[2023] JMSC Civ 153

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2016 HCV 02364

BETWEEN	**ALBERT RITCHIE**	**CLAIMANT**
AND	**ROSEMARY MCLEOD**	**DEFENDANT**

Sasha-Gay Brown instructed by Oswest Senior Smith & Company for the claimant
Mark-Paul Cowan instructed by Nunes Scholefield Deleon & Company for the defendant

HEARD: 3, 23 MARCH & 31 JULY 2023

Civil Procedure - Rule 15.2 - application for summary judgment - whether the claimant has a real prospect of succeeding in the claim – conflicts of fact – whether case appropriate for grant of summary judgment

MASTER C. THOMAS

INTRODUCTION

[1] The application before this court for summary judgment brings into sharp focus the circumstances in which summary judgment may be entered in favour of a party where there are conflicts of facts arising on the parties' respective cases.

[2] I will attempt to briefly set out the background to the claim before delving into the competing contentions of the parties.

The claim

[3] The claim, which was commenced by fixed date claim form, is in the main for "one-half legal and beneficial interest" of Lot 22, Peter's Rock located in the

parish of St Andrew and registered at Volume 1184 Folio 703 of the Register Book of Titles" ("Peter's Rock"). Consequential orders such as the claimant being given first option to purchase the defendant's fifty percent (50%) in the property were sought to give effect to this declaration. The fixed date claim form was supported by an affidavit sworn to by the claimant. Various affidavits were filed including affidavits by the claimant, the defendant and Monica Walker on behalf of the defendant. The matter had been set for trial in 2018 but was adjourned on the application of the defendant. On 5 March 2020, the court made orders for the filing of particulars of claim and a defence, consequent on the claim being treated as having been commenced by claim form.

[4] The main planks of the claim and the defence have been set out by the defendant in the written submissions in support of her application for summary judgment. They were not disputed by the claimant, and I am of the view that they represent an accurate reflection of the parties' respective cases. I therefore set them out below:

> [For the claimant]
>
> i. The parties were in a sexual/intimate relationship;
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> ii. The parties conceived of a life of subsistence together;
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> iii. The parties jointly decided to purchase Peter's Rock for their joint benefit;
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> iv. The parties moved in together at Peter's Rock and the claimant made a makeshift hut at Peter's Rock where they resided;
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> v. The parties were jointly engaged in the business of leather craft;
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> vi. Profits from the leather craft business were paid to [a] Credit Union to facilitate obtaining the mortgage to purchase Peter's Rock;
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> vii. The claimant, at the behest of the defendant, cared for and managed [property located at Westport, Portmore,

which was owned by the defendant] when the defendant migrated;

viii. The claimant used his own income to service the mortgages on Peter's Rock and Westport; and

ix. The claimant paid property taxes for Peter's Rock from his own income for any relevant period.

[For the defendant]

i. The [defendant's] familiarity with the claimant developed out of a professional association as he became her mechanic;

ii. The defendant solely purchased Peter's Rock and Westport including the servicing of the respective mortgages;

iii. Prior to migrating, the defendant at no point in time cohabited with the claimant;

iv. The defendant moved onto to Peter's Rock by herself after building a modest home with her own resources;

v. After migrating, the defendant selected persons other than the claimant to manage Westport including Ms [Monica Walker] and Mr Hepburn Lloyd Reid ("Mr Reid"); and

vi. The defendant and the claimant entered into a mutually convenient arrangement whereby the claimant would stay at Peter's Rock while the defendant was away to protect her interest, and, in exchange, the claimant could have the use and occupation of Peter's Rock, rent-free, until such time as the defendant needed it.

[5] By way of counterclaim, the defendant contends that she is the sole legal and beneficial owner of Peter's Rock and the claimant was at all material times a bare licensee; that the defendant revoked the licence by several demands for the claimant to vacate the premises, the latest Notice to Quit being the notice dated 21 October 2014; and that the claimant refused to vacate and remains in unlawful

occupation as a trespasser. An order for recovery of possession and mesne profits for the claimant's use and occupation from 20 June 2007 was sought by the defendant.

[6] The defendant's application for summary judgment filed on 7 July 2022 seeks summary judgment on the claim and the counterclaim. It appears to me that the substantive grounds on which the application is based are outlined as grounds 3, 4, which are:

> 3. The claimant's claim to an interest in the defendant's property registered at Volume 1184 Folio 703 of the Register Book of Titles is substantially and irreparably undermined by:
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> i. the written communications from and between the parties; and
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> ii. the previous affidavit evidence filed by the parties herein, including all express averments and omissions.
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> 4. A trial of the action is not required to fairly dispose of the issues joined between the parties in all the circumstances.

THE SUBMISSIONS

For the defendant

[7] Mr Cowan submitted that although no cause of action had been stated it appears that the claim is based on constructive trust and proprietary estoppel. An amended claim form and amended particulars of claim had been filed on 15 February 2023 to add unjust enrichment and for the purposes of the application, the defendant would not object to the court considering its contents as it would not affect the substance of the application.

[8] Relying on the case of **Gissing v Gissing** [1971] AC 886, **Lloyd's Bank plc v Rosset and another** [1990] 1 All ER 111 and **Ivan Williams v Yvonne Thompson** Claim No 2010 HCV 03404 (delivered 15 July 2011) for the principles relevant to establishing a constructive trust, he submitted that there

was no contract or express agreement for the claimant to have a beneficial interest in Peter's Rock; therefore, the court would have to infer a common intention and that this was not an equitable doctrine based on fairness, but was based on the common law based on a common intention formed at the time of purchase of the property. Relying on **Phillip Henry v Peter Perkins** Claim No 2008 HCV 03799 (delivered 31 July 2012), he submitted that even though the claimant had his own desires or intention to share in the property, it was not shared by the defendant. The claimant had, at no time, had the understanding that the defendant wanted him to have a share in the property and a common intention could not be based on an understanding that was not shared between the parties.

[9] Mr Cowan referred to rule 15.2 of the Civil Procedure Rules ("CPR") and the cases of **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** [2009] EWHC 339 (Ch) and **Delroy Howell v Royal Bank of Canada** [2021] JMCA Civ 19 as adumbrating the principles applicable to the consideration of an application for the entry of summary judgment. He also referred to cases such as **Microsoft Corporation v Electro-Wide Ltd and another** (1997) IP & T Digest, **John Rupert James Blackwood (Executor of the Estate of James Whittle Blackwood, Deceased) v Kingsley Lyew and anor** [2022] JMCA App 17, **Anderson Antiques (UK) Ltd v Anderson Wharf (Hull) Ltd & Anor** [2007] EWHC 2086 (Ch) (23 May 2007) and **Franklyn Management SRL v Central Eastern European Real Estate Shareholdings BV** [2014] EWHC 4127 (QB) for the approach of the courts in circumstances where an application is made for summary judgment where there are factual disputes. He submitted that the fact that there are factual issues does not mean that the court is disabled from granting summary judgment. The court ought to look critically at the evidence before it and resolve these issues of fact where appropriate; the court should not send the matter to trial simply because a conflict of fact has been raised by the parties. If a case is implausible or incredible or plainly does not make sense, the court will grant summary judgment even if it involves wading through voluminous paperwork.

