



[2018] JMSC Civ 188

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015 HCV 04509**

<b>BETWEEN</b>	<b>LORNA HOLDING</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SEYMOUR THORPE</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Sashawah Newby and Mrs. Janice Buchanan-McLean instructed by J. Buchanan-McLean for the Claimant

Mr. Keith Bishop and Mr. Andrew Graham instructed by Bishop & Partners for the Defendant

**Heard 18<sup>th</sup> – 21<sup>st</sup> June and 19<sup>th</sup> October, 2018**

**Adverse possession – Beneficial interest – Equitable interest – Entitlement to interest when name not on title – Proprietary estoppel – Constructive trust - Limitation of Actions Act S.3 and 30 – Registration of titles Act S.70**

**CALYS WILTSHIRE J. (AG)**

**Introduction**

[1] Miss Lorna Holding has asked the court to declare that she has a 100% beneficial interest in property at Lot 386 North Circular Road, Southboro, Portmore, St. Catherine, registered at Volume 1198 Folio 406. Both parties moved into the premises in 1981 while Miss Holding was pregnant with their child, Carlene. The

property was subsequently purchased and registered in Mr. Thorpe's name in 1990. Prior to that, in 1982, Mr. Thorpe left and went to Cuba to work. He returned to Jamaica in 1990 and in 1991 left for the United States of America.

- [2] Miss Holding and their child Carlene remained in Jamaica. In 1993 Miss Holding went to work in Grand Cayman. She worked there over a period of 18 years, returning to Jamaica at 6 month intervals. In 2015 Mr. Thorpe visited Jamaica and on that occasion, had a Notice to Quit served on Miss Holding to vacate the premises. Miss Holding has responded by filing a fixed date claim form asking the court to declare that she is entitled to 100% legal and equitable interest in the property and order Mr. Thorpe to desist disturbing her right of possession.

### **Claimant's Case**

- [3] Four affidavits filed by Miss Holding were permitted to stand as her evidence-in-chief. She testified that she had known Mr. Thorpe from 1978 and they were in a relationship before they moved into the house in Southboro. She identified herself as his common law wife and said that they lived together as a family. Mr. Thorpe commenced mortgage payments to the National Housing Trust, hereinafter referred to as NHT, in 1990 but after migrating the said year was unable to continue making the payments.
- [4] She said that after Mr. Thorpe left, she secured a job at a Freezone factory and from the money she earned there and from working in Grand Cayman she paid the mortgage to NHT. She paid the mortgage from 1990 to 1999 until it was paid off. In the said 1999, she commenced renovation work on the property, by extending the front room, adding a carport, a verandah, a kitchen and a big bedroom. Her evidence was that she spent over \$2,000,000.00 working on the property.
- [5] Miss Holding further stated that she paid the property taxes from the time that Mr. Thorpe migrated, the last time being in 2014, and she also paid all the utility bills. She also said that while she was working in Grand Cayman, Mr. Thorpe called her and said, "Lorna, I am asking you to pay for the house, don't let Housing Trust take

it away. Your money is bigger than my own and nobody can get you out of the house. It is your house.” She made payments directly to NHT at their offices in Spanish Town and while working in Grand Cayman, she sent the money via Quick cash through Courts in Jamaica to her helper to pay the mortgage on her behalf.

[6] She testified that in 1999 when the mortgage was paid off, the Defendant came to Jamaica, collected the title from NHT, gave her a copy of said title and returned to the United States of America. She did not see Mr. Thorpe again until 2015. Miss Holding insisted that Mr. Thorpe abandoned the house and since she paid 95% of the mortgage, has been paying the property taxes and made improvements to the house, then the property should be hers solely.

[7] Witnesses Samuel Myers and Desmond Bailey gave evidence in support of the Claimant. Mr. Myers testified that he was the Claimant’s neighbour and had observed Miss Holding and her daughter Carlene Thorpe residing at the property. He said that he had never seen Mr. Thorpe living at said property. Mr. Myers also said that Miss Holding paid him to carry out renovations to the bathroom and build the kitchen and a back bedroom.

[8] Mr. Desmond Bailey stated that he was also a neighbour of Miss Holding. He said that from 1995 when he moved to the neighbourhood he had only seen her and he had never seen Mr. Thorpe living or visiting the house.

