[2017] JMSC Civ. 72

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 01045

BETWEEN	**OSBERT POWELL**	**1st CLAIMANT**
AND	**FRANK POWELL**	**2nd CLAIMANT**
AND	**KARL LINTON POWELL**	**3rd CLAIMANT**
AND	**JASMINE POWELL-STEPHENSON**	**4th CLAIMANT**
AND	**MARSHA BACCAS (Administratrix – Estate of Myrtle Powell)**	**5th CLAIMANT**
AND	**DAVID POWELL (In his personal capacity and in his capacity as Executor of the Estate of Lillian Powell)**	**DEFENDANT**

Ms. Audrey Clarke instructed by Judith Clarke & Co. for the Claimants.

Ms. Janet P. Taylor instructed by Taylor, Deacon & James for the Defendant

Heard: 16th, 17th and 18th June 2014; 29th and 30th September 2014; 1st October 2014, 21st November 2014 and May 12, 2017

REAL PROPERTY – APPLICATION FOR DECLARATION OF BENEFICIAL INTEREST IN UNREGISTERED LAND – VALIDITY OF INDENTURE INSTRUMENT - PROPRIETARY ESTOPPEL

Thompson-James, J.

Factual Background

[1] This Claim involves the proprietary rights in respect of a parcel of land estimated to be one (1) acre, unregistered (with house thereon), in the vicinity of Top Hill Main Road to Tryall in the parish of St. Elizabeth, bearing the Valuation No. 22102002022 (Exhibit "14") (referred to in the Claim Form as 2202002022), hereinafter referred to as "the subject property". The subject property, which the Defendant alleges is in his possession, is said to form part of a 13-acre parcel of land originally owned by the late Curley Powell. Letters of Administration in the said estate was granted to Lillian Powell, wife of deceased Curley Powell July 13, 1992 (Exhibit "8").

[2] The parties to the suit are all related. The 1st to 4th Claimants are siblings of the Defendant David Powell, and are all children of the late Lillian and Curley Powell. The 5th Claimant is a niece of the siblings and claims as administratrix of the Estate of Myrtle Powell, her deceased mother and sister of the Powell siblings. The Defendant has been sued in his personal capacity as well as in his representative capacity as executor of the estate of Lillian Powell. The land which is the subject of this suit includes the former family home in which the parties were raised by their parents.

[3] Curley Powell died May 2, 1988 and Lillian Powell died October 15, 2007. David Powell, along with Varyl Roye, was granted probate in Lillian Powell's estate July 8, 2010 in the Magistrate's Court for the Parish of St. Elizabeth (Exhibit "9"). Exhibit "9b" being the Will of Lillian Powell.

[4] June 30 1993, Lillian Powell, by way of Indenture Instrument (Exhibit "13") transferred the subject property to the Defendant, consideration being the sum of fifteen thousand dollars ($15,000). The instrument was subsequently recorded at the Island Records Office July 22nd 1993 at Liber New Series 4419 Folio 83.

[5] The genesis of the dispute occurred in 2006 when the Defendant attempted to have the subject property surveyed. The 1st Claimant, who was living at the premises and had been served with a notice in relation to the survey, objected;

thereby preventing the survey from taking place. As a result, the Defendant, by Plaint No. 439 of 2006, sued the 1st Claimant for wrongful objection to survey and trespass in the Resident Magistrate's Court for the parish of St. Elizabeth. A notice to quit the property, dated October 2, 2006 was also served on the 1st Claimant.

[6] At a hearing in the Resident Magistrate's Court for the parish of St. Elizabeth June 3, 2008, an order was made in favour of the Defendant as follows:

> "1) Judgment for the Plaintiff in the sum of Eighty Thousand Dollars (80,000)
>
> 2) Costs to be agreed or taxed
>
> 3) Injunction granted as prayed restraining the Defendant by himself, his servants and or agents from preventing the survey on ALL THAT parcel of land part of TOP HILL in the parish of St. Elizabeth, recorded at Liber New Series 4419 Folio 83". (Exhibit "4")

[7] On or about September 17, 2008, the Defendant served on the 1st Claimant a summons for recovery of possession pursuant to the above notice to quit in respect of the subject property. At the date of hearing of this claim the 1st Claimant had not yet complied and was still resident at the property. Another younger brother of the siblings, Clive Powell, said to be mentally challenged, is also resident at the premises, whilst the Defendant visits the property daily to do farming and operate his shop located there.

[8] Subsequently, the Claimants filed the Claim at bar February 27, 2009 seeking the following relief:

i. A declaration that each Claimant is entitled to an equitable/beneficial interest in the aforementioned subject property;

ii. Alternatively, a declaration that the Defendant by himself and/or his servants and/or agents are estopped from claiming to be solely interested in or entitled to the subject property;

iii. An order/declaration restraining the Defendant by himself and/or his servants and/or agents from taking any steps to deal with said property for his sole interest.

iv. An order restraining the Defendant by himself and/or his servants and/or agents from dealing with the subject property as sole owner and from taking steps to interfere with the Claimants and/or their servants or agents, heirs or successors interfering with the Claimants' use and occupation of said property;

v. Alternatively, an order directing that valuation be done to determine the extent of each Claimant's interest, if any, in the subject property, and an order that the Defendant is liable to compensate each Claimant to the extent of the value of their assessed interest in the property;

vi. An order that the Defendant is restrained from interfering with the Claimants' right to possession and/or quiet enjoyment of the subject property.

vii. An order that any proceedings commenced against any of the Claimants, and in particular, the 1st Claimant, relative to the subject property in any Court within the jurisdiction is stayed pending the determination of the claim herein.

viii. Such further/other relief as the Court sees just.

