

COMMONWEALTH OF THE BAHAMAS 2019

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/No. 01498

BETWEEN

WANDA HIGGS

Plaintiff

AND

CHRISTINE HIGGS

1st Defendant

AND

KRISHNA HIGGS-PURCELL

2nd Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: V Alfred Gray for the Plaintiff

Richette Percentie with LaShonda Bain for the Defendants

JUDGMENT

WINDER, CJ

WINDER, CJ

This is the application of the Plaintiff (Wanda) for a permanent injunction and for declaratory relief in similar terms.

[1.] Wanda commenced this action by Originating Summons seeking the following relief:

1. That the 1st Defendant be restrained and estopped whether by herself, her servants, agents or otherwise howsoever from enforcing her propriety right to the upper portion of a building, situate in Johnson Street, Harbour Island, which apartment/house was built by the Plaintiff with the expressed approval, permission and encouragement of the 1st Defendant;
2. That the 2nd Defendant, (in the event the 1st Defendant has transferred the legal title to her) be restrained and estopped whether by herself, her servants, agents or otherwise howsoever from enforcing her propriety right to the upper portion of a building, situate in Johnson Street, Harbour Island, which apartment/house was built by the Plaintiff with the expressed approval, permission and encouragement of the 1st Defendant, of which the 2nd Defendant well knew;
3. That the 1st and 2nd Defendants, their servants or agents, be restrained from interfering with the lawful rights of the Plaintiff to the quiet use and enjoyment of the upper portion of the said building situate on Johnson Road, Harbour Island until further ordered;
4. With Liberty to the Defendants to restore and apply.

[2.] Upon application, Wanda secured an interlocutory injunction from Mr. Justice Keith Thompson on 24 October 2019 which provided, inter alia, as follows:

- (1) That the 1st Defendant be restrained and estopped whether by herself, her servants, agents or otherwise howsoever from enforcing her propriety right to the upper portion of a building, situate in Johnson Street, Harbour Island, which

- apartment/house was built by the Plaintiff with the expressed approval, permission and encouragement of the 1st Defendant;
- (2) That the 2nd Defendant, (in the event the 1st Defendant has transferred the legal title to her) be restrained and estopped whether by herself, her servants, agents or otherwise howsoever from enforcing her propriety right to the upper portion of a building, situate in Johnson Street, Harbour Island, which apartment/house was built by the Plaintiff with the expressed approval, permission and encouragement of the 1st Defendant, of which the 2nd Defendant well knew.

Keith Thompson J thereafter gave directions to set the matter down for trial.

[3.] The matter came on for trial which was conducted over two days. Wanda gave evidence as the sole witness for her case. The 1st Defendant (Christine), the 2nd Defendant (Krishna), Christine's son, Rayon Higgs and Krishna's husband Gabriel Purcell all gave evidence in support of the Defendants' case. Each of the witnesses filed a witness statement and were subject to cross examination and re-examination.

[4.] Having heard the evidence and observed the demeanor of the witnesses as they gave their evidence, I have no hesitation in indicating that I preferred the evidence called on behalf of the Defendants to that of Wanda where the evidence differed. The summary of the factual background that follows includes my findings of fact where the matters to which I refer were in dispute between the parties.

[5.] Wanda is the daughter of Christine and the sister of Krishna.

[6.] On 21 July 1991 Christine purchased property in Johnson's Harbour View Estates. On 15 November 2005 she took out a mortgage facility with Scotiabank (Bahamas) Ltd. to build a duplex consisting of two 2-bedroom 1 bath units. Initially, Christine, Krishna, Wanda and Wanda's son lived in one of the units.

[7.] In 2013 Christine fell into arrears and called upon her daughters to assist. An agreement was reached whereby each would pay 1/3 of the mortgage and utility payments for the property. Wanda was unable to qualify to join in the mortgage and as

such Krishna joined in the mortgage with Christine as a co-mortgagee on 16 April 2013. Notwithstanding she was not included in the mortgage she agreed to make her 1/3 contribution.

[8.] I did not accept Wanda's remarkable position that she did not agree to pay a 1/3 portion of the living expenses for the property or that the mortgage somehow was only for downstairs. Having admitted, albeit reluctantly, that she was aware of the troubles that Christine was having in meeting the mortgage obligations, it was untenable to accept that she was told she could construct the unit above the duplex without any agreement to contribute to the expenses. In fact, I accepted Krishna's evidence that Wanda came onto her job and told her about the problems with the mortgage going into foreclosure and promising to Krishna to pay her share of mortgage if Krishna signed onto the mortgage and took over the payments.

[9.] Krishna has paid the full mortgage payments each month since 2013. Wanda has made occasional payments towards the utilities when approached by Krishna and Christine in 2015. There was consistent bickering between the siblings over the payments of the mortgage and the utilities and therefore Christine permitted Wanda to construct an additional 2-bedroom unit above the duplex. Wanda had agreed to pay her share of the mortgage as a part of the agreement.

[10.] Wanda built the structure in 2016 but had failed to honor the agreement to pay her share of the mortgage and utilities. In 2017/2018 Krishna moved into one of the units, previously occupied by a tenant, leaving Christine in the unit by herself.

[11.] Instead of paying her share of the utilities, Wanda, without obtaining the permission of Christine and Krishna, and without having proven any ownership of the property, installed a separate electrical meter to provide separate power to her unit. This occurred after a storm had damaged the electrical box.

[12.] On 21 March 2019 Wanda and Krishna instructed their attorney to take steps to evict Wanda from the premises for failing to pay her share of mortgage and utilities. On

24 May 2019 the Defendants caused the electrical meter to Wanda's unit to be disconnected. They wrote to BPL advising of an illegal connection and confirming that they had removed the meter.

