

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2013/0257

BETWEEN:

[1] KIPPY HENRY

Claimant

and

[1] MONROY GABRIEL

[2] MAUDELYN GABRIEL

Defendant

Appearances:

Mr. Lawrence Daniels for the Claimant

Mr. Craig Jacas of Stapleton Chambers for the First and Second Defendants

.....
2017; May 8
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JUDGEMENT

[1] **HENRY, J.:**The claimant (Mr. Henry) is the son of the second defendant (Mrs Gabriel) and the step-son of the first defendant (Mr. Gabriel). Mr. Gabriel is the registered proprietor of a parcel of land registered as: Registration Section: Jennings; Block 53 1287 A; Parcel 509. Mr. Henry asserts that in a conversation held with both defendants, Mr. Gabriel promised, in consideration of the natural love and affection which he held for Mr. Henry, to transfer the land to Mr. Henry on which he could build a house, a section of which he could occupy and the remaining section could be rented from which he could earn an income.

[2] Acting on the promise, Mr. Henry commissioned architectural drawings to be prepared for the construction of a two storey building to be erected on the land. Mr. Gabriel, not being satisfied with the drawings, had another set of drawings prepared, which was accepted by Mr. Henry. In order to facilitate the construction of the building and acting to his detriment, Mr. Henry sent various sums of money totalling approximately US\$350,000.00 to Mrs. Gabriel for onward transmission to Mr. Gabriel. After having expended such a significant sum of money towards the construction of the building, Mr. Henry repeatedly requested that Mr. Gabriel transfer the land to him, but Mr. Gabriel has consistently neglected and or refused to do so.

[3] By his Fixed Date Claim he seeks the following relief:

- 1) A declaration that the claimant is beneficially entitled to an interest in the piece of parcel of land described in the Land Registry as Registration Section: Jennings Block: 53-1287A; Parcel:509.
- 2) A Declaration that the Claimant has an equitable interest and /or an overriding interest in the land and premises described in the Land Registry as Registration Section: Jennings; Block:53-1287A; Parcel:509.
- 3) An injunction ordering the First Defendant to transfer his interest in the piece of parcel of land described in the Land Registry as Registration Section: Jennings; Block:531287A; Parcel 509 to the Claimant forthwith.
- 4) An Order for payment of the sum of Three Hundred and Fifteen Thousand Dollars United States Currency or E.C equivalent Eight Hundred and Fifty Thousand Five Hundred Dollars Eastern Caribbean Currency to the Claimant being money had and received by the Defendants for and to the use of the Claimant.
- 5) An Order for payment of the sum of Three Hundred and Fifteen Thousand dollars United states Currency or E.C. equivalent Eight Hundred and Fifty Thousand Five Hundred Dollars Eastern Caribbean Currency from the Defendants to the Claimant.
- 6) Damages
- 7) Interest thereon pursuant to statute
- 8) Costs.

[4] In their defence, Mr. and Mrs Gabriel assert that Mr. Gabriel and Mr. Henry have always had a very tenuous relationship and for the sake of Mrs Gabriel, Mr. Gabriel sought to maintain amicable and pleasant relations in the interest of peace. Mr. Gabriel denies that he had an agreement or that he made the promise or had an intention to transfer the land to Mr. Henry. He states that all discussions in relation to building on the land were discussions held between the defendants as husband and wife. According to the defence, Mr. Gabriel's intention was to gift the land to Mrs. Gabriel. However, neither Mr. nor Mrs. Gabriel had any intention of gifting the land to Mr. Henry during their lifetime. Mrs Gabriel admits discussing with Mr. Henry her intention to build on the land to facilitate Mr. Henry being able to visit with his family and to be comfortable on the land. However, both Mr. and Mrs. Gabriel deny that there existed any promise between them and Mr. Henry.

