

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1557 of 2009

BETWEEN:

**ELSIE SHOREY
ELMO LEWIS
ERLENE LEWIS**

**FIRST CLAIMANT
SECOND CLAIMANT
THIRD CLAIMANT**

AND

LOLITA ROETTGEN

DEFENDANT

Before Dr. the Hon. Madam Justice Sonia Richards, Judge of the High Court.

2011: December 05, 06, 07, 08, 09, 13

2012: January 12 – Written submissions filed on behalf of Claimants

2013: January 10 – Written submissions filed on behalf of Defendant

July 01

Mr. Stephen Alleyne, Attorney-at-Law for the Claimants.

Mr. Errol Niles, Attorney-at-Law for the Defendant.

JUDGMENT

Introduction

- [1] This case is about the beneficial interest in the property “Three Tops”, situated at Thorpes Gardens, Holders Hill, St. James in this island. Sadly, the dispute has led to a seriously fractured family relationship. The parties are a mother and her three daughters. The First Claimant is the mother of the Second and Third Claimants and the Defendant. All the Claimants reside in England, and the Defendant resides in the United States of America.

The Factual Background

- [2] On 23 December, 1983, the Defendant entered into an agreement to purchase the property. The Agreement for Sale was not produced in this Court, but it is referred to at Clause 1 of a Notice to Complete dated 02 May, 1984, and sent to the Defendant by the vendor Leslie Bernard Fairall. The Notice also mentions the payment of a deposit of \$15,000, and a sum of \$165,000 as the balance of the purchase price.
- [3] The Conveyance was executed on 17 July 1984, and signed by Hallam Fields on behalf of the Defendant as purchaser, by the authority of a power of attorney. The following day, the Defendant mortgaged the property to the Barbados National Bank (BNB) for \$160,000, again

with Mr. Fields acting on her behalf. The monthly mortgage payment was \$1651.60 over twenty years, at an annual interest rate of eleven percent.

[4] It is assumed that the vendor received a further \$5,000 by way of an increased deposit. This would support the Defendant's evidence that the deposit was \$20,000. There is also a concomitant reduction in the purchase price by \$5,000, to \$160,000. In February 2012, A.N. Kirton Inc. valued the property at \$789,000. And by July of that same year, Glenvis Bradshaw provided a valuation of \$1,800,000.

[5] The Claimants filed a Writ of Summons dated 05 August, 2009, claiming the following:

- (1) A declaration that the Defendant holds the property on trust for the Claimants and herself in equal shares or in such shares as the Court determines.
- (2) A declaration that the Claimants are equitable tenants in common of the said property.
- (3) A declaration that the Claimants are entitled to their respective shares in the proceeds of sale in the event that the property is sold but subject to the costs of such sale.
- (4) Further or other relief.
- (5) Costs.

The Case For The Claimants

- [6] The evidence of the First Claimant, Elsie Shorey, was given by way of a Witness Statement, supplemented by her oral testimony. She alleged that the Claimants and the Defendant had a conversation in London, during which it was agreed that they would purchase a property in Barbados for the family. The property would be used as a holiday home. According to Ms. Shorey, the Defendant said that the property would be especially for the Second and Third Claimants and the Defendant, each of whom had no husband. Ms. Shorey said that the purchase of the property was also discussed in Barbados in April 1984, when the parties were here for her mother's funeral.
- [7] Sometime in 1984, the Defendant is supposed to have called Ms. Shorey in London, and informed her that she had seen a property in Barbados, "Tree Tops" at a price of BDS \$180,000. Ms. Shorey was told that the property had seven bedrooms, and could serve the family when they came to Barbados on holiday. The Defendant also said that she would pay down BDS \$20,000, and borrow BDS \$160,000 from the bank.
- [8] Ms. Shorey told the Court that after the conversation with the Defendant, the Defendant paid the deposit and put her name on the

mortgage document. It is Ms. Shorey's evidence that all the Claimants promised to help the Defendant repay the mortgage loan.

To quote Ms. Shorey:

“We had an account set up at the [BNB] to facilitate the payment of the mortgage. In addition, from 1984 the three of us would send money to Barbados mostly by International Money Order and Western Union transfer to help pay the mortgage which was \$1,651.60 per month. I still have many of the receipts in my possession to show.”
(para. 7 Witness Statement).

[9] Ms. Shorey said that in addition to contributing to the mortgage payments, on a number of occasions she sent lump sums to Barbados to pay off arrears on the mortgage. On 18 August, 2003, she paid off the remaining balance on the mortgage. Ms. Shorey also spoke of financial contributions towards the maintenance of the property, and the payment of land tax, insurance and other bills.

[10] Ms. Shorey further alleged that after the mortgage was paid off, the Defendant began asking about the rental of the property. In her Witness Statement she described how:

“Lolita began telling me that I want my place rent out, I was tired of you people.” She then got annoyed with me after I told her the place could be rented out but she needed to keep six weeks free every year open for the family. She had the audacity to ask me why I had to stay in the house, and I told her that I had paid all the bills

plus it was just six weeks out of 52 in the year.”. (para. 20).

[11] Ms. Shorey told the Court that:

“The plan was for the family to stay at the property when they came. It would be unfair to pay bills and mortgage and then stay at a hotel. I only want to stay there 6 weeks ... While we are here the 2 bedroom flat could be rented. While we are here the two 3 bedroom flats are not available for rental.”.

[12] The Second Claimant, Elmo Lewis, has lived in one of the flats at the disputed property since 1999. She also gave evidence about an agreement made between the parties in 1984 to purchase a family home in Barbados. She said that the Defendant located the property, and with the permission of the Claimants the Defendant paid the deposit and sourced a mortgage. And the Claimants made it “absolutely clear” to the Defendant that they would remit money to Barbados to pay the mortgage. (See para. 5 of Witness Statement).

[13] Elmo Lewis testified that her mother wanted the property for the three girls who had no husband. Elmo was aware that only the Defendant’s name appeared on the Conveyance, and she expressed her concerns to her mother about this. She said that her mother took no action because her mother trusted the Defendant. Elmo never voiced her

concerns to the Defendant, or asked the Defendant to place her name on the Conveyance.

- [14] Elmo said that between 1993 and 1995, she participated in the foster care programme administered by the British Government. She earned about £1400 monthly. Her oral testimony indicated that it was at this time that she began contributing to the mortgage. She explained that:

“My mother started paying long before me. [The Third Claimant] also contributed. We gave our mother our contribution ... we put money together and paid the mortgage.”

- [15] Elmo alleged that around 1996 or 1997, she borrowed £6,000 from Lloyds Bank to add balconies to the property. She said that both the Defendant and their sister, (the Third Claimant), also contributed to the maintenance of the property. Elmo is supposed to have moved to the property in 1999 at the invitation of the Defendant. She testified that the Defendant asked her to come to Barbados to look after the property because it was beginning to deteriorate. Subsequent to the full repayment of the mortgage, the Defendant wanted Elmo to pay rent, but this was resisted.

- [16] A Witness Statement was filed on behalf of Erlene Lewis, the Third Claimant. However, the case for the Claimants was closed after the oral evidence of the First and Second Claimants. Erlene gave no

evidence at the trial. Therefore, only limited reference will be made to her in this judgment, in so far as the other Claimants and the Defendant referred to her role in relation to the property.

