[2017] **JMSC Civ 111**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV05458

BETWEEN	**CLAUDETTE WHITE**	**CLAIMANT**
AND	**CYRIL MULLINGS**	**1ST DEFENDANT**
AND	**ELDRED MULLINGS**	**2ND DEFENDANT**

Mr. Vincent Chen & Ms. Sylvan Edwards instructed by Chen Green & Co. for the claimant.

Mr. Linton P. Gordon & Ms. Tamika Smith instructed by Frater, Ennis & Gordon for the defendants

November 26, 27 & 28, 2012, July 31, 2017

Whether claim limited to causes of action specifically pleaded– breach of contract– elements of contract– informal family arrangements– intention to create legal relations– presumption of fact– mutual love and affection–assurance by word or conduct– reliance– detriment– whether defendants' action unconscionable– unjust enrichment– restitution– receipt of benefit at claimant's expense– whether unjust to retain benefit– principles of equity– no agreement or promise made in writing– to what extent equity mitigates the rigours of the law

D. FRASER J

THE CLAIM

[1] On November 17, 2008 the claimant filed a claim whereby she sought to recover from her parents, the defendants, possession of a portion of their dwelling house previously occupied by her. She also sought an order for the transfer of the title to the property registered at Volume 1262 Folio 598 to her, as joint tenant with her mother, the existing registered proprietor.

[2] In the alternative, she claimed the sum of Four Million, Eight Hundred Thousand Dollars ($4,800,000.00) plus interest at 6% per annum, for work done in construction of the two storey house on the property by her.

[3] The claimant further sought a declaration that she is the equitable mortgagee by way of deposit of title deeds for the amount claimed and an order that the property be appraised, sold and the said amount with interest and cost be paid out of the proceeds to her.

[4] The main averments in the claimant's particulars of claim were that there was a verbal agreement between herself and her parents that she would provide them with financial assistance to re-construct their house on the understanding, that her name would be added to the Duplicate Certificate of Title as a joint tenant, which she would keep, and on completion she would be permitted to occupy a room in the house. She maintained that in pursuance of that agreement, from time to time she provided substantial sums of money to help the defendants with construction of the house and to pay for building materials.

[5] In their defence filed on April 1, 2009, the defendants agreed that the claimant assisted with the construction of the house, but contended that the property was always treated as family land and there was no agreement with the claimant regarding the construction of the house. Instead, the construction of the house

was done with the understanding of all family members that it was for the occupation by and improvement in the living accommodations of the defendants.

[6] The defendants also filed an ancillary claim/counterclaim on April 02, 2009, claiming damages against the claimant for detinue and conversion and/or trespass to goods, on the premise that she had taken and failed and/or refused to return the Duplicate Certificate of Title and a Deed of Indenture for the property. The 2nd defendant is registered as the sole proprietor on the Duplicate Certificate of Title whereas on the Deed of Indenture, the 1st defendant is recorded as the sole proprietor.

[7] On May 7, 2009, the claimant filed a reply and defence to counterclaim in which she contended that she had not wrongfully retained the property documents but rather held them as a chargee, requiring the defendants to repay her in full with interest the monies she expended to construct the house on the property, in exchange for the release of her interest in the property and the return of the documents.

[8] On March 30, 2012, the 1st defendant filed a notice of application for court orders, with supporting affidavit, seeking an order striking out the claimant's statement of case against him. The basis of this application was that the 2nd defendant is the sole owner of the property and the 1st defendant lives on the land with her permission. He was therefore not in a position to transfer title to the claimant.

[9] On May 25, 2012, the claimant's statement of case as against the 1st defendant in respect of a) claim for possession of the portion of the house formerly occupied by her; and (b) claim for the transfer of title in her name and/or the claimant to be registered as joint tenant in respect of the parcel of land registered at Volume 1262 Folio 598, was struck out by K. Anderson J.

ISSUES

[10] Six (6) issues arise for determination in this matter:

(i) Whether the claim is restricted to the causes of action specifically pleaded in the claim form?

(ii) Whether the court can rely on statements of witnesses who did not attend for cross-examination?

(iii) Whether a valid and binding agreement exists between the parties that was breached?

(iv) Whether there was an assurance given by the 2nd defendant to the claimant on which she relied and consequently acted to her detriment?

(v) Whether the defendants were unjustly enriched at the expense of the claimant?

vi) Whether if the claimant has no other remedy the court can construe an informal family arrangement in respect of the claimant's occupation of a room in the defendants' house?

SUBMISSIONS

[11] Counsel for the claimant submitted in summary that:

(i) She should be taken as a witness of truth as she gave her evidence in clear answers and did not attempt to embark upon long explanations or irrelevances;

(ii) The evidence of Mr. Lenford Clarke was significant and was a cornerstone of the claimant's contention that the 2nd defendant gave her the title with the intention of giving her an interest in the property. He was an independent person with no axe to grind and he should be

accepted as a witness of truth. Further, there was no evidence led by the defendants of a friendship between the claimant and Mr. Clarke and there is nothing in their case which could justify such a suggestion;

(iii) The claimant called as witnesses some of the persons who actually built the structure and supplied material for that purpose. Their evidence was clear and they were not discredited by cross-examination. If anything, it elicited evidence of their truthfulness. Even though the defendants did not have a chance to cross-examine Mr. White on his witness statement, (due to his illness at the time of trial), and the court must be careful about the weight to be given to it, the statement of Mr. Richard White should be accepted in its entirety as proof of the matters stated in it as they were matters that were not really contested;

(iv) The 2nd defendant very seldom gave a direct answer to a question on cross-examination and displayed the classic symptoms of a witness that was not being truthful, by her need to give lengthy explanations in her answers. She made profound statements in support of the claimant's case. She was evasive, argumentative and cantankerous in her responses and wherever her evidence conflicted with that of the claimant and her witnesses, it should not be relied upon. In those instances the evidence of the claimant and her witnesses should be preferred;

(v) No other evidence was led for the defendants. Although two of the sons filed witness statements they were not called as witnesses nor was there any attempt made to admit their witness statements as hearsay. The contents of those witness statements as well as the 1st defendant's witness statement cannot be referred to nor relied upon by the court;

(vi) The court should, on a balance of probabilities, find that the claimant spent $4,800,000.00 on the construction of the house and that the replacement value of the building in 2008 was $8,200,000.00;

(vii) That a valid and binding contract subsisted between the claimant and the defendants and should be enforced by the court directing that they should complete the performance of that contract by putting the claimant's name on the Title and the Indenture;

(viii) If the court was of the view that it could not order the transfer of the title and indenture as prayed, then the court should exercise its equitable powers to prevent the defendants from unjustly and unfairly keeping the benefit of the expenditure of the claimant's funds without compensation to her;

(ix) That the defendants actively encouraged the claimant to improve their property and quality of life knowing that she was doing so in the belief that they would permit her to occupy one room in the house and put her name on the Title and the Indenture. In these circumstances, she mistakenly improved the defendants' property and they acquiesced in this. The claimant had also suffered a detriment by expending her money and spending her time to improve the defendants' asset and quality of life and this should be determined at the date the defendants reneged on the assurances they gave to her. In these circumstances, there was fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it;

(x) In the instant case the claimant had performed her part of the arrangement but there had been a total failure on the part of the defendants. This honourable court should allow her claim in restitution. The claimant's improvements have clearly been beneficial to the defendants and it would be unconscionable for the defendants to

benefit wholly from the claimants expenditure to her detriment. In this case, the defendants' enrichment is prima facie, an unjust enrichment. Therefore, this was a case for which the court should find that the claimant was entitled to the relief as pleaded.

[12] Counsel for the defendants on the other hand submitted that:

(i) The claim form contains no claim for breach of contract nor is there a claim for proprietary estoppel. Therefore the claim should be restricted to recovery of possession and the claim for the sum of $4,800,000.00;

(ii) The claimant's evidence is a clear rejection of a contract being formed between the parties. It cannot be said that the claimant entered into a contract with the defendants or that it was in the minds of or intention of any of the parties that the assistance to be given by the claimant was being done with an intention to create legal relations between the parties;

(iii) The evidence given by the claimant, specifically that "*she was the one who took the initiative in relation to the construction of this house and that she contributed towards the construction of the house out of love and affection for her parents. That further she volunteered to assist as a loving child with deep love and affection for her parents and owning the house was never in her mind when she commenced assisting them",* gives the court no basis on which to ground proprietary estoppel or unjust enrichment;

(iv) The equitable doctrine of proprietary estoppel by way of mistaken belief is only applicable when the claimant can prove that the defendant was aware that she had acted in reliance on the mistaken belief, that the defendants acquiesced to her acting in this way, and in their

acquiescence abstained from “setting her right” so as to benefit from the mistake;

(v) There was no agreement, assurance or encouragement by the defendants to the claimant that she would be given an interest in the property. This instant case is wholly distinguishable from that of ***Gillett v Holt*** [2001] 1 Ch D. 210, on which the claimant relies. In the present case, the defendants deny making any promises to the claimant at all and as held in ***Gillett v Holt***, *“it is necessary to look at the claim in the round”;*

(vi) Proprietary estoppel requires that there be an assurance made to the claimant, on which the claimant reasonably relied and expended money in reliance on that assurance. The claimant has not passed the test in establishing the relevant assurance given. Further, the claimant’s evidence is woefully deficient in establishing that she had suffered detriment. The detriment cannot be categorized as substantial and unconscionable, given the circumstances of the case and the evidence that has been adduced under cross-examination. As such having failed to establish that the defendants had, in fact, made assurances to her and that she had relied upon these assurances and acted to her detriment, the claimant’s claim for relief on the basis of proprietary estoppel must be rejected;

