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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C.234 of 2002

BETWEEN	LLOYD CAYMAN	PLAINTIFF
AND	SYLVIA SIMMS	1ST DEFENDANT
AND	CECIL SIMMS	2ND DEFENDANT

Mrs. Andrea Bickhoff-Benjamin instructed by Grant, Stewart, Phillips & Co. for Plaintiff.

Bert S. Samuels instructed by Bert Samuels & Co. for Defendants.

Heard: May 14, 15, 16 & July 18, 2003

DAYE, J. (Ag.)

This is an action for recovery of possession of premises situated at 40 Westlake Avenue, Kingston 10. The action was brought by the plaintiff on the authorization of his mother the sole surviving joint tenant of the premises. The other joint tenant was the plaintiff's maternal grand-mother who died in August 1998. At the time of her death, her two adult twin children were in occupation of the premises. They are the aunt and uncle of the plaintiff and the defendants in this action. Both defendants have been residing at the said

premises since 1965, and a total of 38 years which includes when the premises was acquired in July 1982 by their mother and sister.

Pleadings

The plaintiff's asserts in paragraph 2 of his statement of claim, which is endorsed on his writ of summons that the defendants occupied the premises "by virtue of a gratuitous licence granted by Agatha Mable Meikle" which is the mother of the defendants. In their defence at paragraph 2 the defendants deny this assertion and claim as follows:

".....the defendants were granted permission to remain on the premises until they die by Agatha Mable Meikle and Winifred A. Bonner the mother and sister of the defendants respectively in 1982 when the premises were bought on condition that the first name defendant paid mortgage along with Agatha Mable Meikle"

Issue

On the pleadings the defendants do not challenge that the plaintiff's mother as the sole surviving joint tenant is the legal owner of the premises. They contend that they have an equitable interest in the premises which entitles them to remain in occupation of the premises for their lives. This raises the issue of promissory estoppel and/or equitable estoppel, proprietary estoppel or constructive trust.

Issues of fact arise as to:

- (a) whether the plaintiff's mother and/or grand-mother made any promise to the defendants at the time the premises was bought that they could live there until they die;
- (b) whether the defendants relied on any promise, if any;
- (c) whether defendants acted to their detriment in reliance on such promise, if any;
- (d) what is the status of the defendants in respect of the premises, and
- (e) whether the plaintiff has a valid authority to commence proceedings for recovery of possession of these premises, which is registered under the Registration of Titles Act

The Law

I accept Lord Diplock's statement of the principle on how a resulting or constructive trust arises in equity where a party whose name is not on the title to land is claiming an interest to the land against the party whose name is on the title. He said in Gissing v. Gissing [1970] 2 ALL ER 780.

"Any claim to a beneficial interest in land by a person whether spouse or stranger where the legal estate in land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to

the beneficial interest of the claimant as cestui que trusta resulting trust or constructive trust is createdwhenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that so by acting he was acquiring a beneficial interest in the land.”

It is agreed by all the parties that the legal title to this premises is in the sole name of the plaintiff's mother as a result of the other joint tenant's death. The defendants by claiming that certain promises were made to them by the plaintiff's mother and their mother in 1982 when the premises was legally acquired jointly are invoking the principle enunciated by Lord Diplock. They assert that they relied and acted to their detriment upon the words and conduct of both their mother and sister.

This principle bears similarity to that of promissory or equitable estoppel (16 Halsbury's Laws of England, 4th ed. Paragraph 1514). The defendants have framed their defence and submissions largely on this narrow principle. However, the authorities disclose that promissory or equitable or proprietary estoppel is part of a broader principle or approach applied in equity to ensure that one party does not behave in an unconscionable manner

towards another in any dealings or transaction (per. Edward Nugee O.C. **Re Basham (decease) [1987] 1 ALL ER. 40 at 414. Paragraph C.)**

The elements of estoppel were identified by Hobhouse L.J. in **Stedmore v Dalby [1996] 72 A.L.J.R 196 at 205 paragraph 2)** when he said after he had discussed proprietary estoppel:

“In other types of estoppel the same element can be identified: conduct/representation/promise; reliance, detriment: just outcome.....”

