**[2013] JMCA Civ 24**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 12/2010**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MRS JUSTICE LAWRENCE-BESWICK JA (AG)**

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| **BETWEEN** | **HENRIQUES MILLS**<br>**IONIE MILLS** | **APPELLANTS** |
| **AND** | **GEORGE POWELL** | **RESPONDENT** |

**Ms Judith Clarke instructed by Judith Clarke & Co for the appellants**

**Mrs Janet Taylor instructed by Taylor, Deacon & James for the respondent**

**17 and 21 June 2013**

**PANTON P**

[1] On 18 December 2009, Evan Brown J (Acting) (as he then was) entered judgment in this suit in favour of the respondent in the sum of $1,461,000.00 with costs to be agreed or taxed.

**The claim**

[2] The respondent had sought the following reliefs by way of a fixed date claim form filed in the Supreme Court as long ago as 25 April 2006:

i. An order for specific performance of a lease agreement in respect of land situated at Brinkley, Saint Elizabeth; or

ii. An order that a building built by the respondent on the land be valued and the appellants pay to the respondent the amount of that value; or

iii. An order that the appellants transfer the said land to the respondent "in consideration for the undeveloped value of the said land.

On 19 November 2007 it was ordered that this matter be treated as if started by claim form and that the supporting affidavit be permitted to stand as the Particulars of Claim.

[3] It should be noted that in his affidavit in support of the fixed date claim form, the respondent sought (instead of that at (ii) above) an order that the appellants pay him "all sums expended in the construction of the commercial building on the subject land". It was with this prayer in mind that the learned judge made the order that is the cause of the appeal.

**The case for the respondent**

[4] The decision of the learned judge is being challenged particularly in respect of his admission of certain evidence, and his findings that the respondent had proven the expenditure claimed and was entitled to the amount awarded.

[5] The case presented by the respondent was to the effect that he and the appellants entered into an oral agreement in early 2001 for the lease of a square chain of land at Brinkley, Saint Elizabeth, to him. In his witness statement he said that he would construct a building thereon for personal use. However, his evidence was that he had leased the premises for the purpose of doing business. In practical terms, he operated a bar and go-go club there, although he had no licence to do so. There was a building on the land at the time of the agreement, and the intention of the parties was for him to renovate and expand it. The annual rent was $24,000.00 and the respondent would retain half of this sum until he had recouped the cost of construction.

[6] There was an intention to reduce this agreement into writing but that did not occur. Between the time of the oral agreement in early 2001 and 2003, the parties visited a Mr Horne, a justice of the peace, with a view to having the agreement documented. Their efforts proved fruitless as in the early stage Mr Horne informed them that his secretary was on long leave, and in the latter stage he advised them that his vision was failing and they should seek assistance from someone else. Acting on this advice, the parties consulted Mr Lenworth Blake, a justice of the peace who was also a member of parliament. By the time of this consultation, the respondent said he had incurred in excess of $1,500,000.00 in construction costs. When Mr Blake learnt the details of the agreement, he told them that it would be a long time before there would be reimbursement of the amount spent on the building, and suggested to the parties that they should enter into a new agreement. As stated earlier, that did not happen. In

the meantime, Mrs Mills informed the respondent that the appellants were interested in purchasing the building.

[7] The respondent continued to pay half the amount of the rent as agreed. He sublet the premises to several persons, the last of whom was one Norman Hylton. In doing so, he had not sought or received the approval of the appellants. In December 2004, the appellants gave the respondent notice to quit.

**The appellants' case**

[8] As far as the appellants were concerned, the agreement with the respondent was for him to remove the zinc roof that was on a section of the existing building and to replace it with a slab roof. It was also agreed that he would add a small room and a bathroom. There was no agreement for him to construct a new building. During the process of the unauthorized construction, the appellants advised the respondent to desist but he ignored them.

[9] Hurricane Ivan did a fair degree of damage in September 2004. The electricity supply was disconnected for non-payment of bills and Mr Hylton, the subtenant, vacated the premises. Notice was given to the respondent in order for the appellants to effect repairs consequent on hurricane Ivan. Despite several requests by the appellants, the respondent failed to produce evidence of his construction costs. However, Mrs Mills is of the opinion that the respondent has recovered all his expenses given the dance sessions that he has hosted at the premises.