(vii) The claimant cannot be accepted as a credible and truthful witness. Further, the version of the claimant’s evidence that she got the title to secure her monies being spent on constructing the house with the intention to put her name on it, should be rejected as unreliable, untrustworthy and in fact untrue. Mr. White’s hearsay evidence ought to be rejected and ought to be seen as further contradiction of the case for the claimant. Mr. Clarke is neither a reliable nor a truthful witness and the evidence of Mr. Rohan Henry and Mr. Franklyn Dixon were not in

any way helpful and/or valuable in determining the factual situation between the parties. Mr. Baugh's evidence should not be relied on because he ended his cross-examination by admitting that his account and the account of the claimant were mixed and that being the case, there would be a danger to rely on such evidence;

(viii) The evidence given by the claimant and her witnesses therefore cannot establish any contractual relationship between the parties and cannot by any remote possibility establish any liability on the part of the defendants. The claimant has not proven the particulars required to establish either a contract between the parties, proprietary estoppel, or unjust enrichment;

(ix) The 2nd defendant gave one and only one version as to how possession of the Title came to pass to the claimant. This is important, as the claimant gave two (2) versions of how she came into possession of the Title. The court should have no difficulty finding the 2nd defendant to be very advanced in age but that she was able to recall with clarity the sequence of events leading up to the claimant laying hold of her land title. The evidence of the 2nd defendant that all funds were sent to the claimant, the coordinator of the project, was credible and on a balance of probabilities should be believed in preference to the evidence of the claimant. In total the case of the defendants is more believable than that of the claimant;

(x) The claimant's claim for restitution is untenable on the basis of claiming unjust enrichment in these circumstances. The pre-requisite for granting this remedy was the ability of the claimant to establish that the benefit enjoyed by the defendant was unjust. This was not a matter to be simply inferred but had to be proved by the asserter to the ordinary civil standard of proof, in a context where awarding the remedy would do justice between the parties. In the alternative to a finding of unjust

enrichment through an act of fraud, the claimant was asking the court to find unjust enrichment where the consideration totally fails. This argument should be rejected on the basis that there was never an agreement between the parties; consequently, there was no privity of contract and thus consideration in this case does not arise;

(xi) It is well established that in claims of debt or simple contract verbal acknowledgements or promises without more are insufficient. There was no verbal contract between the parties and in alleging that there was such a contract, the claimant is unable to show that the circumstances of this case exempts the applicability of the **Limitation of Actions Act** so as to make the contract enforceable;

(xii) The claimant has failed to establish in contract or in equity that the defendants by their words or deeds entered into an agreement with her to give her an interest in the said land in exchange for constructing a dwelling house on their land. Judgment should be given for the defendants on the claim and counterclaim and it should be ordered that the claimant return forthwith the Duplicate of Certificate of Title belonging to the 2nd defendant and all other relevant documents to the defendants. Failure to so do should result in the claimant being held in contempt of court with a penalty of imprisonment.

DISCUSSION AND ANALYSIS

ISSUE 1: WHETHER THE CLAIM IS RESTRICTED TO THE CAUSES OF ACTION SPECIFICALLY PLEADED IN THE CLAIM FORM?

[13] An appropriate starting point is an examination of the contention by counsel for the defendants that the claimant's claim should be limited to recovery of possession and the claim for the sum of $4,800,000.00 because there was no claim in the claim form for any breach of contract nor was there a claim for proprietary estoppel by the claimant.

[14] While the claimant has not expressly pleaded in her statement of case claims for breach of contract and/or proprietary estoppel, on a careful reading of her witness statement and that of her witnesses, those contentions are patent.

[15] In ***Akbar Limited v Citibank NA*** [2014] JMCA Civ 43, Phillips J.A. considering the issue of whether the defendant had specifically pleaded and proven his claim for special damages, observed at paragraph 64 that:

> [T]he important point is that the defendant must not be taken by surprise. The defendant is entitled to know the type of claim being made by the claimant and the amount that is being claimed. However, as stated by Harris JA in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe**, SCCA No 5/2009, judgment delivered 2 July 2009, endorsing Lord Woolf's judgment/dicta in **McPhilemy v Times Newspaper**[1999] 3 All ER 775, once the general nature of a claim has been pleaded, if the witness statements are exchanged those statements may supply particulars of a claim. There is thus no longer the need for extensive pleadings. They are not superfluous, they are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet. In **Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines** Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paras [43] and [44] also endorsed the principles declared by Lord Woolf and stated: "[43] … therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case. [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings…

[16] It appears therefore that the concern of the court is to ensure that the defendant knows the case that he has to meet. The pleadings serve to establish the parameters of such a claim and the issues which arise. The witness statements and other documents should thereafter provide the details and particulars in relation to that claim.

[17] It is a fact that in the instant case a specific claim for breach of contract was not contained in the claim form, nor was such a claim particularised in the particulars of claim. What was pleaded in the claim form was the claim for the sum of $4,800,000.00 for work done in construction of the house by the claimant, pursuant to a verbal agreement. She further pleaded in her particulars that she provided financial assistance to construct the house in reliance on an agreement, understanding and an undertaking that her name would be recorded on the title.

[18] The general parameters of her claim were therefore set out in her pleadings which established the essence of the claimant's statement of case — that there was a verbal agreement between the parties which was breached. The details of the alleged agreement and its breach were outlined in the witness statements in support of her case. Those statements also made it pellucid that the claimant's contentions were that, i) she had expended significant sums of money to her detriment, ii) the defendants had obtained a benefit thereby and accordingly, iii) she was entitled to the appropriate equitable remedy.

[19] In these circumstances the defendants cannot successfully contend that there were insufficient pleadings. The documents when taken together support a claim for proprietary estoppel and/or unjust enrichment and/or breach of contract. The claims the defendants had to meet were obvious when the pleadings and the witness statements filed on behalf of the claimant were read together.

ISSUE 2: WHETHER THE COURT CAN RELY ON STATEMENTS OF WITNESSES WHO DID NOT ATTEND FOR CROSS-EXAMINATION?

[20] Mr. Chen, counsel for the claimant submitted that although the 1st defendant and two of the defendants' sons filed witness statements they were not called as witnesses, nor was there any attempt to have their witness statements admitted as hearsay under the **Evidence Act**. As such, the contents of those witness statements could not be referred to, nor relied upon by the court.

[21] **Part 29.8(1)** of the **Civil Procedure Rules** provides that:

> Where a party - (a) has served a witness statement or summary; and (b) wishes to rely on the evidence of the witness who made the statement, that party must call the witness to give evidence unless the court orders otherwise or it puts the statement in as hearsay evidence.

[22] Based on that rule, subject to the court ordering otherwise or the admission of a witness statement as hearsay evidence, where there is an intention to rely on a witness statement as evidence, the maker must attend court to give evidence. Otherwise the witness' statement cannot be admitted into evidence nor can it be relied upon. The following persons provided witness statements but did not attend and give evidence at trial: Emanuel Dixon, Richard White, Cyril Mullings Sr., Cyril Mullings Jr. and Winston Mullings.

[23] Except in respect of the witness statement of Richard White, there were no applications made to admit the other witness statements as hearsay evidence nor was any other court order sought. Therefore, the witness statements of Emanuel Dixon, Cyril Mullings Sr., Cyril Mullings Jr. and Winston Mullings have been disregarded by this court.

[24] The witness statement of Mr. Richard White was admitted as hearsay evidence pursuant to **s. 31E(1)**of the **Evidence Act** which provides that:

> Subject to section 31G In any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.

[25] Counsel for the claimant submitted that even though the defendants did not get an opportunity to cross-examine Mr. White and the court must be careful about the weight to be given to his statement, it should be accepted in its entirety as proof of the matters stated in it, as they were matters about which there was really no contest.

[26] In **The Modern Law of Evidence** by Adrian Keane, 7th Ed., p. 29 it is stated that *"The weight of evidence is its cogency or probative worth in relation to the facts in issue"*. In the case of hearsay evidence, the assessment of its weight depends on all the circumstances from which inferences can reasonably be drawn as to the accuracy or otherwise of the out-of-court statements. The importance of cross-examination as a vital tool for exposing weaknesses in and assessing the cogency of evidence is axiomatic. Therefore, in determining the weight, if any, to be accorded to the statement of Mr. Richard White, the fact that his evidence was untested by cross-examination, will be a central consideration.

ISSUE 3: WHETHER A VALID AND BINDING AGREEMENT EXISTS BETWEEN THE PARTIES THAT WAS BREACHED?

[27] The claimant contends that a valid and binding contract subsists between her and the defendants that should be enforced by the court. The defendants on the other hand maintain that it cannot be said that the claimant entered into a contract with them or that it was in the minds of or intention of any of the parties that the assistance to be given by the claimant was being done with the intention to create legal relations.

[28] In ***Keith Garvey v Ricardo Richards*** [2011] JMCA Civ 16, Harris JA stated at paras. 10 -12 that:

> It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.
>
> Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded

> that the parties intended to create a legally binding contractual relationship. In **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG UK** (Production) 2010 3 All ER 1 Lord Clarke, at paragraph 45, describes the applicable test to be as follows:
>
> 'Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.'
>
> The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.

