



[2022] JMSC Civ 162

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2019 CV 00285**

| | | |
|----------------|--------------------------|--------------------------------|
| BETWEEN | HORACE BROWN | 1ST CLAIMANT |
| AND | SHIRLEY BROWN | 2ND CLAIMANT |
| AND | CHRISTOPHER BROWN | 3RD CLAIMANT |
| AND | ELLEN ANN MELLISH | DEFENDANT |

IN OPEN COURT

Miss Judith M. Clarke instructed by Judith M. Clarke & Co for the Claimants

Miss Gillian Mullings instructed by Naylor & Mullings for the Defendant

Heard: March 14, 15 and 16, 2022 and September 30, 2022

Land – Proprietary Estoppel – Equity

WINT-BLAIR, J

[1] By way of a Claim Form filed on February 1, 2019, the claimants, Horace Brown, Shirley Brown and Christopher Brown seek the following orders:

- a. A declaration that having regard to the defendant's representations to the claimants or any one of them, the claimants' contributions towards the*

improvement and/or maintenance and/or upkeep of the property situate at Lot 363 Edgewater in the said parish and registered at volume 1080 folio 587 of the Register Book of Titles in reliance on the said representations and/or having regard to the defendant's conduct with respect to the claimants' said actions, the defendant is estopped from denying that the claimant has an equitable interest in the subject property.

- b. Alternatively, a declaration that the entitlement (if any) of the defendant in all that parcel of land part of PORTMORE in the parish of St. Catherine situate at Lot 363 Edgewater in the said parish and registered at volume 1080 folio 587 of the Register Book of Titles has been extinguished under and by virtue of the provisions of the Limitations of Actions Act and the claimant has, in any event acquired title thereto having regard to the said Act.*
- c. A declaration that the Claimants are the beneficial owner of all the land registered at volume 1080 folio 587 of the Register Book of Titles in the name of the Defendant.*
- d. Alternatively, a declaration that the Claimant has an equitable interest in the said property.*
- e. A determination as to the claimant's interest in the said property.*
- f. Such further and other relief as to this honourable court seems just.*
- g. Costs.*

[2] By way of Defence and Counterclaim filed on March 1, 2019, the defendant, Ellen Ann Mellish claims against the 1st claimant:-

- a. Recovery of possession for ALL THAT PARCEL of land part of PORTMORE in the parish of Saint Catherine being Lot numbered THREE HUNDRED AND SIXTY THREE on the plan of part of Edgewater deposited in the Office of Titles on the 9th day of November, 1971 of the*

shape and dimensions and butting as appears by the said Plan and being land comprised in Certificate of Titles registered at Volume 1080 Folio 587.

b. An order compelling the 1st Claimant to deliver up possession of the said property at Lot 363, 34 Edgewater Avenue, Edgewater in the parish of Saint Catherine.

c. Mesne Profits.

d. Such further and other relief as to this Court seems just.

e. Costs.

BACKGROUND

[3] The claimants reside at Lot 363, situate at 34 North Edgewater Avenue, Bridgeport in the parish of St. Catherine being the land comprised in Certificate of Title registered at Volume 1501 Folio 316 of the Register Book of Titles (“the subject property.”)

[4] The 1st and 2nd claimants are husband and wife and the 3rd claimant is their adult son. The defendant is the registered proprietor of the subject property. She is the aunt (“Aunt Ann”) of the 1st claimant and during her lifetime was a resident of the United States of America.

CLAIMANTS’ SUBMISSIONS

[5] The 1st claimant contends that in or around 1980, the defendant invited him to move to the subject property with his family. He accepted her invitation. The 1st claimant, his wife and four (4) children moved to the subject property from 116 Barbican Road where they had been living and where the 1st claimant carried on business as a woodworker.

- [6] After moving to the subject property, the claimants asserted that they began to repair and make improvements to the subject property in order to establish a home there. They said that the defendant indicated to the 1st and 2nd claimants that she had no interest in returning to Jamaica but wished to be able to stay at the subject property whenever she visited the island. On her initial visits after they moved in, the defendant expressed pleasure at the improvements they had made to the subject property. They submitted that they maintained and improved the subject property in full view and with the express approval of the defendant. The claimants argued that the defendant had on occasion over the period of their occupation expressed to the 1st claimant that the house was his.
- [7] Further that in the early 1990s, on one of her visits to Jamaica, the defendant cautioned the 1st claimant not to make any further improvements to the subject property while her husband, (who was at the time, a registered joint tenant), was alive. Once her husband died, the subject property would belong to the 1st claimant. The defendant's husband died in 2007. Thereafter, the claimants contended that they began to make significant improvements to the property with the full knowledge and in the full view of the defendant. Further that they made these improvements in reliance on the defendant's assurance that she was not interested in the property and that their full ownership was contingent upon the death of her husband. The 1st claimant also moved his carpentry business to the subject property.
- [8] The claimants submitted that between the 1980s and throughout the period of their occupation and while they improved the subject property, the defendant would visit and remain with them as their guest. In or around 2018, the defendant and the 2nd claimant had a dispute at which time, the defendant announced her intention to sell the subject property. Sometime in 2019, a realtor visited the subject property and informed the claimants that it was being sold. As a consequence, the claimants caused a caveat to be lodged against the Certificate of Title. In 2019, the defendant served a Notice to Quit on the claimants.

[9] The claimants rely on proprietary estoppel in order for a determination of their interest in the subject property to be made by the court.

THE DEFENDANT'S SUBMISSIONS

[10] For her part, the defendant asserted that in or around the 1960s, she and her husband migrated to the United States of America. In 1971, they used their earnings to purchase the subject property.

[11] The defendant averred that herself and her husband stayed at the subject property during their visits to Jamaica. They also extended the use of the subject property to various family members, particularly Deveroux McDonald. Further that in or about 1980, the claimants and their family members were given permission to occupy the subject property. Mr Deveroux McDonald had already moved out of the house and it was he who gave the keys to the claimants.

[12] She posited that the claimants occupied the subject property while she and her husband visited the island over the span of several years. The defendant contended that she and her husband paid the mortgage on the subject property and paid all the property taxes from the time the subject property was purchased onward.

[13] The defendant's husband died on December 31, 2007. She submitted that she decided to sell the subject property after she began to feel uncomfortable about the 2nd claimant's behaviour. There were also barrels that she used to send to Jamaica and store in the kitchen of the subject property. These barrels were being opened and their contents distributed by the first and second claimants without her knowledge or consent. She paid for repairs to the house and assisted with its expansion. Subsequently, in 2018, she engaged a realtor and her attorneys in order to recover possession and sell the subject property. The claimants were served a notice to quit.

THE LAW

The doctrine of proprietary estoppel

[14] The doctrine of proprietary estoppel is a cause of action in equity against the owner of property who in some way leads or allows a claimant to believe that he has or can expect some kind of right or interest over the owner's property and, the claimant acts to his detriment in that belief¹.

[15] The equitable doctrine of proprietary estoppel was pronounced by Lord Kingsdown, in the well-known and often cited case of **Ramsden v Dyson**² when at page 170, he said:

“If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.”

[16] The principle has been redefined and expanded over the years. A claimant who seeks to invoke the doctrine must demonstrate that the party against whom he seeks to create an equitable entitlement, allowed or encouraged him in believing that he would have a certain interest in land, or that party permitted him to act in the expectation that he would become the owner of the land and in relying on that belief, he acted to his detriment.³

¹ Halsbury's Laws of England/Estoppel (Volume 47 (2021))/1 at paragraph 311

² [1866] LR 1 HL 129

³ See - **Wilmot v Barber** (1880) 15 Ch. D. 96; **In Re Basham** [1987] 1 All ER 405; **Inwards v Baker** [1965] 1 All ER 446 and **AG of Hong Kong and Anor v Humphreys Estate (Queen's Gardens) Ltd** [1987] 2 All ER 387

[17] In all these cases owners of land made promises not to insist on their legal rights in the strict legal sense. It was intended that the promisees would act upon these promises and they so acted but to their detriment. A common thread which runs through all these cases is that the owners of the lands, allowed or encouraged expenditure on the land and the parties expending the money did so in the belief that they would enjoy some right or benefit which the owner sought to deny. The owners were accordingly estopped from asserting their right to the lands.

[18] In the case of **Inwards v Baker**⁴, Lord Denning, MR averred:-

“It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.

All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do.”

[19] In the case of **Caren Cranston v Tamazine Samuels and Gairy Toorie**⁵, Edwards, JA provided a comprehensive discourse on the doctrine of proprietary estoppel. At paragraph 60 she stated:-

“The doctrine of proprietary estoppel was developed in equity as a species of equitable estoppel and is a remedy against the unconscionable or inequitable conduct of one party in dealing with another. The remedy is available where it is established that “one party knowingly encourages another to act, or acquiesces in the other’s actions to his detriment and in

⁴ [1965] 1 All ER 446, at pages 448 and 449

⁵ [2019] JMCA Civ 42

infringement of the first party's rights" (see Hanbury & Martin Modern Equity, 17th edition, at page 897, paragraph 27-022). That party cannot later complain of the infringement of his proprietary rights, and may be forced to give up that right which he encouraged the other party to expect. It is a cause of action in equity brought by a claimant to validate his expectation that he would gain a benefit or right in the defendant's property, brought on by the conduct of the defendant in encouraging, promising or acquiescing in the claimant's acting to his detriment based on that expectation. Estoppel then creates a new right and interest in the claimant. The burden of proof falls on the defendant to show that the claimant's conduct was not induced by his assurances. The extent of the equity is to make good the claimant's expectations."

