration Office. Similar notices had appeared in the Official Gazette published on 22 May 1997 and in the Nation Newspaper published on 15 July 1997.

[22] No adverse claims were filed in the Registration Department. Accordingly, on conclusion of the foreclosure proceedings, the Registrar of the Supreme Court conveyed the land to the respondent by way of a conveyance dated 15 November 1999. This conveyance was recorded in the Land Registry on 15 February 2001 as Deed No. 1085 of 2001. So that, by way of the foreclosure proceedings, the respondent became sole owner of the land.

Action in the High Court

[23] It will be recalled that the respondent, on 26 April 2008, served a notice to quit Lot 3 on the appellant. The appellant refused to do so. Instead, by a writ of summons filed on 27 February 2009, the appellant instituted an action against the respondent. In it she sought to obtain, in particular, a declaration that the conveyance dated 15 November 1999 from the Registrar of the Supreme Court was void and an order that that conveyance be delivered up to the court for cancellation.

[24] In her statement of claim filed along with her writ of summons, the appellant alleged that the respondent had wrongfully commenced the foreclosure proceedings as she, the respondent, "never had any exclusive claim right or title as against the [appellant] to the said land" and that the respondent "knew or ought to have known that the [appellant] was equally entitled to the said land as the [respondent]". The appellant also alleged that the respondent had "knowingly and falsely misrepresented to the Registrar of the Supreme Court" that the respondent had inherited the land from the respondent's maternal grandmother.

[25] The respondent further alleged that their father, Livingstone, had become entitled to the land by curtesy or that, in the alternative, he had obtained possessory title to the land as a result of his occupying the land for about 30 years. She contended that, as her father had died intestate, the land passed to Rose, his second wife, and his children pursuant to the **Succession Act, Cap. 249 (Cap. 249)**. Thus, according to her, the respondent had no exclusive right to the land to which she had obtained title and the conveyance by which she received title should be set aside.

[26] The respondent filed her defence on 20 March 2009. In it she denied the allegations made against her by the appellant. She also denied that her father was ever entitled to the land, whether by curtesy or by adverse possession.

Similarly, she denied that her father's second wife, Rose, ever gained possessory title to the land and so could not pass on any rights to the land to the children of the union between her father and Rose.

Cornelius J's Judgment

[27] The appellant's claim was heard before **Cornelius J** on 8, 9 and 15 November 2012 and, with commendable promptitude, **Cornelius J** delivered her judgment in the matter on 27 November 2012. In denying the appellant's claim, the judge held, at **para [56]** of her judgment, that the appellant's father "had no interest in the land which he could have deposed (sic) by a will or which his children were entitled to claim on intestacy, and also that no adverse possession [was] established." In those premises, she concluded in that same paragraph that "the application by the [appellant] to have the conveyance dated November 15, 1999 from the Registrar of the Supreme Court declared void is dismissed."

[28] With respect to the appellant's father's interest in the land by curtesy, **Cornelius J**, at **para [44]** found that the authorities establish that a right to land by virtue of curtesy only gives a widower claiming the same a life interest in the property in question and that any right obtained therefore determines on the death of the widower. The judge further found in that paragraph that "persons holding a tenancy by curtesy before 1975 did not as a result of the

passage of the Succession Act hold estates in fee simple". Accordingly, she concluded at **para [46]** as follows:

> "Therefore, it is clear that on Livingstone's death he was not in possession of any estate or interest obtained by the common law doctrine of curtesy that he could leave to his wife Rose or his daughter, the [Appellant]."

[29] With respect to the appellant's claim based on adverse possession, after exploring the relevant statutory provisions and case authorities between **paras [47] and [*52*]** of her judgment, **Cornelius J** concluded at **paras [53] and [54]**:

> "[53] Accordingly, as the plaintiff's father was a tenant in curtesy, he could not have been in adverse possession of the land and could not obtain title to it on this basis. Additionally, while the Plaintiff's mother was living on the land with her husband, she was also not thereby in adverse possession of the land as she was living as a member of his household … Her adverse possession of the land commenced only when she remained in possession of the land after the death of her husband…
>
> [54] It is possible that the Plaintiff's mother may or could have obtained title to the land by adverse possession as she remained on it for over 16 years after the death of the Plaintiff's father. The Court finds as a matter of fact that her possession of the land had been continued by her only son, Warrington Daniel. He may therefore have also been able to obtain title by adverse possession, at least until he started paying the Defendant rent for his occupation of the land."

