[2013] JMCA Civ 45

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 135/2008

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN **INTERNATIONAL HOTELS (JAMAICA) LIMITED** **APPELLANT**

AND **PROPRIETORS STRATA PLAN NO 461** **RESPONDENT**

Dr Lloyd Barnett, Walter Scott and Weiden Daley instructed by Hart Muirhead Fatta for the appellant

Paul Beswick and Christopher Dunkley instructed by Ballantyne, Beswick & Co for the respondent

28, 29 November, 1 December 2011 and 4 December 2013

PANTON P

[1] I have read in draft the judgment that has been written by my learned brother Morrison JA. I fully agree with his analysis and conclusion, and do not think there is anything else to say in respect of the matter. However, I wish to apologize for the delay in disposing of this appeal. The reasons for delays of this nature are well known and we trust they will soon be corrected.

MORRISON JA

Introduction

[2] This is a case about rights to registered land in Negril, in the parish of Hanover. As the learned trial judge observed at the outset of his judgment in the court below, "[it] primarily concerns a boundary dispute".

[3] The appellant ('IHJL') is a company registered under the provisions of the Companies Act and the respondent ('PSP') is a strata corporation registered under the Registration (Strata Titles) Act. IHJL is the owner of some 18 acres of land registered at Volume 1113 Folio 630 of the Register Book of Titles. It is also the owner of a narrow strip immediately to the west containing some 12,573 square feet of land ('the intermediate strip'), registered at Volume 1210 Folio 154. Endorsements on both certificates of title direct that the land comprised in each is to be attached to the land comprised in the other, and "held therewith as one holding". IHJL operates a hotel now known as 'Hedonism II' on the land, which I shall refer to as 'the hotel land', comprised in both certificates of title.

[4] PSP is the owner of land to the west of the hotel land, which is now registered at Volume 1238 Folio 4-263 of the Register Book of Titles ('Point Village').

[5] All three properties described above were once owned by the Urban Development Corporation ('the UDC') and/or its subsidiaries. The UDC is a statutory corporation established by section 3 of the Urban Development Corporation Act and is empowered

by section 4(3)(a) of that Act to, among other things, "acquire, manage and dispose of land…"

[6] In 1999, PSP filed action in the Supreme Court to recover possession from the IHJL of two small parcels of land ('section one' and 'section two'), containing approximately 336 and 193 square metres respectively, damages, further and/or other relief. Both these parcels of land, which run respectively along the northern and western boundaries between the hotel land and Point Village, are currently in use by IHJL and enclosed by a fence as part of the hotel land. It is common ground that both parcels, to which I shall refer together as 'the disputed land', are comprised in PSP's title registered at Volume 1238 Folio 4-263.

[7] IHJL resisted PSP's claim, on the grounds that (i) IHJL and its predecessors in title have been in continuous, peaceful and undisturbed possession of the disputed land from and since 1976 and that, by reason of section 3 of the Limitation of Actions Act ('the LAA'), PSP's claim for recovery of possession and damages is statute barred; (ii) pursuant to section 45 of the LAA, the fences between Point Village and the hotel land are the true and/or the legal boundary between the said properties; and (iii) PSP is estopped from asserting any legal rights it may have in respect of the disputed land. Accordingly, by way of ancillary claim, IHJL sought a declaration that it is entitled to possession of the disputed land and consequential orders for the transfer to it by PSP of title to the said land.

[8] In a characteristically lucid judgment given on 4 December 2008, Brooks J (as he then was) rejected IHJL's defence based on section 3 of the LAA, primarily on the basis that, for a considerable part of the relevant period, "the lands on both sides of the fence were ultimately owned by the same entity and thus there could be no application of the concept of adverse possession" (page 20). The learned judge also rejected IHJL's defence based on the doctrine of estoppel, on the ground that "IHJL has not proved that it would be unconscionable for PSP 461 to rely on its legal rights in respect of the disputed land" (pages 19-20). However, as regards section 45 of the LAA, the court considered that IHJL had made good its defence in relation to section one, but not in relation to section two of the disputed land. It was accordingly held that PSP was entitled to possession of section two, but not of section one, and orders for possession were made accordingly. With regard to the costs of the action, the learned judge considered (at page 20) that, "[i]n [the] light of the fact that both parties have had some measure of success, it is perhaps just, that each should bear its own costs".

[9] There is no appeal by PSP from this judgment. This is therefore IHJL's appeal from the order for possession made against it in respect of section two. All three issues canvassed in the court below, *viz*, the applicability on the facts of the case of sections 3 and 45 of the LAA, as well as the doctrine of estoppel, again arise on this appeal.

[10] The evidence at trial was given by way of witness statements, with supporting documentation, and supplemented by further examination-in-chief and cross-examination of the witnesses on both sides. For the purposes of this judgment, it is necessary to rehearse in some detail the evidence regarding, firstly, the history of the

adjoining properties that came in due course to be occupied by Hedonism II and Point Village; secondly, the circumstances in which the boundaries on earth between these properties came into existence; thirdly, the expert evidence; and fourthly, some important items of correspondence which passed between the parties at various times over the relevant period.

The properties

[11] I start with the history of the hotel land. On 14 April 1975, the certificate of title registered at Volume 1113 Folio 630 was first issued to Rutland Point Hotels Limited ('RPHL'). RPHL is a wholly owned subsidiary of National Hotels and Properties Limited ('NHPL'), which is itself a wholly owned subsidiary of the UDC.

[12] Between 1976 and 1978, a hotel known as 'Negril Beach Village' was operated on the hotel land by Issa Hotels, a division of the House of Issa Limited. In 1978 NHPL took over the management of the hotel and continued to do so until October 1981. By a lease dated 6 October 1981 and registered on 21 April 1982, RPHL leased the land comprised in Volume 1113 Folio 630 to Village Resorts Limited ('VRL') (which, in common with IHJL, is a member of the SuperClubs Group of Companies), for an initial period of five years, with two options to renew. (In fact, under a separate agreement, VRL remained the manager of the hotel, by then known as Hedonism II, up to the time of trial.)

[13] In 1978, certificate of title registered at Volume 1148 Folio 38, relating to the land comprised in Volume 1113 Folio 630, was issued to UDC. In 1987, this land was subdivided and on 11 April 1988 title to a part of it (registered at Volume 1210 Folio 154) was issued in the name of RPHL, with the indorsement already referred to, that the land comprised in this certificate "shall be attached to the land comprised in Certificate of Title registered at Volume 1113 Folio 630 [the hotel land] and held therewith as one holding". This was the intermediate strip. Title to the remainder of the land formerly comprised in Volume 1148 Folio 38 (together with other lands) was issued on 7 February 1989 to UDC and registered at Volume 1217 Folio 223.

[14] On 4 December 1989, VRL surrendered its lease to the hotel land and, by transfer registered on that same date, RPHL transferred the hotel land to Linval Limited ('Linval'). On 22 December 1989, Linval changed its name to International Hotels Limited ('IHL') and in due course, pursuant to a reconstruction agreement effective 31 March 2000, IHL transferred all its assets and liabilities to IHJL. The hotel land was specifically included in the property transferred to IHJL by this agreement.

[15] At some point in the mid-1990s, a grill, a bar, a nude pool, a spa, a misting pool and a stone wall were constructed, and the pool pump house expanded, along the hotel's western boundary.

[16] On the other side of the fence, so to speak, the land which is now the Point Village was originally comprised in certificate of title registered at Volume 1217 Folio 233 in the name of UDC. By transfer registered on 7 April 1989, this land was

transferred to Rutland Point Beach Resort Limited ('RPBRL'), a company in which UDC is a 50% shareholder. The annual returns for RPBRL for 1989 and 2004 showed that the directors of the company in both years were members of the board/staff of UDC. A miscellaneous entry dated 24 July 1991 on the title registered at Volume 1217 Folio 233 noted that the land comprised in it had been registered at Strata Plan No 461 of the Registration (Strata Titles) Act. As a consequence, the certificate of title registered at Volume 1217 Folio 233 was cancelled and a new certificate of title for the land was registered at Volume 1238 Folios 4-263.

The boundaries

[17] A number of witnesses spoke to this question. The first was Mr John Issa, the Executive Chairman of IHJL, who had had a particularly long association with the Hedonism II hotel and the hotel land. During the period 1976 – 1978 when the hotel, as Negril Beach Village, was managed by Issa Hotels, Mr Issa was the director of the House of Issa Ltd with responsibility for the hotel division. He was also the Executive Chairman of VRL, a position he had held from its incorporation in 1981.

[18] Mr Issa's evidence was that, when the hotel was opened in 1976 on the hotel land, RPHL also occupied the disputed land "and continued to do so until the sale of the Hotel in 1989 to Linval Limited". In or about 1981, the hotel having become a totally all inclusive resort, a barbed wire fence was erected on the outer base of an earth berm which had up to that time formed the western boundary between the land occupied by the hotel and the land which in due course came to be registered in the name of PSP at

Volume 1238 Folios 4-263. The fence extended all the way down to the sea. At the same time, a chain link fence was erected along the northern boundary of the property, again on the outer base of the earth berm which had alone, up to then, formed the hotel's northern boundary. Both the barbed wire and the chain link fences enclosed the disputed land with the hotel land. According to Mr Issa, it had always been his understanding that RPHL, NHPL, UDC and IHL "had agreed that the entire western portion of the Disputed Lands should have been transferred to IHL when the land comprised in Volume 1210 Folio 154 [the intermediate strip] was so transferred to IHL".

[19] In or about 1990, the barbed wire fence, "for its full length, was moved, eastwards towards the [hotel land], by about ten (10) feet, pursuant to an agreement reached between the adjoining owners, thereby reducing the size of [lot 2]". That agreement was reached "after UDC notified IHL of encroachments along the western boundary of the Undisputed Land, and IHL agreed to move the fence to its present position". When the barbed wire fence was so moved, it was replaced by a chain link fence, along the boundary "agreed by the adjoining owners as the correct one and the cost of moving the fence to its new location was borne equally by the adjoining owners". Since that time, the fence had remained in the same place.

[20] Mr Issa's evidence as to the location of the northern and western boundaries between the hotel and Point Village was supported by that of several witnesses, each of whom had had contact of some kind with the hotel land and the adjoining property at various points over the relevant period.

[21] Mr Cameron Burnet, who was employed to NHPL between 1988 and 1990, joined the SuperClubs Group in 1991. RPHL was, he confirmed, a subsidiary of NHPL, which was a subsidiary of UDC. While he was a member of NHPL's staff, RPHL had no staff of its own and its "transactions and general affairs" were carried out by members of staff of subsidiaries of the UDC, including NHPL. As a member of NHPL's staff, he was involved in the divestment of Hedonism II to Linval in 1989 and stated that the intermediate strip was transferred to Linval on the same date as the land comprised in Volume 1113 Folio 630 was transferred to it, "it being intended that the registered Boundary of Hedonism II would be made to accord with the fence/boundary on the ground which extended to the sea". This was in keeping, Mr Burnet said, with the purchaser's specific request, as shown by a letter dated 12 September 1989 from NHPL's attorneys-at-law to him in his then capacity as chief executive officer of the hotel divestment unit of NHPL. In that letter, referring specifically to the western boundary of Hedonism II, the attorneys advised that "the purchaser wishes a letter from the [UDC] to say that, if necessary, the [UDC] will transfer to the purchaser, free of costs, any land which may be necessary so that the registered boundary may accord with the existing fences on earth".

[22] Mr Lenford Mason had also had a long association with the hotel, having commenced employment to NHPL in 1978 as the maintenance mason of Negril Beach Village. Since that time, he worked in various capacities at the hotel, particularly in relation to what he described as "grounds-related matters". His witness statement

provides perhaps the most vivid depiction of the situation of the boundaries on earth between the land occupied by the hotel and the Point Village:

> "6. When I started working at the Hotel in 1978, there was an earth berm covered with grass forming the boundary between the Hotel and the land on which the Point Village Resort ("the Point") is now located, which at the time was owned by the Government of Jamaica.
>
> 7. The earth berm was about four (4) to five (5) feet high, and about six (6) to seven (7) feet wide at its base, and ran from the Sandals hotel (to the East of the Hotel), along the Norman Manley Boulevard Main Road, then between the Hotel and the Point, down to the beach. The earth berm, built by one Mr Stoddard, was the Hotel's boundaries, including its western and northern boundaries.
>
> 8. The earth berm along the Hotel's western and northern boundaries is no longer very pronounced.
>
> 9. In about 1981, when Superclubs leased the Hotel, it erected a barbed wire fence along the Hotel's western boundary on the outer base (in relation to the Hotel) of the earth berm, a chain link fence having existed along the Hotel's northern boundary on the outer base (in relation to the Hotel) of the earth berm.
>
> 10. The chain link fence started by the Norman Manley Boulevard main Road which is at the end of the roadway leading to the Hotel and the Point, and the barbed wire fence started where the Hotel's boundary turned towards the sea (that is, its western boundary) and ran down to the sea.
>
> 11. In about 1990, when the development of the Point started, the barbed wire fence was relocated (and was changed to a chain link fence) about ten (10) to fifteen (15) feet eastwards towards the Hotel (decreasing the Hotel's land), from the Norman Manley Boulevard Main Road down to the beach. I confirm that this fence has not been moved since it was so relocated in about 1990, and that the chain link fence along the Hotel's northern boundary has remained in the location where it was erected in 1981."

