



[2018] JMSC Civ.52

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2016 HCV 03943**

<b>BETWEEN</b>	<b>OLIVE GREY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ROBERT GREY</b>	<b>DEFENDANT</b>

Ms. Audrey Clarke for the claimant instructed by Judith Clarke and Co.

Mr. Albert S. Morgan for the defendant instructed by Albert Morgan and Co.

**Heard: December 7, 2017 and March 22, 2018**

**Brown G. J**

**Equity-proprietary estoppel-misconduct on the part of claimant**

[1] The claimant is a Real Estate Appraiser and the defendant's brother. She constructed a dwelling house on the defendant's land and has resided there since 2007. The defendant resides in Canada and is the proprietor of unregistered lands situated at Burnt Ground in the parish of Hanover known as Lot 31. He purchased the property in 1987 and on the 20th January, 2004 he executed a power of attorney to the claimant.

[2] It was the claimant's case that in 2003 she sought and obtained his permission to construct her dwelling house on the property. She also planted fruit trees on the land. He assured her that she could remain there for the rest of her life or as long

as she wanted to. She contended that the improvements were made to the property with the encouragement and acquiescence of the defendant and was therefore entitled to a life interest.

**[3]** It was the defendant's case that he gave her permission to construct two bedrooms, a wash room and a veranda to the left side to an existing building on the land. He also told her that she could remain there for as long as she wanted to. Between 1995 and 2013 the defendant did not visit the island. However on his arrival in 2013 he visited the property and found that the claimant was in the act of doing additions to her house. As a result a dispute arose between them and the defendant instructed his Attorney at law to revoke the power of attorney appointing her his agent. Additionally, advising her not to make any renovations, alterations or additions to the existing building. Notwithstanding the claimant ignored the request and completed the building.

**[4]** This action caused the claimant to file a fixed date claim form seeking the following orders and/or declarations:

1. That a life interest is vested in her in respect of all that parcel of land part of Burnt Ground, Ramble in the parish of Hanover, being Lot numbered 31.
2. That she is entitled to have her said life interest endorsed on any relevant Duplicate Certificate of Title, in existence or being processes on behalf of the defendant, his heirs, successors and/or his agents.
3. That she is entitled to have a valuation done on the said property by the Stamp Commissioner, to determine current value of her life interest.
4. That upon completion of the valuation of her life interest by the Stamp Commissioner she is entitled to offer her said interest for sale to an interested party or to the defendant, his heirs and successors in the event they are willing and/ or able to purchase it.
5. An Order that she is entitled to quietly enjoy her occupation of the subject property free from interference from the defendant, his agents, heirs and successors or their agents.

6. An Order that she is entitled to an equitable interest in the subject property to the extent of her financial and other contribution to the development/improvement and also based on representations made to her by the defendant in respect of the property.
7. An order that there be a valuation of her equitable interest in the subject property.
8. An Order that the defendant, his heirs and successors compensate the claimant to the extent of the value of her equitable interest in the subject property within ninety (90) days of the valuation of her equitable interest.
9. An order that in the event that the defendant, his heirs and successors are unable or unwilling to pay the claimant for her interest in the subject property, the a transfer/conveyance of not less than one half acre of the subject property (including the dwelling house) be executed by him/her in her favour.

[5] The court was been asked to determine the claimant's equitable interest in her brother's property and the remedy, if any, she was entitled to in relation to the doctrine of proprietary estoppel.

[6] It is settled law that under the doctrine of proprietary estoppel, a party who has incurred expenditure in building on another's persons land under the belief that he has or will acquire a good title to that land, and where the owner has encouraged or acquiesced in such expenditure, the court will satisfy that party's equity by making such orders as it deems appropriate. In **Crabb v Arun District Council, [1975] 3 All E.R. 865 at p. 871** Lord Denning said:

*"The basis of this proprietary estoppel – as indeed of promissory estoppel – is the imposition of equity. Equity comes in, true to form, to mitigate the rigors of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising equity". If I may extend that, Lord Cairns said in Hughes v Metropolitan Railway Co. [1877] 2 App. Cas. 439 at p. 448. "It is the first principle on which all courts of equity proceed.....that it will prevent a person from insisting on his legal rights, whether arising under a contract or in his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which may have taken place between the parties".*

- [7] Scarman L.J. in his judgment posed three questions which the court has to ask in relation to the law on estoppel:

*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?"*

- [8] The court is primarily concerned with the unconscionable conduct of the party who encouraged another to act to his detriment. In **Taylor Fashions Ltd. V Liverpool Victoria Trustees Co Ltd** Oliver J. Said:

