IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E83/97

BETWEEN	SANDRA WARNER	PLAINTIFF
A N D	RIC MICHAEL WARNER	DEFENDANT

Mr. Anthony Williams, Attorney-at-law for the plaintiff instructed by Anthony A. Williams and Company.

Mr. Gordon Steer, Attorney-at-law, for the defendant instructed by Chambers, Bunny and Steer.

HEARD: 9TH 10th, 11th AND 17TH January, 2001

RECKORD, J.

The plaintiff's claim in this action is for a declaration that the property situated at Apartment C Chelsea Manor, 11 Chelsea Avenue, Kingston 10, in the parish of St. Andrew and comprised in certificate of title registered at Volume 1253 Folio 571 of the register book of titles is owned by the plaintiff absolutely. Further or in the alternative a declaration that the defendant holds the said property as trustee for the plaintiff.

THE PLAINTIFF'S CASE

The parties were married on the 4th of July, 1981, and there were 2 children of the marriage. Ric (Jr.) born 10.12.81 and Robin Marie, born 14th August, 1986. The defendant is the sole registered proprietor of the property mentioned above which he purchased in 1994 while being employed at the National Housing Trust.

In 1992 following several quarrels and fights the marriage had broken down irretrievably and the parties decided to separate because it would be better for the children. The plaintiff testified that the separation agreement was at a meeting Mingles at the Courtleigh Hotel. The defendant agreed that she should take the Chelsea Manor apartment while he kept the Ensom Acres house in Spanish Town and the 2 children. It was also agreed that she should pay the transfer tax when the property was being transferred to the defendant and the monthly mortgage payments when it was ready.

In keeping with the agreement she moved into the Chelsea Manor Studio apartment in October, 1992, leaving the children with the defendant. She did some refurbishing. She added a kitchen, ceramic titles, heater facets; she paid for these herself. The defendant gave her no assistance. He was never told about these improvements.

Sometime in 1993 the defendant told her the mortgage was ready and she began payments. The apartment was run by a Strata Corporation to which she paid property tax, maintenance, security and laundry charges. She also paid all utiliy bills.

Since she has been in occupation, the defendant has never visited the apartment. He never enquired of her about the mortgage payments or other charges. In 1994 – 95 the mortgage payments were in arrears and the N.H.T. put up the property for auction. She paid off the outstanding mortgage payment of $156,245.00. She tendered a number of receipts and returned cheques as to payment of mortgages to the N.H.T..

In 1994, a decree nisi was granted and this was made absolute on the 6th of December, 1996.

In 1997, she removed from the Chelsea apartment and rented it out for $14,000.00 per month. She never informed the defendant and she went and lived elsewhere.

Under cross-examination the plaintiff said she got married a second time on the 21st of March, 1998. She never informed the defendant that she had rented out the apartment and the defendant gave the tenant notice to quit. She did not ask the defendant permission to rent it out and he never told her he has giving her tenant a notice. In 1992 she was under stress and

wanted to move out from June but did not do so because of the defendant's promise to give her the apartment. She was not aware that the defendant paid interest to L.O.J. the vendors.

In 1996 the defendant told her that he wanted back his place. This was when she told him she had the money to pay for the transfer. It was then that he said he had changed his mind to transfer the property from his name to hers. He had planned to sign the transfer when she came up with the money. Between 1992 and 1996 the defendant regarded the property as hers and even to date he still so regard it as he was not involved with the property at all.

They had no fixed time that she should pay the transfer tax. When he said he was not transferring the property to her again she had already paid off the outstanding mortgage payments. The agreement with the defendant was not in writing. When the defendant served notice on her tenant she telephoned him and asked him to stop harassing the tenant and he said he would get even with her.

The plaintiff said she had asked the defendant why her name was not on the Chelsea apartment title and he told her that since he was a staff member at N.H.T. only his name could be on the title.

The reason why she never wrote to the defendant about the transfer is that she trusted him and never thought it would reach court.

DEFENDANT'S CASE

The defendant agrees that himself and the plaintiff did have discussions concerning their separation but it was at home in October, 92, not at Mingles in June, 92.

He agreed for her to reside at the Chelsea apartment until she could find somewhere for herself. The first time he knew about the apartment was in August, 92, when Cable and Wireless made a job offer to him. He paid a deposit on August 7, 1992 and also made payment at Stamp Office. He got possession on the 22nd of September, 1992. he paid interest to L.O.J. in respect of the apartment and never executed agreement for sale until August, 1992.

In October, 1993, he told plaintiff she would have to pay mortgage as he could not afford it. She said it was ok. At no time did he ever tell her that the apartment was hers. He never agreed at anytime to transfer the apartment to her. He never agreed with her at any time that he would take the children and she would take the apartment.

In 1996 he received communication from auctioneer concerning the apartment and he complained to the plaintiff how embarrassing it was to

him. He wanted the premises to be auctioned to avoid any further embarrassment.

In 1997 the plaintiff spoke to him about transferring the apartment to her as it was hers. He said no way, he would rather transfer it to the 2 children. He never looked at the property before purchasing same. The purchase price was approximately $500,000.00. When he gave her keys to the apartment he never discussed with her about payment of mortgage. He had not made any payment to Housing Trust. Possible he made payment in 1998 none in are 1997, 1996 nor 1995. Except in 1996 and 1994 he never called the plaintiff to enquire about payment to N.H.T. Before 1994 to now he never visited to find out the state of the property. He did not give the property to the plaintiff. It was never agreed that whenever she was in position to pay the transfer tax that he would effect the transfer. In answer to the court he said the plaintiff paid all the land tax for the Chelsea apartment.

SUBMISSIONS

Mr. Williams: Plaintiff relying on the principle of estopel. He referred to volume 16 Halbury's Laws of England 4th Edition Page 1514. The facts were clear and unambiguous. Representations were made by the

to the plaintiff which the plaintiff accepted and the defendant later changed his mind.

The plaintiff had paid all maintenance, property tax, utility bills for 4 years from 1992. She had acted to her detriment. She did improvement to the apartment, took in tenants. By his conduct the defendant gave the plaintiff the impression that the apartment was hers in addition to his oral representation. The plaintiff had told court that she paid off arrears before the defendant told her to give him his place. The defendant however said the plaintiff paid off arrears after he had told her he had changed his mind about giving her the premises. Although he had brought the apartment as an investment the defendant was prepared to have it go on auction just for peace of mind.

The defendant had consulted with the auctioneer and discovered that it would be beneficial to him for the auction to proceed. It was a calculated conduct on the part of the defendant.

It was submitted that up to today the defendant had made no contribution to the mortgage payment. The defendant was not a witness of truth.

Counsel referred to the case of Ungurian vs. Lesnoff (1989) W.L.R. Volume 3 page 840 and submitted that although the plaintiff was not

registered as legal owner, by the representation of the defendant, he asked the court to say that the defendant holds the property as a trustee and he should transfer same to the plaintiff as sole owner and to make orders as claimed in the statement of claim.

Mr. Steer

The pleadings of the plaintiff clearly show that she is relying on a separation agreement under the Matrimonial Causes Act under which certain conditions would apply.

See paragraph 3 of the Statement of Claim. The doctrine of proprietory estopel cannot oust the jurisdiction conferred under the Matrimonial Causes Act. Section 20 of the 1989 Act sets out circumstances. This agreement has to be agreed by the court. Section 21 gives the court power to enquire into anti-nuptial or post-nuptial ..... settlements and make orders as court thinks fit. This agreement would be void and unenforceable.

Any agreement between husband and wife to separate at a future date is void – see Cheshire's Law of Contract – 12 Edition page 395 under heading contracts prejudicial to the status of marriage.

This agreement falls under separation agreement, not under estopel rules. If plaintiff is to succeed on estopel there are two elements she has to prove:-

1. The assurance or promise of the donor
2. On relying on the promise, the donee has acted to her detriment.

If no detriment the plaintiff would fail – If there was detriment, the extent of the detriment would determine the amount of interest that the donee would acquire. The amount she would collect from rental would clearly cover the mortgage payments.

As soon as defendant heard of the rental he took action. The reason why the plaintiff never told the defendant what she was doing with the apartment is that she knew he would come back for it – as the terms of the agreement had come to an end. See Doctrine of Proprietory Estopel by Mark Pawlowsky – page 58 Counter-balancing Benefits.

From the facts of the case, it is clear that the plaintiff suffered absolutely no detriment. Was the plaintiff swapping her children for the apartment-this would not be binding in law.

On the principles of Estopel see Attorney General of Hong Kong vs Humphreys Estate Ltd. (1987) 1 A/C page 114 at 121. It is a

question of fact whether or not court believes plaintiff or defendant as to the nature of the agreement. If the court agrees with the plaintiff then the conditions there could not be under the doctrine of estopel but under the Maintenance Causes Act.

COURT

I accept the plaintiff's version of the agreement made between the parties when they discussed the question of division of property on deciding to separate as their marriage was on the rocks.

I find that the defendant offered the apartment to the plaintiff conditioned that she pays the mortgage, maintenance, property taxes and all other outgoings, and that when she could, to pay the transfer tax in return for his signing the transfer document.

I find that after some four years the defendant, when called upon to sign the transfer in 1996, refused to so so on the grounds that he had a change of mind. This was after the plaintiff had paid thousands of dollars for mortgages etc; had done improvements and furnished the apartment. On the defendant's own case he made no mortgage payments from 1994 up to date. He agreed that the plaintiff's obligations towards the apartment were up to date. When

asked who made those payments, he said he would assume that it was the plaintiff.

How then can the defendant submit that the plaintiff never acted to her detriment in acting upon the defendant's representations. She was used to being in a three bed room house or apartment. Now she is lodged in a studio apartment. She could not even have the benefit of her children's company for a weekend in so small accommodation.

She had the right to sue the defendant for maintenance of herself after the separation which she refrained from doing. She could have obtained a substantial order from the court based on her standard of living that she enjoyed before the breaking up.

I reject the defendant's contention that he allowed the plaintiff to occupy the Chelsea apartment until she could find a place of her own. Although he had acquired it as an investment for the first 4 years he paid no attention at all to this valuable asset . No wonder that having discussed with the auctioneer and found out it would be beneficial to him if the property was auctioned, he had his change of mind and refused to sign the transfer as he wanted to get back at the plaintiff as she had challenged him for giving notice to her tenant s and she abused him when she called him about it.

I find that from the plaintiff began occupying the Chelsea apartment she acted as the bona fide owner of the property. She was the owner and acted as such based upon the defendant's representation and she did so to her detriment.

I have considered the contention of counsel for the defendant that this issue lies under the Matrimonial Causes Act. However, while this statutory provision may apply, I hold that it does not affect the position at common law as set out in Halbury's Laws of England – 4th Edition volume 16 at paragraph 1514 referred to by plaintiff's Attorney at the outset of his submissions which reads.

> Promissory Estopel: **"When one party has by words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to effect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations**

subject to the qualifications which he himself has so introduced"

The Court will not allow the defendant to go back on his representation when it would be unfair, unjust and unconscionable to allow him to do so.

Accordingly, the declarations sought at paragraph 1,2,4, 5 and 6 of the statement of claim are granted as prayed, save that, within 21 days of the transfer document is presented to the defendant or his Attorney-at-Law, it is to be signed and returned to the plaintiff's Attorney-at-Law, failing which, the registrar shall sign same.

All costs for the transfer to be bourne by the Plaintiff.

The costs ordered to be paid by the defendant to be in accordance with schedule A.