[2014] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 127/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**RECREATIONAL HOLDINGS (JAMAICA) LIMITED**	**APPELLANT**
AND	**CARL LAZARUS**	**1ST RESPONDENT**
AND	**THE REGISTRAR OF TITLES**	**2ND RESPONDENT**

Michael Hylton QC and Miss Shanique Scott instructed by Michael Hylton & Associates for the appellant

Allan Wood QC and Miguel Palmer instructed by Livingston, Alexander & Levy for the 1st respondent

Miss Alicia McIntosh instructed by the Director of State Proceedings for the 2nd respondent

1, 2 May 2013, 31 July and 30 September 2014

PANTON P

[1] I have read the reasons for judgment that have been written by my learned brother, Morrison JA, in support of our decision that the appeal should be disposed of in the manner set out at paragraph [2] below. I agree with these reasons and have nothing to add.

MORRISON JA

[2] On 31 July 2014, the court announced its decision in this appeal as follows:

1. The appeal is allowed in part. The declaration granted by the learned trial judge that the respondent has been in open and undisturbed possession of the lands registered at Volume 1204 Folio 806 of the Register Book of Titles in excess of 12 years and that the appellant's title to such lands has been extinguished pursuant to section 30 of the Limitation of Actions Act (see para. 1(ii) of the Formal Order filed on 20 September 2012) is set aside.

2. Save as above, the appeal is dismissed and the judgment of Anderson J and the orders made by him on 19 September 2012 are affirmed.

3. Written reasons for this decision will be given in due course, at which time the parties will be invited to address the court by way of written submissions on the costs of the appeal.

[3] These are my reasons for concurring in this decision.

The shape of the case

[4] This appeal is concerned with three properties registered under the provisions of the Registration of Titles Act ('the ROTA'). The first, known as Windsor Lodge, is a property owned by the appellant ('RHJL'), comprising some 338 acres, part of which lies in the parish of St Andrew and part in the parish of St Thomas. The second is a smaller parcel of land, owned by the respondent ('Mr Lazarus'), comprising approximately 27 acres in the parish of St Thomas ('the Lazarus property'). The third is an even smaller parcel of land, also owned by Mr Lazarus, comprising approximately five acres in the parish of St Thomas ('the second Lazarus property').

[5] The second Lazarus property is registered at Volume 1204 Folio 806 of the Register Book of Titles. While orders were originally sought from the court in the proceedings below in relation to this property, its status was resolved by the parties by agreement after the commencement of the litigation. So nothing turned on it at the end of the day. The parties are therefore agreed that the learned trial judge's order in respect of this property was erroneously made and must be set aside, whatever the outcome of the appeal. Save at the end of this judgment, therefore, nothing further needs be said about the second Lazarus property.

[6] RHJL's immediate predecessor in title to Windsor Lodge was Mr Clinton McGann. A certificate of title registered at Volume 1154 Folio 550 of the Register Book of Titles was issued by the 2nd respondent ('the registrar') on 11 April 1978. This certificate of title was cancelled by the registrar in 1986 and a new certificate of title registered at Volume 1294 Folio 10 was issued in its stead. In early 2011, RHJL purchased Windsor Lodge

from Mr McGann and, on 19 April 2011, due to the loss of the certificate of title registered at Volume 1294 Folio 10, a new certificate registered at Volume 1449 Folio 349 was issued in the name of RHJL.

[7] A certificate of title registered at Volume 1204 Folio 807 was issued to the Lazarus property in the name of Mr Lazarus on 20 March 1987. However, the evidence was that Mr Lazarus had actually been in possession of the property from 1985.

[8] Windsor Lodge and the Lazarus property adjoin each other. There is an area of approximately 8.92 acres of land ('the disputed property'), which is included in the certificates of title of both properties. This is therefore a case of dual registration. This situation gave rise to litigation between RHJL and Mr Lazarus and, by his judgment given on 19 September 2012, K Anderson J found that Mr Lazarus had been in open and undisturbed possession of the disputed property for over 12 years. On that basis, the learned judge accordingly granted the declarations sought by Mr Lazarus that he had acquired title to the disputed property by way of adverse possession.

[9] This is RHJL's appeal from K Anderson J's judgment. While there is no challenge to the judge's finding that, on the evidence, Mr Lazarus had been in actual possession of the disputed property for more than the requisite period, RHJL strongly disputes the judge's conclusion that RHJL's right to recover possession of the property was extinguished by the operation of sections 3 and 30 of the Limitation of Actions Act ('the LAA').

[10] The questions that arise on this appeal are therefore (a) whether Mr Lazarus, as the registered proprietor, had a lawful title to the disputed property and was therefore

precluded from succeeding on a claim for adverse possession ('the lawful title issue'); and (b) whether RHJL's right to recover the disputed property from Mr Lazarus will only be barred 12 years after the date of its acquisition of the disputed property in 2011 ('the reckoning of time issue').

The statutory framework

[11] It may first be helpful to consider the statutory provisions to which this appeal invites consideration. These are sections 68, 70, 71, 85-88 and 161 of the ROTA and sections 3 and 30 of the LAA.

ROTA

[12] Section 68 provides that a certificate of title issued under the Act shall –

> "…subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

[13] Section 70 provides that, except in case of fraud, the proprietor of any, estate or interest under the Act shall –

> "…hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong

> description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."

[14] Section 71 provides protection to persons contracting or dealing with the registered proprietor:

> "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[15] Section 85, which was introduced into the Act by way of amendment in 1967, provides for applications to register title acquired by possession of registered land:

> "Any person who claims that he has acquired a title by possession to land which is under the operation of this Act may apply to the Registrar to be registered as the proprietor of such land in fee simple or for such estate as such person may claim."

[16] Under section 87, if the various steps referred to in section 86 are successfully completed, the registrar will cancel or rectify any existing certificate of title to conform with the registration of title to the applicant and issue such new certificate of title as may have been approved by the Referee of Titles.

[17] At the outset of the hearing of the appeal, Mr Wood QC, who appeared for Mr Lazarus, successfully moved an application to adduce fresh evidence, in the form of the Hansard record of the debate in the House of Representatives and the Senate on 7 and 17 November 1967 respectively, concerning the promulgation of Act 25 of 1967 (The Registration of Titles (Amendment) Law), by which sections 85-87 were introduced into the ROTA. I will come back to this in due course.

[18] Section 88 provides for transfers of interests in registered land by an instrument in the statutory form and, importantly, states the consequence of the registration of a transfer:

> "The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B, or C in the Fourth Schedule hereto; and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the

> transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant."

[19] And lastly, section 161 provides that, with certain specified exceptions, the production of a certificate of title or lease to any land under the Act is a bar to an action against the registered proprietor for the recovery of such land:

> "No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say-
>
> (a) the case of a mortgagee as against a mortgagor in default;
>
> (b) the case of an annuitant as against a grantor in default;
>
> (c) the case of a lessor as against a lessee in default;
>
> (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud;
>
> (e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof *bona fide* for value;
>
> (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any

> case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,
>
> and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."

