BARBADOS

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL

CIVIL APPEAL NO: 35 of 2012

BETWEEN:

RUTH SOBERS (also known as Elsie Sobers) (Acting herein by PAULINE BOYCE Her Next Friend)	**FIRST APPELLANT**
GLENDA LEWIS	**SECOND APPELLANT**
AND	
CHARLES ADOLPHUS BANNISTER	**RESPONDENT**

Before: The Hon. Sir Marston C.D. Gibson KA, Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. William J. Chandler Justice of Appeal, (Ag.)

2018: October 10
2020: July 24

Mr. Randall De. V Belgrave, QC for the First Appellant

Mr. Tennyson Vaughn for the Second Appellant

Mr. Arthur Holder for the Respondent

DECISION

CHANDLER JA (AG):

INTRODUCTION

[1] This is an appeal filed by the first and second appellants against the decision

of **Cornelius J** made on 20 September 2012 in which the learned Judge held *inter alia,* that:

> 1. That the failure of the respondent to serve notice of his application for letters of administration to the estate of Charles Christopher Bannister did not invalidate the subsequent grant of letters testamentary to the respondent;
>
> 2. That the respondent's entitlement to apply for letters testamentary was not time barred;
>
> 3. That the first and second appellants did not acquire a title to the property by way of adverse possession; and
>
> 4. That the failure of the respondent to vest in the first appellant her one third interest in the property in the deed of assent to the respondent did not invalidate the assent.

BACKGROUND

[2] Mr. Charles Christopher Bannister (the deceased) died intestate on 16 May 1955. At the date of his death, the deceased was the estate owner of 2,252.8 square metres of land situate at Sion Hill, St. James with a house and shop thereon (the property). He was survived by his spouse Ruth Sobers (the first appellant) and three children, the respondent Charles Adolphus Bannister born on the 6 April 1946, Pauline Boyce and the second appellant, Glenda Lewis. In the affidavit filed 12 March 2008 Pauline Boyce, as next friend of the first appellant, deposed that Alwin Bannister was the son of Christopher

Conrad Sobers and the first appellant. In his affidavit filed in support of the application for a grant of administration to the estate of the deceased, the respondent deposed that Alwin Bannister was the son of the deceased. Nothing however, turns on this point.

[3] On 31 July 1957, the first appellant married Mr. Christopher Conrad Sobers. They established a matrimonial home at the property where they also operated the shop attached to the house. The respondent lived with his mother, the first appellant, stepfather Christopher Conrad Sobers and his three (3) siblings until his emigration to the United States sometime in 1980 at age 34 or 35. It has been conceded by all parties that the respondent is the elder of the deceased's sons and the heir at law to the estate of the deceased (the estate).

[4] The respondent deposed that despite immigrating to the USA he continued to stay at the property on his visits to Barbados until he was prevented from doing so by Christopher Sobers, after he had a disagreement with him sometime in 2003.

[5] On 26 July 2005, the respondent, by way of application bearing the number 730 of 2005, applied to the Supreme Court of Barbados for a grant of Letters of Administration to the estate of the deceased. Notice of the application was not served on the first appellant. On 3 April 2006, Letters of Administration

were granted to the respondent and issued to him on the 21 April 2006 (the grant).

[6] On 26 June 2007, the respondent executed a Deed of Assent vesting the entire property at Sion Hill aforesaid in himself absolutely.

[7] On 10 October 2007, Pauline Boyce and Alwin Bannister applied to the court, under the **Mental Health Act, Cap. 45**, to be appointed receivers and managers of the first appellant's property and affairs. The first appellant suffered dementia due to Alzheimer's disease. This application was granted on 10 October 2007.

[8] On 20 November 2007, the respondent gave Pauline Boyce notice to vacate the house. The respondent issued a subsequent notice on 14 December 2007 to Pauline Boyce to vacate the land and cease operations of the shop thereon. This notice was also sent to his other siblings.

THE PROCEEDINGS IN THE COURT BELOW

[9] On the 12 March 2008, an originating summons bearing the number 414 of 2008 (the originating application) was filed by the first appellant acting therein by Pauline Boyce her next friend for the opinion, advice or directions of the court, *inter alia*, as to whether the grant was illegally and/or improperly obtained.

[10] The first appellant sought declarations that the respondent illegally or improperly obtained the grant and that he failed to comply with the provisions of the **Supreme Court (Non-Contentious) Probate Rules, 1959 (NCPR)**. The gravamen of the appellant's case was that (1) the respondent failed to give notice of his application for the grant of administration to the first appellant who had a prior right to the grant and (2) that the first appellant had acquired a title by adverse possession against the respondent.

[11] The second appellant on 12 June 2008 applied to be joined as a plaintiff in the originating application. No order for joinder is on file, however, the matter continued with her as a second plaintiff.

CORNELIUS J'S DECISION

[12] **Cornelius J** held that the practice of giving notice to other next of kin equally entitled to a grant was a matter of administrative practice or a technical requirement and was not mandatory. She further held that direct notice to the first appellant would not have made any significant difference since the respondent was the person entitled to the fee simple subject to the first appellant's right of dower. There was consequently no real prejudice caused to the first appellant by this omission.

[13] With respect to the first appellant's interest in the property, **Cornelius J**

held that there was no dispute that the first appellant was entitled to a life interest in a one-third share of the property. This was an equitable interest only and only upon her death could her estate be determined and the respondent, as reversioner, able to claim possession of that one-third share. She relied upon *Commonwealth Caribbean Land Law* by *Sampson Owusu Routledge-Cavendish, 2007,* pages *104-105*.

[14] With respect to the claim of adverse possession, **Cornelius J** found that it was insufficient for the first appellant to establish that she occupied the property without paying rent, she had to establish that her possession was open, peaceful and adverse and accompanied by the relevant *animus possidendi*. The learned judge also held that there was no evidence of any unequivocal acts by the first appellant in an effort to dispossess the respondent. Her continued occupation of the property was in concurrence with her life interest in a one-third share of the property and there was nothing in the evidence to show that the first appellant had any intention of dispossessing the respondent.

[15] **Cornelius J** also found that the first appellant could not grant a greater interest in the property than she herself possessed and therefore could not pass to the second appellant any complete and indefinite title,

consequently, any promise to give the second appellant a freehold part of the land was unenforceable.

[16] The learned trial judge found that only two legal estates were now capable of existing in land namely a fee simple absolute and a term of years absolute. Consequently the life interest of the first appellant was an equitable interest and it was unnecessary for there to be a deed of assent in respect of the first appellant's interest in the property.

[17] **Cornelius J** also found that the **Limitation of Actions Act, Cap. 231 (Cap. 231)** did not apply to applications for letters testamentary and therefore the respondent was not barred from applying for Letters of Administration to his father's estate after a lapse of 50 years.

THE FIRST APPELLANT'S APPEAL

[18] The first appellant filed her appeal on 9 October 2012 against **Cornelius J's** findings that:

> 1. The Notice by the Respondent to the First Appellant in respect of his Application for Letters of Administration, in the circumstances, was adequate and/or in the alternative unnecessary;
>
> 2. There were no reasonable and proper grounds to believe that the Grant of Letters of Administration dated the 3rd day of April, 2006 to the estate of Charles Christopher Bannister, deceased and made to Charles Adolphus Bannister, the

respondent herein, was illegally and/or improperly obtained by the said Charles Adolphus Bannister;

3. The Grant of Letters of Administration referred to at 2 above, was not invalid by reason of the defendant's failure or omission to comply with the provisions of the Non-Contentious Probate Rules 1959 or any other provisions governing probate or administration applications, or otherwise;

4. The first appellant had not executed or engaged in any overt act(s) of ownership adverse to the rights and/or title of the respondent herein and/or Charles Christopher Bannister, to the property situate at Sion Hill in the parish of Saint James;

5. There was no limit on the time by which the respondent should have asserted his legal right(s);

6. The circumstances of the case did not warrant the grant of equitable or any other relief to the first appellant.

THE FIRST APPELLANT'S GROUNDS OF APPEAL

[19] The first appellant's grounds of appeal are as follows:

"1. The Honourable judge erred in law by holding that the Notice to the First Appellant was adequate given the unique circumstances of her case that was known to all parties involved;

2. The Honourable judge erred in law in that she did not find that there was sufficient evidence upon which she should have held that there was [sic] reasonable and proper grounds to believe that the Grant of Letters of Administration dated the 3rd day of April, 2006 to the estate of Charles Christopher Bannister, deceased and made to Charles Adolphus Bannister, the Respondent herein, was illegally and/or improperly

obtained by the said Charles Adolphus Bannister;

3. The Honourable judge erred in law in that she did not find that there was sufficient evidence upon which she should have decided in favour of the First Appellant on the issue of the adverse possession by the First Appellant and/or the extinguishment of the title of Charles Christopher Bannister and/or the Respondent herein to the abovementioned property;

4. The Honourable judge erred in law in her analysis of the law and evidence in relation to whether the Respondent was statutorily or otherwise barred from pursuing his legal rights given the considerable lapse of time during which he failed or omitted to exercise same and/or the specific acts of adverse possession by the First Appellant;

5. The Honourable judge erred in law by failing to hold that the doctrine of *laches* was applicable in the circumstances;

6. The Honourable judge erred in law by holding that no equitable relief should inure to the First Appellant given the substantial increase in the value of the property and/or the construction and improvements made thereto by the First Appellant while she was under the belief that the property belonged to the First Appellant."

