BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1430 of 2005

BETWEEN:

NEALE EMILE WATERMAN **PLAINTIFF**

AND

JUDY ELENE BELGRAVE **DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2007 September 18th, 20th
2008 February 4th, 6th, 7th
2011 January 20th, 27th, 30th, 31st
2012 January 31st, February 2nd, 7th, 9th
2016 February 10th

Appearances:

Mr. Ernest Jackman Attorney-at-Law for the Plaintiff
Mrs. Beverley Franklin Brewer and Ms. Mya Daniel Attorneys-at-Law for the Defendant

DECISION

Introduction

[1] Family disputes over property are invariably bitter and often doggedly contentious. This matter does not disappoint in that regard. The importance of and need for mediation, especially court ordered mandatory mediation, is especially evident in cases of this nature.

History

[2] This matter has a long and difficult history resistant to attempts at mediation; an extremely bitter tale of sibling rivalry.

[3] It commenced as an Urgent Application by way of Originating Summons under the 'old' Rules of the Supreme Court filed July 18th 2005 by the Plaintiff Neale Emille Waterman (Executor of the Estate of Stella Isada Belgrave, Deceased), principally to "... recover possession of "Gertdale", Lot 1 Stanmore Crescent, Black Rock in the parish of Saint Michael and Lot 2 Near Retreat Terrace, Black Rock also in the parish of Saint Michael in this Island, on the ground that he is entitled to possession and that the persons in occupation are in occupation without licence or consent."

[4] There were two Respondents to the first action, the Defendant in this action Judy Belgrave and the third sibling, Julian Anthony Waterman.

[5] This followed a Notice to Quit served on the First Defendant in April 2004. The inference to be drawn here is that the Plaintiff deemed the Defendant (and his other sibling) to be a mere licensee and proceeded to terminate/revoke that licence.

[6] The two (2) parties to this action are two of the three children and beneficiaries of the Estate of Stella Isada Belgrave, the Plaintiff being the duly qualified executor of her Last Will and Testament dated June 2nd 1993.

[7] Stella Isada Belgrave died on the 2nd December 2001 in this Island. Letters Testamentary were issued to the Plaintiff in November 2003.

[8] The Defendant was and remains in possession of the top floor of the premises situate at Lot 2 Near Retreat Terrace, Black Rock, St. Michael in this Island, where she has resided with her two sons since 1987.

[9] The Second Defendant to the Originating Summons was originally in possession of the bottom floor, but gave up possession after service of this action.

[10] There is no evidence that either party was in possession of "Gertdale".

[11] By Order dated 2006-10-17 this Court ordered this matter continued as if begun by Writ of Summons and thereafter the matter was case-managed to trial under the 'old' Rules of the Supreme Court.

[12] The course of this action has been plagued by changes in attorneys by both parties, most significant of which being the Plaintiff's which was mid-trial. There were also challenges with the incapacity and unavailability of witnesses, as well as the complication caused in this jurisdiction by transfers from the Civil jurisdiction of the Court to the Criminal.

The Pleadings

[13] The Writ of Summons was filed in November 2006 against only one party, Judy Elene Belgrave; the Second Defendant in the first action having vacated that part of the property in his possession.

[14] The Plaintiff filed pursuant to his lawful authority, seeking possession and mesne profits with respect to the property situate at Lot 2 Retreat Terrace, Black Rock, Saint Michael in this Island. He pleaded that the property fell within the remainder or residue clause of the Will which provided as follows:

> "I DIRECT THAT ALL THE REST RESIDUE AND REMAINDER of my estate and property of whatever kind and wheresoever situate whether real or personal in remainder or expectancy be sold and the net proceeds of such sale be divided in equal shares among my three children namely … absolutely."

[15] There was no specific devise of real property in the Will.

[16] The Defendant filed an Amended Defence and Counter-claim in February 2007. In her Counter-claim she sought a Declaration, inter alia, that she has an interest in the property proportionate to her contribution to the acquisition

and upkeep of the property; and a further Declaration that the "Plaintiff holds the property on trust for the Defendant to the extent of the Defendant's contribution to the acquisition and upkeep of the property and that she be paid out for the value of such interest therein." At the end of this proceeding the Defendant, however, expressed a strong determination to remain in her home of over twenty-five (25) years.

[17] This claim is based on the substantive and substantial allegation of fact by the Defendant, namely, that in reliance on the promise of her mother, reduced to writing by letter dated January 6 1986, she *"constructed a two storey concrete bungalow on the said property with the assistance of a friend who owned his own construction business, and on completion of the construction, sometime in 1987, moved into the top storey of the house."*

[18] She alleged further and significantly at paragraph 11 of the said Defence and Counterclaim that *"the full cost of constructing the house was borne by the Defendant with assistance from her said friend who graciously provided the equipment, materials and some funds to construct the house. The deceased, she alleges, never made any financial contribution to the construction of the property."*

[19] At paragraph 17 of the Defence and Counter-Claim the Defendant pleads that she "has been solely responsible for the maintenance and upkeep of the

top storey", where she had (in 2007) been residing for over 20 years rent free.

[20] These allegations of fact are all strongly disputed by the Plaintiff and the authenticity of the alleged letter was initially challenged, but not pursued during trial.

The Issue

[21] The issue raised by these pleadings directs this Court to a determination of whether the Defendant was a mere licensee or whether she is the beneficiary of an equitable interest in the subject property, which is held in trust by the Estate of Stella Belgrave.

