

intimate partner. She has brought this claim against Mrs. Mauvellette Dayes, the widow of Mr. Dayes, to establish her interest in the Kibo Hotel business. Mrs. Dayes rejects her assertions and is disputing the claim.

[2] Mr. and Mrs. Dayes were the legal owners of the property registered at Volume 1401 Folio 468 and Volume 1520 Folio 294 of the Register Book of Titles (“**the property**”) as tenants-in-common in unequal shares, with sixty percent (**60%**) to Mr. Dayes and forty percent (**40%**) to Mrs. Dayes. The hotel business was registered as a partnership¹ with Mr. and Mrs. Dayes registered as equal partners. Ms. Palmer is the Manager of the Kibo Hotel, a role she held prior to the acquisition of the hotel by Mr. and Mrs. Dayes. It is in contention whether she carried out this role as an employee or as a part owner.

[3] Mr. Dayes died in 2020. His purported Last Will and Testament devised his sixty percent (**60%**) interest in the property to Ms. Palmer. Mrs. Dayes raised a challenge to the validity of said Will and in August 2020 commenced a claim in the Probate Division with Claim SU2020ES01547. Subsequently, in November 2020 Ms. Palmer commenced this claim in the Commercial Division. On 21st March 2022, by the Order of Batts J, proceedings in the Probate division were ordered to travel with this claim, and the probate claim to abide by the outcome of these proceedings.

[4] By way of Claim Form and Particulars of Claim filed 30th October 2020 as amended 4th November 2021 and further amended 15th November 2021. Ms. Palmer seeks the following orders:

- (a) An Order that the Defendant or any of her agents, in particular, Reddington George McIntyre, be restrained from coming unto the Kibo Hotel property to demand payment of monies collected by the Kibo Hotel or in any way to

¹ Certificate of registration for the Kibo Hotel Exhibit “MD6” in the Defence to Amended Particulars of Claim and Counterclaim dated 12th November 2021

intimidate or interfere with the Claimant's control and management of the day-to-day operation of the Kibo Hotel business;

- (b) A Declaration that during the lifetime of Mr. Dayes, the Kibo Hotel business beneficially belonged to the Claimant and Mr. Dayes in shares proportionate to their contribution to the purchase price of the hotel and property and the management and profitability of the business namely as to fifty percent (50%) for the Claimant as an equity partner and as to fifty percent (50%) for Mr. Dayes;
- (c) A Declaration that the devise of the entire interest of his share in ALL THOSE parcels of land, part of Lewis Street in the town of Savanna-La-Mar registered at Volume 1401 Folio 468 and Volume 1520 Folio 294 of the Register Book of Titles is a clear intention that Mr. Dayes Wessell Days always intended that the Claimant would be entitled to a share of the Kibo Hotel business;
- (d) A Declaration that the Claimant is entitled to fifty percent (50%) in the Kibo Hotel business or such other sum as this Honourable Court may determine by virtue of her being an equity partner in this said business with Mr. Wessell Dayes

[5] Mrs. Dayes in her counterclaim seeks the following Orders:

- (a) That the Claimant, her agents and servants be removed from the Kibo Hotel and vacate the room she occupies;
- (b) An audit of the Kibo hotel be done to determine how monies belonging to Kibo hotel have been used or misused;
- (c) That the Claimant delivers all records of the Kibo Hotel both written and electronic to the Defendant;
- (d) An account of funds collected by the Claimant in the management and operation of the Kibo Hotel be given to the Defendant;