THE RELIEF SOUGHT BY THE FIRST APPELLANT

[20] The first appellant seeks orders that:

1. The judgment be set aside and that judgment be granted in favour of the first appellant on the abovementioned grounds;

2. The first appellant be granted the legal title to the property based on her overt acts of ownership adverse to the

legal title held by the estate of Charles Christopher Bannister; or in the alternative;

3. Alternatively, that the respondent do pay to the first appellant an equitable portion of the value of the property as at the present date which would have accrued from the death of the Charles Christopher Bannister due to the first appellant's construction, improvements and upkeep; and,

4. The respondent do pay the costs of the first appellant here and below.

THE SECOND APPELLANT'S GROUNDS OF APPEAL

[21] The second appellant filed her appeal on 8 October 2012 against **Cornelius J's** findings this. The grounds of appeal are as follows:

1. **Cornelius J** erred in holding that the Notice to the first appellant was adequate given the unique circumstances of the first appellant's case that was known to all parties involved;
2. **Cornelius J** came to a decision on the issue of the adverse possession by the appellants of the above mentioned property that should not have reasonably been reached having regard to the facts;
3. **Cornelius J** erred in her analysis of the law and the evidence in relation to whether the respondent could still equitably pursue his rights given the considerable lapse of time and specific acts of adverse possession by the appellants;
4. **Cornelius J** erred in law by holding that no equitable relief should inure to the Appellants given the substantial construction and improvements done by the Appellants while they were under the belief that the property belonged to the Appellants.

THE RELIEF SOUGHT BY THE SECOND APPELLANT

[22] The second appellant seeks the following orders, that:

> "1. The whole ruling be overturned on the above mentioned grounds;
>
> 2. The grant of the Letters of Administration to Charles Adolphus Bannister be revoked;
>
> 3. The Respondent's title to the property be deemed to have been legally extinguished based on the overt acts of ownership by the First and/or Second Appellant adverse to the legal title of the Respondent; or in the alternative
>
> 4. The Respondent do pay to the Appellants an equitable portion of the value of the property as at the present date which would have accrued from the death of Charles Christopher Bannister due to the Appellants' construction, improvements and upkeep; and;
>
> 5. The Respondent do pay the Costs of the Second Appellant here and below".

THE ISSUES

[23] The issues to be determined by this Court are:

(1) Whether the trial judge erred in determining that the Letters of Administration were valid on the basis that the notice to the first appellant was not necessary, (the validity of the grant);

(2) Whether the trial judge erred in her determination that the appellants did not acquire title to the property on the basis of adverse possession;

(3) Whether the respondent's claim to the estate was time-barred due

to the delay between the death of the deceased and the filing of the application for the grant (delay); and

(4) Whether the trial judge erred in finding that the appellants were not entitled to (1) an interest in the property or (2) compensation on the basis of their contributions to the improvement of the property. (Unjust enrichment).

ISSUE 1. THE VALIDITY OF THE GRANT

The Submissions

[24] Mr. Randall Belgrave QC, counsel for the first appellant made the principal submissions. Counsel for the second appellant supported him. Counsel submitted that **Cornelius J** erred in law in holding that the notice to the first appellant was adequate given that the respondent was intimately aware that the first appellant lacked the mental incapacity to handle her own affairs and failed or omitted to disclose this fact to the Registrar. He submitted that, given the length of time (50 years) which had elapsed between the death of Charles Christopher Bannister and the application for the grant by the respondent, the Registrar, as part of the exercise of her discretion, should have made enquiries why notice was not served on the first appellant as surviving spouse.

[25] Counsel also submitted that the grant is invalid by reason of the respondent's failure to serve notice on the first appellant as surviving spouse in accordance

with **Rule 6** of the **NCPR**. **Rule 26** of the **NCPR**, he argued, confers a discretionary power on the Registrar to determine whether the next of kin of a deceased person had been adequately informed of an application for a grant of administration by requiring proof by affidavit that notice of the application had been given to all next of kin.

[26] According to counsel, there is no evidence on record to show what circumstances influenced the Registrar's exercise of discretion, therefore, this Court is at liberty to hold that there are matters in the instant case which, had they been disclosed, would have influenced the Registrar's exercise of discretion. Counsel submitted, therefore, that this Court can find that the Registrar failed or omitted to consider matters she ought to have considered when exercising her discretion.

[27] Mr. Belgrave QC also submitted that, under the **NCPR**, the surviving spouse took priority over children in respect of applications for a grant of administration and that, having regard to the respondent's clear interest in the deceased's estate, his peculiar knowledge of the first appellant's interest therein; as well as her disability, a fair inference to be drawn from the respondent's refusal to disclose these facts to the Registrar, was that the grant was obtained by deliberate non-disclosure on the part of the respondent. It

was extremely doubtful, counsel opined, that the Registrar, seised of that knowledge, would have exercised her discretion in favour of the respondent.

[28] Counsel further submitted that the Registrar's discretion (including the discretion given to her under **Rule 19 (3)** of the **Succession Act, Cap. 249 (Cap. 249**) ought to be exercised "reasonably, regularly and properly" in accordance with the **Administrative Justice Act Cap 109B (AJA)** and, if not so exercised, could be reviewed under **section 4** of the **AJA**. Counsel relied upon *Non-Contentious Probate Practice in the English Speaking Caribbean*, by Karen Nunez-Tesheira, 2001, The Caribbean Law Publishing Company (Nunez-Tesheira).

[29] Mr. Arthur Holder, counsel for the respondent, submitted that **Rule 26** of the **NCPR** was directory in character, and ought to be read in conjunction with **Rules 7, 11**, and **15**. He also submitted that the respondent was not obliged to serve notice on the first appellant and that, in any event, the first appellant's disability rendered it impossible to effect service on her. Counsel submitted that **Rule 26** of the **NCPR** stipulates that the Registrar may require proof by affidavit that notice of the application has been given to all next of kin which confers a discretionary power on the Registrar to determine whether the next of kin had been adequately informed of the said application.

[30] It was his submission that there was no complaint by the first appellant of non-adherence to **Rule 7** which was mandatory in nature and provided for notice of the application for administration to the world at large. **Rule 11**, he further argued, compelled the Registrar to be satisfied that all inquiries had been made and to conduct due diligence prior to the grant of administration which provided a directory procedural requirement within the domain of the Registrar.

[31] Counsel submitted further that no evidence was led by the first appellant to show that the Registrar did not perform her duties with the requisite prudence with respect to **Rule 26**. He relied upon **Regina Secretary of State for the Home Department, ex parte Jeyeanthan Ravichandran v Secretary of State for the Home Department (2000) 1WLR 354** and recommended the approach suggested by *Lord Wolf* in relation to procedural irregularities to us.

[32] Mr. Holder contended that the appellants did not suggest that the Registrar acted capriciously or whimsically in determining that Letters of Administration should be issued to the respondent. The first appellant, in his submission, had failed to utilise **Rule 35** of the **NCPR**. In all of the circumstances, counsel submitted that **Cornelius J** did not err in law and therefore the Letters of Administration and Assent were valid.

THE PRINCIPAL ISSUE

[33] The principal issue which arises on this ground of appeal is whether the grant can be impugned on the ground that the Registrar failed to act reasonably, properly and regularly in the exercise of her discretion when she proceeded with the respondent's application for administration in the absence of notice to the first appellant.