[29] In that case, the respondent sued the appellant for breach of contract on the premise of an agreement whereby he agreed, among other things, to coach players for the national team, assist at tournaments for which the defendants, one of whom was the appellant, would pay him. He however never received any payment. This agreement he alleged was made in a conversation he had with the appellant about conducting the training of junior and senior table tennis players on behalf of the Jamaica Table Tennis Association. The learned Resident Magistrate accepted that there was a binding contract and ruled against the appellant. On appeal however, it was observed at paras. 14-16 that:

> In the case under review, the performance of an obligation is at the heart of the dispute between the parties. Even if there was an arrangement between the parties for the respondent to undertake the training of persons to participate in the table tennis tournaments, the terms of such arrangement are vague…the respondent stated that he performed the services upon which the parties agreed but there is nothing to show that the parties had agreed upon a specific period during which the

> respondent should carry out the services which he said he had done over a two year period. Further, there is no evidence that a fixed amount was agreed upon as to the respondent's remuneration…further, there is no evidence that there was any arrangement with the respondent for the use of the JTTA"s facilities…

[30] Further at para. 19 it was stated that :

> Even if there had been negotiations or discussions between the parties, the evidence does not reveal that these led to a binding and enforceable contract between the parties. No definitive terms had been negotiated which would have had a contractual effect. It cannot be said that, as legally required, all essential terms had been agreed on. There being no agreed terms, there is nothing to show that the parties intended to create legal relations. Any discussions between them cannot be taken higher than pre-contractual negotiations contemplated by them to enter into a binding agreement…

[31] **In Cheshire, Fifoot and Furmston's Law of Contract**, 15th Ed., p. 142 the learned author Michael Furmston also makes it clear that:

> It is therefore contended that, in addition to the phenomena of agreement and the presence of consideration, a third contractual element is required- the intention of the parties to create legal relations.

[32] It is trite law that a valid offer and acceptance constituting an agreement, consideration and an intention to create legal relations are the three fundamental elements of a contract. It is important to make two further observations: ***1)*** the onus of proving that there was a legally binding agreement is on the person who makes the assertion. In this instance, it is the claimant who must prove that on a balance of probabilities, there was an agreement for which consideration was given by the parties with the intention of creating legal relations; ***2)*** in arrangements made between close relations, there is a presumption that persons do not usually intend to create legal relations. Such a presumption is however rebuttable.

[33] In ***Jones v Padavatton*** [1969] 2 All ER 616, Salmon LJ opined at p. 621 that:

> Counsel for the mother has said, quite rightly, that as a rule when arrangements are made between close relations, for example, between husband and wife, parent and child or uncle and nephew in relation to an allowance, there is a presumption against an intention of creating any legal relationship **This is not a presumption of law, but of fact. It derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection. This has all been explained by Atkin LJ in his celebrated judgment in Balfour v Balfour([1919] 2 KB 571 at pp 578–580; [1918–19] All ER Rep 860 at pp 864, 865). There may, however, be circumstances in which this presumption, like all other presumptions of fact, can be rebutted.**(Emphasis added)

[34] In ***Jones v Padavatton***, the appellant sought recovery of possession of a house she owned in England. She had agreed with her daughter that as consideration for her daughter pursuing her legal studies, she would allow her daughter to occupy the house and use the rent income received from the house as maintenance. At p. 620 Danckwerts LJ stated:

> I have reached a conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. **Balfour v Balfour** was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother.

[35] The question in the instant case is whether the claimant has rebutted the presumption that the facts disclose no more than one of those family arrangements that depends on mutual trust and affection grounded in family ties. The words and conduct of the parties in the circumstances must be assessed objectively to determine whether the true inference is that the ordinary man and woman, speaking or writing as they did in such circumstances, would have intended to create a legally binding agreement.

[36] In the instant case, there is no doubt that there was an arrangement between the parties for a house to be built and an assessment of the facts may very well reveal appropriate consideration. The evidence of the claimant on cross-examination was however that she contributed towards the construction of the house out of love and affection for her parents, as she stated that **"*the condition they were in, in that leaky house reached her heart*".** She specifically stated that she volunteered to assist as a loving child with deep love and affection for her parents and that she understood the meaning of volunteer. Perhaps even more importantly, she was adamant that owning the house was never in her mind when she commenced assisting them.

[37] It is undisputed that prior to the construction of the house the subject of this litigation, the defendants lived in a board house that was dilapidated. It is also unchallenged that some construction material had been purchased long before 2005 when construction commenced. The claimant did not assert that she made any contribution to the purchase of these initial materials and the 2nd defendant stated that they were purchased by her sons, amongst others. She said that she was awaiting her sons' assistance but the claimant approached her first.

[38] The facts therefore seem to support a conclusion that the house was built in a context where children were moved by the poor living conditions of their parents and out of love and affection, sought to improve those conditions by undertaking to build a home. Those circumstances the court finds did not evoke an intention to create legal relations. Accordingly the presumption of a mere arrangement inspired and actuated by love and affection has not been rebutted by the claimant.

ISSUE 4: WHETHER THERE WAS AN ASSURANCE GIVEN BY THE 2ND DEFENDANT TO THE CLAIMANT ON WHICH SHE RELIED AND CONSEQUENTLY ACTED TO HER DETRIMENT?

The Doctrine of Proprietary Estoppel

[39] In ***Annie Lopez v Dawkins Brown and Glen Brown,*** [2015] JMCA Civ 6, Morrison J.A. (as he then was), stated at paras. 68-73 that:

> The modern law of proprietary estoppel is aptly summarised by the authors of **Gray & Gray** in this way (at para. 9.2.8): "A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:
>
> • representation (or an 'assurance' of rights)
>
> • reliance (or a 'change of position') and
>
> • unconscionable disadvantage (or 'detriment').
>
> An estoppel claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are inter-dependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn."
>
> As will be seen, the notion of unconscionability of some kind is central to this and other formulations of the principle. However, Lord Scott's important judgment in **Yeoman's Row Management Ltd and another v Cobbe**, to which Mr Williams referred us, sounds an important caution (at para. 16) against allowing unconscionability to take on a life of its own:
>
> "My Lords, unconscionability 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, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a 'proprietary estoppel equity' as

requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion."

Further, Lord Scott continued (at para. 28): "Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be 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."

Attorney-General of Hong Kong and another v Humphreys Estate(Queen's Gardens) Ltd [1987] 2 All ER 387, to which Mr. Williams also referred us, also makes it clear that it is important in every case in which a claim based on proprietary estoppel is made to have regard to the particular facts of the case. In that case, a written agreement, expressed to be "subject to contract", for the purchase of development property had been signed. The agreement stated that the terms could be varied or withdrawn and that any agreement was subject to the documents necessary to give legal effect to the transaction being executed and registered. It was therefore clear that neither party was for the time being legally bound. However, the intended purchaser was permitted to take possession of the property and to spend money on it. Subsequently, the owners of the property decided to withdraw from the transaction and gave notice terminating the intended purchaser's licence to occupy the property.

The intended purchaser's claim to the property based on proprietary estoppel failed because, given the terms of the agreement between the parties, it had chosen "to begin and elected to continue on terms that either party might suffer a change of mind and withdraw" (per Lord Templeman, delivering the judgment of the Privy Council, at page 395). As Lord Scott later explained (at para. 25) in **Yeoman's RowManagement Ltd and another v Cobbe**, "[t]he reason why, in a 'subject to contract' case, a proprietary estoppel cannot ordinarily arise is that the would-be purchaser's expectation of acquiring an interest in the property in question is subject to a contingency that is entirely under the control of the other party to the negotiations...The expectation is therefore speculative" (see also the earlier case of **Gillett v Holt** [2001] Ch 210, 228, where Robert Walker LJ described **Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd**as "essentially an example of a purchaser taking the risk, with his eyes open, of going into

> possession and spending money while his purchase remains expressly subject to contract").
>
> Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity. And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action.

S. 46 of Limitations of Actions Act

[40] This outline of the doctrine of proprietary estoppel has to be viewed in the context of the submission by counsel for the defendants that it is well established that in claims of debt or simple contract, verbal acknowledgements or promises without more are insufficient. Counsel submitted that there was no verbal contract between the parties and in alleging that there was such a contract, the claimant is unable to show that the circumstances of this case exempted the application of the **Limitation of Actions Act** so as to make any such contract enforceable.

[41] Lord Denning MR in the case of ***Crabb v Arun District Council*** [1975] 3 All ER 865, at p. 871 indicated that:-

> The basis of this proprietary estoppel—as indeed of promissory estoppel—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. If I may expand that, Lord Cairns said in Hughes v Metropolitan Railway Co ((1877) 2 App Cas 439 at 448, [1874–80] All ER Rep 187 at 191): '… it is the first principle upon which all Courts of Equity proceed … ' that it will prevent a person from insisting on his strict legal rights—whether arising under a contract, or on his title deeds, or by statute—when it would be inequitable for him to do so having regard to the dealings which have taken place between

> the parties. What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—even though that promise may be unenforceable in point of law for want of consideration or want of writing—and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see Central London Property Trust v High Trees House, Charles Rickards v Oppenheim ([1950] 1 All ER 420 at 423, [1950] 1 KB 616 at 623). 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. In Ramsden v Dyson ((1866) LR 1 HL 129 at 170) Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged.

[42] This authority indicates that equity mitigates the rigours of the strict law and a defendant who has given the claimant a promise and/or assurance, that is not in writing pursuant to the statute, will not necessarily be excluded from the principles of equity. Equity will examine the words or conduct of a party and if, on an assessment of all three elements of the doctrine of proprietary estoppel, it is found that the defendant has acted unconscionably, equity will intervene and prevent him from utilizing the rigours of the law to renege on his promise. It falls to be determined therefore whether in the instant case all the three elements of the doctrine of proprietary estoppel can be established.

[43] Counsel for the claimant contended that the defendants assured the claimant of an interest in the property and in reliance on that assurance, she expended her time and resources in constructing the house and is now suffering a disadvantage as the defendants have unconscionably reneged on their promise.

[44] Counsel for the claimant also submitted that it is an established equitable principle that equity is concerned to prevent unconscionable conduct and this consideration permeates all the elements of the doctrine. Counsel relied on the decision of Robert Walker LJ in ***Gillet v Holt*** [2001] 41 CH 210 at p.232 where his lordship stated that:

> The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.

[45] There is no doubt that unconscionability is central to the doctrine of proprietary estoppel. The law is clear and indeed, it is where the actions of the landowner is such that it would be unconscionable for him to assert his proprietary entitlement or not to transfer title, that an equitable estoppel (proprietary estoppel) may arise to prevent him from enforcing or relying on his legal rights, once certain conditions are fulfilled.

[46] ***Annie Lopez*** however makes it clear that unconscionability in and of itself will not ground a cause of action for proprietary estoppel. The claimant in the instant case must first establish that she was given an assurance which created a clear expectation of an interest in the property, in reliance on which she altered her position by expending her time and resources. It is then that, if proven, the fact that she has suffered a disadvantage, occasioned by the 2nd defendant unconscionably failing and/or refusing to honour the assurance, becomes relevant.

Was there a Representation made by the 2nd defendant that created in the mind of the claimant a clear expectation of an interest in the property?

[47] The question is whether the 2nd defendant through her words and/or conduct assured the claimant of a legal interest in the house and/or property. In

Annie Lopez, Morrison J.A. adopted the view that a representation is present only if the representor intended his assurance to be relied upon.

[48] The claimant stated that once it was discovered that the house could not be repaired, the defendants agreed that the only alternative was to build a new one. As they did not have the money, they asked her to assist. The 2nd defendant then told her that if she assisted them, they (both defendants) would place her name on the title but in the meantime, they would give her the duplicate certificate of title for the property as a security for the money she had to spend, until her name was placed on the title as a joint tenant with the 2nd defendant.

[49] She however also gave another version concerning how she came into possession of the title documents. She also indicated that in 2006, she was having difficulty financing the continued construction of the house which began in 2005, as it was costing more than she expected. This information was relayed to the 2nd defendant who then said that the claimant was the only one financially assisting her and gave her the title as previously arranged. That same day they went to Mr. Clarke's store in Santa Cruz to purchase forms to put her name on the title.

[50] On cross-examination, she maintained that the arrangement was for her name to be placed on the title. However, she testified that she was given the title from 2005 and in 2006, the 2nd defendant attempted to put her name on the title. She further admitted that it was not true that she got the title on the same day they left to buy the forms, as she had received the title prior thereto. The 2nd defendant in response was adamant that there was no agreement between her and the claimant for the claimant to obtain an interest in the house and/or for her to have one of the rooms. The 2nd defendant also denied that she gave the title to the claimant as security for her assistance. Rather she stated that her children pooled their resources together to assist with the construction of the house and sent money to the claimant. The claimant she said was the one who took the

lead in organizing the construction and renovation as she was the most capable one with business sense and the only one here.

[51] The 2nd defendant recalled that in or about 2006 or sometime after the construction of the house had begun, the claimant asked to be allowed to look at the title. She handed it to her and the claimant went into the room in which she stayed when she visited. She heard the claimant talking to someone as though she was on the telephone and then exited the room and informed her that she had an important appointment early the next morning in Ocho Rios and eventually left that same night, even though she (the 2nd defendant) had suggested that she leave very early the next morning. She did not permit the claimant to take away the titles nor was she aware that when the claimant left that night she took both the Duplicate Certificate of Title and the Indenture for adjoining lands owned by the 1st defendant.

[52] This court does note however that in para. k of her defence, the 2nd defendant contended that the claimant requested to see the title and the indenture and thereafter, stated that she needed time to review the documents and would return them the following day, after she had concluded her business in Ocho Rios but had failed to do so. That would indicate that not only was the 2nd defendant aware that the claimant took the title and the indenture but may have given her permission, if only for a brief period, to do so.

[53] On cross-examination, she reiterated that although the claimant was the one who initiated the building of the house, she did not offer to give the title to her for helping her to build the house nor did she give her the title to hold so as to put her name on it. She further stated that the claimant never told her that she was short on money or her funds were being exhausted but she did state that if she wants the title, she would have to get a lawyer.

[54] She gave further evidence that material was purchased and put down from 1995 to build around the house which they then occupied. In her defence filed, she had

stated that this material was purchased by two of her sons but on cross-examination she admitted that it was not only her two sons who purchased the material.This could mean that her husband and herself and/or the claimant and/ or her other children made a contribution to the purchase of these materials. According to the 2nd defendant, it was the first material the masons used on the house in question and none of it was spoilt.

[55] The claimant and her witness Mr. Rohan Henry also concurred with the fact that there was material on the property prior to the start of construction and that some of that material was used in constructing the house. Mr. Henry stated that they did not use the marl or about 50% of the blocks on the building but the rest of the material, which included about 20 lengths of steel and a half load of stone, were used. The claimant testified that there was a small amount of blocks, marl and steel there but the blocks and marl had become unusable and eventually had to be used to dump up the building. The steel was less than a quarter ton and was used in the building.

[56] The 2nd defendant further denied that she had said that the claimant was the only person who could manage to do the house and that she was the only one who built the house. She stated on cross-examination that when the claimant got involved, the claimant knew that she (the 2nd defendant) was waiting on her sons for 10 years and that her sons had the ability to finance the construction of the building. The claimant however came to her before her son did in early 2005.The claimant knew that the 2nd defendant wanted to build around the initial board house but stated that it would not look good and that she was going to raise the house behind the board house so they could live a good life before they died.

The Decision to Replace rather than Repair

[57] The claimant gave evidence that after the plans were prepared, Mr. Rohan Henry went to Elderslie, inspected the board house and found that it could not be repaired. It was not safe to go on the roof, as everything was rotting and

unsafe. She had therefore done the right thing in arranging the plans. This conversation is however unaccounted for in Mr. Henry's evidence. He agrees that he and Mr. Glendon Clarke prepared the plans, but does not state that he found the board house to be irreparable. He did however state that he did not recall the details of the conversation word for word but rather in context. He testified that when he was to commence the work there was a meeting amongst himself, the claimant and the 2nd defendant and it was agreed that a house would be built and where he would stay.

[58] In response to the suggestion that when Mr. Henry looked at the board house, he said it could not be repaired, the 2nd defendant stated that she and Mr. Henry had no argument about her board house and repair. She testified that he and the claimant came and measured the place where the house was going to be built but he never came to do anything to her house. He never came on business to fix board; the claimant came to line out the new house, she further testified.

[59] In her defence the 2nd defendant agreed that the board house which was built sometime between 1972 and 1973 had over time become dilapidated and uninhabitable. Furthermore, she averred that the board house was severely damaged in 2005 by hurricane Katrina. However on cross-examination, she said that she did not know about Katrina damaging the house, but she knew about Dean. Interestingly, the claimant however also disagreed with the suggestion that the board house was destroyed by hurricane Katrina in 2005.The 2nd defendant also said that the house was leaky and the time had come to change. Mr. Franklyn Dixon also gave evidence that the house was leaking and in one room, the roof and floor caved in. The 2nd defendant however denied that in 2005, early one morning she called the claimant crying and told her that she had not slept all night as it was raining and she had to be bailing water out of the house.

[60] It seems clear that from 1995, the defendants thought it necessary, at the very least, to make an addition to the then existing board house. That is why the materials were purchased, on the 2nd defendant's evidence by persons, who

included her sons. It was the evidence of Mr. Franklyn Dixon, one of the claimant's witnesses that the house was already lined out when he got there and with this evidence the claimant has not disagreed. The 2nd defendant testified that there was material on the ground used to build the bottom of the house, only cement was not there. Indeed, in 2005 some, if not all of this material still remained and was used by the parties in the construction of the house.

[61] What is also clear is that the board house the defendants occupied was affected by a hurricane in 2005, and by then the board house was not in the best condition. The 2nd defendant did say the house had become uninhabitable. Further, she admitted on cross-examination that water came into the house through the solitex where the bathroom was joined to the board and got under the bathroom floor board and rotten it. In all the circumstances therefore, it appears to be beyond doubt that the board house had become severely dilapidated and was in need of urgent repair or replacement.

The Alleged Visit to Mr. Clarke's Store

[62] The claimant testified that both herself and the 2nd defendant went and spoke to Mr. Lenford Clarke, owner of LC Stationery & School Supply at his business place and the 2nd defendant told him, in her presence, that she wanted a form to put the claimant's name on the title as a joint tenant as she alone was building a house for her. The claimant contended that the 2nd defendant purchased the forms from Mr. Clarke but never signed them as they needed to be signed in the presence of a Justice of the Peace (J.P.) and she did not have the time then to fill out the form or visit a J.P. In any event, the claimant testified that she did not think it was urgent as she expected her parents to honour their word. She therefore kept the duplicate certificate of title as her security for the money she was spending, as was agreed between her and her parents.

