JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 20/94

BEFORE: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

MAXVILLE TRENCHFIELD - PLAINTIFF/APPELLANT

V

JOSEPHINE LESLIE - DEFENDANT/RESPONDENT

Miss Antoinette McKain for the appellant
instructed by Cecil R. July

Donald Gittens for the respondent
instructed by Messrs Clarke, Nembhard & Co.

September 19 & 20 and October 24, 1994

PATTERSON, J.A. (AG.)

This is an appeal from the judgment of the learned resident magistrate for the parish of St. Elizabeth, dismissing the claim of the appellant against the respondent for the recovery of possession of a dwelling house at Flagaman District, St. Elizabeth, which he claimed the respondent held of him as a licensee.

The appellant's case is quite simple. Alvin Trenchfield, who was the uncle of both the appellant and the respondent, died on or about the 3rd day of February, 1989, and by his will, executed on the 7th November, 1988, he devised to Mr. and Mrs. Maxville Trenchfield his "house and land around it." The will was duly proved and registered in the Supreme Court of Judicature on the 8th day of December, 1989, and administration granted to Loleta Trenchfield and Maxville Trenchfield, the executors named therein. The "house and land around it" referred to in the will was identified as a 2½ acre parcel at Flagaman with a two room house thereon, where the testator and the respondent resided up to a few months before his death. The respondent

remained in occupation after the testator's death. The land is not registered under the Registration of Titles Act, but a certificate of compliance with the necessary formalities under the Facilities for Title Act was issued in respect thereof to the said Alvin Trenchfield on the 15th of June, 1977, and was put in evidence by the appellant.

The appellant, by registered letter post on the 10th of August, 1990, served the respondent with a notice which required her to "quit and deliver up possession of a house and land at Flagaman, St. Elizabeth, premises formerly owned by Alvin Trenchfield of which you are a licensee by September 30, 1990." The appellant stated that he required the premises for the administration of the estate of Alvin Trenchfield. The respondent did not budge.

The respondent in her defence contended that she did not occupy the house as a licensee, but in her own right. She said that Alvin Trenchfield gave her the land long before he died and that she had been in possession ever since the date of the gift, improving the building and the land. In the event, she said that the testator was not entitled to validly dispose of the land at the date of his death.

The uncontroverted evidence is that Alvin Trenchfield was a very sick man from about February, 1986 up to the time of his death in 1989. During that time and in fact from about 1972, with the exception of about six months prior to his death, he was cared for by the respondent. In February, 1986, he was staying at the home of the respondent's father, where she then lived, since his house had fallen into disrepair. The respondent's evidence is that long after she commenced caring for him, she told him that her father's house was not convenient for him to stay, and "so he had to fix his house" in order that she could move in and look after him. She said that at her expense, repairs were done to the house and a toilet was built in October, 1986, and in November, 1986

Alvin Trenchfield and herself moved in.

The appellant undoubtedly made out a **prima facie case.** The land in question was certified in the name of Alvin Trenchfield under the provision of section 13 of the Facilities for Title Act, and the title thereto was capable of being registered under the Registration of Titles Act, with the certificate providing the proof of the title of Alvin Trenchfield to the said land (section 12). He devised it by a valid will to the appellant and his wife. They are the executors of his estate and are entitled to possession. The respondent was duly served a notice to quit and deliver up possession and she had failed to do so. The respondent, who is contending that the land did not pass under the will, must therefore establish her right to possession if she is to displace the appellant's **prima facie** case. This, she has sought to do by relying on an oral agreement between Alvin Trenchfield and herself. Her evidence is that he told her that in order for her to take care of him, he would give her his house and the land around it. She said that she was taking care of him long before the agreement, and she continued to do so up to about six (6) months prior to his death, when the appellant's wife prevented her from continuing by taking him away to her home, where he eventually died.