[10] Mr Cowan submitted that in the instant case when the history of the matter along with the contemporaneous documents between the parties are

considered, this is a matter that is appropriate for summary judgment. He pointed to various letters written between the parties between 1986 and 2006, which were exhibited to the affidavits filed in the claim and in support of the application and argued that these provide a clue as to the understanding and relationship between the parties and were the best evidence of what took place between the parties as they were written at a time when litigation was not contemplated. These documents demonstrated that the position of the claimant was not credible. Specifically,

(i) In relation to the claimant's assertion that he and the defendant were involved in an intimate relationship leading to the pooling of funds to purchase the property, there was correspondence in 2005 in which the claimant referred to himself as like a son to the defendant and the defendant as like a mother to him; and the defendant referred to him as her mechanic. Also, there was no evidence on behalf of the claimant to support his claim notwithstanding that on his case the relationship was not secret. On the other hand, the defendant provided testimony (from Monica Walker) supportive of her denial of an intimate relationship.

(ii) With respect to the claimant's assertion that the parties jointly decided to purchase Peter's Rock and that the claimant built a hut for both of them to occupy when they moved on to the property, there was correspondence in which the claimant indicated that the house that the defendant left was getting bad.

(iii) The claimant's claim that he contributed to mortgage payments was undermined by correspondence which demonstrated his impecuniosity and that it was the defendant who at times had to send money to assist the claimant and the mother of his child. Also, there was no evidence of how much the mortgage instalments were.

(iv) The claimant's claim to managing the Westport property including maintaining and putting it on the market for rent was contradicted by documentary evidence which showed that the defendant was a careful, organized woman who attended to her affairs with a certain degree of formality and that she had appointed another individual to manage the

property. Furthermore, there was correspondence which showed that the claimant had no knowledge of when the sale occurred.

(v) The claimant's assertion that there was a common intention for the claimant to have a share in Peter's Rock was undermined by the correspondence in which the claimant acknowledged that Peter's Rock was the defendant's land and did not confront the defendant about her assertions as to her sole ownership of the property in circumstances where a denial or confrontation was warranted.

(vi) The claims for a share based on proprietary estoppel and unjust enrichment were undermined by the correspondence in which the defendant expressly told the claimant not to build anything on her land. Unjust enrichment could not exist where the claimant did acts which were contrary to what was expected and where the defendant did not give the claimant any permission to do those acts.

Mr Cowan also submitted that the various assertions of the claimant were "bare and uncorroborated" and were simply not credible.

[11] In respect of the counterclaim, it was submitted that if the court finds that the claimant has no realistic prospect of success, then recovery of possession of the land would be suitable and a reasonable timeframe for the claimant to organize his affairs and vacate the property would be two months. There was no evidence as to what the rental in the area is, but the court can award a nominal sum of about $5,000.00 or $10,000.00 from 2007; 2007 being the year when the defendant first asked the claimant to leave the premises to the date of delivery of judgment.

For the claimant

[12] Ms Brown submitted that even though proprietary estoppel and constructive trust were not pleaded, the facts pleaded, including the evidence in the form of the affidavits by the claimant, indicate that legal issues relating to the doctrines of constructive trusts and proprietary estoppel are live issues. The parties had a visiting relationship and would not have been cohabiting or married at the time

of the acquisition of the property. It was argued that it was not a defeating fact that the registered title was in the name of the defendant only as cases such as **Fowler v Barron** [2008] EWCA Civ 377 demonstrate that the intention of the parties is to be extracted from the time of the acquisition of the property and not at the time period when the relationship goes bad as at that time the parties will remember and rationalize the situation differently to suit their separate positions. Financial contributions, both direct and indirect should be taken into consideration. The claimant is asserting that it was agreed from the onset that the property would be held in equal shares for the benefit of both parties, the property having been bought with the financial assistance of the funds from the craft business that he contributed to and he acted accordingly. It was implied, Ms Brown argued, that the claimant and the defendant intended to own the property in equal shares. The conduct of the parties showed a joint effort to purchase and maintain the property. One party would financially support the venture and the other would support it through farming, caretaking the property, and providing security among other things.

[13] There was no doubt on the evidence that there could be inferred a common intention for the parties to have equal shares in the subject property. The parties jointly managed the property and it was not until the relationship became sour that the parties began to act independently of each other. It is now recently that the defendant, who is in possession of the title, has raised objection to the claimant's presumed entitlement to 50% interest as a result of the breakdown of their relationship. Ms Brown argued that there is nothing strange in such a drastic shift because as was cautioned by Baroness Hale in **Stack v Dowden** [2007] 2 WLR 83, the intention of the parties is often affected by the emotions and when the relationship breaks down so does the intention to jointly and equally benefit from the property. In addition to **Stack v Dowden**, counsel also relied on **Clinton Campbell v Joyce McCallum and Renea Whitmore** Claim No HCV 01825 of 2003 (delivered 11 February 2011).

[14] Counsel also submitted that the common intention of the parties is to be found in the conversations between the parties that was shared between them alone. One party would be more knowledgeable than the other and so there would be

no recording of the conversations. The court would therefore have to hear from the parties as the letters came after the purchase of the property.

DISCUSSION AND ANALYSIS

[15] Rule 15.2 of the CPR empowers the court to grant summary judgment on a claim or issues. It is well-accepted that the rationale behind this provision is the furtherance of the overriding objective, in particular the saving of time, costs and the court's resources as well as dealing with a case fairly (see **Sagicor Bank v Taylor Wright** [2018] UKPC 12. Thus, a claim or a defence which would be a waste of time should not be allowed to go to trial. With respect to the burden of proof and threshold test, Phillips JA in **Delroy Howell v Royal Bank & Ors; Ocean Chimo Ltd v Royal Bank of Canada & Ors** stated:

> [114] It appears to be well-settled now that the burden of proof on an application for summary judgment rests on the applicant to prove that the respondent's case has no real prospect of success. However, once the applicant asserts their belief on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case that is better than merely arguable (**ED&F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472. The defendant must then show that he has a real prospect of success (**Swain v Hillman**). It is also well settled that "real" means just that, "real" and not "fanciful" but not real and substantial, nor does it mean that the application will only be granted if the claim or defence is bound to be dismissed at trial. The threshold standard of "an arguable case" will definitely be considered too low (see A Practical Approach to Civil Procedure, 14th Edition, paragraphs 21.17-21.18).