### **Defendant’s Case**

[9] Mr. Thorpe’s testimony is that he moved into the house on the property in 1978 and commenced mortgage payments in 1981. He then left for Guantanamo Bay to work in 1982 and migrated to the United States in 1991. The mortgage payments were being sent by him by way of remittances until the mortgage was paid off. He returned to Jamaica in 1996, 1998 and 2000 and on those occasions he spoke to the Claimant and visited the house. In 2009 he said that he financed the expansion of the house towards the back of the property. Mr. Thorpe also said that through

remittances he caused the property taxes for the property to be paid. He denied abandoning the property.

- [10] The Defendant called three witnesses. Carla Thorpe testified that she went to live at the premises on or about 4<sup>th</sup> July, 1996 and remained there until about 2008. During those years Mr. Thorpe would send money to her and instructed her to pay the utilities, mortgage and general upkeep of the premises. In either 2000 or 2001 when Mr Thorpe visited Jamaica, she accompanied him to NHT to collect the Duplicate Certificate of Title for the premises.
- [11] Miss Thorpe stated that in 2000 the Claimant had started extension work to the front of the premises but it came to a halt and termites had infested the foundation. Subsequent to a conversation that she had with the Defendant, he sent US\$1,500.00 which was used to treat the termite infestation, purchase paint for the premises and pay property taxes for the said premises. Further that Mr. Thorpe also sent monies in 2005 which was used to purchase bags of cement, French windows, and other fixtures that were used in the addition to the front of the premises.
- [12] She also said that on Mr. Thorpe's instructions, in 2009, she gave Carlene Thorpe the blueprints of the premises. She expressed the view that it was to facilitate the construction to the rear of the premises. In that year Mr. Thorpe also sent monies to pay the outstanding property taxes owed on the premises. Further that in 2011, Mr. Thorpe returned and paid outstanding property taxes and also advanced payments for one year for said taxes.
- [13] Mr. Howard Duncan testified that he would visit the premises with frequency between 1997 and 2012. He knew both Carla and Carlene Thorpe but only met Miss Holding in 2001 and Mr. Thorpe in 2009. He said between 1997 and 2007 he would accompany Carla Thorpe to various agencies to retrieve remittances sent by the Defendant on a monthly basis. He would also drive her to the NHT.

[14] The final witness for the defence was Mr. Cleveland Thorpe, the Defendant's brother. He said that it was he who encouraged the Defendant to acquire the premises in question. In 1982 when the Defendant left for Guantanamo Bay, he left the mortgage documents in his care and would remit monies to him to pay the mortgage. He said he did so for about two years. He further stated that between 1981 and 1991, Miss Holding was unemployed and it was Mr. Thorpe who satisfied all the payments for taxes and mortgage.

[15] This witness also stated that he would receive calls from the Defendant overseas, instructing him to effect repairs to plumbing and electrical fixtures to the house. He indicated that the Defendant returned to Jamaica on occasions and referred specifically to the year 1999 when Mr. Thorpe came for Carlene Thorpe's graduation and stayed at the premises.

### **Claimant's Submissions**

[16] Mrs. Newby has relied on the following to support her submissions:

Sections 68, 70, 158 and 161 of the Registration of Titles Act

**Wills v Wills** [2003] UKPC - 84

**JA Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30

**Recreational Holdings (Jamaica) Limited v Lazarus et al** [2014] JMCA Civ 34

**Fullwood v Curchar** [2015] JMCA Civ 37

**Annie Lopez v Dawkins Brown et al** [2015] JMCA Civ 6

**Eric McCalla v Grace McCalla** [2012] JMCA Civ 31

[17] Counsel submitted that the Claimant had been in exclusive, continuous, open, and undisturbed possession of the property in excess of 12 years as the Defendant

abandoned or discontinued possession of the property or was dispossessed by the Claimant. Further that the Defendant's title has been extinguished and he was barred by section 3 of the Limitations of Actions Act from recovering possession.

