



[2014] JMSC CIVIL 210

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006HCV02103

BETWEEN	MARJORIE McCLURE	CLAIMANT
AND	FERRNAH JOHNSON-BROWN (Executor of purported Last Will and Testament of Leonard Lloyd Brown, Deceased and Beneficiary named therein)	DEFENDANT

Helene Coley-Nicholson for Claimant

John Graham instructed by John G. Graham and Company for the Defendant

*Registered Land – Joint Tenancy – Consent Order – Whether Agreement to Waive Consent Order – Effect of Such Agreement – Whether Estoppel Principles Applicable*

**Heard: 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> May, 2008 and December 5, 2014**

**Cor: Rattray, J.**

1. Marjorie McClure and the late Leonard Lloyd Brown were involved in an intimate relationship for many years, commencing in or about 1976, according to Mrs. McClure. They lived together as man and wife but they were never married ... to each other that is. Mrs. McClure, although living apart from her husband for several years, had filed no legal proceedings to sever their marriage bond. Her spouse eventually took that step, sometime in or around 2003. Leonard Brown on the other hand was married to Mrs.

McClure's daughter, purportedly to enable him to obtain permanent residence in the United States of America.

2. Despite the absence of marital ties, Marjorie McClure would occasionally use the name "Marjorie Brown", as she says Mr. Brown held her out as his wife and she agreed to go along with his wishes, as they were living together as man and wife. As the relationship progressed, properties were purchased which were eventually registered in their joint names.
3. In 1977, Mrs. McClure entered into an agreement to purchase a parcel of land at Throne Circle, Queen Hill in the parish of St. Andrew in her name. She says she paid the full purchase price from her own personal resources and registered title was transferred to her in 1980. She started construction of a dwelling house on that property in 1981 with her own funds and in November, 1981 she says she obtained a mortgage loan of One Hundred and Eighty Thousand Dollars (\$180,000.00) from the National Commercial Bank Limited on the security of premises.
4. Leonard Brown contributed Twelve Thousand Dollars (\$12,000.00) towards the repayment of the loan and the mortgage was discharged on the 5<sup>th</sup> March, 1982. In consideration of that payment, Mrs. McClure says she transferred the Throne Circle property into their names as joint tenants. This was reflected on the Transfer of Land for the said property which was registered at Volume 1117 Folio 879 of the Register Book of Titles.
5. A few years earlier, in January, 1979 Mrs. McClure purchased a dwelling house at Lot 7 Forest Hills in the parish of St. Andrew ("Forest Hills"), again she contends, solely from her personal finances. In purchasing this property, she had the registered title endorsed in the names of Marjorie

Cynthia Brown and Leonard Brown as joint tenants. Her reason for using his surname in that transaction is that Leonard Brown had begun to hold her out as his wife and had instructed her to do so. Because of her feelings for him and the fact that they were living together as man and wife, she agreed to use his surname.

6. During the 1980's however, Marjorie McClure discovered another side to Leonard Brown. She says he became verbally and physically abusive towards her and she discovered that he was also involved with other women. As a consequence, she decided, in her words, "to separate from him." In December, 1984, Mrs. McClure applied to the Court for an Order as to her lawful interest in both the Throne Circle and Forest Hills properties. On the 25<sup>th</sup> July, 1985, she obtained an Order of the Court, on Leonard Brown not appearing, that she was the sole owner of the Forest Hills property and that the Registrar of Titles remove Leonard Brown's name as joint owner from the Certificate of Title for that property. The Court further ordered that she was entitled to three quarters of the beneficial interest in the Throne Circle property, that the said property be sold and that she be given three quarters of the net proceeds of sale.
7. That victory however was short lived as, on the 13<sup>th</sup> May, 1987, the Court set aside the Order obtained in default in her favour and permitted Leonard Brown to file and deliver his Defence within twenty-one (21) days. However, on the 1<sup>st</sup> day of October, 1987, the parties agreed and a Consent Order was entered whereby Marjorie McClure would transfer her interest in the Throne Circle property to Leonard Brown solely, and he would transfer his interest in the Forest Hills property solely to her.

