BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1027 of 2004

BETWEEN:

ROGER ARTHUR **Plaintiff**

(Duly constituted Attorney on Record of Margaret Newsam)

AND

BEULAH GREENIDGE-GARNES **First Defendant**

NICHOLAS GREENIDGE **Second Defendant**

Before The Honourable Madam Justice Elneth O. Kentish, Judge of the High Court

2008: December 8, 9, 10

2009: June 3

2014: March 28

Mr. Gregory Nicholls for the Plaintiff

Ms. Veronica McFarlane with Mr. Douglas Trotman for the Defendants

DECISION

The Parties

[1] The Plaintiff is the duly constituted attorney on record for his wife, Margaret Newsam ("Newsam"), the daughter, and executrix of the Will, of the late Berkley Leslie ("the Testator") who died in this Island on 16 March 2002.

[2] The First Defendant, Beulah Greenidge-Garnes ("Garnes"), was the live-in mistress of the Testator for many years. She bore him three children, one of whom is Nicholas Greenidge ("Greenidge"), the Second Defendant and half-brother of Newsam.

The Land

[3] By his Will dated 21 July 1982, the Testator devised all his property both real and personal, whatsoever and wheresoever, to Newsam. That property included a parcel of land situate at Greaves Road, Ashton Hall, St. Peter ("the land") and is the subject matter of this action.

[4] It is sufficient, for the purposes of the decision, to state that Newsam inherited the land firstly through the Will of her grandfather, Joseph Donald Augustus Newsam ("Joseph Newsam") deceased, secondly as a sole beneficiary of the Estate of Edvistine Ursilla Newsam, her mother and daughter of her aforementioned grandfather and thirdly, under the Will of her father.

[5] Her title is traced through the conveyance dated 23 November 1984; the Will of the Testator; Letters Testamentary for the Estate of the Testator; Letters Testamentary to the Estate of Joseph Newsam and a Deed of Assent dated 26 August 2003.

[6] That title has been challenged in these proceedings, to which challenge I shall return.

[7] The land was divided into two portions by a road. On one side of the road is a chattel house which was purchased and placed on the land there by the Testator. For periods of time, Garnes lived in that chattel house during the lifetime of the Testator.

[8] On the other side of the road is the house in which the Testator lived and in which Greenidge resided at the time of the Testator's death. He still resides there.

[9] After the Testator's death, by letter dated 22 October 2003, Newsam requested both Garnes and Greenidge to vacate the land; Garnes was to remove the chattel house and Greenidge to give up occupation of the house in which he resides.

[10] Under the mistaken belief that the Testator died intestate and that Greenidge, as a son, was entitled to a share in the Testator's estate, both Garnes and Greenidge refused to comply with Newsam's request.

The Action

[11] The Plaintiff then commenced this action claiming possession of the portions of the land occupied by Garnes and Greenidge respectively on the basis that they continued in wrongful possession thereof, their licences to occupy having been determined by Newsam. She also claimed mesne profits, damages to be assessed, interest and costs.

[12] In their Amended Defence and Counterclaim, Garnes and Greenidge deny that Newsam is entitled to possession of the portion of the land occupied by either of them.

[13] They challenged the title of Newsam on the basis that the Grant of Probate issued on the Will of Joseph Newsam is null and void, thereby rendering Newsam's title defective.

[14] They denied that either of them occupied the land as a licensee of the Testator. They asserted that each was given promises and assurances by the Testator that they could live on and occupy the respective portions of the land during

their respective lifetimes.

[15] They further asserted that, on the basis of those promises and assurances, the Testator held the portions of the property as a constructive trustee for each of them and Newsam was therefore estopped from recovering possession of the portions of the land occupied by them.

[16] Greenidge also claimed repayment of sums allegedly spent by him on repairs to the house he occupies. They also sought interest on any sums recovered, damages and costs.

[17] In her Reply and Defence to Counterclaim, Newsam pleaded that if indeed Garnes and Newsam were put in to occupation as alleged, that occupation could not entitle them in law and equity to defeat the interest of Newsam or any other beneficiaries under the Will of the Testator. Nor, it is pleaded, could the express intention of the Testator in his Will and the unequivocal actions taken by him during his lifetime be defeated by the alleged promises or assurances.

The Challenge to Newsam's Title

[18] Counsel for the Defendants contended that the probate of the Will of Joseph Newsam is null and void as the Will itself is null and void. The nullity arose, she contended, because one of the persons, Lemuel Chesterfield Rawlins, stated in the Affidavit of Due Execution as a witness to the Will did not in fact appear on the Will as a witness thereto but the signature of another person, Duncan Parris, so appeared. So while the witnesses appearing on the Will are Duncan Parris and Albert Claude Murphy, the latter of whom swore the Affidavit of Due Execution, the name of Duncan Parris does not appear in the Affidavit of Due Execution as a witness to the Will.