[30] In light of her findings, **Cornelius J** ordered that the appellant be given 6 months from the date of judgment to quit the land occupied by her. The judge ordered that "costs to be taxed or agreed are awarded to the Defendant."

THE APPEAL

Issues in the Appeal

[31] On 14 December 2012, the appellant filed a notice of appeal to this Court against the decision of **Cornelius J**. This notice, as amended by an amended notice of appeal filed on 15 April 2016, contained ten grounds of appeal. In our judgment, those grounds, the written and oral submissions of Mr. Norman Thomas QC, counsel for the appellant, and the written and oral submissions of Mr. Edmund Hinkson make it plain that the final disposition of this appeal depends on whether or not **Cornelius J** was correct in holding that the Registrar's conveyance was not obtained by fraud since, (i) the appellant's father's tenancy by the curtesy did not confer on him an interest in the land which he could have disposed of by a will or which his children were entitled to claim on intestacy, and (ii) that no adverse possession was established in relation to either the appellant's father or her mother. These were the two circumstances adduced by the appellant before **Cornelius J** as constituting evidence that the Registrar's conveyance was fraudulently obtained by the respondent.

[32] The appellant has also raised the issue of her obtaining title to Lot 3 by operation of the doctrine of proprietary estoppel. This issue was neither pleaded nor argued before **Cornelius J**. However, under **section 61 (1) (e)**

and **(i)** of the **Supreme Court of Judicature Act Cap. 117A**, this Court has power to hear an issue not raised before the trial judge. We have decided to exercise that power in favour of considering the estoppel issue in this appeal.

[33] We therefore now turn to consideration of the appellant's challenge of **Cornelius J**'s dismissal of the appellant's application to have the Registrar's conveyance declared void and ordered cancelled on the grounds of fraud. We feel bound to say at the outset that we are in entire agreement with the decision of **Cornelius J** and with the reasons given by her in justifying that decision and do not consider that that decision is in any way undermined by the appellant's belated proprietary estoppel claim.

[34] What follows next is our discussion of the reasons for our agreement with **Cornelius J** and for our dismissal of the proprietary estoppel claim.

DISCUSSION

The Fraud Claim

[35] In our judgment, it is advantageous to begin our consideration of the appellant's fraud claim by retracing some general principles applicable to the impeachment of a Registrar's conveyance obtained in a fictional foreclosure suit on the basis of fraud.

[36] Ms. Molly A. Reid, B.A, attorney-at-law, is the undoubted authority on the fictional foreclosure suit in Barbados. In her seminal work *"The Foreclosure*

Suit in Barbados: A Twentieth Century Fiction" (May 1973 UWI Thesis for the Masters in Law, Faculty of Law Library) (Thesis), she writes at p. 77 that the intention and general effect of the provisions of the **Chancery Act 1906** (now incorporated in **section 16** of the **Judicial Sale of Land Act, Cap. 227**) governing judicial sales of land in Barbados is to grant to the purchaser of any land sold under a fictional foreclosure suit a conveyance, the Registrar's conveyance, which is unassailable in his or her hands. Such a conveyance under ordinary circumstances conclusively establishes his or her title to precisely the estate or interest in the land purported to be granted to him or her subject only to such encumbrances as are disclosed on the face of the conveyance.

[37] This principle that the Registrar's conveyance obtained in a fictional foreclosure suit is conclusive evidence of the purchaser's title in the land was affirmed in the High Court case of **Wiltshire v Cain (1960) 2 WIR 12**. However, at **pp 15** and **16, Fields CJ (Acting)** added the caveat that this principle operates "unless it can be shown that some fraud was perpetrated or for other reasons the process of the Court was abused." That caveat that the indefeasibility of title obtained by a purchaser as a result of the judicial processes of the foreclosure suit is lost on proof of fraud on the part of the purchaser or his agent in obtaining such title was also affirmed in this Court

in the case of **Beckles v Springer (1992) Barb LR 181**. There it was said:

> "The fiction of the foreclosure suit was never intended as a device for subverting the law…. Its use for depriving others of their interests in land cannot be sanctioned….the Court will not stand by and allow a statute to be used to get around the law or as an instrument of fraud."

