[2009] SC (Bda) 35 Civ (17 July 2009)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 288

BETWEEN:

TYRONE DENNIS BUTTERFIELD

Plaintiff

- and -

YVONNE GEDDIES HILL

First Defendant

and

SOPHIA ELIZABETH HEWEY

Second Defendant

and

THE BANK OF N. T. BUTTERFIELD AND SON LTD.

Third Defendant

Date/s of Hearing: 8 – 10 June 2009
Date of Judgment: 17 July 2009

Richard Horseman of Wakefield Quin, for the Plaintiff;
Keith Robinson of Appleby for the First and Second Defendants;
No appearance for the Third Defendants.

JUDGMENT

INTRODUCTION

1. In this case the plaintiff seeks to establish and enforce a constructive trust said to arise from a pair of mutual wills, and concerning domestic property at 10 Scenic Heights Drive, Southampton ('the property'). In order to enforce the trust the plaintiff claims various forms of relief, including a declaration that he is the sole owner of the property, and an order transferring it to him, or in the alternative an order for sale and division of the proceeds. The third defendant is a mortgagee of the property, and has not appeared or played any part

in the action. I do not need to say anymore about them, the plaintiff acknowledging their prior interest.

OVERVIEW OF THE FACTS

2. I hope that I will not be thought disrespectful if, for clarity and ease of reference, I refer to the deceased members of the Hill family only by their first names. The plaintiff is the nephew of Genevieve Eloise Hill ("Genevieve"). Genevieve was married to Stanley Hill ("Stanley"), but they were childless. When the plaintiff was about ten years of age it was agreed in the family that he would go and live with Genevieve and Stanley, who would raise him as their own, and that is what happened.

3. In July 1962 Genevieve and Stanley bought the property, which was then a vacant lot. The evidence is that they did this with some money which she had inherited from her family, but it was conveyed into their joint names[1]. The property was then immediately mortgaged[2], although there is no evidence why or for how much, and it then remained mortgaged more or less continuously down to the present day. Following the purchase, the core of the present dwelling was then built upon it as the family home, and it is the plaintiff's case that he contributed labour and funds to the enterprise on the understanding that one day it would all be his.

4. On 23rd April 1970 Genevieve made a will. It left everything to her husband, Stanley, and in the event he predeceased her, it left the property[3] (together with any other real estate she might own at her death) to the plaintiff. Clause 1 of the will contains an express agreement in the following terms:

> "1. I hereby agree that I will not revoke this my Will at any time after the death of my said husband Provided That there remains unrevoked at the time of his death a mutual Will of even date with these presents in which my said husband (by Clause 3 of his Will) bequeathed and devised to me all his personal and real estate absolutely and in fee simple."

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[1] See the conveyance of 4th July 1962 at Tab 2 of the defendants' documents.
[2] See the summary at Tab 8 of the defendants' documents.
[3] It is described as her property at Sunnyside Park, but there is no dispute but that it is the property now known as 10 Scenic Heights Drive.

It is the plaintiff's case that that will was one of a pair of mutual wills, the other being made by Stanley on the same date and containing similar provisions. I will return to that.

5. Genevieve died on 2nd January 1973, at the age of about 40[4]. Her will was admitted to probate on 19th February 1973, and under it Stanley took $9,055.13 in cash, being the proceeds of two life insurances. Genevieve's half share in the property also passed to him, but that would strictly have been by right of survivorship under the joint tenancy.

6. At that point Stanley was 44. He then met the first defendant, a Jamaican guest-worker, whom he subsequently married in April 1977. That marriage, by operation of law[5], revoked all former wills. Moreover, on 20th August 1977 Stanley made a new will, expressly revoking all former wills and leaving everything, including "my house and land situate at Sunnyside Park" to his new wife. Moreover, by a voluntary conveyance of 30th September 1977, he conveyed the property to himself and his new wife as joint tenants. At or about the same time, the first defendant's daughters came to live in Bermuda with their mother.

