



[2023] JMSC Civ 258

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV04800

| | | |
|----------------|-------------------------|--------------------------------|
| BETWEEN | VICKY GOUGH | 1ST CLAIMANT |
| AND | VARRION FALCONER | 2ND CLAIMANT |
| AND | NATOYA PETERKIN | DEFENDANT |

IN CHAMBERS

Heard June 6 and 7 and September 30, 2022, March 31, 2023

WONG-SMALL J. (AG.)

Recovery of possession – proprietary estoppel -

[1] By a Fixed Date Claim Form filed December 2, 2018 the Claimants seek the following orders.

1. Recovery of Possession of the property known as ALL THAT PARCEL of land being part of Flagaman in the parish of SAINT ELIZABETH deposited in the Offices of Titles on the 7th day of January 1997 and being all the land comprised in the Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of Titles.
2. An injunction restraining the Defendant whether by herself or by her servants and/or agents or howsoever from entering or using property known as ALL THAT PARCEL of land being part of FLAGMAN in the parish of SAINT ELIZABETH deposited in the Office of Titles on the 7th day of

January 1997 and being ALL THAT LAND comprised in Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of Titles

3. That the Defendant vacate the property known as ALL THAT PARCEL of land being part of FLAGMAN in the parish of SAINT ELIZABETH deposited in the Office of Titles and being ALL THAT LAND comprised in Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of Titles within thirty (30) days of the determination of this matter.

BACKGROUND

- [2]** The Claimants Vicky Elizabeth Gough and Varrion Falconer are siblings and the owners of property part of Flagaman in the parish of St. Elizabeth registered at Volume 1293 Folio 435 (the disputed property) which previously belonged to their parents, Osbourne Falconer and Joan Falconer. They acquired their interest therein by way of transfer No 1716955 dated June 8, 2011 from their parents by way of gift to their father and themselves as joint tenants. On September 3, 2018, their father died and the Defendant who has lived at the disputed property with him since about 2003, refused to vacate the property, claiming that she has a beneficial interest in the property due to her alleged romantic relationship with their father. She also claimed that their father left a will in which he gifted to her the disputed property.
- [3]** The Claimants deny that the Defendant has any estate or interest, legal, beneficial or otherwise in the property or the house on it. As a result, their Attorneys wrote to the Defendant on their instructions demanding that she give up possession. She has refused to do so which has resulted in the filing of this claim.
- [4]** In her response to the Claim the Defendant filed two affidavits on July 16, 2020 and on July 1, 2022 in which she claimed that she has sole proprietary interest in the disputed property and that the Claimants had fraudulently obtained the transfer of the property to themselves.

[5] In paragraph 30 of her affidavit filed July 16, 2020, she sought the following relief by way of counterclaim;

- a) An order setting aside the transfer No. 1716955 registered on the 4th day of August 2011,
- b) An order to amend or cancel the instrument, memorandum or entry relating to the land registered at Volume 1293 folio 435 pursuant to Section 158 of the Registration of Titles Act
- c) That the Claimants have no legal or equitable interest in the land registered at Volume 1293 Folio 435,
- d) That the Defendant is a beneficiary under the will of Osbourne Falconer has an equitable interest in the said property in that the Defendant is the equitable owner and in possession of the said land described in the Certificate of Title registered at Volume 1293 Folio 435 on which she has expended significant sums of money and improved the value of the property,
- e) Inter alia that the Claimants their servants and/or agents be restrained from interfering with the Defendant's right to possession and a declaration that the defendant as beneficiary under the Will of Mr. Osbourne Falconer is the equitable owner of the property.
- f) Such further and /or other relief that this Honourable Court deems fit.

[6] At the trial however, she amended this position to claim a beneficial interest by virtue of the doctrine of proprietary estoppel. She contended that after she met Mr. Osbourne Falconer in 2003, they commenced a relationship which lasted until his death. During this time, Mr. Falconer led her to believe that the property belonged to both of them and told her that the house was hers and, in his lifetime, she began to expend her money on the house and carried out expansions and renovations.

CLAIMANTS' EVIDENCE

- [7] The Claim was supported by two affidavits of Vicky Gough, filed on December 2, 2019 and on May 20, 2022, an affidavit of Varrion Falconer filed on December 2, 2019 and an affidavit of Joan Elaine Falconer filed on May 20, 2022 which stood as their examination in chief. The Claimants also relied on the report of Beverly East, the Court appointed expert, filed February 25, 2022. These witnesses were present at the trial and cross examined by the Defence with the exception of Ms. East who was excused after Counsel elected not to cross examine her.
- [8] The Claimants' evidence is that the Defendant was hired as a live-in Caregiver for their elderly father Osbourne Falconer in or around 2003 and has been living on the disputed property since then. After their father's death on September 3, 2018, she refused to vacate the disputed property, claiming that she has an interest therein due to her alleged romantic relationship with their father. She further produced a Will in which their father purportedly devised the disputed property to her. The Claimants deny that she has any such interest in the disputed property and by a letter dated June 5, 2019, their Attorneys, Messrs. DunnCox, wrote to the Defendant demanding that she give up possession which she refused to do.
- [9] The Claimants deny that the Transfer of the property was procured or executed by any fraudulent actions or representations to the Registrar of Titles by the Claimants, Mrs. Gough's husband or any other person but was to give effect to their mother's wish to transfer her interest to her children. Mrs. Joan Falconer's evidence is that in or about 2001, she expressed to her daughter her desire to return to the United Kingdom and to transfer her interest in the disputed property to her children. She was of the understanding that her husband agreed.
- [10] In 2011, while Mrs. Gough was visiting her father in Jamaica, she and her mother again spoke about this and her father agreed. She went to the land Registry with her father to seek information about the process. They were given the Instrument of Transfer and told that there was a part on it which her father was to sign in the

presence of a Justice of the Peace. Her father subsequently signed the Instrument of transfer in the presence of Mr. Joslin Robotham Barnett, a JP in Flagaman, St. Elizabeth as well as herself and her husband. The JP then signed and affixed his stamp.

- [11] She then returned to the UK with the instrument of Transfer. Mrs. Falconer who was very familiar with her husband's signature from having dealt with his documents for all the years they lived together, stated that the signature she saw at this time was his. It was signed by her and her children in the presence of a Notary public who then signed and stamped it. Subsequently, the instrument of transfer was returned to Mr. Osbourne and the Certificate of Title was thereafter amended to add the transfer which reflected the Claimants and their father as joint tenants.
- [12] The Claimants denied that there was a relationship between their father and the Defendant. Mrs. Gough knew her as "Christine", but her father had never told her of a relationship. Mr. Falconer had never personally met the Defendant but knew of her as his father's "Carer", from telephone conversations with his father.
- [13] The Claimants say that Defendant has no proprietary interest or any legal or beneficial estate in the disputed property or the house on it. The Last Will and Testament purported by the Defendant as having been executed by their deceased father is a forgery. It was referred to as a "pretend Will" and they and their mother do not believe that their father executed it.
- [14] Mrs. Falconer was shocked to see the Last Will and Testament for two reasons. Firstly, it directly contradicts their common intention held for years to keep it in the family. She said that the disputed property was family land acquired by her late husband's father and other family members reside on it in neighbouring houses. He never communicated to her that this intention had changed at any point and was made clear by his agreement to and execution of the instrument of transfer.