[23] Mr Gary Williams, an executive of the SuperClubs Group, served as general manager of Hedonism II between 1988 and 1995. His evidence was that when he went to the hotel in 1988, there was a barbed wire fence between the western boundary of Hedonism II and Point Village and a chain link fence for the length of the northern boundary. In or about 1990, the barbed wire fence was moved towards Hedonism II by about 10 feet for the full length of the boundary and replaced by a chain link fence, "because the [UDC]…had claimed that the fence bordering the Point Village Resort and Hedonism II along Hedonism II's western boundary, was encroaching land belonging to the Point Village Resort". The cost of moving the barbed wire fence and replacing it with the chain link fence was shared equally by Hedonism II and Point Village and, before the fence was moved, both parties agreed on the new location of the fence. When he was cross-examined, Mr Williams confirmed that the buildings as shown in section two on Mr Allen's survey plan were not on the land when the fence was first moved, but what was "[t]here now is part of the swimming pool area, a beach grill and a beach bar".

[24] Mr Richard Bourke, who at the date of the filing of his witness statement (12 January 2007) was the general manager of Hedonism II, joined the staff of the hotel in January 1982 and resided there until 1987. As it turned out, he also served as general manager of Point Village between 1996 and 1998, before rejoining the SuperClubs Group that year. When he first joined Hedonism II in 1982, there was a barbed wire fence along the hotel's western boundary and a chain link fence along its northern

boundary. At that time, the land west of the hotel, which would become Point Village, was used by the hotel "as a horse back riding trail, and the coast line was used by the Hotel's guests for beach facilities". His evidence was that the fence on the western boundary was moved towards the hotel in "about 1989/90" and that the moving of the fence "was after the Hotel's nude beach Jacuzzi was built, but prior to the construction of its nude beach pool and grille". He confirmed that the chain link fence along the northern boundary had not been moved since 1982 and that the fence on the western boundary had not been moved "since it was so moved in or about 1989/90".

[25] And finally, there was the evidence of Mr Samuel James, who, at the date of filing of his first witness statement on 12 January 2007 was the vice president, operations of the SuperClubs Group, with specific responsibility for the "Grand Lido and Hedonism brands". During the period 1984-1988, Mr James was the general manager of Hedonism II and since that time had had almost continuous supervisory responsibility for the hotel. When he became general manager of Hedonism II in 1984, he observed a chain link fence as the northern boundary and a barbed wire fence as the western boundary with Point Village. He also confirmed that the barbed wire fence was "changed to a chain link fence and moved by about ten (10) feet towards Hedonism II". Mr James would in due course file a second witness statement, to which I will come in a moment.

The expert evidence

[26] Happily, the court did not have to contend with a clash of experts in this matter. Messrs Leslie Mae and Llewelyn Allen, both commissioned land surveyors, called by PSP and IJHL respectively, confirmed the existence of two areas of encroachment by the hotel operations on the Point Village. There was only a slight variance between the surveyors as to the actual measurement of the encroachment: Mr Mae put it at 356.069 square metres for section one and 193.663 square metres for section two, while Mr Allen put it at 351.06 and 194.38 square metres respectively. In giving judgment, the learned judge appears, albeit without discussion, to have adopted Mr Allen's measurements and I propose to do the same for the purposes of this judgment. The structures affected by the encroachment were a small concrete building in section one and a small concrete building and Hedonism II's pool bar at section two. As Mr Allen put it in his report, "all physical boundaries affecting the sections where encroachment occurs are well established and appear to be of long standing".

The correspondence

[27] Apart from Mr Mae, PSP's only witness at the trial was Mr Richard Brandon, an architect by profession, a former owner (between 1988 and 2003) of one of the units in PSP and a former member and chairman of the management committee of the strata corporation. In his witness statement dated 4 June 2007, in answer to IHJL's defence that it had been in continuous and undisturbed possession of the disputed land, Mr Brandon maintained that at all material times (a) IHJL had ackowledged the ownership

of and title to the disputed land by PSP and UDC and (b) both PSP and UDC had "made strenuous efforts to dislodge [IJHL's] predecessor from the disputed land after the defendant's predecessor ceased acknowledging [PSP's] title to the land". In support of these contentions, Mr Brandon referred to and relied on a series of correspondence dating back to 1987, some items of which were admitted in evidence at the trial.

[28] The earliest in time was a letter dated 25 March 1987 from Mr James, while he was general manager of Hedonism II, to Mr Errol Martin, project manager of UDC ('the 25 March 1987 letter'), which is set out in its entirety below:

> "Dear Mr Martin
>
> Pursuant to our conversation of March 24, 1987, the following is in confirmation of the points discussed:
>
> We are having a major problem with the vacant section of the beach adjacent to our present Nude Beach. This area is unused by Jamaican visitors to Negril and, therefore, becomes the playground of local hustlers from which they prey on our guests, in spite of the constant efforts of the local police.
>
> Our understanding is this section will become part of the proposed condominium and/or Rutland Point Hotel facility. Consequently, until that time, Hedonism II would appreciate your approval in allowing us to maintain this area in a sightly condition, while at the same time utilising it for our guest use.
>
> This does not mean an extension of our existing boundaries but simply the cleaning up of that section of the shoreline and the use by our guests, if they so desire.
>
> In the interest of tourism, I am sure you will find the above suggestion appropriate and will thereby grant your permission."

[29] In a second witness statement filed on 1 October 2007, Mr James sought to put this letter in context as follows:

> "4. I refer to the letter dated 25th March 1987 ("the Letter")…in respect of which I say as follows.
>
> 5. The "vacant section of the beach" referred to in the second paragraph of the Letter is an area of beach land now occupied by Point Village Resort ("the Vacant Land"), the Claimant herein. I confirm that the Vacant Land is to the west and outside of the western boundary of the Hedonism II Hotel ("the Hotel") referred to in paragraph 6 of my first witness statement herein dated 9th January 2007, and is not any of the two (2) parcels of land in dispute in these proceedings.
>
> 6. At the time the Letter was written, the Vacant Land was owned by the Urban Development Corporation ("the UDC"), was not being maintained and was unsightly. The "problem" referred to in the same paragraph is the unsightly condition of the Vacant Land, coupled with the fact that hustlers frequented the Land and harassed and preyed upon guests of the Hotel.
>
> 7. I had understood at the time of the Letter that what is now called "Point Village Resort" was going to be constructed on the Vacant Land. The management of the Hotel felt that pending such development of the Vacant Land, the increasingly acute problem with the hustlers and the unsightly condition of the Vacant Land required immediate attention. In that regard, as reflected in the Letter, the Hotel indicated to the UDC that the Hotel was prepared to maintain the Vacant Land, and the hotel's guests could use it, pending such development. The UDC agreed to this, and the hotel began to maintain, and its guests used, the Vacant Land until about the commencement of the construction of Point Village Resort."

[30] When he was cross-examined about the contents of his second witness statement, Mr James insisted that he had not been shown Mr Brandon's witness

statement between making his two statements. He also maintained that his reference in the 25 March 1987 letter to "the vacant section of the beach adjacent to our present Nude Beach" was not a reference to an area which included section two of the disputed land, but rather to an area "beyond the boundary where the barbed wire fence was".

[31] The second item of correspondence was a letter dated 3 September 1992, from Mr Noel Levy of Myers, Fletcher & Gordon, as attorneys-at-law for IHJL, to Dr Vincent Lawrence, the then chairman of the UDC ('the 3 September 1992 letter'). It is also necessary to quote this letter in its entirety:

> "Dear Vin
>
> *Re: 2023.3 Square Feet of beach land at Hedonism Hotel*
>
> It has just come to my attention that up to now the 2023.3 square feet of land on the western boundary of the Hedonism Hotel has not yet been transferred by the Urban development Corporation to International Hotels Limited.
>
> When National Hotels and Properties Limited were divesting the Hedonism Hotel owned by its subsidiary Rutland Point Hotels Limited, they offered for sale the entire property in which the Hotel is located and particularly the land on the western boundary within the chain link fence including the land in which the pump house jaccizi [sic] pool and nude bathing beach are located.
>
> When the land on the western boundary of the hotel was being transferred from the Urban Development Corporation to Rutland Point Hotels Limited in order that the registered boundary would accord with the boundary on earth along which the chain link fence was constructed, as per an Agreement between Urban Development Corporation, National Hotels and Properties Limited and Rutland Point Hotels Limited, Urban Development Corporation omitted to

> transfer some 2023.3 square feet of land on which the nude beach is located.
>
> In order to have this matter regularised I am asking you to arrange for Urban Development Corporation to transfer this land to International Hotels Limited, the current owners of the Hedonism Hotel. I have been instructed by International Hotels Limited to advise you that International Hotels Limited will pay the full costs involved in obtaining and transferring the title for this small piece of land.
>
> In the meantime, I would be obliged if you could arrange for Urban Development Corporation to grant to my clients, International Hotels Limited, a licence for the exclusive use of this small parcel of land. I am enclosing herein original and two copies of a draft of the licence which, if satisfactory to you, I would be obliged if you would have Urban Development Corporation execute and return for execution by my clients."

[32] The response to this letter was actually supplied by Mr Issa as an exhibit to his witness statement. It came in the form of a letter dated 16 September 1992 from Mr Martin Burke, who was then the Director of Legal Affairs at UDC. Mr Burke stated that, having researched the matter, he had concluded that (a) the piece of land to which reference had been made appeared on the title for Point Village as "a reserved road"; (b) it was discovered that Hedonism II's "jacuzzi pool and pool pump house encroached on this reserved road and we were requested to facilitate Hedonism by transferring the reserved road to them and to eliminate the problem of encroachment...[which] we did in November 1987 and Hedonism received a Title registered at Volume 1210 Folio 154" (however, Mr Burke noted, "the boundary of the reserved road does NOT extend down to the sea"); and (c) as far as UDC was aware, "the piece of land transferred to Hedonism was to conform strictly with the boundaries of the reserved road as appears by the plan attached to Certificate of Title registered at Volume 1148 Folio 38". Mr

Burke concluded with the observation that such part of the chain link fence as was not in compliance with the registered boundary "should be relocated to conform with the plan attached to UDC's title".

[33] Further correspondence, to which the court was denied access by reason of privilege, passed between the parties, culminating in a letter to Myers, Fletcher & Gordon from UDC dated 16 May 1996, which demanded removal of "the encroaching fence within fourteen (14) days of the date hereof failing which such action will be taken as is necessary to have the fence removed and put in its proper location". This was followed in short order by a letter from PSP to Hedonism II dated 20 May 1996, which referred to "the beach boundary which needs to be set back in your direction to comply with our Title as registered". By letter dated 6 August 1996, Myers, Fletcher & Gordon responded to the latter letter and completed the setting of the stage for the litigation that was to follow by invoking the provisions of section 45 of the LAA.

The judgment in the court below

[34] After recounting the facts of the case, Brooks J stated four principles, which, he said (at page 6), "will also assist in clarifying the issues to be determined": (i) "a possessory title will only be acquired after 12 years of continuous occupation which is associated with the requisite intention to possess" (LAA, section 3); (ii) "after a boundary fence between two parcels of land has been acceded to for a period of 7 years, its position may not then be disputed and thereafter…it becomes the legal boundary" (LAA, section 45); (iii) "the filing of a claim, in respect of a reputed trespass

to land, prevents the limitation period from running"; (iv) section 45 of the LAA "speaks to 'where the lands of **several proprietors** bind or have bound upon each other' (emphasis supplied). That section does not apply to a single proprietor".