[63] Mr. Clarke's evidence in that regards was that sometime in 2006, the claimant and the 2nd defendant visited his business place one Thursday afternoon; it was

the first time he was seeing them. The 2nd defendant identified herself and the claimant, as her daughter. She then told him that she had come to purchase a deed of gift form and that she wanted to put the claimant's name on the title, as the claimant was returning to the '*states'* and she wanted to add her name to the title before she left. She also told him that the claimant was the only one who took care of her, gave her money, visited her regularly and was building a house for her in Cook Bottom, St. Elizabeth. He further indicated in his statement that he did not have any of the forms but realizing the urgency of the matter, he took money handed to him by the 2nd defendant went and purchased two (2) copies of the forms. On his return, he handed the forms and the receipt to the 2nd defendant.

[64] On cross-examination, he further intimated that knowing the importance, he left them in the store and went just across the road and bought the forms for them from a neighbouring store. They then left his store and they did not sign in his presence. He however also said that he could not recall who he took the money from but that when he bought the forms the claimant reimbursed him. He stated that it would not be true that he sold the forms to the 2nd defendant as it was the claimant who gave him the money. However thereafter, he again stated that it was the 2nd defendant from whom he received the money (cash) to purchase the said forms.

[65] The 2nd defendant on the other hand denied that she went to the store with the claimant to get the forms and stated that she did not know about paying for the forms.

[66] There is no doubt that the alleged visit to the shop and subsequent happenings thereat are important because if, as the claimant and her witness maintained, the 2nd defendant visited the shop and indicated that she wanted to place the claimant's name on the title and bought the deed of gift forms, then that conduct and the accompanying words could amount to a clear act of assurance which would have given rise to a very clear expectation.

[67] In ***Thorner v Major and Others*** [2009] 3 All ER 945, Lord Walker of Gestingthorpe opined at paras 56-57 that:

> [T]o establish a proprietary estoppel, in a particular case, the relevant assurance had to be clear enough. What amounted to sufficient clarity was dependent on context… The promise had to be unambiguous and had to appear to have been intended to be taken seriously. Taken in its context, it had to have been a promise which one might reasonably expect to be relied on by the person to whom it had been made…It looks backwards from the moment when the promise fell due to be performed and asked whether, in the circumstances which had actually happened, it would be unconscionable for the promise not to be kept...

[68] In ***Thorner*** the defendant began to help his cousin at his farm in 1976 without remuneration. The defendant developed an expectation that he would inherit his cousin's farm, when in 1990 the cousin handed him a bonus notice on two life assurance policies and said 'that's for my death duties'. That remark and conduct on the cousin's part strongly encouraged the defendant. In 2005, the cousin died intestate and his personal representative sought not to honour the expectation of the defendant. The court at first instance held that it was reasonable for the defendant to understand such remarks by the cousin and rely on them in that way. It ordered that the defendant should receive the land, buildings, live and dead stock and other assets of his cousin's farm. The claimant appealed against the decision, which was allowed by the Court of Appeal. The defendant appealed to the House of Lords which allowed the appeal upholding his interests in the property based on his expectation.

[69] If the 2nd defendant had gone to the extent of purchasing deed of gift forms and sharing her intentions with a stranger (Mr. Clarke), then that would be tantamount to an unambiguous promise which could be relied on by the claimant. The submission of the learned counsel for the claimant was that Mr. Clarke was an independent witness. Mr. Clarke himself testified that he did not "have an axe to grind." A careful examination of his evidence is however very revealing.

[70] Although he maintained that on the occasion of the claimant and 2nd defendant's visit to his shop was the very first time he was seeing them, he was able after six (6) years to recall the full names of both parties and where the house was built. He testified that because he likes to cook, he remembered the location of the house. He could not recall when after 2006 he saw the claimant but stated that in 2009 he saw her at Mr. Chen's office, when he went there to do his statement. However, he was unable to recall when he was contacted by the claimant to give a statement as according to him, he has a lot of details on his mind, but he remembered the details about purchasing the forms, as that was a simple matter.

[71] Finally, he disagreed with the suggestions that he was lying for the claimant; that the 2nd defendant never came to him to purchase any form; that at no time did the 2nd defendant go to him and state that the claimant was looking after her and building a house for her; and that his story was a concoction. He further denied that his witness statement was unreliable and untrustworthy and that the matter was important to him as he was supporting his friend. He stated that he and the claimant never discussed his statement.

[72] I carefully observed Mr. Clarke's demeanour when he was giving his evidence. I found his demeanour unconvincing and his evidence too convenient. He remembered the details surrounding the request for and his procurement of the forms very clearly including that this all took place on a Thursday afternoon, but was hazy on most other things. Also it is curious why having just met the claimant and her mother for the first time, he would take the time to go across the road to purchase the forms for resale to them, rather than just sending them across the road to buy the forms themselves. I find Mr. Clarke to be an unreliable witness and I do not accept his evidence or that of the claimant on the issue of the purchase of deed of gift forms.

[73] Having considered all the circumstances I accept the evidence of the 2nd defendant that there was no such visit and no purchase of deed of gift forms. The claimant is therefore unable to rely on any such forms to establish a clear

representation in her favour that the 2nd defendant indicated to her an intention to add her name on the Title as a Joint Tenant.

The Hearsay Evidence of Richard White

[74] Richard White, the claimant's husband and witness said that from the commencement of the construction in 2005, he would accompany his wife to the construction site at the property. In 2006, he became aware that his wife was short on money to do the plumbing and installation of windows and doors and he volunteered his services, as he is a plumber and carpenter.

[75] The 2nd defendant on cross-examination initially denied that the claimant and her husband came to look on the house but subsequently admitted that he came there with the claimant and the workmen. She further stated that she knew Richard would come there sometimes but not often nor regularly. He would come just a day to her house but he did not stay overnight. She also said that she did not know that he was a plumber. She testified that she was there throughout the whole construction and she never saw him do any plumbing or construction work but she also admitted that she did not know who did the plumbing work.

[76] As previously indicated, this court is acutely aware of the fact that the evidence of this witness was not subjected to cross-examination and that he is the husband of the claimant. Other than his evidence, there was no other evidence offered by the claimant regarding who did the plumbing work on the house. It is also observed that the claimant in her evidence referred to a carpenter, masons, a tiler and painter but nowhere in her evidence does she indicate that Mr. White, her husband did the plumbing work on the house. This could however be an oversight.

[77] Even so, none of her other witnesses refer to seeing him or being assisted by him, although Mr. Henry acknowledged that he was assisted by the 1st defendant and his grandson, Andre. Even if he did the plumbing work, being family himself that would not in any way affect the analysis which concluded that there was no

intention for contractual relations to be entered into. Also his work would not in and of itself suggest that the 2nd defendant had made any representation to the claimant that would form the foundation of a claim for proprietary estoppel. I find therefore that the evidence of Richard White does not add any weight of significance to the claimant's case.

How the Title Documents came into the Possession of the Claimant

[78] The claimant's evidence regarding how she came into possession of the title has been inconsistent. She at one point said that she acquired the title before construction commenced and later that she received it after construction had started and at a point where her funds were being depleted. She also admitted that unlike what was previously stated, they did not visit Mr. Clarke's store on the same day that she received the title. In any event I have indicated that claimant's evidence and that of her witness Mr. Clarke regarding the alleged visit to Mr. Clarke's Store has been rejected.

[79] Conversely, the 2nd defendant's account of how the title came into the claimant's possession has been largely, consistent, though there is some uncertainty whether she expected the claimant to keep the documents overnight or not.

The Reason the house was Built

[80] Perhaps, most importantly, both parties agree that the house was built for the comfort of the defendants. This fact is relevant to the issue of whether proprietary estoppel has been established and not just to the question of whether contractual relations were intended by the parties when the project was embarked upon. In the words of the 2nd defendant it was done so that "*she could live life before she died*".

[81] The claimant also intimated that she embarked on the construction of the house because she had sympathy for her parents and when she volunteered to assist them, it was not her intention to own the house. She volunteered to assist, as a

child with deep love and affection and commenced assistance because of the undying love she had for her parents. The condition they were in, in that leaky house reached her heart and she in turn reached out to them based on her love and affection for them.

The Room Occupied by the Claimant or her son

[82] The claimant also contended that she kept a room for herself in which she had furniture and appliances and her son resided in the room until February 2008 when the defendants forced him out of the room. This room she said was broken into by the 2nd defendant. She also testified that she placed a regular lock from the states on the doors but it was not a keyless lock. The placing of locks on the door is evidence which in the appropriate circumstance may have caused someone to hold a reasonable belief that he or she would have control of one of the rooms of the newly constructed building and by extension, a legal interest.

[83] This is even more so in the instant case, where the defendants by their conduct, allowed the claimant to exercise control over one of the rooms to the home; they allowed her to move in her son and to apply a lock on the door, preventing them from gaining access at will. At this time too, she was likely to have still been making financial contributions to the construction of the home. It may very well be that an individual in the position of the claimant could have laboured under the view that he or she would receive some sort of interest in the house itself. However, the case must be looked at "*in the round"* and each case turns on its own facts.

[84] The 2nd defendant admitted that there was a room which the claimant occupied when she visited and that her son had been staying there for a while but that was no longer the case. She stated the claimant's son no longer lives on the property but denied evicting him. She stated that he was very rude and abusive and on one occasion he physically attacked her. She testified that the room was now

locked up and she had no access to it. She however maintained in her defence that the property was family land.