THE FUNCTION OF THE APPELLATE COURT

[34] Prior to embarking upon the analysis of the submissions of counsel, it is useful to reiterate the functions of an appellate court as set out in **Toojays Limited v Westhaven Limited, unreported decision, Civil Appeal No. 14 of 2008** where **Burgess, JA** as he then was said at **para [19]**:

> "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

THE LAW

[35] We now set out the applicable rules of the **NCPR**. Though cited by counsel for the respondent, **Rule 15** is inapplicable to this matter since it deals with proof of execution where a testator is blind or illiterate.

Rule 6:

"6(1) Application for letters of administration shall be in writing and there shall be filed therewith an affidavit by the applicant in support of his application, in which he shall depose that the deceased left no will (or, as the case may be, exhibiting any will of the deceased which the applicant desires to be annexed to such administration) and showing the relationship or other circumstances entitling him to such administration."

Rule 7:

"Public notice of an application for probate or for letters of administration shall be given by one notice in the *Official Gazette* and two notices in a local daily newspaper. From the date of the notice in the *Official Gazette* and from the date of the second notice in a daily newspaper not less than fourteen days shall elapse before an application is submitted to the Court."

Rule 11:

"The Registrar is not to allow probate or administration to issue until all the enquiries which he may see fit to institute have been answered to his satisfaction. The Registrar is, notwithstanding, to afford as great facility for the obtaining of grants of probate or administration as is consistent with a due regard to the prevention of error or fraud."

Rule 26:

"Where administration is applied for by one or some of the next-of-kin only, there being another next-of-kin equally entitled thereto, the Registrar may require proof by affidavit that notice of such application has been given to such other next-of-kin."

Rule 35:

"Any person who wishes to ensure that no grant is issued without notice to himself may enter a *caveat* in the Registry."

THE FINDINGS OF CORNELIUS J

[36] **Cornelius J**, in her reasoned decision, analysed **Rule 26** of the **NCPR** and the opinion of *Nunez-Tesheira*, at *page 217*, that the practice of giving notice to other next of kin equally entitled to apply for the grant may have arisen in Barbados because, although *Rule 19* of the *Non Contentious Probate Rules 1954 UK* is generally followed for the purposes of determining priorities with respect to entitlement to Letters of Administration **section 19** of Cap. 249 effectively gives the Registrar discretion as to whom a grant of administration may be made. **Cornelius J** concluded that **Rule 26** did not create an obligation on an applicant to serve notice on the next of kin equally entitled to take out a grant. The learned judge found that the requirement of service of notice was a matter of administrative practice or a technical requirement and not a mandatory obligation that would go to the substance of the application for a grant.

[37] **Cornelius J** further found that direct notice to the first appellant would not have made any significant difference to the proceedings since the respondent was the person entitled to the fee simple subject to the right of dower in the first appellant, consequently there was no real prejudice caused by the omission to serve direct notice on the first appellant.

ANALYSIS AND DISCUSSION

[38] We now proceed to analyse the various submissions of counsel. The submissions of counsel for the first and second appellants on this issue are similar in nature and may conveniently be taken together.

[39] All parties are agreed that the applicable law at the date of the deceased's death was based on the principle of primogeniture. The respondent, a minor, at the time of his father's death, was the heir at law whilst the first appellant was entitled to Dower or a life interest in one third of the real property of the deceased. It is evident that the first appellant neglected and/or failed to exercise her right to apply for a grant of letters of administration to the deceased's estate. It is also evident that she failed to apply for a grant of administration *durante minore aetate* on behalf of the respondent. She is now not mentally competent to do so. This was the existing factual matrix in which **Cornelius J** made her decision.

[40] There is merit in the practice of serving notice on the next of kin. Notice makes them aware that an application is being made so that anyone with a prior right may challenge the right of the applicant on the basis of priority. It must also be remembered that the procedure which requires notice of the application to be published in the newspapers under **Rule 7** of the **NCPR** also

achieves the same purpose though indirectly. Public notice is notice to the world at large. It is no excuse that other persons who are equally entitled are mentally incompetent since the law provides mechanisms for serving such persons through their receivers or having someone appointed to look after their interest.

[41] Great emphasis was placed on the provisions of **Cap. 249** to buttress the argument that the first appellant had a prior right to apply for the grant. **Cap. 249** came into effect on 13 November 1975 and abolished the common law canons of descent including primogeniture by virtue of **section 4**. The respondent, as heir at law, was the principal beneficiary under intestacy, whilst the first appellant, was a dowager. At the time of his application, he had obtained his majority.

[42] The grant of Letters of Administration gives the administrator the right to administer the deceased's estate that is, to gather in the assets of the estate, pay its just debts and distribute the estate according to law. It does not give that person any rights over and above those of the beneficiaries of the estate, thus we cannot fault the finding of **Cornelius J** that there was no prejudice to the first appellant by the issuance of the grant to the respondent. In addition, in the absence of any evidence of impropriety on the part of the respondent

being elicited before the Registrar, **Cornelius J** was also entitled to find that notice was effected by virtue of **Rule 7** of the **NCPR** even though direct notice was not given to the first appellant.

[43] Mr. Belgrave QC submitted that this Court ought to review the exercise of the Registrar's discretion to issue the grant in the absence of notice to the first respondent. He did not apply to make the Registrar a party to these proceedings nor did he serve notice of these proceedings upon the Registrar so that the Registrar could defend herself against these allegations. Notwithstanding these omissions, it is incumbent on the appellants to provide evidence that the Registrar improperly exercised her discretion. None has been provided. The actions of the Registrar must be judged against the affidavit evidence presented to her in support of the application for the grant. There is no evidence that the Registrar knew or ought reasonably to have known of the first appellant's disability so as to impugn the exercise of her discretion.

[44] With respect to the allegations that (1) the respondent deliberately concealed his mother's disability so as to improperly obtain the grant and (2) that the respondent had sinister or improper motives for not serving notice on the first appellant, these allegations suggest fraud on the part of the respondent. Fraud

ought to be specially pleaded and strictly proven. An omission to serve notice is not fraudulent unless done with the intent to deceive. The onus of establishing this allegation is on the appellants. The standard is a balance of probabilities. We can find no evidence led by the first and second appellants in the court below to substantiate these allegations. **Cornelius J** made no finding on the issue of fraud. We have been unable to find any evidence in support of this allegation. Accordingly, we find no merit in these submissions.

[45] At the present time, the first respondent is mentally incompetent to handle her own affairs or those of the estate of the deceased. She is also of advanced age. We see no sense in revoking the grant when the law provides that the court can ensure the due and proper administration of the estate if required.

[46] It remains only for us to observe that the submission that the Registrar's discretion can be reviewed under the **AJA** is irrelevant to this Court which exercises appellate as distinct from first instance jurisdiction.

ISSUE 2 ADVERSE POSSESSION

The Submissions

[47] It is the first appellant's contention that **Cornelius J** erred in law in that she did not find that there was sufficient evidence upon which she should have decided in favour of the first appellant on the issue of the adverse possession

by the first appellant and/or the extinguishment of the title of Charles Christopher Bannister and/or the respondent to the property.

[48] The second appellant submitted that **Cornelius J** came to a decision on the issue of adverse possession of the property by the appellants that should not reasonably have been reached having regard to the facts. Though couched in different language, both submissions challenge **Cornelius J's** findings of law and her application of the law to the facts found. They may therefore be conveniently discussed together.

[49] Mr. Belgrave QC submitted that, with respect to adverse possession, the question now for determination is whether the statutory time has elapsed since the right accrued, whatever the nature of the possession. He distinguished this proposition from the United Kingdom position prior to the passing of the *Real Property Limitation of Actions Act, 1833 UK (the 1833 Act)*, which he opined was similar to the **Cap. 231** where the rights of the paper owner of property were not taken away save by a "*disseisin*" or an ouster and, use of the land by the squatter, of a kind which was clearly inconsistent with the paper title: **JA Pye (Oxford) Ltd and Others v Graham and Another [2002] 3 All ER 865**.

[50] Counsel relied upon **Wills v Wills (2003) 64 WIR 176**, to urge that the law has shifted with focus now being placed on whether the person claiming adverse possession can show "possession" for the statutory period.

