THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-00545

(1) SANDRA BRIGGS

and

(2) SANDRA BRIGGS (as Legal Personal Representative of the estate of LENORE BRIGGS, deceased)

Claimant

v.

JOHN BRIGGS

Defendant

Before the Honourable Mr Justice James C. Aboud

Representation:

- Mr Beresford Charles instructed by Ms Safiya Charles for the claimant
- Mr John Heath instructed by Ms Susan Kallipersad for the defendant

Date: 27 April 2018

JUDGMENT

Introduction

[1] John Briggs ('John'), the defendant, separated from his wife Lenore Briggs ('Lenore') in 1980. He migrated to the United States of America. One of his children remained living with his wife, the other was married and had moved out. They were young adults at the time. He said that he migrated with a view to improving the chances of success for

himself and his family and with the goal that they would eventually join him there. At the time of his departure he and Lenore were joint tenants of land upon which they had built a home located on Picton Road, Sangre Grande, on the island of Trinidad ('the property'). Save for three or four brief visits he never returned to the property in 28 years. He divorced Lenore in 1989 and married Rosemary Galloway-Briggs within months of the divorce. He began a relationship with her a few months after migrating. Lenore died on 4 May 2006. During his years abroad, Lenore and their eldest daughter, Sandra Briggs ('Sandra'), were in full control of the property. Sandra sues in this case as claimant on her own behalf and on behalf of the estate of her mother Lenore. Sandra says that certain assurances were given by John during this period that suggested to her that he had relinquished his interest in the property. Sandra and her mother effected various improvements, converting part of the building into a downstairs apartment that they rented. In 2008 or 2009 (the date is disputed) John got control of the keys and took over full control of the property. Sandra has now sued for possession claiming that John's title has been extinguished by virtue of the adverse possession of her mother and herself and, further, that she is entitled to an interest by virtue of the doctrine of proprietary estoppel. John has counterclaimed, relying on his legal title as sole surviving joint tenant.

The pleadings

[2] By memorandum of transfer dated 18 December 1965 Sandra's parents became owners of the property as joint tenants. By her Statement of Case filed on 12 February 2014 Sandra alleges, among other things, that she and her mother had been in undisturbed possession and occupation of the property without the payment of rent or licence of her father after he migrated to the United States in 1980. Alternatively, Sandra relies on the doctrine of proprietary estoppel and alleges that her father and mother gave assurances that she relied upon to her detriment so that she, in her personal capacity, is now entitled to a share or interest in the property.

[3] John, however, by his Defence and Counterclaim filed on 31 July 2014, insists that his title was not extinguished and that he continues to be the sole legal title owner of the

property following Lenore's passing in 2006. He further denies that he made representations to Sandra that the property belonged to her and her sister, and that he never expressed any intention to part with the property during his lifetime. According to him, the house was for the use of the family and he always treated it as his own. John visited the premises on three or possible four occasions (John says four times, Sandra says three times). John claims that he entered the premises without permission and as the owner of it. The counterclaim seeks a declaration that he is entitled to possession and that all the repairs and the building of the property were done at his expense. He also seeks an injunction restraining Sandra from entering the property.

[4] This dispute pits a daughter against her father. This Court made every effort to encourage the parties to find a means of compromise. Many raw emotions were exposed at the trial. My general impression of the dynamics of this family, after receiving all the evidence at the trial, is that John's emigration in 1980 was unilaterally taken in the midst of marital problems with Lenore and that, at least up until 2006 when Lenore died and the issue of the ownership of the property began to emerge in his mind, the relationship between him and Sandra was sufficiently stable although prone to occasional upheaval. I will explain how these impressions were created later in the judgment. There is no doubt that their relations will be further damaged by the decision of this Court.

The facts

[5] John and Lenore were married in July 1959. In 1965 they purchased the property as joint tenants. They obtained a loan in their own names. At that time, they had been married for six years. At that time, John worked for the West Indian Tobacco Company, having previously been a taxi driver. John and Lenore moved to the property in 1966. The house on the property was in need of major repair. In 1966 Sandra was eight years old and Jennifer was six years old. A second loan was obtained in 1968 to pay off the first loan. John testified that he paid the monthly mortgage instalments and I have no reason to doubt him as Lenore was a housewife at that time. John first travelled to the USA in 1969. He travelled there twice in that year. The first trip was for six months and the

second for an unknown duration. He paid off the second mortgage in 1974. In September of 1974 he returned to the USA and remained there for some 18 months.

[6] John describes his 1969 and 1974 extended visits in terms markedly different from Sandra. He says that these journeys were intended to financially improve his family's way of life and financial security and suggested that Lenore shared this point of view. During cross-examination, John hesitantly admitted that he had had a relationship with another woman between 1965 and 1969 which produced a son. He also testified under cross-examination that his journey in 1980 was partly as a result of this extra-marital affair. This is what he said in answer to Sandra's counsel, Mr Charles:

> Q: When you said you always wanted to migrate to America, at that time, it was because of a breakdown in the relationship in the marriage?
>
> A: Partly because of that, partly of that.

[7] In 1969 Lenore was employed with the Metal Box Company but I have no reason to doubt that he sent money to her to help with the mortgage loan and the family expenses. Jennifer married in 1972, had a daughter, Rachelle, and moved out. John said that when Rachelle was born, he "became even more motivated to emigrate to the USA to ensure that [his] family had a better life." During his 18-month stay in the USA he attended evening class to learn welding. When he returned to Trinidad, he started repairing cars and, to supplement his income, he did small welding jobs on contract. He also taught auto mechanics two nights per week.

[8] A decision was made in 1977 to demolish the old structure on the property and build a new home. There is a dispute of fact as to the circumstances surrounding the loan that was used to construct the house. John describes the decision as his own and also said that his wife had no role to play except to sign the loan documents. He says Sandra, who at that time was around 18 years old played no role in obtaining the loan or contributing to the mortgage payments. Sandra's version is quite different. In 1977 she was gainfully employed at the Port Authority. She says that the decision was a family decision. Sandra and her mother had reservations. They were concerned about the shortfall of income

required to repay the bank loan as John's source of income as a mechanic was sporadic. She also says that John was an abusive husband and not faithful to her mother, pointing out that he had once left the family in the old structure and went briefly to live with another woman. She said that she and Lenore were worried that he would do that again. Her mother's fears about the income to repay the loan were only allayed, she says, when she gave the assurance that she would provide financial assistance. The old structure was demolished, and John constructed a temporary galvanized steel structure.

[9] In order to build the new structure a loan was obtained from the National Housing Authority ('NHA'). In my opinion, having heard the evidence I believe that John, Lenore, and Sandra each played a role in getting the NHA loan approved. Sandra appeared to me to be a responsible person and as a young adult with a job living in a family with a father who resided abroad for not inconsiderable periods of time, she had an obvious interest in the loan being sought to reconstruct the home she was living in. Construction began in 1977 and although the house was incomplete, John travelled again on 23 February 1978 for six months. At that time, Sandra and her mother lived in the galvanized steel shed. When John returned later in that year, a second loan was sought from the NHA. Again, I have no reason to doubt that Sandra was involved in the decision making. At that time, she was 21 years old and gainfully employed. John's extended stays abroad suggest to me that Lenore, living alone in Trinidad, would have consulted Sandra on these matters.

[10] John permanently migrated to the USA in May 1980. He never returned to the property as the ostensible head of the household or as its owner (an impression he sought to create). This is how John described his decision to emigrate: "At the time I emigrated to the USA my marriage to [Lenore] and the family situation as a whole was very good and at no point in time did I physically abuse [Lenore] nor had I every verbally abused her. [Sandra] still lived at home and Jennifer lived independently with her husband and their daughter Rachelle. Though I had emigrated to the USA the plan was always to work towards bringing the entire family to the USA…" I do not believe that John is telling the truth. I say so for the following reasons:

(1) I believe Sandra's evidence that John spent one night at the house after it was completed and emigrated on the next day. I also believe her evidence that John and Lenore had a bitter argument and that when Sandra intervened John told her to leave the house and she was forced to walk to Jennifer's home to find lodging for the night. It seems to me that this departure, intended to be permanent, must have been planned for many months, and that, and I have a lingering suspicion, the marriage was on rocky grounds long before his emigration.

(2) I also believe Sandra's evidence under cross-examination that shortly before his emigration, Lenore found a letter to John written by a woman and that they had a horrible argument that became abusive. I also note John's reluctant admission during his cross-examination that before emigrating, he closed all his bank accounts in Trinidad. In cross-examination he also conceded that from 1980 onwards he made no contribution to the upkeep or maintenance of the property or his family in Trinidad. It was only in late 2008 that there is any evidence of expenditure on the property. According to the papers filed in his divorce from Lenore, which I will come to in detail later, he met his present wife 10 months after his emigration. Four months after meeting her, to use his language, they were "officially in a relationship." This does not appear to me to be indicative of the behaviour of a spouse whose "family situation as a whole was very good".

[11] It seems clear to me that John and Lenore were not on speaking terms at the time of his emigration and throughout the remaining years of her life. Lenore died on 4 May 2006. She had migrated to the USA in 1994. Her emigration was sponsored by Sandra. She lived with Sandra from 1994 until her death in 2006, a period of 12 years. There is no evidence of any communication between John and Lenore during that period, or indeed from 1980 to 2006. During his cross-examination, John surprisingly admitted that he was not aware that Lenore migrated to the USA in 1994. I do not accept John's evidence that he offered to sponsor Lenore's application for citizenship. During the course of her treatment for cancer and her eventual death at Sandra's home, there was no evidence of

John having visited her. According to the evidence he only attended the funeral. This does not signify the relationship of people who are on speaking terms.