- [5] Mr. and Mrs. Gabriel acknowledge that Mr. Henry sent architectural drawings to them for approval. They assert that Mr. Henry did this without any prior consultation, agreement and/or understanding between the parties. Mr. Gabriel states that he later caused to be prepared architectural drawings, which were subsequently approved. Further, based on discussions and or agreement between himself and Mrs. Gabriel, Mr. Gabriel began to construct the property as per the approved drawings, and that he did so without any financial contribution from any other person.
- [6] Mr. Gabriel denies being in direct receipt of any monies from Mr. Henry. However, Mrs. Gabriel admits receiving monies from Mr. Henry in or about the total sum of US\$81,000.00, which she gave to Mr. Gabriel. She accepts liability to repay the said sum or any other sums that this court deems due to Mr. Henry. The defendants in their pleadings, do not accept that Mr. Henry is entitled to any beneficial and/or legal interest in the land. They ask that the claim for an interest in the land be dismissed with cost.
- [7] Mr. Gabriel counterclaims that in the event Mr. Henry is declared to have a beneficial and or legal interest in the property, that the court do declare that Mr. Gabriel is entitled to be paid reasonable and assessed management, labour costs and fees for the time spent in the construction of the property; that a valuation and quantity survey of the property be done and that the work be valued and that Mr. Gabriel be paid the market rate as assessed for management, labour and time spent on the construction of the property and Mr. Gabriel be paid the market rate interest on any sums found due and payable to him at the rate of 4% per annum .
- [8] In his Reply, Mr. Henry joins issue with Mr. and Mrs. Gabriel on their defence. In the Defence to the Counterclaim, Mr. Henry states that it would be unconscionable, unreasonable and inequitable for the court to hold that in these circumstances Mr Gabriel would be entitled to be paid assessed management fees, labour costs and fees for time spent in the construction of the property. There was never any agreement that any such fees would be paid by Mr. Henry to Mr. Gabriel. At no stage before, during or after the construction of the property was the payment of any fees ever discussed among them. Mr. Henry asserts that the counterclaim is an afterthought designed to deprive Mr. Henry of his lawful beneficial interest in the property.

The Evidence on behalf of the Claimant

- [9] Mr. Henry's evidence is that his mother married Mr. Gabriel in about 1984 and that he was raised by Mr. Gabriel as his son; a loving father/son relationship developed between himself and Mr. Gabriel. He lived with Mr. and Mrs. Gabriel until age 17 when he journeyed to the United States of America, where he currently resides. On cross-examination he admitted that there were times when he and Mr. Gabriel did not get along, even though there were times when they did get along. In his younger days as a teenager especially, there were times when things were not all good, but when he returned as a man, they got along pretty good.
- [10] His evidence in chief is consistent with his pleadings in respect of a conversation which he says took place in 2008 during which Mr. Gabriel promised that in consideration of the natural love and

affection which he had for him, he would transfer a parcel of land to him on which Mr. Henry could build a house. On cross-examination however, Mr. Henry admitted that Mr. Gabriel never told him that he was transferring the land to him "for love and affection".