In similar vein, Mr. Belgrave QC also submitted that the Privy Council in the Bahamian case **Paradise Beach & Transportation Company and Others v Price-Robinson and Others [1968] 1 ALL.ER 530 (Paradise)**, held that emphasis should not be placed on the "adverse" nature of the possession, but on possession "in whatever form", for the relevant statutory period. Counsel noted that **Paradise** was decided on the basis that the parties to the action were co-owners. **Section 32** of **Cap. 231**, he argued, addresses the issue of co-ownership, by outlining that for the purpose of that **Act**, possession of one co-owner is not considered as being possession by the other. Consequently, he submitted that **section 32** of **Cap. 231**, when read together with **Paradise** (which has a similar provision), shows that time can run in favour of a co-owner in sole possession of all of the land, in the absence of proving any actual ouster.

[51] Mr. Belgrave QC further submitted that what constitutes adverse possession is a question of fact relying upon **Browne v Moore-Griffith et al BB 202 CA 8 et al Civil Appeal No. 12 of 2012 (unreported decision) (Browne)**. It

was his final submission that the claim to adverse possession by the first appellant, rooted as it was in her undisturbed and uninterrupted possession of the property since the death of her first husband 1955, is so outstanding that it cannot be impeached statutorily or otherwise.

[52] Mr. Arthur Holder, counsel for the respondent submitted that the learned trial Judge, placed emphasis on the notion that the first appellant's possession was not "adverse" to that of the respondent since there were no substantial acts done by her that were inconsistent with her 1/3 life interest in the property of a nature to openly and unequivocally dispossess the respondent.

[53] Mr. Holder also argued that the second appellant's occupation of the property was based on the permission of the first appellant. She was therefore a licensee and could not acquire title by adverse possession. He relied upon **Wallis's Cayton Bay Holiday Camp Ltd. v Shell-Mex and B. P. Ltd. [1974] 3 All E R 575, (Wallis v Shell-Mex) Huges v Griffin (1969) 1 All E.R. 960 (Huges v Griffin)** and **Egan Dublin v Pearl Warren Carlyle Hackshaw St. Vincent and the Grenadines CV No. 37 of 2005**.

[54] The issues which arise from these submissions are whether:

1. **Cornelius J** applied the wrong principles of law, and;

2 Did the learned trial judge err in holding that the first appellant had not acquired title to the property by virtue of adverse possession.

THE LAW

[55] The law relating to adverse possession is governed by **section 25 (1) and 31 (1)** of **CAP. 231** which are now reproduced:

> **Section 25 (1)** "Subject to **subsection (2)** 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."
>
> S**ection 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."

Section 31 (4) and **section 32** provide that:

> "In determining whether a person occupying any land is in adverse possession of the land, it may not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely because the occupation of the land is not inconsistent with the present or future enjoyment of the land by the person entitled to the land".
>
> **32.** (1) For the purposes of this section
>
> *"(a)* co-owners" mean joint tenants or tenants in common;

> *(b)* "third party" means any person who is not a co-owner.
>
> (2) Where 2 or more persons are entitled to any land or rent as co-owners and any one or more of the co-owners is or are for his or their own benefit or for the benefit of any third party
>
> *(a)* in possession or receipt of all the land or all the profits thereof or in receipt of all the rent; or
> *(b)* in possession or receipt of more than his or their undivided share or shares of the land or the profits thereof or of the rent, such possession or receipt shall not for the purposes of this Act, be regarded as possession or receipt by the other co-owners or any of them."

DISCUSSION AND ANALYSIS

[56] Mr. Belgrave QC's analysis of the case law on adverse possession and his submission on the factual basis of his client's claim suggest that **Cornelius J** applied the wrong legal principles in relation to adverse possession.

[57] It is not disputed that the first and second appellants were in physical possession of the property. The first appellant was the dowager of the deceased and the second appellant in possession with the permission of the first appellant. Prior to embarking on our discussion of the issues, we deem it necessary to set out certain other matters of fact which are material to our analysis of the decision of **Cornelius J**. In her affidavit in support of her

application to be joined in the proceedings filed 12 June 2008 at paragraph12, the second appellant swore that:

> "Sometime in early 2006 my step father gave me permission to construct a restaurant on the property. This was constructed in or about June 2006."

At paragraph 8, the second appellant swore that her mother, the first appellant, and stepfather evinced an intention to give her a part of the property when they signed a letter giving permission for her to obtain a copy of plans to the property. At paragraph 9 in relation to the respondent she swore that:

> "At no time did he even questioned [sic] the fact that I had been given the land by my mother and step father nor did he suggest or indicate that he considered the land to be his own.".

[58] We now turn to the legal principles applied by **Cornelius J** in the context of the possession of the property by the first and second appellants as outlined above. **Cornelius J.** held in relation to the first appellant that:

> " [23] In order for the plaintiff to claim the entire property by way of adverse possession, her possession must have been open, peaceful and adverse, and must have been accompanied by the relevant *animus possidendi*, or intention to dispossess: ***Powell v McFarlane* (1979) 38 P & CR 452**.
> [24] It is not enough that the plaintiff occupied the land without paying rent for a continuous period. There must have been substantial equivocal acts amounting to adverse possession: ***George Wimpey and Co Ltd v Sohn* [1967] Ch 487**. **In the circumstances of this case, there is no evidence of any unequivocal acts done by the first plaintiff in an effort dispossess the defendant. The first plaintiff's continued residence on the property was in concurrence with her life**

> **interest in a one-third share of the estate and there is nothing to show that she had any intention of dispossessing the defendant (emphasis added)**."

Clearly **Cornelius J** was here addressing the issue of the intent with which the first plaintiff occupied the property. This is consistent with her obligation to distill the relevant legal principles and apply them to the factual matrix of the case. We therefore now consider whether or not **Cornelius J** applied the wrong principles of law or misapplied the legal principles in relation to adverse possession.

[59] The appellants sought to impugn the decision of **Cornelius J** on the basis that she misapplied the law relative to adverse possession. We now consider this submission against the statutory law and the case law submitted by counsel. It is clear from **sections 25** and **31** of **Cap. 231** that a person claiming title to land by adverse possession 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. Adverse means in opposition to the rights of the owner.

[60] This was succinctly stated by **Mason JA**, as she then was, in **Browne** as follows: "A simple definition of adverse possession is possession in opposition to the true owner and is an ouster of the true owner." **Mason JA** noted that:

> "***The Limitation of Actions Act, Cap. 231*** (the ***Act***) provides the legal basis on which a claim by the true owner is made whenever the circumstances surrounding the possession of the stranger for 10 years are found to be sufficient to manifest incompatibility with the title of the true owner."

This statement of principle distinguishes between possession simpliciter and possession which is adverse to the rights of the true owner. The *animus possidendi* or intention to possess to the exclusion of others distinguishes possession which is adverse from simple possession. In **Browne**, this Court went on to consider the principles adumbrated by **Slade J** in **Powell v. McFarlane [1979] 38 P. & C.R. 452 at 470 – 472**, namely that:

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('*animus possidendi*').
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must

> depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.
> …
> Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.
> …
> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so **(emphasis added)**.
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by ***Lindley MR*** in ***Littledale v. Liverpool College [1990] 1 Ch. 19, 23 CA*** (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

[61] Having regard to the legal principles expounded by this Court in **Browne**, it is clear to us from the extract from **Cornelius J's** decision at para [58] above,

that the learned trial judge relied upon and applied the correct principles of law in arriving at her decision. Whilst she was not as expansive as the court in **Browne**, **Cornelius J** clearly set out the essentials of the law of adverse possession as they relate to the factual basis of possession and the intent which must be established by the possessor.

[62] We now consider whether **Cornelius J** incorrectly applied the established law to the facts before her.

[63] The first and second appellants have challenged the inference drawn by **Cornelius J** that the first appellant's occupation of the property was consistent with her right of dower. We are of the view that that inference flowed naturally and logically from the factual matrix presented to the learned trial judge for the following reasons.

[64] The factual matrix from which **Cornelius J** drew the inference was that the first appellant was in possession of the property as a dowager. The respondent, the infant heir at law lived with the first respondent in ignorance of his right. The first appellant never made the respondent aware of his right even though she was his guardian and "trustee" during his infancy by virtue of **section 3** of the **Trustees Act 1891-23**. Even after the respondent reached the age of majority, and migrated to the United States of America, he continued to visit

and stay at the property until he was disallowed by the first appellant's husband with whom he had had a disagreement.

