[2015] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 113/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ANNIE LOPEZ**	**APPELLANT**
AND	**DAWKINS BROWN**	**1st RESPONDENT**
AND	**GLEN BROWN**	**2nd RESPONDENT**

Carlton Williams instructed by Williams, McKoy & Palmer for the appellant

Miss Althea McBean instructed by Frater, Ennis & Gordon for the respondents

11, 12, 13 November 2013 and 27 January 2015

MORRISON JA

Introduction

[1] The appellant ('Mrs Lopez') is the registered owner of premises registered at Volume 1024 Folio 132 ('Lot 1') and Volume 1236 Folio 877 ('Lot 2') of the Register Book of Titles. A semi-detached dwelling house stands on each lot, with both houses

sharing a common wall. At all material times, Lot 1 was occupied by Mrs Lopez as her home.

[2] By an instrument in writing made on 1 January 2004, Mrs Lopez granted a lease of Lot 2 to the respondents ('the Browns') for a period of one year at a rental of $45,000.00 per month ('the lease'). By the same instrument, Mrs Lopez also gave the Browns an option, exercisable at any time up to 60 days before the expiration of the lease, to purchase Lot 2 for $10,000,000.00 ('the option'). Upon the execution of this document, the Browns entered into occupation of Lot 2, also known as 9 Panton Road, Stony Hill, St Andrew, as their home. When the lease expired at the end of 2004, Mrs Lopez, by a second instrument in writing dated 1 January 2005, granted another lease of Lot 2 to the Browns for a further period of one year ('the further lease'). However, the further lease did not contain an option to purchase.

[3] These documents were prepared by Mrs Lopez' attorney-at-law, Mr Lancelot A S Cowan and Mr Cowan also represented Mrs Lopez in the court below.

[4] This case arises out of a dispute between Mrs Lopez and the Browns as to whether the option was exercised, either in accordance with its terms, or in keeping with any terms subsequently agreed between the parties. The dispute resulted in an action being filed by the Browns against Mrs Lopez, in which they claimed the following:

> "i) Special Damages **$833,093.00**
>
> ii) A declaration as to the equitable interest of the [Browns] in Lot 2, 9 Panton Road, Stony Hill, St. Andrew.

iii) Specific Performance of Agreement to Purchase property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew.

iv) A declaration that [Mrs Lopez] is bound by a proprietary estoppel in favour of [the Browns].

v) Interest

vi) Costs."

[5] After a trial before him in the Supreme Court, Campbell J, in a written judgment given on 19 May 2009, gave judgment for the Browns in the following terms:

> "(i) That the claimants have an equitable interest in Lot 2, 9 Panton Road, Stony Hill, St. Andrew.
>
> (ii) That the defendant is band [sic] by a proprietary estoppel raised in favour of the claimants.
>
> (iii) Costs to the claimants to be agreed or taxed."

[6] For reasons which were never fully explained, the orders set out in the formal judgment, which was filed on 2 June 2009, differed to some extent from those announced by the judge in his judgment:

> "1. That there be specific performance of [sic] agreement to purchase property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew between the Claimants and the Defendant for the sum of $10,000,000.00 less $540,000.00 allocated as rent towards the purchase price, such rent being for the period of January to December 2004.
>
> 2. The Claimants are declared to have an equitable interest in the property at Lot 2, 9 Panton Road, St. Andrew by virtue of proprietary estoppel.
>
> 3. That if the parties fail or neglect to sign an Agreement for Sale and Transfer then the Registrar of the Supreme Court shall be empowered to sign the Agreement for Sale, Transfer

> and any document necessary to effect the sale and transfer of the property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew.
>
> 4. That all sums in account #001-101-034-6143 in the names of Althea McBean and or Lancelot Cowan at the RBTT Bank (Ja) Ltd., Duke and Tower Street Branch, to be paid forthwith to Robertson Smith Ledgister & Co. on behalf of Annie Lopez.
>
> 5. Stay of Execution granted for a period of 21 days.
>
> 6. Costs to the Claimant [sic] to be agreed or taxed."

[7] Notice and grounds of appeal were filed on behalf of Mrs Lopez on 29 July 2009, almost 10 weeks after the date of judgment. This was a clear breach of rule 1.11(1)(c) of the Court of Appeal Rules, by which a notice of appeal must be filed within 42 days of the judgment being appealed against. No doubt in recognition of this, an application to extend the time for filing the notice of appeal had actually been filed on Mrs Lopez's behalf in this court on 21 July 2009, but this application was never heard. Accordingly, when the appeal came on for hearing before this court on 11 October 2011, it was struck out on the ground that it had been filed out of time. Mrs Lopez filed a fresh application to extend the time for filing the notice of appeal, this time in the Supreme Court, where it finally came on for hearing before Campbell J on 24 July 2012. Among the matters prayed in aid on the application was the discrepancy between the judgment as pronounced by the judge in court and the formal judgment when filed. Having heard the matter, Campbell J granted the application as prayed (with no order as to costs) and notice and grounds of appeal were duly filed on 31 July 2012. In granting the application, the learned judge appears to have taken the view that, although he considered his original judgment to be sound, Mrs Lopez ought not to suffer for the

mistakes of her attorneys-at-law, through whose inadvertence the appeal had not been filed in time.

[8] By counter-notice of appeal filed on 17 August 2012, the Browns also sought to challenge the judge's extension of time order. In essence, their complaint was that (i) since the judge considered that his judgment on the substantive matter was sound, he ought not to have granted the application; and (ii) the judge erred in not ordering costs in their favour on the application.

[9] Because the first part of the Browns' complaint in the cross-appeal was potentially determinative of the matter, the court decided to hear it first. Miss Althea McBean for the Browns submitted that, in considering the application for extension of time, the court was required to take all factors into account, including the strength of the proposed appeal, the extent of the delay and the prejudice to the proposed respondents. By the time Campbell J came to consider the application in this case, Miss McBean pointed out, the Browns had already been deprived of the benefit of the judgment for more than three years and had suffered prejudice as a result. On the other hand, Mr Carlton Williams for Mrs Lopez submitted that, despite the missteps taken by her attorneys-at-law, Mrs Lopez had consistently evinced a desire to appeal and the judge had been correct to allow her to do so in all the circumstances.

[10] In considering this aspect of the matter, we were invited to have regard to the well-known formulation by Panton JA (as he then was) of the approach of this court to

applications for extension of time in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999, judgment delivered 6 December 1999, page 20):

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider –
>
> (i) The length of the delay;
>
> (ii) The reasons for the delay;
>
> (iii) Whether there is an arguable case for an appeal; and
>
> (iv) The degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[11] While the length of the delay in this case was significant, the court considered that Mrs Lopez had proffered a reasonable explanation for the delay, bearing in mind that it was substantially attributable to the errors of her then attorneys-at-law. As regards the strength of the proposed appeal, the court was of the view that it could not be said that it stood no reasonable prospect of success. And, as regards the issue of prejudice, the court considered that, beyond the passage of time, which always carries with it the possibility of prejudice of some kind, there was no evidence of any particular

prejudice to the Browns in this case. In all the circumstances, bearing in mind that this was an appeal from the exercise of discretion by the very experienced judge, the court concluded that the cross-appeal should be dismissed and ordered that the matter of costs should abide the outcome of the substantive appeal, to which I will now turn.

[12] In this regard, it may be helpful, first, to recall the relevant parts of the option and the pleadings; second, to give a brief account of the evidence; and, third, to summarise the learned judge's reasons for his decision.

The option

[13] So far as is material, the option is in the following terms:

> "1. In consideration of the Sum of Five Hundred Forty Thousand ($540,000.00) Dollars paid by the intending Purchaser to the intending Vendor (the receipt thereof the Intending Vendor hereby acknowledges) the Intending Vendor grants to the intending Purchaser the option to purchase ALL THAT parcel of land described in the Schedule hereto (hereinafter 'the said land') for the sum of Ten Million ($10,000,000.00) Dollars on the terms and payable in the manner hereinafter set out.
>
> 2. The Option is granted from the date hereof and shall be exercisable for a period of up to sixty (60) days before the expiration of the contemporaneous Lease Agreement between the parties concerning the said land.
>
> 3. The option may be exercised by notice in writing to the Intending Vendor at any time during the option period.
>
> 4. The statutory charges in relation to this option shall be borne entirely by the Intending Purchaser.
>
> 5. The notice relating hereto may be validity [sic] given or made only in writing through letter delivered by hand with receipt acknowledged or sent by registered post

addressed to the Intending Vendor at her address hereinabove and every such Notice or communication given or made ten (10) days following the posting thereof.

6. Upon the Intending Purchaser's exercise of the option, an amount of Five Hundred [sic] Forty Thousand ($540,000.00) Dollars from the Option sum (being a maximum of $45,000.00 x 12 – or a minimum of $45,000.00 x number of months rent paid) and [sic] shall be applied to and shall be accepted by the Intending Vendor as part of the consideration stated in the Memorandum of Sale of the said land to be entered into between the parties.

7. If the Intending Purchaser fails to exercise the option within the option period prescribed above the option shall lapse and the sums paid by the Intending Purchaser will be forfeited to the Intending Vendor."