- [15] Secondly, she did not believe her husband executed this last Will and testament because the signature on the document did not look like his. Her husband could not read or write and having dealt with his documentation for the majority of their marriage in Jamaica, she knew her husband signature.
- [16] The Claimants also relied on the report of the Court appointed expert, Ms. Beverly East. In her report filed on February 25, 2022, Ms. East indicated her opinion based on an analysis of known samples of Mr. Osbourne Falconer's handwriting and comparison with that on the questioned documents, the Transfer and the Will. She opined that the signature of Mr. Falconer on the instrument of transfer No 1716995 was authentic but indicated that the signature on the last Will and Testament was not.
- [17] The Claimants also denied that the Defendant spent her own money on the disputed property. Mrs. Gough stated that she and her father were close and she frequently sent him money via MoneyGram. She exhibited a MoneyGram Transaction History Request in proof of sums sent by her between 2014 to 2018 with the Defendant as the recipient. It was claimed that these periods coincided with times when the Defendant claimed to have spent her own money on the house.
- [18] Mrs. Gough was not aware that her father wanted Ms. Peterkin to stay at the property as long as she wanted. He had never said it to her, her mother or her brother. It was not true that she as a result of this she worked and invested her money in the house by building an extension to the back of the house and a storage room. These were done by her mother.
- [19] It was also not true that in her father's final days, the defendant had to work to earn funds for the household, pay utility and medical expenses. While she was in fact working, it was not to pay the bills because they were paying them. The Defendant did not bear her father's medical and funeral expenses. They were paid by hers and her relatives.

DEFENDANT'S EVIDENCE

[20] The Defendant relied on her affidavits which stood as her evidence in chief. She met Mr. Osbourne Falconer in 2003 and thereafter they commenced a relationship which lasted until his death on September 3, 2018. At the time she met him, he was energetic and outgoing and contrary to the suggestions of his children, she was never employed by him, his children or any of his relatives as his caregiver.

[21] Mr. Falconer represented to her that he was a single man and invited her to live with him at the disputed property. Their relationship flourished and she was added to his bank accounts to which she contributed and was made a beneficiary of his life insurance policy. They took into their household Demario Salmon, a child of her nephew from he was nine months old and cared for him as their own child. All three lived together at the property for fifteen years unmolested until the claimants formed an interest in the property.

[22] Mr. Falconer led her to believe that the property belonged to both of them. He told her that the house was hers and these representations were confirmed by his last Will and Testament dated the 2nd of January 2014 in which he left the disputed property to her.

[23] He did not tell her until sometime after their relationship started, that his wife and children were resident in England. He also told her that they had no interest in him or his properties. There was no communication between him and his wife and he did not have a close relationship with his children. She has never seen or met the 2nd Claimant and only met the 1st Claimant in or around 2010 to 2011 when she visited Jamaica, in 2018 when her father became ill and after her father's death when she took documents relating to the land taxes and her father's death certificate. During these visits there was no discussions between them about the property.

[24] She was surprised to see that the property had been transferred to Claimants and Mr. Falconer because he was estranged from his children and he did not tell her

of it. Having seen a copy of the transfer, she alleged that the signature on the document was not his and further alleged that the transfer was procured by the fraudulent actions of the Claimants, their servants and or agents. She also denied that Mr. Falconer was not literate as he purchased newspapers which he did not ask anyone to read to him.

[25] As a result of the promise made by Mr. Falconer, she began to expend money on the disputed property. She tendered into evidence a number of receipts as proof that she expended her money to complete expansions and renovations on the premises. She also paid the property taxes from 2004 to 2018.

[26] In addition, during Mr. Falconer's last days, she had to do extra work to assist with the upkeep of the household and she had to deal with Mr. Falconer's medical and utility bills. The 1st claimant did assist her father with money but this was only on three occasions in 2013, 2014 and in 2018 when she set up a go fund me account the proceeds of which were used to assist in paying his hospital bills. She also had to deal with the funeral expenses of Mr. Falconer.

SUBMISSIONS

[27] In submissions filed on September 29, 2022, the Claimants submitted that since there has been no further challenge to the Title of the Claimants which is presumed indefeasible by virtue of Sections 68 and 70 of the Registration of Titles Act, then the main issue that remains in this case, is whether the Defendant has established that she has an equitable interest in the disputed Property by virtue of the doctrine of Proprietary Estoppel.

[28] It was argued that once indefeasibility of the Claimants' title is accepted, the burden shifts to the Defendant to prove her ground for challenging the Claimants' legal interest and that the Defendant therefore carries the burden to prove her equitable interest in the circumstances of this case.

[29] Counsel relied on **Halsbury's Laws of England**, 5th Edition, Volume 23 (2016) at paragraph 29 and **Cranston v Samuels and Toorie** [2019] JMCA Civ 42 as establishing the elements required in order to rely on this doctrine. It was submitted that in order to discharge the presumption of indefeasibility in reliance on this equitable doctrine, the Defendant would have to establish on a balance of probabilities that:

- a. The 1st and 2nd Claimants or any of the Proprietors made an express representation to the Defendant, that she would acquire an interest in the subject property; or
- b. The 1st and 2nd Claimants or any of the Proprietors made a promise to, or entered into an agreement with, the Defendant to the effect that they will not enforce their legal rights to the property, knowing and intending the Defendant to act on that promise or agreement; or
- c. The 1st and 2nd Claimants or any of the Proprietors knowingly created and encouraged through words or conduct, an expectation that the Defendant will acquire an interest in the property. In this sense "knowingly", invariably involves having knowledge of (and a hand in) the Defendant's belief that she was entitled to own (and not just occupy) the subject property, and having knowledge that the Defendant laid money upon the land without obligation, based solely on that belief or expectation; and
- d. The Defendant actually spent monies on the property to her detriment, solely because of that representation, promise, agreement, belief or expectation, knowingly created and encouraged by the Claimants or any of the Proprietors.
- e. Counsel argued that the burden on the Defendant to establish Proprietary Estoppel has not been met as when the evidence extracted at the Trial was examined, none of the above legal tests have been established on a balance of probabilities.

- [30]** In relation to the promise, it was pointed out that the evidence of the Defendant has failed to prove that a representation was made by the proprietors Osbourne and Joan Falconer, or the Claimants at any of the material times. On the evidence presented, the Defendant has not established that one was made by the 1st and 2nd Claimants in any of the manners set out above. What the Defendant has sought to rely on are allegations that Osbourne Falconer made representations to her that she would receive the disputed property and that the Claimants were aware of this representation.
- [31]** It was firstly pointed out that Osbourne Falconer could not gift the disputed Property to a third party, or create an equitable interest in the entire subject property, since he was a co-owner at all material times during his lifetime even prior to the transfer to himself and the Claimants. It is trite law that one cannot dispose of an interest greater than what one owns.
- [32]** In addition, since the Defendant's claim is for an equitable interest in the entire property, she would be required to show that the equity was created by all the proprietors at the material time. It was pointed out that prior to the Defendant's Affidavit filed July 1, 2022, the Defendant at no point stated that the 1st and 2nd Claimants were even aware of any alleged representation made by Osbourne Falconer and that when this was put to the 1st Claimant in cross examination, she clearly stated that this was not so.
- [33]** It was further pointed out that the only evidence to suggest that a representation was made by the Claimants is in the form of images of WhatsApp messages purportedly between the 1st Claimant and herself after the death of Osbourne Falconer one of which the Defendant's Attorney has suggested satisfies the Proprietary Estoppel tests. In addition, these messages were being relied on by the Defendant as proof that the 1st Claimant was aware that the Defendant expended funds on the property.

