



[2021] JMSC Civ. 09

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

**Civil Division**

**CLAIM NO. 2015 HCV 04608**

<b>BETWEEN</b>	<b>MARLAN HIGGINS</b> <b>(Executor of the Estate of Egbert Higgins)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SHERMAN CHRISTIE</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Claimant unrepresented and appearing by video link from the United Kingdom.

Mrs. Denise Senior Smith instructed by Oswest Senior Smith & Company for the Defendant.

Heard: September 21 and 22, 2020 and January 18, 2021.

**Whether claimant authorized to initiate proceedings by himself. Whether Agreement for Sale between deceased and defendant remained a valid agreement. Whether counterclaim statute barred. Whether executor should be made to transfer property to defendant. Whether executor entitled to mesne profit. Whether executor estopped from seeking recovery of possession.**

**PETTIGREW- COLLINS J**

**INTRODUCTION**

[1] By way of Claim Form filed on June 30, 2016, the Claimant Marlan Higgins, one of the executors of the estate of Egbert Higgins deceased, who died on July 27, 2014, claims against the Defendant Sherman Christie, the following:-

- (i) That the Defendant and his agents leave the land registered at Volume 621 Folio 32 of the Register Book of Titles and give possession to the Claimant.
- (ii) Damages in the form of mesne profits from 1<sup>st</sup> January 2006 on going, at a rate of \$40,000 per month
- (iii) Interest at a rate of 5% per annum
- (iv) Costs

**[2]** The Defendant filed a Counterclaim in which he asserts that at all material times he has acted as owner of the land, has performed his obligations under the sale agreement into which he had entered with the deceased, has paid property taxes and as such he has a beneficial interest in the property. He states that the Claimant is estopped from claiming an interest in the lot purchased as it does not form part of the deceased's estate. Further, that the Claimant as executor is bound by the sale agreement, is in breach of it and has refused to transfer the property to the Defendant despite his power to do so.

**[3]** In that Counterclaim, he sought the following orders:

- i. That the sale agreement dated April 17,1990 is a valid conveyance evidencing the sale of Lot 15 to him or in the alternative specific performance of the sales agreement.
- ii. That the executor be directed to complete the conveyance by transferring the property to him and for the Defendant to pay all outstanding money towards the completion of the conveyance.
- iii. In the event, the Claimant fails to sign the documents giving effect to the transfer, the Registrar of the Supreme Court be directed to sign the said documents.

- iv. An injunction to restrain the Claimant his servants and/or agents from disturbing the Defendant's quiet enjoyment of the property.
- v. Costs

## **DECISION**

**[4]** Based on the evidence presented in this case, the Claimant is not entitled to any of the orders sought in his claim. The Defendant is entitled to remain in the disputed property and is entitled to have same transferred to him. The Defendant is also entitled to the injunction sought.

## **PRELIMINARY MATTERS**

**[5]** At the commencement of the trial, the Defendant's Attorney at Law Mrs. Senior Smith took objection to the Claimant's witness statement being admitted as his evidence in chief on the basis that it did not comply with rule 29.5 (1) (g) of the Civil Procedure Rules (CPR) which requires that the statement should include a statement by the intended witness, that that witness believes statements of facts contained in his statement to be true. Mrs Senior Smith also contended that a filed witness statement was not served. It became apparent that issue was being taken with the fact that the statement which apparently was served by electronic means upon the Defendant's Attorney at Law was not a statement that was filed; that is, it did not bear the stamp of the court indicating that it was filed.

**[6]** The court considered the fact that the Claimant resides in the United Kingdom, had in fact filed a copy of his witness statement and he was not represented by an Attorney at Law. The court permitted the witness statement to stand as the Claimant's evidence in chief, subject to the making of an application to strike out portions of the document. The court exercised its discretion to allow the witness statement to stand even though there was no application by the Claimant, pursuant to the court's powers under rule 26.9(3).

[7] Significant portions of the Claimant's witness statement were struck out. Paragraph 10, portions of paragraph 13 as well as paragraphs 16, 20, 21, 26, 37, 45, 46, 56 were also struck out. Although certain other paragraphs were not then struck out, the court will not place reliance on any portion of the witness statement which infringes the rules of evidence, in this instance, particularly the rules against hearsay. The conduct of the Claimant's case in terms of how certain relevant information was treated with did not comply with the rules of evidence or the Civil Procedure Rules. The Claimant, whom the court was advised during the course of the trial is a practising Solicitor in the United Kingdom, chose to represent himself in this case.