[65] The first appellant has never deposed or given *viva voce* evidence that the respondent's occupation of the property, even after he emigrated, was not consistent with his occupation prior to his emigration. The law affixes the first appellant with knowledge of the respondent's rights as heir at law through the *maxim* ignorance of the law is no excuse. There is no evidence that the respondent was aware that the property was owned by his father prior to conducting the search after he was disallowed entry onto the premises. He was, consequently, ignorant of the facts. We will return to this when we analyse **Terceira v Terceira [2011] SC (Bda) 6 Civ (Terceira)** on which counsel relied.

[66] We turn now to the issue of whether a dowager can acquire a title to the property by adverse possession. In **Doe dem Milner v Brightwen 10 East 582**, cited with approval by **Burgess JA** as he then was in **Best v Kinch, Civil Appeal No. 37 of 2012 [unreported]**, it was held that a person who claims to occupy land through the English custom of curtesy cannot simultaneously claim to be in adverse possession. Tenancy by the curtesy was the surviving

husband's right to a life interest in the freehold property of his deceased wife. We are of the opinion that the same principle applies to a dowager.

[67] The facts relative to this proposition of law are contained in the affidavit of the second appellant filed on 12 March 2008 in support of the first appellant's application by way of originating summons filed on even date seeking orders that, inter alia, the grant was illegally or improperly obtained and that provision be made out of the estate of Charles Christopher Bannister for the maintenance and support of the first appellant. The second appellant deposed at paragraph 10 that the first appellant married Chistopher Conrad Sobers and continued to reside on the property which she previously shared with Charles Christopher Bannister, deceased. She further deposed that:

> "I am advised and verily believe that the surviving spouse, the said Ruth Sobers, herein, **is entitled by law and/or equity** (emphasis added) and/or under the Succession Act Cap 249 of the Laws of Barbados to the property at Sion Hill aforesaid. Alternatively, that based on the facts and circumstances aforementioned, the Defendant is stopped by law from claiming rights of ownership thereto. In the circumstances, I seek an order to that effect and/or that adequate provision be made for her

> proper maintenance and support out of the estate of the deceased."

[68] These paragraphs appear to concede the ownership of the property by the estate of the deceased against which a maintenance order was being sought. The words in parenthesis above appear also to acknowledge her rights under the law of succession, namely, the law of primogeniture which secured to her the right of dower.

[69] In these circumstances, and having regard to **Cornelius J's** finding that the first appellant's acts were not inconsistent with the first appellant's right of dower, we are unable to find that **Cornelius J** erred in law in her application of the law to the facts before her.

[70] We now turn to discuss **Cornelius J's** findings with respect to the second appellant's occupation of the property and her claim in respect of adverse possession. **Cornelius J** found that the second appellant was in possession of the property with the permission of the first appellant and held that:

> "[26] Permission given by the plaintiff to another person to enter upon the land for some purpose pursuant to her interest in the property renders that person a licensee: ***Gilbert Kodilinye, Commonwealth Caribbean Property Law,*** *2nd* ***ed. at page*** *107.* One of the most important features of adverse possession is that it must have been acquired without the permission or authorisation of the owner: ***Ramnarace v Lutchman (2001)*** **59**

> ***WIR* 511**. As such, adverse possession cannot be founded on a licence. See: ***Wallis's Cayton Bay Holiday Camp Ltd. v Shell-Mex and BP Ltd* [1975) QB 94**. The second plaintiff s possession is founded upon the licence granted by the first plaintiff and her claim for adverse possession cannot be sustained on this ground."

[71] Two important considerations arise on the evidence. First, did the second appellant go into possession *animo possidendi* and second if the answer is no, in what capacity was she in possession of part of the property. The second appellant deposed that she was granted permission to place a restaurant on the property by her stepfather and the first appellant. The second appellant also deposed that she had a claim to the property by way of adverse possession. These two things are incongruous with each other. Possession with permission undermines and destroys a claim by way of adverse possession simply because it undermines the *animus possidendi*. It therefore follows that **Cornelius J** could not be faulted for finding that the second appellant, by her own admission, having entered into possession with the permission of the first appellant, was a licensee and therefore could not sustain a claim in adverse possession. This is explored in greater detail later in this decision.

[72] The second consideration is whether the second appellant acquired a possessory title by transmission from the first appellant.

[73] Having found that the first appellant had not acquired a possessory title to the

property, **Cornelius J** went on to consider this issue and held that:

> '[27] …the owner of an estate cannot give a greater interest in the estate than he or she owns. Therefore, the first plaintiff could not pass onto the second plaintiff any complete and indefinite title and any promise made to give the second plaintiff a freehold part of the land is unenforceable: ***Cheshire and Burn's Modern Law of Real Property, 11h ed. at page 421***."

[74] The applicable legal principle is *nemo dat quod non habet*. Simply stated the first appellant could not pass on to the second appellant a greater title than she possesses.

[75] In light of the factual matrix outlined above, we are of the view and hold that **Cornelius J** applied the correct legal principles when she held (1) that the second appellant was a licensee and (2) that the first appellant could not pass to the second appellant any title to the freehold property.

[76] We now consider **Cornelius J's** holding that the first appellant could grant permission for persons to reside on the property with her. There was no challenge to this finding which is consistent with her right of dower. We note only that the tenancy for life extends only to a one-third interest in the property. We can find no fault therefore in **Cornelius J's** finding that:

> "[28] …pursuant to the first plaintiff's tenancy for life, she has a right to grant permission to whomever she sees fit, to reside on the property with her. The defendant cannot validly require persons residing on the property as the plaintiff's licensees to

> leave until the determination of her interest in the property. It would be unconscionable for the defendant, knowing that the first plaintiff is an Alzheimer's sufferer, to demand that her caretakers vacate the property."

As previously noted, adverse possession requires an intention to possess or *animus possidendi*. **Cornelius J** so ruled in her discourse on the applicable law. Mr. Belgrave QC's submission that the claim to adverse possession by the first appellant, rooted as it is in her undisturbed and uninterrupted possession of the property since the death of her first husband, Charles Adolphus Bannister Snr, back in 1955, is so outstanding that it cannot be impeached statutorily or otherwise, ignores **Cornelius J's** finding that such possession was consistent with her right of dower and that she did not evince an intention to dispossess the respondent, her son.

[77] We therefore agree with the determination of the trial judge that the first appellant did not carry out acts inconsistent with her life interest and could not acquire a title to the property by adverse possession.

[78] In our opinion **Cornelius J's** finding of facts were entirely consistent with the history of the occupation of the property.

THE SECOND APPELLANT'S CLAIM BY WAY OF ADVERSE POSSESSION

[79] With respect to the second appellant's occupation of the property. **Cornelius J** found that her occupation of the property was founded upon a licence granted to her by the first appellant. Mr. Vaughn argued under his third ground of appeal that the trial judge erred in law as she did not properly assess and consider the evidence. In support of his argument he posited that the learned trial Judge at paragraph [2] of her decision acknowledged that the second appellant was the sister of the respondent, and in paragraph [10] of her decision stated:

> "The second plaintiff proffers that she is entitled to a portion of the property because the first plaintiff and her deceased husband had already extinguished the title of the defendant by adverse possession when they granted her a gift of part of the property. Further, she was in possession jointly with the first plaintiff and Christopher Sobers before he died and continued the adverse possession after her [sic] death."

[80] Counsel further submitted that there was an abundance of evidence which the trial judge did not assess properly or at all. This evidence, he submitted, pointed to the issue of proprietary estoppel in the second appellant's favour. It was his further submission that the totality of the second appellant's evidence was never considered as, nowhere in the learned Judge's decision was it shown that **Cornelius J** had addressed her mind to this evidence.

[81] Mr. Vaughn acknowledged that an appellate court will not readily interfere with the findings of fact at first instance, but submitted that when it is clearly evidenced that the learned trial judge failed to draw any relevant and necessary inferences from the evidence, this Court can indeed draw those inferences in the interest of a fair and equitable decision.

[82] Mr. Holder submitted that the second appellant's occupation of the property was with the permission of the first appellant, consequently, she was a licensee and could not acquire any interest in the property. He relied, inter alia, upon **Hughes v Griffin** and **Wallis v Shell-Mex**.

THE LAW

[83] We have already distilled the principles applicable to adverse possession, it is now only necessary to further distill those principles in relation to licensees. In **Hughes v Griffin**, Harman LJ, in the English Court of Appeal, stated:

> "…. the words "adverse possession" have crept back into the statute of 1939; but there they only mean that a person is in adverse possession in whose favour time can run. Nevertheless it does seem to me that "adverse possession" means to some extent at least that which it says. Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession."