[20] In the case of **Crabb v Arun District Council**⁶, Lord Denning M.R. said:

"The basis of this proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity." If I may expand what Lord Cairns L.C. said in Hughes v. Metropolitan Railway Co. (1877) 2 App.Cas. 439, 448: "it is the first principle upon which all courts of equity proceed," that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights – then even though that promise may be unenforceable

⁶ [1976] 1 Ch 179 at 187

in point of law for want of consideration or want of writing – then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise: see Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130 and Charles Rickards Ltd. v. Oppenheim [1950] 1 K.B. 616, 623. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In Ramsden v. Dyson (1866) L.R. 1 H.L. 129, 170 Lord Kingsdown spoke of a verbal agreement “or what amounts to the same thing, an expectation, created or encouraged.” In Birmingham and District Land Co. v. London and North Western Railway Co. (1888) 40 Ch.D. 268, 277, Cotton L.J. said that “... what passed did not make a new agreement, but ... what took place ... raised an equity against him.” And it was the Privy Council in Plimmer v. Wellington Corporation (1884) 9 App.Cas. 699, 713–714 who said that “... the court must look at the circumstances in each case to decide in what way the equity can be satisfied” giving instances.”

[21] Scarman LJ, in **Crabb v Arun**, accepted that the claimant had no contract, no prescriptive right and no grant. However, he agreed he had an equity. He said this:

“If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the Court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is

established? And, thirdly, what is the relief appropriate to satisfy the equity?"

[22] The defendant, her agent or her predecessor in title, must have encouraged the claimant to spend money or do other acts directly or indirectly while failing to assert her legal rights. The claimant then has to show that the defendant, by now asserting her legal right, is acting in an unconscionable, unequitable and unjust manner. If this occurs, the question is what remedy would be available to the claimant.

[23] In Snell's Equity⁷ the conduct required to raise the doctrine equitable estoppel is explained as follows:

"The cases show that at least three types of conduct suffice to raise the estoppel. First acquiescence, succinctly described as follows: "If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards interfere and take the profit."

Secondly, encouragement which occurs where a party under an expectation created or encouraged by a landowner that he will have an interest in it goes into possession and lays out money upon the land. Equity may compel the owner to give effect to the expectation.

Thirdly, promises or representations as to future conduct which may occur where a party is led to suppose that the other will not insist on his legal rights either at all or for the time being. But all these are aspects of a much wider doctrine. Recent authorities "have supported a much wider jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable." The doctrine is, indeed, very flexible."

⁷ Twenty-ninth edition, at page 569, para. 2

[24] To successfully raise the doctrine of proprietary estoppel, the claimants must satisfy these elements: -

- i. That there has been a representation or an assurance by the landowner that he will not insist on his strict legal rights;
- ii. That they relied on a representation (or change of position on the strength of it) by the claimant; and
- iii. That some resultant detriment or disadvantage to the claimant arising from the unconscionable withdrawal of the representation by the landowner.

[25] In **Annie Lopez v Dawkins Brown and Glen Brown**⁸, Morrison, JA looked at the effect of an agreement on the doctrine and at paragraph 73 he opined:-

“Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity. And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action.”

[26] In **Cranston v Tamazine Samuels and Gairy Toorie**⁹, Edwards, JA gave the effect of successfully establishing the equity:

⁸ [2015] JMCA Civ 6

⁹ (supra)

“Where proprietary estoppel is successfully established, it acts as a qualification to the general rule that a person who voluntarily spends money on improving the property of another cannot claim an interest in that property or compensation for the sums spent.”¹⁰

[27] All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In every case in which a claim based on proprietary estoppel is made, the court must have regard to the particular facts of the case.¹¹

ISSUES

1. Did the claimants have a genuine belief mistakenly or otherwise, that the subject property would belong to them, and based on this belief, did they act to their detriment by expending money on it with a view to creating a comfortable home for their family who were residing there, with the encouragement and/or acquiescence of the respondent.
2. If this is in fact so, the court must then decide if it would be unjust and inequitable for the respondent, in all the circumstances, to be permitted to assert her legal rights.
3. What conduct was displayed in this case by either side.
4. Has the claimant satisfied the elements of proprietary estoppel.

¹⁰ *Cranston v Tamazine Samuels and Gairy Toorie* (supra), at paragraph 65

¹¹ *Attorney-General of Hong Kong and another v Humphreys Estate (Queens Gardens) Limited* [1987] 2 All ER 387; *Cranston v Tamazine Samuels and Gairy Toorie* (supra)

The evidence of the defendant

[28] The witness statement of Ellen Ann Mellish (now deceased) was admitted as Exhibit 1 pursuant to section 31E of the Evidence Act.¹² It is set out in full as this trial date had been fixed before the defendant died. This is her evidence in chief:

"I, ELLEN ANN MELLISH state as follows:

- 1. That my address is 4522 NW 50 St., Coconut Creed, FL 33073 in the United States of America. I am the registered owner of the property at Lot 363, 34 North Edgewater Avenue, Bridgeport in the parish of St. Catherine (hereinafter referred to as the 'subject property') and the Defendant herein.*
- 2. On or about 1968, I migrated to the United States of America where I worked as a registered nurse.*
- 3. The subject property was purchased by my husband and I while I was residing in Manhattan, New York on or about the 22nd of December 1971. We acquired the subject property as joint tenants using both our financial resources. The subject property was bought as a family home for my husband and our children.*
- 4. My nephew Deveroux McDonald also stayed at the subject property after we purchased same with the permission of myself and my husband.*
- 5. On or about 1980's I was contacted by Deveroux McDonald, brother of the 1st Claimant and both of whom are my nephews, who informed me and I did verily believe that the 1st Claimant was evicted from his residence in Barbican and his household items were on the street.*

¹² The Death certificate became Exhibit 3.

6. *Deveroux asked me if I could allow the 1st Claimant to stay in the subject property. I told him yes. The 1st Claimant was appreciative of the assistance and expressed his thanks and gratitude to me.*
7. *The agreement was that the 1st Claimant and his family could stay at the property without paying rent until their living situation improved. He would have full access to the subject property, save and except for the master bedroom which was to be left unoccupied for the yearly visits my husband and I would make. In return, the 1st Claimant would manage the upkeep of the property and pay the utility bills.*
8. *At the time I my husband was not pleased with the decision I made but nevertheless he agreed to the arrangement as the 1st Claimant was my family. My husband and I usually went home to Jamaica and stay the subject property at maximum twice every year.*
9. *On or about the 31st day of December 2007 my husband died. As we held the subject property as joint tenants, I succeeded his interests and now am the sole proprietor of the subject property.*
10. *The 1st Claimant was a cabinet maker by trade was having financial troubles as the market for custom cabinets had reduced. Consequently, there were times, while staying at the subject property with his family, when he required my assistance to carry out his agreed obligations with respect to the property.*
11. *I sent the 1st Claimant monies to make repairs to the subject property including the repair of the veranda roof. I also sent the 1st Claimant monies to assist with the completion of an expansion project. He suggested that a part of the garage could be enclosed and it would make the dining room a little bigger.*
12. *Notably, from the purchase of the subject property to date I have borne the sole responsibility of paying all the property taxes associated with*

same. Further, aside from monies sent for the repairs of the subject property, I have also sent the 1st Claimant money for his personal use.

13. Since the purchase of the home in 1972 up until 2017, whenever I visited Jamaica, I usually send barrels to the subject property. I usually ship the barrels from New York and then fly to Jamaica to receive the said barrels myself. When the barrels would arrive at the subject property I initially stored them in the kitchen, however, the 1st and 2nd Claimant would distribute the contents of the barrels to neighbours and their friends without my permission. Consequently, I started to keep the barrels locked in my bedroom at the subject property whenever I was not in the island.

14. The barrels were for the benefit of my family, including the 1st Claimant and his family. The 1st Claimant and his family would also benefit from the groceries and household supplies shipped in the said barrels.

15. On or about 2017, I noticed that whenever I visited the subject property the 1ST Claimant's wife would ignore me and act as if I never existed, I found it strange. After returning to my home in the United States of America after that visit, I read several articles about family members killing returning residents in Jamaica over property. I started to feel unsafe and stopped visiting the property as I thought that may be the reason the 1st Claimant's wife was now ignoring me.

16. I made an immediate decision that I wanted the property sold. When I informed the 1st Claimant that I was going to sell the subject property and his response was that he does not know what his wife will say, this caused me to be even more afraid as I did not know what the 1st Claimant's wife would do in retaliation to my decision. Consequently, after my last visit in 2017, I did not go back to the subject property.

17. After informing the 1st Claimant that I will be selling my home, I contacted my attorneys' Naylor & Mullings to begin the process of selling the home.

The 1st Claimant and his family were given a notice to quit however they refused to leave and are still in my home to date.

18. That having also discovered the 1st Claimants intention to take over my property, since October 2018 whenever I visit Jamaica, I now stay in a hotel as I am in fear for my life. I wish to sell the subject property so that I can recoup what was invested in same by myself and my husband.”

THE CLAIMANT’S CASE

Horace Brown (sworn)

- [29]** The witness statement and evidence in chief of Horace Brown stated that he is a woodworker who resided at the subject property. The defendant was his ‘Aunt Ann’, sister to his mother Sheila Wright. The defendant lived in the USA. He has two siblings they are Kenneth Bennett and Deveroux McDonald.
- [30]** When his mother died, he was ten (10) years old, his Aunt Ellen took his brothers to live with her and he went to live with his father Allan Brown. He remained there until he was twelve (12) years old when he was left with his father’s girlfriend Aunt Vie. His father left for the USA soon after.
- [31]** Aunt Vie also migrated to the USA and Mr. Brown was left with one Sonny Forrester at 118 Barbican Road, Kingston 8. He lived there for about five (5) years until he was eighteen (18) years old. It was with Sonny Forrester that he was trained as a woodworker. He constructed a workshop at 118 Barbican Rd. and began living at 116 Barbican Rd.
- [32]** Aunt Ann sent a message to him that he should go live and occupy the subject property which he did. It was Deveroux McDonald, his brother who gave him the keys to the house. In response to and in reliance on the invitation to live in house, he accepted the keys and moved in. The house consisted of three (3) bedrooms, two (2) bathrooms in disrepair, a small kitchen in disrepair, a small living and dining room and a garage. The witness said they set about cleaning

and repairing the subject property which had been vacant. They moved in shortly after the general elections in 1980.