[35] Applying these principles, the learned judge determined (at page 7), that "up to 1989, the physical boundary between the hotel land and the Point, could not cause time to start running for the purposes of the Act…[t]hey were ultimately owned by the same entity; the UDC". The judge gave short shrift to the submission made on behalf of IHJL that RPHL and UDC were two separate legal entities, beyond dismissing it summarily (at pages 7-8) with the comment that, "I cannot accept that submission as being valid". After noting that RPHL was a subsidiary of NHPL, which was in turn a subsidiary of UDC, and acted "through the employees of other UDC subsidiaries", the judge observed (at page 8) that "[t]o find that a UDC subsidiary intended to hold land to the detriment of the UDC, is untenable", before going on to say this (at pages 8-9):

> "Although there may be different statutes applicable to the European Economic Community, it may be noted that in *Halsbury's Laws of England* 4th Ed. Reissue Volume 7 at paragraph 813, the learned editors opine:
>
> > '...for the purposes of the European Economic Community Treaty... **the conduct of a subsidiary can be imputed to its parent company** whether or not it has its own separate legal personality, and whether or not the parent wholly owns the subsidiary.' (Emphasis supplied)
>
> I also find that it cannot be ignored, that the UDC is a statutory corporation established to carry out the business of the State in the areas assigned to it by [t]he Urban Development Corporation Act. All its subsidiaries must be

> presumed to be formed to carry out its mandate. They all manage the assets which they have on account of the people of Jamaica. Certainly, normal commercial adversarial intentions cannot be imputed to them, as between themselves. It is of significance, in my view, that both of the directors of Rutland Point Beach Resorts Ltd in the years 1989 and 2004 respectively, are officers of the UDC. (Exhibits 21A and 21B)"

[36] On this basis, the learned judge concluded that no question of adverse possession could arise against the Point Village before 1989, since both RPHL and NHPL were in possession of the disputed land with the permission of UDC and the possession of VRL as lessee could only inure to the benefit of its landlord, RHPL. The relevant starting point for the purposes of the LAA was therefore 4 December 1989, when IHL became the registered proprietor of the hotel land, and the terminal point for the purposes of limitation was 17 September 1999, which was the date on which action was filed by PSP. IHL/IHJL could not therefore acquire possessory title pursuant to section 3 of the LAA, as they had been in possession for a period of less than 10 years.

[37] However, the boundary fences, the learned judge said (at page 12), "demand a slightly different consideration". As regards the chain link fence along the northern boundary, his finding was that there was no evidence of any issue having been raised or complaint made about it within a seven year period after December 1989: "Its position was acquiesced to by PSP 461 and it became the reputed boundary". As regards the fence along the western boundary, on the other hand, the judge's conclusion (at page 13) was that IHJL could not show acquiescence by PSP for the requisite period of seven years, since the position of that fence "proved contentious"

after 3 September 1992, when "IHL's attorneys-at-law wrote to the UDC pointing out that the western fence had not been placed in complete conformity with the registered boundary and requesting the UDC to have the situation corrected". The fence along the western boundary had not therefore become the reputed boundary for the purposes of section 45 of the LAA.

[38] On the question of estoppel, the learned judge concluded that there was no evidence that IJHL had acted in reliance on any promise made by PSP in respect of the location of the western boundary and that it had not therefore been shown that it would be unconscionable for PSP to rely on its legal rights in relation to the disputed land.

[39] And finally, although he regarded the point as "merely academic" in the light of his conclusion on the relevance of the pre-1989 period to the question of adverse possession, the learned judge expressed the view that the reference in Mr James' 25 March 1987 letter to "the vacant section of the beach adjacent to our present Nude Beach", by which PSP had laid great store, was to a part of the disputed land only.

[40] On this basis, Brooks J proceeded to give judgment in the terms set out at para. [8] above. However, he made no award of damages in favour of PSP (on the ground that no evidence had been produced in support of the claim) and also declined to make the order which PSP had sought for a separate assessment of damages (on the ground that "[t]here must be an end to litigation" – page 20).

The grounds of appeal

[41] IHJL filed 28 grounds of appeal in all, the effect of which I hope that I do not misrepresent by summarising them (largely based on para. 10 of IHJL's printed skeleton argument) in the following contentions:

1. The learned trial judge erred in not finding, pursuant to section 3 of the LAA, that IJHL and its predecessors in title have been in continuous, peaceful and undisturbed possession of the disputed land from and since 1976, and that, by reason of the provisions of section 3 of the LAA, PSP's claim for recovery of possession of the said land is statute-barred.
2. The learned trial judge erred in law in failing to apply the accepted principles governing the establishment of possessory title.
3. The learned trial judge erred in law in not applying the fundamental principle of the separate legal personality of a company and its shareholders, in particular as regards the relationship between UDC and its subsidiaries.
4. The learned judge erred in failing to make findings of fact favourable to IHJL in accordance with the uncontradicted evidence.
5. The learned trial judge erred in not finding, pursuant to section 45 of the LAA, that the existing fence along the western boundary between the hotel land and Point Village is the true and/or legal boundary between the said properties.

6. The learned trial judge erred in failing to find on the basis of the uncontradicted evidence in the case that PSP is estopped, by proprietary estoppel and/or estoppel by agreement, from asserting any strict legal rights it may have in respect of the disputed land.

The submissions

[42] Dr Barnett for IHJL submitted that it was clear from the uncontradicted evidence that IHJL and its predecessors in title, by themselves or through their agents, had been in continuous, peaceful and undisturbed possession of the disputed land in the aggregate since 1976. Therefore, it was submitted, by the time action was filed in 1999, IHJL had acquired a title by limitation to the disputed land, any action commenced after 1988 being statute-barred. In holding that RPHL and/or NHPL, as subsidiaries of UDC, could not acquire possessory title against UDC, Dr Barnett submitted, the learned trial judge disregarded the fundamental principle of separate legal personality, established by ***Salomon v A. Salomon & Co Ltd*** [1895-9] All ER Rep 33 and other cases, and the principle that a shareholder of a company, whether a majority shareholder or a holding company, has no legal or equitable interest in the company's property. In this regard, the judge had also erred in applying jurisprudence arising out of the provisions of the European Economic Community Treaty, which does not form part of the law of Jamaica.

[43] Further, it was submitted, by holding that RPHL, as a subsidiary of UDC, could or did not have the required intention to acquire possessory title over the disputed land,

being land "ultimately owned by the same entity", the learned judge misapplied the correct principles for the acquisition of possessory title, as laid down in particular in ***JA Pye (Oxford) Limited v Graham*** [2002] 3 All ER 865; [2002] UKHL 30 and subsequent cases. It was clear from the authorities that, in order to obtain a possessory title, it was necessary only to establish an intention to possess and not to show an adversarial attitude towards the paper owner.

[44] IHJL also submitted that the learned trial judge had failed to make some critical findings of fact on the evidence which were favourable to its case. The first was that the parties had acquiesced in the position of the earth berm and the fences in respect of the northern and western boundaries from 1976 onwards, without there having been any contention that the areas enclosed by those boundaries were not comprised in the titles for either the hotel land or the intermediate strip. Secondly, that since 1976 Hedonism II's western boundary extended southwards from the point of convergence of its northern and western boundaries down to the beach. And thirdly, that in or about 1990, by an agreement reached after UDC had notified IHL of encroachments along the western boundary of the hotel land, the fence along the western boundary was moved eastwards towards the hotel, thus reducing the size of the disputed land in Point Village's favour.

[45] Turning to the question of reputed boundaries, Dr Barnett's submission was that there had been acquiescence in and submission by the parties to the boundaries between the adjoining lands for at least 15 years prior to mid September 1992, with the

result that, as mandated by section 45 of the LAA, the fences between the hotel land and the Point Village are now the true and legal boundary between the said properties.

[46] Mr Scott followed on from Dr Barnett on the issue of estoppel. Basing himself in particular on ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*** [1981] 1 All ER 897 and ***Thorner v Major*** [2009] 3 All ER 945, Mr Scott submitted that, in the alternative to its position based on the LAA, IHJL has acquired title to the disputed land by virtue of a proprietary estoppel. Given the knowledge of and acquiescence by PSP and its predecessor in title in the position of the western boundary over the years, as well as the construction by IHJL and its predecessors in title of various structures on the disputed land in reliance on the correctness of that boundary, it would be unconscionable for PSP to be permitted to deny IHJL's right to the land at this stage. Further, the uncontradicted evidence of the consensual relocation and replacement of the barbed wire fence in 1990, when the statutory boundary had already been established, bound and or estopped PSP from now asserting its right to section two of the disputed land.

[47] Mr Beswick for PSP submitted at the outset that Brooks J had correctly (i) identified the principles of law applicable to the establishment of a claim to adverse possession and (ii) concluded that it was not possible for RPHL, as a subsidiary of UDC, to maintain a claim for adverse possession against its parent company. In relation to the second point, Mr Beswick observed that the corporate veil of separate legal personality was lifted "on a daily basis for various purposes", and placed reliance in this regard on the decision of the Court of Appeal of England and Wales in ***Re Citybranch***

Group Ltd, Gross and others v Rackind and others [2004] 4 All ER 735; [2004] EWCA Civ 815. Indeed, Mr Beswick went further to submit that "the concept of adverse possession is foreign to wholly owned government entities inter se and is contrary to public policy". In these circumstances, the judge's conclusion that IHJL had failed to establish 12 years of unbroken and continuous possession so as to satisfy section 3 of the LAA was correct and should not be disturbed.

[48] In any event, Mr Beswick submitted, IHJL's claim for possessory title also failed because of the acknowledgments of the superior title of PSP and its predecessors in title, as shown by the 25 March 1987 letter and the 3 September 1992 letter. In relation to the former letter, Mr Beswick invited us, in the absence of an express finding by Brooks J on the point, to reject Mr James' evidence as to what the letter referred to as self-serving and "entirely incredulous" [sic]. And, as regards the latter letter, it was submitted that it was in effect an offer to purchase and a clear acknowledgment of PSP's title, within the meaning of section 16 of the LAA and the decision of the House of Lords in ***Edginton v Clark and Another*** [1963] 3 All ER 468.

[49] As regards IHJL's defence based on section 45 of the LAA, it was submitted that the learned judge had correctly held that the defence failed in relation to section two of the disputed land because it was unable to prove a continuous and unbroken period of seven years acquiescence. Given IHJL's acknowledgment of PSP's title in the 3 September 1992 letter, any period of acquiescence in a new boundary by PSP could only run from the date of that letter onwards and would in any event have come to an end on 16 May 1996, when a demand was made for the removal of the fence. Further,

there was evidence that UDC had made "strenuous efforts to dislodge [IHJL's] predecessor in title" within the seven year period. And lastly on this point, there was no evidence that PSP and/or its predecessors in title had "submitted to and acquiesced in" the boundary on the western side of the hotel land.

[50] On the question of estoppel, Mr Beswick submitted that IHJL's reliance on the principle of proprietary estoppel is without merit, because (i) proprietary estoppel is a personal right which cannot be transferred to a third party, in the instant case from IHL to IHJL; (ii) an essential requirement of the doctrine, of which there is no evidence in the instant case, is that the party relying on it must have been encouraged by the actions or inactivity of the other party; and (iii) the party asserting the right "cannot have known that the party relying on same was not in agreement with the course of action undertaken by the party asserting the right". In any event, IHJL could not rely on the principle of proprietary estoppel because of the conduct of its predecessors in title in continuing with their expenditure and construction on section two of the disputed land "knowing full well that there was an extant dispute about the western boundary". And lastly on estoppel, it was submitted that the claim for estoppel by agreement was neither pleaded in that form nor argued in the court below and should not therefore be entertained on appeal. Further, the so-called agreement in 1990 to move the western boundary eastwards towards Hedonism II could not be relied on as a binding agreement in the absence of writing.

[51] As regards the issue of damages, Mr Beswick submitted that it was open to this court to order an assessment of damages, as had been done in ***Robert & Marjorie***

Evans et al v Cable & Wireless Jamaica Ltd (SCCA No 44/2005, judgment delivered 5 December 2008). And finally, on the matter of costs, it was submitted that the learned judge's order that each party should bear its own costs was not the correct order in the circumstances and the proper order would have been an order in favour of PSP for "some proportionate part of the trial costs".

[52] In a brief reply, Dr Barnett challenged five contentions (which he described as "impermissible contentions") put forward by PSP in responding to the appeal, on the ground that they were not relied upon by Brooks J and no counter-notice of appeal had been filed in accordance with rule 2.3 of the Court of Appeal Rules 2002 ('CAR'). These were (i) that the period for which the disputed land was in the possession of and was being used for the purpose of the hotel by its owner and operators did not satisfy the requirements of the LAA as to duration, it having been implicit in Brooks J's judgment that the occupation and use of the disputed land had continued for a period in excess of 12 years; (ii) the invitation to this court to reject Mr James' evidence as to the portion of land referred to by him in the 25 March 1987 letter; (iii) that the 25 March 1987 letter and the 3 September 1992 letter constituted acknowledgments of title within section 16 of the LAA; (iv) that the 1990 agreement for the adjustment of the western boundary had to be in writing; and (v) that an order for an assessment of damages ought to be made by this court. Dr Barnett also submitted that both ***Re Citybranch Group Ltd*** and ***Edginton v Clark and Another***, to which Mr Beswick had referred us, were distinguishable.

Resolving the case

[53] The broad questions raised by this appeal appear to me to be as follows:

i. Was the learned judge correct in determining that the principle of adverse possession could not inure to the benefit of RPHL, as predecessor in title to IHJL, against its ultimate owner, UDC ('The separate legal personality issue').

ii. Was IHJL entitled to an order in respect of the disputed land under section 3 of the LAA? ('The possessory title issue')

iii. Alternatively, was IHJL entitled to an order, pursuant to section 45 of the LAA, that the existing chain link fence along the western boundary between the hotel land and Point Village is the true boundary between the adjoining properties? ('The reputed boundary issue')

iv. In the further alternative, was IHJL entitled to an order that PSP is estopped, whether by the operation of the doctrine of proprietary estoppel or by estoppel by agreement, from asserting that the registered boundary between the hotel land and Point Village is the true boundary between the adjoining properties? ('The estoppel issue')

The separate legal personality issue

[54] The judge's emphatic conclusion on this issue was, it will be recalled, that a finding that RPHL, as a subsidiary of NHPL, which was in turn a subsidiary of UDC, "intended to hold land to the detriment of the UDC, is untenable" (para. [35] above).

