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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 20/03/2017

2010 No 079753

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BETWEEN:

KATHLEEN CALDWELL

Plaintiff;

and

RAYMOND BRYSON

First Defendant;

and

ANNIE BRYSON

Second Defendant;

and

NOEL BRYSON

Third Defendant;

and

EAMON BRYSON SUED AS ONE OF THE EXECUTORS OF THE
ESTATE OF MICHAEL BRENDAN BRYSON DECEASED

Fourth Defendant.

HORNER J

A. Introduction

[1] In a bitter and acrimonious family dispute, Kathleen Caldwell, the plaintiff, and the ex-wife of Raymond Bryson, the first defendant, seeks to establish her entitlement to certain lands at 224 Lisnarragh Road, Donemana formerly owned by Michael Brendan Bryson Deceased ("the deceased"), the father of the first defendant. The first defendant disputes the claims made by the plaintiff. Drawn into this struggle are Annie Bryson ("the second defendant") and Raymond Bryson ("the fourth defendant"), who are executors of the estate of the deceased. Noel Bryson ("the third defendant") had the land at 224 Lisnarragh Road, Donemana transferred

to him on 31 May 2006 after the plaintiff and the first defendant separated. The transfer, which was registered in the Land Registry on 2 June 2006, was for natural love and affection.

[2] The main contestants, and the only ones to give oral testimony, were the plaintiff and the first defendant. They each sought to establish that they had a superior claim to the property at Lisnarragh Road which had been formerly owned by the deceased. The other defendants were largely bystanders to these contested proceedings. They played no active role in them. They said through their legal representatives that they were content to be bound by the decision of the court on its determination of the dispute between the plaintiff and the first defendant.

B. Background Information

[3] The plaintiff is the former wife of the first defendant. They married on 22 August 1992. They ran a business together, Highway Rentals which does not appear to have enjoyed any real success. It is not possible for me to determine why it did not succeed. In any event the plaintiff and the first defendant separated in 2005. They were divorced on 5 March 2008 when a decree nisi was granted. The second defendant is the mother of the first defendant and the wife of the deceased who died on 5 May 2007. The third defendant and the fourth defendant are the brother of the first defendant. The second defendant and the fourth defendant as I have said are the executors of the estate of the deceased.

[4] The plaintiff and the first defendant are childless. They moved into premises owned by the plaintiff at 27 Camus Park, Douglas, Strabane. By indenture dated 1 October 1992 (which was registered in the Land Registry on 26 January 1995) the deceased, a farmer, transferred to the plaintiff the dwelling and lands at 224 Lisnarragh Road, Donemana together with the right to maintain an effluent pipe over the deceased's lands. The deceased owned the lands behind the property and to the right of the property as one stands on the Lisnarragh Road, that is to the west. The transfer was registered on 26 January 1995 and the consideration for the sale was stated to be £4,000. The cottage on those lands, which was to be replaced by a new dwelling, was run down and in poor repair. The plaintiff and the first defendant initially lived at Camus Park but then moved to 224 Lisnarragh Road and occupied the cottage despite its rudimentary condition. The deceased and the second defendant moved into 226 Lisnarragh Road which is situated on lands owned by the deceased to the immediate west of 224 Lisnarragh Road.

[5] There appears to have been close contact between the plaintiff and the first defendant on the one hand and the deceased and the second defendant on the other hand. The plaintiff and the first defendant were regular visitors to 226 Lisnarragh Road. The deceased and the second defendant were regular visitors to 224 Lisnarragh Road. The deceased and the second defendant seem to have been well acquainted with the plans to build a new replacement dwelling behind the old cottage. They were also aware of the trials and tribulations of the planning process

which appears to have been unduly convoluted primarily so far as I can understand because of the behaviour of the plaintiff and the first defendant. They were most certainly aware of the construction of the shed and of the building work for the new dwelling which were clearly on the deceased's land.

