



[2020] JMSC Civ 54

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV01194**

<b>BETWEEN</b>	<b>MYRTLE KERR</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>PATRICK KERR</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Kimberly Myrie instructed by Michael B.P. Erskine and Company for the Claimant

Olivia Derrett instructed by Oswest Senior Smith and Company for the Defendant

Heard: February 20, 2020 and April 2, 2020

**Application for recovery of possession – Equitable estoppel – licensee -  
constructive trust – beneficial interest – representation – reliance –  
unconscionable detriment**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

[1] There are two applications before me for decision, the first is a Fixed Date Claim Form filed on the 22nd of March 2019 in which Myrtle Kerr seeks the following orders against her son Patrick Kerr;

1. That the Defendant quit and deliver up possession of the space he occupies in the two story dwelling house situated on all that parcel of land part of Golden Spring in the parish of St Andrew being the lot numbered one and

being the land registered at Volume 1051 Folio 931 of the Register Book of Titles which he occupies as a licensee.

2. That the Defendant does not have an equitable interest in the Claimants property situated on all that land part of Golden Spring in the parish of Saint Andrew being the lot number one and being the land registered at Volume 1051 Folio 931 of the Register Book of Titles which he occupies as a licensee.
3. Costs of these proceedings to the Claimant.

[2] On the 8th of May 2018, the Defendant Mr. Patrick Kerr filed an affidavit in reply and counterclaim in which he seeks the following orders;

1. That the defendant has an equitable interest in the two storey dwelling house at Lot 1 Golden Green Terrace, Golden Spring in the parish of St Andrew registered at Volume 1051 Folio 931 of the Register Book of Titles.
2. The Claimant being well aware of the Defendant's interest is estopped from claiming against the Defendant for the recovery of possession of the portion of the house at Lot 1 Golden Green Terrace, Golden Spring in the parish of St Andrew occupied by the Defendant.
3. The Defendant is entitled to the sum of three million five hundred thousand based on his equitable interest and contribution to the said dwelling at Lot 1 Golden Green Terrace, Golden Spring in the parish of St Andrew.
4. Cost of the proceedings to the Defendant.

## **BACKGROUND**

[3] The property in dispute was purchased by the Claimant, Mrs Myrtle Kerr and her late husband Mr. Gilart Kerr on the 31st of July 1989 as joint tenants. Mr Kerr passed away on the 5th of January 2003. A two storey dwelling home was constructed on this property. The Claimant subsequently took up residence in the

property along with her son Clement and it is not in dispute that the Defendant also occupied a room in this structure.

- [4] In 2018 a letter was sent to the Defendant by Attorneys acting on behalf of the Claimant demanding that he vacate the premises. A Notice to Quit was prepared by the Claimant's Attorneys on the 8th of October 2018 and served on the Defendant on the 9th of October 2019. On the 15th of November 2018 an action for recovery of possession was filed in the Corporate Area Court at Sutton Street. In response to this suit a defence and counterclaim was filed on behalf of the Defendant on the 15th of February 2019 in which he claimed an equitable interest in the property and an order that the Claimant be estopped from proceeding against him. He also sought the sum of \$3,500,000 as the value of his contribution to the house.
- [5] As a result of this counterclaim and the orders sought the matter was withdrawn from the Parish Court and filed in the Supreme Court.

#### **CLAIMANT'S CASE**

- [6] The Claimant a widow in her 80s is the mother of the Defendant and 10 other children having been predeceased by her husband and one child. It was her evidence that the land in Golden Springs was purchased through the joint efforts of her husband and herself in 1989 and held by them as joint tenants until his passing in 2003. In or about 1999 she commenced construction on the property with the intention of constructing a family home where all her children could have a room if they visited or if they needed accommodations for a time.
- [7] She outlined that the house was constructed from her own resources having been engaged in poultry rearing and shop keeping while in Jamaica. She testified that she would also visit the United States where she would work and send home the funds which she used to assist in the construction which would take place whenever she was home.

- [8] According to Mrs. Kerr in 2006 the first story of the house had been completed and having received an eviction notice from her landlord she decided to move into the incomplete structure. Her son Clement also moved into the premises with her and the Defendant would according to her 'go and come.' She noted that he moved in to the premises after Clement did and there was actually a disagreement as he wished to have Clement's room but she directed him to take another and as such he moved into a room in the incomplete second story of the house.
- [9] It was the evidence of Mrs Kerr that the Defendant would at times be at the home of his girlfriend and in this she was supported by her daughter Coleen who stated that the Defendant lived with his girlfriend at Mount Ogle. There was another occasion or two when he went to Haiti for work and was there for a period of 6 months.
- [10] She asserted that the costs of construction were covered entirely by her but she subsequently acknowledged that she was also assisted by her children who provided labour or paid for material and in this she referred to the material bought by her daughter Coleen to complete upstairs after someone had broken in and burgled the house. She indicated that the extent of the Defendant's contribution was a load of sand and a load of gravel but subsequently stated that he had also contributed his labour to the excavation of the house's foundation.
- [11] She testified that although she had sent him to school to be trained as a plumber the Defendant refused to assist with any of the plumbing work and she also denied that he had paid for any material or paid any workmen. It was her evidence that he was in the house by virtue of her giving him permission to stay there and noted that he had his own room and bathroom which no one else used except his visitors.
- [12] Mrs Kerr denied that there had been any discussion and/or agreement among herself, her husband and the defendant for him to contribute to the construction of the home in order to receive an interest. She also denied that her husband could have had any such discussion with the defendant without her awareness or input

given that it was her property as well. She also noted that in any event her husband was not involved in the construction as he was ailing, unable to work and unable to play any role.