*"A very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour".*

- [9] This was summarised:

*"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')*
- \* Unconscionable disadvantage (or detriment).*

- [10] Morrison JA in the case of **Annie Lopez v Dawkins Brown** and **Glen Brown** [2015] JMCA CIV 6 at paragraph 68 said:

*"The modern law of proprietary estoppel is aptly summarised by the authors of Gray and Gray's Elements of Land Law (5<sup>th</sup> edn. 2009) in this way (at para. 9.2.8):*

*“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 on his unconscionably withdrawn.”*

[11] The burden was on the defendant to show that he had not acted unconscionable in all the circumstances. Once it has been established that promises were made and that there has been conduct by claimant of such a nature that the inducement may be inferred, then the burden of proof shifts to the defendant to establish that he did not rely on the promises.

[12] The claimant in this case called two of their siblings Thomas and Bertram Grey as her witnesses to support her case that she was solely responsible for the development of the property and not the defendant. In her affidavit she stated that as follows:

*“The defendant gave me permission to live at the subject property and at no time did he place any limitations on me improving the said property. In fact it was agreed between the defendant and me that I would be living there for the rest of my life.”*

[13] The claimant further maintained that she had frequent conversations with the defendant who was “fully apprised of the extent of the renovation/remodelling of the original structure as well as proposed addition and ... provided him with an update of the status of the construction at all material times.”

[14] This clearly was the issue to be determined was whether the defendant knowingly or unknowingly, allowed or encouraged his sister to make further additions to her house. Was she speaking the truth when she said she advised him of the renovations and he did not object? Additionally, did he encourage her to expend her own monies to purchase fruit trees such as coconuts, breadfruit, mangoes, and ackees which increased the value of the property?

The claimant in her affidavit admitted that she had received the letter from the defendant's attorney that she should not make any renovations, alterations or additions to the existing buildings. Nevertheless, she said that she "*ignored the said letter... for good reasons, there was no security fencing plus an incomplete section on the house made me vulnerable and I completed construction for my personal security*". She said "*when he came in 2013 the living room and dining room finished. The kitchenette, kitchen was under construction also car port, garage and another bedroom. This was done to both sides*".

[15] The defendant in his affidavit admitted that he "gave the claimant permission to live on the land for as long as she lived and also gave her permission to add no more than two bedrooms to the structure that was on the property at the time of its acquisition." He revoked the power of attorney as he claimed she was doing much more to the property in respect of the construction than ... agreed".

[16] In *Inwards v Baker* [1965] 1 All ER 446 where a father invited his son to build a house on the father's land, it was held that the son was entitled to live in the house as long as he wished. Lord Denning MR at pages 448-449 said:

*"It is quite plain from the authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an interest. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow the expectation to be defeated where it would be inequitable to do so. In this case, it is quite plain that the father allowed an expectation to be created in the defendant's mind that this bungalow was to be his home. It was to be his home for life, or at all events, his home as long as he wished it to remain his home."*

[17] In this case the claimant occupied the property with the defendant's permission with the assurance that she could live there as long as she desired. In the circumstance she was not a tenant at will but a licensee coupled with an interest as she had constructed her dwelling house. However it was never the claimant's contention that the defendant had promised or represented to her that a part of the land would be given to her. What was in dispute was whether the claimant

was truthful when she said that the defendant was aware of the extent of her construction she had commenced in 2013.

- [18]** The fulcrum of her case was that she had informed him of the renovations and he did not object. This was denied by the defendant. The evidence showed that the defendant on the other hand resided in Canada at all times and had not visited Jamaica between since 1995. The claimant stated in her affidavit she stated as follows:

*“That after the defendant had put me in possession he subsequently agreed for me to renovate the one room structure as I desired at my expense. On the basis of this I got a building plan drawn up and approved by the local authority. The plan related to a two bedroom structure with the usual amenities”. She subsequently admitted that “when she went there I added two rooms and extended the existing structure. I put on 8 feet turning it into living and dining”. These statements were consistent with the arrangement made between them as claimed by the defendant.*

- [19]** Bertram Grey in his cross examination mentioned that the defendant had called him and asked him who was building on the land. He told him it was the claimant. He subsequently made a surprise visit to Jamaica and was upset that she was doing much more to the property than was agreed. Notwithstanding her unreasonable act he did not resile on his promise that she could remain on the property for the rest of her life. He then consulted Mr. Morgan and terminated the power of attorney he had given her. He never disputed her assertion that the structure she was given permission to construct belonged to her. This was her equity and defendant must compensate her if an agreement is reached with her to leave the property.