The pleadings

[14] In significant respects, the Browns' amended particulars of claim filed on 4 May 2007 were admitted by Mrs Lopez in her defence and counterclaim filed on 16 May 2007. Thus, it was common ground that the Browns entered into possession of Lot 2 as lessees pursuant to the lease with an option to purchase the property for $10,000,000.00. It was also common ground that the Browns duly paid a total of $540,000.00 for rent (at $45,000.00 per month) during the year 2004 and a further $1,320,000.00 (at $55,000.00 per month) during the years 2005 and 2006.

[15] However, and critically, Mrs Lopez in her defence denied the Browns' averments in the amended particulars of claim that, although "[t]he option to purchase was to have been exercised by November 2004", they "were granted an extension by [Mrs

Lopez's] Attorney in a meeting with all the parties this was as a result of [sic] initial problem identified [sic] with the boundaries"; and that "sometime in early 2005, [they] expressed to [Mrs Lopez] their intention and readiness to exercise the option to purchase the said property and in furtherance of this the [Browns] commissioned a land surveyor to conduct a survey to [sic] the property and applied for a mortgage for the purchase of the property". In answer to these statements, Mrs Lopez averred that the Browns "never formally notified [her] of any intention to execute the option to purchase"; that "[a]ny acts allegedly done by [the Browns] in late 2005 were in their efforts to prequalify for a mortgage, as there was no agreement for sale between the parties on which [they] could apply for a mortgage"; and that "any work done on the building by [the Browns] was to make the building more suitable to their preferences, and was not done pursuant [to] an agreement to purchase that did not exist".

[16] Mrs Lopez also counterclaimed against the Browns as follows:

> "I claim...for the sum of $110,000.00 being two months [sic] rent due and owing...at $55,000.00 per month, which unpaid monthly rent continues. In 2007, the [Browns] deliberately blocked the common driveway to the property, preventing...free ingress and egress to the property. In addition, the [Browns] and their guests verbally abused [my] quiet enjoyment of [my] own property."

The evidence

[17] In addition to oral evidence given by the Browns (to whom I will refer individually where necessary as 'Dawkins' and 'Glen' respectively) and Mrs Lopez, the learned judge

had the benefit of a considerable amount of documentary evidence, which was tendered and admitted in evidence by the consent of the parties.

[18] The main burden of the Browns' evidence was borne by Dawkins. In his witness statement dated 4 June 2008, which was admitted at the trial as his evidence-in-chief, he stated the following (at paras 3-19):

> "3. On attempting to exercise the option to purchase, my brother and I discovered that there were fundamental defects in the Title for the property in that the premises which contains two houses had been sub-divided and the line purporting to divide the two lots actually ran through the house we intended to purchase. Also the wall surrounding the property did not conform to the registered boundary as it served as a retaining wall without matching the boundary to the property.
>
> 4. In light of the problems associated with the title we had a meeting with the Attorney, for the transaction Mr. Cowan, as we were unable to exercise the option within the period of up to 60 days before the expiration of the lease.
>
> 5. As a result of the meeting we were granted an extension of the option to purchase by Mr Cowan.
>
> 6. Pursuant to this a new lease agreement was entered into in January of 2005.
>
> 7. During this time we did not have our own attorney and until very recently we understood and had the distinct impression that Mrs Lopez's attorney also represented us.
>
> 8. On the 7th day of June 2005, we expressed to the Defendant in writing, our intention and readiness to exercise the option to purchase the property by November 2005.

9. In reliance on the Defendant's promise to extend the time for the option, we retained and paid for the services of a surveyor, Barrington Dawkins, who conducted surveys of the property on three occasions with Mrs. Lopez's knowledge and permission in November of 2005.

10. The surveyor's report however disclosed breaches and discrepancies in respect of the Certificate of Title.

11. On the request of Mrs Lopez a second surveyor's report, by Donovan Simpson, was commissioned in January 2006 which we paid for. This report confirmed the discrepancies in respect of the Title for the said property.

12. As a result of this we also paid Mr Donovan Simpson to prepare a new sub-division plan and have it pre-checked for submission to the Titles Office in order to rectify the defects as agreed between the parties.

13. Further we applied to the Jamaica National Building [sic] for a mortgage to effect the purchase of the property. Again the process could not be completed because of the defects in the property.

14. We also spent more than $300,000.00 tiling the house and other considerable sums making improvements to the property in reliance on the said Agreement and promise to extend the option to purchase. The Defendant was fully aware and consented to the expenditure on the property.

15. However in February of 2006 Mrs Lopez, through her Attorney, purported to withdraw her offer to sell until the issues surrounding the title were resolved.

16. In July of 2006, Mr Cowan again wrote to me indicating that when the issues were resolved, a 'new' Agreement for sale of the property would be entered into, and that this would negate the need for an option to purchase.

17. The original Agreement was that the lease payments made would reduce the purchase price of $10,000,000.00.

18. However in July 2006 nothing was or has been said about how the lease payments would be treated or what became of the previous agreement which was accepted, that all the lease payments served to reduce the purchase price. When we insisted on addressing these issues she served us with a Notice to Quit.

19. Since then, however Mrs Lopez is adamant that she will never sell the property to us and has therefore reneged on every agreement and promise made by her.

20. Furthermore she has brought two actions before the Resident Magistrate's Court for rent and recovery of possession after this matter was filed in the Supreme Court and after her defence was entered. She also brought actions for gardening which she claimed was maintenance payments stipulated by the lease when this is in fact not so. She has also brought an action for damage to a gate and electronic system which were installed by us.

21. Further she went to the Jamaica Public Service Company and had our electricity supply disconnected at her request although she advised the Court it was disconnected for arrears, which is not true. We had to apply to this Court for an order that the supply be reconnected and that she refrain from her constant interference with our occupation. This matter was heard on the 7th of November, 2007 and her Attorney undertook to give us a letter to JPS to have our supply reconnected by 12:00 noon on the 8th of November. My Attorney received a fax on the 9th of November which JPS would not accept. I had to send to his office on the 12th of November to collect the letter.

22. On the 12th of November 2007 the matter was set for mediation and the parties had difficulty arriving at a

> settlement and near the end of the mediation session I was served with two summons [sic] for the Half-Way-Tree Criminal Court on allegations that I threatened her. These were filed by way of private prosecution because she says the police refused to assist her.
>
> 23. I am of the view that the Defendant will make every attempt to thwart the process of the Court and to go back on her agreement because the relation [sic] between us broke down."

[19] Under cross-examination at the trial, Dawkins stated that his understanding of paragraph 2 of the option was that the option should have been exercised 60 days before the expiration of the one year term of the lease on 31 December 2004. He agreed that he was unable to "produce anything" to show that a letter exercising the option had been sent in 2004. But he insisted that, at a meeting in the offices of Mr Cowan in January 2005, the time for the exercise of the option "was extended" and this was done "in writing in 2005".

[20] Well into 2005, Dawkins testified, Glen and himself regarded Mr Cowan as acting, not only for Mrs Lopez, but also on their behalf. In fact, he said, "Mr Cowan was [a]n integral part" and, while there was nothing in writing from Mr Cowan to say that he represented the parties on both sides of the transaction, "all actions indicate [sic] he represent [sic] both parties". Indeed, Mr Cowan's initial bill for preparing the lease was shared equally between Mrs Lopez and the Browns.

[21] In his witness statement dated 30 June 2008, which was also admitted at the trial as his evidence-in-chief, Glen was largely content to adopt Dawkins' evidence.

However, he provided the details of the Browns' special damages claim, stating that before Mrs Lopez's refusal to sell Lot 2 to them, they had taken "steps to rectify the Title and paid substantial sums to do so". Further, that in addition to having expended money, they had acted to their detriment "in foregoing other properties that we could have purchased...and also obtained a new diagram and Pre-checked plan with the proper boundaries as agreed by the parties in May 2006". Glen itemised the Browns' expenditure as follows:

"a) Donavon [sic] Simpson 6.1.06	$ 22,368.00
b) Donavon [sic] Simpson 5.5.06	$ 75,725.00
c) Valuation Report October 2004	$ 26,000.00
d) B.A. Dawkins 12.2.05	$ 84,000.00
e) To install automatic gate	$103,350.00
f) Tiling	$300,000.00
	$611,443.00"

[22] When he was cross-examined, Glen told the court that he had also had the impression that Mr Cowan was representing both sides in the transaction, although he accepted that he had seen no written communication to that effect.

[23] Mrs Lopez was the only witness for the defence. In her witness statement filed on 19 May 2008, she stated the following:

> "1. In January 1, 2004, I had granted a lease with an option to purchase Lot 2, 9 Panton Road, Stony Hill to

the claimants. The option to purchase was to have been exercised by October 31, 2004, and it was never exercised by the claimants.

2. The claimants failed to exercise the option to purchase granted in the 2004 lease with option to purchase for Lot 2, 9 Panton Road, Stony Hill, within the time set out in the said option to purchase. As a result thereof, the said option lapsed and was null and void when the claimants tried to exercise same in their letter to me dated January 11, 2006.