[19] In response, Mr. Nicholls, Counsel for the Plaintiff, contended that whilst the grant of probate remains unrevoked it is conclusive even if there is evidence of fraud. Counsel cited ***Williams, Mortimer and Sunnucks: Executors, Administrators and Probate*, 19th Ed. (2007) p. 492 at para 41-04**. He pointed out that there is a specific procedure set out in the **Non-Contentious Probate Rules 1958** which govern the manner in which an application to revoke a will should be made. He argued further that even if the Court were to entertain the application for revocation to the grant of probate, the Defendants have no *locus standi* to make such an application because neither has a beneficial interest under the Will of Joseph Newsam.

[20] He argued further that, in any event, the Defendants need a good title residing in the Testator in order to obtain any relief on their Counterclaim since the Testator's title would also be defective based on the submissions of Counsel for the Defendants.

[21] Having regard to the submissions of both Counsel, I made a ruling on 10 December 2008 that this Court cannot, in these proceedings, allow the defendants to challenge the probate of the Will. No order has been sought or obtained that the probate of the Will of Joseph Newsam is null and void. Accordingly, the probate is valid and the contention of the Defendants that the title of Newsam is defective is rejected.

The Issues

[22] The following are the issues which arise for determination:

(i) Is the Testator a constructive trustee holding the portions of the land occupied by Garnes and Greenidge in trust for them for their use and benefit during their respective lifetimes?

(ii) If the Testator is not a constructive trustee, is Newsam estopped from recovering possession of the land from either or both Garnes and Greenidge?

The Evidence

The Evidence of Newsam

[23] Newsam testified that she knew Garnes as someone who took care of her father and bore him two children Nicole, her sister, and Greenidge, her brother.

[24] She is not the daughter of Garnes. She is the daughter of Ursilla Newsam, deceased and the Testator who were not married to each other. Her father and mother lived together until her mother's death in 1979. Nicole was born before her mother's death and Greenidge after.

[25] She inherited the land from her grandfather and her mother by virtue of a conveyance dated 23 November 1984, admitted into evidence as Exhibit "MN2", the objection of Counsel for the Defendants having been overruled. Under that conveyance, two-thirds of the property was conveyed to the Testator, and one-third to her. Later, she inherited her father's two-thirds interest under his Will, as the sole beneficiary thereunder.

[26] That Will was admitted into evidence as Exhibit "MN3". She obtained Letters Testamentary to the Testator's estate issued on 15 May 2003, admitted into evidence as Exhibit "MN4" and by an Assent dated 26 August 2003, admitted into evidence as Exhibit "MN5" the Testator's two-thirds share in the property was vested in her.

[27] After the Testator's death, she wrote to the Defendants separately asking them to contribute $40.00 per month as rent towards the upkeep of the land. She received in response a letter dated 27 February 2002 from their lawyer, Kenrick C. Wiltshire, stating that the Testator died without leaving a Will and they did not have to pay her anything. That letter was admitted into evidence as Exhibit "MN6".

[28] That letter and the Defendants' refusal to pay the $40.00 prompted her to give them both notice to vacate the land and remove the chattel house by 1 February 2004 (See Exhibit "MN7").

[29] Under cross-examination, Newsam stated that her grandfather died in about 1997 leaving a Will in which her mother was the only beneficiary, though she was not an only child. Letters Testamentary in the Estate of her grandfather were admitted into evidence as Exhibit "MN8".

[30] She was born on 9 December 1960 and was 16 years old when her mother died. She had known Garnes for many years since her early teens and, from what she could remember, the Testator brought Garnes to the house. She knew Greenidge. He was born on 9 December 1981 and lived with his mother. She was not aware that from his birth he was living in the same house with the Testator. In 1981 she had been living in New York for about one year.

[31] She knew of a relationship between the Testator and Garnes and would assume that it was an intimate relationship.

[32] The chattel house was placed there when Garnes moved from My Lord's Hill and placed it on the land that belonged to her father and herself. She did not know who moved the Garnes from My Lord's Hill.

[33] As far as she was aware, after Garnes and her husband moved to Golden Mile, St. Peter, the chattel house was rented. When Garnes moved to Golden Mile, Greenidge did not move with her. He remained in the house with the Testator. Both Nicole and Greenidge moved over to the Testator's house where Nicole lived until she died.

[34] The house in which the Testator lived was built by her grandfather. During the Testator's lifetime she had the bathroom and kitchen remodelled. The floors were initially cement. She had them tiled and undertook some repairs to the roof in about 1990. She was not aware of any repairs done by Greenidge. She was not aware of Greenidge paying land taxes. Prior to her paying the land taxes, the Testator paid them. She could not remember the exact year she started paying them.

[35] When the Testator fell ill in the latter years, she hired someone to look after him and had no idea whether Garnes looked after him.

The Evidence of Garnes

[36] In her evidence-in-chief, Garnes testified that she lived at Greaves Road, Ashton 1Hall, St. Peter. She was not employed but used to be. She knew Newsam from five years old through the Testator. She knew the Testator from the time she was 12 years old.

[37] She was living with her grandmother at Welches, St. Thomas when the Testator first came to her grandmother's house. Describing her relationship with the Testator as "somewhat complicated" she stated that she moved to Ashton Hall when she was 12 years old. She lived there with the Testator, Ursilla Newsam and Joseph Newsam continuously until the age of thirty-two.