LAA

[20] Section 3 bars the right to recover land, either by entry or by action, after 12 years:

> "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 have not 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."

[21] The consequence of the expiry of the limitation period prescribed by section 3 is set out in section 30:

> "At the determination of the period limited by this Part to any person for making an entry, or bringing an 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."

What the judge decided

[22] There were two actions before the judge. The first in time was commenced by RHJL's fixed date claim form dated 5 September 2011 (Claim No 2011 HCV 05503), in which it sought orders (a) declaring that it is the fee simple owner and registered proprietor of the disputed property; (b) for recovery of possession of the disputed property from Mr Lazarus; and (c) that the Registrar cancel certificate of title registered at Volume 1204 Folio 807 and issue a new certificate of title to Mr Lazarus, excluding the disputed property.

[23] The second action was commenced by Mr Lazarus' amended claim form dated 15 September 2011 (Claim No 2011 HCV 05582), in which he sought, among other things, a declaration that he –

> "…has been in open and undisturbed possession of all the land registered at Volume 1204 Folio 807 of the Register Book of Titles [the Lazarus Property] in excess of twelve years and that [RHJL's] title to such land has been extinguished pursuant to section 30 of the [LAA]."

[24] Mr Lazarus also sought an order that RHJL deliver up the duplicate Certificate of Title registered at Volume 1449 Folio 349 to the Registrar for rectification by removing the disputed property from the land comprised in that title.

[25] Both Mr Lazarus and RHJL made applications for summary judgment in this action. These applications came on for hearing before K Anderson J, together with the final hearing of the fixed date claim form in RHJL's action, on 21 February 2012. The learned judge dismissed RHJL's fixed date claim form but granted Mr Lazarus'

application for summary judgment in the action brought by him. The court accordingly granted a declaration that –

> "…Mr. Carl Lazarus has been in open and undisturbed possession of all the land registered at Volume 1204 Folio 807 of the Register Book of Titles in excess of twelve years and that [RHJL's] title to such land registered at Volume 1449 Folio 349 of the Register Book of Titles has been extinguished pursuant to section 30 of the Limitation of Actions Act."

[26] In arriving at this conclusion, the learned judge reasoned as follows. RHJL's title to the disputed land, being first in time, is the title which ought, by virtue of section 70 of the ROTA, to be viewed "as the only valid title which exists in relation to the disputed property" (para. [49]). RHJL's title, having been obtained by purchase from Mr McGann, is therefore subject only to such rights to the land as may have been acquired subsequent to its first registration by virtue of the operation of the LAA and/or fraud. RHJL's title to the disputed land must therefore take priority over Mr Lazarus' title. Mr Lazarus did not therefore have lawful title to the disputed property and was accordingly in a position to seek to establish possessory title pursuant to the provisions of the LAA. Time begun to run against RHJL, as the lawful title holder, "when Mr Lazarus began to take action in relation to that land which clearly evinced an intention to exclusively possess and utilize the same" (para. [54]). That, on the evidence, was in 1985, since which time Mr Lazarus had remained in open and undisturbed possession of the disputed land, with the intention to possess same to the exclusion of others. Thus, by the time RHJL purchased Windsor Lodge in 2011, Mr McGann's title to the disputed property had already been extinguished in favour of Mr Lazarus.

The grounds of appeal

[27] In the two grounds of appeal which arise for consideration, RHJL contends that –

> "(a) The Learned Judge erred in law when he found that Carl Lazarus did not have a lawful title to the Disputed Property and could be in adverse possession of it, when at all material times he occupied the land pursuant to a registered title duly issued by the Registrar of Titles.
>
> (b) The Learned Judge erred in law when he found that Recreational Holdings (Jamaica) Limited's right to bring a claim against Carl Lazarus for recovery of possession of the Disputed Property had been extinguished pursuant to sections 3 and 30 of the Limitation of Actions Act and that Carl Lazarus was entitled to claim the property by adverse possession. The Learned Judge failed to appreciate that the statutory 12 year time period could only have started to run against Recreational Holdings (Jamaica) Limited when it became the registered proprietor of the property in 2011."

[28] On the first ground, Mr Hylton QC submitted that, because Mr Lazarus' possession was always based on his lawful title, he was never in adverse possession in relation to Mr McGann and no question of time running in his favour therefore arose. Mr Lazarus' status as registered proprietor was, it was submitted, in the absence of fraud, conclusive evidence of his ownership and the judge therefore erred in holding that he did not have lawful title.

[29] On the second ground, Mr Hylton submitted that the judge also erred in taking into account the period predating RHJL's ownership of Windsor Lodge in calculating whether Mr Lazarus was in possession of the disputed property for the requisite period of limitation. It was submitted that, where registered property which is in the possession of a squatter is transferred by the registered owner to a bona fide purchaser

for value, the 12 year time period begins to run anew from the date on which the property is registered in the name of the purchaser. In this case, Mr Lazarus would therefore have been required to show 12 years possession adverse to RHJL, which he obviously could not do. In any event, it was submitted further, a squatter in possession of registered land for the statutory period obtains an interest which is in the nature of an equitable interest only and, unless this interest is converted into a legal interest by way of the procedure set out in sections 85-87 of the ROTA, the squatter's equitable interest will be defeated by a transfer of the property to a purchaser who acquires the legal interest.

[30] Fully recognising that the decision of the Privy Council in **Chisholm v Hall** [1959] AC 719 might appear to be against him on this ground, Mr Hylton submitted that the views expressed by the Board in that case were either obiter or wrong.

[31] In response to Mr Hylton's submissions on the first ground, Mr Wood pointed out, firstly, that while Mr Lazarus' title was first issued in 1987, he had in fact been in possession of the Lazarus property from 1985. During that period, therefore, it was submitted, Mr Lazarus' possession was not referable to any title. But secondly, Mr Wood submitted, Mr Lazarus' title when issued in 1987 was always inferior and competing to Mr McGann's title, which was prior in time. So from 1985, it was submitted, Mr Lazarus was always subject to ejectment by Mr McGann, with the result that his possession was therefore always adverse. His title was accordingly not lawful in the sense in which that term is used in the authorities.

[32] On the second ground, Mr Wood observed that under section 70 of the ROTA certain unregistered rights, such as rights accruing under the statute of limitations, are expressly reserved and continued to operate on a registered title. This is confirmed, he submitted, by section 88, which makes it clear that a transfer of registered land cannot defeat the rights reserved by section 70. The decision in **Chisholm v Hall** to this effect was therefore correct.

[33] This position remains unaffected, Mr Wood submitted, by sections 85-87 of the ROTA, since they contain no provision stating that the consequence of a failure to utilise the procedure established by section 85 is to defeat a claim to title by adverse possession. Therefore, it was submitted, in the absence of express words qualifying the provisions in sections 68, 70 and 88, all that section 85 does is to provide a procedure, as an alternative to seeking a declaration from the court, for the recognition of a pre-existing right to title by adverse possession.

[34] The very helpful oral submissions of both counsel were supplemented by detailed written submissions and we were also referred to a number of authorities, to which I will come in due course.