[34] The material exhibit NP 7 contains a purported What's App message that reads as follows:

“Christine I totally understand, please don't cry, forget it now, we both loved dad, let's go back to how it was and give dad a nice send off, I don't want you to leave, it's your home, I promised dad and you that you could stay as long as you needed it xx”

[35] It is submitted that this evidence of the Defendant ought not to be accepted by the Court as the Claimants were ambushed with this legal argument at Trial and did not have an opportunity to respond to the allegation with an Affidavit of their own. In particular, the 1st Claimant had no opportunity to revisit her conversations, to check the veracity of the image provided and the context of the surrounding messages that were not shared by the Defendant.

[36] In the event that the Court was minded to accept this evidence, it is submitted that the message at its highest can create no more than a mere licence to occupy the premises, which in law is terminable at the will of the licensor. There is no evidence of a promise or agreement that the Defendant would acquire an interest in the property.

[37] It was also pointed out that in her evidence at trial as to the meaning of this message, she agreed that in this statement allegedly made by the 1st Claimant, she did not tell her that she was the owner of the property or that she had a share of the property or rights or claims to the property. She admitted that the reference in it to “your home” simply meant that the 1st Claimant acknowledged that the Defendant lived there for a number of years.

[38] It was also submitted that her evidence showed that she clearly understood the distinction between a grant of permission to occupy the property and the promise of the right of ownership. She also confirmed that permission to stay at the property

from the legal owner, is not the same as promising a right of ownership and admitted that she would not need permission from the Claimants, Mr. Osbourne or any other party to occupy the premises if they had promised, represented, or agreed that she was now the owner of the property.

- [39]** It was further submitted that the Defendant failed to establish that a promise was made by the Claimants in that reference was made only to a representation allegedly made by the 1st Claimant. This would have been insufficient to give the defendant an equitable interest in the whole property as the 2nd Claimant is a joint owner and there is no evidence of a representation, promise, agreement or any encouragement by word or conduct from him conferring a right of ownership on the Defendant.
- [40]** Further, there was no evidence to suggest encouragement from either of the Claimants with knowledge that the Defendant believed herself to be the owner or with knowledge by them that the Defendant expended sums on the property based on her belief.
- [41]** The main evidence of representation, promise, agreement or encouragement was the uncorroborated evidence of the Defendant herself which was focused on statements purportedly made by Mr. Osbourne Falconer and the Will purportedly made by him. Counsel highlighted the evidence of the Defendant where she admitted that outside of the Will there was no other documentation of the promise made to her and it was noted this was evidence that was uncorroborated even by the witnesses who allegedly witnessed it.
- [42]** In the absence of any corroboration, the credibility of the Defendant required careful scrutiny by the Court and it was argued that upon such an examination, the Defendant is not a credible witness. Counsel noted in particular that the Defendant changed her evidence that the promise was made to her by the Deceased in 2013 when it was highlighted in cross examination that some of the documents tendered in proof of her expending sums on the property predated that year.

- [43]** It was also pointed out that this evidence has failed to prove that a representation was made by the proprietors Osbourne and Joan Falconer, or the Claimants at any of the material times and that the alleged statements are in stark contrast with the dealings and proven conduct of the Deceased and his family namely the co-ownership arrangements with his wife and the voluntary transfer to the Claimants.
- [44]** In addition, the Will on which the defendant relies has been challenged by the Claimants as being fraudulent and none of the findings of the expert witness were challenged by the defendant either through written questions which the Defendant was permitted to put to the witness or by cross examination at trial. It was submitted that the expert evidence was accepted without challenge on this point and therefore this removes any probative value from this document as conferring the purported intention of Mr. Osbourne Falconer.
- [45]** In relation to any purported detrimental reliance by the Defendant, it was submitted that even if the Court was to find that a representation had been made to the Defendant, no evidence of reliance by the Defendant on the representation to her detriment has been presented. Counsel pointed out that the Defendant has relied on sums expended on property taxes and property expansion, however, she benefitted from the arrangement in a manner which exceeded any contribution she made and her purported expenses were incidents of her occupation and relationship with the Deceased.
- [46]** In relation to sums expended on property taxes it was pointed out that the Defendant admitted that sums were paid prior to the promise allegedly made to her in 2013 and that these were not paid based on the promise. In addition, these were paid from the joint accounts of the Defendant and the deceased. Further, she also admitted that none of the expenses exhibited by her were paid after the WhatsApp message being relied upon as a representation by the 1st Claimant.
- [47]** On the claim of expansion and renovation of the property, it was pointed out that it was in cross examination of the 1st Claimant that it was first suggested that the

defendant had made an expansion at the back of the house and built a storage room which were both denied. Counsel further noted that apart from these suggestions, there was no supporting evidence of any expansion and renovation of the property by the Defendant.

- [48]** As for the sums expended for expansion of the property, it was submitted that the defendant did not adduce evidence to support her claim that these were from her resources. It was further pointed out that upon examination of the receipts, the sums expended by the Defendant, were found to have been applied to maintaining the space which she occupied rent free in a manner that is regularly incidental of occupation and any personal expense she had was spent on her enjoyment of the property.
- [49]** It was also highlighted that the defendant's evidence that she expended these sums from her own resources was not credible as she gave contradictory evidence as to the source of the funds used to pay for the items in the receipts exhibited by her. She first admitted then later denied that they were paid from the joint account of herself and Osbourne Falconer.
- [50]** In addition, this joint account was admitted to have been funded by the 1st Claimant, the Deceased and the Defendant and there was no evidence differentiating between the different sources of income. It was particularly noted that based on the evidence of the 1st Claimant and the Defendant, between 2014 to 2018 a total of £ 7730 sterling plus \$90,000 Jamaican were sent by the 1st Claimant to the Defendant. Using a minimal exchange rate of 180JMD: 1GBP this amounted to \$1,391,512.83 plus \$90,000.00 and far exceeded the value of receipts for sums that the Defendant allegedly expended on the property.
- [51]** It was further submitted that any expenses allegedly acknowledged by the 1st Claimant in the WhatsApp message exhibited by the defendant cannot be taken as incidental to her acquiring an interest in the property but incidental to the relationship she shared with the Deceased and his personal care.

DEFENCE SUBMISSION

[52] Counsel submitted that the Defendant claims a beneficial interest in the property on the basis of Constructive Trust and/or Proprietary estoppel. In making his submissions he relied on the following passage from **Re Basham, deceased [1986] 1WLR 1499 at 1503 H** as stating the applicable principles and also that proprietary estoppel could apply where the relevant expectation was that rights would be acquired in the future as for example under a Will.

“... The plaintiff relies on proprietary estoppel, the principle of which, in its broadest form may be stated as follows: where one person, A, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right in or over B’s property, B cannot insist on his strict legal right if to do so would be inconsistent with A’s belief. The principle is commonly known as proprietary estoppel, and since the effect of it is that B is prevented from asserting his strict legal rights it has something in common with estoppel. But in my judgment, at all events where the belief is that A is going to be given a right in the future, it is properly to be regarded as giving rise to a species of constructive trust, which is the concept employed by a court of equity to prevent a person from relying on his legal right where it would be unconscionable for him to do so.”

[53] He further relied on the case of **Theresa Henry and Marie Ann Mitchell v Calixtus Henry [2010] UKPC 3**, in which the nature of the doctrine of proprietary estoppel and the general principles underlying it were discussed and pointed out that the elements were not entirely discrete but interrelated and that the matter must be approached in the round.

