ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2005

BETWEEN:

GEORGE KNOWLES
(as executor and beneficiary of the Estate of Oliver Knowles)

Appellant

and

ELAINE KNOWLES

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Hugh Marshall for the Appellant
Ms. E. Ann Henry and Ms. C. Debra Burnett for the Respondent

2006: July 20;
September 18.

JUDGMENT

[1] BARROW, J.A.: In 1984 the respondent (also referred to as the wife) married the brother (also referred to as the husband or the brother) of the appellant and the mother of the two brothers permitted the couple to occupy one of the houses that formed part of the estate (Powell's Estate) that her husband had left. In 2003, after the husband had moved out and the couple had thereafter divorced, the respondent's interest in the house and appurtenant land became an issue. The respondent brought a claim for a declaration that she is entitled to a beneficial interest in the property in such share as the court deemed just.

[2] On the basis that the doctrine of proprietary estoppel operated in favour of the respondent the High Court declared that the respondent and the husband[1] were beneficial tenants in common in equal shares, directed the appellant to transfer the property to the couple and the couple to bear the costs of the transfer equally, and ordered that in the event that the husband decides to sell his share that he shall give the first option to purchase to the wife.

[3] Powell's Estate was registered in the names of the appellant and his now deceased mother as executors of the estate. The father, who had owned the Estate, had died in 1974. The mother died in 1992. The mother had held only a life interest in the estate and on her death the appellant became the sole beneficial owner of the estate. The judge found that in 1984 the mother gave permission to the couple to move into the house as their matrimonial home. They lived there continuously as a family, with their son, until after the mother's death and until 1997, when the husband moved into an annex to the house that the couple had built. The couple divorced in 2003 and the husband moved out completely. The wife and son have remained.

[4] The judge found that the house, made of concrete, was uninhabited before the couple moved in and they carried out substantial improvements to it. This work included painting the entire house, installing closet doors, replacing screens, and renovations to the bathroom – new vanity and face basin and re-tiling the floor. In about 1988 the couple did further works which included building an annex containing a bedroom, bathroom, washroom and storeroom, and a roof joining the main house and the annex that formed a patio between the two. In about 1989 they constructed a concrete and steel fence and a driveway. After Hurricane Hugo they changed all the windows. In 1991 the respondent built a greenhouse for her plants and enclosed the patio with lattice. In 1993 the respondent re-built the kitchen cupboards and in 2002, with the assistance of her estranged husband, she repaired the roof of the main house, the patio roof and repainted the house.

[1] The husband was not a party to the claim and sought no relief.

[5] Where the parties differed in their account of the facts the judge preferred the evidence of the respondent. The judge thus found that the appellant acquiesced in the mother giving permission for the couple to live in the house, that the appellant gave permission to the brother to build a separate room in 1992, that the appellant was aware that renovations were carried out, and that both the appellant and the mother gave the brother permission to do so. The judge also found that neither of the couple sought the appellant's permission to do the works that took place after the mother's death and that the appellant was aware of those works and did not object.

[6] At paragraph [16] of the judgment, after noting that the appellant lived in proximity to the couple and was aware they were doing renovations, the judge stated:

> "He [the appellant] could easily have intervened if he were not in agreement and have made it clear to them that they only had a licence to reside there which was only good up to the death of the mother and that any improvements to the property would [ensure] to his benefit and that he would not compensate them for it. He did not do that and I find that his failure to intervene when he knew of these matters means that he impliedly consented to them residing there and making renovations. Furthermore, it is highly unlikely that his aged mother as co-executor would have acted without consulting him especially as she knew that she had only a life interest in the house. I therefore find that he knew that his mother had given them the house to live in and that he impliedly agreed to this as he knew and raised no objections to them carrying out such significant improvements."

[7] At this stage in her judgment, as I understand it, the judge has not found that the mother gave the couple any proprietary interest in the house. The furthest she goes, at this point, is to find that the mother had given the couple the house "to live in". Indeed, at no point does the judge ever find that the mother gave the couple any proprietary interest in the house. Counsel for the respondent confirmed in oral argument that the mother could not have given the house outright to the couple because the mother did not have the legal capacity to do so since the mother held only a life interest. This is a significant departure from the case that the claimant made in her statement of case.