Similarly in **Wallis v Shell-Mex** Lord Denning M.R. reiterated this position when he held that:

> "…acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939."

DISCUSSION AND ANALYSIS

[84] There are two important considerations raised by Mr. Vaughn's submissions. We find it appropriate to dispose of the first at this juncture, namely that the second appellant acquired a title from the first appellant's husband who had himself acquired a title by adverse possession.

[85] First, the record does not reveal that the first appellant's husband's estate was a party to the proceedings in the court below or that the said estate had made any claim to the property by way of adverse possession. Similarly, there is no such claim properly before us. In these circumstances, **Cornelius J** made her decision against the background of the evidence before her, namely, the fact that the property was owned by the deceased. Christopher Sobers came to live there with the first appellant, his wife and her infant son, the respondent.

[86] Mr. Vaughn's submission, in essence, is that **Cornelius J** ought to have accepted the second appellant's affidavit evidence and ought to have ruled in her favour.

[87] **Cornelius J** was faced with differing accounts of the occupation of the property by competing parties. It was a matter for the exercise of her discretion

what evidence she accepted and what inferences she would draw therefrom provided that those inferences were logical and flowed naturally from the primary facts. **Cornelius J** concluded from the factual matrix above that, the second appellant was permitted by the first appellant to remain on the property and therefore was in occupation as a licenese. The trial judge also concluded that the action of the appellants were therefore not adverse to the ownership of the respondent.

[88] Having regard to the uncontroverted facts relating to the succession to the property and for the reasons outlined above we find no fault in the exercise of **Cornelius J's** discretion on the evidence relative to the allegation of adverse possession. The inferences drawn, in our opinion, were the natural and logical inferences flowing from the facts and cannot be faulted.

[89] Second, we reiterate that the issue of proprietary estoppel raised against the respondent is incongruous with a claim of adverse possession on the part of the first appellant on whose possession the second appellant relies. Simply put, a claim of proprietary estoppel requires acquiescence by the fee simple owner in the actions of the claimant for relief, whereas, adverse possession is a denial of the ownership of the holder of the paper title.

[90] For all these reasons, we find the submissions of counsel for the first and second appellants to be unsustainable.

[91] For the sake of completeness, we wish to note that on the state of the evidence before **Cornelius J**, Christopher Sobers had no title to the property which he could pass to the second appellant. Neither could he give her permission to reside on the land or construct anything on it.

PROPRIETARY ESTOPPEL

The Submissions

[92] Mr. Vaughn submitted that the respondent over a period of three years neglected to inform the second appellant that she was operating under a mistaken belief that she was the fee simple owner of the property thereby allowing her to repeatedly change her position to her detriment. He also submitted that the respondent never enlightened the second respondent that he was the heir at law and entitled to the legal estate. The second appellant was comfortable, counsel argued, in her mistaken understanding that she was entitled to part of the property. He referred to her affidavit evidence that the respondent "never suggested to me that he thought the property was his or indicated that I should not have built on it." Interestingly, at para 35 of his written submissions, Mr. Vaughn submitted that:

> "In 2006, still laboring [sic] under the belief that she had a valid claim to part of the property, and on the further oral promise of her mother and stepfather, the Second Plaintiff/Second Appellant constructed a restaurant, in the absence of any notice from the Defendant/Respondent that he was now the legal owner of the entire property."

Counsel further submitted that the respondent had not come to equity with clean hands. In addition, it was his submission that the second appellant had suffered prejudice as a result of the respondent's failure to pursue his claim over a period of 25 years. The second appellant, counsel argued, had altered her position to her detriment because the respondent's claim to the estate had not been made in a timely manner before she commenced building on the property.

[93] It was Mr. Holder's submission that the first and second appellants, at the material time, knew that the property belonged to the respondent and could not rely on the propriety estoppel since there was no mutual mistake. In consequence, he argued, **Cornelius J** did not err in law in her application of the legal principles.

THE LAW

[94] In **Ward v Walsh Civil Appeal No. 20 of 2005 (Ward v Walsh)**, this Court set out the rationale of the doctrine of proprietary estoppel and laid down the principles applicable to proprietary estoppel when it opined that:

"[73] 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."

[74] That statement exposes 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. In fact, as the doctrine has evolved, it is now often treated as having the effect of creating rights of an equity founded upon estoppel."

[95] In **Inwards v Baker [1965] EWCA Civ 465** the principle, in relation to persons expending moneys on land, was stated as follows:

"… if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. … So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable

so to do."

DISCUSSION AND ANALYSIS

[96] It does not appear that this issue was pleaded or argued before **Cornelius J**. In compliance with the overriding objective under **CPR** and by virtue of **section 61 (1) (e)** and **(i)** of the **Supreme Court of Judicature Act Cap. 117A**, we have decided to exercise our discretion and hear the parties on this issue.

[97] The second appellant bears the burden of establishing proprietary estoppel on a balance of probabilities. Her case is that (1) she acquired title to part of the property by way of adverse possession and/or (2) that she was let into possession and given permission to construct a building upon the land by the first appellant and her husband. For the reasons given above, we have held that there is no claim in adverse possession.

[98] With respect to proprietary estoppel, the second appellant must establish that there was a promise or representation made by the respondent, upon which she relied to her detriment which it would be inequitable to allow him to resile from.

[99] The evidence adduced by the second appellant is ambivalent. The permission of her step-father and the first appellant is not the permission of the

respondent. The encouragement of the first appellant and her step-father is similarly not the encouragement of the respondent.

[100] The evidence is that, if there was detrimental reliance, it occurred out of (1) the second appellant's own belief that the first appellant and her step-father had given her a part of the property or (2) her own mistaken belief that she had acquired title to part of the property by adverse possession. In consequence, we have found no evidence to substantiate Mr. Vaughn's submission that the respondent is guilty of improper conduct which allowed the second appellant to alter her position to her detriment.

[101] It remains only to state that any belief that the second appellant was given a part of the property was unjustified since property cannot be given by word of mouth.

[102] We now turn to the allegation that the respondent assisted the second appellant with the construction of her home on the property in relation to proprietary estoppel. This evidence must be viewed in the context of the second appellant's evidence that she believed that the property had been given to her or that permission had been granted as above and in light of the respondent's evidence that he became aware of his rights in 2005 which was accepted by

Cornelius J. This in our opinion, cannot be considered acquiescence in these circumstances.

[103] It is our considered opinion that the second respondent, on the state of the evidence, has failed to establish a claim in proprietary estoppel against the respondent.

ISSUE 3 DELAY

[104] Counsel for the first appellants submitted that **Cornelius J** erred in her analysis of the law and evidence in relation to whether the respondent was statutorily or otherwise barred from pursuing his rights given the considerable lapse of time during which he failed or omitted to exercise those rights and/or the specific acts of adverse possession by the first appellant.

[105] Counsel for the second appellant submitted that the doctrine of laches and acquiescence ought to be invoked against the respondent since (1) from 1980 when he emigrated to the United States of America to 2005 when the respondent claimed that he became aware of his rights, he ought to have known of his legal rights and (2) from 2005 to 2007 he neglected to inform the second appellant of his claim to the entire estate causing her to act further to her detriment.

[106] During these periods the respondent, counsel argued, never challenged the first appellant nor her second husband for giving the second appellant part of the property nor did he inform her of his claim. Counsel submitted that it is therefore inequitable and unjust to grant the respondent the entirety of the property. He relied upon a dictum of *Kawaley J* in **Terceira** to urge that "Ignorance of the legal position was not a valid excuse." We will deal with this part of the submission later in this decision.

[107] In summary, both counsel have submitted that **Cornelius J** erred in law by failing to hold that the doctrine of laches was applicable in the circumstances. Interestingly, Mr. Vaughn sought to use the combined principles of laches and proprietary estoppel to found his client's claim to the portion of land she occupies.

[108] Mr. Holder submitted that mere delay does not constitute laches. He relied upon *Cheshire and Burn's Modern Law of Real Property 13th Edn by E H Burn London, Butterworths 1982* for his submission that the enquiry is "…whether the reasonable inference from the delay and the attendant circumstances is that the plaintiff has acquiesced in the violation of his right, once it has become known to him, and thereby has in effect waived his claim against the defendant."