- [33]** Horace Brown said shared a good relationship with Aunt Ann before and after moving into the house. She would send money and gifts, to himself and his family especially at Christmas. Aunt Ann came to Jamaica with her husband Cecil Mellish the first year after he moved to the subject property. She visited the house and told the claimants how pleased she was with the way they had fixed up the place. She said they should continue to live there. By that time, the claimants had cleaned up, fixed broken windows, repaired bathrooms, removed garbage from the house and painted it.
- [34]** He said that the next visit of Aunt Ann was three (3) years later, she came to the house and told the claimants not to do any more additions, only repairs.
- [35]** In the early 1990s Aunt Ann and her brother Peter Hall visited the house. She stated clearly to him that she was not interested in the house and that the house was his but he should not do any extensive additions while her husband was alive. She told the witness that once her husband pre-deceased her, the house would be his.
- [36]** Aunt Ann's husband, Cecil Mellish, died in or about 2007. After the death in the year 2007, she told the witness: "Horace, is your house. Do whatever you want to do with it."
- [37]** In reliance on that statement, the witness said he set about doing substantial work on the subject property. He enclosed the garage, knocked out an inside wall to open the kitchen and dining room and added a washroom. The house was expanded to three (3) bedrooms, two (2) bathrooms an open enlarged kitchen and dining room, enlarged living room, a new garage and a new washroom. The first claimant moved his workshop to the subject property. He did not give a date for this latter event.

- [38]** The first and second claimant's paid for this work out of their income, however there are no receipts for the material or work done as over time the witness said he threw them away.
- [39]** He continued by saying Aunt Ann was always pleased with the improvements they had made whenever she came to the subject property. Changes to the house were without reference to her. When a copy of the title was required by the parish council for changes to be made to the house, she sent it to him. When he explained to her the changes he intended to make, Aunt Ann said "do what you want to do with the place."
- [40]** Over the years the entire house was tiled twice, carpets removed, bathrooms upgraded, bath tubs replaced, roof repaired, and a washroom added. The subject property was upgraded and maintained based on the representation made by Aunt Ann that the house was the claimants'.
- [41]** Whenever Aunt Ann visited Jamaica and stayed at the subject property, the first and second claimant would give up their bedroom and sleep on the living room floor. When their two (2) daughters grew up and left, the couple would sleep in their room. There were four (4) children. Aunt Ann was well loved and well treated by the family.
- [42]** It was Aunt Ann who paid the taxes, she said that she would and the claimant's did not object. Whenever they would go to pay, Aunt Ann had already paid them.
- [43]** The last time Aunt Ann stayed at the subject property was in 2013, after that she stayed in a hotel on her visits. The first claimant was never given a reason for this.
- [44]** Sometime in 2018, a realtor arrived at the subject property. The witness called Aunt Ann who replied she had decided to sell the house and give him some money because on her last visit to the house, she had asked the second claimant to roast breadfruit for her to take back to the USA and she felt disrespected when the second claimant roasted it on a coal stove instead of in

the oven. The witness said he expressed surprise and told his wife who was equally surprised.

[45] The realtor began to show the subject property and the claimants lodged a caveat against its title. In 2019, Aunt Ann's attorneys served the claimants' with a notice to quit within fourteen (14) days. The claimants' filed this claim and remained resident.

Evidence related to Aunt Ann's witness statement

[46] The witness statement of the defendant was put to Horace Brown. He denied having financial troubles and asking his Aunt for assistance to carry out his agreed obligations with respect to the subject property.¹³ Further, he denied that there was an agreement with the defendant, the terms of which were:

- a. That he and his family could stay in the subject property rent free until their living situation improved.¹⁴
- b. That they would have full access to the subject property, save the master bedroom which was to be left unoccupied for the annual visits of the defendant and her husband.
- c. That the claimants would manage the upkeep of the subject property and pay the utility bills.¹⁵

[47] The witness denied that Aunt Ann sent him any money to repair the subject property to include the veranda roof, or the completion of the expansion.¹⁶

[48] The witness said he did not recall discussing the property taxes with Aunt Ann, as she told him that she would pay the taxes.¹⁷ The witness agreed that Aunt Ann sent him money for his personal use, she sent One Hundred United States

¹³ Exhibit 1 – para 10

¹⁴ Para 7

¹⁵ Para 7

¹⁶ Para 11

¹⁷ Para 12

Dollars (USD\$100.00) per year for the family. The first time she sent this amount was in 1976 when he got married and continuing until just before “the falling out.” The falling out was in the year Aunt Ann made the decision to sell.¹⁸

[49] The witness said he was unaware of Aunt Ann sending barrels to the house before he lived there, neither was he aware that she shipped any barrels, when she visited Jamaica, as she brought her suitcases and boxes. He did not keep the master bedroom locked for Aunt Ann, it was occupied by himself and his wife when Aunt Ann was not visiting. When she visited they would sleep in the living room. The house had three (3) bedrooms and the other two (2) were occupied by the four (4) children, two (2) sons and two (2) daughters and they were aged six (6) to ten (10). Aunt Ann did not lock barrels in any room when she visited.

Evidence related to Deveroux McDonald

[50] The witness was asked to comment on the witness statement of Deveroux McDonald, his brother.

[51] Horace Brown said that he was not evicted in the 1980s from Barbican Road, however, he did not address the evidence that he asked for assistance with his living situation. He denied that he lived in a shack without any modern conveniences,¹⁹ and further that Donovan Mellish had lived with his family at any time at the subject property.²⁰

[52] The witness said he did not observe Deveroux McDonald come to the subject property to collect things from barrels as no barrels were sent there, he knew of boxes not barrels and that Mr. McDonald got things from boxes. He denied that this went on until 2017 as by then Deveroux McDonald was living in the USA.²¹

¹⁸ Para 12

¹⁹ Para 5 witness statement of Deveroux Mc Donald

²⁰ Para 8

²¹ Para 9

Evidence related to Cynthia Bogle

- [53]** Cynthia Bogle and Horace Brown are cousins. He observed Cynthia Bogle come to the subject property to collect things from Aunt Ann. Cynthia lived in Westport, Portmore, St. Catherine and still does. Deveroux did not live at that address at the same time as Cynthia. He lived in the USA and Cynthia lived in Deveroux's house.
- [54]** In cross-examination, Horace Brown said that he never spoke with Cecil Mellish about the subject property. In the master bedroom, Aunt Ann, Peter Hall and himself were talking and Aunt Ann said, "Horace I'm not interested in this house, I am not coming back here to live, as long as Mr. Mellish dies before me, the house is mine." The year that Cecil Mellish died, Aunt Ann said to him "Horace, is your house. Do whatever you want to do with it." This conversation was also in the bedroom after Cecil Mellish had died. Present were Aunt Ann, Peter Hall and the witness. The witness knew that the name of Cecil Mellish was on the title and recalled that both he and Ann would visit.
- [55]** He said that three (3) years after they first moved in, Aunt Ann told them not to do any more additions, just repairs to the house. By then, they had changed two (2) toilet bowls, two (2) bathtubs and one (1) new face basin. Aunt Ann looking at it, said it was an addition and that there should be no more additions. He told her it was not an addition; it was because the bathroom could not be used. He did not put on any other rooms or do any more "expensive additions."
- [56]** The statement "as usual, my wife and I bought blocks and steel, cement and all the building material to carry out this improvement..." meant Cecil Mellish had died and Aunt Ann gave permission. Money was spent as it became available. The witness agreed that extensive work involving blocks and steel could only have taken place between December 2007 and the service of the notice to quit in

2019. The witness emphatically denied purchasing any blocks or steel to add to the house before Cecil Mellish died.

[57] The suggestion was put to the witness that December 2007 to 2019 is less than twelve (12) years, to which he agreed. (This ended the portion of the claim regarding adverse possession as counsel later conceded.)

[58] The statement he spent “all his resources improving this house based on the fact that Aunt Ann told me that she was not interested in it and it is mine” meant he was restricted to improving the bathrooms.

[59] The following paragraphs in the witness’ statement were shown to him and he was asked whether the resources he referred to meant just the bathrooms:

“41. I have spent all my resources improving this house based on the fact that Aunt Ann told me that she was not interested in it and it is mine. I also established and moved my business there based on Aunt Ann’s representation to me that it was mine and I could do whatever I wished with it.

42. I am 71 years old and do not now have the resources to relocate both me business and my home or either. All my life’s earnings and physical energy has been spent improving and maintaining this house.”

[60] In answer, Horace Brown said:

“No, could never be, when Uncle C²² died, those were the things I put in before he died, I put in the two baths, the two toilet bowls and one face basin, I don’t do anything more because Aunt Ann restrict me from doing any more things.”

[61] When he was asked whether all his resources were tied up in a face basin, two (2) toilets and two (2) bathtubs, the witness said: “You are trying to go from then,

²² Cecil Mellish is Uncle C

but is after Aunt Ann give me the go ahead that is my home that I start to spend my resources.”

[62] The witness at paragraph twenty seven (27) of his witness statement said that over the years the house was tiled twice. *“In the early years, we took up the carpet and laid terrazzo tile on the entire area...”* The following exchange resulted, (the paragraph having been read over to him):

“Q: What early years are you referring to

A: in the early part of the year before Uncle C died

Q: this took place before Uncle C. died

A: yes and we fixed the windows too

Q: why yesterday when you knew that you had tiled did you only mention changes to the bathroom

A: you were talking expensive, I never remember the tiling the room with the terrazzo tile because we dig it up and we do over the house in the ceramic

Q: when did you do it over in ceramic

A: when we doing the expensive repair

Q: when you say you did this work based on representations from Aunt Ann looking at para 27, the early tiling done before Uncle C died, you didn't do it because you knew you were going to get the house

A: no”

[63] The witness testified to taking all the money he could have spent on another house and spending it on the subject property.