[85] The fact that the claimant stored items in a room in the house and that she or her son occupied the said room, is, I find, in the context of family land, insufficiently clear, to amount to a representation. The 2nd defendant, treated the property as family land for the benefit of all family members. This suggests that no permanent interest was contemplated for the claimant to the exclusion of other family members.

[86] It is undisputed that at the commencement of the construction, the claimant did not intend to own the building. It may be that at the point when she faced difficulties with contributing financially, this perceived view of ascertaining some manner of interest in one of the rooms may have induced her to continue making contributions. It does seem however more likely, on her evidence, that it was the knowledge that the 2nd defendant was intending to give the property to her son, the claimant's brother that triggered this claim. She testified on cross-examination that when this started was when she (the 2nd defendant) changed her mind and decided to put the land in her son's name and she is the one who build that house.

[87] In the circumstances and on a careful consideration of the totality of the evidence including the context in which the construction was undertaken, I find the 2nd defendant did not give the claimant an assurance which created an obvious expectation of a legal interest in the house and/ or property. The three elements are interdependent and the construction and the expending of money was done not in reliance on an assurance but out of love and affection between the parties, as the claimant agrees. Accordingly, the court has found that the first element of proprietary estoppel, representation/assurance has not been established by the claimant on a balance of probabilities.

If there was a representation, did the claimant alter her position to her detriment because of it?

[88] In the event however, that I am wrong in finding that there was no assurance given by the 2nd defendant to the claimant, I will go on to consider the other elements of the doctrine. Accepting for a moment that there was an assurance, did the claimant in reliance on this representation, alter her position by expending her time and resources in constructing the house for the 2nd defendant?

[89] It has been made clear that the construction of the house commenced because the 2nd defendant and her husband were in need of suitable living accommodations and the claimant, who cared for her parents' well being, wanted to improve their living conditions. This is accepted, but it is also recognised that after a hurricane, "*the time had come for a change"*, and the claimant and at least one sibling, Winston Mullings, were intending to provide a new home for their parents.

[90] The claimant stated that she expended $4,800,000.00 but that she had not kept all of her receipts and documents. The receipts she has totals $3,247,315.07. She stated that the defendants lodged into her account the sums of $80,000.00 in August, 2006 and $85,000.00 in October, 2006, to assist with the construction of the house. She also agreed that a portion of the land was sold for $280,000.00 in November, 2006 and that assisted with funding the construction.

[91] She further accepts that the two sums of $80,000.00 and $85,000.00 came from her brother Winston Mullings, who also sent her US$2,030.00, which was converted to JA$132,598.56 on August 12, 2006. She said that these are all the monies which she received from her mother or siblings, totalling $577, 958.56. She received no materials from anyone to assist in the construction of the house for her parents, except the steel, the bad blocks and marl. She also paid all the cost for labour, material, fixtures, fittings and the cost of preparation

of the plans and drawings for the construction of the house. Additionally, she strongly denied that she was doing any major work on her own house in Cardiff Hall in 2005.

[92] The 2nd defendant has admitted that the claimant had to finance the building, outside of the money she received from the 2nd defendant and her son, Winston. She however also stated that the claimant did not receive further cash from her as she (the claimant) told her to "*tell Winston to send the money to a Mr. Gordon*." The claimant had referred to a Mr. Keith Gordon, as one of the persons to whom she sent money to pay bills for the construction of the house when she was in the USA.

[93] The upshot is that construction of the house commenced in 2005 and in 2006, several sums of money, were provided to the claimant to assist with its construction. There was no further substantive evidence given by the 2nd defendant to show that the claimant received any further money from her or any of the other children. The sums of money however sent in 2006, after construction had begun, gives a strong indication, that when the construction was initially discussed and undertaken, it was really an arrangement for the 2nd defendant's children to pool their resources together and build a home for their parents.

[94] I accept that the claimant may very well have provided the largest portion of the monies used in the construction of the home. However, in the circumstances, I find that the claimant's position and/ or intention did not change. She had intended to build a home for her parents and she proceeded to do so. Hence, it cannot be said that the claimant has suffered a disadvantage, based on the 2nd defendant's unconscionable failure to honour the assurance, on which the claimant relied.

[95] Regrettably, the claimant may no doubt, in light of the subsequent developments feel "shafted" by the 2nd defendant, but having regard to the state of events

surrounding the construction of this house, it is clear that the 2nd defendant regarded the construction of the house as a kind gesture, done out of love and affection by her children.

Mistaken Fact and Acquiesence

[96] It has also been the claimant's contention that she has mistakenly improved the 2nddefendant's property and they have acquiesced in this. In support of this contention, counsel relied on the dictum of Fry J in ***Willmott v Barber*** (1880) 15 Ch. D. 96. His lordship opined at pp. 105-106 that:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff 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 plaintiff. If he does not know of it he is in the same position as the plaintiff, 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 plaintiff's mistaken belief of 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 plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do... in my judgment, when the Plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge. Then it is said the Plaintiff expended money on the faith of his mistake.

[97] In ***Ramsden v Dyson***(1866) LR 1 HL 129, Lord Cranworth said, at pp 140-141:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

[98] If the claimant's version of how she came into possession of the titles was accepted, it would appear that she would have laboured under a mistaken belief as to her legal rights and expended her resources and the first two elements as regards Fry J's five probanda in ***Willmott v Barber*****,** would have been satisfied by the claimant. The third element however, creates a difficulty. In the context of a family arrangement to construct a house to improve the living accommodation of parents, an endeavour that the claimant herself volunteered and initiated out of love and affection for her parents, on a balance of probabilities, the evidence does not reveal that the defendants, particularly, the 2nd defendant was aware that the claimant was of the view that she would also acquire a legal interest in the property in exchange for her financial contributions.

[99] As stated by Fry J:-

> [I]f he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights.

The submission that the claimant was labouring under mistaken facts and that the defendants acquiesced in that mistake therefore fails. Also in any event, the claimant's version concerning how she came into possession of the titles has been rejected.

ISSUE 5: WHETHER THE DEFENDANTS WERE UNJUSTLY ENRICHED AT THE EXPENSE OF THE CLAIMANT?

[100] In her statement, the claimant stated that she expended a total of $4,800,000.00 in relation to the construction of the house for her parents for material, labour and technical work but she did not keep all of her receipts and documents showing the money she sent to workmen and people in Jamaica who assisted in paying the workmen as she did not expect her parents to turn on her in the way they had. It was also her evidence that she did the calculations to arrive at $4,800,000.00 using information taken from books and other items. She however had not brought the book as she did not know that it was important. She nonetheless maintained that she had a total of the costs for labour and other things added up.

[101] She said that she sent money to different people (Patrick Hutchinson, Nydia Gordon, Michael Baugh, Keith Gordon and Una Shakes) via Western Union to pay bills for the construction of the house when she was in the U.S. and to pay workers. In addition to the costs for labour and material, she paid all the costs for fixtures, fittings and the preparation of the plans and drawings for the construction of the house and took her workmen from St. Ann. She said that she transported some of the cement in her ford explorer to St. Elizabeth. In 2005, cement was scarce and she bought cement in Kingston, St. Ann and Northern Hardware in St. Elizabeth but most of the material, she bought in Santa Cruz and Maggotty.

[102] She stated that she gave some receipts for labour and that in the past when the Carpenter and the Masons worked on her house in Cardiff Hall, they signed a book. She further stated that she paid all of them but there were no receipts for labour and no record of them signing. She explained that this was because she was not here for the construction of the Elderslie property and her neighbour paid them and gave receipts. She would pay them when she came down to take photographs. She also indicated that she was not surprised that neither the

carpenter nor masons had any amounts of money in their witness statements. She had also paid for the valuation of the house on April 21, 2008. It was valued at $5,800,000.00 for the land and building on the open market and $8,200,000.00 was assessed as the replacement cost of the building.

[103] Mr. Gordon and Mr. Henry stated that they were paid by the claimant and in her absence they were paid by a Mr. Keith Gordon but never by the 2nd defendant. They also testified that the claimant purchased and dealt with the supply of the materials. Mr Gordon however stated that he did not know where the claimant got the money to buy the material or to pay him and he knew nothing of any arrangement between the claimant and the defendants concerning the building of the house. He also stated that he stayed at the premises for about six months and all the material he used was bought at Jointwood Hardware and a block factory opposite to the hardware. He accompanied the claimant when she paid for the items but he does not know of cement being bought in St. Ann.

[104] It should be noted that although these two witnesses testified that they were paid by the claimant, they were unable to speak definitively to the source of the money. Mr. Gordon also admitted that he did not know of any arrangement between the parties concerning the construction of the house.

The Evidence of Mr. Fitzroy Baugh

[105] Mr. Fitzroy Baugh stated that he supplied the claimant with goods such as cement and other materials for the construction of the house in or about 2006. These materials he delivered personally most times and to his certain knowledge all of the goods he supplied to the claimant were delivered at the construction site at Cooks Bottom. She paid him in cash or sent money via Western Union. The 2nd defendant on only one occasion purchased and paid for 10 bags cement. On other occasions she purchased materials but told him that the claimant would

pay for them. On cross-examination, he disagreed with the suggestion that it was not true that the 2nd defendant told him that she did not have the money.