### **CLAIMANT'S CASE**

[8] The Claimant asserts that Egbert Higgins deceased, the owner of land registered at Volume 621 Folio 32 of the Register Book of Titles intended to subdivide this land into 20 lots for sale to several persons. Between 1998 and 1999, he entered into a number of sale agreements, including one with the Defendant in 1999, who agreed to purchase a few of the lots after subdivision approval was obtained from the St. Ann Parish Council.

[9] The Claimant further asserts that the application for subdivision approval was refused on August 15, 2000 and following this, Egbert Higgins discontinued the sale, reimbursed the Defendant and the sums paid on account were held by the Defendant's Attorney at Law. According to the Claimant, in 2003 the Defendant and or his legal representative, illegally submitted a subdivision application in Egbert Higgins' name with an inaccurate map of the land in support of the application. At the time of this application he said, Egbert Higgins was overseas and was incapacitated, and had been there since 2002 and (presumably) had no knowledge of this application.

[10] The Claimant states that subdivision approval on this application was wrongfully granted by the St. Ann Parish Council in 2005. According to the Claimant, in 2007, the Defendant, without Egbert Higgins' knowledge or permission and without planning permission or environmental permits, entered the subject land and built a road and a

house. He pointed out that the Defendant has refused demands to vacate the land and continues to build thereon.

### **CLAIMANT'S CROSS EXAMINATION**

[11] In cross-examination, the Claimant agreed that the Last Will and Testament of Egbert Higgins sets out that, portions of the property in question were sold to various purchasers for which agreements for sale had been signed. He also agreed that Egbert Higgins entered into a sale agreement with the Defendant and that this agreement was prior to 1998 or 1999. He agreed that based on the receipts, the Defendant paid \$130,000 for the purchase of the property even though the sale agreement showed that the purchase price was \$10,000. He further agreed that he provided no evidence to show that the Defendant was reimbursed the purchase price of the property.

[12] It was revealed in cross examination that the Claimant was unaware that both the Attorneys at Law who made the subdivision applications, that is, Mrs Playfair who made the application in 2000 and Mrs Joy Bayley-Williams in 2005, were part of the same law firm. The Claimant also agreed that he was not present during any of the transactions between the Defendant and Egbert Higgins.

### **DEFENDANT'S CASE**

[13] Witness statements were filed on behalf of the Defendant and his wife, Kerrvine Christie and both of them were cross examined. The Defendant states that he entered into an agreement with Egbert Higgins on April 17, 1990 for the purchase of land later designated lot 15, which is part of land registered at Volume 621 Folio 32 of the Register Book of Titles with the belief that he would enter into possession of the lot on a further payment towards the purchase price. He states that the purchase price of the lot was \$30,000 which he commenced paying before the sale agreement was signed. According to him, the sale agreement only reflected the balance of \$10,000. He further states that upon paying the \$10,000 in 1990, Egbert Higgins gave him possession of the lot and he commenced construction of a house on the lot in 2000 and has lived there since 2007.

[14] He said however, that Egbert Higgins failed to complete the sale before he died. The Defendant said he learnt that there were issues with the subdivision which caused delay, but the subdivision was later approved. The Defendant denies that he was reimbursed or that he was informed that the subdivision was refused. He asserts that the Claimant did not know of the terms of the agreement. He also denies that he submitted a new subdivision application. He states that the Claimant has been threatening to demolish and sell his house and has demanded that he leaves the property. He also states that he has not continued to build on the land.

[15] Mrs Christie's evidence in chief repeated certain aspects of the Defendant's evidence and she added that the house built on the disputed property is the matrimonial home.

#### **DEFENDANT'S CROSS EXAMINATION**

[16] In cross examination when the Defendant was asked how much he paid for the land, he said it was \$10,000. When pressed further, he stated that he paid \$10,000 to the lawyer for the land but he made payments to Mr. Egbert Higgins as well. When he was re-examined in relation to this aspect of his evidence, he revealed that money was paid towards the road work and sums were also paid prior to a lawyer being retained to oversee the sale. During cross examination the Defendant agreed that when he signed the sale agreement his lawyer was Murray and Tucker. He denied knowledge of his Attorney at Law writing to the Attorneys at Law for Egbert Higgins threatening legal action when Egbert Higgins withdrew the agreement in 1998 and that this was done via letter dated August 26, 1998.

