

IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D 2011

CLAIM NO. SKBHCV 2009/0087

BETWEEN:

JULIETTE HANLEY
(As Executrix of the Estate of Austin Shoy) *Claimant*

And

BERNADETTE CHARLES *Defendant*

Appearances:

Ms Marsha T. Henderson of Henderson Legal Chambers *for the Claimant*

Mr Jason Hamilton of Hamilton & Company *for the Defendant*

2010: April 6th
2011: September 30th

JUDGMENT

- [1] **THOMAS J:** By fixed date claim filed on 24th April 2009 the Claimant, Juliette Hanley, Trustee for Corey Hanley of #105 St Thomas USVI makes certain claim against Bernadette Charles of The Alley, Sandy Point, St Kitts.
- [2] On even date the Claimant filed an affidavit in support in which she identifies herself as the sole executrix of the Estate of Austin Shoy. And at paragraph 2 of the said affidavit it is deposed as follows:
- “That my said father Austin Shoy (deceased of Sandy Point, St Kitts by virtue of Certificate of Title dated 25th September, 1972 registered in Book UI Folio 150 of the Register of Titles of the Island of Saint Christopher became seized in fee simple of all that lot or parcel of land hereditaments and premises situate at The Alley, Sandy Point and more particularly described in the said Certificate of Title.”
- [3] At paragraphs 3 to 5 matters such as the date of the death of Austin Shoy, execution of his last Will, and the appointment of herself as Sole Executrix, the grant of probate and the fact that she is the mother and Trustee of Corey Hanley who is named as beneficiary to premises situate at The Alley, Sandy Point in the Will of the said deceased.

- [4] The issue of the occupation of the property by the Defendant is alleged at paragraph 6 and it is deposed further that the said Defendant has neglected and/or refused to deliver up possession.
- [5] In the premises the Claimant seeks following reliefs:
1. A permanent injunction restraining the Defendant servants or agents or otherwise from trespassing on the said property
 2. Possession of the said land
 3. Damages
 4. Costs
 5. Such further or other relief as the Court deems just.

Affidavit of Defence

- [6] In her affidavit of defence the Defendant admits paragraphs 1, 2 and 4 of the Claimant's affidavit in support. As regards paragraph 3 of the said affidavit the Defendant deposes that she is not aware of the circumstances giving rise to the execution of the Will of the said Austin Shoy.
- [7] Paragraph 6 of the said affidavit is admitted but the Defendant contends that notice to quit and deliver up possession must be personally served and that the Defendant's Solicitors were never authorized to accept service on his behalf in any such or similar circumstances.
- [8] With respect to paragraph 7 of the said affidavit in support, the Defendant neither admits or denies same but contends that she has been in quiet and undisturbed possession of the said premises having been put into same by her father the said Austin Shoy in or about 1973.
- [9] At paragraph 8 of her affidavit the Defendant pleads proprietary estoppel and denies that she is a trespasser due to her proprietary interest in the property.

Affidavit in Support of Counterclaim

- [10] Bernadette Charles on 12th November 2009 filed an affidavit in support of her counterclaim.
- [11] The affiant at paragraphs 1 and 2 of her affidavit outlines the circumstances of the subject property. It is her contention that she was put into possession of the subject property after Austin Shoy migrated from the Federation in or about 1964. It is the affiant's further contention that between 1972 "and now" she has been solely responsible for the payment of all land and house taxes and other payments in relation to the said property, including cosmetic and aesthetic repairs to a value of approximately \$70,000.00 and maintenance repairs to a value of \$65,000.00
- [12] At paragraphs 9 and 10 in her said affidavit of counterclaim the following is deposed:
- "9. Between the period 1972 to present I have effected structural repairs to the said property to the value of \$100,000 which includes but not limited to repair and replacement of entire roof on two occasions, after the

passage of hurricanes, replacement [of] kitchen cupboards and cabinets damaged as a result of said hurricanes and extension and addition of storage facilities to existing structures.

10. The Claimant has expanded the sums as aforesaid to her peril and detriment based on the indication of the deceased Austin Shoy and as such is entitled to a proprietary interest in the said property."

