

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2017/0131**

Between

Tessa Nicholas

Claimant

-and-

Deborah Tyrell

Defendant

BEFORE: His Lordship, the Honourable Justice Ermin Moise

APPEARANCES:

Mr. Brian Barnes of Counsel for the claimant

Ms. Kurlyn Merchant of Counsel for the defendant

2021:	February, 24 th
	March, 8 th (submissions)
	July, 9 th

JUDGMENT

- [1] **Moise, J:** This is a claim for various declarations and orders on the assertion that the claimant is the legal and/or beneficial owner of a parcel of land situated at Cane Garden Estate in Nevis. It is not contested that the parcel of land forms part of lands now lawfully owned by the defendant. The claimant however claims that the property was gifted to her by a previous owner, her deceased aunt, during her lifetime. She therefore seeks to invoke the doctrine of proprietary estoppel as against the defendant in pursuit of what she claims is her entitlement to the land. In the alternative she claims to have been in adverse possession of the property from 1992 and alleges that the defendant now holds the property on trust for her. On account of these assertions the claimant seeks various orders from this court, including a declaration that she is entitled to a conveyance of the property to her as well as an order for costs against the defendant. After reviewing the facts and legal submissions in full, I have determined that the claim should be denied with costs to the defendant. These are the reasons for my decision.

The Facts

- [2] The claimant (Ms. Nicholas) is the owner of a parcel of land situated at Cane Garden Estate in Saint John's Parish, Nevis. She purchased that parcel of land in 1992, after being encouraged to do so by her aunt, the late Mrs. Violet Howell (Mrs. Howell). This property which Ms. Nicholas purchased was adjacent to premises owned by Mrs. Howell. Ms. Nicholas states that from age 14, until Mrs. Howell's death in October, 1992, she lived with her and they enjoyed a very close relationship. Ms. Nicholas asserts that at the time of the purchase of her property there was a wire fence installed on Mrs. Howell's land separating the two premises. During the course of a survey conducted in that same year, it was observed that Mrs. Howell's fence was located some distance within her boundary. The net effect of this was that 1,401 square feet of Mrs. Howell's land was located outside of her fence next to the property being purchased by Ms. Nicholas. It is Ms. Nicholas' evidence that upon purchasing her own property, she was advised by the surveyor that the area of land which she now occupied included this 1,401 square feet of her aunt's property.
- [3] Ms. Nicholas goes on in her evidence to state that when this was pointed out to her she approached her aunt, in the presence of an employee of the surveyor and her mother. It was her evidence that Mrs. Howell indicated to her that she could *"have the land."* She therefore states, in her affidavit of 13th October, 2017, that on the basis of this the 1,401 square feet of land forms part of her property. She states that *"by this affirmation, I believe that my aunt gifted me the land, although the gift was never reduced to writing."*
- [4] However, in her affidavit of 16th December, 2020, Ms. Nicholas goes into some more detail on the circumstances surrounding this conversation she claims to have had with Mrs. Howell. She states in that affidavit that the surveyor had indicated to her that because of the discrepancy regarding the location of the fence, he could not complete the survey. She then communicated with Mrs. Howell who, according to her, was quite ill at the time. Mrs. Howell indicated that she had no objection to completing the survey with the fence in its current position and that Ms. Nicholas *"could go ahead with [her] survey and have whatever the land was as she was the one who recommended that [she] get this land."* Ms. Nicholas goes on to state that from that moment the survey was complete and she retained occupation of the premises including the 1,401 square feet which formed part of her aunt's property.

- [5] I do note however, that the survey completed did not include this strip of Mrs. Howell's land as part of the claimant's own parcel. The surveyor allegedly informed Ms. Nicholas that she would have had to apply for a separate certificate of title to the strip which she claims to have been gifted by her aunt. This application was not then made and Mrs. Howell passed away on 29th October, 1992, having never conveyed her property to Ms. Nicholas. It is worth repeating that the strip of land in question is not currently part of Ms. Nicholas' property as outlined in the survey conducted in 1992.
- [6] Mrs. Howell's estate was administered and the property, including the strip of land claimed in this case, was conveyed by the executors of her estate to Selvin Webbe and his wife Violet. I observe that this conveyance was done somewhat in accordance with Mrs. Howell's own wishes, as declared in her last will and testament. She had in fact left the property to Mr. Webbe who in turn expressed the desire to have it transferred to himself and his wife. The executor duly obliged and a deed of conveyance was executed in favour of Selvin and Violet Webbe. Despite Ms. Nicholas' assertions that she had been gifted the property by her aunt, there was no mention of such a gift in Mrs. Howell's will, neither was there an attempt to convey the property to her during Mrs. Howell's lifetime. In fact, Mrs. Howell did make some provision for Ms. Nicholas in her will. But that related to a chattel house which had been located elsewhere. There is also no evidence to suggest that the executors of Mrs. Howell's will were ever of the view that a gift of the property had been made to Ms. Nicholas. Neither is there evidence that anything of substance was done to give effect to this alleged gift.
- [7] Ms. Nicholas contends that despite the conveyance of the property to Mr. and Mrs. Webbe, she remained in undisturbed possession from the time of her purchase in 1992. However, she states that she built her home in 1995 and occupied the area which she purchased as well as the strip of land which was on her side of the fence. She states that the septic tank and soak away, her clothes lines and various pipes were placed on that strip. She also placed a concrete gate and fruit trees which she planted on the property and built a dog house there.
- [8] Ms. Nicholas claims to have decided to apply for a certificate of title to the property in 2008. She stated in evidence that she engaged a surveyor to complete a survey of the property. However, the surveyor only produced a survey of the property she purchased and did not include the 1,401 square feet of land which she claims to also occupy. In 2009, after paying additional moneys to the