[9] In evidence is (Exhibit "9b") a document purporting to be the Last Will and Testament of Lillian Powell, said Will having been admitted to Probate July 8, 2010 by the Defendant and Varyl Roye, the executors named therein. The Will refers to the thirteen (13) acres of land originally belonging to the estate of Lillian Powell's husband as "my freehold property", and excludes the parcel of land the subject of the claim herein, as that which was sold to her son David:

> "...minus one acre on which the dwelling house is located and which has been sold to David my son"

Issues

[10] The main issue to be decided is whether each of the Claimants is entitled to a beneficial interest in the subject property.

[11] In determining the above issue, the following sub-issues arise:

i. Is the Defendant the sole proprietor of the subject property and as such entitled to deal with the land as he pleases? Were proprietary rights duly transferred from the original owner to the Defendant?

a) Was the land given to the Defendant as a gift from his father prior to his death?

b) Does the Indenture Instrument validly transfer interest in the property from Mrs. Powell to the Defendant?

c) What if any effect does Lillian Powell's Will have on the issue as to who is the true proprietor of the land?

ii. If proprietary rights are vested in the Defendant, are the Claimants entitled to a beneficial interest in the subject property by virtue of significant financial contributions to its development pursuant to the doctrine of *proprietary estoppel* and if so, to what extent?

The Claimants' Case

[12] The essence of the Claimants' case is that they are entitled to a beneficial interest in the subject property on the basis that they made substantial financial contributions to the development of the house and property, and that these contributions were made with the knowledge of the Defendant and without any objection or assertion of any sole rights on his part. For this they rely on the doctrine of proprietary estoppel.

[13] The Claimants further allege that over the years, by virtue of the familial relationship and through the course of dealing with the property, they had, before

2007, been led to believe that there was a common consensus that the said property was for the benefit of all interested family members, and would remain the family home.

[14] In relation to the purported transfer of the property to the Defendant, they contend that Lillian Powell did not have the legal capacity to dispose of the property in the way that she did, which they say was not in accordance with the law. In purporting to transfer the property of her late husband to the Defendant, it is argued that Lillian Powell acted contrary to the law of intestacy, particularly the **Intestate's Estates and Property Charges Act**. In that respect, as Administrator of the Estate of Curley Powell, she was not entitled to consider the property as 'my freehold property'.

[15] Additionally, the Claimants challenge the validity of the instrument by alluding to fraud in its execution. Though they have admitted that their witnesses have not brought any direct evidence in support of fraud, they assert that the circumstances of the Defendant's legal claim to the subject property is questionable. Particularly noted is the Defendant's admission upon cross-examination that he did not in fact pay fifteen thousand dollars ($15,000.00) as consideration for the property as stated in the Indenture Instrument, nor was the said property 'sold' to him as stated in his mother's Will.

[16] In relation to the order handed down in the Resident Magistrate's Court for the parish of St. Elizabeth, the Claimants submit that the order is not judicially and factually sound as there was no trial of the issues, and the then Defendant Osbert Powell was not represented by Counsel when the order was made. It is further submitted that there is no indication on record as to the basis of the order.

[17] The Claimants rely on two (2) authorities to support their position, **Yeoman's Row Management Ltd et al v Cobbe** [2008] UKHL 55, and the **Intestates' Estates and Property Charges Act**.

[18] It is interesting to note that only two (2) of the Claimants (1st and 4th) gave evidence in Court and were available for cross-examination.

The Defendant's Case

[19] The Defendant's case is essentially that he is the legal and beneficial owner of the property by virtue of: (1) the promise of the house to him by his parents prior to their death, and (2) the Instrument of Indenture executed by his mother transferring interest in the property to him. The Instrument of Indenture, he claims, is buttressed by his mother's Will, which purports to leave property to her children with the exception of that piece of land sold to the Defendant, acknowledging that the subject property belongs to him.

[20] In that regard, he asserts that the property was transferred to him by his mother, who was the executor of her husband's estate, and that, by the terms of her Will, and by effecting the transfer of the subject property to him, she was seeking to give effect to what was known to be the intentions of Curley and Lillian Powell as it relates to who should inherit their property upon their demise. The said transfer was in keeping with a promise his parents had made to him when they asked him not to move away as his other siblings had done. They had told him that if he did as they asked, they would leave the family home to him.

[21] The Defendant denies that the property was ever intended to remain a family home by his parents and that there was ever a general consensus that the former home should be for the benefit of all family members. He further denies that the Claimants consistently or significantly contributed funds to the improvement of the subject property.

[22] He contends rather that he carried out several renovation and expansion jobs on the house, and is the only one to have paid property taxes in respect of the subject property since his parents became unable to. Consequently, if he were not the legal owner, he would be entitled to same under the doctrine of proprietary estoppel.

LAW & ANALYSIS

Is the Indenture Instrument valid?