[13] In the premises the following reliefs are claimed:

1. A declaration as to the Claimant's interest in the said property.
2. A quantification of the Claimant's interest in the said property interest.
3. An order that the Defendant pay to the Claimant such sums as the Court determines the Claimant is entitled to as a result of her interest in the property.
4. Costs.
5. Any other relief the Court deems just.

Affidavit in response to affidavits of defence and in support of counterclaim

- [14] Juliette Hanley in her affidavit in response to affidavits of defence and in support of counterclaim deposes that she is the Claimant and makes the affidavit in response to the affidavits filed by the Defendant on 12th November 2009.
- [15] Ms Hanley, in response to paragraph 3 of the affidavit deposes that there was no challenge to the Application for the grant of probate granted out of the Eastern Caribbean Supreme Court on 19th January 2008.
- [16] As far as the matter of service on the Defendant's attorney, the Claimant admits that this was done but contends that the notice was not brought to the attention of the Defendant.
- [17] With respect to possession of the subject property, it is the Claimants contention that the Defendant and her other siblings were put in possession of the said property by their father.
- [18] At paragraph 5 of her affidavit the Claimant admits paragraphs 1 and 2 of the Defendant's affidavit in support of counterclaim and at paragraph 3 the circumstances of the acquisition of the property and construction of a building thereon are outlined.
- [19] Paragraphs 4 to 9 of the Defendant's affidavit are denied by the Claimant and that the Defendant is put to strict proof.
- [20] Finally, at paragraph 11 the following is deposed by the Claimant:

"That in response to paragraph 10 of the Defendant's affidavit I refute the Claim that the Defendant has any proprietary interest in the subject property of the claim, and respectfully request that the Counterclaim of the Defendant is denied."

The Evidence**Juliette Hanley**

- [21] In her witness statement Juliette Hanley say that she is the daughter of Austin Shoy (deceased) and that the Defendant is her biological sister.
- [22] It is Ms Hanley's evidence that her late father owned the subject property and upon his death she was granted probate whereupon she became trustee of premises situate at The Alley, Sandy Point which is more particularly described in the Certificate of Title.
- [23] At paragraphs 6 and 7 of her said witness statement Ms Hanley deals with the construction of a building on the said property and the fact that upon completion "the deceased put into possession his sister (deceased) and subsequently some of my other siblings and children of the deceased, Paulette, Iona Charles, Carol Charles and Ermine Charles." She also says that at some point in time the Defendant was the only person in possession and that up until the present, the Defendant continues to occupy the said premises. She goes on to mention efforts made to have the Defendant deliver up possession.
- [24] At paragraphs 10 to 14 the witness details the events relating to the payment of bills in relation to the property and its maintenance and contends that to her knowledge no major repairs were done to the said property.
- [25] In commenting on the evidence of Bernadette Charles regarding modifications to the building, Ms Hanley said that the house is the same structure and that she was not quite clear of the modification. She went on to say that she is aware of minor modifications, and the fact that the windows were changed by her father when he came home in 2004.
- [26] In cross-examination Ms Hanley testified that her father lived with her and that she was aware that he sent money to St. Kitts. According to her, her sister did not conduct her father business in St Kitts, and was not on the accounts. Ms Hanley added that her father did not entrust the Defendant with his money.
- [27] As regards the persons who lived in the property, Ms Hanley said that the Defendant was not the only person who lived in it. And it was put to her that no other person lived there for more that one and a half years. This was doubted by the witness. She went on to say that she stayed at the house on a temporary basis as she was always going and coming. Ms Hanley also disagreed that between 1975-1976 the person in possession was the Defendant.
- [28] Concerning her father's visit to St Kitts, Ms Hanley testified that he was a frequent visitor even after he lost both legs, but she was not aware of the nature of the business he came to conduct.

Bernadette Charles

- [29] In her witness statement Ms Bernadette Charles says that she is the daughter of the late Austin Shoy and that the Claimant is her sister. It is her further evidence that the subject building was built in or about 1968-1969 and after completion her father permitted her paternal aunt to reside on the said premises until her death. Further,

that the building was left vacant until about 1971-1972. And further still that another sister occupied the premises around 1975-1976 at which time the said sister migrated and the Defendant became the sole occupant along with her one year old son.