THE LAW

[109] The defence of laches has its origin in the latin maxim *vigilantibus non dormientibus, aequitas succurrit*. Briefly defined it means that equity comes to the aid of those who are vigilant, not those who sleep on their rights. In the Privy Council case of **Lindsay Petroleum Company v. Hurd [1874] L.R. 221,** Sir Barnes Peacock stated the doctrine in these terms:

> "The doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct; done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just; is founded upon mere delay; that delay of course not amounting to a bar by any Statute of Limitations the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

DISCUSSION AND ANALYSIS

[110] Though couched in different language, the submissions of counsel for the first and second appellants are one and the same. It is trite law that a party who fails to assert his legal rights in a timely manner, may forever be barred from asserting those rights under the application of the equitable defence of laches. **Section 4** of the **Cap. 231** which provides that "Nothing in this **Act** affects

any equitable jurisdiction to refuse relief on the ground of laches or acquiescence" preserves the equitable jurisdiction of the court to apply the doctrine of laches.

[111] Counsel for the first appellant succinctly submitted that it was unconscionable for the defendant to wait over 50 years to apply for letters of administration to assert his beneficial rights in the property in circumstances where the first appellant was in sole possession for all of those years, and had made significant improvements to the property during that time. He submitted that a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights. He relied upon *Halsbury laws of England (2014) Volume 47* paragraphs *254* and *257* to urge that "Laches will be imputed where the claimant **with knowledge of his rights (emphasis added)**, has allowed the defendant to expend money in the belief that no claim will be made." Reliance was also placed upon **JJ Harrison (Properties) ltd v James Peter Harrison [2000] All ER (0) 2001** which was affirmed on appeal in **JJ Harrison (Properties) Ltd v Harrison [2001] All ER (0) 160 (Oct)**.

[112] We now turn to the decision of the trial judge in our analysis of these submissions. **Cornelius J** dealt with delay in the application for

administration and found that the granting of letters of administration could not be declared invalid because it was brought some fifty years after the death of the deceased. There is no suggestion that this is an untrue statement of law. Indeed, where there has been inordinate delay in applying for letters of administration, the applicant must file a certificate of delay with reasons for the delay. **Rule 9** of the **NCPR** provides that:

> "In every case where probate or administration is, for the first time, applied for after a lapse of three years from the death of the deceased, the reason for the delay is to be certified to the Registrar. Should the certificate be unsatisfactory, the Registrar is to require such proof of the alleged cause of delay as he may see fit."

It does not appear that laches was argued before the learned trial judge in the manner in which it now is. The argument was confined to adverse possession and was rejected.

[113] **Cornelius J** also dealt with the issue of prejudice occasioned by delay and found at para [14] of her decision that "**The cause of the defendant's delay was due to ignorance of his right to the property, and the delay did not cause the first plaintiff to be prejudiced in any way (emphasis added)**."

We have already dismissed the arguments based on property estoppel in this decision. It is now raised again by Mr. Vaughn in a slightly different form

under laches but it is proprietary estoppel nevertheless. There is no evidence that the respondent allowed the second appellant to expend moneys on the property in the belief that no claim would be made. There is no evidence that the respondent's assistance with the construction work undertaken by his sister, the second appellant was undertaken with knowledge of his rights to the property. In short, there is no evidence to contradict **Cornelius J's** findings highlighted at para [14] above.

[114] Having regard to our concurrence with **Cornelius J's** findings that the second appellant's occupation of part of the property was with the permission of the first appellant, we are unable to accept the submission that the doctrine of laches is applicable to bar the respondent's rights.

[115] In the case at bar, the issue is whether there was acquiescence by the respondent in the violation of his proprietary rights by the second appellant's construction of a building on the property. This requires knowledge of his rights by the respondent. In *Volume 57 of Halsbury's laws*, cited by Mr. Belgrave QC, the law is succinctly stated as follows:

> "Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them, hence acquiescence depends on knowledge, capacity and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognizant

> of their right to dispute those claims. **Where a claimant is kept in ignorance of his cause of action through the defendant's fraud, time begins to run only from the time when the claimant discovers the truth or ought reasonably to have done so. It is not necessary, however, that the claimant should have known the exact relief to which he was entitled;** it is enough that he knew the facts constituting his title to relief. As regards capacity, laches is not imputed while the party is a minor or is mentally disordered **(emphasis added)**."

We have been unable to find any evidence to support Mr. Vaughn's submission that the respondent knew or ought to have known of his proprietary rights so as to impugn **Cornelius J's** finding that the respondent was unaware of his rights. Indeed the evidence which underpins **Cornelius J's** finding is contained in the affidavit of the respondent filed 30 May 2008 and which was uncontroverted. The relevant paragraphs are now reproduced:

> "4. After my father's death, the Plaintiff my mother, my sisters Pauline and Glenda, brother Alwin and I continued to reside on my father's land at Sion Hill, St. James. As indicated in paragraph 7 of my Affidavit in Reply filed on the 16th April 2008, the Plaintiff maintained the household as my siblings and I were all minors at the time.
>
> 5. The Plaintiff remarried on the 31st July 1957, and she and her new husband, Christopher Sobers, took up residence at Sion Hill, St. James continuing the operations of the grocery and liquor store.
>
> 6. Sometime between 1980/1981, when I was around thirty-four (34) old, I decided to migrate to the United States of America to live and work.

> 7. Despite migrating to the United States of America, I visited Barbados continuously and stayed at my father's property in Sion Hill, St James. Sometimes in 2003, Christopher Sobers the Plaintiff's husband, and I had a disagreement and from that time he prevented me from staying at the house in Sion Hill, St James on my visits to Barbados.
>
> **8. The occurrence of these events, caused me to think about who really owned the land at Sion Hill, St James. I sought after information regarding the true nature of the ownership of my father's land at Sion Hill, St James**.
>
> **9. Sometime in July 2005, I discovered my legal entitlement being the first born son to Mr. Bannister Snr. I discovered that under the common law and the Pre-Succession Act I was an heir-at-law and as such I was entitled to the realty of my father's estate and my entitlement was subject to the rights of my mother, the widow of Mr. Bannister Snr. to *dower*, which represented a 1/3 life interest in the realty of my father Mr. Bannister Snr (emphasis added).**
>
> 10. I therefore, on the 26th July 2005, made an application to the Supreme Court of Barbados for a grant of Letters of Administration to the estate of my father, Mr. Bannister Snr."

[116] It is not disputed that the respondent was a minor when his father died. Time did not begin to run against him until he attained the age of majority in 1965. His affidavit evidence above explains his unawareness of his legal rights until he was disallowed occupation of the property. This affidavit explains why it was not until 2007 that the respondent took steps to assert his beneficial rights.

[117] Having regard to this explanation, it cannot be said that the respondent slept upon his legal rights. The law with respect to this issue may be found in **Ramsden v Dyson:**

> "If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the lands on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.
>
> But it will be observed that to raise such an equity two things are required, first that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not the person expending the money in the belief he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my rights."

In **Armstrong v Shepherd & Short Ltd** the legal position is succinctly stated as follows:

> "First, it is true to say that a proprietor will not be debarred from asserting his legal right, against one who is shown to have infringed it, on the ground of acquiescence, unless it is also clear

> that, at the time he did so acquiesce, the proprietor was aware of his proprietary rights."

CONCLUSION

[118] Having regard to the uncontroverted facts deposed to by the respondent in his affidavit and the applicable law, we are unable to find that **Cornelius J** was in error when she made her findings in this matter.

[119] With respect to the legal principle that time begins to run only from the time when the persons discovers the truth or ought reasonably to have done so, the only evidence is that of the respondent that he sought to secure his rights when he was debarred from residing at the home and this prompted him to seek to ascertain his rights over the property. We think it important to note that the first appellant, as mother and guardian and trustee of her infant son, was duty bound to protect his interest. Nowhere in the affidavit evidence is it deposed that she took out letters of administration to the deceased's estate either on her own behalf as dowager or *durante minore aetate* on behalf of the respondent or informed the respondent, her son, of the fact that the property was owned by his father when he attained his majority. This was a major failing in her fiduciary duty to the respondent. We will return to this shortly.