[12] In these circumstances I do not accept, as John sought to persuade me, that the purpose of his emigration was the improvement of his family's fortunes as a whole. I believe that he abandoned his wife and his former matrimonial home.

[13] The history of his interactions with Sandra and Jennifer on the other hand, shows that he did not abandon his children. In 1982 for example, Sandra and her niece, Rachelle, visited John in Maryland. The visit did not turn out well because every time they went out his then girlfriend, Rosemary, went along and Sandra says that it upset her because John was still married to her mother. She says that he became furious when she pointed this out and he left her and Rachelle to stay in his apartment for the rest of their vacation and moved into his girlfriend's apartment. John's affection for his daughters seems to me to have been genuine, notwithstanding the awkwardness created for his family life by his relationship with Rosemary. John also allowed his daughters to stay at one of his townhouses on a rent-free basis and sponsored their emigration to the USA in 1987. He also sold the townhouse to them on a subsidized basis and they eventually found employment in the USA and are settled there now. I believe that John had a genuine fatherly interest in the welfare of his children. He and Rosemary have no children of their own.

The divorce proceedings

[14] The divorce papers filed in the Circuit Court for Harford County, Maryland, are insightful. A Writ of Summons dated 8 December 1988 was served on Lenore sometime after its issuance. It contained these words: "(1) Personal attendance in court on the day named is not required. (2) Failure to file a response within the time allowed may result in a judgment by default or the granting of the relief sought against you." The Summons was addressed to Lenore at the property. His lawyer should or ought to have been aware that Lenore owned a half-share in it. The summons begins like this "You are hereby

summoned to file a written response by pleading or motion in this court to the attached complaint filed by John Briggs...within 90 days after service of this summons upon you."

[15] The transcript of John and Rosemary's testimony at the divorce proceedings was produced before me. It confirms that between 1980 and 1989 John and Lenore lived lives that were completely separate and apart. John also testified at the divorce proceedings that he and Lenore separated in May 1980, she was employed, she was capable of supporting herself, and also owned property in Trinidad. In fact, Lenore was retrenched from her job in the same year of the divorce. No disclosure was made to the divorce court of John's joint ownership with her of the former matrimonial home.

[16] Lenore did not participate in the divorce proceedings. At the time of the divorce, they were married for 30 years, having lived together as man and wife for 21 years. Had she participated, it seems likely to me, on the basis of what was adduced in the trial before me, that John's undivided half share in the property would—or ought to have been—transferred to her as a property settlement, ancillary to the decree.

[17] In his evidence before me, he said that he discussed the divorce with Lenore. This is his testimony: "I recall [Lenore] asked what we would do with the house and I told her we would keep it for the use of the children. [Lenore] told me that I would have to pay for her lawyer and I indicated to her if that was the case the house would have to be sold and [Lenore] then indicated the house would not have to be sold as she would not be fighting the divorce." This evidence aroused my suspicion. If the evidence is true, it suggests that John virtually threatened Lenore with a sale of the house if she required him to pay legal fees for her representation. It seems likely that his lawyer would have advised him that on termination of a 30-year marriage a spouse would be entitled to an increased interest in the former matrimonial home. This is so especially since it is clear from John's own testimony, in that court and in mine, that he was not maintaining his wife or upkeeping the home and was making no maintenance payments whatsoever since his separation in 1980. The divorce was taking place only nine years after the separation.

[18] The legal fees to represent her would have been relatively insubstantial. I do not see how the sale of the house would become necessary if he were required to pay them. According to him, Lenore made no claim on him despite his infidelity, the circumstances of their separation, and his open relationship with Rosemary (which Lenore must have been aware of). He testified that he told Lenore that his plan for the property after the divorce was that they would keep it for the use of the children. From John's testimony, it seems to me that Lenore was not satisfied with that proposal. She asked him to pay for her legal representation and he responded by threatening her with a sale of the property and her potential homelessness. If John is to be believed, then Lenore backed down and allowed the proceedings to continue without making any assertion of her legal right to ask for a property settlement. John was therefore able to omit any reference to the jointly owned property. In so doing, he kept a backdoor open to succeeding Lenore, if she should predecease him, as the sole legal owner of the property, as if a 30-year marriage had never existed.

[19] After Lenore died Sandra carried out substantial renovation works to the upstairs apartment. According to her evidence, she gutted the old ceiling and installed a new ceiling throughout the entire upstairs dwelling house. She painted the entire interior and exterior and replaced all the kitchen cabinets and bedroom closets. She redesigned the kitchen, installed new windows in the bedrooms, window air conditioners in the bedrooms, and changed the doors to the upstairs and downstairs units. She said that she told John of all of these activities and he encouraged her. She found a tenant. She says that she discussed these works with John and that he encouraged her. She showed him pictures of the works. I believe her testimony on these issues. In 2008, John, Rosemary and Sandra visited Trinidad together. Rosemary and Sandra had a business plan and they needed finance. Sandra took John to visit the property. Additional repairs were necessary, and she asked him to use the rent money to carry out these works. It was at the end of 2008 that he first got control of the keys and the rent monies which were intended to finance the minor repairs.

[20] I do not believe John when he says that he assumed control and started collecting the rents in his own right from the upstairs and downstairs tenants in 2008. The upstairs tenant had a written lease with Sandra. Why would they pay the rent to John unless she had directed them to do so? There is some evidence in 2008 of John attempting to assert control of the property but I am satisfied that these attempts were resisted by Sandra, and her resistance was not challenged, legally or otherwise. For example, they both agree that in 2008 he asked her to terminate the tenancy of the downstairs apartment so that he and Rosemary could stay there in pursuit of a joint venture business in Trinidad, of which I will say more later. Sandra said she flatly refused to do that. John admits that he asked her to do it because she was, legally speaking, the landlady and it was proper that the notice of non-renewal should come from her. He makes no mention of Sandra's refusal but instead suggests that the tenants themselves told him that he was the owner and he therefore informed them that the lease was not going to be renewed.

[21] The lease agreement contained an option to renew. Its duration was one year, from 1 May 2007 to 30 April 2008. To exercise the option, the tenant was required to give the landlady (Sandra) notice of renewal two months prior to the termination date of 30 April 2008. There is no evidence of the tenants having done so and therefore they must have been month to month tenants capable of being removed with one month's notice to quit. No one knows the circumstances of their departure. John only says that they agreed to vacate because they recognised him as the owner.

[22] It is clear that John did not occupy or maintain factual control or possession of the property for 28 years. According to Mr Heath, John's Counsel at the trial, this long period of dispossession was punctuated by four visits to the property. Mr Heath describes these visits as "re-entries" that have the effect of disturbing the 28-year possession by Lenore and Sandra. These visits occurred in 1984, 1994, 1996, and 2008. It was on the fourth visit, according to John, that he retook control of the property. These visits will be closely scrutinized later in this judgment, after I have analysed the law.

The question of the assurances

[23] Sandra testified that John, by his conduct and his express words, gave her assurances that he would not assert his one-half interest in the property and would instead treat his legal interest as one owned by Sandra and Jennifer only.

[24] She relies on the following facts and circumstances as amounting to assurances by conduct. John permanently migrated in 1980 after closing his bank accounts and made no payment towards the upkeep of the house or the maintenance of the family in Trinidad from that time. Lenore and Sandra converted the downstairs of the house in 1983 into a self-contained apartment with the intention of renting it. They kept the monthly rent of $1,000. These events occurred without John's permission or consent. Lenore was retrenched from her job in 1989 two years after Sandra's emigration to the USA and Sandra sent money to her mother to help pay her living expenses, the NHA mortgage, the upkeep of the property and the rates and taxes, which expenses were supplemented by the rental income of the downstairs apartment. Sandra's payments to her mother were made from 1987 to 1994 during which period Lenore lived alone at the property. When Lenore migrated in 1994 Sandra continued maintaining the property and paying the rates and taxes. The mortgage loan was paid off in 2003 and John had no knowledge of its repayment. The monthly instalment was $372.61. Prior to any visit that John made to the property he first consulted Sandra, as she had control of the keys. After Lenore died Sandra did substantial renovations to the upstairs apartment with a view to renting it. She found a tenant and signed a lease. I believe her when she testified that John was aware of these works and encouraged her. Sandra testified that after Lenore died John always informed her that the property belonged to her and her sister Jennifer. John, on the other hand, says that after Lenore's death he told Sandra that the house was available to be used by the family and they could stay at the property anytime they were in Trinidad. I do not believe John's evidence on this point. Some 26 years had passed since his abandonment of the home and his wife. Sandra had borne the brunt of meeting most of the expenses and was carrying out upgrades to the upstairs apartment. A tenant was in

occupation of the upstairs apartment in 2007. The downstairs apartment was rented. How could the property be used by any visiting family member, least of all John and Rosemary?

[25] Lenore also allegedly told Sandra that the house was intended for herself and Jennifer. Jennifer made no contribution to the upkeep or maintenance of the property save for sending money to Lenore to assist with Rachelle's living expenses. From 1980 to 1987 when Jennifer, her daughter Rachelle, and Lenore lived together at the property, Jennifer testified: "I recall making monthly contribution towards the home in order to support myself and my daughter." According to the literal meaning of her words these contributions do not refer to payment of the rates and taxes, mortgage, upkeep or maintenance of the property. Jennifer's evidence on the point is at best, oblique.

[26] On a balance of probabilities, I believe the evidence set out above. Most of it is uncontradicted. As to whether such conduct amounts to an assurance is a matter of law.