The lawful title issue

[35] Mr Hylton took as his starting point the uncontroversial proposition, reiterated by Lord Rodger in an appeal from this court in **Pottinger v Raffone** (2007) 70 WIR 238 (para. [20]) that "…once a person is registered as proprietor of the land in question, his title is secure and indefeasible except in certain limited circumstances which are identified in the legislation". Accordingly, so the argument ran, Mr Lazarus as the

registered proprietor of the disputed property, was the holder of a 'lawful title', and was as such disentitled from making a claim for adverse possession.

[36] As an example of this principle in action, we were referred to the decision of this court in **Farrington v Bush** (1974) 12 JLR 1492. In that case, the period over which the appellant claimed to be in possession of the land in question included a period during which he had for a time alleged that he was in possession under a good title to the fee simple. However, it was subsequently conceded at trial that the conveyance on which he relied was invalid and he thereafter sought to resist the respondent's claim for possession on the ground that he had acquired title to the land by adverse possession. After observing (at page 1493) that the possession required to ground a claim for adverse possession "must be possession of such a nature as to amount to an ouster of the original owner of the land", Graham-Perkins JA (who delivered the judgment of the court) said this (at page 1494):

> "…we are constrained to observe that the appellant's claim to a possessory title is perhaps a little less than fanciful when looked at on the background of an alleged purchase of the land by him in 1952. He insisted on the validity of this transaction up to April 1971 when he filed and served a notice of a number of special defences, all of which were subsequently withdrawn. The fact that the special defence relating to registration was withdrawn is really nothing to the point. What is clear is that from 1952 to April 1971 the appellant was maintaining that there was vested in him a perfectly good title to the fee simple by virtue of the conveyance to him in 1952. How then could he claim to have acquired a title by adverse possession? These irrevocably inconsistent positions could not possibly have escaped the notice of the learned judge of the Grand Court. He would have noted the absence in the appellant of that mental element so essential to the concept of adverse possession.

> On the hypothesis that the appellant was found to be in possession the trial judge would have recognized that such possession, far from being adverse, to anyone, would have been enjoyed by the appellant in his own right *qua* owner. Indeed all the other acts on which the appellant relied would equally have been done *qua* owner and not with the intention of excluding the possession of the respondent".

[37] With respect, I doubt very much that these statements represent the modern law of adverse possession. For, in **JA Pye (Oxford) Ltd and Another v Graham and Another** [2002] 3 All ER 865 (a decision which was explicitly approved and applied by the Privy Council in an appeal from this court in **Wills v Wills** (2003) 64 WIR 176), the House of Lords held that the two elements necessary to establish possession for these purposes are "(1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess')" (per Lord Browne-Wilkinson, at page 876). As Lord Hope observed (at page 886), "…it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor…[t]he only intention which has to be demonstrated is an intention to occupy and use the land as one's own". (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".)

[38] So there was, in my view, no necessary inconsistency in the position of the appellant in **Farrington v Bush** that he had acquired the land by way of a valid conveyance and his later assertion that he was entitled to it by adverse possession. I cannot therefore regard this case as giving any support to the appellant's contention that, as the holder of a legal title to the disputed land, Mr Lazarus could not rely on the principle of adverse possession.

[39] More to the point, perhaps, is the following well-known statement of Slade LJ, delivering the principal judgment of the English Court of Appeal in **Buckinghamshire County Council v Moran** [1989] 2 All ER 225, 232-233:

> "Possession is never 'adverse'…if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in 'adverse possession' as against the owner of the paper title."

[40] To similar effect is Lord Millett's observation (delivering the judgment of the Privy Council in an appeal from the Court of Appeal of Trinidad & Tobago) in **Ramnarace v Lutchman** (2001) 59 WIR 511 (para. [10]):

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title, or with the consent of the true owner."

[41] Not unexpectedly, Mr Hylton placed great reliance on both these statements. But, Mr Wood submitted, it is important to appreciate that the reference to a person with

'lawful title' in these and other cases is to "a person whose claim to occupation is by virtue of or derived from the title of the true owner who he claims to have dispossessed". In support of this submission, we were referred by Mr Wood to some of the older cases, a few of which I will mention.

[42] In **Doe d Milner v Brightwen** (1809) 10 East 583, a widower took possession of copyhold land after his wife's death and held it for more than 20 years. It was later found that there was an old custom of the manor by which he had a right to 'curtesy', that is, a widower's right to a life interest in his wife's land. It was held that the widower, "…having such good title to the possession as tenant by the curtesy, his possession by the copyhold after his wife's death will be referred to that, and not to any adverse title".

[43] Next, in **Thomas v Thomas** (1855) 69 ER 701, a father entered into possession of lands to which their infant children had become entitled upon the death of his wife. In reliance on **Doe d Milner v Brightwen**, Sir W. Page Wood V-C, after stating the principle (at page 703), that "possession is never adverse if it can be referred to a lawful title", said that "prima facie, unless there were strong evidence to the contrary, his entry must be taken to be on behalf of his infant children and as their natural guardian". Accordingly, the statute of limitations did not begin to run against the children until they attained the age of 21.

[44] Then there is **Corea v Appuhamy and Another** [1912] AC 230, a decision of the Privy Council (on appeal from Ceylon) in which **Thomas v Thomas** was applied. In that case, one of four tenants in common by descent entered into possession of

property to which all four were entitled on an intestacy. The issue was whether in these circumstances he could claim adverse and independent title to the property as against the other three tenants in common. It was held that he could not, Lord Macnaghten saying (at page 236) that -

> "His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood V.-C. in *Thomas v Thomas* holds good: 'Possession is never considered adverse if it can be referred to a lawful title'."

[45] As a footnote to **Corea v Appuhamy and another**, however, I would add that it is important to note that this case was decided under the law of Ceylon as it then stood, which was that the possession of one co-proprietor was the possession of the others (see Lord MacNaghten's judgment at page 236). This was indeed the position at common law, but it was reversed in England by section 12 of the Real Property Limitation Act, 1833 and in Jamaica by section 14 of the LAA. The modern position is therefore that the possession of one co-proprietor is not deemed to be the possession of the others, with the result that one co-proprietor can in a proper case establish a claim for adverse possession against the others (see **Paradise Beach & Transportation Co Ltd v Price-Robinson** [1968] AC 1072 and **Wills v Wills**). I will come back to this point in due course (see para [59] below.)

[46] To this trio of cases cited by Mr Wood, I would add **Moses v Lovegrove** [1952] 2 QB 533, in which Romer LJ said (at page 544) that –

> "… if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings."

[47] Against the backdrop provided by these cases, I come back now to the authoritative dicta of Slade LJ and Lord Millett in **Buckinghamshire County Council v Moran** and **Ramnarace v Lutchman** respectively, upon which Mr Hylton relied. But first, to provide further context, I will give a brief account of the facts of each case.

