IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 02986

BETWEEN	EARLE ALEXANDER SHIM	CLAIMANT
AND	SYLVIA ELMAY SHIM	1ST DEFENDANT
AND	ELIZABETH GERMAN	2ND DEFENDANT

Mrs. Sharon Usim instructed by Sharon A. Usim and Company for the Claimant.
Miss Dale Porter instructed by Townsend, Whyte and Porter for the Defendants.

Equity – Equitable estoppel – Husband (H) claiming equitable interest in Wife's (W) family's property - Whether misrepresentation as to ownership – H expending significant sums in construction on the property –H's intention at the time of incurring expenditure – Whether H relying on representations by W and mother-in-law - Whether equitable interest created thereby – How equity to be satisfied?

Restitution – principles governing – whether expenditure incurred as a result of mistake of fact – unjust enrichment – remedy available

Practice and procedure – Issue estoppel – Court in Cayman declaring that there was no matrimonial property – Whether H's present claim already decided by a court – Whether claim an abuse of the process of the court

IN CHAMBERS

11th, 12th March & 16th May, 2008

BROOKS, J.

On September 15 1999, newly-weds Earle and Sylvia Shim, travelled from their home in Grand Cayman, to Jamaica. Both are Jamaican nationals. They stayed at Sylvia's mother's house at Hopewell in the parish of Saint Elizabeth. Her mother is Mrs. Elizabeth German. Sylvia showed Mr. Shim an unfinished house which was located on the same property as Mrs.

German's house. Mr. Shim asserts that based on assurances made to him by Sylvia and his mother-in-law about his acquiring an interest in the property and based on a document which was to have given effect to those assurances, being signed by all three at the same time before a Justice of the Peace, he later spent significant sums of money and used his own skills, as a professional tiler, in completing the construction of the house. He says that not long after the completion, his relationship with Sylvia deteriorated and when he sought to secure the promised interest in the property, she told him that she had destroyed the relevant document. He is unable to outline the contents of the document because he is barely literate and had not read it. She knew of this disability. The parties have since been divorced and Sylvia has reverted to using her maiden name. I shall refer to her hereafter as "Miss German".

Mr. Shim claims against Miss German and Mrs. German, a declaration as to an interest in the house and consequential orders allowing him to recover his investment in the property. He asserts that the two are estopped from denying his interest because of the assurances and encouragement that they gave to him.

Miss German denies Mr. Shim's assertions. She alleges that the work that he did and the expenditure which he incurred were as a result of a

promise which he made to her. He had promised, she says, to make up for some embarrassment that he had caused them when they first returned to Jamaica as a married couple. She says that the only document which was signed before a Justice of the Peace in Mr. Shim's presence, by her mother, was a will. She denied that she and Mr. Shim signed the will. She insisted that it was only her mother who signed.

The questions which have to be determined by the court are:

1. Whether any promises or encouragement were made to Mr. Shim to act to his detriment;
2. Whether he did act to his detriment;
3. What, if any, equitable interest did he acquire as a result of his actions;
4. What legal basis entitles him to relief;
5. To what remedy, if any, is he entitled?

Is the claim barred by the principle of issue estoppel?

Before turning to the relevant questions, there is one preliminary point which must be discussed. Miss Porter, on behalf of the Germans, submitted that Mr. Shim "is estopped from raising the issue of whether or not he is entitled to or has an interest in the property as this very issue was already raised in previous proceedings and a judgment handed down by a court of

competent jurisdiction". That court was The Grand Court of the Cayman Islands which declared that there was no matrimonial property between these parties. That was during their divorce proceedings. In his judgment in *Shim v Shim* Cause No D 114/03 (delivered 21/4/04) at paragraph 11, Panton, J. concisely stated the reasoning of The Grand Court:

> "In the instant case, for there to be a declaration and order that there is matrimonial property, the evidence would have had to be produced by one or other of the parties. [Miss German] has certainly produced none. [Mr. Shim] has produced evidence of expenditure on a property in Jamaica, but he has not produced any evidence as to how and by whom the interests in that property are held."