[8] In paragraph 5 of the Statement of Claim the respondent stated that at the time she and her husband took up residence in the property "it was the understanding of the Claimant and the Defendant[2] that the said property would be owned by them both."

[9] In paragraph 6 of the Statement of Claim the respondent stated that while the mother was alive the respondent and her husband carried out certain renovation and reparation works "with the permission of the Defendant and on the understanding that the Defendant would transfer the portion occupied by the Claimant and her ex-husband to them both."

[10] In paragraph 7 of the Statement of Claim the respondent claimed that following the mother's death she and her husband got a surveyor to survey and demarcate the portion of land they were occupying "on the basis of the understanding that the said property would be transferred to them."

[11] It is now clear that there was no understanding in the sense of any shared thinking. The evidence is clear that the appellant and the respondent never had any discussion or conversation – the respondent testified they were not on speaking terms (apparently for the entire duration of the marriage), so they never shared their thoughts. Neither told the other what she or he was thinking. The assertion that the respondent made in her witness statement that "… everything said by the Defendant to me or to John and even to our son Rhyves were always to the effect that the property is ours" is fundamentally untrue; as the respondent admitted in cross-examination, the appellant never spoke with her or her son about the property. There was also no evidence that the appellant ever communicated indirectly to the respondent that he thought or intended that the

[2] The reference here to the Defendant seems to be mistaken and it appears that it should have been to the husband, instead.

respondent and her husband should be given the property save for an instance in 1993 when the appellant so communicated to his brother, to which I will return.

[12] As the case was decided, the respondent only succeeded on the basis that the appellant led her to believe, by his inaction, that she would be given the property. This was the specific finding of the judge.[3] The judge found first[4] that by failing to warn the respondent that her works would not earn her any interest in the house and, after the mother's death, that she was a mere licencee liable to be removed at any time, the appellant impliedly consented to the couple residing in the house and making renovations. As noted in paragraph [7], above, the judge has found at this stage in her judgment that the mother had given the house to the couple to live in but not that the mother had given the house to the couple as their own. However, in the very next paragraph the judge found, with no reference to any factual circumstance other than the fact of the mother's death, that by the appellant failing to assert his rights after his mother's death "this would have confirmed [the respondent's] belief that both he and his mother had given them the house as their own."[5] Where did that belief come from?

[13] It is appropriate, at this juncture, to mention a troubling aspect of the judge's decision. The judge decided the case upon the basis that the appellant and the mother led the respondent to believe that they would give the house to the couple and thereby actively encouraged the couple to do the works over the years. This was not the case that the respondent brought. The Statement of Claim is pellucid in its claim that <u>at the time</u> the couple took up residence in the house the couple understood – "it was the understanding" - that they would own the property.[6] There was no case made in the Statement of Claim that the respondent was induced or led to believe, by silence and inaction, that the house would be given to them. The respondent's case was that from the very beginning, before there was any silence,

[3] At paragraph [23]
[4] At paragraph [16]
[5] At paragraph [17]
[6] Paragraph 5 of the Statement of Claim, which is quoted in paragraph 8, above.

acquiescence or inaction, she and her husband understood that the house would be given to them. Counsel for the appellant has made no issue of this situation but it cannot be a satisfactory situation that one case is 'pleaded' and the judgment is pronounced on a different case. The judgment shows the embarrassment that this situation caused. The Statement of Claim should either have been amended or, if it was too late to amend, the claimant should have been confined to the case contained in the Statement of Claim. Having said that I return to where I left off.