surveyor, according to her, a separate survey plan for this strip was produced. Despite this, Ms. Nicholas did not move to apply for a certificate of title. She claims that this was on account of lack of funds due to her studies at the time. The property was therefore not registered in her name. I make one other observation here. It appears to me that iron pegs have been placed to demarcate the location of Mrs. Howell's fence and the extent of the property which remained on the outside of it. That seems to have been the extent of the work done by the surveyor. There is therefore no dispute that the property remains part of that which was initially owned by Mrs. Howell and now owned by the defendant.

[9] According to the evidence, on 28th September, 2009, Mr. and Mrs. Webbe conveyed the property which they owned to the defendant, Ms. Deborah Tyrell (Ms. Tyrell). Ms. Tyrell traces her route of title to the property and argues that the last will and testament of Mrs. Howell is proof that no gift of the premises was made to Ms. Nicholas. The evidence suggests that Ms. Tyrell conducted a survey of her own in 2013. Ms. Nicholas insists that after this survey was conducted she was approached by Ms. Tyrell who accused her of encroaching on her land. She states that she then informed Ms. Tyrell of the gift which Mrs. Howell had made to her or that she had been in adverse possession of the property from 1992.

[10] However, Ms. Tyrell denies the nature of this conversation. She states in her own affidavit that in fact, both herself and her predecessors in title had spoken to Ms. Nicholas and made it clear that they were the rightful owners of the land. In fact, she states that at one point there were discussions geared towards Ms. Nicholas purchasing the strip of land from her. Ms. Nicholas acknowledged having conversations with Ms. Tyrell and her predecessors but states that she always maintained that she was occupying the property as a result of her having been gifted the land by her aunt and that her predecessors in title were aware of and acknowledged this.

[11] The evidence suggests that in 2015, Ms. Tyrell applied for a first certificate of title of her property to be issued to her. Ms. Nicholas lodged a caveat against this application. That caveat was however removed after Ms. Nicholas failed to respond to an order for its removal. For reasons which are not fully explained, the certificate of title was not issued and Ms. Nicholas lodged yet another caveat in 2017 in addition to filing this claim.

[12] In her affidavit evidence, Ms. Tyrell states that when she purchased her property in 2009, the portion of land in dispute was in fact overgrown with trees and foliage and was rather unkempt. She provided photographic evidence of this. She states further that the portion of Ms. Nicholas' home which was closest to her boundary line was in fact constructed in wood until 2018. She states that after renovations in 2019, Ms. Nicholas' home remained entirely on her own property, as was previously the case, and not the strip which is in dispute. Ms. Tyrell states further that it was only after the dispute arose and surveys were done, was she made aware that Ms. Nicholas' septic tank was placed over her boundary line. She insists therefore, that Ms. Nicholas had in fact not been in possession of the land and had not been maintaining it as she has claimed.

[13] In addition to that, Ms. Tyrell states that the boundaries of the various properties have always been clearly demarcated, although she herself may have become fully aware of this after her survey in 2013. Even at the point of purchasing her own property in 1992, Ms. Nicholas would have been fully aware of her own boundary line. Based on Ms. Nicholas' own evidence, she was informed by her own surveyor that in order to claim the property she needed to get a separate conveyance and a certificate of title. This was never done and Ms. Tyrell therefore asserts that the claimant cannot claim ownership of the land in this way.

[14] These are broadly, the facts upon which this case is based.

The issues

[15] Insofar as the pleadings and evidence in this case are concerned the two general issues for consideration are:

- (a) whether Ms. Nicholas can rely on the doctrine of proprietary estoppel; and
- (b) Whether Ms. Nicholas is in adverse possession of the property to which she is now staking a claim. I would also add that the court must first consider whether Ms. Nicholas is entitled to bring a claim for adverse possession in the manner in which she has done.