[38] When she left the residence of the Testator, on her marriage, she went to live in My Lord's Hill where she stayed for six years. The Testator came to visit her at her home in My Lord's Hill. Then, at the Testator's request, she moved back to Ashton Hall, St. Peter with her husband and children but lived in her own home, a wooden three bedroom house (that is, the chattel house) that the Testator had purchased and placed on the land. Neither Joseph Newsam nor Ursilla Newsam were alive when the chattel house was placed on the land.

[39] She testified that the chattel house was put on the land so that she could continue to take care of the Testator. She washed, cooked and did general household work. On top of that she was his mistress and was intimate with him on a regular basis. She stated that "the services she provided at Ashton Hall were the same as provided at My Lord's Hill."

[40] She occupied the chattel house from in 1990 until the present, but in response to the court, she said that she does not live in the chattel house but is staying with her son Greenidge.

[41] When she stopped living in the chattel house, she rented it out. She did not recall the chattel house being rented when the Testator was alive. She did not know whether the Testator made a will.

[42] She testified that her relationship to the chattel house is that it would be there for her "until her passing".

[43] The chattel house needs repairing. She repaired it over the years. She changed windows and doors. She painted it and nobody objected to her doing these things.

[44] Kenrick Wiltshire, her lawyer, was asked to visit "the premises at Ashton Hall in connection with the making of a Will for the Testator." She was not sure whether a Will was ever made.

[45] Kenrick Wiltshire visited twice. On the first occasion he and the Testator discussed the drafting of the Will in her presence. In the discussion her name was mentioned in that the chattel house would stay on the spot it is presently on "until her passing" and "if she was to move away from the premises she would rent it out and the rent would continue to take care of her."

[46] She gave birth to three children for the Testator. The second child was Nicole. She died in an automobile accident.

On Nicole's death she received insurance money. With that money she bought property at Heywoods, St. Peter (used interchangeably with Golden Mile, St. Peter) and it was the Testator's idea that she purchase the property.

[47] She owned the house at Heywoods, St. Peter at the time of the discussion between Kenrick Wiltshire and the Testator. She was not employed other than taking care of the Testator. She was not present on the second occasion that Kenrick Wiltshire visited.

[48] Under cross-examination Garnes stated that she met the Testator in 1964 when she was 12 years old. That same year she moved from her grandmother's house to that of the Testator.

[49] When she moved there Ursilla Newsam, Joseph Newsam and the Testator were living in that house. Newsam was not living there. She was living in Speightstown with the Testator's niece and his sister.

[50] Ursilla Newsam knew that she had a relationship with the Testator. Nobody said anything to her about that relationship.

[51] Her grandmother was not happy with her going to the Testator's house. She did not want to go. She complained to her mother and also to her aunt, but said her mother had no choice. The Testator paid her aunt, now deceased, "X amount" of money for her. She is saying that the Testator bought her as his mistress. Ursilla Newsam, Joseph Newsam and other family members knew that she had been bought.

[52] Garnes stated that she bore six children over a period of some 19 years: Rubin whose father was Martin Sobers, at age 21; Nicole whose father was the Testator, at age 22; Heydon whose father was Richard Browne, at age 25; Greenidge whose father was the Testator, at age 28; and Charlene and Ashley whose father is her husband Wesley Garnes, at ages 33 and 40 respectively.

[53] In 1980 she moved back to the chattel house from My Lord's Hill with her husband and her children Charlene, Heydon, Greenidge, Nicole and Rubin. Her husband said nothing to her about her continuing relationship with the Testator.

[54] She was unemployed when she moved back to Ashton Hall, St. Peter. The Testator did not pay her for cooking, cleaning and washing. Her husband was supporting her then.

[55] Still under cross-examination she stated that she did not know how old the Testator was when she took Kenrick Wiltshire to him. He was younger than eighty. He was fifty-something. She did not take Kenrick Wiltshire to the Testator when he was ill.

[56] In response to a question from the court, she said that she could not remember the year she took Kenrick Wiltshire to the Testator. She knew that he died at 86 years old and it was still her evidence that she took Kenrick Wiltshire there when the Testator was fifty-something.

[57] In further cross-examination she admitted that, by her evidence, she took Kenrick Wiltshire to see the Testator about thirty years before he died. She was born in 1952.

The Evidence of Greenidge

[58] In his evidence-in-chief, Greenidge testified that he lives at Greaves Road, Ashton Hall, St. Peter and is a farmer. Garnes is his mother and the Testator was his father. He knows Newsam. She is his sister by father only.

[59] He lived in Ashton Hall as far back as he could remember except for a short period when he lived in My Lord's Hill with Garnes. The house in which he currently resides was built by the Testator and he is living in that house as the Testator indicated to him that he was to remain in the house.

[60] In this regard, his testimony continued, the Testator attempted to prepare a Will which would state that intention. He was present with Kenrick Wiltshire, the Testator and Garnes when that information was given. Kenrick Wiltshire was at the home twice but he was not present on both occasions.

