[2019] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 41/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**CAREN CRANSTON**	**APPELLANT**
AND	**TAMAZINE SAMUELS**	**1ST RESPONDENT**
AND	**GAIRY TOORIE**	**2ND RESPONDENT**

Leroy Equiano and Miss Denise McFarlane instructed by Leroy Equiano for the appellant

Ms Lavern Glave and Ms Renae Freemantle instructed by Scott Bhoorasingh & Bonnick for the respondents

26 June and 20 December 2019

PHILLIPS JA

[1] I have read, in draft, the judgment of my learned sister, Edwards JA and I agree with her reasoning and conclusion.

SINCLAIR-HAYNES JA

[2] I have read, in draft, the judgment of my learned sister, Edwards JA and I agree.

EDWARDS JA

Introduction

[3] Caren Cranston (the appellant), by way of a fixed date claim form dated 19 November 2015 and filed 18 January 2016, commenced a claim in the Supreme Court against Tamazine Samuels and Gairy Toorie (the respondents) in which she sought the following orders and declarations:

> "a. A declaration that the [appellant] is entitled to one hundred (100%) percent interest in the 2nd house located at the back of the property situated at Harbour Head Road, Port Morant in the parish of Saint Thomas.
>
> b. An order that the 1st and 2nd [respondents] compensate the [appellant] for the full value of the 2nd house located on the subject property based on the current market value.
>
> c. That the [respondents] are ordered to pay the market value of the 2nd house within 90 days.
>
> d. An order that should the 1st and 2nd [respondents] fail to comply with [c] above, that the [appellant's] name be added to the title and she be allowed to live peacefully and unmolested by the 1st and 2nd [respondents].
>
> e. That the Registrar of the Supreme Court be authorised to sign all and any documents necessary herein, if either party refuses to carry out the order of the court."

[4] On 21 March 2018, Nembhard J (Ag) (as she then was) heard the matter, and on 27 April 2018, handed down judgment in favour of the respondents and ordered as follows:

> i. Judgment for the defendants;
>
> ii. Costs to the defendants to be taxed if not sooner agreed;

iii. Leave to appeal is granted.

iv. Defendant's Attorney-at-law to prepare, file and serve the order herein."

It is orders i and ii of those orders which have given rise to this appeal.

The basic undisputed facts

[5] The appellant is the niece of the 1st respondent. The 1st respondent is the sister of the appellant's mother Victoria Lindsay, whom we will call Victoria. The 2nd respondent is the son of the 1st respondent. The appellant and the 2nd respondent are, therefore, cousins. The disputed house is one of two on the premises described above, for which the respondents hold the registered title jointly. The premises previously belonged to Charlton Lindsay, the father of Victoria and the 1st respondent, who had commissioned the construction of the disputed house in the 1960s. It is a house which Victoria had occupied with her children, grandchildren and other members of her family for almost 40 years.

[6] At some point, she migrated to Canada, but upon returning to Jamaica, resumed living in the house with some of her children and grandchildren, up until her death in 2015. According to the appellant, the disputed property was given to her mother by the appellant's grandfather as a wedding present upon her marriage. However, unbeknownst to the appellant and Victoria, Charlton Lindsay died testate in or around 1971, leaving the entire property to his wife Geraldine Lindsay, for the duration of her life, and thereafter to the 1st respondent absolutely. Geraldine died in or about

1982, and years later, on 26 January 2000, the 1st respondent had the property registered in her and the 2nd respondent's names as joint tenants.

[7] The situation was compounded by the fact that, despite the appellant's claim that the disputed house was a wedding gift there was no deed of gift, in that respect, produced to the court, and to the best of the appellant's knowledge, there was none.

[8] It is also undisputed that the house was originally a two-bedroom board and concrete structure, partially on stilts. It is now a modern two-bedroom concrete structure with modern amenities said to be valued, at the time of trial, at a market value of $3,000,000.00, and replacement value of $4,700,000.

[9] On 1 September 2015, shortly after Victoria's death, the 1st respondent brought a claim in the Resident Magistrate's Court for the parish of Saint Thomas (as it then was), against the appellant and other members of Victoria's family who were residing in the house, for recovery of possession. Those proceedings were, however, stayed until the determination of the matter herein.

The case led by the appellant before the judge below

[10] The appellant filed affidavits and called three witnesses in support of her claim at the trial. The case for the appellant was that it was Victoria and other family members, including the 1st respondent, who led her to believe that the disputed property had been a gift to Victoria from her father Charles Lindsay. Victoria, herself and other family members occupied the house undisturbed and unmolested by any adverse claim for upwards of 40 years. Victoria occupied the premises all her life, up until her death in

June 2015. The appellant, herself, resided at the property from birth until she migrated, and even then would return to the property, believing same to be her home. Based on that belief, both her and her mother Victoria made substantial improvements to the property. The house was improved upon over the years, first by Victoria, and then by the appellant, particularly following Hurricane Gilbert.

[11] The 1st respondent never lived in the disputed house, but resided in the other house on the property, which was the original main house, with her father, mother and sister. She migrated to the United States of America (USA) in the 1960's and had no connection to the house until around the year 2000, when she returned to the island. The 1st respondent would conduct business on her and Victoria's behalf, from time to time, regarding the restoration and additions to the said house.

[12] In 1986 the appellant left the island for England and, thereafter, migrated to Canada where she worked. Victoria also migrated to Canada sometime in 1988, where she worked before retiring. The appellant would return to Jamaica every year. Shortly before Victoria left for Canada the house was badly damaged by hurricane Gilbert and the appellant gave Victoria money to effect major repairs to the roof and to the structure of the house. The repairs, which were commenced before Victoria left Jamaica, were done by Winston Pearcy, along with several other workers. At that time, the walls of the house had become crumpled and cracked, and were peeling, whilst the board floors were damaged and broken with wear and tear. The roof, windows and doors, as well as the vertical posts the house rested on, also had to be changed and

reinforced. After Victoria migrated to Canada, she and the appellant sent money to Jamaica to continue the repairs on the house over the years. Her other siblings and other family members in Jamaica continued to reside at the house.

[13] About two years later, the appellant and Victoria decided to do major renovations to the house. Victoria came to Jamaica and engaged the services of Winston Pearcy and other workmen to work on the house. Significant work was done on the house, as the flooring was changed from board to concrete and tiled with ceramic tiles, the foundation was reinforced, and a bathroom, kitchen, concrete steps and awning were added. Before this, the bathroom and kitchen were detached from the house and there was no running water. The windows and doors were changed to modern types, the roof was completely changed, the old and fragile concrete walls were replaced, and the board sections of the house were replaced with concrete. These renovations and construction took place over a period of time.

[14] The appellant and Victoria totally reconstructed the house over a period of time to what it is now. It still, however, only has two bedrooms, a dining room, kitchen and one bathroom. Throughout all the repairs and the construction, the 1st respondent never objected and never sought possession or made any claim whatsoever to the property, until immediately after Victoria's death.

[15] The appellant also claimed that the 1st respondent, who was by then in Jamaica, would, from time to time, assist with the renovations. In fact, the 1st respondent acted on Victoria's and the appellant's behalf, on several occasions, whilst they were in

Canada. The 1st respondent and Victoria also opened a joint account to allow the 1st respondent to withdraw funds to pay the workmen. The appellant herself sent money to the 1st respondent to purchase fixtures and fittings for the bathroom.