[16] It seems to me that it is also well-settled that a court should be hesitant to grant summary judgment where there are obvious conflicts of fact at the time of the

hearing of the application and further investigation could alter the evidence at trial (**Bolton Pharmaceutical Co 100 Ltd v Doncaster** [2006] All ER (D) 389 referred to with approval by Phillips JA in **Delroy Howell**).

[17] In **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** [2009] EWHC 339 (Ch), Lewison J in adumbrating the principles applicable to summary judgment applications, referred to **ED & F Man Liquid Products v Patel** for the principle that the court was not bound to take at face value and without analysis everything that a claimant says in his statements before the court. Laddie J in **Microsoft Corporation v Electro-Wide Ltd and another** (1997) IP & T Digest in considering an application to enter summary judgment against a defendant stated:

> So here the court has to ask whether there is a fair or reasonable probability of the defendants having a real or bona fide defence in relation to these issues. In answering that question it is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendant and to use Ackner LJ's words, look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief. But the court must also be careful before it deprives defendants of the opportunity to have their evidence tested at trial. It is a strong thing to say, simply on the documents before the court and in the absence of discovery and cross-examination that a party's evidence is not to be believed, it

> is an even stronger thing for the court to come to that conclusion when it involves finding that a number of the witnesses for the defence have given evidence which is not credible.

[18] The approach of Lewison and Laddies JJ seems to be consistent with the approach of Edwards J (as she then was) at first instance in **Delroy Howell** which was approved by Phillips JA on appeal. In that case, Edwards J had stated that the court would go behind written evidence to ascertain if it is credible and will disregard fanciful claims and despite the conflict in evidence, Edwards J had determined that the conflicts in evidence in that case were not enough to preclude her from investigating each and every alleged pleaded cause of action to assess if there was any real prospect in bringing the claim. In the course of doing so, Edwards J considered the following dictum of Lord Hope in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513 where he gave guidance on the enquiry to be embarked upon in an application for summary judgment:

> 94 … But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?
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> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of the evidence. To that rule, there are some well-recognised exceptions. For example, it may be clear that as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event, a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as

> possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.

[19] In the light of these authorities I agree with Mr Cowan that the fact that there are conflicts of fact does not disable me from considering the evidence critically to determine whether the claimant has more than an arguable case. Indeed, **Delroy Howell** was one such case in which despite conflicts of evidence the court examined the documents, though voluminous and came to the view that the claimants had no real prospect of succeeding in their claim. A number of cases relied on by Mr Cowan involved similar circumstances in which the court examined the statement of case which was the subject of the summary judgment application against the documentary evidence and determined that the case had no real prospect of succeeding (see **Franklyn Management SRL v Central Eastern European Real Estate Shareholdings BV** [2014] EWHC 4127 QB); **John Rupert James Blackwood) Executor of the Estate of James Whittle Blackwood, Deceased) v Kingsley Lyew and anor** [2022] JMCA App 17). On the other end of the continuum are cases such as **Houchin v Lincolnshire Probation Trust** [2014] EWCA Civ 823, relied on by the claimant, in which the Court of Appeal of England and Wales allowed an appeal against the grant of an application for summary judgment because the Court of Appeal was of the view that there were interconnected issues of fact that underpinned the claimant's case which the court was not in a position to resolve on the evidence available without conducting an "impermissible 'mini-trial'" nor could it be confident that a fuller investigation into the facts made through the ordinary processes of a trial would not add or alter the evidence available and ultimately affect the outcome on liability.

[20] In this case, Mr Cowan's primary contention is that the claimant's assertions are "bare", "uncorroborated", "incredulous" and so undermined by the documentary evidence in the claim that the claimant could not succeed in his claim. It seems to me that in order to grant summary judgment, I would have

to be satisfied that the claimant's case has been so undermined that no evidence which could be elicited at trial could alter this view in favour of the claimant.

[21] It is necessary at this point to consider the principles applicable to the substantive law to determine whether in light of these principles, the claimant has more than an arguable case.

[22] The parties are at one that the causes of action raised in this claim are constructive trust and proprietary estoppel. Unjust enrichment was sought to be added by way of an amendment. The first two causes of action were not named in the claim but I think it is well-settled that this is not fatal provided that the facts giving rise to the cause of action are pleaded (see **Immuniodiagnostic v Johnson** [2010] JMCA Civ 42 per Phillips JA and Morrison JA (as he was then) in **Capital & Credit Merchant Bank Ltd v Real Estate Board; The Real Estate Board v Messado & Co** [2013] JMCA Civ 29). By the same token, an amendment to the claim form and particulars of claim to add unjust enrichment would be permissible as no new facts were pleaded and it therefore appears that the claimant is relying on the same facts. Mr Cowan has also indicated that he has no issue with the court considering the claim for unjust enrichment as this will not affect the substantive arguments. I will therefore consider the relevant legal principles.

[23] With respect to constructive trusts, it is trite law that the person seeking to invoke this cause of action or doctrine must establish that there was a common intention, whether by way of an express agreement or to be implied from the conduct of the parties, that both parties should share in the property (per Lord Diplock in **Gissing v Gissing** [1971] AC 886). With respect to the approach to drawing inferences from the conduct of the parties, Lord Diplock stated:

> In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some subsequent fresh agreement

> acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of acquisition some particular common intention as to how the beneficial interests should be held. But it would, in my view, be unreasonably legalistic to treat the relevant transaction involved in the acquisition of a matrimonial home as restricted to the actual conveyance of the fee simple into the name of one or other spouse… The conduct of the spouses in relation to the payment of mortgage instalments may be no less relevant to their common intention as to the beneficial interests in a matrimonial home acquired in this way than their conduct in relation to the payment of the cash deposit.

Viscount Dilhorne expressed the view that:

> If the wife provided part of the purchase price either initially or subsequently by paying or sharing in the mortgage payments, the inference may well arise that it was the common intention that she should have an interest in the house.
>
> To establish this intention there must be some evidence which points to its existence. It would not, for instance, suffice if the wife just made a mortgage payment while her husband was abroad. **Payment for a law and provision** of some furniture and equipment for the house does not of itself point to the conclusion that there was such an intention.

[24] In **Lloyd's Bank v Rosset** [1990] 1 All ER 111, where the property was registered in the sole name of the husband and the wife was claiming a

beneficial interest by virtue of her supervision of renovation works being carried out on the house, Lord Bridge of Harwich stated:

> The first and fundamental question 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 at any time prior to the acquisition of, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however, imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal **estate to show that he or she acted to his that both parties** should share in the property expressed or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.

[25] In **Phillip Henry v Patsie Perkins Reid** [2012] JMSC Civ 109, E Brown J in applying those principles remarked that an understanding cannot be common if it is held by only one of the parties.

