JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 97/92

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	RAY ARTHURS	DEFENDANT/APPELLANT
AND	BARBARA BERRY	PLAINTIFF/RESPONDENT

Hector Robinson for Appellant

Clark Cousins for Respondent

January 14, 15, 1993 & March 9, 1994

PATTERSON J A (AG)

This is an appeal by the defendant Ray Arthurs, from the judgment of Smith J sitting in Chambers on the 7th October 1992, whereby he dismissed a summons by the defendant seeking to set aside a default judgment entered on the 27th July, 1992 and seeking leave to file defence and counterclaim out of time. We heard the appeal on the 14th & 15th days of January 1993, and it was dismissed. We now give the reasons for our decision.

On the 22nd May 1992, the plaintiff filed an action against the defendant seeking to recover possession of premises occupied by the defendant at Negril in the parish of Westmoreland. The defendant was served with the writ of summons and he entered an appearance but he did not file a defence. Consequently, the plaintiff entered judgment in default of defence.

In his affidavit in support of his application the defendant attributed his failure to file a defence to a misunderstanding and lack of effective communication between his attorney-at-law and himself. He deponed that he had a good defence and he exhibited the draft defence and counterclaim.

It is interesting to look at his defence and counter-claim. His defence seems to be that he is entitled to an estate or interest in the land, subject of the action, and that the plaintiff is not entitled to vacant possession until he is compensated for his estate or interest. Since the 28th August 1991, the land has been registered in the name of the plaintiff at Volume 1238 Folio 944 of the Register Book of Titles.

It is not very clear by what lawful means the defendant entered on the land; this however, seems to be how he claims his estate or interest arose. The previous proprietor was one William Arthurs, but he died in or about the year 1947, survived by eight children, one being Ellen Arthurs. The land was unattended for a number of years. In or about 1975, the defendant says he made an arrangement with Ellen Arthurs and other relatives of the said William Arthurs, whereby Ellen Arthurs would return to live at the house on the land, and he would care for her. He was allowed to erect and operate a club on the said land and in return he agreed to maintain and support the said Ellen Arthurs and pay the taxes on the land from the income generated by the operation of the club. He says he faithfully carried out his part of the bargain up to the time that Ellen Arthurs died in 1983. He has however continued in possession and he claims to be "a licensee of the relevant owners of the estate in fee simple," that his licence is coupled with an interest and that the plaintiff had knowledge of it and has acquiesced in his occupation of the land. He admits that the plaintiff had served on him notices to quit and deliver up vacant possession of the part of the premises he occupies, but he says the notices were neither valid nor effectual to terminate his occupation. It is for those reasons that he claims that the plaintiff is not entitled to possession of the premises unless he is compensated for the clubhouse he

built, the fixtures therein and the goodwill thereof.

It cannot be disputed that where the plaintiff's claim against the defendant is for the recovery of possession of land, the plaintiff is entitled to enter judgment for possession if the defendant fails to serve a defence within the time limited for so doing, (S 250 of the Judicature (Civil Procedure Code) Law.) But the Court may set aside any such judgment by default: (S. 258). In the instant case, the judgment in default of defence was regularly entered, and if it is to be set aside, then the defendant must place before the Court such facts as will show that there is merit in the defence. This is the primary consideration for the exercise of the Court's discretion, but the Court will also take into consideration any reason advanced for the failure to abide by the rules of Court and thus allowing the plaintiff to enter judgment by default. Smith J had these principles in mind when he dismissed the defendant's summons. He concluded that the defence filed had no prospect of success. He held that the defendant's evidence did not disclose that the plaintiff had granted him a licence, and further the licence granted by the plaintiff's predecessors in title did not create an interest in land nor was it binding on the plaintiff. He did not find the existence of a constructive trust as the defendant contended for.

The first question to be decided is whether on the facts disclosed in the defence, the arrangement between Ellen Arthurs and others on the one hand and the defendant on the other, created the interest in the land that the defendant contended for. The arrangement which apparently was not reduced into writing, seems to have been for the paramount purpose of providing funds for the maintenance and support of Ellen Arthurs during her lifetime. The premises already had a house (although

it may have been in disrepair) and that is where Ellen Arthurs went after the arrangement, and lived up to the time of her death in 1983. The defence does not disclose that the defendant was given exclusive possession of the premises; it discloses that he was given permission to erect and operate a club on the property. It certainly is not clear in what right the grantors gave the defendant the permission. It is not known who were the personal representatives of the deceased William Arthurs. But even assuming that the parties who entered into the arrangement with the defendant had lawful authority so to do, the only reasonable inference to be drawn from the circumstances and the conduct of the parties at the time of the grant is that the defendant was granted a licence at the very highest. It was a personal privilege given to the defendant and therefore, it could not and did not create any interest in the land.