[16] The appellant claimed that, as a result of this gift to Victoria by her father, Victoria made assurances to her that the house was theirs, upon which she relied in expending her time and money to improve on the house. She was counselled and encouraged by Victoria to expend money to improve upon the house so that when she got tired of living abroad she would have a suitable habitable home in which to live. The 1st respondent never indicated that the situation was otherwise than claimed by Victoria and the appellant, although she would have known that this was their thinking.

[17] The appellant and Victoria knew nothing of Charles Lindsay's Will or that the property had been surveyed and registered by the 1st respondent. Although Victoria and her family occupied the house, they were not told when the survey was being done. The house is now valued over $3,000,000.00, thanks to the appellant's and Victoria's efforts.

The case led by the respondents before the judge

[18] The respondents relied on their affidavit evidence and called one witness in support of their defence. Their case was that the disputed house belonged to them, the entire property having been left to the 1st respondent by her father Charles Lindsay in his Will. The property, which was unregistered land, was surveyed and registered under the Registration of Titles Act by the 1st respondent. That registration included both

houses on the property, the original house at the back, which is in dispute, and the one at the front in which the 1st respondent now resides. The 1st respondent registered all of the property she thought belonged to her father at his death in her and her son's name.

[19] The respondents' case was that neither Charles Lindsay nor his wife, the 1st respondent's mother, resided at the disputed house before their death, but that it was always rented. Sometime after the death of Charles Lindsay, his wife visited the house and gave Victoria permission to occupy one room. Victoria moved into the room but migrated to Canada sometime thereafter. The original house was never a dilapidated board house but had two bedrooms, living room and kitchen made of concrete. There was no truth to the appellant's assertions that the house was built in the 1960's, was damaged by hurricane Gilbert, and that she and her mother had to do significant renovations to the property. The 1st respondent only allowed Victoria to live at the house during her lifetime and expressly objected to any improvements by her to the house. Despite this, she permitted Victoria to add a bathroom and kitchen to the property, for her own comfort.

[20] The 1st respondent denied that the improvements were extensive and that the house had been badly damaged by hurricane Gilbert, and asserted that, other than the bathroom, kitchen, tiling of one bedroom and changing of two windows, no other work improvement was done to the house. She denied that the appellant herself had done any improvement to the house, and that she had collected and paid any money on the

appellant's or Victoria's behalf for repairs. The roof, which was the only part of the house damaged by the hurricane, was not fixed by Victoria, but based on what her mother told her, was commissioned by her mother.

[21] The 1st respondent denied that the house had been given to Victoria by her father but claimed that it was only after his death, when Victoria's marriage ended and she had nowhere to go, that her mother gave her a room to stay for the rest of her life. Victoria was always aware that their father, in his Will, left the property to the 1st respondent after his wife's death. Victoria lived at the house with her children and grandchildren, but after her death in 2015, they were unwilling to move, so action was taken against them for recovery of possession.

[22] Whilst she did not admit the claimant's assertion that she had never lived in the house, the 1st respondent admitted that she had migrated to the USA, and that she returned to Jamaica in 1996 whilst Victoria was residing in the house.

Grounds of appeal

[23] The grounds of appeal as filed by the appellant are as follows:

> 1. "The learned trial judge erred in her interpretation of the rule of hearsay evidence.
>
> 2. The learned trial judge erred in finding that the [Appellant] was relying on hearsay evidence.
>
> 3. The learned trial judge erred in not finding that what was represented to the [Appellant] went to her state of mind on which she relied and acted to her detriment with the help of the first [Respondent].

4. The learned trial judge erred when she stated that the [Appellant] did not establish proprietary estoppel.

5. The learned trial judge failed to take in to account that the first [Respondent] acquiesced, encouraged and assisted the [Appellant] with the refurbishing and development of the disputed property."

The issues

[24] The grounds of appeal filed in this case give rise to two issues. The first is whether the judge was correct to rule that the evidence relied on by the appellant to ground her claim was hearsay and thereby inadmissible. The second issue is whether the judge erred when she failed to consider whether there was evidence sufficient to ground the appellant's claim that she had a proprietary interest in the disputed house.

Issue 1 - whether the judge was correct to rule that the evidence relied on by the appellant to ground her claim was hearsay and thereby inadmissible (Grounds 1, 2 and 3)

Appellant's submissions

[25] Counsel for the appellant argued that the trial judge failed to take into consideration that the statements in the appellant's affidavit which were made by a person not called as a witness, were offered in evidence, not to prove the truth of the facts contained in the statements, but only to prove that the statements were in fact made. Counsel submitted that, in those circumstances, those statements should not be rendered inadmissible as hearsay statements, as they were not tendered for their truth, but for the purpose of showing the state of mind of the appellant, and merely provided an explanation as to why she acted as she did to her detriment. Counsel cited Adrian Keane in The Modern Law of Evidence, 11th Edition at page 9, **Subramaniam** v **Public**

Prosecutor [1956] 1 WLR 965 and **Crabb v Arun District Council** [1975] EWCA Civ 7, in support of her contentions.

[26] Counsel argued that the appellant's case was supported by the evidence of Mr Winston Pearcy who stated that it was he who built the house in the 1960's for Victoria's father, and that it was he, along with a Mr Riley, who did the repairs for Victoria for which he was paid by the 1st respondent. There was no dispute, therefore, said counsel, that the house was built by Victoria's father in the 1960's. There was also no dispute that Victoria resided there until her death in 2015. These assertions, by the appellant, counsel maintained, were supported by independent evidence called at the trial.

[27] Counsel argued further that the appellant, in her affidavit and in her oral evidence, not only spoke to the representations which were made to her by her mother, but also spoke to the effect that those representations had on her actions. Counsel argued that the issue was not whether what was told to her was true, but the effect it had on her state of mind.

[28] Counsel maintained, however, that when the statements were viewed in the context of the claim, it was evident that the statements were not made to establish the truth of them but were made to establish the appellant's state of mind when she acted as she did. This evidence, going to the appellant's state of mind, should have been considered by the judge along with the evidence as to the 1st respondent's conduct, which gave the impression that she and Victoria were of similar minds with regard to

ownership of the house, resulting in an affirmation of the appellant's belief. Counsel submitted, therefore, that the evidence deemed inadmissible by the trial judge ought to have been treated as original evidence, and accordingly, she would have erred in treating the appellant's evidence as inadmissible hearsay.

Respondents' submissions

[29] Counsel for the respondents submitted before this court that the judge was correct in the findings she made, as, the appellant was clearly relying on the truth of these statements and there was no independent first hand evidence to support the impugned assertions made by the appellant. This, counsel argued, would be in direct contravention of the rule against hearsay, which would, accordingly, render such statements inadmissible. Counsel cited Halsbury's Laws of England, Volume 17, at paragraphs 608, **Subramaniam v Public Prosecutor**, and **Aston Lachman v Surrey Paving and Aggregate Company Limited** [2017] JMCC Comm 33, in respect of what is to be deemed as hearsay, and how the court is to treat with it.

[30] Counsel submitted that if the appellant's assertions were inadmissible they could not be relied on as proof of any element of the cause of action. Counsel also argued that even if the judge had erred in her ruling, the appellant would still have failed to establish a claim of proprietary estoppel, on a balance of probabilities. This, counsel argued, was because, the appellant on her own case, had indicated that the assurances regarding the ownership of the house did not flow from the 1st respondent, as she was not residing in Jamaica at the time the renovations would have begun.