[13.] Krishna has learned that there was no building permit or certificate of occupancy for Wanda's unit.

[14.] In 2020 Krishna learnt that the weight of Wanda's additional unit has caused and continues to cause damage to the structure. The ceiling in both of the bottom units crumbles to the touch and are falling with the steel being exposed. The ceiling now leaks showing water stains with resulting mold and mildew. Christine has had to vacate the premises as a result of the falling ceiling and damage and no longer resides on Harbour Island. Rayon Higgs, Christine's son resides in the unit. Whilst some temporary remedial work has been done, Krishna obtained an estimate which demonstrates that repair work will be well in excess of \$60,000.

[15.] Also in 2020, Krishna refinanced the entirety of the debt due to Scotiabank with the Royal Bank of Canada. Krishna complains that it is unfair that she is saddled with the mortgage of the property and the utilities whilst Wanda, her family and another person continue to enjoy the benefits of water, mortgage and insurance free of charge and at her expense.

[16.] Wanda's case, as stated in her written submissions, was as follows:

All of the parties gave evidence in this case together with the son of the First Defendant and the husband of the Second Defendant. From the evidence there was no contradiction of the Plaintiff's claim that she granted permission by her mother, the First Defendant, to build an apartment for her and her son on the top floor of the building she owned. It is our humble Submission that the Court, unless the parties can agree to a position that is livable by all, ought not to lift the Injunction because once the Injunction is lifted it is almost guaranteed that the Defendants will seek either to close the entry to the property from the Plaintiff and her son, or otherwise make it so difficult for them to live there that it would be better if they were not be able to get to the house that they occupy now. It is my Submission therefore that since the First Defendant by her own admission caused the Plaintiff to build the apartment above her property, she cannot now be heard to say that

the Plaintiff must leave and if she does leave, the value of the apartment must be paid by the First Defendant and by extension the Second Defendant who now seeks to join the First Defendant in putting the Plaintiff away. It is my view that this position will not be tenable as the Plaintiff has nowhere to go. It is hoped therefore that the parties can co-exist since the present situation was by agreement between them. It is suggested that the mortgage amount with the Royal Bank of Canada be determined at the time the Plaintiff built the apartment and up to that amount, all five of the occupants of the building, which means the Plaintiff, the two Defendants, the First Defendant's son and the Second Defendant's husband, should each pay 20% of the monthly mortgage payment related to that amount. This should not be extended to any extra amount borrowed by the Defendants to the exclusion of the Plaintiff and added to mortgage.

[17.] According to the learned authors of ***Commonwealth Caribbean Property Law***, at page 96:

Assurance

In order that the equity may arise by proprietary estoppel, it is essential that the claimant can show some assurance on the part of the person to be estopped, amounting to 'a representation or expectation created by the landowner'. Mere 'expenditure with consent' does not give rise to an estoppel, and 'one who voluntarily improves another's land without encouragement or promise of reward does so "entirely at his own risk". 'In the well-known dictum of Bowen LJ, 'liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will'. ...

Reliance

For an estoppel to arise, it is essential that the claimant should have relied on the assurance, in the sense that he was induced to act in a certain way because of the assurance given to him. Since a claimant may in practice have difficulty in proving reliance on his part, the court may infer reliance in cases in which such reliance may plausibly explain the claimant's conduct, as, for example, in *Greasley v Cooke*, in which it was held that if clear assurances have been made and a detriment has been suffered, the court may presume that there has been reliance.

[18.] Estoppel and or injunctions are equitable remedies and the grant of such relief is within the discretion of the Court, which discretion will attract equitable principles and maxims. The maxim, he who comes to equity must do equity, readily comes to mind. Whilst Wanda complains that it would be unfair that she not be protected from eviction, it is equally unfair that she has lived in the premises, rent free at the expense of her sister Krishna since 2013, having agreed to pay her fair share of the expenses used by her.

[19.] Wanda says that "*since [Christine], by her own admission caused [her] to build the apartment above her property, she cannot now be heard to say that [she] must leave and*

if she does leave, the value of the apartment must be paid by [Christine] and by extension [Krishna] who now seeks to join [Christine] in putting [Wanda] away." I am satisfied that Wanda was granted permission to build the additional unit but on the condition that she paid her fair share. Even if I had found that the promise to pay for adding the unit was not made to Christine, Wanda is still bound by the earlier promise to Krishna (a mortgagee/co-owner) to pay the 1/3 of the mortgage.

[20.] Indirectly Wanda acknowledges this obligation as she now says:

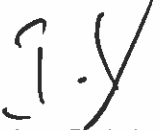
It is suggested that the mortgage amount with the Royal Bank of Canada be determined at the time the Plaintiff built the apartment and up to that amount, all five of the occupants of the building, which means the Plaintiff, the two Defendants, the First Defendant's son and the Second Defendant's husband, should each pay 20% of the monthly mortgage payment related to that amount.

The suggestion however, ignores that Wanda was supposed to pay 1/3 of the mortgage and has not paid this sum for 10 years now. Having not lived up to her obligations under the promise she cannot now seek to rely on the promise.

[21.] It would also seem to me that the promise made by Christine contemplated that the construction would be done lawfully and in accordance with the directives of the Ministry of Public Works which regulates construction. Having not obtained a building permit or an occupancy permit to build the unit, Wanda cannot rely on the promise.

[22.] In all the circumstances, I refuse the application for injunctive and declaratory relief. The interlocutory injunction granted by Mr Justice Keith Thompson is discharged. The Defendants shall have their reasonable costs to be taxed if not agreed. I will suspend this decision for a period of ninety (90) days.

Dated this 9th day of November 2023


Sir Ian R. Winder
Chief Justice