JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121 /2017

MOTION NO 11/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN JOYCE WHITE APPLICANT

A N D DISCOVERY BAY BEACH CLUB LIMITED RESPONDENT

Hugh Wildman instructed by Hugh Wildman and Company for the applicant

Christopher Dunkley and Miss Carissa Bryan instructed by Phillipson Partners for the respondent

17, 18,19 December 2018 and 12 April 2019

PHILLIPS JA

[1] I have read in draft the reasons for judgment of P Williams JA. I agree with her reasoning and conclusion and have nothing further to add.

F WILLIAMS JA

[2] I too have read the draft reasons for judgment of P Williams JA and agree. There is nothing that I wish to add.

P WILLIAMS JA

[3] This is a notice of motion brought by the applicant, Joyce White, for conditional leave to appeal to Her Majesty in Council from the decision and order of this court delivered on 1 June 2018. The decision which was handed down was as follows:

> "1. The application for extension of time within which to file a notice of appeal is refused.
>
> 2. The application to admit fresh evidence is granted.
>
> 3. Costs to the respondent to be taxed if not agreed.
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> 4. The costs of the application for fresh evidence are not included."

[4] The motion was brought pursuant to section 110(2)(a) of the Constitution of Jamaica ("the Constitution"), which provides that an appeal shall be to the Privy Council from decisions of the Court of Appeal in any proceedings, with the leave of the Court of Appeal, "where in the opinion of [the court] the question involved in the appeal is one that, by reasons of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council".

[5] On 19 December 2018, after hearing and considering the arguments from counsel on this application, we made the following orders:

> "(1) Application for leave to appeal to Her Majesty in Council is refused.
>
> (2) Costs of this application to the respondent."

These are our reasons for the decision.

Factual background

[6] The applicant entered into a lease agreement with the Discovery Bay Beach Club Limited, the respondent, in March 2014. The lease agreement was in respect to property owned by the respondent along the beachfront in Saint Ann. It was for a period of two years at a monthly rental of $11,500.00 commencing on 1 April 2014.

[7] In January 2016, the respondent gave notice to the applicant requiring her to quit the premises when the lease expired on 31 March 2016. She failed to do so and the respondent brought a claim in the Parish Court for Saint Ann seeking recovery of possession and mesne profits from the applicant, for her occupation after the expiry of the lease.

[8] The matter was transferred to the Supreme Court in April 2017. The applicant filed a defence to the claim in July 2017. In the judgment in the matter before this court Brooks JA usefully summarised the assertions of the applicant made in the court below at paragraph [8] where he stated:

> "... In her defence, she asserted, among other things, that:
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> a) she was an honorary member of the company;
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> b) she had been, as such, placed in possession of the premises since 2006;
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> c) this was done by the then president of the company, Mr Schnoor;
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> d) she was responsible for the maintenance and upkeep of the premises;
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> e) she expended money to improve the premises and make it habitable;

f) she has continued to maintain the property;

g) although she did sign a lease that lease was invalid as the persons who purported to sign on behalf of the company were not authorized to act on behalf of the company;

h) she has been paying utility bills for the premises;

i) she denies the authority of the persons who purport to act on behalf of the company in initiating and maintaining the claim against her."

The proceedings in the court below

[9] On 2 October 2017 the respondent filed a notice of intention to rely on an application for judgment pursuant to rule 26.1(2)(f) of the Civil Procedure Rules 2002, ("the CPR"). This matter came on for hearing before Laing J on 10 October 2017.

[10] At that time, the applicant was without representation and the learned judge adjourned the matter at her request to afford her time to seek new representation. The matter was adjourned to 20 November 2017.

[11] On 3 November 2017, the respondent filed a notice of application for summary judgment, which was set to be heard on 20 November 2017. The respondent said that the applicant was served with the notice. However, on 20 November 2017, the applicant was still without legal representation. The learned judge proceeded to deal with the matter and granted summary judgment in favour of the respondent. It should be noted that this court has not had sight of the documents relating to this application, which were before Laing J.