“Q: when you say that you spent all your life improving and maintaining this house that is not true

A: *I spent my money there, all of my resources*

Q: *you are a wood worker, you have no verifiable income by way of tax return do you*

A: *no*

Q: *you have no contracts with anyone or any entity to verify your income do you*

A: *no*

Q: *do you have a bank account*

A: *yes*

Q: *you have not brought that bank account to show your earnings*

A: *no*

Q: *the contractor who worked on your place and the workmen he used, is it that you can't find a single one to come here and testify to your earnings*

A: *the whole a dem live in Browns Town and I did not know that I had to bring them come*

Q: *you went to a hardware which one*

A: *several hardware*

Q: *you have not brought any verifiable means of checking that you spent money at the hardware*

A: *my Aunt gave me the house, over the period of time since is my house I never think of putting up the receipts we just buy the things and throw away the receipts we never think it would come to this*

Q: *what you are saying is that Aunt Ann lied about sending you money to do the extension*

A: *yes*

[witness shown EXH 2 – Certified copy of title registered at Vol 1080 Fol. 587]

Sugg: the Mellishs' bought the property using a mortgage and it was not discharged until 1987

A: I don't know

Q: they paid the mortgage alone

A: I don't know anything about that part, she gave me the house

Q: Agree you never paid an mortgage

A: I did not

Q: you also paid no taxes on the house

A: because she said to me that I shouldn't pay none, I shouldn't worry about it, about paying the tax

Q: Aunt Ann was giving you a house that she paid mortgage and taxes for and was getting nothing back, correct

A: that's right

Q: at no time in the 40 odd years you lived in the house was any document prepared with respect to the agreement you said you had with Aunt Ann

A: no paperwork

Q: did you ask Aunt Ann why she gave you the house and was still paying taxes on it

A: I did not

Q: did you ever ask Aunt Ann to sign any paperwork and give house to you

A: one time I asked Aunt Ann when she give me the house, what about Mr. Mellish children, she say Horace don't worry about that

Q: where did this conversation take place

A: *in the bedroom*

Q: *who else was there when you asked her about Mr. Mellish's children*

A: *just me and she was in the bedroom*

Q: *so when she told you she was going to give you the house, did you tell anybody outside of your household*

A: *I told my family. I told them my Aunt give them the house, I told them in church when I'm testifying, that my Aunt gave me the house.*

...

Sugg: *she put barrels in the room*

A: *I did not go there and see any barrels in the room*

Sugg: *you got grocery, foodstuff and clothes out of these barrels*

A: *I got clothes and food from her suitcase and boxes she bring come, I don't know about anybody else*

...

Sugg: *Donovan Mellish, Uncle C's son, was in the house when you moved in*

A: *no*

...

Q: *did you tell your brother Devoroux that the house was being given to you*

A: *no*

Sugg: *you and your wife have made up a big lie in order to take away the house from Aunt Ann*

A: *that is not true*

Sugg: *neither you nor your wife spent money on improvements to the house*

A: *we throw our partner, when I work and collect my little much we collect it up and expand the house, Aunt Ann didn't give me a cent towards it*

Sugg: *you called Aunt Ann and brother Devoroux constantly asking them to send you money*

A: *not true*

Q; *you got the benefit of living in the property rent free and now you want the whole house*

A: *because she gave me the house and I do the other addition if she gave me the house is my house."*

The evidence of the second claimant

Shirley Brown (sworn)

1. *"My name is Shirley Brown and I reside at 34 North Edgewater Avenue, Bridgeport, St. Catherine. I am a canteen worker employed at Liguanea Prep School and the 2nd claimant in this matter. I am 65 years old.*
2. *The 1st claimant, Horace Brown is my husband.*
3. *We were married in 1976 and have produced four children namely Shirline, Antoinette, Christopher and Marlon. All our children were born between 1973 and 1978 while we were living at 116 Barbican Road, Kinston 8.*
4. *Between the early 1970s and some time in or around 1980 my husband built and operated a workshop on the premises where we lived at 116 Barbican Road.*
5. *In about 1980 he told me that his Aunt in America, Aunt Ann had told him that we could all go and live at a house which she owned at 34 North Edgewater Avenue, Bridgeport, St. Catherine. I had met her before that date as Horace*

had taken me to see her at the house. Aunt Ann is the same person as Ellen Mellish.

- 6. Based on what Horace told me in 1980 we went to the house to clean and fix it up to move in. At that time it consisted of three bedrooms, two bathrooms, a small kitchen, living and dining room (in one) and a carport.*
- 7. To the best of my recollection we moved in with our children some time after the general elections in 1980. We had cleaned the house and repaired it before moving in. when we went there to see it after Aunt Ann told us we could move in, the house was vacant and very dirty. There were piles of garbage inside and outside. Old furniture was left there, the windows were in disrepair, the carpet was old and dirty and the bathrooms were not in good condition. When we moved in, we had all the garbage and old furniture removed from the property, my husband repaired the bathrooms as best we could at the time, we cleaned the old carpet, painted and cleaned up the house.*
- 8. In the years following, Horace and I took our time and made extensive repairs and improvements to the house. Aunt Ann would visit Jamaica and stay at the house. She would always express that she was very pleased with the way we had fixed up the place.*
- 9. Over time and as the years went by, we tiled and retiled the house. (In the early days we had tiled it with terrazzo tiles but later in about the early 200s we retiled the entire house with ceramic tiles). We removed the partition wall between the kitchen and the carport, enclosed a substantial section of the carport to construct a separate dining room and built a new carport at the front . We also removed the partition wall between the veranda and the living room and enclosed a part of the veranda to create a larger living room. We installed modern decrabond roof tiles on the new garage roof and entirely*

changed up the appearance of the entrance to the property. We tiled and upgraded both bathrooms and installed new bathtubs, added a washroom. We have, at our own expense maintained and kept the property in very good condition for over forty (40) years.

10. While we lived at the house and made improvements over a period of over two decades, although Aunt Ann visited us there, she never interfered with us in our activities or tried to prevent or control anything we did. She told us to do as we wished because it is our house. We felt and treated the property as if we were the owners. I and my husband spent money on the house, fixed it up and made it our home because Aunt Ann told us it was out house. She said that to me and Horace. I knew that the house was in the joint names of herself and her husband Cecil Mellish. They had no children together but he had children.

11. My children grew up in that house. All have since left with the exception of Christopher George who is 44 years old. While they were growing up there. Aunt Ann would visit and sometimes send Horace small money gifts at Christmas. She was always very much welcome and we treated her royally on her visits. In fact, my husband and I would give up our room to her on her visits. When all 4 children lived at home, we would sleep on the living room floor during her visits. After both our girls became adults and left home, we would sleep in the room they used to occupy whenever Aunt Ann visited.

12. Aunt Ann insisted that she would continue to pay the taxes. I am not sure why. I remember on occasions telling Horace that we should pay the taxes ourselves. However, on the occasions when we attempted to pay it, we found that she had already paid it.

13. *From the time we moved there we all had a very good relationship with Aunt Ann. She told me time and time again that the house was ours to do as we wished with it. As a result, over the years we put all our financial efforts into improving and maintaining this house and did not seek to buy or establish a home elsewhere.*
14. *The last time Aunt Ann visited Jamaica and stayed at our house was some time in about 2013. After that she would stay at a hotel or guest house. I am not quite sure why but I know this because I recall on at least one occasion in about 2018 when Horace told me that she had asked him to meet with her at a hotel.*
15. *Sometime in about 2018, it was brought to my attention that persons had visited the house asking to view it as it had been put up for sale.*
16. *It was some time after this that I learnt from my husband that Aunt Ann had expressed that she was selling the house because I had offended her by roasting a breadfruit for her on a coal stove instead of in the oven. (I had not seen her since her last prior visit in about 2013).*
17. *After I was told that these persons came to view the house, my husband and I went to see a lawyer who advised us to lodge a caveat against the title to protect our interest in the property. We did this.*
18. *In about 2019, we got a notice from some attorneys for Aunt Ann stating that we had 14 days to leave the property. We have a copy of the Notice and will produce it at the trial. By that time, we had lived there, improved and maintained the property over almost 40 years and all our life's earnings had*

been invested in it because Aunt Ann had told us that we should think of the house as ours.

19. We had no reason to ask or insist that Aunt Ann put title into our names because we were completely confident in her saying (on several occasions) that the house was ours. We really had a good relationship.

20. Our son Christopher has lived in the house virtually all his life and since becoming an adult, has remained there because we have often encouraged him to stay at home with us in order to be able to establish himself. He and my other children have all expended money and energy to assist us in making improvements to the property. We have added significant value to the property since moving there, all from our own earnings and savings and we would not now have financial resources to relocate and re-establish ourselves if we were required just simply pick up and leave the property. All our money and earnings are tied up in that property.

21. Over the years, Aunt Ann was always aware of and expressed pleasure at the improvements we had made to the house.

22. Since 1980 we have had full and exclusive possession of the house and treated it as our own.”

[64] In cross-examination the witness gave the following evidence:

“Q: Refer to paragraph 9 of your witness statement when did first tiling take place

A: Not too long after we moved there because it was carpet which was very dirty, tear up and when we took it up it was just the original concrete structure

Q: *What do you mean by not long after?*

A: *I don't think it reach 3 years.*

Q: *Re-tiling took place when?*

A: *Re-tile was after the 2000 when we took up the terrazo tile and put ceramic tile after I don't know what year but is after Uncle C died.*

Q: *Agree that that activity installing new bathrooms was before death of Uncle C?*

A: *It's after the death of Uncle C, I don't remember but I recall we had to tile and take out old cupboards and put in new ones and so on.*

Q: *So you can't remember if it's after or before?*

A: *No, I can't remember.*

Q: *How many times did you change the bathtub?*

A: *Two times.*

Q: *How many times did you change the face basin?*

A: *Two times or so, I know when we did the big construction we took out that face basin and put in a different one, that was after Uncle C. died.*

Q: *When was the big construction?*

A: *After Uncle C. died.*

Q: *That was when you changed the face basin?*

A: *No we had to change it first, when we went over there to live first, we had to change bath it was rotting, bowl couldn't flush and we changed the face basin also.*

Q: *How long after you went there to live?*

A: *When we just went there we couldn't use the toilet or bath so we had to take them out.*

Q: *How long after?*

A: *Same time, we had to clean up the place, same time we were cleaning up, I know say is when we move there in the 80s."*

(Refer to page 121, paragraphs 15 and 16 of your WS (read to witness.)

"Q: *where did you clean*

A: *cleaned the l/r, carpet, bedroom, carpet, painted kitchen, painted the whole house*

Q: *you say you fixed windows what do you mean*

A: *the louvres are board windows*

Q: *what do you mean by fixed them*

A: *some of the blades drop out, some of the thing that hold the blades drop out so I had to get a ribbit gun and ribbit dem and screw dem up*

Q: *what did you do to change the bathroom*

A: *fix the tiles, change the bath, repair the plumbing system, change the toilets*

Q: *you removed the garbage what amount of garbage was there*

A: *clothes, old furniture, whole heap of rubbish outside, cut the hedging*

Q: *what kind of old furniture*

A: *dresser, panel bed, old settee*

Q: *what did you do with the old furniture*

A: *throw them away*

Q: *did you do anything else in that first year that you moved year*

A: *I'm just recalling in myself, no*

Q: *did you anything additional to that in the second year*

A: *things wouldn't mash up so quick so I just keep on painting up the place and if a washer goes bad we just fix them. In the third year we does the same thing because things don't go bad that often*

Q: *para 16 of WS read to witness – agree that is what it said*

A: *yes*

Q: *this was the truth*

A: *yes*

Q: *why would she tell you not to do anymore I*

A: *we just change the toilet bowl and the bath, and when she look at it she said it was addition and not to make any more addition and I told her it was not an addition I just show her that we didn't do any addition it was because we could not use the bathroom*

Q: *you are saying that Aunt Ann thought putting in a toilet and bath was an addition to the house*

A: *yes*

....

Q: *if you didn't do the extensive addition she told you not to do, up to when uncle Cecil died what is it that you did with the premises*

A: *I told you that what Aunt Ann came and see was 2 new baths plus the toilet because we fix up the 2 bathroom because we couldn't get access to them, we had to carry water and flush them*

[65] The first and second claimants describe different repairs and improvements done before the death of Cecil Mellish. This evidence of repairs from the second claimant is discrepant in terms of the evidence of the first claimant. The evidence of changes to the subject property according to the first claimant was before the death of Cecil Mellish. The court notes the prevarication of the second claimant on this point.

[66] Paragraph ten (10) of the witness statement of Shirley Brown said that she lived in the house and improvements were made over a period of over two (2) decades. Aunt Ann visited but never interfered or tried to prevent or control anything they did, "*she told us to do as we wished because it is our house.*" She said in cross examination that the first claimant did the major things after the death of Cecil Mellish, she based this evidence on what she heard.

[67] The second claimant testified that both she and her husband were told while together and that she was separately told by Aunt Ann that "*it is your house.*" She could not recall the date of the conversation or where the defendant told them while together that the house was theirs, but recalled that it was after the death of Cecil Mellish in the master bedroom of the subject property. The subject matter of the subject property was also brought up in conversation several times, sometimes on the veranda, other times in the bedroom. The conversation mostly always ended with Aunt Ann saying Horace "*is your house, do what to want to do.*"

[68] When taxed in cross-examination as to the evidence in paragraph thirteen (13) of her witness statement, the witness responded this way:

"Q: In para 13 is not you, it's your husband and Aunt Ann

A: I know she told me that personally, that is the conversation at para 13

Q: where did the conversation take place

A: I can't recall now where it was

Q: *when was that conversation in para 13*

A: *I can't recall*

Q: *before or after Uncle C died*

A: *I don't recall."*

[69] It is noted that paragraph thirteen (13) of her witness statement does not indicate when, where or whether the conversation took place before or after Cecil Mellish died.

[70] My assessment of this witness is that she appeared to be confident and had perfect recall of the allegations averred in her witness statement, however when taxed to give explanations and further details as to these matters, the claimant suddenly developed a bout of amnesia and repeatedly could not recall. Her inability to recall important details on the issues joined, did not commend her as a sincere witness whose cogency and veracity could be relied upon by this court

Evidence of third claimant

Witness statement of Christopher Brown

1. *"My name is Christopher Brown. I live at 34 North Edgewater Avenue, Bridgeport, St. Catherine. I am 44 years old and I am a chef.*
2. *I am the 3rd claimant in this matter.*
3. *The 1st and 2nd claimants are my parents. I am the 3rd of 4 of the children who they have together.*
4. *My earliest memory living at 34 North Edgewater Avenue, Bridgeport, is probably when I was about 4 years old. At that time I lived at this same address and have since lived anywhere else.*

5. *My father is a woodworker and my mother is a canteen worker. This has been the case for as long as I can remember.*
6. *Throughout my childhood and well into my adult life I observed my parents carrying out improvements on the subject property. At different time from the 1980s to maybe mid 200s they did substantial work on the property. When my three other siblings and I became adults and started to work, we made direct financial contributions towards the improvements, upkeep and maintenance of the property. For my part, this was because from the time I was a young man my parents and Aunt Ann represented to me that the house belonged to my parents.*
7. *My earliest memories of Aunt Ann were when I was about 8 or 9 years old. I remember that in my childhood she would come to Jamaica and stay at the house. I remember clearly because we all loved her very much and would get very excited whenever she visited. Aunt Ann and I always had a good relationship. She calls me George.*
8. *I specifically remember a day about 2013, on one of her visits to Jamaica and while she was staying at our home at 34 North Edgewater Avenue, Bridgeport, St. Catherine, Aunt Ann was in my parents' bedroom where she would be accommodated whenever she came. She asked me to bring her a cup of tea. When I took the tea to her I gave it to her and sat on a chair in her room. I then told her how (as I had before), thanks for giving us the house. She invited me to sit on her bed and said she would explain to me the reason why she gave my father the house.*
9. *At that time Aunt Ann told me that she gave my father his middle name. She told me the name and why she gave him the name but I don't quite remember what she said. I do not even remember the name she told me but I don't think it is the actual middle name on my father's birth certificate. She went on to explain to me that when Horace's mother died she took Kenneth*

and Deveroux and left my father behind and that giving him the house is the best she could do for him now. As we spoke she said, "George, you don't have to worry, the house belongs to your father." As I had before when she told me that the house was ours, I told her that I was very grateful to her.

10. It is based on her such confirmations on more than one occasion that I felt very comfortable expending money on the property as I thought it belonged to my parents. They also told me that Aunt Ann had given them the house.

11. In about 2018, I took a call from a lady claiming to be a realtor. She said she was coming to view the house. I asked why. She said the house was being sold. She came later the same day. I told my father not to let her in. I remember that when we resisted the lady told us that she didn't have to call us as all she needed to do was put up a sign. My father sent me to buy credit to call Aunt Ann. I listened to him as he was saying on the phone something to the effect of "Aunt Ann, yuh really ah guh sell di house afta yuh give mi di house? Why Aunt Ann, why yuh doin dis to mi? The "realtor" called Aunt Ann while my father and I were standing there." My father showed her the place and she left. She didn't stay long. I called a friend who is a lawyer and he told me to get and he told me not to let anybody else in. After that, I personally did not let anyone else in to view the place. I was not home when persons came.

12. Once I realized that more than one person had come to view the place, I, and my parents contacted a lawyer who listened to our account and advised us to lodge a caveat to prevent a sale and transfer of the property.

13. Sometime in early 2019, we received a Notice to Quit requiring us to leave the property in 14 days.

14. My parents (and later myself and my other 3 siblings) have peacefully occupied this property and improved it and made it our home for over 40 years. We all expended our financial and time resources on the property and

remained there (as we did into our adult lives) based on Aunt Ann's representation to my parents and certainly to me that the house belonged to my father."

Evidence of Deveroux McDonald

- [71] The witness is the nephew of the defendant and the brother of the first claimant. He is also the appointed personal representative of the estate of Ellen Ann Mellish. In his witness statement he said that the defendant allowed him to reside at the subject property after she purchased it in 1972 and he did so until he got married in 1976.
- [72] He said the defendant would visit the subject property annually while he resided there and after he moved out, he would assist her with her travel plans to Jamaica each year.
- [73] In the early 1980s his brother, Horace Brown was being evicted from his previous address on Barbican Road and asked for assistance. He had been living in a shack. The witness said he advised the defendant of the situation and she permitted the first claimant to stay at the subject property until his living situation improved.
- [74] The first claimant and his family moved into the subject property with the permission of the defendant in the early 1980s. He was given full access to the property with the exception of the master bedroom which was to remain available to the defendant on her annual visits.
- [75] The defendant also allowed Donovan Mellish, her stepson to occupy the subject property. He stayed there intermittently and moved out to live with his partner in 1997.
- [76] The witness said while he was staying in the subject property, the defendant would send barrels to Jamaica on each visit. She would give him things from these barrels. After he moved out in 1976, he would visit the subject property to

collect things that the defendant would leave there for him from the barrels she would send to Jamaica. This was the custom until 2017. The witness said on his visits, he would enter and have access to the general areas of the subject property. The defendant would go to the wharf and pick up the barrels when she arrived in Jamaica.