8. At the time the Court Order was made in 1987, Marjorie McClure contends that the construction of the dwelling house at the Throne Circle property was incomplete. The roof was unfinished, the kitchen and bathrooms were incomplete and in need of substantial fixtures and fittings and there was little furniture. At the same time, she says Leonard Brown was not and had not been gainfully employed for a significant period. His financial fortunes were on the decline and his previous sole source of income, a night club, had not operated since 1978.
9. Marjorie McClure further contends that throughout much of their relationship, Leonard Brown depended on her and on her business ventures for his income. She unhesitatingly provided him with funds from her resources because of her feelings for him and, as she was then working as a nurse in the United States of America, she could afford to look after him. In proof of her financial strength, Mrs. McClure says during the 1980's and 1990's, she operated a supermarket and a garment store in the Red Hills area, as well as a meat and vegetable store on Molynes Road. In addition, she was also the owner of four (4) houses in the United States of America, in respect of which she was in receipt of rental income from three of those four homes.
10. After the Court Order was made with the consent of the parties, but before any step was taken by either of them to carry out the terms of the Order, Mrs. McClure states that she was approached by Leonard Brown, who indicated that he was sorry about the breakdown in their relationship and that he wanted them to reconcile their differences. She further states that as she still loved him, she wanted to resume their intimate relationship.

When she enquired about the Consent Order of the Court and what was to be done about it, his response was that he wanted their relationship to continue as it was before their separation, and she was to forget about the Court Order. His actual words according to her were, “don’t worry bout any Court”. He further advised her that he needed her continued assistance in taking care of his twin daughters, Ana and Nereida Brown, who she had helped to take care of during their relationship, as their mother had in effect abandoned them.

11. Mrs. McClure’s evidence is that they agreed to resume living together as man and wife and to continue to share both the Forest Hills and Throne Circle properties as joint tenants. As a consequence, neither of them took any steps to transfer their respective interests in the property in accordance with the Consent Order of the Court. No instructions were given by either of them, for their Attorneys-at-Law to carry out or implement the terms of the Consent Order.
12. In furtherance of his representations and their agreement arising therefrom and acting in faith upon it, Mrs. McClure’s evidence is that she dedicated considerable financial resources to complete the construction of the dwelling house at Throne Circle and to take care of Leonard Brown’s daughters. In 1992, she applied for and was granted legal guardianship of his twin daughters in the Family Court of the State of New York, where they were born. Thereafter, they lived with her in the United States of America and would travel with her on some of her visits to Jamaica, where she stayed at the Throne Circle property.

13. Ms. McClure asserts that she used her own money to finish the construction of the house at Throne Circle, which is a five (5) bedroom two storey house, completed in or about 2003/2004. She further asserts that she was put to considerable expense in the construction and furnishing of the house, which she willingly undertook based on the agreement and understanding between Lloyd Brown and herself that she was joint owner of the Throne Circle property. Numerous receipts were exhibited to the Affidavit of Marjorie McClure evidencing her expenditure in respect of the said property subsequent to the Consent Order in 1987. This expenditure she declares was done with the knowledge and concurrence of Leonard Brown in reliance on what he had said that she was and would remain owner of the Throne Circle and Forest Hills properties, as joint tenant with Leonard Brown.
14. Other items of expenditure for which receipts were exhibited included documents reflecting payment of taxes and utility bills for Throne Circle, including water rates. A record was also kept by Mrs. McClure by way of a hard cover exercise book, which disclosed moneys she spent on both the Throne Circle and Forest Hills properties. Occasionally, when money was given to Leonard Brown to be spent on the property, he would sign beside the entry made in the book, so that she could keep a record of her expenditure. That book also contained a notations of expenses paid on her behalf by her agent with respect to both the Throne Circle and Forrest Hills properties.
15. It is the evidence of Mrs. McClure that since her reconciliation with Leonard Brown, she consistently used 18 Throne Circle as one of her mailing

addresses to the certain knowledge of and without objection from Leonard Brown. He too, she says, used 7 Forest Hills as one of his mailing addresses, without protest from her. Marjorie McClure maintains that in all respects, Leonard Brown and herself had resumed living as man and wife after the Consent Order in 1987, in much the same way as they had been living before their separation.

16. In further proof of the resumption of the relationship between the parties after the Consent Order in 1987, and their Agreement to continue to share both properties, Marjorie McClure relies on the following:
  - (a) In or about 1999, she added Leonard Brown's name to her NCB Gold Club Account
  - (b) The mother of Leonard Brown had been living with Marjorie McClure in the United States of America during the 1990's
  - (c) On the death of his mother in June, 1999, Marjorie McClure says she paid for most of the funeral expenses and that the funeral programme referred to both of them as "son and daughter" of the deceased.
  - (d) In December, 1993, they both attended the offices of the Victoria Mutual Building Society and collected the duplicate Certificate of Title for the Forest Hills property.
  - (e) In April 2004, she contracted with Hawkeye Electronic Security Limited to provide security for their home at Throne Circle, with the concurrence of Leonard Brown
17. Leonard Brown died on the 25<sup>th</sup> January, 2006. It was after his death that Marjorie McClure discovered that he was married to Fernah Brown. His

wife started making claims with respect to the ownership of both the Throne Circle and Forest Hills properties.