[23] On the face of it, the Indenture appears to validly transfer the interest in the property from Lillian Powell to David Powell, said transfer subsequently being recorded at the Island Record's Office. The Claimants have, however, raised two issues that they submit throw its validity into question.

[24] Firstly, the Claimants suggest that Lillian Powell, in purporting to transfer the property of her late husband to the Defendant, acted contrary to the law of intestacy, in particular, the **Intestate's Estates and Property Charges Act**. In that respect, as Administrator of the Estate of Curley Powell, for which she was granted Letters of Administration in 1992, she was not entitled to dispose of the property as her own, using the words 'my freehold property' in the instrument, 'without further reference to the thirteen acre and other parcels of land'. The inference to be drawn is that Lillian Powell was not vested with the requisite interest which she purported to dispose, thereby invalidating the transfer.

[25] Secondly, the Claimants have alluded to fraud on the part of the Defendant, and though they have admitted that their witnesses have not brought any direct evidence in support thereof, they assert that the circumstances of the Defendant's legal claim to the subject property are questionable. In particular, they note the Defendant's admission upon cross-examination that he did not in fact pay fifteen thousand dollars ($15,000.00) as consideration for the property as stated in the Indenture Instrument. Neither was the said property 'sold' to him as stated in his mother's Will. Further, the document does not indicate the capacity, whether personal or representative, in which Lillian Powell had been acting.

[26] In defence of the first point, the Defendant, in his Further Written Submissions, has submitted that in disposing of the subject property, Lillian Powell did not transfer lands exceeding her 50% interest in the estate of Curley Powell. The Defendant goes on to submit further, that, the evidence before the Court, by way

of admissions of Linval Kirlew Powell and the 4th Claimant on cross-examination, is that the decision about distribution had been made before Curley passed away in 1988. Furthermore, steps had been taken to start the distribution process to some of the intended beneficiaries before his death, and that the deceased, Lillian Powell, by taking steps to transfer the land to the Defendant, and the reference to such in her Will, was seeking to bring to fruition, plans made while her husband, Curley was still alive.

[27] In my view, the Defendant's submissions on this point incorrectly fuse two different issues. Whether the decision to distribute the property in a particular way was made before Curley's passing ought to be considered separately from whether Lillian, upon her husband's death, was entitled to dispose of the subject property. This is so as, whilst Curley was alive, he and he alone would have been entitled to dispose of the property, as he alone was the legal owner of the property. If he had failed to take the necessary steps to legally transfer the property during his lifetime, then, having died intestate, generally speaking, his wife would not have been entitled to dispose of the property in any way other than according to the law of intestacy, despite what had been decided before.

[28] In relation to the second point, the Defendant has submitted that his mother, in completing and executing the Indenture, followed the advice of the Justice of the Peace who had witnessed the document. She had been advised to just put any figure for the consideration section of the form. In relation to the use of the phrase 'my freehold property' in the transfer document, the Defendant submits that though Lillian Powell was intelligent, she was nothing more than a lay person who obtained assistance in the preparation of the relevant documents, and that to draw a negative inference therefrom, as well as from the other failings of the document, without more, would be wrong.

[29] Further, it is submitted that the 'ready admission' of the Defendant, that he did not in fact pay the stated consideration for the property, should be taken as illustrating that the Defendant is a witness of truth.

[30] The sub-issues that arise are therefore whether the transfer instrument is valid due to the discrepancies in its form, and whether Lillian Powell had the requisite interest to dispose of the property at the material time.

[31] Since the subject property is unregistered, in my view, the **Conveyancing Act** applies. **Section 66** of the **Conveyancing Act** provides:

> *"-(1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand, which the conveying parties respectively have in, to or on, the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on, the same.*
>
> *(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.*
>
> *(3) This section applies only to conveyances made after the commencement of this Act.*

[32] Also, **section 58** provides that

> *"A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."*

[33] In my view, the effect of **section 66** is such that once there is intention that a particular property be conveyed, and the conveying party is vested with such interest that gives him or her authority to so convey, then said conveyance will be valid. Subsection (2) goes on to provide that the section applies only if no contrary intention is expressed in the conveyance. Thus, it is clear the Act places great reliance on what the parties intended.

[34] The effect of **section 58**, in my opinion, is that whatever sum is written on a deed as consideration received should be accepted without more. Based on the wording of the provision, whether the sum was actually paid is, in my estimation, irrelevant to the question of whether the deed is valid.

[35] The **Conveyancing Act,** in its Second Schedule, provides the forms that certain deeds should take pursuant to **section 60**. **Section 60** provides that:

> *"Deeds in the form of and using the expressions in the Forms given in the Second Schedule, or in the like form, or using expressions to the like effect, shall, as regards form and expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient."*

[36] The relevant Indenture, which is a pre-made form, uses a similar wording to that in Form III of the Second Schedule regarding a conveyance on a sale. Importantly, it must be noted that the forms in the schedule do not make any provision for a conveyance by way of gift. In fact, nowhere in the Conveyancing Act is any mention made of a conveyance by way of gift. Bearing this in mind, I accept the explanation of the Defendant as more probable than not, that the Justice of the Peace caused his mother to simply enter a random figure to complete the section of the form that speaks to consideration. The relevant form, like those in the schedules of the Act, make no contemplation of a conveyance by way of gift.

