



[2020] JMSC CIV 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010/ HCV00930

BETWEEN	JACQUELINE BALDIE	1 ST CLAIMANT
AND	CARL MCMURRIN (Executors - Estate of Theresa Flemmings)	2 ND CLAIMANT
AND	EVERALDO CARGILL	DEFENDANT

IN CHAMBERS

Sherica Taylor instructed by Bertram Anderson for the Claimants.

Keisha A. Spence instructed by Tameka Jordon for the Defendant.

HEARD: 22nd, 23rd September 2020 and 23rd of October 2020

Land law - Objection to Survey - Adverse Possession - Proprietary Estoppel.

THOMAS J.

INTRODUCTION

- [1] This claim concerns an unregistered parcel of land located in Hampton Court, St. Thomas. Ownership of the said parcel of land “the disputed land” is the live issue in the claim.
- [2] The Claimants are the executors in the Estate of Theresa Flemmings. By way of a Re-Issued Fixed Date Claim Form filed October 13, 2010, they seek following remedies:

- (i) A Declaration that Theresa Flemmings is the beneficial owner of all that parcel of land part of Hampton Court in the parish of Saint Thomas containing by estimation four and one-half (4¼) (*sic*) squares more or less (hereinafter called “the said property”).
- (ii) An Order that the said Veronica Flemmings and or Theresa Flemmings be allowed to conduct a survey of the said property.”

[3] The Defendant is sued by virtue of the fact that he has raised an objection to attempts to conduct a survey of the disputed land.

BACKGROUND

[4] The original Fixed Date Claim Form initiating this matter was filed on March 2, 2010. At the time of filing, the named Claimant was Veronica Flemmings, the daughter of Theresa Flemmings who, acting under a duly registered Power of Attorney, initiated the matter on her mother’s behalf.

[5] Theresa Flemmings died on January 31, 2011. The Power of Attorney having become extinguished upon her death, Veronica Flemmings was precluded from proceeding as the claimant in her representative capacity. With a view to continuing the claim, and seeking the abovementioned remedies, for the estate of Theresa Flemmings the named executors Jacqueline Baldie and Carl McMurrin were substituted as the Claimants in the matter.

[6] The Defendant, Mr. Everaldo Cargill, is the sole witness for the defence. He contends that the disputed land belonged to his grandmother, Elizabeth Laing. In the year 2009, he objected to a survey being done on the disputed land. His objection was grounded on his belief that the disputed land belonged to his grandmother, Elizabeth Laing.

[7] The Claimants, who are desirous of having the disputed land surveyed with a view to bringing it under the operation of the Registration of Titles Act, now seek

declarations and orders as to ownership in favour of the estate of Theresa Flemmings.

- [8] The mode of trial of this claim was twofold; it was conducted primarily by way of videoconference, however, one witness, Veronica Flemmings, appeared in person. While there is provision for a prior filed witness statement or affidavit to stand as the witness' evidence in chief with the permission of the court, the circumstances of the trial were such that the witnesses who appeared via videoconference were constrained to giving viva voce evidence.

The Claimant's Case

The Evidence

Veronica Flemmings

- [9] Veronica Flemmings' affidavit evidence was permitted to stand as her evidence in chief. She states that prior to the death of her mother Theresa Flemmings and her father Thadeus Flemmings, the disputed land was gifted to them by way of a devise under the last will and testament of one Leonard Harris, late of Hampton Court, in the parish of St. Thomas, dated September 1, 1979. The devise reads as follows:

"I give and bequeath to Mr. Thadeus Flemmings and his wife of Hampton Court in the parish of St. Thomas four and a half square of land more or less (4½ sqs) with my dwelling house and furniture situated at the said Hampton Court because in all my sickness and needs in life they are the persons who help me know [sic] one else"

Leonard Harris' Will was admitted to probate on February 1, 1980.

- [10] Ms. Veronica Flemmings asserts that Leonard Harris derived his title from his mother Elizabeth Laing, who, in her last will and testament, dated July 5, 1954,

gifted to him six (6) squares of land in Hampton Court in the parish of St. Thomas. The disputed land forms a part of that said six (6) squares.

- [11] She says further that subsequent to the Grant of Probate of Leonard Harris' Will, her parents Thaddeus and Theresa Flemmings, who were already living on the disputed land, continued living on the land and caused a concrete structure to be built thereon. Thaddeus Flemmings also, on March 8, 1989, caused a survey of the disputed land to be conducted.
- [12] Thaddeus Flemmings died in 1994. However, his wife Theresa Flemmings and his children, to include Veronica Flemmings, continued to occupy the disputed land. She says that her parents took steps to have their names added to the to the Tax Roll for the disputed land, and since then, they have been paying the taxes.
- [13] She says further that Theresa Flemmings made attempts to have the disputed land resurveyed to establish boundaries, with a view to obtaining a registered title. However, she was met with an objection from the Defendant, Mr. Cargill, on the basis that the disputed land does not belong to her.
- [14] On cross examination she maintains that her parents are owners of the disputed land which they inherited under the Will of Leonard Harris. She states that before the grant of probate, they were living on the land but in a different house. They then moved out of their house and moved into Mr. Harris' house. That is where they lived until they died.

