[2022] **JMSC Civ. 235**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV03780

IN THE ESTATE of **BERTIE ALPHANSO HOWELL**, late of Lot 26 Prospect, Morant Bay P.O., Saint Thomas**.**

AND

IN THE MATTER OF ALL THAT parcel of land part of **PROSPECT** in the parish of **SAINT THOMAS** being lot numbered **TWELVE, TWELVE A AND TWELVE B** on the Plan of Prospect aforesaid deposited at the Office of Titles on the 13th day of December, 1963 of the shape and dimensions and butting as appears by the said Plan and being part of land comprised in Certificate of Title registered at Volume 1014 Folio 620.

BETWEEN	**JENESE BAILEY**	**CLAIMANT**
AND	**CYNTHIA HOWELL (Personal Representative of the Estate of Bertie Alphanso Howell, deceased)**	**DEFENDANT**

IN CHAMBERS

Ms Nieoker Junor instructed by Knight, Junor & Samuels Attorneys-at-Law for the Claimant

Ms Georjean Edwards instructed by Deacon and Associates for the Defendant

Heard on: 2 May, 13 July, 7 December 2022

REAL PROPERTY – APPLICATION FOR BENEFICIAL INTEREST IN PROPERTY – EQUITABLE REMEDIES - CONSTRUCTIVE TRUST – PROPRIETARY ESTOPPEL – HOW EQUITY TO BE SATISFIED – WHAT EFFECT DOES THE DECEASED'S WILL HAVE ON THE CLAIMANT'S BENEFICIAL INTEREST IN THE PROPERTY

ICOLIN REID, J.

BACKGROUND

[1] Jenese Bailey (hereinafter referred to as "the claimant") has brought a claim against Cynthia Howell (hereinafter referred to as "the defendant"), the personal representative of the estate of Bertie Alphanso Howell (hereinafter referred to as "the deceased"), for 100% beneficial interest in the property located at Lot 12 Prospect, Morant Bay P.O. in the parish of Saint Thomas, registered at Volume 1014 Folio 620 of the Register Book of Titles (hereinafter referred to as 'the disputed property"). The claimant and the defendant's deceased husband (Bertie Alphonso Howell) shared an intimate relationship for over 30 years while he was married to the defendant and they also shared a son.

[2] It is the claimant's contention that the deceased's Last Will and Testament did not honour the gift and promise made to her by the deceased about the disputed property. The deceased sought to dispose of the disputed property in question via his will, by giving the beneficial interest to the claimant, her son,(Bertie Howell Jr) and Denver Howell (a son from his marriage to the defendant). The disputed property is comprised of the disputed land that is owned by the deceased and a dwelling house that the claimant constructed on the said land. The claimant has asserted that the deceased had gifted her the land after he encouraged her to sell

a property she owned and promised that the land was hers. She sold the property, used the funds to commence construction of a dwelling house and solely financed the construction of the dwelling house on said land. It is against this background that the claimant brought the claim against the defendant, who was appointed by the Court as the personal representative of the Estate of the deceased.

[3] The claimant filed a Fixed Date Claim Form on March 8, 2021 seeking:

> *"A. declaration that the claimant is entitled to 100% beneficial interest in the land and the house thereon at the disputed property;*
>
> *B. Alternatively, a declaration that:*
>
> *i. by virtue of a constructive trust or the doctrine of proprietary estoppel the Estate of Bertie Alphanso Howell holds the house at the disputed property on trust for the claimant, absolutely;*
>
> *ii. that the claimant and her son Bertie Howell Jnr. are beneficially entitled to a two-thirds interest in the land, excluding the house thereon, at the disputed property pursuant to the Last Will and Testament of the Bertie Alphanso Howell dated the 5th day of August, 2015; and*
>
> *iii. The land, excluding the house thereon, at the disputed property be valued by Clinton A. Bertram & Associates, Licenced Real Estate Dealer & Valuer and the claimant shall pay to Denver Howell the sum equivalent to a one-third interest in the said land."*

[4] The defendant obtained an extension of time to file an acknowledgement of service. The Defendant filed the acknowledgement of service but failed to file a defence and her application for relief from sanctions was denied. The claim, therefore, proceeded undefended.

CLAIMANT'S EVIDENCE

[5] The claimant relied on her affidavit which was filed on March 8, 2021. She states that she and the deceased were in a relationship for over 30 years, despite the fact that he was married. Their relationship began in the early 1980's when she was about 15 years old and continued until his death on March 15, 2017. She gave birth to his son, Bertie Howell Jr, in 1987. The deceased purchased Lot 26

Prospect (hereinafter referred to as “Lot 26”) Morant Bay in the parish of St. Thomas where the claimant and the deceased lived together with their son until she migrated to the USA.

