

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2009/0201

BETWEEN

**(1) CARLTON SMITH
(2) ROSA SMITH**

Claimants

-and-

ESTHER OAKLEY

Defendant

Appearances:

Mr. Terrence Neale of McW.Todman & Co. for the Claimants
Mr. Robert Nader of Forbes Hare for the Defendant

2010: February 01, 12
2010: June 28

Land law – dispute between family – land owned by daughter- house built by mother and stepfather with daughter's permission- fixture-whatever is attached to the land becomes part of the land- daughter is legal owner of house and land - mother and stepfather claims compensation – doctrine of proprietary estoppel –was proprietary estoppel properly pleaded – ancillary issues

The claimants are the stepfather and mother of the defendant. With the claimants' assistance, the defendant bought a parcel of land. She gave the claimants' permission to build a house on her land. The house was primarily built to help offer shelter to the Montserratian refugees after the Soufriere Volcano in Montserrat had erupted. However, this plan never materialized. Instead, the claimants lived in the upper floor of the house from the time it was built until August 2007 when they vacated it so that the defendant and her family who were taking up residence in the BVI could reside therein. The lower floor of the house is currently being occupied by a tenant of the claimants. The claimants still receive the rent and are still paying the bank for a loan which they took out to build the lower floor of the house.

The claimants claimed that the defendant had orally agreed to pay them rent/compensation at the rate of \$400 per month from 1 January 2008 in respect of her occupation of the upper floor of the

house which was built. The claimants claim that the house was built for investment purposes. When the rent/compensation was not forthcoming, the claimants wrote to the defendant offering her to purchase the house from them. The defendant, through her solicitors, wrote to the claimants stating that "*our clients intend to accept your offer to purchase the house... and wishes the most recent (within the last six month [sic]) appraisal of value....*"

As a result, the claimants instituted these proceedings claiming, inter alia, (1) payment of the sum of US\$114,000 being the current value of the house; (2) alternatively, payment of the sum of US\$400 per month as compensation/rent for the occupancy of the house from 1 January 2008 and continuing on a monthly basis and (3) alternatively, damages for breach of contract to purchase the house and/or pay a monthly compensation for the occupation of the house in respect of same from 1 January 2008.

The defendant denies the existence of a contract and also denies that any agreement was reached to purchase the house. In fact, she asserts that her previous lawyer made a mistake as the house should be treated as her property because of her ownership of the land. She also denies that she ever agreed to pay rent/compensation of \$400 monthly from 1 January 2008. She claims that her mother promised that when the refugees moved out, the house would be for her and her son. In any event, the defendant says that the claimants have not specifically pleaded the doctrine of proprietary estoppel in their statement of claim.

HELD:

1. The claimants' house, which is built on the defendant's land, becomes the property of the defendant who is the registered owner of the land. The general rule is *quicquid planatur solo, solo cedit* ("whatever is attached to the soil becomes part of it"): **Billing v Pill (1954) 1 Q.B. 70.**
2. It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. Although pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other side by surprise, judges are also obliged to look to other documents, for example, witness statements, to see what are the issues between the parties: **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea (St. Vincent & The Grenadines, Civil Appeal No. 12 of 2006. Judgment delivered on 16 July 2007 applied.**
3. The claimants acted to their detriment by expending considerable sums of money, giving up their rental income and losing the use of the house. The defendant agreed to pay the monthly rental of \$400 and it is unconscionable in the circumstances for her to disregard her assurances.
4. The claimants built the house on the defendant's land and with her permission with the expectation that they will be able to use the house for investment purposes and particularly, to recoup the expenses incurred in building it. The claimants must have been

labouring under the mistaken belief that they owned or they have sufficient interest in the house.

5. The defendant actively encouraged the claimants to build the house on her land. Throughout, she never objected to the expenditure nor asserted that the house was hers.
6. The claimants have come to the court with clean hands seeking the equitable remedy of proprietary estoppel so there is no bar to the equity.
7. The claimants have satisfied the four elements of proprietary estoppel. The most appropriate way of satisfying this equity is to award the claimants reimbursement of moneys expended on building the house.