- [13]** She insisted that she had allowed the Defendant to move into the room but most of the furnishings were hers and that he had moved his daughters in without her knowledge or permission. She also outlined that she did not get along with him as he had been aggressive towards her even to the point of using expletives to her during an argument, something that the Defendant admitted had occurred.
- [14]** During cross examination she was presented with a letter from Shaw's Quarry in which an individual who identified himself as the owner stated that he had delivered a significant amount of material to the property on behalf of Defendant and she denied that this had taken place. She indicated that the owner of the quarry had in fact gifted her material as he had been a friend of her husband and this material had been collected by another son who had used a truck to do so.
- [15]** She testified that in keeping with the permission to occupy the room, the Defendant was to assist with expenses even while he was not required to pay rent but he failed to honour this undertaking. She outlined that given her advancing age she had to be assisted in this regard by her son Gilart and her daughter Coleen. Gilart paid the light and phone bills and Coleen would pay for the water. She denied that the Defendant assisted with any of these bills and noted that the water had to be disconnected as well as the phone because the amounts had been run up.
- [16]** Mrs. Kerr agreed that she had not produced any receipts for material purchased or payments made to workmen in respect of her case. She explained that this was some time ago and she never thought she would be here (in Court) so she didn't keep them. She insisted that the Defendant never contributed towards the construction of her house and pointed out that in fact both her and her daughter had to assist him with his expenses to travel to Haiti for work and he had not fully repaid this sum.

- [17] In relation to the proceedings before the Parish Court, Mrs Kerr exhibited the Claim which had been filed along with the Defence filed on behalf of the Defendant. A review of the Defence reveals a request for similar orders by the Defendant on the basis that in the early 1990s he had made an oral agreement with the Claimant to be allowed to reside at the house once he made a contribution to its construction through the provision of material and labour.
- [18] The account of the Claimant was supported in some respects by her son and daughter, Gilart and Coleen, who both confirmed the aggressive behaviour of the Defendant towards her. They also spoke of their contribution towards the paying of bills and even towards the construction of the house, the latter was accepted by Gilart as not outlined in his affidavit. They also insisted that the Defendant would not have been promised an interest in the house without their knowledge as their mother was in the practice of sharing things in relation to the house with them. Gilart was asked about the payment of bills and he agreed that he had never asked the Defendant to contribute towards the payment of the bills that he covered.
- [19] In relation to the document produced by Coleen she indicated that it was a copy receipt for the material she had purchased from Home and Things for completion of the upper floor of the disputed property. She indicated that it bore a date of May 2019 as that was when this duplicate was requested for the purpose of the Court proceedings. She agreed that she had recently constructed a house herself but stated that this material went to her mother's house.

## **DEFENDANT'S CASE**

- [20] It was the evidence of the Defendant that contrary to the assertions of his mother he is entitled to an interest in the house having spent a substantial sum of money in the construction of same as a result of his reliance on her promise that he would be able to live there for the remainder of his years.

- [21]** He asserted that this promise was made to him by her and his father in a conversation that all three of them had. He was asked about his second affidavit in which he had stated that he had made this contribution pursuant to a death bed conversation with his father and he indicated that this was two different statements. It was suggested to him that his remark, in his second affidavit, that he made the contribution that in the event he was asked to leave he could be compensated was a clear indication that there was no agreement and he disagreed.
- [22]** He denied that the section of the house which he occupied had in fact been finished by Coleen. He also denied initially that she had done any work on the house at all. In 2 subsequent affidavits however, he acknowledged that Coleen had done some work but asserted none was done on his section as all the work in that area had been done by him.
- [23]** He testified that he had contributed towards the payment of the water bills and that he had been told by Gilart that he could use the light and phone but did not have to make a contribution to same. He acknowledged that the water supply had been disconnected and stated that he wondered what had happened but he didn't ask anyone.
- [24]** He insisted that he was never aggressive to his mother neither did he act in any way that caused her to leave the house. He testified that they had had an argument and he had told her expletives but said this was in circumstances where she wanted him to marry a stranger in order to get a green card and he wanted to remain with his partner. He asserted that it was since this incident that she had turned on him and insisted that he leave the house.
- [25]** Mr Kerr denied that all he ever gave his mother was a load of sand and a load of gravel. He outlined that he did extensive work on the house to include all the plumbing and casting the foundation. He produced the letter from Shaw's Quarry which has been referred to above and he also exhibited a document produced by a Quantity Surveyor. This document was dated September 2nd, 2019. He

acknowledged that the Surveyor had visited the premises and he had told him all the material and labour he provided and expenses covered and from this the Quantity Surveyor affixed figures and the sum of over \$2 million was arrived at for how much he spent. In relation to the value claimed of \$3.5 million he gave no evidence to account for this figure.

**[26]** He insisted that none of his siblings were around when he had the discussion with his parents and as such they could not deny that it had taken place. He denied that he had ever made threats to his mother or destroyed locks separating her section of the house from the part occupied by him. He also denied taking persons to the house or acting in the manner that the Claimant testified that he did.