- [18] Counsel submitted that the **Wills** case (supra) was similar to the case at bar. In that case the appellant had visited the house in question only once and never returned thereafter, she had no belongings there except her abandoned wedding ring and she did not receive income from the rental of the property. In the instant case Counsel contended that Mr. Thorpe never returned to the property after migrating and even if the court accepts that he did, the last time he said spent time there was in 2000, and that would still be in excess of 12 years that he had not visited the property.
- [19] She further contended that Mr. Thorpe had no belongings at the property, had formed and established new attachments and a new life in the United States of America with another spouse and another child, resided in the United States of America, made no contribution to the preservation of the property and paid neither mortgage nor property taxes after migrating.
- [20] Counsel argued that the Claimant on the other hand had performed acts which showed that she was dealing with the land as an occupying owner might be expected to and those acts were sufficient to establish her possession. Further that she carried out the acts of possession with the intention to possess the property and excluded the whole world including the Defendant.
- [21] Mrs. Newby addressed the issue of the Claimant working in the Grand Cayman and submitted that the Claimant continued to exercise the requisite degree of control over the property although she was not physically present every single day. This was premised on the Claimant's evidence that she returned home twice per year, left her daughter at the property in the care of a care-giver, paid bills, taxes and mortgage for the property by way of remittances, expended sums of money renovating the property, and held the keys to same.

- [22]** Counsel also submitted that even if the court accepted that Mr. Thorpe visited the property on three occasions prior to 2015, those visits would not be sufficient to stop time from running as he was only visiting and not exercising any act of ownership.
- [23]** Mrs. Newby submitted that the Claimant was not in possession of the property with the permission of the Defendant. The parties were in a relationship, moved in together and were living together and no permission had been sought of or given by the Defendant regarding the Claimant's occupation of the property. The Claimant therefore was not a licensee or living at the property referable to any permission or grant from the Defendant.
- [24]** In the alternative Counsel submitted that by virtue of the equitable doctrine of proprietary estoppel the Claimant has an interest in the property. She argued that the Defendant made an express representation to the Claimant when she was in Grand Cayman that the house was hers after she paid off the mortgage and then in 1999 gave her a copy of the title to the house. This conduct gave rise to the Claimant's expectation and led her to believe that she had acquired an interest in the property. Further that for over 34 years while the Claimant lived at the house, the Defendant neither said nor did anything to disabuse her of this expectation of ownership.
- [25]** It was contended that the Claimant, as a result, paid off the mortgage, maintained the property and expended large sums of money in its renovation. She would therefore have acted to her detriment having relied on the Defendant's representation. Counsel further contended that it would be unconscionable for the Defendant to silently accept the Claimant's effort to maintain and improve the property and stand by while she spent her money on the property, believing it was hers, and then put her out.
- [26]** Counsel submitted that this is the only home that the Claimant has known all her adult life and she would be more prejudiced than the Defendant if she was put out.

Hence the equity should be satisfied by transferring the property to her as a repayment of monies expended would not do justice between the parties.

[27] It was also argued that a constructive trust had arisen in the Claimant's favour as there was sufficient evidence that there was a common intention for the Claimant to have a beneficial interest in the property and the Claimant acted to her detriment in reliance on that common intention. Counsel submitted that the parties were in a common law relationship with an intention to build life together and to mutually own a home and benefit from said property. Further that the Claimant would not have embarked on the acts of maintenance, investment and renovation if she was not to have an interest in the property.

### **Defendant's Submissions**

[28] The following were the authorities relied on:

**Sonia Staniger-Reid v Robert Lloyd Yee and Others** [2016] JMSC Civ 185

**Thomas v Sorrell** [1673] Vaughan 330

The Property Rights of Spouses Act 2006

**J.A Pye (Oxford) Ltd. And Anor v Graham and Anor** [2002] UKHL 30

**Jones v Kernott** [2010] EWCA Civ 578

[29] Counsel for the Defendant argued that the Claimant could not oust or dispossess his client by adverse possession as she had been left there in his absence as a licensee, having had his permission to remain. Further that he had continued to repair, pay the mortgage and taxes for the property albeit remotely through his daughter and brother. This demonstrated his involvement over the years. Also since there was no declaration of spouse made for the parties or any declaration



that the house was a family home, the Claimant could not benefit as a spouse but if this view was not accepted by the Court then no more than 10% of the value should be hers. Finally, he left the question of intent that she could not benefit under a constructive trust open for the court.