[26] With respect to proprietary estoppel, a clear statement of the principle may be found in the judgment of Phillips JA in **Joyce Whyte v Discovery Bay Beach Club** SCCA 121/2017 (delivered 12 April 2019) where she referred, with approval, to the judgment of Lord Denning in **Inwards and Others v Baker** stated:

> The case of **Inwards and Others v Baker** remains the authority that best propounds on this principle. Lord Denning at pages 36-37 had this to say:

> We have had the advantage of cases which were not cited to the county court judge - cases in the last century, notably **Dillwyn v Llewelyn** and **Plimmer v Wellington Corporation**. This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by Lord Kingsdown in **Ramsden v Dyson**. It is quite plain from those 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 ...But it seems to me, from Plimmer's case in particular, that the equity arising from the expenditure on land need not fail "merely on the ground that the interest to be secured has not been expressly indicated…the court must look at the circumstances in each case to decide in what way the equity can be satisfied." … 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."

[27] E. Brown J (as he then was) in **Phillip Henry v Patsie Perkins Reid** referred to the judgment of Fry LJ in **Willmott v Barber** as expounding "what has now come to be called, the five probanda" as follows:

> A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own legal right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he's in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a

> knowledge of your own legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken beliefs of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

[28] From these pronouncements, it seems to me that the underlying premise of proprietary estoppel is that there must be some conduct or acquiescence on the part of the defendant which encouraged the claimant to act to his detriment by expending monies or doing other acts on the land.

[29] In respect of unjust enrichment, the Court of Appeal in **Musson Jamaica Ltd v Claude Clarke** [2016] JMCA Civ 44 referred to the elements thus:

> The learned authors of The Law of Restitution, in their Fifth Edition of that work, at page 15, addressed the requirements for imposing an order for restitution: —
>
> > …a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on

> the nature of restitutionary claims and the principle of unjust enrichment…. (Italics as in original)

[30] Lord Burrows in the later Privy Council case of **Samsoodar v Capital Insurance Co Limited (T&T)** [2020] UKPC 33 in delivering the judgment of their lordships' board, explained the nature of an unjust enrichment claim:

> 18. It has now become conventional to recognise (see, eg. **Benedetti v Sawiris** [2013] UKSC 50; [2014] AC 938, para 10 and **Investment Trust Companies v Revenue and Customs Comrs** [2017] UKSC 29; [2018] AC 275, paras 24, 39-42) that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence. The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words "unjust enrichment" are used but the claimant must identify sufficient facts to show how those three elements are satisfied: see Goff and Jones, **"The Law of Unjust Enrichment"** (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-38). The important purpose of a statement of case is to ensure, as a matter of fairness, that the defendant knows the case it has to meet.
>
> 19. Moreover, as regards the third of those elements, the claimant must identify what was referred to by counsel for the claimant - using the term coined by Peter Birks (see, eg, **"Unjust Enrichment - a Reply to Mr Hedley"** (1985) 5 Legal Studies 67, 71; Restitution - the Future (1992), p 41) - as the "unjust factor" and is sometimes alternatively referred to as the ground for

restitution. See Goff and Jones, **"The Law of Unjust Enrichment"** (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-21). Examples of unjust factors are mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. For judicial acceptance of the need for, and terminology of, an unjust factor, see, eg, **Kleinwort Benson Ltd v Lincoln City Council** [1999] 2 AC 349, 408-409 per Lord Hope; **Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd** [2008] EWCA Civ 1449; [2009] 1 WLR 1580, paras 50, 62 and 67; **Test Claimants in the FII Group Litigation v Revenue and Customs Comrs** [2012] UKSC 19; [2012] 2 AC 337, para 81, per Lord Walker. In the Court of Appeal of Trinidad and Tobago in **Jaipersad v Shiraze Ahamad**, in a judgment delivered on 24 February 2015, Mendonca JA (with whom Bereaux JA and Narine JA agreed) said the following at para 23: "English law, which the parties agree is the law applicable in this context to this jurisdiction … identifies specific grounds for restitution sometimes referred to as unjust factors. These factors are the trigger for the restitutionary remedy on the ground that it is unjust to retain the benefit."

20. The need to identify an established unjust factor, or some incremental development from it, also lies behind the obiter dicta of Mann J discussing pleading in unjust enrichment cases in **Uren v First National Home Finance Ltd** [2005] EWHC 2529 (Ch) at para 16:

> "[I]t seems to me that it has not been established that the authorities have yet moved to a position in which it can be said that there is a freestanding claim of unjust enrichment in the sense that a claimant can get away with pleading facts which he says leads to an enrichment which he says is unjust … A claimant still has to establish that his facts bring him within one of the hitherto established categories of unjust enrichment, or some justifiable extension thereof."

[31] Lady Carr in the English Court of Appeal decision of **Darmago Holdings Ltd & Anor v Avonwick Holdings Ltd** [2021] EWCA Civ 1149, explored the guidelines applicable to determining whether an enrichment is unjust. At paragraphs 55-62, she stated:

> [56] It is the "unjust factor" that distinguishes the English claim in unjust enrichment from the civilian "absence of basis" approach. Examples of unjust factors include mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. These unjust factors are recognised because they establish that the claimant did not intend the defendant to receive a benefit in the circumstances, either because the claimant never had an intent to benefit the defendant in those circumstances or the intent was vitiated or qualified in some way.
>
> [57] An unjust enrichment claim is not based on a wide ranging and open-ended assessment of fairness (or justice) in the round. Rather, it is a common law remedy requiring a claimant to make out an established category of "unjust factor" in order to trigger the claim6 . As Lord Sumption put it in **Swynson** (at [22]), it is "not a matter of judicial discretion", referring to the dictum of Lord Reed in ITC (at [39]): "[it] does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied." 60. This approach has been echoed consistently in judicial warnings throughout the common law world. Thus in **Pavey & Matthews Pty Ltd v Paul** (1987) 162 CLR 221 ("Pavey") Deane J stated (at 256-257):
>
> > "To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate…. [Unjust enrichment]

> constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case…"

[58] Similarly, Mason CJ and Deane, Toohey, Gaudron and McHugh JJ in **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 353 stated (at 379):

> "Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality." 62. The need to identify an established unjust factor was highlighted by Lord Toulson in Barnes (at [102]) (citing Goff & Jones at 1-08): "the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution' [a citation from the judgment of Campbell J in **Wasada Pty Ltd v State Rail Authority of New South Wales (No 2)** [2003] NSWSC 987, para 16, quoting Mason & Carter, Restitution Law in Australia (1995), paras 59- 60]. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law

> deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled)."

[32] The authorities are therefore clear that the question of whether a defendant's enrichment is unjust is not based upon nebulous notions of what is fair to be determined by the subjective view of an individual. On the contrary, though this area of the law is not closed, there are certain well-established categories. The authorities seem to suggest that even if not falling within the well-established categories, it must be established that the enrichment is of a similar nature as the well-established categories.