Express Assurances:

(a) The 2008 Christmas card

[27] There are three documents that Sandra relies on that she says contain express assurances. Firstly, there is a Christmas card written in December 2008. These are the sentiments expressed in it: "Hi Sandra, Rose and I wish you health happiness and prosperity for the coming years. We wish you a merry Christmas and success for your business venture in 2009. Good luck. Don't worry, the house belong to you-all. I have no plans to take it from you-all. Love Daddy and Rose". (sic) It must be remembered that according to John's testimony, at the time he wrote this Christmas card, he had already re-entered the property and re-taken exclusive possession and control, not on behalf of Sandra or at her request but in his own right as sole legal owner. John testified: "When I wrote the message in the Christmas card to the claimant I did not mean that the claimant had an interest in the house…I was simply stating that the said house was for the use of the family and I would not take that away from them hence the reason I wrote 'you-all' and

not 'you'…I as sole owner…was at the time expressing my wish that the property would pass on to my children…at no time did I contemplate giving [it] to [Sandra] or treating [it] as if it belonged to anyone but myself." I do not think that on a plain and literal reading of the words in the Christmas card, such a meaning can be inferred. The written testimony suggests that he is asserting a sole legal title and would allow, at his sole discretion, other members of the family to use the property. In my opinion, his interpretation of the meaning of the words in the Christmas card is out of sync with his written testimony of having carried out substantial works earlier in 2008 as sole owner. During cross-examination, John's evidence was very weak on this point. He suddenly had a loss of memory and his voice faltered. Later on, he reluctantly conceded that the card was written around the time that he allegedly carried out his works. Why would someone who was by that time asserting sole legal proprietorship say that he had no plans to take away the property from Sandra and Jennifer, when, as it turned out, that is exactly what he did to Sandra? The sentiments in the card, whether they be true or false, diminish the strength of his case.

(b) John's 2009 will

[28] The second express assurance is allegedly contained in a will dated 25 June 2009. In it, John devises the property to Sandra and, if Sandra should pre-decease him, to Jennifer. The will was executed in the State of Florida according to the laws of that State. In John's Defence, he stated that he made this will and gave it to Sandra. A copy of the will was annexed to the Defence as exhibit "JB 4". It seems to me that its inclusion as an exhibit was intended to rebut the assertion in paragraph 17 of Sandra's Statement of Case that John "knew that the house did not belong to him". The wording of the will, however, has more far reaching consequences than a simple assertion that the legal title belonged to him or that he believed that he was the sole legal owner. It is plain, on a reading of the 1965 memorandum of transfer, that John, as the sole surviving joint tenant, is in fact the sole legal owner. This case, however, concerns equitable, not legal title and the question that I ask myself is why John would devise the property to Sandra, at a time when their relationship had turned sour and during the period when, according to his

evidence, he was spending considerable sums of money repairing and upgrading the property. Sandra opposed this unilateral intervention and John's assertion of control over the rental income as is borne out in the pre-action letter of Mr Charles dated 13 January 2010 which, for reasons I cannot explain, was never denied in the pre-action correspondence from John's attorney-at-law. Why would John give Sandra a copy of the executed will at the same time that he was asserting complete control and possession of the property? One possibility is that he wished to pacify her or defuse her objections and to assure her that despite his actions (which she opposed) the house would go to her upon his death. Another possibility that is linked to the first, is that he singled her out as the person most entitled to receive the property on the basis of the history of her involvement with it. The latter possibility suggests a layman's recognition that, among his children, she alone had an equitable interest in the property. It seems to me, on a balance of probabilities and having examined all of the evidence, that this latter possibility has the most traction. The wording of the will contradicts the sentiments expressed in the Christmas card ("the house belongs to you-all" which meant, according to John's testimony, Sandra and Jennifer).

(c) The email correspondence

[29] The third express assurance is contained in email correspondence passing between Sandra and Rosemary in December 2008. The emails arose in these circumstances. After Lenore's death, and while Sandra, John and Rosemary all lived in the USA, Sandra had an idea to open a business in Trinidad and Tobago. John and Rosemary were involved in the business plan. They travelled together to Trinidad. [It was then, incidentally, that John made his fourth visit to the property, was introduced to the tenants by Sandra, and according to her, was allowed to use the rent to carry out minor repairs on his next visit.] The business required bank financing in Trinidad and Tobago. Sandra travelled to the island of Tobago where she had a contact at First Citizens Bank with a view to investigating whether the property could be used as collateral for a bank loan. The bank officer in Tobago met with Sandra and, on the same day, wrote an email to her setting out the terms upon which the Bank was prepared to grant a mortgage loan. It is

clear from the email that the legal owner of the property would be required to join in the transaction. Sandra received the email on 5 December 2008 and forwarded it to Rosemary, who was more active in the transaction than John, on 10 December 2008. The bank officer's response was forwarded to Rosemary with a covering email that simply stated "FYI". Nothing else was written except that acronym. Rosemary replied by email dated 29 December 2008. She pointed out in her email that certain documents had already sent by mail to Trinidad for the incorporation of the joint venture company. With respect to the mortgagee requirements she wrote this:

> "Now this is difficult because your father will probably not sign any loan documents for the house in Trinidad and if his name is on the house it is almost certain that his signature will be required. Suddenly he sees the house as his only means of support as he gets older and this scares him to mortgage the property."

The email now describes the house as John's house. Rosemary says that the option of credit card finance using John's was not suitable and that "it looks like we need another investor so that we can leave his property safe and secure or (I am still thinking)…As I write this I am thinking of where we can go to stay in T&T because we need to get back in order to sell product. Hopefully sometime in the second week of January if not before." *(sic)* On 11 February 2010 Sandra wrote Rachelle (who by this time was a qualified Doctor of Medicine) in these terms:

> "Rachelle,
> Rose sent me this email. She and he wanted to use the house as collateral for a loan for the business. He got extremely upset with me when I said no. I never wanted it. Like you said, he changes his mind all, all, the time. So before you know it, he had changed his mind and she sent me this email about him not wanting to use the house. It was perfect. At one point he was calling to tell me I should sell the house. That was before he started to change from our house to his house. The tone of ownership started in December 2008 when Rose sent me an email saying certain things to the effect. Read the email below from Rose."

[30] The issue of fact has arisen as to whose decision it was that the property should be mortgaged. John says that Sandra acted on her own in attempting to mortgage the property and that he only discovered this after speaking with Rosemary. He testified that he and Rosemary were opposed to the idea of mortgaging his property and that he instead proposed the use of his credit card, but Sandra balked at the idea because repayment terms will be longer under a mortgage. Sandra says that John at first advised her to sell the property and later requested that they should use the property as collateral for a bank loan. She said that she opposed the idea of a sale or a mortgage: she did not want her property comingling with the business plan. She said that she reluctantly went to Tobago and obtained the Bank's loan requirements for a mortgage loan, which she forwarded to Rosemary under cover of her "FYI" email of 10 December 2008.

[31] I prefer Sandra's testimony on this point. I say so for the following reasons. (a) The "FYI" cover email does not advance or recommend the mortgage. It seems to be mere news reportage of the Bank's requirements. Her email to Rachelle, which attached Rosemary's reply to the "FYI" cover email, is a contemporaneous document made long in advance of these High Court proceedings. In that email, she says that the tone of ownership from "our house to his house" started in December 2008 when Rosemary sent her email in response to Sandra's "FYI" email correspondence. (b) John's written and oral testimony contradicts the assertions made in Rosemary's 29 December 2008 reply email. John surely is not telling the truth when he says that he preferred that the joint venture business be financed by his credit card. In fact, according to Rosemary's 29 December 2008 reply email, after stating that John will probably not sign any loan documents, she says this: "He instead proposes using our credit card to pay for the next load [of product] from Perry but the last time we went this way he did not want to pay the 3% surcharge for credit (I reminded him of this)...It looks like we need another investor…" To my mind, Rosemary, although suggesting that the credit card loan is a possibility, does not feel confident that John would pay the 3% surcharge and is instead looking for another investor. John mentioned nothing about his aversion to the 3% surcharge or the need to find another investor in his oral or written testimony. Instead, he testified that the business would have been entirely funded by his credit card. These

contemporaneous statements surely have value in trying to determine which version of the events I prefer.

[32] It seems probable to me that Sandra went on a fact-finding mission to Tobago at John and Rosemary's request and simply forwarded the information that she gathered. It is also probable that Sandra, after receiving the Bank's requirements, informed Rosemary (in the FYI cover email) that John needed to sign the loan documents for purely formal reasons, without compromising her belief that John's interest had been extinguished or that, save for his legal title, he was not the true owner.

[33] But even if I disbelieved Sandra's evidence, it still does not disabuse me of the thought that John still felt it essential to include Sandra in any legal transactions or discussions involving the property. Sandra's February 2010 email to Rachelle gives weight to the notion that John and Rosemary were mindful that Sandra had an interest in the property other than a legal interest because, according to Sandra's contemporaneous email to Rachelle, John and Rosemary wanted to use the house as collateral and, when they told her this, she refused. Why would they be consulting her about the mortgage of the property in the first place?

[34] Another reason why I prefer Sandra's version, and what I am about to say, influences my judgment about other pertinent facts in dispute, is this portion of Rosemary's email: "Suddenly he sees the house as his only means of support as he gets older and this scares him to mortgage the property." By his own written testimony (paragraph 60) he and Rosemary had experience "in fixing up houses as we have made renovations to our other homes." By his 2009 Will it is clear that he owns a property at 2070 Live Oak Boulevard, Osceola County, Florida. I have a strong suspicion that he owns other property in the USA. I say so on the basis of the wording of paragraph 5 of his will under the rubric "Residuary Estate". I do know from the evidence that he has bought and sold other properties in the USA although I cannot make any finding of how many other such properties he owns other than the Live Oak Boulevard property. It may be that John

owns other property in the USA which would provide a means of support, but I cannot make that as a finding of fact.