- (e) Disclosure of the use of funds on the business credit card of the Kibo Hotel that was issued to the Claimant be given;
- (f) A declaration that the 'X' which marks the spot on the purported last Will and Testament of Wessell Dayes referred to at paragraph 27 of the Amended Particulars of Claim is not a mark made by Mr. Dayes Wessell Dayes;
- (g) A declaration that the purported last Will and Testament of Wessell Dayes referred to at paragraph 27 of the Amended particulars of Claim is null and void;
- (h) A declaration that the Claimant is not entitled to any interest in the property registered at Volume 1401 Folio 468 of the Register Book of Titles;
- (i) A declaration that the Claimant is not entitled to any interest in the Kibo Hotel business;
- (j) A declaration that the Defendant is the legal owner of the Kibo hotel and is entitled under the laws of intestacy to a portion of the shares held by her deceased husband in the said hotel; OR
- (k) A declaration that the disposition of Mr. Dayes's estate effected by his Will is not such as to make reasonable financial provision for the maintenance of the Defendant; and
- (l) An Order for the transfer to the Defendant of at least fifty percent (50%) of the interest held by Mr. Dayes in the Kibo Hotel or such other percentage as the Honourable Court deems fit;
- (m) Such other order as the court deems just in the circumstances;
- (n) Costs.

There was no pleaded defence to the counterclaim.

[6] Pursuant to an Interlocutory Order of Batts J, Ms. Palmer continues to manage the daily operations of the hotel whilst Mrs. Dayes maintains control over the hotel's revenue and business accounts and settles hotel expenditures.

BACKGROUND

[7] In 2013 Mr. and Mrs. Dayes purchased the property and hotel from Dr. Pantaleo Mosha and Mrs. Jane Pantaleo Mosha. There is no dispute that the purchase price was funded in part by a deposit of Forty Million Dollar (**JM\$40,000, 000.00**) from the couple's joint account and bank loans, and in part from a Forty Million Dollar (**JM\$40,000,000.00**) vendor's mortgage from the Moshas. The Duplicate Certificate of Title indicates that the land was purchased for Forty Million Dollar (**JM\$40,000,000.00**) leading to the inference that the other Forty Million Dollar (**JM\$40,000,000.00**) was for the hotel business. The only parties referred to in the documents referencing these transactions are Mr. and Mrs. Dayes and Dr. and Mrs. Pantaleo Mosha.

[8] Mr. and Mrs. Dayes also owned and operated farm stores in St. James and Westmoreland. Mrs. Dayes managed the store in St. James until its closure in 2017 whilst Mr. Dayes managed the store in Westmoreland. As the couple resided in Montego Bay St. James, initially, Mr. Dayes travelled back and forth between the matrimonial home in St. James and the hotel and farm store in Westmoreland. Mr. Dayes suffered various medical conditions, consequently, according to Mrs. Dayes, he elected to primarily reside at the hotel during the weekdays whilst returning to the matrimonial home on weekends.

[9] Ms. Palmer and her daughter also resided at the hotel. Ms. Palmer accepted in cross-examination that they commenced residing there whilst employed by Dr. and Mrs. Pantaleo Mosha. Ms. Palmer owned a house located at Phase 6 Llandilo Savanna-lamar Westmoreland. This house was sometimes used to house guests when the hotel was unable to provide accomodation to fulfil its agreement with the Ministry of National Security to house police officers, on special operations, who were assigned to the area.

[10] In late 2019 the health of Mr. Dayes declined. He visited his doctor on the 16th and 17th December and was referred to the hospital for further treatment. On the 18th December 2019, Mr. Dayes was taken to the hospital by Ms. Palmer. It is the contention of Ms. Palmer that he asked her to take him to the offices of his Attorneys-at-Law, Chen, Green and Co. She further contended that following this visit, Mrs. Angelle Green-McNeish, Legal Secretary from Chen, Green and Co, accompanied them to the Savannah-la-Mar police station where (unknown to her at the time) Detective Constable Johana Bunting and Constable Dwayne Elliot witnessed Mr. Dayes execute a document intended to be his Last Will and Testament. Thereafter Ms. Palmer took Mr. Dayes to the Savannah-la-Mar Hospital where he was admitted.