[6] During the period while she was living with the deceased at Lot 26, the claimant travelled to the United Kingdom where she worked for up to 6 months at a time. She worked there until 1993 and she saved the monies that she had earned. From this money and with the help of the deceased, the claimant purchased a vacant parcel of land at Lot 188 Prospect (hereinafter referred to as “Lot 188”) Morant Bay in the parish of St. Thomas. She said the deceased told her that he wanted to leave Lot 26 for the children of his marriage but he also wanted to ensure that she owned her own home.

[7] The claimant said that the deceased contributed towards the construction of Lot 188, but the majority of the monies came from the income that she received from her overseas work. She said that even though the deceased had contributed to the development of Lot 188, he was very clear that it should belong to her and his son, Bertie Jr. The deceased, therefore, never sought to register his name as a joint owner and so, Lot 188 was registered in the name of the claimant and her son, who was a minor at the time.

[8] The claimant also worked in the USA after she stopped going to the UK. She did several different jobs while travelling and working in the USA for periods of six months at a time. She used the monies earned from her various jobs to further the development of the house at Lot 188. Upon completion, Lot 188 consisted of three bedrooms, three bathrooms, kitchen, living and dining rooms, a carport and a verandah.

[9] The claimant rented out the house located at Lot 188 because she was living with the deceased at Lot 26. In the late 1990’s she stopped travelling to the USA. She and the deceased opened a supermarket in John’s Town, Prospect in the parish of St. Thomas where she worked seven days per week. The supermarket became

her main source of income in addition to the income she received from the rental of Lot 188.

[10] The claimant states that sometime in 2003, the deceased encouraged her to sell her house at Lot 188. The primary reasons were that the area where her house was located was underdeveloped with few houses; taxis were unwilling to travel that far and she had to walk over a mile to get to the house.

[11] The deceased was the owner of two vacant parcels of land located at Lots 12 and 13 Prospect, in the parish of St. Thomas. He had gifted Lot 13 to his son Orville Howell. The claimant said that the deceased offered her Lot 12, registered at Volume 1014 Folio 620 of the Register Book of Titles, which was much closer to the road. It was also in a more developed area of Prospect. She accepted the gift.

[12] With this assurance from the deceased that Lot 12 was hers, the claimant sold Lot 188 in 2003 for Two Million Eight Hundred Thousand Dollars ($2,800,000.00), and the money was used to commence the construction of the house at Lot 12. She also used her “partner draws” of $24,000.00 per week from her earnings from the supermarket to advance the construction of the property. She emphasised that it was because of the deceased’s promise to her and his encouragement that she sold her house at Lot 188 and began construction on Lot 12.

[13] She further alleges that in or about 2006, in a bid to secure a lump sum towards the construction of the house, the deceased encouraged her to seek a loan from the National Housing Trust (hereinafter referred to as "the NHT"). They visited the NHT where the deceased signed as the registered owner of Lot 12, a Guarantee Agreement to facilitate her getting the loan. He also co-signed the mortgage and she received approval for $553,561.54. These documents were exhibited.

[14] The claimant said that when she received the money from the NHT, the house was at roof height. She used her monies to develop the house along with the monies received from the NHT. She said that unlike Lot 188, the deceased did not assist her financially with the construction of this house at Lot 12. She said that all he

gifted her was the land. She has been solely responsible for the repayment of the mortgage since 2006.

[15] The claimant states that she paid the monthly mortgage from the income received from the supermarket and, in the later years, by sending monies she earned overseas to her nephew who currently resides at the premises. These monies were sent through Jamaica National Bank (receipts were exhibited). She pointed out that during the deceased's lifetime, she had treated the property as her own. She had paid all the property taxes and had been responsible for its maintenance.

[16] The claimant said that in 2013 while she was overseas, during a telephone conversation with the deceased, he told her that he had visited a lawyer and made a down payment on fees to effect the transfer of Lot 12 to her, however, neither of them had the monies to pay for the transfer at that time. She further states that during his lifetime she did not demand that Lot 12 be transferred to her because she was relying on the deceased as he always honoured his word and she had no reason to disbelieve him. The claimant said that all these circumstances coupled with the fact that she had expended substantial amounts of monies on the house; was repaying the mortgage which he had helped her to secure for the house; and also that she had been treating the property as hers for over 12 years, cemented her belief in the deceased's promise that the property was hers.

[17] Thus, she said, that she was totally surprised to learn that the deceased had bequeathed the said Lot 12 in his will to Denver Howell, Bertie Howell Jr. and herself.

[18] The claimant states that she is now over 50 years old and looking towards retirement. She pointed out that the house at Lot 12 is still under construction and it is now the only home that she has. She highlighted that because of the deceased's promise and inducement, she had sold her house at Lot 188 and will now be left without a home because of his unjust behaviour. She pleads that, at this stage of her life, instead of retiring, she is paying a mortgage (which she has

been doing for over 12 years) and will stand to lose the benefit of her home if the devise in the deceased's Will is upheld.