[33] It is therefore now necessary to consider the important factual contentions of the claimant. These have been set out at paragraph [4] of this judgment.

[34] In relation to the intimate nature of the relationship which provided the basis for the idea of joint ownership of a property, the claimant's evidence at paragraph 5 of his affidavit filed on 28 April 2016 is that he started an intimate relationship with the defendant while he was living in Grosvenor Terrace, Constant Spring. Later, he relocated and he had a visiting relationship with the defendant who owned the property at Westport. It is his evidence that they would do craft work together in Portmore and it was there that "we conceived the idea to buy a piece of land and plant fruit trees. We wanted to eat what we grow and grow what we eat".

[35] The defendant has submitted that the assertions as to the intimate relationship that existed are "bare and uncorroborated assertions". It has been argued that the claimant has not brought forward any witnesses to support his assertions of what was an open relationship between himself and the defendant. It seems to

me that it can be said that a part of the claimant's case is that there was an express agreement between himself and the defendant that there would be joint ownership of property by both of them. He is also seeking to rely on as an alternative that there was an implied common understanding between him and the defendant from which "it was clearly understood that they both intended to share in Peter's Rock equally". While supporting witnesses may have been able to speak to their impression of the nature of the relationship that existed between the parties, the witnesses would not be able to speak to the discussions between the parties. I am therefore of the view that the failure to put forward supporting witnesses is not sufficient basis on which to conclude that the claimant does not have more than arguable case in establishing an express or implied common intention between him and the defendant to purchase Peter's Rock together.

[36] A critical item of correspondence that the defendant is relying on as severely undermining this aspect of the claimant's case is a letter dated "2.7.05" from the claimant to the defendant. In that letter, the clamant wrote:

> I Rose, how keeping. I hope you are in the best of health. I receive your letter with the cheque. I paid the taxes on the land. I want to know what is your intention toward Peter's Rock and me because things is getting away in Jamaica. Because the longer you stay to do things the more things get expensive. Steel, lumber, cement raise everyday. You know and I know that I man love Peter's Rock and I get attach to Peter's Rock so if you a sell or you a give whey Peters Rock I would like it. Rose all I would like down here is a nice safer strong little house because the security problem out here is getting from bad to worse plus from the hurricane Ivan boy the house you left out here is getting bad. The roof is rotting. Rose living in Peter's Rock, my condition need to improve.
>
> …The place need some work done on it, but a you to give me the okay to do. With your help right now Rose I am 48 years of age and me would like to live the other what left comfortable and is only you can help me to do that so it left to you to let

> me know where I stand because all I need at Peter's Rock is a good little house with a little space that I can move around and make life better for I and you because when you come you need some space too.
>
> When the storm came it blow off the storeroom top and lots of the books them wet up. A lot of things … coffee. It is not easy out here you know Rose. The money don't have no value because everything come from foreign. The gas go up every day so you know how it go. To go down every day is just like you working for nothing. Me have a roots wine business and if it get off I can make some money but is just the space to do it right. I man is okay; my daughters then and Merl and everyone know send their love for you, and asking when…
>
> I am look [sic] forward for an answer from you as soon as possible. It's only you can help me right now because you is like my mother because my mother and father never give me nowhere to live, so if you don't confident me as a son, well it left to you.
>
> Your same
> Humble

[37] It is immediately obvious that the date of the letter is 2005, years after the initial purchase of the property. This notwithstanding, it seems to me that this letter, written as it was by the claimant, is critical as it provides an insight into the claimant's perception of the nature of the relationship between him and the defendant, which from the tenor of the letter does not appear to be limited to what existed as at the date of the letter. The letter also provides insight into the claimant's understanding of the arrangement between both him and the defendant in relation to ownership and occupation of Peter's Rock.

[38] The defendant in his affidavit filed on 15 February 2023 denied having a mother and son relationship and stated that the reference is symbolic of his respect for

the defendant. The meaning of the words “mother” and “son”, in my view, is quite plain and the type of relationship conveyed by the use of these words is far different from an intimate relationship. Given the vast difference between these two types of relationship, I am of the view, that if the parties had been sharing an intimate relationship at some point and even subsequent to the defendant’s migration, it is unlikely that the claimant would have referred to the defendant as being like a mother and to himself as a son at all even where he was trying to convey respect. I am therefore of the view that this letter does undermine the claimant’s assertion that he had an intimate relationship with the defendant.

[39] Mr Cowan also drew attention to the sparsity of details which were supplied in relation to the leather craft business which, the claimant asserted, contributed to the initial purchase of the property. Mr Cowan submitted that details such as the expenses, the suppliers, the revenue generated, where the proceeds were held and when the business ended were lacking. It seems to me that in circumstances where the defendant is outrightly denying the existence of the craft business and bearing in mind the integral part that, on the claimant’s case, the business would have played in the initial purchase of the property, in order to show that his assertions about the business are true, the claimant ought to have provided details about the business to support his claim. No details were supplied, whether documentary or otherwise. All that has been put before the court is a picture purporting to be that of the defendant in the craft workshop at Westport. I am of the view that mere assertions as to the existence of the business without giving not even one scintilla of evidence to demonstrate that this business was capable of and did generate income and profits sufficient to contribute to the purchase of the property would not be sufficient to show that the claimant had contributed to the purchase of Peter’s Rock through his contribution to the craft business.

[40] I am also of the view that there is documentary evidence which undermines the claimant’s claim of being involved in the initial purchase of Peter’s Rock. The claimant asserted in his particulars of claim that the property was purchased in 1984 and relied on the certificate of title issued in 1984. The defendant’s

evidence is that the property was purchased in 1982. The defendant's assertion is supported by a document that is exhibited to her affidavit filed on 11 April 2018 which is titled "Notice of Change of Possession of Land". That document was completed by a company known as Walker Developments Limited. On that form it was indicated on behalf of the company that the company was passing possession of "Peter's Rock, Woodford PO" "Lot 22" to Rosemary McLeod and the purchase price is stated to be "$11,781.00". The document is dated 20 October 1982. This therefore contradicts the claimant's claim that the property was bought in 1984. Unlike his explanation for his use of the words "mother" and "son", the claimant did not provide any response or explanation as to how he could have gotten this information wrong in circumstances where he is claiming that he was integrally involved in the purchase. It seems to me that if the claimant was a part of discussions to purchase the property and was intimately involved in the initial purchase as he claims, he would have been aware of the correct year of purchase. I therefore am of the view that when it is considered that a certificate of title is not necessarily evidence of the date of purchase but of the date of transfer of title to the new registered proprietor, the "Notice of Change of Possession of Land" form renders the claimant's evidence that he was involved in the initial acquisition of the land unbelievable.

[41] So, regardless of whether the claimant's letter of 2005 dispelled his claim to an intimate relationship with the defendant, which he seems to suggest was the foundation for their common intention agreement to purchase Peter's Rock, there is documentary evidence that undermines the claimant's claim to being involved in the initial purchase of the property.