[16] I note that in her Fixed Date Claim, Ms. Nicholas also pleaded that Ms. Tyrell owned the property on trust for her. However, this does not appear to have been a pleading which was fully addressed

at trial. Counsel for Ms. Nicholas does not address it in his closing submissions and I state from the start that I see no merit in such a claim.

Proprietary Estoppel

[17] There is no general dispute here on the applicable principles upon which the doctrine of proprietary estoppel is based. It is well settled that there are 3 elements to the doctrine. These are (a) that there has been an assurance, whether expressly or impliedly, that the claimant would have been granted an interest in the land, (b) that the claimant has relied on those assurances and representations and (c) that in such reliance on the assurances, the claimant has acted to her detriment. The court has been reminded on a number of occasions that the approach to be taken in determining whether this estoppel arises is not a rigid one. It must always be observed that this doctrine falls to be determined in the exercise of the court's equitable jurisdiction. In so doing, the court strives for fairness and a balance in determining whether an assurance has in fact been made and whether it would be unconscionable to allow the legal title owner to renege on that promise.

[18] In the exercise of this jurisdiction the rights, interests and obligations of the lawful owner of the property must not be taken lightly. It is where an enforcement or recognition of those rights would be so unjust so as to render it unconscionable should she be estopped from doing so. Even then, although the elements of proprietary estoppel may be satisfied, the court must also consider an appropriate remedy, giving due regard to the very principles of equity upon which the doctrine is based. In cases such as the present, it is not automatic that an estoppel would work to deprive the lawful owner of the full benefit of her property; especially where another remedy would be more appropriate in meeting the ends of justice and fairness in general. That all depends on the nature of the assurances made and the circumstances of the case examined in the round. Ultimately what the court strives to do is ***“to look at all the circumstances in order to achieve the minimum equity to do justice to the claimant.”***¹ The following passage from the **Oxford Law Dictionary**² provides some clarity on the approach to be taken:

¹ Theresa Henry et al v Calixtus Henry [2010] UKPC 3

² 5th Edition, Oxford University Press

“Under the doctrine of proprietary estoppel the court can grant a discretionary remedy in circumstances where the owner of the land has implicitly or explicitly led another to act detrimentally in the belief that rights in or over land would be acquired. The remedy may take the form of a grant of a fee simple in property to one extreme or the grant of a shorter term occupational license at the other.”

[19] As the Privy Council noted in the case of *Theresa Henry et al v Calixtus Henry*³, ***“the existence and extent of any equity arising under the doctrine of proprietary estoppel is nevertheless dependent on all the circumstances of the particular case, including the nature and quality of any detriment suffered by the claimant in reliance on the defendant’s assurances.”*** Their Lordships reminded us in that case that where the assurance of the owner had been proven then ***“notwithstanding that reliance and detriment may, in the abstract, be regarded as different concepts, in applying the principles of proprietary estoppel they are often intertwined.”*** It is not that a pedantic exercise must be undertaken to determine whether the claimant has acted to her detriment, but whether on the basis of the facts as a whole, the acts of reliance would make it unconscionable to allow the owner to go back on her assurance. It was also noted that in distilling the issues, due regard should be given to the concept of proportionality. In the more recent case of *Mathilda Nelson v. Alexis Alcide*⁴, Ferrara JA put it this way:

“... the question of whether it would be unconscionable for a court to allow the promisor to resile from the assurance or representation made or given to a claimant, is to be approached in the round, as part of a broad inquiry. It is not to be approached in a compartmentalised way, whereby each element or ingredient of proprietary estoppel is considered as free-standing, leading to a court accepting or rejecting the claim where it finds that one element may not have been fully made out on the evidence.”

[20] With this broad examination of the principles of proprietary estoppel in mind, this court is called upon to consider whether Mrs. Howell had made an assurance to Ms. Nicholas that she would become owner of the premises. The court must go on to consider whether Ms. Nicholas, in reliance on those assurances, had acted to her detriment and whether equity should allow her to claim an

³ [2010] UKPC 3

⁴ SLUHC VAP2018/0002

entitlement to the land, even against a third party purchaser, who is twice removed from Mrs. Howell's ownership.

Did Mrs. Howell make any assurances to Ms. Nicholas?

[21] Counsel for the claimant submits that there is sufficient evidence to find that Mrs. Howell had encouraged Ms. Nicholas to purchase the adjoining property. He states that Mrs. Howell was made aware of the objection raised by the surveyor and that she had encouraged Ms. Nicholas to proceed with the survey and acquiesced to it being done. In addition to that, it was submitted that Mrs. Howell had encouraged Ms. Nicholas to *"take whatever land that was outside of the fence."* On that premise it is argued that *"it would be unconscionable for Mrs. Howell, her agents, heirs or assigns to deprive the claimant of her legal rights after the claimant had built her house and her housing systems on the land."*

[22] On the other hand, counsel for the defendant refers the court firstly to the case of **Mohammed v. Gomez**⁵ where it was stated that ***"to establish a proprietary estoppel the relevant assurances must be clear enough. What amounts to sufficient clarity ... is hugely dependent on context."*** Counsel then goes on to refer to the following passage from **Mathilda Nelson** where Ferrara JA reinforced the notion that the assurance relied upon by the claimant must be sufficiently clear and stated as follows:

"Importantly, these statements of principle regarding the nature and quality of the assurance necessary to found a claim based upon proprietary estoppel, takes into account the particular 'context' in which the assurance was made, and the weight which a court ought to give to certain types of situations and relationships, existing at the time the assurance was given. Such relationships include family relations, or where a claimant has been accepted or treated as 'family' by the property owner, over an extended period."