### **CLAIMANT'S SUBMISSIONS**

**[27]** It was submitted by Ms. Robinson that the in relation to this matter the Court had to determine;

- a) Whether the Defendant was a licensee given permission to remain in the dwelling house by the Claimant;
- b) Whether there was an agreement or promised involving the Claimant, her husband (before his death) and the Defendant for the Defendant to contribute to the construction of the property and have a right to reside in a section of the house as his dwelling place; and
- c) Whether the Defendant has an equitable interest in the house, subject of the dispute, if so, what is the value of that interest

**[28]** She submitted that in respect of the agreement which the Defendant says was made this is disputed by the Claimant who also pointed out that the sole extent of the Defendant's contribution was a load of gravel and a load of sand. In relation to the contributions which the Claimant accepted were made Ms Robinson submitted that no interest would arise from same as the Defendant had occupied the house

without paying rent or bills for over 12 years and this contribution would have been extinguished.

- [29] In relation to the Defendant's production of the Quantity Surveyor's report it was submitted by Ms Robinson that the Court should view this document with caution as it as a subjective document which was prepared from information that the Defendant himself gave to the Quantity Surveyor in the absence of anyone else.
- [30] In relation to the letter from Shaw's Quarry as to the substantial amount of building material delivered to the house Ms Robinson noted that this was refuted by the Claimant who pointed out that her son Clement had actually used a truck to collect material from that location and no delivery had been done by them to the house. She compared this to the document produced by Coleen Kerr which detailed the material purchased for the house. Counsel asserted that it was evident that while the Defendant made no contribution to the house he has sought to claim what was done by his siblings and he was also content to use amenities which they had to pay for.
- [31] Counsel then made reference to the dicta of McIntosh J at paragraph 27 in *Grace McCalla v Eric McCalla, Jenice McCalla and Jeffrey McCalla* and submitted that the Defendant has failed to show sufficient evidence of a common intention between him, the Claimant and his now deceased father. She also asserted that he has failed to provide any concrete evidence of his contribution or that he acted to his detriment and as such no constructive trust was created and he is not beneficially entitled.
- [32] In respect of the evidence of Collen Kerr, Ms. Robinson submitted that it provided support for the Claimant's contention in respect of the Defendant's aggressive behaviour as it showed that when the Claimant tried to returned home and placed locks to prevent the defendant from entering her section of the house he destroyed same.

- [33] Counsel also submitted that the Defendants continued use of the utilities, even when his mother was away, caused the amounts to increase and led to eventual disconnection for non-payment she observed that is further evidence of his dishonest conduct and his preference to have others pay his way rather than assist.
- [34] She submitted that the assertions made by the Defendant are inaccurate and unreliable and has asked the Court to find that he cannot be considered a credible witness as he has provided no evidence in support of his assertions.
- [35] She made reference to the first instance judgment in **Grace McCalla v Eric McCalla, Jenice McCalla and Jeffrey McCalla**, Mr. Justice Sykes (as he then was) in examining the situation where the name of the person claiming an interest is not registered on the title stated;

*"the issue now is whether there is any post acquisition conduct on the part [of that person] that has the effect of altering the beneficial interest of the property. When there is a claim based solely on constructive trust principles, almost inevitably the claimant is admitting that he did not contribute to the acquisition of the property. He is asking equity to declare that the conduct of the legal title holder is unconscionable."*

- [36] Counsel also observed that in respect of the Defendant's request that the Claimant be estopped from recovering possession from the Defendant, the law is that there must be substantial evidence of an agreement or promise in order for the doctrine of estoppel to apply. She commended to the Court the ratio of the Court in **Lloyds Bank v Rosset** [1991] 1.A.C. where it was stated;

*"Where there is no evidence to support a finding of an agreement or arrangement to share ... the court must rely entirely on the conduct of the parties both on the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust."*

- [37] Ms Robinson also submitted that no agreement or arrangement in order for a claim in estoppel to arise existed, neither was this a situation in which a constructive trust could be said to exist. She observed that at no time did the Defendant provide

evidence to show when an agreement was made with the Claimant, his father and himself, other than stating that it was made before his father's death. She highlighted that there was no specified year, or proof of a meeting. She noted that the Defendant has simply stated that an agreement or promise was made nothing without more. She compared this to the case of ***Grace McCalla v Eric McCalla, Jenice McCalla and Jeffrey McCalla*** where the evidence presented in that case was that there was a meeting among the parties at which promises were made and the Claimant acted to her detriment as a result of those promises.

[38] In respect of this agreement Ms Robinson submitted that the Defendant gave evidence that has contradicted his assertions of a discussion (among himself, the Claimant and his father) in support of his counterclaim to the Court. She observed that in paragraph 4 of his Affidavit in response to Affidavit of Myrtle Kerr filed on the November 25, 2019, the Defendant stated that "It was promised to me by both my parents that if I contributed to the construction of the land then I would have obtained the benefit of living in a section of the premise. As per the agreement, I currently only occupy one section of the house as that was the intention of both my parents and myself at the material time."