### **Issues of fact**

**[30]** The court must determine the following:

- a) Whether the Claimant has been in sole and exclusive possession of the premises for a period of 12 years and more.
- b) Whether the Claimant expended funds in the upkeep, maintenance and renovation of the property.
- c) Whether by words or conduct the Defendant agreed that the Claimant should have a beneficial interest in the property.
- d) Whether by words or conduct the Defendant encouraged the Claimant to expend funds on the property.

### **Issues of law**

**[31]** Whether the nature and quality of the Claimant' occupation and possession entitle her to claim absolute right to the property under the Limitation of Actions Act.

- a) Whether the Claimant has an interest in the property by virtue of the doctrine of proprietary estoppel.
- b) Whether the Claimant has an equitable interest in the property by virtue of the doctrine of constructive trust
- c) Whether the Claimant is entitled to a beneficial interest in the property.

## **The Law and Analysis of the Evidence**

### **Adverse Possession**

[32] Section 3 of the Limitation of Actions Act states:

*“No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”*

[33] Section 30 of the Limitation of Actions Act states:

*“At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.”*

[34] For the Claimant to succeed in her claim under adverse possession she must prove on a balance of probabilities that the Defendant’s rights to the property has been extinguished. Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd and Others v. Graham and Another** (supra) set out the law in relation to the elements of adverse possession. The law lord stated the following at paragraphs 40 -41

*“....there are two elements necessary for legal possession, (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").*

*Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."*

- [35]** Has the Claimant in our instant case been in undisturbed possession for in excess of twelve (12) years? The Defendant lived overseas and the Claimant lived and worked in Grand Cayman and returned to Jamaica intermittently. Hence neither party was in consistent occupation of the property. The parties have a child who resided at the property and who was supervised by a caregiver while the Claimant was working away from Jamaica.
- [36]** Both parties have claimed responsibility for the payment of the mortgage, property taxes and the renovation of the property. The Claimant said that she paid the lion share of the mortgage, the property taxes since the Defendant migrated and over \$2,000,000.00 to renovate the property. She has failed to produce any receipts in proof of these mortgage payments and property taxes. The Defendant stated that he caused the entire mortgage and the property taxes to be paid from remittances he sent. He also has failed to produce receipts in proof of the mortgage payments. He exhibited a receipt, in his name, from the Inland Revenue Department dated May 2011, showing payments of property taxes for the periods 2008 to 2012. The court notes that despite the claims of both parties, arrears of property taxes were allowed to accrue.
- [37]** The Claimant produced receipts totalling \$82,303.32 for material purchased for the renovation of the property. There is no dispute that Miss Holding was responsible for the work done to the front of the property. However, both parties claim to have expanded the back of the premises. Mr. Samuel Myers testified that he was hired in 2008 for the renovation of the back by Miss Holding and paid by Miss Holding. Miss Carla Thorpe agreed under cross examination that Mr. Myers worked on the property, but denied that Miss Holding was responsible for paying him.
- [38]** Miss Carla Thorpe testified that she lived at the property from 1996 to 2008, and was the recipient of the remittances sent by Mr. Thorpe for the payment of the mortgage, utilities, property taxes and maintenance of the property. The court rejects Miss Thorpe's evidence that she accompanied her father to pay property taxes in 2011. He admitted that he did not personally pay property taxes then or at

any other time. Someone, however, did in 2011 make payment of the tax arrears on behalf of the Defendant.

[39] The court does however accept her evidence in relation to her residing at the property and receiving remittances from her father which would have gone toward the payments for the mortgage and property taxes. The court notes that the arrears in property taxes accrued from 2000 when, according to Miss Thorpe, she moved from the property. The Defendant's brother also gave evidence that he was asked by the Defendant to make mortgage payments for two years after he migrated and do minor repairs. The court accepts his evidence. By 1999 the mortgage was already paid off, hence it is the period thereafter, which is critical to the court's determination.

[40] The court accepts the Defendant's evidence that he did maintain his interest in the property and did not abandon same. Up to 2012 he was exercising acts of ownership, evidenced by his payment of property taxes. It cannot be said that he did not deal with the property as an occupying owner might have been expected to deal with it.