Bearing in mind the fact that the house in question is affixed to land which is not owned by any of the parties to this claim, it would seem that decisions on the issues raised in this claim would not conflict with the finding of The Grand Court. In this claim, Miss German does not assert any legal interest in the land. For reasons which will be detailed below, the claim does not allow for Mr. Shim to be awarded a legal interest therein. The question is whether he is entitled to anything else and if so, what. That is not the issue which was decided by Panton, J. I now return to the substantive issues.

Was any promise or encouragement made to Mr. Shim?

This is a question of fact. I find on a balance of probabilities that Miss German and her mother did use words to Mr. Shim to indicate that if

he spent money on this property he would have received an interest therein. Although Miss German testified that any expenditure he incurred and work he carried out was as a result of a promise he made to her, I do not accept that as being true. Mr. Shim's activities were far too extensive and over too long a period (at least three years) for them to be as a result of a promise "to assist [her] to finish the house".

The evidence is that within a very short time of returning to the Cayman Islands, Mr. Shim withdrew money from his bank account and sent the equivalent of J$600,000.00 to Jamaica to buy materials and secure the services of a contractor. This started the ball rolling again on a project which had apparently stalled. By December 1999, the couple was back in Jamaica where Mr. Shim opened an account with "Jen "R" Us Hardware". The account remained active to at least December 2001; numerous purchases and payments are recorded as occurring throughout the period. He had no other property and so it is his un-contradicted evidence that all the goods purchased from this hardware store and from other establishments, went toward the completion of the house in question. He bought steel, cement, sand, tiles, a solar water heater, bathroom fixtures and fittings, including a Jacuzzi tub, pedestal basin, toilets, and as late as October 2002, a sliding glass door. He secured the services of and paid a contractor to carry

out the construction work. He, however, laid the floor tiles himself. The tiling was a big job, involving four bedrooms, two bathrooms, kitchen, living room, dining room, television room, and a veranda.

Mr. Shim produced bills to show that he paid for grille-work to be constructed and installed at the house, and finally, he produced a bill to show that he paid $400,000.00 for work done on the house. All this I find was done by a man who thought that he was purchasing, by this activity, an interest in real property. Miss German says that she also contributed to the cost of the construction. I find however that her contribution, after Mr. Shim took over, was negligible. She concentrated her efforts on building a shop on the same plot of land, which shop was for her daughter and herself. I should also say that I reject her evidence that she contributed to Mr. Shim's bank account held in Cayman from which monies were taken to finance the construction. The record of deposits does not support her testimony. It does however support Mr. Shim's testimony concerning his earnings and his deposits to the account.

There is one other bit of evidence which reinforces my view. Mr. Shim secured the services of a surveyor, Mr. Illonis Jones, to survey the land. Mr. Jones served notices on the St. Elizabeth Parish Council as well as the adjoining neighbours, conducted a survey of the land, and prepared a

survey plan which he had checked and approved by the Director of Surveys. Despite all these steps, both Miss German and Mrs. German say that they did not authorize this survey and knew nothing about it. I reject their evidence as being untrue and a dishonest attempt to conceal that they did make promises to Mr. Shim that if he spent money on this property, he would have received an interest therein.

Did Mr. Shim rely on the assurances and act to his detriment?

It would be clear from the foregoing that I find that Mr. Shim did rely on the assurances and did act to his detriment. He testified that he spent significant amounts of his funds in completing the construction of the house. Although Miss German says that all of that was not his money I accept his account for the reasons set out above.

What, if any, equitable interest did he acquire as a result of his actions?

Mr. Shim clearly acquired no legal interest in the real property. To quote from the judgment of Williams, J. in *Greaves v Barnett* (1978) 31 WIR 88 at page 91j, "[t]he general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed." That principle obviously applies to this claim.

Another general principle applicable here is that stated by Bowen, LJ. in *Falke v Scottish Imperial Ins. Co.* (1886) 34 Ch. D. 234 at page 248:

> "…work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

There are, of course exceptions to that general principle, and one of those exceptions, proprietary estoppel, will be discussed below.

It is undisputed that the owner of the legal interest in the real property is the estate of Leslie German, deceased intestate. Mr. Shim says that he was told otherwise, but he has not adduced any evidence contradicting the assertion that the land vests in the deceased's estate. There is also no evidence that the personal representatives of Leslie German made any representation to Mr. Shim which would bind the estate. In fact, it has not been disclosed if any such representative has been appointed. Mr. Shim cannot therefore have any interest in the land or building, or lien over either.