[35] The more important takeaway from Rosemary's email is that it is only in December 2008 that John, realizing that he is getting on in years, "suddenly" (to use Rosemary's language) recognises or asserts that the house is fully owned by him. This casts doubt on his testimony, (and Jennifer's and Rosemary's as well) that he felt this way since 1980 and that he visited the property as of right as its legal and equitable owner. It provides an insight into his thinking prior to 2008.

[36] It is to be noted that each of these express assurances takes place after Lenore's death and they are not relevant for the purposes of calculating time on the claim for adverse possession. They are, however, relevant to the issue of proprietary estoppel, because, after Lenore's death in 2006 Sandra spent substantial sums of money re-furbishing the upstairs apartment. I find so as a question of fact. The former matrimonial home had been unoccupied for 12 years since Lenore migrated in 1994. Refurbishment and repair would, as a matter of logic, be necessary if it were to be tenantable. In any event, I have seen the receipts for materials that Sandra produced, and I also have the benefit of her sworn testimony. In my view, these latter-day written assurances help to provide a retroactive understanding of the past, partially helping to explain or illuminate John's historical behaviour or actions.

General impressions of the oral testimony

[37] By and large I was satisfied with Sandra's credibility as a witness. She weathered a spirited cross-examination by Mr Heath and generally speaking, corroborated everything she had said in her witness statement. She spoke plainly and did not appear to me to have tailored her version of the events to suit the exigencies of the case she had to prove. She was restrained and spoke without rancour about John's relationship with Lenore. I did not get a sense that she was hateful but rather that she was insistent that she had better rights than him to the property.

[38] There was only one time during her cross-examination that Sandra fell down. This was when she volunteered for the first time that her mother had left a will in which she devised all of her interest in another property at Renwick Street, Sangre Grande ('the Renwick Street property') to Sandra, Jennifer, and Jennifer's daughter, Rachelle. This allegedly testamentary document had never been disclosed and it came as quite a surprise to Mr Heath and the Court that such a will existed. This was so especially because Sandra had already obtained Letters of Administration for her mother's estate and the inventory did not include the Renwick Street property. Under strenuous cross-examination, Sandra prevaricated as to the witnessing of the will. It was executed three days before her mother died. Sandra at first said that both testifying witnesses were present but then later changed her evidence to say that she was not sure if the will was executed before two witnesses.

[39] Her credibility was obviously damaged but not to the extent that I disbelieve the other evidence that she gave at the trial. I say so for the following reasons. Sandra got a friend in Trinidad to prepare the will and email it to her. I do not believe that this friend was properly instructed and merely did what she was asked to do, namely, to prepare a will for the Renwick Street property. The will has never been presented for probate and I accept Mr Charles' argument that it is incapable of being probated as a result of deficiencies in the formalities of its execution. The transmission of property upon death is complicated for a lay person to understand and I am not sure that at the time of its execution Sandra was properly advised on the technicalities of testate and intestate succession. During Mr Heath's spirited cross-examination on this point my impression was of a person who was naïve about such matters. Although damaging to her credibility, the testimony was freely given in an open and transparent manner and betrayed a total lack of understanding of the technicalities of estate succession. Nonetheless, the case before me is not a probate case but one involving a claim for adverse possession and for a proprietary interest.

[40] John's credibility as a witness was called into question by Mr Charles' probing and blunt cross-examination. At some points his voice became muted. At other points he became subject to prevarication or loss of memory or both. Despite his age, he did not appear feeble minded in the slightest. There were several contradictions between his oral and the documentary evidence before me and I have no sense of confidence in his testimony that he and Lenore had a good relationship. Marital breakdown is not a crime and it did not count against this witness. However, he tried to convince me that his 1980 emigration was undertaken for the benefit of his entire family, including Lenore. I do not even remotely believe this. Generally speaking, I feel no sense of confidence in his credibility as a witness of truth insofar as the evidence deals with the history of his involvement with the property after 2006. For example, he produced a spreadsheet containing numerous manually entered entries allegedly proving the amounts of money he spent between 12 October 2008 and February 2010. No receipts were attached. A spreadsheet is simply a piece of paper, generated on a computer, upon which one may insert any information. There is no way of checking whether the information on his spreadsheet is accurate without examining the receipts from the suppliers or the banking records. Most of the entries show cash payments. Cash payments mean that someone went to the hardware store and paid cash for an item. Leslie Greaves, one of John's witnesses, and a person who accompanied him to buy materials "upon his return from the US" (Mr Greaves does not say when) signed a witness statement but did not testify at the trial. No reason was given for his non-attendance. In that witness statement, he does not testify that he purchased materials in cash on John's behalf. The cash payments are allegedly made every few days in the months November 2008, January 2009, May 2009, July 2009, August 2009, September 2009 and October 2009 with sporadic purchases during the other months of the period covered by the spread sheet. If John was present during all of these months, he would have had to spend many more months in Trinidad than he claimed to have spent. The same applies with the LINX (debit card) payments. These transactions usually require the personal attendance of the cardholder. I do not accept that the spread sheet is proper evidence of expenditure and I doubt its truthfulness. Finally, insofar as his state of mind is relevant to the questions of law before me, he seemed basically genuine in telling me that he considered himself as a legal owner during

his 28-year absence. However, his state of mind is not as relevant to this enquiry as his actions, and they tell entirely different stories.

[41] Louis Wells, Lenore's brother, who testified on Sandra's behalf, was not very useful to the resolution of the factual disputes—he was cross-examined mostly about the legalities of Sandra's will—and neither was Ava Ramnath, the person in Trinidad who Sandra put in charge of the keys to the property. Jennifer was not impressive as a witness. At first, she testified that John was sending money to Lenore after she (Jennifer) migrated to the USA in 1987. However, when pressed, she said that John merely "mentioned" that he sent money to Lenore. When further pressed, as to whether John told her he was sending money to Lenore, she admitted that he did not tell her and then changed her evidence to say that she did not know if John sent money to Lenore. She also testified that she had no role in the 1984 renovation to create the downstairs apartment as she was not living there at the time. Importantly, she also conceded that her father first complained about Sandra "taking ownership of the house in 2008/2009." I generally formed the impression that Jennifer had fallen out with Sandra and came to court to support her father out of loyalty to him or maybe some sort of gain, I can't say which. John has written a new will and he told me that Sandra is not a beneficiary.

[42] Rosemary and Leslie Greaves filed witness statements in support of John, but Mr Graves never attended the trial for cross-examination. I could not help coming to the conclusion that Rosemary's primary purpose at the trial was to defend her husband's interest. As the wife of someone who had a legal title to a Trinidad property, especially when she was led to believe that he single-handedly financed it, and that it was his former matrimonial home, I would have expected a keener interest in entering and viewing the property during her 1996 visit to Trinidad. She and John were not strangers to property development and ownership. Her lack of enthusiasm cannot be explained away by the fact that Lenore was still alive. Even after Lenore's death she writes in deferential terms to Sandra, giving me the impression of a tacit acknowledgment that Sandra had rights in the property.

Legal issues requiring resolution

[43] The legal issues to be decided in this case are not complicated. The first question is whether John's legal title as a joint tenant was extinguished during the years 1980 to 2008 despite his four visits to the property. If the answer is no, the second question is whether the shield of proprietary estoppel can be raised in resistance to his unilateral repossession of the property. As stated earlier, John's legal title is not in doubt.

Whether John's legal title as a joint tenant was extinguished in the years 1980 to 2008 despite his four visits to the property

[44] Under the doctrine of survivorship, the share of one joint tenant passes automatically to the survivor, unless the joint tenancy was severed in their lifetimes. This case does not involve severance. Upon Lenore's death in 2006, John became the sole legal owner of the property.

[45] John's title may, however, be extinguished if Sandra and Lenore, or either or both of them, can establish that they were in adverse possession of the property or that he discontinued his possession for the requisite number of years.

[46] Section 3 of the *Real Property Limitation Act* Chap. 56:03 ('the Act') prevents a legal owner from recovering property 16 years after the time when the right to make a re-entry or bring an action for recovery first accrued. Section 4(a) says that such a right is deemed to first accrue at the time when the person claiming the land has been dispossessed or has discontinued their possession.

[47] Before there can be a discontinuance of possession, "there has to be someone in possession other than the true owner, in circumstances such that the true owner had a right to recover the land but failed to exercise that right": Jourdan and Radley-Gardner, *Adverse Possession* (2011) 2nd ed., Bloomsbury, at para 5-09. "Discontinuance of possession, as interpreted by the courts, required that the true owner went out of and the squatter went into possession" (para 5-12). In *Rains v Buxton* (1880) 14 Ch D 537 at 539 Fry J suggested that the "difference between dispossession and the discontinuance of possession might be expressed in this way: 'the one is where a person comes in and drives out the others from possession, the other is where the person in possession goes out and is followed into possession by other persons'. So, in either case, the true owner would have to go out of possession and the squatter would have to go into possession."

[48] Where the legal owner has not made any "entry or distress" or brought an action for recovery of the land within the 16-year period, then the right and title of the owner is extinguished by section 22 of the Act. The words "entry or distress" are separate concepts and involve different actions. The two may go hand in hand, but not always. A distress can only occur in conjunction with an entry on the land. But an entry can, logically, occur without the act of distraining the property of the occupier.