[31] Counsel pointed out that the appellant's case was that the works on the disputed property began in or around the year 1988, when the island was hit by hurricane Gilbert, and at various times, thereafter, up to 2000. Counsel argued, however, that it was agreed between both parties that the 1st respondent was not residing in Jamaica at the time when hurricane Gilbert hit the island and accordingly would not have been aware of these works being carried out.

[32] Counsel argued further that it could reasonably be inferred that, at this juncture, the appellant and her mother would have been doing improvements to the property based on the belief that the property belonged to the mother as a result of an allegedly oral gift of the property to her mother. This belief, she said, could not be ascribed to anything done by the 1st respondent when she returned to the island in or around the year 2000. Accordingly, the evidence proffered by the appellant would not have been sufficient to establish a case of proprietary estoppel as it was blatantly clear that no assurances flowed from the 1st respondent.

Analysis and conclusion on issue 1 (grounds 1, 2 and 3)

[33] This issue arose because at the commencement of the trial counsel for the respondents raised a preliminary objection to certain assertions made in the affidavits filed in support of the appellant's case. The basis of counsel's objection was that they contained hearsay statements, and ought to be struck out as they did not fall within any of the recognised exceptions to the hearsay rule. Those assertions were in paragraphs 5, 7 and 13, of the affidavit of the appellant filed 30 June 2017, as well as paragraphs 4, 8, 9 and 10 in her affidavit filed 18 January 2016. Paragraph 14 of the

affidavit of Winston Pearcy, filed 30 June 2017, was also impugned. The impugned paragraphs in the appellant's affidavit filed, 30 June 2017, are conveniently set out as follows:

> "5. I was informed by my mother and other older relatives and I believe it to be true that the disputed house was built by my Maternal grandfather, Mr. Charlton Lindsay (deceased) as a two (2) bedroom board and concrete structure house and that he gave it to my mother Miss Victoria Lindsay (deceased) as a gift while she was dating my father (Mr. Oswald Cranston) and was planning on getting married, so they could have a place to live.
>
> ...
>
> 7. I have been informed and truly believe the same to be true that the Defendant was asked by her father to leave the house, this is the main house and then the Defendant moved and went and lived at a premises further down the street from the house. After a short time she migrated to the United States of America and her other sister went to live in Kingston.
>
> ...
>
> 13. I was informed and I do believe the same to be true that the disputed house was constructed in the 1960's and as stated above the original structure was severely damaged by Hurricane Gilbert and several other weather conditions."

[34] Similarly, the impugned paragraphs of the appellant's affidavit filed 18 January 2016 are in the following vein;

> "4. That the said premises in dispute was given to my late mother Victoria Lindsay by her father upon her marriage as a wedding present and that my late mother has lived at the said premises all her life until her death in June 2015. Unbeknown to my mother and I my late maternal grandfather died purportedly testate and willed the disputed property to the 1st Defendant.

...

8. That over the years my mother [counselled] me to ensure that I improve upon the disputed property so that I would have somewhere in Jamaica that is fit for habitation if and when I got tired of living abroad; and at those moments she would remind me that this property is family property and no one can run me away from the property because it was a gift from her father to her upon her marriage to my dad.

9. To my knowledge, information and belief, there is no deed of this gift but notwithstanding the absence of a deed of gift, over the past forty (40) years my mother and I have relied on the averments of my maternal grandfather and her father the late Charlton Lindsay that this is her home.

10. That [my] late mother and I, along with other family members [who] were also told the same thing improved upon the value of the said properly [sic]."

[35] The judge, having concluded that one of the issues for her determination was whether the evidence relied on by the appellant to establish that there had been a gift of the house to Victoria from her father, was hearsay, found that it was. The judge took the view that the appellant's evidence in the above paragraphs, in relation to the alleged gift of the house, was based on hearsay statements from her mother and other persons. She also found that the evidence as to when the house was constructed was hearsay.

[36] The judge found too that there was no independent evidence as to the averments made by Charlton Lindsay to Victoria Lindsay, and therefore, there was no evidence capable of defeating the defendant's title to the disputed house, and, particularly, no evidence on which the court could rely to find that the appellant had established a proprietary estoppel. The judge also found that there was no evidence

that ownership of the disputed house had been transferred to the appellant's mother Victoria.

[37] In my view, firstly, the judge, embarked on an unnecessary foray into the issue of whether the house had been transferred to Victoria. That was not the appellant's case and no claim had been made in that regard. Indeed, the appellant's evidence was that, to the best of her knowledge, there was no deed of conveyance.

[38] Secondly, apart from paragraph 7 of the affidavit of 30 June 2017, which was clearly hearsay and rightly rendered inadmissible by the judge, in my view, the judge fell into error when she treated the appellant's evidence of what was told to her regarding the gift of the house as inadmissible hearsay. It is clear, in the context of the appellant's case, that, the evidence was not being led for the truth of it but was narrated to show the appellant's state of mind and to provide an explanation as to why she acted in the way she did. Whether it was true or not was not the issue in this case. What was important was whether it was original evidence of the fact that these things had been told to her and as a result she acted in a certain way.

[39] In the case of **Subramaniam v Public Prosecutor**, on which the appellant relied in support of her contentions, the accused gave, as his defence, an account that he had been captured by terrorists and was forced to act under their duress. He sought to give evidence of what they had said to him which caused him to do certain acts, but was prevented from doing so by the trial judge, who ruled it to be hearsay and thereby,

inadmissible. The judge then found no evidence of duress and the accused was convicted. On his appeal to the Privy Council, it was held at page 970 that:

> "In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes."

[40] Further, at page 972, after examining the judge's decision and reasons therefor, the Board said this:

> "Whatever maybe said of the evidence of duress on the record, it is only fair to the appellant to assume that the evidence which the appellant was in the course of, but was wrongly prevented from, giving would have borne upon the vital issue of duress, and their Lordships have to consider whether in the circumstances of this case this exclusion of admissible evidence affords sufficient reason for allowing this appeal."

[41] In that case, the evidence of the accused, generally, was that he was in fear and had been put in fear by the statements made to him by terrorists. The Board took the view that the evidence of what was said to the accused by terrorists was wrongly

excluded and as it went to the root of his defence of duress, they could not say with certainty that even if the excluded evidence had been admitted, the result would have been the same. The conviction was, therefore, overturned.

[42] In the instant case, what was told to the appellant by her mother Victoria and other family members was relevant to the state of mind of the appellant. It provided some of the reasons for the appellant acting towards the house in the manner she did, by expending unusual sums of money on it. It showed that the appellant did not act as a volunteer but acted in expectation of something, even if she was mistaken that there was any truth to it. It did not matter whether the statements were true or whether the expectation was well founded, and the judge was wrong to have excluded the evidence.

[43] Furthermore, in agreeing with the respondents and excluding the evidence, the judge fell further into error. For, instead of going on to examine the evidence to determine whether the 1st respondent had done any act to encourage, or had in anyway acquiesced to the actions of the appellant and her mother based on the mistaken belief the house was Victoria's, she went off into a study of what was required by law to make a legal conveyance of land. As I said before, there was no claim that the house was legally transferred to Victoria, and the judge's ultimate finding that the house had not been transferred to Victoria by her father was, therefore, not necessary to any issue in the case. No such claim was before the court and, to my mind, nothing on the pleadings required such a determination to be made. Having excluded the evidence of the state of mind of the appellant, the judge failed to further examine the

evidence, including that of the respondents, in order to determine, if on the evidence, proprietary estoppel had been made out.

[44] I find, therefore, that there is merit in the complaints in grounds 1, 2 and 3 and that those grounds ought to succeed.