IHJL's direct challenge to this finding as a fundamental error in law therefore invites consideration of the concept of separate legal personality.

[55] Company law in Jamaica is currently based on the Companies Act 2004 ('the 2004 Act'). Before the enactment of that Act, the governing statute was the Companies Act 1965 ('the 1965 Act'), which is the Act pursuant to which RPHL and NHPL were incorporated. Section 15(2) of the 1965 Act provided that, from the date of incorporation, the subscribers and members of the company from time to time should be a body corporate "...capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal..." A provision in virtually identical terms is now to be found in section 12(2) of the 2004 Act. Under section 3 of the 1965 Act, a company was formed by any two or more persons subscribing their names to a memorandum of association, which was required by section 4(1)(c) to state the objects of the company. This gave rise to the well-known doctrine of *ultra vires*, pursuant to which a company was unable to do any acts which were outside of the scope of the objects of the company as set out in the relevant clause of the memorandum of association. Any such acts were accordingly invalidated (***Ashbury Railway Carriage and Iron Company v Riche*** (1875) LR 7 HL 653). By virtue of section 3(1) of the 2004 Act, a company is formed by the signing and registration of simple articles of association. The doctrine of *ultra vires* is effectively abolished by section 4(1), by virtue of which a company has the capacity and, subject only to the Act itself, "the rights, powers and privileges of an individual". Although by section 8(1)(f) the articles of association may place restrictions on the business that a

company may carry out, section 6 provides that any act that is carried out by a company contrary to its articles "shall not be invalid by reason only that the act is contrary to its articles". Now that a company has all the powers of an individual, it was no longer necessary to include the express power given to a company by section 16 of the 1965 Act "to hold lands" in the 2004 Act. Section 354 of the 2004 Act provides for its application to pre-existing companies as if they "had been formed and registered under [the 2004] Act".

[56] Professor Paul Davies has observed (in Introduction to Company Law, 2nd edn, page 9) that "separate legal personality is an inevitable consequence of the incorporation of a company". As Professor Brenda Hannigan puts it (Company Law, 2nd edn, para. 3-1), "[o]n incorporation, a company becomes a separate legal entity distinct and separate from its shareholders and it is not the agent of those shareholders, not even if it is a one-man company with one shareholder controlling all its activities".

[57] The foundation authority for this fundamental principle of company law is the hugely influential decision of the House of Lords in ***Salomon***. Mr Salomon, who had been a leather merchant and wholesale boot and shoe manufacturer for many years, sold his business to a limited liability company which he had set up for the purpose. As part of the purchase price for the business, Mr Salomon took shares in the company for a part of the money and debentures for the remainder. Of the issued 20,007 shares of the company, 20,001 were issued to Mr Salomon and the remaining six to members of his family. The debentures, which entitled Mr Salomon to a fixed charge on the company's assets, were subsequently assigned by him to a third party. Shortly

thereafter the company became insolvent and was unable to meet the full claim of the assignee or to meet the claims of the other (unsecured) creditors. The liquidator attempted to hold Mr Salomon liable for the debts of the company on a variety of grounds, including that the whole transaction was a fraud on the company's creditors from which he should not be allowed to benefit and that the company was simply his agent and he should therefore indemnify the company (and its creditors) with respect to its debts.

[58] At first instance, Vaughn Williams J agreed that the company was merely an agent for Mr Salomon and that he was therefore liable as principal for his debts. Mr Salomon's appeal was dismissed by the Court of Appeal, which concluded that the formation of the company and the issue of the debentures were no more than a mere scheme to enable Mr Salomon to carry on business in the name of a company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. It was therefore in essence a device to defraud creditors and, Lopes LJ observed ([1895] 2 Ch 323, 340-1), "it would be lamentable if a scheme such as this could not be defeated".

[59] The House of Lords unanimously reversed the decisions of the courts below. Lord Halsbury LC said this (at page 36):

> "I observe that Vaughn Williams J held that the business was Mr Salomon's business and no one else's, and that he chose to employ as agent a limited company,...and that he was bound to indemnify that agent – the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular

> contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

[60] And in his leading judgment (recently described by one learned commentator as "a legal classic" - Andrew Burgess, Commonwealth Caribbean Company Law, 2013, page 87), Lord MacNaghten said this (at pages 47-48):

> "The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one the learned lords justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed, the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.
>
> When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith' to use the words of the enactments, 'of exercising all the functions of an incorporated company' [Companies Act, 1948, s. 13 (2)]. Those are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a

> subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are manager, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability."

[61] Commenting on this decision, Professor Hannigan observes as follows (at para. 3-9):

> "In legitimating the one-man company, the decision in *Salomon* also legitimates the group concept with each subsidiary company being a separate and distinct entity and not the agent of its controlling or sole shareholder, its parent company. The relationship between a parent company and a subsidiary company is the same as between Mr Salomon and his company. The parent company (i.e. the corporate shareholder in the subsidiary) and the subsidiary company are separate legal entities and each company is entitled to expect that the court will apply the principles of *Salomon v A Salomon & Co Ltd* in the ordinary way and respect the separate identity of each company in the group. This is so even if the subsidiary company has a small paid-up capital and a board of directors all or most of whom are also directors or executives of the parent company."

[62] ***Macaura v Northern Assurance Co Ltd and Others*** [1925] AC 619 is an oft-cited example of the principle in action, although, curiously, no reference at all appears to have been made to ***Salomon*** in either the argument or the judgments. In that

case, the House of Lords held that neither a creditor nor a shareholder in a company has any property in the assets of the company and therefore neither has an insurable interest in any particular asset of the company, even though the debt due from the company to the creditor is a very large sum and the shareholder is practically the sole shareholder in the company. Lord Wrenbury observed (at page 633) that "this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation".

[63] It is therefore clear that a company generally falls to be treated as an independent person, separate and distinct from its shareholders, capable of holding land and other property, entering into contracts and incurring debts and other liabilities in its own name. In the context of groups of companies, each company is also a distinct entity and a subsidiary does not fall to be regarded as an agent of the parent by reason only of the fact that the parent is its controlling shareholder. In this regard, it is generally irrelevant that the parent and the subsidiaries share or have common directors or other officers. As Slade LJ, delivering the judgment of the Court of Appeal in ***Adams v Cape Industries plc*** [1990] Ch 433 (a case in which it was sought to attach liability to a parent company for the conduct of a subsidiary), observed (at page 536):

> "…the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies,

> which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

[64] Nevertheless, despite the enduring robustness of the principle of separate legal personality, the courts have, exceptionally, ignored the ***Salomon*** principle and "pierced the corporate veil" (Burgess, page 93). But, in common with several judges and other textbook writers (some leading examples are collected in the judgment of Lord Neuberger in ***Prest v Petrodel Resources Limited and others*** [2013] UKSC 34; [2013] 4 All ER 673, discussed in paras 76-79 below), Professor Burgess bemoans the fact that "the courts have not done this in any systematic way and it is difficult to find any unifying principle that explains their approach to piercing the veil". Among the instances given by Professor Burgess and other writers are cases in which (i) on the facts, an agency relationship is found to exist between the parent and the subsidiary; and (ii) "special circumstances exist indicating that [the company] is a mere facade concealing the true facts (per Lord Keith in ***Woolfson v Strathclyde Regional Council*** (1979) SLT 159, 161; and see generally Burgess, pages 93-101 and Hannigan, *op cit*, paras 3-12 to 3-39).

[65] I should perhaps add, as a footnote to this discussion, a reference to the recent decision of the Supreme Court of the United Kingdom in ***Prest v Petrodel Resources Limited and others*** (in which the judgment was delivered on 12 June 2013). That was a case concerning an application for ancillary relief in matrimonial proceedings, in which the issue was whether the court had the power to order the transfer to the wife

several properties which were legally owned by the three respondent companies, which were themselves owned and controlled by the husband. The Supreme Court unanimously declined the wife's express invitation to pierce the corporate veil and to make an order on that basis. Although the court confirmed that there is a limited category of cases in which it might be appropriate to pierce the corporate veil, it squarely located the jurisdiction to do so within the context of cases of abuse of a company's separate legal personality "for the purpose of some relevant wrongdoing" – per Lord Sumption at para [27]). Delivering the leading judgment, Lord Sumption, after a full review of the relevant authorities, said this (at para. [35]):

> "...there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem*, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital* who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

[66] In his concurring judgment, Lord Neuberger accepted (at para [80]) that the doctrine that the court could in an appropriate case pierce the corporate veil "represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available". However, he considered (at para. [81]) that the doctrine should only be invoked where, as Lord Sumption expressed it, "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control". Lady Hale (with whom Lord Wilson agreed), was of the view (at para. [92]) that the cases in which the courts "have been or should be prepared to disregard the separate legal personality of a company…may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business". Lord Mance, while being cautious not "to foreclose all possible future situations which may arise", nevertheless considered (at para. [100]) (with Lord Clarke's specific concurrence on this point) that "the strength of the principle in *Salomon's* case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare".

[67] In the instant case, despite a broad submission that the corporate veil is lifted by the courts "on a daily basis for various purposes", the only authority cited by Mr Beswick was ***Re Citybranch***, which was a case concerning an application to strike out

a petition to wind up a holding company under the provisions of section 459 of the UK Companies Act 1985. This section permitted a member to petition the court for an order regulating the future management of the affairs of a company and its subsidiaries on the ground that the company's affairs were being "conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members". 50% of the holding company was owned by one family and 50% by another. There were two directors, one from each family. The holding company also had two subsidiaries, the directors of which were basically the same two directors of the company. The personal relationship of trust and confidence which formed the basis of the quasi-partnership by which the companies was operated broke down and one of the families filed a petition for the winding up of the holding company on just and equitable grounds and this was countered by the filing of the section 459 petition by members of the other family. An application having been made to strike out the section 459 petition, the main question which arose was whether the court had the power to make an order under that section in relation to a holding company where, first, the allegation was that it was the affairs of its wholly owned subsidiary that were being or had been conducted in an unfairly prejudicial manner and, secondly, the directors of the holding company were also the directors of the subsidiary.

[68] On an appeal from the refusal at first instance to accede to the strike out application, it was held, dismissing the appeal, that the conduct of the affairs of one company could also be the conduct of the affairs of another, since the expression 'the affairs of the company' was one of the widest import and could relate to the affairs of a

subsidiary of that company. In this case, equally, the affairs of the subsidiary could also be the affairs of its holding company, especially where the directors of the holding company, which necessarily controlled the affairs of the subsidiary, also represented a majority of the directors of the subsidiary. The court therefore accepted (at page 745) the reasoning of the judge in the court below, who had said that, bearing in mind that this was a strike out application, in which the court should not strike out a petition that has any realistic prospect of success, he did not think it to be "beyond the bounds of possibility that the court may reach the conclusion that the acts complained of were also acts in the conduct of the parent company's affairs".

[69] The foregoing account of the case therefore demonstrates, it seems to me, that, far from being a case about piercing the corporate veil, ***Re Citybranch*** was a case concerned with the question, in the context of a strike out application, whether the conduct of the affairs of one company in a group of companies in a quasi-partnership relationship could amount to conduct prejudicial to the affairs of another for the purposes of a section 459 petition. In the context of the case, this was purely a question of fact, in which no question of going behind the corporate veil was involved. As a decision on a strike out application, and not a final decision on the petition itself, it establishes no more than that, on the pleaded facts assumed to be true at that stage, it could not be said that that contention had no realistic prospect of success. In these circumstances, I think that the case is, as Dr Barnett submitted in his reply, clearly distinguishable and cannot take the question now under consideration any further.

[70] On the facts of the instant case, there is in my view no basis in the evidence to support the conclusion that RPHL acted at any point in the capacity of agent for UDC or otherwise than in its undoubted capacity as a separate legal entity. It is clear that RPHL owned the hotel land and occupied the disputed land, in its own name and for its own benefit, incurring, as the entries in the Certificates of Title registered at Volume 1113 Folio 630 and Volume 1210 Folio 54 demonstrate, substantial indebtedness by way of mortgage finance on the security of the hotel land. Read in its context, the learned trial judge's suggestion (at page 8) that "[a]ll that was done [by RPHL] was done for the eventual benefit of the UDC" was, it seems to me, clearly not an expression of any contrary view on the facts of the case, but rather a statement of the legal position as he saw it. Nor was there anything in the evidence to suggest that RPHL's corporate structure was a mere facade concealing the true facts and there was certainly not even a hint of wrongdoing or unconscionable conduct of any kind lurking behind the veil of incorporation in this case.