The defendant submits that the licence was not a bare gratuitous licence, but that it is "a contractual licence coupled with an equity." Now, in paragraph 2 of the defence and counterclaim, the defendant expressly denies the plaintiff's allegations that "the defendant was at all material times the tenant of the plaintiff's predecessors in title." He states that "the defendant denies that he was in occupation of the land by virtue of any tenancy agreement with any predecessor in title of the plaintiff or with any person at all." He further states in paragraph 8 of the defence that, "If which is not admitted the parties abovementioned are the predecessors in title of the plaintiff the defendant will say that he was at all material times a licensee of the relevant owners of the estate in fee simple coupled with an interest and that these said persons or the plaintiff as against the defendant are not entitled to claim possession of the said land without compensation."

A "contractual licence" may be described as a licence granted by contract by the proprietor of land to another to occupy the proprietor's land. It is only a term of the contract, and although it creates personal rights, it does not create any estate or interest in the land to which it relates. The decision of the Court in **Ashburn Anstalt v. Arnold and another** [1988] 2 All E R 147 makes it quite clear that "a mere contractual licence is not, without more, an interest in land binding on a purchaser even with notice and therefore the mere fact that land is expressed to be conveyed "subject to" a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the contract." In the instant case, although it can be assumed that the plaintiff purchased the land with notice of the defendant's presence on it, the "contractual licence" if it existed would not necessarily be binding on her. But if the defence had been able to show that the purchaser's conscience was affected by the contractual licence, then the Court could in those circumstances, imply a constructive trust.

It does not appear to me that the defence discloses facts from which a Court could imply a constructive trust. A constructive trust would arise "where a purchaser takes land which is subject to a contractual licence for occupation by a licensee with knowledge of the licensee's right to occupy." (See Halbury's Laws of England 4th Edition paragraph 9.) Even assuming that the appellant entered the land on a contractual licence, it seems to me that the contract came to an end with the death of Ellen Arthurs in 1983. The main purpose for which he had entered no longer existed. From 1986 onwards, it appears that the defendant did not pay the taxes on the land. It is not clear when it was that the plaintiff became the

proprietor of the land, but in any event, the defendant's occupation after 1983 may be described as "occupational licence" which is quite incapable of bestowing any proprietary right on the defendant. It was never contended that the understanding of the defendant was that he should remain on the land for his lifetime, and he is not claiming any such life interest. His defence to the plaintiff's claim for possession is "that the plaintiff is not entitled to possession of the said premises unless the defendant is compensated for the clubhouse and fixtures and the goodwill thereof."

This brings me to the final submission of counsel for the defendant. It is based on the equitable principle of estoppel. He argues that whatever interest the defendant has in the land against the plaintiff's predecessor in title, the plaintiff knows and had actual notice of such interest before acquiring title to the said land or alternatively, she acquiesced in the continuation of his interest. In those circumstances, he argues that the correct way to satisfy the equity would be to order compensation for the club building and fixtures, and the goodwill he had built up.

The difference between a contractual licence and an estoppel licence may be difficult to define. It is said that contractual licences are usually precise in terms, while estoppel licences are less formal and usually depend on the conduct of the parties for their existence. In a great number of cases, that may be a true difference, but not in every case. The principle of estoppel licence was pronounced for long ago in the Privy Council decision **Plimmer v. Wellington Corporation** [1884] 9 A.C. 699, and more recently Lord Denning said in **Inwards v. Baker** [1965] 2 W.L.R. 212 (at p. 217):

> "So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. 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.
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> It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied."

In the instant case, the defence clearly shows that the defendant entered as the result of an arrangement, and the terms of that arrangement are set out. There is no suggestion that when he entered, it was with the understanding that he would remain there forever nor was the question of compensation for any building considered. He entered into a business venture of a personal nature, and accordingly, it is not binding on the plaintiff and it is therefore revocable by notice. On the facts, the question of the intervention of equity does not arise.

I agree with the views expressed by Smith J that the defence as filed has no prospect of success. In the circumstances, I see no reason why this Court should interfere with the exercise of the learned judge's discretion. Accordingly, I agree that we should dismiss the appeal with costs to the plaintiff.

Rowe, P. (Retired

I agree.

Downer, J.A.

I agree.