[23] Counsel for the defendant argues that *"there are no sufficiently clear words or necessary implication by omission of the claimant's aunt that rises to the level required to maintain a claim for proprietary estoppel."* Counsel also refers the court to the provisions of section 4 of the

⁵ [2019] UKPC 46

Conveyance and Law of Property Act⁶ which outlines the legal requirements for an agreement to transfer title to property to be enforced. It is argued that insofar as the actual transfer of property is concerned, an action for the sale or other disposition of land can only be maintained if there is an agreement of such in writing. It is not disputed that no such written acknowledgement of Mrs. Howell's promise to Ms. Nicholas exists.

[24] To my mind, contrary to Mr. Barne's assertion, there is no issue here of Ms. Nicholas being deprived of any legal right. She is not the lawful owner of the land as there has never been any conveyance of such to her; neither was there a promise in writing sufficient to enable her to enforce this right under the law. This is compounded by the fact that in evidence she stated that this conversation with Mrs. Howell took place even before she had completed the purchase of her own property. Yet no steps were taking in that very process to regularize what she said was a gift made to her during the very survey of the property she was acquiring at the time. There has not even been so much as a partition of the property to date. One would have thought that at the time of the purchase and survey of her own property, Ms. Nicholas would have taken whatever steps which were necessary to ensure that this gift was fully regularized or at least documented. There is therefore no strict legal entitlement which she can claim to the premises as of right.

[25] However, Ms. Nicholas' claim, grounded in equity, is not that there was an actual gift of the property made in the strict legal sense. She acknowledges that there is nothing in writing which can prove this. I take her claim to be that she had been given the assurance that she would become the owner of the strip of land which was located outside of Mrs. Howell's fence and that she has relied on that assurance to her detriment. She doesn't appear to assert a promise to merely occupy, but an assurance that she could "have the land" and that Mrs. Howell had relinquished her interest in it. The question is whether the facts substantiate this assertion and whether equity should step in where a strict application of the law would not avail Ms. Nicholas. For my part, for reasons which I will now explain, I am not convinced that this case is made out.

[26] Ms. Nicholas' evidence of the assertion allegedly made to her is premised primarily on what appears to me to be a rather brief conversation with Mrs. Howell at the time of the surveying of Ms.

⁶ CAP 10.04 of the Laws of Saint Christopher and Nevis

Nicholas' property in 1992. It is worth repeating that this conversation allegedly took place prior to the completion of the purchase of her own property and yet, despite the assurances allegedly made by Mrs. Howell, the surveyor did not do anything other than survey the property which Ms. Nicholas had actually purchased. I bear in mind that Mrs. Howell is now deceased and cannot attest to the substance of that conversation. In addition to that, the surveyors and their employees who were allegedly part and parcel of the conversations and actions leading up to it, were not presented to the court to clarify any of the issues raised in the evidence.

[27] Ms. Nicholas goes on to assert that in surveying the property it was pointed out to her that there was a discrepancy in that Mrs. Howell's fence was not on the boundary line. She asserted further that the surveyor had indicated to her that the survey could not have been complete had this discrepancy not been rectified. She stated in cross examination that a decision had to be made as to what to do with the fence which was on Mrs. Howell's property. Ms. Nicholas went on further to state that the surveyors said to her that the issue of Mrs. Howell's fence, being in the wrong position, had to be settled.

[28] Despite this, Ms. Nicholas admitted in cross examination that the survey of her property clearly demarcated the boundaries of that which she had purchased. This did not include Mrs. Howell's property. Yet, she goes on to state that the conversation she had with Mrs. Howell had to do with the placement of the fence and the completion of the survey, in that, part of Mrs. Howell's property was on her side of the fence. It seemed clear to her, based on her responses in cross examination, that there were no issues with the boundary markers. What she took issue with was the placement of Mrs. Howell's fence. In cross examination she stated as follows:

"... the conversation with my aunt was about leaving the fence where it was. Whether to leave it there or not. At that meeting she said that she did not want the fence to be removed and that I could have whatever lands that were on my side of the fence. She instructed the surveyor to put the survey marks on that side of the fence. In effect she relinquished her rights to the property right then and there."