[14] Where did the respondent get the belief that the mother and the appellant had given the house to her and her husband? On the evidence that the judge accepted, when the respondent and her husband went into occupation of the property they went in purely as licencees and no promise of any interest was made then to them. The couple were the son and daughter-in-law of the life tenant (the mother) who let them in to the house. When she let them in the mother did not promise to give them the house and, as noted, counsel has accepted that the mother could not have promised them the house. In fact the respondent had a clear understanding that the mother could not have intended to give them the house because, as the respondent said in her witness statement, the mother "told us that the Will of her late husband left the property to her and George and that she cannot do anything without George and George cannot do anything without her." George, the appellant, had stopped speaking to the respondent even before the marriage so the respondent would have been very clear as to the appellant's disposition towards giving her anything.

[15] There is no longer any dispute, at this stage of the proceedings, that the couple did extensions and renovations to the house at different times over the period that the couple lived there. The crucial question is, in the absence of any promise or representation to the couple, did the respondent believe, either when the couple first did works on the house or at any time that they subsequently did works, that the mother had impliedly promised to give them the house to own? Never once in her witness statement or in oral testimony did the respondent ever say that by the

mother and/or the appellant not objecting to the couple doing the works she, the respondent, was induced by the mother and/or the appellant to believe that they, the owners, would give the house to the couple. Her oral evidence[7] was that she thought the house had been given to her. She said that she knew the house was "mine from the onset when we had asked Mrs. Knowles for a house to marry and live." She provided not an iota of evidence to show how she could have come to that conclusion – who gave it to her, or when, or by what words, or by what conduct.

[16] The judge accepted that the respondent believed the house had been given to her but referred to no evidence to found that belief except the acquiescence of the mother and/or the appellant in the works that the couple did on the house. The judge found that such acquiescence amounted to an inducement that led the respondent to hold that belief. The judge ignored the fact that the respondent did not say that the mother's and/or the appellant's acquiescence induced her to hold the belief that the judge said she held. Apparently, the judge simply concluded that acquiescence in occupation and works converted a licence to occupy into a promise to give.

[17] As a matter of reasoning there is no irresistible or even more probable inference from the relevant facts that the respondent was induced into thinking that the owners were giving them the house by letting them occupy and do works on the house. Such conduct by the owners was consistent with a variety of possibilities as to what the owners had in mind for the couple. The owners may have had in mind that they would be permitted to remain in the property until further notice. Or until the property was sold. Or while the family relationship remained good. Or while the marriage lasted. Or indefinitely. Or for their joint lives. Or that the freehold would be given to them. Or to their children. Or to the husband alone. In this regard the husband's evidence is interesting; he said he had no expectations

[7] As distinct from her statement of case, which spoke to a future gift (the house "would be" given to them). In her witness statement (at paragraph 7) the respondent said that the appellant told her in effect "that the property is ours."

because he had already gotten his share from the father's estate while the father was alive. Indeed, he had sold a house (that he had gotten from his father?) to the respondent before she became his wife!

[18] It seems clear on any objective basis that it was not possible to infer that the mother and/or the appellant had or should have had in mind when they left the couple to do the works that the couple were being encouraged to believe that they would be given the house. Specifically, I do not accept that it was the most or even the more probable inference that the respondent did the works in the belief that she would be given the house.

[19] That being the case I see no basis for ascribing to the appellant anawareness that his brother and the brother's wife were doing works in the belief that the appellant would give the property to them. If the appellant knew that the couple were doing work in the belief that the appellant had committed himself to giving them the property and he did nothing to disabuse them of that belief but instead stood by and allowed them to do the works - that would be one thing. In this regard it is significant that it was not suggested to the appellant in cross examination that he knew or should have known that the respondent was doing works in the belief that he, the appellant, was committed to giving her the property. It is a completely different thing if the appellant did not know that this was the belief with which the couple were doing work. I can find no evidence that the appellant knew or should have inferred that the couple believed that the appellant had committed to giving them the property. The respondent has not advanced this argument. Therefore, I do not see on what basis the judge could have concluded that the appellant, by his silence and inaction, led the respondent to believe that he would give the house to the respondent and her husband.