[71] But before arriving at a conclusion on this issue, I must consider briefly two additional matters which emerge from Brooks J's judgment. The first is the judge's reference to a statement in Halsbury's Laws of England (4th edn, Reissue, Volume 7, para. 813) that "the conduct of a subsidiary can be imputed to its parent company". The context of the actual passage relied on by the judge is important: the wider context is a discussion of the rules relating to the form and content of the accounts of companies generally, as well as the accounts of subsidiary companies (paras 810-812), while the immediate context is the meaning of 'holding company' and 'subsidiary' for

these purposes (para. 813). After setting out the various circumstances in which a company may be deemed to be the subsidiary of another, the learned authors conclude as follows:

> "For the purposes of the Companies Act 1985, a company is deemed to be another's holding company if, but only if, the other is its subsidiary; and a body corporate is deemed the wholly-owned subsidiary of another if it has no members except that other and that other's wholly-owned subsidiaries and its or their nominees.
>
> **Furthermore, for the purposes of the European Economic Community Treaty (The Treaty of Rome) the conduct of a subsidiary can be imputed to its parent company whether or not it has its own separate legal personality, and whether or not the parent wholly owns the subsidiary**." (Emphasis supplied)

[72] Taken in its context, it seems to me to be clear that the passage highlighted above (the one to which the judge referred), far from being a general statement on the law relating to separate legal personality in English law, is a specific reference to the way in which the principle is impacted by the treaty provision. This provision, as Dr Barnett submitted, does not form part of the law of Jamaica. Accordingly, with the greatest of respect to Brooks J, who obviously thought otherwise, I do not consider that it provides any assistance in resolving the issues before the court in this matter.

[73] The second matter is the view expressed by the learned judge that "the UDC is a statutory corporation established to carry out the business of the State…[and all]…its subsidiaries must be presumed to be formed to carry out its mandate". No authority was cited for this proposition and it is not at all clear to me why this should be so as a

matter of general principle. I would have thought that while the UDC, as a creature of statute, is obviously bound to operate within the confines of the powers accorded to it by the UDC Act, a subsidiary company of the UDC (or a subsidiary of a subsidiary, such as RPHL), in the absence of any specific provision in the UDC Act itself governing the conduct and operation of subsidiaries, is constrained only by the provisions of its own constitutive documents and the general law. It therefore appears to me that the learned judge fell into error in this respect as well.

[74] My conclusion on this issue is accordingly that, no ground for the going behind the corporate veil having been shown to exist or even prayed in aid in this case, the rule in ***Salomon*** should have applied, with the result that RPHL should have been treated for all relevant purposes as a separate legal entity with all the rights and liabilities which would normally attach to such an entity. Among such rights would ordinarily be, in my view, those given by sections 3 and 45 of the LAA, if established in accordance with the law and the evidence.

[75] Accordingly, notwithstanding Mr Beswick's characteristically muscular submission, for which no authority was cited, that "the concept of adverse possession is foreign to wholly owned government entities inter se and is contrary to public policy", I have come to the clear view that the learned trial judge fell into error in excluding section 3 in its entirety and section 45 in part from his consideration of the posessory title/reputed boundaries issue on the basis of what he described as "the factual situation concerning the connection between UDC and RPHL".

The possessory title issue

[76] Section 3 of the LAA provides as follows:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

[77] This provision is complemented by section 30 of the LAA, which provides that, upon the determination of the period limited to any person for making an entry, or bringing any action or suit, "the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished".

[78] The leading authority on the nature of the possession required to ground possessory title under the LAA is now the decision of the House of Lords in ***JA Pye (Oxford) Ltd v Graham***. In that case, the claimant was the paper title owner to certain agricultural land. Up until 31 August 1984, a neighbouring farmer had used the land, with the claimant's consent, for the purpose of cattle grazing and grass cutting. Although the farmer had been willing to pay for grazing rights thereafter, if requested to do so, no such request was made and the farmer proceeded to farm the land all year round for the next 14 years without the claimant's permission, using it in any way he thought best and treating it as part of his own farm. During that whole period, the

claimant did nothing on the land and proceedings in connection with the land were not brought by it until 30 April 1998. The issue was therefore whether the claimant's action was barred by section 15 of the Limitation Act 1980, which provided that no action to recover land could be brought after the expiration of 12 years from the date on which the right of action accrued. The question for the court (pursuant to paragraph 1 of Schedule 1 to the Act) was whether, at any time between 31 August 1984 and 30 April 1998, the claimant had been dispossessed of the land.

[79] At first instance, it was held that the farmer had obtained title to the land under the provisions of the Act, but this decision was overturned by the Court of Appeal, which held that the farmer had lacked the intention of possessing the land to the exclusion of the claimant. The appeal by the farmer's personal representatives to the House of Lords succeeded, on the ground that, it having been established that the farmer had been in factual possession of the land for the relevant period, the necessary intention for the purposes of the Act was one to possess, not to own, and an intention to exclude the paper owner only so far as was reasonably possible.

[80] Lord Browne-Wilkinson, with whom the other members of the House agreed, delivered the leading judgment. After observing (at para. [35]) that the concept of 'adverse possession' in the modern law "is directed not to the nature of the possession but to the capacity of the squatter", Lord Browne-Wilkinson went on to say this (at para. [36]):

> "Many of the difficulties...which I will have to consider are due to a conscious or subconscious feeling that in order for a

> squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to 'oust' the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner. In my judgment, much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."

[81] As regards what would constitute possession in the ordinary sense of the word, Lord Browne-Wilkinson's conclusions (adopting in large part the views expressed by Slade J in his judgment in ***Powell v McFarlane*** (1977) 38 P & CR 452, described by Lord Browne-Wilkinson at para. [31] as "a remarkable judgment") may be summarised as follows:

> (a) The two elements necessary for legal possession are (1) a sufficient degree of physical custody and control ('factual possession'); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess') (para [40]).
>
> (b) Factual possession signifies an appropriate degree of physical control, that is, single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. 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 land of that nature is commonly used or enjoyed. What must be shown is that the person in possession has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so (para. [41]).

(c) The intention required is not an intention to own but an intention to possess, that is, an intention in one's own name and on one's own behalf to exclude the world at large, including the owner of the paper title if he is not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow (paras [42]-[43]).

(d) The sufficiency of the squatter's possession depends on the intention of the squatter and not that of the paper owner of the land (para. [45]).

(e) The willingness of the squatter to pay the paper owner for the use of the land if asked is not inconsistent with his being in possession in the meantime (para. [46]).

[82] In a brief concurring judgment, Lord Hutton said (at para. [76]) that, by using the land in the manner in which an owner of the land would have done, the occupier

"will normally make it clear that he has the requisite intention to possess and such conduct should be viewed by the court as establishing that intention, unless the claimant to the paper title can adduce other evidence which points to a contrary conclusion".

[83] In ***Wills v Wills*** [2003] UKPC 84; (2003) 64 WIR 176, the guidance given by the decision in ***JA Pye (Oxford) Ltd v Graham*** was accepted by the Privy Council as being fully applicable to Jamaica, particularly as regards the importance of giving effect to the state of mind of the squatter, rather than that of the paper owner. (See also ***Ofulue v Bossert*** [2008] 3 WLR 1253, in which Arden LJ said (at para. [63]) that "[w]hat emerges from *Pye v Graham* is that it is necessary only to show that the person who claims to have acquired property by adverse possession was in possession without the consent of the paper owner and intended to possess. A person who wrongly believes he is a tenant can occupy property in such a way that he has possession, just as much as a squatter. He does not have to show that he had an intention to exclude the paper owner.")

[84] Dr Barnett also cited a number of cases to make the point that, where a series of trespassers have taken possession of land in succession without any interruption for periods which total the statutory limitation period of 12 years, the paper owner's action for recovery of possession will be barred in favour of the squatter in possession. Thus, in the Canadian case of ***Fleet and Fleet v Silverstein and Tenebaum*** [1963] 1 O.R. 153, 155, McRuer CJHC observed that there was an "abundance of authority that...where there has been adverse possession by 'A' as against 'B' which is

surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner".

[85] To similar effect is ***Mount Carmel Investments Ltd v Peter Thurlow Ltd and another*** [1988] 3 All ER 129, in which it was held by the Court of Appeal of England and Wales that if a squatter dispossessed another squatter and the first squatter abandoned his claim to possession, the second squatter could obtain title to the land by the 12 years' adverse possession of both squatters. Nicholls LJ, who delivered the judgment of the court, said (at page 135), referring to the then current edition (the fifth) of Megarry & Wade on the Law of Real Property, that "[t]hese principles of law are well established". In the seventh edition of that work, under the rubric "Successive squatters", the learned editors state the position in this way (at para. 35-021):

> "...a squatter has title based on his own possession, and this title is good against everyone except the true owner. Accordingly, if a squatter who has not barred the true owner sells the land he can give the purchaser a right to the land which is as good as his own. The same applies to devises, gifts or other dispositions by the squatter, and to devolution on his intestacy; in each case the person taking the squatters interest can add the squatter's period of possession to his own. Thus if X, who has occupied A's land for eight years, sells the land to Y, A will be barred after Y has held the land for a further four years."

[86] ***Mount Carmel Investments Ltd v Peter Thurlow Ltd and another*** was also cited for the proposition that the mere assertion by the paper owner of a claim to

possession of land in a letter to a squatter is not sufficient to prevent the squatter obtaining a possessory title. Nicholls LJ said this (at page 133):

> "Counsel for the plaintiff submitted that the defendant ceased to be in adverse possession...when she received the letter of 30 January 1981, because by that letter the plaintiff indicated, in the clearest way possible, an intention to take possession. That, he submitted, amounted to the acquisition by the plaintiff of constructive possession of the property. We are wholly unable to accept this argument. What strikes us most forcefully is that nothing changed at the property when the letter was received. The defendant was living there, with exclusive occupation, before she received the letter. So she was afterwards, without any break. Before receipt of the letter the property was in the possession of the defendant in whose favour the period of limitation was running. It was still in her possession after the receipt of the letter. We confess to being unable to see how the sending and receipt of that letter can have had the effect of making the property cease to be in adverse possession, viz cease to be in the possession of the defendant as a person in whose favour the period of limitation was running. By the letter the plaintiff asserted a claim. That is all. We do not accept that, in a case where one person is in possession of property, and another is not, the *mere* sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession."

[87] In the instant case, it will be recalled that the clear and unchallenged evidence of Mr Mason was that when he started working at the hotel, then Negril Beach Village, in 1978, there was a pronounced earth berm, covered with grass, which formed the northern and western boundaries between the hotel land and the neighbouring land on which Point Village is now located. Along the western boundary, the earth berm extended down to the beach. Both Mr Mason and Mr Issa agreed that when the barbed

wire fence was originally erected along the western boundary in 1981 it was erected on the outer base of the earth berm and that it extended all the way down to the sea, thus enclosing the disputed land with the hotel land. Mr Issa's - also unchallenged - evidence was that the disputed land was occupied by the hotel as part of the hotel land from 1976, right up to the time of its sale to Linval in 1989.

[88] It seems to me that this history of the use of the disputed land for the purposes of operating the Negril Beach Village and its successor, Hedonism II, more than adequately satisfies the requirement that, in order to show factual possession of the property in question, an appropriate degree of exclusive physical control over the disputed land must be established. The very act of fencing the northern and western boundaries in 1981 was an act in relation to the disputed land which was entirely consistent with the way in which an occupying owner might have dealt with it. In the absence of any other evidence pointing to a contrary conclusion, this history also suffices, it further seems to me, to establish that RPHL/VRL, in circumstances in which it was obviously thought that the disputed land formed part of the hotel land, had the requisite intention to possess the disputed land.

[89] As regards the duration of possession, it is clear from the evidence that the possession and use of the disputed land (as reduced by the 1990 relocation of the western boundary 10 feet to the east, that is, closer to the hotel) as part of the hotel land continued without interruption, despite changes in the right to possession, from 1976, or, at latest, 1981 (when the fences were erected), to 1999, when this action was filed by PSP. In these circumstances, it seems to me, IHJL, as the ultimate successor in

title to RPHL, would be entitled to rely as against PSP on the principle that each one of a succession of squatters gives to his successor a right, as against the paper owner, which is as good as his own (see paras [83]-[84] above). In my view, the result of this is that, in the absence of any other relevant factors (such as an acknowledgment of title), the aggregation of the continuous periods of seamless possession of the disputed land by RPHL, NHPL, VRL and IHL, over the relevant period should ordinarily inure to the benefit of IHJL. In these circumstances, PSP's right to recover the disputed land would therefore have been barred from 1988, or at latest 1993, that is, 12 years measured either from the date it initially came into the possession of RHJL or from the date when the fences on the northern and western boundaries were erected on the outer base of the earth berm. On the undisputed evidence that, before the fences were erected, the outer base of the earth berm was taken to be the boundary of the disputed land, it would seem to me that the earlier dates (that is, 1976-1988) are in fact probably more in keeping with the facts and the law. However, even if the opening date is taken to be 1981, when the fences were erected, the action would have been statute-barred by the time of its filing in 1999.

