IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00353

BETWEEN	**PREMIUM PRODUCE EXPORT LIMITED**	**CLAIMANT**
AND	**LYNFORD GEORGE JOHNSON**	**DEFENDANT**

Lease- Proprietary Estoppel-Tennant constructed permanent structures- Whether lessor obligated to compensate tenant upon termination of the lease- Whether lessee has an equitable interest in the land - Meaning and effect of "tenant's fixtures"- Whether lessor's conduct and representations created equitable interest.

Charles Piper QC, and Immanuel Williams instructed by Charles E. Piper & Associates for Claimant.

Matthew Royal and Kimberly Brown instructed by Myers, Fletcher & Gordon for Defendant.

Heard: **28th February, 1st March, 8th March and, 20th May, 2022.**

In Open Court

Cor: Batts J.

[1] This matter concerns land, the subject of a lease and, on which a permanent structure was erected by the lessee who is the Claimant. The lessor is the Defendant. He contends that the structure was erected in breach of the lease and without his knowledge. The Defendant terminated the lease and the Claimant wants compensation for the structure on the basis that the Defendant was aware of and agreed to its construction, benefitted from its existence and, agreed to pay compensation. The Claimant, on that basis, claims an interest in the land and

relies on the principles of proprietary estoppel. The Defendant has counterclaimed for an order for possession *"free and clear of all tenant's fixtures erected thereon pursuant to clauses 3 .6 and 3.10 of the Lease Agreement dated July 1, 2011*." The resolution, of these factual and legal issues, did not turn as much on the viva voce evidence as it did on the documentation.

[2] On the first morning of trial, a Bundle of Agreed Documents was put in evidence as exhibit 1. Another bundle of documents was admitted, by consent, as exhibit 2. Replacement pages, for some illegible pages in exhibit 1, were admitted as exhibits, see exhibit 3 (replacing pages 56-72), exhibit 4 (replacing pages 165-179), exhibit 5 (replacing pages 87-97), exhibit 6 (replacing pages 111-122) and, exhibit 7 (replacing page 203).

[3] Insofar as oral evidence is concerned Mr. Trevor Donegal, the Claimant's managing director, was its only witness. His evidence in chief was contained in a witness statement dated 1st December 2021. He stated that in 2009 the Claimant leased an empty lot, located at 55 Old Hope Road, from the Defendant. He obtained permission from the KSAC to erect a temporary structure on the land. His intention was to operate a restaurant using containers. He says he later obtained wooden material and had the KSAC approval adjusted to allow for permanent structures. The first lease, signed on the 1st October 2009, was for five years, exhibit 1 page 12. This lease in clauses 3(iv) and 5(vi) clearly stated only a temporary structure was to be erected. On the 1st July 2011 another lease, this time for 20 years, was entered into. That lease did not state that only a temporary structure was to be erected. Mr. Donegal says construction of the two-storey wooden building commenced in December 2009 and was completed in December 2011. At paragraph 11 of his witness statement Mr. Donegal said:

> *11. "Before the completion of the building on the property the defendant attended the location on several occasions and made no complaints or objections about the permanence of the structure. By*

> *this time the permanence of the structure was obvious."*

[4] Mr. Donegal details the construction costs and the material used. At paragraph 14 of his witness statement he asserts that, after the completion of construction, the Defendant's then attorneys prepared an option agreement for the Claimant's purchase of the Defendant's legal and equitable interest in the land, see exhibit 1 page 106. The option agreement was signed on the 24th January 2012 and the price for the land fixed at $25 million. The Claimant was however unable to exercise that option and attributed its failure to the Defendant obtaining other mortgages over the land. Significantly one recital in the option agreement read as follows:

> *"And whereas the purchaser is the lessee in possession of the said parcel of land on which the lessee has undertaken the construction of a building.*"

[5] The witness also details his negotiations with, one Mr. Glenford Millin, the Defendant's agent for that purpose. He references a valuation by Langford and Brown (exhibit 4) which was commissioned by the Defendant in 2017. They valued the building at $109,000,000.00 and the land only at $35,000,000.00 (Mr. Donegal erroneously says $45 million dollars at paragraph 22 of his witness statement). That report, commissioned by the Defendant, is also significant because of the following notation made by the valuer:

> *"We are of the opinion that the property is not suitable for loan security purposes; currently the owner of the building is different from the owner of the land"*

[6] The witness references, an email dated 13th September 2017 and, a letter dated 18th September 2017 which he says set out an agreement for the Defendant to purchase the Claimant's building. This was not carried into effect because the Defendant had a change of mind.