[39] She asserted that, in paragraph 8 of the same affidavit, he contradicted himself when he stated that "I contributed to the construction with the intention of not losing my right to live there. On his dying bed my father said he knew that his wife was miserable but he was asking [me] to help her please.' She also highlighted, paragraph 6 of the same Affidavit, where the Defendant stated "I am only aware of what agreement I arrived at with my parents, during my father's lifetime. I moved to live at the house a year after my father passed away with the intention to start construction as per our agreement."

[40] Ms Robinson submitted that the Claimant's husband died in 2003. At the time of his death, the structure of the house was almost complete, as such, the Defendant's statement in paragraph 6 is contrary to his claim that there was an agreement with the Claimant, himself and his father and this would affect the

contribution claimed by the Defendant. She asked the Court to note that when asked about the word 'start' in paragraph 6, the Defendant stated that the word was an error and should be read as 'complete'. She contended that the change of the word only serves to raise the issue of the Defendant's credibility as a witness as all these paragraphs

- [41] Counsel commended to the Court the evidence of the Claimant that she was not aware of any such agreement. She also submitted that although the father was in his right mind, as confirmed by the evidence of Coleen Kerr, he had not been in a position to make any decision regarding the property without the Claimant's input, as the Claimant noted that no construction took place unless she was present in Jamaica. Ms. Robinson noted that it can be inferred from this that she controlled every aspect of the construction of the house.
- [42] Ms. Robinson asked the Court to accept the evidence of the Claimant of how the Defendant came to be living at the house. She noted that the Defendant was given permission to stay at the house. She asked the Court to accept the evidence of Coleen Kerr that the Defendant lived with his "baby mother" at Mount Ogle and would 'kotch' on one of the beds when he came to visit while they lived at the rented house, and the situation was the same at the house in Golden Springs.
- [43] Counsel also referred to the defendant's evidence that he would spend time with his common law spouse as well as his evidence about Haiti where it was highlighted that he lived in Haiti for six month intervals over the period 2011 to 2013.
- [44] Ms. Robinson also submitted that the Defendant's account is unreliable as throughout his evidence, he constantly provided the Court with contradictory information. She observed that initially, the Defendant held firm at paragraph 25 of his first affidavit that his sister did not make the contribution which was stated in the Claimant's evidence.

- [45]** Counsel noted that in his subsequent affidavit however, he agreed that his sister, Coleen Kerr did in fact make contributions to the property and these included "bathroom windows and a window to an upstairs room, doors, grill and burglar bar, she painted upstairs, tiled upstairs, put in kitchen cupboards, and kitchen window and finished four bathrooms."
- [46]** Ms. Robinson also highlighted that during cross-examination, the Defendant was adamant that he knew what he contributed and no one else knew; however, upon further questioning he stated that he knew what his other siblings contributed because everyone knew what the other did, which she stated shows that he is an untruthful witness as to his contribution.
- [47]** Counsel asserted that the contributions claimed by the Defendant are fabricated as his main proof of contribution is based wholly on a document which was created from his opinion of the work he claimed to have completed on the property. In respect of this document, she noted that the information was recently collected and not documented at the time of construction. She submitted that the Court will have to decide whether the contributions claimed by the Defendant were in fact contributions made by him or whether they were a gift to the Claimant.
- [48]** Ms Robinson also submitted that the Claimant's action to recover possession of the section of the house which the Defendant occupies is not unconscionable and that she should not be estopped from her claim. She maintained that there was no evidence presented by of an agreement/arrangement/promise which the Defendant relied on and acted to his detriment for the doctrine of estoppel to apply. She also noted that a constructive trust does not arise in this situation as the contributions being claimed by the Defendant are not valid, and those which he in fact made were not significant to amount to an interest in the property, when compared to the contributions of others who also gave gifts.

## DEFENDANT'S SUBMISSIONS

[49] In putting forward her submissions Ms Derrett identified 13 areas under the heading facts in dispute, 6 of which I have highlighted as being central to the claim and counterclaims brought in this matter.

1. Whether or not the Claimant, her husband and the Defendant entered into an arrangement wherein the Defendant would contribute to the construction of the premises in exchange for a right of occupation of a portion of the premises?
2. Whether or not the Defendant contributed to the construction of the premises to his detriment?
3. Whether or not the Defendant contributed to the construction of the premises which now values \$3,500,000.00?
4. Whether or not the Defendant is a licensee?
5. Whether or not the Defendant has an equitable interest?
6. Whether or not the Claimant is estopped from recovering possession from the Defendant?

[50] It was submitted by Ms. Derrett that the Defendant can rely on the doctrine of Estoppel as a counterclaim to the action brought by the Claimant as the said doctrine is also a cause of action per **Crabb v Arun District Council** [1975] 3 All ER 865, Lord Denning MR where Lord Denning MR said at page 871:

*“When counsel for Mr Crabb said that he put his case on an estoppel, it shook me a little, because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action.”*

- [51] She also referred to and relied on the dicta of Lord Scarman LAJ in the same decision where he expounded at page 879:

*“The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway. 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?”*

- [52] Ms Derrett also asked the Court to consider the decision of **Clarke v Kellarie** (19701 16 WIR 40 as well as the dicta of the Court in **International Hotels Jamaica Limited v Proprietors Strata Plan No 461 2013 JMCA Civ 45**, paragraphs 123 to 127 where it was outlined that the main elements of proprietary estoppel are, firstly, a representation (or assurance) by the landowner; secondly, reliance (or change of position) on the part of the person claiming the equity; and, thirdly, resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner

- [53] In respect of the evidence of the Claimant Ms Derrett noted that she testified that she was the one who purchased all the materials had the excavation done and purchased the cements, gravel and sand. Counsel also noted that the Claimant challenged the evidence of the Defendant that he provided materials he purchased from Shaw's Quarry by asserting that the owner gave her a load of sand and gravel as a gift. Ms Derrett argued however that the Court was not advised if this was the same load of sand and gravel that she alleged that she received from the Defendant.