Issue 2- whether the judge erred when she failed to consider if there was evidence sufficient to ground the appellant's claim that she had a proprietary interest in the disputed house (Grounds 4 and 5)

Appellant's submissions

[45] Counsel for the appellant submitted that the appellant had satisfied the three basic requirements for establishing an equitable interest, particularly a proprietary estoppel. She cited Lord Scarman's judgment in the case of **Crabb v Arun District Council** [1975] EWCA Civ 7 at pages 15 to 17. Counsel submitted that the decision in that case showed that it was irrelevant whether or not the appellant was mistaken in her belief that she would gain an interest in the house. What was important, counsel submitted, is that she acted on that belief and demonstrated her reliance on the assurances made by her mother, as well as the active participation and acquiescence of the 1st respondent, in expending time and monetary investment to her detriment. The 1st respondent's actions, counsel further submitted, conveyed that there had been a meeting of the minds with the appellant and her late mother.

[46] Counsel argued that once the appellant had established the three basic criteria for proprietary estoppel to exist, she would have successfully established that she had

an equitable interest in the house. These three criteria counsel submitted were as follows:

> "i. Assurance giving rise to an expectation that the Claimant would have an interest in land;
>
> (a) This assurance can be active in nature whereby word or conduct the owner leads the Claimant to believe she will have an interest in the house OR
>
> (b) Passive in nature where the Claimant is mistaken in expectation she would gain an interest in the land and the owner stands by and allows it.
>
> ii. The Claimant must demonstrate reliance on the assurance.
>
> iii. The Claimant must have acted to her detriment as a result of the assurance."

[47] Counsel submitted that, the appellant having established these three basic criteria, would have acquired an equitable interest in the house, and it would be unconscionable for the respondents to now insist on their strict legal rights, the 1st respondent having perpetuated the belief of the appellant and her late mother by not discrediting same, but instead aiding them in carrying out the reconstruction of the disputed house.

[48] Counsel submitted further that the trial judge erred in failing to take account of, or recognize, the significance of the evidence of the actions of the 1st respondent to the case, being that the 1st respondent not only admitted to acquiescing and encouraging both the appellant and her late mother, but also, that she actually participated in the

refurbishment and development of the disputed house on their behalf. Counsel relied on the case of **Inwards v Baker** [I962] 2 QB 29 in support of the appellant's case.

Respondents' submissions

[49] Counsel for the respondents, relying on **Blanford Taylor v Marie Falconer Jeffers** [2017] JMSC Civ 207, paras. 39-42, argued that, in so far as the appellant's case rests on the doctrine of proprietary estoppel, for the appellant to succeed she must prove that:

> "a. There was an assurance
>
> b. There was reliance on this assurance; and
>
> c. Detriment as a result."

[50] Counsel pointed out that the appellant's evidence was that she was operating under the belief that the property was gifted to her mother by her maternal grandfather, and that her mother accordingly made assurances to her on which she relied to improve the property, and from that, counsel argued, it is abundantly clear that there were no assurances flowing from the respondents to the appellant.

[51] Counsel argued further that the 1st respondent, having migrated to the USA from the 1960s and not returning to the island until around the year 2000, could not have been in a position to make assurances to the appellant. She pointed out that it was the appellant's own case that during that period she and her mother would have started improvements and renovations to the property based on the fact that it belonged to her mother by way of gift from her grandfather. The appellant, counsel argued, having,

therefore, operated from a position of ownership, could not claim that the 1st respondent had made assurances to her which caused her to improve upon the property.

[52] Counsel submitted that on the appellant's case, it had not been established that the 1st respondent acquiesced or encouraged her to carry out renovations to the disputed property, as the renovations started in 1988 following hurricane Gilbert, at which time the 1st respondent was not residing in Jamaica, and it was decades before she returned. Counsel contended that the 1st respondent, not being present at the time of the renovations, would not have been able to acquiesce or encourage or assist the respondent with all the improvements done on the property.

[53] Counsel also pointed out that it was the respondents' case that once the 1st respondent returned to the island and was approached by Victoria about doing further additions to the property, the 1st respondent reminded her that she was only allowed to reside at the disputed property until her death as the property belonged to the 1st respondent. Counsel argued that the assistance that was given to Victoria to add the kitchen and bathroom was done solely for Victoria's benefit, as she was not accustomed to using the sanitary facilities on the outside of the home. The appellant, she said, had been residing in Canada at this time, visiting only once every two years, and was therefore, not in a position to refute that this was the arrangement that existed between the 1st respondent and her mother.

[54] Counsel also asked this court to note that the brother of the appellant had stated in evidence that he was not aware of the 1st respondent giving Victoria permission to reside at the disputed house, whilst the appellant had contended that the 1st respondent was fully aware of the fact that the disputed home did not belong to her maternal grandfather anymore, and as such, he could not have disposed of it by way of Will. Counsel argued that, on this basis, the judge properly found that proprietary estoppel had not been established, as there was insufficient evidence to prove that the appellant received assurances from the respondents and as a result of those assurances acted to her detriment.

[55] Counsel further contended that, in the event that the judge ought to have accepted that proprietary estoppel had been established, an award could not have been made to the claimant for 100% interest in the disputed property, as the detriment would have been suffered by herself and her mother. Further, counsel argued, the alleged oral gift of the property, which could not be corroborated by the appellant, would not be sufficient to give rise to an interest in the disputed property.

[56] Counsel maintained, therefore, that the judge did not err in giving judgment for the respondents as the appellant had failed to present a case to the judge which proved, on a balance of probabilities, that she was entitled to 100% interest in the disputed property.

Analysis and conclusion on grounds 4 and 5

[57] It is clear that the judge determined the case on the basis of a rejection of the claim by the appellant that the house was left to her mother by her grandfather. Having determined that the evidence of the appellant, with regard to the alleged gift, was purely hearsay and that there was no evidence of a proper conveyance at law to Victoria, the judge failed to examine the evidence any further, in order to determine whether there was sufficient evidence, not of legal ownership, but of an equity in the appellant's favour. In this regard, the judge fell into error. This court must, therefore, embark on the assessment that the judge failed to conduct herself.

[58] If this had been a case between the respondents, who were not bona fide purchasers for value, and Victoria, the respondents would take the house subject to an equity in favour of Victoria, if there was evidence on which the court could find that the requisite criteria for a proprietary estoppel in favour of Victoria had been established. I do not believe there is any dispute as to that. The question for the judge to have determined was what proprietary rights, if any, did the appellant have, as against the respondents, with regard to the house. For that, the judge was required to examine the evidence of the appellant, as well as that of the respondents. At no time did the judge examine the evidence led by the respondents in answer to the appellant's case, nor did she examine any other evidence led by the appellant apart from the evidence she deemed to have been hearsay.

[59] As between the appellant and the respondents, the question is whether the expenditure on the house made by the appellant gave rise to a successful equitable

claim. Can the appellant successfully claim a proprietary estoppel in the house? Faced with such a claim the judge was entitled to consider all the circumstances and decide whether the equity was successfully raised and, if it was, in what way it could be satisfied. I will, therefore, consider the applicable principles dealing with proprietary estoppel, and then apply those principles to the instant case, to see if the appellant's claim has been made out.