3. The claimants were never granted any oral or written extension of any option to purchase by me or by my Attorneys-at-Law at any time whatsoever. The claimants were given new one year lease agreements in January 2005 and January 2006.

4. There was never any signed or other agreement for sale of the property at issue between the parties herein at any time whatsoever from January 1, 2004.

5. The claimants never formally or otherwise at any time whatsoever notified me of any intention to execute the option to purchase on their part.

6. In late 2005, without ever expressly or implicitly notifying me of their intention to exercise the said option to purchase, the claimants took steps, on the face of it, to pre-qualify for a mortgage. A survey by B. A. Dawkins dated November 7, 2005 commissioned by the claimants indicated the boundaries to the lot on the ground did not conform to the boundaries on the title. This rendered my title to the property, defective, thereby preventing any transfer of the property in its current state.

7. The parties did agree for new surveys to be done on the property, on the request of Dawkins Brown.

8. While the claimants paid for the surveyor's report, they took no steps to implement the recommendations to rectify any defects as the claimants were in no position to rectify any boundary

> defects for lands they did not own and had not signed any agreement to purchase."

[24] Amplifying her witness statement in examination-in-chief at the trial, Mrs Lopez denied having had any discussions with the Browns as regards either extending the time for exercising the option or any defects in the title to Lot 2. She denied receiving a letter dated 7 June 2005 from Dawkins referring to the exercise of the option, or having given any instructions to Mr Cowan at any time during 2005 to extend the period for the exercise of the option. In cross-examination, while she insisted that the option had lapsed when it was not exercised in accordance with its terms, Mrs Lopez admitted that she did agree for "new plans to be drawn to recognise the new boundary", and that she did so based on correspondence between her lawyer and the surveyor. While she had never seen either Mr Dawkins or Mr Simpson come onto the property, she did recall seeing a man on her lot who told her that he was "surveying". She also agreed that, through her lawyer, she did give permission for Mr Simpson to do something in relation to the property.

[25] Turning now to the documentary evidence that was put before the judge, the first item was a letter dated 7 June 2005 from Dawkins to Mrs Lopez, referring to discussions between the parties on the question of the option:

> "Dear Ms. Lopez,
>
> We refer to our discussions regarding option to purchase 9A Panton Road and the problems identified by Mr. Barrington Dawkins, Commissioned Land Surveyors [sic]. Mr. Dawkins is

> of the view that the breach is significant and may require re-survey.
>
> As previously indicated I would like to exercise the option and complete the purchase before November 2005. To this end, I have asked Mr. Barrington Dawkins to revisit the location with his team and discussed [sic] the boundaries with you. He will confirm the exact time with me next week and I will inform you."

[26] Next in time were the surveyors' reports. The first was a surveyor's identification report dated 7 November 2005, prepared by Messrs B A Dawkins & Associates, commissioned land surveyors. Although this report stated that "[t]he boundaries are in general agreement with the plan attached to the...Certificate of Title [registered at Volume 1236 Folio 877]", it concluded, somewhat cryptically, that,"[i]f the measurements in the Title are to stand the building could be affected". In fact, the sketch plan attached to the report depicted the boundary line between Lot 1 and Lot 2 as running through the western side of the building on Lot 2.

[27] The second report, dated 10 January 2006, which was prepared by Mr Donavan H Simpson, commissioned land surveyor, was more explicit in its conclusions. After indicating that the boundaries of Lot 2 "are not in general agreement with the Plan attached to the...Certificate of Title", Mr Simpson observed as follows:

> "1) The stone wall erected along the road way does not coincide with the registered boundary. The said wall appears to be erected ostensibly as a retaining wall.
>
> 2) The registered line runs through the [concrete] building as indicated on the sketch plan below. A re-survey and re-registration [are] therefore recommended."

[28] The sketch plan attached to this report depicted the retaining wall on the north-eastern side of Lot 2 as running alongside, but outside of, the registered boundary; and the boundary line between Lot 1 and Lot 2 as running directly through the building on Lot 2.

[29] Around this time, the Browns were also in touch with the Jamaica National Building Society ('JNBS') with regard to an application for mortgage financing to acquire Lot 2. By letter dated 6 January 2006, JNBS advised Dawkins of a problem with the application:

> "Dear Mr. Brown
>
> **RE: APPLICATION FOR MORTGAGE FINANCING**
>
> Further to your request for Mortgage financing from us, we hereby inform you that your mortgage application is presently on hold as there is a significant breach of covenant on your Surveyors [sic] Identification Report.
>
> As soon as the above breach is addressed, we will be able to proceed with your application."

[30] Having received the surveyors' reports and the letter from JNBS, Dawkins sent a detailed letter dated 11 January 2006 to Mrs Lopez. Despite its length, I cannot avoid quoting it in full:

> "Dear Mrs Lopez:
>
> **Re: Purchase of Property situated at 9A Panton Road, Stony Hill, St. Andrew**

I refer to our previous discussions regarding the surveyors [sic] Identification Report for the above mentioned property and now provide a formal update on the matter.

Our mortgage Bank (Jamaica National Building Society) has requested the Surveyor's Identification Report for the above property. The report was requested in September 2005 from Dawkins & Associates. This report revealed that the boundaries were not in agreement with the Plan per Certificate of Title. See Report attached at Appendix A.

I was not comfortable with this report and thus the firm of Donovan H. Simpson – Commissioned Land Surveyor was engaged to prepare another report. Their report reveals that the registered line runs through the concrete building. They recommend a re-survey and re-registration of the two lots (1 & 2) **See report attached Appendix B**.

As a result Jamaica National has advised us that the breached [sic] must be corrected before they can proceeds [sic]. **See letter attached**.

Based on the above and the terms contained in the Lease & Purchase Agreement we need to meet with your lawyer to explore the available options to rectify the breach referred to in the two reports.

However, subject to your approval, I would recommend the following:

- Request the firm of ' Donovan H Simpson‘ to resurvey the property and re-register the boundaries.

- Agree a realistic time for this to be done and communicate this to Jamaica National via Lawyer

- Prepare agreement for sale of Property based on the terms previously agreed. This will allow Jamaica National to complete the process and disburse the payment immediately after evidence of correction of the breach has been supplied to them.

- Agree on the deposit that needs to be paid upon signing the sales agreement.

- Incorporate the appropriate closing date in the sale agreement based on the time require [sic] to correct the appropriate breach (Maybe 180 days is reasonable).

- Request your lawyer to write Jamaica National outlining the steps taken to correct the breach and request a commitment from them to pay the funds over to you as soon as they are able to register their mortgage on the title for 9A Panton Road.

The above are suggestions in order to resolve the matter. I know that both of us are anxious [to] finalize this transaction quickly.

I would recommend that you meet with your lawyer and discuss the matter, so we can inform all the relevant parties (Jamaica National and the Surveyors) as soon as possible.

Please find enclosed two copies of the relevant reports and letters." (Emphasis as in the original)

[31] Responding to this letter on 16 January 2006, Mr Cowan proffered the opinion that, on the basis of his reading of Mr Simpson's report, the source of the problem identified by Mr Simpson was that the relevant measurements of Lot 2 on the original sub-division plan differed from the measurements on the plan attached to the Certificate of Title to Lot 2 registered at Volume 1236 Folio 877. Therefore, Mr Cowan concluded -

"After all of the above, we agree that Lot 2 has to be re-surveyed. But not for the reasons stated by Mr. Simpson's report.

Lot 2 has to be re-surveyed, and the plan re-registered to reflect that the true boundary of the property extends all the way to the stone wall on Panton Road.

> Once your surveyor agrees the above recommendation, then we can agree the remaining recommendations set out on page two of your January 11, 2006 letter to Mrs. Lopez."

[32] For his part, Mr Simpson, upon receiving a copy of Mr Cowan's letter to Dawkins, took issue with the view that there was anything wrong with the measurements of Lot 2 in the plan attached to the certificate of title. In a letter to Mr Cowan dated 6 February 2006, Mr Simpson stated that his investigation had revealed no substantial discrepancy between the sub-division plan and the plan attached to the certificate of title.

[33] Be all that as it may, by a letter to Dawkins dated 18 February 2006, Mr Cowan advised as follows:

> **"Re: Lease of Lot 2, 9 Panton Road, Stony Hill, Volume 1236, Folio 877**
>
> Dear Mr. Brown:
>
> We refer to previous correspondence.
>
> It seems that there will be some work that will have to be done to resolve the apparent issues that have arisen concerning the title to Lot 2, 9 Panton Road, Stony Hill. We have advised Mrs. Lopez of same.
>
> She instructs that having regard to the need to resolve the [sic] or any issues related to the said title, she is withdrawing her offer of sale of the property to you until the issues are resolved. She will, however, continue to lease the property to you, and further instructs that the lease for 2006 will be increased to $58,850.00 plus g.c.t. thereon.
>
> We enclose a new lease for the property, for your perusal and signature, and return to us along with your cheque for the charges we have already advised you of."