Mrs. Usim, on behalf of Mr. Shim, submitted that he is entitled to a declaration that he has a beneficial interest in the house. For the reasons just outlined above, that submission is clearly flawed. The cases cited by Mrs. Usim, of *Pascoe v Turner* [1979] 2 All E.R. 945 and *Greasley and Others v Cooke* [1980] 1 W.L.R. 1306, are both distinguishable on this point. The promissor in each of those cases was the owner of the real property in

question, and the promissee was in occupation of the property and wished to remain there. These cases have relevance in another context however and I shall return to one of them.

I am also of the view that there is insufficient evidence to establish that a binding contract existed between these parties. True, I find that legal intentions were formed, but the subject matter is land. No documentary agreement has been produced. Mr. Shim does not know the import of the document which he signed. He initially said that the agreement was that he was purchasing the property for $600,000.00 and that he paid that sum as the purchase price. He corrected that statement orally, in examination in chief, saying that he had sent that sum to Jamaica immediately after the agreement was made, but that that was not paid to Mrs. German. It was used instead as the initial outlay for the construction. Nothing was paid to either Miss or Mrs. German by way of purchase price, nor does it seem that any specific purchase price was agreed. He has received no consideration for his outlay.

Finally, it is clear from his evidence that he was not to have an exclusive interest in the property. The intention seemed to have been that he would be sharing the interest with, at least Miss German, as she had commenced the construction. There is also evidence that Mrs. German would also be residing in the house. No evidence as to shares was adduced.

The absence of mention of shares would perhaps have resulted in a joint holding if a transfer had occurred but even then, it is not clear what precisely it is that he would receive as compensation for his outlay.

Legal Basis for Relief

Since the expenditure by Mr. Shim does not entitle him to any legal or equitable interest in the realty and there seems to be no remedy in contract, the question is, on what legal basis is Mr. Shim entitled to relief. The factual situation presented to the court, as I have found it to be, on a balance of probabilities, is this:

1. Mrs. German and Miss German made a representation to Mr. Shim that Mrs. German owned the land and was in a position to transfer a share in the legal interest to him and would do so if he assisted in completing a building on the land;

2. Mr. Shim acted on this representation to his detriment, spending, over the course of three or so years, his money and his time in completing the building;

3. He would not have incurred that expenditure or made that investment, had he not received those representations;

4. Mr. Shim acted on the honest expectation that he was thereby acquiring an interest in the legal estate;

5. The Germans actively encouraged Mr. Shim in his investment of time, talent and treasure and reinforced his expectation;

6. The representation by the Germans was a misrepresentation of the fact of ownership, made either with no intention to perform their part of the bargain, or if they initially intended

to do what they could, at some later point they decided to resile from their promise;

7. Miss German informed Mr. Shim, shortly after the construction was completed, that she had destroyed the document evidencing their agreement;

8. There is not sufficient certainty as to the interest which Mr. Shim was to acquire to allow for relief in contract.

In my opinion, on these facts, three bases for relief are available for the consideration of the court, namely, fraudulent misrepresentation, proprietary estoppel and restitution.

Fraudulent Misrepresentation or Deceit

Lord Herschell in *Derry v Peek* (1889) 14 App. Cas. 337, at page 374, set out the classical definition of fraud as follows:

> "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

In *Horizon Resorts Services Ltd., Norma Lee-Haye and Jackson C. Wilmot vs. Ralph Taylor* Suit C.L. H 176 of 1996 (delivered 18/1/2001) F. A. Smith, J. (as he then was) reiterated that this tort should not be advanced lightly and a court will require clear evidence of it. He cited as authority for

the proposition, the case of *Hornal v. Neuberger Products Ltd.* (1957) 1 Q.B. 247. Jones J. in *Oman Ltd. v Bevad Ltd.* Suit C.L. 009 of 2002 (delivered 15/11/2005) relied on *Hornal* for the principle that:

> "The standard of proof required to prove fraud in a civil matter is on a balance of probabilities. However, a court when considering a case of fraud in a civil matter will, of course, require a higher degree of probability than in a case of negligence." (See paragraph 15)

Mr. Shim's Particulars of Claim do not particularize any elements of fraud. His witness statement similarly does not include any evidence that the Germans knew that Mrs. German had no authority to sell any interest in the property. There may have been in operation, an element of ignorance of the law relating to succession. In light of the higher standard required, I am not inclined to find that the Germans had no belief in the truth of their statement as to the ownership of the property.