[120] We find it appropriate to dispose of Mr. Vaughn's submission with respect to the respondent's rights over the property that "Ignorance of the legal position was not a valid excuse." It is important to put this dictum in its proper context. In **Terceira**, the salient facts of which are contained in the dictum which follows, *Kawaley J* found that the plaintiff was aware of the facts on which he alleged that his claim had arisen. The plaintiff gave evidence that the delay in making his claim had been partly because he was unaware that he had any legally enforceable claim and also that he did not wish to cause distress to his mother. The full dictum reads as follows:

> "In traditional legal terms, there is little question that there was unreasonable delay. The claim could first have been brought in 1996 and was not raised until eleven years later. However, in the unique context of the present case, the plaintiff's decision to defer raising the claim until after his mother's death was in my view understandable, especially since his co-executors were content to defer execution of the vesting deed until then as well. Despite this unique factual matrix in which for practical purposes the need to finally adjudicate the beneficiaries' respective interests was in any event suspended, there is no legally acceptable reason why the plaintiff could not have given some notice (eg by way of a reservation of rights at the very least) of his claim. Ignorance of his legal rights is not a valid excuse."

In this matter, the respondent argued and the trial judge accepted, that the respondent was unaware of the facts on which his claim was founded until his step-father denied him access to the property. This is

a finding that the respondent was ignorant of the facts as distinct from ignorant of the law. By contrast, the first appellant was cognizant of all the facts and cannot claim ignorance of the law.

ISSUE 4 UNJUST ENRICHMENT

The Submissions

[121] The appellants submitted that **Cornelius J** erred in law by holding that no equitable relief should inure to the first appellant given the substantial increase in the value of the property and/or the construction and improvements made thereto by the first appellant while she was under the belief that the property belonged to her.

[122] Mr. Vaughn submitted that, owing to the respondent's neglect in asserting his beneficial rights, the first appellant went ahead as the person in possession of the property and paid the land taxes and expended substantial funds into the improvement of the property over the years. As a result, the value of the property significantly increased from the death of the deceased in 1955, to the date when the respondent took action in 2007. He argued that this is evident by the value of the property contained in the Affidavit of Value (as part of the supporting documents for the Grant of Letters of

Administration), which was listed at $57,000.00 when compared to the value of the property today that is now in excess of $500,000.00.

[123] Counsel therefore submitted that it would be unconscionable if the respondent was allowed to profit so substantially from his delay.

[124] Mr. Holder submitted that this Court must be satisfied that the main ingredients identified by **Fry J in Willmott v Barber (1880) L.R. 15 CH 96** (**Willmott v Barber)** had been complied with, namely that:

> ***"(a) In the first place the second appellant must have made a mistake as to her legal rights;***
>
> ***(b) The second appellant must have expended some money or must have done some act (not necessarily upon the respondent's land) or suffered some detriment on the faith of his mistaken belief;***
>
> ***(c) The respondent, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the respondent. If he does not know of it, he is in the same position as the second appellant and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights;***
>
> ***(d) The respondent, the possessor of the legal right, must know of the second appellant's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.***
>
> ***(e) The respondent, the possessor of the legal right, must have encouraged the second appellant in her expenditure of money or other acts which she has done either directly or by abstaining from asserting his legal right."***

[125] It was counsel's submission that where all the elements identified in **Willmott v Barber** existed, there is fraud of such a nature as would entitle the court to restrain the possessor of the legal right from exercising it. He also relied upon **Armstrong v Shepperd Ltd (1959) 2 QB 384, Derreck v Mohammed (1960) 2 WIR 352, Ramsden v Dyson (1886) L.R. 1 H.L. 129 (Ramsden v Dyson)** and **Taylor Fashions Ltd. v Liverpool Victoria Trustees C. O. Ltd. (1982) 2 W.R 576 (Taylor Fashions)**.

THE LAW

[126] The principles applicable to the issue of unjust enrichment may be found in **Ramsden v Dyson** where Lord Cranworth stated:

> "If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the lands on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

Lord Cranworth continued:

> "But it will be observed that to raise such an equity two things are required, first that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land

> belongs to him and not the person expending the money in the belief he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my rights."

In **Willmott v Barber**, Fry LJ stated the principle in the dictum which follows and which Oliver J described in **Taylor Fashions** as the *five probanda*:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? **In the first** place the plaintiff must have made a mistake as to his legal rights. **Secondly**, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. **Thirdly**, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. **Fourthly**, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. **Lastly**, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a

> nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do (**emphases added**)."

In **Taylor Fashions** the principle was stated thus**:**

> "Simply whether in all the circumstances of the case, it was unconscionable for the defendants to seek to take advantage of the mistake, which, at the material time, everybody shared."

DISCUSSION AND ANALYSIS

[127] The claim founded upon the concept of unjust enrichment is an equitable one. In order to succeed, the appellants must establish that the respondent has acted inequitably or fraudulently applying the concept of inequality enunciated in **Willmott v Barber** and the five *probanda* set out above and which we now examine seriatim.

First - The affidavit evidence of the first appellant is that she is claiming the property by way of adverse possession. Having regard to the evidence she gave as to the ownership of the property by her first husband, the deceased, she cannot claim ignorance of the factual matrix in which her claim is located. Any mistake is a mistake as to the applicable law. We reiterate that the first appellant's claim in adverse possession undermines her claim for unjust enrichment.

Second - It is not disputed that the first appellant expended moneys in

improving the property. She was a dowager and therefore entitled to a life interest in a one-third of the freehold. Her expenditure was on property in which she and the respondent had an interest. There is no evidence that the first appellant made any attempt to clearly demarcate her one-third part of the estate over which her claim would coalesce. She, her second husband, her second son, the respondent and her daughter enjoyed the fruits of her expenditure until the respondent was denied access to the property. In these circumstances, she took no steps to ascertain her legal rights over the property. Her expenditure cannot be attributed to her mistaken belief.

Third - We reiterate our finding above, in consonance with that of **Cornelius J**, that the respondent was unaware of his right until he was denied access to the property. We find therefore that the respondent did not, until then, know of the existence of his own right which was inconsistent with the right to the entirely of the property claimed by the first appellant. The doctrine of acquiescence is founded upon conduct with knowledge of one's legal rights. We have already found that the respondent had no knowledge of his legal rights until 2005.

Fourth - It also follows from our findings that the respondent did not

know of the first appellant's mistaken belief in his (the respondent's) rights. His explanation of his ignorance of his right by virtue of succession is reasonable having regard to the factual matrix which we have accepted in this decision. We therefore hold that until he obtained knowledge of his legal rights there was nothing which called upon him to assert his own rights. Indeed, during his minority, the first appellant ought to have asserted his right for him.

Fifth - There is no evidence that the respondent, the possessor of the legal right, encouraged the first appellant in her expenditure of money or in the other acts which she did, either directly or by abstaining from asserting his legal right. Such evidence as there is points to her expending money on her own behalf.

[128] With reference to the application of the five probanda to the second appellant, her affidavit evidence is that she built on the property with the consent of the first appellant. She denied any proprietary right in the respondent and relied upon the possessory title of the first appellant and her second husband by adverse possession. In these circumstances, it is clear that she has not fulfilled the first to fourth *probanda*.

[129] With respect to the fifth *probanda* the second appellant, in her affidavit

filed 12 June 2008 deposed that the respondent assisted her in small ways in the construction of the building. This has to be viewed in the context of his uncontroverted affidavit evidence that he was unaware of his rights until he was barred from the home. In consequence, there is no evidence that the respondent encouraged the first appellant in her expenditure of money either directly with knowledge of his right or by abstaining from asserting his right. Consequently, we are unable to accept the first and second appellants' submissions that the respondent has been unjustly enriched.

THE DEED OF ASSENT

[130] We wish to make one observation with respect to the deed of assent. **Cornelius J** held that the first appellant's interest in the property was an equitable one which did not have to be inserted in the assent. We do not agree. The right of dower accrued when Charles Bannister died in 1955. On that date a life interest in property was still a legal estate. Such an interest only became an equitable one when the **Property Act Cap. 236** (**Cap. 236**) was passed on 1 January, 1980 and which provided that the only estates capable of subsisting as legal estates thereafter were the fee simple absolute in possession and the term of years absolute. We are

therefore of the view that the first appellant's interest which predates **Cap. 236** is a legal interest in the property and ought to be reflected in the assent.

CONCLUSION

[131] For all the reasons above, we have found no merit in the various submissions of counsel for the first and second appellants which would impugn the decision of **Cornelius J**. In the circumstances, these submissions are dismissed.

DISPOSAL

[132] In the circumstances, we make the following orders:

1. The first and second appellants' appeals are dismissed.
2. The decision of **Cornelius J** is affirmed in all respects save and except with respect to the deed of Assent.
3. The deed of assent be amended by a deed of correction so as to reflect the first appellant's interest in the property.

4. The first and second appellants shall jointly and severally pay the respondent's costs of this appeal to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal (Ag.)