- [30] At paragraphs 5 to 27 the witness details her involvement with the property in terms of the payment for repairs, payment of taxes, modifications done by her, replacement of door, cupboards, tiles and pipes, repairs to the roof after the passage of hurricanes in 1989 and 1996 and the building of a septic tank. The witness also details the various costs involved.
- [31] In the final paragraph the evidence is this: "At no time did I receive a notice to quit and deliver up possession of the premises in question, nor did I authorize anyone including my Solicitor to accept service of any such notice on my behalf."
- [32] In cross-examination Ms Charles testified that she lived in the subject house for 36 years and never paid rent to her father and was not aware if the property was mortgaged. In further testimony the witness said that she paid the taxes and utilities from her own money and denied that the money for these purposes were supplied by her father. However, in view of paragraph 9 of her witness statement the witness then testified that her father stopped sending money around 1988. At the same time the witness went on to reject the suggestion that she was not being honest.

Kirth Charles

- [33] In his witness statement Kirth Charles says that Bernadette Charles is his mother and the Claimant is his aunt.
- [34] With respect to the subject property, Mr Charles says he lived there between the period 1974 to 2005 and that during that time other members of the family have intermittently lived at the house, but none stayed for more than two years.
- [35] It is the evidence of the witness that over the years, workmen were engaged by his mother to do work on the house and he would assist them. He also gives evidence of persons he hired to do work on the property, including the maintenance of the said property, replacement of the roof, replacement of pipes, installation of new tiles in the bathroom, replacement of windows in the living and dining room area of the house, construction of a septic tank, rebuilding of the cabinets, cupboards and clothes closets. In this regard it is the witness' contention that as far as he is aware "all the repairs mentioned above were paid for from funds provided by either my mother or I and no one else."
- [36] In cross-examination Mr Charles testified concerning the replacement of the pipes. He gave details as to what was done by Anthony Jeffers to the walls and the removal of the toilet. He went on to say that Mr Jeffers was paid by his mother, but he was not sure if she had a receipt. Mr Charles also rejected learned counsel's suggestion that he was not being truthful.
- [37] In further cross-examination Mr Charles testified that he was aware that his grandfather sent money to pay the taxes, but the utilities were always paid by his mother as she always worked.

- [38] In terms of his employment Mr Weeks testified that he worked from \$305.00 per week at Horsfords during 1993-1997. He also said that he buys and sells cars and also buys crashed cars.

Jason Warner

- [39] Jason Warner in his witness statement filed on 31st May, 2010 that he is the carpenter by trade and that he knows Kirth Charles who engaged him to effect repairs to a property located at The Alley, Sandy Point. He says that this was shortly after the passage of Hurricane Luis.
- [40] It is Mr Warner's evidence that based on his assessment of the roof he formed the opinion that the entire roof needed to be replaced and provided an estimated material list and labour costs. According to Mr Warner the task took him two weeks to complete with the help from a labourer and with assistance from Mr Charles. It is Mr Warner's evidence that he charged Mr Charles \$25,000.00 for the job and it was duly paid.
- [41] Mr Warner also gives evidence concerning work done for Mr Charles on the kitchen cupboards and cabinets at the said residence and for which he charged \$5000.00. He also said that the materials for the job were provided by Mr Charles.

ISSUE

- [42] The issue for determination is:

Whether the Claimant is entitled to possession of land, situate at The Alley, Sandy Point, registered in Book U1 Folio 150 of the Registrar of Title of Saint Christopher, in light of the Defendant's counterclaim for an interest in the said property?

Whether the Claimant is entitled to possession?