7. Meanwhile the plaintiff continued to live in the property. When the daughters arrived, he moved into one of the apartments that had recently been added to the original building. They all continued to live happily under the same roof as a family, the plaintiff referring to the first defendant as 'Momma' or 'Maisie', and the daughters calling him 'uncle Tyrone'.

8. This essentially continued for nearly 23 years[6], until Stanley's death on 1st December 2000, two weeks short of his 72nd birthday. He had not apparently changed his second will, but in any event it was never probated, his half-share in the property passing to the first defendant by right of survivorship. The full legal title to the property now vested in the first defendant, but on 1st February 2006 she conveyed the property to herself and her daughter, the second defendant, as tenants in common. The daughter then set about arranging for some much needed renovations to the property, and on 8th January 2007 she entered into a

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[4] I cannot be more precise as I do not have her exact date of birth.
[5] See section 12 of the Wills Act 1840. The equivalent modern provision is now section 14 of the Wills Act 1988.
[6] It seems the plaintiff did move out for a while following an argument with Stanley over his purchase of a taxi, but he eventually returned before Stanley's death.

contract with M & M Construction for substantial works, to pay for which the property was mortgaged in the sum of $717,600[7].

9. In order for the renovations to be carried out, the property needed to be vacated, and the defendants intimated this to the plaintiff, beginning, he says, with a discussion in late October 2006 followed by a letter of 1st November 2006. The plaintiff flatly refused to move out, and says that he told the defendants that it was his house, and he had built it with his own blood, sweat and tears. At that point he says he began to look for his copies of the wills of Genevieve and Stanley, but could not find them. There is a suggestion in his witness statement that he thinks that the defendants had stolen them, but there is no evidence to support that, and it was not pursued. In any event he then hired a lawyer (not his present one), who conducted a fruitless search with the law firms. Things might have rested there, had not the first defendant had a row with a neighbour, a Mr. Duane Santucci, over his removal of a wall along their common boundary. This led to Mr. Santucci approaching the plaintiff, whom he believed to be the true owner of the property, and once he learned of the plaintiff's inability to find the wills Mr. Santucci threw himself into the search for them to great effect. He rapidly located the probated copy of Genevieve's will, and after a persistent search through her lawyer's old office files he found Stanley's file misplaced under the letter 'M'. In that file was an office copy of a will which was the counterpart of Genevieve's.

10. In the meantime, the plaintiff had to move out of the property in early January 2007, when the contractors disconnected the plumbing. The works were then carried out, being completed by June 2007, when the defendants resumed habitation. Stanley's will was located at some point after that, and these proceedings were then begun by writ of 9th October 2007.

[7] It seems that $59,921.60 of that went to the repayment of previous mortgage.

The Factual Issues

11. Although the broad picture set out above is tolerably clear there are a number of disputed issues of fact with which I will have to deal before getting to the legal issues. These are:

(i) whether Stanley's first will was ever executed;

(ii) the extent and terms of the agreement (if any) underlying the mutual wills;

(iii) whether the first and/or second defendants knew of the mutual wills; and

(iv) whether the plaintiff knew of Stanley's second will and the voluntary conveyance by which the first defendant took a joint interest, and if so when he became aware?

I will also have to deal with the parties' competing claims to have made contributions to the construction and financing of the property, although in the event I think that, with the exception of the recent renovations, that has little bearing upon the legal position.

(i) Whether Stanley's first will was ever executed

12. I accept Mr. Santucci's evidence, which was not contested, as to the finding of Stanley's file, with the carbon copy of his will, in Dame Lois Browne-Evans's old files. The copy of Stanley's will is very much in the same physical form as the probated copy of Genevieve's will, and appears to the untrained eye to have been typed manually on the same or a very similar machine. It is not signed by Stanley himself. However, someone has entered the date (23rd April 1970); the testator's name and the names of the attesting witnesses in manuscript on the carbon copy. In the case of the testator and the second attesting witness the handwritten name is preceded by the letters "s/d". Dame Lois had, sadly, died before the finding of this document, and before she could make a written statement as to her dealings with Stanley and Genevieve. I did however hear from Mildred Hill, who had been her book-keeper for thirty years, and who knew something of the firm's practice and procedures. It is her name which is entered in manuscript as the second attesting witness of Stanley's will, and she was also one of the attesting witnesses to Genevieve's will. In her evidence she confirmed that she was an attesting witness and that Stanley had attended at the office and signed the original of the will. However, in her first