Hobhouse L.J. accepted that Mason C.J. was correct when he said that there is one “overriding doctrine of estoppel rather than a series of independent rules: The element was unconscionable conduct on the part of the person bound by the equity” (**Commonwealth of Australia v. Verwayen**) (1990) 95 A.L.R. 321. The same case emphasises that the party asserting the estoppel must be able to show that his own conduct was attributable to an expectation or a mistake contributed to by the conduct of the affected party.

Evidence/Finding of Facts

The 1st defendant relies on the following in her evidence to support the estoppel:

(a) **Words:**

She testifies in her witness statement and at the trial

that both her mother and sister told her when premises

40 West Lake Avenue was bought that it was family property and "Me and my brother should live there until we die." Further she said her sister told her in 1996 and particularly in 1998 "Don't worry yourself you are going to live at 40 Westlake Avenue until you die."

The 2nd defendant also testified that he was told by his sister Winnifred Bonner that he could live at the premises until he died. In cross examination he said "she told him this only six years ago". So the inference can be drawn that no promise was made to him that he could live on the premises until death at the time when it was acquired.

The plaintiff's mother, Mrs. Winnifred Bonner admitted under cross examination that she gave her brother and sister permission to "live on the premises until my mother die" which was in August 1998. She denied telling the brother the second defendant that he could live on premises until he died.

Having seen the witness, I accept Mrs. Winnifred Bonner as a witness of truth. I found her to be straight forward and reliable. I prefer her evidence to that of the 1st defendant who I do not find reliable but false as to her interpretation of all the transactions surrounding the premises. The 2nd defendant is simple minded and his evidence is largely based on hearsay

evidence from his twin sister. He is wrongly influenced and misguided by his twin sister.

I find as a fact that the plaintiff's mother, Mrs. Winnifred Bonner did not make any promise or representation that 1st and 2nd defendants should live at the premises until they die, but that they could live there until their mother died.

(b) **Conduct**

- (i) The 1st defendant asserts that as a result of her sister's promise in 1982, her sister knowingly allowed and acquiesced in her paying the mortgage for the premises for the 5 years between 1982 to 1987. She testifies that it was she and her daughters who assisted her mother to pay the mortgage during those years. She also said everybody including her sister Mrs. Bonner helped to pay the mortgage. In cross examination, she was contradicted by her witness statement that she actually paid any mortgage. Her assertion that she paid the mortgage for 14 years was also successfully challenged. I find that she did not have the means to pay the mortgage and her daughter's means and ability to pay was doubtful. I find that Mrs. Winnifred Bonner who was employed in the United States had the means, and did send money regularly to pay the mortgage for the premises between 1982 to 1987. The receipts numbered Ex. 7, 8 and 9 support her evidence. I do not accept that receipt Number Ex. 15 detracts from her credibility as submitted by Counsel for defendants. I

accept the fact that she sent money from the United States to the Victoria Mutual Building Society via telegraphic transfer as well as to her sister to pay the mortgage on her behalf and for other purposes. Whatever money her niece Doreen Smith paid to the Building Society was from money sent to her mother. The 1st defendant witness admits that she knew Mrs. Bonner would always send money to her mother and Mrs. Bonner would also pay the mortgage. I find that this was done for the period 1982-1987 and up to 1998. The 1st Defendant's evidence is also inconsistent with her mother's pleading that it was in 1982 that Mrs. Bonner told her mother that she could live at the premises for life. On the witness's evidence this would have been 1984. She clearly lacks knowledge of this transaction.

(ii) The 1st defendant again testified that she paid land taxes for the premises for 16 years until 1998 and her sister acquiesced and encouraged her to do so. She also claimed that she paid electricity bills.

(iii) Her brother made repairs to the house such as the ceiling in the dining room, dining hall and kitchen. He also maintained the yard without any payment for his labour but on reliance of the promise that he could live there until death.

I find as a fact that Mrs. Winnifred Bonner sent money to the 1st Defendant to pay bills such as land tax and for general maintenance of the premises. The receipts Numbered Ex. 9A to 9I support her on this. This

payment of bills by the 1st defendant is not attributable to any promise by Mrs. Bonner that this was to be done in exchange for living at the premises for life.

(b) **Reliance on Promise and Acting to Detriment**

- (i) The first defendant testified that 1998 she gave up the prospect of staying and working in the United States at her sister's encouragement that she should return to Jamaica and look after her mother.
- (ii) After 1989 she again gave up the prospect of marrying in the United States and getting a permanent visa so that she could work and buy her own house because her sister encouraged her to return to Jamaica to look after her elderly mother on the basis that she could reside at the premises for life.
- (iii) She resigned from her job as an office helper in Jamaica after her mother got a stroke and was bedridden, to devote her attention to her mother as required by her sister.

Mrs. Bonner denied each of these assertions made by the 1st defendant. The 1st Defendant evidence is that on each occasion that she went to the United States of America Mrs. Bonner got a job for her, and allowed her to reside at her home before she got these jobs. She admits that Mrs. Bonner would send money to take care of her mother, and that Mrs. Bonner would physically take care of her mother when she visited Jamaica. The first defendant's care of her mother during her illness was not that of one stranger to another. That was her duty to her mother.

The 1st defendant could not make financial contributions to her mother and so she contributed by taking care of her physically. It can't be said that in so doing she was acting to her detriment when her other sister was making such a substantial contribution.

Having observed witnesses and the exhibits in the case, I find that Mrs. Bonner was a hard working, loving and providing sister and daughter. She showed an extraordinary responsibility and commitment to both her immediate and extended family. She gave moral, physical and financial support to all of her family in Jamaica. She did that by her thrift and industry, working as a nurse's aid in the United States. Both defendants on oath, constantly acknowledged her kindness to them over the years. There is nothing unconscionable in her conduct towards either her brother or sister. In

fact in cross examination, the 2nd defendant said he did not expect to get paid for the maintenance and repairs that he effected at the premises. This is contrary to what his twin sister asserted. I find that the defendants have fallen in a state of dependency on their sister. The 1st defendant and her brother have laboured under a misplaced expectation that the premises were family property and they would live there for life. As a consequence, they are unwilling to face the reality of giving up possession of the premises at which they have residing for over 30 years with their children and some grandchildren, rent free.

There was never any intention by Mrs. Bonner to enter into any legal relationship with 1st and 2nd defendant when she bought the premises in 1982.

What then is their status in respect of the premises? They are not paying tenants or tenants at will. The defendant do not allege that they pay rent. Miss Doreen Smith said while she lived at premises with her fiancé and her children for 9 years she paid no rent. I hold that they are gratuitous licencees. They only had a personal privilege with no interest in the land. I do not accept counsel for the defendants' submission that the plaintiff granted the defendants permission to occupy the premises on condition that they provided consideration. The defendants were asked to pay \$7,000.00 into Mrs. Bonner's account at Victoria Mutual Building Society for the first time

in 1998 after their mother died. This they did not do until about 2002. Past consideration is no consideration. They were allowed to stay on the premises as a privilege for which they benefited for several years.

Although each party disputed who made the deposit to purchase the house in 1982, this issue became immaterial as the defendants conceded that the house belonged solely to their sister Mrs. Bonner on their mother's death. As the sole registered owner Mrs. Bonner is entitled to appoint any agent she chooses to act on her behalf. In her evidence she testified that she gave her son Lloyd Cayman, the plaintiff, authority to act on her behalf in relation to 40 Westlake Avenue. Ex. 1b is written support of the plaintiff's authority. There is no evidence that ex. 1 or 1b was registered as a Power of Attorney. I hold that the absence of this formality does not deprive the plaintiff of the power to bring this action. **Under sec. 149 of the Registration of Titles Act** the owner of registered land may appoint any person to act on their behalf in transferring or "otherwise dealing" with the land. They can do this by executing a power of attorney which should be deposited with the Registrar. The section states that owner "may appoint" and is therefore permissive and as such it is not obligatory that an agent be appointed Power of Attorney. The terms of the authority given to Lloyd Cayman, although not created by a Power of Attorney, permit him to deal with the premises at 40 Westlake

Avenue by bringing an action for recovery of possession. The plaintiff has satisfied the court on a balance of probabilities that he is entitled to bring this action. The defendant's have not established any estoppel against the plaintiff.

Accordingly, judgment is given for the plaintiff. I hereby order that defendants do quit and deliver up possession of premises 40 Westlake Avenue, Kingston 10 within ninety (90) days of this order.

Costs to plaintiff to be agreed or taxed.