I should mention that the respondent sought to attack the validity of the will under which the appellant claimed, on the ground that it was a forgery, but that did not find favour with the learned resident magistrate. The respondent also spoke of a will made by Alvin Trenchfield about two (2) years before he died. She said by that will, which was written by one Teacher Buck, the testator devised to her one acre of land and his two bedroom dwelling house. She said the appellant took that will from Teacher Buck, and apparently that was the reason why it was not produced in court. But even if such a will existed, the later will

which was proved and registered would have revoked it so I do not think that the respondent was relying on that devise, but purely on the oral agreement that I have mentioned earlier.

It is surprising that the respondent did not seek to assert her right to possession of the land by way of a counter-claim to this action. It is clear that at common law, the oral agreement on which she relied could not be enforced in a claim against the appellant, it having been caught by the provisions of the Statute of Frauds. However, in her defence, reliance was placed on the equitable doctrine of part performance, and also on the doctrine of promissory estoppel, and those issues must be examined.

Where there has been a definite concluded contract for the disposition of land, but there is an absence of a sufficient note or memorandum to satisfy the requirements of the Statute of Frauds, a common law action cannot be brought on such a contract. But a court of equity will nevertheless grant relief by way of an order for specific performance of a parol contract where the party seeking to enforce such a contract shows sufficient acts of part performance. In the instant case, the respondent was not seeking in any way to enforce a parol contract, but sought to set up acts of part performance in proof of her title to the land and as a defence to the claim for possession. In my judgment, the equitable doctrine of part performance is inapplicable and cannot assist the respondent in her defence to this action for recovery of possession. In my view, the learned resident magistrate fell in error when he found that "the equitable doctrine of part performance protected Mrs. Leslie."

A parol contract, though unenforceable, is nevertheless a valid contract, and in certain circumstances, may be used as a defence. Counsel for the appellant

contended that there was no proof of a definite concluded contract between the respondent and Alvin Trenchfield for the disposition of his house and land at Flagaman. Counsel for the respondent, on the other hand, contended that "the terms of the contract are clear in this case." He placed great reliance on the evidence of the respondent to bolster his contention, and for emphasis, I will repeat her evidence:

> "He said in order for me to take care of him he would give me his house and the piece of land around it. Having spoken to me I was taking care of him long before and I continued to take care of him."

I must confess that it is difficult for me to extract a definite contract from those words, but the learned resident magistrate seems to have placed a liberal interpretation on the evidence. In his reasons for judgment, he had this to say:

> "This court is of the opinion that in the evidence before it the defendant did take possession of the premises on the basis of the undertaking and understanding between Mrs Leslie and Mr Trenchfield that she would get the house for her having taken care of him during his period of incapacity."

It is on this basis that he concluded that:

> "The court is prepared to hold that neither Mr. Trenchfield nor the plaintiff are able to circumvent or ignore the estoppel which operated against them - in other words in this action for recovery of possession brought by the executor, the defendant is entitled to rely on the principle of estoppel and the doctrine of part performance to protect her

interest in the property and her right to remain in possession."

In the face of the interpretation placed on the respondent's evidence by the learned resident magistrate, counsel was constrained to concede that there was indeed no definite concluded contract proved, but he submitted that there was clearly a promise coupled with an interest. He submitted further that where on the basis of a promise made, the promisee does certain acts, then an equity arose. He referred to the case of **Pascoe v Turner** (1979) 2 All ER 945, and argued that the instant case, like **Pascoe's** case, is a case of estoppel arising from the encouragement or acquiescence of the deceased, Alvin Trenchfield, between February, 1986 and the time of his death, when in reliance on his promise, the respondent performed adequate acts to justify her entitlement to an equitable interest in the property. The acts, he said, were:

1. physically taking care of the promisee; and
2. repairing the building.

The learned resident magistrate found as a fact that the respondent "relied upon the undertaking given her by Mr. Trenchfield", and that she was not paid for her services. He concluded that there was "no other explanation for Mrs. Leslie's - married with a husband and four (4) children - conduct in relation to Mr. Trenchfield and the property in question. In relation to the house she carried out repairs, entered into possession and did acts consistent with a reasonable explanation that the house would be hers."