witness statement she identified the manuscript of the testator's name and her name as their respective signatures, but she then made a second witness statement recanting that, and stating that it was the handwriting of Dame Lois's secretary, Elvira Warner, who was also the first attesting witness to both Stanley's and Genevieve's wills. Mildred Hill states that it was the practice of the firm for Ms. Warner "to sign the carbon copy to indicate that the original had been signed". By that I understand her to mean that Ms. Warner would write in the signatory's name in her own hand, and she would then indicate that the original had been signed by that person by writing "s/d" before the handwritten name of that person.

13. It is said that I should disregard Mildred Hill's evidence in view of her initial mistake. I do not think that I need do that. Her revised version makes sense and accords with the document itself. I therefore accept her primary evidence, as an attesting witness, that the original will was signed by Stanley, and that it was in the same terms as the carbon copy that we now have in evidence. I also accept her evidence as to the identity of the manuscript on the will, and the office practice, so that Ms. Warner's notation "s/d Stanley Winfield Hill" becomes her hearsay statement, made by her in the course of her employment and pursuant to her duties, and therefore admissible in its own right under section 27D of the Evidence Act 1905, that he had signed the document

14. As noted above, the plaintiff says that he is unable to locate the original will, and although he did once possess a copy of it, that too is now lost. I accept his evidence on that. I therefore admit the carbon copy of the will as the best evidence of the contents of the original.

(ii) The extent and terms of the agreement (if any) underlying the mutual wills

15. It is the plaintiff's case that in the early 1970s Stanley and Genevieve sat him down at the kitchen table to discuss their final wishes, which were that the property would come to him once they passed away. He says that they had both written out their wills in their own hands which mirrored each other's wishes. They read them out to him and said they would get them typed by a lawyer and signed, which they did, and once done they gave him a copy of both wills to keep, and they kept their own copies in their top dresser draw.

16. The wills themselves both use the expression ‘a mutual will’, and they both contain an express agreement not to revoke –

> “1. I hereby agree that I will not revoke this my Will at any time after the death of my said husband [my wife GENEVIEVE ELOISE HILL] Provided That there remains unrevoked at the time of his [her] death a mutual Will of even date with these presents in which my said husband [wife] (by Clause 3 of his [her] Will) bequeathed and devised to me all his [her] personal and real estate absolutely and in fee simple.”

17. It is true that that agreement only recites the bequest to the spouse, and does not refer to the eventual bequest of the real estate to the plaintiff, but both wills contain identical provisions in that regard, and I have no difficulty in concluding that there was an agreement as recited, and that it extended to all the terms of the wills. This is supported by the plaintiff’s testimony, but I would have found such an agreement on the bare terms of the wills without more.

18. Against that, the defendants point to the other material found in Stanley’s file, which consisted of two similar manuscript versions of a will for Stanley. Mildred Hill said that these were in his hand, annotated by Dame Lois, and she goes on to say that she is sure of that because they mirror the content of his will of 23rd April 1970. In fact they do not mirror the will – they omit the vital agreement in clause 1 (see above), and they both bequeath all his real and personal estate to his wife (if she survives him) “absolutely and beneficially and without any sort of trust or obligation”. In the circumstances I cannot accept her evidence on authorship, and so am unable to say by whom the manuscript drafts were written. Assuming, in the defendants’ favour, that they were written by Stanley, or even possibly Genevieve, the bequest to the surviving spouse “absolutely and beneficially and without any sort of trust or obligation” is on the face of it incompatible with the alleged scheme to ensure that the property passed to the plaintiff by way of enforceable mutual wills. But these documents are plainly either drafts or instructions or both, and they are superseded by the final, executed version, which in my judgment prevails.