- [43] The Claimant rests her entitlement to possession of the property on a number of facts and circumstances. They are that the Claimant is the daughter of the late Austin Shoy and sole executrix of the Estate of Austin Shoy, deceased; the late Austin Shoy owned the said property and died testate on 10th December 2006; prior to his death the late Austin Shoy executed his last Will and Testament on 5th January, 1999 appointing the said Claimant as Sole Executrix of his Will; probate was granted out of the Eastern Caribbean Supreme Court to her on 19th January 2008; the said Claimant is the mother and Trustee of Corey Hanley named in the Will as beneficiary to premises situate at The Alley Sandy Point; the Claimant on 1st October, 2008 caused a letter to be written to the Defendant demanding that she deliver up possession of the property on or before 30th November 2008.
- [44] For her part the Defendant in her Defence pleads that she has been in quiet and undisturbed possession of the premises having been put in the same by her father, the late Austin Shoy in 1973. The basic proposition is repeated in the affidavit in support of counterclaim except the year mentioned is 1972. And in cross-examination the Defendant testified that she has lived on the subject property for 36 years and never paid rent to her father.

- [45] The Defendant also contends that she spent large sums of money to repair the property because of certain indications given to her by her father.
- [46] Although the Defendant in her defence pleads that she is now aware of the circumstances giving rise to the execution of the Will of Austin Shoy, yet there is no challenge to the said Will of which this Court has been made aware. Beyond that the Claimant in her pleadings and in her witness statement says that she was granted probate of the said Will whereupon she became executrix of the Estate of Austin Shoy, deceased and trustee of her son, the beneficiary named in the Will.
- [47] *Prima facie*, therefore, the Claimant is entitled to possession of the property but this is subject to the conclusions reached with respect to the issues of proprietary estoppel and constructive trust arising on the counterclaim.

Is proprietary estoppel pleaded?

- [48] In the case of *Carlton Smith and Esther Oakley*, Madam Justice Hariprashad-Charles perused the law on pleadings in this regard and in doing so examined a number of leading authorities including: Bullen & Leake & Jacobs Precedents of Pleadings¹, *McPhilemy v Times Newspapers Ltd*² and *East Caribbean Flour Mills Ltd v Ormiston Ken Boyea*³ and came to the following conclusion in the context of CPR 2000:

“So pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties.”

- [49] The Court considers that in particular the following pleading in the counterclaim raises the issues of proprietary estoppel or constructive trust:

“This Claimant has expended the sums as foresaid to her peril and detriment based on the indication of the deceased Austin Shoy and as such is entitled to a proprietary interest in the said property.”

- [50] In addition the Claimant, Ms Bernadette Charles, in her witness statement gives evidence as to what money she spent on the property over the years.
- [51] The next question is whether on the law and the evidence proprietary estoppel is established.

Proprietary estoppel

- [52] The respective positions taken by the Claimant and Defendant/Counterclaimant have given rise to a consideration of the applicability of proprietary estoppels.

¹ 13th ed. P11 48

² [1999] 3 All ER 775, 792-793 per Lord Woolf MR

³ Civil Appeal No. 12 of 2006 (SVG), judgment delivered on 16, July 2007.

- [53] The doctrine of proprietary estoppel grew out of the doctrine of encouragement and acquiescence as enunciated by Kingsdown in *Ramsden v Dyson*. The position is to be found in *Elements of Land Law*⁴ at paragraphs 9.2.7 to 9.2.8:

“The Law of proprietary estoppel operates where the owner of an estate in land has expressly or impliedly given some informal assurance respecting present or future rights on that land. The doctrine of estoppel restrains that person from any unconscientious withdrawal of his representation if the person to whom it was made has meanwhile relied upon it to her own disadvantage. The primary inquiry for the court is whether it is conscionable for the representer to deny that which he has allowed or encouraged the representee to assume to his detriment. In this way estoppel doctrine finds its ultimate purpose in enabling the courts to do justice.

A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements: representation (or assurance of rights) reliance (or a change of position) and unconscionable disadvantage (or detriment)”

The representation

- [54] The matter of proprietary estoppel or estoppel by acquiescence must necessarily rest on a statement or conduct by one party in relation to another and where property rights are involved.
- [55] It is appropriate to begin with a dictum of Lord Denning in *Moorgate Mercantile Co Ltd v Twitching*⁵

“Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this. When a man, by his words or conduct, has led another to believe in particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. *Dixon J [in Grundt v Greater Boulder Pty Gold mines Ltd (1937) 59 CLR 641 at 674]* put it in these words: ‘The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another to adopt or accept for the purpose of their legal relations.’”