[42] The claimant has also claimed that he made a makeshift hut at Peter's Rock and the parties moved in and lived together there. The defendant has relied on her letter dated 13 February 1986 which, it was argued, was in "close proximity to the relevant activities surrounding Peter's Rock" and written when litigation was not contemplated. This letter, it was argued, shed light on their relationship and was relevant to this issue. In that letter, the defendant wrote:

> Dear Lloyd

Re: Lot 184 Westport Boulevard – St Catherine

Please refer to our verbal agreement that you act as my agent during my absence from the island.

The terms of the agreement are: -

a. Organise the rental of the house
b. Collect 10% of the monthly rental as commission.
c. Paint the interior of the house, including the living room floor.
d. Pay water bill to A/C #01009-0184-2
e. The balance of all subsequent month's rental must be paid to Workers Bank, account #020372348
f. Please organize for the sale of #184 Westport Boulevard. If necessary place advertisement in the Newspaper.
g. Kindly liaise with the Co-operative to ascertain if there are outstanding maintenance for 184 Westport Boulevard. They are responsible for maintenance of the common areas, as well as the building exterior. The Co-operative is also responsible for tax payments.

Please pay: -

a. Property tax due in April
b. Mortgage payments of $150.00 to JPS Credit Union.

Finally, please be informed that I have given permission to my mechanic, Mr Albert Ritchie (also known as 'Humble') to occupy the premises at Peter's Rock while I am away. I was worried that thieves would break in and vandalise my belongings. We were in dialogue one day when he mentioned that he was looking for a place to live as he was given notice from where he was living. The opportunity to have someone in the place to protect it came at a good time, so now I can rest in peace and don't have to worry about my place been torn down by vandal's [sic].

> I will enlighten him to the role you have as my agent so he can have this knowledge if and when he encounters any problem (s) at Peter's Rock. I will also provide him with your contact information so he will have immediate access to you whenever it becomes necessary to rely on your good judgment.

[43] The letter appears to have been written to an individual named "Lloyd" who the defendant describes as "Lloyd Reid" in her affidavit filed on 11 April 2018 concerning the arrangements for the management of the defendant's property located at Westport, Portmore. It seems to me that the penultimate paragraph of this letter clearly contradicts the claimant's case as to how he came to be on Peter's Rock. The letter shows that it was based on what would appear to be a caretaker arrangement which dispels the claimant's contention that it was pursuant to the intimate relationship shared between himself and the defendant. The use of the words "break in" and "vandals" suggest that the property did not comprise mere land but included some kind of structure. That there was some kind of structure on the land is supported by the claimant's statement in his letter of "2.7.05" that "the house you left out here is getting bad".

[44] There is also the defendant's letter dated 18 October 2012 in which she made a report to the Kingston & St Andrew Corporation in relation to "unauthorized activities" taking place at "Lot 22 Vista Monte, Peters Rock, Jacks Hill – Folio 703, Volume 1184". In that letter, the defendant asserted that she is the "sole legal proprietor" and that the claimant was building a structure over the one bedroom "wooden structure that I had originally built on said property". I am of the view that though this would have been written to a third party, it shows consistency in the defendant's position that the initial structure erected on Peter's Rock was built by her and not by the claimant. It therefore seems to me that documents including the claimant's letter of "2.7.05" strongly contradict the claimant's assertion that he built a makeshift hut on Peter's Rock for he and the defendant to reside in.

[45] The claimant's case is also that he managed the Westport property and used the rental income from the property to pay the mortgage from Peter's Rock and when Westport was sold he continued to pay the mortgage for Peter's Rock.

[46] I am of the view that the defendant's letter dated February 1986 belies the claimant's assertions in respect of his management of the Westport property. In that letter, it is clear that Lloyd Reid was the person with whom the defendant had an agreement with respect to management of the property. This factual state of affairs is supported by letters dated 10 February 1986 from the defendant to the manager of Westport Housing Co-operative Society advising of Mr Reid's appointment as her agent and to the Jamaica Public Service and the Jamaica Telephone Company informing of Lloyd Reid's authority as her agent for the instalment of services in respect of tenants at the Westport property. There are also letters from "Hepburn L Reid" dated March 1986 and March 1987 to the Jamaica Public Service Company Limited and the Jamaica Telephone Company Limited which confirm that he was acting as the defendant's agent for the Westport property.

[47] I note that there is a letter written by the defendant, the date of which is indecipherable, that was exhibited to the claimant's affidavit (see exhibit AR5), in which the defendant enquired, "Are things going well at Westport?". This suggests that at some point at the very least, the claimant was a source of information to the defendant in relation to the Westport property, and to that extent, this letter could be regarded as being supportive of the claimant's assertion that at some point he had responsibility for overseeing the affairs of the Westport property. However, this, by itself, would not be sufficient to establish the claimant's claim to management of the Westport property. This is even more so when considered in light of the claimant's enquiry in his letter dated "27.02.2006" as to whether the defendant "get through with the West Port house". The claimant enquired whether "everything went through alright because I don't hear you say anything to me about it. I just a fast me a fast in a you business, because I was a look forward to a thing out of it even to this position I in now". The claimant's enquiry makes it plain that he was not aware of the sale of the property and it seems to me that if he had been using his income to maintain the Westport property he would have stated this as a basis

for his expectation that he would receive some money from the proceeds of the sale.

[48] The claimant has also asserted that he paid the mortgage on both properties when the rental income was insufficient to cover the expenses of both properties and later after the sale of the Westport property, he paid the mortgage for Peter's Rock. I agree with Mr Cowan's observations that there is no evidence from the claimant giving specifics such as the period for which he paid the mortgage or the amounts that were paid. Also, there is no documentary material in support of the payments of the mortgage nor is there any reason given for the absence of these documents. This is to be contrasted with the documents such as the utilities bills which the claimant produced to support his assertion that he paid the utilities. The failure to put forward a specific period in which the payments of the mortgage were made assumes great significance since there is evidence in letters written by both parties that the defendant was not at all times financially stable. For instance, in his letter dated "2.7.05" the claimant makes reference to a "roots wine business and if it get off I can make some money" and in his letter dated "27.02.2006" he asked the defendant to "give [him] a thing that I could buy some block and steel". In addition, there is also evidence that the defendant gave financial assistance to him as is demonstrated in her undated letter to the claimant in which she directed the claimant to keep the "left over money" from the money that she had sent to him to pay the taxes. Also, there is the defendant's admission in paragraph 13 of his affidavit filed on 11 June 2018 that the "defendant has sent [him] monies on more than one occasion".

