

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2020/0013

BETWEEN:

JOSEPH FENTON

Appellant

and

AUDREY FREDERICK

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Darshan Ramdhani

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant
No appearance for the Respondent

2021: July 26.

Civil appeal – Pleadings – Whether the issue of trust was properly raised on the pleadings – Circumstances in which Court may raise and determine issue when not raised on pleadings – Whether evidence on oath in a civil trial between private parties, could create a legitimate expectation – Propriety estoppel – Whether there was any basis to ground a finding of propriety estoppel

REASONS FOR DECISION

[1] **RAMDHANI JA [AG.]:** This appeal was heard on 26th July 2021 and by a unanimous decision of the Court it was allowed, the judgment of the learned High

Court judge set aside, and judgment entered for the appellant. These are the reasons for that judgment.

The claim before the High Court

- [2] The underlying proceedings began in 2012, the respondent filed a claim against her stepbrother, the appellant and was essentially one for the exclusive possession of the downstairs apartment of a property recorded on the land register as Parcel 21 Block 13/18 of the St. Peters Registration Section situate at Baker Hill, Montserrat. The respondent also sought an injunction restraining the appellant from preventing the respondent from having 'full access' to this downstairs apartment, as well as damages for loss of use, monies expended to repair the upstairs of the home and money paid by the respondent to clear a mortgage on the said property.
- [3] The appellant's pleaded case in response was that he was the sole registered proprietor. He counterclaimed for an injunction restraining the respondent from entering the property.
- [4] It is necessary to put this claim in context to understand how the High Court judge fell into error.
- [5] The context was aptly summarised by Mr. Kelsick who appeared for the appellant throughout these proceedings. It will be adopted by this Court.
- [6] The parties are siblings. Their mother Jane Fenton died on 19th March 2012. While the parties are both Montserratians, the appellant resides permanently in New York, USA, and the respondent in Boston, USA. On 9th August 1989, title to Parcel 21, Block 13/18, St. Peters Registration Section (the "Property") was registered in the names of the appellant and the late Jane Fenton as joint proprietors. On 16th June 1993, a charge signed by both the appellant and the late Jane Fenton was registered on the title to the Property to secure a loan from the Montserrat Building

Society Ltd. The charge was subsequently removed from the title after the loan was paid off.

- [7] The respondent claimed that on 3rd September 2009, Jane Fenton signed a memorandum purporting to give the respondent an interest in the Property. The respondent also claimed that she subsequently built the downstairs apartment at the Property for an undisclosed sum. Per his evidence, the appellant disputes this.
- [8] On 6th January, Jane Fenton made a will (the "Will") purporting to convey ownership of the upstairs apartment on the Property to the appellant and various siblings of his and the downstairs apartment to the respondent. Jane Fenton died in March 2012 and the Will was probated on 11th October 2012. On 2nd October 2012, Jane Fenton's name was deleted from the title to the Property, resulting in the appellant becoming the sole owner thereof. By letter dated 19th November 2012, the appellant's then attorney-at-law, Mr. Kenneth Allen QC, informed the respondent that any further entry by her onto the Property would be treated as a trespass. There then ensued an unfruitful exchange of letters between Mr. Allen and Mr. David Brandt, culminating in the issuance of the said claim form. The appellant subsequently issued a counterclaim against the respondent.
- [9] In her claim, the respondent made no reference to the fact that the appellant was registered as the proprietor of the Property but asserted that in 2009, her mother gave her permission to construct an apartment 'downstairs of that house' and she paid a construction company, one Ryan Investment Limited, to build the apartment and on completion she furnished it. The company rented out the apartment from time to time on her behalf and paid the rent into her account. On seeing the 'defence and counterclaim' which asserted that the appellant was the sole registered proprietor, the respondent pleaded in answer that the appellant held the property in trust for all the siblings.

[10] This was the state of the pleadings when the parties got to trial. There were two trials of the claim. The first one proceeded *ex parte*, in the absence of the appellant. By consent, that judgment was later set aside by this Court, and the matter was re-sent to the High Court for a full *inter partes* hearing. It is that hearing which has given rise to this appeal.