[34] There was then a relative lull in the correspondence, during which, Dawkins testified in cross-examination, he communicated to Mrs Lopez "verbally" the contents of a second letter from JNBS dated 11 January 2006, which had advised that, in order for the mortgage application to proceed, the Society would require an undertaking from the vendor's lawyer outlining "[t]he approach that will be taken to address the breach [and a] specific time frame in which this breach will be fixed".

[35] Then, by letter dated 4 May 2006, Mr Cowan wrote to Mr Simpson, advising him of the outcome of a further discussion between Dawkins and Mrs Lopez:

> "**Re: Lot 9 Panton Road, Stony Hill, St. Andrew**
>
> Mrs Lopez and Mr Dawkins Brown met on Tuesday, they agreed for the following to be done:
>
> (1) A new boundary between the properties, is to be drawn, with the new boundary to include the common wall between the two houses;
> (2) New plans are to be drawn to reflect the new boundary between the properties;
> (3) New titles are to be obtained reflecting the new boundary between the properties;
> (4) An application to modify the covenant to permit the use of a common wall as part of the boundary.
>
> Mr Brown says he will pay your fees for the work outlined above. In any event let us have your estimate of fees for the proposed work.
>
> Thank you for your assistance."

[36] Responding to this letter the following day, Mr Simpson advised Mr Cowan of his estimate of fees ($75,725.00) to carry out a survey and prepare a pre-checked plan in

respect of Lot 2. Accordingly, by letter dated 15 May 2006, Mr Cowan directed Mr Simpson to "proceed to survey the current structure showing the party [sic] wall and prepare new pre-checked plans for title purposes".

[37] A further – shorter – break in the correspondence ended in Mr Cowan's letter of 3 July 2006 to Dawkins:

> "**Re: Sale of Lot 2, 9 Panton Road, Stony Hill, Volume 1236, Folio 877**
>
> Dear Mr. Brown:
>
> We refer to previous correspondence. We also repeat our client's position that she is withdrawing the option to purchase the property, until the issues surrounding the titles to the property, are resolved. When the issues are resolved, she will enter into a new agreement for sale of the property to you, thereby negating any need for an option to purchase.
>
> You may recall that you never exercised the option to purchase, within the terms of the said option. Therefore, the option lapsed even before it was withdrawn.
>
> She also repeats the rent payments are increased to $58,850.00 per month, effective immediately."

[38] This letter from Mr Cowan elicited another long letter from Dawkins, dated 10 July 2006, which plainly presaged the litigation that was to follow:

> "**Re: Sale of Lot 2, 9 Panton Road, Stony Hill, Volume 1236, Folio 877**
>
> I refer to your letter dated July 3, 2006 regarding the captioned matter.

You [sic] letter contained the following points:

1. Withdrawal of option to purchase the above property
2. New Agreement for sale when the issues surrounding the title is [sic] resolved
3. Failure to exercise the purchase option before lapse.
4. Increase in Rent

I would like to bring your attention to the following matters which contradict several of the above points.

1. I agree [sic] to pay premium on the monthly lease as consideration for the lease option. You and your client cannot unilaterally withdraw the option without compensation.

2. The issues surrounding the title are not my fault and thus you cannot punish me for your client's errors. She agree [sic] to sell a property that breach [sic] the covenants on the title. I acted in good faith.

3. Your claim of failure to exercise purchase option during the period is erroneous. Your client give [sic] permission for B.A. Dawkins & Associates, Commissioned Land Surveyors to conduct [sic] an Identification Report after Jamaica National Building Society requested it. This report was submitted on November 7, 2005 after more that [sic] three (3) visits to the property. See attached copy of report.

Your client did not accept this report and hence we agree [sic] that we will contract another firm of Surveyors to conduct another. Jamaica National Building Society (our Mortgage Company) recommends [sic] Donovan Simpson. The firm was contracted and submits [sic its report on January 10, 2006 to Jamaica National Building Society.

The report confirms the breaches identified by B.A. Dawkins & Associates and recommend [sic] that the property is re-survey [sic] and re-registered. SEE REPORT ATTACHED.

Jamaica National Building Society subsequently wrote me on January 11, 2006 (See letter attached) [sic] certain

undertaking [sic] from the vendor's lawyer. I gave your client a copy.

In addition valuation of the property was conducted from July 15, 2005 by W & L Associates SEE REPORT ATTACHED

The mortgage for the purchase of this property was 'pre-approved' by Jamaica National Building [sic] from April 2005.

I am very surprise [sic] at your claim that I 'fail to exercise the option to purchase'. The option was frustrated by your client's failure to conform to the covenants and registered boundaries.

The terms of the Purchase option clearly stated that total lease payments will be deducted from the purchase price of Ten Million Dollars ($10,000,000). Why is there a need to negotiate after the issues are resolved?

On the point of increased rent. Will this increase forms [sic] part of the deductible? And why am I been [sic] asked to increase the monthly payments? I currently pay an average of $58,000.00 per month which include [sic] contribution for the Gardener.

I spend [sic] over Three Hundred Thousand Dollars ($300,000) doing improvement [sic] to this property based on representation [sic] from your client.

In April we had a meeting at your office and the following was agreed:

- Extension of option to purchase on the same terms
- Acceptance of Donovan Simpson's recommendation and the appointment of his firm to correct the breaches identified.

I had previously recommend [sic] that a sale agreement be executed and a reasonable time be given for the completion of sale so as to protect all parties.

Based on information from the Surveyor's office the work is almost completed, so why are we changing?

> I am asking you to review the situation again and let us work to an amicable agreement on terms that are fair and equitable.
>
> I don't want to get into any legal dispute regarding this matter at this stage. I hope good sense prevails.
>
> I enclosed [sic] copy of the following documents:
>
> 1. B.A. Dawkins & Associates - Surveyor's report
> 2. Valuation Report for property
> 3. Letter from Jamaica National Building Society
> 4. Report from Donovan Simpson and Associates and Letter dated February 6, 2006
>
> If you require additional information please do not hesitate to call the undersigned.
>
> I hope to hear from you soon."

[39] Several months later, on 21 March 2007, Messrs Frater, Ennis & Gordon wrote to Mr Cowan on behalf of Dawkins, indicating his continued willingness to proceed with the transaction and advising that they were instructed that "our client has given Miss Lopez the proposed corrected diagram in order to lodge the Certificate of Title to have it rectified".

[40] In his response dated 22 March 2007, Mr Cowan rehearsed the history of the transaction from his client's point of view, insisting that, the Browns having taken "no formal steps to exercise the option", the option had lapsed. By notice to quit also dated 22 March 2007, Mr Cowan's firm, as attorneys-at-law and agents for Mrs Lopez, gave the Browns 30 days in which to vacate the premises. The stated reason for the notice

was that the Browns had "unlawfully blocked the ingress and egress of the Owner to her property and that the Owner requires the premises for her own use and occupation".

Campbell J's judgment

[41] The learned judge approached the case in two ways: first, whether the option to purchase had lapsed or, as the Browns contended, "its life was extended by subsequent agreements and actions of both parties"; and second, whether, even if the option to purchase had lapsed, the Browns were nevertheless entitled to succeed under the principle of proprietary estoppel. On either basis, the judge concluded, the Browns' claim succeeded.

[42] The judge considered that the answer to the first question was to be found in the series of letters which commenced with Dawkins' letter dated 11 January 2006 to Mrs Lopez (see paras [30]-[38] above). Based on these letters, the learned judge's conclusion (at paras (15)-(17) was that:

> "It is clear that although the [Browns] had not exercised the option to purchase in the lease of 2004, the parties had been engaged in discussions re the sale of the lot. Mr Dawkins Brown's letter of the 7th June 2005 to Ms. Annie Lopez indicates that 'he would like to exercise the option, and complete the purchase before November 2005 [sic]. On the witness stand, [Mrs Lopez] denied having seen that letter before. The letter had been part of the discovery process, and had been before the court as a part of the case management regime. I accept that [Mrs Lopez] had been aware of the letter. The letter is also important because on its face, it fixes [Mrs Lopez] with notice of a visit by surveyors at the behest of the [Browns]. Despite Mr.

> Cowan's letter of 18th February 2006, which purports to withdraw the option until the matters had been resolved, it is clear that efforts were still being made to resolve the concerns in relation to the title.
>
> On 4th May 2006, Mr Cowan's letter indicates that meetings between the parties were continuing, and that certain agreements were struck between the parties, which anticipated a new boundary wall, new plans were to be drawn, new titles to be obtained and an application made to modify the covenant. The letter also indicated that the surveyors' fees will be paid by the 1st claimant. A further letter dated 3rd July 2006 repeats [sic] that the defendant is [sic] withdrawing the option to purchase, until the issues were resolved.
>
> Both letters, to my mind, provide ample evidence that the option to purchase was certainly open to the claimants up to July 2006. I accept Dawkins Brown's testimony that there was a meeting between the parties in Mr Cowan's office. I find that at this meeting or soon thereafter, the option to purchase was extended. The acts of the claimants in making good the defects in the title, particularly the payment of the fees of the surveyors, would be sufficient acts of [sic] part performance that would entitle the claimants to specific performance."

