

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: 45 of 2020
(LACV0091/2019)

BETWEEN

MARVIN ALFRED KELLY

Plaintiff



-And-

JUDITH HODGSON

First Defendant

IVOR LARIN HODGSON SR.

Second Defendant

DUSTIN LAREN HODGSON

Third Defendant

IVOR LARIN HODGSON JR.

Fourth Defendant

OPEN COURT

Before: Hon. Mme. Justice Ramsay-Hale
Appearances: Ms. Alice Carver of Nelsons for the Plaintiff
Mr. Crister Brady of Brady Law for the Defendants
Heard: 28 September 2020
Draft Judgment Circulated: 26 October 2020
Judgment Delivered: 10 November 2020

HEADNOTE

Land Law - occupant a licensee not entitled to land either under a constructive trust or by estoppel - licensee not entitled to compensation for improvements to land.

JUDGMENT



INTRODUCTION

1. This claim is in respect of land situate in Bodden Town, previously owned by generations of the Kelly family, to which Ms. Edna Kelly ("Aunt Edna") obtained Registered Title in or around 1974. The parcel of family land was thereafter known as Block 44B Parcel 66 in Bodden Town ("the Original Parcel").
2. The uncontroverted evidence is that on 15 November 1994 the Original Parcel was transferred by Aunt Edna to her nephew, Mr. Lyngard Kelly ("Lyngard") and her niece, Mrs. Judith Hodgson, née Kelly, the First Defendant to the action, as proprietors in common of an undivided half share in the land. The Transfer was attested by a Justice of the Peace, Mr. William Wood. The Transfer records that it was made in consideration of the payment of \$18,400 but it is accepted that no sum of money was ever paid to Aunt Edna for the parcel. Rather, the transfer recorded the value of the parcel on which the fees and duty, paid by Mrs. Hodgson and Lyngard, were assessed by the relevant authority.
3. In November 1994, the Original Parcel was subsequently divided in two. Lyngard became the registered owner of land now known as Block 44B, parcel 363 and Mrs. Hodgson, the registered owner of Block 44B, parcel 364 ("The Land").
4. The Land remained undeveloped until 2007 when the Cayman Islands National Recovery Fund ("NRF"), which was established to give relief to persons rendered homeless or destitute by the passage of Hurricane Ivan, built a small dwelling on the land for the Plaintiff, Mr. Marvin Alfred Kelly, in response to an application made by him for relief.
5. Mr. Kelly is the nephew of Aunt Edna, brother of Mrs. Hodgson and Lyngard's cousin. Up to the time he made that application, Mr. Kelly had been living in a small cottage on his sister Anabell's property in Northward.
6. As the Land was registered in Mrs. Hodgson's name, Mr. Kelly was obliged to seek his sister's permission for the house to be built on the Land. In response to his request, Mrs. Hodgson granted that permission by letter dated 14 February 2006, in the terms stipulated by Mr. Kelly. The letter reads in the relevant part:

"This letter is to inform you that I, Judith Edna Hodgson, hereby state that I am the owner of the Parcel of land at 364, Block 44 in Bodden Town.

"I also hereby state that I give authorization to the Cayman Islands National Recovery Fund to rebuild my brother's house, Mr. Marvin Alfred Kelly, on the back of the foresaid property: Parcel 364, Block 44B in Bodden Town, which is owned by me."

7. After the house was built, Mr. Kelly moved unto the Land and has remained there ever since.

8. In 2018, Mr. Kelly consulted an attorney as he wished to devise his house by will to his nephew, Mr. Alfred Nelson Jr., who he thinks of as his own son. He was advised by his attorney that he couldn't do so as the property on which the house was built was not in his name. It appears that this was a matter of some surprise to Mr. Kelly who avers that he thought his name had been added to the Title after Aunt Edna died or, at the latest, after his house was built on the Land.
9. Mr. Kelly was referred to his current attorneys who undertook certain inquiries on his behalf. It was then he discovered that Mrs. Hodgson had granted an interest in the Land to her husband and her two sons - respectively the Second, Third and Fourth Defendants - and that they all now held the Land as joint proprietors.
10. In November 2019, while Mr. Kelly was briefly hospitalized, certain works were commenced on the Land as Mrs. Hodgson prepared to build a vacation home on the property. Mr. Kelly became concerned that Mrs. Hodgson intended to have him removed from the Land and this prompted him to instruct his attorneys to seek an injunction to restrain the development and approach the Courts to have his interest in the Land determined.

The Constructive Trust

The Evidence

11. Mr. Kelly claims to be entitled to the Land, or a part thereof, under a constructive trust. It is his case that Aunt Edna intended to give the Original Parcel to him and Lyngard. In his evidence he says that, in his aunt's later years, he and his cousin, Lyngard, took care of her. He visited her daily, ensuring that she had food and was adequately cared for by the home help carer. His aunt, in turn, made promises that she would give the family land to him and Lyngard. In his *viva voce* testimony he said:



"My Aunt Edna told me she wanted to leave the land to me. In 1994, she said, 'Alfred - that's my name - I've decided to give you and Lyngard the land. Build a little house and you can live on it'. ..Those were her words and that's what I did."

12. Mr. Kelly asserts that he made an agreement with Mrs. Hodgson that, in return for her assisting him to build a house on the land, he would share it with her. She would have the front portion of the land and he, the back. In consideration of Mrs. Hodgson's promise to assist him with building a house, Mr. Kelly says he told Aunt Edna to transfer the land to his sister instead of him and they would share it. Asked why he did not ask Aunt Edna to transfer the land to both of them, he said they were a loving family and he did not believe it would come to this.
13. After Aunt Edna died in 1997, Mr. Kelly avers that he called Mrs. Hodgson, who was then resident in the USA, to ask if she would assist in building him a house as promised, but she did not. She also failed to add his name to the title for the Land as promised.

14. Mr. Kelly contends that, in the circumstances where Mrs. Hodgson breached their agreement, she and her family now hold the whole of the Land for him on a constructive trust. In the alternative, should the Court find that he had agreed to share the Land with Mrs. Hodgson, whether or not she built a house on the Land for him - a proposition he does not accept ¹ - Mr. Kelly seeks a declaration that they hold 50% of the Land for him on trust.
15. The defence to Mr. Kelly's claim is a straightforward denial by the defendants that the promises on which Mr. Kelly relies were made.
16. Mrs. Hodgson, who gave evidence on behalf of all the defendants, says that she and Aunt Edna, for whom she had been named by her father, had a very close relationship. They had spoken for many years about the parcel of land and about the possibility of Mrs. Hodgson building a house on it and living there after she had retired, which has been her dream since she was 23 years old.
17. It is Mrs. Hodgson's evidence that Aunt Edna had offered the parcel of land first to their brother, Timothy, but that she later fell out with him. She then offered the parcel to their sister, Anabell, but Anabell didn't like the idea of living close to a graveyard and intended to sell the parcel if it were given to her. She, on the other hand, as she told her Aunt Edna, didn't mind because she loved the parcel of land which had been in the family for more than 100 years.
18. Mrs. Hodgson says it took Aunt Edna 23 years to decide to give the Original Parcel to her and then she gifted it to Lyngard and her in equal shares and the two of them paid the requisite costs and stamp duties on the transfer.
19. Mrs. Hodgson says she was not aware of any intention on Aunt Edna's part to give the Original Parcel to Mr. Kelly and that Aunt Edna never said anything to her about giving it to Mr. Kelly or sharing the Land with Mr. Kelly. She never promised to build anything for him on the land nor did she have any discussion with Mr. Kelly or, indeed anyone else, in which she promised to share the Land with him:



"The entire family knew that my aunt gave me that piece of land. And that was it. Nobody talked about sharing because they knew that the land belong to me mine. I never said anything to [Mr. Kelly] or anyone else about sharing the land."

20. In recounting the circumstances in which she gave consent for him to build a house on the Land, Mrs. Hodgson said,

¹ Paragraph 16 of the Mr. Kelly's Amended Statement of Claim: *"In the alternative, should it be found, which is not accepted, that the Plaintiff agreed to share the Disputed Parcel even without the First Defendant paying for his House, the Defendants hold 50% of the Disputed Parcel on trust for the Plaintiff."*



“He called me while I was working in Maryland and said, ‘Judith, I might be able to get me a little house if I get somewhere to put it.’ And I told him, ‘Well, I don’t know what to do about that.’ Then he brought up to me, ‘You have a little piece of land there, why don’t you ... I am going to write you a letter and all you do for me is write the exact transcript and sent it back to me as quick as possible.’ I did just that because my brother is not a healthy person and he needs help and they were promising him to build a little place. So that’s why I sent him that letter, exactly how he sent it to me in that transcript and I wrote his exact words, sign it and send it back to him. ...I told him I was going to let him put his little house in the back so that when I’m ready to build my little dream vacation home we would be close to each other. He’d be in the back and I would have the front part...I specifically told him to do it that way.”

21. She said that he only asserted that he had an interest in the Land some 5 or 6 years after the house was built. The first hint she got was when he complained that he was ‘poorly accommodated’ as he wanted a two bedroom and only had a studio. She says she got a hint then that he was thinking about accommodating his nephew, Alfred Nelson Jr.
22. Every now and then, Mr. Kelly would bring up things Aunt Edna had purportedly said, to which she would respond, *“Aunt Edna never said anything. No evidence.”* She heard nothing more until she got the letter from his attorneys.
23. Pressed on what Mr. Kelly would say Aunt Edna said, Mrs. Hodgson replied,

“One minute he would say, ‘Aunt Edna said this land is mine.’ That the whole entire piece of land is his: Lyngard’s and the piece that I got. Another day he would change his story and say, ‘Aunt Edna said you and I should share’. So I’m confused about what his real story is.”

Discussion and Findings of Fact

24. It is trite law that he who avers must prove. In the instant case, in order to establish a constructive trust of the Land, Mr. Kelly must prove on a balance of probability that his Aunt Edna intended to gift him the land, that his sister knew this and knew, when the parcel was transferred to her and Lyngard, that she held half the undivided share the parcel for Mr. Kelly on the basis of an agreement made between them that, in return for building him a house on the land, she would become beneficially entitled to the front portion of the land and would convey legal title to the back portion to him.
25. Oral agreements are as binding as written contracts but less susceptible of proof. In seeking to determine whether an oral agreement was made, the court will consider, in addition to the credibility of the parties to the alleged agreement, the evidence of third party witnesses to such



an agreement, any written communications between them that support the finding that such an agreement was made, any conduct which may be referable to the agreement asserted and whether there was performance of any act promised under the agreement.

26. Here there are no third-party witnesses to support Mr. Kelly's assertions that the Land was promised to him by his Aunt Edna and transferred to Mrs. Hodgson at his request on the terms alleged. On Mr. Kelly's own case, no-one was present when Aunt Edna spoke about giving him the parcel or when they agreed between them that she would transfer it to Mrs. Hodgson for them to share. Likewise, no-one was present when he and Mrs. Hodgson were said to have agreed that if she built a house for him on the Land that he would share it with her and the allegations are not admitted by Mrs. Hodgson.
27. Mrs. Hodgson did not build a house for Mr. Kelly on the land, so there was no conduct on her part that might have supported the oral agreement on which Mr. Kelly relies.
28. There was also no conduct on Mr. Kelly's part which was consistent with the agreement he said he made with Mrs. Hodgson: he did not write Mrs. Hodgson at any time between 1994 and 2006 to ask that she either live up to her part of the bargain and build him a house or re-convey the land to him. His evidence was that he called her on two occasions to remind her of the promise she made - which Mrs. Hodgson denies - but he did nothing to get the Land transferred to him in light of the alleged breach of their agreement. Between 2007 when the house was built on the Land by the NRF up to 2019 when these proceedings were put in train by his attorneys' letter before action, Mr. Kelly had no further discussions with his sister about the Land.
29. In his pleaded case, it is averred (para 9) that after Ms Kelly died in 1997, Mr. Kelly believed that his name had been added to the Title to the Land. Mr. Kelly did not, however, repeat that assertion in his evidence nor set out any basis for his belief. Certainly no correspondence passed between him and his sister and no transfer or other document was executed by him. The pleaded case also avers (para 10) that after the house was built, he "*understood that his name would thereafter be added to the title*" but it is Mr. Kelly's evidence that after the house was built, he had no further discussions with his sister and no correspondence passed between them so, again, the basis of his belief or understanding is unexplained.
30. The inconsistency between the pleaded averments and Mr. Kelly's evidence undermines his case which is founded on the inherently incredible proposition that Aunt Edna made a gift of the Land to him which he caused her to transfer the Title to his sister on the strength of a promise that she would build him house on the Land, a promise which he did not pursue over the ensuing 25 years and which is unsupported by any documentary or other independent evidence.
31. On the evidence, the only time Mr. Kelly wrote to Mrs. Hodgson about the Land was when he wrote setting out the terms of the permission she needed to give government so that the house could be built on the Land for him. When he called her seeking permission for the house to be

built on the land, it is Mrs. Hodgson's uncontroverted evidence, which I accept, that Mr. Kelly said "You have a little piece of land there..." I am satisfied and find that her evidence shows that Mr. Kelly clearly acknowledged her title to the whole of the Land.

32. I go further and say that, having observed Mrs. Hodgson as she gave her evidence and bearing in mind the evidence of both, that theirs was a close and loving family, I do not believe that Mrs. Hodgson would fail to honour a promise made to her brother, if one had been made.
33. Mr. Kelly has failed to discharge his burden of satisfying the Court on a balance of probability that Mrs. Hodgson holds the Land or any portion of it on constructive trust for him and his claim is dismissed.

Proprietary Estoppel

34. In the alternative to the claim in constructive trust, Mr. Kelly advances a claim in proprietary estoppel entitling him to have the whole or half of the Land transferred to him.
35. At its simplest, a proprietary estoppel will arise where the owner of land makes an imperfect gift of land and the person to whom the gift is made relies on it to his or her detriment. This can be illustrated by reference to the case of *Dillwyn v Llewelyn*² 1862 4 De G. F. & J. 517 where Lord Halsbury stated,

"So if A puts B in possession of a piece of land, and tells him 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made".

36. The pleaded case is wholly unsupported by the evidence as Mr. Kelly does not say that Mrs. Hodgson promised to give him the Land or that he had the house built there in reliance on such a promise. The promise on which Mr. Kelly relies was allegedly made by Aunt Edna. So far as Mrs. Hodgson is concerned, his case is that she had no land to give, as the whole of the Land belonged to him in equity.
37. The claim in proprietary estoppel is therefore dismissed.

Licence

38. With respect to Mr. Kelly's final claim in the alternative, for a declaration that he has a licence for his lifetime to live peaceably upon the Land, this is not disputed. In their defence to the claim,

² Not cited by Counsel



Mrs. Hodgson and her family accept that he has a licence and assert that his right to live out his days on the Land was never in dispute.

39. His further pleaded claim - that he or his estate is entitled to be compensated for the value he added to the Land including, but not limited to, the construction of the house - was not strenuously advanced by Counsel. No legal basis for the claim to compensation was put forward. It seems to me that, as Mr. Kelly is a bare licensee, then absent agreement made at the time he was given permission to move unto the Land, Mrs. Hodgson would not be required to compensate Mr. Kelly or his Estate for the value of any improvement to the Land.
40. Mr. Kelly's claim for compensation is dismissed. I shall hear counsel on the form of Order and on costs, if they cannot be agreed.



RAMSAY-HALE J.
Judge of the Grand Court