And, in the High Court decision of **Duke v. Jones (Suit No. 1518 of 1990)**, **Williams CJ** stated the principle as follows:

> "In Barbados the fictitious foreclosure suit is a device long used to enable those who own interests in land to obtain a marketable title. Its use to enable persons to be deprived of what they own has never been and should never be, countenanced. Its use as an instrument of fraud must not be permitted."

[38] So, it is undoubted law that title by way of a Registrar's conveyance obtained in the fictional foreclosure suit may be defeated by proof of fraud or other abuse of the process of the court on the part of the purchaser obtaining such title. But, how is perpetration of fraud shown?

[39] It appears to be well-settled by a flood of case law in Barbados that there are two principal circumstances in which fraud may be established. The first is where, as Ms. Reid puts it at p. 79 of her Thesis "some persons, whilst being aware that there were others with equally good or better titles to the fee simple estate in the particular parcels of land, have concealed this knowledge from the Court and attempted to invoke the provisions of the fictional foreclosure suit to obtain the benefit of the Registrar's conveyance." **Reece v Goddard**

(Action No. 198 of 1952 in **Assistant Court of Appeal)**, **Griffith v Bayley (Action No. 442 of 1952** in **Assistant Court of Appeal)**, **Archer v Haynes (1972) 7 Barb LR 104** and **Yearwood v Griffith (1961) 16 Barb LR 272** are all cases supporting this statement of law. The second circumstance is where the defendant-mortgagor in a foreclosure suit, who was fully aware that a party has obtained a title at law to a parcel of land by means of adverse possession against him, seeks to defeat such rights by concealing the fact from the court and obtaining a Registrar's conveyance in ignorance of that party. **Spencer v Spencer (Suit No. 1517 of 1995) (Spencer v. Spencer)** and **Welch v Broomes (Suit No. 603 of 1979)** may be cited in support of this principle.

[40] Very importantly, **Spencer v Spencer** is authority for the proposition of law that, no matter which of these two circumstances is alleged to support a fraud claim, the standard of proof required to establish that fraud claim is not easily discharged. Ms. Reid explains the reason for this very high standard of proof as follows:

> "[T]he uncertain status of land law in the Island frequently leads some persons to a genuine belief that they have a valid claim to land to which they in fact have no rights in law. The injured party will therefore be required to demonstrate forceably to the Court that the defendant-mortgagor of the suit never genuinely or could not possibly in any circumstances have had a genuine belief in the existence of his right to the land before he can attempt to prove a concealment of the real facts from the Court. Then only

will the remedy of rescission of the fraudulent conveyance be available."

[41] As already noted, before us, the appellant contended that **Cornelius J** erred in law and fact in holding that fraud was not established in this case. In furtherance of this contention, the appellant maintained that **Cornelius J** should have held that the appellant had established that the respondent knew or ought to have known that the appellant was as equally entitled to the land as the respondent by virtue of the fact that their father became entitled to the land by curtesy, had died intestate and that the land passed to Rose, his second wife, and to his children pursuant to **section 49** of **Cap 249**. The appellant also maintained that she had shown that the respondent was fully aware that her father and her mother had obtained a title at law to the land by means of adverse possession and that the respondent had sought to defeat such rights by concealing the fact from the Court and obtaining a Registrar's conveyance in ignorance of the appellant.

[42] Against the backdrop of the foregoing legal principles, we consider these contentions under the sub-heads (i) Title by Curtesy, **Cap. 249** and the **Property Act Cap. 236 (Cap. 236)** and (ii) Adverse Possession.

(i) Title by Curtesy, Cap. 249 and **Cap. 236**

[43] It is not in the terrain of dispute that an estate by curtesy of England (or

Scotland), also called tenancy by curtesy, until its abolition by **section 4 (b)** of **Cap. 249**, had been long recognised in Barbados. Basically, an estate by curtesy, or a tenancy by curtesy, consisted of the common law right of a widower to a life interest in land owned by his wife who died intestate during their marriage and who at the time of her death had children that were born alive from her who were capable of inheriting the land of their mother. The wife had also to be solely entitled to the land and had to have seisin, or actual possession, at the time of her death.