[43] As regards the second question, the learned judge took the view (at para. (18)) that, "[e]ven if I am wrong on the question as to whether the option to purchase was extended or renewed, the [Browns] would succeed on the principle of proprietary estoppel". Citing in support the well-known cases of **Ramsden v Dyson** (1866) LR 1 HL 129 and **Crabb v Arun District Council** [1975] 3 All ER 865, Campbell J went on to observe that reliance on this principle "does not require a contract, agreement or a grant, and recognizes that *in strict law*, the defendant may be entitled to her land, however, the principle is in *the realm of equity* and arises out of the conduct and the

relationship of the parties". On this basis, the judge concluded (at para. (21)), that "Mrs Lopez must have been aware of the efforts being made by the [Browns] to remedy the defects in the title", and further (at para. (25)), that "it would be unconscionable and unjust to allow [her] to set up her undoubted rights against the claim being made by the [Browns]".

The appeal

[44] In this appeal, Mrs Lopez challenges Campbell J's decision on a number of grounds. I hope that I do the grounds no disservice by condensing them into the following four propositions. First, the Browns not having exercised it in accordance with its terms by 1 November 2004, the option lapsed and was thereafter no longer enforceable. Second, any discussions between the parties subsequent to the lapse of the option were incapable of reviving the option and, in the absence of an express written agreement between the parties, any purported extension or renewal of the option could be of no effect. Third, the principle of proprietary estoppel was inapplicable on the facts of this case and, even if it was applicable, any equity raised in favour of the Browns could justly have been satisfied by an order that Mrs Lopez should repay any expenses which may have been incurred by them. And fourth, the judge fell into error by signing the judgment filed on 2 June 2009, in terms substantially different from those contained in the orders pronounced by him at the time of delivery of the written judgment on 19 May 2009.

[45] It will be seen that these grounds give rise to the same two principal issues with which Campbell J was concerned, *viz*, the status of the option and the applicability of the principle of proprietary estoppel. In addition, the grounds of appeal invite consideration of the effect of the supposed difference between the judgment pronounced by the judge on 19 May 2009 and the perfected judgment signed by him and filed on 2 June 2009. I will accordingly consider each of these issues in turn.

The status of the option

[46] Mr Williams' submission on this issue was simple and direct: the effect of the Browns' failure to exercise the option in accordance with its terms was that the option lapsed; any extension of the time for its exercise could only be validly given in writing and there was no evidence of this; in the absence of a valid exercise of the option, there was no contract for the sale of land in respect of which the judge could have decreed specific performance; nor was there any or any sufficient act of part performance by the Browns so as to relieve them of the consequences of not being able to show a written contract.

[47] For her part, Miss McBean submitted that there was evidence from which the learned judge could have concluded, as he did, that the option to purchase had been extended by Mr Cowan acting on Mrs Lopez's behalf. In these circumstances, it was submitted, it was not open to Mr Cowan to seek to withdraw it unilaterally in 2006. Further, there was a valid contract between the parties capable of being specifically performed in accordance with the learned judge's order. And further still, even if there

was no evidence of a contract in writing, there was evidence of sufficient acts of part performance so as to make the contract enforceable against Mrs Lopez.

[48] It is common ground in this case that the option was not exercised in accordance with its terms. As will be recalled, clause 2 of the option required that it be exercised 60 days before the expiration of the one year term of the lease and clause 3 provided for it to be exercised in writing. Neither of the Browns having been able to produce any evidence that the option had been duly exercised, Campbell J's judgment proceeded, as did the argument before us, on the basis that the option was not exercised before 1 November 2004.

[49] Miss McBean quite properly referred us to two authorities which, on the face of it, appear to be against her as regards the consequence in law of a failure to exercise an option strictly in accordance with its terms. The first is **Hare v Nicoll** [1966] 1 All ER 285, a decision of the Court of Appeal of England, which was a case concerning an option to repurchase 25,000 shares in a private company. The option was granted on condition that the plaintiff should give notice in writing to the defendant before 1 May 1963 of his desire to re-purchase the shares at the price of £4,687 10s and pay the said sum of £4,687 10s to the defendant before 1 June 1963. By a letter dated 30 April 1963, but written on 1 May 1963, the plaintiff gave notice that he wished to exercise his option. Although the defendant treated the notice as duly given, the plaintiff did not pay the money due for the repurchase of the shares before 1 June and by a letter dated 1

June, posted on 4 June, the defendant's solicitors informed the plaintiff that the option was terminated.

[50] The Court of Appeal upheld the decision of Waller J at first instance that the option conferred a privilege subject to conditions, one of which was that payment should be made before 1 June, and that since that condition was not fulfilled, the option lapsed and the plaintiff's claim failed. Willmer LJ said this (at page 289):

> "It is well established that an option for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option. In the present case, cl 2 of the agreement prescribes two specific dates: (i) a date before which the plaintiff must give notice of his desire to re-purchase the shares, and (ii) another date before which he must make his payment of the purchase price."

(To similar effect, see the judgment of Winn LJ, especially at pages 294-295.)

[51] The second authority is the decision of Patterson J (as he then was) in **Janet Robertson v Surbiton Property Developments Ltd** (1982) 19 JLR 90. That was a case concerning an option to purchase contained in a lease of land. The lessee was required to give notice of her intention to exercise the option at least six months before the expiration of the term of the lease, but it was common ground that the notice was given late. Holding that the lessee's action to enforce the option could not succeed, Patterson J said this (at page 94):

> "At common law, stipulations as to time in a contract were, as a general rule, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Equity, on the other hand, regarded stipulations as to time, in the absence of express or implied evidence to the contrary, not to be of the essence of the contract, save in mercantile contracts. The doctrine of Equity that time is not of the essence, is especially true in the case of contracts for the sale of land but it is not one of universal application. It is well settled that 'an option for the renewal of a lease or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse.' (See Halsbury's Laws of England Vol 8, 3rd edition, 165.) There is no difference as regards stipulations for time between the rule of the common law and the rule of equity. Where time is limited the option must be exercised within the time in which it is expressed to be given, both at law and in equity. Where six months' notice in writing was necessary, a shorter notice was held to be insufficient (*Riddel v Durnford* [1893] W.N. 30)."

[52] It is therefore clear that at common law an option to purchase is a species of privilege (and it does not appear that there is any relevant distinction, as Miss McBean seemed minded to suggest, between an option to purchase shares and an option to purchase land). Accordingly, the party seeking to rely on the option must comply strictly with the conditions stipulated for its exercise, failing which the option will lapse.

[53] But in this case, even if the matter were in any doubt under the general law, it is, in my view, put beyond question by clause 7 of the option itself, which says unequivocally that "[i]f the intending Purchaser fails to exercise the option within the option period prescribed above, the option shall lapse..." On the face of it therefore, whichever way one takes it, it seems to me that the option lapsed and ceased to have

any effect when the Browns failed to take any steps to exercise it in the terms prescribed by 1 November 2004.

[54] Although Miss McBean would obviously have had it otherwise, she did not flinch from this conclusion. Rather, she directed our attention to the further statement of Patterson J in **Janet Robertson v Surbiton Property Developments Ltd** (at page 94) that "a landlord may waive any delay in the exercise of the option". In this regard, Miss McBean placed great reliance on the clear inference from the correspondence between the parties that as late as 2006, as the judge found, discussions between them were ongoing with a view to concluding the sale of Lot 2 to the Browns. Therefore, Miss McBean submitted, on this evidence, the time fixed for the exercise of the option was either extended or waived.

[55] This submission collides directly with Mr Williams' insistence, on a long line of authorities, that this result cannot be achieved orally in relation to an option for the purchase of land. In this regard, we were referred to cases as far back as **Stowell v Robinson** (1837) 3 Bing (N S) 929, in which the question was whether the day fixed in a written contract for completion of the purchase of an interest in land could be waived by oral agreement and another day substituted in its place. Answering this question in the negative, Tindal CJ said the following (at page 937):

> "So that the question as was before stated, is this, Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot.

> This is an agreement for the sale of land, upon which, by the statute of frauds, section 4, no action can be brought "unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorised.' Now we cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the statute of frauds."

[56] Similar statements may be found in **Vezey v Rashleigh** [1904] Ch D 634, 636 ("...[the court] cannot admit parol evidence of an agreement to vary the terms of the contract"); and **Hutton v Watling** [1948] 1 Ch 26, 30 ("...it would be contrary to all principles to admit oral evidence for the purpose of thus wholly contradicting and indeed nullifying the document which the defendants themselves have signed as containing the terms of their agreement with the plaintiff").

[57] At least two factors have persuaded me that Mr Williams has the better of this aspect of the contest. In the first place, there is the strictness of the rule established by the authorities that an option lapses if it is not taken up in accordance with the conditions stipulated for its exercise. In this case, the rule is plainly bolstered, it seems to me, by not only the strong language used by the parties in the option itself, but also by the fact that, after the expiration of the term of the lease at the end of 2004, the parties chose not to make any fresh provision for an option in the further lease. And

secondly, despite the judge's findings that the parties had continued to discuss the possibility of the purchase of Lot 2 by the Browns during 2005 and 2006, there is no written evidence of any subsequent agreement between the parties in relation to a waiver or renewal of the option or for the sale of Lot 2 to the Browns at the price contemplated by the terms of the option.