[29] Taking this evidence into account as a whole, I do not accept it as being reliable as I simply cannot find any reason to believe that there was anything wrong with the location of Mrs. Howell's fence. I

am unaware of any requirement in law that a person is obligated to place his or her fence on the boundary line. Mrs. Howell's fence was well within her own boundary line, on her own property, and I can see nothing which prohibited the surveyor from completing a survey of the property which had been purchased by Ms. Nicholas without impressing upon Mrs. Howell the need to relocate her fence. In light of this, and without any corroborating evidence, I do not accept that this was conveyed to Ms. Nicholas by a surveyor and this calls into question the credibility of her evidence as a whole.

[30] However, even if I were to accept Ms. Nicholas' evidence at its highest (which I do not), I express grave concern about some of the representations which were allegedly made to Mrs. Howell during the conversation which took place. Firstly, it seems to me that Mrs. Howell was made to believe that there was a problem with the location of her fence. It was further represented to her that Ms. Nicholas' own survey could not be complete unless this problem was rectified. Ms. Nicholas and her mother both insisted that this was the very substance of the conversation which took place with Mrs. Howell. Given that Mrs. Howell was approached with this information, I express the view that any assurances she may have made must have been based on what was represented to her in the first place; as she would have clearly expressed a desire not to have to relocate her fence.

[31] I am of the firm view that if indeed Mrs. Howell was told that there was a problem with the location of her fence which would have inhibited Ms. Nicholas from completing her own survey of the property which she had purchased, that would have been a clear misrepresentation of fact. As I have already stated, I can find nothing about the location of Mrs. Howell's fence which would have substantiated this assertion and after observing her in the witness box, I do not find Ms. Nicholas to be naïve about this issue. If Mrs. Howell's alleged assurances were based on those representations, then I doubt that equity should avail Ms. Nicholas in those circumstances when what was represented to Mrs. Howell was clearly wrong and inaccurate.

[32] It seems to me that what Ms. Nicholas desired was to either own or occupy Mrs. Howell's property in addition to that which she had purchased. Despite the fact that she has not specifically pleaded this, in order to give Ms. Nicholas the benefit of the doubt, one may assume that her initial impression was that Mrs. Howell's fence was on the boundary line and she was made to appreciate otherwise by the surveyor. At that point she may have wished to own or occupy all the property

leading up to Mrs. Howell's fence. Yet, if her evidence is taken at its highest, instead of making her desires clear, she, along with other persons, approached Mrs. Howell on the premise of a problem or a discrepancy which clearly did not exist. The court simply cannot overlook this reality in distilling the issues in this case.

[33] When examining Ms. Nicholas' evidence she was persistent in using terms such as "a discrepancy" and a "problem" as it relates to Mrs. Howell's fence. She insisted that the fence was "in the wrong place" and that the survey could not have been completed without it being "rectified". The conversation centered on the question of whether the fence should be relocated in order to complete the survey. None of this appears to me to be true. It would have therefore been most unfortunate if these assertions had formed the basis of the conversation during which Mrs. Howell allegedly agreed that Ms. Nicholas can "have the land"; especially in light of her age and the stage she was in her own life at that point.

[34] By Ms. Nicholas' own account, Mrs. Howell made it clear that she did not wish to relocate her fence. It would also not be a strain in the evidence to find that Mrs. Howell would also not have wished to hinder Ms. Nicholas in her own process of completing her survey. However, after reviewing the evidence I am unable to find any viable reason for Mrs. Howell to have been given the impression that any of this was even necessary or likely in the first place. She is now deceased and unable to be present to explain what she must have understood by that conversation; which, according to Ms. Nicholas, was the very basis upon which she was approached in the first place.

[35] Ms. Nicholas and her counsel have insisted that Mrs. Howell had a particularly close relationship with her and would have wanted her to have the land. However, it is precisely the close nature of this relationship which causes me to pause and consider more carefully the circumstances under which this conversation took place. If indeed Ms. Nicholas was close with Mrs. Howell then it begs the question as to why such a convoluted conversation would have occurred in the first place. Why wasn't she simply upfront with Mrs. Howell and express a clear desire to own and occupy the 1401 square feet which remained outside of Mrs. Howell's fence? Instead Mrs. Howell was likely led to believe that the location of the fence was problematic and was a hindrance to Ms. Nicholas completing her own survey when none of this appears to me to be true. At the very least a surveyor could have been presented to explain if any of this was even reliable. In any event, after listening to

Ms. Nicholas in the witness box and examining her affidavits I simply do not believe that the surveyor had made any such representations to her.