The Evidence

The Plaintiff's Case

[22] The Plaintiff gave evidence in support of his claim, and after expressing an intention to call three (3) witnesses, in fact called only one (1). This, in the opinion of this Court, proved to be a significant error.

[23] His evidence was that Lot 2 Stanmore Crescent was acquired by Deed of Gift by the deceased from her sister Ilene Day in 1988. In 1980 there was a wooden house on this parcel of land which was occupied by his brother Anthony Julian Waterman, but sometime between 1980 and 1987 the present

house was constructed. He was obviously vague as to the date and year of construction commencement.

[24] It was his evidence that the construction of that structure was financed by his mother who was at that time living and working in the United States of America and sending money home. She also inherited her brother's home in Chicago, which she sold around 1985/1986. The obvious inference to be drawn is: that she would therefore have been financially capable of building a home in Barbados during this period because she was financially solvent.

[25] It is to his knowledge that his mother transferred funds from the sale of her brother's home to Barbados to his aunt Ilene Day; and it is his belief that these funds were used to fund the construction at Lot 2. The inference this Court is also being asked to draw is that these funds did not finance her day to day living for the next fourteen (14) years as she had a pension for this purpose. But later in his cross-examination he did state as follows:

> "My mother did not work in Barbados after 1986. She died about 14 years later. She had another source of income. She received a pension from England. She collected rents from 3 apartments. She also paid water rates, electricity and land taxes for both properties, that is, lots 1 and 2."

[26] No evidence was led as to the quantum of this pension from England and the only evidence as to the nature of her employment was that she 'looked after' people in the United States. The Defendant gave evidence that she has had to support her mother while she was between jobs in the United States. (See

Exhibit "J.B5", a letter from Stella Belgrave to Judy Belgrave dated December 8th 1985).

[27] It can be concluded that these funds were non-existent at her death if one draws certain inferences from the evidence of the Plaintiff, but there is a lack of information as to how they were spent. It however can be reasonably inferred that her pension was supplemented over the fourteen (14) years of her living in Barbados by the use of her cash fund. Or alternatively, (as the Plaintiff would have us believe) that this cash fund was used in the construction of Lot 2.

[28] His sister's role was to oversee the construction as his mother was overseas when the construction commenced. She also had access to bank accounts that his mother kept both in Barbados and the United States. He has knowledge of his mother's financial affairs showing that she withdrew money from various accounts in the United States and brought that money to Barbados. One document discovered by him after his mother passed away, showed an amount of $20,520.15 (presumably US) drawn on an account at Exchange National Bank of Chicago, Illinois. While this document was produced to the Court, there was no corresponding entry provided to this Court showing a deposit in Barbados.

[29] As Executor, he has access to documents showing that on December 12th 1986, his mother held $29,560.56 on an account at the Bank of Nova Scotia Black Rock Branch. The implication appears to be that those funds were no longer on the account when he became Executor, and he is clearly inviting this Court to find that those funds were used in the construction of the subject property, but he obviously has no firsthand knowledge of how these funds were used. However, the savings pass book for the deceased's account at the Bank of Nova Scotia admitted as an exhibit, shows that the deceased spent in excess of $30,000 during the course of 1987.

[30] What came across clearly from this evidence is that the Plaintiff put together a picture from the documents found by him after his mother's death, and from the investigations and due diligence conducted by him as her Executor.

[31] When his mother returned to Barbados in 1986 the construction was not complete and it was his evidence that, thereafter, his mother took charge of the construction. At that time, the walls were up and there was a roof on it. Upstairs the interior finishes had to be completed. The apartment downstairs which his mother later occupied was a mere shell without doors and windows. She employed persons one such being a Michael Alleyne. However, Michael Alleyne gave no evidence to this Court. The Plaintiff was unable to find any receipts evidencing the payments she made and the

materials she bought to complete construction of the house. He was adamant that no funds other than those of his mother, were used in the construction of this property. He volunteered no information as to the source of his strongly held beliefs in this regard.

[32] By 1987 his mother, the Defendant and her two sons occupied the upstairs apartment (disputed by the Defendant who alleges that the deceased never occupied the upstairs apartment) and sometime in 1987/1988 his mother moved into the downstairs apartment for a brief time. This apartment was registered for tenancies. Certificate of Registration #05879 in the name of Stella Belgrave of Retreat was produced to the Court. It was his evidence that his mother collected rent for this apartment and when she was out of the country he collected the rent on her behalf.

[33] The property was insured by his mother and after her death he continued the insurance payments on behalf of her Estate.

[34] His mother paid all the utility bills up to the time she moved next door to Gertdale. After her passing, he paid the utility bills for the downstairs apartment up to the time the last tenants left.

[35] He had a very good relationship with his mother and at no time did she ever indicate to him during her lifetime that the house was owned by anyone other than herself.

[36] He alleged that his mother moved next door to Gertdale, because of disputes with the Defendant; there was (as told by him) a breakdown in family relations. He produced to the Court a letter from attorney-at-law Mr. Anthony Wiltshire, dated September 1989, asking the Defendant's son Jason Belgrave to vacate Lot 2. There is no evidence that she ever asked the Defendant to vacate the property and the Plaintiff can speak to no personal knowledge of such action. The Defendant however maintains that the deceased moved to Gertdale because her sister died and left her the property. Since becoming Executor, he has taken steps to recover possession of the property himself and served her with a letter saying that she ought to pay rent, because he considers the Defendant's claim unjustified.