[6] Work began on the foundations of the new house in March 2000. The deceased would have been aware of the location of the foundations and did not object, even though the foundations were situate on land owned not by the plaintiff or the first defendant, but by the deceased. During the course of these proceedings the plaintiff and the first defendant disputed what role the other had played in the construction of the new house. Both the plaintiff and first defendant proved to be unreliable historians. The plaintiff was candid in her evidence making admissions which were against her interest. The first defendant on the other hand sought to portray himself in the best possible light. But both proved themselves in their evidence to be dishonest and unreliable. The plaintiff had apparently no qualms about defrauding her creditors on her IVA. The first defendant sought to claim that he had carried out all sorts of heavy manual work when he was at the same time in receipt of benefits because he was apparently unfit to work. He is now divorced from the plaintiff and is married with five children. He claims to be separated but his domestic arrangements are such that he gives all the appearance of someone who is trying to work the benefit system to his advantage by running two separate households. He was a deeply unimpressive witness. He offered excuses. He claimed to be autistic and he said he had a phobia about paperwork. These excuses, unsupported by any medical evidence, appeared lame and unconvincing. I note that the Master having observed the first defendant when he gave evidence in the ancillary relief application said of him:

“Her husband, however, admitted previous dishonest conduct and his oral testimony had numerous inconsistencies and could only be regarded in some parts as delusional.”

[7] It is fair to say that Master Bell assessed the plaintiff as giving “truthful evidence” in the ancillary relief proceedings. But as the first defendant was not legally represented, her testimony was not fully tested. There is no doubt that she was straight-talking. If she had been challenged about her dishonest conduct, then she would no doubt, unlike the first defendant, been open about it. Her testimony before me was both credible and damning. The consequence is that in the absence of independent direct evidence, the testimony of both the plaintiff and the first defendant must be approached with considerable caution.

[8] I must also record that the deceased who was concerned about the possibility of land which he owned being owned by someone other than a member of the Bryson family, transferred the area of land on which the new house stands to the third defendant by conveyance dated 21 May 2006 for nil consideration. He did this after the marriage between the plaintiff and the first defendant had obviously failed

and they had separated and were living apart. There can be no doubt that the deceased had originally gifted this land to the plaintiff and the first defendant, and had stood by while they had begun to erect the new house. However he had changed his mind when he began to fear for good reason that the land which he still owned, might fall into the hands of the plaintiff. The transfer of this land by the deceased to the third defendant was his way of trying to keep this land in the Bryson name.

[9] Given my findings, it is necessary to approach the testimony of both the plaintiff and the first defendant with considerable caution in the absence of independent, objective evidence.

[10] I find the following:

- (i) The plaintiff and the first defendant constructed the shed on which the electricity supply for the new dwelling is situated on lands which they did not own and which were owned by the deceased. I have no doubt that the deceased, who appears by all accounts to be a canny farmer and who left a net estate of nearly £1M knew this and intended that this land should be transferred to the plaintiff and the first defendant. If I am wrong, then it is clear that he stood by and acquiesced while the plaintiff and the first defendant erected the shed in the reasonable expectation that it would be theirs.
- (ii) The plaintiff and the first defendant constructed a new house on land behind the old cottage. This was done on land which they did not own but which was the property of the deceased. Again the work to construct the new house was done with the consent or acquiescence of the deceased. He would have seen the plans for the new home and knew exactly what was proposed. All the parties to this arrangement knew that the plaintiff and the first defendant reasonably expected to have the land on which the new house was to be built and for which planning permission had been obtained, transferred into their names, together with the title to the land comprising the shed which they had constructed earlier.
- (iii) I am unable to distinguish between the contribution of the plaintiff and the first defendant in respect of the construction of the new house. I consider that they each made an equal contribution. But the court is not really concerned with the apportionment between the plaintiff and the first defendant as this is not an appeal from Master Bell's decision and the determination in the ancillary relief application that the plaintiff should have 100% charge on any equity which remains on 224 Lisnarragh Road, Donemana (and 27 Camus Park).
- (iv) The parties obtained a mortgage from the Alliance & Leicester Building Society to enable the property to be constructed at 224 Lisnarragh Road.

However this mortgage was secured on the old house apparently and does not include the new dwelling house. The building society may have a claim for rectification. It is entirely possible that the building society believed the new house formed part of their security. But I can reach no concluded view on this issue. In any event given the improvident borrowing of the first defendant which is referred to in Master Bell's judgment in the ancillary relief proceedings it is difficult to know whether there is any equity in 224 Lisnarragh Road, Donemana. In other words the charge awarded by Master Bell to the plaintiff in respect of the first defendant's equity may turn out to have little value.

- (v) Regardless of the plaintiff's and the first defendant's flawed testimonies to this court and the first defendant's untruthful evidence to Master Bell, I do not consider that either the plaintiff or the first defendant behaved unconscionably or dishonestly towards the deceased. I find he knew exactly what was happening and indeed was not averse to taking steps himself that would prevent his land from being owned by anyone other than his offspring. It was his settled intention that the plaintiff and the first defendant would share equally in the land at Lisnarragh Road encompassing the new house and the shed until the plaintiff and the first defendant separated. At that stage the deceased realised there was a risk that the property might go out of the Bryson name and it was for that reason that he transferred the further lands comprising the site to the third defendant.

C. Legal Principles

[11] In Thorne v Major [2009] UKHL 18 Lord Walker said that proprietary estoppel "is based on three main elements ... 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".

[12] There are 3 strands of proprietary estoppel. They each have their own requirements:

- (a) A principle based on acquiescence.
- (b) A principle based on representation.
- (c) A promised based principle. (See 12.032 of Snell's Equity (33rd Edition).

[13] In this case, at the very least the deceased stood by and permitted the plaintiff and the first defendant to construct the shed and the new house on his land. The deceased knew of the plans and the planning permission which had been granted. This was a joint exercise carried on by the plaintiff and first defendant to the deceased's knowledge and it was an enterprise to which, I find, each contributed equally whether by way of capital or labour. I consider that it would be

unconscionable for the estate or the beneficiaries to now seek to act in any way that would deprive the plaintiff and the first defendant of the right to enjoy the newly erected house at 224 Lisnarragh Road, Donemara together with the shed.

[14] There have been two approaches to determining what relief should be granted: see Snell's Equity at 2-048. Firstly, the starting point is to protect the expectation of the promisee and a departure from this will only be allowed where it is clear that such an order would impose a disproportionate burden on the promisor.

[15] Secondly, and in the alternative, while there is no presumption in favour of making good the expectation held by the promisee, the relief granted will be such as to do no more than ensure that the promisee suffers no detriment as a result of his reasonable reliance on the promisor.

[16] It seems to me that the second approach concentrating as it does on the need for proportionality and the concentration on the detriment suffered by the plaintiff and the first defendant is the better one: see Crabb v Arun DC [1976] CH 179 at 198 per Scarman LJ.

D. Discussion and Conclusion

[17] My determination of what interest either party has in 224 Lisnarragh Road as far as it affects the plaintiff and the first defendant may be irrelevant because any equity which the first defendant may have, and there may be none, is subject to Master Bell's order charging such equity 100% in favour of the plaintiff.

[18] I consider that on the basis of the evidence adduced before me and on the basis of the relevant legal principles that:

- (a) The deceased knew that the shed was being erected on his land by the plaintiff and the defendant. He encouraged them to build it and it is appropriate that it is included in the take of 224 Lisnarragh Road.
- (b) The deceased knew the plans for the construction of the new house. He encouraged the plaintiff and the first defendant to spend money on the construction. However, what he understood and agreed to is the land which was captured by planning permission together with the shed which the plaintiff and the first defendant constructed to his knowledge.
- (c) The plaintiff and the first defendant are entitled to no other land save that they enjoy the necessary easements and sight lines so as to permit occupation and use of the new house.
- (d) Regardless of the plaintiff and the first defendant's behaviour and conduct towards each other, they did not behave unconscionably or unfairly or unjustly towards the deceased.

[19] In the circumstances adopting the second approach and given the work carried out by the plaintiff and the first defendant, I consider that the appropriate relief is to give the plaintiff and the first defendant equally the house as defined by the application for planning permission together with the shed and any necessary easements and sight lines over the area occupied by the cattle pens so as to ensure compliance with the planning permission. I will leave it to the parties to map out the total take necessary to comply with my conclusion that the plaintiff and the first defendant are entitled to have transferred to them that area of land comprising the planning permission together with the shed and any necessary easements to ensure planning permission compliance. If no agreement can be reached, I will mark the boundaries on the map.

[20] While the interests of the first defendant in 224 Lisnarragh Road, is equal to that of the plaintiff, the first defendant's interest is subject to the order of Master Bell, namely that it is charged in favour of the plaintiff. But as I have observed it may be that the money borrowed on 224 Lisnarragh Road is such that there will not be any equity left for the plaintiff never mind for the first defendant. But that is not a matter for this court

[21] I will hear the parties on the issue of costs.