[36] In those circumstances I am not of the view that a clear assurance had been made to Ms. Nicholas regarding her becoming owner of any portion of Mrs. Howell's land. Even if I had found that such an assurance was made, the circumstances of that conversation and the representations made to Mrs. Howell would not give rise to an equity in favour of Ms. Nicholas. Equity is not blind to the law and one who approaches the court's equitable jurisdiction must do so with clean hands. Ms. Nicholas acknowledges that there is no written proof of the gift allegedly made to her. She wishes that equity would none the less be invoked to enforce this alleged promise. However, having, by her own assertions, misrepresented the circumstances to Mrs. Howell, whether deliberately or not, I would not be prepared to exercise this equitable power available to me to hold Mrs. Howell or her predecessors in title to this alleged assurance made to Ms. Nicholas.

Reliance and Detriment

[37] Having made the findings referred to above, I am of the view that these are enough to deny the claim in proprietary estoppel. However, for the sake of completeness I will briefly address the two remaining limbs of the doctrine. Counsel for Ms. Nicholas did not specifically address this issue in his closing submissions. Counsel for Ms. Tyrell on the other hand referred to the case of **Mathilda Nelson** where it was noted that ***"detriment must be alleged, pleaded and proved; and ... whether detriment is sufficiently established is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded."*** It was also observed, that overall the test is not limited to an actual expense or a loss suffered by the claimant. The court's analysis must be based on the overall concepts of equity and whether it would be unconscionable to allow Mrs. Howell or her predecessors in title to go back on the assurance.

[38] As was stated by the Privy Council in the case of **Theresa Henry v. Calixte Henry**, the court must assess the evidence in the round. It may consider, for example, whether the claimant has already derived any benefit as a result of her actions. These may be balanced against any actual detriment suffered in giving effect to the principle of proportionality. In that case, it was found that Mr. Henry had given up opportunities to improve his own life and continued to remain on the property on account of a promise made to him. Not only did he benefit from his occupation and cultivation of the

property, but so did the property's owner, who had promised him an entitlement to the property had he done so. In balancing the principles to be considered it was found that an estoppel had certainly arisen in Mr. Henry's favour notwithstanding the benefit he had derived from his years of cultivation of the property.

[39] However, in the circumstances of the case before me, quite apart from the rather suspicious and convoluted nature of the conversation had with Mrs. Howell in 1992, the only act which Ms. Nicholas can rely on is that she had built her septic tank on the premises. She claims to have occupied the premises and built fruit trees and run pipes thereon, but she provided little evidence of this. Based on the photographs presented and the nature of the evidence as a whole, including Ms. Nicholas' own demeanor during the trial, I do not accept this as being truthful. She constructed her home at least 3 years after Ms. Howell's death and I can find nothing in the evidence to substantiate the notion that she exercised any right of ownership or any act which can be said to raise the equity which she claims. In addition to that, it took in excess of 25 years for Ms. Nicholas to even raise the question of the estoppel. The surveyors who were engaged by her all initially declined to survey Mrs. Howell's property in order to give effect to Ms. Nicholas' wishes, or appeared to express some reservation about doing so. Not one of these surveyors appeared to explain their role in this process. I do not find that there is any detriment which Ms. Nicholas has suffered which rises to such a level so as to invoke the court's equitable discretion. When balanced against the representations allegedly made to Mrs. Howell in 1992, I am not of the view that equity should avail Ms. Nicholas in this case. The claim in proprietary estoppel is therefore dismissed.

Adverse Possession

[40] As an alternative to the claim of proprietary estoppel, Ms. Nicholas claims that she has been in adverse possession of the strip of land which is the subject of this dispute. The first observation to be made is that which was acknowledged by the court of appeal in the case of ***Arnold Celestine v. Carlton Baptiste***⁷ where it was noted that ***"it is inconsistent ... to claim to be in possession of land as of right whilst at the same time claiming to be in adverse possession."*** Indeed, counsel for the claimant acknowledged this challenge in his own submissions but goes on to argue

⁷ HCVAP 2008/011

that the pleading of adverse possession is not inconsistent with the application of the doctrine of proprietary estoppel. He relies firstly on the provisions of section 6(3) of the **Limitation Act**⁸ which states as follows:

“No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some person through whom he or she claims, to that person...”

[41] Mr. Barnes’ submission is simply that the proprietor’s title is extinguished after 12 years if the claimant is deemed to have been in adverse possession of the premises for that period of time. He refers the court to a number of authorities to show that the applicable test is that Ms. Nicholas must prove that she had enjoyed a sufficient degree of physical custody and control of the premises and that she had an intention to exercise such custody and control on her own behalf and for her own benefit.