- [56] In the context of proprietary estoppel in *Thorner v Major & Ors* it was held that: “A statement had to be clear and unequivocal, but what amounts to sufficient is hugely dependent on context.”
- [57] There are two sets of submissions by learned counsel which are converged in this context. The submissions are as follows:

⁴ 5th ed. 2009

⁵ [1975] 3 All ER 314

(2) Mistaken belief

Carlton Smith and Rosa Smith v. Esther Oakley expounds that "...the expenditure or detriment must have taken place in the belief either that the claimant owned a sufficient interest in the property to justify the expenditure, or that he would obtain such an interest (mistaken belief). In incurring the expenditure or altering his position for the worse, the claimant should have been laboring under the delusion that he owned or that he would obtain sufficient interest in the subject matter of the litigation to justify the expenditure on the property."

The evidence in this matter is that the Defendant did maintenance, upkeep, repairs and replacement to the property on the expectation and belief that the property was hers or alternatively that the property would eventually become hers after the death of her father. In either scenario the Defendant conducted herself on the basis of that belief under the impression that given the significant expenditure that she put into the property would ultimately become hers and so conducted her affairs towards the said property.

(3) Element of assurance

Carlton Smith and Rosa Smith v. Esther also deals with this aspect of the criteria and points out that "...the third element is the belief or delusion of the claimant must have been induced and sustained by the owner. In other words, there should be some form of encouragement. Where the claimant fails to establish either by language, or conduct, or silence and inaction he was encouraged, or his activities were acquiesced in by the owner, he would not succeed. There should either be active or passive encouragement."

The Defendant contends that her actions, her conduct and her activities regarding the property, were based on certain intimations given to her by her father. This evidence is repeated by Mr. Kirth Charles who corroborates these intimations and indicates that he himself operated regarding the property based on these intimations.

The Claimant gave no evidence to dispute these intimations as alleged by the Claimant and her witness nor did the Claimant and her waiver under cross examination with respect to this point.

Although there is no direct evidence to the precise nature of the intimation, particularly since the person who gave the assurance is now deceased, a good barometer for the Court to determine the veracity of the Defendant's assertion in this regard is to analyze the actions, conduct and activities of the Defendant to determine if those actions, conduct and activities to reconcile same with the alleged intimations of the deceased to determine consistency with the actions of a reasonable person having been given similar intimations.

Analysis

- [58] In the context of proprietary estoppel it must be common ground that some representation by word or conduct is mandatory. Learned counsel's submissions would seem to ignore the legal proposition that whatever the Defendant did must satisfy the relevant legal requirements. For instance any mistaken belief must rest on something the deceased did or said which is admissible into evidence.
- [59] The simple point is that there is no evidence of any conduct by the deceased Austin Shoy which can qualify as a representation. More to the point certain statements allegedly made by the deceased, was contained in the Defendant's witness statement but which upon application by the claimant was struck out by order of the Court on the date of the trial.
- [60] Apart from the foregoing, there are a number of pieces of evidence which in the view of the Court do impact on the issue of the conduct of the deceased: the late Austin Shoy executed a will on 1999 which was probated on 19th January 2008, the deceased supplied the money to pay the land and house taxes over the years which was admitted by the Defendant under cross-examination; the deceased lost one leg in 1987 and the other in 1999 and ever after that he still came to St. Kitts and was taken around by Kirth Charles, the Defendant's son.
- [61] None of the foregoing issues can reasonably be said to give rise to an express or implied representation or assurance on the part of the deceased.

Detriment

Submissions

- [62] Learned counsel for the Defendant/counterclaim makes the following submissions with respect to the element of detriment.

"On the authority of *Greasley v. Cooke* [1980] 1 W.L.R. 1303 which was cited and applied in the authority of *Carlton Smith and Rosa Smith v. Esther Oakley* Dunn L.J. said "There is no doubt that for proprietary estoppel to arise the person claiming it must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment."

Both authorities support the contention that "expenditure and detriment can take any form. It does not have to take the form of expenditure of money or other quantifiable financial loss, provided that it is substantial and was incurred or suffered on the faith of the representation."