[7] Mr. Donegal, at paragraphs 26 to 30, outlines the Claimant's financial challenges. At paragraph 31 he outlines further negotiations with the Defendant. This time the parties contemplated selling the premises and distributing the proceeds by giving the Defendant the value of the land and the Claimant the value of the building. This is evidenced by a letter dated 7th March, 2019 (exhibit 2 page 2). That letter, is signed by the Defendant and, states:

> *"I refer to discussions with respect to putting for sale on the open market the property located at 55 Old Hope Road, Kingston 5 in the parish of St. Andrew, comprising land owned and registered in my name and building owned by Trevor Donegal.*
>
> *I hereby confirm my sale price for the land only which is to form part of the total sale price for the land and building as one property to be sold, to be in the amount of Thirty-Five million Dollars ($35,000,000.00).*
>
> *The said proposed sale price of Thirty-Five Million Dollars (35,000,000.00) will be subject to my review and adjustment after one (1) year from the date of this confirmation."*

[8] There followed further exchanges culminating in a meeting between the parties on the 20th April, 2020. At that meeting the Defendant refused to commit to any figure as to the '*land only*' value and wanted another valuation. The questions, of outstanding rental and of '*his having used the value of the building on the said property to obtain a mortgage",* were also unresolved. By letter dated 11th May, 2020 the Claimant's attorneys-at-law referenced the meeting and asserted, among other things, that the Defendant and his company had obtained a financial benefit by virtue of the Claimant's buildings being on the land. The witness says there was no further communication. This is however inaccurate because the Defendant's attorney did respond by letter dated 11th May 2020 (exhibit 1 page 210). That letter took no issue with the Claimant's interest in the building but, queried and asked for

particulars of the alleged benefit by way of mortgage obtained by the Defendant and, raised again the matter of outstanding rent.

[9] In amplification, of his witness statement, Mr. Donegal was asked why did he build a permanent structure when his 2009 lease stipulated something temporary. He said;

> *"We, the idea to begin with was, reason for temporary structure NWA said land not to be used for permanent structure. We intended to purchase the property from Mr. Johnson and we did not seek his permission because we did not think it important as at end of period we would have bought the property."*

[10] When cross-examined he agreed that at the time of the 2009 lease it was agreed structure would be temporary. He also stated the following:

> *"Q: The lease of 2011 also reflects the same agreement*
>
> *A: No sir*
>
> *Q: Para 8 of your witness statement last line. Both leases 'temporary structure' see that*
>
> *A: yes*
>
> *Q: that is your evidence*
>
> *Suggest your representation and his agreement only concerned you constructing a temporary structure.*
>
> *A: don't understand*
>
> *Q: Discussion was for a temporary structure*
>
> *A: yes"*

On the other hand, he later stated the following:

> *Q: you agree that in building a permanent structure you knowingly breached terms of the lease agreements.*
>
> *A: No*

Q: You knew had no right to build permanent structure and did so by deceiving Mr. Johnson as to intentions

A: No."

[11] The witness maintained that during construction the site was easily viewed as there was no zinc fencing erected. He stated that construction was continuing in 2012 but that consisted of minor finishing on the inside. He said, when an article published on the 11th March 2015 in the Gleaner newspaper (page 9 Exhibit 2) was put to him, that the restaurant took 4 years to be built. When referred to several letters, exhibits 2 page 1 and exhibit 1 pages 162-164, he denied they were written to protest the building on the property. He admitted that the letters concerned rent which had not been paid since 2010. Although making this admission he surprisingly denied that outstanding rent remained a point in negotiations. He maintained that answer having been shown pages 83,185 and, 186-188 of Exhibit 1.

[12] The witness denied ever assuring the Defendant that he would construct only a temporary structure. He said its nature and permanence were "*obvious*" throughout the entire construction. The following exchange occurred:

"Q: Exhibit 3, May 9, 2011 p. 73 Exhibit 1, July 2011 lease, you signed this lease when the structure was obviously permanent.

A: yes

Q: Did July 2011 lease contemplate a temporary structure

A: the structure was already completed

J: answer the question.

A: Yes."

[13] The witness stated that in July 2012 he agreed with Mr. Johnson for an option to purchase, Exhibit 1 p. 106. Further that Mr. Johnson wrote letters to facilitate his obtaining a mortgage to effect the purchase Exhibit 2 pages 4 – 5. He thereafter

admitted that it was not the Defendant but his earlier problems with *"Finsac*" which prevented him getting a mortgage to finance the purchase. He admitted he was still in possession of the property. This *volte face* from his earlier evidence did not reflect well on his candour.

[14] Re-examination was unremarkable. In answer to the court the following exchange occurred.

> *"J. Why did you say the letter at page 164 is not objecting to the building?*
>
> *A: The date of the letter is not objecting to the building.*
>
> *J: That is what the letter says*
>
> *A: Objecting to me constructing something already constructed."*

[15] The Claimant called no other witness and closed its case. The Defendant then gave evidence. His witness statement, dated 30th November 2021, stood as his evidence in chief. He describes the Claimant's principal, Mr. Donegal, as a friend. In his statement at paragraphs 3 and 4 he indicates, the purpose for which the first lease dated 1st October 2009 was granted and, its terms. Critically relevant to this case was the provision in that lease that a "*temporary structure*" was to be erected and was to be removed at the end of the lease and the land restored to its original condition. He says at paragraph 5 that at some point "*in the negotiations and discussions"* Mr. Donegal advised him that wood and not containers would be used to construct the structures or buildings. He is categorical that at no time did he agree to a permanent structure being erected. At paragraph 7 he stated that he only visited the premises on one occasion after the 2009 lease was signed. Further that he does not often pass by there and that the property was fenced in a manner that prevented observation by passersby.

[16] He states that in early 2011 he visited the property to enquire about rent which had been unpaid since May 2010, (paragraph 8 of witness statement). He then observed *"that PPEL began to construct a large structure on my land which*

appeared to be much larger in scope than we agreed." He indicates, in paragraph 9, that he confronted Mr. Donegal about it and," *demanded that he refrained from building any permanent structure on my property"*. He said that Mr. Donegal assured him that it would remain a temporary structure. He felt comforted by that assurance and, as the material to be used was wood, he felt it could be removed easily. He was not made aware of applications to the KSAC for the erection of a permanent structure. In July 2011 Mr. Donegal approached him to renegotiate his lease. They therefore signed an agreement dated 1st July 2011. This lease was for a longer duration, 20 years as against 5 years, see paragraph 117 of his witness statement and exhibit 1 pages 73-86. This lease contained a recital:

> *" AND WHEREAS : It is Agreed that the lessee shall construct wooden structures on the said property which shall remain the fixtures of the Lessee and shall not become fixtures of the Lessor which structures have already been constructed."*

That recital notwithstanding, the Defendant insisted that the 2011 lease permitted only a temporary wooden structure.

[17] He explains the extended term of the lease by reference to the Claimant's representation that its business plans needed a lease of longer duration. He states at paragraph 13:

> *"13. Notwithstanding these several demands for it to cease and desist construction of the offending structure, the Claimant persisted in the unauthorized work. The Defendant has also failed, neglected, and/or refused to pay the rent that is owed to me since May 2010."*

[18] He indicates in paragraph 14 that he observed the structure in 2013 and that it was incomplete and ongoing. It was not until July 2013 he knew the Claimant had erected a permanent structure. He references the newspaper article, at page 2 of exhibit 2, as proof that the structure was incomplete in 2011. He references, in paragraphs 15 to 18 of his witness statement, loans he obtained from his bankers.

Those indicated that only the land was being used as security, see exhibit 1 page 20, being a commitment letter dated 10th September 2010. At paragraphs 20 to 29 of his witness statement he discusses the option to purchase dated 24th January 2012 (exhibit 1 page 106). He says the Claimant was unable to exercise it, due to an inability to obtain financing, although he extended the time for its exercise and even tried to assist the Claimant to obtain financing.

[19] In paragraph 30 he says that, in or around May of 2017, the Claimant approached him to terminate the lease, "*through my purchase of the building which he put up without my permission."* And, that:

> *"At that time, PPEL was heavily indebted to me, having not paid rent since May 2010. My primary concern at that time was to have the rent owed to me cleared and to terminate the lease arrangement which had been unprofitable for me for several years. This arrangement was negotiated as a possible settlement of issues of his unprofitable tenancy. I did not engage with PPEL on the basis that it had an interest in my property because it has no such interest."*

[20] At paragraph 32 the Defendant acknowledges that Mr. Glenford Millin was his agent and represented him in negotiations which commenced in September 2017. An email dated 13th September 2017, exhibit 1 page 182, confirms proposed terms of purchase. These terms he said reaffirm that the agreement was subject to the parties arriving at a "*satisfactory binding agreement*" and that he reserved, "*the right to use all legal means to protect [his] rights and interests.".* Ultimately, by letter dated 28th September 2018 (exhibit 1 page 196), he agreed to purchase the structure on condition that the Claimant sign the agreement for sale which his attorneys had prepared and that the rent owed was deducted from the purchase price. That agreement for sale was never signed. He says the non-response from the Claimant's attorneys-at-law resulted in his withdrawing from the negotiations,

see paragraph 36 of his witness statement. In this regard he relies on letters dated 10th December 2018, (exhibit 1 page 202) and, 14th January 2019 (exhibit 7).

[21] His effort to purchase the building having failed the Defendant at paragraphs 37 to 41 discussed the efforts to sell the property to a third party. This commenced in March 2019. However, the Claimant's attorneys asked that he sign an "Agreement for Severance of Proprietary Interest in Land" which he refused to do. The discussions were also frustrated by the Claimant's insistence that he compensate for alleged "*benefits*" he obtained from loans through the use of the property as security. The Defendant says at paragraph 43,

> *"All proposals and negotiations that were discussed between PPEL and me were with a view to dissolving the unprofitable tenancy and recovering the money owed to me due to PPEL'S non-payment of rent over the years. These negotiations were only an attempt to avoid having the matter resolved at court. None of my negotiations or proposals were an acknowledgement of any interest PPEL had in my property because it has no interest in my property."*

[22] Beginning at paragraph 47 the amount of rent outstanding and unpaid is outlined. That amount, as at 31st May 2021, is $32,737,466.70 inclusive of GCT. On the 30th April 2021 a Notice to Quit was issued to the Claimant. He claims possession and compensation for the continued occupation even after a notice to quit was given. He references Clauses 3.6 and 3.10 of the lease and states that he is entitled to have the structure removed and be paid for any damage to the property, paragraph 52 of witness statement. Paragraphs 53 and 54 of his witness statement affirm a sentiment the witness reaffirmed when being cross-examined and I quote them in full:

> *"53. I was very lenient in dealing with Mr. Donegal and his business throughout the years because I sympathized with his struggles as a businessman. Mr. Donegal has told me that he suffered significant loss due to FINSAC which ruined his business at the time and drastically reduced his wealth. As a businessman, I am very familiar with the hardship of being a business owner in Jamaica. I am a man of humble beginning who started a small business that has since grown. I was very patient with Mr. Donegal in not aggressively pursuing the rents owed to me when he stopped paying in 2010 because he led me to believe that he was just going through a rough patch, trying to rehabilitate his finances and that I would be paid in full once the business grows. I even gave him a longer term on the lease, trusting him that he would pay me as agreed. I am very surprised now that we are in court fighting over my property and the rent that is owed to me.*
>
> *54. Mr. Donegal has abused my generosity and empathy and breached the lease agreement by building a permanent structure without me knowing or permitting him to, refusing to pay me the money he owes in rent, and now, claiming that my property is, somehow his."*

[23] During cross-examination the humility of the Defendant's beginnings, and his tremendous success in business, became apparent. His diminished facility with the written word was such that the court's registrar was asked to read documents to him. His success is such that the property in this case was, only one of several he owned and, not one to which he over the years had paid any particular attention. The Defendant, made a generally favourable impression on me and, seemed genuinely confused as to how it is a claim is being made to his land.