The Case For The Defence

[17] Mrs. Lolita Roettgen filed her Defence on 02 December, 2009. In it she denied any agreement between the parties for the purchase of the property. She said that the Claimants were unaware of her intention to purchase the property, until after she had signed the Agreement for Sale and paid the deposit. The Defendant acknowledged that her mother (the First Claimant) and a brother, Roosevelt Lewis, made financial contributions to the mortgage payments. However, she denied that her two sisters, (the Second and Third Claimants), ever made any mortgage payments.

[18] The Defendant accepted that the Third Claimant, Erlene Lewis, carried out repairs to one of the apartments at the property. But she said that this was done without her knowledge or approval while Erlene was vacationing at the property. In relation to Elmo Lewis (the Second Claimant) the Defendant contends that she is a mere licensee at the property, who has ignored a request by the Defendant that she should pay rent. The Defendant believes that the Claimants have

neither a beneficial interest in, nor an equitable title over the property. In her oral evidence the Defendant did not agree that her mother has a share in the property. However, she admitted in the Defence filed on her behalf, the possibility that her mother “only may possess a substantially minor equitable title over or share and/or interest” in the property. (See para. 7 of the Defence).

[19] Roosevelt Lewis gave evidence for the Defence. Any suggestion that he contributed either to the payment of the mortgage, or to the maintenance of the property, is disputed by the Claimants. However, Mr. Lewis clearly stated in his evidence to this Court that he was not making a claim against the property. Therefore, it is unnecessary for the Court to make any finding of fact about any interest that Mr. Lewis may have in the property.

[20] Mr. Lewis’ evidence is more relevant with regard to his assertion that to his certain knowledge there was no agreement between the parties to purchase a family home in Barbados. He said that he was present at his mother’s home in London when the Defendant called to say that she had bought a house. To his recollection, Elmo Lewis was not there when the Defendant called. He also came to Barbados to his

grandmother's funeral in April, 1984, and he was not aware of any discussion about the purchase of a house in Barbados at that time.

[21] Mr. Michael Yearwood, attorney-at-law, was the final witness for the Defence. He confirmed that he had prepared a will for the Defendant, in which there were three beneficiaries. He believed that he had worked for the Defendant prior to the preparation of this will.

Issues For Determination

[22] In the joint pre-trial memorandum filed on 28 October, 2011, counsel for the parties outlined the issues to be resolved at trial as follows:

- (1) Whether the Defendant holds the property upon a resulting or constructive trust for the benefit of herself and the Claimants or any of the Claimants.
- (2) Whether the Claimants jointly or severally have an equitable interest in the property.
- (3) Whether the Second Claimant occupies the property as a licensee or as an equitable part owner.

[23] Counsel for the Plaintiffs dealt with the issue of a resulting trust at paragraph [20] of his written submissions. Mr. Alleyne referred to admissions made by the Claimants that, contrary to paragraph 3 of their Statement of Claim, they did not contribute to the deposit.

Neither were they parties to the mortgage deed. Therefore, he conceded that no claim could be made for a beneficial interest in the property under a resulting trust. The author of “Lewin On Trusts” (J. Mowbray Q.C. et al, 2008, 18th ed.) is also of the view that:

“It would therefore seem that, where a party in fact makes payments of mortgage instalments despite not having agreed to do so at the time of acquisition, his claim to a beneficial interest ought in principle to be based on the common intention rules ... and not on those relating to resulting trusts.”. (p. 319 para 9-61).

This extract supports Mr. Alleyne’s submission.

The Common Intention Constructive Trust

[24] Subsections (2) and (5) of section 60 of the Property Act, Cap. 236, provide that:

“(2) A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by the person disposing of the same or by his agent lawfully authorised in writing, or by will.

(5) Nothing in this section affects:

(a) the creation or operation of resulting, implied or constructive trusts;”.

[25] In the absence of the appropriate documentation, as required by the legislation, the Claimants are seeking to establish their respective beneficial interests in the property, by way of a constructive trust.

Counsel for the Claimants premised his written submissions on the basis of a common intention constructive trust, arising out of the purchase of a property within the context of a family arrangement, as distinct from a commercial undertaking or a commercial joint venture.

[26] More than 40 years ago, Edmund Davies LJ. observed that:

“English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the courts by technicalities in deciding what the justice of a particular case may demand.” (See Carl Zeiss Stiftung v. Herbert Smith [1969] 2 Ch 276).

But more recently, Arden LJ. gave a precise and all-embracing description of the common intention constructive trust as:

“a trust arising by operation of law where parties agree that beneficial ownership should be held in a particular way but do not follow the formalities required by law and where one of the parties has suffered detriment in reliance on the agreement.”. (See Gallarotti v. Sebastianelli [2012] EWCA Civ. 865 at para.5).

[27] The constructive trust has been prayed in aid as a remedy after the collapse of commercial joint ventures. (see Pallant v Morgan [1953] Ch 43; Holiday Inns Inc v. Broadhead 232 E.G. 951; Banner Homes Group plc v. Luff Developments Ltd. [2000] Ch. 372. In

Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752,

Lord Scott of Foscote commented that:

“It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint ventures.” (page 1769 para. 30 e-g).

[28] A common intention constructive trust can arise too in property disputes between couples who lived together in a family setting. (See **Gissing v. Gissing** [1971] A.C. 886; **Oxley v Hiscock** [2005] Fam. 211; **Stack v. Dowden** [2007] 2 WLR 831; **Abbott v. Abbott** [2007] UKPC 53; **Jones v. Kernott** [2012] 1 A.C. 776). The principles on which the common intention constructive trust is founded, are also considered in cases where property was purchased by family members or close friends. (See **Laskar v Laskar** [2008] 1 WLR 2695; **Buggs v Buggs** [2003] EWHC 1538 (Ch); **Gallarotti** (supra)).

[29] Caribbean courts have considered the common intention constructive trust in Sweeting v. Finlayson (SC Bah. No. 1076 of 2006; unreported decision of Oct 6, 2010); Anderson v. Reynolds (SC Ja. No. 364 of 2007; unreported decision of 10 Nov. 2010); Johnson-Lamie v. Administrator General (CA Ja. No. 59 of 2009; unreported decision of 29 July, 2011); Hanley v. Charles (ECSC StC. & N. No. 87 of 2009; unreported decision of Sept. 30, 2011); and George et al v. Benjamin (EHC Ant. & Bar. No. 271 of 2009; unreported decision of 29 Nov, 2010) among others.

[30] With reference to trusts founded on common intention, the general principles are expounded in "Lewin On Trusts" (supra):

“A trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest and (ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest.”. (p. 321 para. 9-66)

[31] The Claimants alleged the existence of a common intention between the parties, that entitles them to a beneficial interest in the property. Therefore, the burden of proof is on them to establish, on a balance of probabilities, that there was such a common intention. (See Stack v.

Dowden [2007] 2 WLR 831 at para. [4], [56] and [68]; **Johnson-Lamie** (supra)). As there is no presumption of joint beneficial ownership, in order to determine whether a common intention is established by the evidence, the Court must look at the discussions between the parties, and examine their conduct in the matter. The whole course of dealings between the parties in relation to the property should be considered. (See **Geary v. Rankine** [2012] EWCA Civ. 555 at para. [18] and [20], and **Jones v. Kernott** (supra)).