[11] Mr. Dayes remained in the hospital for two weeks and subsequently died approximately four (4) months later on 23rd April 2020. Upon his death, Ms. Palmer was notified by Mr. Leonard Green that she was the sole beneficiary of the only property he had devised in his Will.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[12] Counsel on behalf of the Claimant, Mr. Jeffrey Daley, contended that Ms. Palmer is entitled to an interest in the Kibo Hotel business as a consequence of her partnership with Mr. Dayes. He submitted that this partnership arose from an express oral agreement between the parties which was later demonstrated by their conduct. He relied on the doctrine of Promissory Estoppel to give effect to this agreement. To this end he relied on **Central London Property Trust Ltd. v High Trees House Ltd.** [1947] KB 130, **Joseph Taylor v Lancashire County Council and Anor** [2001] EWCA Civ 174, **Emery v UCB Corporate Services Ltd.** [2001] ALL ER [D] and **Manhertz and another v Island Life Insurance Company Ltd.** SCCA No 24/2006. It was submitted that Mr. Dayes led Ms. Palmer to believe that she was an integral part of the Vendor's Mortgage agreement to finance the purchase of the Kibo Hotel. In furtherance of the foregoing, Mr. Daley submitted that Ms. Palmer was an equitable partner who though she made no monetary contribution to the operation business, provided her expertise in the hotel industry and,

specifically, the operations of the Kibo Hotel. He also relied on the case of **Robert Joseph v David McKenzie** (unreported), Supreme Court, Jamaica, Claim No. J-088 of 1985, judgment delivered 21 June 1993.

[13] Counsel further submitted that the conduct of Mr. Dayes clearly evinced that a promise of partnership was made to Ms. Palmer and she acted on said promise to her detriment. Counsel contended that Ms. Palmer exceeded the expectations of an employee by working and residing at the hotel 24/7 as a consequence of her belief that she had an interest in the business. Further, it was submitted that Mrs. Dayes acquiesced and accepted the position of the Ms. Palmer during the life of Mr. Dayes, as such, equity would not allow Mrs. Dayes to act inconsistently with the promise made.

[14] Counsel Mr. Daley further submitted that the partnership between Mr. Dayes and Ms. Palmer was not required to be formalized by a written agreement, however, in absence of a written agreement, the substance of the relationship between the parties should be examined. Reliance was placed on Lindley on the **Law of Partnership 14th Edition, Keith Spicer Ltd. v Mansel** [1970] 1 W.L.R. 333, **Lyle Barnes v Jocelyn Bennett, Dalton Barnes and Michael Barnes** [1993] 30 JLR 114, **The Grace Thrillers Outreach Ministry Ltd. v Shirley Willis et al** (unreported), Supreme Court, Jamaica, Claim No. 2007 HCV00607, judgment delivered 30 July 2007, and **Christine Johnson-Lake v The Administrator General of Jamaica et al** [2017] JMSC Civ 147. It was contended that the conduct of Ms. Palmer and Mr. Dayes established a partnership. Ms. Palmer was given unfettered access to the business income and credit card in order to operate the business and to receive her drawings from the business.

[15] In the alternative, Counsel submitted that if a partnership to operate the hotel is not found to exist between Mr. Dayes, and Ms. Palmer, then a sub-partnership was formed when Ms. Palmer agreed to provide her professional expertise and Mr. Dayes agreed to provide the capital to purchase the hotel. He relied on **Lindley & Banks on Partnership 17th Edition**.

[16] Counsel Mr. Daley contended that Ms. Palmer is an equal partner of the hotel and not an employee. He submitted that Ms. Palmer's monthly salary and pay slip is not by itself indicative of an employer/employee relationship. Ms. Palmer would receive pay slips and a set sum labelled as salary in order to facilitate statutory deductions which she wished to contribute. Further, Mr. Dayes, as a partner, would take payments from the business labelled as "*salary*". Counsel argues that the absence of supervision over Ms. Palmer in her operation of the hotel namely; the indefinite accommodations at the hotel, the lack of disciplinary actions for the improprieties which Mrs. Dayes complained of, and the unlimited access to the profits of the business, e.g. the blank cheques left in the possession of Ms. Palmer, illustrate that there exists no control or dependency which is required to establish an employer/employee relationship. Additionally, Mr. Daley maintains that Mrs. Dayes was a silent partner in the business and as such would not be able to speak to the agreement between Mr. Dayes and Ms. Palmer.