- [20]** Having seen and heard the witnesses I accepted the defendant’s account that he gave the claimant permission to live on the land for as long as she lived or desire and to add two bedrooms and amenities to the existing structure. This was

corroborated by the claimant when she said *“on the basis of this I got a building plan drawn up and approved by the local authority. The plan related to a two bedroom structure with the usual amenities.”* Consequently I found the defendant to be a credible and reliable witness.

- [21]** The claimant in her affidavit dated the 10<sup>th</sup> day of September 2016 exhibited a photograph of the construction site in 2013 when the defendant visited Jamaica. Notwithstanding the letter from his attorney in 2013 she continued building and exhibited another photograph illustrating a section commenced on February 2016. These photographs confirmed the dispute between the parties. The defendant would have been severely criticised if he had remained silent and allowed the claimant to continue upon discovering her action.
- [22]** On the other hand I rejected the claimant’s account that she had advised the defendant of her plan to make the additions and find as a fact that he did not acquiesce, encourage or gave the claimant permission as she alleged.
- [23]** The evidence further showed that the parties had discussed compensating the claimant for the structure but no agreement was reached. However she is requesting that the court grant her a life interest or make an order for compensation. He maintained that he was not prepared to transfer any portion of the land to her or be responsible for any monies expended by her to erect structures that he did not agree to or encouraged her to build.
- [24]** In my judgment equity arose in the claimant’s favour out of the defendant’s conduct in encouraging her to construct the two bedroom dwelling house. It was her unreasonable conduct that caused the defendant to determine the power of attorney and to stop her from completing the renovation she had commenced. At no time did he attempt to interfere with her tenure or to go back on his assurances. It was his refusal to transfer to a part of the land to her that caused her to institute this action. This certainly could not be described as oppressive conduct on the part of the defendant.

[25] In the case of **Roebuck v Mungovin** [1994] 2 AC 224 Lord Browne-Wilkinson observed that the effect of estoppel is to give the court the power to do what is equitable in all the circumstances. In **Jennings v Rice** [2002] EWCA Civ. 159 Aldous LJ said:

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

[26] In **Holiday Inns Inc v Broadhead** (1974) 232 EG 951 at 1087 Goff J summarised the position as follows:

*“...the authorities clearly establish that there is a head of equity under which relief will be given where the owner of property seeks to take an unconscionable advantage of another by allowing or encouraging him to spend money, whether or not on the owner’s property, in the belief, known to the owner, that the person expending the money will enjoy some right or benefit which the owner then denies him .....The authorities also establish.... that this relief can be granted although the agreement or understanding between the parties was not sufficiently certain to be enforceable as a contract, and that the court has a wide, albeit of course judicial, discretion to what relief should be given and what form it should take.”*

[27] In this instant case it was the claimant’s who had asked the defendant to allow her to occupy his property. He agreed that she would live on the land as long as she wanted and to construct a two bedroom dwelling house on the existing structure. The defendant did not interfere with her until she began to expand it without his consent and knowledge. He acted promptly and without delay in advising her not to proceed with her extension and revoked the power of

attorney. At no time he attempt to breach his promise that she could live there for the rest of her life or as long as she desire. Thus, it cannot be said that he was seeking to defeat her expectation or act to her detriment. She disobeyed him by completing it and then sought to have the National Land Agency do a part of land transfer. I find the claimant's conduct particularly reprehensive and unconscionable.

- [28] The claimant was seeking the court of equity to intervene and give her a life interest or to compensate for her. In *Baker v Baker* (1993) 25 HLR 408 a *father gave up his secure tenancy and moved in with his son and daughter-in-law to a property partially bought with his money on the basis that he would live there for the rest of his life. The father left following a family dispute and it was held that what he was entitled to was compensation for the loss of rent-free accommodation for the rest of his life.* However in this case the claimant continues to live on the land and has not suffered any loss.
- [29] The property comprised of approximately eight and one half acres of unregistered land which the National Land Agency have not transferred to him. The house was constructed on about three quarter acres and she had planted about two acres with fruit trees. Thus, the life interest was not registrable as a land charge.
- [30] In this case the expectation was that the claimant would live on the property for as long as she desires. The defendant has not attempted to withdraw that representation. She has not suffered any disadvantage and has remained on the property rent free and reaping the produce. The only person who has committed a wrong was the claimant by making additions without first seeking permission. It is my view that defendant was justified in demanding that she stop any further construction and terminated the power of attorney.
- [31] The claimant was seeking an equitable remedy. Therefore, the maxim he who seeks equity must come with clean hands is applicable in this case.

I find no merit in the claimant's case.

Judgment to be entered for the defendant with costs to be taxed if not agreed.