

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017- 02970

Between

KEN JOSEPH

(also known as Winston Kenneth Joseph)

Claimant

And

FLOYD PHILIP

GARY SEEPERSAD

Defendants

Before the Honourable Madame Justice Margaret Y Mohammed

Delivery date: June 18 2019

APPEARANCES:

Ms Pavitra Ramharack Attorney at law for the Claimant.

Mr Kenya Murray Attorney at Law for the Defendants.

JUDGMENT

1. The Claimant and Carmen Seepersad (“Carmen”), the First Defendant’s mother were in a common law relationship sometime in the mid 1970s. During this time, they jointly purchased from Mr Winston Philip the residue of an unexpired lease for the property known as and situated at No 5 Smith Street, Mon Repos, San Fernando (“the property”). After the common law relationship ended, Carmen and her children continued to live on the property until her death in 2017. The First and Second Defendants have continued to occupy the property without the Claimant’s permission. The Claimant has now approached the Court to recover possession of the property and other related orders.

THE CLAIMANT'S CASE

2. The Claimant contended that sometime in the mid 1980s the relationship between he and Carmen ended and they agreed that Carmen would continue to live on the property for the rest of her life and upon her death it would revert to the Claimant. It was also agreed that the Claimant would continue to pay the land and building taxes, the mortgage instalments and the water rates and Carmen would maintain the property and pay all other outgoings.
3. In or around 2009 both the Claimant and Carmen jointly executed a new lease with the Housing Development Corporation ("the HDC") for the property. On 26 January 2017 Carmen departed this life. Subsequent to Carmen's death, the Claimant attempted to secure the property, however, the First Defendant has continued to have possession of the property and the Second Defendant is in possession of a mini mart on the property.
4. Based on the aforesaid facts the Claimant seeks the following orders from the Court:
 - (a) A declaration that the Claimant is the registered legal owner of and entitled to possession of the property;
 - (b) An order that the First Defendant and the Second Defendant are unlawfully in occupation and/or are trespassers in respect of the property;
 - (c) Damages for trespass;
 - (d) Costs;
 - (e) Mesne profits;
 - (f) Interest;
 - (g) Such further or other relief as the nature of the case may require.

THE DEFENCE

5. The Defendants oppose the Claimant obtaining the orders sought. They Defendants contended that the property has always been the home of Carmen and the First Defendant. Carmen and the First Defendant's father, Floyd Philip Snr were tenants of the property until 1975 when Floyd Philips Snr obtained the remainder of the lease for the property by a Deed of Conveyance. The common law relationship between

Carmen and Floyd Philip Snr. ended around 1977 and the latter abandoned his family and migrated to Venezuela.

6. Floyd Philip Snr. secretly sold his interest in the property to his brother Winston Phillip whilst Carmen and her children were in occupation of the property. Carmen convinced Winston Philip to sell her the property which she jointly purchased with the Claimant. The Claimant and Carmen subsequently shared a common law for approximately for 6 months which came to a mutual end in 1977 when both parties went their separate ways. Carmen continued to live at the property with her family without any objections nor any agreement with the Claimant. Carmen paid the mortgage instalments for the property together with all outgoings of the property. Carmen constructed a mini mart on the property and carried out renovation works on it. The First Defendant assisted Carmen and continues to reside on the property. The Second Defendant assists the First Defendant in the mini mart.

7. Based on the foregoing facts the First Defendant has counterclaimed for the following orders:
 - (a) A declaration that the Claimant has abandoned the property;

 - (b) A declaration that Carmen and the First Defendant have been in undisturbed possession and occupation of the property for a period of more than 16 years;

 - (c) A declaration that the First Defendant in his personal capacity and as one of the executors of Carmen's estate is entitled to possession of the property; and

 - (d) A declaration that the First Defendant in his personal capacity by virtue of the doctrine of proprietary estoppel is entitled to a right, share, title and interest in the property.

DEFENCE TO COUNTERCLAIM

8. In his defence to the counterclaim the Claimant denied the First Defendant's allegations. He contended that the First Defendant had no locus standi to maintain an action on behalf of Carmen.

MATTERS NOT IN DISPUTE

9. Based on the pleadings it was not in dispute that the Claimant was a joint owner of the property with Carmen since the parties have admitted to the following documents:
 - (1) Deed of Assignment dated 15 June 1977 registered as No. 11435/77 vesting the property jointly in the Claimant and Carmen;
 - (2) Deed of Mortgage dated 15 June 1977 registered as No. 10585 of 1977 ("the Deed of Mortgage") Between Barclay's Bank, the Claimant and Carmen;
 - (3) The Deed of Release dated 15 December 1982 and registered as No. 33 of 1983("the Deed of Release") Between Republic Bank, the Claimant and Carmen; and
 - (4) Deed of Lease dated 30 December 2009 and registered as No. DE201000168422 ("The 2009 Deed of Lease") Between the HDC, the Claimant and Carmen.
10. The property as of 1977 was vested jointly in the Claimant and Carmen. In December 2009 the lease for the property was renewed and at that time the property continued to be vested jointly in the Claimant and Carmen. There have been no evidence before the Court that the joint tenancy was severed. Therefore upon Carmen's death on 26 January 2017 the doctrine of survivorship took effect and the legal and/or equitable interest of the property was vested solely in the Claimant.