The applicable principles

[60] The doctrine of proprietary estoppel was developed in equity as a species of equitable estoppel and is a remedy against the unconscionable or inequitable conduct of one party in dealing with another. The remedy is available where it is established that "one party knowingly encourages another to act, or acquiesces in the other's actions to his detriment and in infringement of the first party's rights" (see Hanbury & Martin Modern Equity, 17th edition, at page 897, paragraph 27-022). That party cannot later complain of the infringement of his proprietary rights, and may be forced to give up that right which he encouraged the other party to expect. It is a cause of action in equity brought by a claimant to validate his expectation that he would gain a benefit or right in the defendant's property, brought on by the conduct of the defendant in encouraging, promising or acquiescing in the claimant's acting to his detriment based on that expectation. Estoppel then creates a new right and interest in the claimant. The burden of proof falls on the defendant to show that the claimant's conduct was not induced by his assurances. The extent of the equity is to make good the claimant's expectations.

[61] In **Crabb v Arun District Council**, the Master of the Rolls described the operation of the equity, in the relevant portion of which he says:

> "Short of an actual promise, if he, by his words 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."

[62] Scarman LJ, in the said case, accepted that the claimant in that case had no contract, no prescriptive right and no grant. However, he agreed he had an equity. He said this:

> "If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the Court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

[63] The defendant, his agent or his predecessor in title, therefore, must have encouraged the claimant to expend money or do other acts directly or indirectly by abstaining from asserting his legal rights. The claimant then has to show that the defendant, by now asserting his legal right, is acting in an unconscionable, unequitable and unjust manner. If this occurs, the question is what remedy would be available to the appellant.

[64] In Snell's Equity (twenty-ninth edition, at page 569, para. 2), the principle of equitable estoppel is explained as follows:

> "The cases show that at least three types of conduct suffice to raise the estoppel. First acquiescence, succinctly described as follows: "If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards interfere and take the profit." Secondly, encouragement which occurs where a party under an expectation created or encouraged by a landowner that he will have an interest in it goes into possession and lays out money upon the land. Equity may compel the owner to give effect to the expectation. Thirdly, promises or representations as to future conduct which may occur where a party is led to suppose that the other will not insist on his legal rights either at all or for the time being. But all these are aspects of a much wider doctrine. Recent authorities "have supported a much wider jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable." The doctrine is, indeed, very flexible."

[65] Where proprietary estoppel is successfully established, it acts as a qualification to the general rule that a person who voluntarily spends money on improving the property of another cannot claim an interest in that property or compensation for the sums spent. The equity has been successfully raised in several cases, a few of which I have considered below.

[66] In the case of **Inwards v Baker**, relied on by the appellant, the son was encouraged by his father to build a bungalow on lands owned by the father. The son did so and occupied the land for 40 years before efforts were made to evict him by the beneficiaries under his father's Will, to whom his father had left the land. The English

Court of Appeal held that the son had an equitable right to remain on the land undisturbed as long as he wished. In that case, Lord Denning, in referring to the authorities on the equitable principle, said this at page 448:

> "It is quite plain from those authorities that, if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity."

[67] At page 449 he continued:

> "All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."

[68] The case of **Dillwyn v Llewelyn** (1862) 4 De GF & J 517 was another such case in which the equitable principles were found to be applicable. In that case, similarly, a father encouraged his son to build on the father's land and purported to convey the land to the son by a memorandum which proved to be ineffective. The father then died, and by his Will, the entire property was devised to others. It was held that the son, having spent a great deal of money on the land with his father's encouragement and approval, was entitled to have the land conveyed to him after the father's death. In **Pascoe and Turner** [1979] 1 WLR 431, the claimant was also awarded a conveyance of the land in question, having spent money improving the property following a gratuitous promise that it would be hers, with the knowledge and acquiescence of the promissor.

[69] The earliest formulations of the principle, or the doctrine as it is usually referred to, are to be found in **Ramsden v Dyson and Thornton** (1866) LR 1 HL 129 per Lord Kingsdown at page 170, and in **Willmott v Barber** (1880) 15 Ch D 96 at 105 to 106 per Fry J. Fry J laid out the principle in the following way:

> "In the first place the [claimant] must have made a mistake as to his legal rights. Secondly, the [claimant] must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the [claimant]. If he does not know of it he is in the same position as the [claimant], and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the [claimant's] mistaken belief to his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the [claimant] in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right."

[70] More recently, cases have shown that the defendant need not know of his strict legal rights (see **Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd** [1981] 2 WLR 576). Each case must be judged on its own facts and, there being many variances of estoppel, it is impossible to lay down hard and fast rules. In the aforementioned decision, the parties had been operating under the mistaken belief that the plaintiffs had, by way of express clauses in their leases, the valid option to renew once certain conditions had been met. The conditions were met, but unbeknownst to all, including the landlord, the validity of

the option became contingent on its registration, which had not been done. The approach taken by Oliver J, in embracing a much broader approach, was simply to enquire whether, in all the circumstances of the case, it would be unconscionable for the defendants to seek to take advantage of a shared mistake.

[71] The doctrine of proprietary estoppel is not confined to an existing right but also extends to a future right, as seen in the case of **Re Basham** [1986] 1 WLR 1498, where the entire estate of a stepfather was conveyed to his stepdaughter to satisfy the expectations he encouraged in her. In some cases, a clean break may be necessary, in which case the court will award compensation instead of a conveyance or life interest.

[72] In **Matharu v Matharu** (1994) 68 P & CR 93, a married couple improved on property owned by the husband's father who had encouraged the wife to believe that it belonged to her husband. She was granted a licence to occupy for life even though some of the improvements were done after she discovered the truth (see Hanbury & Martin at page 898 to 899).

[73] These principles were considered and applied in this jurisdiction in the case of **Esmin Williams v George Breary and Cynthia Breary** (1984) 21 JLR 6. In that case the claimant and her mother were joint tenants of a property on which the mother lived with her husband. The mother gave permission for the 1st defendant, her son, to build a house on the property with the knowledge and acquiescence of the claimant. At some point the land was conveyed to the claimant solely and she sought to evict her brother, the 1st defendant, without compensation. Bingham J found that the permission

to build was given with the full knowledge of the plaintiff and she acquiesced to it. He agreed with the 1st defendant that he did not just have a bare licence, but instead had a licence with a proprietary interest in the land, and it would be unjust to allow the claimant to insist on her strict legal rights as a fee simple owner and turn out the 1st defendant. In looking for a remedy, Bingham J considered that no promise had been made to the 1st defendant that the property would be transferred to him, and found that the most equitable remedy was compensation for the value of the house, in lieu of which the 1st defendant and his family were to remain in the house undisturbed for the rest of his life, or as long as he so desired.

Application of the doctrine to this case

[74] From the foregoing, it is clear that the issue in this case is not only whether the appellant had a genuine belief, mistakenly or otherwise, that the house belonged to her mother, but also whether, based on this belief, she acted to her detriment by expending money on it in creating a comfortable home for herself, Victoria and the rest of her family who were residing there, with the encouragement and/or acquiescence of the 1st respondent. If this is in fact so, the court must then decide if it would be unjust and inequitable for the respondents, in all the circumstances, to be permitted to assert their legal rights.

[75] The gravamen of the appellant's case, in that respect, is to be found in paragraphs 12, 16, 18 and 20 of her affidavit filed 30 June 2017, in which she said this:

> "12. After my mother came to Canada she and I would send money to Jamaica to continue the repairs on the house

over the years. My other siblings and other family members resided at the house. As a child growing up, I have always known that house to be our house. This is where we stayed each time we return to Jamaica. This is the reason why I spend monies to renovate and reconstruct the house and for the upkeep of the house. My mother and I wanted to have a decent house for us to live in whenever we are in Jamaica and for the other siblings to be comfortable. My mother always treated the property as belong [sic] to her and I treated it as our family home and had no reasons to believe that the house was [not] family home [sic].