(iii) Whether the first and/or second defendants knew of the mutual wills

19. It is the plaintiff's case that there came a time when he became worried about his inheritance. This was after Stanley retired from his job at a bakery and after he[8] had taken out a mortgage to buy a taxi, and then experienced difficulty with the repayments. At that point the plaintiff says that he went to Stanley who sat him down in front of the first defendant and told him that the Wills were intact and remained in his top drawer, and that he therefore had nothing to worry about should anything happen to Stanley. The first defendant denies any such meeting, or any other knowledge of the wills or the agreement they embodied. It is not entirely easy to assess this question. Neither party was a very convincing or believable witness, and I am afraid that the conduct and demeanour of both while under cross-examination left me with the impression that they would say whatever they thought suited their case. In the end I simply consider it improbable that Stanley, who knew he had made a new will and knew that he had conveyed the property to himself and the first defendant, would tell such an outright lie. I think that the reality is that the plaintiff was (and is) not very attuned to such matters, and paid little attention to them, being content to let things continue as they had always been without asking any questions. This is born out by his conduct after Stanley's death when for nearly seven years the plaintiff took no steps to secure the administration of Stanley's estate, or to ensure that title vested in him. I therefore find that the defendants did not know of the mutual wills until the plaintiff finally raised the issue long after Stanley's death in either late 2006 or early 2007.

(iv) Whether the plaintiff knew of Stanley's second will and the voluntary conveyance by which the first defendant took a joint interest, and if so when he became aware?

20 I also find that the plaintiff did not know of what Stanley had in fact done, and did not know about the new will or the voluntary conveyance. I do not think that he ever asked about such matters, for the reasons given in the preceding paragraph, and I do not think that Stanley volunteered them. Indeed, in cross-examination the first defendant said that Stanley told her not to say anything to anybody about the voluntary conveyance – not to the plaintiff, not to anybody – which suggests that Stanley was actively trying to keep what he

[8] In paragraph 19 of his witness statement the plaintiff implies that the loan was taken out by both Stanley and the first defendant, but in his cross-examination he said that it was only Stanley who took out the mortgage to buy the taxi, and that the use of the word "they" in that context was a "misprint".

had done secret. To the extent that the first defendant says that she ignored this caution and told the plaintiff anyway, because he was like her "big son" and she told him everything, I disbelieve her. I think that if she had told him at or near the time there would have been an almighty row, which is why Stanley told her not to do so.

(v) The parties' contributions

21. In view of my eventual findings on the legal points (see below), I do not think that it is necessary for me to make detailed findings on all of this. It was the plaintiff's case that he had contributed to the initial construction of the main house and the apartments, both with his own labour and financially. I accept that he did work on the house during its construction, as did Stanley, and that each of Stanley, Genevieve and the plaintiff contributed to the cost of materials by deductions from their wages. I find that they did that as a joint family enterprise. I also find that he then contributed labour and money to the apartments that were added to the property, although I think that his actual contribution is somewhat exaggerated by him. I find that those apartments were built to generate income. I get that from the plaintiff's evidence in paragraph 10 of his witness statement about assisting with the retirement plans of Genevieve and Stanley. Given that Genevieve was about 40 at the time of her death, and Stanley only three or four years older, I doubt if they were talking about an immediate retirement, and it makes more sense if they were talking about the apartments as an income producing property.

22. As to the timing of the construction of the apartments, the plaintiff's evidence is that they were begun during Genevieve's life-time. However, the first defendant asserts that they were only started after she moved into the house in late 1973, but she gave at least three different versions of when Stanley began construction by digging the water pit and foundations, and I think that her evidence is not to be trusted on that. I find, therefore, that the apartments were begun during Genevieve's life-time, and finished at an uncertain time after her death, possibly after the first defendant had started to live at the property, but certainly before September 1977, when the second defendant came to live in Bermuda, as her evidence was that they were completed when she came here.