[48] In **Buckinghamshire County Council v Moran**, the plaintiff council had in 1955 acquired a plot of land adjacent to some houses, with a view to carrying out a road diversion at some time in the future. The plot adjoined the garden of a house owned by the defendant's predecessors in title and, although the council fenced the roadside boundary of the plot, there was no fence between the plot and the garden of the house. Over time the defendant's predecessors in title maintained the plot and treated it as part of their garden. The only access to the plot was in fact through the garden. In 1971, the defendant purchased the house and continued to maintain the plot as part of his garden. Despite correspondence between the defendant and the council, the latter made no attempt to assert physical ownership of the plot until late in 1985, when it issued a writ claiming possession of the plot. In response, the defendant pleaded the Limitation Act, claiming that he and his predecessors in title had been in adverse possession of the plot for more than 12 years. The plea succeeded on the basis that the defendant had acquired complete and exclusive physical control of the plot for a period in excess of the statutory period of limitation, with "…an intention *for the time*

being to possess the land to the exclusion of all other persons, including the owner with the paper title" (per Slade LJ, at page 238).

[49] The decision may therefore be seen as a precursor to **JA Pye (Oxford) Ltd and another v Graham and another**, in which Slade LJ's judgment was expressly approved (at page 877). But what is important for present purposes is the context in which Slade LJ restated the proposition upon which Mr Hylton relied. In answer to what he identified as the crucial question (that is, whether the defendant was in adverse possession of the plot for more than 12 years before the writ was filed), Slade LJ said that "[p]ossession is never 'adverse'…if it is enjoyed under a lawful title", adding that possession pursuant to a subsisting licence from the owner with the paper title cannot be adverse. The learned judge then went on to mention the supposed doctrine that, in certain types of case, there would be an implied licence in favour of the would-be adverse possessor, which would prevent his possession being adverse. However, Slade LJ observed, quite apart from the fact that the so-called doctrine had been abolished by the Limitation Act 1980 (para 8(4) of Sch 1), it was in any event difficult to justify in principle, given the ordinary meaning of the words "possession" and "dispossession" (see per Slade LJ at page 233; and see **JA Pye (Oxford) Ltd and another v Graham and another**, page 874, where Lord Browne-Wilkinson endorsed these reservations). So the suggestion that the defendant may have had an implied licence (i.e., a lawful title to the plot) from the council was dispensed with on that basis.

[50] In **Ramnarace v Lutchman**, the appellant's claim by adverse possession to land upon which she had been given permission to live by her uncle and aunt, with a

view to her buying the property when she could afford to do so, succeeded because, on the evidence which the trial judge accepted, her exclusive possession of the property "was attributable, not merely to her uncle's generosity, but to the parties' intention that she should purchase the land in due course" (per Lord Millett at para. [20]). Having therefore entered into possession of the disputed land as an intending purchaser and tenant at will, her tenancy automatically came to an end by operation of the relevant limitation statute after a year and her possession thereafter was no longer "by a lawful title or with the consent of the true owner", but was in fact adverse to the true owner.

[51] Lord Millett's statement in **Ramnarace v Lutchman** was referred to with approval by Lord Walker, giving the decision of the Privy Council in **Clarke v Swaby** [2007] UKPC 1. In that case, however, the appellant's claim for adverse possession failed because his occupation of the property had been as licensee. This is how Lord Walker explained the outcome (at para. 11):

> "After Mr Swaby had taken proceedings for possession of the property Mr Clarke gave notice of a special defence under section 3 of the Limitation of Actions Act 1881 (as amended), which prescribes for proceedings to recover land a limitation period of twelve years 'next after the right...to bring such action or suit, shall have first accrued to the person...bringing the same.' Section 4 of the Act explains when the claimant's cause of action arises…However it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim: see the opinion of the Board in *Wills v Wills* [2003] UKPC 84, citing the Board's earlier opinion (delivered by Lord Millett) in *Ramnarace v Lutchman* [2001] 1 WLR 1651, 1654:

> 'Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner.'
>
> That was an appeal from Trinidad and Tobago but the relevant legislation was in substantially similar terms."

[52] And finally among the judicial statements on this point, I should add Lord Walker's characterisation of the kind of possession which can support a claim for adverse possession (in **Wills v Wills**, at para. [17]) as "…possession which is not by licence and is not referable to some other title or right".

[53] Turning now to the textbooks, in the work, Adverse Possession, by Stephen Jourdan QC and Oliver Radley-Gardner (2nd edn), to which we were also referred by Mr Wood, the learned authors preface their discussion of the cases with the comment (at para. 6-16) that, generally speaking, "lawful possession is not adverse". To this they add that "…possession by a squatter is only adverse if the owner is entitled to recover possession against the squatter". Not dissimilarly, in The Law of Real Property, 7th edn, Megarry & Wade define adverse possession (at para. 35-16, citing, among other cases, **Ramnarace v Lutchman**) as "possession inconsistent with and in denial of the title of the true owner, and not, e.g., possession under a licence from him or under some contract or trust". And, in Elements of Land Law (5th edn), under the rubric "Adverse possession cannot be consensual", Grey & Grey say this (at para. 9.1.46):

> "The adverse quality of a claimant's possession is more generally negatived by any consent by the paper owner to the claimant's presence on the land. Thus possession is never 'adverse' if enjoyed under a lawful title or by the leave

> or licence of the paper owner. For example, the presence of a landlord-tenant relationship between the paper owner and the occupier is plainly inconsistent with a claim of adverse possession. Nor can adverse possession stem from other forms of mandate or permission given by the paper owner. Thus no adverse possession arises on the basis of occupation which is exercised at the request of or with the consent of the paper owner."

[54] In a footnote to this passage (on page 1181), after referring to **Buckinghamshire County Council v Moran** and **Ramnarace v Lutchman,** Grey & Grey go on to add a further comment (based on the judgment of Schiemann LJ in **Rhondda Cynon Taff County Borough Council v Watkins** [2003] 1 WLR 1864, para. [25]):

> "A squatter's possession is not prevented from being adverse merely because the squatter happens, for unconnected reasons, to have some lawful title. Possession ceases to be adverse only if it is possession *under* that lawful title."

[55] All these formulations of the principle suggest, it seems to me, that, generally speaking, the notion of possession under a 'lawful title' by a squatter is, as Mr Wood submitted, referable to possession by virtue of the leave, licence or consent of the paper title owner. In my view, even if it is not possible to explain all the cases in this way (in **Doe d Milner v Brightwen**, for instance, the widower's possession was probably neither by leave nor licence, though it was clearly by virtue of what Lord Walker described in **Wills v Wills** as "some other title or right"), they all support the proposition advanced by Mr Wood in his skeleton argument (at para. 25) that "adverse possession cannot be claimed by a person whose possession was obtained and

continued by virtue of the consent, grant or otherwise from the true owner whom he claims to have dispossessed". The important factor on all the authorities is that the squatter's possession, in order to ground a claim for adverse possession, must be (i) inconsistent with and in denial of the title of the true owner; and (ii) such that the owner is entitled to recover possession against the squatter.

[56] Returning now to the facts of this case, there can be no doubt that Mr Lazarus' title was in one sense of the phrase (which is clearly the sense on which Mr Hylton relies) a 'lawful title': it was a title duly issued by the registrar under the authority of the ROTA and, as such, it was entitled to the security and cloak of indefeasibility guaranteed by the Act to such a title. But, as section 70 itself makes clear, even such a title is subject to "the estate or interest of a proprietor claiming the same land under a prior registered certificate of title". This in turn provides one of the only six situations listed in section 161 (a)-(f) in which, as Lord Rodger put it in **Pottinger v Raffone** (at para. [20]), "a certificate of title is not a complete bar to proceedings". Specifically, section 161 (f) permits such an action in "the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land".

[57] As has been seen, Mr McGann's certificate of title to Windsor Lodge was issued on 11 April 1978. Mr Lazarus, having gone into possession of the Lazarus property in 1985, was registered as proprietor on 20 March 1987. Mr McGann's registration as

proprietor of Windsor Lodge therefore predated Mr Lazarus' registration as proprietor of the Lazarus property by several years. The disputed property was included in both titles. Accordingly, from (at latest) the date of the issue to Mr Lazarus of the certificate of title to the Lazarus property, he was vulnerable to a claim for recovery of the disputed property by Mr McGann, as the registered proprietor of the same land under a prior - and therefore superior – certificate of title. In a word, Mr Lazarus' possession of the disputed property was always adverse to Mr McGann's title.

[58] Anderson J found that in these circumstances Mr Lazarus did not have 'lawful title' to the disputed property, in the sense connoted by the authorities, and I think he was right to do so. The important consideration in this case, it seems to me, is not so much the formal provenance of Mr Lazarus' certificate of title, the aspect upon which Mr Hylton placed full reliance, but the fact that Mr Lazarus' possession of the disputed property was without leave or licence from Mr McGann.

[59] I would add parenthetically that, if Mr Hylton's submission on this point were correct, neither **Paradise Beach & Transportation Co Ltd v Price-Robinson** nor **Wills v Wills** could have been decided in the way they were. For, in each of these cases, it was held by the Privy Council that a co-proprietor, who would undoubtedly have entered into possession of the land in question under a 'lawful title' in the formal sense contended for by Mr Hylton, was capable of sustaining a claim of adverse possession against another co-proprietor. In fact, as the reports of both cases confirm, the 'lawful title' issue did not arise in either of them.

[60] By the end of March 1999, therefore, Mr Lazarus had been in adverse possession (as the judge found) of the disputed property for more than the 12 year period limited by section 3 of the LAA. Accordingly, no action having been taken by Mr McGann to recover it from Mr Lazarus within that period, I have come to the clear conclusion (though naturally subject to the discussion on the second issue in the appeal which follows) that Mr McGann's title to the disputed property was extinguished by the operation of section 30.

The reckoning of time issue

[61] Mr Hylton's submissions on this issue, which was not argued before the learned trial judge, bring fully into focus the decision of the Privy Council in **Chisholm v Hall**, an appeal from this court. It is therefore necessary to consider that case in some detail. But before doing so, I should mention **Goodison v Williams** (1931) Clark's Reps. 349, which was an earlier decision of this court on the very issue which arises for decision in this case. That was a case in which, after a title by 12 years' possession of registered land had been acquired by another person, the registered proprietor transferred the land and a new certificate was issued to the transferee pursuant to what is now section 88 of the ROTA. By a majority decision, it was held that the issue of the new certificate to the transferee had the effect of defeating the title already acquired by limitation. **Goodison v Williams**, if it is still good law, therefore provides direct support for the contention of RHJL on this issue.

[62] So I come now to **Chisholm v Hall**, in which the appellant and the respondent were the registered proprietors of contiguous plots of land on King Street, Kingston.

Then, as now, King Street ran from north to south and these plots were known respectively as number 105, which lay to the north (the appellant's plot), and number 103, which lay to the south (the respondent's plot). The first certificate of title to number 105 was issued to the appellant's predecessor in title in 1928 and the appellant was registered as proprietor of that plot on 16 April 1928. The first certificate of title to number 103 was issued to the respondent's predecessor in title in 1901 and the respondent was registered as proprietor of this plot in 1941, having bought it from the Administrator General as legal personal representative of the respondent's predecessor in title who had died in 1918. The Administrator General as legal personal representative obtained the registration of himself as proprietor and had had issued to him a new certificate of title in 1919, when the certificate issued to the original owner in 1901 was cancelled. The Administrator General subsequently lost the certificate issued to him in 1919 and, in 1941, obtained the issue to himself of a new certificate.

[63] The dispute between the parties concerned the proper position of the boundary, which ran from east to west, between the two plots. At the time of the action (which was brought in 1951), there was in existence a physical boundary, which the appellant contended was rightly placed. The respondent, on the other hand, maintained that the physical boundary was placed a matter of 7 feet too far south and that there had to that extent been an unwarranted encroachment of number 105 on number 103. The area in dispute was thus a strip of land ('the disputed strip') immediately north of the physical boundary between the plots, some 7 feet in width from north to south and coextensive with the length of the two properties from east to west. The issues in the

case were (i) whether the disputed strip was part of the land comprised in the certificate of title to number 105 (the appellant's land) or number 103 (the respondent's land); and (ii) in the event of the first question being decided in favour of the respondent, whether his registered title had by the time the action was brought been defeated by the operation of the LAA.

[64] The trial judge decided the first issue in favour of the appellant and accordingly found it unnecessary to decide the second. The Court of Appeal decided both issues in favour of the respondent, holding on the first that the disputed strip fell within the certificate of title to number 103 and, on the second, that it was bound by its previous decision in **Goodison v Williams** to hold that the issue of a new certificate of title in 1941 to the Administrator General, the respondent's predecessor in title, had the effect of defeating the title by limitation acquired by the appellant. The Privy Council held that the Court of Appeal was correct on the first issue (that is, that the disputed strip was included in the certificate of title to number 103), but wrong on the second issue: by the time the action was brought in 1951, the respondent's title to the disputed strip had been defeated by the operation of the LAA in favour of the appellant, who had been in continuous possession of it from the date of his purchase in 1928. Further, the issue of a new certificate of title in 1941 to the Administrator General, the respondent's predecessor in title, did not have the effect of defeating the title by limitation to the disputed strip which the appellant had already acquired, the new title having been merely a substitute for the lost one. And further still, that **Goodison v Williams** was wrongly decided and should be regarded as overruled.

[65] In coming to this conclusion, the Board was explicitly concerned to reconcile sections 67 and 69 of the ROTA, the exact equivalents of which are now numbered sections 68 and 70 (which, for ease of understanding, is the numbering I will use). Thus, reading the two sections together, Lord Jenkins considered (at page 738) that section 68 must be read as if it was followed by a proviso, "to the effect that the land described in the certificate is to be deemed to be subject to any rights acquired over it since first registration under any statute of limitations, notwithstanding that they are not notified as incumbrances in the certificate". Then, describing the scheme of section 70 as "reasonably plain", Lord Jenkins went on to add this (at page 739-740):

> "The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient, protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers section [88], which provides that the transferee shall be 'subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor.' This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor; and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the 'deeming' provision of section [70] is applicable.

> The combined effect their Lordships would attribute to sections [68] and [70] may perhaps be criticised as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than 12 years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the Law of preserving rights acquired by limitation notwithstanding that they are not noted in the register."

[66] On the face of it, therefore, **Chisholm v Hall** is clear authority for the proposition that rights acquired by limitation in respect of registered land rank as if they are incumbrances noted in the certificate; and that a purchaser of registered land, such as RHJL, therefore takes a transfer of the property subject to such rights. Mr Hylton's contention that Lord Jenkins' statements in **Chisholm v Hall** as to the effect of sections 68 and 70 were obiter is based on the fact that the narrow issue in the case was whether the issue of the new title to the Administrator General in place of the one that had been lost destroyed any rights which had accrued before it was issued. That may well have been so, but, in my view, that issue clearly begged the wider question, as the summary of the argument before the Board amply demonstrates (see pages 723-730 of the report of the case). The issues squarely placed before the Board by counsel on both sides, leading and junior, were (i) whether, in the light of the provisions of sections 68 and 70, a purchaser of land from a registered proprietor was bound by any adverse interests that may have accrued against his predecessor in title by limitation; and (ii) by extension, whether the decision of this court in **Goodison v Williams** that he was not so bound was correct. In these circumstances, I find it impossible to treat

the considered pronouncements of the Board on these issues as anything less than authoritative.

[67] I would only add that, even if I did not consider the matter to be completely covered by authority, I would find it equally impossible to come to any other conclusion, given the combination of (i) the proviso to section 70, which makes it plain that land included in any certificate of title shall be deemed to be subject to any rights acquired over the land by limitation since first registration; and (ii) section 88, which provides that a transferee of registered land takes subject to all liabilities to which the transferor was subject. In my view, these provisions clearly evince what Lord Jenkins described in the passage quoted above (at para. [60]) as "the policy adopted by the Law of preserving rights acquired by limitation notwithstanding that they are not noted in the register".

[68] In this regard, nothing turns, in my view, on section 71, which does not mention the issue of limitation at all. That section, as Wright J (as he then was) observed in **Lynch & Lynch v Ennevor & Jackson** (1982) 19 JLR 161, 174, "exempts a person, except in the case of fraud, from tracing the root of title of any registered land with which he proposes to deal". Such a person is therefore, fraud apart, (i) relieved of the necessity to enquire or ascertain the circumstances in which the proprietor or any previous proprietor came to be registered; (ii) not required to see to the application of any purchase or consideration money; and (iii) not affected by notice, actual or constructive, of "any trust or unregistered interest". As Mr Wood submitted, I think correctly, it is necessary to read section 71 in context and in the light of other

provisions of the Act, particularly the immediately preceding section 70. The proviso to section 70 makes it clear that, notwithstanding the general primacy of the register as the source of rights affecting registered land, certain unregistered rights, such as those arising under the LAA, can continue to operate on a registered title.

[69] Mr Hylton also referred us to the decision of the Privy Council on appeal from the Court of Appeal of Belize in **Quinto and Another v Santiago Castillo Ltd** [2009] UKPC 15, to make the point made by Lord Phillips (at para. 4) as regards the normal expectations of the Torrens system of land registration upon which the ROTA is based:

> "Under the Torrens system registration confers title on the registered proprietor. A merit of the system is that a purchaser from the registered proprietor does not normally need to look further than the register for reassurance that the vendor has good title."

[70] But, despite the unquestionable general validity of this statement, Lord Phillips went on to restate (at para. 39) the importance of having regard to the particular manner in which the legislature in each jurisdiction has elected "to balance the desirability of a simple system of land transfer with the interests of justice". In other words, the terms of the legislation that embodies the Torrens system in each jurisdiction must prevail over *a priori* generalisations as to what such a system strives to achieve, even where the former appears to be in conflict with the latter. Thus, in that case, the Board gave effect to what it took to be the clear language of the Registered Land Act of Belize, despite its recognition of the fact that the interpretation which it applied on an issue of rectification, in preference to the one chosen by the Court of

Appeal, "significantly diminishes the element of indefeasibility of registered title that is a feature of the Torrens system".

[71] And in **Chisholm v Hall** itself, making a not dissimilar point, Lord Jenkins had remarked at the outset (at page 733) that, although the ROTA "…is one of many enactments for the registration of titles in force in this country and in various parts of the Commonwealth and Empire…these enactments are by no means uniform in their terms, and it was agreed in the course of the argument that no useful purpose would be served by comparing other enactments with the [ROTA]…"

[72] In the light of these statements, therefore, I do not think that there is any reason to regard **Chisholm v Hall** as qualified in any way by general considerations as to the principle of indefeasibility of title, given the clear intention of the legislature to make registered title subject to the operation of the LAA.

[73] As an example of **Chisholm v Hall** in action, we were referred by Mr Wood to **Miller v Bolton et al** (Suit No C.L. 1998/M137, judgment delivered 24 March 2001), a decision of Harris J (as she then was) at first instance on an application for an interlocutory injunction. Commenting on the case of the plaintiffs, who were purchasers of registered land, the learned judge observed (at page 6) that, more than 12 years having elapsed since the first registration of the title, "[i]t will be incumbent on them to show that they had gone behind the Register Book of Titles to ensure that no adverse interest by limitation had been acquired".

[74] But Mr Hylton also referred us to the subsequent decision, also at first instance, of Mangatal J (as she then was) in **Violet McFarlane et al v John Eugster and**

Another (Claim No HCV 0144/2003, judgment delivered 28 January 2011). That was a case in which several persons claimed to have acquired rights by adverse possession in registered land. The defendants were registered as proprietors in 2002 and the main issue in the case was whether the claimants were entitled to rely in calculating the 12 year limitation period on periods of adverse possession against the defendants' predecessor in title. In other words, the defendants made the identical point which RHJL advances on this issue.

[75] The learned judge held that the claims could not succeed. The judge first pointed out that section 85 provided a procedure for any person claiming to have acquired title by possession to apply for and obtain a registered title, and observed that the claimants had made no application under the section. The judge next referred to sections 70 and 71, the combined effect of which, she observed (at para. 16), "is that the certificate of title is conclusive evidence of [the registered proprietor's] proprietorship of the land in question". Therefore, the learned judge concluded (at para. 27), the claimants not having applied for and become registered as proprietors before the defendants became the registered proprietors in 2002, their claim failed, because they could not establish possession against the defendants for the requisite 12 year period. In essence, therefore, the registration of the defendants as proprietors in 2002 defeated any prior right by limitation that may have accrued to the claimants against their predecessors in title.