...

16. The work done on the house was significant, the flooring was changed from board to concrete, the foundation had to be reinforced, a bathroom and a kitchen was added along with concrete steps and awning. Before this, the bathroom and kitchen were detached from the house with no running water in the house. The windows and doors were changed to modern types; the roof was completely changed, the old and fragile concrete walls were replaced and the board sections were replaced with concrete. These renovations and construction took place over a period of time.

...

18. All throughout the construction the defendant never objected and never sought possession or made any claim whatsoever to the property.

...

20. The Defendant would also from time to time assist us with the renovations. In fact, the defendant on several occasion acted on my mother and I behalf while we are in Canada. My mother opened a bank account with her and the defendants name in order for the defendant to withdraw moneys to make payments to the workmen or purchase material on her behalf. The Defendant was always willing to assist. I also sent money directly to the Defendant to purchase fixtures for the bathroom. The Defendant never objected to me in respect of the work and expenditure I was expending on the house and to the best of my knowledge,

> information and belief the Defendant never stated any objections to any persons."

She also maintained in paragraph 25 that it was only after her mother's death in 2015 that the defendant started to stake a claim in the house.

[76] In order to prove her case, in addition to her own evidence, the appellant called three witnesses: her brother Wayne Cranston, Winston Pearcy and Nicola Fraser.

[77] The appellant's evidence was that she, as well as her mother and other family members had occupied the house for several decades. She, in particular, had lived there from birth (10 October 1964). This was supported by the evidence of her own witnesses, as well as that of the 1st respondent and her witness. Although there was an attempt by the 1st respondent to discredit how long Victoria and the appellant had resided there, her evidence was inconsistent and there were discrepancies between her evidence and her witness in that regard. The evidence of the appellant and her witnesses', on that point, therefore, was clearly more reliable.

[78] The appellant's further evidence was that she and her mother were of the view that the house belonged to her mother, and by extension, that her family had the right to live there with her mother's permission. Based on that view, they both treated the house as their own, undisturbed for more than 40 years and made significant expenditure on the house.

[79] Charles Lindsay died in 1971, and at that time the 1st respondent lived overseas and Victoria lived in the disputed house. The 1st respondent's evidence as to how long

Victoria lived in the house was inconsistent. In both of her affidavits, she claimed that after her father died, her mother allowed Victoria to live in the house having "seen her condition". This evidence was allowed in by the judge, although it was hearsay. Then, in her affidavit of 13 April 2017, she stated that the house in dispute was the original house, and that her father, mother and siblings resided in the house until his death. At trial, however, the 1st respondent admitted that the back house was occupied by her sister and her sister's grandchildren. She also stated that she did not know how long Victoria had been living there, and that it could have been a long time. Indeed, the evidence from the appellant's brother, Wayne Cranston, was that he went to live at the disputed house in 1974 with his mother and siblings, and at that time his mother had occupied the entire back house. The evidence of Nicola Fraser, was that she was living at the house with Victoria from the 1980s, prior to hurricane Gilbert. I, therefore, accept that the appellant's assertions, that she, her mother, her siblings and other family members had lived in the house for decades, is made out on the evidence.

[80] It was also clear, on the appellant's evidence that significant improvements were made to the house. The wooden floors were changed to concrete. The foundation was reinforced. A bathroom and kitchen were added. A verandah, concrete steps and awnings were added. The old dilapidated concrete walls were replaced with new concrete and block walls. Roof, windows and doors were changed. Ceramic tiles were laid down. The house was built in 1960 as a two-bedroom board and concrete structure with board floors by Mr Winston Pearcy, who gave evidence to that effect, and as I

have already said, the judge was wrong to find that this evidence from the appellant was hearsay.

[81] The appellant's evidence was that the house was being fixed up by Victoria from she was a child. Although Victoria had migrated to Canada, she continued to fix the house because her children and grandchildren still occupied it and she herself returned to Jamaica every year until she finally retired home. The appellant would send money to Victoria to repair and restore the house.

[82] The appellant also gave evidence that the 1st respondent returned to Jamaica in the late 1990's and was there when the renovations begun. According to the 1st respondent she returned to Jamaica in 1996. The appellant also maintained that she sent money to the 1st respondent to pay the workmen. Mr Winston Pearcy corroborated the story in part, although he said it was Victoria and the appellant who sent the money and the 1st respondent paid him on their behalf. It was he who did both the repairs and later, the renovations on the house.

[83] Wayne Cranston also gave evidence that although he left the house in 1982, he returned for frequent visits. He also corroborated that the house was damaged in hurricane Gilbert, to include the loss of the roof, the back door which was blown off and the windows which were damaged. The 1st respondent denied there was any damage to the house by hurricane Gilbert, but it is unclear how she could refute this evidence as she was not in the island. Her witness could not say otherwise, except through hearsay evidence. Hers, therefore, was a bare denial.

[84] Wayne Cranston said his mother began repairs immediately after hurricane Gilbert. His siblings, his mother and her grandchildren were at the house at the time, and he went to assist. He said the entire roof was overhauled, the door and windows were changed, cracks in the wall were repaired, and erosion mitigation had to be done as the land was moving. Walls had to be made as the root of the house was being exposed. He said repairs were ongoing. The veranda was made only of sand and it was dug up levelled and tiled. The veranda wall and fencing were done. The original door was glass and it was changed to wall and a single door. He said Victoria and the appellant were the main players in the repairs although he assisted and acted as a guard. He also said Victoria's old age pension from Canada supplemented the funds provided by the appellant to renovate the house. This corroborated the appellant's account that she sent money to Victoria to effect repairs to the roof and structure of the house. He said the appellant became the main contributor to the house after Victoria got older. He did not know of the house belonging to the 1st respondent.

[85] Winston Pearcy gave evidence that he was one of the persons who helped to build the original structure for the 1st respondent's father Charles Lindsay in the 1960s. He built a two bedroom concrete and board structure, suspended on a cellar, with a dining room and small veranda. Only one part of the flooring was made of cement and the rest was made of board. The windows were also made of board, and the roofing of zinc. The kitchen and bathroom were separate from the house on the same premises.

[86] Mr. Pearcy also corroborated that the house had been damaged after hurricane Gilbert, and he did repairs on the house for Victoria, starting in 1988. He said the roofing and the beams that held the house together had been destroyed. In cross examination he said that the zinc had blown off the roof and the lathe had rotted. He did several repairs to the house on behalf of Victoria and the appellant, changing the flooring from board to concrete, tiling the house, reinforcing the foundation, and grilling the windows and doors. After those repairs, Victoria left for Canada and returned to the house a few years later, at which time, Victoria asked him to do additions to the house.

[87] In 2000, for about two and a half months, he did renovations to the house based on Victoria's instructions, adding a new zinc roof, an inside bathroom, a kitchen and a sewer. To the best of his knowledge, the renovations were financed by the appellant and Victoria. Victoria informed him that she or the appellant would send the money to the 1st respondent for her to pay him. The 1st respondent bought the materials and would call him and pay him whenever the money had arrived. The house, he said, had a total makeover as if built from scratch.

[88] According to Mr Winston Pearcy, the 1st respondent was away and returned after her father died. She renovated the front house and virtually made it new. He, however, did not work on that house.