[90] Despite a full and accurate recounting of the history of the hotel land, Point Village and the disputed land (and despite a passing reference, albeit only in the context of IHJL's submissions on the point, to ***JA Pye (Oxford) Ltd v Graham***), Brooks J made no express finding on the issues of either factual possession or the intention to possess the disputed land during the pre-1989 period. However it seems to me that, as Dr Barnett submitted, it is clearly implicit in the judge's stated reason for

leaving that period out of account for limitation purposes (that before 1989 RPHL and NHPL were "ultimately owned by the same entity; the UDC"), that he appeared to accept – or, at any rate, did not reject - the evidence that the disputed land had in fact been in occupation and use by IHJL's predecessors in title as part of the hotel land. That was a finding which, as I have sought to demonstrate, was plainly open to the judge on the undisputed evidence in the case.

[91] To recapitulate, the judge's primary reasons for rejecting IHJL's defence based on section 3 of the LAA were as follows:

> (i) "There is no evidence of any intention by RPHL [or NHPL] to possess UDC's land to the exclusion of the UDC…the factual situation concerning the connection between UDC and RPHL contradicts any presumption of such an intention."
>
> (ii) "…normal commercial adversarial intentions cannot be imputed to [UDC and its subsidiaries] as between themselves."
>
> (iii) "VRL's occupation is presumed to be as lessee. Any rights of adverse possession which it may have acquired during the term of the lease, against any other property inures to the benefit of the landlord…RPHL, was then, of course, acting on behalf of the ultimate owner of both holdings."

[92] In my respectful view, none of these reasons is consonant with the well settled principles governing either the establishment of possessory title or the separate legal personality of corporate structures. In so far as the first two reasons are concerned, they plainly fly in the face of the clear principles emerging from ***JA Pye (Oxford) Ltd***

v Graham that (a) a squatter, in order to gain title by lapse of time, does not have to act adversely to, or to 'oust', the paper title owner and (b) that the intention required is not an intention to own but an intention to possess (see paras [79]-[80] above). The third reason, while – in my view, correctly – recognising that any possessory rights acquired by VRL as lessee of the hotel land would inure to the benefit of RPHL as its landlord, perpetuates the fallacy that RPHL's possession was "on behalf of [UDC]", and not in its own right as a separate legal entity.

[93] In my judgment, therefore, the learned judge fell into error in determining that IHJL was not entitled to maintain a claim to possessory title of the disputed land, pursuant to section 3 of the LAA, on the basis of the continuous, peaceful and undisturbed possession of the disputed land from and since 1976 by the company and its predecessors in title.

[94] A relevant factor militating against this conclusion would, of course, be an acknowledgment of title of the paper owner during the limitation period, within the meaning of section 16 of the LAA. This section provides, in effect, that a written acknowledgment of the title of the person entitled to any land or rent by the person in possession will interrupt and start anew the running of the relevant period of limitation. Mr Beswick submitted with some force that two such acknowledgments of the title of PSP and its predecessors in title are to be discerned from the 25 March 1987 letter and the 3 September 1992 letter.

[95] In this regard, I should say at once that Dr Barnett's submission that this point, which was not relied on by Brooks J in his judgment, is not now open to PSP, no counter-notice of appeal having been filed in accordance with rule 2.3(3) of the CAR, is obviously correct. Rule 2.3(3) provides that a respondent "who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court **must** file a counter-notice in form A3 setting out such grounds" (emphasis mine).

[96] However, primarily because Brooks J did give some consideration to the 25 March 1987 letter, in the context of the identical submission by Mr Beswick in the court below, I will address the point briefly. ***Edginton v Clark and Another***, to which Mr Beswick referred us, was a case in which the plaintiff went into possession of certain freehold property in 1947. Some seven years later, in 1954, he wrote to a person who he knew to be the agent for the owner of the property, though he did not know the identity of the owner, making an offer to purchase the property, "subject to contract". A few months later, no response having been received, he wrote again, this time increasing his offer. The increased offer was accepted and the plaintiff in fact paid a deposit of 10% of the purchase price, but, for reasons which are not relevant, the sale did not go through and the deposit was in due course returned to him. However, the plaintiff remained in possession of the property and, in 1961, some 14 years after he had originally gone into possession, the question arose whether he had acquired title by adverse possession against the owner, the limitation period being 12 years.

[97] The Court of Appeal upheld the trial judge's finding that the plaintiff's two letters offering to purchase the property amounted to an acknowledgment of title, so as to

prevent his acquisition of an adverse possessory title against the owner. Delivering the judgment of the court, Upjohn LJ said this (at page 471):

> "Apart altogether from authority, it would seem to be a very clear case and it so appealed to the learned county court judge. If a man makes an offer to purchase freehold property, even though it be subject to contract, he is quite clearly saying that as between himself and the person to whom he makes the offer, he realises that the offeree has a better title to the freehold land than himself, and that would seem to be the plainest possible form of acknowledgment."

[98] However, the learned judge went on to observe that "it is not possible to lay down any general rule on what constitutes an acknowledgment…whether a particular writing amounts to an acknowledgment must depend on the true construction of the document in all the surrounding circumstances". This dictum was cited with approval by Arden LJ in ***Ofulue v Bossert***, in which the learned judge said (at para. [66]) that "[i]t is a question of interpretation whether an allegation in a pleading constitutes an acknowledgment for the purpose of s 29 of the [Limitation Act]".

[99] Against this background, I come then to the letters. The 25 March 1987 letter was, as has been seen, written by Mr James, in his capacity of general manager of Hedonism II, to UDC (see para. [28] above). In it, Mr James advised that "we are having a major problem with the vacant section of the beach adjacent to our present Nude Beach". Accordingly, the letter indicated, "Hedonism II would appreciate your approval in allowing us to maintain this area in a sightly condition, while at the same time utilising it for our guest use". The letter concluded with the assurance that "[t]his does not mean an extension of our existing boundaries…" As will be recalled, Mr James

was emphatic in his second witness statement (para. [29] above) and in his cross-examination that the reference to "the vacant section of the beach adjacent to our present Nude Beach" was not a reference to an area which included section two of the disputed land, but rather to an area "beyond the boundary where the barbed wire fence was".

[100] Although, in the light of his finding against IHJL on the claim to possessory title, he considered the point to be "merely academic", Brooks J did essay a resolution of the question whether Mr James' request for permission to maintain an area of the beach in a "sightly condition" was, as had been submitted on behalf of PSP, a reference to land part of the disputed land and therefore an acknowledgment of UDC's title to that land. Thus, the learned judge reminded himself – correctly in my view - that in 1987 the fence on the western boundary of Hedonism II was "10 to 12 feet further west than it currently is". The learned judge then combined the width of the disputed land (9.23 metres, as measured by Mr Allen, or "almost 30 feet") and the use by Mr James of the word "adjacent", giving it "its usual meaning of 'beside'", to lead to the conclusion that Mr James must have been referring to an area partially within and partially without the western boundary. In other words, the judge concluded, Mr James' request for permission must have related in part to the disputed land.

[101] With the greatest of respect to the learned trial judge (and notwithstanding my natural disinclination, on principle and on authority, to disagree with a trial judge on a matter of fact), I find it impossible to reconcile this view of the evidence with the other uncontested evidence in the case. That evidence established that the disputed land

had at all relevant times since 1976 been enclosed and occupied as though it were part of the hotel land. In these circumstances, quite apart from what Mr James actually said at the trial, it seems to me that the reference in the 25 March 1987 letter to a "vacant section of the beach" could only make sense as a reference to an area beyond the western boundary of the disputed land. It certainly strikes me as counter-intuitive that an area within its boundary and in use by Hedonism II, an all inclusive hotel, should have been allowed at any time to become "the playground of local hustlers" to "prey on [the hotel's] guests". Mr James' clear statement in cross-examination that "[t]he issue at the time was the unsightly condition of the area beyond the boundary where the barbed wire fence was", is therefore entirely consistent, in my view, with the other evidence in the case and the probabilities.

[102] Nor, it seems to me, is this conclusion affected in any way by Mr James' use of the word "adjacent": despite the learned judge having attributed to it "its usual meaning of 'beside'", it is clear that the word can also attract less precise meanings, such as 'lying near' (Chambers Dictionary, 12th edn, page 18), 'proximate' or 'close to' (Concise Oxford Thesaurus, 3rd edn, page 15). I would therefore conclude that no acknowledgment of title can be discerned from the 25 March 1987 letter.

[103] As regards the 3 September 1992 letter, the position appears to me to be even clearer. That letter was expressly premised on the view that IHS was legally entitled to the ownership of the disputed land on the basis of its agreement with NHPL for the purchase of Hedonism II. Far from acknowledging the title of UDC, in my view, what the 3 September 1992 letter sought from UDC was a bringing of the boundaries on the

title into conformity with the position of the boundaries on the ground. The expectation that this would have been done had been long and clearly foreshadowed by the letter dated 12 September 1989 from NHPL's attorneys-at-law to NHPL (referred to at para. [21] above), shortly before the completion of the transfer of the hotel land to IHL's predecessor in title, Linval, which indicated that the purchaser "wishes a letter from the [UDC] to say that, if necessary, the [UDC] will transfer to the purchaser, free of costs, any land which may be necessary so that the registered boundary may accord with the existing fences on earth". Further, Mr Burnet's unchallenged evidence was that, in keeping with this request by the purchaser, the transfer of the intermediate strip to Linval on the same date as the hotel land was done in an effort to ensure that "the registered Boundary of Hedonism II would be made to accord with the fence/boundary on the ground which extended to the sea".

[104] Against this background, I keep in mind Upjohn LJ's caveat in ***Edginton v Clark and Another*** (para. [98] above) that "whether a particular writing amounts to an acknowledgment must depend on the true construction of the document in all the surrounding circumstances". In these circumstances, I cannot take IHL's offer in the 3 September 1992 letter to pay "the full costs involved in obtaining and transferring the title for this small piece of land" as anything more than a proposal made with a view to expediting the regularisation of a title anomaly that had been long outstanding. At all events, it certainly cannot be taken, in my view, to be an acknowledgment, either express or implied, that PSP had a better title to the freehold, as was clearly the case in ***Edginton v Clark and Another***.

[105] But even if it could be read as an acknowledgment of title, by the time the 3 September 1992 letter came to be written, as IHJL pointed out in its printed skeleton argument (at paras 47-49), on the analysis of the evidence and the law which I have taken to be correct (see para. [89] above), the title of UDC, PSP's predecessor in title, to the disputed land would already have been extinguished by the operation of section 30 of the LAA, from as early as 1988. The 3 September 1992 letter would accordingly have been completely ineffectual as an acknowledgment of title, since, as Jessel MR put it in ***Sanders v Sanders*** (1879) 19 LR Ch D 373, 379, "when a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired under the statute as good a title as if a conveyance had been made to him can restore the old title".

[106] For all of these reasons, I therefore consider that IHJL has made good its claim to a possessory title to the disputed land, pursuant to section 3 of the LAA.

The reputed boundary issue

[107] If I am correct in my conclusion on the possessory title issue, this issue, which now relates only to the existing chain link fence along the western boundary between the hotel land and Point Village (the trial judge having already found in favour of IHJL in respect of the fence along the northern boundary), no longer arises. However, for completeness (and in the event that I am wrong on the possessory title point), I will consider it briefly in the alternative.

[108] Section 45 of the LAA provides as follows:

> "45. In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such proprietors claim, for the space of seven years together, such reputed boundary shall for ever be deemed and adjudged to be the true boundary between such proprietors; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding:
>
> Provided always, that nothing herein contained shall extend to preclude minors under the age of twenty-one years, or persons of unsound memory, from contesting and disputing at law the truth of any boundaries set up or established during the minority, or insanity of the said respective persons:
>
> Provided such persons shall contest and dispute the same within five years after such person under age shall attain the age of twenty-one years, or persons of unsound memory shall become *compos mentis*."

[109] As to the meaning of the phrase "acquiesced in and submitted to", IHJL relies on the following dictum of Brett J (interpreting the similar words found in section 4 of the UK Prescription Act) in ***Glover v Coleman*** (1874) LR 10 CP 108, 119:

> "Acquiescence, according to my view, would mean, not an active agreement, but what may be called a tacit, a silent agreement, - a submission to a thing by one who is satisfied to submit. The question for the jury, therefore, upon a suggested acquiescence, would be, whether the plaintiff, although he has not specifically agreed that the thing should be done, has submitted to it, and has been satisfied to submit. Now, 'opposition', on the other hand, I should say would mean dissent or dissatisfaction manifested by some act of opposition. 'Submitted to', in this part of the section, seems to me to be something intermediate between a submission by one satisfied to submit and a dissatisfaction

> manifested by some act of opposition. It seems to me that what it means is this, - submission without satisfaction and without any direct act of opposition, and although discontent be made apparent by some expression or some act. If that be so, the question for the jury would be this, - Although it be clear that the plaintiff did not submit to the interruption, being satisfied to submit, nevertheless, did he submit, though with discontent, and though it was made apparent? This would render necessary an inquiry into the state of mind of the person who is said to have submitted, and whether his state of mind was made apparent by either expressions or acts."