THE ISSUES

11. In order for the Claimant to obtain the reliefs he sought the following issues must be determined in his favour:

- (a) Were the First Defendant and Carmen in continuous undisturbed possession of the property and was the Claimant's right in same extinguished by virtue of Section 3 of the **Real Property Limitation Act**¹ ("the RPLA")?;
 - (b) Is the First Defendant in his personal capacity entitled to the reliefs in his counterclaim by virtue of the doctrine of proprietary estoppel?
 - (c) Is the Claimant entitled to an order for mesne profits/damages for trespass?
12. The determination of the aforesaid issues are fact driven. According to the learning in **Horace Reid v Dowling Charles and Percival Bain**² when determining questions of fact the Court must weigh the versions of the events, on a balance of probabilities, in light of the evidence and in doing so the Court is obliged to check the impression of the evidence of the witnesses on it against: (1) contemporaneous documents; (2) the pleaded case; and (3) the inherent probability or improbability of the rival contentions.

WERE THE FIRST DEFENDANT AND CARMEN IN CONTINUOUS UNDISTURBED POSSESSION OF THE PROPERTY AND THE CLAIMANT'S RIGHT IN SAME HAS BEEN EXTINGUISHED BY VIRTUE OF SECTION 3 OF THE RPLA?

13. The First Defendant has sought a declaration that the Claimant has abandoned the property and that the Claimant's title has been extinguished by his and Carmen's adverse possession of the property.
14. The First Defendant did not set out any particulars in the Defence and Counterclaim of the said abandonment. In **Harold Pantin v Michael Bellay & Anor**³ Rajnauth-Lee J (as she then was) in her decision considered the issue of abandonment. The plaintiff in that matter had filed a claim for possession of a certain portion of lands, the defendants in their counterclaim contended that the plaintiff had abandoned the lands. At paragraph 28 of the decision Rajnauth-Lee J stated:

¹ Chapter 53:06

² Privy Council Appeal No. 36 of 1987.

³ HCA 2350 of 1991

"I agree with Counsel for the plaintiff that the onus lies on the defendants to satisfy the Court that there was abandonment by the plaintiff's mother from as early as 1966. I also agree that cogent evidence ought to be brought to establish abandonment.

The Court of Appeal in the case of *Archer v Georgiana Holdings Limited* (1974) 21 W.L.R. 431 referred to the judgment of *Leigh v Jack* [1879] 5 Ex. D. 264 where it was stated that the mere fact that the true owner does not make use of his land does not necessarily mean that he has discontinued possession of it (per Cockburn CJ).

To establish discontinuance or abandonment, it must be shown positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it.

15. The law with respect to adverse position is well settled. The law will presume that the paper title owner, in this case the Claimant was in actual possession and with the right to possess the property. At paragraph 40 in **J A Pye (Oxford) Ltd v Graham**⁴ the House of Lords approved the following statement from **Powell v McFarlane**⁵:

"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."

16. According to the learning in **J A Pye (Oxford) Ltd v Graham** the two elements necessary for legal possession are (a) a sufficient degree of physical custody and

⁴ [2013] 1 AC 419

⁵ 39 P&CR 470

control (“the factual possession”) and (b) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“an intention to possess”). In **Bligh v Martin**⁶, Pennycuick J opined at page 811 that:

“(1) Possession is a matter of fact depending on all the particular circumstances of a case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it is well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user.”

17. Slade J in **Powell v Mc Farlane** described “factual possession” as⁷:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession though there can be a single possession exercised by or on behalf of several persons jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances of the case in particular, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so”.

18. Slade J in **Powell v Mc Farlane**⁸ described the “necessary intention to possess” as:

“3. ‘intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow”.

⁶ [1968] 1 WLR 804 at 811 F

⁷ [1977] 38 P& CR 452 at page 470-471

⁸ [1977] 38 P&CR 452 at page 470

19. The onus of establishing a claim in adverse possession is on the party making the assertion. The facts relied on must be cogent and clearly stated in the pleading⁹. The pleading must establish that the entry on the land was unlawful; that the possession was for a period of at least 16 years and the intention to dispossess¹⁰. In the instant case the onus was on the First Defendant to demonstrate that Carmen and he in his personal capacity were in undisturbed possession of the property for a period of more than 16 years before 2017.
20. It was argued on behalf of the Claimant that the First Defendant's claim in adverse possession must fail since Carmen was in occupation of the property with the permission of the Claimant and the First Defendant's was in occupation of the property with Carmen's permissions.
21. Counsel for the First Defendant submitted that the Claimant's title to the property has been extinguished and Carmen's estate should be entitled to the property since the Claimant never had any genuine interest in the property and he totally neglected to exercise any custody or control of his interest in it since 1977. The Claimant's sporadic payments of water bills over a forty-year period did not amount to any resumption of possession by the Claimant.

The Claimant's evidence

22. The Claimant gave evidence and he also relied on the evidence from his nephew Mr Peter Joseph ("Peter").
23. The Claimant testified that in the 1970's he met Carmen and they began a common law relationship. At that time, he was aware that Carmen had previously been in a relationship with the First Defendant's father and the said relationship had ended. He was also aware that Carmen had children from this relationship. At the time of entering into the common law relationship Carmen was a tenant of the property and Mr. Winston Philip who was the owner was considering selling it.