[77] The witness said the defendant was a mother, aunt and big sister to her family and extended family. She worked very hard to purchase, extend and maintain the subject property. The first claimant and his family were only allowed to stay there at his request so that they would not end up on the “road side.” The claimant never paid rent for the estimated forty (40) years of occupation. It was the defendant who paid the property taxes for the subject property.

[78] In 2017 in conversation with the first claimant, the witness said he asked his brother what he planned to do now that the defendant had decided to sell the property, the first claimant responded saying he had no plan.

Evidence related to that of Shirley Brown

[79] The witness said he did not know of the first claimant having a business on Barbican Road, he only knew that he worked with one Mr. Alliman on Barbican Road. Donovan Mellish was still living in the house in the 1980s, there was usable furniture in the house and the bathrooms were in good condition.

[80] Whenever the first claimant wanted to do something to the house, he would call the defendant and she would send the money by Western Union. In the mid - 1990s, the defendant became sick and was not able to drive, it was the witness who would pick her up and drove her to Western Union in Publix Supermarket and this was not done annually, but whenever the first claimant would call to tell her about a project he was doing on the house. The witness said he would also send money to his brother. There are no receipts from Western Union due to the demise of defendant.

Evidence related to Horace Brown

[81] The defendant continued to pay the mortgage and taxes on the subject property, this demonstrated her interest in the house. She could not in the year that her husband died, have told the first claimant that “once her husband died before her the house would belong to him” as her husband died on the last day of 2007.

[82] The house was tiled he didn't know if it had been re-tiled. Mr. Brown did repair the roof on the veranda as he said, though he could not recall when. Mr Brown did carry out repairs as he said prior to 2007 and he worked on the bathrooms etc. Substantial work was not done until after 2007 after Mr. Mellish passed.

[83] In cross-examination,

“Sugg: when Mr. Brown and fam moved in Donovan didn't live there

A: disagree

Sugg: you had to give keys to Mr. Brown because it was otherwise locked up

Q: you said there were 6 of you living there before Mr. Brown

A: 90 percent were Mr. Mellish's relatives, from his mother to his daughter, his son, his niece. I was the only relative for my Aunt

Q: during this period correct to say that the place would have suffered some wear and tear

A: yes, any house with 6 people living there would have some wear and tear

...

Q: after you left you had nothing to do with upkeep and maintenance

A: no, I just visited the house”

[84] The witness is one of the executors of the defendant's estate. He said that Cynthia Bogle is a beneficiary of the subject property.

DISCUSSION

[85] The following facts are found by the court. The subject property owned by the defendant was owned by her until the date of her death. She has bequeathed the subject property to Cynthia Bogle. She paid the mortgage until the date of its discharge²³, and the property taxes from the date of purchase to the date of her death. She permitted the claimants and their family to live in the subject property from the 1980s rent free. She was generous and provided money and gifts to her family in Jamaica. It was her nephew Deveroux McDonald who handed over the keys to the first claimant so he could move in with his family.

[86] I accept the evidence of Deveroux McDonald that it was he who made the request that the claimants move in to the subject property as he had been living there after it had been newly purchased and had keys. I reject the evidence of Horace Brown that the defendant contacted him and told him and his family to move in without more. I accept that it was he who contacted the defendant to express his gratitude as stated by the defendant in her witness statement.

[87] Having accepted the defendant's invitation and moved in the 1980s, I accept that the claimants cleaned up the subject property. The evidence of Deveroux McDonald was that six (6) people had formerly occupied it and that there was wear and tear to the house and this is evidence which I also accept. I do not accept that Donovan Mellish lived in the house up until the claimants moved in as the evidence was that he occupied intermittently. It means he would have been living in the house with the claimants from the 1980s to 1997 which is not the evidence.

[88] I accept that the house was vacant and in disrepair. There was no evidence that the wear and tear referred to by Deveroux McDonald was seen to by anyone of

²³ Exhibit 2

the six (6) occupants, or the defendant, therefore it was left in a state of some disrepair and it was his evidence that he did not maintain the subject property.

[89] I accept that the claimants worked to effect repairs to suit themselves. I accept that the defendant restricted the work on the house while her husband was alive as it was her evidence that when the claimants moved in, her husband was not pleased with her decision but he agreed as it concerned her family. This is evidence bolstered by that of Deveroux McDonald.

[90] The claimants tiled the house, fixed broken windows and changed the bathrooms between 1980s and December 31, 2007, the date of death of Cecil Mellish. Thereafter, more extensive work began with the removal of walls to extend the dining room, the addition of a garage, wash room, re-tiling of the entire house and renovations to the kitchen and roof.

[91] That there were projects done by the first claimant was given in evidence by Deveroux McDonald who said that the defendant would go to Western Union to send money to the first claimant. The defendant in her witness statement speaks of “assisting with the completion of an expansion project.”

[92] I accept that the first claimant knew that the house belonged solely to the defendant after the death of her husband based on his evidence in cross-examination as set out below:

“Q: when you were doing that first set of tiling you knew Uncle C²⁴ was on title and you didn’t know if he would die first

A: I didn’t know if he was on title I know its Aunt Ann’s house”

[93] I accept that the first claimant knew that the subject property belonged to her in *toto*. Acting with this state of mind, the first claimant began his expansion project. This project was known to the defendant as it was the first claimant who notified her of the project and she assisted him to finance it. There is evidence of

²⁴ Uncle C is Cecil Mellish

needing the certificate of title and having to ask for it on the part of the first claimant. This is evidence of consultation and co-operation between the two in improving the subject property.

[94] There is no doubt that the defendant sent money to members of her family in Jamaica. The trips to Western Union prove a payment to the first claimant for the purpose of working on the house as the evidence of the defendant was that she sent money for the first claimant to make repairs to the subject property including to the veranda roof and to assist with the expansion.

[95] I accept that the sale of the house came about, the expansion having been done. The defendant gives the reason for selling saying that in 2017 the second claimant began to ignore her which she found strange. The defendant upon her return to the USA read several articles about family members killing returning residents in Jamaica over property and she began to feel unsafe. She stopped visiting the subject property as a result. This is evidence of her state of mind.

[96] I accept the nature of the relationship between the defendant and the claimants was very good and that they slept on the floor when she came to stay. The evidence of the defendant was that there was an agreement in which the master bedroom was to be left unoccupied for her annual visits, the claimants and family could occupy the house rent free until their living situation improved and that the first claimant would manage the upkeep of the property and pay the utility bills. There is no evidence that it was the defendant who paid the utility bills, however it is a reasonable inference to draw given that the defendant was not an occupier. The undisputed evidence was that she paid the mortgage until it was discharged²⁵ and all property taxes. The first claimant denies that there was any such agreement, however he and his family honoured all of its terms.

It is undisputed that the claimants vacated the master bedroom when the defendant arrived. There was no difficulty with this arrangement until the defendant stated that barrels she would send to Jamaica were being opened and

²⁵ Exhibit 2

their contents distributed by the first and second claimants without her permission. The defendant said that she would fly to Jamaica and clear these barrels herself. This assertion that the defendant sent and cleared these barrels was bolstered by the evidence of Deveroux McDonald. The defendant said as a result, she began to keep the barrels locked in her bedroom whenever she was not in the island. This means that she locked the first and second claimants out of the master bedroom.

[97] There is no mention of this locking out in the evidence of either the first or second claimant as their evidence is that no barrels were sent by the defendant. She brought boxes and suitcases from which she distributed gifts to the family. The first and second claimant resided with their four (4) children in the subject property which only had three (3) bedrooms. The locking of the master bedroom door would have impacted the household quite significantly. I note that there was no date given for this event by the defendant and this is important as it is evidence which, if accepted, would show an act of ownership of the subject property and a change in the nature of the relationship with the claimants on the part of the defendant. It is evidence which the court accepts. The real issue raised by the claimants is the container in which goods were shipped to Jamaica, boxes over barrels. They have failed to address the real impact of the evidence on this point.

[98] While I accept that the first and second claimants expended money on the subject property it is unknown what the expenditure was, this is addressed later on. The third claimant has adduced no evidence at all on that point.

Was there a representation?

The objective assessment

[99] The court must look at the conduct of the defendant in order to say whether she reasonably conveyed any assurance to the claimants.

- i) In the 1980s the defendant invited the claimants to move in despite her husband's displeasure until their living situation improved.
- ii) There was an agreement in which the claimants would have full access save the master bedroom which was to be left unoccupied for the annual visits. The first claimant would manage the upkeep of the property and pay the utility bills and live rent free.
- iii) There is evidence that the defendant made annual trips to the subject property before the claimants moved in. She said that at the time she allowed the claimants to move in herself and her husband usually made trips to stay at the subject property at maximum twice per year.
- iv) The defendant also said in her witness statement that between 1972 (the year of purchase) until 2017 whenever she visited Jamaica she usually sent barrels to the subject property. She would ship the barrels from New York where she lived and then fly to Jamaica to clear them herself. The barrels were taken to the subject property and stored in the kitchen. Deveroux McDonald gave evidence that this was the case even when there were six (6) people living at the subject property. The barrels were stored in the kitchen then also.
- v) The defendant would have known the condition of the subject property. She gave evidence that she sent money to the first claimant for repairs including repairs to the veranda roof. She therefore knew that the subject property required repairs. The evidence of Deveroux McDonald was also that six (6) people having lived in the subject property, it had suffered from wear and tear (before the claimants moved in.)
- vi) The defendant stayed at the property despite this wear and tear, and despite the need for repairs. There is no evidence that over the many years between

1972²⁶ and the 1980s²⁷ that the defendant, or anyone on her behalf or any occupant effected the needed repairs.

vii) The first claimant began to repair and improve the subject property. There was no challenge to this evidence. The defendant knew of the need for repairs and she sent money for this. There is no evidence of how much was sent or what aspect of the subject property was to be repaired with those funds (the roof on the veranda aside.)