[17] Further, it was contended that the use of Ms. Palmer's property to supplement the hotel further bolsters Mr. Dayes's recognition of the partnership which existed between him and Ms. Palmer.

[18] Counsel also submitted that Mr. Dayes was deliberate in purchasing the property as a tenant-in-common with Mrs. Dayes as he intended to separate the business of the Kibo Hotel from the other assets he wanted his wife to receive.

[19] According to Mr. Daley, since June 2022, Mrs. Dayes has wilfully orchestrated to sabotage the business by ceasing to pay all operating expenses contrary to the Orders of the Court. He notes that the report of Ms. Dian Wilson, an accountant appointed to report weekly on the business of the hotel, is unhelpful in the Court determining the matter as the report merely sets out the purported income and no reporting of any expenses for the business. Further, Ms. Hayles, a chartered accountant, asserts that she could not perform her task due to the lack of accounting records which Ms. Palmer was to provide.

[20] Mr. Daley argues that the Last Will and Testament of Mr. Dayes was duly executed and complied with all formalities as set out in **S.6 of the Wills Act**. To this end he relied

on **Errol Anthony Davis et al v Naomi Evadney Barret-Davis** [2017] JMSC Civ 44. Counsel vehemently denies all allegations of the forgery of the Last Will and Testament of Mr. Dayes. He submitted that Mr. Dayes was plagued with several illnesses which caused him to be weak and incapable of signing his testamentary document and, consequently, Mr. Dayes marked his Will with an "X". Counsel contended that the expert report of Ms. Beverley East which stated that there was no effect of illness which was obvious in the handwriting of Mr. Dayes did not take into account Mr. Dayes' disability. He further argues that pursuant to the evidence of Dr. Fielden Fairclough, Mr. Dayes was in a poor state of health which could have impaired his ability to write properly.

[21] He submitted that the evidence of the attesting witness, Ms. Johana Bunting, illustrates that she satisfied herself that Mr. Dayes was of sound mind and was not under any undue influence when he marked his Will. Further, the evidence of Mr. Leonard S. Green, former Attorney-at-Law of Mr. Dayes, illustrates that it was the intention of Mr. Dayes to give one half of his interest of the Kibo Hotel business to Ms. Palmer.

[22] Lastly, it was submitted that Mrs. Dayes' counterclaim for financial support cannot succeed as such a claim can only be made against the estate of Mr. Dayes, of which Ms. Palmer is not a representative.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[23] Counsel on behalf of the Defendant, Mrs. Emily Shields, refutes Ms. Palmer's assertions of being an equity partner in the Kibo Hotel business. It was Counsel's submission that Ms. Palmer did not provide any capital contribution towards the purchase of the hotel. Further, the evidence of Mr. Leonard Green confirms that Ms. Palmer was never a party to the agreement to purchase the hotel and neither was her continued association with the hotel a term to the grant of the vendor's mortgage by Mr. and Mrs. Moshia. Ms. Palmer was privy to financial statements which indicated that Mr. Dayes and Mrs. Dayes owned and operated the hotel as a partnership.

[24] Counsel further denies the contention of Counsel Mr. Daley that Mr. Dayes intentionally purchased the property with Mrs. Dayes as tenants-in-common because he intended to separate the business of the Kibo Hotel from the other assets he wanted Mrs. Dayes to receive. Counsel pointed out that the evidence of Mrs. Dayes highlighted that she and Mr. Dayes owned several other properties as tenants-in-common.

[25] Ms. Palmer, as Counsel submitted, was a salaried employee of the Kibo Hotel and same is reflected on the employer's annual return SO2 forms. She rejected Ms. Palmer's assertion that she did not receive a salary but instead received drawings in cash or by cheque. It was submitted that payments made to Ms. Palmer by cheque were labelled as "salary", and were always in the same amount each month, consequently, this was indicative of her status as a salaried employee. Further she submitted that no proof of drawings in the form of cash was provided.