[37] In cross-examination, counsel for the Defendant sought to establish that the deceased's earnings could not have funded the construction at Lot 2; but the real concern for this Court was whether she used funds from the sale of her brother's house and the parcel of land that she sold in Black Rock to fund some or all of the construction. It was also made clear that this witness's knowledge of what occurred on Lot 2 during construction was not first hand. While it was his evidence that he corresponded with his mother by letter during this period, on his admission she gave him no details about what was going on at Lot 2. His evidence was that he visited his aunt about twice per

month and his knowledge came from what his mother told his aunt in her letters (and what he personally observed from his aunt's property when he visited her); his aunt then communicated it to him. No such documents were however tendered in evidence, as was pointed out by counsel for the Defendant in her cross-examination.

[38] The Court was left to conclude that the Plaintiff was not his mother's confidante and right hand, as he sought to convey. His source of information as to what was going on at Lot 2 was based on his personal observations when he visited his aunt and what he gleaned from her. In spite of the fact that he was living in Barbados at that time, he was obviously not being asked by his mother to conduct her business while she was overseas. The basis of his allegation that his sister had access to his mother's accounts (both in Barbados and the US) is because he has seen bank books for accounts in the United States with his mother and sister's name on them. He had never seen any such bank books for accounts in Barbados or cheques written to or by Judy Belgrave so it is unclear as to the source of his information that his sister had access to such accounts. No documentary evidence of these allegations were tendered by the Plaintiff. He also insisted that his aunt told him that his mother was sending money through her to the Defendant, to be

used in the construction of the house. It is unclear why she would need to do so if her daughter had access to all her accounts.

[39] This Court concluded that there was some truth in the allegation put to the Plaintiff by counsel for the Defendant that the reason he had no firsthand knowledge of what took place between 1980 and 1987 is because his relationship with his mother was not as close as he sought to convey; and namely, that he was in fact estranged from her and only reconciled with her in the 1990s. The defence case, as put to him and denied, is that construction started in 1986 and that the Defendant oversaw the construction of the house and was at all times in full control of the construction process; in other words, that the deceased had not supervised its construction on her return to the Island. It was put to him that she worked on the garden on her return in 1986 and that was the major extent of her involvement. Ironically, the Plaintiff did corroborate this when he stated in cross-examination when asked what Michael Alleyne did on the property:

> "He did labour work. Landscaping and gardening. He assisted with the bridge over the canal. He was a labourer. I saw him forking up beds, cutting the lawn, trimming the hedges. My mother paid Michael. I do not know what his fees were."

[40] He went on further to state, and was not contradicted, that his mother built the bridge on the property around the canal, paved the yard, placed pedestals

around the canal etc. This work continued after his mother moved over to 'Gertdale'.

[41] He also denied when it was put to him that his mother at any time promised his sister, the Defendant, that she would transfer the land to her. Again the witness did not enlighten the Court as to the basis in fact for his strongly held beliefs in this regard.

[42] Neale Waterman was recalled after objecting to the admission of the letter of 1986 on the basis that he had never seen the original before the trial. He however admitted to seeing a copy sometime after his mother's death. This Court observed that the existence of the said document was pleaded by the Defendant. His evidence was, that his mother never discussed the contents of this letter with him. His evidence never was that it was not his mother's handwriting affixed to the type written letter produced.

[43] The second witness for the defence was an electrician by the name of Llewellyn Ifill, who spoke to work carried out on the property in 1998, this work being contracted by the deceased and paid for in her name. He was a fellow church member of the deceased meeting her for the first time in 1998. They enjoyed a cordial relationship, and he returned subsequently, at her request, to carry out further works to the building. His evidence was of limited assistance in the determination of this matter, except that it

contradicted the evidence of the Plaintiff to the extent that he insisted that there was only one electrical meter as opposed to the Plaintiff's evidence that there were two. It therefore did not speak to the arrangements for construction; and the witness did create the impression that he was not very familiar with the property.

The Case for the Defendant

[44] The Defendant gave her evidence in support of her position which is, that she built the house with the permission and approval of her mother, as evidenced by the letter of January 6th 1986. When asked if she would have built the house without this permission, this was her response:

> " I would not have done so because I have two brothers and I was concerned that if I didn't have permission from her or some proof in writing that at some later stage they would claim that they were entitled to share in the house because it was on my mother's land…"

[45] She first spoke to her mother firstly about renovating the wooden house on the spot, but after receiving advice that this would be unsafe, she first spoke to her mother in 1985 about building a completely new house, and her mother agreed. She proceeded to employ artisans for both the demolition and the construction. She employed a Wilfred McClean and his crew as her contractor and he proceeded to build a three bedroom two bathroom with kitchen living and dining area on the top floor and a two bedroom two bathroom with living dining and kitchen on the bottom. A construction date

of 1985 is corroborated by Exhibit JB5 dated December 8th 1985, a letter from her mother to her.

[46] It was her evidence that her mother never took any further steps to transfer the land. She told her that she would consult her lawyer who at the time was out of the country, but to the best of her knowledge her mother never did so.