[89] Nicola Fraser, who is the cousin of the appellant, described her as her 'mother', though not her birth mother. She gave evidence that she lived in the house for many years with Victoria, having moved there in the 1980s. She described the house as

initially being a board house but the rest of her description of the house was consistent with that given by Mr Winston Pearcy. She was living at the house during hurricane Gilbert but when the roof was blown off, she moved temporarily. In cross examination she said the house had been completely damaged and the two back rooms were gone. It took a while to fix everything, and they moved back in 1996 after the house was fixed. She said it was Victoria who got Mr Pearcy to do the repairs. She eventually moved from the house in 2000.

[90] The 1st respondent gave evidence that she migrated in 1966 and returned home in 1996, having built a house where the original front house was. Victoria was then living in the disputed house. She said she objected to improvements to windows and tiles in the bedroom but agreed to the construction of a bathroom and kitchen for Victoria's comfort. The latter she said she agreed to because she saw the need for it. The 1st respondent said she only knew of those improvements but if any other repairs were done she did not know of it. Victoria and her grandchildren lived at the house at the time of Victoria's death in 2015.

[91] When the 1st respondent returned in 1996, it seems she returned home for good. It is not clear if she had returned for her father's or her mother's funerals. There is no evidence that between 1966 and 1996 she ever returned to visit the island. She admitted that the house was not made of blocks initially, because at the time it was built, concrete blocks were not then being used to build houses. She also admitted that she never lived in that house and never inspected it.

[92] The property was unregistered and it was she who surveyed it and obtained the registered title. This she did in accordance with what she thought her father owned and what was in the Will. She said she thought he was talking about the entire property in the Will. Under cross-examination, she said the house in dispute was not the original house, and that Victoria only lived at the premises after her father's death. She said her mother told her that she allowed Victoria to live there for the duration of her life, and that Victoria knew that the property was willed to her after her mother's death.

[93] It was also the 1st respondent's evidence that her mother told her that it was she who fixed the roof after hurricane Gilbert. This was hearsay, and also impossible, as hurricane Gilbert was in 1988, six years after her mother was said to have died.

[94] The 1st respondent did not appear to be a very truthful witness, and when shown a picture of the present structure she maintained that it was still the original house except for the fact that it had been painted by the appellant after Victoria died and that's why it looked different. She admitted that when hurricane Gilbert came she was not in Jamaica and is unaware of the damage done to the house. Her mother and father were dead by then, she said. At the time, she said, the girl who was raised by the appellant, Victoria and the appellant's siblings lived in the house. The house presently at the front, she built from scratch. It had originally been an old board house built by her mother and father.

[95] In cross examination she admitted she paid Mr Winston Pearcy money on behalf of her sister, although she had denied it in her affidavit evidence. She admitted that she

oversaw the building of the kitchen and the bathroom for Victoria but claimed that's all she did. She also said she did not go near that house and that it was locked up. Although she admitted she never took action to stop Victoria from renovating the house, she maintained that the house did not belong to Victoria. She admitted that the action she took in the Parish Court for recovery of possession was against the appellant as first defendant. She also admitted that she had surveyed the property and applied for the title to the property without informing Victoria. In her first affidavit filed 18 April 2017, she contradicted what she said in her second affidavit filed 31 August 2017 in many respects. In her April affidavit, she said the disputed house was built by her father, and he, along with her mother and siblings, including Victoria, lived there until his death. Then her mother and siblings moved to the front house. However, in the affidavit of August 2017, she said that whilst the disputed house was being built they lived in the front house, when the disputed house was completed it was rented out to tenants.

[96] She said Victoria lived with her parents in the front house until she got married and went to live with her husband. In the April affidavit, she said that after her father died Victoria visited the premises and her mother gave Victoria permission to occupy a room in the original house. However, in the said affidavit, she said that Victoria migrated to Canada and returned in 1998 whereupon she gave her permission to live in the disputed house until her death, and told her not to carry out any improvements. Further, although in the same affidavit the 1st respondent stated that, against her wishes, Victoria added a bathroom, kitchen and awning but did no other improvements,

and neither did the appellant, under cross-examination she admitted that she had agreed for Victoria to do the additions of the bathroom and kitchen, as she saw the need for it. She also said she objected to the work being done by the appellant and her mother but they still did it, and that she was not aware that there was improvement to the windows and tiles until they were done. She did not know about any other improvements.

[97] The 1st respondent admitted that Victoria lived at the house with her grandchildren until her death at which time she took action to recover possession. She denied that Victoria's children were living there at the time.

[98] The 1st respondent's sister, Cynthia Peart, gave evidence on her behalf. However, Ms Peart claimed a number of facts inconsistent with the 1st respondent's case, as well as between her affidavit and her evidence at trial. She also gave what amounted to hearsay evidence. She claimed her father did not give the house to Victoria, and that her father showed her the title to the property and she saw the 1st respondent's name on it. However, this must have been an error as the evidence is that there was no title to the property during her father's lifetime.

[99] She said that to the best of her knowledge the only additions Victoria did to the property were the kitchen and bathroom, and the tiling of some sections of the house. She said that the 1st respondent always told Victoria that she was not to do any addition to the property, and that the only addition she allowed was the bathroom and kitchen. The other additions, she said, were done without her sister's knowledge. Victoria only

stayed in the one bedroom given to her by her mother, until she added to the house with her sister's permission. She also said that to the best of her information, knowledge and belief, the appellant did not carry out any improvements on the property. Other than the addition of the bathroom and kitchen, which she said Victoria told her she was going to do, and which she saw, she did not say how she by came by this information. This was not evidence she could properly give, as she had no first-hand knowledge of the communications between Victoria and the 1st respondent or Victoria and her parents, nor was she in a position to know, outside of what she said she saw, what renovations and repairs had been done to the house and by whom.

Her evidence as to her knowledge of the house and the family's involvement with the property is as follows. She went to Saint Thomas at nine years old and left at 23 years old. She came and saw the disputed house, and it was rented out first by her father, and then by her mother. Victoria came there when she was older than three months but before she could walk. There was no clear indication in her evidence where Victoria lived when she came at over three months, and if the property had been rented out at that time. However, she did say that Victoria grew up in the front house with her and her sister. When she left the property, Victoria was living in Spanish Town. She said the 1st respondent left for the states, Victoria left, and then she left.

[100] Her further evidence was that when her father died she was living in Kingston, and that she never returned to Saint Thomas to live. She did not say how often she would visit the property, or if she did in fact do so, other than the occasion she came

and saw the addition to the kitchen and the bathroom. She said she went to Saint Thomas after hurricane Gilbert because her mother was there and the roof was still there. However, this could not be true as hurricane Gilbert was accepted on the evidence to have occurred in 1988 and her mother died in 1982.

[101] In respect of the additions, she agreed that Mr Winston Pearcy was the one who did the work.

[102] From the evidence in this case, it is clear that both the appellant and Victoria, based on their actions, laboured under the misapprehension that the house belonged to Victoria, and no doubt the appellant, encouraged by Victoria, planned to continue to live there even after Victoria's death. Nothing else could explain why two people who had the opportunity to travel, live and earn abroad, would spend their hard-earned money improving on the value of the property. It defies common sense to think that they would knowingly improve on someone else's house rather than securing one of their own. It is also clear that the 1st respondent was aware of their mistake and was content to allow them to labour, pun intended, under that misapprehension. She did nothing to stop them and even encouraged them. Further, the fact that the 1st respondent built, from scratch, a brand new house at the front to replace the old house but showed no interest in the house at the back; hid, from Victoria, the contents of the Will and the fact that she was surveying the land and applying for the registered title; then helped Victoria and the appellant to renovate the house without telling them she had title to it, seems to me to show that her conscience had been invoked.