[42] However, even before one can go on to examine the accuracy of Ms. Nicholas’ claim, one must determine whether she is even entitled to bring such a claim in the first case. If indeed counsel seeks to rely on the provisions of section 6(3) of the **Limitation Act**, then it seems to me that the Act creates no cause of action in Ms. Nicholas’ favour. It is one thing to argue that the title holder of the premises is barred from enforcing her right to possession on account of prescription and another to submit that the adverse possessor can maintain a cause of action in her own right under the provisions of the **Limitation Act**. Insofar as that issue is concerned, the Court of Appeal noted the following in the case of **Arnold Celestine v. Carlton Baptiste**:

“In essence, what Mr. Baptiste succeeded in doing was to invoke the Limitation of Actions Act as a sword in acquiring a declaration of ownership of the Land rather than using limitation as a shield against any claim made by Mr. Celestine, the paper owner to the Land. Indeed, Mr. Celestine has brought no claim for recovery of the Land. It is most unusual for statutes of limitation to confer positive benefits or rights on those invoking such provisions. The whole purpose of such statutes growing out of public

⁸ CAP 5.09 of the Laws of Saint Christopher and Nevis

policy considerations and well recognized over many years, was to bar stale claims, or, put another way, they are designed to encourage the timeliness of claims.”

[43] The court of appeal held therefore, that the general purpose of the provisions of the **Limitation Act** was not to give rise to a cause of action to an adverse possessor, but rather to operate as a shield against the paper owner if and when she seeks to enforce her legal rights. As was noted in that case, what the provisions of the **Limitation Act** “***do not permit or contemplate is the situation where, as here, the adverse possessor brings a claim against the paper owner and then sets up the limitation bar as against the paper owner as a basis upon which the adverse possessor becomes entitled to ownership of the land.***” I am of the view that a similar interpretation is to be placed on section 6(3) of the **Limitation Act** here in Nevis. I am therefore not of the view that Ms. Nicholas is entitled to raise adverse possession as a sword against Ms. Tyrell’s ownership of the property in this way. Notwithstanding this, I make some further observations about the issues raised in this case.

[44] It is important to assess and fully appreciate the entire regime of the legislation in force in Nevis as it relates to the acquisition and registration of ownership of land. By way of the **Title by Registration Act (TRA)**⁹, the legislature has made provision for persons who claim to be entitled to land to not only claim such ownership but to become the registered proprietor of the land. This legislation must be balanced against the provisions of the **Limitations Act**. In as much as the provisions of the **Limitation Act** operate as a shield against an owner seeking to dispossess an adverse possessor, section 12(d) of the **TRA** makes provision for persons who claim to be in possession of land for a specific period of time, whether as a squatter or otherwise, to become the registered proprietor. I appreciate that the purpose of the **TRA** is designed to bring unregistered land within the provisions of the legislation. Insofar as that is the case there is no obligation on an owner or a possessor to invoke the provisions therein. However, the process involved in making such an application outlines a number of issues which I believe are fundamental to anyone’s claim to be in adverse possession of land. To circumvent that process and approach the court in the way Ms. Nicholas has done may very well amount to an abuse of the court’s process; especially when one considers certain facts which are peculiar to this case.

⁹ CAP 10.19 of the Laws of Saint Christopher and Nevis

[45] Firstly, when one examines the provisions of section 12(d) of the Act, it creates an obligation on the part of the person making such a claim to an entitlement to prove his possession. Proof of possession under that regime requires not only the claimant's own assertion of her possession but affidavit evidence of at least 2 other persons who can attest to her possession. Even then, section 14 of the Act gives broad powers to the judge to require additional evidence, if necessary, before a decision is made. The Act requires that the surveyor whose survey plan is presented also swear to an affidavit and that the application be served on all adjoining owners in addition to being published in two consecutive issues of a local newspaper. If, after being served with such an application, an individual wishes to challenge the claim, then a caveat may be lodged within the provisions of section 16. Without addressing the process in any further detail, I note that at that point the matter may be referred to the judge who must hear the evidence and determine whether the claimant has in fact proven possession and is entitled to the issue of a certificate of title.

[46] The question is whether or not Ms. Nicholas is entitled to circumvent the process required by the legislation and seek to invoke the process of this court to make the declarations which she seeks. I am not of the view that she is entitled to do so. To my mind, if the court were to encourage such an approach, it would mean that Ms. Nicholas would then be able to use the court's order and demand the issue of a first certificate of title to the property without ever coming up to the level of proof which parliament in its wisdom thought was necessary in order to fulfill the requirements of the Act. This would certainly be in defiance of good public policy. One of the fundamental purposes behind such legislation is to introduce certainty into the process of acquisition and ownership of title to land; including a process of independent verification of the claimant's assertion of her occupation of the land. The provisions of the Act provide clarity as to what is required as proof before ownership of land can be determined and registered. This should not be taken lightly.