[58] But, obviously alive to the last mentioned problem, Campbell J went on to find that there was evidence of sufficient acts of part performance by the Browns to entitle them to specific performance. In support of this finding, the learned judge referred to the decision of the Privy Council, on appeal from this court, in **Eldemire v Honiball** (1991) 28 JLR 577, upon which Miss McBean also relied before us. That was a case in which the respondent sought specific performance of an oral agreement for the sale of land. In the absence of an agreement in writing, the respondent relied on acts of part performance consisting of repairs and improvements to the premises. The trial judge found that there was an oral contract, which was supported by the acts of part performance relied on by the respondent and made an order for specific performance accordingly. This court rejected the appellant's attack on the judge's finding that there were sufficient acts of part performance by the respondent and the Board declined, in accordance with its usual practice, to interfere with concurrent findings of fact on this point in the courts below. The Board's decision to dismiss the appeal against the order for specific performance of the oral contract made in the courts below is therefore ultimately unhelpful as to the actual content of the doctrine of part performance.

[59] More to the point, perhaps, is the old case of **Dale v Hamilton** (1846) 5 Hare 369, to which Mr Williams referred us. In considering what might amount to a sufficient act of part performance to take a contract required to be in writing out of the Statute of Frauds, Wigram V-C said this (at page 381):

> "It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. Of this a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as shewing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground been admitted to be an act of part performance: *Morphett v Jones* (1 Swanst 172). But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part-performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money alleged to be purchase-money."

[60] In Gray & Gray's Elements of Land Law (5th edn, 2009, para. 8.1.40), under the rubric, 'Acts sufficient to constitute part performance', the learned authors state the following:

> "The doctrine of part performance rendered[1] a contract enforceable, even in the absence of a written memorandum, where the claimant had done acts which, on a balance of probability, were referable to and explicable only in terms of the existence of a contract in relation to land. Although these acts did not need to be such as would demonstrate

[1] The doctrine of part performance was abolished in England by section 2(8) of the Law Reform (Miscellaneous Provisions) Act 1989,

> the precise terms of the contract, part performance was premised on the current existence of an actual contract. Acts of reliance were irrelevant if performed on the footing of mere negotiations which might or might not ripen later into contract."

[61] Campbell J found that the actions of the Browns, in "making good the defects in the title, particularly the payment of the fees of the surveyors", were sufficient acts of part performance. On the other hand, Mr Williams submitted (at para. 16 of his written submissions) that "the procurement of a valuation report and surveyors [sic] report by persons who are desirous of purchasing premises, prior to entering into an agreement for sale, is an act of due diligence and a condition precedent to any contemplated contract, and therefore not acts [sic] of part performance". In this case, Mr Williams submitted further (perhaps a trifle unkindly), the Browns were guilty of "the folly of acting without a written contract" (as Eyre LCB had said of the plaintiff in the long-ago case of **O'Reilly v Thompson** (1791) 2 Cox, 271, 273).

[62] On this point, I am again inclined to agree with Mr Williams. For the reasons advanced by him, I find it difficult to conclude that the acts of part performance relied on by the Browns were explicable only on the basis of the existence of a contract in relation to land. They were certainly not acts, such as the otherwise unexplained taking of possession, which suggested unequivocally that there must have been some contract between the owner of the land and the person in possession. I would therefore conclude that the acts of part performance relied on in this case were not sufficient to enable the Browns to overcome the absence of a written contract for the sale of Lot 2

to them. I accordingly consider that the learned judge's order for specific performance cannot be sustained on this basis.

Proprietary estoppel

[63] Mr Williams submitted (at para. 24 of his skeleton submissions) that the principle of proprietary estoppel was not applicable in this case, "as on the totality of the evidence no reasonable tribunal could have concluded that [Mrs Lopez] gave any assurance and or representation of rights to the premises". He pointed out that the alleged extension of the option was given by Mr Cowan and not by Mrs Lopez and that, in any event, the representation, such as it was, was not as to the grant of an interest in land, "but rather to some further negotiations directed towards the creation of legal rights".

[64] In answer to these submissions, Miss McBean maintained that the judge was correct in saying that the applicability of the principle of proprietary estoppel does not require that there be any contract, agreement or grant, but arises in equity out of the conduct of and the relationship between the parties. On the evidence, she therefore submitted, there were ample grounds for the judge's conclusion that the Browns were entitled to rely on the principle.

[65] Both counsel placed reliance, as did Campbell J, on what Lord Walker has referred to (in **Yeoman's Row Management Ltd and another v Cobbe** [2008] UKHL 55, para. 52) as "[t]he great case" of **Ramsden v Dyson**. Lord Kingsdown's

classic statement of the principle in that case (at page 170) still underpins the modern law of proprietary estoppel:

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

[66] We were also referred by Miss McBean to the decision of the Court of Appeal of England in **Crabb v Arun District Council**, a case involving a claim to a right of access over land to a public highway. In that case, Lord Denning MR said this (at page 871):

> "When counsel for Mr Crabb said that he put his case on an estoppel, it shook me a little, because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action...What then are the dealings which will preclude [a landowner] from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—even though that promise may be unenforceable in point of law for want of consideration or want of writing—and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise...Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict

> legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In *Ramsden v Dyson* [(1866) LR 1 HL 129 at 170)] Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged'."

[67] In similar vein, Scarman LJ added the following (at page 875):

> "The plaintiff and the defendants are adjoining landowners. The plaintiff asserts that he has a right of way over the defendants' land giving access from his land to the public highway. Without this access his land is in fact landlocked, but, for reasons which clearly appear from the narration of the facts already given by Lord Denning MR and Lawton LJ, the plaintiff cannot claim a right of way by necessity. The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway. If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well-settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

[68] The modern law of proprietary estoppel is aptly summarised by the authors of Gray & Gray in this way (at para. 9.2.8):

> "A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:

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

[69] As will be seen, the notion of unconscionability of some kind is central to this and other formulations of the principle. However, Lord Scott's important judgment in **Yeoman's Row Management Ltd and another v Cobbe**, to which Mr Williams referred us, sounds an important caution (at para. 16) against allowing unconscionability to take on a life of its own:

> "My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a 'proprietary estoppel equity' as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion."

[70] Further, Lord Scott continued (at para. 28):

> "Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so."

[71] **Attorney-General of Hong Kong and another v Humphreys Estate (Queen's Gardens) Ltd** [1987] 2 All ER 387, to which Mr Williams also referred us, also makes it clear that it is important in every case in which a claim based on proprietary estoppel is made to have regard to the particular facts of the case. In that case, a written agreement, expressed to be "subject to contract", for the purchase of development property had been signed. The agreement stated that the terms could be varied or withdrawn and that any agreement was subject to the documents necessary to give legal effect to the transaction being executed and registered. It was therefore clear that neither party was for the time being legally bound. However, the intended purchaser was permitted to take possession of the property and to spend money on it. Subsequently, the owners of the property decided to withdraw from the transaction and gave notice terminating the intended purchaser's licence to occupy the property.

[72] The intended purchaser's claim to the property based on proprietary estoppel failed because, given the terms of the agreement between the parties, it had chosen "to begin and elected to continue on terms that either party might suffer a change of mind and withdraw" (per Lord Templeman, delivering the judgment of the Privy Council, at page 395). As Lord Scott later explained (at para. 25) in **Yeoman's Row**

Management Ltd and another v Cobbe, "[t]he reason why, in a 'subject to contract' case, a proprietary estoppel cannot ordinarily arise is that the would-be purchaser's expectation of acquiring an interest in the property in question is subject to a contingency that is entirely under the control of the other party to the negotiations...The expectation is therefore speculative" (see also the earlier case of **Gillett v Holt** [2001] Ch 210, 228, where Robert Walker LJ described **Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd** as "essentially an example of a purchaser taking the risk, with his eyes open, of going into possession and spending money while his purchase remains expressly subject to contract").

[73] Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity. And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action.

[74] Against this background of principle, I therefore come to the facts upon which the Browns grounded their claim to Lot 2 based on proprietary estoppel. There is no appeal from the judge's finding that Mrs Lopez was aware of Dawkins' letter dated 7 June 2005, which had indicated that, "I would like to exercise the option and complete the purchase before November 2005". Upon receipt of this letter, it was clearly open to Mrs Lopez to have pointed out from this stage that the option had lapsed, the time for exercising it having long passed. Instead, the Browns were allowed, obviously with the knowledge of, and certainly no dissent from, Mrs Lopez, to incur the expense of procuring reports from not one, but two surveyors. It seems clear to me that this is the only reasonable inference that can be drawn from the evidence when the following is recalled.

[75] By letter dated 11 January 2006, Dawkins wrote directly to Mrs Lopez, referring to "our previous discussions regarding the surveyors [sic] Identification Report" (copies of which were enclosed), providing "a formal update on the matter" and making suggestions "in order to resolve the matter". Mrs Lopez must have passed this letter to Mr Cowan, since, although it was not on its face copied to him, it was responded to by him, presumably acting on instructions, in his letter dated 16 January 2006. In that letter, while to some extent disagreeing with Mr Simpson's theory of how the discrepancies in the title measurements came about, Mr Cowan said nothing to dispute Dawkins' reference to previous discussions with Mrs Lopez. But, of even greater significance, he agreed unequivocally that, "Lot 2 has to be re-surveyed, and the plan

re-registered to reflect that the true boundary of the property extends all the way to the stone wall on Panton Road."