(i) The Purchase Of The Property

[32] Elsie Shorey contended that prior to the purchase of the property, the parties discussed buying a family home in Barbados. These discussions also allegedly took place in Barbados when the parties attended the funeral of Ms. Shorey's mother in April 1984. The Defendant is said to have seen the property in Barbados before calling the Plaintiffs in England to tell them about it. Ms. Shorey said too that the property was to be used as a holiday home.

[33] Elmo Lewis revealed that the parties always wanted a family home; and that it was agreed between them that "whoever saw one first we would buy it.". She said she was present in London when the Defendant called to say she had seen the property. It was allegedly at

this stage that the Claimants agreed that the Defendant should arrange the purchase of the property. According to Elmo, payment for the property was also discussed during that telephone conversation.

[34] The Defendant's case is that she never told the Claimants about the property until after the Agreement for Sale was signed, or after she had secured the mortgage in July 1984. She insisted that there was no agreement between them for the purchase of a family holiday home. She only mentioned to the Claimants that the property "was large enough to accommodate the whole family if they were ever in Barbados for a vacation."

[35] Having considered the evidence presented by the parties about their initial discussions, and their conduct at the time the property was purchased, the Court has concluded that the Claimants have not discharged their burden of proving that a common intention constructive trust existed in their favour at the time of purchase. A number of factors have led the Court to this conclusion.

[36] If, as alleged by the Claimants, the Defendant called them in London when she found the property, this would have been prior to the signing of the Agreement for Sale in December, 1983. Therefore, by the time they all arrived in Barbados for the funeral in April 1984, the

Claimants would have known about the property. There is not one iota of evidence from their collective memories about either a desire to see the property; or a visit to the area where the property was located; or an attempt made to see the property; or an actual viewing of the property, at that particular period in 1984. Elsie Shorey told the Court that they went and viewed the property, but she did not indicate when this occurred. Elmo Lewis said nothing about seeing the property before it was purchased.

[37] The Court is of the opinion that when the Claimants visited Barbados in April 1984, they neither knew about the property, nor knew that the Defendant had entered into an agreement to purchase the property. The Court accepts the Defendant's version of the events, namely, that she did not tell the Claimants about the property until she had arranged the mortgage facility.

[38] Another reason why the Court is persuaded by the Defendant's version is the reference in her evidence to managing "to secure the mortgage to stave off forfeiture of the deposit". There is no evidence from the Claimants that they were aware of the possibility that the Defendant was in danger of forfeiting her deposit. The vendor sent the Defendant a Notice to Complete dated 02 May, 1984. Clause 2 of

that Notice required her to pay the balance of the purchase price “forthwith”. And completion was set by Clause 3 to a maximum of 21 days from the date of the notice. If the Defendant had failed to comply with the Notice, she would have forfeited her deposit. Both the Conveyance and the mortgage were executed on the 17 and 18 July, 1984, respectively, nearly two months after the sale was to be completed. This suggests that forfeiture of the deposit was a very real possibility for the Defendant. The vendor must have permitted completion after the deadline set in the Notice to Complete, and waived his right to forfeit the deposit.

[39] It is more than likely that the Defendant would have told the Claimants about the property when she had secured the mortgage. Had the Claimants known about the property before July 1984, surely they also would have been aware of the efforts of the Defendant “to stave off forfeiture of the deposit”. Surely there would have had some knowledge of the import of the Notice to Complete, that is, that their longed for property would not materialise if the balance of the purchase price was not paid by a particular time. If, as the Claimants contend, they knew about the property from the initial stages, and gave the Defendant the go ahead to purchase, it is not unreasonable to

assume that she would have kept them abreast of any challenges to its acquisition.

[40] At the time of its purchase the property could not be described as a typical Barbadian family home. It comprised three flats, two of which appear to have been tenanted at the time of purchase. The property was being used as commercial real estate. Various caretakers were appointed to collect the rent and pay the mortgage. And, over the years, there was discussion, discord and dispute between the First Claimant and the Defendant about the rental of the property.

[41] The Defendant's evidence is that she was introduced to the property as a potential investment. The undisputed evidence of the Defendant is that her husband died in 1983, and she was a beneficiary of his estate. The Claimants accepted that she was in a financial position to pay the deposit without their assistance. She must also have been solely responsible for the legal fees associated with the power of attorney, the Agreement for Sale, the Conveyance and the mortgage. There is no evidence from the Claimants about a contribution to any of these expenses. The Defendant had repaired her grandmother's house prior to the grandmother's death. She arranged and paid for her

grandmother's funeral in April 1984. She also made a gift of US \$6,000 to her mother (the First Claimant) which facilitated her mother's attendance at the funeral in Barbados. The Claimants have not suggested that the Defendant did not make this financial outlay.

[42] At the time of her introduction to the property, the Defendant appears to have been "rolling in dough". Therefore, her decision to invest on her own in a property with income making potential was neither unusual nor unreasonable. The rental from two tenants, at the time of purchase, was said to be \$800 and \$600 respectively. This covered more than three quarters of the monthly mortgage of \$1651.60. The Defendant said in her evidence that she intended to rent the apartments in order to cover the land tax, mortgage and insurance over the years. Therefore, she did not envisage having to supplement the mortgage to any significant degree. When the property was purchased, she certainly did not require other partners in a family or commercial joint venture.

[43] The Claimants have never alleged, either in their pleadings or in their evidence, that the purchase of the property was a joint venture between the parties to invest in commercial real estate. A family relationship is not incompatible with the relationship of business

partners. (See Geary v. Rankine (supra) at para. [11]). In Laskar v. Laskar (supra), a mother and daughter purchased a council house primarily as an investment for rental income and capital appreciation. However, this is not the case for the Claimants. On the contrary, they allege the purchase of a family home or a family holiday home by the Defendant on behalf of four persons.

[44] The First Claimant said that her daughter (the Defendant) envisaged a family property “especially for the three girls who don’t have a husband; we could have it as a holiday home.” These were allegedly the last words of the Defendant when she called London “to inform the Claimants about the property.” But it is the evidence of the Second Claimant that it was her mother, the First Claimant, who said “she wanted a family house for the three girls who had no husbands.”. This apparent discrepancy in their evidence was not explained by the Claimants.

[45] The learned authors of “Lewin On Trusts” (supra), further posit that:

“Where at the time of the transfer the legal owner puts forward some excuse for the property not being placed in joint names, especially if the claimant reposes trust in the legal owner, then the court may take that fact as direct evidence of common intention that the claimant is to have a beneficial interest, for if there was no such intention, why should the legal owner have found it necessary to put forward an excuse?” (para. 9-68).

[46] The Defence is that there was no common intention. Beyond this, there is no evidence in this case that the Defendant advanced any excuses for not including the names of the Claimants on the Conveyance. It is the Claimants who alleged that they were aware of and actively involved in discussions with the Defendant about acquiring the property. However, absent from their evidence is any conversation between the parties about the names to be included in the Conveyance.

[47] The First Claimant said that no request was made for the property to be conveyed to them:

“I wasn’t looking for this to come so far ... At that time we were living so good and so close that it didn’t matter to me if [the Defendant] put her own name I never asked for the property to be put in our names. If I had known that [the Defendant] would have turned that way I would not pay the mortgage. I have looked after her. I was not looking for her to be so ungrateful and unkind.”