[26] Counsel further maintains that it was not on the assurances of Mr. Dayes that Ms. Palmer was an equity partner which caused her to reside at the hotel 24/7. Rather as adduced in cross-examination, Ms. Palmer had separated from her husband and was in the process of moving and, as such, Mr. and Mrs. Mosha allowed her to reside at the property in order to better manage the business. Hence, it is to that end Ms. Palmer continued to reside at the hotel.

[27] In response to Mr. Daley's submission that Ms. Palmer enjoyed unbridled access to business profits, as seen through Mr. Dayes' act of providing Ms. Palmer with signed blank cheques to issue as she saw fit, Counsel denied this assertion. It was contended that this act was done in order to facilitate timely payment of business expenditure and was not unique to the Kibo Hotel. This was done in a business previously owned by Mr. Dayes and Mrs. Dayes.

[28] Mr. Daley had submitted that Mr. Dayes orally agreed for Ms. Palmer's home to operate as an extension of the Kibo Hotel whenever the hotel was full to capacity. Following this a bill would be tendered for such occupancy. However, Counsel Mrs.

Shields submitted that this agreement was not intended to be long, additionally, all but one invoice was dated and paid out after the death of Mr. Dayes.

[29] In light of the foregoing submissions, Counsel maintained that there was no evidence of a constructive trust or any other trusts having been formed between Mr. Dayes and Ms. Palmer. To this end Counsel submitted that Ms. Palmer failed to satisfy the Court that there was a common intention for her to have a beneficial interest in the property which she relied on to her detriment. Counsel relied on **Halsbury's Laws of England 4th Edition** and **McCalla v McCalla** [2012] JMCA Civ 31. Further, she submitted, Ms. Palmer had provided no evidence of any assurance which was given to her by Mr. Dayes which could bolster the argument of promissory estoppel. Reliance was placed on **Thorner v Major and others** [2009] 3 ALL ER 945.

[30] Counsel Mrs. Shields also disputed the validity of the Last Will and Testament of Wessell Dayes. She argued that the "X" which was used to mark the Will is not a mark made by Mr. Dayes. It was submitted that in this case where there is evidence disproving the due execution of the Will, the Latin maxim *omnia praesumuntur rite et solemniter esse acta* does not apply and cannot be applied to strengthen the case of due execution. Reliance was placed on **In the Goods of Chalcraft, dec'd. Chalcraft v Giles and Rance** [1948] P 222 and **Griffith v Griffith** [2017] JMCA 136.

[31] Counsel urged the Court to accept the expert report of Ms. Beverley East which concluded that the "X" on the Last Will and Testament of Wessell Dayes is not authentic as it bears no evidence of illness. She submitted that the foregoing was supported by the expert report of Dr. Fairclough which indicated that Mr. Dayes experienced weakness in all his joints and limbs and, consequently, was not able to grip any objects as firmly as he normally would. It was further submitted that the evidence of Ms. Beverley East remains unchallenged and, as such, there is no reason to cause the Court to decline to accept said evidence. To this end Counsel relied on **Griffiths v Tui (UK) Ltd** [2021].

[32] The evidence of the attesting witness, Johana Bunting, was rejected by Counsel Mrs. Shields as unreliable. She submitted that in accordance with **In the Goods of**

Chalcraft, dec'd. Chalcraft v Giles and Rance [1948] P 222, the evidence of Ms. Bunting did not state whether the Will was read over to Mr. Dayes or that he acknowledged and approved the contents of the Will. Further, Ms. Bunting should not be regarded as a reliable witness as there existed material discrepancies in her evidence.

[33] Counsel urged the Court to reject the submission of Mr. Daley that the handwritten notes given to Mr. Leonard Green demonstrated the intention of Mr. Dayes to give an interest in the business to Ms. Palmer. She submitted in support, that the notes were not written by Mr. Dayes but instead by Ms. Palmer.

[34] It was further submitted that if Mrs. Dayes has proved her counterclaim, she is entitled to judgment as the counterclaim was not defended.

[35] Lastly, Counsel maintains that pursuant to **Thorner v Major and others** [2009] 3 ALL ER 945, Mrs. Dayes is not the proper party against which the claim ought to have been commenced.

ISSUES

[36] The Court has to answer the following questions raised in this matter:

1. Did Mr. Dayes and Ms. Palmer enter into a partnership agreement to operate the Kibo Hotel?
2. If there was such an agreement, what were the terms of the agreement?
3. If there was no partnership agreement to operate the hotel, was there a sub-partnership between Mr. Dayes and Ms. Palmer and what were its terms?
4. Did Mr. Dayes, by his conduct, prove that Ms. Palmer was an equity partner in the operation of the hotel?
5. Did Mr. Dayes execute the purported Last Will and Testament made on 18th December 2019?

These questions require the Court to examine the law as it relates to partnerships, sub-partnerships, proprietary or promissory estoppel and due execution of a Will.

LAW AND ANALYSIS

PARTNERSHIP

[37] The main contention in this claim concerns whether a partnership existed between Mr. Dayes and Ms. Palmer. The **UK Partnership Act 1890** (“**The Act**”) defines a partnership as the relationship which exists between individuals carrying on a business in common with a view of profit.² As pointed out by Carey JA in **Lyle Barnes** *infra* the Act was a consolidation of the common law received by this jurisdiction. A partnership is constituted by way of a contract whether express or implied. At common law there are no formal requirements for formation of contract. However, such an arrangement must possess the required elements of a contract, namely, offer, acceptance, consideration and an intention to create legal relations.

[38] The Court of Appeal has given guidance on how the courts should approach the question of whether or not an agreement was formed. In the case of **Carlton Williams v Veda Miller** [2016] JMCA Civ 58, Edwards JA(Ag) as she then was, stated as follows:³

[31] How should a court approach the issue of considering whether there is a valid contract in existence? Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the document to find the terms of the contract. In the absence of any written document, where the contract is alleged to be oral, the court must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract. What the court cannot do is create a contract where none existed. However, as in this case, where one party is asserting that there was an oral contract, it is the duty of the court to thoroughly examine all the circumstances and determine whether or not

² Lindley & Banks on Partnership (17th edition), pg 8

³ [2016] JMCA Civ 58, para 31-33

the parties, by their words, conduct and negotiations, intended their actions to have legal consequences.

*[32] Where the subject matter of the agreement is commercial rather than domestic, it is not necessary for the person asserting the agreement to prove that there was an intention to create legal relations and for the purpose of this principle, it is accepted that there can be commercial agreements between members of a family. There is a rebuttable presumption that the parties to a commercial agreement intended that agreement to have legal consequences and the onus is on the party asserting that there was no such intention for the agreement to have legal consequence, to prove it. See *Edwards v Skyways Ltd* [1964] 1 WLR 349 at 355-357 and *Chitty on Contract* twenty-fifth edition at paragraph 123.*

*[33] In *Garvey v Richards*, Harris JA, in discussing when an agreement will be considered to have legal effect, stated at paragraph [10] that;*

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”

[39] In ***Stekel v Ellice*** [1973] 1 WLR 191 (“**Stekel**”) Megarty J, pointed out that a partnership could exist whether it was so called. The opposite was also true. Defining the arrangement as a partnership did not make it so. He outlined the considerations the court ought to have in mind in determining whether a partnership existed. The brief facts of ***Stekel*** are that the defendant had employed the claimant for a three-month probationary period with a view to partnership. A year later, pursuant to a written agreement, the claimant became a salaried partner. This agreement provided that the claimant was paid a fixed salary and would have no interest in the capital of the firm or in the clients, except for those whom he introduced to the firm, whilst the defendant would be responsible for providing capital and withstanding the losses incurred. Subsequent to the agreement no steps were taken towards a full partnership, however, the claimant’s name had been placed on the firm’s letterhead as a partner and, within the firm, he held out to be a partner. Sometime later the parties ended the agreement and the claimant left the business. The