[54] He submitted that the Court is being asked to decide whether Mr. Osbourne Falconer induced, encouraged or allowed the Defendant to believe that she has or would enjoy some right or benefit over his property and that in reliance upon this belief, she acted to her detriment to his knowledge and where unconscionable

advantage is taken of the Defendant by denying her the right or benefit which she expected to receive. Against this background he stated that the key factors in considering whether a constructive trust and/or proprietary estoppel has been established are:

- a. Was there an agreement and what was the nature of the agreement: was there a belief at all material times that she was going to receive what she was promised.
- b. Was the belief encouraged by Mr. Osbourne Falconer, deceased
- c. Did she act to her detriment?
- d. Were the acts done by her in reliance on or as result of her belief that she would become entitled to an interest in the home?
- e. Unconscionability
- f. Quantification
- g. Beneficial interest.

[55] In relation to the agreement, he submitted that this arose out of specific representations made by the Deceased to the Defendant in 2005 to 2006 and concretized in 2013 which she accepted. The Defendant's evidence as to the representations made to her was clear where the Deceased told her;

[56] "Baby my children don't want the house and my children won't put you out" as well as further representation that the house would be hers. In addition, these representations were confirmed by his last Will and Testament which granted her possession of the house.

[57] From her evidence the Defendant clearly accepted the representations made by the Deceased and was correct to do so as he was in full and sole control of the premises as the 2nd Claimant had not visited Jamaica in a very long time and the

1st Claimant had visited on roughly two or three occasions. In addition, the message of the 1st Claimant to the Defendant is a clear indication that she was aware of the relationship between her father and the Defendant as well as his wishes in relation to the property.

- [58] It was submitted that the defendant had shown that she has acted to her detriment or significantly altered her position in reliance on the agreement giving rise to an equity in her favour. As a result of the representation, she invested her life, time and funds to her detriment. She used the money she earned to look after the household, assist with paying his medical bills and paying for construction and renovation work on the house. In this respect Counsel again relied on the case of **Henry and Mitchell v Henry (supra)** as offering guidance on the question of whether the Defendant had acted to her detriment. He pointed out that in that case, the Board said that the process of deciding whether there had been sufficient detriment was to weigh up the advantages and disadvantages suffered by the Defendant in reliance on the promises made.
- [59] He relied on the dicta of Lord Denning in **Greasley v Cooke [1980] 1 W.L. 1306** in support of the contention that it was not necessary for her to establish detriment by the expenditure of money. He submitted that in this case the Defendant's detriment went beyond financial. She subordinated her own interests and deprived herself of opportunity elsewhere as a result of the wishes of the Deceased. Particularly, Counsel claimed that there was evidence that she refrained from taking certain jobs and took only jobs in close proximity to the house so that she could attend on him and care for him. While some of the incidents relied on in support of the claim were not financial and may not be significant, taken together they "went well beyond what was called for by natural love and affection"
- [60] He also submitted that on the evidence, the actions of the Defendant were because of her belief that she would be entitled to an interest in the home that she shared with the Deceased. One reason why the Defendant acted in the way she did was because of her belief that being in a committed relationship with the deceased, he

would leave his estate to her on his death or she would be entitled to an interest in the home she shared with the deceased.

[61] In addition, it was submitted that the Claimants in not doing what the deceased said when the 1st Claimant knew his wishes was unconscionable in the circumstances as the Defendant had been led to believe that she had an interest in the property which had been agreed and on which she had acted. She had therefore acquired an equity in the property.

[62] The other elements having been made out, it was submitted that consideration would have to be given to what manner or effect should be given to the equity which has arisen in the Defendant's favour. Counsel relied on **Re Bashan** and stated that the expressions of the parties would be reflective of the beneficial interest to which the Defendant was entitled. He submitted that in accepting the offer of Mr. Osbourne Falconer, the beneficial interest in the property arose and the extent of the equity is to have made good the expectations which the deceased encouraged. In this case it could only be satisfied by a remedy which assures the defendant security of tenure, quiet enjoyment, freedom in respect of repairs and improvements without interference from the Claimants and protection against future eviction by the Claimants.

Further submissions by the Claimants

[63] The Claimant took objection to Defendant's submissions in the matter on September 29, 2022, on the grounds that the Defendant in it had improperly sought to raise without an application, a new line of defence or a new cause of action by way of counterclaim and to introduce new factual material and/or misstatements of evidence extracted at the trial. The claimants were therefore permitted to file further submission to respond to these submissions.

[64] In the submissions so filed, Counsel for the Claimants pointed out that in the closing submissions, the defence has gone even further in its trial by ambush by introducing a new line of defence and cause of action after the close of the trial. It

was pointed out that these were raised in the submissions, for the first time, by the defendant claiming that she has grounds to oppose the claim under the doctrines of Proprietary Estoppel and Constructive Trust and seeking an order declaring her interest in the subject property under the said doctrines.

- [65] It was argued that the defence thereafter sought to conflate Proprietary estoppel and constructive trust in order to introduce a cause of action under which she may claim an interest in the subject property. It was pointed out that Counsel relied on legal principles grounded in a species of constructive trust to also suggest that the evidence led by the Defendant at trial gave rise to a right in the future or a future interest in the subject property.
- [66] Counsel relied on the dicta of Lord Esher **Steward v North Metropolitan Tramways Company** (1886) 16 QBD 556 referencing **Clarapede v Commercial Union Association** 32 WR 262 and stated that this added to the prejudice occasioned to the Claimants at trial by the Defendant's failure to plead and rely on the doctrine of proprietary estoppel. It was emphasized that this claim was not featured in the pleaded case since July 2020 or even the opening statements at trial.
- [67] As such, no opportunity was provided to the Claimants to lead evidence in relation to the doctrine of constructive trust or to challenge the evidence of the Defendant on those legal principles in the trial. While the Claimants attempted to reformulate the extraction of evidence to meet the case introduced at trial, they were not afforded sufficient opportunity to prepare for the case by preparing responses, gathering facts or present supporting documentation to dispute the new cause of action.
- [68] It was argued that it would be unjust to allow the Defendant to introduce further causes of action in closing submissions. The Defendant did not apply to amend her statement of case but introduced the new cause of action mala fide in her submissions and to accept and consider them, would be to permit the defendant

to amend her pleadings after the close of the trial. It would have the fatally prejudicial effect of depriving the Claimant of the opportunity of leading evidence in relation to the new defence and/or causes of action.

[69] Counsel stated that the law was clear that the amendment of pleadings should not be permitted at all or only in exceptional circumstances after the close of the Claimant's case. Further, even if an application had been made before the Court to engage rule 20.4(2) of the CPR, it ought properly to be refused on the basis that it is unjust and the requirements of the Rules are not met. Any application to amend would fail firstly because;

- a. There is no new fact of facts introduced by the Claimants before trial that caused the Defendant to rethink her defence. In the event that this was the case, the burden rested with the defendant to show that she could not have sought to amend the defence with reasonable diligence at an earlier stage in the litigation.
- b. The new defence stands to change the nature of the claim as was done at trial as although Constructive Trusts are potentially similar to proprietary estoppel, is an entirely different defence.
- c. The defendant without an application and impermissibly, raised an entirely new ground of defence.

[70] It was also argued that Counsel for the defendant has misquoted the evidence by indicating that the Claimant accepted that there was an agreement in which the ownership of the property was the subject. Further, the defence seeks change, fill in gaps and clarify the inconsistency in the evidence at trial as to when the alleged promise was made to her. In addition, it also sought to include evidence which was not contained in the Defendant's affidavits, extracted at trial via cross examination or re-examination in relation to jobs which the Defendant purportedly refused in order to rake care of Mr. Osbourne.