[61] He testified that he undertook repairs to the house. Also shown to him, and admitted into evidence as Exhibits "NG2 1-5" were receipts dated between 1 September 2003 and 5 December 2003 for materials purchased from Barbados Lumber Company. Greenidge testified that, to undertake these repairs, he obtained a loan of $11,320.00 from First Caribbean International Bank. A copy of the promissory note executed by him and loan disbursement summary of the loan proceeds dated 27 August 2003 were shown to him and admitted into evidence as Exhibit "NG3".

[62] His evidence continued that he also paid land tax on the property from 1999 to 2002 but could not recall whether receipts were issued in his name or the amounts paid though, he stated, it was not a large amount. In addition, he paid the house insurance in respect of which copies of three receipts were shown to him and admitted into evidence as Exhibit "NG2".

[63] Under cross-examination he said that the Testator was not ailing before he died but, at 86 years old, he was not in good health. A person by the name of Valerie Holder was responsible for looking after the Testator shortly before he died but he did not know who paid for her services. The Testator built the house in Ashton Hall. It is not the same house that he moved into from My Lord's Hill with the rest of his family.

[64] There were only four persons present when the Testator gave instructions to Kenrick Wiltshire. He was in the room because his father asked him to be there. Kenrick Wiltshire did not say that a doctor's certificate would be required for

the making of the Will in view of the Testator's age. Garnes told him that the Testator could not sign the Will because he was too ill. The Testator died shortly after the second visit of Kenrick Wiltshire.

[65] He was aware that the Testator had stocks and shares in Banks Breweries. The Testator offered to give him these stocks and shares and that was mentioned in his presence and that of Kenrick Wiltshire. The Testator offered him those shares only once and he did not refuse the offer at that time. Nothing came of it and it was to be in the draft Will.

[66] He denied that, when the Testator offered the shares, he and Garnes said they did not want shares, they only wanted land. He asserted that it is correct that the Testator told him that he wanted him to live in the house but the Testator died and left nothing for him in the Will.

[67] Still under cross-examination, Greenidge said that he was not aware that Newsam was also an owner of the land. He was aware that she had written a letter to Garnes requesting that they vacate the property but he has not left.

[68] He is aware that the land was not originally owned by the Testator and that it was owned by Newsam's grandfather, Joseph Newsam and that the Testator's claim to the property was through his spouse, Ursilla.

[69] To the best of his knowledge, the Testator owned other property at the date of his death. He was also aware that other people had an interest in the land at the time the Testator told him that he could live in the house.

[70] He admitted that the repairs to the house were done after the notice from Newsam in September 2002. He ignored the request to vacate and went ahead and did the repairs. He did not tell the bank that he had received notice to vacate the premises because he did not think it was relevant in order for him to secure the loan.

[71] Re-examined, Greenidge stated that he became aware to whom the land belonged when he paid the land tax bills. Newsam is his sister so he automatically believed that she had an interest in the land.

Findings of Fact

[72] Much of the background facts in this case, are not in dispute.

[73] Newsam is the daughter of the Testator to whom he devised all of his property in his Will. She is also the half-sister, through the Testator, of Greenidge who, unlike Newsam, spent almost his entire life in the same house with the Testator while Newsam was growing up and residing in the United States of America.

[74] Garnes, in her own words, had a very complicated relationship with the Testator. It began at age 12 when she was taken by him from her grandmother's home to live with him at Ashton Hall which he then shared with his spouse, Ursilla Newsam, Newsam's mother and her grandfather, Joseph Newsam.

[75] There she was to become his 'mistress' in her teenage years and remained so throughout much of her adult life, even when she was bearing children fathered by other men and throughout her marriage to Wesley Garnes.

[76] It is no wonder then, that the somewhat twisted relationships that existed in the Testator's household, seemingly with the knowledge of his spouse Ursilla and her father, would in time spawn this case.

[77] For the most part, I find that the witnesses, with the exception of Garnes, gave their testimony candidly and truthfully. As for Garnes, I accept her evidence that she was the mistress of the Testator and provided unpaid domestic services for him over many years. However, her evidence that she asked Kenrick Wiltshire, to prepare a Will for the Testator when he was "fifty-something" was wholly discredited. It is clear from the evidence of her son, Greenidge, that this occurred when the Testator was very ill and certainly in his eighties.

[78] Much turns on this aspect of her evidence as it undermines her credibility as to what exactly transpired during Kenrick Wiltshire's visit with the Testator.

[79] When asked in cross-examination how old the Testator was when she took Kenrick Wiltshire to him, she responded that she did not know. When pressed further she responded that he was younger than eighty, he was "fifty-something".

[80] In response to the Court on this aspect of her testimony Garnes said that she could not remember the year she took Kenrick Wiltshire to the Testator, but she knew that the Testator died at 86 years old and that it was still her evidence that she took Kenrick Wiltshire there when the Testator was "fifty-something."