[49] *Black's Law Dictionary*, (2004) 8th ed., provides the following useful definitions:

(1) 'entry': "the act, right or privilege of entering real property" (p. 574);

(2) 'lawful entry': "the entry onto real property by a person not in possession under a claim or colour of right, and without force or fraud" (p. 574)

(3) 'Re-entry': "the act or an instance of retaking possession of land by someone who formerly held the land and who reserved the right to retake it when the new holder let it go" (p. 1305)

(4) 'Possession': "the right under which one may exercise control of something to the exclusion of all others" (p. 1201).

[50] However, in the context of a claim for adverse possession, the authors of *Adverse Possession, op. cit.* make these important distinctions:

(1) A person exercising control over land without title does not acquire possession until the control becomes effective (para 7-25);

(2) In some circumstances, a squatter may be treated as in possession of land even though the true owner continues to make some limited use of it. The squatter must be the only person in effective control of the land. But if he is, the fact that the true owner makes use of the land in a way not amounting to the effective control of the land will not prevent the squatter from being in possession (para 7-51);

(3) Where the squatter takes effective occupation or control of the land, and the true owner then claims possession or enters on the land but does not deprive the squatter of effective occupation or control…the squatter remains in possession. Where the squatter takes effective occupation or control of the land, but the true owner makes some use of it by permission of the squatter…the squatter, and not the true owner, is in possession (para 7-56);

(4) Once a squatter has taken possession, entry onto the disputed land by the true owner will not suffice to prevent a squatter who is in effective control of the land from being in possession, unless the owner takes back actual possession, that is, effective and exclusive control of the land. An entry in assertion of title by the true owner is ineffective to interrupt the period, unless it amounts to a resumption of possession by him (para 7-65).

[51] In *Doe d Baker v Coombes* (1850) 9 CB 714, the removal of a stone from the wall of a hut and a portion of a fence was not an entry which was sufficient to restore possession: the squatter remained in possession. Again, in *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] AC 1072, the Privy Council held that occasional visits to disputed property and the receipt of occasional presents of vegetables from the occupiers by one of the true owners fell short of possession and was insufficient to prevent the squatter from being in exclusive possession. In *Kadar Lall Gobind v H S Cameron et al* (1970) 17 WIR 132 at 154 (Guyana) Crane JA said that "the difference between making an entry and entering into possession under title is quite clear. In the one case, the rightful owner goes on his land merely with the intention of asserting a right to or interest in it; in

the other, he does so with the intention of remaining on and regaining possession of it from one who is not lawfully there."

[52] With regard to co-owners of property, it seems logical to suppose that one joint tenant cannot extinguish the undivided half share of the other. They are, after all, owners of the whole of the estate. This was the legal position for many centuries. All that changed in England and elsewhere in the Commonwealth in 1833. Section 14 of the Act, which mirrors the English legislation of that year, makes it plain:

> 14. When any one or more of several persons entitled to any land or rent as co-heirs, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons or any of them.

[53] The effect of this section, according to Upjohn LJ in *Paradise Beach, op. cit.*, was to remove the common law presumption that one co-owner held possession for another co-owner. It made the possession of joint tenants separate possessions. That case was an appeal to the Privy Council from the Bahamas. A testator devised land to named children and grandchildren in undivided shares as tenants in common. The testator died in 1913. Two of his daughters, entitled to some of the undivided shares, and their successors in title, continued and were in exclusive possession of the land until the commencement of the proceedings. It was held in the courts below that the possession of the daughters was for their own use and benefit and that they were rightfully in possession of all of the land. The appellants had a paper title to certain other undivided shares in the land and contended that, as the possession of the daughters and their successors in title was not wrongful, the appellants' title was not statute-barred under the Statutes of Limitation of 1833 and 1874. The appeal was dismissed. The Board held that a right of entry and a right to bring an action had accrued, for the purposes of the Statutes of Limitation, in

1913, and the appellants' title had been extinguished by the daughters' possession as co-tenants for 20 years before the action was brought.

[54] Writing on behalf of the Board, Upjohn LJ first analysed the facts. He upheld the trial judge's finding that the daughters and their successors in title were in exclusive possession for the required term of 20 years. The question of the possession being adverse was not relevant. They openly farmed the land by day. They did not live there. One of the co-heirs, identified in the judgment as Cousin John, was held to have visited the land on occasions and to have received periodic gifts of vegetables from his aunts. Upjohn LJ upheld the judge's conclusion that "on the evidence, these sporadic acts fall far short of possession, even though one must take a most favourable view of a documentary owner." Further, the Board held that these visitations and the receipt of produce did not establish Cousin John's entry into possession. The Real Property Limitation Acts 1833 and 1874 (Bahamas) were in identical terms to those applicable in the UK before the 1925 revision of its land law. In 1925 the English Parliament modernised all that country's land laws. One crucial and sensible improvement was to mandate that all co-owned property takes effect behind a trust-for-sale. This simplified the process of alienating shares in co-owned land (something that still burdens the time of the courts in this country). It also made it clear that one co-owner, being a trustee holding on a trust-for-sale, could not thenceforth extinguish the title of the other co-owner. The position in Trinidad and Tobago is identical to that in England prior to the 1925 legislation, and there are no modern English authorities on the topic.

[55] Section 12 of the 1833 Act (Bahamas) is in terms identical to section 14 of the Act. After quoting the relevant sections of the 1833 Act, Upjohn LJ said this:

> "Before those enactments it was common ground that the relevant law was the same as in this country. The reason for this substantial alteration to the previously existing law is well known.
>
> Onto the Statute of James the common law engrafted the doctrine of "non-adverse" possession, that is to say, that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely "adverse possession", so that there had to be

something in the nature of ouster. In practice, however, it was very difficult to discover what was sufficient to constitute adverse possession; thus the possession of one co-tenant was the possession of the rest though undisputed sole possession for a very long time might be evidence from which a jury could properly presume ouster. (See *Doe d Fisher and Taylor v Prosser,* (1774), 1 Cowp. 217.) All this was swept away by the Act of 1833 as was explained in an illuminating judgment of Lord Denman CJ in *Culley v Doe d Taylerson* (1840), 11 Ad. & El., 1008 at p 1015.). After pointing out that at common law the possession of one tenant in common was possession of all and that there must be an ouster, he continued ((1840), 11 Ad & El 1008 at 1015):

> 'The effect of this section [s. 2] is to put an end to all questions and discussions, whether the possession of the lands, be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section.'

He then went on to point out that this section standing alone would not have affected the possession of co-tenants, for at common law the possession of one was possession of the other and the position would have remained to be determined by the rules of the common law. He then quoted section 12 and held that the effect of the section was to make the possession of co-tenants separate possessions from the time when they first became tenants in common and that time ran for the purposes of section 2 from that time. In the earlier case of *Nepean v Doe d Knight* ((1837), 2 M. & W. 894 at p 911.), Lord Denman CJ had said:

> 'We are all clearly of opinion that the second and third section of that Act…have done away with the doctrine of non-adverse possession, and…the question is whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession.'

And then the learned editor of *Darby and Bosanquet On Limitation Of Actions* (2nd Edn) p 337, when discussing this case, adds:

> "so that without an actual ouster the one tenant in common could bring his ejectment and the other could defend his possession under the statute."

> All this is well settled law and there is a number of authorities to the like effect (see for example *Re Manchester Gas Act Ex p Hasell*, (1839), 3 Y. & C. Ex. 617 and *Doe d Jones v Williams* (1836), 5 Ad. & El. 291)."

[56] The argument of the appellants in *Paradise Beach* was that time cannot run in favour of the co-tenants in possession until they commit a wrong. As Upjohn LJ described it, "these arguments necessarily led to the submission that where a co-tenant was lawfully in possession of the whole there must be some wrongful act showing a possession inconsistent with the other co-tenant's right to re-enter; something which counsel could not attempt to define, but which was short of adverse possession under the pre-1833 law. Their Lordships have no hesitation in rejecting this argument; to adopt it would defeat the whole object of the Act of 1833." It was held that the right of entry of the co-heirs in the Bahamas accrued at the date of the death of the testator in 1913. As Upjohn LJ pointed out, there may be cases, when on the facts of a particular case, the possession of one co-tenant might be at the request of or on behalf of or as trustee of the other co-tenant, or there might be cases where the co-tenant acknowledges the title of his or her counterpart who is not in possession. In such cases, the running of time would be interrupted and another period of 20 years (it is 16 years in this country) would have to run anew.

[57] Time therefore begins to run when co-owners take possession of more than their undivided share of the land: *Ralph & Ralph v Bernard*, Civ. App No 131 of 2011, unreported, judgment of 9 March 2016 by Mendonça JA at para 26.

[58] In the more recent case of *Wills v Wills* [2003] UKPC 84, an appeal to the Privy Council from Jamaica, George and his first wife, Elma became owners of two properties in 1957 and 1966 as joint tenants. One property was let and the other was used partly as a matrimonial home and partly let. During the marriage, in the early 1970s Elma left Jamaica and migrated to the US. In 1973 George met Myra who he began to live with as man and wife. Myra helped with the management of the properties and acted as if she was a co-owner. In 1976, Elma visited Jamaica and stayed at the residence. After 1971 Elma left no possessions in the former matrimonial home except her wedding ring and after 1976 she never set foot in the matrimonial home. In 1985 the couple got divorced.

George married Myra in 1986. In 1991 Elma visited Jamaica but did not visit the properties as George did not invite her. George and his second wife Myra managed the properties and did not account to Elma for any of the rental income. George died intestate in 1992 and Elma returned to Jamaica and gave notice to the tenants that they should pay future rent to her.