[110] Save in one respect, the evidence of the existence of the northern and western boundaries was essentially the same. The only significant difference was that, in or about 1990, by agreement between the adjoining owners, the barbed wire fence along the western boundary was moved eastwards towards the hotel land by about 10 feet, thereby reducing the area of the disputed land (section two) on the western side of the hotel land. On this issue, Brooks J took the view (at page 7) that the reference in section 45 to "several proprietors" demonstrated that the section "does not apply to a single proprietor", and therefore (page 13) "with a single ultimate proprietor, time does not begin to run for the purposes of the Act, until December 1989". In relation to the fence along the northern boundary, the learned judge found that, in the seven years following December 1989, no issue had been raised or complaint made as to its location, that its position had been acquiesced in by PSP and that it had therefore become the reputed boundary. However, in relation to the fence along the western boundary, the judge considered that, on the evidence, IHJL had not been able to show that there had been acquiescence in the position of the fence for the requisite seven

year period after 1989. In this regard, the judge made particular reference to the 3 September 1992 letter, which had elicited a response from UDC by letter dated 16 September 1992, requiring that the fence be relocated in conformity with the registered boundary (see paras [31]-[32] above). Thus, the learned judge concluded (at page 15), "although there was initial agreement concerning the location of the fence, there was no seven-year acquiescence of [sic] its position" and the fence along the western boundary "did not become a reputed boundary for the purposes of Section 45".

[111] I have already expressed the view that the learned judge erred in thinking that, for the purposes of section 3 of the LAA, a subsidiary company cannot acquire rights by limitation against its parent company. It seems to me that the learned judge fell similarly into error in his conclusion that RPHL on the one hand and UDC on the other could not be considered as "several proprietors" within the meaning of section 45. In my respectful view, there is no obstacle in law to adjoining lands belonging to RPHL, on the one hand and UDC on the other, being regarded as the lands of "several proprietors", within the meaning of section 45 of the LAA, despite the fact that RPHL was at the material time the subsidiary of a subsidiary of the UDC.

[112] In my view, the learned judge therefore wrongly excluded the period up to December 1989, which is when the hotel land was transferred by RPHL to Linval, from his consideration of the boundary issue altogether. As I have attempted to demonstrate, during this period RPHL, as a separate legal entity from NHPL and UDC, was entirely capable of enjoying rights and incurring liablities in its own name and on its own account. In these circumstances, there is, in my view, no reason why time should

not have begun to run in RPHL's favour as regards the western boundary of the disputed land from 1976, when it first came into occupation of the hotel land and the disputed land and when, it is clear from the evidence, the earth berm running along the northern and western boundaries down to the sea was regarded and treated as the boundary between Hedonism II and Point Village. In the absence of any evidence of any issue raised or complaint made about its position before 1992, it seems to me that that boundary had indeed been the reputed boundary between the adjoining properties for a period well in excess of seven years, by virtue of which it had become "the true boundary between [the] proprietors".

[113] The conclusion that the position of the western boundary was acquiesced in by UDC during this period derives support, in my view, from the evidence of both Mr Issa (see para. [18] above) and Mr Burnet (see para. [21] above), that the transfer of the intermediate strip to Linval in 1989, was with the intention shared by all parties that, as Mr Burnet put it, "the registered Boundary of Hedonism II would be made to accord with the fence/boundary on the ground which extended to the sea".

[114] Accordingly, I would conclude that IHJL also succeeds in this issue.

The estoppel issue

[115] IHJL submits, in the further alternative, that it has acquired the right to the disputed land by virtue of either a proprietary estoppel or an estoppel by agreement. As regards proprietary estoppel, in ***Taylor Fashions Ltd v Liverpool Victoria***

Trustees Co Ltd [1981] 1 All ER 897, 909, Oliver J (as he then was) described the seminal nineteenth century case of ***Ramsden v Dyson and another*** (1866) LR 1 HL 129 as "[t]he starting point". In that case, Lord Kingsdown said this (at page 170):

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

[116] In ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd***, Oliver J then went on to say this (at pages 915-916):

> "…the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

[117] A few examples taken from the cases may be helpful. In ***Inwards and others v Baker*** [1965] 1 All ER 446, the defendant had been considering building a bungalow on land which he would have had to purchase. His father, who owned some land, suggested that the defendant should build the bungalow on his land and make it a little bigger. The defendant accepted that suggestion and built the bungalow himself, with

some financial assistance from his father, part of which was repaid. The defendant had lived in the bungalow ever since. His father died some 20 years later, and, after another 13 years had passed, the trustees of his father's will sought possession of the bungalow on the ground that the defendant was, at most, a licencee and that his licence had been revoked. It was held that, since the defendant had been induced by his father to build the bungalow on his land and had expended money for that purpose in the expectation of being allowed to remain there, equity would not allow the expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees.

[118] Delivering the leading judgment in the Court of Appeal, Lord Denning MR, after referring to, among other cases, the decision in ***Ramsden v Dyson***, said this (at pages 448-449):

> "It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay...
>
> So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case, it is quite plain that the father allowed an expectation to be created in the defendant's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as

> long as he wished it to remain his home. It seems to me that, in the light of that equity, the father could not in 1932 have turned to the defendant and said: "You are to go. It is my land and my house". Nor could he at any time thereafter so long as the defendant wanted it as his home.
>
> Counsel for the plaintiffs put the case of a purchaser. He suggested that the father could sell the land to a purchaser who would get the defendant out; but I think that any purchaser who took with notice would clearly be bound by the equity. So here, too, the plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case that it can be satisfied by holding that the defendant can remain there as long as he desires to use it as his home."

[119] In a brief concurrence, Danckwerts LJ observed (at pages 449-450) that "this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated".

[120] ***Inwards v Baker*** was followed in ***E.R. Ives Investments Ltd v High*** [1967] 1 All ER 504. In that case, the plaintiffs' predecessor in title, a Mr Westgate, and the defendant bought building sites which adjoined each other in 1949. The foundations of Mr Westgate's building trespassed under the defendant's land, drawing an objection from the defendant. It was then agreed between them that the foundations might remain in that position and that the defendant should have right of access to and from

his site across Mr Westgate's yard at the back of his building to a side street. This agreement was documented in correspondence between the parties. In 1950, Mr Westgate sold his site and the flats which he had built on it to Mr and Mrs Wright, while the defendant completed his own building and used the right of way for the purpose of the construction work. In 1959, he built a garage in such a position that it could only be entered by access over the yard and the Wrights complimented him on it. The defendant used the yard for access for his car and in 1960 he contributed one-fifth to the cost of re-surfacing the yard. In that same year, the flats were sold by the Wrights to the plaintiffs, the property being conveyed subject "to the right (if any) of the owners and occupiers of" the defendant's land "as now enjoyed to pass and repass with or without vehicles, over the open yard at the rear". However, the defendant's rights over the yard were never registered under the relevant statutory provisions and in due course the plaintiffs sought an injunction to restrain the defendant from exercising a right of passage across the yard.

[121] The Court of Appeal held that the defendant was entitled in equity to access to and from his garage over the yard by virtue of equitable estoppel or acquiescence by the plaintiffs' immediate predecessors in title, in consequence of their having stood by when the defendant built his garage in such manner that access for a car to and from it could only be had over the yard. Lord Denning MR stated the following (at pages 507-508):

> "The right arises out of the expense incurred by the defendant in building his garage, as it is now, with access

> only over the yard: and the Wrights standing by and acquiescing in it, knowing that he believed he had a right of way over the yard. By so doing the Wrights created in the defendant's mind a reasonable expectation that his access over the yard would not be disturbed. That gives rise to an 'equity arising out of acquiescence'. It is available not only against the Wrights but also their successors in title. The court will not allow that expectation to be defeated when it would be inequitable so to do. It is for the court in each case to decide in what way the equity can be satisfied (see *Inwards v Baker*, *Ward v Kirkland* and the cases cited therein). In this case it could only be satisfied by allowing the defendant and his successors to have access over the yard so long as the block of flats has its foundations in his land."

[122] And, finally in this series of citations, I should mention ***Crabb v Arun District Council*** [1975] 3 All ER 865, a case involving a claim to a right of access over land to a public highway, the fairly complicated facts of which it is happily not necessary to state. Some observations of Lord Denning MR and Scarman LJ are however relevant. Lord Denning MR said this (at page 871):

> "When counsel for Mr Crabb said that he put his case on an estoppel, it shook me a little, because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action."

And Scarman LJ said this (at page 879):

> "The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway. If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well-settled law that the court,

> having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

[123] (As a matter of interest, I would add that the line of cases to which I have referred above was followed and applied by Rees J in ***Clarke v Kellarie*** (1970) 16 WIR 401, a decision of the High Court of Trinidad & Tobago. In that case, it was held that where the plaintiff, the legal holder of the land, had allowed the defendant to spend money under an expectation encouraged by her that he would be able to remain on the premises until he died, an equity by estoppel was thereby created, thus entitling the defendant to protection from the court in order that his expectation would not be defeated. The learned judge observed (at page 404) that –

> "I think it is now well settled from the authorities that where the legal owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of a promise or assurance that the person who so expends his money will be permitted to remain there, this gives rise to an equity and a court of equity will *prima facie* require the owner to fulfil his obligation".)

[124] In Gray & Gray's Elements of Land Law (5th edn, 2009), the principles emerging from the authorites (in terms obviously approved by Lord Walker of Gestingthorpe in ***Thorner v Major and others***, para. [29]) are summarised in this way (at para. 9.2.8):

> "A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of *three* elements:
>
> - representation (or an 'assurance' of rights)
> - reliance (or a 'change of position") and

- unconscionable disadvantage (or 'detriment').

> An estoppel claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are inter-dependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn."

(And see Megarry & Wade, Law of Real Property, 7th edn (2008), para. 16-001, where the law is summarised in essentially similar terms.)

[125] The main elements of proprietary estoppel are therefore, firstly, a representation (or assurance) by the landowner; secondly, reliance (or change of position) on the part of the person claiming the equity; and, thirdly, resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner.

[126] In the instant case, IHJL relies on the knowledge of and acquiescence by PSP and its predecessor in title (UDC) over the years in the position of the western boundary, as well as the construction by IHJL and its predecessors in title of various structures on the disputed land in reliance on the correctness of that boundary. It submits that in these circumstances it would be unconscionable for PSP to be permitted to deny IHJL's right to the land at this stage. Further, Mr Scott submitted, the uncontradicted evidence of the consensual relocation and replacement of the barbed

wire fence in 1990, when the statutory boundary had already been established, bound and or estopped PSP from now asserting its right to section two of the disputed land.

[127] Taking each of the requirements in turn, firstly, as regards assurances held out to IHJL's predecessors in title, in ***Thorner v Major***, Lord Walker observed (at para. [55]) that "if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance". In support of this statement, the learned law lord cited the following dictum of Lord Eldon LC in ***Dann v Spurrier*** (1802) 7 Ves 231, 235-236, 32 ER 94, 95:

> "…this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement…"

[128] It seems clear from the evidence that, up to 1981, RPHL's assumption that the boundary between the hotel land and the Point Village was as described by the earth berm running along the northern and western boundaries, all the way down to the sea, remained unchallenged. Further, there was no protest when, in 1981, RPHL erected the chain link and barbed wire fences along the northern and western boundaries respectively. Nor was there any protest from UDC when, in the 25 March 1987 letter, Mr James wrote on the clear assumption, as I read the letter, that the hotel was entitled to the use of the land within the western boundary as deliniated by the barbed wire fence. Nor was there any protest from UDC when, in 1989, it appeared clearly

that it was the purchaser's expectation that UDC would transfer to it, free of cost, "any land which may be necessary so that the registered boundary may accord with the existing fences on earth" (see para. [21] above - indeed, as I have already pointed out, Mr Burnet's unchallenged evidence was that the transfer of the intermediate strip to Linval in 1989 was intended to be in fulfilment of this expectation). It seems to me that, in all these circumstances, spanning a period of over 13 years (1976-1989), UDC's conduct "in standing by in silence" amply satisfies the element of assurance.

[129] It further seems to me that the 1990 exercise, in which, pursuant to an agreement reached between the adjoining owners, the barbed wire fence was moved, for its full length, eastwards towards the hotel land by about 10 feet, is entirely consistent with this view of the matter. For, if it was the position of UDC at that time that IHS was not entitled to the use of the disputed land, I would have expected that, rather than entering into a negotiation with IHL with a view to changing the course of the fence, it would have taken precisely that position in 1990. In my view, UDC's action in negotiating and ultimately agreeing on the location of the new fence therefore further satisfied the element of assurance.