[24] The Defendant told the cross examiner that the document at page 184 of Exhibit 1 was an acceptance of his offer to purchase the building. He admitted that the Langford & Brown valuation was to determine the price at which he was to buy the building see exhibit 4. He said also that the Notice to Quit of 2021 was not the first one given to the Claimant. It turns out he had given earlier instructions for one to be issued but was unable to prove an earlier one had been issued. He admitted that his mortgage, used to secure a loan to a third party, was a land only mortgage, exhibit 1 p. 34 – 54. With regard to the 2011 lease he admitted that the building had already been constructed,

> *"Q: After the lease of 2009 you granted a new lease to the Claimant in 2011.*
>
> *A: Yes*
>
> *Q: that was for 20 years*
>
> *A: yes*
>
> *Q: at that time building had already been constructed*
>
> *A: yes*
>
> *Q: the 2009 lease set out the rental you claimed annually sum monthly*
>
> *A: Yes*
>
> *Q: Do you agree that you stated in 2011 lease that the outstanding rent before September 1, 2011 was subject to a collateral agreement*
>
> *A: Based on the document no I cannot maintain that."*

[25] The Defendant admitted that at one point in the negotiations, conducted on his behalf by Mr. Millin, he agreed to sell the land only to the Claimant. On another occasion he was prepared to buy the building. There followed a most important exchange,

> *"Q: Mr. Johnson did you not visit premises when being constructed.*

A: when it just started to build we agree on containers and Mr. Donegal change it and bring in some wood. So I used to visit the premises. After he bring wood he start to bring up structure as he said he got these wood free. So I said remember the agreement was not a permanent building and he started put up building. Then I and Mr. Donegal fall out.

Q: Was that before the 2011 lease or after

A: before yes

Q: at time of the signing of 2011 lease the structure had already been built

A: Yes

Q: Have you ever heard about an injunction

A: yes

Q: did you think of taking out injunction

A: no, the reason he knew it is temporary. If he want to put gold on the property it don't matter to me as long as he knew when the 20 years up he has to take it off."

[26] There was no re-examination of this witness. In answer to the court he said:

"J: Why building was not given as a reason for a notice

A: because I talk to him about it and told him if he have to put gold no problem because that is what you make your money from. It have to look good."

[27] Such was the evidence in the matter. Both parties expressed a desire to prepare written submissions. As such we adjourned to the 8th March 2022. In written submissions the Claimant contends that in its preamble the 2011 lease permitted the erecting of "*tenants' fixtures*" and also that these had already been constructed. That lease also gave the Claimant an option to buy the land. Further that clause 3.6 expressly stated that upon termination the structures remained the property of the lessee. They might be removed at the lessee's option. Clause 3.10 gave the lessor an option to purchase the said structures. It is urged that these provisions, as well as the negotiations and agreements made during the exchanges with Mr.

Millin on the Defendant's behalf, demonstrated the Defendant's acknowledgement that the Claimant has an interest in the land. The Claimant relies on the doctrine of proprietary estoppel. Several authorities were cited in that regard. It is alleged also that the Defendant had waived his right to rent and in the alternative that the claim for rent in excess of 6 years was now barred by statute of limitations.

[28] In written submissions the Defendant's counsel stated that there was no evidence of a representation prior to the construction of the building. Further that Mr. Donegal himself admitted he had agreed to erect a temporary structure. The construction submitted Mr. Royale, for the Defendant, was not the result of any promise or representation. He submitted that Lord Oliver's judgment in ***Taylor Fish Limited v Liverpool Victoria Trustee Co. Ltd. [1981] 1 All ER 897*** reflected the modern expression of the law of proprietary estoppel. He referenced a passage in ***Lettsome v Flanders*** **Suit 46 of 1993 High Court of the British Virgin Island (unreported judgment delivered on 5th July 1999)** which applied Taylor Fisheries per Benjamin J at page 9 of the judgment:

> ***"…I am content to rely on the first element [in Wilmot] which is that the person relying upon estoppel must have made a mistake as to his or her legal rights. The Defendant was never mistaken as to what the agreement was. Indeed, she repeated from the witness box that she was permitted to build a plywood house. Even more fundamental is my observation that at no time during her testimony did she in any fashion assert that she was lulled into believing that she had somehow derived an interest of any kind in the land…. The inevitable conclusion is that the Defendant has failed to establish an estoppel by acquiescence."***

Interestingly the Defendant also relied on ***Aston Lewis v Victor McLean [1982] JLR 56*** to support a submission that in the absence of an express term in the lease

a Claimant can have no right to compensation. There was he said no representation on which the Claimant had relied before constructing the building.

[29] The Defendant's counsel also submitted that the Claimant had not come with clean hands because rent was owed and his application, to the KSAC for permission to construct a permanent structure, was made without notice to the Defendant. Submissions were made for an order for possession and judgment for rent. It was submitted that sections 3 and 36 of the Limitation of Actions Act are inconsistent as to the relevant limitation period and that the Claimant has acknowledged the debt in writing, see letter dated 12 June, 2017 exhibit 2 page 180.

[30] The oral submissions did not depart from the written ones earlier filed. Mr. Royale, for the Defendant, did however assert as a statement of principle the following:

> *"Equity will not assist a man who knew in 2011 a temporary structure was contemplated. If the parties determine that the building at the end of the lease, "I recover my property and you can recover what you have built', that is the end of the matter.*
> *No discussion after that, has any relevance. It is plain and obvious what the parties agree".*

[31] It is best that I outline the law related to proprietary estoppel as I understand it to be. Then I will summarize my findings on the relevant facts, apply the law and state my decision.

[32] I respectfully differ from an assertion that the written terms of the agreement constitute "*the end of the matter*". This can hardly be so because in these matters of estoppel, whether promissory or proprietary, very often the analysis begins with the agreement or contract. The question often is whether, when one has regard to words or conduct after contract, a party ought to be allowed to enforce (or rely on) the terms of that contract. A modern statement of the relevant principles can be found in the judgments delivered by the House of Lords (as the Supreme Court of England and Wales was then called) in ***Thorner v Major and others*** [2009] 3 All ER 945. It is a decision which also makes it clear that a claimant can rely on

principles of estoppel. Lord Walker of Gestingthorpe states the relevant elements of estoppel concisely, at pages 956- 957,

> *[29] My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Gardner An Introduction to Land Law (2007) p 101) has recently commented: 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).' Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (see Megarry and Wade Law of Real Property (7th edn, 2008) para 16–001 ; Gray and Gray Elements of Land Law (5th edn, 2009) para 9.2.8; Snell's Equity (31st edn, 2005) paras 10–16 to 10–19; Gardner An Introduction to Land Law (2007) para 7.1.1).*

[33] The principles are applicable in a wide variety of circumstances and are not to be treated as statutory or immutable constraints lest injustice results. Justice Oliver, as he then was, perhaps explained it best in **Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd** and **Old & Campbell Ltd v Liverpool Victoria Trustees Ltd [1981] 1 All ER 897 at 918 :**

> *"So here, once again, is the Court of Appeal asserting the broad test of whether in the circumstances the conduct complained of is unconscionable without the necessity of forcing those incumbrances into a Proscrustean bed constructed from some unalterable criteria.*
>
> *The matter was expressed as follows by Lord Denning MR in Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314 at 323, [1976] QB 225 at 241:*
>
> *"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J [in* Grundt v Great Boulder Pty Gold Mines Ltd *(1937) 59 CLR 641 at 674] put it in these words: "The principle upon which estoppel* in pais *is founded is that the law should not*

> *permit an unjust departure by a party for the purpose of their legal relations." In 1947, after the* High Trees *case, I had some correspondence with Dixon J about it, and I think I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land has led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct—what he has led the other to believe—even though he never intended it."*
>
> *The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared, and, in approaching that, I must consider the cases of the two plaintiffs separately because it may be that quite different considerations apply to each".*

[34] Lord Oliver's reference to "*mistake*" does not add an immutable requirement to the principle. It reflects the facts and circumstances before him. The equity arises when one party is led to believe a state of affairs exists and in consequence has acted to his detriment. The person who has induced that belief will not be allowed to assert a contrary position.

[35] This being the law, on the evidence before me, the result can hardly be in doubt. The facts as I find them, and my reasons for those findings, are as follows:

i. The original lease, in 2009, contemplated only a temporary structure which could be removed without damage to the land.

This is clear from the evidence of both parties. The Claimant at that time intended to use containers on the land.

ii. The Claimant unilaterally, and without reference to the Defendant, changed his mind. Having sourced a supply of timber, he decided to construct a permanent structure of wood which would be affixed to and form part of the land. He, to this end, obtained the requisite building approval on or around November 18, 2009 (exhibit 2), also without reference to the Defendant.

iii. The Claimant stopped paying rent to the Defendant in the year 2010. This coincided with the commencement of construction.

iv. The Defendant attended the premises during this period and by early 2011, and prior to the entry into the second lease in July 2011, was aware of the permanent nature of the building being erected.

v. The Defendant, although upset that the rent was not being paid, acquiesced in and agreed to the erection of the permanent all wooden structure on his land.

vi. The Defendant, although that may not have been his subjective intent, lead the Claimant reasonably to believe that his interest in the building would at all times be treated separately from the land on which it was constructed. The Defendant's conduct, which induced this belief, was as follows:

    a) Visiting the premises in the period 2010 to 2011 and informing the Claimant that he could erect anything "*even gold*" as it was business and it must look good.

    b) Entry into a new 20-year lease in 2011 which included an option, by the landlord to buy the building (Clause 3.10) and, contained a recital acknowledging that the building already constructed remained the fixture of the lessee. That lease, page 73 exhibit 1, also stated in

clause 3.6 that the structure *"shall remain the property of the lessee"* and that the lessee had an option to remove his building. The lease is silent as to what is to become of the structure if the Defendant fails to exercise his option to purchase it and the Claimant fails to exercise his option to remove it. However, as both parties were aware it was a permanent structure affixed to the land and both acknowledged it belonged to the Claimant, I find as a fact that it was mutually contemplated and agreed that if not removed or purchased the building remained the property of the Claimant. This result flows by necessary implication from the terms of the lease itself. I find as a fact that the Claimant, given the terms of the lease, reasonably believed that the building would remain his even after termination of the lease. This applied even if he chose not to remove it and the Defendant chose not to purchase it.

c) The subsequent conduct of the Defendant supports my findings at letters (a) and (b) above. I fail to see how the Defendant's valuation in the year 2017, which instructed the valuer that the building was separately owned (see para 5 above) or, the Defendant's entry into an option to purchase the land only in January 2012 (para 4 above) or, the Defendant's tender to the Claimant of an agreement to purchase the building in September 2017 (para 6 above) or, the move in 2020 by both parties to sell the premises to a third party and to divide the proceeds between them based on the respective value of the land and building at which time the Defendant wrote the letter of 7th March 2019 (see para 7 above and exhibit 2 page 2), can be otherwise explained. It is clear

that at all material times the parties understood that the building remained the property of the Claimant and that, even if not dismantled at the Claimant's option or purchased at the Defendant's option, the Claimant's proprietary interest in it remained.

vii. The Defendant, contrary to the Claimant's assertion, did not use the building to obtain any financial benefit. The documents clearly indicated it was the land only which was used as security (exhibit 1, page 22). Furthermore, the loan was to a third party and not to the Defendant.

viii. The Claimant completed the building, and continued to make the improvements he described, in the reasonably held belief that the building was his and would remain his even if the lease was terminated. This belief, was consistent with the terms of the lease agreement of 2011 and, was induced by the Defendant agreeing to those terms and orally encouraging him to complete the building.

ix. Relations between the parties deteriorated because of the Claimant's failure to pay rent. The Defendant's effort to rely on letters, written during the period 2013 to 2015 which protested the erection of a building, to prove otherwise is misconceived. In the first place those letters refer to the lease dated 2009 which by then was no longer in effect. In the second place, and as admitted by the Defendant, he was well aware of the nature of the structure erected when the lease of 2011 was entered into. There could therefore be no breach of the lease as it was obvious to all that the structure was permanent and affixed to the land. The Defendant's apparent misunderstanding, of the legal consequence of his acquiesce in the construction of a permanent structure, does not cause the designation "*temporary*" to be applicable. He knew the nature of the

structure erected at the time of the 2011 lease and cannot thereafter complain that it was erected in breach of the lease.

x. The Claimant, has paid no rental since 2010 and, has in writing acknowledged liability for rent, see exhibit 1 pages 180,185 (which encloses a draft contract proposing a waiver of rent owed) and, 210.

xi. The Claimant remains in possession of the premises.

[36] It is manifest that a proprietary estoppel arises. Equity will prevent the Defendant claiming ownership of the building affixed to his land or proceeding to destroy the said building. This is consistent with the terms of the 2011 lease. The Claimant was induced to complete the structure, in its permanent form and affixed to the land, by the terms of the lease as well as by the conduct and representation of the Defendant. They supported a belief, reasonably held, that the building would remain the property of the Claimant and would be treated separately from the land on which it stood upon termination of the lease. The Claimant not exercising its option to purchase the land, and the Defendant not exercising his option to purchase the building, the Claimant's interest can only be protected by a constructive trust.

[37] The lease of 2011 describes the structures erected as "*fixtures of the lessee*" see the recital, page 74 exhibit 1. I will therefore briefly consider the law concerning "tenant's fixtures". Lord Denning MR in ***New Zealand Government Property Corporation v H.M.& S. Ltd [1982] Q.B. 1145*** at page 1157 opined that:

> *"The term "tenant's fixtures" for present purposes, means those fixtures which the tenant himself fixed into the premises for the purpose of his trade…. but which do not become part of the structure itself".*

The general rule, with respect to annexations made by a tenant during the continuation of his term, is that whatever the tenant affixed to the demised premises cannot be severed, without the consent of the landlord. This is because

whatever is affixed to the land immediately becomes the property of the landlord, see ***Elitestone Ltd. v Morris & Anor [1997] 2 All ER 513***. The learned authors of **Woodfall: Law of Landlord and Tenant, 27th ed. at paragraph 1574** state exceptions, to this general rule, which allow fixtures erected by the tenant to be removed by the tenant if they are:

i. Fixtures for purposes of trade;
ii. Fixtures for ornament and convenience; and
iii. Fixtures for agricultural purposes.

See also **Megarry and Wade "The Law of Real Property" 4th edition pages 711 to 717**. The tenant's fixtures remain the property of the landlord until the tenant exercises his right to remove them.

[38] These common law principles have very little relevance to the case before me. In the first place a building, erected as a permanent structure, would not fall within any of the common law exceptions listed above, see paragraph 1578 of **Woodfall** (cited above). In the second place the lease has in clause 3.6 expressly stated that the building is the property of the tenant, exhibit 1 page 76. The parties are free to agree to whatever terms they wish. This includes, as in this case, agreeing that the permanent structure erected remains the property of the tenant. The agreement may bind the parties even if, as against third parties, it has no legal effect. In this regard the court is guided, as with all contractual documents, not so much by what a party says he agreed to as by the meaning of the words used in the contract.

[39] The Defendant relied on the case of ***Aston Lewis v Victor Mclean (1982) 19 JLR 56*** in support of the submission that, in the absence of an expressed term in the lease providing for compensation, there could be no award by the court. If correct the result would be that, regardless of any equity that may arise, the Claimant would be left without an effective remedy. Thankfully, the case supports no such conclusion. The facts of that case were that the Defendant (in proceedings for recovery of possession) rented land from a Mr. Lee. With Mr. Lee's permission he

erected certain buildings thereon. Mr. Lee sold the land to the Claimant who terminated the lease and commenced a claim for possession. The Defendant counterclaimed for compensation for the buildings he had erected. The court dismissed his counterclaim because the lease agreement, to which the Claimant was privy (as successor in title), contained no provision for compensation. This is correct because equity, which acts in personam, could give no relief as there was no claim against Mr. Lee (the previous owner who had allegedly allowed the building to be constructed). There was also no alleged representation or promise, by Mr. Lee, with respect to payment of compensation. The, or any possible, relief had therefore to be considered in the context of the lease agreement the terms of which would bind the landlord's successor in title. The authority is useful to the extent that it underscores the fact that, where there is a written lease, it is the terms of that lease that are of paramount import. In the case at bar, as we have seen, the lease declared the Claimant to be the owner of the structure erected thereon notwithstanding that it is affixed to the land. The Defendant, and I daresay any successor in title except a bona fide purchaser for value without notice, holds his legal interest subject to that.

[40] There is authority to the effect that a contract cannot change the legal status of fixtures attached to land. In ***Melluish (Inspector of taxes) v BMI (No 3) Ltd. and related appeals [1995] 4 All ER 453*** Lord Browne-Wilkinson stated, at page 460 (h):

> ***"… The equipment in these cases was attached to the land in such a manner that, to all outward appearance, they formed part of the land and were intended so to do. Such fixtures are, in law, owned by the owner of the land. It was suggested in argument that this result did not follow if it could be demonstrated that, as between the owner of the land and the person fixing the chattel to it, there was a common intention that the chattel should not belong to the owner of the land…"***

And at page 461c

> ***"… the terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil… The terms of such agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by, the contract as against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed…"***

[41] The above stated dictum is not determinative, or particularly relevant even, to the issues in this case. The House of Lords were in that case considering a taxing statute and in particular whether equipment attached to land was "*belonging*" to the owner of the land. The court decided that "*belonging*" meant "*legal or equitable*" ownership. The equipment, having been affixed to the land, belonged to the landowner. It was not equitably owned by the taxpayer because there was no evidence to support such an equity. The parties had been operating under a "*misapprehension*" as to the ownership of the equipment, (see page 461 letter j and 463 a-c). Importantly the court accepted that the taxpayer may have had an equity in the equipment even after it was attached to the land and became the property of the land owner (page 463 a-b). However, it was decided that, the rather limited equitable rights in the case (listed at page 462 b-d) were not sufficient to constitute "*belonging*" within the meaning of the Act, (page 463 c-d and 464-b). The House of Lords did not rule out, or even consider, an equity arising from representation or conduct. In order to do so they would have had to overrule several cases which recognize the legal owner's interest being subject, or postponed, to a beneficial interest protected by way of trust (resulting, promissory or proprietary), see for example ***Pascoe v Turner [1979] 2 All ER 945*** and ***Griesly v Cooke 1990] 1 WLR 1306.***

[42] The day may yet come when the idea of *"chattel"* houses will need to revisited. It is after all a well-established practice among our people for an owner of land to rent a "*house spot*." The tenant is permitted, to bring or build a house thereon and, to remove it when the lease of the house spot ends. Many rural dwellers will have seen, as I did as a child, houses being moved on the flat bed of trucks for that reason. It has been recognized here in the Caribbean that a house may be a chattel, see ***Mitchell v Cowie 7 WIR 118 @ page 129F*** and ***Obrien Loans Ltd. v MIssick (1977) 1 BLR 49.*** The question of whether the house belongs to the landlord or the tenant may therefore depend, on the intention of the parties and, not only on the degree of annexation. I doubt that a decision of the House of Lords, applicable to the circumstances of the United Kingdom, could be considered binding were that issue to come before by the Judicial Committee of the Privy Council.

[43] The case at bar is not however the one for that determination. There is no doubt in this case that the structure forms part of and is affixed to the land. It is therefore legally owned by the owner of the land who is the Defendant. The Defendant when he saw construction commence encouraged the Claimant to continue building. He later entered into a lease the terms of which further encouraged the Claimant to believe that his interest in the building would be respected even after the lease ended. The Claimant therefore, at great expense, completed its construction. The Defendant wishes to go back on his representation and evict the Claimant without any credit or account for the latter's investment. Equity will not allow that. Therefore, as between the Claimant and the Defendant, a proprietary estoppel will give rise to a constructive trust.

[44] The Defendant says the Claimant is not entitled to the assistance of equity because, he owes rent and, obtained permission for a permanent structure without first advising the Defendant. I do not agree. These actions occurred prior to the entry into the lease of 2011. The Defendant by then knew rent was owed. He also knew, or ought reasonably to have known, that the Defendant should have had

permission for the permanent structure. The or any "*misconduct*" which is to defeat an equity cannot be that which, the person against whom the equity is being sought, has already forgiven.

[45] On the matter of the counter claim, the Defendant is entitled to recover from the Claimant all the rent owed in the period 2010 to the date of the notice to quit in 2021. I find that there is no statutory bar to recovery as the Claimant acknowledged the debt in writing. I accept the Defendant's submission in that regard, see para 35 (x) above. The Defendant is also entitled to recover statutory rent for the period subsequent to the issue of the notice to quit until the present. The notice to quit was valid and hence the Defendant is entitled to an order for possession. I accept the evidence of the Defendant at paragraphs 47 and 48 of his witness statement which was unchallenged. The rent due as at 31st May 2021 is $32,737,466.70. There was a claim for interest at commercial rates but no evidence in that regard was presented. I therefore allow interest at 6 percent per annum from the 31st May 2021 until payment.

[46] My orders and declarations are therefore as follows:

1. It is hereby Declared that the Claimant is the equitable owner of the building it erected on property registered at Volume 1446 Folio 866 being the land located at 55 Old Hope Road, Kingston 6 in the parish of Saint Andrew (hereinafter referred to as the said land).
2. It is further Declared that the Claimant has an equitable interest in the said land, to the extent of the market value of the said building and, that the Defendant the legal owner, holds by way of constructive trust the Claimant's said equitable interest and is accountable therefor.
3. There is judgment for the Defendant against the Claimant in the amount of $32,737,466.70 with interest thereon at 6 percent per annum from the 31st May 2021 until payment.

4. The Claimant is ordered to quit and deliver up possession of the said land to the Defendant on or before the 30th day of June 2022.

5. An order for sale is made in the following terms:

   a) The said land shall be sold.

   b) The Defendant's attorneys-at-law shall have carriage of the sale.

   c) The said land is to be sold by private treaty, after being valued and the value of the land and buildings thereon separately appraised, and listed for sale with, and in accordance with advice to be rendered in writing by a licensed real estate valuer and appraiser (hereinafter referred to as the appraiser).

   d) The said appraiser is to be agreed upon between the parties within 14 days of the date of this judgment or, if there is a failure to agree, selected by the Registrar of the Supreme Court, from a list or lists provided to the Registrar by either or both parties to this action within 7 days of the failure to agree. The said lists are to be accompanied by the consent in writing to act of each of the said appraisers on the list.

   e) The Defendant is to have an option to purchase the Claimant's equitable interest which is to be exercised within 30 days of the delivery of the appraiser's valuation to the Defendant by payment to the Claimant of a deposit being 15% of the purchase price. The said sale is to be completed within 90 days and due account may in that event be taken of any amounts due from the Claimant to the Defendant by virtue of this judgment.

   f) In the event the Defendant fails to exercise the said option to purchase and, subject to any further or other order of this court and, unless there is a sale by private treaty within 12 months of the date

of this order, the said land shall be sold by public auction.

g) Subject to any further or other order of this court the reserve price, being the minimum price at which the said land is to be sold by private treaty or otherwise shall be fixed on the advice of the appraiser.

h) The proceeds of sale of the said land shall be applied in the following manner:

   i. To pay all costs and expenses incurred, inclusive of professional fees, to effect the sale
   ii. To discharge any amount due for property tax, rates or dues connected to the said land and including, but not limited to, any amount due to the National Water Commission
   iii. to discharge liabilities due to any creditors secured by a registered interest in the said land.

i) In the event a person or entity is unable or unwilling to accept payment in accordance with paragraph (h) the amount required to discharge the said liability and/or liabilities shall be paid into court and, upon service of notice of payment into court, the said liability and/ or liabilities shall be deemed to be discharged.

j) Upon completion of the sale, and the discharge of liabilities in accordance with paragraph (h) the Defendant shall apportion the net proceeds of sale in accordance with the proportionate value of land on the one hand and buildings on the other and, with due account being given for rent owed and the mortgage or mortgages discharged and the respective liabilities of the Claimant and the Defendant if any and, serve a statement of account on the Claimant’s attorneys at law and, unless an objection is filed within 14 days, the Registrar of the Supreme Court shall certify the

amount due to the Claimant as contained in the said statement of account.

k) The Defendant shall upon the issue of the Registrar's Certificate be entitled to retain the amount due to him and shall pay the balance (if any) to the attorneys at law on the record for the Claimant or if the attorneys decline to accept same shall pay the same into court. A notice of payment into court shall then be served on the Claimant.

l) In the event an objection is filed, pursuant to paragraph (j), the Registrar of the Supreme Court shall as soon as practicable list the matter before a Judge of this Court.

m) In the event the Claimant or Defendant or either or both of them fails, neglects and/or otherwise refuses to sign any document required to give effect to this order for sale within 7 days of being requested to do so, as to proof of which request a letter written to their attorneys at law on the record shall suffice, the Registrar of the Supreme Court shall be entitled to execute the said document.

n) Liberty to Apply to either party generally.

6. Three fourths of the costs of this action will go to the Claimant to be taxed if not agreed. Costs are apportioned in this manner because, although the Defendant succeeded on his counterclaim, most of the time in this action was consumed with the claim on which the Claimant has succeeded.

David Batts
Puisne Judge