[17] He admitted that he was granted a building licence/permit by the St. Ann Parish Council. When referred to two tax receipts admitted into evidence, he was unable to confirm whether tax numbers on the receipts related to his land. He stated that he did not know whether Lot 9, which was the address on one of the tax receipts, related to his mother's land (which it was agreed by both sides, was land purchased from the deceased).

**[18]** During cross examination, Mrs. Christie indicated that she used the title from another property to get a loan from the National Housing Trust (NHT) and used the money to build the house on lot 15. She stated that persons from the NHT came to look at the house she was building on lot 15 but admitted that no request was made to see a title, building plan or permit.

### **CLAIMANT'S SUBMISSIONS**

**[19]** The Claimant in his skeleton arguments submitted that pursuant to sections 3 and 25 of the Limitations of Actions Act, the Defendant's Counterclaim is statute barred. He stated that the Defendant threatened to take action for specific performance as of August 26, 1998 and that based on the stated sections of the Limitations of Actions Act, the Defendant had until August 25, 2010 to seek a remedy from the court. He said therefore, that the Defendant's Counterclaim filed on the 15<sup>th</sup> of September 2016 is some six (6) years out of time. He says accordingly, pursuant to the provisions of section 30 of the Limitations of Actions Act, at the expiration of the period limited for bringing the claim the "right and title" of the Defendant was extinguished.

**[20]** He further submitted that the Claimant is not statute barred from seeking a remedy based on the provisions of section 27 of the Limitations of Actions Act. In support of his submission he detailed that Egbert Higgins left the island in April 2002 due to a stroke which left him disabled. He states further that the fraud was only discovered after Egbert Higgin's death when his sons travelled to Jamaica in July 2014 to arrange for his funeral.

**[21]** He argued that Egbert Higgins and his family who were resident abroad were not in a position to discover the fraud before July 2014. At the time of the discovery he said, Probate was not yet granted, but notice to quit was nevertheless issued to the Defendant and action filed in the Resident Magistrates Court. He continued that when Probate was granted on February 20, 2015, the executors withdrew their claim in the Resident Magistrates Court and commenced a claim in the Supreme Court on June 30, 2016. The Claimant's contention is that once the fraud was discovered, the executors acted diligently and sought remedy from the courts. As such, he continued, time did not

start to run against him bringing his claim until February 20, 2015, when he was legally in a position to seek a remedy from the court.

[22] Additionally, the Claimant in his skeleton arguments relies on Harris JA statements at paragraph 33 of **Frank Phipps v Harold Morrison** in reference to **Waugh & others v HB Clifford & Sons Ltd** where she said “An Attorney at Law has complete control over a case in which he is retained to represent the client. Until this retainer is withdrawn, the Attorney-at-law continues to act for the client. He submits that conversely an Attorney at Law who has not been retained has no implied or expressed authority to act for the client or have control over his case. The basis of this submission is the Claimant’s contention that Mrs Bayley Williams was never retained to act on behalf of Mr Egbert Higgins.

[23] He then went on to ask the court to consider his further and alternative submission that any Attorney-at-Law who claims to have authority to act on behalf of a client, carries the burden of proof that such authority has been granted. He then submitted that the burden of proof falls on the Defendant to show that Ms. Joy Bayley-Williams whom he claims is the Defendant’s former Attorney at Law, was retained by the Claimant. He also submitted that, if the court finds that the Defendant’s former Attorney at Law, Ms Joy Bayley-Williams was not retained by the Claimants, the court must deem any action taken or representations made by her on behalf of the Claimant as null and void, including the subdivision approval.

[24] The Claimant further submitted in his skeleton argument that the restrictive covenants in the subdivision approval issued on March 8, 2005 formed implied terms in the agreement for sale between himself and Mr Egbert Higgins to give business efficacy to the terms of the agreement. Further, that the Defendant has committed breaches of these implied terms, having failed to obtain and/or apply for the approval of the St. Ann Parish Council prior to the development of any lot on the said land. Accordingly, the St. Ann Parish Council is unable to certify to the Registrar of Titles that any construction and or development has been completed by the Claimant in a satisfactory manner and therefore the Registrar of Titles is precluded from issuing any certificate of title, or effect



any transfer in relation to the said land. In this manner he asserts, the agreement for sale has been further frustrated.