- [11] Acting on this promise of the transfer of the land to him, he not only commissioned drawings he also sent sums of money to Mrs. Gabriel for onward transmission to Mr. Gabriel. His evidence is that it was clearly understood among them that the money sent from America was for the purpose of constructing his (Mr. Henry's) house on the land Mr. Gabriel promised to transfer to him.
- [12] His evidence in chief is that at all times he acted on the promise of Mr. Gabriel to his detriment; that Mr. Gabriel stood by and allowed him to spend money improving Mr. Gabriel's land in the expectation that he would eventually transfer the interest in the land to him. Excavation was done, the foundation was dug and the construction of the house commenced and was continued, all this was made possible by and with his financial contribution. Mr. Henry's evidence is that the money was sent by means of money transfers via Wells Fargo and Money Gram. Money was also given to family friends and family members to deliver to Mrs. Gabriel. The Money Gram Report of Mr. Henry's transactions was tendered into evidence. It revealed a total of US\$63,000.00 was sent by Mr. Henry. His further evidence is that on 6 different occasions he gave friends US \$15,000.00 for a total of US\$90,000.00. At other times he sent US\$10,000.00 on each occasion. According to him he started sending money in early 2009.
- [13] On cross-examination Mr. Henry also gave evidence that he intended to pay for the land on transfer of same to him. He stated that the defendants did promise the land to him but he had decided to pay them for it because nothing in this world is free.
- [14] Mr. Henry called one witness, one Blair Christian. Mr. Christian's evidence is that he and Mr. Henry grew up together from about age 5. They are friends. Whenever he journeys to America he stays with Mr. Henry at his residence. His evidence is that he knows that in or about 2008 Mr. Gabriel with the concurrence and agreement of Mrs. Gabriel and Mr. Henry agreed to build a house for Mr. Henry on one of the parcels of lands owned by Mr. Gabriel. On cross-examination, he stated that he was present when the parties were talking on the phone. He over-heard Mr. Henry talking about the project and when he came off the phone, he explained what it was all about. The witness admitted that he could not hear who was on the other side or what was being said. He could only hear Mr. Henry's end of the conversation. He could not tell if Mr. Henry was speaking to his mother or to his stepfather.
- [15] Mr. Christian's further evidence is that he knows that Mr. Henry provided the money for the excavation and all other works which were performed in the construction of the building. He was present in America when Mr. Henry gave monies on several occasions to his mother to be applied to the building of the house in Antigua. His evidence is that this happened on at least six occasions and on each such occasion the sum of money given to Mrs. Gabriel was US\$15,000.00. According to him the money was counted in his presence. In addition, he states that he

accompanied Mr. Henry to Wells Fargo and Money Gram and saw Mr. Henry wire various amounts of US dollars to Mrs. Gabriel. According to him there were also occasions when he brought money from the United States from Mr. Henry and gave same to Mrs. Gabriel. He states that there were at least 16 such occasions. Each time he delivered the sum of \$10,000.00 to the defendants. They would drive to his home in Bolans to collect the money. These transactions occurred between 2009 and 2012.

- [16] Mr. Christian was cross-examined at length as to his frequent travels to the United States. His evidence is that he is employed with his father as a driver from which he earns a monthly income of \$2800.00. He gets one month paid vacation per year. However, he often takes unpaid leave to travel to the United States, because he also purchases clothing for sale at flea markets. His evidence is that between 2009 and 2012 he travelled to the United States about 22 times

The Defendants' Evidence

- [17] Each defendant gave evidence however, no witnesses were called. Mr. Gabriel in evidence sought to paint a different picture from that painted by Mr. Henry. Mr. Gabriel's evidence is that about 2008 he started having discussions with his wife "towards the construction of a dwelling house on a portion of the land if I was to encounter any form of grave illness or any other mishap". He denied however having any discussion with Mr. Henry.
- [18] His further evidence is that on the basis of the strained relationship with Mr. Henry, he avoided discussions with him. Therefore he had no reason at any point to discuss his motives and intentions with regard to his land with Mr. Henry. Mr. Gabriel says however, that he did indicate to his wife that on completion of the house, Mr. Henry would be able to occupy the top floor for his use and benefit so as to accommodate his return and his acceptance to the family. This was said to make his wife happy. He intended to give the land to his wife.
- [19] Without any consultation and/or understanding between them, Mr. Henry caused architectural drawings to be prepared and sent for approval. The plans were incomplete, so he rectified the plans and applied to DCA for approval and commenced construction shortly after. Mr. Gabriel says he is aware that Mr. Henry started making contributions towards the construction of the house. However the monies sent were not sent directly to him but to his wife and was only in the total sum of US\$81,400.00. He is adamant that his intention was to transfer the land to his wife, who he assumed would allow Mr. Henry to build on a portion of the land. However, on cross-examination he stated that he never refused to transfer the land to Mr. Henry, they just never discussed it. He states that if the court is of the view that Mr. Henry has an interest in the land, he is asking to be compensated for the works done and materials purchased. He is willing he says to pay the difference of monies owed to Mr. Henry.
- [22] Mr Gabriel admitted that he made the application to the Development Control Authority (DCA) for permission to carry out the works and that the application was made in the name of Kippy Henry. He also claimed to have paid for the backhoe to excavate the foundation, but had no receipts. He

stated: “there are no receipts because I thought it was a family thing. He further stated I spent a lot of money on the property because of my wife, because of the love for my wife, I do whatever I have to do. I brought in the backhoe and paid him. As to the cost of the foundation for which he claim to have paid, his evidence is : “ I don’t have a fixed figure for the foundation because it was done on weekends and whenever I had time. He was later asked who were the members who contributed to the building. His response was: “my wife, whatever money Kippy sent to her. We go along step by step. No one else contributed”. He later admitted that money was sent in his name via Western Union, but insisted that he didn’t keep an account of all the monies he received from Mr. Henry. He admitted that he never submitted a bill for labour to either Mr. Henry or his mother because it was a “family thing”.

- [23] Mrs Gabriel admitted that she received money from Mr. Henry by wire transfer, also from his girlfriend and by Blair Christian. With regard to the land, her evidence is that her husband told her he has land and he will give Kippy one and Fitzgerald (another son) one in case anything happen to him. She thereafter spoke with Kippy about it. Having discussed it, Mr. Henry sent a plan for the house and thereafter started sending money. She states clearly that it was Mr. Gabriel’s decision to build the house on the land. As the building commenced Mr. Henry would come home and inspect the work from time to time. The last time he came was in 2012. It was put to her that the whole disagreement came about because Mr. Gabriel didn’t transfer the land. Her response was: “well Kippy asked me about the transfer of the land. I told him take time and from then I don’t hear from him”. It take time because we have to discuss it but you can’t tell him that. She agreed that after the disagreement in 2012, Mr. Henry ceased sending money and no further construction work was done on the house. Lastly, she agreed that because of the mother/son relationship she didn’t keep a record of all the money received. She concluded by accepting that her husband never discussed with her payment for his labour.

Submissions

- [24] Mr. Henry submits that the case falls squarely within the holding of the case of **Inward v Baker**¹. That case held that where a person expended money on the land of another in the expectation, induced or encouraged by the owner of the land, the he would be allowed to remain in occupation, an equity was created such that the court would protect his occupation of the land. The court had power to determine in what way the equity so arising could be satisfied. He submits that Mr. Henry sent money to Mr. and Mrs Gabriel for the construction of a house. The monies were sent by Mr. Henry based on his expectation and discussion that the land would be transferred to him by Mr. Gabriel. He also sent the plans for the house which was modified by Mr. Gabriel. Mr Gabriel himself built the house on the parcel of land he owned with full knowledge that the monies used for the construction were sent by Mr. Henry. The three-storey concrete building estimated at over 5,000 sq. ft is now 85% complete and cannot be removed from the land. He submits that the court ought to order that the property be transferred to him.

¹ [1965] 2 QB 29

- [25] Counsel for the defendants refer the court to the cases of **Taylor Fashions Ltd v Liverpool Victoria Trustees C. Ltd**² and **Blue Haven Enterprises Ltd v Tully and Another**³. He submits that the issue of paramount importance is whether there was behaviour so unconscionable that the courts of equity must provide a remedy. He further submits that though the construction of the house would not have been possible without the intervention of Mr. Henry, and though it will require his continued intervention in order to continue, Mr. Gabriel has contributed his money, time and labour towards its construction on the faith that he will grant his stepson permanent rights in the occupation of a portion of the premises. It follows that Mr. Gabriel's conduct cannot be said to be unconscionable in the circumstances as he acted honestly and in good faith.
- [26] He concludes that the entire situation when viewed objectively, cannot amount to unconscionability so as to allow Mr. Henry to acquire the entire interest in Mr. Gabriel's land. Both parties, he submits have acted to their detriment.
- [27] In closing submissions Counsel sought to put the defendants' case on a different footing from the one pleaded. He now states that Mr. Gabriel has never denied that Mr. Henry would be entitled to an interest in the property should Mr. Henry assist Mr. Gabriel with his idea of constructing the house. What he does deny is that the interest would have been full legal ownership of the land – at least not during his lifetime. The interest that was being contemplated by Mr. Gabriel at the time of the construction of the property was, in the very least, an inextinguishable licence granted to Mr. Henry to exclusively occupy and or possess a portion of the premises for his own use and benefit absolutely. At best therefore, Mr. Henry has a claim not in estoppel, but perhaps under constructive trust for a determination of his share in the property
- [28] With regard to the appropriate share, Counsel submits that considering all the evidence, including the work carried out by the defendants, and considering what is fair, just and reasonable, that the share in the property be split between the parties so that 30% of the interest of the property be awarded to Mr. and Mrs Gabriel and 70% be awarded to Mr. Henry.

Findings of Fact

- [29] From the evidence, Mr. Henry has failed to prove by a preponderance of the evidence that Mr. Gabriel made an express promise to him as set out in his pleadings. The court finds that the discussions regarding Mr. Gabriel's intentions for the parcel of land were held, not with Mr. Henry, but between Mr. and Mrs. Gabriel. It was Mrs. Gabriel who then had conversations with Mr. Henry. From those conversations Mr. Henry formed the conclusion that Mr. Gabriel intended to transfer the land to him. The evidence of his witness, Mr. Blair, did not assist him on this issue. Mr. Blair only heard one side of the conversation. He could not say conclusively who was on the other end of the phone. The court further finds that Mr. Henry's expectation was not that the land would be transferred for love and affection. He was not relying on the transfer of the land without a cost.

² [1982] QB 133

³ [2006] UKPC 17

- [30] The court finds that in reliance on the land being transferred to him, Mr. Henry did send substantial sums of money toward the construction of the house. The sums were sent by various means: some electronically, some by friends and/or family, and some given to Mrs. Gabriel on her visits to Mr. Henry. The sums were intended to and were used by Mr. Gabriel in the construction of the house. Although Mr. Gabriel alleged that he spent his own money on the foundation and on materials used in the construction of the house, Mr. Gabriel tendered absolutely no evidence in support of his allegation. The court finds that Mr. Gabriel has failed to prove his allegation that he commenced constructing the building without any financial contribution from any other person. No receipts or other documentary evidence was submitted. Mr. Gabriel when asked to name the members of the family who contributed to the construction of the house named only his wife and Mr. Henry. Mr and Mrs. Gabriel are retirees. No bank statements showing substantial withdrawals or other evidence of use of their own funds were tendered in court. The court finds that any monies given by Mrs Gabriel to Mr. Gabriel for construction of the house came from Mr. Henry. From the evidence the court is satisfied that all the monies expended in regard to the construction of the house came from Mr. Henry. The court accepts that the total sum was approximately US \$315,000.00. The un-contradicted evidence is that when he stopped sending money in 2012, construction ceased.
- [31] Further, from the evidence Mr. Gabriel understood that the house was being built with Mr. Henry's money for Mr. Henry. Mr. Gabriel's contention that his intention was to build a house on his land and give Mr. Henry a license to occupy a portion of it out of love for his wife is undermined by the following evidence: (a) The application to DCA for building permission was made by Mr. Gabriel in Mr. Henry's name; (b) the substantial sums sent by Mr. Henry for the construction of the building; (c) the extent of Mr. Henry's input in the design of the building and (d) the fact that construction on the building ceased when Mr. Henry's remittances stopped.
- [32] Mr. Gabriel encouraged and consented to the building of Mr. Henry's house on the land. First it was his idea to build the house and he did the construction himself.
- [33] The court finds no evidence of an intention, either prior to or at the time of construction, to engage in a joint family venture where the value of Mr. Gabriel's labour would count towards his equity in the building. His evidence is that, at the time, he did not expect to be compensated for his services. He expressly stated on cross examination that he worked on the weekends out of love for his wife and had never discussed a bill for his services with either his wife or Mr. Henry.

Conclusions

- [34] The fact that Mr. Henry has been unable to prove a promise made directly to him by Mr. Gabriel is not fatal to his claim. In the **Taylor Fashions Ltd** case, Oliver J stated

“The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of estoppel. In the light of the more recent cases, the principle ‘requires a very much broader approach which is directed rather at

ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick of unconscionable behaviour.”

[35] A party who seeks to set up an estoppel, whether a proprietary estoppel, estoppel by acquiescence or estoppel by encouragement, must establish that it would be unconscionable for the other party to be permitted to deny what he has allowed or encouraged the first party to assume to his detriment

[36] In order for the claimant to succeed it is necessary to show that Mr. Gabriel stood by in circumstances where Mr. Gabriel's actions or inaction would make it unconscionable for him to now refuse to transfer the land to Mr. Henry⁴. Both defendants have admitted that Mr. Henry has contributed substantial sums of money towards the construction of the building. The court has found that all the sums expended on the construction of the building came from Mr. Henry. Mr. Gabriel has not proven his alleged contribution to the foundation. Mr. Gabriel's evidence is that the building is approximately 5,000 sq. ft. The application to DCA made by Mr. Gabriel lists the total floor space as 5250 sq.ft. When completed, his evidence is that it will be valued at approximately EC\$1million. It is clear from the size of the investment that Mr. Henry was labouring under the belief that the land would be transferred to him. If this was a misapprehension, as the defendants now allege, notwithstanding the family connection, and especially in light of Mr. Gabriel's characterization of that relationship, Mr. Gabriel was under a duty to indicate that he had no intention to transfer his land, instead of assisting Mr Henry in erecting such a substantial structure on the land. Mr. Gabriel has maintained throughout that, even while receiving such sums and carrying out the construction, he never discussed the issue of the transfer of the land with Mr. Henry. Mr. Gabriel never asserted the legal right he now asserts. Under these circumstances it would be unconscionable for Mr. Gabriel not to transfer the land to Mr. Henry. In the court's view granting an inextinguishable licence to Mr. Henry to exclusively occupy a portion of the premises would not do justice to the case and would be impractical in light of the tension between the parties. The court therefore finds that the claimant is entitled to an order that the land be transferred to him on the payment by him of the value thereof.

The Counterclaim by the First Defendant

[37] Mr. Gabriel pleads that in the event Mr. Henry is declared to have a beneficial and/or legal interest in the property that the court ought to declare that Mr. Gabriel is entitled to be paid reasonable and assessed management, labour costs and fees for the time spent in the construction of the property. The issue of his labour was only briefly mentioned in Mr. Gabriel's witness statement. In paragraph 10 he states: “ I however did not incur much expense for labour as I am a tradesman by

⁴ See also *Blue Haven Enterprises Lt v Tully and Another*

profession and worked day and night to ensure completion of the building.” In his penultimate paragraph he states: “Given the nature of the relationship between the claimant and I if the court is of the view that he has an interest in the laid lands and accept that I am to be compensated for the works done and materials purchased, then I am willing to pay the difference of monies owed to the claimant.” In cross-examination he agreed that he had never charged his wife or Mr. Henry for anything done. That is the sum total of his evidence on his labour and there is no evidence by him regarding management fees or other fees.

[39] His evidence is that he did work on the house out of love for Kippy and his wife. There is no evidence of an agreement for payment of fees to Mr. Gabriel or that he performed the work he did with the expectation of receiving compensation for such. In fact the evidence is just the opposite. There is no basis upon which the court can make such an award.

[40] Accordingly judgment is granted in favour of the claimant Mr. Kippy Henry as follows:

- 1) A declaration that the claimant has an equitable interest in the premises described in the Land Registry as Registration Section: Jennings; Block: 53-1287A; Parcel:509.
- 2) An order that a valuation be carried out of the said Parcel 509 by a valuator to be agreed upon by the parties, the cost to be borne equally by the parties.
- 3) An order directing the first defendant to transfer his interest in the said Parcel 509 to the claimant upon the payment by him of the price fixed by the valuator in accordance with paragraph 2 above.
- 4) The counterclaim is dismissed
- 5) Cost to the claimant to be prescribed cost.

Clare Henry
High Court Judge

By the Court

Registrar