ISSUES

- [71] Whether the Claimants are entitled to recover possession of the property known as all that part of land being part of Flagaman in the parish of Saint Elizabeth deposited in the Offices of Titles on the 7th day of January 1997 and being all the land comprised in the Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of titles.
- [72] Whether the Defendant has a beneficial interest in the property on the basis of Proprietary estoppel.

LAW

- [73] There is no dispute that the Claimants are the registered proprietors of the disputed property and are protected by the provisions of section 68 and 70 of the Registration of Titles Act which state;

68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any title provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.

70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud, hold the same as the same may be described or identified in the certificate of title, subject any qualification that may be specified in the certificate, and to such incumbrances as may be notified in the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing

the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such purchaser:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be the subject of reservations, exceptions, conditions and powers (if any), contained in any patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rent or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interest of any tenants of the land for a term not exceeding three years, notwithstanding the same respectively may not be specifically notified as incumbrances in such certificate or instrument.

- [74] The Defendant having abandoned her claim that the transfer of title to the Claimants was obtained fraudulently, the claimants as holders of the legal interest in the disputed property are entitled prima facie to recovery of possession. However, the Defendant has claimed a beneficial interest by way of proprietary estoppel.

PROPRIETARY ESTOPPEL

- [75] The equitable doctrine of proprietary estoppel is one of the methods by which the Court provides a remedy against a Defendant who has acted unconscionably and is an exception to the rule that transactions involving land are required to be in writing. In **Annie Lopez v Dawkins Brown and Glen Brown** [2015] JMCA Civ 6, Morrison JA (as he was then) reviewed the historical statement of the principle as found in **Ramsden v Dyson** (1866) LR 1 HL and **Crabb v Arun District Council** [1975] 3 All E.R as well as the modern application of the law as found in **Gray and Gray Elements of Land Law**. At paragraphs 65 to 68 he stated as follows;

*[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."

[76] On these authorities it appears that the party who seeks to successfully raise proprietary estoppel must establish three requirements namely;

1. An agreement, assurance, promise or representation giving rise to an expectation that the claimant would have an interest in land
2. The Claimant must demonstrate reliance, a change of position on the basis of the agreement etc.,
3. The Claimant must have acted to his or her detriment as a result of the agreement etc.

[77] In **Earle Alexander Shim v Sylvia Elmay Shim and Elizabeth German** Claim No 2005 HCV 02986, delivered May 16, 2008, Brooks J (as he was then) stated;

"It would seem then that the principle leading to the modern application of the doctrine is the detrimental reliance on a promise in circumstances where it would be unconscionable for the promisor to rely on his strict legal

rights and resile from the promise. (See Taylor Fashions Ltd. V Liverpool Victoria Trustees Co. Ltd. [1981] 1 All E.R. 897)

[78] However, unconscionable conduct by itself does not give rise to proprietary estoppel, all the elements of the doctrine have to be established. This was made clear in **Annie Lopez** (supra) where at paragraph 73 it was stated;

“[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.”

ANALYSIS AND DISCUSSION.

[79] Upon an examination of the pleadings in this matter and the evidence presented by the parties it is clear that the question of whether the claimants are entitled to recover possession is to be determined upon the resolution of whether the Defendant has established that she has a beneficial interest in the subject property.

[80] At the trial of this matter, there was a material change in the defence and the claim made by the Defendant in her affidavit evidence. At the commencement of the trial, Counsel for the Claimants pointed out that the Defendant had not filed any submissions and they were therefore unaware of the legal basis on which the Defence was proceeding. It was pointed out that it would be unfair to the Claimants to proceed in the circumstances where they would become aware for the first time of the defence being raised after closing their case.

[81] In his response, Mr. Samuels on behalf of the Defendant advised the court that the defence was proceeding on the basis of proprietary estoppel. Upon an examination of the evidence presented by the Claimants, I find that the Defendant having abandoned her defence that title to the disputed property was obtained by the fraudulent transfer to the Claimants, there is no longer a challenge to the Claimants' Title to the subject property and their right to recover possession because of the indefeasibility of title. I also accept that by abandoning this part of the defence, the defendant is relying solely on the defence and counterclaim that the defendant has a beneficial interest in the subject property by the doctrine of proprietary estoppel.

[82] Before turning to the examination of the issue of whether the defendant has established a beneficial interest by way of proprietary estoppel, it is necessary firstly to deal with two procedural issues raised by the Claimants with the defence and counterclaim of the defendant. Counsel argued firstly that the counterclaim which was made by the defendant was not done in accordance with Part 18 of the Civil Procedure Rules in that the Defendant failed to file an Ancillary Claim Form and Particulars of Claim. Secondly, the Defendant improperly amended her statement of case at the commencement of the trial and thereafter at the end of the trial in closing submissions with irremediable prejudice to the Claimants.

[83] The first issue was initially raised at the trial by Counsel for the Claimant who pointed out that the Defendant ought to have filed a Counterclaim instead of including the orders being sought by way of counterclaim in paragraph 30 of the Defendant's first affidavit. Part 18 of the CPR deals with Ancillary Claims and at Rule 18.1(2) states;

"An ancillary claim" is any claim other than a claim by a claimant against

a) a defendant or a claim for a set off contained in a defence and includes –

A counterclaim by a defendant against the claimant or against the claimant and some other person;"

In addition, Rule 18(2) provides that except where the Rules provide, these are to be treated as if they were claims. An ancillary claim is made when an ancillary claim form is filed except in the case of a counterclaim which by Rule 18.5 (1) may be made without the Court's permission if it is filed with the Defence.

- [84]** At the trial an application was made to strike out the paragraph. It was ruled, applying the overriding objectives, that although the Defendant ought to have filed an ancillary claim and not included it in the defendant's affidavit in response, at this point it was a question of substance instead of form and it was permitted to remain. I am still of this view.
- [85]** Counsel contended that as it had not been served with an ancillary claim, the claimants were not alerted to the need to file a defence or address a counterclaim at trial. Respectfully I disagree. It appears from Rule 18.5, that there is no need to file an ancillary claim as contended by the Claimant once the Counterclaim is filed at the same time as the defence which was done here albeit not in the required form. In addition, this affidavit was filed on July 16, 2020 so it could not be said with any credibility that the Claimants had no notice of it and the need to file a defence or address a counterclaim at trial. In any event, no prior objection was taken to it. As such, I was not minded to strike it out as requested by Counsel for the Claimants.
- [86]** Secondly, Counsel for the claimants has pointed out that the manner in which the defence was presented amounted to an amendment of the statement of case without the Court's permission. Counsel referred to it as trial by ambush in that up to the date of trial, the Claimants did not know the legal basis of the Defence as the Defendant failed to comply with orders to file submissions and authorities on or before June 27, 2022. Further, the defence/ counterclaim of a beneficial interest by way of proprietary estoppel was first raised at trial and no application was made to amend the statement of case. In addition, in closing submissions the Defendant added a further defence /counterclaim of a beneficial interest based on

constructive trust which was not mentioned in pleadings or at trial at all again without any application to amend the statement of case.