In the witness statement of the Defendant evidence was given regarding acts undertaken in respect of the property that were to the Defendant's detriment. These acts include but are not limited to:-

- a) Repainting of property on multiple occasions;
- b) Plumbing repairs including replacement of fixtures and fittings;
- c) Replacement of the exterior and interior doors of the premises;
- d) Replacement of vinyl tiles throughout premises and multiple occasions

- e) Acquisition of ceramic tiles for installation;
- f) Repair and replacement of roof on multiple occasions;
- g) Repair and replacement of the kitchen cupboards and cabinets;
- h) Replacement of septic tank;
- i) Repair and replacement of windows throughout the premises;
- j) Erection of shed at premises;
- k) Maintenance and upkeep of yard of premises;
- l) Fencing of premises;

From the evidence adduced even given the discrepancies adduced under cross examination there is no question that the Defendant would have acted to her prejudice and detriment and incurred expenditure in effecting repairs maintenance and upkeep to enhance and improve the property and to otherwise keep the property in a general state of repair.

Contrary to the assertion of the Claimant it is almost improbable to think that the fixtures and fittings initially installed on the premises over thirty five (35) years ago are the same fixtures and fittings that exist in the premises today. Given that fact it is more plausible on the Defendants version of events that substantial and substantive funds were expended by her to maintain upkeep and improve the property in question.

From the evidence in its totality the Court should have no difficulty determining that the Claimant would have satisfied the first requirement of the criteria.”

Analysis

[63] In her affidavit in support of counterclaim the Defendant/counterclaim deposes as follows:

- “7. Between the period 1972 to present I have effected cosmetic and esthetic repairs to the property to the value of approximately \$70,000.00 which includes but is not limited to landscaping and general up-keep such as painting.
- 8. Between the period 1972 to present I have effected maintenance repairs to the property to the value of approximately \$65,000.00 which includes but is not limited to replacement of entire plumbing and electrical infrastructure, replacement of all internal and external doors, replacement of all windows and maintenance of septic tank.
- 9. Between the period 1972 to present I have effected structural repairs to the said property to the value of \$100,000 which includes but not limited to repair and replacement of entire roof on two occasions after passage of hurricanes, replacement kitchen cupboards and cabinets damaged as a result of said hurricanes and extension and additional storage facilities to existing structures.

10. The Claimant has expended the sums as aforesaid to her peril and detriment based on the indication of the deceased Austin Shoy and as such is entitled to a proprietary interest."

- [64] Against the foregoing expenditure over the period 1972 to present the matter of the Defendant's income becomes a central. And so does that of her son who was one year old when they moved into the subject house.
- [65] In cross-examination Ms Bernadette Charles testified that she was laid off from her employment at a garment factory having worked there for 3 years. She said that prior to that she worked in a brassiere factory from 1978 to 1992.
- [66] Regarding her wages at both of these places of employment Ms Charles could not remember.
- [67] According to Ms Charles, her next place of employment was at the Port Authority from 9th December, 1999 to 23rd September, 2010. She made plain that she worked for \$1790.00 per month.
- [68] Mr Kirth Charles also said that he paid for work on the house. It was his evidence that he was employed at S.L.Horsford from 1993-1997 and his wage was \$305.00 per week [\$1220.00 gross per month]. It is her further evidence that he bought and sold cars and also fixed cars.
- [69] The commencement of work at Public Works is not clear from the evidence, but by implication it was after the cessation of work at Public Works. According to him: "I was making \$1900.00."
- [70] The Court has focused primarily on the matter of the income of mother and son given the level of expenditure claimed. In this regard the first point to be noted is that the evidence reveals that the house was completed somewhere between 1968 - 1969. So it is a new house and the question of repairs cannot reasonably arise for the first several years - fair wear and tear expected. An added factor is the level of occupancy over the years.
- [71] The Defendant cannot remember her wages at the garment factory or at the bra factory, but at the Port Authority it was \$1790.00 gross. Over much of this time living expenses would have been met by the Defendant alone until her son started to work at Horsfords in 1993.
- [72] Part of the expenditure which the Defendant identified relates to the repairs to the roof after two hurricanes. In her witness statement the Defendant said that after hurricane Hugo in 1989 the roof was severely damaged leaving large areas of the roof leaking. The evidence in a similar name is repeated with respect to Hurricane Louis in 1996. According to her on the first occasion labour and materials cost \$1000.00 and on the second occasion it was \$2100. What is surprising is that the late Austin Shoy is not mentioned in the equation. Indeed according to Kirth Charles, his grandson, he visited St Kitts frequently, even after he lost both legs.
- [73] All of the foregoing leads the Court to conclude that the matter of spending \$100,000 on the property is unsubstantiated, it is the view that on the income of the Defendant between 1978 and 1993 when her son began to earn income could not support the kind of expenditure claimed; the amounts stated in the counterclaim are

not substantiated in the witness statement of the Defendant; in one instance concerning the roof the Defendant testified that the roof cost \$30,000 for repairs, this is at variance with the figures of \$1000.00 and \$2100.00 stated in the witness statement; the figures mentioned by Kirth Charles in his witness statement while they amount to \$30,000 are in conflict with what the Defendant states in her witness statement in relation to repairs after the hurricane Louis, and the various amounts mentioned by the Defendant do not give a total even close to \$100,000.00-actually \$19,600.00. From this latter figure the amounts spent to do repairs after hurricane can only be attributed to an act of God.

- [74] In the final analysis the Defendant admitted that she did not pay rent to her father, and she treated the house as her home and as the Court comes to the conclusion that such circumstances whatever was spent by the Defendant cannot be said to have acted to her detriment; notwithstanding the fact that the fittings and fixtures were over 35 years old.

Constructive trust

- [75] As indicated earlier, the pleadings also give rise to the issue of constructive trust. On this account much of the evidence identified earlier will also be relevant in this context. The essence of the submission on behalf of the Claimant is as follows:

“We would ask [the Court] to find that there was no evidence to support the allegations made by the Defendant of a common intention. During the trial, leave was granted to the Claimant on an application made, to strike evidence of hearsay from the witness statement of the Defendant, at page 95 of the Bundle which purported to support the claim of a common intention. The Defendant sought to convince the Court that her father would have told her something to the effect of going towards a common intention. The Claimant has denied such, and this we submit is reinforced by the deceased Austin Shoy making his Last Will and Testament and leaving the said property to his grandson, as opposed to the Defendant.

We wish to proffer the case of **Lineth Webster v Carolyn** (Lawful attorney for Bernice Stapleton, Executrix of the estate of Percy Sylvester deceased) AXAHCV0100/2008 which we submit is instructive in this regard as it is similar to the case at Bar. In this case, the Court found that the Claimant had failed to meet the threshold to establish a common intention, and spoke at lengths on the issue.

Indeed ... the several letters admitted into evidence by the Claimant, which the Defendant under cross examination admitted to writing and sending to her deceased father, is proof that the Defendant was always cognizant of the fact that her father solely owned both the legal and beneficial interest in the property. Further, it is submitted that the said letters also proves that it was the father of the Defendant who sent monies for payment of the utility bills and not the Defendant herself as she alleges.

We would also ask the Court to find that the Defendant was at all material times not a witness of truth. It is the evidence of the Defendant that she has

been occupying the property for some 36 years. That during this time, she worked at the Brassiere Factory, also as a Postmistress for about 3 weeks in September 1996 and then at the Port Authority for 11 years during the period 9th December 1999 – 23rd September 2010. The defendant does not recall the salary made at the two jobs firstly mentioned, but recalls that at the Port Authority she earned a monthly salary of EC\$1790.05. The Defendant would want this Court to believe that she made major repairs to the roof on the house, on 2 separate occasions, replacement of the cupboards, changing of several windows to the house, installation of a septic tank, tiling of the entire house and major plumbing to certain areas of the house. It is also the evidence of the Defendant that the total work done on the property is in approximate sum of EC\$100,000.00 but has failed to provide the Court with any receipts to support this claim.