[19] She points out that she would not be able to return to Lot 26, where she first resided with the deceased for over two decades because it was bequeathed to three of his children of the marriage, as he had told her during their discussions while they were living together.

[20] She is therefore asking the court to find that the deceased was holding the property on a constructive trust or that a proprietary estoppel has arisen in her favour.

CLAIMANT'S SUBMISSION

[21] Miss Neokor Junor, Attorney-at-Law for the claimant, made comprehensive submissions in writing. She argued that the two central issues which arose in the case were:

i. Whether the deceased gifted Lot 12 to the claimant; and

ii. Whether the claimant is entitled to 100% beneficial interest in the land and house at Lot 12, or alternately, whether the claimant has acquired an interest and the extent of such interest by way of proprietary estoppel or a constructive trust?

[22] Counsel argued that during the course of the claimant's relationship with the deceased, she acquired Lot 188 which was her home. However, due to the encouragement of the deceased, coupled with his promise to gift her Lot 12, the claimant sold her home at Lot 188 in 2003 and used the proceeds therefrom, to commence construction of her new home at Lot 12, with the deceased's blessings, knowledge and acquiescence. At the time when she sold her home, she had been living with the deceased at Lot 26, which had been her primary home since 1988. The claimant, relying of the deceased's words and conduct, expected that she would have been the sole beneficial owner of Lot 12, even though the registered title remained in the deceased's name.

[23] Ms. Junor pointed out that by virtue of the deceased's representation to the claimant, she acted to her detriment by expending substantial amounts of monies on the construction of her house at Lot 12. She also acquired a mortgage from the NHT for which she has been solely responsible over the years and for which she continues to be responsible.

[24] Counsel argued that the deceased's act of supporting the claimant in obtaining the mortgage from the NHT further reinforced his representation that the claimant would have proprietary rights to Lot 12. He also co-signed the mortgage instrument and signed a guarantee agreement so that the claimant could obtain the loan from the NHT. These actions taken together solidified his promise that the claimant would have an interest in the land.

[25] Ms. Junor emphasised that based on the strength of the representations and promise made by the deceased, the claimant changed her position and acted to her detriment by relying on the promise of the deceased gifting her Lot 12. It was the assurances given by the deceased which led the claimant to act as she did and, therefore, it would be unconscionable for him to devise Lot 12 to anyone else except the claimant.

[26] Counsel argued in the alternative that, if the court failed to find that the claimant had an interest in the land by virtue of proprietary estoppel, then she would be entitled to an interest by virtue of a constructive trust. She relied upon **Osbert Powell and Others v David Powell** [2017] JMSC Civ. 72; **Marriette Taylor v Dazel Alexander Tapper O/C Horace Dazel Tapper** [2017] JMSC Civ. 101; **Annie Lopez v Dawkins Brown and Glen Brown** [2015] JMCA Civ 6; and **Earle Alexander Shim v Sylvia Elmay Shim**, (unreported), Supreme Court, Jamaica, Claim No. 2005HCV02986, judgment delivered on May 162008.

THE ISSUES FOR DETERMINATION

[27] I am grateful to counsel for her erudite submissions which I found to be quite helpful. In consideration of the claim, I find that the following are the issues for determination:

i. Whether a representation, promise or encouragement was made by the deceased to the claimant that she was gifted the disputed property;

ii. Whether the claimant relied on the representation, promise or encouragement to her detriment;

iii. If yes, what is the remedy to which the claimant is entitled; and

iv. What if any effect does the deceased's Will have on the issue of the claimant's entitlement?

LAW

[28] It is trite law that "he who asserts must prove" and, therefore, it is for the claimant to prove that she has acquired an equitable and beneficial interest in the devised property. The claimant has made a claim for 100% beneficial interest in the disputed property by virtue of equitable means. Section 48(d) of **The Judicature (Supreme Court) Act** provides that:

> *"48. With respect to the concurrent administration of law provisions and equity in civil causes and matters in the Supreme Court the following provisions shall apply-*
>
> *…*
>
> *(d) The Court and every Judge thereof shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, appearing incidentally in the course of any proceeding, in the same way as the Court of Chancery would have done in any proceeding instituted therein before the passing of this Act."*

[29] Based on the facts of the instant case, I believe that there are two principles of law based on equitable principles that must be considered in determining the issues. These are constructive trust and proprietary estoppel.