[49] The specifics in relation to the claimant's payment of mortgage are crucial in light of clear pronouncements in the authorities such as **Gissing v Gissing** that a single payment of the mortgage will not be sufficient; nor it seems to me will an occasional or sporadic payment suffice; nor will payment of the property taxes or utilities be sufficient. In **Lloyd's Bank v Rosset**, the fact that the wife had paid spent sums on renovation of the property and had supervised the renovation works were not sufficient to establish the common intention so as to entitle her to a share in the property. I therefore do not think it is necessary to consider in detail the evidence in relation to whether the claimant paid the

utilities because even if this issue of fact were to be determined in the claimant's favour, this would not entitle him to a share in the premises. In any event, the claimant's production of the utility bills does not equate to payment of the bills.

[50] I am of the view that the evidence I have examined so far demonstrates that the claimant does not a have real prospect of establishing that there was any common intention agreement, whether express or implied, upon which he could have acted to his detriment so as to establish his entitlement to a share in the property. I also am of the view that the absence of any common intention is underscored by the claimant's own statements in his letters to the defendant. Most telling are the claimant's statements in his letter of "2.7.05" in which he enquired of the defendant what was her "intention toward Peter's Rock" and stated that "you know and I know that I man love Peter's Rock and I get attach to Peter's Rock so if you a sell or you a give whey Peters Rock I would like it". In that letter in stating that the "place need some work done to it", the claimant stated that "a you to give me the okay to do" and asked the defendant to let him "know where I stand". That there was no agreement or understanding that the claimant would receive a share in Peter's Rock is underscored in the claimant's letter dated "27.02.06", which appears to be a follow-up to his request for permission or approval sought in his letter dated "27.02.06" to build on Peter's Rock. In the letter dated "27.02.06", he stated:

> I Rose
>
> How keeping. I hope you are keeping in the best of health. I have receive your letter, but I don't understand some of what you say because question I asked you, you don't answer. Anyway, I am going to try and build a little house because my condition is very bad and in Jamaica now you need to have a building that is secure because the lease little thing you and a man have, him want to come and shoot up your house or burn it down so you see I would like to have a secure structure to live in because as I say to you last time I wrote you, the condition of the house has deteriorated badly.

> Remember is 20 add year now I am at Peter's Rock and I can't leave because I don't have nowhere to go because Peter's Rock is like a part of I and I put out so much labour and effort. Whatever you are going to do with it, I would like to know that you give I first preference because all the places that I could get have passed me by already.
>
> I am in a job that I think I can work until I reach pension and there is a benefit that I could get from the Housing Trust to build a house but the land is not mine so I can't get that benefit, but there is a benefit where I can get the money to buy it so whenever you ready to do what you want you can make your decision. I end here. You get through with the West Port house, everything went through alright because I don't hear you say anything to me about it. I just a fast me a fast in a you business, because I was a look forward to a thing out of it even to this position I in now".
>
> You could give me a thing that I could a buy some block and steel. Me a leave that to you. Anyway as I say I would not like a next rainy season come back and catch me like the pass two year in the condition that I am in, it bad. Anyway I man a hold the faith and try to be good and careful as ever so until.
>
> Yours same
> Humble

The letter makes it clear that the claimant did not regard himself as sharing in the property. This is in direct contrast to his evidence at paragraph 22 of his affidavit filed on 28 April 2016 that he added value to Peter's Rock at his own expense because the defendant "assured me that the property belonged to us".

[51] I am also of the view that the defendant's letter dated 20 June 2007 in relation to the sale of Peter's Rock which was exhibited to the claimant's affidavit filed on 28 April 2018 underscores the lack of any agreement between the parties

that the claimant would share in the property. In her letter dated 20 June 2007, the defendant wrote:

> As you know I am selling the property at 184 Peter's Rock.
> My agreement with you was only to give you first offer to buy the property. The selling price is between $3,800,000.00 to $4,000,000.00 Jamaican currency.
>
> We had an agreement that you would stay in the house that I built and what ever you planted on the land you could sell. I think that after all these years you have made a profit off of my land.
>
> I allowed you to live at 184 Peter's Rock rent free but I never gave you permission to build on the land. On my visits back to Jamiaca I observed you not only built an addition to my house along with a shed, you also moved your girlfriend and her child into my house without my permission.
>
> I am sorry but you have to leave, 184 Peter's Rock is for sell [sic]. This is a letter of eviction. You are to move from my home and property immediately.

[52] There is no letter from the claimant disputing the defendant's assertion in relation to the agreement that governed his residence at Peter's Rock. I am of the view that the letter is consistent with paragraph 3 of the claimant's letter dated "27.02.06" (see paragraph [48] above) in which the claimant recognized that "the land is not mine so I can't get that benefit, but there is a benefit where I can get the money to buy it so whenever you ready to do what you want you can name your decision". Later in her letter dated 1 May 2010, the defendant wrote to the claimant that he should "make me an offer of what you will pay for Peter's Rock Land". Again, there is no letter in response being relied on by the claimant disputing the defendant's right to sell him the property as the sole proprietor. I agree with Mr Cowan that a response disputing the defendant's assertions should have been forthcoming especially since the question of the

ownership of the property was central to the defendant's intention to sell. It seems to me that if the claimant had been of the view that there was an agreement that he had a share in the property he would have so stated in a letter in response. The claimant's assertion in his affidavit filed on 28 April 2016 that a letter dated 18 March 2013 was written to the defendant to purchase the defendant's 50% interest in the property consequent on his engagement of the services of Oswest Senior Smith and Company to protect his interest in Peter's Rock shows that the first time that the claimant sought to dispute the defendant's claim to being entitled to sell Peter's Rock on the basis of her being sole owner was 6 years after the defendant's assertion. It seems to me that the letters written by the claimant in 2005 and 2006 are consistent with the defendant's assertion in her letter of 20 June 2007 and severely undermine the claimant's belated attempts to now establish that there was a common intention that he should share in the ownership of Peter's Rock.

[53] I am of the view that the documentary evidence makes it plain that the claimant's claim to a share in the property at Peter's Rock on the basis of a common intention agreement does not have a realistic prospect of success. The documents produced including those relied on by the claimant do not even demonstrate that there was a common intention or even that he had an understanding that he would share in the property; but even if he had that understanding as was noted by E Brown J in **Phillip Henry v Patsie Perkins Reid** the understanding must be shared in order for it to be a common intention, and it was not shared by the defendant.

[54] The claimant is also seeking to rely on proprietary estoppel to establish his claim to a share in Peter's Rock. In my view, the claimant's letters dated "2.7.05" and "27.02.06" are critical to determining this issue. As I stated in paragraph [48], the former letter clearly contained a request for permission to do work on Peter's Rock; and the claimant in stating that the "question I asked you, you don't answer" makes it clear that he did not receive the claimant's permission to do so.