Cases referred to in judgment

1. Billing v Pill (1954) 1 Q.B. 70.
2. Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd [1982] Q.B. 133n.
3. Brinnard v Ewens (1987) 19 H.L.R. 415
4. McPhilemy v Times Newspapers Ltd [1999] 3 All E.R. 775, applied by the Court of Appeal in Tancic v Times Newspaper Ltd (2000) The Times, 12 January.
5. East Caribbean Flour Mills Ltd v Ormiston Ken Boyea (St. Vincent & The Grenadines, Civil Appeal No. 12 of 2006. Judgment delivered on 16 July 2007.
6. Greaseley v Cooke [1980] 1 W.L.R. 1303.
7. Cashley v Seale (Unreported), October 28, 1986, C.A. available on Lexis.

JUDGMENT

Introduction

- [1] **HARIPRASHAD-CHARLES J:** This is a dispute *en famille*. Carlton Smith and Rosa Smith (“the claimants”) are the stepfather and mother of Esther Oakley (“the defendant”). At the heart of this dispute is a house which the claimants built, with the defendant’s permission, on Parcel 232 Block 3139B East Central Registration Section (“the land”) owned by the defendant.

- [2] The claimants lived in the upper floor of the house from the time it was built and vacated it in or around August 2007 when the defendant and her family moved to the British Virgin Islands to take up residence here. The lower floor of the house is currently being occupied by a tenant of the claimants.
- [3] The claimants claimed that the defendant had orally agreed to pay them rent at the rate of \$400 per month from 1 January 2008 in respect of her occupation of the upper floor of the house. The house was valued by one of the leading real estate firms in this Territory, Smiths Gore at \$114,000. The defendant has not paid a cent since her occupation of the house. She posits that she has never agreed to pay such rent and, in any event, given that she owns the land, the house should be treated as her property and consequently, she is not liable to make any payments to the claimants in respect of her occupation of the house.
- [4] The non-payment of purported rent has resulted in a dispute between the parties. During the course of the dispute, the parties sought to reach a resolution. The claimants wrote to the defendant offering her to purchase the house from them. The defendant, through her solicitors, Farara Kerins wrote “...Further, we are instructed to inform you that our clients intend to accept your offer to purchase the house. She wish [sic] to have you present her with the most recent (within the last six month [sic]) appraisal of value...”
- [5] The defendant denies the existence of a contract and denies that any agreement was reached. In fact, she asserts that her previous lawyer made a mistake as the house should be treated as her property because of her ownership of the land.
- [6] As a result, the claimants instituted these proceedings seeking the following relief:
1. Payment of the sum of US\$114,000 being the current value of the house as appraised by Smiths Gore in April 2008 and constructed on Parcel 232 Block 3139B East Central Registration Section.
 2. Alternatively, payment of the sum of US\$400 per month as compensation/rent for the occupancy of the house from 1 January 2008 and continuing on a monthly basis.

3. Alternatively, damages for breach of contract to purchase the house and/or pay a monthly compensation for the occupation of the house in respect of same from 1 January 2008.
4. Interest at such rate and for such period as the Court deems just.
5. Costs.

The evidence

- [7] The evidence came from the claimants and the defendant. Having had the opportunity of seeing and hearing the parties and also observing their demeanour, I preferred the evidence adduced by the claimants to that of the defendant. I found the claimants to be candid and forthright. Suffice it to say, I found their evidence to be more credible.
- [8] The defendant struck me as evasive and impetuous. She was unable to provide any evidence that she and her siblings also assisted in the construction of the house. She was also unable to demonstrate that the government assisted financially. As her mother said, this government does not provide such assistance.
- [9] Then, the defendant accepts that her mother had mentioned to her a rent of \$400 but she says that she knows nothing about rent. In addition, she says that she never agreed to purchase the house and that the reference to that in her former lawyer's letter was a mistake. All in all, I found her evidence to be unbelievable. I believed that greed and selfishness have triumphed over truth and honesty not only in relation to her but her husband. Although he has not testified, he appears to be the mastermind behind this avarice. In Carlton Smith's witness statement, he referred to an incident where the defendant's husband not only physically assaulted him as he was attending to a problem that the tenant was experiencing but ordered him off the premises claiming that he was a trespasser.¹ Further, under cross-examination, the defendant admits that her husband wrote the letter dated 16 February 2009 which she signed.²

¹ See paragraphs 15 and 16 of Carlton Smith's witness statement dated 25 November 2009.