This finding of fact was not challenged. It is well known that in Jamaica the kind of agreement contended for by the respondent is not uncommon. In some instances, the owner of land will enter into a valid contract to have someone care for him in his sickness or old age and leave

his land on death to that person. If such a contract is in writing, no difficulty would arise in enforcing it. If its a parol contract, the court would decree that it be specifically performed in an action by a plaintiff who proves acts of part performance which are referred to some contract and referrable to the parol contract alleged. But it is conceded that no definite contract existed in the instant case and accordingly, no reliance can be placed on those propositions. In the event, counsel's reference to **Wakeham v Mackenzie** (1968) 2 All ER 783 was not helpful. Nevertheless, the respondent's contention, that Alvin Trenchfield did promise to give her his house and land if she cared for him, led the learned resident magistrate to consider the question of a promissory estoppel as a defence to the appellant's claim for possession.

The learned resident magistrate, in holding that:

> "neither Mr Trenchfield nor the plaintiff are able to circumvent or ignore the estoppel which operates against them",

made reference to a review of the authorities known to him. Although he did not say so, I think he had in mind the line of authorities which established and extended the principle on which a person may obtain an interest in land if he is led by the owner thereof to believe that he will be granted such an interest, and as a result, he acts to his detriment. The principle seems to have had its genesis in the judgment of Lord Kingsdown in **Ramsden v Dyson** (1866) LRI HL 129 when he said:

> " If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord,

> and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

The principle thus enunciated, was followed and applied with extension and limitations, in a number of cases, one such being **Inwards v Baker** (1965) 1 All ER 446, where Lord Denning, M.R., expressed the principle in these terms (at p. 448):

> "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."

Further on he said:

> "... it seems to me, from **Plimmer's** case, (1884), 9 App. Cas. at pp. 713, 714, in particular, that the equity arising from the expenditure on land does not fail
>
> > 'merely on the ground that the interest to be secured has not been expressly indicated ... the court must look at the circumstances in each case to decide in what way the equity can be satisfied.'"

Crabb v Arun, D.C. (1975) 3 All ER 865, and **Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.** (1981) 1 All ER 897 are but two other cases in which the principle was considered and applied, and Lord Denning, M.R. reduced the principle and its extensions, refinements and limitations, into one general principle when, in **Amalgamated Investment and Property Co. Ltd. (in liq.) v Texas Commerce International Bank Ltd.** (1981) 3 All ER 577, he said (at p. 584):

> "When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."

This principle has been described as the doctrine of promissory estoppel (or proprietary estoppel) and the appellant's claim was based on what may be called 'estoppel by encouragement or acquiescence.' While conceding that the evidence regarding encouragement was slim, counsel for the respondent submitted that there was "adequate material on the evidence" to ground acquiescence on the part of the promisor. He referred to the expenditure by the respondent of her own money to effect repairs to the house during the lifetime of the promisor, and to the fact that she cared for him without pay at his request up to a few months before his death.

In light of the unchallenged findings of fact by the learned resident magistrate, I am inclined to agree with counsel for the respondent. I have expressed the view that the respondent's occupation was that of a licensee, but a licence may create personal rights though it cannot create any estate or interest in land. It seems to me that in the instant case, the respondent's licence may be aptly described as a "licence coupled with an equity" as was said in **Inwards v Baker** (supra). The words of Lord Denning, M.R. in that case seems to be relevant to the facts of this case. He said (at pp 448-449):

> "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. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."

In my judgment, there was sufficient evidence to support a finding that the deceased, Alvin Trenchfield promised the respondent the gift of his house and the land around it, and that the respondent acted to her detriment as a result. The parties conducted their dealings between them on the assumption that the house and land would go to the respondent. It is too late in the day, and it would be unjust, to allow the appellant, who stands in the shoes of the deceased, to repudiate the promise and exercise his legal right to possession. The defence of promissory estoppel has been made out, and accordingly, the plaintiff's claim, fails. I would dismiss the appeal.

FORTE, J.A.:

I have had the opportunity of reading in draft, the judgment of Patterson, J.A. (Ag.). I agree with his conclusion and the reasons therefor, and have nothing to add.

CAREY, P. (Ag.):

I agree. The appeal is dismissed. Judgment of the court below affirmed. Costs of appeal fixed at five hundred dollars ($500).