Jacqueline Baldie

- [15] Ms. Baldie is one of the executors in the estate of Theresa Flemmings. Her evidence is that she came to know Theresa Flemmings in 1984, when she started working at the Hampton Court Basic School. Theresa Flemmings was the Principal of the school. At that time, Theresa Flemmings was living on the disputed land along with her husband, her children, grandchildren and two church members, Ms.

Margaret and Mr. Miller. Theresa Flemmings, she says, continued living on the disputed land even after the death of Thaddeus Flemmings in 1994.

- [16] She says that the Hampton Court Basic School is on the same property on which Theresa Flemmings lived. She says she has seen a copy of the Will of Leonard Harris which devised the disputed land to Thaddeus and Theresa Flemmings and which directed that the Basic School is to remain on the land as long as the Government continues to take care of it. She recalls that in the year 1997 renovations were conducted on the Basic School by the Ministry of Education. For the purpose of those renovations, a copy of Leonard Harris' will was given to the Ministry. There were no objections to the renovation. She worked at the Hampton Court Basic school for 25 years, leaving in the year 2012.
- [17] On cross-examination she admits that her knowledge of the land as it relates to Mr. Harris came from the reading of the will of Leonard Harris and what she was told by Theresa Flemmings and others about the land. She says she knows Theresa Flemmings was paying property taxes in her own name, because she got copies of the property tax receipts which were sent to the Ministry of Education. She admits that she has not shown the court any of those property tax receipts, but says, the property tax was in relation to the 4½ squares and for the church. That means that property tax was paid for more than 4½ squares of land.

Carl McMurrin

- [18] Mr. McMurrin, the other executor in the estate of Theresa Flemmings states that he came to know Theresa Flemmings as a boy, and has always lived across the road from the disputed land. He says throughout all his years, he has known Theresa Flemmings and her family to be living on the disputed land. In October of this year he will be 65 years old. In 2009 he was 54 years old. The Flemmings have lived on the property during that entire time. There were also two members of the church who he says did not have anywhere else to live, living on the church property. These persons are Ms. Margaret, and Mr. Miller who was an elder of

the church. He says that there is a church on the land separate from where the Flemmings were living. The church, he says was "opposite from the house". Theresa Flemmings and other tenants were living on the land. He understands tenants to mean "*someone living on the land*".

[19] He says Mr. Miller was the tenant and was paying lease to Theresa Flemmings. He states that he knows that Mr. Harris was the "parson" for the church as he grew up seeing Mr. Harris running the church, while he, Mr. Harris was living same place on the property. Theresa Flemmings and her husband lived on the property with Mr. Harris.

[20] Mr. McMurrin further states that he knows that Mr. Harris died sometime in 1979 and that in 1979, he was still living same place in Hampton Court. After Mr. Harris died the Flemmings were living same place on the property. Up until then he did not know of any issues with the property. Before Theresa Flemmings died her husband died. Before she died, she made a will to her children. He did not know of any issue with the land until Veronica's mother passed off.

[21] He also states that he does not know Everaldo Cargill. The only Cargill he knows are Tessa Cargill and Bubsie Cargill. He knows that Bubsie was living on a piece of the land and Tessa has a house behind where Bubsie lived. Mr. McMurrin further testifies that the "*land is a big piece of land from up by the Cross-Road going straight down to the bottom down to Rocky Point*". He states that "*the first piece of the land is where the church is, where the Flemmings live and there is another piece. Starting from the Cross Road going towards Rocky Point, Bubsie's piece is first. After Bubsie's piece, you find the church and the yard where Theresa Flemmings lived, then there is the basic school, then there is another big piece that goes all the way down to the bottom*". He says that, the big piece is an open land and that the property is not fenced.

[22] On cross examination he states that, there is no partition separating the persons on the land. "*The land that Mr. Harris was living on, that he gave to Mrs. Theresa Flemmings, and when she passed off she gave to Ms. Veronica Flemmings, is part of the big piece of land*" he described earlier. He states that he knew Mr. Harris before he died, and that he was about 24 years old when Mr. Harris died. He says that Mr. Harris used to have boys over on the land and he would go over there and play with them. He cannot say which part of the land is Mr. Harris' land, but says he "*born come see the church there and the house where the Flemmings live*" He cannot say whether Tessa Cargill owned the land where she had her house, nor does he know if Bubsie owned the land where he had his house.

The Defendant's Case

[23] The Defendant, Mr. Everaldo Cargill, was the sole witness for the defence. He disagrees with the evidence of the witnesses for the Claimants as it relates to the disputed land. His evidence is that the disputed land belonged to Elizabeth Laing, who is his grandmother. Leonard Harris who was, Elizabeth Laing's last son, was his uncle. He says the disputed land was subject to a family agreement wherein it was decided that the land cannot go to Leonard Harris. He says Leonard Harris came to be on the disputed land by permission of Elizabeth Laing who allowed him to put a church there. In addition to the church, he says Elizabeth Laing gave Leonard Harris permission to build one (1) room onto the back of the church, and subsequently granted him further permission to build a house on the land.

[24] Mr. Cargill says he is aware of the Flemmings family living on the land but says he has disputed it from the time they commissioned a survey without his or his family's knowledge. He says that was in the 60's when he came back from England. However, he went on to say that at that time Mr. Harris was already dead

[25] On cross examination he states that. there are lots of houses on the land. One of which belongs to him was built on a piece of land that was given to him by his

grandmother. He accepts that his uncle Leonard Harris built a house and the church for himself while his grandmother was still alive. He further states that he did not see or hear anything about a basic school “because they did not ask any permission to build a school there”, so he did not pay attention to any school. He nevertheless states that he knows that there is a building over there. He states that he does not quite remember when his grandmother died. He, however admits that she died before his uncle Leonard Harris. He agrees that his uncle Leonard Harris died in 1979.

[26] When asked whether he knew of Elizabeth Laing’s will, Mr. Cargill said he had heard about her making a will, but he did not know about it because his grandmother could not read. He says further that he is unaware of any grant of probate in the estate of Elizabeth Laing. He also says that he is unaware of any attempts to get the Flemmings off the land. He claims however, that Theresa and Thaddeus Flemmings came to live on the land because they were members of the church and used their membership to “*join in, wanting to take away the place.*”

[27] In relation to Leonard Harris’ occupation of the disputed land, Mr. Cargill says: “*Leonard Harris still lived on the land after my grandmother died. Nobody never trouble Leonard Harris when he lived on the land. I agree that he lived there up until the time that he died... Leonard Harris lived on the land while my grandmother lived on the land. I agree that Theresa Flemmings and her husband and children were living there with Leonard Harris while he was alive.*”

[28] He maintains that there was a family arrangement in which Leonard Harris was not to receive any share of the disputed land. He agrees however, that he was only told about this arrangement and that his grandmother could have changed her mind and given the land to Leonard Harris. He further agrees that Leonard Harris lived on the land before Elizabeth Laing died in 1961 and up until he, Leonard Harris, died in 1979. He does not know if Leonard Harris left a will.

[29] He says that he disputed the survey of the land in 2009 because he is of the view that the disputed land did not belong to Leonard Harris, as Elizabeth Laing did not give it to him, the land still belongs to Elizabeth Laing.

ISSUES

[30] The issues which arise for me to determine are as follows;

- (i) Whether Leonard Harris acquired sole interest in the disputed land.
- (ii) Whether the disputed land devolved to Thaddeus and Theresa Flemmings, under the will of Leonard Harris, upon his death.
- (iii) Whether Thaddeus and Theresa Flemmings acquired the equitable interest in the disputed land by adverse possession.
- (iv) Whether the Defendant has established a right to object to the disputed land being surveyed by the personal representatives of the Estate of Theresa Flemmings.

SUBMISSIONS

Claimants' Submissions

[31] Counsel for the Claimants, in support of her claim that Theresa Flemmings is the beneficial owner of the disputed land, admits that the Will of Elizabeth Laing was invalid for want of formalities, under section 6 of the Wills Act. As such, she admits that the gifts therein would fall to intestacy, including the gift of 6 squares of land to Leonard Harris. (She relies on of the decisions in ***George Mobray v Andrew Williams*** [2012 JMCA Civ 26 No. 4/2011] and ***In Re Leigh's Will Trust*** [1969] 3 All ER 432 which applied the Privy Council decision in ***Commissioner of Stamp Duties (Queensland) v Livingston*** [1964] 3 All ER 692).

[32] In relation to the defendant's right to object to the survey, she submits that the Court ought to consider whether on his own case, the Defendant had any interest in the land which would be the subject of the intended survey, to justify his objection. She says: "It must be noted that the Defendant against whom the claim

was brought on account of him having objected to the survey commissioned by Theresa Flemmings, has not adduced any evidence in proof of his claim to being the grandson of *Elizabeth Laing, deceased*.

[33] She states that ““*anyone who would have stood to benefit under Elizabeth Laing’s estate would only arise after the residue has been ascertained*” and that “*the Defendant who purports to be a beneficiary entitled to share in the residuary estate has no legal or equitable interest therein*”,

[34] In this regard she submits that the Defendant has no basis on which to object to the survey, as he has no legal or equitable interest in the land.

[35] On the doctrine of Proprietary Estoppel, she relies on the cases of ***Blanford Taylor v Marie Falconer Jeffers*** [2017] JMSC Civ. 207 in submitting that:

“the three requirements of ...•representation (or an ‘assurance’ of rights) •reliance (or a ‘change of position’) and •unconscionable disadvantage (or ‘detriment’), have been satisfied.”

[36] She submits that the evidence is sufficient to show that:

“there was a common understanding or agreement between Leonard Harris and his mother Elizabeth Laing as to the future of a portion of the property”. In addition, she submits that the “last will and testament of Elizabeth Laing, despite being invalid, serves to demonstrate her intention for her son Leonard Harris to be have an interest/claim for 6 squares of land.”

Defendant’s Submission

[37] In addressing the court on the doctrine of proprietary estoppel, Counsel for the Defendant relied on the case of ***Gillet v Holt*** [2001] Ch 210, emphasizing Lord Walker’s finding that “*the fundamental principle that equity is concerned to prevent unconscionable conduct, permeates all the elements of the doctrine*” of proprietary estoppel.

[38] Additionally, she relied on the case of ***Caren Cranston v Tamazine Samuels and Gairy Toorie*** Supreme Court Civil Appeal N0 41/2018, where the Court of Appeal said in relation to proprietary estoppel:

“The remedy is available where it is established that ‘one party knowingly encourages another to act, or acquiesces in the other’s actions to his detriment and in infringement of the first party’s rights.’”

[39] She submits:

“In the present case, the claimants have failed to provide any admissible evidence to establish the nature of the assurance and the detriment that Theresa Flemmings faced in reliance on the purported reliance. In respect of Leonard Harris, the only evidence of an assurance was Mr. Cargill stating that his grandmother permitted Mr. Harris to build a church and a room to the back of the church on the property. However, no evidence has been^g [sic] adduced as to the nature and extent of this assurance and the detriment that Mr. Harris would have experienced.”

Counsel submits further that:

“...the claimants have failed to establish the ‘equity’ and as such the claimants are not entitled to any remedial relief.”

[40] In relation to the doctrine of adverse possession, particularly as it relates to Leonard Harris, counsel submits that the only evidence submitted by the claimants in relation to the element of intention to dispossess, is that when Elizabeth Laing died, the permission she would have granted to Leonard Harris to live on the land, would have died with her. To this she says:

“if Mr. Harris started to treat the land as his upon the death of his mother then it cannot be said that he ‘dispossessed’ the owner since he would be the owner and one cannot dispossess oneself. It is therefore submitted that this contention by the claimants is baseless.”

[41] Counsel submits that the Claimants have not provided any legal or factual basis to cause this Court to make an order for the survey, especially since they agree that Elizabeth Laing, deceased died intestate.

Analysis

[42] I will assess all the evidence with the objective of determining whether the Claimants have established on a balance of probabilities that they are entitled to the orders that they now seek.

Whether Mr. Leonard Harris acquired a Proprietary Interest in the Disputed Land

The Will of Ms. Elizabeth Laing

[43] In the document purporting to be the will of Ms. Laing, the testator sought to devise 6 squares of land to Mr. Harris. However, the document was signed by only one attesting witness.

[44] **Section 6 of the Wills Act of Jamaica** reads:

*“No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction; **and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in presence of the testator,** but no form of attestation shall be necessary. Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent, on the face of the will that the testator intended to give effect by such*

his signature to the writing signed as his will, and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will; or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature; or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after or under or beside the names, or one of the names, of the subscribing witnesses; or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will whereupon no clause or paragraph, or disposing part of the will shall be written above the signature; or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made”.

[45] In light of the foregoing provision it is clear that the will of Elizabeth Laing, does not conform to the **Section 6** of the **Wills Act**, as it was only witnessed by one person. In any event both parties have agreed that the gifts under the will of Ms. Laing failed due the failure of the testator to comply with the formalities of the **Wills Act**. As such the disputed land could not have validly pass to Mr. Harris under the will of Ms. Elizabeth Laing.

Adverse Possession

The Law

[46] **The Limitation of Actions Act** places certain prohibitions on recovery of land as between the title holder and the occupier. **Section 3** reads:

“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.”

Section 30 reads:

“At the determination of the period limited by this Part to any person for making an entry, or bring- 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.”

[47] The impact of these provisions on the title holder and the occupier are as follows:

- i. The title holder is prohibited from succeeding in any action for the recovery of possession of his land, whether by entry or otherwise from an occupier who has been in exclusive, undisturbed possession of the said land for a period of 12 years or more.
- ii. The title of the title holder is extinguished once the 12 years have elapsed.

- iii. The occupier who has been in exclusive, undisturbed possession for the 12 years or more, is allowed to acquire title to the said land.

[48] It was pointed out in the case of ***JA Pye (Oxford) Ltd v Graham*** [2003] AC 419, that in order for a court to make a finding in favour of adverse possession two essential elements must be established. These are:

- i. factual possession; and
- ii. an intention on the part of the occupier in his own name and on his own behalf, to exclude the world at large, including the owner. (See also ***Smith (Personal Representative of Hugh Smith (Deceased) and others v Molyneau*** [2016] UKPC 35 Privy Council Appeal No 0064 of 2013).

[49] However, permission given by an owner of land to a person to occupy the said land, is sufficient to stop the running of time as it relates to adverse possession. In the instant case, as it appears on the evidence, Mr. Harris entered into occupation of 6 squares of land (to include the disputed land) with the permission of the owner, his mother, Elizabeth Laing. There is nothing on the evidence, despite the evidence of factual possession, that Mr. Harris occupied exclusively to Ms. Laing during her lifetime.

[50] The Claimants have conceded that Leonard Harris could not have acquired the right to ownership by virtue of the will of Elizabeth Laing. That is, they have not denied the invalidity of the will by virtue of the failure of the testator to comply with the formalities under the Wills Act. Additionally, there is no assertion on their part that Ms. Laing did not retain the right to pass the land by will. Essentially, this amounts to an acceptance on the part of the Claimants that up to the time of her death Ms. Laing had retained some control over the land. Mr. Harris, then, having occupied the lands, to include the disputed land, by the permission of Ms. Laing, as long as that permission remained, it cannot be said that Mr. Harris acquired

interest in the land by adverse possession during the lifetime of Ms. Laing. However, the law is also clear that the permission dies with the death of the owner.

[51] On this point Counsel for the Defendant submits that when Leonard Harris purported to devise 4½ squares of land to Thaddeus and Theresa Flemmings, he had no legal or equitable interest in the said land and as such, he was not in a position to make any such devise. She submits that the fact that the Grant of Probate in relation to Leonard Harris' will is unchallenged, does not mean that Mr. Harris owned the land that he purportedly devised to the Flemmings, and says "*a Grant of Probate does not convey title to a testator neither does it legitimize a testator's title or lack thereof.*"

[52] She also submits that the submissions of counsel for the Claimant that "*anyone who would have stood to benefit under Elizabeth Laing's estate would only arise after the residue has been ascertained*" and that "*the Defendant who purports to be a beneficiary entitled to share in the residuary estate has no legal or equitable interest therein*", equally applies to Leonard Harris, and as such supports the Defendant's position that Leonard Harris had no legal or equitable interest in the land that he purported to devise

[53] As it relates to the Defendant's submission that "*if Mr. Harris started to treat the land as his upon the death of his mother then it cannot be said that he 'dispossessed' the owner since he would be the owner and one cannot dispossess oneself*", the case ***Paulette Curchar v Winnifred Fullwood*** [2015] JMCA Civ. 37, is applicable. In that case at paragraph 53, McDonald-Bishop JA, relying on the case of ***JA Pye (Oxford) Ltd and Others v Graham and Another*** [2002] UKHL 30, stated:

"With regards to "dispossession...that means nothing more than simply whether the person against whom possession is sought has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. By

'ordinary possession' is meant, possession as defined, meaning factual possession with the intention to possess for one's own benefit and on one's behalf."

- [54] The cases have established that permission granted to persons by the landowner to occupy land, ceases on the death of the owner. Therefore, on the death of Ms. Laing, her permission to Mr. Harris to occupy ceased. Essentially, as it relates to adverse possession and Leonard Harris, time began to run from the date of death of Elizabeth Laing.
- [55] The unchallenged evidence of the 2nd Claimant, Mr. McMurrin, is that he grew up seeing Mr. Harris running the church, while living on the property. However, he made no mention of knowing Ms. Laing, or knowing of her living on the property. None of the witnesses for the Claimants gave evidence of the date of death of Ms. Laing. However, the Defendant Mr. Cargill admitted, after being pressed under cross examination, that she died in 1961.
- [56] There is no evidence that Mr. Harris accounted to Mr. Cargill, or any person he was claiming through, in relation to the operation of the school or the church. This amounts to clear evidence that between 1961 and 1979 Mr. Harris demonstrated not only factual possession but also an intention to treat the land as his own (See the case of *Wills v. Wills* [2003] UKPC 84). The Defendant also admits that "*Nobody never trouble Leonard Harris when he lived on the land*", and agrees that he lived there up until the time that he died.
- [57] Therefore, the evidence supports a finding, and I so find, that Leonard Harris was in undisturbed exclusive possession of the disputed land with the requisite intention to possess, for a period of 18 years spanning 1961, the year of Elizabeth Laing's passing, to 1979, the year of his, Leonard Harris', passing. Therefore, he would have acquired an equitable interest in the land, by virtue of the doctrine of adverse possession, which he could validly pass to his beneficiaries.