[59] The issue here was whether George and Myra extinguished the title of Elma as the other co-owner. The trial judge found that Elma had not abandoned her claim to an interest in the properties and had been waiting for George's death in order to benefit as the survivor of the joint tenancy. The Jamaican Court of Appeal dismissed Myra's appeal.

[60] The Privy Council reversed the Court of Appeal. Writing on behalf of the Board, Lord Walker of Gestingthorpe made a declaration that Myra, in the capacity of her late husband's personal representative, was solely and exclusively entitled to both properties. Lord Walker reasoned that Elma's intentions could not prevail over the plain fact of her total exclusion from the properties as she had been dispossessed. George's state of mind, not Elma's, was decisive. According to Lord Walker, the evidence established that Elma never set foot in the matrimonial home after 1976. She never received any rental income either from the flats at the matrimonial home or from the other property. From 1976 at latest, Myra was living with George at the matrimonial home, and joining with him in managing the rented property, to all appearances as if they were co-owners as man and wife. Lord Walker said this at paragraphs 29, 31 and 32:

> "[29] In their Lordships' opinion the courts below reached that conclusion [that Elma had not been dispossessed for more than 12 years] only because they proceeded on what Lord Browne-Wilkinson in *Pye* called the "heretical and wrong" supposition that it was Elma's state of mind, and not George's, which (together with George's actions) was decisive. Elma no doubt wished to maintain her claim to co-ownership, not least because she expected to outlive George and hoped to take by survivorship. But such an intention, however amply documented, cannot prevail over the plain fact of her total exclusion from the properties. After 1976 at the latest George occupied and used the former matrimonial home and enjoyed the rents from the rented properties as if he were the sole owner, except so far as he

chose to share his occupation and enjoyment with Myra. The judge's conclusion was wrong in law, and the Court of Appeal was wrong to uphold it. Neither court had the benefit of the full and clear guidance which the House of Lords has since given in the *Pye* case. But that decision was not making new law; it was clarifying what has been the law in England since the 1833 Act, and in Jamaica since the Limitation of Actions Act of 1881."

…

"[31] Their Lordships think it right (especially in view of the observations at the end of the judgment of Langrin JA (Ag)) to emphasize that this appeal turns ultimately on its own facts; and although separation and divorce are sadly commonplace, the facts of this case are quite unusual. Elma began to live apart from her husband in 1964 and (apart from some disputed evidence about occasional co-habitation in the United States) she lived completely apart from him from 1976 at the latest. She consulted lawyers in 1984 but she never seems to have taken action either to have the properties sold, or to rearrange their ownership by an exchange of beneficial interests, or even to obtain a proper written acknowledgement of her title (which could no doubt have been obtained if the alternative had been the threat of more drastic action). And yet Elma seems, from some of the evidence, to have been an independent-minded and forceful lady. So it is an exceptional case."

"[32] Their Lordships do not therefore see the outcome of this appeal as likely to cause trouble for the large number of Jamaican citizens who work overseas and contribute to their families' welfare and the island's economy. Most of them will come home on a fairly regular basis, will retain the bulk of their possessions at home, and will not (on coming home) be treated as guests in their own houses. But if (as must sometimes happen) a Jamaican working overseas forms new attachments and starts a new life, and entirely abandons the former matrimonial home, he or she will (within the ample period of 12 years) have to consider the legal consequences of that choice."

[61] Applying this reasoning to the reality of the possession in the case before me—and this applies whether the land is co-owned or not—Sandra must therefore prove that, for a period of at least 16 years, she and/or Lenore were in undisturbed, sole and exclusive possession of the whole of the property with the intention to possess it as owners.

Adverse possession requires factual possession, which is possession adverse to the paper title owner with an intention to possess. The person whose intention is critical is the possessor and not the paper title owner. It is important to note that the Act recognizes such inaction by a paper title owner that amounts to a discontinuance of possession (section 4(a)).

[62] Factual possession requires a sufficient degree of physical custody and control. It must be single and exclusive possession. The question of 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 property of that type of commonly used or enjoyed (see Browne-Wilkinson LJ in *JA Pye (Oxford) Ltd & Anor v Graham & Anor* [2002] 3 All ER 865 at para. 41 relying on Slade J in *Powell v Mc Farlane* (1977) 38 P&CR 452).

[63] An intention to possess requires an intention to exercise such custody and control on one's own behalf and for one's own benefit. The necessary intent is one to possess, not to own, with an intention to exclude the paper owner only as far as is reasonably possible: *JA Pye (Oxford) Ltd & Anor v Graham & Anor* [2002] 3 All ER 865 at para 43. Thus, if a person occupies land as a licensee or with the consent of the owner, then he cannot claim adverse possession: *Ramnarace v Lutchman* [2001] UKPC 25.

[64] Possession of land—the effective control of the land—can be exercised jointly, but not severally. Where more than one squatter has possession simultaneously the title acquired is held by the squatters as joint tenants, in the absence of evidence of a contrary intention, but one alone of the joint squatters cannot claim title alone (see *Adverse Possession, ibid.* at paras 7-43 and 20-68).

Analysis and findings

[65] It is clear to me that John abandoned his wife and the matrimonial home in 1980. His continued affection—and at times, in relation to Sandra, disaffection—for his daughters

is immaterial. I have come to the conclusion that insofar as the property was concerned he left it entirely in the hands of Lenore and Sandra, making them believe that he had ceded full control and autonomy to them. That he played a major part in the construction is not critical. Lenore and Sandra also had a hand in the decision-making and the execution of the house building. What is important is his conduct after the house was completed, and the way that his conduct was reasonably perceived.

[66] The circumstances of his departure are noteworthy. He slept one night at the home after it was completed and permanently departed the next morning. A move like that would have taken weeks or months of clandestine planning. Of course, he must have arranged a place to stay in the USA. And he had loose ends to tie up in Trinidad, like closing all his bank accounts. None of his personal possessions remained in the house. I do not regard the furniture and appliances in the house as personal property. They are matrimonial assets. It seems to me that he packed all his clothes and left, with no intention of returning to the property or of being responsible for its upkeep or mortgage instalments. I do not accept his written or oral testimony that he intended the whole family to join him in the USA. Lenore was definitely not part of this plan. His marriage was on the rocks, not least because of his relations with another woman, and their arguments over it. There is no crime in having an unhappy marriage and leaving your spouse.

[67] John was completely unaware of the decision-making process or the financing to carry out the renovations that created the downstairs apartment in 1983. After Lenore's death in 2006 Sandra unilaterally took the decision to upgrade and re-furbish the former matrimonial home into a tenantable upstairs apartment. He first became aware, if he is to be believed, of the downstairs tenancy in 1994 (some 11 years later) and of the upstairs tenancy in 2008. In relation to the upstairs apartment I believe Sandra's evidence: she showed him photos of the works in 2007 and he encouraged her.

[68] For some 28 years John never had a key to the premises, nor did he ask for a copy. I believe that his receipt of the rent in 2008 was originally triggered by Sandra's request that he use those monies for the short-term repairs that needed to be done. She did so

because of his known talents in property development. I also accept Sandra's evidence that he was made aware of the incremental improvements and maintenance that she and Lenore effected during Lenore's lifetime, and, at least shortly after Lenore's death, made no bones about Sandra's continued control and management of the property. He had no interest in the goings on at the former matrimonial home. He virtually turned his back on the life he once (only briefly) had at the former matrimonial home. Like Elma Wills, he started a new life in the USA, marrying, buying and selling properties with Rosemary and asserting no interest whatsoever in the goings on or management of the property.

[69] Nowhere is there any evidence of him seeking a formal acknowledgment or an undertaking from Lenore that he owned an undivided half-share for the 26 years between his 1980 abandonment and her death in 2006. She didn't die suddenly, and her whereabouts were not unknown. The 1988 divorce proceedings provided an ideal opportunity for him to do so but, it seems, he was less than honest with the court, preferring to leave the topic of his joint ownership—and the likely prospect of a property settlement, or some other form of ancillary relief—hidden from the presiding judge in Maryland. I find it hard to believe that his divorce attorney would not have asked him about any property jointly held with his wife.

[70] Mr Heath has argued that his four visits to the property in the period 1980-2008 amount to "re-entries into possession" that have the effect of stopping the running of time. At this point, I will now analyse the evidence surrounding those visits to the property.

The 1984 visit

[71] The first visit occurred in September 1984. According to his testimony he travelled to Trinidad "to spend time with my family". He could only stay eight days as that was all the time he could get off from work. He says that even though he was of the view that the marriage had come to an end he "still maintained a good relationship" with his family. Sandra has however testified that she had to first ask her mother's permission to allow him to stay at the house. She said that her mother refused but she was very

persuasive and got her to agree to it. She said it was she (Sandra) that wanted him to stay at the home, not Lenore. It must be remembered that in 1984 John and Rosemary, to use John's language, were already "officially" in a relationship. This relationship was known to his daughters. It was not concealed.

[72] He had been four years absent from the home. During those four years he made no contribution to the mortgage payments or to any of the rates and taxes. I do not accept John's evidence that he entered the property as of right. I feel more confident in saying that Lenore's permission was required. And why would it not have been required? He was a prodigal husband. His abandonment of Lenore and his new relationship with Rosemary—which by then was known to Sandra and Jennifer—would likely have distressed her. But he still had daughters, and although I do not accept his evidence that in wanting to spend time with "his family" he included Lenore, I do accept that his fatherly intentions were genuine. It may be that Lenore did not want to stand between him and their daughters. John did not testify that he showed any interest in the maintenance of the property during his eight-day visit. He made no enquiry about how the mortgage payments, upkeep of the premises, and rates and taxes were being met and by whom. Neither is there any evidence of any discussion with Lenore or Sandra about the conversion of the downstairs into an apartment, which took place later in that year. The only thing that can be said about his evidence on the 1984 visit is that he arrived, he stayed for eight days, and he returned to Rosemary and his new life in the USA. He did not look back.