⁹ Pemberton J (as she then was) in CV 2007-00042 Nelson v De Freitas

¹⁰ Kokaram J at paragraph 35 in Meah John v Allsop and ors CV 2010-04559

24. According to the Claimant, Carmen was concerned that if Winston Phillip sold the property she would be left homeless. Carmen discussed her concerns with the Claimant and due to his relationship with Carmen he decided to intervene. He approached Winston Philip with an offer to purchase the property and after some negotiations it was agreed that he and Carmen would jointly purchase the property. In cross-examination he stated that both he and Carmen approached Winston Philip to purchase the property.

25. The Claimant testified that at that time he was employed with Texaco so that he was able to secure the money for the mortgage. Carmen was a housewife and she unable to contribute towards the purchase of the property. He said that in order to pay the purchase price he took a loan from Texaco Credit Union for a portion of the money and he also secured a loan with Barclay's Bank for the remainder of the money needed for the purchase of the property. He stated that a standing order was placed on his salary to repay the monies to each lending institution each month.

26. The Claimant also testified that during his relationship with Carmen he financially supported Carmen and her children. However, in the 1980's, he ended his relationship with Carmen since he became aware that she was involved in an affair. He said that he was devastated by Carmen's action after he had gone to such lengths to assist her and her children.

27. In cross-examination, the Claimant denied that his relationship with Carmen was only for 6 months in 1977. He maintained that his relationship with Carmen was sometime in the 1970s and 1985. He accepted that Carmen had a child for Floyd Philip Snr between 1970 and 1985. However, he denied that his relationship with Carmen ended before 1985. He accepted that before he started living with Carmen she already had children with the Philip name and a child named Anton Gopaul. However, he was unable to recall their names. He stated that when he was living with Carmen, the First Defendant was a toddler at that time. The Claimant also stated that he did not have any children with Carmen. He accepted that when he met Carmen she was already

living on the property and that it was always her family home but not his family home at that time.

28. According to the Claimant, upon terminating the relationship, they had a discussion about the property since Carmen was not able to purchase his interest nor could she have vacated the property. The Claimant said that due to the nature of their relationship he and Carmen agreed that Carmen could remain in the property for the remainder of her life and then it would revert to him. It was also agreed that he would continue to pay the mortgage instalments, all land and building taxes and water rates. Carmen agreed to pay all the outgoing for the property and to undertake all maintenance work.
29. The Claimant testified that he always kept his end of the agreement and as proof he attached copies of the bills and receipts to his witness statement. He attached to his witness statement copies of receipts from WAA for the period 1981 to 2018. He also attached receipts from the HDC for payments in 2013 and 2013; land tax receipts for 2013 and 2017. In cross-examination, the Claimant accepted that he did not have any receipts from Texaco Credit Union and Barclay's Bank to show that he was paying the mortgage for the property. He maintained that Carmen did not pay the mortgage since at that time he was the person who had job security to secure the mortgage and to make arrangements for the standing order to pay the mortgage.
30. The Claimant also testified that he was of the belief that both he and Carmen were fulfilling their agreement since he continued paying the mortgage and the bills and Carmen continued maintaining the property. In cross-examination the Claimant stated that his motivation in purchasing the property was because he wanted to assist Carmen and that he was also interested in the property. He also testified that despite the circumstances of infidelity which caused his relationship with Carmen to end he still entered into an agreement with Carmen with respect to the property.

31. The Claimant testified that he was contacted by the HDC to confirm that he was still alive, since Carmen had attempted to have his name removed from the lease for the property by contending that he was deceased. Thereafter, in 2009 the HDC requested that both he and Carmen attend their office to enter into a new lease for the property. They both attended and signed off on copies of the new lease which he annexed to his witness statement.
32. According to the Claimant, in or around the time of entering into the new lease, he received a letter dated 3 November 2009 from Carmen's attorney at law which stated that he was prepared to transfer his interest in the property to Carmen. He stated that he was disturbed by Carmen's dishonesty since he did not have any discussions with her about transferring his interest in the property to her. The Claimant stated that by letter dated 4 January, 2010 his then attorney-at-law responded to the letter of 3 November 2009 denying any such discussions. In cross-examination the Claimant testified that Carmen never offer him any money to purchase his interest in the property and he never agreed to sell his interest to her.
33. The Claimant accepted in cross-examination the following: Carmen treated the property as if it was hers; the signature on the letter¹¹ to the Director of Surveys which was annexed to the First Defendant's witness statement was Carmen's; the receipts¹²annexed to the First Defendant's witness statement were in the name of Donna Seepersad, which was Carmen's name, and that it concerned construction. The Claimant stated that he was not aware of the structure built in the back of the property and he did not know when it was completed. He also did not know that Carmen stopped living in the tapia house and moved into the new house on the property. The Claimant agreed that between 1980 to 1994 he did not know how the property was being maintained. The Claimant was shown He was the stop notice from the San Fernando City Corporation in the name of D. Philip and he said he was never served with it. He was also shown the "SHOW CAUSE NOTICES" which were addressed to D. Philip and said he was never served with same.