Constructive trust

[30] A constructive trust arises where:

> *"two or more persons have a common intention, expressed or implied by words or conduct, that one or more is to have a specific share in a property, or an uncertain share to be determined in due course according to their contributions; and the person or persons in reliance on that common intention acted to their detriment on the reasonable belief that they were acquiring the agreed interest. (See **Grant v Edwards and Another** (1986) 2 All ER 427). The case law has demonstrated that where this occurs the courts have consistently held that it would be unconscionable or inequitable for the legal owner of the property to claim to be solely entitled to its beneficial ownership."* (per V. Harris J. (as she then was), at paragraph [40], in **Marriette Taylor v Dazel Alexander Tapper O/C Horace Dazel Tapper** (supra).

[31] The concept of constructive trust has also been expounded upon by McIntosh JA, in the Court of Appeal decision of **Eric McCalla et al v Grace McCalla** [2012] JMCA Civ. 31, at paragraph [27] Her Ladyship opines:

> *"[27] It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan** (1985) 25 JLR 301, that where the legal estate is vested in one person (the legal owner) and a beneficial interest is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties."*

[32] Edwards J (as she then was) in **Dean Hinds v Janet Wilmot** (unreported), Supreme Court, Jamaica, Claim No. 2009HCV00519, judgment delivered July 15, 2011, at paragraph 25, concisely stated that, in determining whether a constructive trust exists in a particular case, there must be:

> *"I. Evidence of a common intention, can either be expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.*
>
> *II. Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See* ***Nourse, L.J. in Turton v Turton*** *(1987) 2 ALL ER 641 at p. 684.*
>
> *III. In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property maybe evidence from which the court could infer the parties' intention:* ***Grant v Edwards*** *[1986] 3 WLR 120, per Lord Brown Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and/ or show that the claimant has acted to his detriment on reliance on the common intention.*
>
> *IV. The claimant must have acted to his detriment in direct reliance on the common intention."*

Proprietary estoppel

[33] Any land transaction will not be upheld in a Court of law unless it is in writing evidenced by sufficient note or memorandum. Thompson-James J, opined in **Osbert Powell & Others v David Powell** *(supra)*, at paragraphs [44] and [45], that:

> *"[44] It is a longstanding principle that a land transaction will not be upheld in a court of law unless it is evidenced by sufficient memorandum in writing (section 4 of the Statute of Frauds). This principle holds true for purported transfers of land by way of gift. The starting point is that an appropriate deed of transfer must be effected to legally pass title. In the case at bar, there is no dispute that the deceased Curley Powell failed to transfer the property by way of deed to the Defendant during his lifetime. Even if Curley Powell had purported to give David the subject property as alleged, the gift would have been imperfect owing to the lack of a memorandum in writing and ordinarily the Court could not countenance such a gift [****Dillwyn v Llewelyn*** *[1861-73] All ER Rep 384].*
>
> *[45] However, there is an exception where the person to whom the gift was purportedly given, acted to his detriment in reliance on said gift. In* ***Dillwyn v Llewelyn*** *[1861-73] All ER Rep 384, (a case approved by the case of* ***Pascoe v Turner*** *[1979] 2 All ER 945), the Court found that equity will not complete a voluntary agreement in cases of mere gift if anything is*

> *wanting to complete the title of the donee, unless the donee has, on the strength of the promise, acted to his own detriment [see also **Milroy v Lord** (1862) 4 De G. F. & J. 264 at 274]."*

[34] After discussing several of the authorities cited above, Her Ladyship in **Osbert Powell's** *(supra)* observed, at paragraph [48], that:

> *"… it can be deduced that in cases where a party asserts interest in land by virtue of a gift or promise, and said land has not been transferred in the requisite manner, the Court will only give effect to that gift or promise where it can be demonstrated that the person to whom it was made acted to his detriment owing to his reliance on said gift or promise with the acquiescence or approbation of the owner. This is based on the doctrine of proprietary estoppel."*

[35] In the Court of Appeal case of **Annie Lopez v Dawkins Brown and Glen Brown** *(supra)*, Morrison JA (as he then was) examined the historical underpinnings of the principle of proprietary estoppel and cited with approval the House of Lords (as they then were) in **Yeoman's Row Management Ltd and another v Cobbe** [2008] UKHL 55*,* at paragraphs. 16 and 52; ***Crabb v Arun DC*** [1976] Ch 179, at pages 871 and 875, in addition to the learned authors of **Gray & Gray's Elements of Land Law** (5th edn, 2009, para. 9.2.8). At paragraphs [65] - [66] and [68], he appreciated that:

> *"[65] Both counsel placed reliance, as did Campbell J, on what Lord Walker has referred to (in **Yeoman's Row Management Ltd and another v Cobbe** [2008] UKHL 55, para. 52) as '[t]he great case' of **Ramsden v Dyson**. Lord Kingsdown's classic statement of the principle in that case (at page 170) still underpins the modern law of proprietary estoppel:*
>
> > *'If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.'*
>
> *[66] ...We were also referred by Miss McBean to the decision of the Court of Appeal of England in **Crabb v Arun District Council**, a case*

involving a claim to a right of access over land to a public highway. 'In that case, Lord Denning MR said this (at page 871):