[44] The parties to this appeal are in full agreement that their father, Livingstone, acquired a tenancy by curtesy in the estate of his wife, Lamont, after her death in 1932. The parties are also in full agreement that the rights of Livingstone at common law, as a tenant by curtesy, were akin to those of any tenant for life and that, without more, like any other tenant for life, his tenancy by curtesy determined on his death. However, Mr. Thomas QC argues that there is more, namely, **section 4 (b)** and **section 49** of **Cap. 249** and **section 5 (1)** of **Cap 236**. The operation of **section 4 (b)** of **Cap. 249** and **section 5 (1)** of **Cap. 236** in the case at bar, argues Mr. Thomas QC, is to convert Livingstone's tenancy by curtesy into a fee simple estate, an inheritable estate, which was then to be distributed in accordance with **section 49** of **Cap. 249**.

[45] Let us retrace this argument.

[46] The foundation stone of Mr. Thomas QC's argument is that **section 4 (b)** of **Cap. 249** and **section 5 (1)** of **Cap. 236** read together "abolished tenancy by curtesy and created and vested the fee simple in the land in the appellant's father by operation of law." On this substructure, Mr. Thomas QC erects the conclusion that the land was distributable in accordance with **section 49** of **Cap. 249**.

[47] We must confess to finding tremendous difficulties with this argument for at least the three reasons which follow.

[48] First, the floor board of Mr. Thomas QC's argument rests on the assumption that **section 4 (b)** of **Cap. 249** is to be read as having both prospective and retrospective effect and that as such it operates to abolish both tenancies by curtesy after 13 November 1975, the date of the Act, as well as those subsisting at the date of that Act. In our judgment, this reading of **section 4 (b)** of **Cap. 249** flies in the face of fundamental principles of statutory interpretation, including the principle that no statute is to be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication: per Kennedy LJ in **West v Gwynne [1911] 2 Ch. 1**.

[49] **Section 4 (b)** of **Cap. 249** provides as follows:

> "4. With regard to the real and personal estate of a person dying intestate there shall be abolished
>
> (b) tenancy by curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate under the general law or by custom or otherwise."

In our judgment, there is not even a vague suggestion in this subsection that it is to operate retrospectively. The clear words of the subsection point unequivocally to the abolition of tenancies by curtesy which would have arisen after the date of the Act and not those subsisting at the date of the Act. This is because the subsection expressly abolishes tenancy by curtesy in respect "of a person dying intestate" but does not abolish tenancy by curtesy in respect "a person who has died intestate" before the time of the Act.

[50] Second, the next layer of the appellant's argument is that, **section 4 (b)** of **Cap. 249** having abolished tenancy by curtesy, **section 5 (1)** of **Cap. 236** somehow converted a tenancy by curtesy so abolished into a fee simple estate. We can find no interpretational pathway to such a conclusion.

[51] **Section 5 (1)** of **Cap. 236** provides that: "A fee simple in possession (including any such estate of a corporation) is…equivalent so far as the law permits to absolute ownership, and all feudal tenure of land is hereby abolished." The clear effect and import of **section 5 (1)** is the abolition of the feudal tenure theory, thought to be operating in Barbados at the time of that

Act, that the Crown was vested with beneficial ownership of all land. Accordingly, we do not agree that **section 5 (1)** somehow transmutes Livingstone's tenancy by curtesy which was subsisting at the date of **section 4 (b)** of **Cap. 249**, and which was unaffected by **section 4 (b)** of **Cap. 249**, into a fee simple estate.

[52] Third, in light of our conclusion that Livingstone's tenancy by curtesy was unaffected by **section 4 (b)** of **Cap. 249**, and that, in any case, **section 5 (1)** of **Cap. 236** did not operate to confer a fee simple estate on Livingstone, the distribution on intestacy rules established under **Part VI** of **Cap. 249** which includes **section 49** are inapplicable to Livingstone's tenancy by curtesy. **Section 48** of **Cap. 249** expressly makes those rules applicable only to "all estate to which a deceased person was beneficially entitled for an estate or interest not ceasing on his death…" The estate or interest of Livingstone under his tenancy by curtesy ceased on his death and so, by the express language of **section 48** of **Cap. 249**, **section 48** of that Act had no application.