[25] He additionally submitted that the National Environmental and Planning Agency did not issue all relevant permits for the subdivision or building approval to be granted for the said land and the last application for subdivision approval granted on March 8, 2005, was made upon false or fraudulent information provided by the Commissioned Land Surveyor. Accordingly, the pre-checked or deposited plan and/or map made in or about 2005 submitted in support of the application for subdivision approval were false or incorrect and does not bear and/or reflect the actual measurements in size of the land on the ground.

[26] The Claimant finally submitted in his skeleton argument that the Defendant has not disputed that monies were returned and are being held by his former Attorney at Law Ms Joy Bayley-Williams and he has refused to contact her to confirm that funds are being held by her.

[27] In his final submissions the Claimant addresses the issues of whether a claim for specific performance is excluded from the Limitations of Actions Act and if it is not when does time [begin to] run? He relied on **Marjorie Knight v Lancelot Hume [2017 JMSC Civ. 51]** to answer the questions posed. The Claimant relied on Evan Brown J reasoning for his submission that a claim for specific performance falls within the Limitations of Actions Act.

[28] The Claimant further submitted that if the court is not with him on the proposed date as to when time started to run, he relies on the decision letter of the St. Ann Parish Council dated August 15, 2000 to say that time began to run from August 15, 2000 and the Defendant's legal and equitable rights were extinguished as of August 14, 2012.

[29] In support of this date, he submitted that the Defendant has not denied that the St. Ann Parish Council refused the application for subdivision at a meeting held on July 31, 2000, that his Attorney at Law was informed of the decision by letter dated August 15, 2000, that under special condition set out in the sale agreement, the agreement was

subject to subdivision approval of the St. Ann Parish Council or that the Defendant took no legal action or sought a remedy until September 15, 2016 when he filed his Defence and Counterclaim.

## **DEFENDANT'S SUBMISSIONS**

[30] Counsel for the Defendant in her final submissions before the court, opined that the Claimant does not have the capacity to bring the action. She observed that a grant of probate was issued to joint executors to act for the estate of Egbert Higgins deceased and the Claimant has not shown that he has the capacity to act solely to the exclusion of the other executor, his brother. According to her, the Claimant has gone rogue to bring this action and consequently his claim should be refused.

[31] In relation to the Claimants submissions on the Limitation of Actions Act, Mrs Senior Smith pointed out that the issue of the limitation period was never pleaded in the Claim Form, Particulars of Claim or the Claimant's response to the Defendant's Defence and Counterclaim. Further, that the Defendant filed his Counterclaim on November 3, 2016 in which he set out an on-going contract with Egbert Higgins up to the time of his death which continued after his death and which is protected by his Last Will and Testament and at no time did the Defendant claim that there was a breach of contract or that the contract had determined. There is also no evidence before the court she said, that the deceased terminated the contract. It is therefore clear she submitted, that the Defendant was treating the property as his own and it was the Claimant who was now enquiring about the Defendant's interest in 2014.

[32] Mrs Senior Smith quoted extensively from the judgment of E Brown J in the case of **Marjorie Knight v Lancelot Hume** (supra) a case which was cited by the claimant. She acknowledged as the Claimant observed, that a limitation period is relevant to a claim for specific performance. She also addressed the issue of whether the agreement for sale between Mr Egbert Higgins and the Defendant is a valid agreement, observing that the Defendant entered onto the disputed land under the terms of the agreement. She cited the case of **Annie Lopez v Dawkins Brown and Another** 2015 JMCA Civ. 25 to say that since the defendant has obtained an equitable interest in the property,

and time has not run for the bringing of the claim to enforce the agreement, the Claimant is bound to complete the sale to the Defendant.

[33] Mrs Senior Smith also addressed the question of whether the payments made in respect of the purchase of the property was returned to the Defendant. She posited that an estoppel operates in the Defendant's favour against the executors of Mr Egbert Higgins' estate.

### **THE ISSUES ARISING IN THIS CLAIM**

[34] The issue of whether the Claimant had authority to initiate proceedings by himself has been raised and will be dealt with. This court must also address the question of whether the agreement for sale which was entered into between Egbert Higgins and the Defendant remains a valid agreement. Subsumed under this issue, are two sub issues, the first being whether the sums paid by the defendant pursuant to the agreement and in connection with the sale of the disputed property were returned to the Defendant and accepted by him. The second surrounds the status of the subdivision approval.