- [87] An examination of the Defendant's statement of case confirms Counsel's contentions. The Defendant at trial and in closing submissions has amended her statement of case by substituting a defence and counterclaim not previously stated and has not made an application to do so. The defence of proprietary estoppel was raised for the first time on the first day of trial. There is no mention in the first affidavit filed by the Defendant or in her affidavit filed on July 1, 2022, four days before the trial commenced, of a defence or counterclaim for a beneficial interest in the subject property based on the doctrine of proprietary estoppel.
- [88] It is also patently clear that it was in submissions that it was raised for the first time that the beneficial interest was also being claimed by way of a constructive trust. Similarly, the claim that the nature of the interest that the Defendant had obtained by way of proprietary estoppel/ constructive trust was a future interest in the disputed property was also first raised in submissions.
- [89] Part 20 of the CPR governs amendments to a party's statement of case which can be done without the Court's permission up to Case management where the amendments do not involve change of parties or amendments after the end of a limitation period. (See Rule 20.1) Thereafter the statement of case may only be amended with the permission of the Court and an application must be made. (Rule 20.4)
- [90] Part 20 does not give guidance as to when and what factors should be considered in determining whether permission should be granted to amend a statement of case. The learned author Stuart Sime in his text, **A Practical Approach to Civil Procedure**, 12th Edition at paragraph 15.08 states,

“that the courts... have power... to allow the amendment of a statement of case. The rule simply says that amendments may be made with the permission of the

court, without saying how the discretion will be exercised. A court asked to grant permission to amend will therefore base its decision on the overriding objective”.

At paragraph 15.10 he cited the case of **Clarapede and Co v Commercial Union Association** (1883) 32 WR 262, where Brett JA opined that;

“the amendment should be allowed if it can be made without injustice to the other side”

- [91] Despite the submission of the Claimants in relation to the prejudice occasioned by the raising of proprietary estoppel at trial for the first time, it is to be noted that at that time, there was no request for an adjournment by the Claimants. Counsel for the Claimant did point out the disadvantage to the Claimants in terms of their preparation and presentation of their case but indicated that they would proceed. In their opening it was indicated that for the purposes of cross examination and closing submissions, the Claimants would focus on proprietary estoppel and no issue was then taken about the failure to seek permission to amend the statement of case.
- [92] I find the manner in which the defence has been conducted in the instant case to be disgraceful. The most generous description would be that it appears to have been a work in progress that started on the day the trial commenced, developed as the evidence was given by the parties and continued after the trial ended.
- [93] From the pleadings, up to the date of trial, the defendant’s case was based on the purported last will and testament and the alleged fraudulent transfer of the disputed property to the Claimants. This is evident in the orders being sought by the defendant in her affidavits filed in response to the Claim and the fact that even in the affidavit filed four days before trial, there was no mention of any other defence or claim of proprietary estoppel or constructive trust.
- [94] On the day the trial commenced, there was a monumental shift from the Defence as pleaded. It is at this point that the indication that she was claiming a beneficial interest based on proprietary estoppel was made for the first time. Further, the

defence of fraud was abandoned after it was pointed out to Counsel that if the Transfer was found to be fraudulent, it would not result in the orders sought by the defendant on her counterclaim as the ownership of the property would revert to the pre-transfer position. The claim or defence of constructive trust appears for the first time in the closing submissions and was not raised at any point in the trial or that the interest claimed was a future interest.

[95] In relation to the claim of a constructive trust, Counsel's relies on dicta in **Re Basham** and appears to have made his submissions on the basis that there is no distinction between the doctrines of proprietary estoppel and constructive trust. This is not a novel position. It is accepted that there is some overlap between the doctrines and a reading of some authorities would suggest that there is no distinction between them.

[96] In **Equity and the Law of Trust**, 10th Edition, 2006, the learned author Phillip Pettit stated that;

[97] *"In order to secure a beneficial interest a party has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. The first and fundamental question, Lord Bridge stated in **Lloyds Bank Plc v Rossett**, which must always be resolved is whether independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has been at any time prior to acquisition or exceptionally at some later date, been 'any agreement, arrangement or understanding reached between them that the property is to be shared beneficially, though it is not necessary that the agreement extends to defining the extent of the respective shares. The common intention which has been said to mean a shared intention communicated between them can only be based on evidence of expressed discussions between the parties however imperfectly remembered and however imprecise the terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or*

she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to constructive trust or proprietary estoppel.”

If this position that there is no distinction between constructive trust and proprietary estoppel is accepted, it cannot be correctly said that the Defendant has introduced a new defence or cause of action in her submissions.

[98] However, while both may arise on the circumstances of a particular case, upon an examination of the authorities, it is clear that a distinction remains between the doctrines of constructive trusts and proprietary estoppel. In **Grant v Edwards and another** (1986) 2 All ER 426 the requirements to establish a constructive trust were stated by Lord Nicholas Brown - Wilkinson V.C. as follows;

“If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant), in order to establish a beneficial interest has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated:

- a) That there was a common intention that both should have a beneficial interest; and*
- b) That the Claimant has acted to his or her detriment on the basis of that common intention.”*

[99] These principles have been considered and applied by the Court of Appeal in a number of cases including **Azan v Azan** (1985) 25 J.L.R 301 and in **Haddad v Haddad** Supreme Court Civil Appeal No. 36/ 2003 delivered April 20, 2007. In **Marietta Taylor v Dazel Alexander Tapper O/C Horace Dazel Tapper** [2017] JMSC Civ 101, V Harris J (as she was then) also cited **Grant** (supra) and indicated that a constructive trust arises where;

“...two or more persons have a common intention, expressed or implied by word or conduct, that one or more is to have a specific share in a property, or an uncertain share to be determined in due course according to their contributions; and the persons or persons in reliance on that common intention acted to their detriment on the reasonable belief that they were acquiring the agreed interest. The case law has demonstrated that where this occurs the courts have consistently held it would be unconscionable or

inequitable for the legal owner of property to claim to be solely entitled to its beneficial ownership.”

[100] In **Dean Hinds v Janet Wilmot** 2009 HCV 00519 delivered July 15, 2011, Edwards J (as she was then) indicated that in order to determine that a constructive trust exists in a particular case the below mentioned factors must exist;

- iv. “Evidence of a common intention, it can be either expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.
- v. Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See Nourse, L.J. in *Turton v Turton* (1987) 2 All ER 641 at p.648.
- vi. In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property may be evidence from which the court could infer the parties’ intention: *Grant v Edwards* [1986] 3 WLR 120, per Lord Brown-Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and /or show that the Claimant has acted to his detriment on reliance on the common intention.
- vii. The Claimant must have acted to his detriment in direct reliance on the common intention.”

[101] It is quite easy to see the similarities between the two equitable principles as both require a Claimant to establish that he or she has acted to his or her detriment and both are concerned to prevent unconscionable conduct. However, in the statement of the doctrine above when compared with the previously outlined principles of proprietary estoppel (see paragraphs above), the distinctions are clear.

[102] In the case of a constructive trust, the claimant must establish a common intention or arrangement between the parties that one or both are to have a share in the beneficial interest in property or the claimant establishes that he or she has contributed to the acquisition, construction or improvement of the property legal ownership of which is vested solely in the Defendant. In **Yeoman's Row Management v Cobbe** (supra) it was stated in relation to constructive trusts that the;

[103] "pre-acquisition or post-acquisition arrangement is what colours the subsequent acquisition of the land by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it."

[104] In proprietary estoppel the focus is on the conduct or actions of the Defendant solely who by representation, assurance, promise or encouragement raises in the Claimant an expectation that it would be unconscionable for the defendant to deny. In **Stack v Dowden** [2007] UKHL 17, Lord Walker highlighted the distinction in this fashion;

"Proprietary Estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. This claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice which may sometime lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners and the size of their beneficial interests."

[105] It is therefore clear from the foregoing that any mention of or reference to constructive trust in submissions amounts to the addition of a new cause of action/defence without the permission of the court. As no permission was sought and obtained no consideration will be given to any submissions in relation to the existence of a constructive trust in favour of the Defendant.

[106] Such amendment at this stage in the proceedings would not have been allowed as to do so would clearly breach the principle set out in **Clarapede and Co** (supra) as there would clearly be injustice to the other side. I say this against the background that no mention of the cause of action was made prior to submissions,

no evidence was led at the trial or otherwise to satisfy the requirements of a constructive trust and the witnesses were never cross examined in this regard. Further, the Claimants had no opportunity to cross examine the Defendant. To permit this behaviour on the part of the Defence would be highly prejudicial to the Claimants, unjust and unfair.

[107] The preliminary issues having been disposed of, I turn now to consider the substantive and deciding issue of whether the defendant has established that she is beneficially entitled to the disputed property as a result of proprietary estoppel. It is of note that this is a question of fact and that the issue stands to be determined on the credibility of the Defendant as she was the sole witness on her case. I therefore have to determine whether her evidence has satisfied the three stated requirements to successfully raise proprietary estoppel on a balance of probability.

Whether an assurance, promise or representation was made to the Defendant that she was beneficially entitled to the disputed property.

[108] There is no evidence from the Defendant that the Claimants made any representation or promise to her. Her evidence is that she met Mr. Osbourne Falconer in 2003 and thereafter they commenced a relationship which lasted until his death on September 3, 2018. He invited her to live with him at the disputed property shortly thereafter and she was added to his bank accounts to which she contributed. She was also made a beneficiary of his life insurance policy. They lived together at the property for fifteen years unmolested along with a child of her nephew who they cared for as their own child.

[109] In relation to the representation to her, she stated that Mr. Falconer represented to her that she would get possession of the house and these representations were confirmed by his last Will and Testament dated the 2nd of January 2014 under which he granted her possession of the house. He told her "Baby my children don't want the house and my children won't put you out". He further told her that the house was hers. He led her to believe that the property was for both of them.

- [110]** In assessing the evidence of the Defendant, I find that while I accept that there was a relationship between the Deceased and her, I was unable to find her evidence as to the representations made to her to be credible. I accept that there was a relationship between the Defendant and Mr. Osbourne because while the Claimants denied its existence, neither gave any evidence as to who it was that employed and paid her, during the time she lived at the disputed property with their father from 2003 until his death in 2018. Further, they did not refute her claim that in 2003 he was an outgoing and energetic man as opposed to old and feeble and in need of care as they suggested.
- [111]** In addition, no challenge was made to her evidence that she was placed on his bank accounts and made a beneficiary of his insurance policy. In addition, it is conceded that she partly paid his medical and funeral expenses. These arrangements are more consistent with the relationship claimed by the defendant and not the employer/employee relationship alleged by the Claimants.
- [112]** Upon an examination of the representations as alleged by the defendant I find that it is not clearly indicated what interest in the disputed property was promised to the Defendant. There is firstly the statement “baby my children don’t want the house and my children won’t put you out”. There is nothing in that statement that conveys a promise that the house was hers or would be hers which is the further alleged representation. It appears to be no more than what it says, an assurance that his children would not put her out of the house and in fact is contrary to the promise the house was or would be hers as it impliedly recognizes the right of his children to decide whether she can stay there or not.
- [113]** Further, although it was her evidence that the deceased had promised that the house was hers and would be hers, in her second affidavit filed July 1, 2022, she stated, “that the 1st Claimant is well aware of his wishes towards me residing at the premises.” She also exhibited a WhatsApp message between herself and the 1st claimant allegedly in proof that she was aware of a promise by the deceased that she could live at the property as long as she liked.

[114] Further, in cross examination it was suggested to the 1st Claimant that her father told Ms. Peterkin that she could remain at the property. She also stated that Mr. Falconer led her to believe that the property was for both of them and as such she was surprised to see that it had been transferred to his children and himself.

[115] What then was the promise or representation? Was it that she was to reside at the property as long as she wanted? Was it that the house did or would belong to her? Was it that the property was to be hers? It cannot be argued that these are the same interest in the disputed property.

[116] In relation to the representation, assurance or promise, it is established that it must be clear and unambiguous and it must relate to an interest in the property. In **Yeoman's Row Management** (supra) Lord Scott stated at paragraph 16;

"... 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."

[117] In **Thorner v Major** [2009] UKHL 18 at paragraph 15 he also stated;

"These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the Claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity."

Having examined the evidence of the defendant, I find that the representations are not sufficiently clear and unequivocal and there is a marked lack of clarity as to the interest in the property promised to the Defendant.

[118] The Defendant has also sought to rely on the contested last will and testament of the deceased as confirmation of his intent that she should have the property. Two factors preclude reliance on this document. The first is that the authenticity of the deceased's signature on this document has been challenged by the claimants and supported by the Court appointed expert Ms. East. At the trial, the Defence did not contest these claims by cross examination of the witnesses or the Expert witness

or by providing any evidence in proof of the Will. In those circumstances, I am not prepared to rely on the contents of this document.

[119] The second factor is that Mr. Osbourne the deceased joint tenant could not convey by his will an interest that he did not possess. It is settled law that each joint tenant is wholly entitled to the whole of the estate in property which is the subject of the joint tenancy. The joint tenants hold no distinguishable share but hold the property as one and ownership is subject to the right of survivorship. In the absence of any evidence that he had severed the joint tenancy, any gift of the property by Will would fail unless the Defendant could establish that the elements of proprietary estoppel exist.

[120] The applicable principles were succinctly and effectively explained by McDonald-Bishop, J(Ag.) (as she was then) in **Bertram Cooper (As Executor in the Estate of Lucille Adela Coleman v Linford Coleman** Claim No. 2004 HCV 01803 delivered June 15, 2007 where she stated at paragraphs 13;

“It is well established that the essence of joint tenancy is that each joint tenant is wholly entitled to the whole of the estate which is the subject of co-ownership. In joint tenancy, no joint tenant holds any specific or distinct share himself, but each is, together with the other joint tenant or tenants, vested with the entire interest in the property in question.... They hold as one single owner as against the whole world. It is therefore characterized by the presence of the four unities of time, possession, interest and title.”

She went on to make it clear that because of the right of survivorship, a joint tenant could not dispose of his interest by a testamentary disposition;

“13. It has, however, been said that the right of survivorship (or jus accrescendi) is the ‘grand and distinguishing incident of joint tenancy’. By the right of survivorship, the entitlement of each joint tenant is eliminated on his death. This right takes precedence over any testamentary disposition made by a joint tenant. This is the core of the defendant’s contention.

14. The right of survivorship, however, may be destroyed by severance of the joint tenancy during the lifetime of the joint tenants. This would mean a severance of at least one of the essential unities. When this occurs, the joint tenancy becomes a tenancy in common and each party is entitled to a distinct share. With severance, the right to survivorship is totally and

irrevocably destroyed and so testamentary disposition may take effect. That is the core of the claimant's contention." As there is absolutely no evidence of a severance in this case, the deceased was clearly not in a position to devise the disputed property to the defendant. However, the defendant's claim is in equity and I do note that proprietary estoppel can operate in the case of an imperfect gift if the requirements are made out by the defendant.

[121] I also do not accept the Defendant's evidence of the representation made to her because I found that she gave conflicting evidence and made admissions which undermined her credibility. She stated when asked, that the representations were made to her by the deceased in 2013. After subsequent cross examination established that the payment of property taxes and a receipt on which she relied predated this date, she changed her position and claimed that it was made in 2005 – 2006. This inconsistency was not cleared up in re-examination and Counsel inappropriately sought to do in his closing submissions by stating, in the absence of any such evidence, that the promise was made in 2006 and concretized in 2013 when Mr. Falconer had a minor stroke.