[47] She received financial assistance and assistance with the supply of materials from a dear and close friend. This friend supplied the jackhammer for digging the foundation, provided blocks and cement, and sent his plumber and electrician to carry out the work. This friend provided her with financial assistance in the form of cash, payment of the workmen Henderson Durant and a Mr. Craig (both employees of Rayside Construction Limited), paid her sons school fees at Presentation College and paid her rent.

[48] When she moved into the property in February/March 1987, the house was largely completed except for the painting of the outer walls. Several months later, when her container had arrived, her mother moved into the bottom apartment (contrary to the evidence of the Plaintiff she never lived in the top apartment).

[49] This extract encapsulates the case for the Defendant:

> "… My mother never assisted me financially with the construction of the house. She never assisted me in any way with the construction of the house. I would say it cost me in the region of $200 to 250,000 to build the house. I bought some of the building materials. I purchased from Oran, windows and doors; from Barbados

> Lumber Co all the lumber nails etc.; from Blades and Williams the roofing; from Branckers the bathroom fittings taps tiles etc. I bought things from Plumbers Mart, from BRC (steel) etc. I paid for these items."

[50] JB7, admitted into evidence without objection later in her testimony, placed a value of $335,000.00 on the property.

[51] She produced to the Court a bundle of documents, admitted without objection, as JB2. These consisted of 'some' of the receipts she received from various suppliers for the construction of the house at Black Rock. It was later put to her in cross-examination that the only reason these receipts were in her name was because she supervised the construction.

[52] The plastering of the outer walls of the house was financed by her; she also paid for the painting. She never received any money from her mother towards the construction of the house and she never had access to any of her mother's accounts in Barbados or in the United States; nor did her aunt ever transfer any funds to her on her mother's behalf. Her mother received US$39,000 from the sale of her brother's house, but none of this money was used for the construction of the house. She has no knowledge of what her mother did with this money. From this sum, her mother gave her US $2000 and told her it was her commission. She acted as her mother's agent in the sale of a parcel of land before her mother returned to live in Barbados. When her mother returned, she carried her to the Bank of Nova Scotia and the sale

money in the sum of $18,000 was given to her. The house was already constructed when this was done. From this money, her mother gave her BDS. $200.00.

[53] Since 1987 she has spent further money on the house; she has since purchased roofing materials from BRC and changed the roof (this has been her major expense to date). She has continued to maintain the property by looking after the grounds surrounding the house, the painting of interior walls, plumbing and electrical repairs. Her mother always paid the water bill and land taxes when she was alive; the electricity bill came in her name.

[54] Her mother told her that she had made a will, but did not inform her of its contents. She, however, told her that she should not worry because she would get more than the house in the will.

[55] At the time of her mother's death, the ground floor was tenanted. She did not have a key to this apartment and never received any rents from it. She was employed at the time of the construction of the house doing sewing, catering and upholstery with a monthly income of about $2000 to $2400 per month. Further to her source of income, she stated the following:

> "I worked as seamstress, upholsterer and caterer. I did these all at same time. I worked doing catering delivering lunches to business places Tuesday to Friday. That I did four days. I did not do it on Mondays. I did upholstery and sewing on Saturdays, Sundays and Mondays… I had expenses. I had two sons to support. I had school fees to pay…"

[56] In cross-examination, the defendant in admitting the existence of tenants in the bottom part of the property (because of her mother's contribution to the construction) stated as follows:

> "…I accept there were tenants in downstairs part of property. My mother secured the tenants for the premises… I have no knowledge of my mother registering the house with Inland Revenue for collection of rents… My mother insured the property. I did not insure it."

[57] As to why she allowed the tenants on the ground floor if the property was hers, she stated as follows:

> "After my aunt's death my mother moved into her house known as Gertdale. At the time I was residing in New York and I had no difficulty with mother renting the space that she had occupied downstairs. She was a pensioner and I saw it as extra income for her."

[58] Plumber Henderson Durant gave evidence on behalf of the Defendant. In the 1980s he was employed as a plumber for Rayside Concrete Works. As part of his job he worked on private residences as well. He can recall working on the residence of Judy Belgrave at Stanmore Crescent, Black Rock. He did all the plumbing at that residence on behalf of Mr. K. C. Rayside (hereinafter Mr. Rayside) who paid him for those services. He received payment from no-one other than Mr. Rayside. Judy Belgrave gave him his instructions for the work to be done on the house. Mr. Rayside provided the plumbing materials. He can recall meeting Stella Belgrave who came in from the United States when he was 'finishing off'. She never paid him for any of the services he performed. Stella Belgrave never gave him any instructions, and

it was his impression that the property was owned by Judy Belgrave. He was paid about $2500 by Mr. Rayside for the plumbing on that property.

[59] He was not broken in cross-examination, nor was an attempt made to do so.

[60] The next witness was Mathew Ian Belgrave, the son of the Defendant. He recalls when his mother built the house at Stanmore Crescent; he assisted as a labourer by mixing cement and helping the mason. He can recall seeing Rayside vehicles, (and others), delivering materials; but the main deliveries were by the Rayside vehicles. His grandmother never lived on the top floor with them after they moved in, but he does recall her indicating at some point that she wanted to move into the top floor. He has no recollection of having ever seen the letter addressed to him asking him to leave the top floor. To his knowledge Keith Rayside paid his school fees at Presentation College and Metropolitan. He never saw his uncle Neale Waterman on the site or in the vicinity when the house was under construction. He was adamant that his mother built the house and that she is its lawful owner.

[61] Contractor Wilfred Coleridge McClean gave evidence of his occupation and business providing carpentry, masonry, tiling, plumbing and electrical services. He told this Court that he first met the Defendant in 1984 when a friend told him that he knew a lady who needed a house built in Black Rock. The friend took him to see this lady, and she showed him the spot on which

she wanted the house built. If he recalls correctly, she told him that she wanted 'her' home built. They never discussed the ownership of the land or where the money came from or what her arrangement with Rayside Construction was. There was a chattel house on the spot, and she told him to demolish the chattel house and build a wall bungalow on the spot. He started construction of the house in February 1986. It was him and three other people who helped; there was her son, the same friend Mr. Durant and two other fellows whose names he cannot now remember. All his instructions came from Judy Belgrave, as did his weekly payments. The construction took approximately six (6) months. All building materials and everything used on the house came from Rayside Construction. The process was that when he had to order materials, he would consult Ms. Belgrave and to his knowledge she would contact Mr. Rayside, and thereafter materials would arrive by trucks marked Rayside Construction.

[62] He told the Court that he knew Stella Belgrave. He met her after the house was built, and Judy Belgrave introduced her as her mother. He never received any instructions or payment from Stella Belgrave. He did not know the Plaintiff. No other person visited or supervised the construction of the house.

[63] His evidence ended the case for the Defence.

The Issue of the Admissibility of the Affidavit Evidence of Mr. K. C. Rayside

[64] An issue arose before this Court as to whether it should accept the Affidavit of K. C. Rayside (Mr. Rayside) who in February 2012 was 86 years of age, and in poor physical and mental health at that time (see the Report of Rev. Dr. Marcus Lashley dated February 12th 2012) and therefore unfit to attend court.

[65] His Affidavit however, was dated September 18th 2007, sworn before Justice of the Peace Alphea Wiggins-Rock. It states as follows:

> "I KEITH CLEMENT RAYSIDE, self employed Businessman, Consultant and former Managing Director of Rayside Construction Limited of Green Hill in the parish of Saint Michael in the Island of Barbados MAKE OATH AND SAY AS FOLLOWS-:
>
> 1. I have known the Waterman family for over sixty (60) years.
> 2. The late Julian Emille Waterman was married to Stella Isada Belgrave, deceased and was the father of Neale Emille Waterman, Judy Elene Belgrave and Julian Anthony Waterman.
> 3. During the late forty's and early fifties the said Julian Emille Waterman who was a mechanical engineer at the time and myself developed a good business relationship and he often repaired my two lorries free of charge.
> 4. I felt a great sense of obligation and gratitude to him for his assistance during those early years when I was in the process of building my business.

5. Sometime in 1976 I discovered that his daughter Judy Elene Belgrave of Stanmore, Black Rock in the parish of Saint Michael was experiencing severe financial hardship and I therefore decided to support Judy and her two sons financially and looked after their welfare over the ensuing years.
6. In 1985 Judy informed me that she had received permission from her mother the said Stella Isada Belgrave to build a house at Stanmore, Black Rock in the parish of Saint Michael in this Island.
7. As I was in the construction business and Managing Director of my own firm Rayside Construction I agreed to assist Judy with the construction of the house as a gift to her.
8. To this end I provided the equipment and all of the building materials including concrete blocks, cement, sand and marl.
9. I also provided for the digging of the foundation and the filling-in of a part of the land which had been eroded by a water course.
10. I provided the plumber and electrician to carry out all of the plumbing and electrical work on the house and took care of their payments.
11. I further assisted Judy financially during the building of the house.
12. I provided the resources to construct the house from inception right through to its completion in 1987 at an approximate cost of $60,000.00.
13. It would cost approximately $400,000.00 to construct the same house at today's costs.
14. To the best of my knowledge no other persons contributed to the construction of the house.

I therefore make this Affidavit for the purposes of establishing that I provided all of the equipment, building materials and financial resources for the construction of the dwelling house now occupied by JUDY ELENE BELGRAVE at Stanmore Black Rock in the parish of Saint Michael as a gift and to the best of my knowledge she is the owner of this house.

SWORN TO by the deponent the)
said **KEITH CLEMENT RAYSIDE**) .....
at)
on the day of 2007)

BEFORE ME

Alphea Wiggins-Rock
Justice of the Peace"

[66] This Court recognizes that under Order 38, Rule 2(1) of the "old" Rules of the Supreme Court, it has a discretion to order that the witness's affidavit be read at the trial, if it is reasonable to do so in the circumstances of the case: see **Ebrahem v Ebrahem [1989] SLT 808** and **Secretary of State for Trade and Industry v Moffatt [1996] 2 BCLC 16.**

[67] There exists also, discretion to so do provided for in the current Evidence Act.

[68] This Court so exercised its discretion, bearing in mind in that determination, what weight to attribute to it in view of the fact that the deponent was not available for cross-examination; but also the extent to which it corroborated

the evidence of the other witnesses for the defence (see evidence of Defendant, Mr. Henderson Durant and Mr. Ian Belgrave).

The Salient Aspects of the Submissions

[69] Both parties, of course, commended to the Court their clients' version of events. Counsel for the Plaintiff, while being prepared to admit that equipment and materials were supplied to the site by Rayside Construction Ltd, argued that it was gratuitous and that whatever was provided, the Defendant Judy Belgrave was given the necessary wherewithal to pay for. The Plaintiff strongly maintained and would admit of no contribution whatsoever by Defendant Judy Belgrave, towards the construction of the house.

The Plaintiff's Arguments

[70] Counsel for the Plaintiff submitted extensively that counsel for the Defendant was confused on the issue of Promissory Estoppel as opposed to Proprietary Estoppel on which she based her submissions. He submitted that the principle of Estoppel was broadly stated by **Lord Denning** in **Combe v Combe [1951] 1 AII ER 767**. The elements of Estoppel set out therein are three: a promise(s) made; that promise/assurance made before the act that led to the detriment and that there be legal relations existing between the

Promisor and Promisee before the promise was made. He also submitted that for there to be a Proprietary Estoppel, the representation must be by the paper owner, and the facts show that at the time of the representation the land was owned by Eileen Day.

[71] It was counsel's submission that the house was constructed in 1985 before the promise/letter (1986); and that the Defendant, therefore, could not have relied on the promise in the letter. This Court's observation was however, that while an inference could be drawn that the original structure was demolished in 1985, the evidence before this Court supports a finding that construction commenced in 1986.

The Defendant's Arguments

[72] The Defendant argued Proprietary Estoppel on the facts and evidence outlined above. The promise made by Stella Isada Belgrave, who, although she was not the legal owner of the land at the time (but both her and her sister Gertrude Eileen Day having knowledge of and acquiescing in the construction) that she could build her home on the land, and that she would 'transfer it to her later' constituted the promise; the detriment being the construction of her home of more than 25 years (14 of which being in her mother's lifetime).

[73] Counsel argued that counsel for the Plaintiff exhibited a grave misunderstanding of the principles of Promissory and Proprietary Estoppel. In response to counsel for the Plaintiff's argument that the Defendant's claim in Proprietary Estoppel was defeated by the fact that at the time of construction Stella Belgrave was not the legal owner of the land, she argued that in law there is no prerequisite that the promise must have been made by the landowner (and no one else) in order for the principle of Proprietary Estoppel to be relied on; nor that there must have been a pre-existing legal relationship between the Promisor and the Promisee as is the case with Promissory Estoppel. In support of this argument counsel for the Defendant relied on the Caribbean cases of **Clarke v Kellarie (1970)** and **Denson v Bush [1980–83] CILR**, discussed, in the text **Commonwealth Caribbean Property Law, 2nd ed**., where the principle of Proprietary Estoppel was found to apply even though the promise was not made by the owner.

[74] Counsel also relied on the English case of **Inwards v Baker** [**1965] 1 All ER 446.**

Discussion

Promissory Estoppel or Proprietary Estoppel?

[75] **Brennan J** in **Walton's Store (Interstate) Limited v Maher 1988 164 CLR 387** explains the difference between the two concepts in the following words:

> "… in cases of promissory estoppel, the equity binds the holder of a legal right who induces another to expect that right will not be exercised against him… In cases of proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him."

[76] See also Promissory Estoppel as defined in **Halsbury's Laws of England 4th Edition Volume 16 para 1071** and cases: **Seechurn v Ace SA-NV 2002 EWCA Civ 67; Evenden v Guildford City Football Club [1975] QB 917; Central London Property Trust Limited v High Trees House Limited [1956] 1 All ER 256; Emery v UCB Corporate Services Limited [2001] EWCA Civ 675.**

[77] In **Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55, Lord Scott** at paragraph [14] of his judgment characterizes Proprietary Estoppel as a *"... sub-species of a "promissory estoppels - 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."*

[78] Ironically, **Snell's Equity 29th ed.** states at page 573 that "Proprietary estoppel is older than promissory estoppel."

[79] A major point of distinction is that Promissory Estoppel is a shield not a sword: **Combe v Combe [1951] 2 K.B 215** while Proprietary Estoppel is capable of operating positively so as to confer a right of action: **Denny v Jensen [1977] NZLR 635.**

[80] A useful and in-depth discussion of both Promissory and Proprietary Estoppel can be found in **Chitty on Contracts Thirtieth Edition 3-137.** At **3-160,** where the two doctrines are compared and distinguished, it is the expressed view that while the ingredients of the two are distinguishable, they have a common basis, namely, *"…that it would be unconscionable for the promisor to go back on his promise after the promisee had acted in reliance on it."*

[81] See also **Burgess JA** in **Ward v Walsh et al Civ Appeal No. 20 of 2005** at paragraph 73 and onwards and his exploration of the role of Unconscionable Conduct as not constituting a 'stand-alone' ground, particularly at Paragraphs 103 to 106.

[82] Gilbert Kodilyne in his text **Commonwealth Caribbean Property Law Second Edition** provides a practical understanding of the concept of

Proprietary Estoppel under the rubric "Reasonable expectation of acquisition of a right" at p.115. as follows:

> "Proprietary estoppels may arise in cases where there is no clear express promise of a gift by X, but where X and Y have nevertheless consistently dealt with one another in such a way as to cause Y to believe that he would acquire a right to remain in possession of X's land …"

[83] This type of case thus resembles the cases of incomplete gifts, but the main difference is that, in this class of case, there is no attempted gift or express promise to give in the future, only conduct which causes an expectation in the mind of the person expending his money that the expenditure will be justified. In order to satisfy the equity in this type of case, the court may grant an irrevocable licence to occupy the land. The leading example is **Inwards v Baker (supra).** In that case, the inimitable **Lord Denning** said at p. 448 thereof:

> "If the owner of land **requests another**, **or indeed allows another**, (my emphasis) to expend money on the land under an expectation created or encouraged by the (owner of the land) that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay."

[84] Acquiescence forms a significant part of the factual matrix of this Defendant's case. An in-depth and useful discussion of this topic can be found under the rubric, "Proprietary estoppel (acquiescence)" at page 186 of the text **Commonwealth Caribbean Land Law** by author Sampson Owusu.

[85] These cases are all illustrative of the principle: **Chalmers v Pardoe [1963] 3 All ER 582; Hussey v Paldoe [1972] 3 All ER 744; Pascoe v Turner**

[1979] 2 All ER 945; Thorner v Major et al [2009] 1 WLR 776; Gillett v Holt [2001] Ch. 200; Greasley v Cooke [1980] 1 WLR 1306; Taylor Fashions Limited v Liverpool Victoria Trustee Company Limited 1982 QB 133.

[86] In the Commonwealth Caribbean and in this jurisdiction, the following cases have applied this principle: **Clarke v Kellarie (Trinidad) (1970) 16 WIR 401; Denson v Bush (Cayman Islands) [1980-83] CILR 41; Denny v Edwin BB 2013 HC 19; Kennedy v Cole BB2013 HC 17; Sealy v Sealy BB 1990 HC 31; Arthur v Greenidge-Garnes and Greenidge BB 2014 HC 15.**

[87] Notwithstanding the arguments of the Plaintiff, this Court accepts the submission of the Defendant that a determination of this matter is based on an application of the principles of Proprietary Estoppel and not Promissory Estoppel.

What are the Elements of Proprietary Estoppel?

[88] The classic statement of the principle was deemed by the Caribbean Court of Justice in **Walsh et al v Ward et al [2015] CCJ 14** to be that stated by **Oliver J** in **Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd [1981] 1 All ER 897** as follows:

> "If A under an expectation created or encouraged by B that A 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 with such land, a Court of Equity will compel B to give effect to such expectation."

[89] The above statement establishes three (3) elements, these being (i) a representation or assurance; (ii) an act of detrimental reliance; and (iii) an unconscionable denial of the claimant's rights.

[90] The elements of this doctrine are outlined by their Honours in the said case at paragraph [37] as follows:

> "[37] Equity has a long tradition of enforcing or granting rights to those who have been induced to invest in or improve property owned by other either as a consequence of their own mistake (acquiesced in by the owner) or by direct encouragement or informal agreement. It has been judicially accepted that there is no definition of proprietary estoppel that is both comprehensive and uncontroversial. Nonetheless, Lord Walker explained in the House of Lords decision of *Thorner v Major and others* that most scholars agree that the doctrine is based on three main elements: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance."

[91] In **Gillet v Holt [2000] 2 FLR 266**, **Walker LJ** opined that these required elements *"cannot be treated as being subdivided into three or four watertight compartments."*

[92] Any current discussion of Proprietary Estoppel would be severely deficient without reference to the decisions of our Court of Appeal and the Caribbean Court of Justice in **Walsh v Ward (supra)**. This judgment by **Burgess JA** in our Court of Appeal, traces the origins of the principle of Proprietary Estoppel and applied the elements to the facts before the appellate court

(these being the facts accepted by the trial judge). In this case, the Court of Appeal overturned the finding of the first instance judge in their finding, on an interpretation of the evidence, that Walsh was a "mere licensee" as the elements of Proprietary Estoppel were absent. In other words, they found that the trial judge had drawn incorrect inferences from the facts found (they did not disagree with his findings of fact, but instead drew a distinction between perception of facts and evaluation of facts).

[93] On an appeal to the Caribbean Court of Justice (CCJ) the findings of **Burgess JA** and his "scholarly" discussion of the law on Proprietary Estoppel was upheld. They too found that the elements of this equitable doctrine were not present: there was no clear and unequivocal promise made to Walsh and neither could the elements of detriment or unconscionable behavior be established. While Walsh expended significant sums, doing so was not found to be to his detriment as he benefitted significantly from such (this last finding being a departure from **Burgess JA's** findings of fact).

[94] Their Honours discussion of the application of Proprietary Estoppel can be found at paragraphs [37] to [44].

The Burden of Proof and its Discharge

[95] This is simply addressed by reference to paragraph [43] of the CCJ judgment as follows:

> "[43] … The party seeking to assert the estoppel should show he relied on or was encouraged to act by representations made by the party against whom the estoppel is asserted: *Attorney General of Hong Kong v Humphreys Estate* per Lord Templeman; *and Lim Teng Huan v Ang Swee Chuan* per Lord Browne-Wilkinson. There is a presumption of reliance that operates in favour of the party asserting the estoppel. The burden of proof lies on the other party to show that there was no reliance upon the representation in question: *Greasley v Cooke*."

[96] Lord Denning in **Greasley (supra)** stated this, on the question of burden of proof, at page 1311:

> "The burden is not on her [the defendant], but on them [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…"

Findings of Fact

[97] The Plaintiff failed to discharge his fundamental burden of proof. His evidence was largely self-serving, whereas the Defendant corroborated key aspects of her case by the calling of witnesses who were not challenged in cross-examination.

[98] It is significant that there was no challenge to the role played by Rayside Construction only to the admission of the Affidavit of K. C. Rayside and the spurious and unsupported allegation that the Defendant received money from her mother for all the work done gratuitously by Rayside Construction Ltd.

[99] It is also noted that there was no challenge to the authenticity of the document purportedly signed by Stella Belgrave only to the fact that it appeared to post-date the construction, and that at the date of the letter Stella Belgrave was not the legal owner.

[100] To accept the argument that the fact that Stella Belgrave was not the legal owner at the time was determinative in this matter, would in my opinion be as erroneous as a finding that this action was defeated by the fact that the legal owner is now the Estate, and not the original promisor.

[101] I have not placed great significance on the date of the letter, because it is the view of this Court that this letter was merely a confirmation of the earlier discussion and agreement between the Defendant and her mother. This Court does not place heavy reliance on this fact in the application of the equitable doctrine of Proprietary Estoppel.

[102] It accepts the evidence of the Defendant as to the role played by Rayside Construction, and as to her own involvement in the construction of the house.

[103] However, it rejects her evidence that her mother made no contribution to the construction. I find that difficult to accept on the balance of probabilities. It is my view that the bottom apartment was constructed with Stella Belgrave in mind. The actions of Stella Belgrave indicate that in her mind she had a

significant stake in this property; not only did she move in downstairs, during her lifetime she paid insurance, land tax, electricity and water rates for the entire property. Her estate continued these payments after her death. When her sister died, she moved into her sister's home, but she registered the apartment with Inland Revenue and was the beneficiary of the rental income.

[104] It is the Court's view that she undertook the landscaping of the property when she returned to Barbados; and it appears more likely than not, that she 'finished' the bottom apartment into which she moved briefly before moving to her sister's property.

[105] This Court was sensitive to the nuances in the evidence given by the Defendant: her insistence that she was responsible after construction for the maintenance of upstairs (the clear implication being that it was to the exclusion of the ground floor); the easy acceptance and admission that her mother during her lifetime was responsible for insurance land tax and water rates; her heated reaction to the suggestion that she exercised any control over the bottom floor and rents received there from, by insisting that she never had a key or other access to the bottom floor.

[106] This Court is also of the view from the evidence that the conduct of Stella Belgrave typified that of an owner: her ownership of the land is not in

dispute, but her conduct does indicate that she displayed rights of ownership with respect to the building by paying the land taxes, insurance and water rates; she registered the ground floor apartment with Inland Revenue and was solely responsible for its maintenance and the receipt of the rental income therefrom after she vacated it. In 1998 when she hired Llewellyn Ifill he carried out work on the entire building, top floor and bottom floor.

[107] But these findings do not, in my opinion, defeat a finding that the Defendant is not a mere licensee, and has in fact acquired an equitable interest in the property, and I so find.

[108] It is in fact the finding of this Court that the elements of Proprietary Estoppel as outlined in the discussion above, are all present: this Court accepts not only that there was an express promise but certainly at the very least the type of Acquiescence referenced by **Lord Denning** in **Inwards v Baker (supra)**; there was a significant act of detrimental reliance by the Defendant; and it would be unconscionable in these circumstances to deem the Defendant a mere licensee.

Disposal

[109] In determining what order to make in this matter, in other words in determining the question of the manner in which the equity should be

satisfied, I adopt the words of my brother **Alleyne J**. in **Kennedy v Cole (supra)** where he states as follows:

> "[79] In Henry, it was emphasized that in satisfying equity, a court will not necessarily make an order that corresponds with the promise made or the expectation held by a claimant. The court is entitled to consider whether the expectation is proportionate to the detriment suffered. Sir Jonathan Parker stated at paragraph 65 that "proportionality lies at the heart of the doctrine of proprietary estoppels and permeates its every application."

[110] See also **Burgess JA** in **Ward v Walsh et al (supra)** at paragraphs 107 to 109 where the proper approach of the Court was outlined:

> "[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.
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> [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.
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> [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."

[111] In cases of Proprietary Estoppel, the remedy must be proportionate to the Detriment suffered and the Court has a complete discretion as to the manner in which the equity is satisfied.

[112] In this regard, this Court notes that while Judy Belgrave's evidence is that her mother promised her more than the home, there is no evidence that she promised her the full value of the land.

[113] What would be an appropriate relief in order to achieve the minimum equity required to do justice to this Defendant?

[114] The Plaintiff's action for possession and mesne profits is dismissed. The following Orders are made:

1. It is declared that the Estate of Stella Belgrave holds 90% of the equity in the building situate at Lot 2 Retreat Terrace Black Rock in trust for the Defendant Judy Belgrave.
2. The Plaintiff is estopped from recovering possession and mesne profits with respect to the same.
3. The Defendant is entitled to possession of Lot 2 Near Retreat Terrace, Black Rock in the parish of St. Michael in this Island.
4. The Plaintiff is ordered to settle the Estate of Stella Belgrave and in so doing to set off the remaining equity in the building and the Estate's

ownership of the land against the Defendant's entitlement to one-third of the Estate of her mother.

5. Liberty to apply.

[115] I will hear submissions on Costs should the parties be unable to agree same.

MARGARET A. REIFER
Judge of the High Court