Proprietary Estoppel

The Law

[58] In the case of **Crabb v Arun District Council** [1975] EWCA Civ. 7 at pages 15 to 17, Scarman LJ accepted that the claimant in that case had no contract, no prescriptive right and no grant. However, he agreed he had an equity.

[59] He said this:

“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?”

[60] The decided cases have established that in order for there to be a finding of proprietary estoppel, three necessary elements must be present. These are (i) A representation, or, assurance or other encouragement of sufficient clarity giving rise to an expectation by the claimant that he (she) would have a certain proprietary interest; (ii) Reliance by the claimant on that assurance; and (iii) Detriment to the claimant in consequence of his reasonable reliance on the representation, or , assurance or other encouragement (See the cases of **Thorner v Major** [2009] UKHL 18, **Gilbert v Holt and Anor** (2000) EWCA Civ 56, and **Blanford Taylor v Marie Falconer Jeffers** [2017] JMSC Civ. 207).

[61] In the more recent Jamaican Court of Appeal case of **Caren Cranston v Tamazine Samuels and Gairy Toorie** [2019] JMCA Civ. 42 at paragraph 60, the court stated that

“The doctrine of proprietary estoppel was developed in equity as a species of equitable estoppel and is a remedy against the

unconscionable or inequitable conduct of one party in dealing with another. The remedy is available where it is established that “one party knowingly encourages another to act, or acquiesces in the other’s actions to his detriment and in infringement of the first party’s rights” (see Hanbury & Martin Modern Equity, 17th edition, at page 897, paragraph 27-022). That party cannot later complain of the infringement of his proprietary rights, and may be forced to give up that right which he encouraged the other party to expect. It is a cause of action in equity brought by a claimant to validate his expectation that he would gain a benefit or right in the defendant’s property, brought on by the conduct of the defendant in encouraging, promising or acquiescing in the claimant’s acting to his detriment based on that expectation. Estoppel then creates a new right and interest in the claimant. The burden of proof falls on the defendant to show that the claimant’s conduct was not induced by his assurances. The extent of the equity is to make good the claimant’s expectations”.

[62] Further at paragraph 70, the court stated:

*“More recently, cases have shown that the defendant need not know of his strict legal rights (see **Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd** [1981] 2 WLR 576). Each case must be judged on its own facts and, there being many variances of estoppel, it is impossible to lay down hard and fast rules.”*

[63] In the instant case, there is no dispute that Ms. Laing gave Mr. Harris permission to build his church and house on the land. However, the Defendant failed to dispel the presumption that Mr. Harris built on the assurance of Ms. Laing that he would get an interest in the land. In fact, despite the fact that the gift under the Will would have failed due to the fact that the will failed to comply with the formalities under

the Wills Act, the content of the Will is relevant in so far as it goes to support a finding of proprietary estoppel in favour of Mr. Harris. That is, it supports a finding that in encouraging Mr. Harris to build his house, school and church on the land, it was Ms. Laing's intention that Mr. Harris should have a proprietary interest in the land.

[64] Therefore, it is my view that even in the event that there was insufficient evidence to establish adverse possession in Mr. Harris' favour, there is sufficient evidence under the principle of proprietary estoppel to vest proprietary interest in Mr. Leonard Harris in relation to the disputed land. Therefore, in all the circumstances of this case, I find that on a balance of probabilities, the evidence is overwhelmingly in favour of a finding that Mr. Harris, prior to his death, had acquired proprietary interest in the 6 squares of land which he was in possession of.

[65] Consequently, I find that Mr. Harris, prior to his death, had acquired total proprietary interest in the 6 squares of land part of Hampton Court in the parish of St. Thomas, on which he constructed his house, school and church. I find also that he derived the right to pass to Thaddeus and Theresa Flemmings 4½ squares of that land.

[66] However, I will go further to consider whether, in the event that the disputed land was not validly passed to the Flemmings, they would have acquired proprietary interest by virtue of their own possession.