**The case management orders**

[10] In preparation for the trial of this matter, a case management conference was held on 16 April 2008 by King J. Specific orders were made with a view to having the matter disposed of in a timely manner. The trial was fixed for 16-18 September 2009, that is, 17 months after the case management conference. All documents ought to have been filed and served by 4 June 2009, that is, a year and two months after the conference. Notwithstanding the length of time allowed, the orders were ignored by the respondent.

[11] It became necessary for fresh orders to be made, and that was done at the pre-trial review held by McDonald J on 18 June 2009. Time was extended for the respondent to comply with the orders made on 16 April 2008. For reasons which have not been stated, but which may reasonably be linked to the nonchalant attitude of the respondent, the trial date was later rescheduled.

[12] On 19 November 2009, the respondent gave notice of his intention to tender in evidence hearsay statement made in a document. This was in the form of an estimate done by W & L Associates Limited, real estate appraisers and cost consultants. This was a significant development which prompted the appellants' attorneys-at-law to request attendance of the witness involved. This witness turned out to be Mr Ian Lyon from whom there is no record of a witness statement having been filed, and who was treated as an expert witness by the learned trial judge.

**The reasons for judgment**

[13] In his reasons for judgment, the learned judge expressed a preference for the evidence of the respondent. He said:

> "In any event, having seen the witnesses, it is the claimant's evidence that commends itself to the court as the more probable account" [para. 19]

[14] In respect of what he described as "the issue of the cost of the construction" [para. 23], he said the following:

> "I believe the claimant when he said the construction cost him $1.5m dollars. I did not for [sic] the view that the claimant hails from the class of persons properly described as greedy, grasping and, to borrow from the vernacular, gravalicious, inclined to take advantage of poor illiterates as was submitted by counsel for the defendants." [para. 24]

The learned judge went on to say the following:

> "Whatever the reason or reasons for the claimant's failure to supply the requisite bills, the claimant sought to make good on that omission. Alas! That effort was thwarted every step on the way. The defendants now seek to benefit from the consequences of their effort to frustrate a proper inspection of the building. It is quite perplexing as how [sic] a court could proceed in the absence of such a report if it adjudged damages to be the appropriate remedy. I accept the quantity surveyor's report as the best assessment of the cost of the construction that can be provided in the circumstances. The defendants strove to shut up this information in their bosom and keep it locked away from the courts." [para. 25]

[15] In para. 30 of his reasons for judgment, the learned judge again acknowledged the failure of the respondent to produce any documentary evidence to support his claim for reimbursement of construction costs. However, he added that the respondent "demonstrated a willingness to put that assertion to the test by employing expert, disinterested help" – a clear reference to Mr Lyon, whom he found to be "most impressive" as a witness.

[16] The learned judge expressed the view that it was crystal clear that only one of the parties to the agreement got the full benefit of their intended bargain. He found that the respondent was "clearly wronged" and that the "ululation" from him was "for justice". He went on to say that "equity will not suffer a wrong to go without a remedy" [para. 26]. He ruled out the doctrine of promissory estoppel, but expressed agreement with counsel for the respondent that on the question of the applicability of proprietary estoppel, therein "lies the balm so desperately yearned for" by the respondent. He quoted a passage from the 31st edition of Snell's Equity at page 273 as regards equity's long tradition of enforcing or granting rights over land to those who have been induced to invest in or improve land owned by others as a consequence of their own mistake or by direct encouragement or informal agreement.

[17] Following on his view that the respondent was encouraged to improve the appellants' land to his detriment, the learned judge expressed himself in the following terms as regards what should be the outcome:

> "But this day I say, justice shall flow from this fountain, aye, it shall gush like the Rio Cobre in spate from the torrents of October rain."

He then proceeded to make an award in damages, deducting from the sum of $1,500,000.00 the amount that he calculated that the respondent would have withheld under the agreement towards the construction costs. That sum was $39,000.00. Consequently, he awarded the respondent $1,461,000.00.

**The grounds of appeal**

[18] The following grounds of appeal were argued:

> "1. The learned judge erred in finding that the claimant had proved that the construction done by him cost him $1.5.
>
> 2. The learned judge erred in his determination that the claimant was entitled to damages in the sum of $1,461,000.00
>
> 3. Having regard to the provisions of the Evidence Act, The [sic] learned judge erred in admitting into evidence the report of W. & L. Associate's [sic] Limited and the evidence of Mr. Lyon
>
> 4. Having regard to the requirements set out in the Civil Procedure Rules the learned judge erred in permitting the said Mr. Lyon to be called to give evidence at the trial.
>
> 5. Having regard to the provisions of the Evidence act [sic] and the Civil Procedure Rules the learned judge erred in treating the said Mr. Lyon as an expert witness.
>
> 6. The learned judge erred in determining that the doctrine of proprietary estoppels was available to the claimant.

7. The learned judge erred in failing to consider whether the claimant was in breach of contract.

8. The findings of the learned judge are not in keeping with the evidence."

**The submissions**

[19] Miss Judith Clarke, for the appellants, grouped and argued the grounds in this manner – three, four, and five together; followed by one, two and eight together, ending with six and seven together.

[20] The grouping of the grounds facilitated the identification of the issues. Grounds three, four and five relate to the issues of the admissibility of the report by W & L Associates Limited and the treatment of Mr Lyon as an expert. Grounds one, two and eight concern the sufficiency of the evidence of the expenditure by the respondent. In view of the conclusions that we have arrived at, it is not necessary to consider in any detail grounds six and seven.

[21] Miss Clarke submitted that the decision by the judge to admit the evidence of Mr Lyon "did not have regard for the law and the rules of procedure". She said that the judge seemed to have been guided by a kind of righteous indignation at the prospect that the respondent may be left without relief for failing to prove his case. That approach, she submitted, was untenable as the decisions of the court must at first be guided and informed by laws and rules with which the parties are obliged to comply.

[22] Miss Clarke complained that no witness statement had been served in respect of Mr Lyon, and that the rules in respect of expert witness had been ignored. In particular, she referred to section 31E of the Evidence Act and Part 29 of the Civil Procedure Rules.

[23] Mrs Janet Taylor for the respondent was content to submit that the learned trial judge had a discretion in the matter and exercised it properly. She invited us to consider that a witness summary had been filed in July 2009 and it disclosed the report which contained "the cost of construction". She said that a notice of intention to rely on the document was served on the appellants and they objected and requested that the witness be called. The witness duly attended and was cross-examined. Mrs Taylor prayed in aid rule 1.1(1) of the Civil Procedure Rules which states: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly". She submitted that the judge committed no error in admitting the report or in hearing the evidence of Mr Lyon. According to her, the learned judge was exercising his inherent jurisdiction in controlling the matters in his court and ensuring that the case before him is dealt with fairly and justly.

[24] Mrs Taylor, no doubt, is also fully aware of rule 1.3 which reads: "It is the duty of the parties to help the court to further the overriding objective". For many years, indiscipline held sway in the practice of law on the civil side. Excuses were aplenty whenever a matter was listed for trial. Consequently, cases dragged on and on. The Civil Procedure Rules were designed to assist in the speedy disposition of matters. This court has warned on several occasions that the days of advancing excuses are over.

Litigants and their attorneys-at-law are duty bound to follow the rules in every respect. Failure to do so will, more often than not, bring painful consequences.

[25] It bears repeating that the respondent ignored the case management conference orders made on 16 April 2008. The time for complying with those orders was extended at the pre-trial review on 18 June 2009. On the latter occasion, permission was also granted for the respondent's witness statement that had been filed out of time to stand as having been filed in time. No witness statement was ever filed for the witness Ian Lyon. There has been no explanation for that failure. It should be noted that the respondent was given the option of calling three witnesses, by order of King J at the case management conference. It should also be noted that there was no witness summary prepared in respect of this witness. Instead, a notice was served under section 31E of the Evidence Act of the intention to tender into evidence the report that he had prepared. This prompted Miss Clarke to file a notice of objection requiring his attendance.

[26] Mrs Taylor at trial made the bold submission that there could then be no objection to his evidence seeing that the appellants had required his attendance. This seems to have been an unfair effort to tie the hands of the appellants. Witness statements are to be served. If not, a witness summary is to be served. Such service must be done within the time specified by the court. If this has not been done, rule 29.11 (2) provides that the court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

**Decision on the admission of the evidence**

[27] Rule 26.8 of the Civil Procedure Rules provides for the making of applications for relief from any sanction imposed for the failure to comply with any rule, order or direction. It mandates that such applications are to be made promptly and supported by evidence on affidavit. The court may grant relief only if satisfied that the failure to comply was unintentional and there is a good explanation for the failure. In considering whether to grant relief, the court must pay due regard to the interests of the administration of justice, among other matters.