[81] The effect of that testimony is that, according to Garnes, the meeting between the Testator and Kenrick Wiltshire, at which she was present, took place some 30 years before the Testator died. That has been shown by her son's evidence to be demonstrably false. The motive for the falsehood on such a simple matter is difficult to fathom and, to my mind, seems intended to distance herself from the attempt to have the Testator make a Will at his advanced age and deteriorating health.

[82] More importantly, it calls into question her evidence that, at that meeting, there was a discussion in which it was stated that the chattel house would stay on the spot it is now presently on "until her passing" and if she "should want to move away from the premises she would rent it out and the rent would continue to take care of her."

[83] That is the testimony on which it is contended that a constructive trust arose in her favour. The Testator, as the alleged constructive trustee whose interest would be adversely affected by Garnes' claim, is now deceased and unable to contradict that testimony. The court cannot ignore that the evidence of Garnes, in relation to that alleged discussion, is entirely self-serving particularly in light of the fact that her evidence has been wholly discredited in relation to when the meeting with Kenrick Wiltshire took place. However, whilst I find as a fact that such a meeting did take place, I do

not accept her testimony as to what transpired at that meeting.

[84] On the pleadings Garnes and Greenidge deny that they were occupying the property as licensees. On the evidence adduced I find, as regards Garnes, that when the Testator bought and placed the chattel house on the portion of the land it now occupies and she moved there with her entire family, that the Testator had impliedly, by his conduct, granted her permission to use and occupy that portion of the land. At that time he was still the owner of a two-thirds share or interest in the undivided land. He, therefore, did not need or require the consent of Newsam as the other part owner to allow the chattel house to be placed there.

[85] No doubt, his motivation was to make Garnes more accessible to the fulfilment of his insatiable desires. Thus, she testified, and I quote:

> "When I left the residence of the [Testator] I went to My Lord's Hill, St. Michael on my marriage. I stayed at My Lord's Hill for six years. After that I moved back to Ashton Hall, St. Peter in my own home...The [Testator] purchased that home. It was a three bedroom house...[the Testator] came to my house in My Lord's Hill to visit me...The house was put on the land at Ashton Hall so that I could continue to take care of the [Testator]. I washed, cooked, did general household work and on top of that I was his mistress."

[86] I, therefore, find and hold that at all material times Garnes was occupying that portion of the land on which the chattel house was placed as a licensee of the Testator.

[87] As to Greenidge, it was Garnes' unchallenged testimony that from the age of 12 to the age of 32 she lived continuously in Ashton Hall. I accept that testimony and find as fact that she lived there during that period. It was also her testimony, elicited under cross-examination, that she had Greenidge at age 28. What follows from this is, and I so find, that Greendige was born whilst Garnes was still living in the Testator's house. I accept his evidence and find further that he lived at Ashton Hall with the Testator for all his life except for the short period he spent at My Lord's Hill and also in the chattel house.

[88] It is the evidence of Newsam, elicited under cross-examination, that when Garnes moved to the house she purchased at Golden Mile, Greenidge did not move there with her. He remained in the house with the Testator. To the extent that Greenidge remained in that house as an adult and until the Testator's death, he was doing so with the Testator's permission.

[89] I, therefore, find and hold that Greenidge was at all material times occupying the house at Ashton Hall as a licensee.

Submissions

[90] Counsel for Garnes and Greenidge, Ms. Veronica McFarlane, argued that a constructive trust existed in favour of the Defendants. She contended that it was the Testator's intention to give Garnes a life interest in that portion of the land on which the chattel house is placed and Greenidge a life interest in the house in which he resides.

[91] In support of her submissions, Counsel cited the text ***Commonwealth Caribbean Trusts Law, 1st Ed. (2002)*** **by Gilbert Kodilinye and Trevor A. Carmichael at p. 25** which reads:

> "In general, a trust may be created in any form, whether by deed, will, simple writing or word of mouth; all that is required is an intention on the part of the settlor to create a trust."

[92] She also cited **ss.60 (1) and (5)(a)** of the **Property Act Cap. 236 of the Laws of Barbados** which provide:

> (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 authorised in writing, by will or by operation of law.
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) Nothing in this section affects
>
> (a) the creation or operation of resulting, implied or constructive trusts;

[93] Counsel, therefore, contended that the absence of writing did not negative the existence of a constructive trust. Such a trust could be created *inter vivos* or by will. She cited as authority ***Dora Walcott v Barclays Bank DCO* (1974) 26 WIR 554 at p. 558**, a decision of the Court of Appeal of Trinidad and Tobago, where it was held that the *inter vivos* declarations of the testator taken in conjunction with certain testamentary declarations showed clearly his intention to constitute himself a trustee in the beneficial ownership of the premises. It seems to me that Counsel was relying on this case simply to establish that a constructive trust could be created by *inter vivos* declarations, as on its facts, it is far removed from the facts in the present case.

[94] Miss McFarlane conceded that there is no writing in this case but argued that the Defendants are relying on the oral representations made to them by the Testator. The creation of the oral trust in favour of Garnes, she argued, is to be found in her evidence that the chattel house would stay on the spot "until her passing" and if she "should want to move away from the premises she would rent it out and the rent would continue to take care of her." It is said that this evidence shows the intention of the Testator that Garnes should have the benefit of keeping the chattel house on the portion of land on which it is situate during her lifetime. This submission represents an interpretation of the expression "until my passing" which, in common parlance, is understood to mean "until my death".