- [54] Counsel submitted that although the Claimant exhibited a quotation from Home and Things dated May 21, 2019 which she stated represented the contribution of Coleen Kerr, most of the items put forward were fixtures for bathrooms and did not reflect the full evidence as to what Coleen provided. She also submitted that there

was no explanation given as to the date being 2019 or why the address of Golden Spring was not placed at the very top of the quotation where it says address instead it was written on the document by hand. She observed that in any event this was just a quotation and not a receipt and asked the Court to note that Coleen had recently constructed her own house.

**[55]** It was also submitted by Ms. Derrett that in spite of detailed Affidavits provided by the Claimant which included detailed events with dates and specifics, in giving her evidence the Claimant came across as not having a good memory as when she was asked certain questions in cross-examination about her affidavits she could not readily remember and the question had to be repeated several times, she noted that this was so even in relation to events as recent as 2018.

**[56]** Counsel then highlighted a number of areas where she stated that the Claimants memory was faulty this included her inability to recall an argument in 2018 with the Defendant which she had mentioned in her affidavit. It was also submitted that in her affidavit evidence she denied that the Defendant had assisted with the excavation but in cross examination she stated that he had helped at the beginning.

**[57]** In relation to Gilart Kerr, it was submitted by Ms. Derrett that an examination of his evidence showed that he was not always around and would not have been privy to every conversation between his mother and father and the defendant. She also submitted that on this basis he would not have been in a position to assert that the Defendant made no contribution towards the construction of the house.

**[58]** In relation to Coleen Kerr it was submitted that the document from Home and Things which has been produced by her as material bought for the house is a quotation and not a receipt. It was also noted that she was not privy to every conversation between the Defendant and her parents so her evidence had to be considered in that respect.

- [59]** Counsel submitted that the Claimant, her spouse and the Defendant entered into an agreement wherein the Defendant would have enjoyed the right of living at the Claimant's premises, if he contributed financially to the construction of the said premises. She maintained that this was the representation made by the Claimant and her spouse to the Defendant and noted that it is not sufficient to say that she did not enter this arrangement with the Defendant because she did not enter this arrangement with any of her other children.
- [60]** Ms Derrett submitted that it is clearly shown from her evidence that the relationship the Claimant has with her children is diverse. She also argued that if all the children who contributed to the premises have a designated room, it is sufficient to suggest that a representation for permission to live at the premises was made to the Defendant.
- [61]** She argued that in reliance on the promise the Defendant incurred expenses to assist with the construction to the said premises and has been residing at the said premises as his home. She submitted that the Defendant physically assisted with the labour on the said premises and bought materials and she contended that he has provided evidence of this.
- [62]** Ms. Derrett argued that had this promise not been made the Defendant would not have acted accordingly. She contended that it is unconscionable for the Claimant, who is now not getting along with the Defendant, to seek to displace him and asked that she be estopped or that the parties should sever ties on a contribution basis.

## **LAW**

- [63]** In resolving the issue between the Parties it is clear that the decision of the Court must be guided by the resolution of the question whether there was an equitable interest which would allow the Defendant to successfully claim equitable estoppel.

## Equitable Estoppel

- [64] In the decision of *Eric McCalla et al v Grace McCalla* [2012] JMCA Civ 31, the legal principle applicable to a claim for equitable estoppel was noted by McIntosh JA as follows;

*“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.”*

- [65] This principle was also examined by our Court of Appeal in the decision ***International Hotels (Jamaica) Limited v Proprietor’s Strata Plan No. 461*** [2013] JMCA Civ 45 where Morrison JA stated as follows;

*“As regards proprietary estoppel, in Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897, 909, Oliver J (as he then was) described the seminal nineteenth century case of Ramsden v Dyson and another (1866) LR 1 HL 129 as “[t]he starting point”. In that case, Lord Kingsdown said this (at page 170): “If a man, under a 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, without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.”*

- [66] Having made this observation, the Learned Judge continued;

*“In Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Oliver J then went on to say this (at pages 915-916): “...the more recent cases indicate, in my judgment, that the application of the Ramsden v Dyson principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to*

*inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”*

- [67] His Lordship then continued his exposition on this subject matter by considering the decision ***Inwards and others v Baker*** [1965] 1 All ER 446, where Lord Denning MR at pages 448-449 stated:

*“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... So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. 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.”*

- [68] In respect of the general application of these principles Morrison JA noted;