[53] The upshot of the foregoing is that the appellant's claim to an interest in the land under **section 48** of **Cap. 249** is of decidedly dubious pedigree. In any event, it does not constitute evidence sufficient to satisfy the standard of proof required to establish the fraud claim, which is on all the authorities not easily discharged. Accordingly, the appellant's impeachment of the respondent's

title obtained in the Registrar's conveyance on the grounds that fraud was shown because she, the appellant, derived title to the land through her father's estate, was correctly held by **Cornelius J** to have failed.

(ii) Adverse Possession

[54] The law relating to adverse possession is governed by the **Limitations of Actions Act Cap. 231 (Cap. 231)**. First, **section 25** of that Act provides that no action shall be brought by any person to recover land after the expiration of 10 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In turn, **section 31** of the Act provides as follows:

> "31. (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run, that is to say, the land is in "adverse possession", and when under this Act any right of action to recover land is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing until adverse possession is taken of the land.
>
> (2) When a right of action to recover land has accrued and after its accrual but before the right is barred the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued, and no fresh right of action may be treated as accruing until the land is again taken into adverse possession."

[55] It is clear from **sections 25** and **31** of **Cap. 231**, then, that for a person to claim title to land by adverse possession that person must have been in adverse

possession of the land for a continuous period of not less than 10 years from the making of his or her claim to the land. In our judgment, the appellant's father, Livingstone, being a tenant by curtesy, could not have been in adverse possession and was therefore disentitled from claiming title to the land by adverse possession. This is because, as was held in the old English case of **Doe dem Milner v Brightwen 10 East 582**, a person who claims to occupy land through the English custom of curtesy cannot simultaneously claim to be in adverse possession. Of course, it will be remembered that the appellant has maintained before us, and we have accepted, that her father became entitled to the land during his lifetime by virtue of curtesy.

[56] Nor was the appellant's mother ever in adverse possession of the land. During her husband's, Livingstone's, lifetime, she was living with him as a member of his household and was thereby not in adverse possession of the land. Her adverse possession could only have commenced after his death when she remained in possession of the land for 16 years. In relation to this, however, **Cornelius J** found at **para [54]** of her judgment that "as a matter of fact…her possession of the land had been continued by her only son, Warrington Daniel" and that Rose was therefore not in adverse possession during those 16 years.

[57] The settled jurisprudence of this Court is that it will only interfere with a

finding of fact by a trial judge where there was no evidence or only a scintilla of evidence to support that finding. In this case there was ample evidence before **Cornelius J** to support her finding that Warrington and not Rose, the appellant's mother, was in possession during the 16 years Rose remained on the land after Livingstone's death. Therefore, consistent with its case law, this Court will not interfere with **Cornelius J**'s finding that the appellant's mother never acquired a possessory title capable of descending to the children of the marriage between herself and Livingstone, including the appellant.

[58] It is our judgment that, in consequence of the foregoing, the appellant did not substantiate her fraud claim to the effect that the respondent, being fully aware that the appellant's mother, had obtained a title at law to the land.

Our Conclusion on the Fraud Claim

[59] For all of the foregoing reasons, we hold that **Cornelius J** was correct in holding that the Registrar's conveyance was not obtained by fraud. The appellant's father's tenancy by the curtesy did not confer on him an interest in the land which he could have disposed of by a will or which his children were entitled to claim on intestacy. Additionally, no adverse possession was established in relation to either the appellant's father or her mother. In those premises, the appellant's appeal must fail on this ground and the judgment of **Cornelius J** upheld.

[60] We therefore turn to the proprietary estoppel issue.

Proprietary Estoppel Claim

[61] In this Court's decision in **Ward v Walsh Civil Appeal No. 20 of 2005 (Ward v Walsh)**, this Court opined at **para [73]** as follows:

> "The fundamental concern of the doctrine of proprietary estoppel is the promotion of conscientious dealings in relation to land. In ***Crabb v Arun District Council [1976] Ch 179 at 187***, Lord Denning MR, citing Lord Cairns in ***Hughes v Metropolitan Ry Co (1887) 2 App Cas 439 at 448***, explained the doctrine as having its origins in "the first principle upon which all courts of equity proceed", namely, "to prevent a person from insisting on his strict legal rights arising under a contract, or on his title deeds, or by statute when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties".