[103] Her evidence that she told Victoria that the money she was spending was only for her comfort until she dies, is self-serving, defies common sense and ought to have been rejected by the judge. The 1st respondent knew that Victoria was being assisted in the extensive renovation of the house by her daughter, the appellant, therefore, the judge ought to have been placed on enquiry as to the likelihood that Victoria would have allowed the appellant to expend her money on a house she had no hope of inheriting or living in, after Victoria's death. Clearly that was hardly likely. Surely Victoria would have warned the appellant rather than encouraged her. Surely Victoria would have created a fuss, having thought her father had made provisions for her only to later discover that the 1st respondent was the beneficiary instead of her. The evidence of the 1st respondent, which the judge accepted as true, would lead a reasonable person to conclude that Victoria not only accepted the position put to her by the 1st respondent, but nevertheless, continued to expend her and her daughter's money, time and resources on improving on the 1st respondent's property. However, in my view, it is highly unlikely that neither Victoria nor the appellant would have made no other provision for a home for themselves, or for the children and grandchildren under their care, but instead would have continued to spend on the 1st respondent's second house, if they had no genuine belief it belonged to them.

[104] An extract from the judgment of Lord Scott in **Yeoman's Row Management Limited and Another v Cobbe**, [2008] UKHL 55, was relied on by the judge at paragraph 61 of her judgment. The correct statement made by Lord Scott is follows:

> "[16][...] [U]nconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. [28][…] Proprietary estoppel requires […] clarity as to what is it that the object of the estoppel is estopped from denying or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so."

[105] The judge also cautioned herself that it was important in every case in which a claim for proprietary estoppel is made, to have regard to the particular facts. It seems, however, that the judge failed to heed this caution. Having ruled that the evidence of the gift to Victoria was hearsay, and having found that the ownership was not transferred according to the law of real property, she failed to examine the evidence to see if the ingredients for a proprietary estoppel were present. She failed to examine whether the conduct of the 1st respondent towards the appellant and her mother, was such that she ought to be estopped from asserting her own legal claim to the house, regardless of the issue of ownership by Victoria.

[106] Although the judge also outlined the test in **Taylor Fashions Limited** (at page 55), which is whether the "situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it", she failed to apply the test to the case before her.

[107] In my view, the judge was wrong when she concluded at paragraphs [104] and [107] of her judgment, that the claim had failed on the basis that the evidence on which the appellant relied to prove her interest was hearsay evidence. Apart from the evidence she claimed was hearsay, the judge made no effort to examine or assess the remaining evidence in the case.

[108] There was no dispute that Victoria lived at the property with her family, including the appellant, undisturbed for many years, even if there were some discrepancies as to the exact period of time. There is no dispute, and it was admitted by her, that the 1st respondent exercised no ownership or control, and showed no interest in the house, until Victoria's death in 2015. There is no dispute that the 1st respondent left Jamaica in the 1960s and never returned until 1996, and that although she knew she had inherited her father's property after her mother's life interest had expired, she said nothing about this to Victoria or the appellant. During all that period, she exercised no dominion over the house and showed no interest in it. Most telling is the fact that she built on the front house but did not touch, examine or even enter the disputed house.

[109] According to the 1st respondent, she knew nothing of its state as she did not look at it or go in it. Even after hurricane Gilbert, by which time her mother had died and she became entitled to the property, she did not make any effort to know the damage or to repair any damage to that house. Thereafter, she participated in the renovation of the premises by Victoria, although she denied the appellant was involved. It was she

who collected the money sent by Victoria, bought the building the materials for her and paid the workman.

[110] The judge also had before her the fact that the original house left by the 1st respondent's father was a dilapidated old house made of board and some form of concrete mixture, not concrete blocks. The evidence of the 1st respondent was that the front house was also old and dilapidated, so much so, that she did no renovation to it, but instead built an entirely new house. The disputed house was clearly repaired and renovated over time by Victoria and the appellant to, as the evidence in the valuation before the judge showed, one which was now a structure of concrete block walls, galvanized metal sheet roof, painted plywood ceilings, wooden and glass louvre windows, ceramic floor tiles, and raised panel doors. It is fully grilled with an enclosed porch. There are two bedrooms, a dining room, and a kitchen, with a stainless steel sink and cupboards. There is a bathroom with basin, toilet and shower, and the house is in good condition.

[111] It was clear, therefore, that considerable expenditure had been made to the house, none of which was done by the respondents. It was incumbent on the judge, faced with a claim for proprietary estoppel, to embark on an enquiry of the conditions under which, and the reason for which the house was built, and the part played by the respondents in the building of this structure. The house without the land was valued at $3,000,000.00 with a replacement value at the time of $4,700,000.00.

[112] When the 1st respondent's admittedly hands off approach to the house is juxtaposed against the appellant's belief as to the ownership of the house and the fact that it was being treated as the appellant's family home; and, when account is taken of the acquiescence and active participation of the 1st respondent by her conduct in fostering that belief, it is difficult to see how a court could find that the equity was not successfully raised. In those circumstances equity could not do otherwise than find that the 1st respondent's conscience was so engaged that it would be unjust and unconscionable to allow her to now assert her legal rights over the house and to claim that no equity arose in the appellant, or indeed, in her mother. The 2nd respondent, not being a bona fide purchaser for value, is in no better position than the 1st respondent.

[113] All that remains to be determined is, what the equitable remedy that best meets this situation is. To my mind, all this began with an expectation that the house belonged to Victoria and ultimately her family, including the appellant. Both Victoria and the appellant acted under that belief. Neither Victoria nor the appellant had another home in Jamaica. Victoria lived at the house until she died. The least remedy that could satisfy this equity, based on the expectation and the fact that the expenditure was done by the appellant and her mother, is to order that the respondents pay to the appellant the full value of the house and that the appellant be allowed to remain in the house undisturbed until and unless those funds are paid.

Disposition

[114] I would, therefore, recommend that the appeal be allowed and the judge's orders be set aside. I would also declare that the appellant has an equitable interest in

the 2nd house located at the back of the property situated at Harbour Head, Port Morant in the parish of Saint Thomas. In the discharge of that equity, the respondents are liable to compensate the appellant for the full value of the house, without the land, as at the value stated in the valuation done by NAI Jamaica Langford and Brown dated 13 January 2016, that is, JA$3,000,000.00. Until and unless this order for compensation is carried out the appellant is to reside in the house undisturbed for as long as she desires or so long as life shall last. I would make no orders as to costs.

PHILLIPS JA

ORDER

(1) The appeal is allowed.

(2) Orders 1 and 2 of the judgment and orders of Nembhard J (Ag) granting judgment to the respondent with costs are set aside.

(3) It is hereby declared that Caren Cranston has an equitable interest in the 2nd house located at the back of the property situated at Harbour Head, Port Morant, in the parish of Saint Thomas.

(4) In discharge of that equity the respondents are liable to compensate the appellant the full value of the house,

without the land, as at the value stated in the valuation done by NAI Jamaica Langford and Brown dated 13 January 2016, that is, JA$3,000,000.00.

(5) Until and unless the orders herein are carried out, Caren Cranston is to reside peacefully and undisturbed in the said house, as long as she desires or so long as her life shall last.

(6) Costs to the appellant here and in the court below, to be taxed if not agreed.