The application before this court

[12] On 18 December 2017, the applicant filed a notice of application for leave to extend time to appeal. In her affidavit in support she explained that she had sought and obtained advice on the matter from Mr Wildman and was satisfied that she had a good prospect of success in an appeal having regard to the defence that had been initially filed on her behalf by the attorney-at-law who was then representing her.

[13] She further explained that it was at that time of consulting with Mr Wildman that she became aware that the time for appealing the decision of Laing J had expired, hence the application.

[14] On 23 January 2018, the applicant filed her notice of application for leave to appeal. The grounds of appeal on which she was proposing to rely were as follows:

> "(a) That the Learned Trial Judge erred in law in failing to appreciate that the Defence raised by the Applicant established that the Respondents were not properly constituted in keeping with the Articles and Memorandum of Association of the Respondents, and therefore they could not have brought a Claim against the Applicant.
>
> (b) That the Learned Trial Judge erred in law in failing to consider the Defence that was filed by the Applicant when he entered the application for Summary Judgment.
>
> (c) That the Learned Trial Judge erred in law in failing to appreciate that the Defence raised by the Appellant [sic] established issues of a triable nature which could not be determined on a Summary judgment."

[15] The applicant also, on 7 March 2018, filed a notice of application for court orders to adduce fresh evidence, which was amended on 21 March 2018. The fresh evidence concerned her assertion that she was in fact a member of the respondent and she exhibited articles of association of the respondent in support of her contention. In her further affidavit in support of her notice of application to adduce fresh evidence, the applicant exhibited an affidavit, which was the evidence she wished the court to consider. This affidavit was from someone who asserted that he was entitled to full membership of the respondent with full voting rights. He also asserted that he was not advised of any annual general meeting held in August 2015 and was consequently not a party to any decision to end a lease agreement that was in place. Further, he asserted that the lease agreement was never supported.

[16] The applicant at this time also asserted that she had paid all property taxes related to the property and exhibited the most recent copies of the certificates of payment of taxes.

[17] At the hearing of the application for leave to extend time to appeal before this court, Mr Wildman raised the issue of the applicant having acquired an equitable interest in the property by virtue of her expenditure thereon. He argued that the principle of proprietary estoppel applied. Brooks JA, on behalf of this court, in arriving at the decision already noted at paragraph [3] above, found that Mr Wildman's submissions "failed on a number of fronts" and pointed to five difficulties in the submissions. These difficulties can be summarized as follows:

1. The defence of proprietary estoppel was not the defence that was placed before the court below. The applicant had in fact filed no evidence for the learned trial judge to consider and hence he could only consider the defence she had filed. The defence stated that the applicant had been put into possession and cared for the premises on behalf of the respondent.
2. There was no indication or evidence of any promise, whether expressed or implied being made to the applicant. Neither was there any pleading or evidence that she relied to her detriment on any promise or implied position that would raise an equity on her behalf.
3. The applicant entered into a lease agreement with the respondent and she presumably paid rental on the agreement, to be inferred from the fact that she was not being sued for rental. When her lease ended, she was estopped from denying her landlord's title, and in this case, entitlement on the reversion.

4. The applicant's assertion that the respondent did not authorise instituting the action against her was without evidential support.
5. The respondent's articles of association do not support the submission that the applicant is an honorary member and by virtue of her ownership of other property in the subdivision, an ordinary member. In any event, even if a person is an ordinary member, there is no entitlement to the respondent's property; the respondent is a separate legal entity.

[18] Brooks JA concluded that based on all the various flaws in the applicant's position there would be no real prospect of her succeeding on the appeal. It was ultimately on that basis that her application for an extension of time in which to file a notice and grounds of appeal failed.

The motion

[19] The motion was supported by the affidavit of the applicant filed on 20 June 2018. She deponed that the effect of paragraph 3 of her defence raised the question of proprietary estoppel, as the respondent would have acquiesced in her spending vast sums of money to improve the property without any objection. She contended that the ruling of this court that there was no evidence that the respondent had made any promise to

the applicant to raise the issue of proprietary estoppel was erroneous and not supported by the weight of authorities.

[20] She ultimately contended that the equitable interest arose out of her expenditure to improve on the property coupled with payment of taxes over the period of eight years. The respondent had acquiesced to this expenditure. This equitable interest was sufficiently raised on the pleadings that were before the learned judge and this court and the learned judge on a summary judgment application could not determine such an issue. She concluded that this issue raises a question of great general or public importance for the determination of Her Majesty in Council.