And the Second Claimant in her Witness Statement said:

“I was concerned about the property being transferred in [the Defendant’s] sole name and I raised it with [the First Claimant]. However, [the First Claimant] insisted that [the Defendant] was her daughter and [the Defendant] would not do anything to hurt her or the family.” (para. 7).

[48] When cross examined by counsel for the Defendant, the Second Claimant revealed that she did not express her concern to the Defendant. She also told the Court that:

“I was aware that the Defendant’s name alone was on the conveyance from the time the property was purchased. We know that only one name was on it because she was the only one in Barbados to sign that paper. I don’t know if she was in Barbados when the conveyance was signed. I don’t know if the Defendant signed the conveyance. I don’t know who signed the conveyance.”

[49] The Second Claimant was unaware that the Conveyance was executed by a third party on behalf of the Defendant, as the Defendant was not in Barbados at the relevant time. The First Claimant said she thought that the Defendant had mentioned that Hallam Fields had a power of attorney for her; and that she knew that Fields had conducted the arrangement for the property. Given the extent of the discussions alleged between the parties by the Claimants, the Court is of the view that their lack of knowledge about, and their failure to mention, critical aspects of the acquisition of the property, is indicative of the fact that there were no discussions from which to distill a common intention for them to have a beneficial interest in the property.

[50] Had the Claimants been as involved in discussions with the Defendant, as they would have the Court believe, they should all have

known about Mr. Fields' role in the purchase. Mr. Fields could have been given the requisite authorization to sign the Conveyance on their behalf. The First Claimant said that the reason why they did not request to be, or insist on being, parties to the Conveyance, was because they trusted the Defendant, and there was a close relationship at the time. There is no evidence to suggest that the parties collectively would have been unable to access a mortgage if they all were parties to the Conveyance. Indeed, the limited knowledge of the First and Second Claimants about the role of Mr. Fields, is more consistent with the evidence of the Defendant that she did not tell them about the property until she had secured the mortgage.

[51] The Claimants contend that four persons were to share in the beneficial interest. This common intention was said to be evidenced by their agreement with the Defendant to contribute to the mortgage payments on a monthly basis. In other words, by assisting with the mortgage they acted to their detriment, reasonably believing that they were acquiring a beneficial interest. In her Witness Statement the First Claimant spoke about all three Claimants contributing to the mortgage payments from 1984.

“We had an account set up at the [BNB] to facilitate the payment of the mortgage, and every month Elmo, Erlene and I deposited money on this account for the payment of the mortgage. In addition, from 1984 the three of us would send money to Barbados mostly by International Money Order and Western Union transfer to help pay the mortgage which was \$1,651.60 per month”. (para. 7).

[52] The Witness Statement of the Second Claimant supported her mother’s statement about the Claimants making mortgage payments from the inception of the mortgage in 1984:

“In 1984 my mother, Erlene and I started sending moneys to Barbados to pay the mortgage instalments to various agents who were appointed from time to time by [the Defendant] to look after the property.”. (para. 8).

However, Elmo Lewis did not confirm the existence of a BNB account that was set up by the parties to facilitate mortgage payments. She was not asked about this account by either counsel, and she did not volunteer any knowledge or information about such an account.

[53] The First Claimant also spoke about the account in her oral evidence. She said that it was a joint account opened between herself, Elmo and the Defendant. Curiously though, no money went into this account “because we did not have sufficient money to go on the account.”. This statement by the First Claimant raises more questions than answers. If the First Claimant is referring to the same account in her

Witness Statement and in her oral evidence, how was it possible to use the account for monthly deposits towards the mortgage, and yet still not have sufficient money to go on the account? No evidence was given that the Bank expected a minimum deposit to be maintained. If the purpose of this evidence from Ms. Shorey was to confirm the existence of a common intention through the setting up of a joint account, she should have explained the inconsistencies in this evidence.

[54] With respect to the mortgage payments, the Second Claimant contradicted her own Witness Statement and that of her mother when she revealed that:

“I started to work in 1993. 1993 to 1995 was foster care ... I started contributing to the mortgage from when I started the foster care.”.

According to this oral statement, Elmo Lewis made no contribution to the mortgage until 9 years after the mortgage facility was put in place. This conflicting evidence impacts heavily on the credibility of the First and Second Claimants. And the Court finds that, in accordance with her oral testimony, the Second Claimant did not contribute to the mortgage payments between 1984 and 1993.

- [55] And what about the financial contributions of the First Claimant? She alleges that her contribution to the mortgage was from 1984. She said that some of her documents were not available because they were stolen by the Defendant from her trunk in England. (Incidentally, the Defendant also accused the First Claimant of purloining some of her documents in New York.) The First Claimant submitted a copy of an international money order dated 18 August, 1984. It is in the sum of £350, and the payee is Mr. Winston Griffith.
- [56] The First Claimant submitted this Exhibit, together with a series of 23 other money orders, as proof of her contribution to the mortgage from 1984. This money order is the only one from 1984. The Court had some difficulty with this document, because all the parties agreed that Mr. Hallam Fields was the person responsible for collection of the rent and payment of the mortgage in 1984. It was not until 1992 that Mr. Griffith assumed these duties. Mr. Griffith was engaged by virtue of correspondence sent to him on 09 September, 1992 by Tyrone Estwick, attorney-at-law. Therefore, it is unlikely that any money sent to Griffith by Elsie Shorey in 1984, or prior to 1992, was in relation to the mortgage. There is no evidence from the Claimants, or

the Defendant, that Mr. Griffith had any responsibility for the property in 1984.

[57] Thus, Ms. Shorey has not provided satisfactory proof of her contribution to the mortgage payments from the outset. Like the Second Claimant, Ms. Shorey has not shown initial contributions to the mortgage that would support her claim of an entitlement to a beneficial interest in the property. If contribution to the mortgage payments from the inception of the mortgage was the requirement for securing a beneficial interest, Ms. Shorey has not proved that she contributed at the critical time.

[58] The Court outlined a number of reasons why it determined that the evidence does not establish either an expressed or implied intention that the Claimants should have a beneficial interest in the property. The evidence of the conversations between the parties, about a transaction that occurred nearly thirty years ago, did not establish, on a balance of probabilities, that there was such a common intention. And the Court is unable to deduce a common intention from the conduct of the parties at the time of purchase. The Court does not accept that the Claimants made mortgage payments from the inception of the mortgage.

[59] The conservative assessment of this Court is that if both versions of the Claimants and the Defendant are to be believed, there was a collision of intentions in relation to the purchase of the property. Two of the Claimants gave evidence about having a beneficial interest in a property purchased as a family or holiday home. The Defendant considered herself solely to be entitled to the beneficial interest in a commercial property that she bought as an investment. There was no unity of purpose, at the time of purchase, that could support the existence of a common intention between the parties to share in the beneficial interest in this property. And the conduct of the parties did not crystallise into an intention that they should all have a beneficial interest in the property.

[60] Additionally, the evidence of the First and Second Claimants revealed issues of credibility that persuaded the Court that the evidence of the Defendant is to be preferred to their evidence. In this regard, the evidence of Roosevelt Lewis is accepted by the Court as bolstering the Defendant's evidence that, when the property was purchased, there was no common intention for the Claimants to share in the beneficial interest.

(ii) Events Subsequent To Purchase

[61] This Court determined that neither the words nor the actions of the parties, at the time the Defendant purchased “Tree Tops”, are indicative of a common intention that all four persons were to share in the beneficial interest in the property. The Court is entitled to look at what occurred between the parties, after the property was acquired, to see whether there is evidence supporting a common intention to fasten the property with a constructive trust. As stated in **“Lewin On Trusts”** (supra):

“... if it is agreed that the claimant should have some beneficial interest in a property previously beneficially owned by the legal owner, and the claimant acts on that agreement to his detriment in the reasonable belief that he is acquiring a beneficial interest, for example by paying for an extension to the property, then effect will be given to the agreement.”. (para. 9-77).

(See also **Stack v. Dowden** (supra); **Hussey v Palmer** [1972] 1 WLR 1286; **Hyett v. Stanley** [2003] EWCA Civ. 942).

[62] The Defendant never denied her mother’s assistance with the payment of the mortgage and other expenses associated with the property. She conceded that the mortgage was paid between 1984 and 2003 “with occasional help from Elsie Shorey and my brother Roosevelt Lewis”. (See para. 6 Witness Statement). However, the Defendant denies that

her mother's assistance was the result of a common intention to give Ms. Shorey a beneficial interest. The Defendant also disagrees that Ms. Shorey's financial outlay was as substantial as claimed by Ms. Shorey.

[63] The evidence indicates that the mortgage fell into arrears on a number of occasions. The Defendant mentioned five occasions. The parties agree that this was due in part to the misappropriation of monies, earmarked for the mortgage, by Hallam Fields, Winston (James) Griffith and Philip King. The First Claimant spoke of a confrontation between herself and Mr. King. In fact, item 33 of Part 1 to Schedule 1 of the Claimants' list of documents, refers to a copy of a letter sent to King, by an attorney-at-law, demanding rent money collected from tenants at the property.

[64] When she purchased the property, the Defendant anticipated that the rental income would cover a substantial portion, if not all, of the mortgage and other expenses. She suggested to the First Claimant that the apartments could be rented for short periods of 2 to 3 weeks to persons coming to Barbados on holiday. Rental to university students was another option. The Defendant was assured by real estate agents that she would have no difficulty in renting the apartments. She

testified that one of these agents was supposed to assist Mr. Griffith, but that agent withdrew after experiencing problems with Elmo Lewis.

[65] There was no consistent or continual rental of the apartments. The First Claimant insisted on having both three bedroom apartments available to the family entourage for their annual six week holiday in Barbados. Only the two bedroom apartment was available for rental, for six weeks, when the family was in residence. The Defendant received no co-operation from the Claimants with respect to the rental of the property. The First Claimant admitted that she knew that the original intention was to rent the apartments. However, she spoke of a plan for

“... the family to stay at the property when they came. It would be unfair to pay bills and mortgage and then stay at a hotel. I only want to stay there 6 weeks. Everybody would come down at the same time for 6 weeks.”.

[66] The absence of a continuous flow of rental income, coupled with the misappropriation of funds by the caretakers and the declining fortunes of the Defendant, contributed to her challenges in paying the mortgage. Her savings were exhausted, she experienced financial difficulties, and she was dipping into her son's trust fund. By 2001 she

lost her investments as a result of the 9/11 disaster in the USA. She considered selling the property, and so informed her mother. Ms. Shorey counselled the Defendant not to sell, and it is against this background that Ms. Shorey began to assist with the mortgage payments around 1994. Although not denying her mother's assistance, the Defendant insisted that "Elsie Shorey would not have had to contribute at all if the house was rented on a regular basis." (Para. 12 Witness Statement).

[67] The Court is doubtful as to whether the Second Claimant was able, at anytime, to make any significant financial contributions either to the mortgage or to the maintenance of the property. If, as she testified, her working experience was limited to a brief secretarial stint after leaving school at 16, to janitorial work at schools and offices, and to foster care between 1993 and 1995, what significant continuous financial contribution could she make to the acquisition, or conservation of the property? With respect to the foster care programme, no documentary evidence such as written confirmation from the British Government, or even a pay slip, was produced to verify this source of employment. Elmo Lewis appears to have been unemployed for many of her adult years. There is no evidence that

she has independent means. And none of the Claimants attempted to estimate the extent of Elmo's alleged financial contribution to the mortgage and other expenses associated with the property.

[68] With respect to her evidence of having financed the installation of balconies to the tune of six thousand pounds, the Court was not persuaded by this evidence. The document tendered to the Court, as supporting a loan taken out by Elmo to finance the balconies, had an address that differed from where she was resident at the time. And the document bore no signatures on behalf of either the lender or the borrower. In addition, there is no evidence of Elmo's means of support while she lived at the property from 1999 to the present.

[69] The Claimants have not discharged the burden of proving that the Second Claimant contributed financially to either the mortgage or to the maintenance or improvement of the property. Therefore, she cannot rely on her alleged financial contributions as conduct indicative of an agreement to give her a beneficial interest in the property. This Court is not persuaded that she personally incurred financial detriment in reliance on an alleged agreement between the parties to give her that beneficial interest.

[70] The First Claimant alleged that Erlene Lewis, the Third Claimant, spent approximately £20,000.00 refurbishing one of the apartments. No documentary evidence was produced to support this expenditure. However, the Defendant accepted that an apartment was refurbished, although her evidence was that the work was executed without her knowledge. She discovered the extent of the work done to the apartment on one of her visits to Barbados. The refurbishment occurred after the mortgage was paid off in 2003.

[71] The Court was put on inquiry as to why any of the Claimants would spend money on this property after it was bought by the Defendant. In the case of Ms. Shorey, her financial contribution to the property post acquisition was significant. It would be convenient at this stage for the Court to estimate Ms. Shorey's financial outlay on the property.

[72] Ms. Shorey made continuous payments between 1994 and 1999, to Winston Griffith, Philip King, and Elmo Lewis, totalling £9,335.00. This is approximately \$32,000 Barbados dollars, using a conversion rate of 3.3 Barbados dollars to one pound sterling. However, even if the Court accepts that this sum was intended for the mortgage and

other payments associated with the property, can Ms. Shorey be given a full credit for this money?

[73] An unquantified portion of the money sent to Griffith and King during these years, by both the Defendant and the First Claimant, was misappropriated. And on Ms. Shorey's evidence she was not the only person sending money from England to Barbados. She said that all the Claimants put together and sent money. The Court did not accept this evidence, and was more persuaded by the testimony of the Defendant that it was the First Claimant and Roosevelt Lewis who contributed. The Court will credit Ms. Shorey with half of the amount shown on the documentation presented to the Court for the period 1994 to 1999.

[74] Ms. Shorey mentioned paying off the mortgage arrears of \$24,000.00 and \$15,000.00 around 1987 and 1999 respectively. (See para. 9, 10 and 15 of her Witness Statement). The Defendant accepted that her mother paid off arrears on two of the five occasions when the mortgage fell into arrears. Therefore, the Court will credit Ms. Shorey with the sum of \$39,000.00 paid towards arrears of mortgage. The Court also finds that Ms. Shorey paid off the mortgage in 2003 (not arrears as she claimed). The amount paid was \$14,527.57 as

mentioned at paragraph 7 of the Defendant's Witness Statement, and Ms. Shorey will be given a credit for this amount as well.

[75] The Court finds that Ms. Shorey contributed approximately \$69,527.57 towards the mortgage payments for the property, inclusive of arrears. The loan from the BNB was \$160,000. But there is no evidence before the Court as to the full amount repaid to the bank, inclusive of the annual interest calculated at eleven percent per annum. Item 9 of Schedule 1 Part 1 to the list of documents filed by the Defendant on 22 March, 2010, mentions loan amortization results submitted by the BNB. But once again, critical documents mentioned in the lists of documents for both sides, were not made available to the Court.

[76] Even without documentary evidence of the full amount repaid to the BNB, the Court is of the opinion that Elsie Shorey did not "practically [pay] all the mortgage" as she alleged in her evidence. And the Court also heard evidence that some part of the money used by Ms. Shorey belonged to her two disabled great grand children.

[77] Ms. Shorey also contributed to other bills connected to the property. Again, the sums spent were not quantified for the benefit of the Court. She spoke of paying over \$3,000.00 to treat the property for termites,

and to install fencing, new guttering and new doors. Various bills and receipts are mentioned in the Claimants' list of documents. But all of them cannot be attributed to Elsie Shorey, as the Defendant also spent her money on the property.

[78] Why did Ms. Shorey make this financial contribution when, as the Court found, there was no agreement to give her a beneficial interest in the property when it was purchased? Undoubtedly she is a generous parent. There is evidence of her supporting Elmo Lewis during her adult years. Elsie Shorey also testified that she looked after the Defendant, and that every year she paid for the Defendant to travel from New York to London.

[79] Counsel for the Defendant urged the Court to find that Ms. Shorey's conduct can be explained by the presumption of advancement. In Laskar v. Laskar (supra), Lord Neuberger of Abbotsbury accepted that the presumption of advancement between a parent and child still exists. But he also pointed out that:

“... it was said as long as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence: see per Lord Upjohn in Pettitt v. Pettitt [1970] AC 77, 814.” ([2008] 1 WLR 2695, 2700G).

In the Laskar case the presumption was found to be extremely weak, and of no application, where a property was purchased in the joint names of a mother and daughter, and the daughter was over 18 years of age and managing her own affairs at the time of the transaction.

[80] The presumption of advancement may also be rebutted in this case. Ms. Shorey believed that her financial contributions were securing accommodation for her family during its annual vacation in Barbados. In this regard, the oral evidence of the Defendant is critical to an appreciation of one of the reason why Ms. Shorey spent money on the property.

[81] The Defendant testified that:

“After 1995 my mother assisted me from time to time. In 1995 she started making payments to various people. I was also making payments towards the mortgage, and my mother was also making payments to other people. I never asked her to send money. When the mortgage fell into arrears I would tell her and suggest that I would sell the house because I couldn't understand if we were both sending money why the mortgage was in arrears at any given time. It is my property. I told her I was going to sell it. She said “Don't sell it, we will help you”. I said if that's the case, rent out two sections of the house to bring in some money so that you could repay yourself. She said she didn't want any repayment, only somewhere to stay for six or eight weeks of the year.”.

[82] The Court finds that Ms. Shorey's offer of assistance was made at a time when the mortgage fell into arrears. This occurred prior to 1995,

when Ms. Shorey made two payments towards mortgage arrears. The Defendant conceded the possibility that the mortgage fell into arrears in 1987. She also conceded that her mother paid off arrears about twice. Therefore, Ms. Shorey's contributions prior to and post 1995 cannot be considered as gifts between a parent and her child in the nature of an advancement. She did not expect to be repaid. But she made it clear that she expected to be accommodated at the property, together with her family, for six to eight weeks every year. She told the Court that it would be unfair for her to pay bills and mortgage, and then stay at a hotel.

[83] After careful consideration, the Court has formed the view that there is another compelling reason for Ms. Shorey's "investment" in the property. As a caring but aging parent, Ms. Shorey was concerned about Elmo Lewis. If she died before Elmo, what was to become of her hearing challenged adult daughter, who had no visible means of support? Because of this real concern, Ms. Shorey wished to assure Elmo a more certain future after her mother passed on.

[84] Ms. Shorey wanted to secure a permanent roof over Elmo's head, and that roof was at "Tree Tops". She persuaded the Defendant not to put Elmo out of the property, with the plea that Elmo was also her

daughter. She asked the Defendant to put Elmo's name on the Conveyance. And she cajoled the Defendant into giving Elmo a life interest under the first will. It was the very real danger that the Defendant would sell the property, or remove Elmo from the property, that galvanised Ms. Shorey into action with the filing of this case. She candidly told the Court that the Defendant wanted to put Elmo out of the property, and in her estimation that was wrong.

[85] There is evidence that Ms. Shorey sent over 25 thousand US dollars to the Defendant in New York, between September 2005 and December 2007. This was after the mortgage was paid off. If the payments were connected to the expenses of the property, it is more than likely that she would have sent the money directly to Elmo, who was in Barbados at the time. Her explanation was that she contributed to the Defendant's rent in New York. The Defendant offered another explanation for these payments. Having agitated for Elmo to pay rent for the apartment she occupied, the Defendant received some of this money from Ms. Shorey in lieu of rent for Elmo. Ms. Shorey was also making these payments because the apartments were not rented.

[86] These payments also demonstrate that Ms. Shorey did not consider herself or Elmo to be beneficial owners of the property. Why pay rent

for a property in which you have a beneficial interest? Indeed, the conduct of the parties post- acquisition, does not compel the Court to find that the parties agreed to give the Claimants a beneficial interest in the property after it was acquired. For example, Ms. Shorey did not assist with mortgage payments for three years after a falling out with the Defendant. Would a beneficial owner so casually jeopardise the family and holiday home? I think not.

[87] The Defendant testified that the First Claimant asked her to put Elmo's name on the Conveyance. The Defendant refused. However, the Court accepts that Ms. Shorey was aware that the Defendant made wills in 2003 and 2007 respectively. The 2003 will is dated 22 August, 2003, and it gives a life interest in the property to Elmo, and to the Defendant's two brothers, and to her son, mother and niece, as joint tenants. In this will the Defendant did not treat the Claimants as co-owners of the property. In fact, the Third Claimant was not mentioned in this will.

[88] The second will was prepared in 2007 by Michael Yearwood, attorney-at-law. The document presented to the Court is signed by the Defendant but does not bear the signatures of two witnesses. It purports to revoke all previous wills, but its validity is uncertain. Mr.

Yearwood confirmed that he prepared this will. In this will the Defendant gave the property to her son and her two great nieces in equal shares. Her evidence is that after seeing this will, the First Claimant said that it should be redrafted because the name of one of the great nieces was spelt incorrectly. The First Claimant was aware in 2007 that all three persons, who now claim to have a beneficial interest in the property, were excluded from this second will. There is no evidence that Elsie Shorey objected to the Defendant treating the property as her own in either of these wills.

[89] Even the oral evidence given by the First Claimant suggests that she did not consider herself to be a part owner of the property. During cross examination by counsel for the Defendant, Ms. Shorey was asked about the rental of the property. She responded that:

“The original intention was to rent it out. I know that. No one never told the Defendant don’t rent out *her* flat.”