[28] In the instant case, the parties attended a case management conference in April 2008 and a pre-trial review in June 2009. On both occasions, orders were made in respect of the filing of witness statements. Given the nature of the proceedings, the respondent and his advisers knew that it was necessary for them to prove the amount of the construction costs. They were allowed to call a maximum of three witnesses. They did not seek to take advantage of the opportunity. It took them a year and seven months after the case management conference to give the appellants notice of their intention to tender as evidence the report of W & L Associates Limited. It would have been foolhardy of the appellants not to object and require the attendance of the maker of the document.

[29] A party may not be allowed to use section 31E of the Evidence Act to spring a surprise witness on his opponent, while ignoring the provisions of the Civil Procedure rules which are aimed at preventing ambushes and fostering fairness. In the circumstances of the instant case, where no good reason was offered by the

respondent for not previously seeking relief under rule 26.8, it was not open to the learned judge to have received the report in evidence or to have allowed the witness Ian Lyon to testify (rule 29.11(2). The situation is further exacerbated by the fact that the learned judge not only allowed him to be a witness, but also elevated him to the status of expert witness. In that regard, all that we need say is that Part 32 of the Civil Procedure Rules dealing with experts and assessors was totally ignored by the respondent and the learned judge. It cannot therefore be said that Mr Lyon's evidence was properly admitted.

**The quality of the evidence**

[30] Grounds one, two and eight challenge the quality of the evidence. The appellants contended that the respondent, on his own admission, did not produce any documents to the appellants to substantiate that he spent $1,500,000.00 on the construction. Miss Clarke submitted that there was also no evidence that the respondent produced any probative data to Mr Lyon that could have formed the basis of the finding by the court. On the other hand, Mrs Taylor submitted that the report prepared by W & L Associates Limited was sufficient, and that it gave good support to the oral evidence of the respondent that he spent $1,500,000.00.

[31] The report itself does not state anything as regards its import. It shows a description of materials, a stated quantity beside each, a rate and there is a column that provides an amount in dollars. By itself, it conveys nothing whatsoever. Mr Lyon, its maker, said in evidence that he prepared a cost estimate based on what he saw, and what he was told by the respondent as to what the building contained. He had been

requested "to measure work that had been done on the property in order to arrive at the cost that he (the respondent) would have expended". However, Mr Lyon was severely handicapped as he was not allowed to go on the property.

[32] In answer to this court, Mrs Taylor said at first that Mr Lyon had valued the building as of 2001. Of course, there was no evidence that the building was constructed in 2001. In response to further enquiries by the court, Mrs Taylor changed her position by saying that the valuation was "of what it would cost to construct the building in 2009". This seems to indicate some confusion on the part of the respondent as regards the report of W & L Associates Limited.

**The decision on the quality of the evidence**

[33] We are of the view that even if the report had been properly received in evidence, the respondent would not have proven his case. Mr Lyon was not able to properly inspect what had been done in the form of construction. He did not see the entire building. He was not provided with any invoices, receipts, or bills in respect of workmanship. There was therefore no basis on which the learned judge could have been satisfied that the respondent had expended $1,500,000.00.

[34] This case calls to mind the words of Lord Goddard CJ, in the oft-cited case ***Bonham-Carter v Hyde Park Hotel Limited*** (1948) 64 TLR 177 at 178:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of

> the Court, saying: "This is what I have lost; I ask you to give me these damages." They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory."

This court has repeatedly reaffirmed this position as regards proof of damages - see ***Murphy v Mills*** (1976) 14 JLR 119, and more recently, ***Attorney-General of Jamaica v Tanya Clarke*** (SCCA No 109/2002 – delivered on 20 December 2004). In the instant case, the court was not even provided with particulars.

[35] In the circumstances of the case, the appeal is well-founded. This was not a case of proprietary estoppel. This was a straight arrangement for the leasing of property with payments to be made on a particular basis. The arrangement fell apart and the respondent sought to recoup that which he feels he has lost. He has not proven his loss, however.

[36] The appeal is allowed. The judgment of the court below is set aside. Judgment is hereby entered in favour of the appellants. The costs below as well as in this court are awarded to the appellants, and such costs are to be agreed or taxed. The counter notice of appeal is dismissed.