claimant claimed that subsequent to the termination of the salaried partnership agreement a partnership at will existed, consequently, he sought a winding up order. It was held that in accordance with certain aspects of the salaried agreement and the conduct of the parties which were consistent with the existence of a partnership, the claimant was a partner even though he received a salary and had no interest in the profits of the business. However, said partnership was terminated by way of the parties' mutual consent, and owing to the salaried partnership agreement, the claimant was to have no interest in the capital or clients of the firm.

[40] Megarty stated:⁴

...What must be done, I think is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negating partnership.

It therefore means that the court should seek to pierce the veil of what might be labelled as a partnership and look to the substance and reality of the relationship which existed between the parties. In the case of **Stekel** it is only after the court had closely scrutinized the conduct of the parties, the terms of the agreement and the accounts of the business, that a determination was made as to whether there was a partnership relationship between the parties.

[41] The principles espoused by Megarty J have been observed in the jurisdiction and is evident in **Lyle Barnes v Jocelyn Bennett, Dalton Barnes and Michael Barnes** [1993] 30 JLR 114 ("**Lyle Barnes**"). This case involved a dispute amongst siblings concerning the formation of a partnership. Carey JA examining whether a partnership existed stated:⁵

⁴ [1973] 1 WLR 191, pg 199

⁵ [1993] 30 JLR 114, pg 117

*The question whether a partnership existed is a question of mixed law and fact. Parties cannot by their mere say so, create a partnership, nor is the fact that they assert that they are not, determinative of the matter. See *Weiner v Harris* (1910] 1 KB 285...*

In Lindley on the Law of Partnership (14th edition) p. 126, the learned editors state as follows:

“As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of accounts, by the testimony of clerks, agents, other persons, by letters and admissions”...

*“The Partnership Act [(1890) U.K.] defines partnership as the relation which subsists between persons carrying on business in common with a view of profit This Act, it should be noted, is declaratory of the common law. One of the rules under the Act for determining whether a partnership exists is that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business: section 2(2) Partnership Act It is important to bear in mind as well that the test of partnership is the carrying on of a business and not the agreement to carry it on. Partnership, properly so called, must be distinguished from some loose agreement such as was held to be in the case of *Keith Spicer Ltd. v Mansel* [1970] 1 WLR 333...”*

[42] The recent authority of **Burnett v Barker** [2021] EWHC 3332 (Ch) (“**Baker**”) deals with conduct as evidence of an agreement to carry on business as partners. In **Baker** the defendant had operated a fire safety company, Site Rescue, as a sole trader. The claimant worked at an administration and book keeping consultancy, BTS Europe Ltd. The parties became involved in an intimate relationship and subsequently endeavoured to jointly form SR Safety Services Ltd, a company akin to the services of the defendant’s business. The defendant began to experience issues in dealing with the back-office function of his sole trader business, and so, said functions were contracted out to BTS. The claimant, as an employee of BTS, superseded the task of merely supervising the staff dealing with the administration of the defendant’s business by expending multiple hours working within the defendant’s business, and, was subsequently held out as general manager of the business. Consequently, the claimant alleged that she and the

defendant had carried on Site Rescue as partners and had given notice of dissolution of the partnership. The defendant denied said allegation and asserted that he was a sole trader. The court concluded that there being no express agreement for partnership, the court would have to look to the conduct of the parties, however, the court was unable to imply from conduct, an intention to enter into a partnership. The court spoke to the normal incidences of a partnership. It held that in that case:⁶

There were no 'normal incidents of partnership' - no mutual agency; no contribution to capital; no liability for losses; and no holding out as a partner...

Although the claimant clearly made a substantial contribution to the running of the business, there was no evidence that she was ever intended to be a partner. I cannot be satisfied, on the evidence, that she was ever intended to be a partner, and she cannot rely on any of the 'usual' evidence to assist...