[37] Further, the learned authors of **Halsbury's Laws of England** (volume 47 (2014)/2, para. 43, Mistake in executed transaction) note that:

> *'Where a transaction has been completed by the execution of a deed or other instrument, but the instrument does not express what the parties had agreed, it will be rectified if proof of their agreement can be produced…A unilateral mistake, whether of fact or of law, in a deed or other instrument of conveyance is not in general a ground for setting aside the instrument where the mistake has not been induced by fraud'*

[38] The Claimants have alluded to fraud in the execution of the transfer document but have not pleaded any particulars in relation thereto. They have also readily conceded that their witnesses have not brought any direct evidence in support of fraud. Although fraud may be inferred from the acts or conduct of a Defendant in the absence of express pleadings, 'the pleadings must disclose facts or conduct consistent with fraud,' and there 'should be sufficient evidence to establish that the interest of the Defendant which the Claimant seeks to defeat was created by actual fraud.' (Per Harris JA, para 57 and 58 of **Harley Corporation Guarantee**

Investment Company Ltd v Estate Rudolph Daley et al [2010] JMCA Civ.46. Also see **Eldemire v Honiball** (1990) 27 PC 5 of 1990 delivered on November 26, 1991.)

[39] In the case at bar, the evidence before the Court as to the Defendant's conduct is wholly insufficient to ground any finding of fraud. The only evidence before the Court in this respect is the false statement in the document as to consideration, which the Defendant has admitted he did not pay. There is no evidence that this insertion or any part of the document was made by the Defendant, that the document was made without the consent of Mrs. Powell, or that the Defendant did any dishonest act in order to acquire interest in the relevant property to the exclusion of others.

[40] From the foregoing, I find that the discrepancies in the form of the Indenture do not, by themselves, invalidate the transfer of the property.

[41] In relation to the second sub-issue as to whether Lillian Powell had capacity to transfer the property, the **Intestate's Estates and Property Charges Act** (as amended and gazetted March 28, 1988) is applicable, as Curley Powell died, intestate May 2, 1988. It has been submitted by the Claimants that Mrs. Powell was not entitled to effect transfer of the property to her son as she did, either in her personal capacity, or in her capacity as administratrix of her late husband's estate.

[42] Pursuant to the distribution table in **section 4** of that Act, the residue of the residuary estate of the deceased, of which the subject property would fall, is to be shared, if there is a surviving spouse and more than one child of the intestate, half to the spouse absolutely and the other half amongst the children equally. This means that, in her personal capacity, Mrs. Powell would have been entitled to 50% of the value of the property falling in the residuary estate. **Section 5 (1)(i)** provides that where any part of the residuary estate of the intestate is to be held on statutory trust to more than one issue of the intestate, said residuary is to be held in equal shares for said children. The Act does not define what is to be

meant by 'equally' or 'equal shares'. An ordinary and logical interpretation of 'equal shares' would lead to the inescapable meaning of equal percentage or ownership of equal value. I am fortified in this view when considering that all pieces of land are unique, and that each piece of land, more than likely, holds a different value. For instance, a piece of dry barren land would obviously be of less value than a fertile piece of land with readily accessible water of the same acreage. The portion of land with the house thereon and its accompanying amenities, in my estimation, would clearly be of greater value than other parts of the lot. I therefore cannot find favour with Counsel for the Defendant's argument that Lillian Powell was entitled to distribute her late husband's estate by giving a particular portion of the estate to David Powell to hold entirely on his own, since it was valued at less than 50% of the total value of the deceased's residuary estate. In my estimation, upon an intestacy in accordance with the aforementioned Act, Curley Powell's residuary estate ought to have been distributed by transferring 50% of the ownership in Lillian Powell's name and the remaining 50% to be divided amongst the children in equal percentages to be held jointly as tenants in common or as joint tenants. The only exception would be if the beneficiaries themselves all agree to a different distribution. At most, Mrs. Powell would have only been able to transfer to David her 50% share of the residuary estate, in addition to his $1/7^{th}$ of the remaining 50% (7.14%). The wording of s66 of the **Conveyancing Act** is such that a conveyance is only effectual in so far as the conveying party has the requisite estate, right, title interest, claim or demand, or power to convey the property that party seeks to convey. Therefore, I find that the Indenture Instrument is invalid as Mrs. Powell was not seised with the interest she purported to transfer.

[43] Though it is agreed that the subject property formed part of the 13 acre property originally owned by Curley Powell, it is unclear what part of that property formed part of his estate upon his death, as it has not been challenged that he had started to distribute some of that land to his children prior to his death. The Defendant in particular asserts that his father promised him the property whilst he was alive. The subject property is approximately 1 acre and 2 roods in size,

according to the relevant valuation report. Whether the property formed part of Curley Powell's estate when he died is significant because if it did, then the property ought to be distributed as outlined above pursuant to the Intestate's Act, subject to the issue of proprietary estoppel. However, if in fact the property had been given to David by his father prior to his death as alleged, interest would have passed to David during his father's lifetime, and thus, would not fall as part of his estate upon his death to be shared on an intestacy.

Was the property a gift to the Defendant?