[106] He further stated that he collected all the bills from Camric Hardware that he paid on the claimant's behalf and she would reimburse him. He exhibited a bundle of receipts illustrating, among other things, the bills from Camric which he paid on her behalf, totalling $513,636.65. Seven (7) Camric Ltd. receipts were exhibited by the witness. However, only one was written in the name of the claimant. The others were all in the name of Baugh's Grain Store. Mr. Baugh stated that he purchased the things from Camric as he had an account with them and that the claimant did not. He also however stated that he is not sure if the things were bought in the claimant's name or his from Camric Hardware and that his and her account were mixed.

[107] It was his evidence that he had all the original receipts in his possession and would present them to the court if required. However, on cross-examination, he testified that he did not have the original receipts, instead he had given them to Mrs. White in 2006 and he did not get them back. He also stated later in cross-examination that he had not totalled the bills himself, it was his wife who came up with the figure. On cross-examination, he also testified that the claimant sent him money through Western Union but he did not know how many times or where she got it from. Further it was his evidence that the 2nd defendant never told him that the claimant was in charge of the money but he knew she would pay him. He said he met the claimant weeks before he started buying things for her and delivering them.

Mr Richard White's Hearsay Evidence

[108] He stated that to his certain knowledge the claimant paid for the material and labour, as part of that payment was secured by exhausting all of their credit cards in the United States of America to purchase the materials she sent down and pay for labour to build the house for her parents. They had to take a

mortgage on the property they owned in Florida to help with the financing of this construction which they have to be paying now. No documents were however placed before the court proving this mortgage, and the claimant did not give any evidence of it.

[109] The defendants submitted that the claimant had since 2005 been constructing her own house located in Cardiff Hall, St. Ann and that a significant majority of the receipts attached to the particulars of claim related to the construction of the claimant's house. The defendants also asked the court to consider whether given the occupations of the claimant (Nurse's Aide) and her husband (Tradesman), they would be in a position to finance their home in the United States of America, the one at Cardiff Hall and the house in question.

[110] The claimant denied these assertions and testified that she was not building at Cardiff Hall between 2005 - 2007. She may only have been doing minor "knocking out" in Cardiff Hall or grilling but no major work on her house in Cardiff Hall in 2005. She had done construction on that house before she started her parents' house and has been doing construction from she took possession. She did her fence in 2008, which was the only thing she had left to do.

[111] On an evaluation of the evidence it is clear that the claimant did not solely finance the construction of the house, though she no doubt spearheaded the arrangements and made her own contributions. It was however a family endeavour and she received very helpful assistance from her siblings, particularly Winston. It may have appeared to the workmen and indeed to the average onlooker that she was the only one financially maintaining the construction but that was only because she was the only one of the defendants' children physically present, available and on the 2nd defendant's evidence, very able.

[112] Counsel for the claimant submitted that if the court was of the view that it could not order the transfer of the titles, the court should exercise its equitable powers

to prevent the defendants from unjustly and unfairly keeping the benefit of the expenditure of the claimant's funds without compensation to her. Counsel further submitted that the claimant's improvements had clearly been beneficial to the defendants and it would be unconscionable for the defendants to benefit wholly from the claimant's expenditure to her disadvantage. In this case it was argued that, the defendants' enrichment was prima facie, an unjust enrichment.

[113] Conversely, counsel for the defendants contended that the claim for restitution was untenable on the basis of claiming unjust enrichment in these circumstances. The pre-requisite for granting this remedy was establishing that the benefit enjoyed by the defendant was unjust; a matter not to be simply inferred but proved by the asserter within the ordinary civil standard of proof, as well as it being established that awarding the remedy would do justice between the parties.

[114] In the **Law of Restitution**, 1998, 5th edition, p. 15, the learned authors Goff and Jones note that:-

> In restitution, as in other subjects, recourse must be had to the decided cases in order to transfer general principle into concrete rules of law. As Lord Wright once said of Lord Mansfield's famous dictum in Moses v. Macferlan: 'Like all large generalisations, it has needed and received qualifications in practice...The standard of what is against conscience in this context has become more or less canalised or defined, but in substance the juristic concept remains as Lord Mansfield left it.'
>
> As might be expected a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary claims and the principle of unjust enrichment.

[115] In the context of the instant case, the law of restitution presupposes three things. Firstly, that the defendants were enriched from a benefit received; secondly, the benefit was derived at the claimant's expense and thirdly, that it would be unjust to allow the defendants to retain that benefit.

[116] In ***City Properties Limited v New Era Finance Limited*** [2016] JMCC Comm. 1, Edwards J. stated at para. 63:

> So a claimant must have given up something to the benefit of a defendant without it being a gift and the defendant must have freely accepted that benefit and had at least incontrovertibly benefitted from the claimant's loss. Restitution as a legal proposition can no longer be termed new and has firmly taken root in the common law.

[117] The learned authors of **Halsbury's Laws of England, Vol. 40(2)**, 4th Ed., Reissue, para. 1310 endorse the proposition of law on the structure of a restitutionary claim as follows:

> [I]t is now generally accepted that there are four stages to any restitutionary claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) consideration must be given to any applicable defences. The claimant must satisfy the court that the first three elements of the claim have been satisfied. All three must be satisfied before a restitutionary claim can succeed. The fourth stage, the defences, is likely to assume ever increasing significance in the cases. As the courts slowly expand the grounds on which restitution can be ordered, it will fall to the defences to keep liability within acceptable bounds. In addition to these four stages it has been argued that there is a fifth stage to the inquiry, namely the remedies which are available to the claimant.

[118] The law of restitution is concerned with reversing a defendant's unjust enrichment at the claimant's expense and a restitutionary claim can only be brought where the defendant has been so enriched at the claimant's expense. Therefore, the claimant in the instant case is seeking to be restored to her previous position through a restitutionary claim by making good the loss she has allegedly suffered. The question therefore becomes, whether the defendants were enriched?

[119] The learned authors of **Halsbury's Laws of England**, **Vol. 40(2),** 4th Ed., Reissue, at para 1311 state that:

> An enrichment may be either positive (the receipt of money or goods) or negative (the saving of necessary expenditure)...A defendant may be enriched by the receipt of goods or services even where he has not requested, bargained for or freely accepted them. In such cases the defendant is said to have been incontrovertibly benefited. An incontrovertible benefit is 'an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture.' It may take either a negative or a positive form. Negatively, a defendant is incontrovertibly benefited when he is saved a necessary expense. The expense may be legally of factually...Expenditure which is factually necessary, might include sums spent on the purchase of 'necessaries' for a person who lacks the capacity to enter into a contract to purchase them. In deciding whether or not the expenditure is factually necessary, courts will disregard 'unrealistic or fanciful possibilities of the defendant doing without it

[120] There is no doubt that the defendants in this case have benefited from the saving of necessary expenditure. The resources expended by the claimant in this instance were primarily sums spent contributing to building a house for the defendants. The evidence clearly indicates that the house the defendants had occupied since 1972/1973 had fallen into significant disrepair. An appropriate house was needed by the defendants which they could not provide by themselves. This explains why the 2nd defendant said she was waiting on her sons for ten (10) years. The claimant made a contribution to this necessity which the defendants could neither afford nor eventually, do without. The defendants have thus been enriched.

[121] The second question is whether this enrichment was at the expense of the claimant? At para. 1318 of **Halsbury's Laws of England**, Vol. 40(2), 4th Ed., Reissue, it is indicated that:

> The requirement that the claimant prove that the defendant has been enriched at the claimant's expense serves to identify the claimant as being the proper person to bring the claim and also to identify the measure of that claim....Generally the enrichment will be 'by subtraction'

> from the claimant; that is to say, the gain made by the defendant will correspond exactly with the loss suffered by the claimant. Where, however, the defendant has been enriched as a result of a wrong which he has committed against the claimant, there need be no correlation between the gain to the defendant and the loss to the claimant, and, indeed, in most cases the gain which the defendant has made from the wrong exceeds the loss which the claimant has suffered.

[122] The above question clearly has to be answered in the affirmative. The evidence indicates that through a collaborative effort, which included the contribution of the claimant, the house was built for the defendants. Therefore, the defendants were enriched partly at the expense of the claimant.

[123] Thirdly, was the enrichment unjust? Would it be unjust if the defendants should retain the benefit without recompensing her. **Halsbury's Laws of England, Vol. 40(2)**, 4th Ed., Reissue, at para 1320 records that:

> In deciding whether or not a particular enrichment is unjust, the court is not given free rein to give effect to its own perception of what is or is not unjust, but must have regard to the case law in deciding whether, in a particular case, it is unjust that the defendant should retain the benefit without recompensing the clamant. Thus mistake of fact, mistake of law, duress, undue influence, an ultra vires demand by a public authority for tax or other impost, (total) failure of consideration, discharge of the debt of another, necessity, incapacity, and the receipt of property which belongs, whether at law or in equity, to the claimant, have all been recognized as factors which can render an enrichment unjust. The category of factors which can trigger a restitutionary claim is not closed ....However, restitution will generally be denied where the benefit was conferred upon the defendant in the form of a valid gift or in pursuance of a valid common law, equitable or statutory obligation owed by the claimant to the defendant.

[124] In ***Blue Haven Enterprises Ltd v Tully and another*** [2006] UKPC 17, Lord Scott at para. 24 stated that:-

> Enrichment of A brought about by improvements to A's property made by B otherwise than pursuant to some representation, express or implied, by acquiescence or by encouragement, for which A is responsible would not usually entitle B to an equitable remedy. But the reason would be that A's

> behaviour in refusing to pay for improvements that he had not asked for or encouraged could not, without more, be described as unconscionable.