*“Inwards v Baker was followed in ***E.R. Ives Investments Ltd v High*** [1967] 1 All ER 504. In that case, the plaintiffs’ predecessor in title, a Mr Westgate, and the defendant bought building sites which adjoined each other in 1949. The foundations of Mr Westgate’s building trespassed under the defendant’s land, drawing an objection from the defendant. It was then agreed between them that the foundations might remain in that position and that the defendant should have right of access to and from his site across Mr Westgate’s yard at the back of his building to a side street. This agreement was documented in correspondence between the parties. In 1950, Mr Westgate sold his site and the flats which he had built on it to Mr and Mrs Wright, while the defendant completed his own building and used the right of way for the purpose of the construction work. In 1959, he built a garage in such a position that it could only be entered by access over the yard and the Wrights complimented him on it. The defendant used the yard for access for his car and in 1960 he contributed one-fifth to the cost of re-surfacing the yard. In that same year, the flats were sold by the Wrights to the plaintiffs, the property being conveyed subject “to the right (if any) of the owners and occupiers of” the defendant’s land “as now enjoyed to pass and repass with or without vehicles, over the open yard at the rear”. However, the defendant’s rights over the yard were never registered under the relevant statutory provisions and in due course the plaintiffs sought an injunction to restrain the defendant from exercising a right of passage across the yard.”*

*“The Court of Appeal held that the defendant was entitled in equity to access to and from his garage over the yard by virtue of equitable estoppel or acquiescence by the plaintiffs’ immediate predecessors in title, in consequence of their having stood by when the defendant built his garage in such manner that access for a car to and from it could only be had over the yard. Lord Denning MR stated the following (at pages 507- 508): “The right arises out of the expense incurred by the defendant in building his garage, as it is now, with access only over the yard: and the Wrights standing by and acquiescing in it, knowing that he believed he had a right of way over the yard. By so doing the Wrights created in the defendant’s mind a reasonable expectation that his access over the yard would not be disturbed. That gives rise to an ‘equity arising out of acquiescence’. It is available not only against the Wrights but also their successors in title. The court will not allow that expectation to be defeated when it would be inequitable so to do. It is for the court in each case to decide in what way the equity can be satisfied (see **Inwards v Baker**, **Ward v Kirkland** and the cases cited therein). In this case it could only be satisfied by allowing the defendant and his successors to have access over the yard so long as the block of flats has its foundations in his land.”*

[69] The extract from the text Gray & Gray’s Elements of Land Law (5th edn, 2009), was also examined by His Lordship and he noted that it lays out the principles emerging from the authorities as follows;

*“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’).*

[70] In light of this exposition on the relevant principles, it is clear that an estoppel claim succeeds only if the circumstances reveal that it would be inequitable to allow the ‘representor’ to overturn assumptions which had been reasonably created by his earlier informal dealings in relation to his land. To this end there must be evidence sufficient to show the elements of representation, reliance and detriment for a claim made in this regard to succeed.

## **ANALYSIS AND DISCUSSION**

**[71]** In considering the matter before me, I note that it is agreed between the parties that the land on which the house was constructed was owned solely by the Claimant, her husband having passed on in 2003. It also appears to be uncontroversial that construction of the structure which is now being occupied by the Claimant as well as the Defendant was funded at least in part by the Claimant. In making this second observation, I have taken note of the Defendant's first affidavit in which he had insisted that his mother had no means as she was a housewife but in subsequent affidavits it is evident that he no longer disputed contribution by his mother but sought instead to assert his own contribution and his reason for same.

**[72]** It is clear from an examination of the respective cases that the parties are in strong disagreement as to how the Defendant came to be residing at the disputed property. It is also apparent that the disagreement may have affected the family dynamics as two of the Defendant's siblings were witnesses against him.

**[73]** With the uncontroversial issues between the parties, it is clear that the Claimant has the requisite legal standing to bring the action which she did, as such the issue for the Court is whether the Defendant was a mere licensee or had he in fact acquired an equitable interest in the property which would require that the Claimant be estopped from evicting him from same.

**[74]** It is the Claimant's case that her house, while intended to be a family home, was never intended to be a permanent residence for any of her children at least not during her lifetime. She also indicated that in light of the fact that she had 12 children, one of whom had later passed away, she could not have made an agreement with only one child to give him an interest when it would have been her intention that all of her children would eventually benefit.

**[75]** In support of her position that the Defendant had always been a licensee she stated that this was consistent with her outlook and approach as another of her sons

Clement had also been permitted to stay at the house from time to time. She outlined that the Defendant would stay at the house with her permission but at other times he would be at his girlfriend. She also highlighted that the understanding was the Defendant would be required to pay his way as he had been informed he needed to contribute to the bills. She also testified that although the Defendant had been living at the house for over twelve years she had demanded that he leave her premises when his behaviour became threatening and had instructed her attorneys to serve him with letters as well as an eviction notice.

[76] In respect of this contention, the Defendant has denied being a licensee and has asserted that to the contrary he assisted in the construction of the house, has a right to be there and should be compensated for same if he has to leave.

[77] In examining these competing positions, I have noted the guidance provided by McIntosh JA at paragraph 47 of the decision of *Eric McCalla et al v Grace McCalla* that the party seeking to establish an entitlement to a beneficial interest ought to present to the court more than bare assertions.

[78] In applying this guidance, I have conducted a careful review of the Defendant's case as well as that of the Claimant to determine if he has established a basis for this entitlement.

[79] It is settled law that in order for a successful claim of proprietary estoppel to be established three elements must be proved by the party which is raising same;

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

It is my intention to examine the evidence presented under each heading in order to arrive at a determination of the issues joined.

### **Representation/Assurance of Rights**

**[80]** The Defendant has asserted that there was a conversation with his parents during which he was asked by them to contribute to the construction and agreed to assist in exchange for the right to reside at the house. In order to determine if there was any such agreement, I have considered the other evidence which has been presented by him on this point as well as the conduct of the parties themselves.

**[81]** In conducting my examination, I noted that although the Defendant presented evidence of an agreement in his first affidavit and asserted under cross examination that one was made with his parents, he accepted that in his second affidavit he stated that he had this conversation with his father alone as he lay on his death bed. In providing details of this conversation he stated that he was asked by his father to help the Claimant even though she was miserable. When asked about the apparent conflict between these two positions the Defendant's explanation was that it was two different statements.

**[82]** On a close examination of the details of this conversation with the father it was apparent that it does not convey that any sort of agreement was being made with the Defendant. In fact, the father's request that he help the mother in spite of her being miserable would convey the impression that his father was in fact soliciting a gift/assistance from him to assist the mother in undertaking the work which she apparently had been funding on her own.

**[83]** In arriving at this conclusion I found support in the response of the Defendant when he was asked by Counsel for the Claimant as to what informed the preparation of the Quantity Surveyor's report as he replied; 'He did the report from what I told him I used, gave as gift, I now say donated and what his eyes saw'. This was a significant remark as even though Counsel sought to re-examine on the point and asked what he meant by donated, his reply was to say he should have said delivered. In those circumstances, I was left with the impression that this was a

case in which the Defendant had made a Freudian slip and the truth of the situation had 'slipped' out in spite of his efforts to suppress it and later explain it away.

- [84]** I am fortified in this conclusion as on the evidence of the Claimant, her supporting witnesses and even the Defendant himself in his subsequent affidavits, quite a bit of the work on the house had been contributed to by other children who had supplied material, labour or both. In those circumstances even if this death bed conversation had occurred it was clear that no quid pro quo was promised as all that the father would have asked of him was exactly as he stated, that is, to help his mother.
- [85]** The contradictions did not end here however as the Defendant also went on to say that having had this conversation with his father he made his contribution 'with the intention that if in any case he was asked to leave he would be compensated'. Apart from being an intention/outlook which is wholly inconsistent with an agreement being in existence, it is clear from this bit of his evidence that what the Defendant was seeking to do at this point was to make an investment in the property in order to secure an interest and he was doing so in order to be compensated.
- [86]** Apart from the evidence of conversations, in keeping with the principles outlined in decided cases, I have also examined the conduct of the parties. It has not been disputed by the Claimant that the defendant occupied a specific section of the house consisting of a room and bathroom, what she has indicated however is that this is with her permission which makes him a licensee and as such her behaviour in allowing him to remain there ought not to be read as her acquiescing in him acquiring an interest in her home.
- [87]** The defendant on the other hand outlined that this section of the house was his and it was understood to be his by everyone but on his own admission when he returned to the house after working in Haiti he had been denied access to this area

as things had been packed up in that section of the house and he had to move into a room which had formerly been occupied by his brother.

**[88]** In respect of the amenities, it was his evidence that he had gotten permission from his brother Gilart to use the light and telephone. He asserted that he had made contributions to the water bills but when the water was disconnected, although it would have been an inconvenience to him as an occupant who possessed a beneficial interest, he stated that no one said anything to him neither did he ask any questions. More importantly he took no steps to have this situation addressed.

**[89]** He was asked about the fact that he had moved in his daughter into the premises and whether he had asked permission of his mother to do so. His response was most instructive as he indicated that he had not done so, not because he didn't need to, but because his mother was overseas and she wasn't answering his calls.

**[90]** Whereas the conduct of the Claimant was consistent with her contention that the Defendant was nothing more than a licensee, the Defendant on the other hand operated not as someone who held an interest in the property but as an individual who was aware of the parameters governing his residence and the need to seek permission or the input of another.

## **Reliance**

**[91]** It was the evidence of the Defendant that he was currently employed as a quarry supervisor but no documentary evidence has been presented as to his occupation at the time of the construction of this property or his income. Additionally, there been no evidence presented by him as to his finances or ability to assist in the construction neither has he furnished any evidence of what was provided by him in respect of material and funding.

**[92]** I have noted that he sought to rely on a letter from Shaw's Quarry which contained a vague representation that a substantial amount of various building material was delivered to the address on his behalf over time. The challenge in respect of this

document is that there was no indication as to the period of time when this material was delivered, ie what date, month or even year or years.

**[93]** Additionally, there is no indication as to what constituted various building material neither was there an indication as to what was meant by a substantial amount. In light of the type of business operated, it would not be too much to expect that a quarry would have kept records of what was ordered and delivered, by whom and where it was delivered. While the letter is specific as to who placed the order and the address to which it was delivered it provides absolutely no details of what exactly was delivered or how much. In those circumstances, I was not persuaded that this was a document which provided the cogent evidence which would be required to show the purchases made by the Defendant in reliance on this agreement.

**[94]** Having examined the letter, I then went on to consider the report provided by the Quantity Surveyor which was dated the 2nd of September 2019. It was the evidence of Mr Kerr that the information as to the material provided, the quantity of the material and the extent of the work done all came from him. It also emerged from his evidence that the Quantity Surveyor had actually visited the house during which this information was provided and areas were pointed out and all of this was done in the absence of the Claimant. In these circumstances I found myself in full agreement with the submission of Counsel for the Claimant that this document had to be viewed with caution. Additionally, taking into account the circumstances in which it was created I was not persuaded on a balance of probabilities that it was a document that could be accepted as authentic and of any assistance in determining the issue between the parties.

**[95]** The final document which was exhibited by the Defendant was a valuation report and it appears that this report was prepared in respect of his request for compensation of his interest in the sum of \$3.5 million. An examination of this report shows that the market value of the house was placed at \$22 million. Although the Defendant did not place a dollar figure on how much he spent in

assisting to construct the house, the quantity surveyor in his report placed this figure at over \$2.2 million. Between the two documents there is nothing to explain the elevation of the value of the Defendant's contribution from the figure of \$2.2 million to the \$3.5 million claimed. Neither was any evidence given by the Defendant to account for this variance.

- [96]** In the circumstances I was unable to find that the documentary 'proof' which was exhibited by the Defendant provided any support for his contention that he had acted in reliance on this agreement. In respect of his viva voce evidence as to what was done by him, I found that this state of affairs was not much better as the scope and extent of the work done by the Defendant was wholly inconsistent from affidavit to affidavit. In his first affidavit he explained the scope of the work done by him as the casting of a number of rooms, providing building material, excavating the foundation and general plumbing. He also stated that he purchased material for tiling and construction of a shelf. He denied that his sister Coleen had put in windows, doors, painted, tiled, completed kitchen cupboards, provided burglar bars and completed 4 bathrooms by putting in fixtures. He also denied that one of these bathrooms was the one used by him, even though Coleen had exhibited the receipt for the purchase of these fixtures.
- [97]** In his second affidavit however while acknowledging that Coleen had helped with some construction on the upper floor he said that his contribution was that he did work on the entire house. He stated that he did the plumbing with his bare hands, laid all the pipes and did the sewage. He also added that he was the one who put in all the windows downstairs and the major windows upstairs and although Coleen painted and tiled upstairs he was the person who painted and tiled his room.
- [98]** In cross –examination he was asked about his conflicting remarks as to the scope of the work done by Coleen and he initially denied that she had done work on the property. His affidavits were shown to him and he accepted that she had done work but maintained that she did no work on his room.

**[99]** With the contradictions in his evidence, additions to the work he claimed to have done and further changes made to his viva voce evidence I was left with a doubt as to whether his account could be accepted on a balance of probabilities that he had in fact carried out this work on the property in question.

**Unconscionable disadvantage/detriment**

**[100]** In light of my findings that there was no representation made to the Defendant, neither has there been any cogent and reliable evidence presented that he took any action in reliance on this representation whether mistakenly or otherwise, I am unable to find that the Defendant suffered any detriment which would entitle him to have the Claimant estopped from evicting him from the premises.

**[101]** I did not believe that there was any conversation in which he was asked to make a contribution in exchange for an interest in the property and I accept the account of the Claimant that he had in fact been given permission to stay at the house but this permission was later withdrawn when he became a source of contention in the house.

**[102]** As I considered his evidence and observed his demeanour under cross examination I was not impressed with the Defendant. I found his account to be contradictory and subject to adjustments and I was left with the impression that he was not being truthful with the Court.

**[103]** My assessment of the Claimant on the other hand was that of a straightforward witness who was weary of the situation but was doing her honest best to inform the Court of all that had transpired. I noted that there were times when she did not remember certain details shared in her affidavit but this was in relation to the subject of a quarrel with the Defendant in 2018 and why exactly her son Clement had made a report to the police against the Defendant. These were peripheral issues and did not go to the issue between the parties, where that was concerned she gave clear and cogent evidence which I found to be credible and reliable.

**[104]** I was also impressed with the evidence of her witnesses and it was clear that they gave honest accounts of what had transpired as the only point of significance on which their evidence was challenged was that they would not have been present during this discussion as they did not live at the house. I believed their indication that they shared a close relationship with their mother and if such a situation had existed this would have been conveyed to them. The closeness of this relationship was confirmed by the Claimant herself who stated that they were the closest ones to her.

## **DISPOSITION**

**[105]** Having carefully reviewed all the evidence which had been presented in support of this claim and counterclaim, it is my finding that the Claimant has proved her case on a balance of probabilities. In respect of the Defendant, his counterclaim not having been proved to the requisite standard his application herein is denied.

**[106]** Accordingly, these are my orders;

1. The Defendant does not have an equitable interest in the Claimants property situated on all that land part of Golden Spring in the parish of Saint Andrew being the lot number one and being the land registered at Volume 1051 Folio 931 of the Register Book of Titles which he occupies as a licensee.
2. The Defendant is to quit and deliver up possession of the space he occupies in the two story dwelling house situated on all that parcel of land part of Golden Spring in the parish of St Andrew being the lot numbered one and being the land registered at Volume 1051 Folio 931 of the Register Book of Titles which he occupies as a licensee within 60 days of the order herein.
3. The Defendant's application on the Counterclaim is refused.
4. Costs of these proceedings is awarded to the Claimant to be taxed if not agreed.

5. Claimant's Attorney to prepare, file and serve order herein.