> *'When counsel for Mr Crabb said that he put his case on an estoppel, it shook me a little, because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action...What then are the dealings which will preclude [a landowner] from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—even though that promise may be unenforceable in point of law for want of consideration or want of writing—and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise...Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In Ramsden v Dyson [(1866) LR 1 HL 129 at 170)] Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged'."*

[36] He further opined that:

> *"[68] The modern law of proprietary estoppel is aptly summarised by the authors of **Gray & Gray** in this way (at para. 9.2.8):*
>
> > *'A successful claim of proprietary estoppel thus depends, in some form or other, on the demonstration of three elements:*
> >
> > - *representation (or an 'assurance' of rights)*
> > - *reliance (or a 'change of position') and*
> > - *unconscionable disadvantage (or 'detriment').*

> *An estoppel claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are interdependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensues only if the representation, once relied upon, is unconscionably withdrawn."*

[37] His Lordship continued at paragraph [73] that:

> *"Although proprietary estoppel is not based on contract, it is therefore always necessary to have regard to the nature and terms of any agreement between the parties. In the absence of agreement, the important starting point must be, firstly, whether there has been a representation (or assurance) by the landowner, capable of giving rise to an expectation that is not speculative, that she will not insist on her strict legal rights. Secondly, there must be evidence of reliance on the representation (or change of position on the strength of it) by the person claiming the equity. And, thirdly, some resultant detriment (or disadvantage) to that person arising from the unconscionable withdrawal of the representation by the landowner must be shown. But unconscionability, standing by itself, without the precedent elements of an estoppel, will not give rise to a cause of action."*

[38] The caution was referenced **Yeoman's Row Management Ltd and another v Cobbe** *(supra), at* paragraph 16*,* Lord Scott reasoned:

> *"16. …. My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. …Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat."*

[39] Therefore, a successful claim of proprietary estoppel, has three requirements which must be proven before the Court can uphold such a cause of action:

i. an assurance/promise/representation, giving rise to an expectation that the claimant would have an interest in land;

ii. the claimant must demonstrate reliance (a 'change of position) on the assurance; and

iii. the claimant must have acted to their detriment as a result of the assurance (unconscionable disadvantage).

ANALYSIS

[40] It is quite clear that in order to achieve what I consider to be a just result, I have to consider the appropriateness of the two operative principles as stated above. Both the proprietary estoppel and the constructive trust are claims to a proprietary interest in the property. A claimant, could on either of these principles, if successful, obtain a remedy which would give him a benefit more or less equivalent to the benefit he expected to obtain from the oral agreement, representation and or promise. In effect, this benefit would be based upon the value of his non-contractual expectations pursuant to either principles (see **Yeoman's Row Management v Cobbe** *(supra),* paragraph 4).

[41] Constructive trust and proprietary estoppel overlap at times and several Law Lords over the years have argued that there is no difference between the two.

[42] In **Equity and the Law of Trust**, 10th edn. 2006, the learned author Philip H Pettit opined at page 193, that:

> *"… in order to secure a beneficial interest a party has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. The first and fundamental question, Lord Bridge stated in **Lloyds Bank Plc v Rossett**, which must always be resolved is whether independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition or exceptionally at some later date, been 'any agreement, arrangement or understanding' reached between them that the property is to be shared beneficially, though it is not necessary that the agreement extends to defining the extent of the respective shares. This common intention which has been said to mean a shared intention to communicated between them can only be based on evidence of expressed discussions between the*

> *parties however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to constructive trust or proprietary estoppel."*

[43] Where there is evidence to support a finding of an arrangement to share the beneficial interest (common intention), or where the claimant shows that she has contributed to the acquisition of the property, a constructive trust will be presumed. This is of course a rebuttable presumption (see **Marriette Taylor v Dazel Alexander Tapper O/C Horace Dazel Tapper** *(supra*)).

[44] Whilst constructive trust highlights arrangements and common intention, according to Gilbert Kodilinye and Trevor Carmichael in **Commonwealth Caribbean Law of Trusts** (Third Ed.), at page 61:

> *"… under the doctrine of proprietary estoppel where P has incurred expenditure in building on D's land under the belief that he (P) has or will acquire a good title to that land, and where D has encouraged or acquiesced in such expenditure, the court will satisfy P's 'equity' by making such order as it deems appropriate; for example, an order that D must convey the fee simple to P…The doctrine is an exception to the rule that equity will not perfect an imperfect gift in the sense that where D has made an imperfect transfer of land to P, or where he has promised to convey land to P in the future and P incurs expenditure in building on the land, equity may compel D to perfect the transfer or to carry out his promise."*

[45] The assurance/representation or promise that was made must be clear and unambiguous and it must relate to an interest in the property and this will in turn credit itself with a certain expectation per Lord Scott in **Yeoman's Row Management v Cobbe** *(supra)*. Lord Scott in **Thorner v Major** [2009] UKHL 18, at paragraph 15, stated that:

> *"These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity."*

[46] The issue of detriment must be judged at the moment when the person who has given the assurance seeks to retract it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded. Consideration would also have to be given as to whether this withdrawal would be deemed unconscionable.