18. In her evidence Ferrnah Brown in responding to the allegations of Marjorie McClure as to ownership of the Throne Circle property, says that she got married to Leonard Brown on the 7<sup>th</sup> May, 2004. Throughout the marriage and up to the time of his death, Ferrnah Brown says they lived at the Throne Circle property. She further says that she had been advised by her husband that by virtue of the 1987 Consent Court Order, he was the sole owner of the Throne Circle property. She states that Leonard Brown told her that he intended to have the Consent Order put into effect and in that regard, a letter dated April 5, 2005 was written to Marjorie McClure by Leonard Brown's Attorney at Law requesting her to take steps to have title to the Throne Circle property transferred solely to Leonard Brown. After the death of Leonard Brown, an examination of the last Will and Testament reveals that his wife was appointed the Executor and Trustee of his Estate and that he had devised both the Throne Circle and Forest Hill properties to her absolutely.
19. The Attorney at Law for Leonard Brown, Mr. Hamilton, who was instructed to prepare the Last Will and Testament of Leonard Brown and who was one of the witnesses to his signing of the said Will, also gave evidence in this matter. In light of instructions received from Leonard Brown, the Attorney wrote to Marjorie McClure under cover letter dated the 5<sup>th</sup> April, 2005 referring to the 1987 Consent Order and requesting that he be contacted with a view to transferring title to the Throne Circle property into the sole name of his client. Leonard Brown died less than a year later.



20. The relationship between Marjorie McClure and Leonard Brown was, like all relationships, never constant and steady, but subject to the ebb and flow of their different personalities. Although they never married, they were an integral part of each others lives, for better or worse for approximately thirty (30) years.
21. The case advanced on behalf of the Claimant, Marjorie McClure relies on the equitable jurisdiction of the Court and is based on the doctrine of estoppel. Counsel for the Claimant seeks to rely on the principles of promissory estoppel, proprietary estoppel and estoppel by convention. Promissory estoppel, where applicable, prevents a party from reneging on an unambiguous promise or assurance intending to affect the legal relations with another, where that other party has altered their position in reliance on that promise or assurance to their detriment. Under this type of estoppel, the promisor is precluded from resiling from his promise or assurance. (see Snell's Equity 29<sup>th</sup> edition pages 570 – 571) However, promissory estoppel may only be temporary, can only be used as a defence and does not create a cause of action.
22. The right to relief by way of proprietary estoppel arises where one party is encouraged by another to spend money improving the property of that other, to their detriment, on the representation or encouragement of the owner, that that other party will acquire rights in or over the said property. In such a circumstance, it would be unconscionable for the owner to be permitted to insist on his legal rights. This doctrine is primarily concerned with the acquisition of rights over land and the owner is thereby precluded

from denying the other party's rights over his property. If granted, this relief is permanent and provides the basis for a cause of action.

23. Estoppel by convention arises where both parties to a transaction act on assumed state of facts, belief or agreement. They are then precluded from denying the truth of that assumption, if it were to be unjust or unconscionable to allow either or both of them to go back on the agreement. For this type of estoppel to operate, there need not be any clear and unequivocal promise or representation. See Chitty on Contracts 29<sup>th</sup> edition, Volume 1 paragraph 3 – 107.
24. Counsel Mr. John Graham on behalf of the Defendant Fernah Brown, submitted that it mattered not which principle of estoppel the Claimant intended to rely on in this matter. His focus was on the nature and reliability of the evidence presented by the Claimant. He was of the view that “proprietary estoppel would be the more appropriate rubric under which the claim could be posited”. He further submitted that Marjorie McClure's case is that she had an agreement with Leonard Brown, which led her to act in the manner that she did, based on what she was told by him. Further Counsel argued that if property rights were going to be so fundamentally altered, the Court would need cogent and compelling evidence, which Marjorie McClure failed to provide.
25. Mr. Graham argued that the only document more powerful than the endorsement which appears on a Certificate of Title under the Torrens System is an Order of the Supreme Court. These litigants he argued were not unfamiliar with the Justice System and yet when it came to dealing with

the Consent Order of the Court he questioned whether they would have decided to move forward with “vapourising words”.

26. Counsel maintained that Court Orders are meant to be obeyed. He referred to the dicta of Romer L.J. in Hadkinson v. Hadkinson (1952) 2 ALL E.R. 567 at page 569, where the learned Law Lord opined:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

Counsel further maintained that the effect of the Consent Order in 1987 is that the interest of the parties, as joint owners of the Throne Circle property, was severed and that the late Leonard Brown was declared sole owner. As such, he was freely entitled to leave the said property to his wife, as disclosed in the Last Will and Testament of her late husband.

27. I accept the contention of Counsel Mr. Graham that the parties’ interests in the Throne Circle property as joint tenants was severed by the Consent Order of the 1<sup>st</sup> October, 1987. By virtue of that Consent Order, total ownership of the Throne Circle property passed to Leonard Brown and total ownership of the Forest Hill property passed to Marjorie McClure. That however, does not affect in any significant way the Claim before this Court. Total ownership of Throne Circle having passed to Leonard Brown as of the date of the Consent Order in 1987, it was subsequent to that date that the alleged representations were made on which Marjorie McClure says she relied on and acted to her detriment.

28. It is to be noted that Fernah Brown would have been hard put to substantially challenge the allegations raised by Marjorie McClure as to the alleged representations and responses passing between her late husband Leonard Brown and Marjorie McClure with respect to the Throne Circle property. The evidence before the Court does not reflect Fernah Brown being an active factor in their lives until 2004, a few years prior to the passing of Leonard Brown, although his wife testified in answer to the Court, that she met her late husband in 1977. The burden however, always rests on a Claimant to provide sufficient evidence to the Court, on the balance of probabilities if such a Claimant is to be successful in obtaining a ruling in that party's favour.
29. No authority ought to be required to confirm the principle that a Court Order once made, must be obeyed. It is trite law. The stability and integrity of the judicial system is underpinned by the knowledge that Judgments and Orders of the Court must be complied with and are final, subject to the avenues of appeal available to the parties: A Consent Order in effect is a contract that has received the stamp of finality of the Court.
30. Having had such an Order made in his favour, the issue then is whether, if the Court finds that the late Leonard Brown did in fact make the representations as alleged by Marjorie McClure, in which she relied and upon which she acted to her financial detriment, the Executrix of the Estate of the late Leonard Brown, standing in his shoes, could seek to shield herself behind the Consent Order of the Court. I think not. I am of the view that this is precisely the type of matter that the application of the doctrine of proprietary estoppel is ideally suited for.

31. I have heard the testimony of the parties in this matter and after observing their demeanour as they gave their evidence, I am satisfied Marjorie McClure was a credible witness. Her relationship with the late Leonard Brown spanned approximately thirty (30) years. It is therefore understandable that with the passage of time in recalling certain transactions many years ago, inconsistencies may arise in her testimony. I find her to have been a witness of truth.
32. I further find and accept as truthful Marjorie McClure's assertion that the late Leonard Brown made representations to her to the effect that he was prepared to forego his entitlement under the 1987 Consent Order, making him the sole owner of the Throne Circle property and would revert to their previous position as joint owners of the properties, if she would resume their intimate relationship and take care of his daughters. This to my mind is confirmed by the fact that at no time during the years subsequent to the Consent Order did Leonard Brown take any step to enforce the Order made in his favour as regards ownership of Throne Circle. I also find that in acting on that assurance, Marjorie McClure expended substantial resources in the construction of the house at Throne Circle, providing the furnishings therefor and looking after his daughters.
33. Fernah Brown's contention of an entitlement to the Throne Circle property in accordance with her late husband's Last Will and Testament cannot succeed, as she would be estopped by virtue of the conduct of her late husband from benefitting from that property. It is interesting to note that another provision in his Will for the Forest Hills property to be devised to his wife is also of no legal effect. Leonard Brown had no interest in that

property which could be passed to anyone as a result of the said Consent Order.

34. In the circumstances, having regard to the evidence before this Court, I am satisfied that the Claimant Marjorie McClure is entitled to the Order sought. It is therefore hereby ordered that:

1. A Declaration is granted that the said Marjorie McClure is the lawful owner of all that parcel of land comprised in Certificate of Title registered at Volume 1117 Folio 879 of the Register Book of Titles otherwise referred to as 18 Throne Circle, Queen Hill, Kingston 19 in the parish of Saint Andrew.
2. A Permanent Injunction is granted restraining the Defendant, Fernah Deloris Brown by herself or her servant and agents or otherwise howsoever from trespassing on the said property or any property of the Claimant or from threatening, harassing or besetting the Claimant at her said property or any property of the Claimant at any time.
3. There be a stay of execution of the judgment for a period of 6 weeks from the date hereof.
4. Access to the premises at 19 Throne Circle granted to the Claimant between 4 to 6 p.m. on December 5, 2014. Further access to the Claimant on giving the Defendant, through her Attorney-at-Law, at least 2 days notice of her intention to further inspect the said property.
5. Costs to the Claimant to be taxed if not agreed.