23. The plaintiff called various witnesses as to the works undertaking or paid for by him. I am afraid that I formed the general impression that each was exaggerating and essentially saying what the plaintiff wanted him to say, and I accept the first defendant's assessment of them as his cronies. One example will suffice. Mr. Morrison Swan said in his witness statement that on many occasion in the past eighteen years he was hired by the plaintiff to paint the entire house, but in cross-examination he conceded he only did that once, 30 years ago, and that his subsequent efforts had been limited to the roof. He also conceded that an occasion when the first defendant required him to put on a second coat of paint, notwithstanding that the plaintiff was paying, related only to the roof and not the entire house, as he had said in his witness statement.

24. The plaintiff also claims that, when Genevieve and Stanley mortgaged the property to build the apartments, part of their domestic arrangement was that he would be responsible for paying that mortgage. Neither I nor the parties were not taken through the mortgage documents in an attempt to tie down the mortgage question, but it would appear that the mortgage for the apartments would be that taken out with L. P. Gutteridge Mortgage & Finance Ltd. ('L. P. Gutteridge') on 22nd May 1969 and discharged on 9th March 1975, when the property was immediately remortgaged to Commercial Union. Later, when Stanley borrowed money to buy the taxi, there was a further mortgage, again apparently with L. P. Gutteridge, and the plaintiff says he had to bail Stanley and the first defendant out by paying off accumulated arrears to stop the security being enforced against them.

25. There is some independent evidence on all of this in the form of a statement from Pamela Madeiros, which was read in. She was a loan officer with L. P. Gutteridge and its successor entities, from 1973 until 2007, and she was responsible for the mortgages on 10 Scenic Heights. She says that she only recalls receiving payments from Stanley and the first defendant, and not from any other individual.

26. I accept the plaintiff's evidence that he did throughout make cash payments in respect of the house, but there is nothing to indicate that he was paying the mortgage as such. I think that the reality was that he was making a payment in respect of his accommodation

which was in the nature of rent, and which may or may not have been used by the householders for the time being to pay the mortgage and other outgoings. This is not an unusual thing for family members to do. In this case it makes particular sense because, when the first defendant's daughters arrived in or about 1977, the plaintiff moved out of the main house into one of the apartments. On his own evidence a tenant had to be evicted in order for him to do that, and the loss of that income had, no doubt, to be made up. That this was indeed the case by the time of Stanley's death is apparent from his own evidence in paragraph 22 of his witness statement:

> "After the death of Uncle Stanley Yvonne [told] me that I would have to start paying more *in order to help pay for the money owed to the bank*. I had no problem with that and I paid her $1,200.00 a month from 2000 to January 2007." [My emphasis]

27. As to the defendants' contributions, they gave further and better particulars of these on 18th December 2008. Paragraph 1 of those particulars deal largely with works before Stanley's death. The plaintiff on cross-examination accepted most of these, although he was variously critical of the standard of the work, and of its purpose, contending that much of it was to create accommodation for the first defendant's daughters.

28. Paragraph 2 of the particulars deals with those to which the second defendant contributed, all but the first of which were after Stanley's death. To the extent that the plaintiff disputed some of these items, or claimed to have paid for them, I consider that he is contradicted by the documentary evidence.

29. As to the work done as part of the renovations 2007 which were the immediate trigger for this dispute, they are pleaded in paragraph 3 of the particulars. The plaintiff does not dispute that the works were carried out, and I find that those works were done at that price. I also accept the defendants' evidence that the property had become run down and dilapidated, and that repair works were necessary, although I also note that the work included an extension of the accommodation and the property, in that the previous two small apartments have become a two-level, four bedroom unit and a new one-bedroom

unit[9]. The total cost was $620,013.36, which is lower than the valuer, Mr. Lowry, would have priced the work. He noted –

> "This is partly due to the defendants importing the majority of the materials themselves at considerable savings and the resultant lower price shows that good value was received."

30. The works in 2007 were paid for by a mortgage which the defendants took out with the Bank of Butterfield. This was for a sum, $717,600[10], the difference between that and the actual cost, according to the second defendant's evidence, being used to pay off a pre-existing indebtedness. I cannot work out the exact figures on the information before me, because the pre-existing mortgage[11] in favour a different bank, the Bank of Bermuda, was only in the sum of $63,579.77. However, I do not think that that matters, it being enough for me to find that the defendants spent $620,013.36 on renovating and extending the property, for which they got good value.