[44] It is a longstanding principle that a land transaction will not be upheld in a court of law unless it is evidenced by sufficient memorandum in writing (**section 4** of the **Statute of Frauds**). This principle holds true for purported transfers of land by way of gift. The starting point is that an appropriate deed of transfer must be effected to legally pass title. In the case at bar, there is no dispute that the deceased Curley Powell failed to transfer the property by way of deed to the Defendant during his lifetime. Even if Curley Powell had purported to give David the subject property as alleged, the gift would have been imperfect owing to the lack of a memorandum in writing and ordinarily the Court could not countenance such a gift [**Dillwyn v Llewelyn** [1861-73] All ER Rep 384].

[45] However, there is an exception where the person to whom the gift was purportedly given, acted to his detriment in reliance on said gift. In **Dillwyn v Llewelyn** [1861-73] All ER Rep 384, (a case approved by the case of **Pascoe v Turner** [1979] 2 All ER 945), the Court found that equity will not complete a voluntary agreement in cases of mere gift if anything is wanting to complete the title of the donee, unless the donee has, on the strength of the promise, acted to his own detriment [see also **Milroy v Lord** (1862) 4 De G. F. & J. 264 at 274]. In ***Dillwyn*** the Plaintiff who had been given a gift of land by his father contrary to a gift of the same land in the father's Will, was found by the Court to be entitled to the fee simple of the land, owing to his expenditure on the development and improvement of the land to the tune of £20,000 subsequent on the gift, with the approbation of his father before his death.

[46] In the case of **Pascoe v Turner** [1979] 2 All ER 945, the Plaintiff, who was a businessman, met and started a friendship with the Defendant. As the relationship progressed she began helping him in his business, with his child, and at his house as housekeeper after having moved in. The two shared a bedroom and lived in every way as man and wife, although they did not marry. The Plaintiff subsequently purchased a house, as well as all its furnishings, and the two moved in. The Defendant continued to work as housekeeper, and assisted in the Plaintiff's business, for which she was paid. Eventually, the Plaintiff started a relationship with another woman and moved out, but assured the Defendant she had nothing to worry about and that the house and its contents would be hers. The Defendant continued to live in the house, with the Plaintiff's knowledge, and effected considerable repairs, improvements and redecorations to the property on the basis that the house and its contents belonged to her. The house however was never formally transferred to her. Subsequently, the parties had a falling out and the Plaintiff, by way of letter from his solicitor, gave the Defendant two months' notice to quit the premises. The Defendant refused to leave and the Plaintiff sued for recovery of possession. The County Court found in favour of the Defendant. On appeal by the Plaintiff, the Court of Appeal, having accepted the evidence of the Defendant, found that the principle to be applied, since the Defendant had no perfected gift or licence other than a licence revocable at will, is that,

> *"the court ought to consider all the circumstances and decide what was the minimum equity required to do justice to her, having regard to the way in which she had changed her position for the worse with the acquiescence and encouragement of the plaintiff, the legal owner" [p.950]. Emphasis mine.*

The Court concluded that, in the circumstances, the equity to which the facts gave rise could only be satisfied by compelling the Plaintiff to give effect to his promise and the Defendant's expectations, and thus to perfect the gift [p.951]. Accordingly, it was ordered inter-alia, that the fee simple be vested in the Defendant. The Court noted that the case was one of estoppel arising from encouragement and acquiescence, which falls under the broad heading of

proprietary estoppel, and where this is found on the facts, a cause of action arises and may be relied on as a sword and not merely a shield [p. 949]. The Court relied on the cases of ***Dillwyn*** [supra], ***Ramsden v Dyson*** and **Plimmer v Mayor of Wellington and Crabb v Arun District Council** [1975] 3 All ER 865.

[47] The Jamaican Court of Appeal in the case of **Maxville Trenchfield v Josephine Leslie** (1994) 31 JLR 497 (CA) similarly dealt with what is to obtain in circumstances involving an 'imperfected' gift. In that case, the appellant, who was a co-executor of the Will of the deceased owner of the relevant property, as well as one of the beneficiaries of that land, sued the Respondent for recovery of possession after she refused to leave the premises, having been served with a notice to quit. The Respondent contended that the deceased, who was very ill for about three years prior to his death, had promised her the house in exchange for her taking care of him. The Court ruled in favour of the Respondent on the basis that there was sufficient evidence to find that the deceased had promised the Respondent the gift of his house and the land around it, and that the Respondent had acted to her detriment as a result of that promise. Further,

> *'the parties had conducted their dealings between them on the assumption that the house and land would go to the respondent and it would have been unjust to allow the appellant who stands in the shoe of the deceased, to repudiate that promise and exercise his legal right to possession' [pg. 501] Emphasis mine.*

The Court ultimately found that the Respondent held a 'licence coupled with an equity' and the defence of promissory estoppel had been made out. In coming to its decision, the Court considered the unchallenged findings of the magistrate that the Respondent was not paid for her services to the deceased and that she carried out repairs and did acts consistent with a reasonable expectation that the house would be hers. Also taken into account, was that the magistrate had found that there was 'no other explanation for the Respondent's conduct in relation to the deceased and the property considering that the Respondent was married and had four children' [pg. 500].

[48] From the above authorities, it can be deduced that in cases where a party asserts interest in land by virtue of a gift or promise, and said land has not been transferred in the requisite manner, the Court will only give effect to that gift or promise where it can be demonstrated that the person to whom it was made acted to his detriment owing to his reliance on said gift or promise with the acquiescence or approbation of the owner. This is based on the doctrine of proprietary estoppel.