¹¹ Page 243 Trial Bundle on Witness Statements

¹² Page 249 of Trial Bundle on Witness Statements

34. The Claimant also testified that in February 2017 he visited the property after Carmen had died. At the time of Carmen's death he knew that none of her children were living at the property. Upon visiting, he realised that the First Defendant was attempting to secure the property for his own interest. On 20 May 2017 he and his nephew Peter met the First Defendant at Tropical Plaza, Marabella to discuss the property. Prior to this he visited the property in search of the First Defendant and he met the Second Defendant who told him in the presence of Peter, that he was a tenant and he had rented the mini-mart from the First Defendant. The Claimant stated that the mini mart was opened without consulting him and at no time anyone offered him money from the sale of proceeds from the mini mart and he did not approach Carmen and ask her for monies from the proceeds of it.
35. According to the Claimant, at the meeting in Marabella, the First Defendant gave him a copy of Carmen's Will ("the Will"). The First Defendant offered to purchase the property on the condition that the Claimant did not inform his siblings of the meeting. However, the Claimant refused the offer. The Claimant stated that he believed that the First Defendant rented a portion of the property to the Second Defendant and the First Defendant enjoys the profits of the mini-mart either by rental income or the profits of the mini-mart while the Claimant has been denied access to the property.
36. In cross-examination, the Claimant testified that he only saw the Will from the First Defendant and that Carmen had left her interest in the property to 2 of her children the First Defendant and Stacy Ann Philip.
37. The Claimant's evidence in chief and in cross-examination was in a large part consistent with his case that he and Carmen purchased the property; to do so the property was mortgaged to Barclay's Bank and he also took a loan from Texaco Credit Union; Carmen had an agreement with respect to the use and upkeep of the property after their common law relationship and that he kept his side of the agreement. His evidence of his meetings in 2017 with the First and Second Defendants respectively were also unshaken.

38. Peter testified that the Claimant is his uncle and he lived with him during his childhood. In cross-examination he stated that was 59 years; in 1976 he was about 11 years old and that he lived at the property around 1976.
39. According to Peter, the Claimant is the owner of the property and knows of the relationship between the Claimant with Carmen. He also testified that he was familiar with the property. However, in cross-examination Peter stated that he did not know that Carmen was living at the property from 1976 to 1980; that Carmen continued to live at the property with her children after that period and that he became familiar with the disputed property around the 1990's. He also did not know the names of Carmen's children.
40. Peter also stated in cross-examination that he knew the tapia house but only knew of the mini mart after its construction sometime around the 2000's. He said he passed in front the property about 3 times a month but could not recall which years he did so. He was aware of the new house only after the Claimant told him Carmen had died in 2017. He admitted he did not know what year the Claimant was in a relationship with Carmen; what year the Claimant moved into and out of the property; what arrangements the Claimant had with Carmen; and the specific times anything was built on the property.
41. According to Peter, he assisted the Claimant with his transactions and sometimes he accompanied the Claimant to pay bills. He knew that the Claimant continues to pay bills and some outgoings for the property.
42. Peter testified that the Claimant told him he wanted to visit the property in February 2017 after Carmen died and he agreed to accompany him. He went to the property and spoke to the Second Defendant about the First Defendant and the Second Defendant informed him that he was renting the mini mart from the First Defendant for \$1500.00 a month and that the First Defendant lived in Trincity and that he would only be able to meet him on weekends. He was able to get a telephone number for

the First Defendant from the Second Defendant and scheduled a meeting for 20 May 2017.

43. According to Peter, on 20 May 2017 he, the Claimant and the First Defendant held a meeting at Tropical Plaza, Marabella. At the meeting the First Defendant stated that the mini-mart was operated by the Second Defendant who was a tenant of the First Defendant. During the meeting, the Claimant was given a copy of the Will. The First Defendant also offered to purchase the property on the condition that the Claimant not inform his siblings of the meeting. However, the Claimant refused the offer.
44. In my opinion, Peter had no first-hand knowledge about the occupation and use of the property prior to 2000 and even after 2000 his knowledge was limited. However, his evidence corroborated the Claimant's evidence and version of the meeting the Claimant had with the Second Defendant at the mini mart in 2017 and the Claimant's meeting with the First Defendant at Marabella in May 2017 both of which Peter attended.

The Defendants witnesses

45. The Defendants gave evidence and they also called two other witness, Mr Mervyn Noel ("Mr Noel") and Ms Sylvia Seepersad-Philip (Sylvia").
46. The First Defendant testified that he was born on 12 July 1976 and he grew up at the property where he lived with Carmen and his siblings. At the time the house was made out of tapia and by 1988 only he and Carmen were living at the property.
47. According to the First Defendant, when Carmen died he went through her belongings and found a Deed¹³ which showed how his father Floyd Philip Snr had obtained the property. He did not know the Claimant and he only met him after Carmen's death. He said that he did not know about the relationship between the Claimant and Carmen but he found a letter in Carmen's belongings which showed that she was in a common

¹³ DE197508418063

law relationship with the Claimant¹⁴; the Deed of Mortgage¹⁵ for the property bearing the signatures of Carmen and the Claimant; the Deed of Release¹⁶ for the property in the name of Carmen and the Claimant; loan receipts¹⁷ in 1980 from Barclays Bank showing payments of a loan in Carmen's name; 2 receipts in 1996 for land tax, electricity bills, and water bills for the property.