THE LEGAL ISSUES

31. I take it to be settled law that where testators enter into mutual wills pursuant to an agreement to ensure that property devolves as provided in the wills, and then the first of them to die does so without having revoked their will, then the property which was the subject of the agreement becomes impressed with a constructive trust in favour of the agreed beneficiary. The key to this is that there has to be an agreement:

> "It is therefore clear that there must be a definite agreement between the makers of the two wills; that that must be established by evidence; that the fact that there are mutual wills to the same effect is a relevant circumstance to be taken into account, although not enough of itself; and that the whole of the evidence must be looked at." Per Nourse J in In re Cleaver [1981] 1 WLR 939 at 945.

And see also In re Goodchild, decd. [1997] 1 WLR 1216[12].

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[9] See the report of Woodbourne Associates Ltd. (Mr. Paul Lowry) of 20th January 2009, at paragraphs 3 and 4.
[10] The mortgage deed of 12th January 2007 is at Tab 46, p. 128 of the defendants' documents.
[11] The mortgage deed of 1st February 2006 is at Tab 37, p. 105 of the defendants' documents.
[12] No sufficient agreement was established in Goodchild, but the facts were different.

32. It may be possible for the surviving testator to dispose of the property during his life time, but not if the purpose of doing so is to defeat the trust:

> "It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos*, is, therefore, not unqualified." Birmingham v Renfrew (1937) 57 C.L.R. 666 at 689 per Dixon J, as cited with approval by Nourse J in In re Cleaver [1981] 1 WLR 939 at 946.

I have no doubt that Stanley's *inter vivos* disposition of half the property to the first defendant soon after their marriage is caught by that, because, although he may not have understood all the legal ramifications, he must have been aware that it was contrary to the understanding or 'compact' that he had come to with Genevieve.

33. While some of the early cases suggest that only the property which passed under the will of the first to die is impressed with this trust, I think that the better and modern view is that it is the whole of the property, provided that is the tenor of the underlying agreement: see e.g. In re Goodchild (*supra*), at 1229 per Morritt LJ:

> "Where there are mutual wills the doctrine affects the property of both testators, in particular that of the second to die. If he is to be subjected to an obligation with regard to property of his own not derived from the other then an agreement should be required."

34. Moreover, because it is the underlying agreement which is the crux of this, and not the mere fact of mutual wills alone, it does not matter whether the subject property in fact passes under the will of the first to die, provided it does so by reason of his/her death. Thus it does not matter that Genevieve's half share in the property in fact passed to Stanley by right of survivorship, and not under her will. I therefore find that all the requirements for the creation of a constructive trust were present here.

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35. Stanley's first will was revoked by operation of law on his remarriage. The defendants rely upon Re Marsland, Lloyds Bank Ltd. v Marsland [1939] Ch. 820 to argue such an involuntary revocation avoids the mutual obligations that the testators had undertaken to each other. However, I do not think that that represents the modern law, which recognizes the formal validity of the second or subsequent wills, but impresses the trust upon the property in the hands of the survivor and then in the hands of his personal representatives or beneficiaries:

> "It is true he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will." Birmingham v Renfrew (1937) 57 C.L.R. 666 at 683 per Dixon J, as cited with approval by Nourse J in In re Cleaver [1981] 1 WLR 939 at 946.

36. The defendants plead and argue that any agreement between Stanley and Genevieve was a contract for the disposition of land (or at least of an interest in land), and so is caught be section 3 of the Conveyancing Act 1983 (which essentially embodies the old Statute of Frauds). The section provides –

> **"Contracts for the disposition of land to be in writing**
> 3 (1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized to act on his behalf."