[95] Counsel submitted that the intention of the Testator can be gathered from the actions he took in relation to Garnes. He bought the chattel house for her and her entire family lived in it. Further, when she acquired the home at Heywoods that did not change his intention. If her evidence is to be believed, Counsel argued, the court should accept as a fact that when the Testator attempted to make a Will, he gave instructions that the chattel house should remain on the land.

[96] Garnes' evidence is that she was the Testator's mistress from age 12. She got married and went to My Lord's Hill and the Testator subsequently moved her from My Lord's Hill back to Ashton Hall. She was not shaken in cross-examination in this regard. Thus, Counsel contended that one may find from the foregoing evidence that a constructive trust was created in favour of Garnes since the three certainties were satisfied: (i) certainty of the Testator's intention for her to benefit from the use of the chattel house during her lifetime; (ii) certainty of object, that is, Garnes; and (iii) certainty of property, that is, the portion of the land on which the chattel house is located.

[97] As regards Greenidge, Counsel contended that he adduced similar evidence that the Testator indicated to him that he was to remain in the house and continue to work the land. And from his evidence there can also be garnered a certainty of the Testator's intention, a certainty of the property that is, he was to remain in the house, and certainty of object that is, Greenidge himself.

[98] Thus, Counsel submitted that the three certainties required for the existence of the constructive trust are satisfied in relation to both Garnes and Greenidge.

[99] Counsel advanced the case for Garnes and Greenidge on an alternative basis of proprietary estoppel. She argued that, based on the actions and assurances of the Testator, Newsam is estopped from seeking to recover possession of the land on which the chattel house is erected and the house from either Garnes or Greenidge.

[100] In support of the defence of proprietary estoppel, Counsel argued that Garnes relied on the following actions and assurances of the Testator to her detriment: (i) the removal by the Testator of Garnes from her grandmother's home; (ii) the fact that, some "years down the line", he placed her in the chattel house; and (iii) the Testator's assurance to Garnes that she would have the right to occupy and use the land on which the chattel house stands during her lifetime.

[101] I digress to point out that the removal by the Testator of Garnes from her grandmother's home at the age of 12 is so far removed in time that it cannot be relied on in any manner to support Garnes' claim.

[102] With respect to Greenidge, it is contended that the Testator gave him an oral assurance that he could remain in the house and continue to work the land and that, in reliance on that assurance, he undertook certain repairs to the house to his detriment.

[103] In support Counsel cited ***Greasley and others v Cooke* [1980] WLR 1306 ("*Greasley*")** and ***Re Basham Deceased* [1986] 1 WLR 1498**.

[104] In response, Mr. Gregory Nicholls, Counsel for the Plaintiff, argued that the voluntary removal of Garnes from her residence at My Lord's Hill cannot establish a basis, in law or in equity, that there was sufficient consideration or an alteration of her position to her detriment so as to create any interest in the land. He argued that the Testator had, by his Will, bequeathed his entire legal and beneficial interest in the land to Newsam. That deliberate act by the Testator was sufficient to defeat the alleged claim of Garnes.

[105] Counsel contended that Garnes had a licence to occupy the chattel house and that Greenidge had a licence to occupy the family home. Newsam issued two separate and valid notices to quit against the Defendants and so determined the licences, but they have refused to comply and deliver up possession.

[106] Counsel further argued that the Defendants have not satisfied the test of proprietary estoppel grounded on a constructive trust.

[107] With respect to Garnes, Mr. Nicholls submitted that the evidence disclosed that the chattel house was not placed on the land by her, but by the Testator. Furthermore, on the evidence, Garnes is not occupying the chattel house but is residing in her property in Heywoods, St. Peter. In this regard, Counsel pointed out that in her affidavit filed 2 December 2004, Garnes gave her address as 7th Avenue, East Drive, 120 Heywoods Development, St. Peter whereas, in testimony before the court she stated her address as that of Greenidge. He argued that this inconsistency, taken together with the inconsistency in her testimony as to that date on which the Testator attempted to make a Will, reveals that her evidence ought not to be relied on.

[108] Further, Counsel posited that any claim or interest in the land by Garnes was defeated by the contrary intention of the Testator that she relocate to the home in Heywoods. There is no evidence to support this argument. The evidence before the Court is that it was the Testator's idea that Garnes purchase the property at Heywoods from the insurance money she received on Nicole's death.

[109] Finally, Counsel contended that there was no detriment or prejudice suffered by Garnes since she had not shown that she has acted on the faith of the said assurance or promise made by the Testator.

[110] Mr. Nicholls also contended that no detriment could be proven with respect to Greenidge. As to the claim that he paid household bills, Counsel argued that that was insufficient to establish a constructive trust since a mere indication that a parent required assistance did not give rise to a common intention.