The Court considers this to be a curious response from the First Claimant, akin to an admission by her that the legal and beneficial interest in the property belonged to the Defendant.

[90] While the legal title to the property continued to be vested in the Defendant over the years, there is no evidence that she ever

represented to third parties that other persons were entitled to share in the beneficial interest. Likewise, there is no evidence that the Claimants ever represented to third parties that they had a beneficial interest in the property. It was never alleged that Hallam Fields, who negotiated the purchase of the property, was made aware that the Claimants had an interest in the property. He was introduced to the Second Claimant as the Defendant's boyfriend. The Claimants were also aware that Fields was responsible for the property between 1984 and 1992.

[91] James Griffith, a friend of the Second Claimant, replaced Hallam Fields in 1992. Griffith was engaged by virtue of a letter sent to him by Tyrone Estwick, attorney-at law, on behalf of the Defendant. This letter is dated 09 September, 1992, and it permitted Griffith to live at the property until it was rented, on condition that he maintained the property. The property is described in this letter as the Defendant's home ("her home"). Griffith was also supposed to collect the rent and deposit it towards the mortgage. There is no evidence that Griffith was made aware, by any of the parties, that the Claimants had a stake in the property.

[92] Philip King took over from James Griffith. In her oral evidence the Second Claimant said that she took a letter, about the insurance for the property, from the Defendant to King. The Second Claimant never alleged that she told King that the Claimants had an interest in the house even though she admitted a relationship with King. King was also given a letter of authorisation by the Defendant to manage the property. He too was supposed to collect rents and pay the mortgage. Documents produced to the Court show that King made deposits to the Defendant's account. His letter of authorisation is mentioned as document No. 14 in the Defendant's list of documents filed on 14 April 2010, but it was not entered as an Exhibit in this case.

[93] The Defendant also gave Elmo Lewis a letter of authorisation dated 20 May, 1996. That letter states in part:

“... I am the owner of “Tree Tops”, located at Thorpes Gardens, St. James, Barbados West Indies. This letter is to [the Second Claimant] giving her the authority to act on my behalf concerning any and all matters legal or otherwise pertaining to my property “Tree Tops”.

By this letter Elmo Lewis was appointed as the Defendant's agent.

She was not described in the letter as a part owner of the property.

[94] Elmo's evidence is that she was concerned that only the Defendant's name was on the documents for the property. But she never took the

opportunity between 1984 when the property was purchased, and 2009 when this action was filed, to speak directly to the Defendant about her concerns. She only told her mother. 25 years of silence between herself and the Defendant on this issue, and some of this time spent as an agent for the Defendant. There is no evidence from her that she told third parties, with whom she interfaced on behalf of the Defendant, that she was a part owner of the property or that it belonged to her family.

[95] The evidence of the Claimants in this case does not satisfy the Court, on a balance of probabilities, that there was a common intention, either before or after the purchase of the property, to give them a beneficial interest therein. There is a compelling body of evidence that suggests otherwise. In addition, Ms. Shorey's request for access to the property for six to eight weeks of the year, cannot be interpreted as a request by her for a beneficial interest in the property. The Defendant considered Ms. Shorey's financial assistance as a loan to be repaid. And so she suggested repayment by way of the rental income from two of the apartments. In the absence of a common intention constructive trust, the Court must decide whether the

Claimants have an equitable interest in the property, based on proprietary estoppel.

Proprietary Estoppel

[96] An interest may be acquired in property where an equity arises through a proprietary estoppel. Three main elements should be identified by a person claiming a proprietary estoppel; these are:

“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).”.

(See **Thorner v. Major** [2009] 1 WLR 776, [29]; “**Snell’s Equity**”, 32nd ed. at para. 12-017).

[97] In the recent Court of Appeal decision of **Ward v. Walsh et al** (Civ. App. No. 20 of 2005; unreported decision of 28 November, 2012), Burgess JA., speaking for the Court stated that:

“The fundamental concern of the doctrine of proprietary estoppel is the promotion of conscientious dealings in relation to land.”. (Para. [73]).

Referring to the dicta of Lord Denning MR in **Crabb v Arun District Council** ([1976] 1 Ch 179 at 187), Burgess JA opined that the Master of the Rolls exposed:

“... two critical facets of the proprietary estoppel doctrine. The first is that the doctrine is predicated on the assumption that legal rights cannot be enforced in

total isolation from the relational context in which relevant dealings have taken place. The second is that the courts have a residual jurisdiction to scrutinize the dealings between parties and to restrain particular assertions of strict legal rights on grounds of conscience. In fact, as the doctrine has evolved, it is now often treated as having the effect of creating rights of equity founded upon estoppel.” (Para. [74]).

[98] Burgess JA. also observed that there are essential requirements that must be pleaded if a claim for proprietary estoppel is to be successful. (See para. [77] of judgment). In Ward, the pleadings did not satisfy the requirements, because neither the proprietary interest claimed, nor the facts that the appellant was estopped from denying, were pleaded. But, notwithstanding these deficiencies, the Court of Appeal went on to consider whether the ingredients to buttress a proprietary estoppel were present.

[99] A perusal of the pleadings in this case, reveals that they are similarly defective. However, following the precedent set by the Court of Appeal, this Court will conduct a similar inquiry. The first inquiry is what was the representation or assurance made to the Claimants by the Defendant? When the Defendant informed the Claimants about her purchase of the property, she intimated to them that the property was big enough to accommodate the whole family, if they were ever in Barbados for a vacation. This cannot be construed as an assurance

or representation by the Defendant that the Claimants would receive a beneficial interest in the property. Neither can it be construed as a commitment by the Defendant to provide the Claimants with six to eight weeks of accommodation every year.

[100] It was not until 1993 that Ms. Shorey began to visit Barbados annually. Her average stay at the property was about six weeks. This coincided with her regular contributions to the mortgage from around 1994. Ms. Shorey's evidence is that Erlene Lewis starting visiting Barbados every year from about 1994, However, Elmo Lewis contradicted this evidence. She told the Court that Erlene started coming to Barbados "since three years ago"; that is since 2008. Erlene was not a regular visitor to Barbados because of her fear of flying.

[101] According to Ms. Shorey, Elmo only came to Barbados when she was sent. Elmo said that she visited Barbados about six times prior to 1999, and sometimes three times in one year. With the possible exception of Elmo, the Claimants did not visit Barbados regularly between 1984 and 1993/1994. And it appears that some of Elmo's visits were to pursue her personal interests.

[102] So that even if the Defendant could be said to have made a representation or assurance to the Claimants in 1984, the Claimants did not make annual trips to Barbados, in reliance on that representation or assurance, until about ten years after. Additionally, when the regular visits began, only Ms. Shorey has proven any expenditure in relation to the property, by way of two payments for mortgage arrears. There is no persuasive evidence of detriment, on the part of Elmo or Erlene, during those years.

[103] This Court found that prior to 1995, Ms. Shorey paid off some of the arrears on the mortgage. (See para. [82] of this judgment, supra). And it was at that time that the Defendant suggested that in return for her mother's financial assistance, Ms. Shorey should rent two of the apartments, and use the rental income to repay herself. Ms. Shorey declined the rental income, and instead requested accommodation for six to eight weeks of the year. Did this conversation, which this Court believes occurred, give rise to a proprietary estoppel in favour of Ms. Shorey or the other Claimants?