[130] Secondly, as regards the element of reliance, the learned authors of Megarry & Wade observe (at para.16-013) that "[t]he most obvious examples of detriment have involved expenditure [by the occupier] on [the landowner's] land, as where he built a house, constructed a garage wall, or installed drains on the property, or carried out improvements to it". While it is true that, as Brooks J pointed out (at page 19), the

evidence was that "the buildings now in place on the disputed land 'were not there when the fence was moved'", it is in my view hardly realistic to separate the pre and post 1990 periods in this manner. The fact is that the 1990 agreement represented, as I have attempted to suggest, a continuation of the assurance by UDC to IHJL's predecessor in title, albeit in modified form, that it was entitled to regard an area of land outside the registered boundary of the hotel land as the true boundary. In these circumstances, it seems to me that evidence of expenditure incurred both before and after 1990 is of relevance in this regard.

[131] Therefore, in addition to the evidence of the construction of the hotel's nude beach jacuzzi and a building in section one of the disputed lands before 1990, there was also evidence of the construction of the hotel's nude beach pool and grille after 1990. But in any event, it is also clear that RPHL would have incurred expenses in reliance on its view, acquiesced in by UDC, of the correct location of the boundary: in the construction of the chain link and barbed wire fences on the outer base of the earth berm along the northern and western boundaries of the property in 1981; in the construction of the new chain link fence (the cost of which was borne equally by the adjoining owners) along the western boundary in 1990; and in the maintenance of the boundary fences and the land within them. It is in this way, in my view, regrettably contrary to the learned judge's conclusion on this point, that the element of reliance was amply satisfied on the evidence in this case.

[132] And lastly, as regards detriment or disadvantage, as the learned authors of Gray & Gray put it, "[d]isadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn". PSP's action for possession in this case, which was plainly foreshadowed by UDC's comment in its letter dated 16 September 1992 that the fence along the western boundary "should be relocated to conform with the plan attached to UDC's title", signified its demand that IHJL should revert to the title boundaries and thereby lose the benefit of the disputed land and its utility to the operations of the hotel. The requirement of unconscionability is now regarded, as it is put in Megarry & Wade (at para. 16-18), "as the essential element of proprietary estoppel". In my view, this requirement is also fully satisfied in this case, having regard to the long history of use by IHJL and its predecessors in title of the disputed land, the tacit as well as express assurances given to IHJL's predecessors in title in this regard over these many years and PSP's withdrawal of these assurances in 1992, by which time IHJL and its predecessors in title had cumulatively been in occupation of the disputed land for over 15 years.

[133] It accordingly seems to me that the elements of proprietary estoppel have been fully made out in this case. But that, of course, is not an end to the matter. For Mr Beswick submits that proprietary estoppel is a personal right and as such cannot be transferred to a third party. "Put another way", it was submitted in PSP's printed skeleton argument, "a proprietary estoppel cannot be sold, devised, leased, exchanged or otherwise transferred from one party to another". The point arises because of the fact that, under the reconstruction agreement which was effective 31 March 2000, IHL

transferred all its assets, including the hotel land and the intermediate strip to IHJL. Thus, the argument runs, any existing right by estoppel in favour of IHL at the time of the transfer did not pass to IHJL under this agreement and cannot therefore be relied on by it at this stage.

[134] In this regard, we were referred by Mr Scott to two Australian cases, the first of which is ***Hamilton v Geraghty*** (1901) 1 SR (NSW) Eq 81, a decision of the Supreme Court of New South Wales. In that case, the plaintiff's predecessor in title, one Connor, mistakenly believing the land to be his own, built on the defendant's land without any protest from the defendant, who was aware of the mistake. Connor assigned all his right, title and interest in the land to the plaintiff, the representative of the unpaid contractors who had erected the building at Connor's request, who now sued the defendant for a declaration that the land was chargeable with payment of certain moneys expended on and in connection with the said building.

[135] The Supreme Court held that Connor, under the principle of ***Ramsden v Dyson***, had acquired a right to an estate by estoppel against the defendant and that this right was assignable to the plaintiff, who was therefore entitled to the declaration which he sought. Owen J considered (at page 89) that "this was not a personal right to sue which could not be assigned, but an interest in the land itself created either by contract or by estoppel". Walker J, expressing himself perhaps a bit more conservatively, said this (at pages 90-91):

> "I can therefore only consider that – where a person lays out money on land in the mistaken belief that the land is his, and the owner with full knowledge of such mistaken belief stands by and allows him to do so – such conduct on the part of the owner has the effect of transferring an estate or interest in the land to the person making such expenditure. I do not, however, think that such estate would necessarily be one equal to the whole estate of the person so standing by; it would in my opinion be co-extensive with the amount of expenditure; that is to say, a charge or lien to that extent."

[136] The second Australian case, ***Young v Lalic*** (2006) NSWSC 18 (judgment delivered 10 February 2005), is also a decision of the Supreme Court of New South Wales. In that case, Brereton J at first instance, citing ***Hamilton v Geraghty***, said this (at para. [83]):

> "If a person has acquired an equitable interest by way of proprietary estoppel, that interest is itself capable of conveyance to a third party, and may be enforced by the third party against the original legal owner."

[137] The learned author of Cheshire and Burn's Modern Law of Real Property (15th edn) refers (at page 602) to ***Hamilton v Geraghty*** as having held that "the benefit of an estoppel based on passive acquiescence was assignable and in fact had been assigned". However, he observes, "there is no English authority on the transfer of the benefit of an estoppel licence" (a point which PSP readily embraces - see para. 87 of its skeleton argument).

[138] The view that the benefit of such an equity is assignable to a third party does in fact derive some support from the statement of Lord Denning MR in ***E.R. Investments***

Ltd v High (see para. [121] above) that the equity in that case "could only be satisfied by allowing the defendant **and his successors** to have access over the yard so long as the block of flats has its foundations in his land" (emphasis mine). However, Winn LJ, while concurring in the result, expressly reserved (at page 512) "[the] subsidiary but important question whether the defendant's claim, if valid, is only a personal right", considering that "[it] does not fall to be now decided". There are also other dicta which lend support to the view that an equity raised by a proprietary estoppel is a mere personal interest and as such not assignable (see, for example, ***Fryer v Brook*** [1984] L.S. Gaz. R. 2856, at para. 4.7.7, where Oliver LJ likened it to the personal right of occupation created by a statutory tenancy; ***Jones (AE) v Jones (FW)*** [1977] 1 WLR 438, 443, where Lord Denning MR held that the defendant had an "equity…of a possessory nature entitling him to remain in this house, but it would not…extend to the defendant's wife"; and ***Matharu v Matharu*** (1994) 68 P & CR 93, 98, per Dillon LJ).

[139] In an article entitled 'Estoppel interests in land', (1967) 31 Conv (NS) 332, 341, written after the decision in ***E.R. Investments Ltd v High***, Mr F R Crane observed that while "[l]ay and legal opinion alike would probably approve the decision in *Ives v High* and the earlier estoppel cases…[but]…estoppel interests in land do fall outside the 'necessarily tidy world of the conveyancer'…[which]…has to be tidy because in everyday practice clients expect their legal advisors to be able to tell just what rights over land they are getting, and to what rights they are entitled". (In ***Brikom Investments Ltd v Carr*** [1979] 1 QB 467, a landlord and tenant case in which a promissory estoppel was relied on, Lord Denning MR dismissed a similar point made in argument in

characteristically ringing language (at page 484): "I prefer to see that justice is done: and let the conveyancers look after themselves.") Mr Crane goes on to conclude with a rhetorical question:

> "Is it desirable or practicable to contrive a statutory jurisdiction so that an estoppel interest in land, as soon as established by the court, should simultaneously and if need be at the instance of the court be converted into a more regular interest in land?"

[140] Despite these reservations, Gray & Gray, commenting on the question whether the benefit of an inchoate equity can pass to a third party, observe as follows (at para. 9.2.90):

> "There remains some question whether the inchoate equity raised in circumstances of proprietary estoppel can be asserted, not by the party who originally relied on the relevant assurance, but by a successor in title. There have been isolated suggestions that the equity is merely a 'personal interest' vested in the original estoppel claimant himself and is neither shareable with nor transmissible to others. In view of the modern acceptance of the proprietary quality of inchoate equities, the preferable view is that the benefit of the equity is transferable to third parties, so that a successor in title is entitled to claim an inchoate 'equity' on the ground of an earlier assurance made to, and relied on by, his predecessor. This approach is consistent with the status attached to other 'equities' (such as the right to seek rectification or specific performance) and finds further support in the ancient law of estoppel."

[141] There can in my view be no doubt that, as Mr Beswick submitted, the cases of proprietary estoppel to which we were referred have tended to underscore the personal nature of the remedy. The consideration that, especially in a system of registered conveyancing, a court ought to be cautious in recognising interests that are capable of

subsisting outside of the register is one that has in particular given me pause. I have nevertheless come to the view, albeit with some diffidence, that IHJL, as IHL's successor in title to the hotel land pursuant to the reconstruction agreement, is entitled to the benefit of the equity created in IHL's favour by proprietary estoppel. Although there is, as Mr Beswick submitted, no English or Jamaican authority to support this conclusion, it does derive clear support from the Australian authorities to which I have referred and no reason has been advanced to suggest that it would be inappropriate to apply them in the circumstances of this case.

[142] The question which therefore next arises is what is the appropriate relief? On this point the authorities are clear that, once a proprietary estoppel has been established, it is for the court in each case to decide in what way the equity can be satisfied. In this regard, it seems to me that, in all the circumstances of this case, bearing in mind in particular the long history of undisturbed use and enjoyment by the operators of Hedonism II of the disputed land as part of the hotel land, the most appropriate and convenient way to satisfy IHJL's equity is, as was submitted by Mr Scott on its behalf, for the court to order a transfer of the land to it.

Conclusion

[143] In the result, IHJL succeeds, in my judgment, on all issues identified at para. [53] above as arising on this appeal. Save for the learned trial judge's order (numbered (3)) in favour of IHJL in respect of section one, which I would affirm, I would therefore allow the appeal and set aside the judgment dated 4 December 2008. I would accordingly make the declaration and orders sought by IHJL as follows:

(1) IHJL is entitled to possession and ownership of all those parcels of land being 351.06 and 194.38 square metres more or less (the disputed land), and being part of the lands comprised in Strata Plan No. 461 and part of the lands comprised in the Certificate of Title formerly registered at Volume 1217 Folio 223 (now registered at Volume 1238 Folios 4-263) of the Register Book of Titles, being the lands identified as Section 1 and Section 2 on the plan of The Point Village and Hedonism II Rutland Pen in the parish of Hanover prepared by Llewelyn Allen & Associates, Commissioned Land Surveyors from a survey done by them on 5 and 9 October and 9 November 2006.

(2) PSP is hereby ordered to execute forthwith a transfer of the disputed land to IHJL and to deliver up forthwith the relevant duplicate Certificates of Title to the Registrar of Titles for the purpose of transferring the disputed land to IHJL.

(3) Should PSP fail to execute the transfer as aforesaid, the Registrar of the Supreme Court is hereby authorised to execute the necessary transfer on PSP's behalf.

(4) Should PSP fail to deliver up forthwith the relevant duplicate Certificates of Title as aforesaid, the Registrar of Titles is hereby directed to cancel the said Certificates of Title and to issue a new title in the name of IHJL to the disputed land and another in the name of PSP for the other lands in the said Certificates of Title respectively.

(5) IHJL is to have its costs in this court and in the court below, such costs to be taxed if not sooner agreed.

HIBBERT JA (AG)

[144] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion.

PANTON P

ORDER

1. The appeal is allowed.

2. The judgment of Brooks J (as he then was) dated 4 December 2008, and set out at pages 497 and 498 of volume 1 of the record of appeal, is set aside in respect of paragraphs (1), (2) and (4) thereof.

3. It is hereby declared and ordered as follows:

    (i) IHJL is entitled to possession and ownership of all those parcels of land being 351.06 and 194.38 square metres more or less (the disputed land), and being part of the lands comprised in Strata Plan No. 461 and part of the lands comprised in the Certificate of Title formerly registered at Volume 1217 Folio 223 (now registered at Volume 1238 Folios 4-263) of the Register Book of Titles, being the lands identified as Section 1 and Section 2 on the plan of The Point

Village and Hedonism II Rutland Pen in the parish of Hanover prepared by Llewelyn Allen & Associates, Commissioned Land Surveyors from a survey done by them on 5 and 9 October and 9 November 2006.

(ii) PSP is hereby ordered to execute forthwith a transfer of the disputed land to IHJL and to deliver up forthwith the relevant duplicate Certificates of Title to the Registrar of Titles for the purpose of transferring the disputed land to IHJL.

(iii) Should PSP fail to execute the transfer as aforesaid, the Registrar of the Supreme Court is hereby authorised to execute the necessary transfer on PSP's behalf.

(iv) Should PSP fail to deliver up forthwith the relevant duplicate Certificates of Title as aforesaid, the Registrar of Titles is hereby directed to cancel the said Certificates of Title and to issue a new title in the name of IHJL to the disputed land and another in the name of PSP for the other lands in the said Certificates of Title respectively.

4. Costs in this court and in the court below to IHJL to be taxed if not agreed.