[41] The Claimant did not maintain a constant physical presence at the property, in light of her 18 years spent in Grand Cayman which commenced in 1993. She testified that she returned twice a year, in Easter and in summer. Her daughter was left there and she did do renovations to the property. I do not find however that the degree of physical custody and control demonstrated by her and for her benefit, is sufficient to exclude the Defendant. There was no exclusive control and undisturbed possession by the Claimant for in excess of 12 years. The Defendant has not been dispossessed of his title by virtue of adverse possession.

**Did the Defendant by words or conduct make representations which encouraged the Claimant to spend monies improving the property.**

[42] The Claimant stated that she spent significant sums on the acquisition, upkeep and improvement of the property. She said that she paid the balance and lion's share of the mortgage, paid property taxes, built a concrete wall, planted fruit trees,

renovated and expanded the house to the tune of two million dollars (\$2,000,000.00). Counsel for the Claimant submitted that based on the doctrine of equitable estoppel she should be allowed to benefit from an interest in the property. The Defendant should not now be allowed to claim the property, having led her to so act.

[43] The doctrine of equitable or proprietary estoppel was outlined in the case of **Annie Lopez v Dawkins Brown and Glen Brown** (supra). In that case Morrison J.A. (as he then was), stated at paras. 68 and 73 that:

[68] *“The modern law of proprietary estoppel is aptly summarised by the authors of Gray and Gray in this way (at para. 9.2.8): “A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:*

- *representation (or an ‘assurance’ of rights)*
- *reliance (or a ‘change of position’) and*
- *unconscionable disadvantage (or ‘detriment’).*

*“An estoppel claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are inter-dependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn.”*

[73] *“**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”.*

[44] Lord Denning MR in the case of **Crabb v Arun District Council** [1975] 3 All ER 865, at p. 871 indicated that:

*“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 that, Lord Cairns said in **Hughes v Metropolitan Railway Co** [1877] 2 App Cas 439 at 448, [1874–80] All ER Rep 187 at 191: '... 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 on his strict legal rights - even though that promise may be unenforceable in point of law for want of consideration or want of writing-and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see **Central London Property Trust v High Trees House, Charles Rickards v Oppenheim** [1950] 1 All ER 420 at 423, [1950] 1 KB 616 at 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”.*

- [45] It therefore must be determined whether in the instant case all the three elements of the doctrine of proprietary estoppel have been established. The Claimant alleged that the Defendant made representations, on which she relied to her detriment, when he told her that the property was hers. This allegedly happened, when she was in Grand Cayman working and he asked her to pay the mortgage. She said that the Defendant called her and said, “Lorna, I am asking you to pay for the house, don’t let Housing Trust take it away. Your money is bigger than my own and nobody can get you out of the house. It is your house.” No date was given for this but she said that she began to pay the mortgage when she was working at the Freezone and also when she was working in Grand Cayman. From the evidence she worked there from 1993 to 2011. The Claimant also stated that in 1999 after the mortgage was repaid, the Defendant visited Jamaica, collected the title from NHT and gave her a copy of same.

**[46]** On his case, however, the Defendant denied making any representations on which the Claimant could have relied to ground her claim to an interest in the property. He denied asking her to pay the mortgage, he denied telling her that the house was hers and denied giving her a copy of the title. He also denied that she paid the mortgage and insisted that he sent remittances to pay the mortgage. It has already been noted that neither party has produced any documentation to support their claim of payment of the mortgage. It has not been disputed that the Defendant was paying same up to the point when he migrated in 1991. It is also the undisputed evidence of Mr. Cleveland Thorpe that when the Defendant went to Guantanamo Bay in 1982, he would send money to him to pay the mortgage. Mr. Cleveland Thorpe said that he paid it faithfully for two years. Under cross examination he admitted that after his brother migrated to the United States of America, he did not know how the mortgage, taxes and bills were paid.

**[47]** From the acquisition of the property in 1981 to the Defendant's migration in 1991 is a period of ten (10) years. The Claimant said that she paid the mortgage from 1990, after the Defendant migrated, to 1999. That is a period of nine (9) years. The evidence on the Claimant's case does not support her assertion that she paid 95% of the mortgage. If she is to be believed, then she contributed about half of the mortgage payments. The Defendant was very aware of the progress of the mortgage payments as he was able to return to Jamaica and collect the title as soon as the mortgage was fully paid. There is no evidence to support the claim that the Claimant was asked to pay, and paid the mortgage. I accept the Defendant's evidence that by way of remittances he paid the mortgage for the property. I also find that the Defendant's evidence that he was paying the property taxes to be credible and accept same.