[47] Both fundamental principles of equity at their core are concerned with the prevention of unconscionable conduct. In both principles, the claimant must show that she has acted to her detriment. However, in the case of constructive trust, a common intention must be established akin to the acquisition of the property; while in proprietary estoppel, the unilateral act of the defendant (the representation/assurance/promise/encouragement) must raise an expectation in the claimant which it would be unconscionable for the defendant to deny. According to Lord Walker in **Stack v Dowden** [2007] UKHL 17, at paragraph 37:

> *"Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice. which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."*

[48] In constructive trust, the *"pre-acquisition or post acquisition arrangement is what "colours the subsequent acquisition of the land by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it"* (see **Yeoman's Row Management v Cobbe** (*supra*), at paragraph 32). No evidence was led in the case at bar for an inference to be drawn that there was a common intention of joint venture or any pre-acquisition or post-acquisition arrangement of the land or dwelling house.

[49] Given the evidence that the deceased made an imperfect gift of the land, I find that proprietary estoppel is more appropriate and ought to be applied to the case at bar as oppose to constructive trust.

Issue i: Whether a representation, promise or encouragement was made by the deceased to the claimant that she was beneficially entitled to the disputed property?

[50] The Court must now consider the evidence in order to make a determination of whether a promise was made gifting the land to the claimant by the deceased.

[51] I am in agreement with Brooks J (as he then was) in **Earle Alexander Shim v Sylvia Elmay Shim** *(supra),* that this issue is "*a question of fact*". Much of the findings of fact will be determined based on the credibility of the claimant who was the sole witness in the case at Bar. I will make an assessment on a balance of probability to ascertain whether or not her evidence has met the requirements of the applicable law.

[52] The claimant resided with the deceased for over 30 years on Lot 26. The claimant and her minor son were the registered owners of Lot 188. Through her sole efforts, she constructed and maintained a dwelling house on Lot 188 which she rented. The income from this house was never shared with the deceased.

[53] In 2003, with the encouragement of the deceased and the promise that Lot 12, a vacant lot owned by the deceased, would be hers, the claimant sold her house situated at Lot 188. The deceased offered her Lot 12 because, among several reasons, it was closer to the main road and located in a more developed area of Prospect. The claimant utilised the monies received from the sale of Lot 188 to commence construction of the dwelling house that now sits on Lot 12. She utilised the monies that she earned from various sources to further the construction of the house.

[54] The deceased went further with his encouragement by signing documents as the registered owner, at the NHT, which allowed her to obtain a mortgage to continue construction on the house. Unlike Lot 188, the deceased did not make any financial contribution to the construction of the dwelling house at Lot 12. The claimant was the only one and is still solely responsible to repay the NHT mortgage. She

continues to make payments by sending monies from overseas through her nephew to pay the NHT.

[55] The evidence revealed that the deceased's assurance/promise continued when sometime in 2013, while overseas, during a telephone conversation with the claimant, he (the deceased) told her that he had visited a lawyer and made a down payment on fees to effect a transfer of Lot 12 to her. It was through a lack of adequate finances by both parties that the transfer was not effected.

[56] I consider the relationship which the claimant had with the deceased and the environment in which they operated. I consider all the actions of the deceased in relation to Lot 12. I have also analysed the actions of the claimant and her dealings with the finances obtained from the income and sale of Lot 188. I have given consideration to how she went about the construction of the house on Lot 12 and the acquisition of the mortgage from the NHT.

[57] In sum, I find on a balance of probability that the deceased gave the claimant certain representations, promises and encouragement, by both his words and conduct, that led the claimant to believe that she would have an absolute beneficial interest in the disputed property.

Issue ii: Whether the claimant relied on the representation, promise or encouragement to her detriment?

[58] It is pellucid that from the abovementioned evidence that the claimant did rely on the representation, promise or encouragement made to her by the deceased and acted to her detriment. I find that the claimant expended substantial amount of monies earned from the sale of the house at Lot 188, her earnings from the supermarket and overseas jobs and all of these were channelled into the development of the land into it becoming a dwelling house. She also bore all the financial burdens in respect of the mortgage and maintenance of the house with the belief that she would have the sole beneficial interest in the property.