- [76] The matter of constructive trust is well traversed ground resting in our case on the celebrated case of *Abbott v Abbott*⁶ in which Baroness Hale reviewed the law having regard to our outdated statutory context. There is therefore no need to review the law again except to state the basic principles. In this regard the Court relies on a concise statement of the governing principles by Madam Justice Louise Blenman in the case of *Lineth Webster v. Carolyn Gumbs* said this:

“A beneficial interest arising from a constructive trust arises pursuant to a common intention between the parties, that such an interest should be accorded to a party(ies) notwithstanding that the party does not have legal ownership of the property. A constructive trust is often found in cases involving matrimonial or quasi-matrimonial property, in which the Court has found that the wife or female partner to the relationship, has a beneficial interest in the property shared with the husband or male partner, despite the latter having sole legal ownership thereof. English common law has established that the general rule is to find both parties as having an equal beneficial interest. This rule may however be departed from depending upon the particular circumstances of each case. See: *Abbott v Abbott* (Privy Council Appeal, Appeal No.142 of 2005); *White v White* [2001] 1 AC 96). This rule has been applied in the Eastern Caribbean Jurisdiction, as seen in the recent case of *Norman Jarvis v Carmella Williams ANUHCv 2008/2038*.”

Analysis

- [77] There is hardly any need for an analysis as the prerequisites for a constructive trust be conjunctive. Therefore it is the finding of the Court that the question of common intention between the Defendant and the deceased is simply not on. As Ms Henderson for the Claimant put it, the deceased, Austin Shoy is sole legal owner and the Defendant's claim is not supported by the evidence. To that the Court must add that the only evidence of the deceased regarding his property is contained intention regarding his property is contained in his Will which was executed on 5th January, 1999. And further, the Court has already concluded that whatever money was spent on the property by the Defendant did not warrant the conclusion that she

⁶ Privy Council Appeal No.142 of 2005

acted to her detriment: As such the constituents of a constructive trust do not arise on the evidence and the law.

Convergence

- [78] Under this rubric it is appropriate to begin with the following learning from **Elements of Land Law by Gray and Gray**⁷ at para. 9.2.1:

“The law relating to proprietary estoppel provides a means closely allied to constructive trust by which certain rights in land may be created informally. Whereas conventional law of constructive trust places its primary emphasis on bargains in respect of the beneficial ownership, the principle of proprietary estoppel focuses on representations which generate expectations of proprietary entitlement.”

- [79] Both in respect of proprietary estoppel and constructive trust there is a requirement of some representation or encouragement on the one hand and common intention between the parties on the other hand. Whatever the case may be, there is no evidence in this regard coming from the action or inaction of the deceased. He always treated his property as his own and merely permitted his children to occupy it from time to time.
- [80] Therefore, on the law and the evidence proprietary estoppel and constructive trust are not established. It follows that the Claimant is entitled to possession of the property. It also follows that the Defendant has no beneficial interest in the property and must vacate.

ORDER

- [81] **IT IS HEREBY ORDERED AND DECLARED as follows:**

1. On the law and the evidence no proprietary estoppel or constructive trust arises.
2. The Claimant is entitled to vacant possession of the property situate at The Alley, Sandy Point, St. Kitts and registered in Book U1 Folio 150 of the Register of Titles.
3. The Defendant has no beneficial interest in the said property.
4. The Defendant must vacate the said premises within three (3) months from the date of this ORDER.
5. The Defendant's counterclaim is dismissed.
6. The Defendant must pay the Claimant costs in the amount of \$14,000.00.

Apology

This judgment was reserved on 6th April, but there is a reasonable explanation for the delay. The fact is that this Judge was transferred from Antigua and Barbuda to St Kitts with effect from 1st September 2010. The transfer of a Judge

⁷ 5th edition, 2009

in our jurisdiction must necessarily impact on reserved Judgments from the other Jurisdiction which must be completed in the new jurisdiction. This transfer is no exception. Indeed this Judge's first order of business was the Criminal Assizes while at the same time seeking to complete the judgments from Antigua and Barbuda. In all the circumstances a sincere apology is tendered to counsel on all sides and their respective clients.

ERROL L. THOMAS
High Court Judge (Ag.)