**[48]** On the Defendant's case, both parties allegedly paid to have work done on the property. He said that he did the back while the Claimant had done the front. The Defendant stated under cross-examination that the Claimant renovated and improved part of the property and admitted that the Claimant had never sought his permission to do the improvements. While he remained insistent that he renovated

the back room and the kitchen, he agreed that he never extended the front room, or financed the building of the carport and the veranda or built the concrete fence.

**[49]** I have accepted that the Defendant maintained his interest in the property but I do not accept his evidence that he renovated or made any contribution to the renovation of the property. I have already determined that there was no verbal agreement between the parties regarding the Claimant's interest in the property. I must therefore examine the course of conduct of the parties. The Defendant was very aware of the Claimant's acts of improvement. His daughter's evidence and his own responses are indicative of his knowledge. Yet the Defendant did not object to or stop the Claimant from doing the renovations.

**[50]** While the Claimant has not produced receipts to support her claim of expenditure of \$2,000,000.00, the unchallenged evidence is that she undertook extensive renovations and did improve the property. She would only have done this work if she felt sure that the property was hers. The Claimant has resided at the house since 1981 and remains there to this day. It was in 2015, some 34 years after she moved into the house that the Defendant served her with a notice to quit. She has spent money improving the property and the value has been enhanced. Her contribution was of a capital nature. The Defendant did nothing all those years to remove her from the property, object to her spending or stop her spending. He therefore acquiesced to her spending. In my view, representation can be communicated by such conduct. She placed reliance on said representation and as a result made a significant financial investment in the property.

**[51]** With the knowledge and acquiescence of the Defendant, the Claimant acted to her detriment in expectation of an interest in the property. Equity requires that effect be given to that expectation. I find that she is entitled to a 95% beneficial interest in the property.



## Constructive Trust

[52] A constructive trust arises where it would be unconscionable for the legal owner of property to claim sole entitlement to the beneficial interest. In **McCalla v McCalla** (supra), McIntosh JA outlined the principle as follows at paragraph 27 -

*“It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan** [1985] 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.”*

The Claimant in this case must satisfy the court that:

- a) There was the existence of a common intention that she and the Defendant were to have a beneficial interest in the property and
- b) That she, in reliance on that common intention, acted to her detriment.

[53] This common intention must also have existed at the time when the property was acquired. Nourse LJ at page 431 of **Grant v Edward** [1986] 2 All ER 426, said:

*“In most of these cases the fundamental and invariably the most difficult question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house..... If it is found to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted on it.”*

[54] I do not find that any of the expenditure undertaken by the Claimant is referable to the acquisition of the property. Although the parties were living together at the time of the acquisition, there was no agreement or common intention between them that the Claimant should have a beneficial interest in the property. The Claimant has failed to establish the existence of a constructive trust.

**[55]** It is declared and ordered as follows:

- 1) By virtue of the doctrine of proprietary estoppel the Claimant is entitled to a 95% beneficial interest in the property located at Lot 386 Southboro, Portmore, St. Catherine, registered at Volume 1198 Folio 406.
- 2) The Claimant is permitted to have the first option to purchase the Defendant's 5% share and interest in the property located at Lot 386, Southboro, Portmore, St. Catherine. The said option to be exercised within 120 days of the receipt of the valuation report.
- 3) The property is to be valued by a reputable firm of property valuers to be agreed by the parties within 60 days of this order. Costs of same to be borne equally by the parties.
- 4) If the option is not exercised, then the property should be sold on the open market and the proceeds of the sale be apportioned in accordance with the parties' interest.
- 5) The law office of J. Buchanan-McLean shall have carriage of sale.
- 6) The Registrar of the Supreme Court is empowered to sign any document required to effect the sale and transfer of the said property in the event of the incapacity, neglect or refusal of either party.
- 7) All costs related to the transfer of the property are to be borne equally by both parties.
- 8) Costs awarded to the Claimant to be taxed if not agreed.