The 1994 visit

[73] The second visit to the property occurred 10 years later in 1994. He travelled to Trinidad three times that year. The first two journeys were to visit his brother who was very ill. On those two occasions, he stayed at his brother's home, not at the property. That was the year that Lenore migrated to the USA, sponsored by Sandra, and presumably, the upstairs apartment was either vacant or still occupied by Lenore. He apparently had no interest in visiting the property or Lenore (if she was still residing there). The third journey to

Trinidad was to attend his brother's funeral. By this time Lenore had certainly migrated. He said that he stayed at the property for one week. According to him, he never asked anyone's permission and specifically denies asking Sandra. I do not believe him. He admitted in cross-examination that he collected the keys from Ms Monica Renwick-Brasche. Ms Renwick-Brasche was Sandra's cousin and, after Lenore's migration she was put in charge of the keys. I believe Sandra's evidence that she informed Monica to give the keys to John. How would he know who had the keys unless Sandra told him? And why would Monica give him the keys unless directed to do so by the person who gave them to her? I believe Sandra when she testified that John asked her to get Lenore's permission in Maryland to allow him to stay at the property in 1994. Sandra says that she did not mention John's request to her mother but instead directed Monica to give the keys to her father. He stayed there for approximately one week.

[74] John said that it was during this visit that he first became aware that the downstairs of the house had been built up and rented for $1000 per month. His evidence in cross-examination on this point was a bit confusing. At first, he said that he knocked on the door and introduced himself to the tenants to let them know that he will be staying upstairs for a few days. Almost immediately after, he admitted he never saw the tenants in person. If he did not see the tenants in person, how could he have introduced himself to them? As a joint owner he was content to speak to the tenants through a closed door? I find that quite strange. Further in his cross-examination he said that he only became aware of the amount of the downstairs rent in 2008, but his written testimony and his pleadings says that it was in 1994.

[75] I am not sure why an owner of land would be apathetic about the uses to which his property was put, the rent the property was earning, or the terms upon which the downstairs apartment was let. For example, was the tenancy a 20-year tenancy? Did the tenant purchase an interest in the freehold? Questions like that appear insipid to him. He admitted that this improvement was done without his knowledge, but (according to his evidence) he nonetheless had no difficulty as it provided Lenore with additional income.

[76] Besides his testimony that his short stay took place because he treated the house as his home there is nothing to suggest any assertion of his title beyond his *ex post facto* approval of the works that were undertaken without his knowledge. Again, no interest was taken in the general upkeep of the premises or the source of funds used to improve it, and neither is there any evidence of him offering any one-half compensation to those who had improved the real estate value of his legal half interest.

[77] According to Sandra's evidence, he had built a new home in Harford County, Maryland, in 1993. John's mind must apparently have been on that home and not on his former matrimonial home. I am satisfied that Lenore and Sandra opened a joint account with Monica so that they could wire money to the account and allow her to make disbursements as and when necessary. John had absolutely no knowledge of this. I feel satisfied that in order for John to stay at the unoccupied upstairs matrimonial home, he needed a key and access to the key depended on Sandra's permission.

[78] The visit in 1994 cannot amount to an entry as of right but one undertaken with Sandra's consent or permission. Moreover, there is no evidence whatsoever that upon receiving the key from Monica John made a copy. This to me is not the behaviour of an owner of property, the upstairs portion of which is unoccupied. After his brother's funeral, John blithely returned to his now completed home in Maryland, once more turning his back on the matrimonial home. It appears to me, on the basis of the evidence, more in the nature of a man seeking short term lodging than a man exercising rights of ownership.

The 1996 visit

[79] John says that he made three visits to Trinidad in January, May and June 1996. I believe him. On the January visit he said that before he travelled he asked Sandra who had the keys and she told him that he would have to get them from Monica. This is consistent with Sandra's testimony in relation to the 1994 and 1996 visits. Assuming that his evidence is correct, the January 1996 visit again involved notification being given to Sandra and a request being made for the keys from Monica—keys that any right-thinking

property owner would already have had a copy of. Again, this is two years after Lenore's migration and the upstairs matrimonial home was definitely unoccupied. There is no evidence that he stored any possessions on this visit or made any pertinent enquiries about the tenancy downstairs. It seems to me, as before, that his actions on this visit more closely resembled that of a temporary lodger than that of a legal owner.

[80] In the May and June 1996 visits, he travelled to Trinidad with Rosemary. He said he drove past the house so that she could see the property that he and Lenore built. He did not go inside to examine the state of repair of the upstairs matrimonial home. He does not seem to have been interested in whether there were any leaks in the roof, or plumbing issues or whether any trespasser was illegally occupying the former matrimonial home. Rosemary, as his wife, would obviously have an interest any property that her husband ostensibly owned. Lenore was far away in Maryland and it does not seem rational to me why either of them should feel trepidation in entering and viewing it. According to Rosemary's evidence, when they drove past the property, John said "that is my house I built." I find it unusual that he did not tell her "this is the house that I jointly own with Lenore." Is that not what his case is all about? I am curious why Rosemary did not herself express an interest in examining the repair of the building. The structure was completed in 1980, some 16 years earlier, and had been unoccupied for two years. These questions become more pertinent knowing that John and Rosemary had experience in buying and building homes in the USA. This is not the type of behaviour one expects from a person who says that he is the owner of property in the usual meaning of those words.

The 2008 visit

[81] A fourth visit to Trinidad occurred 12 years later. During this not inconsiderable number of years he was happily living in Maryland and, I believe, was unmindful about the activities taking place at the property. On this occasion, Sandra travelled with John and Rosemary, arriving one day after them. The purpose of the visit was to explore the joint venture business plan that I referred to earlier. Sandra says that she took John and Rosemary to visit the premises, but they did not stay there. They stayed at the home of

Ava Ramnath. Sandra had done extensive renovations to the house between January and June 2007. She says that when they visited the house, she took them there to show them what repairs she had done. The tenant had been installed in the upstairs apartment the year before. She denies that he unilaterally took control of the property and the rents. She said that some further minor repairs were required and, due to his experience in building matters, she agreed to allow him to collect the rent to purchase of materials needed for the repairs. According to her, he carried out these repairs to the then fully occupied building, not in that year, but later in 2009. I feel satisfied nonetheless that John first attempted to assert ownership in December 2008. I say so on the basis of Rosemary's reply email. These inchoate assertions were made a thousand miles away. His actual physical control occurred in January 2009, when he caused the downstairs tenant to vacate and started collecting the rents.

Resolution of the adverse possession claim

[82] I feel more than satisfied that the first three visits do not fulfil the requirements of our common law definition of an entry into possession, nor do they amount to acts that sufficiently denote that John's discontinuance of possession came to an end. Although John had more of an interaction with the property than Elma Wills, the wife in the *Wills* case, these interactions do not, to my mind, cross the threshold necessary to disturb Lenore and Sandra's sole, exclusive, and uninterrupted possession of the property from 1980 to 2008. His three visits in 1984, 1994, and 1996 did not have the effect of making use of the property in a way that even fictionally dispossessed Lenore or Sandra. Making limited or brief use of property does not have the effect of stopping the running of time unless the persons in possession are, by the owner's actions, rendered as no longer in effective control by the entry, however briefly. These entries (in the non-legal sense) did not amount to John's resumption of possession (in the legal sense). Having regard to the deliberate actions of Sandra and Lenore I feel confident in holding that they were jointly in sole, factual possession and control of the property with the clear intention of possessing it on their own behalves, to the exclusion of the other joint tenant, and using the property and its income as if they were the sole owners of it.

[83] Alternatively, having regard to John's activities over the 28-year span, his discontinuance of possession cannot rightfully be said to have come to an end until January 2009. It would be heretical and wrong, to use Lord Browne-Wilkinson's strong language in *Pye*, to pay regard to John's personal or private thought processes, ensconced in a new life in a different country, far-removed and alienated from the goings-on at the property. There are legal consequences when a joint owner migrates (whether to serve his or his family's interests) and puts his property and his life completely behind him, as Lord Walker delicately observed in *Wills*.

[84] At the date of Lenore's death in 2006 John's undivided half share had already been extinguished. Much more than 16 years of sole, exclusive possession had elapsed. His right to the legal title under the doctrine of survivorship ceased to exist. The upshot of this is that Lenore's estate is beneficially entitled to her one-half share and Sandra and Lenore's estate are jointly entitled to the other half share. Mr Charles told me that the entire property is owned by Lenore's estate and asked me to make an order that Lenore's beneficial interest should be divided equally between Sandra and Jennifer. On the basis of the law and my findings, I do not think that such an order would achieve justice in this case.

[85] In my view, John's title having been extinguished, the beneficial interest in the property should be divided in such a way that Lenore's estate will be solely entitled to a one-half share and Lenore's estate and Sandra will together be entitled to the remaining one-half share. Therefore, Lenore's estate will be entitled to a three-quarter interest (her one-half undivided share plus half of John's undivided share) and Sandra is entitled, in her own right, to a quarter interest (being the other half of John's undivided half-share). Bearing in mind that Lenore's sole next of kin are Sandra and Jennifer (they are equally entitled to her estate) the three-quarter interest to which the estate is entitled ought to be shared equally between the next of kin upon due administration of Lenore's estate. After such administration, Sandra and Jennifer will each be entitled to a three-eighths share of the whole, and Sandra will be solely entitled to the remaining one-quarter share. In fractional terms, these are the divisions: Jennifer is beneficially entitled to a three-eighths share and

Sandra is beneficially entitled to a five-eighths share. As to whether Sandra, as Administratrix, nonetheless wishes to divide all the equities equally between herself and Jennifer, as her counsel suggested, is a matter entirely up to her.