48. According to the First Defendant, in 1994 Carmen opened a mini mart named "Donna's Mini Mart" at the front of the property. The mini mart was unauthorised and Carmen received notices from the San Fernando City Corporation which she showed him. Both he and Carmen operated the mini mart and the Second Defendant also assisted. In an effort to conform to all the statutory requirements Carmen made an application to the Director of Surveys with a floor plan. Carmen told him of this application and showed it to him and he found the application in her belongings.
49. The First Defendant testified that Carmen maintained the tapia house on the property and in 2003 she started to build a new house separate from the tapia house. He assisted her with money in the construction. He found some of the receipts and invoices for the separate house and attached them to his witness statement¹⁸. He testified that he and Carmen have occupied the property for over 42 years and they did improvement works and planted crops. He said that he found letters which showed that Carmen tried to have the Claimant's name removed from the lease for the property when it expired¹⁹.
50. He said that he lived at the property until 2001 when he got married but he always assisted Carmen with the upkeep of it and he continued to work part time in the mini mart and paid all the bills for it. He said that when he separated from his wife in 2008 and he returned to live on the property. In 2015 Carmen became ill and shortly after

¹⁴ Exhibit FP 2 of the First Defendant's Witness Statement

¹⁵ Exhibit FP 3 of the First Defendant's Witness Statement

¹⁶ Exhibit FP 4 of the First Defendant's Witness Statement

¹⁷ Exhibit FP 5 of the First Defendant's Witness Statement

¹⁸ Exhibit FP 6 of the First Defendant's Witness Statement

¹⁹ The Claimant also referred to these letters in his evidence

she made the Will where she bequeathed her interest in the property to he and his sister. In 2015 he moved out of the property with Carmen to Trincity. The Second Defendant continued to assist him and Carmen with the shop. He had the responsibility of paying all the bills for the property. When Carmen died he and his common law wife and children returned to the property where they still live today. In cross-examination he stated that when Carmen got ill he returned to live on the property to care for Carmen.

51. According to the First Defendant, in 2017 he met with the Claimant in Marabella where they had a discussion about the property. The Claimant never demanded nor made any requests for the keys for the property. The Claimant suggested that he make the Claimant an offer for the property but he did not make any such offer. In cross-examination he denied that he requested the Claimant to sell the property to him.
52. In cross-examination the First Defendant admitted the following. He did not know if Carmen was in a common law relationship with the Claimant and if the Claimant was a friend of his deceased father Floyd Philip Snr. He was aware that Carmen and the Claimant owned the property jointly since Carmen told him so while she was ill. He did not know Claimant prior to 2017 and he was unaware if there was an arrangement between the Claimant and Carmen with respect to the property. He never saw a Deed for the property until Carmen's death and he did not know anything about mortgage for the property or if Carmen was employed at the time of the mortgage. He stated that Carmen was employed at the Hospital in San Fernando but he could not recall if it was at the time of the mortgage.
53. The First Defendant also accepted that some of the water bills that came to the property and which were not paid by Carmen. He said that he has never paid the water bills but there was always a credit on the water bills and he never asked Carmen about it since it was only after her death he saw the water bill. He accepted that a third party was paying the water bill.

54. The First Defendant also stated that the mini mart was opened by Carmen in 1994 and this was her only source of income and it made a profit. The Second Defendant assisted in the mini mart about 6 or 7 times a month. In 2003 Carmen decided to renovate the property using the income from the mini mart. He accepted that none of the receipts he attached to his witness statement were in his name and that he had no evidence to show that he spent any money on the property. He accepted that Carmen did not promise him the property and that in the Will Carmen acknowledged that the property belonged to Carmen and the Claimant. He also accepted that in the Will Carmen did not intend that the property was for his sole benefit.
55. He first became aware of the letters between the Claimant's and Carmen's attorneys after Carmen died and she did not try to take the Claimant to Court on the property. The mini mart now belongs to him and that the Second Defendant is neither a tenant nor an employee but he shares the profits of the mini mart with him.
56. Based on the First Defendant's evidence in chief and his admissions in cross-examination he had no basis for putting forward a defence and counterclaim in adverse possession. With respect to Carmen's occupation of the property, he had no direct knowledge of the arrangement for the payment of the mortgage and of any arrangement between the Claimant and Carmen for her to stay on the property. With respect to his possession of the property, he did not meet the statutory requirement of continuous undisturbed possession for 16 years prior to 2017 since his evidence was that he was not in possession of the property after he got married in 2001 until 2008 and then he left and returned in 2015. Further, he admitted meeting with the Claimant in May 2017 in Marabella.
57. Mr Noel testified that he shared a common law relationship with Carmen in 1978 for approximately 10 years. He moved into the property with her in 1978 and her children were living there with her. He stated in October 1978 he and Carmen had a daughter Onika Seepersad who is his only child. He annexed a copy of her birth certificate²⁰

²⁰ Exhibit MN 1 to the Witness Statement of Mervyn Noel

which showed that Onika was born on the 3 October 1979 to Carmen and Mr Noel. However in cross-examination he stated that he started living with Carmen on the property in 1976.