² See Tab. 12 of Claimants' Documents in Bundle of Agreed List of Documents.

- [10] An emotional mother, Rosa Smith continues to show immense love and affection for the defendant referring to her as “her queen” despite the defendant's hostility and vulgarity to her. Overall, I preferred the claimants' evidence to that of the defendant.

The facts

- [11] The facts as I found them are as follows. The defendant is the registered proprietor of the land which was purchased from a close and personal friend of her mother for the sum of \$15,000. In or around June 1997, with the defendant's permission, the claimants constructed a dwelling house on the lower portion of the land at an alleged cost of approximately \$125,000. The defendant denies that the claimants expended this sum of money to build the house, stating that a substantial amount of the construction work was undertaken gratuitously by relatives, friends and neighbors of the claimants. Neither of these contentions was proven. However, an Appraisal Report dated 14 April 2008 by Archibald C. Christian of Smiths Gore valued the house at \$114,000. I accept the Appraisal Report.
- [12] The house was primarily built to help offer shelter to the Montserratian refugees after the Soufriere Volcano in Montserrat had erupted. However, this plan never materialized. Instead, the claimants lived in the upper floor of the house. The defendant contends that her mother promised to eventually give the house over to her and her son which she took to mean that when the refugees who were to occupy the house had moved out, it would be for her disposal. However, this is inconsistent with the evidence since the defendant never asserted any ownership of the house even though it was never occupied by the Montserratian refugees. Instead, she permitted the claimants to occupy and rent the house. However, I believe that the claimants may have promised the house to her and her son but were hoping that at the very least, they would be compensated for the expenses incurred in the building and furnishing of the house. I believed that the claimants made this promise on the basis of their love and affection for the defendant but, as I said, they were hoping for some compensation, hence the discussion about the payment of \$400 monthly as rent/compensation. I do not believe that the claimants intended to give to the defendant the house absolutely free.

- [13] In 2005, with the defendant's permission, the claimants enclosed the downstairs of the house with a loan from a bank (which they are still paying). The apartment is being rented at a monthly rent of \$500 which the claimants are still collecting.
- [14] The defendant lived full-time abroad until her return in August 2007. Upon her arrival, the claimants moved out of the upper floor of the house to facilitate the defendant and her family taking up residence there. The defendant denies that there was an oral agreement between the claimants and her that she will pay rent/compensation of \$400 from 1 January 2008. During their testimony in court, I found both claimants to be candid and forthright and as such, I believe their evidence that there was such an agreement.
- [15] By letters dated 10 November 2007 and 27 December 2007 respectively, the claimants wrote to the defendant reminding her of the agreement to pay rent. She has refused to do so alleging that, as the owner of the land, she is also owner of the house.
- [16] In addition, the claimants claim that the defendant had made an agreement with them to purchase the house at the current market value, upon them producing an appraisal report of the house. They rely on a letter dated 9 January 2008, sent by Farara Kerins., which states, inter alia, that, Ms Oakley *"intends to accept your offer to purchase the house. She wish you to present her with the most recent (within six month)(sic) appraisal value"*.
- [17] Upon receipt of this letter from Farara Kerins, the claimants instructed Smiths Gore to carry out a valuation of the house. The cost of the Appraisal Report is \$400. As already mentioned, the house was valued at \$114,000.
- [18] By letter dated 14 May 2008, Mc.W Todman and Co. wrote to Farara Kerins acknowledging receipt of their letter of 9 January 2008. The letter stated: *"...our clients note that your client has accepted their offer to purchase the house upon the basis of a recently conducted appraisal report. In this regard, we enclosed for your attention an appraisal report for the house which was done by Smiths Gore, one of the leading valuers in the territory....You will note that Smiths Gore has appraised the house at \$114,000 and in this regard, [we] would now invite your client's proposal for payment of the appraised value of the house."*

[19] The defendant never replied to this letter. She continues to reside in the top floor of the house with her family. Arising out of these circumstances, the claimants instituted the present action.

The issues

- [20] The issues in this dispute may be considered under four discrete headings namely:
1. Whether the defendant is the owner of the house which is constructed on her land;
 2. If the answer to (1) is yes, whether the claimants have an equitable interest in the house, through proprietary estoppel;
 3. Whether there was any contract to pay rent/compensation, and if so, what is its effect; and
 4. Whether there was any contract to purchase the house, and if so, what is its effect.

Ownership of the house

- [21] It is common ground that the house was built at the expense of the claimants and that the defendant is the registered owner of the land.
- [22] Learned Counsel for the defendant, Mr. Nader submits that as owner of the land, the defendant is owner of the house and it is on that basis that she refuses to pay rent in respect of her occupation of the top floor of the house. He says that she cannot purchase what she already owns.
- [23] This issue can be disposed of simply. In **Billing v Pill**,³ Lord Goddard CJ said “*What is a fixture? The commonest fixture is a house which is built into the land, so that in law it is regarded as part of the land. The house and the land are one thing*”.
- [24] Therefore the question is: who becomes the owner of both the house and the land.
- [25] Mr. Nader submits that buildings erected on land become the property of the owner of the land. He relied on *Megarry & Wade, the Law of Real Property* 7th Ed at 23-001, where the learned authors stated:

³ (1954) 1 Q.B. 70, 75

“The general rule is “quicquid planatur solo, solo cedit”⁴ (“whatever is attached to the soil becomes part of it”). Thus if a building is erected on land and objects are permanently attached to the building, then the soil, the building and the objects affixed to it are all in law “land”... **They will become the property of the owner of the land, unless otherwise granted or conveyed**⁵. This is so, notwithstanding that it was the common intention of the parties that there should be no merger of ownership”⁶ (emphasis added).

- [26] It is plain that the house becomes a part of the land, and the defendant, being the registered owner of the land, automatically becomes the registered owner of the house. I therefore find that the defendant is also the legal owner of the house.
- [27] It is not disputed that the house was built by and at the expense of the claimants. According to the claimants, they paid approximately \$125,000 to construct the house on the defendant's land and with her permission. It is for the reason that they claim that they have an equitable interest in the house.
- [28] Learned Counsel for the claimants, Mr. Neale argues that the claimants are entitled to compensation for the house on the basis of the doctrine of proprietary estoppel. According to him, the defendant allowed the claimants to expend considerable sums of money on the development of her land on the understanding that they would obtain an interest in the house.
- [29] Importantly, Mr. Neale argues that the defendant would unjustly benefit if she were allowed to disregard her express and implied promise to compensate the claimants for the construction of the house and instead take occupation of the same to the exclusion of the claimants.
- [30] On the other hand, Mr. Nader submits that proprietary estoppel does not arise at all because the claimants have failed to plead the doctrine in their Statement of Claim. Learned Counsel did not rely on any authority to bolster his submission.

⁴ Minshall v Lloyd (1837) 2 M & W 450 at 459.

⁵ Royco Homes Ltd v Eatonwill Construction Ltd (1979) Ch 276, at 289.

⁶ Melluish v BMI (No 3) Ltd (1996) AC 454.

- [31] Three fundamental issues arise from the defendant's submission namely (1) what is the doctrine of proprietary estoppel? (2) does proprietary estoppel have to be specifically pleaded in the Statement of Claim? and (3) have the claimants pleaded proprietary estoppel?

Proprietary estoppel

- [32] The essence of proprietary estoppel is that if a legal owner of land has so conducted himself, either by encouragement or representations, that the claimant believes that he has or will acquire some right or interest in the land and has so acted to his detriment on that basis, it would be unconscionable for the legal owner to assert his strict legal rights.⁷ The basic requirements of the doctrine are that the legal owner makes a representation to the claimant that the latter either has or will be granted an interest in the land, and the claimant relies on this representation by acting to his detriment or otherwise by changing his position.

- [33] The rule from which proprietary estoppel arises, comes from the case of **Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd**⁸ where Oliver J provided the following statement of the elements of the doctrine:

“If A, under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and the knowledge of B and without objection from him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.”

- [34] This remains the most important and authoritative modern statement of the doctrine although it must now be qualified by the proposition that the relief granted by the court must be proportionate to the detriment suffered and that the court is not always required to satisfy his or her expectation by awarding the promised or expected interest in land.⁹

⁷ Snell, *Principles of Equity*, 29th edition, pages 573 -574.

⁸ [1982] Q.B. 133..

⁹ See *Jennings v Rice* [2002] EWCA Civ 159 and *Grundy v Ottey* [2003] EWCA Civ 1176.

[35] According to *Snell's Principles of Equity*,¹⁰ there are four ingredients to establish a proprietary estoppel. First, the claimant must show that he has incurred expenditure or otherwise acted to his detriment (i.e. the element of detriment). Secondly, the expenditure or detriment must have taken place in the belief either that the claimant owned a sufficient interest in the property to justify the expenditure, or that he would obtain such an interest (mistaken belief). Thirdly, the claimant's belief must have been encouraged by the owner of the land or others acting on his behalf (i.e. the element of assurance). Fourthly, there should be no bar to the equity (e.g. misconduct or delay on the part of the claimant). This particular formulation of the doctrine was applied by the Court of Appeal in **Brinnard v Ewens**.¹¹

Does proprietary estoppel have to be specifically pleaded in the Statement of Claim?

[36] Learned Counsel, Mr. Nader insists that the claimants have failed to plead proprietary estoppel in their Statement of Claim and as such, they are now estopped from relying on the doctrine.

[37] The learned authors of Bullen & Leake & Jacobs Precedents of Pleadings,¹² state as follows:

“Every estoppel must be specifically pleaded, not only because it is a material fact, but also because it raises matters which might take the opposite side by surprise, and usually raises issues of fact not arising out of the preceding pleadings....It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (*Houstoun v Sligo* (1885) 27 Ch D 448; and see *Sanders (or se Saunders) v Sanders (or se Saunders)* (1952) 2 All ER 767, p 769, per Lord Merriam P.). On the other hand, where a party omits to plead the defence of estoppel, when he has the opportunity of doing so, he cannot thereafter rely on it (*Matthew Osbourne* (1853) 13 CB 919 and see *Trevivian v Lawrence* (1704) 2 Smith LC 13 ed 655.”

[38] Prior to the introduction of the Civil Procedure Rules, 2000 (“the CPR”), the most elementary principle of pleading was that one pleaded the material facts on which a party relied for his claim or defence but not the evidence by which those facts were to be proved.

¹⁰ 29th ed. at pp. 573 et seq.

¹¹ (1987) 19 H.L.R. 415 at 416, per Nourse L.J.

¹² 13 Ed. p 1148

Furthermore, whilst the old rules did permit the pleading of law, in practice that was usually only done where not to plead the law in question might take the other side by surprise. Now, to what extent do these basic tenets of the old approach to pleading still hold good?

[39] On the face of it, both of these principles are now under attack. While (by CPR 8.7) a claimant must still plead “a statement of all the facts on which the claimant relies”, there is no doubt that the CPR do not adhere to the strict demarcation line between facts and evidence that was embodied in the old rule and they also appear to adopt a rather more relaxed attitude to the pleading of law.

[40] In **McPhilemy v Times Newspapers Ltd**,¹³ Lord Woolf MR gave guidance upon the statements of case under the new regime. At pages 792-793, he said:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader.” [emphasis added]

[41] Lord Woolf went on to observe that excessive particulars could serve to obscure, rather than clarify issues, and could lead to fruitless but expensive tactical applications. Recently, the above dictum of Lord Woolf was considered by the Court of Appeal in **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**.¹⁴ It is apparent from the judgment the modern approach of the courts to pleadings generally. A fundamental issue before the High Court was the determination of the extent of the obligation upon the claimant and the defendant to set out in their pleadings all the facts on which they intend to rely. The issue arose whether the contents of certain documents and witness statements (and an expert report in particular) were particulars of allegations contained in the pleadings or whether they

¹³ [1999] 3 All ER 775. **McPhilemy** was applied by the Court of Appeal in **Tancic v Times Newspaper Ltd (2000) The Times, 12 January**.

¹⁴ St. Vincent & the Grenadines Civil Appeal No. 12 of 2006 (judgment delivered on 16 July 2007).

were new allegations, amounting to a change in the statements of case. The court of appeal upheld the submission of counsel for the appellant that the judge failed to distinguish between a fact and a particular of a fact. Barrow J.A. said:

“It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The issue in the *Three Rivers* case was the need to give adequate particulars, not the form or document in which they must be given. **In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties.**” [emphasis added]

- [42] So, pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties.

Have the claimants pleaded proprietary estoppel?

(1) The element of detriment

- [43] The requirement of detriment was emphasised in **Greasley v Cooke**.¹⁵ Dunn L.J. said: *“There is no doubt that for proprietary estoppel to arise the person claiming it must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment.”* Expenditure and detriment can take any form. It does not have to take the form of expenditure of money or other quantifiable financial loss, provided that it is substantial and was incurred or suffered on the faith of some representation. The test is whether it is unconscionable in all the circumstances for the assurance to be withdrawn or disregarded.
- [44] In the present case, as the Court of Appeal accentuated in **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**, I am obligated to look at the claim form, the statement of

¹⁵ [1980] 1 W.L.R. 1303, 1313, Dunn L.J.

claim as well as the witness statements in order to see whether the claimants have pleaded the doctrine of proprietary estoppel.

- [45] In the witness statement of Carlton Smith, he stated *"In or about 1997, whilst having Esther's two children living with us, we ask her permission to build a house on the land as an investment as well as to provide shelter for our Montserratian friends who were in need of refuge.... Esther gave us permission to build on the land.... The building cost us about US\$125,000... We later with the full knowledge and consent of Esther enclosed the downstairs of the new house with a loan from the bank of which we are still paying...."*¹⁶
- [46] Rosa Smith also testified to this effect.¹⁷ Further, in the defendant's Pre-Trial Memorandum, she admits that "the claimants represented to her that the house was to be constructed, at least in part, for the purpose of accommodating refugees from Montserrat and that she did not prevent the claimants from constructing the house."¹⁸
- [47] As I see it, the facts show that the defendant allowed the claimants to expend considerable sums of money on the development of her land which was to be used for investment purposes. As the Montserratian refugees did not arrive, the claimants moved into the house and instead, rented their own home and were receiving income. When the defendant asked to occupy the house, the claimants altered their position by terminating the tenancy of their own home and vacating the house on the strength that the defendant had agreed to pay \$400 to occupy the house. They permitted her to occupy the house rent-free for 6 months until 31 December 2007.
- [48] In my opinion, the claimants acted to their detriment by expending considerable sums of money, giving up their rental income and losing the use of the house. They are still paying the bank although it is a set-off by the rent that they are receiving from the tenant. If the tenant vacates the premises, the claimants still have to pay the bank. I have already found that the defendant agreed to pay the monthly rental of \$400 and it is unconscionable in these circumstances for her to disregard her assurances.

¹⁶ See paragraphs 5 and 6 of Carlton Smith's witness statement.

¹⁷ See paragraphs 5, 6, 8, 10 and 17 of her witness statement.

¹⁸ See paragraph 10(c) and (d) of Defendant's Pre-Trial Memorandum.

(2) Mistaken belief

[49] Next, the expenditure or detriment must have taken place in the belief either that the claimant owned a sufficient interest in the property to justify the expenditure, or that he would obtain such an interest (mistaken belief). In incurring the expenditure or altering his position for the worse, the claimant should have been labouring under the delusion that he owned or that he would obtain sufficient interest in the subject-matter of the litigation to justify the expenditure on that property.

[50] The evidence here is that the claimants built the house on the defendant's land and with her permission with the expectation that they will be able to use the house for investment purposes and particularly, to recoup the expenses incurred in building it. With the defendant's consent, they enclosed the downstairs of the house which is still being rented to a tenant as an investment. So, in doing all of this and still paying a loan to the bank, the claimants must have been labouring under the mistaken belief that they owned or they have sufficient interest in the house. Indeed, they were living in the house. They rented the downstairs and overall, they developed the house in a manner that they saw fit.

(3) Element of assurance

[51] The third element is the belief or delusion of the claimant must have been induced and sustained by the owner. In other words, there should be some form of encouragement. Where the claimant fails to establish that either by language, or conduct, or silence and inaction he was encouraged, or his activities were acquiesced in by the owner, he would not succeed. There should be either active or passive encouragement.

[52] In the present case, the defendant gave the claimants permission to build the house on her land. When they enclosed the downstairs of the house, she consented to that. In my opinion, the defendant encouraged the claimants to build on her land. Throughout, she never objected to the expenditure nor asserted that the house was hers. In paragraph 37 of the witness statement of Rosa Smith, she stated thus:

“...on several occasions the defendant had openly acknowledged to us that not only did she give her consent to the construction of the house but that same belonged to us notwithstanding her ownership of the land.”

[53] In paragraph 9 of her defence, the defendant admits paragraph 10 of the statement of claim which reads in part "It was further stated that the defendant "intends to accept your offer to purchase the house. She wish [sic] you to present her with the most recent (within six month) appraisal value." Indeed, she was willing and ready to purchase the house from the claimants in effect, acknowledging that they had an interest in the house.

[54] I therefore find that the defendant actively encouraged the claimants to build the house on her land.

(4) No bar to the equity

[55] The next element is that there should be no bar to the equity (e.g. misconduct or delay on the part of the claimant). There has been no misconduct or delay on the part of the claimants in seeking to be compensated for the construction of the house which rests on the defendant's land.

[56] The claimants assert that there was an oral agreement between them and the defendant that she will pay a rent of \$400 from 1 January 2008. This is after allowing the defendant to live rent-free for the first six months until she gets settled and finds herself a job.

[57] After the defendant failed to pay the claimants sought an amicable settlement of the matter due to their familial relationship. When that failed, they sought legal advice. So, the claimants have come to the court with clean hands seeking the equitable remedy of proprietary estoppel.

Range of remedies

[58] Now that an equity of proprietary estoppel has been established, I must identify the "maximum extent of the equity",¹⁹ followed by an analysis of the "minimum equity to do justice"²⁰ and then finally "look at the circumstances of the case to determine in what way the equity can be met." The expectation induced by the representation or promise is the maximum equity. The minimum equity takes the form of the detriment suffered relying on the representation.

¹⁹ *Gillett v Holt* [2003] 3 W.L.R. 815, 840G-H.

²⁰ *Crabb v Arun D. C.* [1976] Ch. 179, 198.

- [59] There is therefore a wide range of relief within which the court can exercise its discretion to tailor the order to satisfy the equity.
- [60] In the case at bar, the claimants are no longer in occupation of the upper floor of the house. The defendant lives there with her family. The most appropriate way of satisfying this equity is to award the claimants reimbursement of moneys expended on building the house. In **Cashley v Seale**,²¹ the defendant has spent a considerable sum of money on fitting out and improving shop premises in the expectation of a substantial tenancy which ultimately, was not granted to her. The defendant had already given up possession of the shop at the date of the trial so the appropriate form of relief was held to be restitution of the funds she had laid out in improving the premises.
- [61] In the present case, the claimants have obtained from Smiths Gore, the current appraisal of the house, valued at \$114,000. I will therefore award the claimants the sum of \$114,000 being the current value of the house. Alternatively, if the defendant cannot afford to purchase the house, then I will order that she pays the sum of \$400 monthly as rent/compensation commencing 1 July 2010 and continuing until she pays off the amount of \$114,000. The defendant must also pay the arrears of rent from 1 January 2008 to 30 June 2010 within 6 months failing which the court may order that the land be sold to the claimants at a price to be agreed by the parties upon a current valuation.

Other issues

- [62] There are two other issues. Based on my findings in respect of proprietary estoppel, I do not think that it is necessary to explore either of these issues. But, briefly, as I have already found, there was an agreement between the parties that the defendant will pay \$400 monthly.
- [63] The other issue of whether there was a contract to purchase the house is now merely academic based on my decision. For present purposes, I will not deal with it any further.

²¹ Unreported, October 28, 1986, C.A. available on Lexis.

Conclusion

[64] For all the reasons stated above, I will award the claimants the sum of \$114,000 being the current value of the house. Alternatively, that the defendant shall pay the sum of \$400 monthly commencing 1 July 2010 and until she pays off the amount of \$114,000. The defendant must also pay the arrears of rent from 1 January 2008 to 30 June 2010 within 6 months failing which the court may order that the land be sold to the claimants at a price to be agreed by the parties upon a current valuation.

Interest and costs

[65] The claimants also claim interest and costs. The general principle is that a successful party is entitled to his costs. Costs are discretionary. In the exercise of my discretion, I will not make any award of interest and/or costs to the claimants since over the years, they have benefited from the use of the defendant's land. Consequently, this can be set-off against any award of interest and/or costs that I would have made.

Indra Hariprashad-Charles
High Court Judge