[21] In the notice of motion, the questions which the applicant identified ought to be submitted were summarized as follows:-

> "(1) Whether the Applicant by virtue of her occupation of the property, for some eight (8) years, at the request and acquiescence of the Respondent, acquired an equitable interest in the said property.
>
> (2) Whether, for the applicant to establish an equitable interest in the said property, she has to show that there was a promise from the Respondent that she will acquire an interest in the said property;
>
> (3) Whether on the pleadings that were before the learned judge at the time he considered the summary judgment application, warranted the learned judge to decline the application for summary judgment and to allow for the applicant to contest the issue in a trial as to whether she had acquired an equitable interest in the said property against the Respondent.
>
> (4) Whether the learned trial judge and the Court of Appeal applied the correct test in establishing that the

> Respondent was entitled to the grant of summary judgment, having regard to the pleadings that were before the learned judge and the Court of Appeal."

[22] In the hearing before us, Mr Wildman relied on the affidavit in support filed by the applicant. He submitted that there was an exceptional point of law, which arose as to the correct test that should guide courts of Jamaica in the application of the principle of proprietary estoppel. It was his contention that in the judgment of this court the wrong test was applied.

[23] Mr Wildman submitted that in the usual invocation of the doctrine of propriety estoppel an aggrieved person must show that the landlord held out a promise to the aggrieved that he or she, by virtue of occupation of property and making expenditure, would have a share in the property. This, he contended, would seem to make the touchstone of the doctrine the issue of a promise. However, Mr Wildman contended that the modern formulation does not require a claimant to show that there was any such promise held out by the landlord. He relied on **Plimmer and Another v The Mayor, Councillors, and Citizens of the City of Wellington** (1884) 9 AC 669.

[24] Counsel submitted that the test to be considered was whether, given the expenditure of the claimant with the knowledge and concurrence of the landlord and with no objections raised, it was unconscionable for the landlord to disregard the expenditure and disregard her interest. He further contended that the fact that she paid the taxes for the property as well raises the question of whether she was a mere licensee. He

referred to **Inwards and Others v Baker** [1965] 2 QB 29 and **Taylors Fashion Ltd v Liverpool Victoria Trustees Ltd** [1982] QB 133.

[25] Mr Wildman submitted that although the principle of proprietary estoppel is well settled, it is clear from the judgment of this court that the application of it is unsettled. Hence, he continued, a question to be considered is whether one can invoke the doctrine in the absence of a promise, express or implied, in circumstances where there is evidence that the licensee made expenditure on the property and paid the taxes.

The submissions in response

[26] Mr Dunkley in opposing the motion stressed that based on the defence of the applicant before the Supreme Court the issue of proprietary estoppel did not arise. It was submitted that the applicant was unable to establish a basis in law for proprietary estoppel.

[27] In his submissions, Mr Dunkley highlighted the evidence that would have been before the learned judge, which led to the granting of summary judgment. He contended that the decision to grant summary judgment and this court's decision not to extend time to permit an appeal does not give rise to any novel legal point which needs to be submitted to Her Majesty in Council.

Discussion and analysis

[28] Section 110(2) of the Constitution provides:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases: -

a) where in opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

b) such other cases as may be prescribed by Parliament."

[29] This court has considered and pronounced on this provision in several cases and the principles governing its application are now well settled.

[30] The requirements that are to be met for leave to be granted was outlined in **Viralee Bailey-Lattibeaudiere v The Minister of Finance and the Public Service and others** [2015] JMCA App 7. Phillips JA at paragraph [34] stated:

> "The question as to the true and proper interpretation to be given to section 110(2)(a) of the Constitution, has also been the subject of review in this court. In **Georgette Scott v the General Legal Council** SCCA No 118/2018, Motion No 15/2009, delivered 18 December 2009, I set out, on behalf of the court, at page 9 three steps that ought to be used in construing this section namely:
>
> > '…Firstly, there must be the identification of the questions (s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one, which it can be properly said, raises an issue (s) which require (s) debate before her Majesty in Council. Thirdly, it is for the applicant to persuade the court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general [or] public importance.'
>
> It is clear therefore that before granting leave the court must be satisfied that the proposed appeal raises questions which arise from

> the decision of the Court of Appeal, are determinative of the substantive issues, on the merits of the appeal, and are by their nature of great general or public importance to justify being considered by Her Majesty in Council."

[31] In **National Commercial Bank Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24, Morrison P succinctly defined what is meant by great general or public importance as follows:

> "[33] … in order to be considered one of great general or public importance, the question involved must, firstly be one that is subject to serious debate. But it is not enough for it to give rise to a different question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and the public interest."

[32] In holding that the application for an extension of time to file an appeal should be refused, this court found that there was no realistic prospect of success firstly, because of the fact that propriety estoppel was not the defence placed before the court below and secondly, that there was no evidence for the learned judge to consider. Mr Wildman does not challenge either of these factual findings.

[33] Nowhere in the defence as filed, does the applicant state clearly that she was claiming any interest in the property. Indeed, the main thrust of the defence was a challenge to the validity of the lease and to the authority of persons purporting to act on behalf of the respondent in seeking to recover possession from her.

[34] It is noted that the proposed grounds of appeal presented to this court, whilst challenging the failure of the learned judge to deal with the defence, did not refer to what the defence was. Indeed, in none of the affidavits filed in support of the applications before this court, by either the applicant or Mr Wildman, is there any mention of any factors that could give rise to the issue of proprietary estoppel.

[35] The applicant relies on one paragraph in the defence as the basis for her contention that the issue of proprietary estoppel arose; paragraph 3 thereof states:

> "3. In response to paragraph 3 of the Particulars of Claim the [applicant] says she is an honorary member of the [respondent] having been invited to become a member of the club by the former president Mr Raymond Schnoor in or around 2006 and who put the [applicant] in possession of the property as a member of the Club and at which time it was agreed that the [applicant] would be responsible for the maintenance and upkeep of the property on behalf of the [respondent]. The [applicant] expended monies to improve the property and to make it habitable as at the time it was derelict and has continued to maintain the property since taking possession in 2006."

[36] This bald assertion as to expenditure of monies and being responsible for maintenance and upkeep are not, to my mind, sufficient to support a claim of an equitable interest in the property. This is especially so since the applicant acknowledged that she was initially doing so as a member of the respondent and on its behalf. These pleadings are not demonstrative of the applicant's actions being to her detriment; neither do they raise any suggestions as to what her expectations for having so acted were. It is apparent

that the principle of proprietary estoppel cannot assist the applicant based on these pleadings.

[37] As Mr Wildman rightly acknowledged in his submissions, the principle of proprietary estoppel is well settled. The case of **Inwards and Others v Baker** remains the authority that best propounds on this principle. Lord Denning at pages 36-37 had this to say:

> "We have had the advantage of cases which were not cited to the county court judge - cases in the last century, notably *Dillwyn v Llewelyn* and *Plimmer V Wellington Corporation*. This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by Lord Kingsdown in *Ramsden V Dyson*. It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will remain there, that raises an equity in the licensee such as to entitle him to stay . ...But it seems to me, from *Plimmer's case* in particular, that the equity arising from the expenditure on land need not fail "merely on the ground that the interest to be secured has not been expressly indicated…the court must look at the circumstances in each case to decide in what way the equity can be satisfied."
>
> … All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there."

[38] In the circumstances of this matter, there was no proper basis from the material that was before Laing J for him to consider the issue of an equitable interest in the land being claimed by the applicant. The issue of proprietary estoppel did not sufficiently arise from the defence as pleaded. The summary judgment entered by Laing J was appropriate

since the applicant had no realistic prospect of success on her pleadings (see **Swain v Hillman and another** [2001] 1 All ER 91).

[39] The decision of this court was therefore that the applicant had no likelihood of success in seeking to set aside the judgment of Laing J and thus the application for extension of time within which to file a notice of appeal should be refused. Against this background, the proposed questions did not raise any issue of any great general or public importance in keeping with section 110(2)(a) of the Constitution. Accordingly, the application for leave to appeal to Her Majesty in Council was refused.