[104] After Ms. Shorey's counter proposal, the Defendant continued to insist on the rental of both three bedroom apartments.

“I said my sister could stay in the guest section two bedroom flat, and rent out the other section. It could be

on a temporary basis. I suggested to her that she could contact the Cave Hill Campus to rent rooms out to students, or she could contact an agency and have them rent it to people who visited the island for two or three weeks. That was not done.”.

[105] When the Court examined this conversation, and the circumstances existing when the proposal and counter proposal were made, it is not readily apparent that the Defendant made any representation or assurance to Ms. Shorey. It is not certain that Ms. Shorey’s counter proposal was accepted by the Defendant. And the Defendant’s response suggests, at best, a conditional acceptance of the counter offer. In other words, Ms. Shorey could have her six to eight weeks, if she agreed to the short term but ongoing rental of the two larger apartments when she and the family were not vacationing in them.

[106] The Court of Appeal in **Ward** spoke to these issues. Burgess JA emphasised that:

“The need for the promise or representation creating the expectation to be a promise or representation which leaves no doubt as to the inevitability or certainty of an interest, be it existing or future, in land has been consistently asserted by courts of equity.”. (Para. [84])

The learned Justice of Appeal also referred to Lord Templeman’s remarks in **Attorney-General of Hong Kong v. Humphrey’s Estate** ([1987] A.C. 111) to the effect that:

“ ... It is not sufficient for an individual to believe that he will obtain an interest over another’s property if he is also aware that the other person may change his mind or that the proposed agreement under which the interest would arise is dependent on contingencies.”. (Para. [85]).

[107] Counsel for the Claimant in his written submissions filed on 10 January, 2013, quoted Sir Nicholas Browne-Wilkinson in Grant v. Edwards ([1986] Ch. 638 at 657), as stating that:

“[i]f proprietary estoppel is established, the court gives effect to it by giving effect to the common intention so far as may fairly be done between the parties.”. (See para. [61] of submissions).

But there is no evidence of a representation or assurance by the Defendant to any of the Claimants that would support a common intention to give them, either jointly or severally, a beneficial or other equitable interest in the property.

[108] Ms. Shorey’s request, to spend six to eight weeks annually at the property, was made sometime in the late 1980s to the early 1990s. It coincided with her two payments totalling \$39,000 towards the mortgage arrears. Thereafter, all future contributions were made towards mortgage payments, property expenses, Elmo’s rent, and payments in lieu of lost rental income. Assuming a representation or

assurance by the Defendant, and a corresponding reliance by Ms. Shorey, did she suffer any detriment as a consequence?

[109] Her expenditure over the years is estimated at approximately \$75,000, excluding payments for land tax and other bills. She derived the benefit of approximately six weeks annual vacations at the property from 1993 to 2009, approximately 16 years. While on vacation she and her family occupied the two three bedroom apartments. The evidence is that in the early years the larger apartment was rented at \$800 per month. A conservative estimate is that the rental value of two three bedroom apartments for a six week vacation was about \$2400. And for 16 years this estimated value is \$38,400. It appears, therefore, that her expenditure far exceeded the value of her vacation time.

[110] The Court is also minded to factor in the cost incurred by the Defendant when the apartments were not rented outside of the family vacation time. Part of the problem was the refusal by Ms. Shorey and Elmo Lewis to cooperate with the Defendant. The Defendant continued to insist on the rental of the apartments with a dogged determination. In 2003 she again suggested to her mother that after the family left the two apartments should be rented. Elmo, who

continued to live at the property, refused to arrange the rentals. In fact, when the family left Elmo moved out of the two bedroom flat into the refurbished three bedroom apartment.

[111] The Defendant suggested the rental of the apartments to her mother on several occasions. Her mother's response was never encouraging.

“She would get irate and go into a rage and ask why the house can't be available for us when we come down. I explained to her that it was a large house with three sections, and why was it so difficult to have a section rented out. She would always ask why can't they have six weeks out of the year.”

The apartments were not rented between 2003 and 2008, and out of frustration the Defendant came to Barbados in 2009 to arrange the rentals on her own. The tensions between the parties escalated in that same year, with the filing of this action by the Claimants.

[112] The Court also considered the additional cost to the Defendant by the refusal of Elmo Lewis to pay any rent to the Defendant between 1999 and 2009, approximately ten years. The Court did find that Ms. Shorey sent money to the Defendant in the USA, over \$25,000. US dollars, to cover Elmo's rent and the loss of rental income. But without the appropriate valuation evidence, the Court is unable to find that Ms. Shorey's expenditure resulted in detriment to her, or the true extent of that detriment. In relation to Elmo Lewis, there was no

perceivable detriment with her rent free accommodation and maintenance by her mother. With respect to Erlene Lewis, her repair of the flat was accepted by the Defendant, but the amount of the expenditure was not valued or otherwise substantiated. In any event, the Court holds that Erlene's expenditure is not referable to any representation or assurance made to her by the Defendant. The Claimants have not satisfied the Court that a proprietary estoppel exists in their favour against the Defendant's property.

An Alternative Remedy

[113] There was no common intention to give the Claimants a beneficial interest in the property "Tree Tops", at Thorpes Gardens, Holders Hill, St. James. Therefore, the Court is unable to grant the declarations sought at paragraphs 7(1), (2) and (3) of the Statement of Claim. The Court was also invited to find that the Claimants have an equitable interest in the property arising out of a proprietary estoppel, but the Court is unable so to do.

[114] The Claimants prayed for further or other unspecified relief. They made no specific claim for restitution based on the doctrine of unjust enrichment. Faced with a similar situation in the ***Ward*** case, supra, the Court of Appeal held that one of the parties should be reimbursed

for any benefits that his expenditures and labours conferred on another party. (See para. [162] of judgment). The evidence accepted by the Court in this case, is that the First and Third Claimants, through their financial contributions, may have substantially enhanced the value of the property. In 2012, the estimated value of the property was between \$789,000 and \$1.8 million, bearing in mind that in 1984 the purchase price was \$180,000. The Defendant stated in her pleadings and in her oral evidence, that she is willing to reimburse the First Claimant for her expenditure. The Third Claimant should also be reimbursed. However, in relation to both of them, the value they received from rent free accommodation at the property should be discounted.

Disposition

[115] The Court grants the following orders:-

- (1) That there be an inquiry into:
 - (a) the financial contributions of the First and Third Claimants to the acquisition and or conservation of the property;
 - (b) the financial contributions of the First Claimant to the bills and other expenses associated with the property;

- (c) the value of the lost rentals for the property between 1995 and 2009; and
 - (d) the value of the benefit of accommodation at the property by each Claimant between 1995 and 2009.
- (2) A declaration that the Second Claimant occupies the property as a bare licensee thereof.
- (3) That there be another valuation of the property by a valuer to be agreed between the parties. If there is no agreement within a reasonable time, the Court will identify a valuer. The costs of the valuation will be borne between the Claimants and the Defendant equally.

[116] The parties are to file and exchange written submissions with respect to costs within 14 days.

SONIA RICHARDS
Judge of the High Court