37. Reference was made to the case of Healey v Brown & Saffer 2002 WL 498883, but that case turned upon the provisions of section 2 of the English Law of Property (Miscellaneous Provisions) Act 1989. That Act contains materially different provisions, not least that the contract must be made in writing, and that that document must contain all the express terms in one document, and must be signed by all the parties. It therefore avoids oral agreements, unlike the old Statute of Frauds which permitted them, provided they were evidenced in writing signed by the person to be charged.

38. In my judgment Stanley' original will was a sufficient memorandum of the agreement, not least because it recites that agreement:

> "*I hereby agree that* I will not revoke this my Will at any time after the death of the said GENEVIEVE ELOISE HILL Provided That there remains unrevoked at the time of her death a mutual Will of even date with these presents in which my said wife (by Clause 3 of her Will) bequeathed and devised to me all her personal and real estate absolutely and in fee simple." [Emphasis added]

39. Nor does it matter that the original is not produced. As noted above, I find as a fact that Stanley did indeed execute the original will, and it follows from that that there was once a sufficient signed memorandum in writing. It does not, therefore, matter that it is now lost, as a lost memorandum can be proved by secondary evidence: Barber v Rowe [1948] 2 All E. R. 1050.

40. In the alternative to their primary claim, the defendants also seek to assert some form of proprietary estoppel against the plaintiff for standing by and letting them spend their money on improving and extending the property. However, I do not think that routine maintenance works are sufficient for this. As to the various extensions and adaptations done during Stanley's lifetime, they cannot be held against the plaintiff as his interest had not come into possession at that time, and he had no basis for objecting. Further works were done, largely by the second defendant, between Stanley's death and the major renovations, but I think that they are really subsumed in and overtaken by the latter. As to those major renovations, I think it clear that once the plaintiff became aware of the proposal for major improvements, he objected and after that the defendants proceeded at their own risk as far as establishing a proprietary estoppel again the plaintiff is concerned. I do, however, think that some allowance is required for that work, and I return to that question below.

41. Finally the defendants assert the Limitation Act 1984 and/or laches. The first step in considering such an argument is to establish from when time should begin to run against the plaintiff. I do not think that that could be until Stanley's death on 1st December 2000. It was then that, if he had acted sensibly in his own interests, the plaintiff would have moved

to probate the original will and would then have discovered the intervening dispositions and the new will. I do not need, for the purposes of this action, to tie it down more than that, but if I had had to I would have put the start of time running at six months after Stanley's death, that allowing a reasonable time for the plaintiff to react. On that basis, time would then have started running on 1st June 2001. The writ in this action was issued on 9th October 2007, which would have been outside a six year limitation period.

42. What is the appropriate limitation period for this cause of action? The defendants contend for six years pursuant to 23(3) of the Limitation Act 1984, which provides –

> "(3) Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession."

43. The plaintiff, however, says that this is an action to recover an interest in land, and that for that a different limitation period of 20 years is prescribed under another provision of the Act, namely section 16. I think that that is right, because section 20(1) provides:

> **"Equitable estates and interests**
> 20 (1) Subject to section 23(1), the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, as they apply to legal estates."

On the face of it, that would apply the 20 year limitation period in section 16 to equitable interests in land. That is not, in my judgment, excluded by the cross-reference to section 23(1). That subsection simply provides that there is no limitation period in cases of fraud, fraudulent breach of trust or conversion of property by a trustee to his own use. There is no such cross-reference to the rest of section 23, and certainly not to subsection 23(3). I therefore find that the time limit for recovering an equitable interest in land is 20 years,

except in the case of a trustee who has converted the land for his own use, where there is no time limit[13]. This action is not, therefore, time-barred.

44. Given that I find that there is an applicable limitation period, which has not yet expired, I think that it would be inappropriate to enter into the question of equitable laches. I take the law on that from Underhill & Hayton, 'Law Relating to Trusts and Trustees' 17th ed., at paragraph 96.35:

> "It is clear that if statute specifically provides for an express period of limitation then there is no room for the equitable doctrine of laches . . . "

45. If I were wrong on that I would have held, given the domestic circumstances of the parties, that the question of equitable delay only really arose once the plaintiff in fact became aware of the defendants' claim, which was at the time of the attempt to get him to leave the premises to facilitate the renovations – i.e. October/November 2006. Any delay after that was either not so great as to attract equitable sanctions, or was sufficiently explicable by the difficulties arising from the loss of the original wills..

CONCLUSIONS

46. I find, therefore, that the property at 10 Scenic Heights Drive is impressed with a trust in favour of the plaintiff. That trust still attaches to the land in the hands of the defendants, notwithstanding the voluntary transfers, or the fact that neither defendant knew of the agreement with Genevieve and the mutual wills, because neither is a purchaser for value. They therefore take the property subject to prior equities.

47. However, that is not the end of the matter. I think that the court is not only entitled, but obliged, to ask itself what is the extent of that trust? The court is exercising an equitable jurisdiction and is, therefore, more than ever obliged to be fair and in doing so is obliged to have some regard to the circumstances of the first defendant. Her marriage with Stanley

[13] I do not have to get into the difficult distinctions between the two types of constructive trust that were considered in Paragon Finance plc v Thakerar & Co. [1999] 1 All E. R. 400. That case was not directly concerned with the recovery of land, but with actions for breach of contract, negligence and breach of duty and/or fraud, the question being whether there was any limitation period at all.

was a substantial and lasting relationship which endured for nearly 23 years. The evidence of her financial contribution to the upkeep of the property during this period does demonstrate that she played a real role in the marriage, and was not the parasitic passenger suggested by the plaintiff's witness statement. It is plainly the policy of the law that a wife in such circumstances should have some claim on the property of her husband. That is now encapsulated in the provisions of Part III of the Succession Act 1974. It may well be that, had Stanley honoured the agreement with his first wife, on his death his second wife would have had the right to apply for financial provision under section 13 of that Act. It is not, as a matter of strict law, entirely clear how such an application would have fared: there are provisions in the Act to deal with contracts to leave property by will, but they only apply if the provisions were made with the intention of defeating an application for financial provision under the Act, which would be hard to show in the case of wills made nearly four years before the Act came into force. And in any event those anti-avoidance provisions were a later addition, and only apply to contracts made after 8th January 1988[14].

48. However, whatever the strict position at law, in a case such as this I think that the court can and should give effect to the wife's 'equity'. I think that the starting point for that, in the circumstances of this case, would be a one-half share. By 'the starting point', I mean the share that she would have been entitled to on her husband's death, looked at as matters stood at that point in time. I think, however, that a further adjustment then has to be made in view of the works that were done in 2007.

49. I do not think that it is an answer to that that some or all of the money for the works was spent after the defendants became aware of the plaintiff's claim. On the facts that I have found, the defendants' dispute of his claim was *bona fide*, and I think that they were entitled to go ahead with their planned works. In any event the plaintiff did not issue his proceedings until 9th October 2007, which was after the works were done and long after the financing was obtained and the contract with the builders signed. In my judgment, therefore, it is enough that the defendants have spent $$620,013.36 improving the property, and they should get some allowance for that.

[14] See Succession Act 1974, section 22(6).

50. Of course those repairs were funded by a mortgage on the property, and, if the property is to be sold, it may be that that allowance can simply be made by splitting the net proceeds of sale, after payment of the outstanding mortgage, equally (subject to an adjustment in the plaintiff's favour to reflect the fact that not all the mortgage was spent on the building works). In that way each side would equally bear the burden of paying for the works and would equally obtain the benefit of them in the uplift of the sale price. However, that depends on whether the property is to be sold.

51. I think, therefore, that the best way to proceed is to give the parties an opportunity to consider the outcome and then to make submissions to me about how to deal with the incidence of the cost of the recent building works, if they cannot resolve it by agreement, in the light of my primary ruling. I also invite the parties to address me on the appropriate relief generally. The plaintiff has claimed a variety of alternative orders, including declarations, an order for sale and damages, and I need submissions from both sides as to which is the most appropriate in light of the actual outcome.

52. I will also hear the party on costs.

Dated the XX day of July 2009

Richard Ground
Chief Justice