[20] The authorities show that there must be a clear representation when proprietary estoppel is founded on a representation. In Inwards v Baker[8] there was a clear

[8][1965] 2 QB 269

representation by the father, to be implied from the fact that he invited his son to build on the father's land, that the son would be allowed to remain there for as long as the son desired. Similarly when the estoppel is said to be founded on acquiescence there must be acquiescence in an action or course of conduct undertaken by the claimant that the owner clearly knows or should know was only undertaken by the claimant in the belief by the claimant that a certain fact exists which the owner later seeks to deny. Thus, in Pascoe v Turner[9] the owner acquiesced in the claimant improving a house in the belief, founded on the owner's express representation, that the owner had given her the house and the owner was compelled to execute a conveyance to the claimant.

[21] In the instant case there was no mistaken belief by the respondent that she had any right or that anyone had promised to give her the property. The respondent, contrary to her statement of case, never had any understanding that anyone had promised or committed to giving her the property. It may readily be presumed that she had such a hope. Indeed she may have had an expectation but that hope or expectation was not referable to what anyone had said or done or had failed to say or do.

[22] A helpful formulation of proprietary estoppel is provided in this construct from Megarry & Wade, The Law of Real Property[10]:

(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;

(b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and

(c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive."

[9] [1979]1 WLR 431
[10] 6th ed., paragraph 13-001

In this case there was no promise or representation or inducement or encouragement by O to lead C to believe that O would do anything. Rather, C began acting to her "detriment" on a completely unilateral basis; she did so with no reference to any promise or acquiescence. Perhaps, thereafter, she continued to act in reliance on the expectations that she had unilaterally created by her actions. Can she be permitted to rely on the failure of O to stop her as the promise? Or on O's inaction as proof of a prior intention/promise of which there is no other evidence?

[23] This is what the judge said:

> "[23] I find from this evidence[11] coupled with his silence about the repairs and his inaction after his mother's death that the Defendant and his mother intended to give the house and the portion of land to the couple or led them to believe that they would give it to them and so could be said to have actively encouraged them in embarking on substantial improvements over the years in that belief. I also find that the Defendant intended to give full effect to the gift after his mother's death by transferring the title and so approved the survey but no one followed up when the lawyer did not act promptly. This is not surprising as when a relationship is good and there is no urgency one seldom bothers with formal legal documentation. Furthermore, the fact that the Defendant did not give any evidence of ever visiting the house periodically or at all to inspect it or to remind them that Mr. Knowles alone was his licensee for the duration of the marriage, all supports Mrs. Knowles testimony that the mother's intention was to give them the house and that the Defendant impliedly consented to that and that [the couple] expended substantial sums on the property on that basis. To allow the defendant to go back on that in these circumstances and to claim a house which has no doubt [been] significantly transformed by improvements made over a period of more than twenty years would be unconscionable. I therefore find that in all the circumstances, he is estopped by his conduct from asserting his legal title to the house and land …"

[24] With respect, I do not see how that conclusion can stand scrutiny. There are three primary facts upon which the judge based the conclusion that the appellant and his mother led the couple to believe that the appellant and his mother would give the property to them: (1) that in 1993 the appellant promised to transfer the property to

[11] This was the evidence of the respondent that the appellant had promised in 1993 to transfer the property to his brother.

the brother and the respondent; (2) that the appellant was silent about the repairs that the couple effected; (3) that the appellant did nothing after his mother's death to alter the situation that existed before. From these 3 things the judge found that the appellant and his mother intended to give the property to the couple or led the couple to believe that the mother and the appellant intended to give the property to the couple.

[25] On even a cursory consideration it is obviously impossible to ascribe to the mother an intention to give the property to the couple from a promise that the appellant made after the mother was dead. Similarly it is not possible to find, from the promise that the appellant made after the mother's death, that the mother by that promise from the appellant led the couple to believe that the mother (and the appellant) would give the property to the couple. In short, it was logically impermissible for the judge to find, as she did, that the promise that the appellant made after the mother's death could be related back to create a finding that the mother led the couple to believe that the mother would make the gift that the appellant promised, after the mother's death, to make.