[111] This submission is unfounded. There is no evidence that Greenidge paid the household bills because of an indication that the Testator required assistance.

[112] Counsel pointed out that Greenidge admitted under oath that the house repairs had been conducted after he had been given notice to quit the property and after the death of the Testator. He stated that the mere payment of land tax is insufficient to establish a common intention.

[113] Counsel posited that the law with respect to constructive trusts is unsettled and the outcome is largely dependent on the facts of the individual case. In support of his contention, Counsel cited ***Maudsley and Barn's Trusts and Trustees: Cases and Materials,* 5th Ed. (1996) at pp. 292 to 297** and ***Hanbury and Martin: Modern Equity*, 15th Ed. (1997) at pp. 317 to 323**.

Discussion

[114] Lord Diplock defined the term 'constructive trust' in ***Gissing v Gissing* [1971] A.C. 886 at 905** as follows:

> "A resulting, implied or constructive trust...is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired and he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

[115] In ***Hussey v Palmer* [1972] 1 WLR 1286** Lord Denning described the imposition of a constructive trust more broadly **at p. 1290** as:

> "...a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. "

[116] With respect to promissory estoppel, the definition is found in ***Halsbury's Laws of England 4th Ed. Volume 16* at para 1071**:

> "**Promissory estoppel.** When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

[117] And in relation to proprietary estoppel, the requirements are stated in ***Halsbury's Laws of England 4th Ed. Volume 16* at para 1072**:

> "**Elements in the estoppel.** When A stands by while his right is being infringed by B, it has been said that the following circumstances must be present in order that an estoppel may be raised against A:
>
> (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted;
>
> (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights;

(3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights;

(4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake;

(5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.

...The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it."

[118] In ***Greasley***, the owners of a dwelling house, by inheritance, served notices to quit on the defendant, the sole occupant of the house since 1975. They then brought a claim for possession. The defendant claimed that she had entered the house as a live-in maid to the then owner, a widower with three sons and a daughter, but that from 1946 she had cohabitated with one of his sons, K. The widower died in 1948 leaving the house in equal shares to K and another son O. The Defendant continued to look after the house and family, and in particular cared for the daughter who from 1947 until her death in 1975 was mentally ill.

[119] K died in 1975 and left his share to his surviving brother, H (the first plaintiff). The defendant claimed that she had received no payment from any person for her services after the death of the widower in 1948 and had not asked for payment because she reasonably believed and had been encouraged by members of the family to believe that she could regard the property as her home for the rest of her life, and that the plaintiffs were estopped from evicting her. She counter-claimed for a declaration that she was entitled to occupy the house rent-free for the rest of her life.

[120] The Court of Appeal held that once it was shown that the defendant had relied on the assurances given to her, the burden of proving that she acted to her detriment in staying on to look after the house and family without payment did not rest on her. In the absence of proof to the contrary, the court would infer that her conduct was induced by assurances given to her and declare that in equity she should be allowed to remain in the house for so long as she wished.

[121] In delivering the decision Lord Denning indicated at **p.1311**:

"The burden is not on her [the Defendant], but on then [the plaintiffs] to prove that she did not rely on their assurances. They did not prove it, nor did their representatives. So she is presumed to have relied on them...

The second point is about the need for some expenditure of money — some detriment — before a person can acquire any interest in a house or any right to stay in it as long as he wishes. It so happens that in many of these cases of proprietary estoppel there has been expenditure of money. But that is not a necessary element.

He continued at **p.1312**:

"The equity having thus been raised in her favour, it is for the courts of equity to decide in what way that equity should be satisfied. In this case it should be by allowing her to stay on in the house as long as she wishes."

[122] In ***Greasley*** there was before the court a substantial body of evidence as to the ongoing nature of the assurances given to the plaintiffs by the defendant over an extended period of time and of the detriment to the plaintiffs in relying on those assurances.

[123] In this case, the evidence falls far short of the nature and quality that is required to establish that the alleged assurance was given to Garnes. In fact, the only evidence relied on is to be found in the discussion at the meeting between Kenrick Wiltshire and the Testator at which she was present. And I have earlier rejected that evidence. It follows that, as regards Garnes, the defences of either promissory or proprietary estoppel cannot arise for consideration on the basis of the evidence.

[124] I, therefore, find that no constructive trust arose in favour of Garnes. I find that she was a gratuitous licensee and the virtual Plaintiff is not estopped from recovering possession of the portion of the land on which the chattel house is erected.

[125] I turn now to consider the case of Greenidge which stands on a different evidential base. In his case the alleged assurance is found in his testimony that, and I quote:

> "My father basically indicated to me that I was to remain in the house"

And that:

> "I was present when my father gave instructions to Mr. Wiltshire. I was mentioned in those instructions...in regard to being able to remain in the home and continue to work the land."

[126] The question is, whether it can be said that that language amounts to a clear, unequivocal assurance to Greenidge by the Testator on which Greenidge could rely so as to raise an equity in his favour that he ought to be allowed to remain in the house as long as he wishes.

[127] In construing that language I bear in mind that this is a father speaking to his son who was born in that house and has lived there with his father almost his entire life. One ought reasonably, therefore, to expect a certain level of informality in such a familial situation.

[128] Taken in such a context I am prepared to, and do, construe the testimony of Greenidge as constituting a sufficiently clear and unequivocal assurance to him that he could remain in the house during his lifetime.

[129] The question is whether on the evidence it has been shown that Greenidge relied on the assurance given by the Testator. In this regard, his testimony is that he is still living in the house at Ashton Hall as his father indicated to him that he was to remain in the house.

[130] According to the evidence of Newsam, she got an "interesting response" from the lawyer for Garnes and Greenidge in reply to her letter to each of them asking that they contribute $40.00 as rent towards the upkeep of the property, saying that his father died without leaving a will and they did not have to pay anything. The body of that letter is reproduced below in full and reads:

> 27th February, 2002.
>
> Ms. Margaret Newsam
>
> 30-405 Newport Parkway
>
> Jersey City, NJ 07310
>
> USA.
>
> Dear Madam
>
> Re: Beulah Greenidge-Garnes.
>
> I act for Ms. Beulah Greenidge Garnes, who has handed me your letter dated September 11, 2002, for a response thereto,

My instructions are that the subject-parcel of land at Ashton Hall, St. Peter, is part of the estate of Berkeley Leslie, deceased, who died recently. You and a son, Nicholas, are his surviving children. Nicholas resided with, and still resides, at the home of the deceased at Ashton Hall.

I am instructed that the deceased made certain promises and representations to Mrs. Greenidge-Garnes regarding the said land, upon which she acted. These promises and representations bind the deceased's estate.

I am further instructed that the deceased died intestate, and if this is so, then Nicholas, like you, would be entitled to a share of the deceased's estate. Further, the deceased made certain promises and representations to Nicholas regarding the said property.

Kindly therefore inform me of the basis of your claim for rent from my clients, both of whom would be grateful to amicably resolve this matter, Also, I would be grateful to know the status of the estate as steps need to be taken to administer and distribute it,

Yours faithfully,

_____

Kenrick C. Wiltshire

KCW/th

[131] However, an examination of that letter shows that, apart from stating that the attorney-at-law was instructed that the Testator died intestate, it also stated his instructions that the Testator made certain promises and representations to Greenidge regarding the property. Further, in response to Counsel for Newsam in cross-examination, Greenidge stated, and I quote:

"I did ignore the request to vacate but I went ahead and did the repairs."

[132] To my mind, there is sufficient evidence to establish, on a balance of probability not only that the Testator made the assurance but also to establish that Greenidge relied on that assurance having regard to the fact that: (1) he lived in that house with the Testator from the time of his birth and for the greater part of his life; (2) he refused to vacate the house and also refused to pay the $40.00 rent requested by Newsam and; (3) undertook repairs to the house despite the notice to quit. Why else, I ask myself, would he incur a loan of $11,320.00 plus interest and costs to carry out repairs to the house after he had been given notice to vacate and run the risk of losing that money? The answer, I think, must be that he was relying on the Testator's assurance.

[133] The case of ***Greasley*** is authority for the proposition that once it is shown that the Defendant has relied on an assurance, the burden of proving that he acted to his detriment did not rest on him. Moreover, in the absence of proof by the plaintiff to the contrary, the court would infer that his conduct was induced by the assurance given and declare in equity that he should be allowed to remain for so long as he wished.

[134] In the course of his decision in ***Greasley*** Lord Denning MR commenting on the need for some expenditure of some money (some detriment) in cases of proprietary estoppel opined at **p. 1311**:

"But I do not think that that is necessary. It is sufficient if the party, to whom the assurance is given, acts on

the faith of it — in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it...”

[135] It is said by Counsel for Newsam that there is insufficient evidence of detriment by Greenidge. Applying the dicta of Lord Denning MR cited above, detriment is not a necessary element in cases of proprietary estoppel.

[136] Echoing the words of Lord Denning MR I find that in this case equity should be satisfied by allowing Greenidge to continue to reside in the house for as long as he desires.

[137] I therefore grant a declaration on the counterclaim of Greenidge that he is entitled to occupy the house at Greaves Road, Ashton Hall, St. Peter rent-free during his lifetime.

Disposal

[138] Accordingly, I make the following orders and/or declarations:

1. The First Defendant shall within 14 days of the date of this order remove the chattel house from the portion of the land on which it stands and deliver up vacant possession of the said portion of the land at Greaves Road, Ashton Hall, St. Peter;

2. The First Defendant shall pay to the Plaintiff the costs of the action to be agreed or taxed;

3. It is declared that the Second Defendant is entitled to occupy rent-free the house at Greaves Road, Ashton Hall, St. Peter and to farm the land on which the said house stands during his lifetime;

4. The Plaintiff is estopped from recovering possession of the aforementioned house or lands from the Second Defendant during his lifetime;

5. The Plaintiff shall pay to the Second Defendant the costs of his defence and counterclaim, such costs to be agreed or taxed.

Elneth O. Kentish

Judge of the High Court