[49] The Jamaican Court of Appeal in the case of **Annie Lopez v Dawkins Brown and Glen Brown** [2015] JMCA Civ 6 examined the principle of proprietary estoppel. Morrison J at paragraph 65 noted that the modern law of proprietary estoppel is still underpinned by the classic statement of the principle by Lord Kingsdown in **Ramsden v Dyson** (1866) LR 1 HL 129, to wit,

> '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, and 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.'

[50] Further, after citing with approval the words of Lord Denning and Lord Scarman in the seminal case of **Crabb v Arun District Council** [1975] 3 All ER 865 (at para. 66 and 67), and the summary of the principle by the authors of **Gray & Gray's Elements of Land Law** (5th edn, 2009, para. 9.2.8), inter-alia, Morrison JA summed up the task of the Court in cases of this nature as follows:

> *"Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity. And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But*

unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action."

[51] In the case at bar, the considerations for this Court as to the issue of whether the Defendant is the owner of the property are therefore (1) whether the deceased did in fact promise to gift the property to the Defendant, (2) whether, subsequently, the Defendant acted to his detriment in reliance on this promise, and (3) whether these acts of detrimental reliance by the Defendant were done with the acquiescence and or approbation of his father.

The Evidence

[52] The evidence before the Court that the land was promised to the Defendant is to be found in the evidence of the Defendant himself, and his witnesses Reuben Powell and Desmond Smith. The Defendant's evidence is that in the early 1980s his parents made a promise to him that if he remained at home, unlike his other nine siblings, the house would be his. He asserts that, relying on this promise, he did not attempt to build a house of his own, but took care of his parents, and using income from his job at Port Kaiser, carried out several renovation and expansion jobs on the house. A booklet of receipts showing some of the Defendant's purchases of construction material and fixtures in this respect is in evidence as exhibit "10". He asserts that all the money he could have used to construct a house of his own went into improving the subject property, as he believed it to be his own. Whilst he did undertake the renovations to make life easier for his parents, he also believed them to be for his own benefit in the long run as owner. The work was started and carried out over a period of several years beginning in the 1980s when the Defendant was in a financial position to have it done, and his brother Kirlew and the Claimant's witness Linval Powell, were hired by the Defendant to carry out the work. The Defendant asserted that to his personal knowledge, his other siblings knew of the arrangement because it was spoken amongst family members on several occasions, and no objections were made by any of them to the work he had done on the house. The 1st Claimant, he says, in particular, knew, because he specifically mentioned to him

via letter in the 1980s, that the house would be his. Thereafter, he received no further letter from the 1st Claimant.

[53] The Defendant asserts that the first major repair was carried out in the 1980s and involved expansion of the house from the front to back. He also covered the cost of re-ceiling the house and fixing the eaves, among other things, when his parents were unable to continue the repairs they had started. In 2001 he constructed a washroom and air tank with a storeroom underneath and was only assisted by the 4th Claimant who offered to assist and sent US$300. The 1st Claimant, who was living on the property at the time, did not assist with the cost nor did he enquire of the Defendant directly what was being done. Additionally, the Defendant farmed on the property and reared his parent's chickens, as well as goats. Up until 2001 when he lost his job, he would provide his parents with a box of groceries weekly. In 2004 he constructed his business place on the property about 20 feet away from the house. He visited and worked on the premises daily. It has not been disputed that the Defendant had a wife and child and lived at a premises belonging to his wife's sister who resided overseas. The Defendant and his wife owned no property of their own, and it was their understanding that if his sister-in-law were to return, they would have to leave. This bit of evidence remains unchallenged. Much like in ***Maxville v Trenchfield***, I find it peculiar and therefore unlikely, despite the close relationship he enjoyed with his parents, that the Defendant, being that he had a wife and child, would have invested so much time and money, and for so long, into a property that he did not consider to belong to him, with the result that he would have had no place that he and his family could call their own, especially in light of the fact that, given his steady income over the period of his contribution, he would have been in a position to invest that money in a home for himself and family.

[54] The Defendant invites the Court to consider that, of nine siblings, he was the only one who remained at home, taking care of his parents and the property, and he maintained a very close relationship with them as a result. The Defendant declared that the land had long been shared up by his parents, and his siblings

also had been given their own plots of land in their father's lifetime, though they had not been given papers for them. The 1st Claimant was to get a piece of land at 'country,' Myrtle and Jasmine were to get a piece of land at 'big yard' and the rest of the children were to get portions of land on the parcel on which the family home stood. After Myrtle complained that her piece was too small to be shared, his mother agreed that Myrtle was to get the entire portion at 'big yard' and Jasmine, the land attached to the former family home.

[55] This assertion was corroborated by the evidence of Reuben Powell, a sibling of the parties, not party to the suit, who gave evidence that his parents did in fact give land to each of his siblings, including himself, and he and his brother Kirlew built their own houses on the land they were given, as they were encouraged to do by their parents. He asserted that his mother and father have always said that the house and the lands around it would belong to their youngest son David, and that he did not believe the house was a family home. David was the closest to their parents as David remained behind when the other children moved abroad or away, and he did everything for them that a son could do to ensure they were comfortable. Reuben also agreed that David took over work on the house when his parents stopped, and noted that he himself did not contribute, nor is he aware of any contributions made by his other siblings. I find Reuben Powell a witness on whose evidence I can rely.

[56] The Defendant's evidence is also corroborated by that of his witness, Desmond Smith, whose evidence is that he had known Curley Powell and his children all his life (59 years), and who lived in the same community and would socialize with Curley at a local shop and bar owned by his brother. Mr. Smith gave evidence that Curley Powell had told him several times that his house belonged to his last son David, as well as what land his other children were to get, including that the land at 'big yard' was for his girls and a piece of land by the 'old yard' was for Linton. This accords with the Defendant's evidence. Mr. Smith further gave evidence that he had done work over the years at the property and each time he was told what to do and paid by David. He was also aware that David was

always at the house and that he took care of his mother and paid for a box of groceries weekly for many years from his brother's shop after Curley had died. There is no direct evidence challenging Mr. Smith's testimony and I see no reason why Reuben Powell and Desmond Smith should not be viewed as independent witnesses.

[57] The Defendant further puts forward as evidence referable to his ownership of the land, that (1) he applied for electricity for the house in 1987 and paid the bills from then up until 2001 when the 1st Claimant moved in. This is corroborated by receipts in evidence as Exhibit "11b". To date, the bill still remains in his name; (2) he has paid the land tax on most of the property for an extended period of time. Twelve tax receipts showing payments from 1994 to 2012 pertaining to the subject property have been adduced by the Defendant as Exhibit "12". (3) He enjoyed a close relationship with his parents as a result of him staying behind and taking care of them. The 1st and 3rd Claimants went overseas to England and later the 4th and 2nd Claimant went to the United States of America. The 2nd Claimant moved into the 4th Claimant's house in the same district before he moved abroad, Kirlew added onto and moved into a building next door, Reuben built and moved into his own house in the vicinity, and his sister Myrtle had moved to Westmoreland. He further alleges that when his father died, he paid for his father's funeral by himself and most of his other siblings did not even return for the funeral. These allegations remain unchallenged.

[58] Interestingly, it is to be noted that the 3rd Claimant indicated at trial that he did not believe himself to be the owner of an interest in the house and even went so far as to acknowledge that the house and the one acre around it was owned by the Defendant.

[59] On the other hand, it is the position of the 1st Claimant that at no time was he told by his mother or the Defendant or any other person that the subject property belonged to the Defendant, nor was he shown any document until the matter was brought to Court. He asserts that the house is his father's house and he has

never sought permission to remain there. He and his siblings have contributed to the upkeep and development of the property at various times.

[60] Specifically, the 1st Claimant alleged that, during the entire period that he was living in the United Kingdom, he made substantial financial contributions to the development of the house and property by sending money consistently to his mother, Lillian Powell, and to the Defendant. He constructed a cess/sewer pit and valley bed and effected repairs to the roof of the property at his own expense. In particular, he asserts he spent between fifteen and twenty thousand dollars ($15,000 - $20,000) on repairs to the house following Hurricane Dean in 2007. He was never told to not send money and the Defendant did not tell him he was negotiating to purchase the property or had bought same. He also planted several vegetable gardens on the said property, and his sister, Myrtle, who also resided at the house, also did farming there. He stated that neither David nor any other person interfered with him in any way. He also alleged that he continues to pay electricity bills and taxes, and assist in providing for Clive. It must be noted that the 1st Claimant has not put forward any evidence to substantiate these alleged contributions. apart from Exhibit "6" a letter addressed to 'Mother' from 1st Claimant indicating a sum of £200.00 'to finish the kitchen and if any is left, to do the ceiling in the new room.' Defendant has agreed that the Claimant assisted.

[61] He asserted that his mother denied making a Will and that upon visiting the office of Attorney-at-Law Jeremy Palmer with some of his siblings, Mr. Palmer had advised them that the house should be kept as a family home and the balance shared up equally.

[62] The 1st Claimant gave evidence of his sister Myrtle's objection to the building of the shop on the property by the Defendant, but did not indicate that he had objected in any way.

[63] It was also submitted by the Claimants that notwithstanding that some family members were overseas at various intervals, the family shared close ties. For this, they rely on the evidence of Adrian Stephenson. In any event, the Claimants

submit that it is immaterial to the issue whether the Defendant was favoured or not.

[64] It is my view that the document purporting to be the Last Will and Testament of Lillian Powell has no real bearing on this case in terms of what ought to happen with regards to the subject property, save and except that it can be seen as material showing the intention of Lillian Powell as it relates to said land, that could be referable to an intention by Curley and Lillian for David to have the property. The reference to the land cannot be seen as any disposition of said land given the words used, and most importantly, as I have found earlier, Lillian Powell was not seised of the interest in the land so that she could have disposed of it in the manner she purported to in the Indenture Agreement. It must also be noted that I reject the allegation or inference that the Will is fraudulent, as no proof whatsoever has been adduced by the Claimant to prove same. Furthermore, the Will has already been admitted to probate by a competent court in this jurisdiction, and there was no challenge to the validity of the Will in those proceedings.

[65] On a totality evidence, I find the Defendant's evidence to be more credible, and that it is more probable than not that he was promised the gift of the property. I find that Curley Powell did share up portions of his land prior to his death to his various children, including the gift of the subject property to the Defendant. I consider that the Defendant did enjoy the closest relationship with his parents and that he took care of them primarily by himself, and also that several of his other siblings received land on which they built their own homes.

[66] It is to be seen that, despite the Claimant's assertions that the house was to be the family home, there was no direct testimony from any of the Claimants that they were ever told specifically by their parents, particularly Curley Powell, that the house belonged to all of them.

[67] Further, it is clear from the evidence that the Defendant expended money on the property to his detriment, some of which was with his father's approbation, based

on the promise that this property belonged to him. Further, there was no challenge to this expenditure and development by any of the Claimants or any other family member. In my view, it is unlikely that the Defendant would have done so to the extent that he did, considering he had a family of his own, no house of his own, and the funds with which he quite likely could have acquired his own home, if it were that he did not honestly believe that he would own the property. These actions in my estimation lend themselves to the conclusion that the property was indeed a gift to the Defendant.

The Decision of the Court Below – See addendum attached

[68] June 3, 2008, upon the hearing of the Defendant's summons for recovery of possession against the 1st Claimant [see para 5] in the Resident Magistrate's Court for the parish of St. Elizabeth, the Magistrate found favour with the Defendant's case, awarding him damages, costs, and an injunction restraining the 1st Claimant from preventing the survey of the land by the Defendant and/or his agents. In my view, it is apparent from the said Order [Exhibit 4], that the Magistrate accepted the transfer instrument as referable to the ownership of the Defendant, as he refers to the property as that recorded at 'Liber New Series 4419 Folio 83'. The Claimants have submitted several reasons why they believe this Order ought not to be followed. Whilst I will not make a pronouncement on whether the order is 'judicially and factually' sound, since the issue of an appeal against that Order is not before me, I am however of the view that I am not particularly bound by that decision. Further, there is no material before me as to the reason for the learned Magistrate to rule in that particular way.

Effect of Registration of the property at the Island Record Office

[69] Since I have found that the transfer was ineffectual to transfer interest in the property as purported, the fact that it was recorded at the Island Records Office on July 22, 1993 at Liber New Series 4419 Folio 83 is inconsequential. In my view, registration at the Records Office (pursuant to the Record Office Act) in and of itself, is insufficient as proof of ownership, and does not lend itself to the

protection of the principle of indefeasibility as does registration under the Registration of Titles Act. Legal documents are registered at the Records Office, in my view, as an official record that a transaction has taken place between parties, and to put the public at large on notice that this in fact has been so. Registration in this way aids in showing root of title, for instance to a parcel of 'unregistered' land. However, it is not unassailable by a party who is able to show a better title.

Proprietary Estoppel in respect of the Claimants

[70] The Claimants argued that they made significant financial contributions to the improvement and renovation of the property and so hold an interest in the property pursuant to the doctrine of proprietary estoppel. However, there is insufficient evidence to support that this was in fact so. I agree with the submissions of Counsel for the Defendant that not only is there no evidence before the Court that any promise was made to any of the Claimants that they were to obtain any proprietary interest in the subject property, by Curley Powell or the Defendant, which is the first requirement to satisfy the doctrine, but there is also paltry evidence, documentary or otherwise, of any contribution that could possibly amount to detrimental reliance, on the part of the Claimants. It has been submitted, inter alia, that the Claimants were under no mistake as to their legal rights as to the property but only sought to assert these rights after it was realized that the Defendant intended to assert his legal rights to have the 1st Claimant removed, and that the behaviour of the Claimants has been inconsistent with a true belief in ownership or an entitlement to interest in the property.

[71] The only evidence of any contribution by the 4th Claimant are five (5) letters from her to the Defendant; three (3) exhibited as signed by 'Dolly' (the 4th Claimant's 'pet name'), and two (2) by Jasmine, which enclosed money and detailed how the sum was to be shared for the care of her children. Interestingly, these letters were adduced by the Defendant. I accept the Defendant's evidence that, save and except for the US$300.00 that she sent in 2001 to assist with the air tank

and washroom, any money sent by the 4th Claimant was for their mother and the care of the 4th Claimant's own children, one of whom was disabled, who undisputedly were in Lillian's care at the subject property, and was not contribution towards improving the house. I also accept the Defendant's evidence that the money sent by the 4th Claimant was never sufficient to cover the needs of the children and that he would always have to subsidize it. The box of groceries he would provide weekly benefitted all who were in the house including the 4th Claimant's parents. In cross-examination, the 4th Claimant went so far as to state that she did not dictate what use her mother should put the money she sent to.

[72] No documentary evidence has been put forward to show any contribution by the 1st, 2nd and 3rd Claimants, apart from Exhibit "6" (£200.00 from 1st Claimant).

[73] I appreciate that there are inconsistencies and contradictions on both sides, but I lean towards the submissions of Defence Counsel that the Claimant's evidence at trial was inconsistent and were unable to speak to what work was done to improve the property, when it was done, how much it cost, and how much money they each expended.

[74] From the foregoing, on a balance of probability, I find that no equity has been created in favour of the Claimants.

ORDER

(i) Judgment for the Defendant.

(ii) Costs to the Defendant against the Claimants to be agreed or taxed.