[122] Her claim that there was a representation that the house and or property was hers was contradicted by other evidence she gave as she admitted under cross examination that she lived at the disputed property up to 2018 with the permission of Mr. Osbourne Falconer. She also conceded that she would not need permission if the property belonged to her.

[123] Further, in relation to the WhatsApp message between herself and the 1st Claimant, she agreed that the reference to the property being her home meant that she lived there and that it did not mean that she was the owner. In light of this evidence, I do not accept Counsel's position that this message amounts to a representation which binds the Claimants and would satisfy the requirements of proprietary estoppel. It is clear from her evidence as well that it was made long after the time when the Defendant claimed to have expended her funds on the strength of the promised interest in the disputed property.

[124] In light of the foregoing, I do not find on a balance of probability that Osbourne Falconer gave the Defendant representations or a promise that led her to believe that she was beneficially entitled to the disputed property.

Whether the claimant relied on the representation, promise or encouragement to her detriment.

[125] Notwithstanding my finding in this respect, I nonetheless considered whether there was evidence that the Defendant relied on the promise made to her by the deceased and acted to her detriment. The Defendant's evidence is that as a result of the promise made by Mr. Falconer, she began to expend money on the disputed property. She tendered into evidence a number of receipts as proof that she expended her money to pay property taxes stated that she and Mr. Falconer began to complete expansions and renovations on the premises. In addition, during Mr. Falconer's last days, she had to do extra work to assist with the upkeep of the household. She had to deal with Mr. Falconer's medical and utility bills and she paid his funeral expenses.

[126] In relation to the property taxes, she claimed to have been paying same since 2004 and exhibited receipts for the years 2013 – 2014, 2016 – 2017 and 2017 – 2018 in proof. In cross examination she stated that property taxes paid before the promise in 2013 were not based on the promise. Having made this admission however, she subsequently changed her evidence to move the date of the promise to an earlier date between 2005 to 2006. I found this latter assertion to be less than convincing as it contradicted her earlier evidence and came after cross examination which showed that some of the expenses she claimed, predated the alleged promise.

[127] Receipts were also exhibited for sums she said were spent on expansions and renovations. There were eighteen of these which ranged in date from 2007 to 2016 and totalled \$302,311.06. She did not exhibit any proof of payment for medical and utility bills or for funeral expenses.

- [128]** Having examined the evidence of the defendant I am not satisfied on a balance of probability that she expended her own money on expansions and renovations of the house. It is clear from her evidence that she did not undertake any work on the house on her own. In her first affidavit she indicated that the renovations and expansion were done by herself and Mr. Osbourne.
- [129]** In addition, she admitted that the sums expended came from their joint account which meant that the funds allegedly expended were not solely hers. Her uncontested evidence was that her name was placed on Mr. Osbourne's bank account and although she insisted that she made contributions to it, she provided no proof of these. Additionally, under cross examination it was admitted that the 1st Claimant also contributed funds to this account. In the circumstances it cannot be said with any certainty that the defendant expended sums of her own money on renovation and expansion on the house.
- [130]** The 1st Claimant has exhibited a MoneyGram Transaction History Request for the period January 1, 2014 to December 9, 2021 which showed sums totalling £ 7730 GBP sent by her to the Defendant between February 2014 up to September 2018. Between 2014 and 2017 it showed that sums amounting to £2280 were sent and the 1st claimant alleged that the receipt of these sums coincided with periods when the Defendant claims to have expended her own money on renovations and expansion of the house. It was also pointed out that the sum sent, far exceeds the sums claimed to have been expended by the Defendant and also that there were additional sums which the Defendant admitted were sent to her.
- [131]** A comparison between the transaction history and the dates on the Defendant's receipts show that purchases appear to have been made within periods ranging from one day to two weeks after the dates on which the funds were received by the defendant in February 2014 and October 2016. This was not the case with all the receipts. The Defendant did not agree with the documentary evidence and has denied receiving funds from the 1st Claimant save and except on two occasions in

2013 and 2014 when sums of \$84,000 and \$90,000 were sent to Mr. Osbourne her father.

[132] I do not accept her evidence in this respect and find on a balance of probabilities that the 1st Claimant sent funds totalling £2280 to the Defendant between 2014 and 2017. I do not, however, accept that the sending of these sums coincided with all the expenditure that the defendant claimed to have made on renovations and expansion.

[133] The evidence of the Defendant reveals that she made bare assertions that she had expended sums on expansion and renovation in reliance on the promise of the deceased. No evidence was provided of the renovation and expansion that was supposedly done to the house by her using her own funds. An examination of her affidavits does not reveal details of any renovation such as what was done, when it was done, who did the work and at what cost.

[134] There were also no such details in relation to the expansion to the house. In fact, it was in cross examination that any information about the expansion of the house was revealed when Counsel asked the 1st Claimant if she was aware of an expansion at the back of the house and that a storage room was also built by Ms. Peterkin. In any event the Claimant denied that the Defendant was responsible and indicated that her mother had built both.

[135] Further, an examination of the receipts tendered does not provide any evidence of expenses related to expansion of the house or the building of a storage room. Of the receipts tendered, eleven were for tiles and or items necessary for tiling. Others were for plumbing supplies, bathroom fixtures and for items related to fencing. At the highest, they suggest that work was done on a bathroom and that tiling was done at the house in 2014 and in 2016 but they provide no proof of an expansion.

[136] In light of the foregoing, I do not accept the Defendant's evidence that she carried out expansion and renovation work on the house and that she expended her own funds. I do not find on a balance of probability that the Defendant acted to her

detriment on the representation of Osbourne Falconer that she would have a beneficial interest in the disputed property.

[137] In his closing submission Counsel also put forward that the detriment relied on by the Defendant was non-financial. He stated that the Defendant gave up employment opportunities in that she refrained from taking jobs too far away so that she could attend on Mr. Falconer and take care of him. He submitted that she “subordinated her own interest and deprived herself of the opportunity elsewhere as a result of the wishes of Mr. Osbourne Falconer.”

[138] It is to be noted that there is no evidence either of her giving up job opportunities or of her doing so as a result of the wishes of Osbourne Falconer to be found in any of the Defendant’s affidavits. Nor did it arise under her cross examination or anywhere else for that matter. The only detriment mentioned by the Defendant in her evidence and on which she was cross examined were the sums of her money spent or invested in the property. I therefore reject this submission as an outright dishonest attempt to introduce evidence that was not given at the trial.

[139] On the totality of the evidence, I do not find that there was a representation or promise given by Osbourne Falconer on which the Defendant relied to her detriment. There is no evidence that the Defendant has acquired an equity in the disputed property by way of the doctrine of proprietary estoppel. Consequently, Judgment is entered for the Claimants on the Claim.

[140] At the trial of the matter, the Defendant having relied solely on proprietary estoppel, no evidence was led in support of the counterclaim. The orders sought on the defendant’s counterclaim are therefore refused.

ORDER

1. An order is granted for Recovery of possession of the property known as all that parcel of land being part of FLAGAMAN in the parish of SAINT ELIZABETH deposited in the Offices of Titles on

the 7th day of January 1997 and being all the land comprised in the Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of Titles.

2. The Defendant shall vacate the property known as all that parcel of land being part of FLAGAMAN in the parish of SAINT ELIZABETH deposited in the Office of Titles and being all that land comprised in Certificate of Title registered at Volume 1293 Folio 435 of the Register Book of Titles within thirty (30) days of the determination of this matter.
3. Costs to the Claimants to be taxed if not agreed.