[26] In relation to the second and third propositions I have tried to show that silence and inaction by the appellant do not amount to inducement or encouragement of the respondent in a belief that the appellant would give the property to the respondent. The respondent never said she thought the appellant had promised to give the property to her. And at trial the respondent resiled from her earlier case that she did the works because she thought the appellant would give the property to her. Rather, what the respondent contended was that because she did the works she thought the appellant would (should) give the property to her. The authorities are clear, as the judge stated at the outset[12] in reliance on Snell's principles of Equity[13], that a person by spending money in improving the

[12] At paragraph [5] of the judgment
[13] 28th edition (1982) at p. 558

property of another does not acquire a proprietary interest in the owner's property or become entitled to reimbursement.

[27] The exception is when the claimant establishes that she made the expenditure on another's property in the belief, encouraged by the owner, that she would be given a proprietary interest. In this case, as counsel for the appellant has emphasized, the sequence of events is the wrong way around; at the outset the respondent spent money on the property and thereby and thereafter encouraged herself to believe that she would be given the property. She did not spend because she was induced or encouraged to believe she would be given the property; she spent and then developed the belief she would be given the property. It seems clear to me that the respondent cannot come within the doctrine of proprietary estoppel on those facts and I would so hold.

[28] On a different footing stands the promise that the judge found the appellant made to his brother in 1993 to give to the brother or the couple the house and land. In consequence of that promise the respondent and the brother had a survey done in 1994. The judge found that subsequent to the making of that promise the respondent did further works. However, the judge did not treat this promise as a separate basis upon which to find that there was an equity in favour of the respondent but rather treated this promise as simply an expression of the appellant's intention to now perfect the gift that the appellant and his mother had long before intended to make.[14] In oral argument counsel for the respondent indicated a similar view of the effect of this promise – that it did not create an equity in itself but was part of the whole course of dealings.

[29] Notwithstanding these views, I consider the fact that in reliance on the appellant's promise in 1993 to give the house and parcel of land to the couple they got a survey done. Assuming that the couple paid for the survey (which counsel for the

[14] This conclusion is stated in paragraph [23] of the judgment, quoted in paragraph 23, above.

appellant was not prepared to assume) that could amount to detrimental reliance and could make it unconscionable for the appellant to go back on the promise to transfer the property. Unfortunately, as counsel for the appellant argued, the respondent's pleaded case, while it mentioned the survey, made no claim in respect of the survey and, in particular, did not seek reimbursement for the cost of the survey. In addition, the evidence is that the respondent simply did not sufficiently follow up the promise that the appellant had made to transfer the property (while the couple were together) and I am not satisfied, having heard no argument on it, that it would be unconscionable for the appellant not to be made to pay for the cost (if any) of the survey. In that situation I think it would be overreaching if I were to make an (unsought) order in respect of the costs of the survey and I decline to do so.

[30] The matter of compensation to the respondent for the costs of the works and improvements that she and the brother did to the property has also engaged my consideration. In her statement of case the respondent alleged that she had spent in excess of $100,000.00 in doing works to the property. The judge found that the respondent had produced receipts showing a total expenditure by the couple of $29,000.00. The judge did not make any finding whether or not this was all that they had spent and neither did the judge determine which of the respondent and her husband had made the greater expenditure. On the issues that arose for decision, it was unnecessary for the judge to have done either. In fact the respondent did not claim reimbursement in the alternative to her claim for a proprietary interest. It may be that had the respondent so claimed the appellant would have claimed a set off in respect of the respondent's rent free occupancy; in this regard I note that the appellant claimed mesne profits for the period of the respondent's occupation since the appellant served notice to quit but counsel told us on appeal that he has abandoned that claim. In the absence of a claim for reimbursement I do not think it would be appropriate, on appeal, to create and then pronounce on an issue that was never an issue at trial.

[31] It follows from the views I have expressed that I would allow the appeal, with prescribed costs to the appellant both here and in the court below. The appellant had counterclaimed in the High Court for possession and in his notice of appeal had sought that relief. It seems to me that he is entitled to the order he seeks and, accordingly, I would order that the appellant recover possession.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal