BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 20 of 2005

BETWEEN:

STEPHEN WARD	**Appellant**
AND	
TIMOTHY WALSH	**1st Respondent**
BJORN BJERKHAM	**2nd Respondent**
NATURE'S PRODUCE INC	**3 rd Respondent**

BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2011: September 20 and 21

2012: November 28

Mr. Leslie Haynes, Q.C. in association with Mr. Amilcar Branche and Ms. Shena-Ann Ince for the Appellant

Mr. Denis Chandler in association with Mr. Benjamin Norris for the 2nd Respondent

Mr. Barry Gale, Q.C. in association with Ms. Zarina Khan for 1st and 3rd Respondents

DECISION

I. Introduction

[1] **BURGESS JA**: This is a hard case. It is one of those rare cases where all of the parties have in one way or another impugned the trial judge's treatment of facts as

well as his application of the principles of law. It has spawned in this Court an appeal by the appellant, Mr. Stephen Ward, against aspects of the order made by ***Greenidge J*** that Mr. Ward convey to Mr. Timothy Walsh, the first respondent, a sugar plantation called "The Farm" in the parish of St. Peter owned by Mr. Ward for the sum of $1.5 million; an appeal by Mr. Bjorn Bjerkham, the second respondent, against other aspects of the same order; and finally and most interestingly, a cross appeal by Mr. Walsh to the effect that the decision of ***Greenidge J***, in making the order, was wrong and should be affirmed on additional grounds.

[2] But, it is in Mr. Walsh's cross appeal that the real complexity of this case resides. That cross appeal involves claims for remedial justice based, not so much on the relatively orderly framework of structural property law established by the ***Property Act, Cap. 236 (Cap. 236)***, but more on this Court's jurisdiction to arrive at "just" and "equitable" solutions in an arms-length dealing in land which was admittedly extremely loose, informal and defective. The cross appeal also involves an overlapping claim for contractual remedies within the framework of ***Cap. 236***. In addition to all of this, the persistent nag that Mr. Ward's dealings in relation to The Farm were not conscientious has not made the adjudication of this case any easier.

[3] Perhaps, it may be appropriate to turn to the factual history of this appeal at this point.

Factual History

[4] The starting point of this case is a meeting between Mr. Walsh and Mr. Ward at Mr. Ward's place of work sometime in May 1996. At that time, Mr. Walsh was engaged in farming an area of land in Indian Ground, St. Peter. The land at Indian Ground did not have the right soil to produce the crops Mr. Walsh wished to grow. So, satisfied that the soil at The Farm was suitable, Mr. Walsh approached Mr. Ward at the meeting in May 1996 seeking to lease part of The Farm through his, Mr. Walsh's, company, Nature's Produce Inc.

[5] During the meeting in May 1996, Mr. Walsh was told by Mr. Ward to speak to Mr. Roy Ward, Mr. Ward's father who was managing The Farm on Mr. Ward's behalf, with a view to ascertaining the price to be paid for the agricultural rental. We would add here that The Farm comprised approximately 135 acres. The 135 acres were made up of various fields, a derelict plantation house, servants' quarters, garages, a

workshop and other buildings, including pig pens, the well and pump house the curtilage of which consisted of 3.5 acres.

[6] On the day following the May 1996 meeting, Mr. Walsh spoke to Mr. Roy Ward at The Farm. Mr. Roy Ward pointed out a 12 acre field to the south of the plantation for the purposes of Mr. Walsh's agricultural project. There it was discussed that Mr. Walsh would rent the 12 acre field for a price of $700.00 per acre per year. Mr. Walsh requested, and it was agreed, that the option to purchase be contained in the lease because, in his words, "of the amount of money I would need to spend to put in infrastructure- pump, parts and hatchery." The duration of the lease was also discussed. At the time of this meeting, Mr. Roy Ward had two acres of the 12 acre field planted in sugar cane.

[7] A draft lease was thereafter drawn up by Mr. John Hanschell & Co., Attorneys-at-Law acting on behalf of Mr. Walsh. This draft was delivered to Mr. Ward at his work place. The lease as finally negotiated was not entered into until January 1997. In the meantime, Mr. Walsh told Mr. Ward that he, Mr. Walsh, "had a lot of work to be done to get [his] project into operation and asked if there was any problem with starting work". Mr. Ward said it was not a problem and Mr. Walsh went into possession of the ten acres and out buildings and commenced work towards the end of May 1996.

[8] Once in possession, Mr. Walsh developed an interest in purchasing the entire plantation and sometime in June 1996, he commenced discussions with Mr. Ward concerning its purchase. There were several conversations during which Mr. Ward indicated that he would be willing to sell "if the price was right".

[9] Mr. Walsh then gave instructions to his Attorneys-at-Law, Mr. John Hanschell & Co., as a result of which the following letter dated July 13, 1996 was addressed to Mr. Ward:

> "Dear Sir,
>
> We act on behalf of Mr. Timothy Walsh of Red Hill House, St. Peter.

Our client has instructed us to confirm to you that he is interested in purchasing your property known as the Farm, St. Peter, comprising approximately 135 acres in respect of which he has already spoken to you.

Our client is prepared to offer the sum of $408,500. 00 subject to contract which is calculated as follows:-

85 acres (arable) @ $4100 per acre	$348, 500. 00
50 acres (non arable) @ 1200 per acre	60, 000. 00
	$408, 500. 00

We also advise that our client is interested in securing if necessary "first refusal" rights for the purchase of this property.

Kindly let us hear from you by return.

Yours faithfully

John A. Hanschell

C.C Mr. Timothy Walsh"

[10] Mr. Ward replied to the letter from Mr. Walsh's Attorneys-at Law by way of a letter dated August 26, 1996. This letter reads as follows:

"Dear Sir,

I am in receipt of your letter (sic) dated July 31st 1996 written on behalf of Mr. Timothy Walsh.

I regret to inform you that I would not be interested in the disposal of the property at the price offered and would only consider a partial sale as follows:-

1. Approximately 80 acres of arable land @ $7500/acre inclusive of water well rights.

2. Approximately 4 acres of yard with water well and buildings $ 300, 000.

There remains approximately 41 acres of non arable land which a Realty company is interested in purchasing with a ridge development plan in mind. Subsequently, I am unable at this time to make any commitment regarding the non arable land.

Yours faithfully etc."

It is worth noting here that the "first refusal" right requested in the letter from Walsh's Attorney-at-Law to Ward was not granted in this letter.

[11] The next significant date in this narrative is January 12, 1997. On this date, a written lease for the 12 acres was made between Mr. Ward and Nature's Produce Inc. There had been several changes to the draft lease with the main change being that the duration of the lease was now 5 years instead of 10 years.

[12] In May 1997, Mr. Walsh saw Mr. Roy Ward at The Farm. Mr. Roy Ward told Mr. Walsh that his, Mr. Roy Ward's', wife was sick in hospital and that he no longer had time for running The Farm. He also told Mr. Walsh that he, Mr. Walsh, should start working the whole plantation.

[13] Encouraged by this conversation with Mr. Roy Ward, Mr. Walsh visited Mr. Ward at his, Mr. Ward's, place of work sometime in June 1997 and proposed a partnership between the two of them for the cultivation of vegetables on the remaining arable lands of The Farm. The proposal was that Mr. Walsh would look after cultivation,

irrigation and the management of the operation whilst Mr. Ward would have responsibility for equipment. The proposal was for a "fifty-fifty" partnership.

[14] According to Mr. Walsh's evidence, Mr. Ward was "very keen on the partnership". However, under cross examination, Mr. Walsh admitted that he left the meeting without any firm commitment from Mr. Ward on the proposed partnership.

[15] At the said June 1997 meeting, the evidence of Mr. Walsh is that Mr. Ward made a promise to him to sell the plantation to him for whatever it was valued at. Mr. Ward also encouraged him to proceed with the work contemplated by the partnership.

[16] Following the June 1997 meeting, Mr. Walsh went into possession of 25 acres of lands of The Farm by ploughing and harrowing the same. He fixed and began using a tractor belonging to Mr. Ward. He also began repairing an old irrigation system and obtained permission from Mr. Ward to use an old overhead aluminum irrigation system which was not in operation at the time. After a lot of work, he got the system to function. He worked 7 days a week from June when he had permission to live at the farm and expended, between himself and Nature's Produce Inc., considerable sums of money to get the project off the ground.

[17] It must be stressed here that at the time of Mr. Walsh undertaking this work in pursuance of the June 1997 meeting there was no concluded agreement on the partnership proposal.

[18] Mr. Walsh had The Farm valued by a Mr. A. N. Kirton. Mr. Walsh gave this valuation to Mr. Ward. Mr. Ward said that he would give it to his father, Mr. Roy Ward, to look at and that he would get back to Mr. Walsh.

[19] In July 1997, Mr. Walsh again visited Mr. Ward at Mr. Ward's work place. He told Mr. Ward that he, Mr. Walsh, wanted to do a pilot fresh water crayfish project. Mr. Ward told him to go ahead. Mr. Walsh contracted Mr. Ward to move the clay for this project from St. Andrew to a dam on The Farm for a price of $8.00 per metre. Mr. Walsh turned out the inside of the dam, cut out the trees and spread the clay for the purposes of making the dam shallower.

[20] Mr. Walsh spent about $9000.00 on this project. However, some of the payments were made by Nature's Produce Inc.

[21] As promised, Mr. Ward got back to Mr. Walsh in August 1997 in respect of the valuation by Mr. A. N. Kirton. Then, Mr. Ward informed Mr. Walsh that he, Mr. Ward, had spoken with his father and with Mr. Clyde Turney QC, an Attorney-at-Law, and that they had advised him that he should not sell the land for another 5 to 10 years. They had further advised him that the land belonged to him and not his father and that he could decide when he would sell it. Mr. Walsh then asked Mr. Ward for a "first refusal" when he, Mr. Ward, decided to sell The Farm. Mr. Ward replied that he had no problem with that.

[22] At another meeting at Mr. Ward's place of work sometime in August 1997, Mr. Ward told Mr. Walsh that he was no longer interested in the partnership. Mr. Ward went on to say that he understood that Mr. Walsh had put a lot of time, work, effort and money into the project and that he should keep working the lands until he, Mr. Ward, decided to sell The Farm. Mr. Ward further said that he would make sure that when he decided to sell The Farm he would give Mr. Walsh the opportunity to match the offer he would accept. It is not clear from the evidence whether Mr. Ward promised to give Mr. Walsh adequate notice of his intention to sell The Farm.

[23] On or about January 17, 1998, Mr. Ward approached Mr. Walsh at The Farm and said that he was interested in selling The Farm. Following this approach by Mr. Ward, on January 21, 1998, Mr. Walsh wrote the following letter to him:

> "Dear Sir,
>
> This letter is to formally offer to purchase the Farm Plantation.
>
> As we have discussed, this offer is in the form of a partial sale including arable land, water well rights and the yard.
>
> The second offer is for the Farm Plantation in its entirety including non arable lands and the quarry.
>
> 1. In the 80 acres of arable land, water well, rights and the 4acres of yard I offer subject to contract $700, 000 Barbados.

> 2. For the Farm Plantation in its entirety I offer subject to contract $800, 000 Barbados. I thank you in advance for considering my offer and look forward to your reply at your earliest convenience.
>
> Yours sincerely…."

[24] Mr. Walsh received a response from Mr. Ward in early to mid February 1998 rejecting the offers in that letter. According to Mr. Walsh's evidence, Mr. Ward told him in response to these offers that "he was not selling the plantation as a favour. He was selling for money."

[25] In February and March 1998, Mr. Walsh saw several persons looking over The Farm. One of those persons was Mr. Bjerkham, the second respondent. However, Mr. Walsh did not speak to Mr. Bjerkham at this time.

[26] In the beginning of April 1998, Mr. Walsh saw Mr. Ward at The Farm and enquired as to what was happening with the sale. He was told by Mr. Ward that Mr. Bjerkham was interested in making an offer. Mr. Walsh then reminded Mr. Ward that he, Mr. Walsh, had a right to match the offer. This was confirmed by Mr. Ward who also told Mr. Walsh that Mr. Bjerkham knew of Mr. Walsh's interest in The Farm as well as the interest of Nature's Produce Inc.

[27] Mr. Walsh was later told by Mr. Ward that Mr. Bjerkham had offered $1.3 million for the purchase of The Farm. Mr. Walsh then told Mr. Ward that he was interested in matching this offer. Mr. Ward responded that he would get back to Mr. Walsh.

[28] After a number of phone calls by Mr. Walsh, Mr. Ward told Mr. Walsh that he should add $50,000 more to the $1.3 million that he had agreed to match and to pay the costs. Mr. Walsh told Mr. Ward that he was interested.

[29] Mr. Ward promised to speak to his lawyer and get back to Mr. Walsh, but did not. According to Mr. Walsh's evidence, he called Mr. Ward on April 30, 1998 and was

told by Mr. Ward that Mr. Bjerkham had offered $1.5 million in addition to costs. Mr. Walsh then asked Mr. Ward if that was the price he would accept for The Farm to which Mr. Ward responded in the affirmative. Mr. Walsh asked that it be put in writing.

[30] Pursuant to Mr. Walsh's request, Mr. Ward wrote the following letter to Mr. Walsh on May 12, 1998:

> "Dear Sir,
>
> **Re: The Farm, St. Peter.**
>
> I refer to our conversation in connection with the above and confirm that I have received an offer of Bds $1, 500,000 in my hand and in keeping with our discussions over the past few months I am giving you an opportunity to make this offer.
>
> If you decide to proceed with an offer you must bear in mind that I must receive a net amount of Bds $1, 500,000 and you will be requested to pay to my Attorney-at-Law a 10% deposit of Bds $150, 000.00 within ten days of the date hereof and be in a position to complete purchase and pay the balance within sixty (60) days of paying the deposit.
>
> If the deposit is not paid by Friday 22nd May, I will proceed with the sale of the property without further obligation to you.
>
> Yours faithfully…."

[31] After receiving financial advice on Mr. Ward's May 12, 1998 letter, Mr. Walsh organized a meeting with himself, Mr. Ward and a Mr. Kirby for May 15 1998. The meeting took place at Mr. Ward's place of work. The evidence of Mr. Walsh as extracted from page 14 of the Notes of Evidence is as follows:

> "Mr. Kirby told Stephen (Mr. Ward) that we accept the offer made on 12th May 1998. Then he asked Stephen to consider some minor changes which he had in a letter that he gave to Stephen. Stephen read it through and Mr. Kirby went through the changes with Stephen. Witness shown **T.W.7**. $75 000 to be paid in 14 days and a further $75 000 on signing the agreement. The price remained at 1.5 million."

[32] Mr. Ward said that he would take legal advice on the letter before considering the changes. At this point Mr. Kirby reiterated to Mr. Ward that, if there were any problems with the changes he, Mr. Ward, was to make sure that his, Mr. Ward's, lawyer understood that the "offer" in the May 12, 1998 letter was accepted.

[33] At the meeting, Mr. Bjerkham's name was mentioned. However, Mr. Ward said that he did not consider Mr. Bjerkham's offer as being serious.

[34] Sometime during the meeting, Mr. Walsh wrote the following on the May 12, 1998 letter:

> "The above offer is hereby accepted
> 15th May 1998
> Signed
> TIM WALSH."

[35] After taking legal advice, Mr. Ward wrote to Mr. Walsh on May 18, 1998 as follows:

> "Dear Sir,
>
> Re: The Farm, St. Peter
>
> Circumstances have arisen which have required me to take advice on the contents of my letter of 12th May 1998.
>
> You are informed that the letter of the 12th May 1998 is totally and unreservedly withdrawn and should not be relied on to provide you with any rights relating to the above.

Yours faithfully….."

[36] Mr. Walsh responded to this letter as follows:

> "Dear Sir,
>
> I am in receipt of your letter dated 18th May 1998 which purports to be a withdrawal of your offer of the 12th May 1998. As you are aware your offer of the 12th May was accepted by me on the terms and conditions stated therein on the 15th May 1998 thereby constituting a binding contract between the parties.
>
> In the circumstances your purported withdrawal by letter dated 18th May 1998 is invalid.
>
> Yours faithfully….."

Case in the High Court

[37] After seeing a letter from Mr. Bjerkham to Mr. Ward in which Mr. Bjerkham agreed to purchase The Farm for the sum of $ 1.364 million, Mr. Walsh felt he was tricked and commenced an action in the High Court against Mr. Ward as owner of The Farm claiming a right to purchase the Farm or alternatively an interest in The Farm. Mr. Bjerkham was joined as a party who might have an interest as a result of his having signed a memorandum to purchase The Farm which was also signed by Mr. Ward.

[38] Taking into consideration the issues raised in the appeals before this Court, it is important to turn to and examine Mr. Walsh's case on the pleadings before the court below.

[39] A review of Mr. Walsh's Amended Statement of Claim reveals that he made essentially three claims against Mr. Ward. The first claim, pleaded in paragraphs 5 and 6, was based by inference on the doctrine of proprietary estoppel. This claim was in essence that Mr. Ward promised that he would sell The Farm to Mr. Walsh for whatever it was valued at and encouraged Mr. Walsh to carry out substantial work on The Farm and to incur great expense in so doing.

[40] The second claim against Mr. Ward, pleaded in paragraphs 7, 10 and 13 was for enforcement of what is referred to in the pleadings as the "first contract". This "first contract" is said to consist of a right of preemption granted by Mr. Ward to Mr. Walsh on or about August or September 1997 and was evidenced in writing by the letter of May 12, 1998 written by Mr. Ward to Mr. Walsh.

[41] The third claim against Mr. Ward, pleaded in paragraphs 8, 9, 11, 12 and 14, was for specific performance of what was referred in the pleadings as the "second contract". This "second contract" is said to be an agreement evidenced in writing by the letter of May 12, 1998 written by Mr. Ward to Mr. Walsh. In the alternative to the claim for specific performance, Mr. Walsh claims damages from Mr. Ward for breach of this "second contract".

[42] A consequential claim was also made against Mr. Ward and Mr. Bjerkham. It was for a declaration that Mr. Walsh's right of preemption to purchase The Farm as are contained in the "second contract" are both valid and have priority over any rights which Mr. Bjerkham may have to purchase the Farm. Mr. Bjerkham counterclaimed against Mr. Walsh for a declaration that he had priority over the rights claimed by Mr. Walsh and against Mr. Ward for specific performance.

[43] It is clear from a perusal of the judgment of ***Greenidge J*** that, at paras [1] and [2] of his judgment, he correctly identified the issues for determination as it relates to Mr. Walsh's claim on the pleadings. It is also clear that, at paras [1] and [2] of his judgment, ***Greenidge J*** correctly identified the issues raised in the pleadings against Mr. Ward and Mr. Bjerkham in respect of proprietary estoppel, the first and second contracts as well as the issue of priority.

[44] Despite this, at para [14] of his judgment, ***Greenidge J*** upheld

Mr. Walsh's claim for specific performance on the sole basis that there was part performance "of the oral contract for the sale of land to him". Apparently, this oral contract was the "first contract", the right of preemption contract claimed by Mr. Walsh. Accordingly, ***Greenidge J*** made an order (i) allowing Mr. Walsh's claim against Mr. Ward and directing Mr. Ward to convey The Farm Plantation to Mr. Walsh for the sum of $1.5 million within four months of the date of the judgment; (ii) discharging the memorandum of agreement in respect of the same property dated 24th April 1998 signed by Mr. Ward and Mr. Bjerkham, and ordering that the deposit of $50,000.00 paid by Mr. Bjerkham to Mr. Ward be returned to Mr. Bjerkham with interest thereon at 8% until satisfaction; (iii) dismissing Mr. Bjerkham's counterclaim against Mr. Walsh and Mr. Bjerkham's counterclaim against Mr. Ward for declaration and for specific performance; and (iv) ordering that Mr. Walsh's and Mr. Bjerkham's costs in the action be paid by Mr. Ward each certified fit for two counsel.

[45] We pause here to note that, although making findings of fact in relation to the claims of proprietary estoppel and the second contract, ***Greenidge J*** made no express determination as to whether Mr. Walsh could and should succeed in respect the proprietary estoppel claim or the "second contract" claim. We also restate here that the only reason given by ***Greenidge J*** for dismissing Mr. Bjerkham's counterclaim was Mr. Walsh's part performance of the oral contract.

[46] As we have already noted, the appellant , and the second respondent have now appealed the order of ***Greenidge J*** and the first respondent, has cross-appealed it.

The Appellant's Case

[47] The case for Mr. Ward, the appellant, before this Court is set out in the Amended Notice of Appeal. This Notice contains fourteen grounds of appeal. The substantive grounds raised in the Notice were summarized in the Revised Appellant's Skeleton Arguments and in Mr. Haynes QC's oral argument before this Court as four contentions. These are (i) that there was no factual or legal basis for ***Greenidge J*** applying the doctrine of part performance; (ii) that there is no factual or legal basis on which the judgment of ***Greenidge J*** can be supported on the basis of proprietary estoppel; (iii) that there is no factual or legal basis on which the judgment of

Greenidge J can be supported on the basis of breach of the "first contract"; and that there is no factual or legal basis on which the judgment of ***Greenidge J*** can be supported on the basis of breach of the "second contract". It is to be noted, also, that the Notice raised as a ground of appeal eleven specific findings of fact by ***Greenidge J***.

[48] The relief sought by Mr. Ward from this Court is as follows:

> "(i) an order that the Order made by ***Greenidge J*** in the High Court be set aside and that the claim of Mr. Walsh be dismissed with costs;
>
> (ii) a declaration that the lease between Mr. Ward and Mr. Walsh has expired by the effluxion of time;
>
> (iii) a declaration that Mr. Ward's counterclaim in the High Court seeking a declaration that Mr. Walsh is a bare licensee in respect of his occupation of the 40 acres be granted, and a further declaration that Mr. Walsh is entitled to reasonable notice to determine the license which in the circumstances is six months."

The First Respondent's Case

[49] The case for the first respondent has been amply represented by Mr. Gale QC in his written submissions to, and in his oral argument before this Court. It is that ***Greenidge J*** correctly identified the three issues raised in the pleadings by the first respondent against the appellant and the second respondent. However, ***Greenidge J*** "wrongfully made no direct determination as to whether the First Respondent could and should succeed in respect of two of these claims as pleaded and seem content only to deal with an oral contract between the Appellant and the First Respondent for the sale of the Farm Plantation on the basis that part performance relative to that contract." In view of this, Mr. Gale QC invites this Court to affirm the decision of ***Greenidge J*** "on additional legal principles of law" as pleaded in the court below,

namely, proprietary estoppel, breach of the "first contract", the preemption contract, and breach of the "second contract. According to Mr. Gale QC, this Court can intervene because, ***Greenidge J***, "though making findings of fact to the issues of proprietary estoppel and the Second Contract seems not to have made any legal determination as to whether these claims were sustainable on the facts as found by him."

[50] In the foregoing premises, Mr. Walsh asks of this Court that the Order of ***Greenidge J*** be varied as follows:

> "(i) that Mr. Ward be ordered to convey The Farm to Mr. Walsh at the sum of $1,364,000.00;
>
> (ii) alternatively, that there be specific performance of the first contract which is to the effect that Mr. Ward sell The Farm to Mr. Walsh for the sum of $1,364,000.00;
>
> (iii) alternatively, that there be specific performance of the second contract;
>
> (iv) in the further alternative, that damages be awarded to Mr. Walsh for breach of the first and/or second contracts."

The Second Respondent's Case

[51] The case before this Court for the second respondent is contained in his Amended Respondent's Notice. That Notice contends that the decision of ***Greenidge J*** should be varied on three grounds. The first is that ***Greenidge J*** misdirected himself in failing to hold that the memorandum of sale, the contract of April 24, 1998, created an enforceable contract for the sale of land in accordance with ***section 60 of Cap. 236*** and as such was first in time and was therefore a binding and enforceable contract for the sale of The Farm. The second is that ***Greenidge J*** erred in holding that the condition in the said memorandum of sale respecting Town and Country Planning

permission affected the enforceability of that memorandum. The third and final is that ***Greenidge J*** misdirected himself in law and fact in holding that on May 15, 1998 there existed a legally binding contract for the sale of The Farm. Mr. Chandler, counsel for the second respondent, in the Revised Second respondent's Skeleton Arguments and in oral argument before this Court expanded on these grounds.

The Issues

[52] From the submissions presented by the respective parties in this appeal, one fairly straightforward issue arises before this Court. It is whether there was any factual or legal basis for ***Greenidge J'*****s** reliance on the doctrine of part performance to support the orders made by him.

[53] Rather more complex issues flow from Mr. Gale QC urging this Court to affirm the decision of ***Greenidge J*** on additional legal principles, namely, the three pleaded by Mr. Walsh in the court below. The first such issue is whether Mr. Walsh can claim an interest in The Farm based on the application of the proprietary estoppel doctrine. The second is whether Mr. Walsh can claim a right of preemption in respect of The Farm. The third is whether Mr. Walsh can claim specific performance of an alleged agreement for the sale of The Farm.

[54] The submissions of Mr. Chandler, on behalf of the second respondent raise a separate issue relating to the priority of Mr. Bjerkham's interest in The Farm vis-a-vis that of Mr. Walsh.

[55] Finally, it has been suggested by all sides that the judgment of ***Greenidge J*** is so inadequately reasoned that, in resolving this appeal, this Court must not only make orders which ought to have been made by ***Greenidge J***, but must also interfere with the evidence that was before him. A preliminary issue therefore arises as to whether this Court has jurisdiction to do these things.

This Court's Power to Interfere

[56] By ***Order 59 r 5 (1)*** of the ***Rules of Supreme Court, 1982***, which have been repealed and replaced by the ***Civil Procedure Rules, 2008*** but which are the operative rules in this case, an appeal to this Court is in the nature of a re-hearing. This rule is generally accepted as conferring on this Court power to give any judgment and make any orders

which ought to have been made by the court below and to interfere with findings of fact.

[57] A quick word on the principles of law that should guide this Court in exercising its power of interference with the findings of fact may be advantageously recounted here. Of these principles, we can do no better than cite the judgment of ***Simmons CJ*** in this Court in the unreported decision of ***Eudese Ramsay v St. James Hotels Services Ltd (Magisterial Appeal No. 4 of 1999)*** where he said:

> "[9] [A]n appellate court will only disturb a decision or finding of fact in the court below where there was no evidence at all or only a scintilla of evidence to support the finding----see for example, ***Layson v Marshall (Civil Appeal No. 45 of 1990); Edwards v Buxton (1982) 30 WIR 82; Powell v Streatham Manor Nursing Home [1935] AC 243 at p. 251 per Viscount Sankey LC; Bookers Stores Limited v Mustapha Ally (1972) 19 WIR 230; Peters v Peters (1969) 14 WIR 457***.
>
> [10] Citations are only necessary from two of those cases to reinforce the principle. In ***Layson v Marshall, Clifford Husbands J*** (as he then was) giving the judgment of the then Divisional Court said:
>
> > "The Divisional Court will not lightly differ from the finding of the Magistrate on a question of fact and will not disturb a judgment of fact unless satisfied that it was unsound. In ***Benmax v Austin Motor Co. [1955] 1 All ER 326***, it was decided that an appellate court, on appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction must be drawn between the perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should

> form its own independent opinion, though it will give weight to the opinion of the judge."
>
> [11] The reason for the reluctance of an appellate court to interfere with findings of fact by a court below is that "the judge is in a better position to assess the credibility of the witnesses and the value of their evidence" per Berridge JA in ***Edwards v Buxton*** (supra at p. 87)."

[58] The gravamen of ***Simmons CJ's*** statement in the ***Eudese Ramsay*** case is that the jurisdiction of this Court to review the record of evidence should be exercised with caution. ***Simmons CJ's*** call for caution is no doubt time-honoured and reflects great wisdom. That said, an important caveat to such caution is underlined in a dictum of ***Byron CJ***, as he then was, in ***Grenada Electricity Services Ltd v. Isaac Peters, Grenada Civil Appeal No. 10 of 2002***. He explained there as follows:

> "[7] [A]n appellate court will usually be reluctant to differ from the finding of a trial judge where his finding turned solely on the credibility of one or more witnesses. This however, includes an important limitation and requires the court to draw a distinction between a finding of specific fact and finding of fact which in reality is an inference from facts specially found. To use different words the court must distinguish between the perception and evaluation of facts. It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving the testimony. On the other hand, the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the

> appellate court is generally in as good a position to draw inference or to evaluate as the trial judge."

[59] It is clear from the authorities, then, that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of primary facts. An appellate court is more reluctant to interfere with the former than the latter.

[60] In the case before us, ***Greenidge J*** saw and heard the witnesses. At para [11] of his judgment he said that he preferred "Mr. Walsh's evidence as being more credible". Nothing has been presented to this Court that persuades us that we should interfere with ***Greenidge J*'s** findings of fact where his findings were based on the credibility of Mr. Walsh and Mr. Ward. Consequently, consistent with the principles expounded in the foregoing paragraphs of this judgment, this Court has accepted the evidence of Mr. Walsh on the factual background of this case.

[61] However, as was pointed out in paras [52] to [55] of this judgment, the real dispute in this case turns on the evaluation of the factual or legal basis for ***Greenidge J*'s** reliance on the doctrine of part performance, and whether there is a factual or legal basis for this Court to affirm ***Greenidge J's*** decision on the alternative basis of the proprietary estoppel, a right of preemption in respect of The Farm, and/or specific performance of an alleged agreement for the sale of The Farm. Thus, the dispute in this case is as to the proper inferences to be drawn from the facts found by ***Greenidge J*** in relation to these issues rather than the credibility of the witnesses. That being so, this Court is in as good a position as ***Greenidge J*** to draw inferences from the facts found by him and will do so.

Part Performance

[62] As has already been noted, ***Greenidge J*** based his decision in this case solely on the application of the doctrine of part performance. But, part performance was neither

pleaded by Mr. Walsh nor was it argued before ***Greenidge J***. This notwithstanding, ***Greenidge J***, at paragraph [14] of his judgment found that "Walsh can rely on his being (sic) part performed the oral agreement for the sale of land to him".

[63] Our reading of ***Greenidge J's*** judgment is that he invoked the doctrine of part performance as a device for averting the legal difficulty posed by ***section 60*** of ***Cap. 236*** in founding an interest in The Farm in Mr. Walsh based on the "oral agreement" pleaded in paragraph 7 of the Amended Statement of Claim. The provisions of ***section 60***, cited *in extenso* at para [155] of this judgment, made it impossible for Mr. Walsh to claim any interest in The Farm on the basis of the oral contract. And so, ***Greenidge J*** turned to the doctrine of part performance to say that Mr. Ward was, as was said by Lord Selborne in ***Maddison v Alderson (1883) 8 App Cas 467 at 476,*** "really 'charged' upon the equities resulting from the acts done in the execution of the contract, and not…upon the contract itself…" But, was the doctrine of part performance applicable in the circumstances of this case?

[64] The law on the essential elements necessary for the application of the doctrine of part performance is well settled. According to **Megarry and Wade, The Law of Real Property 4th Edition at pages 563 – 572**, for the doctrine to apply, four essentials must be satisfied. First, there must be clear evidence that there was a contract between the parties. Second, the individual relying on the contract must be able to establish that the contract could be specifically enforced. Third, the individual relying on the contract must have done acts in performance of the contract. Fourth, these acts must be referable to the contract.

[65] In this Court's view, there was neither legal nor factual basis for the application of the doctrine of part performance in this case because as appears in paras [115] to [131] of below, there was no evidence of a contract for the sale of The Farm between Mr. Ward and Mr. Walsh. In consequence, the first requirement of part performance, clear evidence of a contract between the parties, was not satisfied.

[66] This Court is of the view that the second requirement of the doctrine of part performance, that the contract must be capable of being specifically enforced, is also not satisfied. The undisputed evidence is that the "oral agreement" found by ***Greenidge J***, if perchance a contract, was a contract to match an offer, or what is

sometimes called a pre-emption contract. As is explained in paragraphs [132] to [133] below, it is tolerably clear that the appropriate remedy for breach of such a contract is damages. The "oral agreement", if a contract, was therefore not capable of being specifically enforced.

[67] The third requirement for the application of the part performance doctrine, namely, that the individual relying on the contract must have done acts in performance of the contract, was not satisfied. The acts that the learned trial judge referred to at para [11] of his judgment were all performed by Mr. Walsh prior to August 1997 the date of the "oral agreement". These include the execution of the lease in January 1997 by Mr. Walsh and Nature's Produce Inc., a separate legal personality from Mr. Walsh; Mr. Walsh's entry into additional land in June 1997 upon the suggestion of Roy Ward; Mr. Walsh's acts of cleaning, harrowing, cultivating the land and implementing an irrigation system in furtherance of a proposal and a pilot crayfish project in June and July 1997.

[68] All of those acts preceded the "oral agreement" and as such could not be done in the performance of a contract which came into existence at a later date. This Court cannot therefore agree with ***Greenidge J's*** categorization of those acts as acts of part performance. What is more, we cannot find in the evidence found by ***Greenidge J*** any other factual basis on which the third requirement of part performance can be satisfied.

[69] The logic of our holding that the acts of part performance found by ***Greenidge J*** preceded the "oral agreement" is that those acts could scarcely be described as referable to the "oral agreement", a not-yet-in-existence contract. The fourth requirement for the application of the doctrine of part performance was therefore not satisfied.

[70] Our conclusion on this matter is that we agree with Mr. Haynes QC and Mr. Chandler that ***Greenidge J*** erred in law and in fact in invoking the doctrine of part performance to support his order in the court below. In fairness to Mr. Gale QC, it must be stated that he did not attempt to support ***Greenidge J*'s** decision on this basis.

[71] We now turn to the additional grounds on which Mr. Gale QC argues the decision of ***Greenidge J*** should be affirmed.

Proprietary Estoppel

[72] Mr. Gale QC has argued before this Court that ***Greenidge J***, in his decision, made significant findings of fact which could have supported a finding that Mr. Walsh was entitled in law to purchase The Farm from Mr. Ward based on the principles of proprietary estoppel. Mr. Gale QC's reliance on the doctrine of proprietary estoppel in the context of this case is entirely understandable.

[73] The fundamental concern of the doctrine of proprietary estoppel is the promotion of conscientious dealings in relation to land. In ***Crabb v Arun District Council [1976] Ch 179 at 187***, Lord Denning MR, citing Lord Cairns in ***Hughes v Metropolitan Ry Co (1887) 2 App Cas 439 at 448***, explained the doctrine as having its origins in "the first principle upon which all courts of equity proceed", namely, "to prevent a person from insisting on his strict legal rights arising under a contract, or on his title deeds, or by statute when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties".

[74] That statement exposes two critical facets of the proprietary estoppel doctrine. The first is that the doctrine is predicated on the assumption that legal rights cannot be enforced in total isolation from the relational context in which relevant dealings have taken place. The second is that the courts have a residual jurisdiction to scrutinize the dealings between parties and to restrain particular assertions of strict legal rights on grounds of conscience. In fact, as the doctrine has evolved, it is now often treated as having the effect of creating rights of an equity founded upon estoppel. Unsurprisingly, therefore, Mr. Gale QC's argument is that Mr. Walsh, in the circumstances of this case, acquired the right of an equity in The Farm founded upon estoppel. But did he?

[75] In approaching that question, this Court has very much in its mind the caution of Lord Walker in the English House of Lords case of ***Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55 (Yeoman's Row)***, that even though the proprietary estoppel doctrine is a flexible doctrine, it is not to be used as a 'wild card' whenever the court disapproves of the conduct of an individual. Lord Walker stated as follows at ***para [46]***:

> "My Lords, equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in **Muschinske v Dodds (1985) 160 CLR 583, 615-616**, 'Under the law of [Australia]-as, I venture to think, under the present law of England-proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void' of individual moral opinion…"

[76] So, ever mindful of Lord Walker's caution, this Court considers that, as a matter of principle, it is useful as a first step in deciding whether or not proprietary estoppel is available in this case to enquire into the intrinsic nature of a proprietary estoppel claim. In this regard, Lord Scott's statement at ***para [14]*** of ***Yeoman's Row*** is apposite. He stated there that:

> "An "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a "proprietary estoppel"—a sub-species of a "promissory" estoppel—if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action."

[77] We understand this statement to mean that, as a matter of principle, the fact or facts, or the matter of mixed fact and law which Mr. Ward is estopped from asserting as well as the proprietary interest in The Farm claimed by Mr. Walsh are essential requirements which must be pleaded if a claim for proprietary estoppel is to be

upheld. As Lord Scott warned ***at para [28]*** of ***Yeoman's Row***, "if these requirements are not recognized, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable…"

[78] In the opinion of this Court, the pleadings in this case do not satisfy these requirements. In para [5] of the Amended Statement of Claim, it is pleaded that "the First Defendant [Mr. Ward] represented to the Plaintiff [Mr. Walsh] and promised that when he was willing to sell the said plantation, he, the First Defendant, would sell the same for whatever it was valued and encouraged the Plaintiff to start and carry out work on the said plantation." It is not pleaded, for instance, that this promise was legally binding. So what is Mr. Ward estopped from denying? It is not pleaded, as another instance, that Mr. Walsh acquired any proprietary interest in the Farm. Again, Mr. Ward cannot deny this for it was not alleged. What is more, the proprietary claim which Mr. Walsh is making that estoppel is necessary to protect is nowhere pleaded.

[79] The state of the pleadings notwithstanding, Mr. Gale QC has argued strenuously in his written skeleton argument and his oral submissions before this Court that, on the facts found by ***Greenidge J***, a proprietary estoppel claim is available to Mr. Walsh. We now turn to considering this argument.

[80] It is clear from para [5] of the Amended Statement of Claim that the estoppel which is relied on by Mr. Walsh falls into the category of what is called a "common expectation" case. As was described in ***Yeoman's Row*** by Lord Walker ***at paras [52]*****- [55],** a "common expectation" case is a case where A and B have dealt with each other in such a way as reasonably to cause B to rely on the shared supposition that he would acquire rights of some kind in A's land. There can be no doubt that this case falls within this description.

[81] In the oft-cited English case of ***Ramsden v. Dyson (1866) LR 1 HL 129 at 170***, Lord Kingsdown adumbrated the requirements of estoppel in this type of case as follows:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the

> knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

[82] In the relatively more recent, but equally well-known English Chancery Division case of ***Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897 at 909 (Taylors Fashions)***, **Oliver J** (as he then was) restated these requirements as follows:

> "if A under an expectation created or encouraged by B shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation."

[83] Oliver J's restatement of the law was regarded by Lord Scott in ***Yeoman's Row*** as underlining that, in "common expectation" cases, heightened emphasis is to be given to, not merely the requirement for an expectation, but for an expectation of "a certain interest in land". Of this, Lord Scott, at ***paras [18]*** and ***[21]*** respectively of his judgment, said:

> "***[18]*** …Note the reference to a "certain interest in land". **Taylors Fashions** was a case where the "certain interest" was an option to renew a lease. There was no lack of certainty; the terms of the new lease were spelled out in the option and the lessees' expectation was that on the exercise of the option the new lease would be granted…An expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having any comparable certainty to the certainty of the terms of the lessees' interest under the Taylors Fashions option…"
>
> "***[21]…***Mr. Cobbe, whose expectation was that of further negotiations leading, as he hoped and expected, to a formal contract. To the extent

> that he had an expectation of a "certain interest in land", it was always a contingent one, contingent not simply on the grant of planning permission but contingent also on the course of the further contractual negotiations and the conclusion of a formal written contract."

[84] The need for the promise or representation creating the expectation to be a promise or representation which leaves no doubt as to the inevitability or certainty of an interest, be it existing or future, in land has been consistently asserted by courts of equity. Thus, in ***Ramsden v. Dyson (supra)***, it was held that if the agreement which is relied upon as creating the expectation merely refers to a promise on the honour of the promisor and it is not otherwise binding the courts have no jurisdiction to enforce such promise as there is no certainty of an interest. Lord Cranworth noted at ***pp 145 – 146***:

> "…If any one makes an assurance to another, with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of courts of equity no less than of courts of law."

[85] The requirement for a "certain interest in land" was also addressed in the Privy Council decision of ***Attorney General of Hong Kong v Humphrey's Estate [1987] AC 114***. Here Lord Templeman pointed out at ***p 124*** that it is not sufficient for an individual to believe that he will obtain an interest over another's property if he is also aware that the other person may change his mind or that the proposed agreement under which the interest would arise is dependent on contingencies. (As to this, see also ***Taylor v Dickens [1998] 3 FCR 455 at pp 472-473***).

[86] In ***Yeoman's Row,*** Lord Walker was at pains to underscore the importance of courts adopting a strict approach to the requirement for a "certain interest in land" in common expectation cases with a commercial context, as in the present appeal. Of this he stated as follows at ***paras [66] and [81]***:

> "**[66]** The point that hopes by themselves are not enough is made most clearly in cases with a commercial context, of which ***Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114*** is the most striking example."
>
> "**[81]** …. [C]onscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppels. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract."

[87] This Court is of the view that the expectation or belief on which Mr. Walsh claims to have acted cannot, on a proper interpretation of the facts found by ***Greenidge J***, be said to be based on a promise or representation that he would have acquired a certain interest in The Farm. As was seen in para [79] of this judgment, the promise pleaded in para [5] of the Amended Statement of Claim is that "the First Defendant [Mr. Ward] represented to the Plaintiff [Mr. Walsh] and promised that when he was willing to sell the said plantation, he, the First Defendant, would sell the same for whatever it was valued and encouraged the Plaintiff to start and carry out work on the said plantation."

[88] On the plain words of para [5] of the Amended Statement of Claim, then, Mr. Ward's promise to Mr. Walsh to "sell the said plantation…for whatever it was valued" was incomplete and uncertain. It left essential matters to be agreed by the parties. It did not specify whether the sale of the plantation was to be of only the arable land or whether it was to be of both the arable and non-arable land. It did not specify the price for which the plantation was to be sold nor did it contain any formula by which the price could be fixed in the event of no agreement being reached. It was nothing more than a promise to give Mr. Walsh an opportunity to enter negotiations for a contract for the sale of The Farm. That promise was not a promise which

could reasonably create an expectation of the inevitability or certainty that Mr. Ward would sell The Farm to Mr. Walsh.

[89] What is more, it is clear from the evidence that this is how Mr. Walsh understood Mr. Ward's promise and, conversely, that he did not understand this promise to create any certain interest in him in the Farm. Mr. Walsh's letter of January 21, 1998, is one such piece of evidence. In this letter, Mr. Walsh "formally" offered to purchase The Farm "subject to contract". That letter contains two offers. The first is for "a partial sale, including arable land, water well rights and the yard". The second is for "the Farm Plantation in its entirety including non-arable lands and quarry." It is painfully obvious from this letter that Mr. Walsh could not have held any expectation or belief of any certain interest in The Farm and that he was aware that further negotiations were necessary to procure a certain interest by way of a concluded contract in The Farm.

[90] Mr. Walsh's expectation was like the claimant's in ***Yeoman's Row*** which was, as Lord Scott stated ***at para 18***, "that upon the grant of planning permission there would be a successful negotiation of the outstanding terms of a contract for the sale of property to him, or to some company, and that a formal contract, which would include the already agreed core terms of the second agreement as well as the additional new terms agreed upon, would be prepared and entered into." Like Mr. Cobbe, the height of Mr. Walsh's expectation could only have been that a contract for the sale of The Farm, the exact terms of which remained to be negotiated, would be entered when Mr. Walsh matched an offer that Mr. Ward would accept. So, like Mr. Cobbe, Mr. Walsh is unable to point to the "certain interest" in The Farm which he is entitled to receive.

[91] Mr. Gale QC also points to the fact that Mr. Walsh, having entered into possession and worked additional acres of The Farm, was told by Mr. Ward in August 1997 "that when he, Mr. Ward, decided to sell the plantation he would give me, Mr. Walsh, the opportunity to match the offer he would accept" (page 11 of the Record of Appeal) as evidence that Mr. Walsh had already acquired an interest in The Farm. This was not pleaded nor does the evidence support it. Such evidence as bears on this

submission supports a conclusion that Mr. Walsh was permitted by Mr. Ward to enter and work the other lands of the plantation as a mere licensee.

[92] It is settled law that an interest obtained pursuant to an occupation or licence cannot give rise to an equity founded on proprietary estoppel: See generally **Snell's Equity 13th Ed paragraph 39-14** *and* ***Attorney General of Hong Kong v Humphreys Estate (Queen's Garden) Ltd (supra); Halsemere Estate Ltd. v Baker [1982] 1 WLR 1109 at 1199.*** Accordingly, Mr. Walsh, being a mere licensee of the additional acreage, cannot rely on his expenditure to support a claim that he had acquired an interest in The Farm on the basis of proprietary estoppel.

[93] But, even if Mr. Walsh could satisfy the requirement for an expectation of "a certain interest in land", he would still have to clearly establish that he was encouraged either actively or passively to change his position to his detriment in reliance on the representation or promise made by Mr. Ward: (***Attorney General of Hong Kong v Humphrey's Estate (supra) at 124*** per Lord Templeman) or, at least demonstrate such reliance to be a matter of "inevitable inference": (***Lim Teng Huan v Ang Swee Chuan [1992] 1 WLR 113 at 118*** per Lord Browne-Wilkinson). Put another way, the promise or representation relied on by Mr. Walsh must be shown to have been an effective cause of his change of position.

[94] Mr. Walsh's reliance on Mr. Ward's promise or representation, in the sense of such promise or representation being an effective cause of Mr. Wash's change of position, has not been clearly established nor has it been demonstrated to be a matter of inevitable inference. This Court accepts that Mr. Walsh acted in the confident and not unreasonable hope that the "first refusal" promise would eventually lead to a contract for the sale of The Farm. However, as Sir Jonathan Parker stressed in the Privy Council in ***Henry and Mitchell v Henry [2010] UKPC 3 at para [55]***, the inquiry as to reliance in the context of proprietary estoppel falls to be made in the context of the nature and quality of the particular assurances which are said to form the basis of the estoppel. (See also per Walker LJ in ***Gillett v Holt [2000] 2 All ER 289 at 301***). In this Court's view, taken in the context of the nature and quality of Mr. Ward's promise and representation, Mr. Walsh's actions cannot be characterized as satisfying the requirement for reliance.

[95] Our conclusion that there was no reliance for purposes of proprietary estoppel is reinforced when the element of detriment is considered in this case. As to the element of detriment, let us begin by observing that both Mr. Gale QC and Mr. Haynes QC accept detriment as an essential element of proprietary estoppel. Consequently, supposing that reliance on Mr. Ward's promise or representation were established, it would still be necessary to show that Mr. Walsh suffered detriment as a result of such reliance. Mr. Gale QC does not shy away from this element. He submitted in his skeleton argument that Mr. Walsh suffered detriment in that:

> "(i)…he obtained the valuation and began to improve and plough 25 acres west of Farm road, repaired and installed the irrigation system, all at his or his Company's expense. He also repaired and installed a sprinkler system and he worked seven days per week, 12 hours a day personally on the plantation improving it…The vast majority of the expenses on the land and the irrigation system were paid by [Mr. Walsh's] company, Nature's Produce as his agent. He also went into possession of the upper and lower six and cultivated this area. He also repaired a tractor belonging to [Mr. Ward] for use on the Plantation. Again his company funded the cost. He himself spent money on fixing the garage as a living area.
>
> (ii) He also developed a cray fish project with the Appellant's knowledge and in fact with his assistance the (sic) delivered the clay for the Farm".

[96] We accept the submission of Mr. Gale QC that the undoubted law is that, as a general rule, the spending of money on or the improving of The Farm by Mr. Walsh and his payment of outgoings may be considered to be activities that may amount to detriment to Mr. Walsh: see generally **Snell's Equity (supra);** ***Dann v Supplier [1802] 7 Ves 231; Thomas v Thomas [1956] NZLR 785; Pascoe v Turner [1979] 1 WLR 431.*** However**,** as appears from the judgment of Sir Jonathan Parker in ***Henry and Mitchell v Henry (supra) at para [55]***, the question as to whether these activities

amount to detriment in this case falls to be made in the context of the nature and quality of the particular conduct or course of conduct adopted by Mr. Walsh in reliance on the particular assurances of Mr. Ward.

[97] Adopting the approach to the inquiry as to detriment stated by Sir Jonathan Parker, we are of the view that the expenditures and labour relied on by Mr. Gale QC in this case do not satisfy the detriment requirement. Those expenditures were incurred and undertaken in furtherance of Mr. Walsh's personal endeavours pursuant to his lease, the partnership proposal and the pilot fresh water crayfish project. It appears from Mr. Walsh's evidence that he expected to derive profit either personally or through Nature Produce Inc. from these endeavours. His activities were driven by this expectation; not by Mr. Ward's promise and representation that he would sell The Farm to him, Mr. Walsh, when he, Mr. Ward, was ready to sell. Similarly, the refurbishment of the garage and subsequent occupation thereof, his refurbishment of the servant's quarters and use thereof for storage and washing of vegetables along with the installation of the overhead irrigation system, while permitted by Mr. Ward, were in no way encouraged by Mr. Ward. They were done in furtherance of Mr. Walsh's personal business endeavours. These expenditures cannot therefore be said to be detriment suffered in reliance on Mr. Ward's promise or representation and as such cannot amount to detriment for purposes of proprietary estoppel.

[98] We would also add that Mr. Walsh cannot be said to have suffered any detriment in respect of the payment for the electricity for the entire plantation in lieu of rent. In making this payment, Mr. Walsh basically substituted the method by which he would satisfy his obligation to pay Mr. Ward for the access to use and enjoyment of the Plantation. As Mr. Haynes QC puts it, Mr. Ward did not encourage Mr. Walsh to expend such money but merely acceded to the request by Mr. Walsh to satisfy an existing obligation in an alternative manner.

[99] At this point, we pause to note that even though ***Greenidge J*** did not address the proprietary estoppel claim as such, he states at para [13] of his judgment as follows:

> "It is clear from the foregoing and certainly in relation to the crayfish project for which he had sought a partnership with Mr. Ward that he

> expended money to his detriment because Mr. Ward never came up with the expected funds."

In our view, if ***Greenidge J*** intended this to be the "detriment" that is required in the application of the proprietary doctrine, he fell into error. He should have weighed the expenditure incurred by Mr. Walsh against the benefits that would have accrued to Mr. Walsh during his occupation of The Farm. These benefits include rent free occupation of the garage and rent free use of the plantation by Natures Distribution Inc., another company owned by Mr. Walsh, and the potential for increased capacity and profits from cultivating a larger portion of the plantation.

[100] Strong authority for the weighing of counter-balancing advantages in determining whether the detriment element is satisfied is to be found in the decision of the Privy Council in ***Henry and Mitchell v Henry (supra)***. In this case, Sir Jonathan Parker in holding that the trial judge should have undertaken a weighing process in inquiring into the detriment requirement stated as follows at ***para 53***:

> "...he should have weighed any disadvantages which Calixtus Henry had suffered by reason of his reliance on Geraldine Pierre's promises against any countervailing advantages which he had enjoyed by reason of that reliance. Had he done so, he would have brought into account on, as it were, the debit side of the account..."

[101] This Court shares the view that a weighing of counter-balancing advantages in this case yields the conclusion that the detriment suffered by Mr. Walsh is not outweighed by the advantages enjoyed by him. For this reason also, we find that Mr. Walsh has not established "detriment", a critical element of proprietary estoppel.

[102] Out of the abundance of caution, we think that we should comment on two passages in the judgment of ***Greenidge J*** which bear on the proprietary estoppel claim. The first passage is found at para [12] of his judgment. He writes there:

> "I am satisfied that the circumstances raised an equity in favour of Mr. Walsh and that it would be unconscionable to allow Mr. Ward to frustrate the expectation by Mr. Walsh to purchase the farm.

The other is found at para [14] where he states:

> "I find that the delay in perfecting the sale was the greed of Mr. Ward in trying to "back raise" Mr. Bjerkham and extract more money from Mr. Walsh."

[103] We cite these passages to observe that, if Mr. Walsh can only prove unconscionable behaviour on the part of Mr. Ward and fails to establish the other elements we have just discussed, such unconscionable behaviour cannot be a sufficient basis for finding proprietary estoppel. This is because, as Lord Walker pointed out in ***Yeoman's Row*** at ***para [92],*** the part played by unconscionable behaviour in the proprietary estoppel doctrine is that it unifies and confirms, as it were, the other elements. Put another way, where the other elements appear to be present, unconscionable behaviour is necessary to "shock the conscience of the court".

[104] Lord Scott's opinion on the place of unconscionable behaviour in the proprietary estoppel doctrine expressed earlier in ***Yeoman's Row*** bears repeating here. He opined at ***para [16]*** as follows:

> "To treat a 'proprietary estoppel equity' as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion."

[105] In ***Capron v Government of Turks & Caicos Islands [2010] UKPC 2***, Lord Kerr framed the principle in ***Yeoman's Row*** on unconscionable behaviour as follows at ***para [39]***:

> "In advancing the claim under this head, the appellant made much of the alleged unconscionable behaviour of the government in 'resiling from its promises' to him. As is clear from the decision in **Yeoman's**

> **Row**, however, unconscionable behaviour cannot stand alone as the basis for a finding of proprietary estoppel. Where there is no ground for a belief that the claimant was entitled to acquire a certain interest in land, the fact that the behaviour of the person against whom proprietary estoppels is sought to be established was unconscionable cannot fill the gap that exists in the essential proofs required for the doctrine to come into play."

[106] In light of the principle in ***Yeoman's Row*** on unconscionable behavior, even if ***Greenidge J*'s** finding was that there was evidence of unconscionable behaviour on the part of Mr. Ward, this would not lead without more to an application of the proprietary estoppel doctrine. The other elements of proprietary estoppel must first be satisfied for unconscionable behaviour to assume relevance. In our view, these elements have not been established. Accordingly, we conclude that ***Greenidge J*'s** decision cannot be affirmed on the basis of proprietary estoppel.

[107] Assuming, contrary to our conclusion, that the requirements of proprietary estoppel are met, and that an equity has arisen in Mr. Walsh's favour under the proprietary estoppel doctrine, this Court would have to consider how, in the circumstances of this case, Mr. Walsh's equity should be satisfied. For completeness, we undertake this consideration.

[108] In approaching this task, we are guided by the well settled law that this Court is confined to formulating relief in terms of the 'minimum equity' required to do justice to Mr. Walsh. We are ever conscious that this Court's duty is to do equity and no more than equity and that in fashioning its order, this Court, as a court of conscience, can go no further than is necessary to prevent unconscionable conduct.

[109] In our view, the judgment of Walker LJ, as he then was, in ***Gillet v Holt (supra),*** captures the essence of the remedial aspect of the proprietary estoppel doctrine. He stated there at p. 312 that in each case the court must identify the 'maximum extent of the equity' claimed on grounds of estoppel and then "form a view as to what is the minimum required to satisfy it and do justice between the parties". The court must never award estoppel claimants "a greater interest in law than was within their

induced expectation", but may in some circumstances award rather less. We would add that, as was noted by Sir Jonathan Parker in ***Henry and Mitchell v. Henry (supra) at para [65]***, "proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application."

[110] In all the circumstances of this case, we would conclude that, assuming proprietary estoppel were established, an order to convey the Farm to Mr. Walsh would not be an appropriate relief in order to achieve the minimum equity required to do justice to him. We would further conclude that the appropriate relief in order to achieve the minimum equity required to do justice to Mr. Walsh would be an *in personam* remedy in the form of an award of money compensation in respect of any benefits conferred on Mr. Ward by Mr. Walsh's expenditures and labour; not an order for specific performance. This rather more restricted remedy has for a long time been deployed by courts of equity to avoid unconscionablity where the equity claimed is founded, as it is here, on expenditures and labour which result in improvements: See, e.g., ***Montreuil v Ontario Asphalt Co (1922) 69 DLR 313 at 334-335***; ***Re Whitehead [1948] NZLR 1066 at 107***; ***Dodsworth v Dodsworth (1973) 228 EG 1115***; ***Campbell v Griffin [2001] WTLR 981 at [36]***; ***Van Laethem v Brooker [2006] 1 FCR 697 at [273-[275]; Stack v Dowden [2007] 2 AC 432 at para [37]***.

The Pre-Emption Contract or the First Contract

[111] Mr. Gale QC invites this Court to uphold the order made by ***Greenidge J*** that Mr. Ward convey The Farm to Mr. Walsh on the alternative ground that ***Greenidge J*** in his decision made significant findings of fact that Mr. Walsh was granted a right of pre-emption to purchase The Farm in an oral agreement between Mr. Walsh and Mr. Ward. According to Mr. Gale QC, this ground was pleaded in paragraph 7 of the Amended Statement of Claim as follows:

> "By an oral agreement made on or about August or September 1997 between the Plaintiff of the First Part and the First Defendant of the other part (hereinafter called the First Contract), the First Defendant in furtherance of his promise and representations as is more particularly set out in paragraph 5 hereto, granted to the plaintiff a right of pre-

> emption in respect of the sale and purchase of the said plantation. The said first Contract is evidenced in writing by way of a letter dated the 12th May 1998 written by the First Defendant to the Plaintiff."

[112] Mr. Gale QC asserts that, despite these pleadings and despite his having made the determination that Mr. Walsh was given a right of pre-emption, ***Greenidge J*** erred by failing to make a determination as to whether that agreement should be specifically enforced. Mr. Gale QC contends that this Court should now make this determination.

[113] We accept Mr. Gale QC's request and will make such a determination. In approaching this determination, we wish to state at the very outset that we agree with the observation of the learned authors of ***Barnsley's Land Options*** by ***Dray and Rosenthal 5th ed. 2009 at 6-001,*** that "the law in relation to rights of pre-emption is bedevilled with complexity and uncertainty". One thing which is neither complex nor uncertain, however, is that a right of pre-emption, if not created by will or statute, must be created by private contract.

[114] Paragraph 7 of the Amended Statement of Claim is to the effect that the right of pre-emption in this case was created by an "oral agreement made on or about August or September 1997", referred to as "the first contract". That paragraph baldly pleads in effect that the right of pre-emption in this case was created by "an oral agreement made on or about August or September 1997". This pleading implicitly concedes that the pre-emption right in this case is not a term in a larger concluded agreement, as is usually the case, but is a term in a free-standing contract, the "oral agreement" or "the first contract". Be this as it may, the particulars of claim do not plead the creation of that contract in the conventional way of offer, acceptance, consideration, and intention to create legal relations. In fact, when that paragraph is read in light of paragraph 5, what appears to be pleaded is that the creation of "the first contract" is to be deduced from the correspondence between, and the conduct of, Mr. Ward and Mr. Walsh.

[115] Admittedly, there is some authority for such an approach to be found in the judgment of Lord Denning MR in the English Court of Appeal decision of ***Gibson v***

Manchester City Council [1978] 2 All ER 583 at 586 where he said that in some cases:

> "You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforth to be binding, then there is a binding contract in law even though all the formalities have not been gone through."

(Lord Denning MR again repeated this view of the law in ***Butler Machine Tool Vo Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 965 at 968***.

[116] Lord Denning MR's view of the law that the existence or non-existence of a contract may be determined by the correspondence between, and the conduct of, the parties was completely undermined by the House of Lords in ***Gibson v Manchester City Council [1979] 1 All ER 972*** on appeal to the House of Lords. There, the House of Lords reaffirmed the conventional approach of offer, acceptance, consideration and intention to create legal relations, "except in exceptional cases", in determining whether or not contractual obligations were created.

[117] In our opinion, there is nothing in this case to even vaguely suggest that it falls into the category of "exceptional cases". This case is palpably amenable to conventional offer and acceptance analysis. Adopting therefore the conventional approach, we have concluded that there is no clear evidence that the right of pre-emption claimed by Mr. Walsh was created by any contract for three principal reasons.

[118] First, Mr. Ward's "promise and representations" in August 1997 that he, Mr. Ward, would make sure that when he decided to sell The Farm he would give Mr. Walsh the opportunity to match the offer that he would accept is decidedly not in itself a contract. Mr. Ward's "promise and representations", at its most favourable interpretation to Mr. Walsh, can only be considered to be a unilateral offer for Mr. Walsh to submit matching offers to Mr. Ward upon the occurrence of specified

events. The specified events were a decision by Mr. Ward to sell The Farm and receipt by him of an offer that he would accept.

[119] Simply put, this "promise and representation", if an offer could only be accepted when Mr. Ward decided to sell The Farm and received an offer at which he was willing to sell The Farm. The undisputed evidence is that Mr. Ward first received an offer at which he was willing to sell the property in 1998. Since no circumstances arose at any time in 1997, the date of "the first contract" pleaded in paragraph 7 of the Amended Statement of Claim, which would have enabled Mr. Walsh to accept the offer either by words or conduct, Mr. Walsh could not have entered into a contract with Mr. Ward for the sale or purchase of land at any time in 1997.

[120] Second, another essential element of an enforceable contract, consideration, was absent in 1997. The only consideration which could arguably have been requested by Mr. Ward of Mr. Walsh was the making by Mr. Walsh of an offer matching the offer that Mr. Ward would accept. The matching offer could only be made on the occurrence of the specified events. These events did not occur until August 1998. It was only on this date that Mr. Walsh could perform the act requested by Mr. Ward and thereby supply the consideration necessary to create an enforceable contract.

[121] We have laid particular stress on the acts requested of Mr. Walsh by Mr. Ward in determining whether Mr. Walsh supplied consideration. This is because, ever since the English Court of Appeal decision in ***Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256***, the authorities are agreed that it is only performance of those acts requested by the promisor which can constitute consideration in a unilateral contract. It is for this reason also that we are of the view that neither the work done by Mr. Walsh on Mr. Ward's "encouragement", nor the considerable sums of money spent on the plantation on the "belief" that Mr. Ward would sell the plantation to him or on Mr. Ward's "inducement", even though arguably a "detriment" to Mr. Walsh, amounted to consideration as Mr. Gale QC contended. These acts were not requested by Mr. Ward, even if he derived "benefit" from them as argued by Mr. Gale QC, and therefore cannot constitute consideration.

[122] Third, it is doubtful on the evidence whether "the first contract" was intended to create legal relations. Both legal decisions and the opinion of standard text writers support the proposition that it is quite possible to reach an agreement which does not give rise to legal relations. Legal relations will only arise if the parties intend their agreement to give rise to legal relations.

[123] The question of what the parties intend does not involve a subjective analysis of the state of their mind. The true position is that it is for the courts to decide whether or not an agreement made in the particular context should attract legal sanction based on an objective analysis of the parties' dealings. Accordingly, in ***Edmonds v. Lawson [2000] 2 WLR 1091 at 1099*** Lord Bingham asserted:

> "Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by inquiring into their respective status of mind ..."

Important considerations which the courts take into account in deciding whether or not there was an intention to create legal relations are the identity of the parties: ***Jones v. Padavatton [1969] 2 All ER 616***; their relationship: ***Merritt v. Merritt [1970] AC 806***; the nature of the agreement, (whether social/domestic or commercial): ***Rose & Frank Co. v. J.R. Crompton Bros Ltd. [1923] 2 KB 261***; the subject matter of the dispute: ***Parker v. Clark [1960] 1 WLR 286***; and the general circumstances.

[124] Taking these important considerations into account, we come to the conclusion that "the first contract" was not intended to create legal relations. We note in particular that the subject matter of "the first contract", the contract in dispute, was the sale of a plantation and that by ***section 60 (1) of Cap. 236*** "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same." Given ***section 60 (1)***, "the first contract", the "oral agreement", pleaded by Mr. Walsh could not without more have been intended to create legal relations.

[125] We also note that there is no evidence that Mr. Ward and Mr. Walsh had any relationship other than a business relationship. In fact, the evidence is that Mr. Ward and Mr. Walsh dealt with each other at arms-length and consulted their respective

lawyers in all of their dealings relating to the sale of the plantation in general, and the pre-emption agreement, "the first contract", in particular. Importantly, from as early as July 13, 1996, Mr. Walsh, in a letter written by his lawyers sought "first refusal" rights from Mr. Ward. Mr. Ward ignored this request in his reply to this letter. Indeed, throughout his dealings with Mr. Walsh, Mr. Ward conscientiously refused to give Mr. Walsh any formal "first refusal" rights or to even discuss such rights with his, Mr. Walsh's, lawyers. In our view, given the arms-length dealings between Mr. Ward and Mr. Walsh, it is difficult to view Mr. Ward's informal promise as intended to create legal relations.

[126] In the absence of the essential elements of a contract, offer and acceptance, consideration and intention to create legal relations, no enforceable contract was formed in 1997. Mr. Ward's "promise or representation" at that time was therefore at most a voluntary gratuitous promise to allow Mr. Walsh to make matching offers when he, Mr. Ward, was ready to sell. Mr. Walsh was consequently a volunteer and the settled law is that specific performance will not be awarded to a volunteer: ***Cannon v Hartley [1949] Ch 213.***

[127] Let it be supposed, contrary to our conclusion, that the "oral agreement" were thought to be a contract giving Mr. Walsh the right to match the offer which Mr. Ward would accept, classified by Mr. Gale QC as a "pre-emption contract" or a "first refusal contract", we are of the view that specific performance would still not lie. As Mr. Haynes QC contends, relying on the judgment of Chadwick LJ in the English Court of Appeal case of ***Bircham & Co (Nominees) Ltd v Worrell Holdings Ltd (2001) 82 P & CR 34***, if such were supposed, it would then be necessary for this Court to consider carefully the precise terms of the pre-emption agreement in this case. This necessity springs from the fact that there may be substantial variations between the terms of different agreements all of which might be generically described as pre-emption contracts or first refusal contracts. These variations have differing legal consequences.

[128] Park J in the English case of ***Specialty Shops v Yorkshire and Metropolitan Estates Ltd [2003] 2 P & CR 31*** explored three variations of pre-emption agreements and their differing legal consequences. The first such agreement is one which provides

that upon the occurrence of the triggering event, the owner is obliged to sell the property to the pre-emption holder, and the owner must leave the offer outstanding and capable of acceptance for a specified period. In such an agreement, during the period when the offer cannot be revoked, the pre-emption holder does have an interest in land and is in a position equivalent to an option holder. The English Court of Appeal leading decision in ***Pritchard v Briggs [1980] Ch 338*** provides an example of such an agreement.

[129] The second such agreement is one which provides that, upon the triggering event, the landowner must offer to sell the land to the pre-emption holder, but is not obliged to leave the offer open for any period. He can revoke it at any time, as long as he does so before the pre-emption holder accepts it. In such a case, the effect of the English Court of Appeal decision in ***Bircham & Co (Nominees) Ltd v Worrell Holdings Ltd (supra)*** is that the pre-emption holder does not, on the triggering event, acquire an equitable interest in land.

[130] The third agreement identified by Park J is one which provides that, upon the triggering event, the landowner is not obliged positively to offer to sell the land to the pre-emption holder, but rather he is obliged to notify the pre-emption holder of the situation, leaving it for the pre-emption holder to make his own offer to purchase the land if he chooses. If the pre-emption holder chooses to make an offer, the land owner, in all but the most unusually worded agreements, would be free to accept or refuse the pre-emption holder's offer. Be that as it may, the land owner would not be entitled to refuse the pre-emption holder's offer and then go ahead with a sale to a third party on the same or worse terms. If the land owner actually did that, the pre-emption holder's remedy would be for damages against the land owner for breach of contractual obligations under the pre-emption agreement. It would not be open to the pre-emption holder to assert any sort of proprietary interest in the land.

[131] Supposing, then, that the "oral agreement" in this case were thought to be a contract, it would clearly fall to be classified under the third variation identified by Park J. This is so because that agreement does not oblige Mr. Ward to sell The Farm to Mr. Walsh as was the case in ***Pritchard v Briggs (supra)***, nor does it oblige Mr. Ward to offer to sell to Mr. Walsh. The obligation on Mr. Ward under the "oral agreement" is merely

to notify Mr. Walsh of his, Mr. Ward's, intention to sell, and thereupon Mr. Walsh becomes entitled to make a matching offer to purchase if he chooses.

[132] For the foregoing reasons, the legal consequence of the terms of the "oral agreement" would be that Mr. Walsh would at no stage acquire any equitable interest in The Farm under that agreement. He could only do so by making a matching offer which Mr. Ward accepted: ***Specialty Shops v Yorkshire and Metropolitan Estates Ltd (supra)***. If the right to match the offer were breached, the appropriate remedy for such a breach would be damages for breach of contract. Because of this, on ordinary equity principles, the contract would therefore not be capable of being specifically enforced.

"The Second Contract"

[133] Another basis on which Mr. Gale QC argues that the order of ***Greenidge J*** may be upheld by this Court is on, what is called in paragraph 9 of the Amended Statement of Claim, "the Second Contract". This paragraph reads as follows:

> "9. On the 15th May 1998 and the 18th day of May 1998 the Plaintiff accepted both verbally and in writing the First Defendant's said offer dated 12th May 1998 (hereinafter called "the Second Contract)."

It will be noted that "the Second Contract", in contrast to the so-called first contract, is pleaded on conventional offer and acceptance analysis. Consequently, our primary task here is to determine whether Mr. Ward's letter of 12 May 1998 constituted an offer and whether, if an offer, it was accepted by Mr. Walsh on 15 May, 1998 and/or on 18 May 1998.

[134] So, first, was Mr. Ward's letter of 12 May an offer?

[135] Mr. Gale QC submits that at para [6] of his judgment, ***Greenidge J*** found as a fact that Mr. Ward's letter of 12 May 1998 was an offer. But this finding does not turn on the credibility of any witness. It turns on an interpretation of a document. As was said by Thesiger LJ in the English Court of Appeal case of ***Turquand and the Capital and Counties Bank v Fearon (1879) 48 LJQB 703 at 704***: "An agreement is not a fact but an inference which the law draws from facts." Thus, this Court feels no compulsion to accept ***Greenidge J's*** characterization of the letter of 12 May 1998 as

an offer. On the contrary, this Court feels every freedom to make, and will make, its own determination of the legal status of that letter.

[136] In our view, the letter of 12 May 1998 does not fit the legal definition of an offer. That letter was in discharge of Mr. Ward's "promise and representations" in August 1997 that he, Mr. Ward, would make sure that when he decided to sell The Farm he would give Mr. Walsh the opportunity to match the offer that he was prepared to accept. In the letter of 12 May 1998, Mr. Ward informed Mr. Walsh that he had received an offer of $1.5 million and that he was giving him, Mr. Walsh, "an opportunity to make this offer". The letter continued that if he, Mr. Walsh, "decide(d) to proceed with an offer", he should bear certain specified conditions in mind.

[137] In classical contract law theory, an offer is defined as a definite promise to be bound which is capable of being converted into an agreement by its acceptance. It is difficult to see how on any reasonable reading, the letter of 12 May 1998 can be viewed as an offer within this definition. The only reasonable interpretation of that letter is that it is an invitation by Mr. Ward to Mr. Walsh to make an offer of not less than $1.5 million.

[138] The legal effect of a communication which invites another to make an offer in general contract law is explicitly addressed in ***Chitty on Contracts Volume 1 28th ed (Chitty) para 2-007***. There the learned authors state as follows:

> "A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms."

This statement of the law makes it very difficult to resist the conclusion that the letter was anything other than an invitation to treat.

[139] Nor is this conclusion diminished in any way by the mere fact that the letter makes express reference to the figure of "B'dos $1,500,000.00" which Mr. Walsh is invited to offer. That such a reference does not necessarily do this is plain from the venerable Privy Council decision in ***Harvey v Facey [1893] AC 552***. The facts of this case are

that the plaintiffs telegraphed the defendants: "Will you sell us Bumper Hall Penn? Telegraph lowest cash price." The defendants telegraphed in response: "Lowest price for Bumper Hall Pen £900." The plaintiffs then telegraphed the defendants: "We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title deeds." There was no further communication. The Privy Council held that there was no agreement. The second telegraph, even though making express reference to a price, was not an offer. It was only an indication of the minimum price that the defendants would accept if the defendants ultimately resolved to sell and therefore only an invitation to treat. The reference in this case to the figure of "B'dos $1,500, 000.00" which Mr. Walsh was invited to offer is to be interpreted similarly, that is, as the minimum price Mr. Ward was willing to accept.

[140] The already cited English House of Lords case of ***Gibson v Manchester City Council (supra)*** provides even more compelling support for treating the letter of 12 May 1998 as an invitation to treat and not an offer. The facts of that case are that Gibson was a tenant of a house owned by the Manchester City Council. In 1970, the Council, then under the control of the Conservative Party, adopted a policy of selling Council houses to its tenants. It circulated printed forms which tenants could send to obtain details. The form read in part:

> "Please inform me of the price of buying my council house. I am interested in obtaining a mortgage from the Corporation to buy the house. Please send me the details."

Gibson sent in the form and received a letter from the City Treasurer stating (in part):

> "The Corporation may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2, 180 …
>
> Maximum mortgage the Corporation may grant: £2, 177 repayable over 20 years…
>
> This letter should not be regarded as a firm offer of a mortgage.

> If you would like to make a formal application to buy your council house, please complete the enclosed application form and return to me as soon as possible."

Gibson did this.

At this point local elections were held and control of the Council changed from the Conservative Party to the Labour Party. The Labour Party immediately reversed the policy of the sale of council houses, and refused to proceed with the sale to Gibson. The question before the House of Lords was whether a contract was created on these facts. It was held that there was no contract. The language of the letter to Mr. Gibson was not sufficiently definite to be an offer capable of acceptance by him.

[141] This Court does not see any consequential difference between the letter to Mr. Gibson in ***Gibson v Manchester City Council (supra)*** and the letter to Mr. Walsh in this case. Thus, on general contract law principles, we hold that the letter to Mr. Walsh was not sufficiently definite to be an offer capable of acceptance by him. We should add that these general contract law principles are wholly applicable to pre-emption contracts. The English case of ***Gordon v Dakin (1963) 186 EG 541*** is authority for this proposition. In that case it was held that where the right of pre-emption, as here, provides for the grantee to offer a specific figure, no contract can arise simply by the grantee putting forward that figure.

[142] But, assuming that the letter was indeed an offer, was it accepted by Mr. Walsh?

[143] The law on what constitutes an acceptance is ancient and well settled. In our view, it is ably captured in a statement of the learned authors of ***Cheshire, Fifoot and Furmston's Law of Contract 15th ed. Cheshire) at page 49*** that:

> "The offeree must unreservedly assent to the exact terms proposed by the offeror. If, while purporting to accept the offer as a whole, he introduces a new term which the offeror has not had the chance of examining, he is in fact merely making a counter-offer."

The statement in ***Chitty para 2-084*** that "an attempt to accept an offer on new terms, not contained in the offer may be a rejection accompanied by a counter-offer", is to the same effect.

[144] Of course, not every communication by an offeree to an offeror after an offer has been made is to be viewed as a counter-offer. The old English case of ***Stevenson v McLean (1880) 5 QBD 346*** shows that some post-offer communication may be construed as nothing more than a request for information. A request for information, unlike a counter-offer, does not have the effect of rejecting the original offer. Thus, an offeree can accept the original offer even after there has been a request for information.

[145] In light of the foregoing, the question in this case now becomes whether Mr. Walsh's request for changes to the terms contained in the letter of 12 May 1998 at the meeting on 15 May 1998 is to be construed as a counter-offer or a request for information. In our view, Mr. Walsh's request for changes was a counter-offer and not a request for information. The letter of 12 May 1998, if an offer, stipulated that Mr. Walsh "will be requested to pay …a 10% deposit of Bds $150, 000.00 within ten days of the date hereof". Mr. Walsh, through his agent Mr. Kirby, requested that this term be changed to "$75, 000 to be paid in 14 days and a further $75, 000 on signing the agreement". This is clearly a counter proposal as to manner of payment, (two payments rather than one), as well as the time of payment, (one payment in 14 days and the other at the time of signing the agreement). The terms in question are abundantly clear and Mr. Walsh's request is for a change of these terms, not for information on them.

[146] This case is like the old English case of ***Hyde v Wrench (1840) 3 Beav 344*** where the plaintiff's offer was to sell for £1000 and the defendant's counter proposal was to buy for £950. The defendant's communication was not a request for any clarification of the original offer price of £1000. It was a request for a change to the original offer. The request was therefore held to be a counter-offer. This case is not like ***Stevenson v McLean (supra)*** where the defendant's offer was to "sell for 40s. net cash, open till Monday" and the plaintiff's reply was "please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give". The

defendant's offer gave no information on the terms of payment and the plaintiff's request was for information on what these terms were.

[147] It is clear, then, that, on the authorities, Mr. Walsh's request at the meeting of 15 May 1998 was a counter-offer. There was therefore no acceptance of any offer that may be argued to reside in the letter of 12 May 1998 at that meeting.

[148] By the same token, there was no acceptance by Mr. Walsh on the 18 May, 1998 of an alleged offer in the letter of May 12, 1998. It will be remembered that on 18 May, 1998, Mr. Walsh had delivered to Mr. Ward the offer letter which he, Mr. Walsh, had endorsed on the 15 May, 1998 at Mr. Kirby's office after the meeting as follows:

> "The above offer is hereby accepted
> 15th May 1998
> Signed
> TIM WALSH."

This was an attempt by Mr. Walsh to accept the alleged offer in the letter of 12 May 1998 after his counter-offer at the meeting of 15 May, 1998.

[149] It is elementary learning that a purported acceptance which is construed as a counter-offer is a rejection of the original offer which cannot be revived by the offeree's change of mind. However, if authority for this proposition is necessary, it may be found in the Trinidad and Tobago Court of Appeal decision in ***Sousa v Marketing Board (1962) 5 WIR 152***. The facts of that case are that the Board, on 25 March wrote to Sousa offering to sell him Gros Michel Bananas "until 31st December, 1955" and setting out the terms and conditions on which it was prepared to do so. On 14 April, Sousa replied: "I am quite agreeable to the conditions put forward by the Board but feel that the time allowed me for the shipment is very short…I am asking the Board to grant me an extension into 1956…" To this the Board replied that it would extend their agreement to sell Gros Michel Bananas to him to the 30 April 1956 but that this agreement was to be construed as a "Gentleman's agreement". Sousa then wrote that he was not satisfied with the new arrangement. The Board notified Sousa of its intention to terminate its agreement with him. Sousa sued the Board for breach of contract and his action was dismissed. It was held, obiter, that assuming that the Board's promise of 25 March constituted an offer effectual in law, the appellant's

letter of 14 April introduced a new term and fell to be construed as a counter offer which had the effect of destroying the original offer which thereafter could not be treated as subsisting and open for acceptance.

[150] Thus, holding as we have that Mr. Walsh's purported acceptance at the meeting of 15 May, 1998 was a counter-offer, the alleged offer could not be revived by Mr. Walsh's subsequent endorsement on the offer letter. Mr. Walsh's counter-offer could result in a contract only if that counter-offer were accepted by Mr. Ward. In our view it was not so accepted. Mr. Ward's reply to Mr. Walsh's counter-offer was to decline to sign the letter containing the counter proposal and to indicate that he, Mr. Ward, needed to consult T. David Gittens, an Attorney-at-Law. We agree with Mr. Haynes QC that this could at most only be considered a conditional assent and not an acceptance.

[151] The law on conditional assent is very well settled. A conditional assent to an offer does not constitute acceptance. This is ably stated by the learned authors of ***Chesire at page 43*** as follows:

> "A man who though content with the general details of a proposed transaction, feels that he requires expert guidance before committing himself to a binding obligation, often makes his acceptance conditional upon the advice of some third party, such as a solicitor. The result is that neither party is subject to an obligation."

Mr. Ward refused to commit himself until he sought the advice of his attorney-at-law, Mr. Gittens. In these circumstances, it is impossible to find acceptance by Mr. Ward of Mr. Walsh's counter-offer at the 15 May 1998 meeting.

[152] For all the reasons stated in this judgment, there was no concluded binding contract between Mr. Walsh and Mr. Ward. Consequently, Mr. Ward's unreserved withdrawal of the letter of 12 May 1998 letter cannot be considered a breach of contract as there can be no breach of a non-existent contract. By the same reasoning, there can be no specific performance of a non-existent contract.

Mr. Bjerkham's Interest in The Farm

[153] Mr. Bjerkham's appeal against the order of ***Greenidge J*** that Mr. Ward convey The Farm to Mr. Walsh for the sum or purchase price of $1,500,000 has been effectively dealt with in our consideration of "the first contract", that is the "oral agreement" of August 1997. Our conclusion there was that "the first contract" was not a contract in law. Assuming, however, that "the first contract" was a contract in law, what would be its effect on Mr. Bjerkham's claim to have an equitable interest in The Farm?

[154] We agree with the submission of Mr. Chandler that the interest claimed by Mr. Walsh under "the first contract" and that claimed by Mr. Bjerkham under the agreement of 24 April 1998 are both, in principle, capable of taking effect as equitable interests over land. However, to do so they must be in writing signed by the person creating or disposing of the same. This is so because of ***section 60 of Cap. 236*** which provides, in so far as is relevant, as follows:

> "(1) No interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent lawfully authorized in writing, by will or by operation of law.
>
> (2)…….
>
> (3) A disposition of an equitable interest, subsisting at the time of disposition, must be in writing signed by the person disposing of the same or by his agent lawfully authorized in writing, or by will.
>
> (4) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents lawfully authorized in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interest at will only.
>
> (5) Nothing in this section affects:
>
> (a) the creation or operation of resulting, implied or constructive trusts;

(b) the right to acquire an interest in land by virtue of taking possession;

(c) the operation of law relating to part performance;

(d) tenancies which can be validly created by parol agreement;

(e) trusts or interests created, declared or disposed of by will;

(f) interests validly created before 1st January 1980."

[155] It is clear from these provisions that "the first contract", being an oral contract, is incapable of creating or disposing of an equitable interest in The Farm unless it falls into one or more of the exceptions listed in ***section 60 (5)***. In our view it does not. We have already given the reasons in discussing the non-applicability of the part performance doctrine to this case why it does not fall under the exception in ***section 60 (5) (c)*** as is suggested by the judgment of ***Greenidge J***.

[156] But Mr. Gale QC in his written and oral submissions to us argues that it falls under the exception in ***section 60 (5) (a).*** His rather elegant argument is that the conceptual convergence between proprietary estoppel and the constructive trust has rendered the two doctrines indistinguishable. He points to English case law which advocates the assimilation of the two doctrines and asks us to conclude that reference to "the operation… of constructive trusts" in ***section 60 (5) (a)*** includes reference to the operation of proprietary estoppel.

[157] In our view, this argument is as difficult to support as it is elegant. This is so for three good reasons. First, even if constructive trusts and proprietary estoppel were assimilated in the case law, we can find no pathway in the rules of statutory interpretation that would lead us to construe "constructive trusts" in ***section 60 (5) (c)*** as encompassing "proprietary estoppel" in the way suggested by Mr. Gale QC. Second, the case law referred to by Mr. Gale QC is mainly concerned with what is called "common intention" constructive trusts, not constructive trusts generally. Third, in the English House of Lords decision in ***Stack v Dowden [2007] AC 432 at para [37]***, Lord Walker expressed his lack of enthusiasm "about the notion that proprietary estoppel and "common interest" constructive trusts can or should be

completely assimilated." He then in the same passage went on to point to the significant differences between the two doctrines. Of this he said there:

> "Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (Crab v Arun District Council [1976] Ch 179, 198) which may sometimes lead to no more than a monetary award. A "common intention" constructive trust", by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

[158] Our conclusion that the "first contract" does not fall under any of the exceptions in ***section 60 (5)*** means that, at its highest, that "contract" is only capable of creating an interest at will or a mere equity in The Farm in accordance with ***section 60 (4)***. *Per contra*, the Bjerkham agreement of 24 April 1998, being in writing signed by the person creating or disposing of the equitable interest creates an equitable interest in The Farm pursuant to ***section 60***. In consequence, the interest created by the Bjerkham agreement cannot be affected by "the first contract". For this reason the Bjerkham agreement must have priority over "the first contract" and cannot be denied specific performance because of "the first contract".

[159] Another reason why the Bjerkham agreement has a stronger claim to an interest in The Farm than an interest claimed under "the first contract" stems from the fact that, according to ***section 60 (4)***, the interest created by that contract is an interest at will only. It is elementary law that an interest at will is similar to an estate at will. Such an estate entitles the grantee or lessee to the possession for indefinite duration; but it can be determined at will or on demand. The grantee or tenant is therefore, as was said in the English case of ***Colchester Borough Council v Smith and Others [1991] Ch 448 at 483***, "at the mercy" of the grantor or landlord who can validly determine the grant or tenancy without any formal notice.

[160] In this Court's view, when Mr. Ward signed the Bjerkham agreement on 24 April 1998 any interest which may have been created by the "first contract" was determined. One consequence of this is that, even if Mr. Ward's letter of May 12,

1998 were considered as evidencing in writing "the first contract", it still was not capable of creating an equitable interest in The Farm. This is because at the date of that letter, Mr. Ward had already agreed in writing to transfer the legal estate in The Farm to Mr. Bjerkham and that agreement had been signed. Mr. Ward therefore had no interest left in The Farm to transfer or grant to Mr. Walsh at the time of the letter.

[161] Another consequence that flows from the assumption that Mr. Ward's letter of 12 May 1998 created an equitable interest in The Farm is that such interest could only arise eighteen days after the equitable interest created by the Bjerkham agreement. In this premise and assuming that the equities were equal, a court of equity would apply the maxim *qui prior est tempore, potior est jure* (he who is first in time has the stronger right). Mr. Bjerkham's interest would clearly have priority over any equitable interest claimed by Mr. Walsh.

In Personam Remedy

[162] There is no doubt that the value of The Farm was increased by the expenditures and labour of Mr. Walsh and his company, Nature's Produce Inc. It is not difficult to conclude that this increase in the value of The Farm has inevitably resulted in Mr. Ward being unjustly enriched since he did not reimburse Mr. Walsh for his labour and expenditures expended in transforming The Farm from a run-down plantation into an attractive property. The doctrine of unjust enrichment lays down that as a general principle where a defendant, like Mr. Ward, is unjustly enriched at the claimant's expense, the defendant must make restitution. In principle, therefore, Mr. Walsh is entitled to a common law remedy for unjust enrichment. Mr. Walsh did not make any claim for such a remedy. This notwithstanding, it seems to us appropriate that Mr. Walsh should be reimbursed for any benefits that his expenditures and labour may have conferred on Mr. Ward.

Disposition

[163] In the result and for the reasons we have given, we would allow the appeals of Mr. Ward and Mr. Bjerkham, disallow Mr. Walsh's cross-appeal, discharge the orders made by ***Greenidge J*** and substitute the following orders:

(i) that Mr. Ward be at liberty to convey The Farm to Mr. Bjerkham in accordance with the memorandum of agreement in respect of the same property dated 24th April 1998 signed by Mr. Ward and Mr. Bjerkham;

(ii) that Mr. Bjerkham's counterclaim against Mr. Ward for declaration and for specific performance be allowed;

(iii) that there be an inquiry into Mr. Walsh's expenditures and labour on The Farm with a view to reimbursing him for any benefits he conferred on Mr. Ward by his expenditures and labour.

[164] The parties may make submissions in writing within 14 days as to how costs in the court below and the costs of the appeal to this Court should be borne.

[165] In concluding, we wish to acknowledge our significant debt in getting through this very difficult case to the industry and admirable skill of counsel. Quite apart from their written and oral submissions to us, counsel have generously shared important treatise and law review articles on the tricky topics of proprietary estoppel and pre-emption contracts with us. We greatly appreciate this and venture to feel that this is good for the bench and bar.

Justice of Appeal

Justice of Appeal

Justice of Appeal