[47] What the evidence of this case proves is that Ms. Nicholas had been allegedly encouraged by the surveyors to apply for a certificate of title to the property from as far back as 1992. If that were the case then such an application would have been on the basis of a claim which she asserted as of right by way of gift from her aunt. She did not do so. In 2009 she again engaged surveyors but not did complete any request for a certificate of title. The evidence also suggests that Ms. Tyrell in fact made such a request for a certificate of title to her property to be issued to her. Ms. Nicholas

interfered with that process by lodging a caveat. Rather than prosecuting her claim to possession in that process as she was entitled to under the **TRA**, she failed to respond to an order for the removal of the caveat. After it was removed and before the process was complete she lodged yet another caveat. She then filed this claim seeking various declarations as to her entitlement. In this claim, all she has presented is her own word and that of her mother; which I have already found to be rather unreliable. There was no independent verification of her possession as would have been required by the **TRA**. None of the surveyors who allegedly prepared plans for her were presented to the court. Her evidence and claim has fallen far short of what would have been expected under the provisions of section 12 to 14 the **TRA**. Yet, the orders which she would require that I make would allow her to then acquire a certificate of title as of right if they were to be granted to her. I am not satisfied that she is entitled to such remedies.

[48] In light of what I have expressed above, I make reference to the case of **Marjorie Matthews**¹⁰ emanating from Saint Vincent and the Grenadines. That case involved an application for a declaration of title pursuant to the **Possessory Title Act** of that jurisdiction. I appreciate that there may be distinguishing elements to the case at bar insofar as it relates to the specific jurisdiction of the court which had been invoked. However, the general approach to addressing this issue is one I believe may be adopted in the circumstances of this case. There the applicant filed an application for a declaration of title by way of adverse possession. Although she did file affidavits from 2 witnesses as was required by the legislation, the witnesses were not presented at the hearing before the judge. In light of that the learned judge noted as follows:

“Ms. Matthews declined to call witnesses in support of her claim. Her evidence is accordingly uncorroborated. The Act requires an applicant to support her claim to adverse possession by providing testimony of two other witnesses. Although Ms. Matthews has filed two additional affidavits as mandated, her witnesses did not appear in court and were therefore not available for examination by the court as contemplated by the order setting a trial date. While their nonappearance without more does not invalidate Ms. Matthews claim, it substantially restricted the court’s ability to make

¹⁰ SVGHPT2014/0029

inquiry of them. The court was deprived of the opportunity to resolve lingering doubts and critically assess Ms. Matthews' application against "independent" evidence.

[49] The learned judge denied the claim due to her inability to assess any independent evidence substantiating Ms. Matthew's assertions. I do however appreciate that there was no one on the other side to answer the claim as opposed to the circumstances of this case. However, in the case at bar, Ms. Nicholas relied solely on the evidence of herself and her mother. She presented no one else who could have substantiated her actual possession of the property for the period of time she claimed. Ms. Tryell was certainly not in a position to adequately respond to this. When I examine Ms. Nicholas' evidence, I have more than a lingering doubt about its truthfulness. She attributes certain statements to licensed surveyors which make very little sense to the court. She claims to have approached Mrs. Howell with a "problem" about the location of her fence which had to be "rectified", when the court could have discerned no problem whatsoever. None of the surveyors appeared before me and no one else, independent of Ms. Nicholas, appeared to alleviate the doubts which are raised in my mind as to the authenticity of what she had to say. The only thing which can be said with any certainty is that her septic tank is located on Ms. Tyrell's land. I am not prepared to find that this is sufficient evidence to hold that she has been in adverse possession of the property for the period of time which she has claimed. In any event I am not of the view that she is entitled to circumvent the provisions of the **TRA** in using adverse possession as a cause of action in this way. I would therefore decline her invitation for me to do so.

Conclusions

[50] I find therefore that the claim has not been proven. I do not accept that the doctrine of proprietary estoppel can be relied on by Ms. Nicholas. Firstly, I do not believe what she had to say about the conversation with Mrs. Howell. Much of what was asserted about the relevance of the location of Mrs. Howell's fence made very little sense and seemed rather inaccurate. Even if I were to have accepted this evidence I would not have exercised the equitable discretion available to me in Nicholas' favour. Clearly if her evidence is to be believed then what was represented to Mrs. Howell in the last days of her life was wrong and a misrepresentation of what truly obtained. Equity would not avail Ms. Nicholas in such a circumstance.

[51] As it relates to the claim in adverse possession I find that Ms. Nicholas is not entitled to bring an action under the **Limitation Act** in this way. However, even if I were to be wrong about this issue, I do not accept that possession has in fact been proven sufficient to decide this case in her favour.

[52] As I indicated earlier, there was an initial pleading that Ms. Tyrell held the property on trust for Ms. Nicholas. This was not addressed in oral evidence and counsel for the claimant did not address it in his closing submissions. It would nonetheless suffice to say that I see no basis upon which a trust had been created in Ms. Nicholas' favour; especially in light of the findings of fact I have made in this case.

[53] The claim is therefore dismissed with costs in favour of the defendant to be prescribed in accordance with part 65.5(2)(b) of the CPR.

Ermin Moise
High Court Judge

By the Court

Registrar