[86] In the event that I am wrong about the extinguishment of John's title I will deal with the second issue.

Whether John is estopped under the doctrine of proprietary estoppel from asserting his sole legal entitlement to possession

[87] The ingredients necessary to create a proprietary estoppel are fully discussed in my judgment in *Garbo v Jobe and Ors* (unreported), CV 2012-02187, delivered 22 June 2017, (on appeal as to the application of the law). Subject to correction, I believe that the law stated in *Garbo* is correct and I will condense here what I more fully set out there.

[88] Proprietary estoppel arises when the owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner's property. In reliance upon this belief, the claimant acts to his detriment to the knowledge of the owner, and the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive. The claimant has an equitable right to relief, subject to the normal principles governing equitable remedies. The court has a wide discretion in satisfying the equity. It seeks to avoid an unconscionable result. It must have regard to all the circumstances of the case and in particular to the expectations and conduct of the parties. See, generally, *Megarry and Wade*, *The Law of Real Property*, (2008) 7th ed., at pp 698–699.

[89] In *Davies v Davies* [2016] EWCA Civ 463, Lewison LJ helpfully and studiously examined all the cases involved in the creation of this type of equitable estoppel. The principles drawn from those cases were condensed in para 38 of his illuminating judgment. I will now set out the main points.

[90] The ingredients necessary to raise an equity are an assurance of sufficient clarity, reliance by the claimant on that assurance, and detriment to the claimant as a result of his or her reasonable reliance. In deciding whether an equity arises and, if the answer is yes, how it should be satisfied, a court should look backward from the moment when the promise or assurance is denied and ask itself if, in the circumstances as they have been proven, it is unconscionable for the promise or assurance to be broken, either wholly or partially. A "mutual understanding" is not always the *sine qua non*. The assurance and the resulting reliance are often intertwined, for example, the quality of an assurance may influence the nature of the reliance. Each element needs to be separately weighed to see how or if they influence each other. However, overlapping between the elements often occurs. Financial detriment or the expenditure of money is not strictly essential as long as the detriment is substantial enough to raise the red flag of unconscionability. In fact, the essential test is unconscionability, and it is to be assessed on an objective, not subjective basis. The plain duty of the court is to avoid an unconscionable result. If the claimant has benefitted as a result of the assurance, then, in crafting the appropriate relief to address a proven detriment the benefit must be taken into account. The governing principle in the search to avoid an unconscionable result is proportionality. An expectation that is disproportionate to the assurance upon which it was founded should be protected in a more limited way than one that is proportionate. The remedy must therefore be proportionate to the detriment and should not overcompensate the claimant. In determining what relief to order, the court, though exercising a broad judicial discretion, must act on a principled basis.

[91] In *Mills v Roberts*, Civ. App. No. T 243 of 2012, a judgment of the Court of Appeal delivered on16 December 2016, Jamadar JA dealt with the issue of how the equity is to be satisfied. Quoting from the judgment of Sir Jonathan Parker in *Theresa Henry and Anor v Calixtus Henry*, [2010] UKPC 3, Privy Council, (an appeal from the Eastern Caribbean Court, St. Lucia, and one that informed many of the statements of principle by Lewison LJ in *Davies v Davies* that I set out in para [88] above) he emphasized that the

court should strive to discover the minimum equity to do justice to the claimant. Jamadar JA described this discovery process as a real and practical directive of our common law. It involves a weighing exercise: assessing any disadvantages suffered by the claimant by reason of reliance on the defendant's inducements or encouragements against any countervailing advantages enjoyed by the claimant as a consequence of that reliance. In abstract terms reliance and detriment are different concepts, but in applying the principles of proprietary estoppel they are often intertwined: *Theresa Henry*, per Sir Jonathan Parker at para 55.

[92] The promise or assurance need not be reduced into writing or even contained in any express words. Conduct can constitute an assurance. In *Mills* Jamadar JA distinguished this branch of estoppel from promissory estoppel. In the latter, the court will look for a clear an unequivocal promise or assurance intended to affect legal relations. But in the law of proprietary estoppel there is no absolute requirement for any finding of an express promise or of any intention to affect legal relations.

[93] In my opinion, Sandra and Lenore were reasonably entitled to, and did rely on John's assurances that they were jointly entitled to use and occupy the former matrimonial home, and that he had relinquished all claims to it. These assurances were mostly made by his conduct, but some of them were express utterances. Insofar as these assurances were express, they are found in the three written documents that I discussed in paras [27]-[29] above. The analysis there need not be repeated, save to say that the documents provide a backward-looking view of what, it seems to me, is an embryonic understanding of the equitable *status quo* operative in the minds of both John and Sandra prior to their dissemination. These written statements were purely voluntary, and they were not clandestinely but openly shared. They have value in understanding the quality of the reliance that existed in Sandra's mind before she read them, and even afterwards.

[94] In coming to the conclusion that John's conduct could reasonably be regarded as an assurance I take note of all my previous findings of fact set out earlier in this judgment. In particular, I note the following. He abandoned their family home in 1980, remarried

and settled permanently in the USA. He made four random visits to the home over the 28-year period of his absence. These visits do not amount to an entry into possession in the legal sense. During this time, he did not act in the manner that a person with a subsisting legal interest would normally be expected to act. He paid no bills. He took no interest in the upkeep or improvements. In fact, he knew of and encouraged Sandra's expenditure after Lenore's death. During his sporadic visits he did not ask for his own copy of the keys to the premises. He kept no clothes there. He ceded full control of the premises to Lenore and Sandra for 28 years. He never sought a written declaration from Lenore (and, after her passing, Sandra), or even the courts, that his half undivided share was not extinguished by their sole, exclusive possession of the whole of the property.

[95] Did he feel morally obligated to act like this after Lenore, his wife of 29 years, received no property settlement during the divorce proceedings? I cannot say. What was operative in his mind is immaterial and I pay no regard to it. The critical question is what was operative in the minds of Lenore and Sandra. They relied on the conclusiveness of the state of affairs created by his total abandonment. Their reliance on his conduct does not seem unreasonable or disproportionate. They felt, and, in my view, were reasonably entitled to feel on the basis of his actions that they were the sole owners. They acted to their detriment in expending money on the rates and taxes and the maintenance and improvement of the property. Sandra's extensive upgrade of the upstairs apartment after Lenore's death demonstrates the nature and magnitude of this reliance. She signed a lease identifying herself as a landlady. She didn't seek John's permission to do this. A lease is a formal legal document with legal consequences if any of the statements in it are later held to be untrue. This is significant insofar as her state of mind is concerned. It seems to me that she and Lenore held fast to the idea that this was their property, to do with as they pleased. Detrimental reliance is however not always about spending money. Attachments to property are often emotional in nature, especially when built up over 28 years of exclusive control in the unique circumstances of this case. These emotional attachments cannot be totally discounted in determining whether a declaration of John's sole legal title and right to possession would create an unconscionable result. Taken together with their exclusive control, possession and expenditure—and John's

extraordinarily long abandonment—I feel certain that there was substantial reliance and that the detriment created by a withdrawal of the assurance is substantial.

[96] In crafting the appropriate relief, I must have regard to the proportionality of the relief that is sought in relation to the benefits that accrued to Lenore (during her lifetime) and to Sandra. Beginning in 1980 the property provided shelter to them, and for a short while, to Jennifer. In 1987 Sandra migrated, leaving Lenore. Lenore migrated in 1994. One could take account of the shelter that the property provided for the time that they lived there, but it cannot be said that John provided "rent-free" accommodation. They were paying the mortgage, however small the instalment was, together with all the maintenance bills and property taxes. Lenore was also an owner in her own right and did not require John's permission to remain in occupation or to build the downstairs apartment. In assessing the benefits enjoyed by Lenore and Sandra, the benefit of the rental income of the downstairs apartment must be taken into account. That rental income must however be balanced against the expenditure in enclosing the lower floor and creating an apartment. Information about that expenditure was not provided, but the rental income was a modest monthly sum of $1,000. Again too, Sandra's 2006-2007 refurbishment of the upstairs dwelling produced an income once it was rented, but the income cannot be said to be disproportionate to the detriment she would suffer if John's right to possession was declared. On the evidence the cost of the refurbishment was $60,023. The rental income was $1,650 per month beginning in May 2007. That is $19,800 per year. She enjoyed this income until January 2009, when John started receiving the rent. Her total rental receipts amounted to $34,650. She has therefore lost $25,373 of her investment in the refurbishment. In money terms the rental income dos not amount to a benefit, but a loss.

[97] In my view it would be unconscionable to permit John to assert his legal title and retake possession of the property. An order, in the same terms as that granted in the claim for adverse possession would produce the least unjust result.

Disposition

[98] I therefore make the following orders:

(1) There shall be judgment for the claimants against the defendant on their claim;

(2) The counterclaim is dismissed;

(3) The defendant shall pay the costs of the claim to the claimant, prescribed in the sum of $14,000. The claimants have not asked for their costs on the counterclaim;

(4) It is declared that Sandra Briggs and Lenore Briggs were in undisturbed possession, control, and occupation of the property for more than 16 years prior to filing this claim and the legal title of the defendant has, by virtue of such possession, control, and occupation, been extinguished.

(5) The shares in the property are beneficially held as follows: a three-quarter share is held by the estate of Lenore Briggs and a quarter share is held by Sandra Briggs personally.

James Christopher Aboud
Judge