[62] This Court went on to explain that there are two critical facets of the proprietary estoppel doctrine. The first of these is that the doctrine is predicated on the assumption that legal rights cannot be enforced in total isolation from the relational context in which relevant dealings have taken place. The second is that the courts have a residual jurisdiction to scrutinise the dealings between parties and to restrain particular assertions of strict legal rights on grounds of conscience. Indeed this Court noted that, as the doctrine has evolved, it is now often treated as having the effect of creating rights of an equity founded upon estoppel. It is unsurprising, therefore, that

Mr. Thomas QC, in the circumstances of this case, has raised an argument that the appellant acquired the right of an equity in Lot 3 founded upon estoppel. But did she?

[63] In approaching that question, this Court has to bear very much in its mind the caution of Lord Walker in the English House of Lords case of **Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55 (Yeoman's Row)**, that even though the proprietary estoppel doctrine is a flexible doctrine, it is not to be used as a 'wild card' whenever the court disapproves of the conduct of a land owner. In our judgment, this caution means that, as a matter of principle, the fact or facts, or the matter of mixed fact and law on which estoppel is being asserted must be pleaded if a claim for proprietary estoppel is to be upheld. As Lord Scott warned at **para [28]** of **Yeoman's Row**, if this requirement is not recognised, " proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable…"

[64] The foregoing notwithstanding, this Court in **Ward v Walsh** (and the CCJ did not disagree) recognised an exception to the general principle that proprietary estoppel must be pleaded, a case where on the facts found by the trial judge, a proprietary estoppel claim is available. However, in our judgment, this exception is not available to the appellant in this case.

[65] In the oft-cited English case of **Ramsden v. Dyson (1866) LR 1 HL 129 at 170**, Lord Kingsdown adumbrated the requirements of estoppel in this type of case 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 upon the faith of such promise or expectation, with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

[66] It is manifest from this authority, which was cited with approval by the CCJ in **Walsh v Ward**, that to assert proprietary estoppel in this case the appellant would have had to adduce evidence of a promise or representation by the respondent which created an expectation to an undoubted and inevitable certain interest in the land. Here, the only relevant evidence adduced by the appellant was that her husband's father gave him a house which she, the appellant, asked the respondent to allow her, the appellant, to put on a part of the land and that the respondent agreed to that request. In our view, this can hardly be described as evidence of a promise or representation of the character needed to assert a proprietary estoppel claim to the land.

[67] From the authorities, the appellant would also have to adduce evidence clearly

establishing that she was encouraged either actively or passively to change her position to her detriment in reliance on the representation or promise of the respondent. Here, we note that Mr. Thomas QC, in his written submissions before us stated that "there were substantial improvements which included water borne facilities and a wall bathroom." We can find no evidence which was led before **Cornelius J** to this effect. By the same token, we can find no evidence that the respondent was aware of any such improvements or indeed had either actively or passively encouraged any such improvements. The appellant's evidence before **Cornelius J** does not therefore satisfy the requirement for detrimental reliance in a proprietary estoppel claim.

[68] In sum, on the facts found by **Cornelius J**, there was no evidence to support the basic requirements of a proprietary estoppel claim. Accordingly, the appellant's proprietary estoppel claim must fail.

CONCLUSION

[69] The appeal must fail on each of the grounds raised by the appellant. The appellant has failed to discharge the standard of proof required to show that the Registrar's conveyance, vesting her half-sister, the respondent, with title in the land, was obtained by fraud. Additionally, the appellant's contention that adverse possession was established in relation to either of her

parents was unsubstantiated. There was no evidence that the appellant's parents acquired a possessory title in the land which was capable of descending to the children of the marriage, including the appellant. Finally, there was no evidence of a promise or representation made by the respondent, which created an expectation in the appellant to an interest in the land, on which the appellant relied to her detriment.

DISPOSAL

[70] For all of the foregoing reasons, we hold that the appeal is dismissed, with costs to the respondent, to be assessed, if not agreed.

Justice of Appeal

Justice of Appeal **Justice of Appeal**