Proprietary Estoppel

The summary of facts set out above has most of the requirements for the application of the doctrine known as proprietary estoppel. This is one method by which the court provides a remedy against a defendant who has acted unconscionably. In *Crabb v Arun District Council* [1975] 3 All E.R. 865, Lord Denning, M.R. explained the nature of proprietary estoppel. He said at page 871 c – f:

> "The basis of proprietary estoppel - as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate rigours of strict law. The early cases…spoke of it as 'raising an equity'….it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which would preclude him from insisting on his strict legal rights?...Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights…and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again the court of equity will not allow him to go back on that promise…Short of an actual promise, if he by his word or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct."

In *Pascoe v Turner* mentioned above, Cummings-Bruce L.J. stated that proprietary estoppel could give rise to a cause of action. It could be used as a sword instead of a shield. He said at page 949e:

> "One distinction between this class of case and the doctrine which has come to be known as 'promissory estoppel' is that where estoppel by encouragement or acquiescence is found on the facts those facts give rise to a cause of action. They may be relied on as a sword, not merely as a shield."

There is a considerable body of case law involving the application of the doctrine. The learned authors of *Snell's Equity* 29th Ed. at page 574 report that, "[t]he doctrine has been concerned almost exclusively with the acquisition of rights in or over land. But it can extend to other forms of property, such as insurance policies, and to future property such as [another's] residuary estate". It would seem that the principle leading to the modern application of the doctrine is the detrimental reliance on a promise in circumstances where it would be unconscionable for the promissor to rely

on his strict legal rights and resile from the promise. (See *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* [1981] 1 All E.R. 897)

The application of the doctrine in the cases, would lead to the conclusion that for the granting of the relief, there must be some legal right to property vested in the promissor, which, because of his earlier conduct, he would be prevented from enforcing.

In *The Doctrine of Proprietary Estoppel*, 2nd Ed. the learned author Mark Pawlowski treats, as essential to the doctrine, the existence and action, of a legal owner of the property in question. He states at page 1:

> "The essence of proprietary estoppel is that if a legal owner of land has so conducted himself, either by encouragement or representations, that the claimant believes that he has or will acquire some right or interest in the land and has so acted to his detriment on that basis, it would be unconscionable for the legal owner to assert his strict legal rights."

Lord Justice Mummery used very similar terms at paragraph 52 of his judgment in *Yeoman's Row Management Ltd. and Anor. v Cobbe* [2006] EWCA Civ. 1139 (delivered 31/7/2006). He there stated:

> "…The essence of proprietary estoppel is unconscionable conduct in inducing or encouraging another to believe that he will obtain an interest in, or right over, **the defendant's property**…" (Emphasis supplied)

The obvious distinction between the instant case and that majority of cases spoken of by the learned authors of *Snell's Equity*, is that neither of the Germans is, on the evidence, an owner of a legal interest in the land in question. They are beneficiaries of the estate of Leslie German. They may,

as a surviving spouse and child (there are other children) respectively, have future interests, which are yet to be realized. It is true that they occupy the house, which is the subject of the dispute and Miss German admits to chasing Mr. Shim away from the premises when he went to inspect them. They however, own no legal interest in them, which they may be prevented from enforcing.

In his work *The Law of Succession* 6th Ed. at p. 249, Sir David Hughes Parry, in my view, correctly outlined the right of a beneficiary thus:

> "The title of beneficiaries claiming the property of a deceased person, whether as devisees, legatees, or statutory next-of-kin, is not complete without some act on the part of the deceased's personal representatives for giving effect to the gift or succession. Until such an act, which generally takes the form of an assent or a conveyance, occurs, a beneficiary has merely an inchoate, but transmissible right….A residuary legatee or devisee, however, has no claim to any of the deceased's estate in *specie* nor to any part of that estate until the residue is ascertained. His right is to have the estate administered and then applied for his benefit. **The right of a beneficiary claiming on a total intestacy is similar, except that he takes under a statutory trust for sale and conversion.**" (Emphasis supplied)

It would seem therefore, that Miss German and Mrs. German would have no right to insist on a transfer or a sale to themselves, or either one alone. Other beneficiaries have to be considered and the administrators would be obliged to first determine, having paid the debts of the estate, whether that property was otherwise free and clear.

There is, however, a case in which relief has been granted to a claimant relying on equitable estoppel against a party who was not a legal

owner. In *Waltons Stores (Interstate) Ltd. v Maher* (1988) 164 C.L.R. 387 which is cited at page 672 of *Goff and Jones, The Law of Restitution* 5th Ed. the High Court of Australia held that Mr. Maher was entitled to damages in lieu of specific performance. This was in the situation where there was no contract, but Mr. Maher had acted to his detriment in respect of his own property, in reliance on an 'agreement in principle' with Waltons. Waltons then declined to enter into the lease agreement, in contemplation of which the work had, in large part, already been done. The rationale of the Court was that Waltons stood by "in silence when it must have known that [Mr. Maher was] proceeding on the assumption that they had an agreement and that completion of the exchange [of contracts] was a formality." The point to be noted is that Waltons had no property of its own, which was relevant to the issue.

That case seems to be in conflict with the English authority of *Western Fish Products Ltd. v Penwith D.C.* [1981] 2 All E.R. 204 in which the English Court of Appeal denied relief to a company which had proceeded to remodel its real property, on the basis of an expectation that it would have been given formal permission so to do, by the defendant council which was the planning authority. The court refused to prevent the authority

from withholding the permission. The headnote, at page 205 c, concisely sets out the court's finding on this aspect:

> "The principle of proprietary estoppel only applied where the plaintiff, encouraged by the defendant, acted to his detriment in relation to his own land in the expectation of acquiring a right over the defendant's land…."

Megaw, LJ, at page 219 a, in reference to the plaintiff's evidence said:

> "On their own case they have spent money in order to take advantage of existing rights over their own land which the defendant council by their officers had confirmed they possessed. There was no question of their acquiring any rights in relation to any other person's land, which is what proprietary estoppel is concerned with."

In *Snell's Equity* 29th Ed. at pages 574-5 the learned authors cite *Western Fish Products Ltd.* as authority for the principle that "expenditure by A on his own land in the expectation that he had or would obtain planning consent does not raise the equity, for that is concerned with the acquisition of rights in another's land". That opinion is supported by the portions of the report which have just been cited.

The explanation for the difference between the cases, it seems, is that the High Court of Australia treated the matter as one of promissory estoppel, and not proprietary estoppel, but that it was prepared to allow Mr. Maher to be use it as a "sword", that is, that it created a cause of action. Like my learned brother Anderson, J. in *Jaltique Ltd. v Walker,* Claim No. C.L. J 016 of 2000 (delivered 31/1/2008) I am reluctant to follow the Australian model in the face of established English authorities such as *Pascoe v Turner* cited

above and *Combe v Combe* [1951] 1 All E.R. 767 which have been adopted in our jurisdiction. In the latter case, Lord Denning, M.R. specifically stated (at page 769 G) that the principle (of promissory estoppel) "does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal right, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place".

Lord Denning went on to say at page 770 E:

> "Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action."

That principle as stated by Lord Denning was approved by our Court of Appeal in *Central Fire & General Insurance Co. Ltd. v Hylton* (1985) 22 J.L.R. 358 at page 381 G.

I therefore have come to the view that proprietary estoppel is not available to Mr. Shim in these circumstances.

Restitution

The law regarding restitution is relatively new, to the common law. It is concerned with reversing a defendant's unjust enrichment at the claimant's expense. It is said to have first been given judicial recognition, as a discrete area of law, in *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, and has been recognized in our own jurisdiction, at the highest level. The Judicial Committee of the Privy Council considered it in *Dextra Bank and Trust Co.*

Ltd. v Bank of Jamaica PCA 26 of 2000 (delivered 26/11/2001), [2002] 1 All ER (Comm) 193 and in *Blue Haven Enterprises Ltd. v Tully and Robinson* PCA 57 of 2004 (delivered 29/3/2004). The Privy Council upheld the decision of our Court of Appeal in both cases. In *Dextra Bank*, though the courts at all levels considered the validity of restitution as a principle, their Lordships refused to grant Dextra Bank a remedy.

A distinct difference between the concept underlying restitution on the one hand and that for deceit and proprietary estoppel, considered above, on the other, is that in restitution it is not necessary to find fault on the part of the defendant. The Privy Council in *Dextra Bank* specifically eschewed the concept of fault in this context. They said at paragraph 45 of the judgment:

> "45. Their Lordships are however most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so. They regard good faith on the part of the recipient as a sufficient requirement in this context. In forming this view, they are much influenced by the fact that, in actions for the recovery of money paid under a mistake of fact, which provide the usual context in which the defence of change of position is invoked, it has been well settled for over 150 years that the plaintiff may recover "however careless [he] may have been, in omitting to use due diligence": see *Kelly v Solari* (1841) 9 M & W 54 at p. 59, per Parke B. **It seems very strange that, in such circumstances, the defendant should find his conduct examined to ascertain whether he had been negligent, and still more so that the plaintiff's conduct should likewise be examined for the purposes of assessing the relative fault of the parties**." (Emphasis supplied)

In *The Law of Restitution*, mentioned above, Andrew Burrows asserts that the underpinning principle of restitution is the reversal of unjust enrichment (page 1). He goes on, at page 15, to say:

> "Stripping the unjust enrichment principle down into its component parts, there are four questions to be answered:
> a. has the defendant *benefited* (i.e. enriched)?
> b. was the enrichment *at the claimant's expense?*
> c. was the enrichment unjust?
> d. are there any defences?"

The learned author cites Lord Steyn in *Banque Financière de la Cité v Parc (Battersea Ltd)* [1999] 1 AC 221 at page 227 in support of that proposition. The learned editors of *Halsbury's Laws of England* Vol. 40(2) 4th Ed. Reissue, support that approach (paragraph 1310), and argue that a fifth question may properly be asked, namely, what are "the remedies which are available to the claimant". I shall adopt the supplemented approach here, as being correct, and address each question in turn.

a. Have the Germans been enriched?

I think it fair to say that the short answer to this question is, yes. They occupy the property developed by Mr. Shim. Though they may not be legal owners they would have been saved the cost of construction which he undertook. Similarly they would have been saved the cost of paying for that accommodation by way of rental or mesne profits. In *The Law of Restitution*, Mr. Burrows speaks to a negative benefit to the defendant (page 16). I find that the factual situation in this case, falls into this category. It is also important for the assessment of this concept of restitution, that Mr. Shim's services were requested and freely accepted by the Germans.

b. Was the enrichment at Mr. Shim's expense?

Here again, the answer is clearly in the affirmative. I shall, at a later stage, consider the value of Mr. Shim's expenditure.

c. Was the enrichment unjust?

Bearing in mind that one need not point to any fault on the part of the defendant in considering this question (despite the approach in *Dextra Bank*), it is appropriate to consider a concept known as "unjust enrichment by subtraction". The rationale behind this concept is the existence of factors "that render a defendant's enrichment unjust where the enrichment has been subtracted from the claimant". (See page 42 of *The Law of Restitution*)

Mr. Burrows continues by saying that identifying unjust enrichment is not a matter of individual morality but must be guided by the case law. There is case law which establishes that mistake is one of the main factors which can render enrichment unjust. In *Kelly v Solari* [1841] 9 M & W 54 at page 58, Parke, B. said:

> "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, **an action will lie to recover it back and it is against conscience to retain it**…" (Emphasis supplied)

It is my view that the Germans have been unjustly enriched at Mr. Shim's expense, by their wrong but, in the absence of civil liability being established, then at least by subtraction.

d. Are there any defences?

When our Court of Appeal considered the *Dextra Bank* case (SCCA 130/97 (delivered 30/7/99), Forte, J.A. (as he then was) quoted Goff, J. in *Barclays Bank v W. J. Simms Ltd* [1980] 1 Q.B. 677 at page 695 by way of summary of the circumstances which would cause a claim for monies paid under a mistake of fact to fail. These would be:

> "…if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so."

Based on my findings of fact outlined earlier in this judgment, it is my view that none of these defences would be available to the Germans. I am of the view that I may now properly turn to the question of providing relief to Mr. Shim.

To what Remedy is Mr. Shim entitled?

In light of the fact that the Germans are not the legal owners of the realty involved, it is my view that the most appropriate method of providing a remedy to Mr. Shim, is by approaching the matter as one of providing

restitution for his loss, rather than one of depriving the Germans of the benefit which they have derived. Mr. Shim's pleadings include a claim that the Defendants compensate him for the monies expended by him in the construction of the house. The particulars of claim aver that he spent a total of $2,500,000.00 on the construction. He breaks down that figure, in the pleadings, to the payment of bills in the sum of J$1,426,727.90 and US$6,000.00 and the value of his tiling of the house in the amount of J$100,000.00. Those figures were repeated in his witness statement.

Although the law of restitution approaches providing a remedy to the claimant differently from the approach of compensation in damages for loss caused by a defendant's wrong, it cannot be that a court should accept figures placed before the court without some objective proof of accuracy or veracity. For example, I am of the view that Mr. Shim's valuation of his own work could not properly be used in assessing his loss. It is true that an independent valuation was not feasible before the claim was filed, but a request could have been made to the court to order a quantity surveyor's report. The burden of proof is on Mr. Shim. He failed to make the request.

It is arguable that the facts could ground a declaration of entitlement at this stage with enquiries, including an accounting of his expenditure, to be made at another time for the valuation of the appropriate restitution. I find,

however, that this case is better dealt with completely at this stage rather than set for another time for enquiries to be made and accounts taken. These parties need a clean break as quickly as possible.

I shall therefore examine the expenditure that Mr. Shim has proved. He has provided bills totalling J$ 1,204,335.82 and CI$857.40. It is these figures to which he will be entitled. I should state that I have not included in that figure a bill made out to Sylvia Shim for J$4,801.65, but which was included in the documents provided by Mr. Shim. There was no evidence justifying its inclusion. I take it to have been included in error.

He should be awarded interest on the sums. In the absence of material concerning commercial rates of interest, I shall use the interest rates on judgments as the standard. Those rates were adjusted by the Minister in June 2006. Also, I shall use 16th October, 2002, the date of the latest bill, as the date from which interest should commence.

Motor Car

There was a further aspect to Mr. Shim's claim. He asserted that he and his wife had purchased a car in Cayman and that she has sold it and had not accounted to him for the proceeds of the sale. The evidence in cross-examination was that when the car was purchased, it was registered and insured in his wife's name only. She paid the lion's share of the deposit for

the car and he, thereafter, paid the monthly payments. He had his own vehicle but both parties had separate keys for and drove both vehicles.

He said that the car was purchased in his name but I do not accept that as being so, since it was licensed and insured in her name. I am not convinced that he intended to acquire ownership of the car. I therefore find that any expenditure he made toward the acquisition of the vehicle was by way of gift to her and that she did not have to account to him for the proceeds of sale when she did in fact sell it.

Conclusion

I find that Mr. Shim was promised an interest in the property if he assisted in completing the construction. I find that from the manner in which he threw himself into the task and the extensive time and money that he spent in the construction, that his motivation was the promise.

I find that Mr. Shim would not have incurred that expense had he not been requested so to do and induced by his wife and his mother-in-law that he would have thereby acquired an interest in the property.

Based on my findings they have been unjustly enriched at his expense. Since they are not the legal owners of the realty he cannot secure a proprietary remedy which touches the property. He is however entitled to

restitution by virtue of a refund of the sums he has proved that he spent in constructing the property.

Ordered that:

1. Judgment for the Claimant against both Defendants in the sum of J$1,204,335.82 and CI$857.40;
2. Interest on the sum of J$1,204,335.82 at the rate of 12% per annum from 16/10/2002 to 22/6/2006 and at the rate of 6% per annum from 23/6/2006 to 16/5/2008;
3. Interest on the sum of CI$857.40 at the rate of 6% per annum from 16/10/2002 to 22/6/2006 and at the rate of 3% per annum from 23/6/2006 to 16/5/2008;
4. Costs to the Claimant to be taxed if not agreed.