Whether Thaddeus and Theresa Flemmings were in Undisturbed Possession of the disputed land for 12 years or more

[67] The evidence as it stands, is that Leonard Harris entered onto the land with the permission of Elizabeth Laing. As such, it was found that he was not occupying adverse to Ms. Laing during her lifetime as that permission was never withdrawn. However, once Elizabeth Laing died, he could no longer have been occupying with her permission. Therefore, considering the fact that Theresa Flemmings entered

the disputed land by the permission of Leonard Harris, the law is clear, that while that permission remained, she would not be occupying adverse to Mr. Harris. However, on his death, the law, as previously stated, is that the permission of Mr. Harris would cease. So in relation to the Flemmings' occupation, time would have started to run from Leonard Harris' death in 1979.

[68] The unchallenged evidence of Ms. Baldie is that in 1984, when she came to know Ms. Flemings, she was living at the property with her husband, children, grandchildren. Then, Mrs. Theresa Flemmings was the principal of Hampton Court Basic School, (the school built by Mr. Harris on the land). She taught at the school for 25 years until she retired. In 1997, Mrs. Flemmings provided proof of her relationship with the land to the Ministry of Education in the form of the Will of Mr. Leonard Harris, prior to the Ministry effecting the renovation. There was no objection to that renovation.

[69] Ms. Baldie also says that at the time of Thaddeus Flemming's death in October 1994, Ms. Theresa Fleming was still living on the property, and paying taxes in her name. She is aware of Ms. Flemmings' attempt to conduct a survey in relation to the disputed land, in 2009. It was at this time that she was prevented by Mr. Cargill from doing so. The proceedings before the court were first initiated by Veronica Flemmings on behalf of Ms. Theresa Flemmings.

[70] This evidence of Ms. Baldie, which I accept, is sufficient to demonstrate factual possession and an intention to possess, on the part of Thaddeus and Theresa Flemmings. That is, to treat the disputed land as their own. It also establishes that Theresa Flemmings, for at least 25 years (1984-2009), a period way in excess of 12 years, occupied the disputed land without interference.

[71] I also find the evidence of the 2nd Claimant Mr. Carl McMurrin quite convincing. He was not discredited on the material particulars as it relates to facts in issue. He says he has been living on the opposite side of the road from the property in question from his birth in October 1955. From he was a little boy coming in age,

he has known of Theresa Flemmings living on the property with her husband Thaddeus Flemmings and Mr. Leonard Harris. Further, he mentions that during that time, one Reginald Miller, was a tenant paying rent to Theresa Flemmings. Therefore, on his evidence from 1979 up until 2009, (the date of objection to the survey), Ms. Theresa Flemmings would have been in undisturbed possession of the disputed land, treating it as her own.

- [72] The evidence of Ms. Veronica Flemmings also demonstrates not only factual possession on the part of Theresa and Thaddeus Flemmings, but also an intention for themselves to possess the land. Her evidence is that subsequent to the grant of the probate of the Will of Mr. Harris her parents took possession of the land and built a concrete structure on it. They also moved out of their house and moved into Mr. Harris' house, where they lived until they died. This evidence was not challenged. She also exhibited a survey that was done at the instance of Mr. Thaddeus Flemmings in 1985.
- [73] In relation to the survey, counsel for the Defendant has submitted that the Court should attach little or no weight to the document as there is no evidence that the survey is of the land in dispute and there is no other evidence as to which section of the land was surveyed, or the instructions that were provided to the surveyor, as the surveyor was not called as a witness. She says the Claimants' failure to make an application pursuant to **Part 32** of the **Civil Procedure Rules 2002** means that the survey cannot be relied on as cogent evidence as to the occupation of the land.
- [74] I note that that these issues are just now being raise in her submissions. The witness Veronica Flemmings was not challenged on this evidence. No objection was raised to the admission of the survey in evidence. It was never put to Ms. Flemmings that the survey in question was not done at the instance of Thaddeus Flemmings, neither was it suggested to her that the area that is reflected in the survey is not a survey of the parcel of the disputed land. Nonetheless, this survey

is only one of several pieces of evidence, which I accept, that Thaddeus and Theresa Flemmings were in actual possession of the disputed land and that they demonstrated an intention to possess the said land.

[75] Additionally, Mr. Cargill admits on cross examination that it was somewhere about the year 2009, that he disputed the survey. He disputed it because he was of the view that the land did not belong to Leonard Harris. Therefore, the evidence clearly establishes that Theresa Flemmings and her family were in actual occupation, of the disputed land with an intention to possess from 1979. There was no objection to that occupation until 2009, when Mr. Cargill objected to the survey. The evidence is therefore undisputed that Ms. Theresa Flemmings and her family were in undisturbed possession of the land in excess of 12 years. Therefore, on a balance of probabilities I find that Theresa Flemmings was in undisturbed possession of the land for a period of more than 12 years.