[11] At that trial, both parties gave evidence and brought witnesses. The long and short of the evidence was that the respondent continued to maintain her claim that she was entitled to exclusive possession of the downstairs apartment. Her evidence at trial was that when her mother was 89 years old, the appellant brought her to the respondent's home and left her on the doorstep, abandoning her. She took care of her mother and the following year she and her mother journeyed to Montserrat and her mother made a will in which the downstairs apartment was devised to her. At trial, the respondent insisted that the property was to be held on trust for all the children of the deceased mother.

[12] The appellant's evidence was that the respondent had no right to claim exclusive possession of the downstairs apartment and that he was the sole registered proprietor of the property. He resisted suggestions that the mother had been abandoned. The transcripts reveal the following questions by the court and answers given by the appellant:

"The Court: It wasn't contemplated that you would own the house?

Answer (Joseph Fenton): No.

The Court: And it wasn't contemplated that you would inherit the house for yourself?

Answer: No it was not.

...

"The Court: What was supposed to happen to your mother's house when she died?

Answer (Joseph Fenton): The property was to go towards her children.

...

The Court: And you think it should be shared part of the upstairs/downstairs by all four of you?

Answer(Joseph Fenton): Absolutely.”¹

- [13] This evidence led the court to press the parties to mediate the matter with a view of resolving it. A brief adjournment was granted at the end of the evidence of the appellant, but on resumption there was no resolution and the trial resumed with the appellant’s witnesses testifying. Mabel Armstrong, another sibling, gave evidence on behalf of the appellant and she was asked by the court:

“Do you think you could ever get to a stage where being siblings you and Audrey can somehow put the past behind you and share that house both upstairs and downstairs you and Audrey and Joseph and John?

Answer (Mabel Armstrong): The whole purpose of our mother constructing that home was for the enjoyment of all her children not one more than the other. It was to share the house equally”.²

- [14] At the end of the trial, the court again sought to press the parties to seek to resolve the matter and expressed preliminary views that it seemed that the parties should agree to share the property with all the siblings in equal shares. The matter was adjourned for decision, the court expressing the view that the parties might earlier reach some settlement.

- [15] That was not to be. During the break, the appellant’s attorney filed written submissions contending that the claim ought to be dismissed as disclosing no cause of action.

- [16] On resumption, the court again expressed its own views on the matter and pressed the parties to seek to resolve it. At one stage, the learned judge noted: ‘I am very unhappy leaving this house solely in the hands of Joseph given what he said. It doesn’t sit right with what is the morality of family but the difficulty is that moralizing is not the job of the Judge.’³

¹ See Hearing Bundle at e-pages 155-156.

² See Hearing Bundle at e-pages 167-168.

³ See Hearing Bundle at e-page 186.

[17] A written judgment was delivered on 11th May 2019 in which the learned High Court judge made a number of findings. It is useful to set out the salient parts of his judgment. Making reference to the evidence given by the appellant at the trial, he held that:

“9 ...By his words on oath he has created a legitimate expectation in the mind of Audrey the claimant, and the others, she would at least have a joint share in the property. Moreover he spoke directly to the court. There is something offensive in seeking to undo his sworn words, such that he should be estopped. By his words on oath he gave up his claim to exclusive ownership. Borrowing loosely from the doctrine of proprietary estoppel, in my judgment Joseph should be fixed to his evidence, such that its consequence is I order the Land Registry to record plot 13/18/21 jointly owned by the four siblings.

10 If I am wrong to do so, I declare at the very least Joseph, in light of what he said in court, holds legal title for the benefit equally in equity of the four siblings, such that his mother's home is not his to sell or control wholly for his own financial gain.

11 There shall be no order as to costs. I had considered awarding some costs to Joseph, but will not, in light of his volte face, leading in my mind to unwarranted further litigation and hearings.”

The Issues on Appeal

[18] The appellant in his notice of appeal raised a number of grounds but this appeal was determined on three issues. These are as follows:

- (1) First, whether the issue of trust was properly raised on the pleadings so as to ground any of the orders granted by the learned trial judge.
- (2) Second, whether evidence on oath in a civil trial between private parties, could create a legitimate expectation in a matter such as this?
- (3) Third, whether there was any basis to ground a finding of proprietary estoppel.

The Pleadings Point

- [19] It was contended that the case which the judge determined and the reliefs which were granted are different from the case which was pleaded and from the orders which were sought.
- [20] Mr. Kelsick for the appellant argued that the case before the learned judge was one for exclusive possession of a downstairs flat on the basis that one of the joint owners, during her lifetime and by her Will had respectfully given and devised this property to the respondent. He contended that there was no pleaded case of the existence of a trust in equity nor was there any claim for any 'remedy in equity'. He contended further that it was not open to the learned judge to rely on the appellant's words at trial to grant the orders made.