viii) The defendant came to Jamaica and stayed at the subject property one (1) year after the claimants had moved in, this is unchallenged. She would have been able to observe any repairs which had been done by the first claimant to make the dwelling habitable.

ix) The evidence of the first claimant was that the defendant came to Jamaica with her husband Cecil Mellish the first year after the claimants moved into the subject property, she visited the house and told the claimants how pleased she was with the way they had fixed up the place. **She said they should continue to live there.** By that time, the claimants had cleaned up, fixed broken windows, repaired bathrooms, removed garbage from the house and painted it.

x) The claimant's further evidence on this point was that the next visit of the defendant was three (3) years later, she came to the house **and told the claimants not to do any more additions, only repairs.** The first claimant said that the work he did was considered an addition by the defendant

xi) In the early 1990s, Aunt Ann and her brother Peter Hall visited the house and she stated clearly that she was not interested in the house and that the house was his but he should not do any extensive additions while her husband was alive. She told the witness that once her husband pre-deceased her, the

²⁶ The year of purchase

²⁷ When the claimants moved in

house would be his. Such language might have been more consistent with a current intention rather than a definitive assurance. There was no way of knowing which one would pre-decease the other, at that point the defendant could not have given an assurance based upon the death of her husband as any sort of guarantee.

xii) This conversation took place in the master bedroom and was between the defendant, Peter Hall and the first claimant. The first claimant gives the date of this conversation as the year that Cecil Mellish died. [It is noted that Cecil Mellish died on December 31, 2007 and this conversation could not have taken place in 2007 as was the first claimant's evidence.]

xiii) The second claimant said that the defendant told both herself and her husband that it was "our house".

“Q: you heard her in many conversations saying what exactly about the house

A: she was just telling him he can do anything he wants to do she didn't stop him, he did the major things after the death, she said it's your house if Horace consults her

Q: para 10 – who is the us she told that it was your house

A: Horace and myself

Q: When did that conversation take place

*A: can't recall the date, **but it was after the death of Uncle C***

Q: where was the conversation

A: 34 North Edgewater, where we are living now

Q: where in the house

A: *most times she's in the bedroom, she used to mostly stay in the bedroom,*

Q: *did the conversation take place in the bedroom*

A: *yes*

Q: *was this the first conversation having about house being yours*

A: *no*

Q: *when was the first conversation about the house*

A: *can't recall*

Q: *would you say there were several conversation's before that one*

A: *yes, several times that conversation came up between she, Horace and myself*

Q: *she, you and Horace were discussing the house becoming yours several times*

A: *yes*

Q: *all of these conversations took place in bedroom*

A: *sometimes on the veranda but mostly in the bedroom*

Q: *you were in her bedroom having a conversation with her about the house at one time*

A: *yes, we were in the bedroom where she was on the bed*

Q: *she was on the bed*

A: *she most time lying on the bed*

Q: *where were you*

A: *in the room*

Q: *where in the room*

A: *I was in the same room with Aunt Ann and Horace either I sit on the bed or on a chair in there, but I was in the room*

Q: *what were the exact words she said to you in relation to the house*

A: *can't remember the exact words she didn't talk to me only but when we were talking she kept on saying do what you want to do with the place its yours, in the end she always keep saying that, most times when we have a conversation always end it that way*

Q: *asking about para 10 – did she end it that way that time*

A: *yes, she always say Horace is your house do what you want to do*

Q: *that's how she ends it*

A: *yes, most times*

Q: *what did you say*

A: *can't recall, most time I just listen, is Horace and his Aunt talking, now and then I put in my words but most times is she and him*

Q: *recall what Horace said*

A: *no"*

xiv) The second claimant made no mention of Peter Hall being present for any of the conversations. She recalls the conversation as after the year that Cecil

Mellish died. This is weighed against the evidence of the second claimant set out earlier in respect of paragraph thirteen (13) where she was unable to recall the specifics of the conversation.

xv) The first and second claimants are discrepant in their account of the assurance given by the defendant, to whom, when and what words were said on the occasion when it was made.

xvi) The third claimant, chef and son of the first and second claimants said that he recalled bringing the defendant her tea in 2013, *“I was always asked to bring her a cup of milo or tea with a teabag because of the nature of my profession.”* After much painstaking cross-examination, the third claimant admitted that he overheard what he described as a representation. He overheard his father and the defendant talking when he was a child. He could not be relied on as a witness as his answers kept changing and his evidence lacked veracity.

xvii) The defendant continued to visit and she stayed in the master bedroom as had been agreed. The evidence that the defendant said to the first claimant that he was to stop any additions to the house until after the death of her husband is corroborated by Deveroux McDonald who said *“Mr Brown did carry out repairs as he said prior to 2007 where he did work on the bathroom etc. Substantial work was not done until after 2007 after Mr. Mellish passed.”*

xviii) The reason for substantial work being done after the passing of Mr. Mellish was that the defendant had restricted the work until that event. *“Aunt Ann’s husband, Cecil Mellish, died in or about 2007. After the death, she told the witness: “Horace, is your house. Do whatever you want to do with it.”* This conversation did not take place on the date of death and therefore could not have been in 2007. The date of the conversation which gave rise to the purported assurance is therefore unknown.

xix) The defendant said that the claimants had financial troubles and there were times when the first claimant required her assistance to carry out his agreed obligations to the subject property. Deveroux McDonald also gave evidence of sending money to his brother as well as the defendant sending money to him for his personal use.

xx) The agreement between the parties which I have found to have been in effect and as has been indicated previously was for upkeep and not renovations. The inference which can be drawn is that the defendant was assisting in the improvement of the subject property though she did not live there. This is so from her sending money to assist with the first claimant's projects.

xxi) Deveroux McDonald testified that:

*“Whenever my brother wanted to do something on the house **he always called my Aunt and shared what he was going to do and she in turn would send him money by Western Union** and how I know this is that in the mid- 90s my Aunt became sick and was not able to drive and so whenever she wanted to send money, I would have to drive her to the Western Union in Publix supermarket and this was not done once per year but whenever my brother called to tell her about a project that he was doing on the house. Based on my Aunt's sending money through Western Union a couple times I would also send money to my brother and then my brother would call me and say something like I had someone who worked and I didn't have the money to pay him and I am so glad you sent this. Reason I don't have proof from Western Union my Aunt died during the process of getting information. The process ended because she died.”*

xxii) In cross examination Deveroux McDonald said:

“Q: *Correct to say you have no direct personal knowledge for yourself as to how the **financing of the maintenance and improvement** the house went?*

A: *My personal knowledge is that I had to take her to Western Union to send money to Jamaica, it was not a matter of what she said but what we did*

Q: *this is the mission she said*

A: *you had to fill out a form at Western Union and show ID, sometimes she takes 2/3 cards and goes to the store and I fill it out*

Q: *when you lived in JA did Aunt Ann send money for you*

A: *of course*

Q: *you said have no proof of Western Union receipts because Aunt Ann died*

A: *she died Nov 3, 2021.”*

xxiii) The evidence that the defendant would send money to the first claimant has not been refuted. The purpose for which she would send it has been established. The question put to Deveroux McDonald was as to the **“financing of the maintenance and improvement”** of the subject property. The defendant was financing the maintenance and improvement of her property in addition to sending money for the personal use of the first claimant, this is also evidence that bolsters the defendant’s evidence that there were financial troubles and she was called upon to assist.

The subjective assessment

What did the assurance mean to the claimants?

[100] The claimants all testify to a direct, express and articulated promise regarding the subject property. If it was reasonable for the first claimant, given his knowledge of the defendant and the nature of their relationship to have understood her to mean, not just that her present intention was to give him the subject property, but

that she would definitely do so, then it would be enough that the understanding she conveyed could reasonably have been understood and intended to be relied upon as an assurance.

[101] If the elements of the estoppel are established, then it is not necessary that the defendant should have known or foreseen that particular act of reliance. If the claimants acted to their detriment on what was understood to be an assurance by the defendant's statements, then the intention of the defendant would not be material to the analysis. This is supported by a consistent line of authority.²⁸

[102] Ms. Clarke argued that in the minds of the claimants, the subject property had been given to them and they acted accordingly to their detriment. She argued that there was no enquiry as to their living situation, the defendant instead just sat idly by and encouraged the claimants tacitly or otherwise to not just maintain but expand the subject property after the death of Cecil Mellish. The evidence of the first claimant was that the defendant also offered to give him some money when she told him she would be selling the subject property. *"the same time we were talking on the phone, I said to her how you said you giving me the house and now you selling it she said I am selling it and she will give me some money."* This promise to give the first claimant some of the proceeds of sale is not in the defendant's witness statement.

[103] The submission by Ms. Clarke that there was no enquiry into the claimants' living situation is really an acceptance on the part of the claimants that they had made themselves comfortable, and the defendant was pleased with how they had maintained the property as had been agreed. It was plain to see that the claimants were in a better situation and there was no evidence from any quarter, that there had to be an enquiry into their living situation for the terms of the agreement to have been fulfilled.

²⁸ (see for instance per Lord Denning MR in **Crabb v Arun District Council** [1976] Ch 179, 187 F, 188 C (citing his earlier observations in **Moorgate Mercantile Co Ltd v Twitchings** [1976] QB 225, 242; see also **Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd** [1956] 1 QB 529, 540–541, quoted by Lord Walker at para 50 of his opinion), and per Oliver J in **Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)** [1982] QB 133, 151 H–152 A

[104] The claimants have couched their case on two limbs, the assurance/promise and the acquiescence by the defendant. The promise being assertive and positive, the standing by or acquiescence being the unconscionable conduct.

[105] In the case of **Walton v Walton**,²⁹ Hoffmann LJ stated:

"The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."

[106] Hoffmann LJ enlarged on this, at paragraphs 19 to 21:

"But in many cases of promises made in a family or social context, there is no intention to create an immediately binding contract. There are several reasons why the law is reluctant to assume that there was. One which is relevant in this case is that such promises are often subject to unspoken and ill-defined qualifications. Take for example the promise in this case. When it was first made, Mrs Walton did not know what the future might hold. Anything might happen which could make it quite inappropriate for the farm to go to the plaintiff.

But a contract, subject to the narrow doctrine of frustration, must be performed come what may. This is why Mr Jackson, who appeared for the plaintiff, has always accepted that Mrs Walton's promise could not have been intended to become a contract.

But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

²⁹ [1994] CA Transcript No 479, at paragraph 16

[107] So when was this gift going to be given to the claimants? The evidence which I accept is that it was after the death of Cecil Mellish that the first claimant began to do the substantial work on the house. It is evident that there was a point at which things changed in the mind of the first claimant and he began to actively deal with the subject property. However, it does not answer the question at what point did the promise fall due?

[108] Ms. Mullings argues that there cannot be said to be a representation in circumstances where each claimant recalls a different conversation with the defendant. Each claimant has inserted their own interest into the evidence given to the court. Counsel goes further to submit that the conversations purportedly given in evidence by the second and third claimant are derived and no conversations were had between themselves and the defendant regarding the subject property.

The conduct of the defendant

[109] The defendant's visiting and taking over the master bedroom did not accord with her having given her house away. The claimants always slept on the floor when she came to stay, there was no difference after the death of Cecil Mellish. She gave evidence of locking her bedroom door when goods from her barrels began to be distributed by others and not her. This evidence was not answered. She retained the title for the subject property. The claimants did not know whether there was a lien on that title or whether they were being given any liabilities related to the subject property. The defendant exercised acts of ownership over the subject property until she stopped visiting. While she was visiting, she stayed in the subject property annually, assisted in paying for repairs and the expansion project, paid the mortgage and property taxes, she, never transferred the subject property to the claimants nor was there any indication that she would do so. When she stopped visiting she did not simply leave the claimants in the subject property, she sought to get them out. This evidence does not point to exclusive possession on the part of the claimants and has to be weighed with the words

alleged to have been spoken giving the purported assurance. The defendant's conduct and the words are inconsistent. This ought not to have given rise to a reasonable expectation or understanding on the part of the claimants that the defendant was giving them an assurance. It especially does not address the issue of when the promise would have become due.

[110] I find that any expansion of the house was to accommodate the growing family of six (6) for their comfort and convenience. Any improvements to the house benefitted the claimants, the fact that the defendant did not demur did not move the balance of probabilities in favour of the claimants. It is probable that the defendant saw no reason to object as any improvements would increase the value of her property. This was against the background of the claimants living there rent free from the 1980s and making no contributions to the mortgage or taxes.

[111] Further, it was the first claimant's evidence that he used the subject property to earn an income by locating his workshop there. The subject property was being viewed by the claimants as a burden for the purposes of this trial, whereas it was clearly a benefit. They, having occupied the subject property which did not belong to them for almost forty (40) years would have been expected to pay for the privilege by some means and the evidence disclosed that the only contribution they made was by improving the house.

[112] Based on the foregoing, I find that there was no representation or assurance given by Ellen Ann Mellish, the defendant to Horace Brown, the first claimant. The second and third claimant's evidence on whether there was a representation was derived from the evidence of the first claimant and is viewed as unreliable. I will continue on in the event of error.

Did the claimants rely on the representation or change their position on the strength of it?

[113] The evidence below as articulated by the first claimant just about sums up the issue whether or not there was a reliance on the representation.

“Sugg: You had over 27 years between 1980 and 2007 to use your resources to buy the house you wanted

*A: No, but my Aunt put me there to live, she never tell me say tomorrow you a go move out and then she came with that promise to me, if she had even said before Uncle C died Mr Brown move, then I got to come out, I couldn't resist, this couldn't be here. It's after her promise to me that I began to do real fixing of the house and that is when my money went into the house that time, I took my money that I could have bought another house and spent it on **her house**.”*

[114] The first claimant testified that if he was asked to move out he would have had to move out. This is evidence which is inconsistent with an intention to own the subject property. He qualifies the evidence into before and after the death of Cecil Mellish and further qualifies it by the promise to him. Yet, the last two (2) words of the quoted evidence at paragraph [118] said that the money was spent on “**her**” house, not on “my” house or on “our” house. In my view, that testimony by the first claimant during his evidence at the trial in 2022, from the witness box, shows that Horace Brown in his own mind, was living in a house which belonged to his Aunt.

Evidence of Expenditure

[115] The claimants adduced no evidence from a quantity surveyor, produced no receipts nor called any witnesses to testify to the condition of the subject property. There were no photographs and no evidence from anyone who had worked on the subject property. The claimants provided no bank statements or records, though the evidence was that they each held bank accounts. The

second claimant provided no documentary evidence of her income from her past employment though she worked for the principal of the same school at which she had formerly worked in the canteen. None of the claimants gave any evidence of their income at the time of the events as they described them. There was no evidence of income earned or sums spent from that income from any of the claimants. The claimants did not supply even general figures from their memories, there was simply no evidence.

[116] As Ms. Mullings has submitted, the claimants occupied the house for twenty-seven (27) years up to the death of Cecil Mellish. In all that time, they were not allowed to add to the house. They did not look for alternate accommodation. It was the defendant who would send money to assist them with their financial obligations; she would bring groceries and household goods for distribution amongst the family members including the claimants. The claimants were not paying rent. Over that period, they had made themselves comfortable at the subject property. They had very little in terms of outlay on the subject property. There was maintenance and upkeep as was to be expected as the occupants would cause wear and tear to the subject property.

[117] Over the period, the defendant exercised acts of ownership and visited the subject property each year. Despite the death of Cecil Mellish when the first claimant was alleged to have been given the house, he would still call the defendant to tell her what he wanted to be done on the property. This is evidence of needing permission and funding to make any alterations. I find that there was no independent remodelling of the house, as there was always input from the defendant. I find that there was no reliance on a representation which can be said to have changed the claimants' position.

Was there evidence of a resultant detriment or disadvantage arising from the unconscionable withdrawal of the representation

[118] The evidence was that the first claimant had moved his workshop to the subject premises and it was his only source of income. His witness statement also contains the following paragraphs:

"I have spent all my resources improving this house based on the fat [sic] that Aunt Ann told me that she was not interested in it and it is mine. I also established and moved my business there based on Aunt Ann's representation to me that it was mine and I could do whatever I wished with it."³⁰

I am 71 years old and do not now have the resources to relocate both my business and my home or either. All my life's earnings and physical energy has been spent improving and maintaining this house."³¹

[119] The claimants were living in what was now a larger and more comfortable home, they were maintaining the house they lived in as was to be expected. There was no change in their position which could be described as a disadvantage. The evidence of repairs done by the defendant and of improvements paid for by her is more consistent with acts of ownership and an intention to maintain custody and control of the subject property than having given it as a gift to the claimants.

[120] There is also the improved property value which though not argued by counsel can be inferred from the evidence of renovations to the property. The claimant would have derived a benefit from his own efforts expended to effect repairs, and remodel the subject property. There was no evidence as to what resources were spent or what physical energy was spent improving and maintaining this house. There was no evidence what the claimant paid to improve the house. There was no demonstration that he was in a financial position to make these improvements

³⁰ Para 41

³¹ Para 42

over what period of time and what was the cost to him. None of this is before the court. The value of the premises has not been established.

[121] Deveroux McDonald said that he asked the first claimant what his plan was now that the defendant had decided to sell the house and the first claimant responded that he had no plan. Despite having saved themselves the rent paid at the Barbican address, there was no evidence of the creation of a pool of funds from which to rehouse themselves if the need arose. The evidence was always that any representation was based on Cecil Mellish dying before the defendant. The possibility always existed that the defendant could have predeceased him, there was no preparation for that possibility on the part of the claimants.

[122] The claimant's family enjoyed the benefit of any expenditure on what they made into their family home. For the entire period and to date, the first claimant and his family enjoyed rent free occupation of the subject property. It is difficult to see the injustice when the defendant did not live at the subject property and any improvements benefitted the claimants. The absence of evidence is not evidence; the claimants have not put the court in a position to determine the extent of any equity they seek.

What was the intention of the defendant

[123] The defendant paid off the mortgage but never intended to transfer the title for the subject property. She never caused his name to be placed on the tax roll pursuant to an instrument of transfer. She did not allow the claimants to pay the property taxes. The defendant left a will, she bequeathed the subject property not to the first claimant but rather to Cynthia Bogle. There was no discussion with the first claimant on what her wishes would be after her death. The first claimant gave evidence that he was seventy- one (71), therefore the defendant would have been much older. The defendant did not instruct her attorneys with regard to the subject property. She visited each year, distributing gifts to the family and for all intents and purposes was lady of the manor.

[124] The defendant in her defence and counterclaim denies the claim and said that she never parted with possession of the subject property. The evidence disclosed that it was the defendant who paid the mortgage until its discharge (see Exhibit 2) and the property taxes at all material times. She slept in the master bedroom when she stayed at the subject property and was its sole legal proprietor after the death of Cecil Mellish. There is no question that the claimants could not have brought this claim for the period while Cecil Mellish was alive.

[125] In all the circumstances of the case, there is no estoppel operating against the claimants. The existence of an equity has failed due to a paucity of evidence as to how it came into being. No injustice has been done to the claimants based on the expenditure upon their family home which they fully enjoyed until their children were grown and moved out. The rent free occupation of the subject property for some forty (40) years, without the burden of paying for it does not entitle them to the transfer of the freehold. The balance of probabilities favours the defendant and I so hold.

[126] The defendant claimed mesne profits, however, there is no evidence upon which I could on a balance of probabilities say that the defendant has made out a claim for mesne profits from any of the claimants whatsoever.

[127] Orders:

1. Judgment for the defendant on the claim.
2. Judgment for the defendant on the counterclaim.
3. Costs awarded to the defendant to be agreed or taxed.