[55] The defendant has relied on three letters dated "3.2.05", "March 1, 2005" and "10.10.05". In those letters, there are very clear statements from the defendant to the claimant that she did not wish for him to build on the land. So, in the letter dated "3.02.05", the defendant stated that "my plans are for me to do with my land what I will. If you are a friend as you say you are, then you would have found somewhere to move to. I will not put you in a house that I do not want on my property. Remember, it is my land, not yours".

[56] In her letter dated "March 1, 2005", she stated:

> I have told you on the phone that I did not want anything built at Peter's Rock. When we talked I could hear your girlfriend Marcella telling you what to say. She has nothing to do with me and you. If she wants a bigger house let her build it on her land, not mine.
>
> Do not build anything at Peter's Rock. I have my own plans, and you have already made it impossible for me to do what I want to do because you put a building where it was not supposed to be.
>
> Think about it. If things are not to your liking, move to someplace else.

And in her letter dated "10.10.05", she stated:

> I am sorry you are having trouble with your housing. I have not been able to make any arrangement about when I will be back. My plans can't be made at this time.
>
> If you built a house on the land I will not be able to tell you what will happen in the coming years. My health is o.k. but I need to see the doctor for least every 3 months. I take prescription also and all of this cost money.
>
> I am working 2 or 3 days a week because I need my insurance. If I come back now to Jamaica, I will not have insurance. So for now I don't know what I will do. You need to make arrangement

for yourself. I don't have the money to put up a good house for you at this time.

The house that Patrick lives in would be o.k. to build, but I can't tell you to spend your money on Peter's Rock. You need to have a place of your own and I can't help you at this time. My mother need to be taken to the doctor and I cannot leave her at this time. Detroit is a city that is run down and there are few jobs here.

Taxes have gone up and so has water and lights. Last winter I paid over $500.00 for one month of heating and this year should be colder and gas for the house is going up by 40%. I don't have a lot of money at this time. So you are putting me in a spot to come up with cash to help you out. I know you need a house but I can't tell you to put it on Peters Rock. The land need a lot of retaining walls and a house would need a deep foundation.

I cannot repay you for the castoff a house that you would put up. As you said you are getting older and so am I. I am trying to prepare for my future also. I hope you can stay at Peters Rock but I will understand if you cannot. This is not a good time for me to put money in a house. I would love to build a house like the one Patrick lives in at Red Hills. It is the right size and the cost to build it is low and the roof will be good in bad weather.

But as of now I don't have the money to help out. This is just the wrong time for me.

[57] It is noted that in his letter dated "27.02.06", the claimant indicated that he received the defendant's "letter" and not "letters", which suggests that not all three letters may have been sent or if sent, were not received by the claimant. Nonetheless, the claimant in his affidavit in response to this application has not denied receiving all three letters. In any event, it seems to me that the letters all convey a recurring theme of the absence of permission given to the

defendant to build a house at Peters Rock. Those letters are bereft of any representation or conduct that would reasonably have led the claimant to believe that he had the defendant's permission to build a house at Peter's Rock.

[58] I also note that the defendant in her letter dated June 20, 2007 stated that "on my visits to Jamaica I observed you not only built an addition to my house along with a shed, you also moved your girlfriend and her child into my house without my permission". It seems to me that in circumstances where the defendant had already indicated to the claimant that she was not giving permission to build on the land, her statement that she observed that he had built an addition cannot be interpreted as encouragement to the claimant to build at Peter's Rock.

[59] I am therefore of the view that in the face of the defendant's three letters written between 2005 and 2006 and in the absence of a denial from the claimant of having received any or all of them, the defendant has demonstrated that the claim of proprietary estoppel does not cross the threshold of being more than arguable. I am also of the view that the claimant's letter dated "27.02.06" in stating that the defendant had not given him an answer, which in my view was an acknowledgment that he had not received permission has not established that the claimant has a prima facie case that should go to trial.

[60] Where unjust enrichment is concerned, there is no dispute that the claimant built on the land at Peter's Rock, and in that way the defendant may be said to benefit from any increase in the value of the land brought about as a result of the structure on the land. However, this would not be sufficient to establish unjust enrichment. In my view, in light of the dicta in the authorities canvassed above, it is not sufficient to simply show that the claimant would be deprived of the structure or house built on the land.

[61] It is my view that the claimant would have to show that there is some "qualifying or vitiating" factor why the defendant should not be allowed to benefit from the building on the premises. In circumstances where the claimant's own letter

demonstrates that he did not understand the defendant to be giving him permission to build on Peter's Rock when he had specifically sought her permission to do so and the defendant's letters show that she was consistent in her insistence that the claimant should not build on the land, it is my view that there is no vitiating factor demonstrated by these circumstances. It seems to me that the claimant does not have a more than arguable case of establishing that it would be unjust to allow the defendant to keep any benefit derived from the structure built on the land.

Re: Mesne profits

[62] The result of my findings above is that the defendant is entitled to 100% share in the property at Peter's Rock. The remaining question is whether the defendant is entitled to mesne profits for the defendant's occupation of the land.

[63] It is trite law that mesne profits may be awarded to a person rightfully entitled to possession of land against the person in wrongful possession for the period of the wrongful occupation. The learned authors of **Halsbury's Law** (5th edn. para 502) in the context of a landlord and tenant relationship, state as follows:

> The landlord may recover in a claim for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation. In most cases, the rent paid under any expired tenancy is strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises.

[64] In this case, the defendant revoked her permission for the claimant to reside at Peter's Rock by way of her letter dated 20 June 2007, albeit the evidence of the first notice to quit being given was in 2012. Mr Cowan submitted that there being no evidence of the amount of the rental for the property, a nominal sum between $5,000.00 and $10,000.00 should be awarded. In **Dennis v Barnes and Barnes** [2021] JMSC Civ 89, the court awarded a nominal sum of $5,000.00 for mesne

profits in circumstances where there was damage to farming land but no evidence to assist the court in the quantification of same. In the circumstances, I think the award of $5,000.00 monthly is an appropriate award and will therefore award accordingly.

Conclusion

[65] In the light of the foregoing, I have come to the view that while a court should exercise great caution in granting summary judgment in a case which involves substantial disputes as to fact, in light of the evidence, particularly the contemporaneous documents written by both parties, the defendant has discharged the burden of showing that the claimant does not have a more than arguable case of establishing his claim for a share in the property located at Peter's Rock and the claimant has not shown that he has a prima facie case that should go to trial.

[66] I, therefore, make the following orders:

(i) Summary judgment is entered against the claimant in favour of the defendant on the claim and the counterclaim.

(ii) The claimant shall vacate and deliver up possession of the property at Lot 22, Peter's Rock located in the parish of St Andrew and registered at Volume 1184 Folio 703 of the Register Book of Titles within 90 days of the date of this order.

(iii) Mesne profits are awarded to the defendant in the amount of $5,000.00 monthly from July 2007 to the date of this judgment.

(iv) Costs of the application to the defendant to be taxed if not agreed.

(v) Leave to appeal is granted