[35] Another issue is whether the Claimant is able to assert for the first time in his skeleton submissions that the Defendant's Counterclaim is statute barred, he not having so asserted in his statement of case.

[36] Assuming the latter question is answered in the negative, and/or it is determined that the claim is not statute barred, this court also has to decide whether the claimant should be made to complete the sale of the disputed property to the defendant. The question of whether an estoppel operates in the Defendant's favour will be addressed.

### **THE CLAIMANT'S AUTHORITY TO INITIATE PROCEEDINGS**

[37] Mrs Senior Smith took issue with the Claimant's right to bring this claim without him providing proof that he had the permission of his co- executor to bring the claim. The Claimant stated in cross-examination that he was authorized by his brother and co-executor to bring the claim. He provided no documentary proof of this authorization as

he was required to do if he was acting with his brother's permission. It is however, my understanding of the law that joint executors have joint and several authority. It is not always clear whether it is in respect of every single act that this rule applies. Even if it is not, it is observed that this claim was filed in the year 2016 and this court finds it unsatisfactory for a party to wait over four years and until the day of trial to take issue with a matter such as the authority of a party to bring a claim.

**[38]** This is not a case of the complete absence of locus standi. The contention is that probate was extracted by two executors, yet only one brought the claim without establishing by way of tangible evidence that he had the authority of his co- executor to do so. Even if this is not one of those instances in which the Claimant ought properly to have brought the claim solo, I am not of the view that his doing so is fatal to the claim. I am also of the view that if the court should accede to the Defendant's submission, then the Defendant would not be on good ground in bringing his counterclaim against one of the two executors.

## **WHETHER THE AGREEMENT FOR SALE WAS FRUSTRATED OR WHETHER IT REMAINS A VALID AGREEMENT**

### **Whether monies paid by the Defendant were returned to him**

**[39]** The Claimant asserts that the sums paid by the defendant towards the purchase of the property were returned to him. The Defendant denied the assertion. The Claimant has not produced any admissible evidence in proof of this assertion. The purported evidence intended to be advanced in support of the assertion was struck out as inadmissible hearsay. Even if the view may be taken that the evidence should not have been struck out, the purported evidence was a bare assertion that Egbert Higgins repaid all deposits to the purchasers (which inferentially included the Defendant) and confirmed that he was no longer willing to continue with the sale. The source and basis of that assertion was not revealed. The assertion that Mrs Bayley Williams confirmed in a sworn affidavit that the deposit for many of the purchasers were still being held by her in a client's trust account would not have been unequivocal evidence that the Defendant

was among the persons whose deposits were returned and was being held in the trust account.

### **The status of the subdivision approval**

**[40]** It was a special condition of the agreement for sale that the sale was subject to the grant of subdivision approval by the St Ann Parish Council and or other property authority. Frustration of a contract such as an agreement for sale may occur upon the happening of an event subsequent to the formation of the agreement. The agreement will usually be premised upon the occurrence of an event which forms the basis of the contract. In this instance, that event was the grant of subdivision approval. The refusal of subdivision approval could without more have frustrated the contract, but the matter did not end with the initial refusal in 2000. I divert momentarily to address a point that was taken in relation to the Claimant's pleadings on the matter of the status of the subdivision approval.

**[41]** Mrs Senior Smith's contention that the Claimant's claim that the subdivision approval was null and void does not form part of the Claimant's statement of case and therefore should not be considered by this court, does not in my view stand on good ground. The Claimant filed a document on the 29th of November 2016 headed 'Claimant's Response to Defendant's Defence and Counterclaim'. This document must properly be regarded as the Claimant's reply. In paragraph 15 of that document, the Claimant asserted that the agreement for sale in question was frustrated.

**[42]** The Defendant did not dispute the Claimant's assertion that subdivision approval was initially refused in the year 2000. My understanding of his position is that he was not aware of that fact. He however stated that he was aware that there were issues with the approval. There is a dearth of evidence regarding the circumstances of the refusal, whether it was unconditional or whether for example, the applicant needed to do something further to reactivate the process. There is really nothing to indicate as the Claimant asserted in his witness statement, that the Parish Council determined that any application would have to be treated as a new application.

**[43]** Ignoring for the moment the fact that the Claimant only annexed the letter from the Parish Council to his witness statement and did not seek to have it admitted into evidence, there is nothing in that letter which indicates that the application would have to be treated as a new application. However, both the Claimant and the Defendant stated that subdivision approval was granted in 2005. As to whether it was by way of a new application, there is not sufficient evidence before the court to make that determination. This approval the Claimant says was illegal null and void.

**[44]** Without addressing the details of the bases on which it is said that the approval is null and void, as far as this court is aware, the approval granted by the St Ann Parish Council has not been withdrawn by the granting body. It is the Claimant's evidence that the Parish Council has declined to withdraw the approval despite his request for the Council to do so. Neither has the approval been declared null and void by any court. This court is mindful of the Claimant's evidence that he has brought a claim in the Supreme Court seeking orders to that effect. This court is in no position to entertain any argument that the approval is null and void and a fortiori, to grant any declaration to that effect, in an action in which the authority granting the approval is not a party. The subdivision approval granted in 2005 in respect of the subject land must therefore be treated as valid.

**[45]** I do not agree with the Claimant's contention that the agreement was frustrated. On the face of it the agreement for sale which was entered into between the Defendant and Mr Egbert Higgins was a valid agreement. It possessed all the essential requirements of a valid agreement for sale. The Claimant also seeks to rely on the breach of what he has referred to as implied terms which he says was central to the agreement for sale. Those terms as the Claimant himself pointed out, are conditions imposed by the St Ann Parish Council as part of the subdivision approval. I take the view that these are not terms that can be implied into the sale agreement. The question of whether or not the Defendant is in breach of, or has constructed his home contrary to the terms of the approval granted by the Parish Council is a matter between the Defendant and the Parish Council and any other relevant agency or agencies, and a

matter with which the Claimant ought not to be concerned. Any purported breach has absolutely no bearing on the validity of the sale agreement.

[46] Even if by a stretch it could be said that the sale agreement was terminated because of the refusal of subdivision approval in the year 2000, Mr Egbert Higgins' overall conduct would have to be taken into account in making a decision whether the disputed land ought to be transferred to the Defendant. That matter will be addressed in due course.

**WHETHER THE CLAIMANT WAS REQUIRED TO PLEAD THE ASSERTION THAT THE COUNTER CLAIM IS STATUTE BARRED / WHETHER THE CLAIM IS STATUTE BARRED.**

[47] There can be no dispute that the Claimant did not in any of his pleadings and in particular his "Response to the Defendant's Defence and Counterclaim" raise the issue of the Defendant's counterclaim being statute barred. It is a requirement based on rule 10.5, that a Defendant should set out any defence on which he relies. As expressed in **A Practical Approach to Civil Procedure by Stuart Sime, 18<sup>th</sup> Ed.**, paragraph 14:32, "the defence must specifically set out **any matter, such as** performance, release, expiry of limitation, fraud, or illegality which is a defence to the claim..." Of course, the same rules applicable to the setting out of a defence are applicable to what should be included in a defence to a counterclaim.

[48] I will assume for the purposes of the following discussion that the Claimant may nevertheless be able to put forth this defence. It is now beyond dispute that the provisions of sections 3 and 30 of the Limitation of Actions Act are applicable to a claim for specific performance. Section 25 of the Act specifically states that the provisions are applicable to claims in equity. (see the decision of E Brown J in the case of **Marjorie Knight v Lancelot Hume** supra). This is one matter in relation to which both the Claimant and the Defendant are in agreement. I need not therefore engage in a full discourse of the relevant law.

[49] The agreed position is that the right to bring a claim for specific performance of a contract for sale of land may be extinguished by the effluxion of time. If the requisite twelve years have elapsed, then a claim is statute barred. As indicated earlier, the Defendant's Counterclaim stands in the same position as a claim.

[50] The question which follows is whether the counterclaim in the instant claim would have been statute - barred. The Claimant was insisting that the court address that matter as a preliminary issue at the outset of the trial. The court declined to do so and indicated that the matter would be dealt with when giving a final judgment in the matter.

[51] In order to decide if the counterclaim would have been statute barred, this court must determine when time began to run against the bringing of the claim. In other words, when did the cause of action accrue. As E. Brown J observed in **Marjorie Knight**, "practically people are not moved to assert (or protect) their right in the absence of a threat to those rights" (paragraph 35 of the judgment). This court rejects the Claimant's position that time began to run as at the 26th of August 1998 when the Defendant's then Attorneys at Law Murray and Tucker wrote to the Claimant's predecessor in title indicating the likelihood of bringing a claim for specific performance.

[52] I note at this point that the Defendant denied the suggestion when it was put to him, that his Attorneys at Law Murray and Tucker wrote to the Claimant's predecessor in title indicating the likelihood of bringing a claim. There is no other evidence to this effect. The Claimant in his final submissions sought to exhibit a letter as proof of the assertion. Having regard to the manner in which such information was introduced, it is not admissible as evidence. Even if that information was to be considered as evidence, my position that time did not begin to run at the date of such letter would not change. If the court were to have regard to the contents of the letter, it did not have the effect of making time of the essence of the contract.

[53] I also reject the alternative submission that time began to run in August 2000 when the subdivision approval was initially rejected. I am of the view that time did not begin to run until the Defendant's right to occupation and ownership of the disputed property was challenged. The Defendant's unchallenged evidence is that he had paid



sums in excess of the purchase price for the disputed property. He offered an explanation for making payment of at least part of the excess sums. It was also his unchallenged evidence that he was put in possession of the land by Mr Egbert Higgins from as far back as 1990 and that he commenced building his house in the year 2000. It is noteworthy that in the year 2000, on the Claimant's own evidence, Mr Egbert Higgins was living in Jamaica and evidently was not incapacitated. The Claimant said he had a Power of Attorney from Mr Egbert Higgins in 2000. Mr Egbert Higgins spent a further two years in Jamaica and took no steps to remove the Defendant from the land.

**[54]** Based on the Defendant's evidence which I accept, I conclude that nothing at all had happened that should have caused him to think that his ownership, possession and occupation of the property was in anyway being questioned or threatened. He said that he had been aware that there were issues with obtaining subdivision approval, but approval was granted in 2005. He was by then in the process of constructing his home, which his wife gave evidence, is the matrimonial home. He constructed his home and was residing there. He had entered into contractual arrangements with utility companies and was enjoying the use of his property. He omitted to say in his witness statement when it was that the Claimant first contacted him, but from the Claimant's evidence, this was sometime in 2014, when according to the claimant he first found out about what he referred to as the "fraud". I find that the Defendant's right to ownership and occupation was first challenged in the year 2014.

**[55]** Even if I am wrong in my assessment that time began to run when the Defendant's right to possession was first challenged, the only potentially viable alternative argument is that time began to run in 2005 when subdivision approval was granted and it was then open to Mr Egbert Higgins or his duly appointed agent to complete the sale. Even so, the Defendant's claim for specific performance would not have become statute-barred until 2017.

## WHETHER THE DEFENDANT IS ESTOPPED FROM RECOVERING POSSESSION OF THE PROPERTY

[56] The above discussion brings me to the Defendant's contention that the Claimant is estopped from seeking recovery of possession against the Defendant. There is no question in my mind that there is no tenancy existing between the Claimant and the Defendant. I raise this matter because the Defendant's Attorney at Law said it was somehow implied by the Claimant that the Defendant was a tenant at will. The Claimant's posture is more in keeping with the Defendant being a trespasser. Based on my finding however, he is not. The Claimant would therefore not be able to recover possession on the basis of the Defendant being a tenant of any kind or on the basis that he is a trespasser. The principle of estoppel operates to prevent a party who has induced another to rely upon his representation from denying the truth of the facts which have been represented. It is in this instance a principle upon which the Defendant may rely as a shield.

[57] In the case of **Crabb v Arun District Council**, [1976] Ch 179, on the matter of proprietary estoppel, (as taken from page 568 of **Cheshire and Burn's Modern Law of Real Property** by E H Burns 14<sup>th</sup> Ed) Scarman LJ had the following to say:

"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?"

[58] A Claimant will generally have to suffer some detriment arising from his activity or inactivity in relation to the disputed land. As said in **Crabb v Arun District Council**, (supra) the person seeking to establish the estoppel must show that he has incurred expenditure or otherwise prejudice himself or acted to his detriment.

[59] It is the Claimant's evidence that the Defendant claimed that his house is valued in the region of \$50 million. There is no evidence of sums actually spent but it is apparent that the Defendant in this case expended significant sums in constructing his

home on the disputed land. The defendant's wife and witness gave evidence of taking a loan from the National Housing Trust for the purpose of constructing their home.

[60] It is apparent from the decision in the case of **Pascoe v Turner** [1979] 1 WLR 431, that a fee simple interest could arise from the operation of a proprietary estoppel in one's favour. It is also quite clear that an estoppel binds a successor in title such as the claimant in this case in respect of the disputed property.

[61] When a party signs a contract for sale of land, pays the purchase price and fulfil his obligations under the contract for sale, he acquires a beneficial interest which is an equitable interest in that property. The claimant in this instance has acquired a beneficial interest in the property in question. Mr Egbert Higgins' successors in title would take Mr Higgins' property subject to that interest.

[62] Mr. Higgins in his last will and testament, (a probated copy of which was tendered and admitted in evidence in this case) devised the land contained in the parcel in which that occupied by the Defendant is contained. He did however make it clear that the portion he was devising did not include the portions sold to the various purchasers or the portions in relation to which agreements for sale had been signed. It was therefore made abundantly clear that he did not intend to devise the portion occupied by the defendant since an agreement for sale had been signed in respect of that portion.

[63] From all indications, it seems fair to say that the Claimant in this matter had no personal knowledge of the transaction between his deceased father and the Defendant. He is seeking to realize the assets of his father's estate. However, it cannot be said that the property occupied by the Defendant forms a party of that estate.

[64] Mr Egbert Higgins and/or his successor in title would in the circumstances based on the above analysis, be estopped from denying the Defendant's interest in the property.

## **WHETHER THE CLAIMANT IS ENTITLED TO RECOVER MESNE PROFIT**

[65] Mesne profits represent compensation for deprivation of use and occupation of land. Same is assessed according to the present value of the land in question. The Claimant in this instance is not entitled to recover mesne profits since it cannot be said that he has been deprived of the use and occupation of the disputed land.

## **DAMAGES IN LIEU OF SPECIFIC PERFORMANCE**

[66] The question of damages in lieu of specific performance has not been raised. I do not think it necessary to address it, suffice it to say that the evidence discloses that the significant improvement to the property has converted it into the matrimonial home of the Defendant and his witness and there is nothing standing in the way of the duly authorized executors of Mr Higgins' estate transferring the property to the Defendant.

## **THE APPLICABILITY OF SECTION 27 OF THE LIMITATION OF ACTIONS ACT**

[67] Section 27 of the Limitation of Actions Act provides that in any case of a concealed fraud, the right of an individual to bring a cause of action for recovery of land accrues at a time when the fraud is first discovered or with reasonable diligence, could have been discovered. In circumstances where this court has found that the twelve-year period during which the Defendant could bring a claim for specific performance had not elapsed, the Claimant's contention that his right to bring this claim has been preserved by virtue of the provisions of section 27 of the Limitation of Actions Act does not arise for consideration.

## **CONCLUSION**

[68] The Claimant did not plead the limitation defence in respect of the Defendant's Counterclaim for specific performance of the agreement for sale. Even if that position is incorrect, the time within which the counterclaim should be brought based on the Limitation of Actions Act had not expired. The sale agreement between the Defendant and the late Egbert Higgins is valid and enforceable. Even if the agreement was not still enforceable, the principle of estoppel would operate to prevent the Claimant from

recovering possession of the disputed land. The Claimant is not entitled to an order for possession of the disputed property. Neither is he entitled to mesne profits.

**[69]** Based on my findings, the court makes the following orders:

- i. The orders sought by the Claimant are refused.
- ii. The Claimant in his capacity as Executor of the estate of Egbert Higgins (deceased) is hereby ordered to transfer the disputed property to the Defendant. The Defendant is hereby ordered to make any payments required by law in respect of the completion of the transfer of the said property.
- iii. In the event the Claimant fails to sign the documents giving effect to the order of the court, the Registrar of the Supreme be directed to sign the said documents.
- iv. An injunction is granted to restrain the Claimant his servants and/or agents from disturbing the Defendant's quiet enjoyment of the property.
- v. Costs of the claim and counter claim to the Defendant to be taxed if not sooner agreed.

**A Pettigrew Collins J.**