58. Mr Noel also testified that Carmen was working at San Fernando General Hospital as a laundry attendant when he met her. In cross-examination he stated that he did not know if she was a permanent employee. He always knew the property as Carmen's. In cross-examination he stated that he did not know who owned the property but he assumed that Carmen owned it. He assisted Carmen with all the plumbing around the house on the property when he lived there and he painted the house. He knows Carmen started to do renovations to the tapia house on the property after their relationship ended but he rarely returned after their relationship ended.
59. In my opinion, Mr Noel's evidence did not assist the Defendants case since he did not know who owned the property and he had no knowledge of the arrangement between the Claimant and Carmen with respect to the property. At best, his evidence demonstrated that at least by 1979 he and not the Claimant was in a relationship with Carmen since they had a child in October 1979. However, it was clear that although he was in a relationship with Carmen in 1979 she did not confide in him the details of the ownership of the property and they had an arrangement for her to occupy it until her death.
60. Sylvia testified that she was Carmen's sister and she was very close to Carmen. She left Trinidad in 1972 and she spent time with her whenever she returned to Trinidad. In cross-examination Sylvia stated that after she emigrated she visited Trinidad for weeks or months but not longer than 6 months.
61. According to Sylvia, in 1974 Carmen and Floyd Philip Snr moved to the property. Sometime in 1977 Carmen came to her home with the First Defendant and informed her that Floyd Philip Snr had left the family; he had sold the property to his brother Winston Philip and that she needed to borrow money to purchase it because she had nowhere else to go. She said that she did not have the money to lend her but their

older sister named Grace gave Carmen the money. In cross-examination, Sylvia admitted she did not know how the property was purchased; who owned the property and whether there was any arrangement between the Claimant and Carmen with respect to the property.

62. According to Sylvia, Carmen and her 6 children lived at the property. She knew the Claimant as Floyd Philip's Snr's friend. She did not know if the Claimant and Carmen had a relationship but Carmen told her that the Claimant was helping her out after Floyd Philip Snr left.
63. Sylvia testified that in 1977 Carmen started to work as a laundry attendant in the San Fernando General Hospital. She knows that Carmen spent her life on the property. Carmen built the shop and she used the profits from the shop to renovate the house and build a separate house.
64. In my opinion, Sylvia was not a witness of truth when she said that she shared a close relationship with Carmen since if she did it was more probable that Carmen would have told her about the details of the arrangement she had with the Claimant for staying on the property. However, by Sylvia's own admission, she did not know how the property was purchased; who owned it and whether there was any arrangement between the Claimant and Carmen.
65. The Second Defendant testified he is the First Defendant's cousin and he visited the property since he was a child. At the trial, he stated that he works with F.M Caterers and also part time at the mini mart located at the property which has always been Carmen and the First Defendant's mini mart. He stated that in 1994 Carmen and the First Defendant built the mini mart on the property. When the mini mart was completed he sometimes worked there to help out Carmen when the First Defendant could not work in the evenings. He started to work regularly in the mini mart when Carmen became ill and confined to a wheelchair. He also became a caretaker of the property.

66. However, in cross-examination the Second Defendant stated that he was born in 1970 but he did not visit Carmen often as a child. He did not recall when the mini mart was built but he recalled that Carmen built it. He spent time at the mini mart assisting Carmen and the First Defendant and after Carmen got ill she asked him to assist her and she gave him some money. According to the Second Defendant, the First Defendant did not know of the arrangement he had with Carmen since at this time the First Defendant was no longer living on the property since he had gotten married but he still visited.
67. The Second Defendant also testified that the property was a family home for Carmen and her children and the only other person he knew living there was her common law husband Mr. Noel until they separated. According to the Second Defendant, Carmen and the First Defendant always lived on the property. However, in cross-examination he changed his evidence and stated that Carmen left the property to live in Trincity when she got ill and the First Defendant moved out from the property after he got married. The Second Defendant also testified that Carmen renovated the tapia house on the property until she and the First Defendant built another house on it.
68. According to the Second Defendant, in February 2017 he was working in the mini mart when the Claimant and another man parked opposite the mini mart and called out to him. He had a conversation with the Claimant who began asking him questions about the property. He told him the property belonged to Carmen. The Claimant told him that the property was his and he then told the Claimant that all questions relating to the property should be directed to the First Defendant whose contact information he gave to the Claimant. In cross-examination, the Second Defendant stated that the Claimant was with his nephew, Peter when he approached him in February 2017. He denied that he told the Claimant that he was a tenant of the First Defendant and he paid \$1500.00 per month in rent. He said that the First Defendant was running the mini mart but when he has to work in the day he contacted him which is usually 3-4 days a week and the First Defendant paid him weekly. He stated that he received the pre-action letter but ignored it.

69. Again, the Second Defendant had no first-hand knowledge of the ownership of the property. He confirmed that the First Defendant has not been in continuous possession of the property since he admitted in cross-examination that after the First Defendant got married he left the property. His version of the Claimant and Peter's meeting him at the mini mart in early February 2017 was not plausible given that the Claimant's version was supported by both the Claimant and Peter's evidence.
70. In my opinion, the First Defendant failed to demonstrate that the Claimant's title to the property has been extinguished by virtue of adverse possession for the following reasons.
71. First, Carmen's occupation of the property was with the permission of the Claimant. The Claimant was consistent in his contention that he always retained an interest in the property since he and Carmen agreed after their common relationship ended that Carmen could continue to live on the property with her children until she died and after the property would revert to him. In exchange Carmen agreed to be responsible for all outgoings on the property and he agreed to pay the mortgage instalments, the land and building taxes and the water bills. There was no credible and reliable evidence from any of the witnesses for the Defendants to dispute the Claimant's assertion of the arrangement which he had with Carmen. At best the Defendants were able to demonstrate that the length of the common law relationship of the Claimant and Carmen was not from the mid 1970s to the mid 1980s as asserted by the Claimant but it was more plausible that this relationship ended sometime in 1979. In my opinion, although the common law relationship between the Claimant and Carmen only lasted for over 1 year it was more plausible that since Carmen had nowhere to live with her children and she could not purchase the Claimant's interest in the property they entered into the said arrangement as asserted to by the Claimant.
72. Secondly, the Claimant's assertion of the agreement between himself and Carmen and that he did not abandon his interest in the property were supported by the contemporaneous documents which the First Defendant testified which he found amongst Carmen's things and which were attached to his witness statement. In

particular the WASA receipts showed that from 1981 to 2018 he was paying the water bill for the property since the First Defendant admitted in cross-examination that the said bills were always in credit.

73. Further, in late 2009 to early 2010 the letters which were exchanged between Carmen's Attorney at Law and the Claimant's Attorney at Law proved that the Claimant did not abandon his interest in the property but his intention to retain the said interest was well known to Carmen.

74. With respect to the payment for the mortgage for the property, it was not in dispute that the Claimant and Carmen mortgaged the property to Barclays Bank. There was no evidence to dispute the Claimant's evidence that he paid the mortgage instalments by a standing order from his bank account at Barclays Bank since he was employed at Texaco at that time and he also took a loan from Texaco Credit Union. The only evidence from the First Defendant that Carmen paid the mortgage instalments were some receipts from Barclays Bank in 1980. One receipt had loan payment but it did not state which loan. This evidence was unreliable for the Court to make a finding that only Carmen paid off the loan since there was no credible evidence that Carmen was employed in 1980. In my opinion it was more probable that both the Claimant and Carmen paid off the mortgage with the Claimant making the greater contribution since he was employed. As such the Claimant's action demonstrated that although he was no longer living on the property he was still complying with his part of the arrangement with respect to the payment of the mortgage instalments.

75. Third, It was not disputed that in 2009 the Claimant made himself available to execute the 2009 Deed of Lease for the property which showed that in 2009 the Claimant took an active interest in the property.

76. Fourth, Carmen acknowledged the Claimant's interest and ownership of the property in the Will which stated:

"I GIVE AND BEQUEATH my property which consist of portion of a dwelling house and which said dwelling house is shared between my common law husband Ken

Joseph and myself and is situated and known as Lot#5 Smith Street, Mon Repos, Housing Project together with a Plot of Land on which the dwelling house it built.....”

77. It was clear that as late as 23 December 2015, Carmen did not intend to possess the property as her own since she acknowledged the Claimant’s interest and/or ownership of the property.
78. Fifth, the First Defendant’s occupation of the property was with the permission of Carmen so he cannot establish the elements of adverse possession in his personal capacity. The First Defendant acknowledged that he lived on the property with his mother Carmen, he left when he got married in 2001 and he returned to live on the property to take care of Carmen when she got ill in 2015. The Second Defendant’s evidence was that the First Defendant left the property after he got married. Therefore based on the evidence of both Defendants during the period 2001 to 2015 the First Defendant was not living on the property which does not meet the statutory period of continuous possession of 16 years in his own right.

IS THE FIRST DEFENDANT IN HIS PERSONAL CAPACITY ENTITLED TO THE RELIEFS IN HIS COUNTERCLAIM BY VIRTUE OF THE DOCTRINE OF PROPRIETARY ESTOPPEL

79. In the First Defendant’s counterclaim he sought a declaration in his personal capacity by virtue of the doctrine of proprietary estoppel that he is entitled to a right, share, title and interest in the property.
80. The elements of proprietary estoppel were repeated by Mendonca JA **Nester Patricia Ralph and Esau Ralph v Malyn Bernard**²¹ at paragraph 38 where he referred to the dicta in **Thorner v Major and Ors**²² where Lord Walker pointed out that “while there is no universal definition of proprietary estoppel, which is both comprehensive and uncontroversial, that most scholars agree that the principle of proprietary estoppel is

²¹ Civil Appeal No. 131 of 2011

²² [2009] UKHL 18

based on “three elements, although they express them in slightly different terms; a representation or assurance made to the claimant; reliance on it by the claimant and detriment to the claimant in consequence of his (reasonable) reliance...” For a claimant therefore to properly plead his case in proprietary estoppel, he must set out those three elements; a representation or assurance, reliance on that representation or assurance and detriment as a consequence.

81. In **Mills v Roberts**²³ Jamadar JA explained that the elements of proprietary estoppel must be examined holistically in the round and are not “watertight compartments”. The Court will examine the alleged inducement, encouragement and detriment to determine if they are both real and substantial and the Court “must act to avoid objectively unconscionable outcomes”. Jamadar JA stated at paragraphs 19 and 22 that:

“19. In respect of the law of proprietary estoppel we are more troubled about the correctness of the application of the law. Whereas in promissory estoppel there must be a clear and unequivocal promise or assurance intended to effect legal relations or reasonably capable of being understood to have that effect in the law of proprietary estoppel there is no absolute requirement for any findings of a promise or of any intentionality.

82. In proprietary estoppel therefore, the focus shifts somewhat from the search for a clear and unequivocal promise and for intentionality, to whether the party claiming the benefit of the estoppel had a reasonable expectation induced, created or encouraged by another, and in those circumstances acted detrimentally to the knowledge of the other. For proprietary estoppel to operate the inducement, encouragement and detriment must be both real and substantial and ultimately the court must act to avoid objectively unconscionable outcomes.

83. Kokaram J in **Kurt Farfan and Ors v Anthony White**²⁴ at paragraph 26 stated the extreme care the Court should adopt when examining the questions of promise,

²³ CA T243 of 2012

²⁴ CV 2016-03644

reliance and detriment. Kokaram J referred to Sir Henry Brooke in the Privy Council decision of **Knowles v Knowles**²⁵ at paragraph 27 who stated:

“In *Jennings v Rice* [2002] EWC Civ 159 [2003]1FCR 501...Robert Walker LJ said at para 58 that the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result. In the opinion of their Lordships it would be unconscionable in this case to deprive George of his property when he had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them. While recourse to the doctrine of estoppel provides a welcome means of effecting justice when the facts demand it, it is equally important that the courts do not penalise those who through acts of kindness simply allow other members of their family to inhabit their property rent free. In *E & L Berg Homes Ltd v Grey* (1979) 253 EG 473, [1980] 1 EGLR 103 Ormrod LJ said at p 108: ‘I think it important that this court should not do or say anything which creates the impression that people are liable to be penalised for not enforcing their strict legal rights. It is a very unfortunate state of affairs when people feel obliged to take steps which they do not wish to take, in order to preserve their legal rights, and prevent the other party acquiring rights against them. So the court in using its equitable jurisdiction must, in my judgment, approach these cases with extreme care.’ ” (Emphasis added)

84. The Court must examine the inducement, encouragement and detriment to determine if they are both real and substantial. The Court must act to avoid objectively unconscionable outcomes²⁶.
85. Again, this relief sought by the First Defendant must fail for the following reasons. First, he did not plead any promise that he would get the property. Second, he admitted in cross-examination that Carmen never promised him the property. Third, he also accepted in cross-examination that in the Will, Carmen’s intention was to give him and his sister her interest in the property and not him alone. Fourth, even if there was a promise, he admitted in cross-examination that he provided no evidence that

²⁵ [2008] UKPC 30

²⁶ Jamadar JA in *Esther Mills v Lloyd Roberts* Civ Appeal No T 243 of 2012

he expended any funds on the property. Indeed, he accepted that all the invoices and bill he produced to the Court had Carmen name and not his name.

IS THE CLAIMANT ENTITLED TO AN ORDER FOR MESNE PROFITS/DAMAGES?

86. The Claimant has also sought orders for mesne profits and damages for trespass to be paid to him by the Defendants.
87. It was submitted on behalf of the Claimant that he is entitled to an award of mesne profits for the damages he suffered from being out of possession of the property after Carmen died based on the monthly rent of \$1,500.00 from February 2017 until the time of the trial which was 26 months in the sum of \$39,000.00.
88. The Defendants did not address this issue in their closing submissions.
89. Having found that the First Defendant has failed in his counterclaim for extinguishment of the Claimant's title to the property and his claim in proprietary estoppel it follows that the Defendants have been wrongfully in possession of the property since February 2017 when Carmen died and the Second Defendant was only in possession of the mini mart on the property with the permission of the First Defendant.
90. The Second Defendant testified that he worked more regularly in the mini mart when Carmen became sick and he became a caretaker for the property. Both Defendants agreed that the Second Defendant was involved in the mini-mart, However, the Defendants were inconsistent in establishing the extent of the Second Defendant's involvement. The First Defendant stated that the Second Defendant assisted 6 or 7 times a month, the Second Defendant stated that he assisted 3 to 4 days a week and during Carmen's illness he assisted every day. The Defendants' evidence was also inconsistent with respect to the payment received by the Second Defendant for his assistance. The First Defendant stated that the mini mart was not profitable so that

the Defendants usually shared the profits. The Second Defendant initially stated that he was paid about \$500.00 but that the profits were shared.

91. In my opinion given the inconsistencies between the First and Second Defendants evidence the Claimant's version which was that the Second Defendant told him and Peter in early 2017 that he was renting the mini mart from the First Defendant for the sum of \$1500.00 was more plausible. For this reason, the Claimant is entitled to an order for mesne profits/damages for trespass in the sum of \$39,000.00 to be paid by the First Defendant.

ORDER

92. Judgment for the Claimant.
93. It is declared that the Claimant is the registered legal owner of and entitled to possession of the property situate at No 5 Smith Street, Mon Repos, San Fernando.
94. The First Defendant and the Second Defendant are unlawfully in occupation and/or are trespassers in respect of the property.
95. The First Defendant to pay the Claimant the sum of \$39,000.00 as mesne profits/damages for trespass.
96. The First Defendant counterclaim is dismissed.
97. The Defendants to pay the Claimant's costs of the claim in the sum of \$14,000.00 and the First Defendant to pay the costs of the counterclaim in the sum of \$14,000.00.

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Margaret Y Mohammed

Judge