[76] In coming to this conclusion, the learned judge found support, albeit by implication, in **Clarke v Swaby**, to which I have already referred in another context

(see para. [51] above). The respondent in that case ('Mr Swaby') was the executor of the estate of his aunt (a Mrs Watt), who had been registered as proprietor of the property in question in 1968 and who died in 1981. Mr Swaby himself was registered as proprietor in 1993. The single issue in the case was whether the appellant ('Mr Clarke'), who had lived on the property for many years and who set up a limitation defence to Mr Swaby's claim to recover possession, had been in occupation of the property as licensee. Both this court and the Board decided this issue against Mr Clarke and nothing turns on this aspect of the matter for present purposes. But in the course of his judgment on behalf of the Board, Lord Walker detected an error on this court's part (at para. 15):

> "In considering the new argument on adverse possession, Panton JA seems to have thought that time could not start running against Mr Swaby until he became registered proprietor in 1993. That was in their Lordships' view an error, since from 1983 Mr Swaby (as the executor of Mrs Watt and as beneficial owner of the property) had been in a position to give notice to quit to Mr Clarke, and the formality of registration did not start time running again."

[77] Mangatal J commented on this statement as follows (at para. 24):

> "The obvious implication seems to me to be that had Swaby been registered as proprietor in 1991, without any other prior connection as executor or beneficiary, irrespective of whatever length of time had already run in Clarke's favour against the Aunt and her estate, time would have begun to run again from the date of Swaby's registration as the proprietor in counting the twelve year period. The Privy Council in my judgment have helped to make it crystal clear that only a time period of adverse possession subsequent to a particular registration can be counted against that particular registered proprietor. Such a person has a right to

> make entry and to give Notice to Quit in his own right, and is not a person making a claim through the previous registered proprietor. This is because of the paramountcy of registration accorded by the Torrens Title system and the scheme established by our Registration of Titles Act."

[78] In my respectful view, it is impossible to discern any such far-reaching implication in Lord Walker's seemingly innocuous observation, which had nothing to do with the only issue in the case, which was whether Mr Clarke's possession was by licence. For, if Lord Walker were to be taken to have intended to make the point which Mangatal J found it possible to deduce from his observation, the Board would have firstly, by a bye-blow, so to speak, effectively nullified the proviso to section 70 of the ROTA; and secondly, by an *obiter dictum* in a case in which the issue simply did not arise, swept away and overruled its own previous decision (of long standing) in **Chisholm v Hall**.

[79] Both the clear language of the proviso to section 70 and **Chisholm v Hall** suggest to me that, naturally subject to proof, the claimants in **Violet McFarlane et al v John Eugster and Another** were entitled to rely for limitation purposes on periods of possession predating the defendants' registration as proprietors. However, the learned judge made no reference to **Chisholm v Hall** (to which she was obviously not referred) and, although she quoted the main part of section 70, she did not mention the proviso. In these circumstances, I cannot but conclude, naturally with the greatest of respect, that the decision in **Violet McFarlane et al v John Eugster and Another** was, as Mr Wood submitted, *per incuriam*.

[80] Mangatal J subsequently revisited the point, albeit in lesser detail (and less definitively), in **Ralph Williams and others v The Commissioner of Lands and**

another [2012] JMSC Civ 118, a decision on an application for an interim injunction until trial, in which the issue of the impact of the LAA on a registered title also arose. In concluding that the **American Cyanamid** test for the grant of an interim injunction (**American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504) had been satisfied, the learned judge identified three serious issues to be tried (at para. [38]):

> "…whether (a) a registered title is extinguished on the expiry of the relevant limitation period; (b) whether a person who claims to have acquired title by possession during the time when another person was the registered owner can now maintain that claim against a new registered owner to whom the registered land has been transferred and in respect of whose own period of being registered as owner the limitation period has not run anew; (c) Can a claim to adverse possession/title by possession in those circumstances be maintained where the claimant has not applied to become the registered proprietor pursuant to section 85 of the [ROTA], or has not sought and obtained from the court a declaration of entitlement prior to the successor of the person 'dispossessed' becoming registered as owner, or has not lodged a caveat in protection of his interest?"

[81] As I have already sought to demonstrate, both the first and second questions posed by Mangatal J in the passage quoted above are, in my view, answered (in the affirmative) by the combined effect of sections 30 and 70 of the LAA and the ROTA respectively, as elucidated by the Board in **Chisholm v Hall** (to which the judge was referred on this occasion). But it is still necessary to consider the learned judge's third question (which, as has been seen, she had in fact answered in the negative in her earlier decision in **Violet McFarlane et al v John Eugster and Another**), which invites consideration of the meaning and effect of sections 85-87 of the ROTA. Although

the learned judge did not put it quite this way, Mr Hylton's submission was, it will be recalled, that a squatter in possession of registered land for the statutory period obtains an equitable interest only and that if this interest is not converted into a legal interest by way of the procedure set out in sections 85-87, it will be defeated by a transfer of the property to a bona fide purchaser for value of the legal interest.

[82] In my respectful view, both Mangatal J's ruling in **Violet McFarlane et al v John Eugster and Another** and Mr Hylton's submission on this point are unsustainable, for at least two reasons. In the first place, section 30 of the LAA provides that, upon the expiry of the 12 year limitation period, the title of the owner "shall be extinguished". As Cozens-Hardy MR stated in **In re Atkinson and Horsell's Contract** [1912] 2 Ch D 1, 9 (discussing the impact of section 34 of the Real Property Limitation Act 1833, the statutory precursor to section 30 of the LAA), "…that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives". It is clear that this position is unaffected by the ROTA, since, although section 2 of that Act repeals all laws and practice inconsistent with its provisions, as has been seen, section 70 makes registered title expressly subject to rights acquired "under any statute of limitations". It seems to me that it is also important to bear in mind that the LAA was enacted by the legislature a mere eight years before the ROTA. In these circumstances, I simply cannot regard the express and clear reservation (in section 70 of the latter Act) of rights acquired by limitation (under sections 3 and 30 of the former) as either inadvertent or irrelevant.

[83] It goes without saying, I think, that this position is equally unaffected by section 75(1) of the English Land Registration Act, 1925, under which the registered proprietor's title was no longer extinguished after time had run, but was held in trust for the person who, if the land were not unregistered, would have acquired a title by adverse possession: as Mangatal J recognised in para. 26 of her judgment in **Violet McFarlane et al v John Eugster and Another**, this is not the law in Jamaica.

[84] And, although the point now under discussion was not directly in issue in the case, the illuminating judgment of Harris JA in **Broadie & Broadie v Allen** (RMCA No 10/2008, judgment delivered 3 April 2009), a case concerning registered land, may also be relevant. That was a case in which the learned judge considered the meaning of sections 3 and 30 of the LAA in the light of the guidance given by the House of Lords in **JA Pye (Oxford) Ltd and another v Graham and another** and by the Privy Council in **Wills v Wills**. Having found that the appellants were in possession of the disputed land for the statutory limitation period with the requisite intention, Harris JA (with the concurrence of the other members of the court) concluded (at para. [38]) that "[t]hey had acquired a possessory title to the disputed land…[and the respondent's] title has been extinguished by the effluxion of time thus barring him from possession of the land".

[85] In my view, this decision, in which no reference was made to section 85 of the ROTA, is also clear authority, albeit *sub silentio*, directly against the view that a title acquired by adverse possession must, in effect, be 'perfected' by an application under section 85 before it can be considered to be an absolute title.