[76] It was not until over a month later that Mr Cowan wrote again, by letter dated 18 February 2006, to indicate that "having regard to the need to resolve the...issues related to the said title, [Mrs Lopez] is withdrawing her offer of sale of the property to you until the issues are resolved". The judge considered (at para. (20)), and I agree with him, that "[t]hat assertion was ambiguous and too late". But, in any event, by 4 May 2006, Mr Cowan wrote to Mr Simpson recording an agreement reached at a later meeting between Dawkins and Mrs Lopez, for the drawing of new plans to reflect the new boundaries between Lots 1 and 2; the obtaining of new titles; and the modification of the existing restrictive covenant. In that letter, Mr Cowan also advised Mr Simpson that Dawkins would be responsible for his fees for this work. Then, by letter dated 15 May 2006, Mr Simpson having supplied the requested estimate of his fees, Mr Cowan authorised him to proceed with the work. The unchallenged evidence was that Mr Simpson's fees of $75,725.00 were duly paid by the Browns in May 2006, so as to enable Mr Simpson to prepare a new sub-division plan and to have it pre-checked at the Office of the Registrar of Titles. And, by the time of Dawkins' subsequent letter to Mrs Lopez dated 10 July 2006, he asserted, again without contradiction, that "[b]ased on information from the Surveyor's office the work is almost completed..." (see para. [38] above).

[77] A further six weeks would elapse before Mr Cowan's further letter to Dawkins of 3 July 2006, repeating Mrs Lopez's position "that she is withdrawing the option...until the issues surrounding the titles to the property are resolved". But what this correspondence reveals, it seems to me, is that, as late as July 2006, the parties were in active discussions, encouraged by Mrs Lopez and Mr Cowan, with a view to achieving a sale of Lot 2 to the Browns at the price contained in the option. By the time of Mrs Lopez's purported withdrawal from these discussions, coming after almost a year of assurances to the opposite effect, the damage which equity seeks to obviate had already been done, the Browns having already, as the unchallenged evidence shows, gone a long way to giving effect to Mrs Lopez's assurances.

[78] The role of Mr Cowan in all of this, I would observe parenthetically, is one issue which was not fully explored either at the trial or on appeal. While the Browns maintained that they at all times had the impression that Mr Cowan was acting for them as well as for Mrs Lopez in the transaction, in his letter to Mrs Lopez dated 11 January 2006 Dawkins more than once referred to Mr Cowan as "your lawyer" (see para. [30] above). The judge made no finding on this point, perhaps understandably in the light of the fact that Mr Cowan himself, having opted to act as Mrs Lopez's advocate, did not give evidence at the trial. But what does emerge clearly from the evidence, in particular the course of correspondence to which I have already referred, is that Mr Cowan acted at all times as the authorised agent of Mrs Lopez and was in effect her alter ego in all discussions with the Browns.

[79] Campbell J specifically rejected (at para. (21)) the submission that there had been no conduct on Mrs Lopez's part "which represented or encouraged the [Browns] to believe that they had acquired an interest in the property and accordingly acted to their detriment on that basis". While the judge allowed that acts of improvement to the property, such as tiling and the payment of outstanding light bills, might be construed as acts "consistent with a tenancy", he took a different view (at para. (22)) of the Browns' efforts to remedy the defects in the title to Lot 2:

> "How could such conduct be referable to a mere tenancy agreement as argued or a unilateral act, by the defendant. The landlord was made aware of the application for the mortgage, the obtaining of the valuation reports and the obtaining of two surveyors' ID reports. In addition, the claimants had the property re-surveyed, and obtained a pre-checked plan. These are the actions consistent with that of a prospective purchaser, as alleged by the claimants. I reject the defendant's testimony, when confronted with the letter of 4th May 2006, that Mr Brown recommended the solution in that letter, so that she should have a proper title and that Mr Brown did it on his own accord. I accept that Mr Cowan had asked of Dawkins Brown if he would agree to pay the professional cost for the resurveying and that sum would be deducted from the 'closing cost', and Mr Brown had agreed. It was after Brown agreed that Mr Cowan requested a quotation of the professional cost, after which a letter was sent giving permission to conduct the survey. Why would a landlord consider the cost of remedying the defects in the title, at the expense of the tenant, a gift to the landlord? Why would a tenant be interested in perfecting the landlord's title, at his own expense?
>
> In the witness box, the defendant said that she was unaware that Mr Brown had agreed to pay for the new titles. She also claims[sic] to be unaware that Dawkins Brown was planning on erecting a new boundary wall around the perimeter. Did the defendant encourage or made [sic] such

> a representation that would cause the claimant[s] to act to their detriment? The defendant admits that she did see a man cutting trees on the premises and another one surveying, she said she inquired of him, what he was doing. The man's response was, surveying. She said, having seen this man on her property, who she had not commissioned to do a survey, there were no further discussions between them. That, according to her, took place in November of 2005. Her testimony that she was unaware of the claimant's efforts to perfect the title strains credulity.
>
> Did the defendant encourage the claimants to think that they had or was [sic] going to be given a right? Had she done it directly or had she done it by abstaining from asserting a legal right? Surely, the action of seeking the claimants to bear the professional expenses, the obtaining of surveyors' reports, the valuation reports, the acts done with the assistance and compliance of the defendant were direct encouragement of the belief in the minds of the claimants that they were to be sold the property.
>
> The instances [sic] of not acting when men were observed by the defendant surveying the property, constitutes an acquiescence, a remaining silent, an abstaining from an assertion of rights which inured to the detriment of the claimants. I hold that it would be unconscionable and unjust to allow the defendant to set up her undoubted rights against the claim being made by the claimants. (See Crabb v Arun, Scarman L.J. page 195 letter E). There is no denial that the claimant[s] incurred large expenses in respect of the property."

[80] In my respectful view, it is difficult to improve on this analysis. The correspondence amply demonstrates that, between 2005 and 2006, irrespective of the legal status of the option, there were ongoing discussions between the parties, in which the Browns were encouraged to believe, either by Mrs Lopez or by Mr Cowan acting on her behalf, that, once the issues with the title were rectified, Lot 2 would be transferred to them at the price originally proposed in the option. There was therefore, applying

standard proprietary estoppel analysis, an assurance or representation by Mrs Lopez (which was neither subject to contract nor speculative), with the clear intention that it should be relied on by the Browns. The evidence also indicates that, acting on the strength of this assurance, the Browns changed their position by incurring expenses in engaging surveyors with a view to rectifying the defects in Mrs Lopez's title so as to facilitate the sale of Lot 2 to them. Finally, in my view, the Browns clearly suffered resultant detriment or disadvantage from Mrs Lopez's unconscionable withdrawal of her assurance that she would sell Lot 2 to them. I would therefore conclude that Campbell J's conclusion that Mrs Lopez was bound by a proprietary estoppel in favour of the Browns was correct and ought not to be disturbed.

The remedy

[81] In the light of this conclusion, the question which next arises is, as Lord Denning MR put it (at page 872) in **Crabb v Arun District Council**, "in what way now should the equity be satisfied?" Mr Williams submitted that the Browns' remedy should be proportionate to the detriment suffered by them, that is, the expense incurred by them in engaging the services of the surveyors. Distinguishing between what he characterised as the Browns' 'reliance interest' and their 'expectation interest', Mr Williams urged the court to say that any equity raised in their favour would be adequately satisfied by an order for repayment of their expenses. In support of his submissions, Mr Williams referred us to the following passage from Gray & Gray (6th edn, para. 9-066):

> "It is a recurrent theme in estoppel cases that the court must preserve some kind of *proportionality* between the detriment that has been incurred by the estoppel claimant and the remedy eventually awarded...As Robert Walker LJ indicated in *Gillett v Holt* (2001), it is the function of the court in each case to identify the 'maximum extent of the equity' founded on estoppel and then 'to form a view as to what is the minimum required to satisfy it and to do justice between the parties'. The court may never award estoppel claimants a greater interest in law than was within their induced expectation...but may in some circumstances award rather less..."

[82] The authorities also support the wider proposition that, as was said by the Privy Council in the leading older case of **Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington** (1884) 9 App Cas 699, 714, "... the court must look at the circumstances in each case to decide in what way the equity can be satisfied". It is in this context that, as Lord Denning MR observed in **Crabb v Arun District Council** (at page 873), "equity is displayed at its most flexible". Thus, in that case, the court granted to the plaintiff the right of access and the right of way which he claimed, without requiring him to compensate the defendant for it. And there have also been cases in which the court concluded that the way to achieve the minimum equity and to do justice between the parties was to order the conveyance of the fee simple estate to the claimant (see, for example, **Dillwyn v Llewelyn** (1862) 4 De G F & J 517 and **Pascoe v Turner** [1979] 2 All ER 945).

[83] But each case must be viewed on its own facts and, in **Jennings v Rice and others** [2002] EWCA Civ 159, Aldous LJ emphasised, as did Mr Williams, the element of proportionality (at para. [36]):

> "...once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment."

[84] Thus, in that case, in which the claimant had acted to his detriment on the strength of having been led by the deceased to believe that he would receive all or part of her property on her death, the court considered that, on the particular facts of the case, it would have been disproportionate to award him the whole estate. In the result, the trial judge's award of £200,000.00 to be paid out of the estate was upheld on appeal. However, in his concurring judgment in that case, Robert Walker LJ also referred (at para. [50]) to the kind of case in which the defendant's assurances, and the claimant's reliance on them, may have a consensual character falling not far short of an enforceable contract:

> **"...**there is a category of case [sic] in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

[85] In the instant case, having declared that the Browns "have an equitable interest in the property...by virtue of equitable estoppel", Campbell J went on to empower the Registrar of the Supreme Court, in the event of the parties failing to do so, "to sign the Agreement for Sale, Transfer and any document necessary to effect the sale and transfer of the property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew". In effect, the learned judge therefore awarded the Browns what Mr Williams described as the expectation interest in Lot 2.

[86] The question is therefore whether the judge's order, which gave effect to the maximum extent of the Browns' equity in Lot 2, was the minimum required to satisfy the equity and to do justice between the parties in all the circumstances of the case. The Browns originally went into occupation of Lot 2 pursuant to the lease at the beginning of 2004. They have remained in occupation of the property since that time (although we were told during the course of the hearing that they were no longer actually living there). Although, as the judge found, some of their expenditure on the property was of a nature that a tenant might legitimately be expected to make, it is clear that they occupied the property in the expectation of ultimately becoming the owners of it. At all events, the assurances by Mrs Lopez upon which the judge found the Browns to have acted were as to the transfer to them of the fee simple to Lot 2 in accordance with the terms of the option. The unchallenged evidence, to which I have already referred, was that, on the strength of those assurances, and encouraged by Mrs Lopez, the Browns went to considerable expense and trouble to identify whatever was

required to rehabilitate Mrs Lopez's title for the purposes of enabling the sale to them. Even after the first intimation in Mr Cowan's letter of February 2006 that Mrs Lopez was "withdrawing her offer of sale" of Lot 2 (see para. [33]), Mrs Lopez in fact and in effect renewed her assurances in her subsequent meeting with Dawkins (see para. [35] above), thus leading directly to the Browns incurring yet further expense by paying Mr Simpson's fees for re-surveying the property.

[87] It seems to me that this is not a case in which the Browns' expectation that Mrs Lopez would fulfil her promise was at large, as in the kind of case in which the claimant is assured that the benefactor will at some future date confer a not fully defined or quantified benefit on him. Rather, it is a case falling within the category referred to by Robert Walker LJ in the passage quoted above (at para. [84]), in that the parties had plainly arrived at a clear mutual understanding on known and agreed terms, subject only to the rectification of the title problem, which the Browns had undertaken to pay for. In these circumstances, an order that Mrs Lopez should refund the Browns' expenses incurred in rectifying her title, in the expectation generated by her sustained assurances of the transfer of Lot 2 to them, would, in my view, be patently insufficient to satisfy the equity and do justice between the parties. I would therefore affirm the judge's order.

[88] And finally, I must say a word about the discrepancy between the judge's orders as pronounced by him in his written judgment delivered on 19 May 2009 and the formal judgment filed on 2 June 2009. The significant difference between the two was that

while in the former the judge mentioned only the fact that the Browns were entitled to an equitable interest in Lot 2 based on proprietary estoppel, to the latter he added an order for specific performance in their favour and included a mechanism for securing this result if needed (see paras [5] and [6] above). In both versions of the judgment, the judge's conclusion that the Browns were entitled to an equitable interest in Lot 2 was clearly stated and this is the conclusion that I now propose to invite the court to endorse, on the basis that it was one which was plainly open to the judge on the evidence. In the light of this conclusion, it now appears to me that nothing at all now turns on the discrepancy, however it may have arisen. In any event, the original order not having been formalised, it was in my view open to the learned judge to make the further orders that he did.

[89] But I should not leave the subject of the formal judgment filed on 2 June 2009 without mentioning the judge's order numbered 4 (see para. [6] above), concerning the disposition of funds held (pursuant to the order of the court made on 7 November 2007) in the joint names of the attorneys-at-law for the Browns and Mrs Lopez. Nothing was said about this order during the hearing of the appeal and, as will presently appear, I propose that this should be dealt with by way of further written submissions from the parties.

Conclusion

[90] I would therefore allow the appeal in part, by setting aside the judge's order for specific performance of an agreement between Mrs Lopez and the Browns for the sale

and purchase of Lot 2. As I have attempted to demonstrate, no such agreement came into being in this case, because the option was not exercised within the time limited by its terms. However, I would dismiss the appeal against the judge's order awarding an equitable interest in Lot 2 to the Browns on the footing of proprietary estoppel. In substitution for the orders made by the judge, I would propose the following:

> 1. The respondents are hereby declared to be entitled to the transfer to them of the fee simple ownership of Lot 2, 9 Panton Road, Stony Hill, St Andrew, being the property registered at Volume 1236 Folio 877 of the Register Book of Titles, upon payment by them to the appellant of the sum of $10,000,000.00, less the sum of $540,000.00 paid by the respondents as rent for the period 1 January - 31 December 2004 and allocated as a payment on account of the purchase price. The respondents will also be liable for the usual expenses payable by purchasers of real property.
>
> 2. If the appellant shall fail or neglect to sign an agreement for sale and/or a registrable transfer in compliance with the order of the court, the registrar of the Supreme Court shall be empowered to sign the agreement for sale and/or the transfer and any other document necessary to effect the sale and transfer of Lot 2, 9 Panton Road aforesaid to the respondents.
>
> 3. The sale shall be completed within 90 days from the signing of the agreement for sale, in respect of which time shall be of the essence.
>
> 4. The parties are to file written submissions as regards –
>
> (i) the learned judge's order that "all sums in account #001-101-034-6143 in the names of Althea McBean and or Lancelot Cowan at

the RBTT Bank (Ja) Ltd., Duke and Tower Street Branch, to be paid forthwith to Robertson Smith Ledgister & Co. on behalf of Annie Lopez."; and

(ii) the costs of the trial in the Supreme Court and of this appeal (including the cross-appeal),

within a period of 21 days from the date of this order, or such longer period as may be allowed by the court on the application of either party.

[91] And finally, I must tender a sincere apology to the parties and their counsel for the inordinate, though regrettably unavoidable, delay in producing this judgment.

McINTOSH JA

[92] The privilege was mine to read the draft judgment of my brother Morrison JA in this appeal. In my opinion, his reasoning is sound and his conclusions inescapable on the facts and circumstances and I accept his invitation, expressed at paragraph [88], to endorse the judgment of the learned trial judge that the Browns are entitled to an equitable interest in Lot 2, 9 Panton Road, Stony Hill, St Andrew, on the footing of proprietary estoppel. I accordingly agree that the orders proposed by him in paragraph [90] should constitute the judgment of the court in this appeal.

BROOKS JA

[93] I have read, in draft, the judgment written by my learned brother, Morrison JA. I agree with his reasoning, his conclusions and his proposed orders and I have nothing that I can usefully add.

MORRISON JA

ORDER

Appeal allowed in part. Campbell J's order for specific performance of an agreement between Mrs Lopez and the Browns for the sale and purchase of Lot 2 set aside.

Appeal against Campbell J's order awarding an equitable interest in Lot 2 to the Browns on the footing of proprietary estoppel dismissed and the following orders substituted therefor:

> 1. The respondents are hereby declared to be entitled to the transfer to them of the fee simple ownership of Lot 2, 9 Panton Road, Stony Hill, St Andrew, being the property registered at Volume 1236 Folio 877 of the Register Book of Titles, upon payment by them to the appellant of the sum of $10,000,000.00, less the sum of $540,000.00 paid by the respondents as rent for the period 1 January - 31 December 2004 and allocated as a payment on account of the purchase price. The respondents will also be liable for the usual expenses payable by purchasers of real property.

2. If the appellant shall fail or neglect to sign an agreement for sale and/or a registrable transfer in compliance with the order of the court, the registrar of the Supreme Court shall be empowered to sign the agreement for sale and/or the transfer and any other document necessary to effect the sale and transfer of Lot 2, 9 Panton Road aforesaid to the respondents.

3. The sale shall be completed within 90 days from the signing of the agreement for sale, in respect of which time shall be of the essence.

4. The parties are to file written submissions as regards –

(i) the learned judge's order that "all sums in account #001-101-034-6143 in the names of Althea McBean and or Lancelot Cowan at the RBTT Bank (Ja) Ltd., Duke and Tower Street Branch, to be paid forthwith to Robertson Smith Ledgister & Co. on behalf of Annie Lopez."; and

(ii) the costs of the trial in the Supreme Court and of this appeal (including the cross-appeal),

within a period of 21 days from the date of this order, or such longer period as may be allowed by the court on the application of either party.