[59] I accept her evidence that she did not ask the deceased to transfer Lot 12 to her because he always kept his word and she had no reason to doubt or "second guess his promise" to her. I believe her evidence that, when taken together, all his (the deceased's) actions would have led her to spend significant amount of monies and years of her labour on the development of Lot 12. I consider the fact that the claimant is now over 50 years old and nearing retirement. It would be extremely difficult and create an undue hardship for her to now lose all the millions of dollars that she has spent on the development of the land. The court considers that the deceased encouraged her course of conduct and was now seeking to benefit through his estate to her detriment.

[60] The relationship between the claimant and the deceased spanned over three decades and the evidence depicts that during the relationship the deceased was a reliable man and one who kept his word. He maintained the claimant since she was about 15 years old, he assisted her with owning her first home and they operated a business together. They lived together for many years, therefore, it was not unrealistic that the claimant would believe the promise and encouragement given to her at the time that Lot 12 was hers.

[61] I find that it was reasonable that the claimant accepted the promise and encouragement of the deceased that he was gifting her Lot 12 and therefore relied on these assurances. The claimant indicated that it was always her plan to complete the construction of the house and use it as her home whenever she visited Jamaica. With the passing of the deceased, she would not be welcome to return to Lot 26 which was her home, for almost 25 years, prior to moving to the USA.

[62] The claimant's only home in Jamaica is Lot 12. Instead of focusing on securing her retirement, she has to apportion her income to pay the NHT mortgage. Based on the provisions of the Will, the claimant stands to be deprived of the benefit and ownership of her home. With this possibility in mind, there is also the possibility that she may not have any further prospect to own a home of her own based on

her age (being over 50 years old); and neither a place to call home upon retirement as it would be very difficult at this time to commence acquisition of a new home.

[63] There is a sufficient causal link between the assurance relied on by the claimant and the detriment she asserts will befall her if the devise in the Will is upheld by the court. If the deceased is allowed to retract his promise and assurances to the claimant, she would suffer greatly. It would indeed be unconscionable for the deceased to be allowed to go back on his assurance/promise to the claimant (see **Gillett v Holt** [2001] Ch. 210, at page 232).

[64] The deceased, prior to his death, would have benefited from all the improvement and development of Lot 12. After his death, his Last Will and Testament revealed that he had gone back on his promise/assurance made to the claimant, resulting in the property being included in his estate to the detriment of the claimant. The deceased, by his Will, is seeking to assert his title to the land that he had for many years allowed the claimant to develop, with his approval and consent.

[65] I find as a fact that there was a representation/assurance and/or promise given by the deceased to the claimant on which the claimant relied to her detriment. The deceased, by his conduct, led the claimant to believe that she had or would have had a beneficial interest in the land. The deceased from his grave now seeks to deprive the claimant of her beneficial entitlement to Lot 12, while enlarging his estate.

[66] I find that there is sufficient causal link between the promise and encouragement relied on and the detriment suffered by the claimant. I find that it would be unconscionable to allow the deceased to go back on his assurance; and the claimant would also suffer substantial loss if this was allowed to happen.

[67] I find that the Claimant has acquired an equity in the deceased's property at Lot 12 by reason of proprietary estoppel. The deceased estate is therefore estopped from denying her interest in the property.

Issue iii: What is the remedy that the claimant is entitled to?

[68] The claimant from the onset of this case has made a claim for 100% interest in the land and dwelling house. In the alternative, she sought an order that the estate holds the house on trust for the claimant, absolutely, or that she and her son are beneficially entitled to a two-thirds interest in the land, excluding the house, and for the land to be valued so as to determine its value separate from the dwelling house.

[69] I note here the principle "*quic quid plantatur solo, solo cedit*". It means "whatever is attached to the soil becomes part of it". The claimant has seen it fit to bring the claim in the alternative, that is; in respect of the separation of the land and dwelling house and has also asserted a claim to both. Williams, J. in **Greaves v Barnett** (1978) 31 WIR 88, at page 91j, said that:

> *"the general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed." ().*

[70] In the case at bar, the disputed land is registered in the name of the deceased. The dwelling house would therefore become part of the land and thus be owned by the deceased. It is now vested in the deceased's estate. The claimant has not acquired any legal interest in the disputed property. However, she has acquired a beneficial interest through the equitable remedy of proprietary estoppel.

[71] Walker LJ.) in **Jennings v Rice and others** [2002] EWCA 159, at paragraph [56] indicated that:

> *"The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way to go about that." (per*

[72] I am mindful that the award to which the claimant is entitled may not necessarily be the whole of the property that she says was the subject of the promise. As was stated in **Jennings v Rice and others** (*supra*):

> *"There is a clear line of authority from at least **Crabb** to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment."*

[73] I have also considered how the remedies are dealt with in various cases. Though distinguishable from the case at bar, in **Gillett v Holt and Another** *(supra),* at page 312, Walker LJ opined:

> *"… in my view the maximum extent of the equity. The court's aim is, having identified the maximum, to form a view as to what is the minimum required to satisfy it and do justice between the parties. The court must look at all the circumstances, including the need to achieve a 'clean break' so far as possible and avoid or minimise future friction" (see **Pascoe v Turner** [1979] 2 All ER 945 at 951).*

[74] I consider **Gillett v Holt** which illustrates the consideration of the appropriate remedy in relation to real property and in that case, in 1956, Mr. Gillett left school at 15 to go and work on Mr. Holt's farm. His parents had wished that he would continue with his education and complete his O and A levels. Mr. Holt had never married and had no children. He had taken a liking to Mr. Gillett and began to train him and promised to pass the farming business to him. He made numerous assurances to him throughout his working life that the farm would be his and had drawn up several wills naming him as beneficiary. In reliance on these promises, Mr. Gillett accepted a low wage, worked long hours, and did not pursue further education or seek work with alternative employers. In 1995, however, a dispute arose, Mr. Holt sacked Mr. Gillett and changed his will to remove Mr. Gillett. Mr. Gillett sought to rely on proprietary estoppel. The trial judge refused the claim stating that since a will can be changed, there was no irrevocable promise following **Taylor v Dickens** [1998] 1 FLR 806, Mr. Gillett appealed. The appeal was allowed. Mr. Gillett was found to be entitled to the freehold of the farmhouse and £100,000.00 to compensate the exclusion from the rest of the farming business. Robert Walker LJ opined at page 300 that "*the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round".*

[75] In the instant case, even though distinguishable from **Gillet v Holt** *(supra)*, they both have a similar issue relating to the promised gift of land. The parties shared representations or promises and encouragement of sufficient clarity, reliance by the claimant on the assurance; and detriment suffered by the claimant on that reasonable reliance.

[76] As with **Gillett v Holt** *(supra),* I find that it would be unconscionable to allow the deceased to go back on the promise made to the claimant. Therefore, the just remedy to which the claimant is entitled is the sole beneficial entitlement of Lot 12.

Issue iv: What, if any, effect does the deceased's Will have on the issue of the claimant's beneficial interest in the property?

[77] The Last Will and Testament of the deceased (Bertie A. Howell) provided, *inter alia*, that "*The property located at 12 Prospect, St. Thomas is to be shared between Jenese Bailey, Bertie (Shawn) Howell and Denver Howell*."

[78] A will is a testamentary document which speaks after the death of the testator. It expresses the testator's wishes as to how his property (estate) is to be distributed after his death. The deceased has no greater power of disposition with respect to any property in death than he would have had during his lifetime. The claimant would have had a similar claim against the deceased during his lifetime if he had sought to deny her interest in the property. The Court has the power to act to prevent an inequitable result even after the testator has died. Therefore, although in this case the deceased/testator has acted unconscionably, the Court will intervene to prevent his estate from benefiting from his unjust conduct. In the case at bar, having found that the deceased is estopped from denying the claimant's beneficial interest in Lot 12, it is hereby declared that Lot 12 does not form a part of the estate of the deceased (Bertie Alphanso Howell).

CONCLUSION

[79] In the light of the foregoing, I hereby make the following orders:

i. The claimant, Jenese Bailey, is entitled to 100% beneficial interest in the land and the house thereon located at Lot 12 Prospect, Morant Bay P.O. in the parish of Saint Thomas, registered at Volume 1014 Folio 620 of the Register Book of Titles;

ii. By virtue of the doctrine of proprietary estoppel, the estate of Bertie Alphanso Howell is estopped from dealing with the property situated at Lot 12 Prospect, Morant Bay P.O. in the parish of Saint Thomas, registered at Volume 1014 Folio 620 of the Register Book of Titles, as it does not form a part of the estate of the deceased, Bertie Alphanso Howell.

iii. The defendant, Cynthia Howell, personal representative of the estate of Bertie Alphanso Howell, deceased, is to execute an Instrument of Transfer in favour of the claimant, Jenese Bailey, of all the legal and beneficial interest in the land registered at Lot 12 Prospect, Morant Bay P.O. in the parish of Saint Thomas, registered at Volume 1014 Folio 620 of the Register Book of Titles, within 30 days of this Order.

iv. In the event the defendant, Cynthia Howell, fails, refuses or neglects to execute the relevant documents to effect the transfer of the property referred to in Order # 3 herein, then the Registrar of the Supreme Court is empowered to do so.

v. Costs to the claimant, Jenese Bailey, to be agreed or taxed.

vi. This order is to be served on the National Housing Trust.

vii. Liberty to apply.

viii. The claimant’s attorney-at-law is to prepare, file and serve the order.