[125] The context in which this case has arisen dictates the courts conclusion. On a careful consideration of the law and the evidence, this court finds that the defendants have not been unjustly enriched at the claimant's expense. This enterprise of building a new home for the defendants was commenced by all parties in consideration of love and affection with the claimant and at least one sibling having a desire to improve the living standards of their parents, the defendants. The enrichment was therefore not unjust and no repayment is required.

ISSUE 6: WHETHER IF THE CLAIMANT HAS NO OTHER REMEDY THE COURT CAN CONSTRUE AN INFORMAL FAMILY ARRANGEMENT IN RESPECT OF THE CLAIMANTS OCCUPATION OF A ROOM IN THE DEFENDANTS' HOUSE?

[126] Counsel for the claimant made reference to the case of ***Hardwick v Johnson and Another*** [1978] 1 WLR 683 which explored the issue of informal family arrangements and the power of the court to impose some form of legal relationship in appropriate circumstances when other legal doctrines did not apply.

[127] In ***Hardwick***, Lord Denning stated at page 688,

> So we have to consider once more the law about family arrangements. In the well-known case of Balfour v. Balfour [1919] 2 K.B. 571, 579, Atkin L.J. said that family arrangements made between husband and wife "are not contracts … because the parties did not intend that they should be attended by legal consequences." Similarly, family arrangements between parent and child are often not contracts which bind them: see Jones v. Padavatton [1969] 1 W.L.R. 328. Nevertheless these family arrangements do have legal consequences: and, time and time again, the courts are called upon to determine what is the true legal relationship resulting from them. This is especially the case where one of the family occupies a house or uses furniture which is afterwards claimed by another member of the family: or when one pays money to another and afterwards says it was a loan and the other says it was a gift: and so forth. In most of these

> cases the question cannot be solved by looking to the intention of the parties, because the situation which arises is one which they never envisaged, and for which they made no provision. So many things are undecided, undiscussed, and unprovided for that the task of the courts is to fill in the blanks. The court has to look at all the circumstances and spell out the legal relationship. The court will pronounce in favour of a tenancy or a licence, a loan or a gift, or a trust — according to which of these legal relationships is most fitting in the situation which has arisen: and will find the terms of that relationship according to what reason and justice require. In the words of Lord Diplock in ***Pettitt v. Pettitt*** **[1970] A.C. 777**, 823: "… the court imputes to the parties a common intention which in fact they never formed and it does so by forming its own opinion as to what would have been the common intention of reasonable men as to the effect" of the unforeseen event if it had been present to their minds.

[128] In ***Hardwick*** the plaintiff purchased a house for her son and his wife which was put into her own name. After her son and wife married, they arranged to pay the plaintiff £7 a week in order to pay off the purchase price. The couple made several payments, however the plaintiff did not make any demands for any outstanding amounts. The marriage broke down and the plaintiff sought to recover possession of the house from the son's wife.

[129] Lord Denning applied the principles to the facts and stated:

> The present case is a good illustration of the process at work. The correspondence and the pleadings show that the parties canvassed all sorts of legal relationships. One of them was that there was a loan by the mother to the couple of £12,000 which was repayable by instalments of £28 a month. Another suggestion was that there was a tenancy at £7 a week. Another suggestion was that there might be an implied or constructive trust for the young couple. Yet another suggestion was that there was a personal licence to this young couple to occupy the house. Of all these suggestions, I think the most fitting is a personal licence. The occupation of the house was clearly personal to this young couple. It was a personal privilege creating a licence such as we have often had…. I should have thought that the mother could have revoked the licence. But there has not been a divorce, not even a judicial separation. The daughter-in-law and the grandchild are still at the house. It seems to me that as long as she pays the £7 a week this licence cannot be revoked. Things may develop in the future. One cannot foresee when it may be

> possible to determine the licence, but it cannot be determined at this stage. The judge was quite right in refusing to order possession and in giving, as he did, judgment for the amount of £112 — that is, £7 a week from the time when the daughter-in-law first offered it until commencement of the action in May, 1975.

[130] Roskill LJ also opined at page 690:

> I am disinclined to express any opinion on what if any events that licence is now determinable. Suffice it to say that in my judgment it is not determinable in the event which has occurred, namely, that the husband has left the wife — no divorce proceedings are pending, as Lord Denning M.R. has said — since that licence was not given only to the husband. It seems to me that no event has yet taken place which justifies the bringing to an end of this contractual licence; and therefore, for that reason, I think the deputy circuit judge reached the right conclusion in a careful and closely reasoned judgment.

[131] It appears that the recourse the courts may impose on vague informal family arrangements, are just as vague. What is discerned however is that the courts should aim to preserve the reasonable foreseeable outcomes of these family arrangements. As Lord Denning opined in ***Hardwick***, the likely outcome of the parties' arrangement was that the couple would continue to live in the house and subsequently inherit it. What the court had therefore done, was to impose a license in keeping with this outcome and preserve the status quo until facts are presented which clearly warranted a change in that status quo. Thus it would appear that if the couple were to engage in divorce proceedings, such an event may warrant a revocation of the licence as it moved away from the status quo.

[132] In the case of ***In Re Sharpe*** [1980] 1 All ER 198 which was cited by counsel for the claimant Brown Wilkinson J endorsed the view that where parties proceeded on a common assumption that one of them was to enjoy a right to occupy the property and in reliance on that assumption he expended money or otherwise acted to his detriment, the other party would not be allowed to go back on that assumption, and the court would imply an irrevocable licence or constructive trust giving effect to the arrangement.

[133] In the instant case, there was no prior arrangement for a repayment. However multiple parties made financial contributions to fund the construction; the claimant making the majority contribution. Additionally, notwithstanding the fact that the house was being constructed for the personal benefit of the defendants, there seemed to have been a collective understanding that other family members should also enjoy some benefit of the home and the 2nd defendant referred to her other relatives as her "*Dead Leff"* on multiple occasions during the trial. The defendants gave the claimant control and occupation of the room by allowing her to move in her son and restrict their access. The 2nd defendant stated in evidence that she did not force the claimant's son from the premises and at the time of the trial, she was still restricted from the room.

[134] It appears that had relations not broken down and these proceedings not been instituted, the claimant would have remained in control of the room if not indefinitely, for a considerable time. I gave significant consideration to ordering that the claimant be deemed to have an irrevocable licence to continue occupying the room until the passing of both defendants. However, the situation is not as it was in ***Hardwick*** where the couple would continue living in and likely inherit the house, unless the *status quo* was changed for example by divorce proceedings. In the instant case, the court having held that the claimant has no legal or equitable interest in the property the *status quo* has effectively been changed. This conclusion is also supported by the fact that the poor relations between the parties which led to this litigation and the ouster of the claimant's son from the property, suggests that imposition of such an informal arrangement would be fraught with tension and difficulty, especially as the defendants are now of very advanced age.

[135] Further the only practical benefit of the room the claimant enjoyed at the time of trial was the storage capacity it afforded. She does not reside in Jamaica, her son no longer resides at the property and she has a home of her own in Jamaica in Cardiff Hall. The court should not make an order out of sentimentality. In the circumstances of this case it is more appropriate that the defendants regain

possession of the room. I therefore decline to hold that the claimant has a licence to continue occupying the room.

DISPOSITION

[136] In the final analysis, upon a careful consideration of the law, the evidence of the witnesses, the particular circumstances of this case and assessing the circumstances 'in the round', this court finds that there was no contractual agreement between the parties as there was never an intention to create legal relations. Rather the house was built out of mutual love and affection, the 2nd defendant did not through her words or conduct assure the claimant that she would not enforce her strict legal rights and the defendants have not been unjustly enriched at the claimant's expense.

[137] I therefore give judgment for the defendants on the claim and counterclaim and make the following Orders:

(1) The claim for recovery of possession of the portion of a dwelling house situated on land being ALL THAT parcel of land part of Elderslie called Cooks Bottom in the parish of St. Elizabeth, registered at Volume 1262 Folio 598 is denied;

(2) The claim for an order for the transfer of the title to the claimant as joint tenant with the existing registered proprietor is denied;

(3) The claim in the alternative for the sum of Four Million, Eight Hundred Thousand Dollars ($4,800,000.00) plus interest at 6% per annum, for work done in construction of the house on the property by the claimant is denied;

(4) The claim for declaration that the claimant is the equitable mortgagee by way of deposit of title deeds for the amount claimed is denied;

(5) The claim for an order that the property be appraised, sold and the said amount with interest and cost be paid out of the proceeds to the claimant is denied;

(6) The claimant shall deliver up forthwith to the 2nd defendant the Duplicate Certificate of Title for ALL THAT parcel of land part of Elderslie called Cooks Bottom in the parish of St. Elizabeth, registered at Volume 1262 Folio 598, and to the 1st defendant the Deed of Indenture for ALL THAT piece or parcel of land situate and lying and being in the said parish of St. Elizabeth and known as part of Cooks Bottom containing by Survey three roods and ten and one third perches be the same more or less butting and bounding as shown in diagram from Survey Department numbered 43404, dated January 13, 1960.

(7) If the claimant remains in possession of a room in the defendants' house she shall forthwith deliver up possession of it to the defendants.

(8) Counsel for the defendants at the time of hearing indicated that he had taken on this matter to assist a family member of the defendants. In the circumstances therefore each party is to bear their own costs.