[86] Secondly, and of perhaps even greater significance, it seems to me, the language of section 85 of the ROTA itself ("Any person who claims that he has acquired a title by possession to land…may apply to the Registrar to be registered as the proprietor of such land in fee simple or for such estate as such person may claim") makes it clear that the procedure established by the section is permissive only. If it had been the intention of the legislature, against the background of section 30 of the LAA, section 70 of the ROTA and **Chisholm v Hall**, to prescribe that a failure to utilise the new procedure should result in either the loss or qualification of the absolute legal estate in the fee simple already obtained by the operation of section 30 of the LAA, I would have expected it to do so in express, mandatory terms.

[87] I accordingly consider that, as Mr Wood submitted, sections 85-87 of the ROTA are facilitative only. In other words, they merely provide for a simplified procedure whereby persons who have become the owners of land by adverse possession can obtain a registered title to that land. At the end of the process, entirely consistent with the provisions of sections 3 and 30 of the LAA, the previous owner's title is either cancelled or rectified to reflect the fact that he has lost the ownership of the land in question and a new certificate of title for the land is issued to the applicant (section 87).

[88] However, even if I am wrong in thinking that the intention of the legislature in enacting section 85 of the ROTA appears clearly from the language of the section itself, construed against the relevant background, then the section can only, in my view, be regarded as, at best, ambiguous. This is particularly so when it is set alongside section

70 of the ROTA, which expressly preserves the import of the LAA, section 30 of the LAA, which provides for the extinction of title in cases in which the requirements of section 3 of that Act are satisfied and **Chisholm v Hall**, in which the Board had authoritatively expounded the basis upon which the two regimes should work together. In these circumstances, as the House of Lords held in **Pepper v Hart** [1993] AC 593, the general rule excluding reference to parliamentary material as an aid to statutory construction may be relaxed, so as to permit reference to clear statements made in Parliament, before enactment of the legislation in question, by a minister or other promoter of the Bill. In this connection, we were furnished, pursuant to our order admitting fresh evidence (see para. [17] above), with the Hansard record of the debates in the House of Representatives on 7 November 1967 and in the Senate on 17 November 1967.

[89] In the House of Representatives on 7 November 1967, the Honourable John Percival Gyles, the member for St Catherine, Northern and Minister of Agriculture and Lands, moved the second reading of a Bill entitled "An Act to Amend the Registration of Titles Law". With reference to clause 11 of the Bill, which would in due course become sections 85-87 of the ROTA, the Honourable Minister is recorded as having said this (at page 298):

> "Clause 11 is one of the new Clauses that I referred to and this deals with the question of Registrar of Titles [sic] obtained by adverse possession. The proposed [sic] is to make it possible for any person claiming to have acquired Title under the Limitation of Actions Law, Chapter 222 to register and to procure registration of his Title without first having to take the matter to Court.

> According to the Limitation of Actions Law, Chapter 222, after a person has lived or has exercised ownership of a piece of land for a period of 12 years or over, he has the right to get out a Title for this land. Under the old Law he could not do this without going to Court and incurring considerable expenses and you know that legal fees and Barrister fees have skyrocketed out of our grasp.
>
> Under this Section, though, it gives the right of what we might commonly call 'squatter' or 'occupier of land' for an unmolested period of 12 years or more. During that 12 years if the former owner has taken objection against this occupier or this squatter and it is proven he has taken objection, then the 12 years can only date after the action."

[90] Similarly, when the Bill was considered in the Senate on 17 November 1967, Sir Neville Ashenheim, minister without portfolio and the leader of government business in the Senate, explained the objectives of clause 11 as follows (at page 49):

> "Clause 11 is perhaps the most important Clause in this Amendment. As Members of the Senate know under the Registration of Titles Law there was no means by which a person who came in for long possession of registered land could get himself on the Register or acquire any kind of Registered Title of the land. Many ways have been tried. All these methods have resulted in failure and the only protection was to enter a Caveat against the Title that was held by the registered proprietor who no longer owns land because he had lost it by possession.
>
> Under the Law as it exists at present, a person holding land by adverse possession is required to incur expenses and suffer the delays and difficulties of Court proceedings in order to obtain a Registered Title. At present, the expense, difficulty and delays in proceeding to obtain a Vesting Order through the Court are frequently so great as to discourage the owner."

[91] In my view, it is clear from these extracts from the parliamentary record that, in enacting sections 85-87 of the ROTA, the legislators did not intend to alter the existing

law of limitation, in particular sections 3 and 30 of the LAA. Indeed, both extracts quoted in the preceding paragraph proceeded on the basis that the effect of 12 years' possession of registered land was, as Minister Gyles put it, that the squatter "has the right to get out a Title for this land"; and as Sir Neville stated, "the registered proprietor…no longer owns [the] land because he had lost it by possession". This material demonstrates, in my view, that what the legislature was intending to obviate was the inconvenience and expense to the squatter of court proceedings for the purpose of obtaining a registered title to the land to which he had already become entitled by the operation of the LAA. It therefore seems to me that it plainly validates my earlier conclusion that sections 85-87 are facilitative only and did not affect in any way the provisions of the LAA.

[92] I accordingly think that Anderson J was entirely correct to approach the matter in the court below on the basis of what was at that time the uncontested position on the effect of sections 3 and 30 of the LAA (see para. [10]):

> "It is not in dispute between the parties that section 30 of [the Limitation of Actions Act], makes it clear that as regards private land, if a party has been in open and undisturbed possession of the same, for a period in excess of twelve years, then the previous owner's right to that land, which he would otherwise have been the lawful owner of, is extinguished as soon as that twelve (12) year period of open and undisturbed possession has expired."

[93] For the reasons which I have attempted to state, I also think that **Chisholm v Hall** remains good law, binding on this court. The effect of this is therefore that, by the time RHJL purchased Windsor Lodge in 2011, Mr Lazarus having been in undisturbed

possession of the disputed property for a period well in excess of 12 years, Mr McGann's title to the disputed property had already been extinguished. In these circumstances, RHJL took title subject to Mr Lazarus' rights over the disputed property and there was no necessity for the latter to establish a further 12 years of adverse possession against RHJL. In other words, there was no question of time beginning to run anew upon the registration of RHJL as proprietor in 2011.

Conclusion

[94] These are my reasons for concluding, in common with the other members of the court, that the appellant had not made good its contentions on either of the substantive issues to which the appeal gave rise. To this extent, therefore, the appeal fell to be dismissed.

[95] However, as I have already pointed out (at para. [5] above), the learned judge also made an order (erroneously, as both parties agreed) in respect of the second Lazarus property. This order must therefore be set aside. It is for this reason that the appeal was allowed in part only, but otherwise dismissed. In these circumstances, I would propose that the parties be invited to make written submissions on the question of costs within 28 days of the date of delivery of the reasons for the court's judgment.

PHILLIPS JA

[96] I have had the opportunity of reading the draft reasons for judgment of Morrison JA and am in agreement with them. It was important for this court to make it clear that

Chisholm v Hall is still good law, and I commend my learned brother for his thorough and comprehensive treatment of the law on possessory titles and on dual registration of property under the Registration of Titles Act.