[76] On the totality of the evidence, I find that the Claimants have established on a balance of probabilities that the estate of Theresa Flemmings is entitled to the entire equitable interest in the disputed land, 4 ½ square part of Hampton Court in the parish of St. Thomas, and thereby has the right to survey the land and to apply for and obtain registered title to the said land. However, before disposing of this matter, and for completion, the final issue I must address is whether the Defendant has a right to object to the survey being done on behalf of the estate of Theresa Flemmings.

Whether the Defendant has a Right to Object to the Survey

[77] The determination of this issue rests on the Defendant's position, as it relates to the disputed land. **The Land Surveyors Act** makes provision for objection to be taken to surveys of land, by owners of land or persons interested or affected by the survey. **Sections 29 and 30** of the **Land Surveyors Act** read:

29." Where the survey is undertaken by appointment of Notice of the owner of any land then every owner of any land upon whom notice has been served, and any person interested in and affected by the survey of such land, may cause to be served upon the surveyor, prior to the completion of the survey, notice of objection, in the prescribed form, to such survey. Upon service of such notice of objection the surveyor shall not proceed with the survey in so far as it affects the land in respect of which notice was given until notice of withdrawal, in the prescribed form, is served upon such surveyor.

30." If notice of withdrawal is not served upon the Director of surveyor within ten days of the date of service of notice of objection, the matter may, with the consent of the objector and arbitrate. of the owner of the land to be surveyed, be referred to the Director of Surveys for arbitration in a summary manner:

Provided that nothing in this subsection shall be deemed to prejudice the right of any person to take proceedings before any, court of competent jurisdiction."

[78] In light of the aforementioned provisions, in order to register a valid objection, the defendant should demonstrate that he is owner of land, that will be affected by the survey or that he has interest in the land that is being surveyed.

[79] It is not quite clear what claim the defendant is saying he has to the land. Apart from asserting that it is his grandmother's land, he is not laying claim as a personal representative of the estate of his grandmother. It is not even clear whether he is laying claim as a beneficiary to the land. This is in light of the fact that in his evidence he states that his grandmother only gave him the land that his house is on. Nevertheless, even as a beneficiary, the estate having not yet been administered, his objection could only be channeled through the personal representative of his grandmother's estate. This position is reflected in the undermentioned cases.

[80] In the case of ***National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts*** [1921] 2 AC 1, at page 11, the Court said:

“The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the property properly administered and applied for his benefit when the administration is complete.”

[81] In the case of ***George Mobray, v Andrew Joel Williams*** [2012] JMCA Civ. 26 Harris J A had this to say:

*“On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see **Commissioner of Stamp Duties (Queensland) v Livingston** [1964] 3 All ER 692. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein”.*

[82] In the Australian case of ***the Commissioner of Stamp Duties (Queensland) v Livingston*** 1964] 3 All ER 692 a widow died prior to the administration of her husband’s estate. Under his will, she was entitled to the residue of the estate. It was held that she had no beneficial interest in the husband’s estate.

[83] Despite dealing with testate succession, it is my view that the principle stated in th ***the Commissioner of Stamp Duties (Queensland) (supra)*** case is applicable to the case at bar. The Privy Council expounded on the principle that, prior to the

administration of an estate, the position of a beneficiary is that he acquires no legal or equitable interest in the estate. At page 696 the court stated that:

“What equity did not do was to recognize or create for residuary legatees a beneficial interest in the assets in the executor’s hands during the course of administration.

[84] The court further stated that:

“An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realized for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be”. (See page 696)

[85] In light of the aforementioned principle, on my evaluation of the evidence, I find no right vested in Mr. Cargill to object to the survey of the disputed land.

Conclusion

[86] In conclusion, therefore, I find that on a balance of probabilities, the claimants have established that the estate of Theresa Flemmings is entitled to the entire equitable interest in the 4½ squares of land part of Hampton Court in the parish St Thomas that Theresa Flemmings occupied prior to her death. Additionally, I find that the defendant has failed to establish a basis for his objection to the survey of the said property.

ORDERS

[87] Consequent upon my foregoing findings I make the following orders:

- i. The Estate of Theresa Flemmings is entitled to the entire equitable interest in the land, 4½ squares part of Hampton Court, in the parish of St. Thomas which Theresa Flemmings occupied prior to her death.
- ii. In administering the Estate, the personal representatives of Theresa Flemmings have the right to proceed to survey the land and to apply for and obtain registered title to the said land.
- iii. The defendant Mr. Cargill does not have a right to object to the survey of the said land.
- iv. Cost to the Claimants to be agreed or taxed.