Discussion

- [21] Was the learned judge entitled to embark on an examination of whether the appellant held the property on trust having regard to the pleadings that were before the court?
- [22] It is well established that a party is bound by his pleadings unless he has been allowed to amend them. Blenman JA, in the case of **George W. Bennet Bryson's & Co. Ltd. v George Purcell**⁴ in presenting an excellent and comprehensive disposition on the legal principles on the importance of pleadings, summarised the legal principles thus:
- “...the function of pleadings is to “give fair notice of the case which has to be met and “to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.” It is [the] duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings.”
- [23] I am also reminded of the caution given by this Court in **South East Asia Energy Holding Ag v Hycarbex-American Energy Inc**⁵ ‘it is undesirable for a judicial

⁴ [2018] ECSCJ (delivered 28th February 2018).

⁵ [2017] ECSCJ No. 275 (delivered 4th December 2017).

officer to seek to resolve an issue that did not arise and without the benefit of arguments on the point’.

[24] I would consider that there is nothing preventing a court from raising an issue *ex mero motu* which arises from the manner in which the matter has been conducted. It may be that the issue arises fully from the legally permissible evidence or that it is an issue which relates to some point of law which does not require any more evidence than that which is properly before the court. In such cases, the court may be well placed to decide the issue. A court may also decide an issue without it being pleaded, such as the interpretation of a statutory provision which features in a case, the interpretation of which has a direct bearing on the case and may perhaps resolve an important aspect of the case and there are no factual evidential matters at stake. A court may also suggest that an issue, which arises in the case, requires determination and if the parties agree that it should be determined, then the court may proceed to decide that issue. In the usual case, if an issue is not raised on the pleadings, then a court must consider the prejudice that either of the parties would suffer by any attempt to consider it even with the benefit of arguments. If it is at all possible that even slight prejudice could be caused to one or the other of the parties by the new issues raised, the court should cease consideration of the issue and instead consider whether an amendment should be allowed to do justice to the case. The kind of prejudice which is contemplated here is where the issue cannot be fully ventilated on the proper evidence which is before the court, or is not at all grounded or properly grounded in pleadings, and one of the parties is likely to suffer for these shortcomings. In such circumstances, the general rule must apply and the case must be decided on the pleadings before the court.⁶

[25] I return to this case. This claim was pleaded as a claim for exclusive possession of the downstairs apartment. The reliefs which were sought were based on permission given to the respondent by Jane Fenton to build and occupy the downstairs

⁶ See the case *City of Cape Town v South African National Roads Authority Limited and others* (20786/14) [2015] ZASCA 58 (30th March 2015) at page 12.

apartment and on the respondent's contention that she expended her own money to build the apartment. The concept of a trust was thrown in to answer the appellant's 'Reply and Defence' in which he averred that he was the sole registered owner and that the respondent had no right to occupy the property.

[26] The issue is therefore surely being raised even though it had nothing to do with the thrust of the respondent's claim for exclusive possession. Her claim for exclusive possession was grounded on the deceased mother's permission, the monies she expended and possibly her mother's will in which the downstairs apartment had been devised.

[27] For our part, the learned trial judge could not be faulted for his references to this issue; it was raised by the respondent, clumsily and hanging in midair. Nothing was pleaded nor was there any evidence led as to how this property was put in the joint names of the deceased mother and the appellant in 1989. The pleadings and the evidence were focused on what happened in 1993 when the loan was being secured. The error which followed was the investigation which was then conducted by the learned trial judge on this issue and the interrogation he conducted of the appellant and his witness. This is not a matter which could properly be decided on the pleadings before the court.

[28] Further, and if it needs to be stated, the evidence which was extracted from the appellant and the other witness, was no more than mere conclusions. Nothing was presented to the Court which grounded those conclusions. No court could properly act on those conclusions.

[29] I find relevance in the caution commended by the authorities and adopted by this Court that a judge should refrain from any form of advocacy in his treatment of proceedings. As was noted by Denning MR in **Jones v National Coal Board**:⁷

⁷ [1957] 2 All ER 155.

“The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.”

- [30] The parties in this case were trying a different case from that being tried by the court. There was extreme prejudice caused to the appellant as there was no properly pleaded case on the issue of trust and what that had to do with the reliefs that were being sought. What was the nature of this trust? Did it entitle anyone, including the respondent to claim exclusive possession of a portion of the property?
- [31] The learned judge fell into error by seeking to have the party litigate a case and grant reliefs which were not at all sought by anyone. Whilst the appellant did engage the court on these discussions initially, it became clear at the end that the appellant was raising strenuous objections to this issue being an issue for the court’s determination in the case. Those objections should have been heeded.
- [32] The appeal must therefore succeed on this point.

The Legitimate Expectation Point

- [33] This was not a point argued by the parties.
- [34] The learned judge used the answers given by the appellant during the trial to the effect that he felt that the Property should be shared by all the siblings, to hold that this had created a legitimate expectation which created rights in the others to get a share in the property.
- [35] Now the doctrine of legitimate expectation is a public law notion and has no place in private law proceedings. It is a doctrine which is rooted in fairness requiring public

bodies which have, by their conduct or statements, led a person to have an expectation which may be enforced as a matter of public law.⁸

[36] In any event, the basic principle related to legitimate expectation is that it cannot arise from evidence given in court by one of the parties and then sought to be enforced in those proceedings.

[37] The answers from the appellant therefore could not have given rise to a legitimate expectation in the appellant's other siblings with the effect that a court could use that to ground a finding that a trust existed.

The Proprietary Estoppel Point

[38] The issue of proprietary estoppel is a private law remedy and has often been seen as the private law counterpart of the public law remedy of legitimate expectation.⁹

[39] In **Walsh v Ward and others and other appeals**,¹⁰ the Caribbean Court of Justice held:

“The doctrine of proprietary estoppel was based on three main elements: a representation or assurance made to the claimant that he would have a certain interest in land; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance. The representation had to be clear and unequivocal, made by the party against whom the estoppel was asserted and assuring the other of a certain interest in the property claimed. Further, an expectation of a successful negotiation was not an expectation of an interest having sufficient certainty; the latter being, for example, an option to renew a lease in which the terms of the new lease were spelled out in the option and the lessee's expectation was that on exercise of the option the new lease would be granted. Moreover, it was established that 'detriment' was not to be seen as a 'narrow and technical' concept and it did not necessarily have to consist of quantifiable financial detriment so long as it was 'something substantial'; there should also be a sufficient causal link between the representation and the detriment. As a matter of principle, the court should weigh the disadvantages suffered by

⁸ Council of Civil Service Unions and Others v Minister for the Civil Service [1985] A.C. 374 at page 400 – 401.

⁹ See “Legitimate Expectation – An Odyssey” Hilary Biehler, Irish Jurist New Series, Vol. 50 (2013), pp. 40-69.

¹⁰ (2015) 87 WIR 101.

the claimant against the countervailing advantages which he enjoyed as a consequence of that reliance. In the instant case, neither the pleadings nor the factual narrative given by the appellant supplied the three elements.”

[40] This conclusion applies to this case. To ground a cause of action in proprietary estoppel therefore, a claimant, standing in the shoes of this respondent would be required to plead and show that there was some representation, either by words or conduct made by the appellant that she was entitled in equity to an interest in the property and that she had relied on those representation or acts to her detriment. She would have been required to plead and show that it would be unconscionable for the appellant to then seek to exclude her from the property.¹¹

[41] There are no pleadings in this case which could ground any contention that the appellant made representations to the respondent that she would be entitled to a share in the property on which she relied. Such a representation cannot arise on what is being said in court as was said in this case. It may be that the evidence in court can prove that the elements of proprietary estoppel have been established, that there is basis to find that one party’s conduct amounted to the required representation and reliance. This is not that case.

[42] No doubt the answers could have been the basis for a possible mediated resolution, but these could hardly have been used to ground a finding that the appellant held the Property on trust in the face of his continued position that he was the sole registered owner.

Conclusion

[43] For the reasons set out above, the Court made the following orders:

(1) The appeal is allowed.

(2) The decision of the learned trial judge in the court below is set aside in its entirety.

¹¹ See also *Lewis v Sookdeo* (2016) 89 WIR 475.

- (3) The respondent shall pay the appellant's costs on the appeal in accordance with rules 65.5(2)(b) and 65.13 of the Civil Procedure Rules 2000 in the sum of \$5,000.00.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar