[2020] JMSC Civ 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011/HCV 03902

BETWEEN	**CHARMAINE LYONS**	**CLAIMANT**
AND	**DELROY LINDSAY**	**1ST DEFENDANT**
AND	**LEARIE MITCHELL**	**2ND DEFENDANT**

IN OPEN COURT

Aisha M.N. Mulendwe for the Claimant.

Rudolph Francis instructed by Rudolph I. Francis and Company for the Defendants.

Heard 14th and 15th of January 2019 and the 3rd of April 2020

Recovery of possession of land - Defence of adverse possession - Whether factual exclusive possession and intention to possess proven - Defence of proprietary estoppel - Whether there is evidence of assurance - reliance - detriment - Person in whom interest via proprietary estoppel resides is deceased - Estate not a party to the proceedings - Defendants are not personal representatives of the estate - Whether the Defendants can rely on the rights of the estate to remain in possession - Mesne Profits.

THOMAS J.

Introduction

[1] By Fixed Date Claim Form filed on the 17th of June 2017, the Claimant in these proceedings brought an action for recovery of possession of lands part of Dawkins Mocho in the parish of Clarendon, registered at Volume 1280 Folio 578 of the Registered Book of titles. She also seeks the following declarations:

i. Of entitlement in the building on the said Land described in the Appraisal Report by. CD Alexander Company Reality Limited of February 20th 2010 as Building No. I.

ii. That the beneficiaries of the estates of Eric Harris, Rose Ann Thomas, Gwendolyn Allison and Naomi Small are entitled to share in the said Building No.1 occupied by the 1st and 2nd Defendants.

iii. That the Claimant is entitled to Mesne profits

[2] She also seeks, "a determination of the respective shares of the persons entitled to share in Building 1 and that the Claimant settle in full the share of all those entitled to share in Building 1".

[3] The sum total of the Defence of the first Defendant is that:

I. He has been in undisturbed possession of the land for more than 12 years.

II. The house was built by his mother with her own money with the permission of his aunt, Ms. Naomi Small, the Claimant's predecessor in title

III. The house along with the house spot belonged to his mother

[4] The 2nd Defendant is resisting the Claim on the basis that the house belonged to his grandmother and he built a room on the house.

[5] The following evidence is undisputed:

Ms Lyons is the registered proprietor of the disputed property. Ms. Lyons was registered as the title holder of the property on the 19th of April 1995. The land was originally owned by Garcia Small. Naomi Small was the only child of Rose Ann Thomas and Garcia Small. On the death of Garcia Small the land was transferred to Naomi Small. Ms. Lyons is the only child of Naomi Small. Gwendolyn Allison and Naomi Small were sisters. Their mother was Rose Ann Thomas. The 1st Defendant is the son of Gwendolyn Allison and the 2nd Defendant is the grandson of Gwendolyn Allison.

The evidence of the Claimant Ms. Charmaine Lyons

[6] In her affidavit in support of the Fixed Date Claim Form as also her evidence in chief Ms. Lyons states that:

> She was 11 years old when her grandfather died in 1964. After his death her mother tenanted the property. Her mother and her self-lived in Kingston. Her mother appointed Ms Allison as her agent to collect rent and use it to maintain her grandmother. She and her mother would visit her grandmother and Uncle Eric. Up until 1974 her grandmother lived on her own property with her children to include Ms. Allison and her children, including the 1st Defendant who benefitted from financial support given by her own mother.

[7] She further states that:

> Her uncle Eric died when she was 13 years old. She was present at discussions with her mother about the welfare of her grandmother. Her grandmother started having medical issues. Her home was inaccessible by motor vehicle from the main road. Her mother offered to erect a house on the land so that her grandmother could have easy access to the doctor. It was agreed by all the aunts to include Gwendolyn that Uncle Harris' house would be sold, "and proceeds used, his son to be later repaid".

[8] She asserts that:

> In 1969 her mother engaged the services of a contractor but when she went to the country she realized that Ms Allison had already engaged a contractor. Construction started early 1969 to 1970 and she was present on 2 occasion when her mother gave Ms. Allison money towards the construction. On one of those occasions her mother confirmed the sale of Uncle Eric's house to Alcoa Minerals of Jamaica. In 1974 the house was constructed with three bedrooms, roof and outer walls standing, but it had no bathroom, kitchen dining or living room**.**

[9] She further testifies that:

> As soon as one room was finished, with her mother's permission Ms Allison, her grandmother and Mr. Gilbert Green occupied this bed room. Her mother continued to finance the construction of the house until the death of her grandmother. The house continued in the unfinished state until the death of her grandmother "Over time the house slowly improved with the support of Gloria Lindsay (and herself) . Another bed room was tiled between 1981 to 1983. The 1st Defendant and his brother Eric Green moved from house # 2 and occupied the room" previously occupied by her grandmother.

[10] It is also her evidence that:

> She gave Ms. Gwendolyn Allison "money to complete a third bedroom at her persuasion for Aunt Agatha who lived in a volatile community in Kingston. When completed, Ms Allison's requested her grandson Gilbert Green moved into it in 1984-85". Her mother gave her the property in 1980. She allowed Ms. Allison and her family to remain on the property. She continued to attend on the property to pick fruits, and cut cedar without anybody's permission. She collected rent from Charles Haye. She planted trees, and built a water tank. In 1998 "she purchased and installed toilet

fixtures and paid to build a septic pit for a bathroom in Building No 1 for her comfort". Survey was done at her instructions in 1988 due to boundary issues with a 3rd party. The application to register the land was made in 1995 by her mother. It was advertised in the gleaner. No objection was raise. Her mother died in 2008. She buried her on the land without seeking anyone's permission. The Defendants were in attendance at the funeral. They never objected nor questioned her authority. By 2010 part of the house was still incomplete. She obtained a valuation of Building No.1 so that she could settle the contributions that various family members had put in the construction. The 2nd Defendant came to live in the house in the mid to late 1990. "The house was a joint enterprise of the siblings for their mother not a gift".

[11] On cross examination she states that:

There was a first action for recovery of possession early in the year 2000. She does not remember the exact month. She gave her aunt Gwendolyn funds to complete the third bedroom in the late 1980 to early 1990's to facilitate an aunt who was living in Kingston. No one else gave her money for the construction of the building.

[12] She further asserts that:

The survey was done at her instruction in 1988 by a commissioned land surveyor arising out of boundary issues with a third party. She knew that her mother had given her aunt authority to build on the land "on condition". She did not object to the construction by Ms. Allison and the renovation by Mr Mitchell. Mr. Mitchell went there to live after her mother died. She knows that he added a room. She did not know until she saw it later and was surprised as she did not give him permission. When she knew was when the valuation was done. She goes there every year. Her mother did not give Ms. Allison a house spot. She gave her permission to manage the construction with collective funds. She was not present when her mother

and Ms. Allison agreed about building the house on the land. She came by the information based on a discussion with her mother. Her mother did not tell Ms. Allison what kind of house to build. She knew that her Aunt Ms. Allison had a piece of land in Glenmuir which was sold. She cannot say if it went towards the construction of the house. She cannot say where the major portion of the money to build the house came from. She does not know to what extent Gloria Lyndsay contributed. It is true that she only brought this case because she believes the house should not be on her land.

The Evidence of the Defence

The 1st Defendant Mr. Delroy Lyndsay

[13] Mr. Delroy Lindsay testifies that*:*

After Mr. Small's death Ms. Small his aunt gave his mother permission to build a house on the land. The construction of the house started in 1974 and was completed in 1979. He dug the foundation. When partially finished his mother and grandmother moved in to occupy the finished section. His aunt would come there to visit her mother. She would come on occasions like Christmas and Easter. The Claimant would visit while the house was under construction. He never heard his aunt object to the building of the house.

[14] Mr**.** Lindsay says that his mother, Ms. Allison financed the construction of the house from; moneys borrowed from The Mocho People's Co-operative Bank of which she was a member; from the sale of pigs and goats which she raised for that purpose; moneys from agricultural crops which she planted, reaped and sold; and moneys which his sister Gloria Lindsay gave to her to pay the workmen, carpenters and masons who built the house. He denies that his mother and grandmother got help from the sale of Uncle Eric Harris' house at Glenmore in Clarendon with the permission of Naomi Small.

[15] On cross examination he states that:

> He was actually living in his grandmother's house in Glenmore with his mother, grandmother Rose Ann Thomas, his brother Earl Green and his sister Gloria Lindsay. His aunt Naomi Small lived in Kingston, with her daughter Charmaine Lyons. Ms. Lyons actually lived in the house with him, mother, brother and sister. Gloria actually took her to school and register her. Uncle Eric Harris lived in Glenmore. He died at an early age so he knew him but did not know anything about him. Where he lived was close to his grandmother's house. He knew his son Byron Harris. During the period of time Charmaine lived with his family, he does not know if she used to visit Uncle Harris' house. They all lived close. Mr. Harris died in 1965 when he was about 8 years old. He was born on December 16, 1946.

[16] He recalls that:

> His grandmother whom he was living with got sickly after some time. There was no public transport at the time. They had to lift her up to take her to the doctor about 1 mile or so. His aunty Naomi would visit the home and her daughter would come there with her but not as often as her mother. This is the period after she went back to live with her mother. He saw his aunt come there and talk to his mother and sister, Daphne Green before she died. They talk about his grandmother's condition. His aunt Naomi told his mother that she would make her build a house at Dawkins that his grandmother can see the doctor easier. His Aunt Naomi never showed his mother where to build the house.

[17] He also states that:

> His uncle Eric's house in Glenmore was situated in a mining area. It was a very small house, 1 room. He does know what became of it. He does not know of the sale of Uncle Eric 'house after he died. He was a youth. He

> continued to live in Glenmore until the house was built at Dawkins. To his knowledge the construction of the house started in 1967/68. The area where the house was about to be built was pure rock stone. The rock stone was used in the construction of the house. There was an old house on the land which is still there. In 1974 the new house had on roof and two bedrooms were completed. He and his grandmother lived in one.

[18] He further testifies that:

> He and his mother and grandmother and two sister and brother Earl too, lived in the house. There was somebody already on the land occupying the old house in 1974. A lot of people used to live there, even he used to lived there one time. The old house has three (3) bedrooms. He is not sure if Cullu was living there from 1974, it could be after. Other people used to there before Cullu.

[19] He states that in 1974 it was he and his mother and grandmother and brother and sister Gloria Lindsay that moved from Glenmore to Dawkins Mocho. He denies that Gloria did not move from Glenmore in 1974 to live at Dawkins. He also denies occupying the old house with his brother Earl Green while his mother and grandmother occupied the one room in the new house. He insists that in 1974 the 3 bedrooms were finished and a fourth one was added afterwards. He states that Cullu lives in the old house up until now.

[20] His evidence on cross examination continues as follows:

> Stones formed a part of the construction of the house. Some part was deep and they had to fill it up. During this construction aunty Naomi came there. Charmaine also came there but her mother came more often. Charmaine was a child at the time; she was not involved in construction of the house. She was about 16 or 17 or 18 years old. His aunty when she came there she sleeps there too. She sometimes spends two days or one day. Whenever she came she brought something for her mother; some groceries

or so for everybody. The payment for the construction of this new house was not made by aunty Naomi. She never had any money to give. He does not know of Charmaine Lyons being in any conversation with his mother because she was a child.

[21] He further states that:

His grandmother died in 1976/77. By that time some part of the house was not complete but the whole of the house was lined out at one time. He means that the (three) 3 bedrooms and the kitchen were finished. “The contractor lined out all of it but all was not finished one time. It finished in stages. First two bedrooms, then the hall then the other room”. In 1974 when she comes from Kingston, Ms. Lyons would sleep in his mother’s room. She was boarding in Kingston as she was studying.

[22] He agrees that in 1974 the bathroom was not fully furnished. There was a basin and a shower in there but no toilet. Also there was no running water. He states that there was an old pit latrine outside and that was what everybody was using. He further agrees that later on a toilet was put inside the new house Charmaine Lyons bought it but “they got the plumber to install it”. He also agrees that his Aunt Naomi build the tank, from which they got running water into the new building.

[23] Mr. Lindsay agrees that land was surveyed sometime 1988 but added that it was long after the house was built. He agrees that he, his aunt Naomi and his mother Ms. Allison were present at the survey. Mr. Learie Mitchell was not there. He states that he was aware that it was Ms. Lyons who caused the property to be surveyed and the survey was done and completed. He accepts that at some point he helped the surveyor to hold the tape.

[24] He admits that he did not object to the survey being done on the property. He states that, that was because he knows that the property belonged to Naomi Small and she handed it over to Charmaine Lyons. By hand it over he means she gave her daughter Charmaine Lyons the property.

[25] He states that:

> He did not know that his aunt Naomi had given the property to Charmaine before 1988, before the survey was done. He found out that she had given Charmaine the land because Charmaine surveyed the land in her name. He was not aware that his aunt Naomi was applying to take out a title for the land. He only heard. He knows that Garcia Small was buried on the land. Naomi Small was buried there too. His mother is not buried there. His mother died in 2004 and Naomi died in 2008. "It seemed like there was a conversation going on but he never know what was going on so he take her to cemetery".

[26] He does not accept that the land that the house is on belongs to Ms. Charmaine Lyons. He does not agree that the house was built with contribution from Ms. Lyons. He denies that the house was improved by Ms. Charmaine Lyons through contributions that she made after the house was built. He asserts that it was improved by Gloria Lindsay. He denies that the house was also built with money from the sale of the house of his uncle Eric. He denies that his mother's contribution was not significant to the construction of the house. He insists that his mother was the main source and that Gloria Lindsay came after. To his knowledge his Aunty Naomi did not contribute to the building of the house. He also states that it is not true that whenever Aunt Naomi and Charmaine visit the premises, they picked fruits and planted trees and other things on the land. He asserts that they did not plant anything there.

[27] In terms of his Defence, he says that:

> He is interested in the house, not the land. Maybe the spot of land where the house in on. If the house cannot be separated from the land, he would agree to it if the Claimant is willing to buy the house for the right price. He also states that Gwendolyn left a will.

The Evidene of The 2nd *Defendant Mr Learie Mitchell*

[28] In his evidence in chief Mr. Mitchell states that:

He knew his grandmother to be living in the house which she owned at Dawkins Mocho Clarendon from he was about 5 years old. He went to live with her at age 13 in 1989. He lived with her until she died in 2004. The house (Building 1) was constructed by his grandmother as a 3-bedroom structure with kitchen and bathroom and verandah. In 1998 with the consent of his grandmother he constructed a small room and bathroom on her dwelling house. The cost was $700,000. His cousin Charmaine Lyons used to visit his grandmother from time to time. In 1998 when Charmaine came she remarked that the addition looked good.

[29] On cross examination he states that:

> He knew Naomi Small. She was his grandaunt. Gwendolyn Allison owned the house. He knows that the land was owned by Naomi Small. He knows that the land is now owned by Charmaine Lyons. In1989 he heard the name Charmaine Lyons but he did not know her in person at that time. When he went to the house to live there was no toilet facility inside the house.

[30] He admits that the toilet facility was provided by Charmaine Lyons and that here was no running water in the building. He however states that he was the one who put running water in the building, though it was Charmaine Lyons who built the water tank. He states that by then he knew who Charmaine Lyons was. She used to come to Dawkins Mocho with her mother Naomi Small while he was there.

[31] He further states that he is not aware that the house that he lives in was financed by contributions from his aunt Naomi Small. He is aware that the house was built by Gloria Lindsay and Gwendolyn Allison. He agrees that when Charmaine Lyons and Naomi Small came to visit they would also pick fruits on the land. He remembers clearly in 1998 December, Ms Lyons complemented him on the room

that he built. He emphasizes that when he went to live in Building No.1, three (3) bedrooms were finished. He admits that he now owns a two (2) bedroom house in the area. It is designed to be 5 bedrooms. He states that he is seeking to remain in the house (Building1) because his grandmother built it. All he needs is the quarter acre of the land to access the house (Building 1).

Issue

[32] In this Claim there are two main issues that have arisen for my determination. These are;

i. Whether each Defendant has acquired a right to remain on the land subject of this claim by the doctrine of adverse possession. That is whether they or any person through whom they are claiming have been in exclusive undisturbed possession for a period of 12years or more.

ii. In the alternative, whether a proprietary right has accrued to the Defendants in their own right or to the Estate of Ms Gwendolyn Allison by reason of the doctrine of proprietary estoppel.

The Law

Adverse Possession

[33] The principle of Adverse possession is derived from the statutory bar which prevents a title holder from succeeding in an action for recovery of possession of his or her land after it has been in the possession of another after a period of 12 years has elapsed

[34] In relation to an action for recovery of land, **The Statute of Limitation Act** prohibits any action being brought by the title holder whether by entry or otherwise after a period of 12 years has elapse from the time had arisen for him/ her to bring such action or make such an entry.

[35] Section 3 reads:

> *"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."*

[36] Section 30 reads**:**

> *"At the determination of the period limited by this Part to any person for making an entry, or bring- any action or suit, the right and title of such person to the land or rent, for the recover y whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished"*

[37] Case law has established that in order for a Defendant to successfully defend a claim relying on this statutory bar; or for a Claimant to succeed in a declaration of a right to acquire title by a claim of adverse possession; they must establish 2 elements. These are (i) factual possession and (ii) an intention to possess, (See **J *A Pye (Oxford) Ltd v Graham*** [2003] A C 419).

Proprietary Estoppel

[38] The case of **Thorner v Major** [2009] UKHL 18 outlined the elements that are necessary to trigger a proprietary estoppel claim: These are:

(i) A representation, or, assurance or other encouragement of sufficient clarity giving rise to an expectation by the Claimant that he would have a certain proprietary interest;

(ii) Reliance by the Claimant on that assurance; and

(iii) Detriment to the Claimant in consequence of his reasonable reliance on the representation, or , assurance or other encouragement (See also the cases ***Habib Bank v Habib Bank AG Zurich*** [1981] 1 WLR 1265 ***Taylors Fashion Ltd v Liverpool Victoria Trustees*** [1982] QB 133) and the Privy Council case of **Lim Teng Huan v Ang Swee Chuan** [1992] 1 WLR 1306).

[39] Discussion

(i) Whether the Defendants were in factual possession of the land to the exclusion of the Claimant

(ii) Whether the Defendants have demonstrated an intention to possess the land

[40] There is no dispute on the evidence that the Claimant is the legal title holder of the property in dispute. However, for me to make a finding in favour of the Defendants on the principle of adverse possession it must be established on the evidence that:

(i) They or any person through whom they are claiming had exclusive physical control over the land to the exclusion of the paper owner, Ms Lyons, or her predecessor in title for a continuous period of 12 years and

(ii) an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far

as the processes of the law will allow." (See ***J A Pye (Oxford) Ltd v Graham*** [2003] A C 419.)

[41] However, having examined the evidence, despite pleading adverse possession in their defence, I find that the Defendants have adduced no evidence in support of this averment. They both admit that the land belongs to the Claimant. Mr Lindsay admits that he and Ms Allison were present when the survey commissioned by Ms Lyons was conducted in 1988. Ms Naomi Small was also present. He admits, that at some point he was helping the surveyor to hold the tape. He admits that neither himself nor his mother Ms. Gwendolyn Allison objected to the survey. The reason he gave for him not objecting is that he "could not do that because he knew that the property belonged to Naomi and that she gave it to her daughter Charmaine".

[42] The fact that he felt and expressed the view that he could no object to the survey because of Naomi's title, is an indication to me, that even up until the point of the survey Mr. Lyndsay had no intention to possess the land exclusive to Ms. Small. He accepted and deferred to her title. Both Defendants on their evidence admit that at no point in time they nor Ms. Gwendolyn Allison were in exclusive possession of the land. They admit that there were tenants of Ms. Small on the land. Mr Lindsay admits that the old house was always occupied by tenants.

[43] He accepts that Naomi Small was buried on the said land yet his mother Ms. Allison was not. His mother died in 2004. Naomi Small died in 2008. The reason he gave for his mother not being buried on the land is that "conversation was going on" and he did not "know what going on so we take her to the cemetery"

[44] The inference I draw from this evidence is that based on the conversation he took his mother to the cemetery. Therefore, even up to 2008 I find that based on his own evidence Mr. Lyndsay was not exercising such an authority over the land which can be construed as an intention to possess exclusive to the title holder. The evidence points to him deferring to the rights of the title holder, Ms Lyons Additionally, he states that what he is interested in is the house and not the land.

[45] Therefore, I find that on the evidence at all material times both Defendants knew and accepted Ms. Small's and later Ms. Lyons' title to the land. There is nothing on the evidence to support a finding that they demonstrated factual and exclusive possession of the entire parcel of land. Additionally, neither by conduct or otherwise have they demonstrated an intention to treat the entire property as theirs for a continuous period of 12 years, essentially negating any finding that their occupation is adverse to the title holder.

[46] In fact, the contention of the Defendants right throughout their evidence has been limited to the house and the house spot. (That is Building 1) Therefore I find that the title vested in Ms Lyons was never extinguished at the time of vesting, or prior to, or subsequent to vesting. Consequently, I find that the defence of adverse possession fails.

Proprietary Estoppel

[47] One of the remedies that the Claimant seeks in the claim is the declaration of the interest of the estate of Gwendolyn Allison in Building No 1. In their defence both Defendant assert that the building they occupy that is Building No 1 belonged to Gwendolyn Allison. The evidence of the 1st Defendant, Mr. Lyndsay is that the construction of Building No I was financed by his mother Gwendolyn Allison and his sister Gloria Lyndsay.

[48] Therefore, it is essential for the determination of this matter for me to make a determination of the interest if any Gwendolyn Allison had acquired in the disputed property during her life time. In their pleading and on the evidence the Defendants claim that the right to building 1 and the spot on which it is situated had been vested in Ms. Allison, in that relying on discussions between herself and Ms Small Ms Allison caused the house to be constructed with her own money and moved there with her mother and family. Therefore, I find that the issue arising on the contention of the Defendants is whether property rights to Building No1 and the house spot

on which it rests vested in Gwendolyn Allison. The relevant legal principle applicable to this issue is the doctrine of proprietary estoppel.

[49] In order for there to be a finding of proprietary estoppel in favour of Gwendolyn Allison that would inure to the benefit of her estate there must be evidence of an assurance given to Ms Allison by either the Claimant or her predecessor in title giving rise to an expectation that Ms Allison would have an interest in the land. It must also be demonstrated on the evidence that Ms Allison in relying on that assurance acted to her detriment.

Whether there is sufficient evidence of representation, or, assurance or other encouragement of sufficient clarity giving rise to an expectation by Ms. Allison that she would have a certain proprietary interest in the disputed property.

[50] The courts have said that the representation, or assurance or encouragement, to ground proprietary estoppel should be *clear enough.* However, it is *also clear on a reading of the authorities that* an assurance, representation or encouragement may be active or passive. An active assurance can be by words or conduct of the property owner that leads the party to believe that he or she will have an interest in the property (See **Thorner v Major** (supra)); ***Inward vs Baker*** (1965) 1 AER 446 and the case of **Gilbert v Holt and Anor** (2000] EWCA Civ 56).

[51] In case of **Thorner**, the Appellant did substantial work without pay on his father's cousin's (Peter's) farm. Peter died intestate and the Appellant claimed that by reason of assurances made to him by Peter he would inherit the farm which he (the Appellant) relied on, that Peter's estate was estopped from denying that he has acquired the beneficial interest in the farm.

[52] The court had to determine whether the Appellant had a right of equity, arising out of his and Peter's conduct and relationship, to claim the farm. In determining this issue the court considered the character/quality of the representation or assurance made to the Appellant. It was found that the question to be asked when assessing

the character/ quality of the representation being relied on is “whether his words and acts would reasonably have conveyed an assurance that he would do so.”

[53] In that case the contention of the Respondents was that the remarks made to the Appellant were not clear and unequivocal and as such, there was no way of saying that they were intended to be relied on and accordingly they could not give rise to an estoppel. The Court rejected this contention on the basis that even though clear and unequivocal statements played little part in the communications between the men, they were well able to understand one another. As such it was held that it is sufficient if the representation was ‘clear enough’, even though it may not be clear to an outsider. The court further stated that what matters, is that, what Peter said should have been clear enough for the Appellant, whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and he could rely on it.

[54] In the instant case it is the contention of the 1st Defendant Mr. Lyndsay that:

Ms Naomi Small the Claimant’s predecessor in title gave his mother, Ms. Allison permission to build the house described as Building 1 on her land. The construction of the house started in 1974 was completed 1979

[55] Additionally, the evidence from the 1st Defendant supported by the evidence of the Claimant is that Ms Allison and her children were living with Ms. Thomas as an extended family. Ms. Thomas became sickly after some time. There was no access to public transportation from her home at the time. They had to lift her up in order take her to the doctor which was a distance of approximately about 1 mile or so.

[56] Mr Lyndsay also contends that Ms. Small, had a discussion with Ms. Allison (“she come there and talk to His mother”) and his sister, Daphne Green. They spoke about Ms Thomas’ condition. Ms. Small told Ms. Allison that “she would make her build a house out at Dawkins so that his grandmother, could see the doctor easier”.

[57] Counsel for the Claimant submits that even if some representation or encouragement were given by word or conduct by Ms. Small to Ms. Allison, there is no proprietary estoppel resting simply on expenditure with consent. She cites the case of ***Savva and Costa v Harymode Investments Ltd*** [1980] CA Transcript 723 in support of this submission.

[58] However, my reading and understanding of that case differs from that of counsel. In that case the Claimant asked the court to find that she acquired 50% interest in a house owned by the Defendant, which she occupied with her spouse and children. The circumstance under which she came to occupy the house was that the living conditions where she previously lived with the children were cramped. The Defendant who was the father of her children offered her one of his two houses for her and the children to live in. She contended before the court that the Defendant had made an offer that if she went in and made the house habitable he would contribute a sum of one hundred thousand pounds for repairs and that he would covey the house to her and the children, 50% to her and 50% to the children. It was not disputed that substantial work was done and paid for by her. The Defendant was aware that the said work was being carried out but complained that it was extravagant and he protested to some of it. The Defendant admitted that he offered five hundred pounds towards the repair of the house but denied any arrangement for the plaintiff to have any interest in the house.

[59] In its finding of facts, the court found that there was nothing on the evidence that the Defendant gave the Claimant an expectation that she would have an interest in the house, or that he knew that she believed that she would have such an interest, as there was no evidence that the work was done at the Defendant's expressed or implied request The court further found that the Claimant of her own volition expended, and this did not give rise to a beneficial interest in the property. (See the judgment of Oliver J.)

[60] However, contrary to the view posited by counsel I find that the principle to be extrapolated from the afore-mentioned case is that in the absence of any evidence

of encouragement or assurance it is open to the court to find that the party seeking to rely on proprietary estoppel acted on his or her own volition and therefore would have failed to establish an essential element of the doctrine. Essentially a finding of encouragement or assurance would be inconsistent with a finding that a party acted on his or her own volition.

[61] I find that the case at bar is distinguishable. It is neither the evidence of the Claimant nor the Defendants that Ms Allison expended on the construction of Building 1 on her own volition. The case of the Defence is that Ms. Allison's expenditure in constructing Building 1, was with the encouragement of Ms. Small, the predecessor in title of the Claimant, for the benefit of their mother. The case of the Claimant is that it was by agreement. That it was "a joint effort".

[62] In my assessment of the evidence I found it necessary to refer to and consider statements made in the Claimant's pleading in order to fulsomely consider her case. At paragraph 19 of the Fix Date Claim form she states "Naomi Small **offered her land for the construction of the house** for the occupation by grandmother and those who lived with her at the time to continue to live with her and to support her both emotionally and physically" I note very carefully three important content of this statement. (i) The fact that Ms. Lyons states that Ms. Small offered her land suggest to me that she could not have been offering her land to herself. Therefore, the offer of the land was to someone other than herself (ii) The offer to the person was for the person to construct a house. (iii) The offer for construction was not limited to the benefit or occupation of the grandmother but encompassed the occupation of those who were living with her at the time. That is Ms. Allison and her children.

[63] is also clear on the evidence that the Claimant accepts that the construction of Building I was done as a result of an offer and discussion with Ms. Small her predecessor in title and not on Ms. Allison's own volition. Despite her evidence that it was a joint enterprise and that, Ms. Small did not give Ms. Allison a house spot, she gave her permission to manage the construction with collective funds,

she admits on cross examination that “She knew that her mother had given her aunt authority to build on the land on condition. She did not object to the construction and the renovation.”

[64] Further it is also the Claimant’s evidence that the 1st Defendant, Earl and his brother moved to occupy the other house. This suggest to me that there was available space in the other house prior to “the agreement” that could have housed her grandmother. This is also in light of her evidence that only one room was finished when the grandmother and Ms. Allison moved in together. Essentially suggesting to me that the one room, which was in fact already available in the old house, would have been sufficient for the single purpose of relocating the grandmother, Ms. Thomas.

[65] There is no evidence that Ms Allison or the rest of her family was experiencing any difficulty with their previous living arrangements. The difficulty was with Ms. Thomas, accessing medical care. Ms. Small was residing in Kingston and could not provide the necessary support even if her mother was relocated to her land which already had an old house. I infer from the evidence, not only of the 1st Defendant but more so of the Claimant that there was a necessity for someone to provide the continued familial support, to include domestic, physical and emotional, support to Ms. Thomas along with the need to relocate her in order to facilitate easier access to medical care. Therefore, I form the view that there was encouragement to Ms. Allison to relocate with her children in order to provide the continued support to Ms. Thomas. Consequently. I find that there was encouragement on the part of Ms. Small to Ms. Allison that was not limited to the relocation of Ms Thomas.

[66] The evidence of Mr Lyndsay is that his grandmother died in 1976.The unchallenged evidence is that Ms. Allison and her family continued to live in the house after the death of the grandmother. The unchallenged evidence also is that the construction on the house continued after the death of the grandmother. Therefore, it is my view that if the permission or encouragement was limited to the

welfare of her grandmother there is no explanation from the Claimant as to why the "joint effort" would have continued after that purpose for which that permission had been granted had expired. Essentially, a relevant consideration is, if the sole purpose for the construction of the house was for grandmother Thomas, why then were Ms. Allison and her family allowed to remain in possession and continue construction after Ms. Thomas' death.

[67] The evidence is that Ms. Lyons received the property in 1980. I notice her exact words in paragraph 29 of the Fixed Date Claim Form. That, "in keeping with the understanding previously had by Naomi Small and her siblings the Claimant allowed the occupants to continue to occupy house number 1". The only inference I can draw from this is that although the catalyst for the encouragement was the enablement of access to medical help for her mother, the encouragement and the assurance of Ms. Small was not limited to the medical care of her mother, but to an interest that extended beyond the life of the grandmother**.**

[68] To my mind the motive for the assurance is a factor that assists the court in determining the nature of the assurance, but is not conclusive as it relates to the substance or content of the assurance. The evidence is clear that when grandmother died in 1976/77 the house, Building No. I was not complete. However, Ms. Allison and her family continued to reside in the house and continued the construction without any objections from the Claimant or her predecessor in title.

[69] Ms. Mulendwe also relies on the case of ***Orgee v Orgee*** [1997] EGCS 152 to aid in her submission that any representation given ought to be certain. In that case the Plaintiff and the Defendant, his father, commenced negotiations of the terms of an agricultural tenancy which the son was to have in property owned by the father. However, they were unable to agree on certain important terms. These negotiations continued over six years but the terms were still not agreed. Eventually the father gave the son notice to quit. The son responded to the notice by claiming that he had an agricultural tenancy by proprietary estoppel. The trial judge did not accept his claim of proprietary estoppel and he appealed. The Court

of Appeal, in upholding the trial judge's finding, held that the son's case on which he based the expectation and belief, failed. The Court acknowledged the difficulty the Court would have if it was required to determine the terms that had not been agreed between the parties.

[70] However, on the reading of the case, the main issue was one of credibility, such that the son's claim failed because it was brought out on the evidence, that he was well aware that the basis of his property right was to be a lease, but the terms could not be agreed.

[71] I find that this case does not offer much assistance to the Claimant, as the decision was reached based on the findings of fact that it was a tenancy that was intended from the outset. As such, the uncertainty referred to in the judgement, is the uncertainty as to the terms of the tenancy agreement. I find that in the case at bar there is sufficient evidence to make a finding as to the clarity of the encouragement /assurance.

[72] Counsel for the Claimant submits that the fact that Ms. Allison was present at the survey conducted at the instance of the Claimant and did not raise any objections is an indication that she did not believed that the house belonged to her. However, I do not share her view as there was no indication of an attempt to remove her from the house or house spot. The cases on proprietary estoppel indicate that the interest claimed in many of these cases is not the entire parcel of land contained in the title of the title holders. That is, it is perfectly legitimate for the claim to be for the house and the spot it is on. (See the case of **Inwards v Baker (Supra).** The evidence of the Claimant is that the survey was conducted as a result of border issues in relation to a third party. There is no evidence that this survey threatened or challenged Ms. Allison's possession /interest in Building 1 to include the house spot.

[73] Counsel also relies on the case of ***Blue Haven Enterprises Ltd v Tully*** [2006] UKPC 17, to say that, "one who voluntarily improves another's land without

encouragement or promise of reward does so entirely at his own risk, such reliance, being without representation, generates no equity".

[74] In that case***,*** the Claimant Company entered into a contract for the sale of land with the 1st Defendant. Unbeknownst to the Claimant the 1st Defendant had already entered into a contract ("the first contract") for the sale of, and did in fact sell, the said property to the 2nd Defendant. Also unbeknownst to the Claimant, the property was the subject of ongoing court proceedings, flowing from the first contract, in which abatement of the purchase price and an injunction restraining Mrs. Tully from selling to anyone else were granted. In accordance with the contract, the Claimant had paid 40% of the purchase price. The balance was to be paid on the transfer of the title to the Claimant. The Claimants took possession and significant work was done on the property including the installation of infrastructure for optimal use of the land.

[75] The evidence as accepted by Their Lordships is that at some point after the Claimants took possession, the 2nd Defendant visited the property and left a note with the property manager to be delivered to the Claimant, informing them of the situation. The Claimants subsequently became aware that the 2nd Defendant was claiming to be the owner of the property and was objecting to additional work being carried out, and had obtained an order from the court for specific performance of the first contract and possession of the property. The result of this was that the 2nd Defendant occupied the property with all the work done and infrastructure installed, the cost of which was borne by the Claimant. The Claimant accordingly commenced proceedings for breach of contract against Mrs. Tully and unjust enrichment against the 2nd Defendant.

[76] It was evident that the 2nd Defendant was enriched at the Claimant's expense. The critical issue their Lordships had to determine was whether the circumstances in which that enrichment came about place the 2nd Defendant under an equitable obligation to compensate Claimant. In determining this issue, Their Lordships gave

approval to the judgement of Oliver J in ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) [1982] QB 133*** when he said at page 915 that:

> *"proprietary estoppel…requires a much broader approach which is directed at ascertaining whether, in particular 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…"*

[77] Their Lordships also stated: at paragraph 24 that:

> *"Oliver J's key that unlocks the door to the equitable remedy is unconscionable behaviour and although it might be difficult to fashion the key without a representation by the Defendant it would not, in principle, necessarily be impossible to do so. Enrichment of A brought about by improvements to A's property made by B otherwise than pursuant to some representation, express or implied, by acquiescence or by encouragement, for which A is responsible would not usually entitle B to an equitable remedy.* ***But the reason would be that A's behaviour in refusing to pay for improvements that he had not asked for or encouraged could not, without more, be described as unconscionable****."* (emphasis mine).

[78] I do not find that this case advances the Claimant's position. The Privy Council was clear that the key to unlocking equitable relief is unconscionable behaviour. While it was stated that if a party improves another's property without representation, those circumstances would not usually give rise to an equitable remedy, their Lordships were keen to note that the reason no equity would arise would be that it would be unconscionable to ask a party to pay for improvements he did not request. In the case at bar on the evidence of both parties the construction of Building 1 was as a result of encouragement (discussion) with the Claimant's predecessor in title Ms. Small.

[79] Therefore, I find that there is sufficient on the evidence for me to find and I so find that, in order to facilitate easier access to health care for their mother Ms Allison was encouraged by Ms. Small to relocate with her family to provide continued support to their mother. I find that in furtherance of this purpose she was encouraged to construct a house, Building 1 on the land in dispute, by Ms. Small. I find that in the circumstances that the only inference I can draw is that the encouragement, was that if Ms. Allison and her family would continue to provide the support to her mother as a result of her relocation, she was encouraged by Ms. Small to construct a permanent structure on her land for the benefit of herself, her mother and family. I find that this encouragement can be translated as nothing less than a proprietary interest in the spot of land on which the house was constructed and this is something the Claimant became aware of.

Whether there is sufficient evidence of Reliance on the Assurance/Encouragement

[80] Ms. Mulendwe submits that If such statement of assurance was made there is no evidence given of Ms. Allison's understanding of such statement or that she understood that Ms Small was giving her an interest in the land on which the house stood. However, when I examine the statement of the Claimant in her pleadings there is a clear indication of knowledge on her part that the house was constructed on reliance on the encouragement by her predecessor in title. Paragraph 19 of the Fixed Date Claim Form again becomes relevant to this issue. Here the Claimant states that Naomi Small "offered her land for the construction of the house for the occupation by her grandmother and those who lived with her at the time to continue to live with her and to support her both emotionally and physically", Then further at paragraph 22 she states "relying on the agreement between the siblings the construction began".

[81] In the case of **Greasly and Others v Cook** [1980] 3 All ER**,** the court made the pronouncement that "once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced." Then burden is not on the person seeking the remedy on the principle

of proprietary estoppel to prove that he or she relied on the assurances. He or she is presumed to have relied on them. It is for the person seeking recovery of the property to prove that there was no reliance (See the judgment of Lord Denning)

[82] In the instant case, I find that there is sufficient evidence that the encouragement of Ms. Small was to influence Ms. Allison to relocate with their mother and her family to construct a house and live on the land owned by her. Consequently, I find that there is a presumption of reliance on the part of Ms. Allison. Additionally, the Claimant's evidence has not rebutted the presumption of reliance but instead has reinforced the presumption. As I previously indicated, the Claimant in her pleading indicate that, "relying on the agreement" the construction of Building 1 commenced.

Whether there is sufficient evidence of Detriment

[83] In the case of ***Gillett v Holt and Anor*** (2000] EWCA Civ 56.

Mr Gillett at the time of trial was 35 years old. On the promises of the Defendant he had left school before he was 16 years old, without taking any of the examinations which might otherwise have given him academic qualifications, against the advice of his headmaster and in the face of his parents' doubts, in order to work for and live with the Defendant who was very much wealthier than, his own parents. Mr Holt seriously raised the possibility of adopting him. Mr Holt had promised that he would arrange for Mr Gillett to go to agricultural college but then did not arrange it, and it was only through Mr Gillet's own hard work and determination that he learned additional skills at evening classes. He proved himself by getting in harvest in 1964 when Mr Holt was away fishing.

[84] Mr Gillett also incurred substantial expenditure on a farmhouse of the Defendant most of it after the clear assurance which Mr Holt gave him when, in 1975, when he ventured to ask for something in writing that: "that was not necessary as it was all going to be ours anyway". This was after the Gilletts had sold their own small house.

[85] The court did point out "that there must be sufficient link between the promise relied on and the conduct which constitutes the detriment" However the court went on to say that:

> "In cases where the detriment involves the claimant moving house (as in **Watts v Story** 14 July 1983, 134 NLJ 631, CA) or otherwise taking some particular course of action at the other party's request, the link is, in the nature of things, going to have some resemblance to the process of offer and acceptance leading to a mutual understanding. But in other cases well within the mainstream of proprietary estoppel, such as **Inwards v Baker** [1965] 2 QB 29 and the 19th century decisions which this court applied in that case, there is nothing like a bargain as to what particular interest is to be granted, or when it is to be granted, or by what type of disposition it is to be granted. The link is provided by the bare fact of A encouraging B to incur expenditure on A's land. "(Encouraged to spend his own money to improve land that he does not own)".

[86] The court further stated that:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances**"**

[87] In discussing the case of **Inwards v Baker(Supra)** *the court had this to say:*

> *"If in a situation like that .., a man is encouraged to build a bungalow on his father's land and does so, the question of detriment is, so long as no dispute arises, equivocal. Viewed from one angle (which ignores the assurance implicit in the encouragement) the son suffers*

the detriment of spending his own money in improving land which he does not own. (See the Judgment of Lord Justice Robert Walker)

[88] In the case of **Holt** the matters accepted as detriment included:

(i) The level of the Claimant's remuneration

(ii) The Claimant continuing in Mr Holt's employment and not seeking or accepting offers of employment elsewhere, or going into business on his own account;

(iii) The Claimant carrying out tasks and spending time beyond the normal scope of an employee's duty;

(iv) The Claimant taking no substantial steps to secure his future wealth, either by larger pension contributions or otherwise; and

(v) The Claimant's expenditure on improving the Beeches farmhouse which was, barely habitable when it was first acquired;

(vi) The Claimant paying for new fittings and materials and carrying out a good deal of the work himself.

[89] In the case of ***Grey v Grey [2018] JMSC Civ 52*** Brown G. J stated:

"It is settled law that under the doctrine of proprietary estoppel, a party who has incurred expenditure in building on another's persons land under the belief that he has or will acquire a good title to that land, and where the owner has encouraged or acquiesced in such expenditure, the court will satisfy that party's equity by making such orders as it deems appropriate

[90] Counsel for the Claimant submits that there is no evidence that Ms Allison soley or **partially** financed Building No 1. However, I find that this submission runs counter to the pleadings and the evidence of the Claimant. Ms Lyon's evidence is that the construction of the house was "a joint enterprise of the siblings". In this

regard she is accepting that there was at least "partial" contribution by Ms. Allison. I am mindful of the fact that the 1st Defendant has produced no documentary evidence of Ms. Allison's expenditure in relation to the construction of the house. In any event with the exception of documents in relation to toilet fixture that were installed by her in 1999, that is almost twenty-five years after the construction would have commenced, neither has -the Claimant produced any documentary evidence of any financial contribution of Ms Small or anyone else to the construction of Building No. 1.

[91] However, when I assess the demeanour and evidence of Mr Lyndsay and Ms Lyons I find that not only has Mr. Lyndsay adduced sufficient evidence on this issue but also that this evidence is more convincing than that of Ms Lyons. He outlines the various sources from which Ms. Allison acquired the money to finance the construction of Building 1. These he gave as moneys borrowed from The Mocho People's Co-operative Bank of which she was a member; moneys from the sale of pigs and goats which she raised for that purpose; moneys from the sale of agricultural crops which she planted and moneys which his sister Gloria Lindsay gave her to pay the workmen, carpenters and masons who built the house. He denies the Claimant's assertions that his grandmother Ms. Thomas got money from the sale of lands owned by their Uncle Eric Harris at Glenmore to help finance the construction**.** Additionally, I find that his evidence that he took active part in the construction by digging the foundation is believable.

[92] However, I find Ms Lyon's aspect of the evidence is relation to the history of the construction of the house rather vague and unreliable. She states that she was present at the discussions, yet admits that at the time she was living in Kingston with her mother attending school. She further states that her mother had engaged the services of a contractor but when her mother returned to the country she realized that Ms Allison had already engaged a contractor.

[93] It seems to me that if Ms. Small deferred to the choice of contractor of Ms. Allison, the house being contracted on Ms. Small's land then it is Ms Allison that had the

greater say or authority in relation to the construction of the house. Further the Claimant indicates that she was present on two (2) occasion when her mother gave Ms. Allison money towards the construction of house. However, she has given no evidence as to how much was given by her mother, Ms. Small on these occasions and how she knew that it was for the construction of the house and not for the maintenance of her grandmother.

[94] Additionally, I have the same difficulty with her evidence that, on one of those occasions her mother "confirmed the sale of Uncle Eric's house to Alcoa Minerals of Jamaica". She has not stated who sold this house or how much Uncle Eric's house was sold for and how much of that went towards the construction of Building No.1. Again her evidence that her mother "continued to finance the construction of the house until the death of her grandmother" is vague as there is no further details of this contribution.

[95] Despite Ms Lyon's evidence that the construction of the house was a joint enterprise of the siblings for their mother not a gift, she admits that she was not present when her mother and Ms. Allison agreed about building the house on the land. She came by the information based on a discussion with her mother.

[96] Further, the unchallenged evidence is that Ms. Small did not tell Ms. Allison what kind of house to build. To my mind if the house was not being constructed and financed by Ms. Allison, then she would have had to take instructions from the person for whom she was managing the construction as to the kind of house to be built. Therefore, the fact that the Claimant admits that Ms Allison did not take instructions from Ms. Small as to the kind of house to be built points to the fact that the house was being built by Ms. Allison as her own. The Claimant also admits that she knew that Ms. Allison had a piece of land in Glenmuir which was sold.

[97] However, what is even more instructive is that the Claimant admits that she cannot say where the major portion of the money to build the house came from. I also note her evidence that "over time the house slowly improved with the support of Gloria

Lindsay and her, another bed room was tiled in 1981-83". She also states that she does not know to what extent Gloria Lyndsay contributed to the construction of Building 1. I find that had it been that Ms. Lyons and or her mother Ms. Small were responsible for and the major contributors to Building 1 her evidence with regards to the contributions of others would not be this vague. She would be in a position to say the nature of the assistance that she received from others.

[98] Ms. Lyon's evidence that she gave moneys to Ms. Allison to complete a third bedroom is equally vague and unreliable. In light of the fact that she was the person who would have given this money I find her evidence in this regard quite incredulous. This is in light of the fact she has provided no details of the money she gave. That is, there is no indication of the quantum or even an approximation as to how much money she gave towards the construction of this third bed room**.**

[99] Additionally, my observation is that in paragraph 3 of the Fixed Date Claim Form Ms. Lyons is seeking a declaration that the estates of Eric Harris, Rose Ann Thomas, Gwendolyn Allison and Naomi Small are entitled to share in building 1. In paragraph 6 she seeks an order that she settles the share. I find that the fact that she is requesting these declarations is tantamount to an acceptance that Ms Allison made financial contributions to the construction of Building No 1.

[100] Ms. Lyons has submitted receipts from Rapid Sheffield Company Ltd dated the 28th of April 1999 for toilet fixtures in the sum of $5010.20. However, the Claimant has not established that she was encouraged by anyone to expend this sum to her detriment. It is the unchallenged evidence of Mr. Lyndsay that the occupants of the house used to use the pit latrine. Additionally, it is the evidence of Ms Lyons, despite the fact that it is the clear evidence that she was not one of the occupants of the house, that she put in the toilet fixture for her comfort. That is, she would be able to use them whenever she visited. Essentially there was no encouragement or promise inducing her to make this decision. It was soley on her own volition for her benefit, despite the fact that the other occupants were also able to benefit. Essentially, I find that at the time that the toilet fixture was installed the interest in

the property, would have already been vested in Ms. Allison. That is in light of the encouragement from Ms, Small and the expenditure by Ms. Allison in reliance of the encouragement in constructing the house**.**

[101] Consequently, I find that the subsequent installation of internal bathroom fixtures by Ms. Lyons would not have affected Ms. Allison's proprietary interest. In any event, later on, in her evidence on cross examination Ms. Lyons admits that she only brought this case because she believes that the house should not be on her land. Essentially this is an admission on her part that she does not believe that she is entitled to Building No. 1.

[102] In light of all the evidence I find that with the exception of bathroom fixtures installed by Ms. Lyons in Building No.1 in 1999, the construction was substantially financed by Ms. Allison.

[103] I find that Ms. Gwendolyn Allison, relying on assurance and encouragement from her sister Ms. Small that she would have a proprietary interest in a spot of land, if she relocated with her family in order to provide support to their mother, constructed Building No 1 on the land which was then owned by Ms. Small. Consequently. I find that a proprietary interest in Building 1 and the spot on which it was constructed has been established in favour of the estate of Gwendolyn Allison.

Whether the Claimant is Bound by The Equity

[104] It is an established legal principle that 'any purchaser, or successor in title who took with notice would be bound by the equity". (See **Inward v. Baker** (Supra).

[105] In the case of ***Plemming v Hampton*** [2004] EWCA Civ 446 the Claimant's mother had promised to convey a strip of her land to the Defendants, her neighbours, in return for their cooperation in allowing her to access their property, to give effect to extensions she intended to make to her house. Unbeknownst to the Defendants, the Claimant's mother did not own the property as she had, some two to three

weeks prior, transferred the property to her daughter, the Claimant. Subsequently, tensions arose between the parties, and the Defendant did not fully cooperate with the Claimant's mother in the construction of the extensions. As such, the Claimant sought a declaration that she was entitled to the strip of land which her mother had agreed to convey to the Defendants. The Defendants sought to rely on proprietary estoppel in relation to the strip of land that was promised.

[106] The Claimant objected to the relief sought on the basis that the promise was not made by her, the owner of the land, nor anyone by or on her behalf, but by her mother. On that basis the court dismissed the claim for proprietary estoppel. I find the statement by Chadwick LJ at paragraph 35 to be most applicable to the instant case. He said:

> *"It is said on behalf of the defendants that if the claimant wishes to take the benefit of the building she must accept the burdens which go with it. That would be a powerful submission if the burden on the land which Miss Pleming now owns had accrued before she became the owner. If, as a volunteer, she had taken a transfer of land which was burdened with some equity arising from the conduct of the previous owner, then she would be obliged to give effect to that equity."*

[107] I find this legal principle as expounded by Chadwick LJ very instructive. In light of the afore-mentioned authority once the evidence establishes that at the time that the property was transferred to the Claimant she was aware of the equity of Ms Allison she would be bound in law by the equity. It is significant to note that in the **Pleming** case, legal ownership changed before the promise was made by the former owner and as such, the subsequent owner was not bound. However, in the case at bar, the Claimant Ms. Lyons, acquired the land well after the encouragement was given by Naomi Small, the person from whom she derived her title. I found as a fact that the same representation was made prior to Ms. Lyons obtaining title, giving rise to the equity, in favour of Ms. Allison's estate. It is also

found that Ms. Lyons was aware of the equity before obtaining title. She is therefore bound by it.

[108] In relation to orders that I will subsequently make on this issue, at this juncture I make the observation that in these matters the court has the flexibility to choose the most appropriate mechanism to give effect to the interest that has arisen which can be the transfer of land or payment of money or can be another solution. (See the case of **Inward v Baker** (Supra).

Whether the Defendants have established a right to remain in possession of the land

[109] I find that the Defendants have not established that they have a right to remain in possession of Building No 1 and the house spot. That is, having found proprietary right on the principle of proprietary estoppel in favour of Ms. Allison the interest would inure for the benefit of her estate. Mr. Lyndsay has indicated that Ms Allison had made a will. However, he has not indicated who are the beneficiaries under that will. In any event neither Defendant is claiming or has adduced any evidence that they are personal representatives of her estate. Mr Mitchell is claiming that in 1998 with the consent of his grandmother Ms. Gwendolyn Allison he constructed a small room and bathroom on her dwelling house. The Cost was $700,000. To my mind, though this may give rise to a claim for compensation for the improvement against the estate of Ms. Allison it does not vest in him a proprietary right to the land in question.

Whether the Claimant entitled to Mesne profit

[110] In light of my findings that the house along with the spot was vested in Ms Allison I find that the Claimant is not entitled to mesne profit. If there was any entitlement to mesne profit it would be for the estate of Ms. Allison.

Declarations

[111] In light of all my findings I make the Following Declarations:

i. I declare that Gwendolyn Allison by virtue of proprietary estoppel had acquired full property rights in Building No. 1 along with the house spot on the land registered at Volume 1280 Folio 578.

ii. I declare that the estate of Gwendolyn Allen is entitled to be paid by the Claimant the market value of Building No. 1 along with the house spot.

Orders

[112] I also make the Following Orders

i. The Claimant is entitled to recovery of possession of the land registered at Volume 1280, folio 578 as against the 1st and 2nd Defendant, but subject to the proprietary rights of the estate of Gwendolyn Allison in building No. 1 and the house spot it is on.

ii. The Defendants are to give up possession within 9 months of the date hereof.

iii. Each party to bear their own cost.