They were domestic partners whose business interests coincided.

[43] In **Baker**, the court emphasized the importance of an element which aids in defining partnerships, that is “*carrying on a business in common*”. The court opined, with which I agree, that this meant the parties were carrying on the business for a shared benefit and had in turn, whether express or implied, accepted some level of mutual rights and obligations e.g. mutual agency, participation in profits, sharing of losses, and common capital. However, it is important to note that the foregoing were not prerequisites to a partnership but was instead “*normal incidents of partnerships*”, all of which did not need to be in existence.

[44] On this premise, the court in **Baker** stated:⁷

Fundamentally, partnership is a contractual relationship, or a relationship resulting from a contract, whether express or implied, which has been described as a continuing personal as well as commercial relationship. Like any other contract, the terms must be sufficiently certain, so that where it is found that alleged partners have either reached no binding agreement, or specifically agreed not to enter into a partnership, or one of them has expressly declined to enter into a partnership agreement, the existence of

⁶ [2021] EWHC 3332 (Ch), para 88

⁷ *Ibid.*, paras 37-38

a partnership is unlikely to be inferred from their conduct (Lindley & Banks, para 2-17). 8

As to the distinction between express and implied contracts, Chitty on Contracts, 34th Edition, Vol 1, para 1-047 says that the difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Express and implied contracts are both contracts in the true sense for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other by conduct. In [respect of implied contracts...

I accept that this exposition of the current state of the law relating to Partnerships corresponds with the law as applied in this jurisdiction.

[45] It is important to note that no partner may admit another person as a partner without the consent of all existing partners. **(See Halsbury's Laws of England (Volume 79 2020)**. If said partner attempts to do so without consent, then such act only amounts to an assignment of part of his share in the partnership. **(See the case of Slyth, Re, ex p Barrow (1815) 2 Rose 25)**. **S. 25 of The Partnership Act** provides that the mutual rights and duties of partners can only be varied by the consent of all the partners. Given the liability of each partner for the debts and obligations of the partnership, admission of a new partner would impact the rights and duties of the existing partners.

[46] In the case at bar, there is no written contract. Ms. Palmer maintains that she made an express oral agreement with Mr. Dayes. In her witness statement, Ms. Palmer explained how the agreement was reached. She states;⁸

Mr. Dayes was so impressed with the Moshas recommendation and report of my management of the Hotel that he engaged me in a proposal that we should enter into the Hotel business a Partners, with him funding the purchase of the Hotel and me providing the expertise and hand on management of the operations of the business. I had explained to Mr. Dayes at the time whilst negotiations were being undertaken for the purchase of the building, that I had no money to finance the purchase of the property jointly with him and he made the suggestion that he would raise the capital to buy the Hotel and I would be an Equity Partner in the operation and growth of the Hotel whilst he operated the Farm Store.

⁸ Witness Statement of Cavell Palmer dated 15th of October 2021, para 7

[47] Ms. Palmer's position was that the subsequent conduct of Mr. Dayes and herself evidenced the agreement made between them. Among them she identifies her work in successfully managing the hotel, her not taking vacations, her having been given use of a credit card for business as well as personal expenses, her being given unsigned cheques, her drawings in cash and her residence at the hotel. Given that Mr. Dayes is now deceased, the Court is obliged to scrutinize the evidence given in support of the Claimant. In that regard, the credibility of the witnesses is a critical issue. At this stage I find it necessary to reiterate the dicta of Carey JA in **Lyle Barnes** when he espoused that the determination of a partnership is a mixed question of law and fact.

[48] The Court will first explore whether the conduct of Mr. Dayes in the arrangement for the purchase of the property and hotel revealed an agreement to enter into an equity partnership with Ms. Palmer. Ms. Palmer alleges that she was integrally involved in the negotiations of the purchase of the hotel by encouraging the Moshas to sell the business to Mr. Dayes on generous terms. She further alleged that her continued integral role in the business was an essential condition for the grant of the Vendor's mortgage by the Moshas,⁹ and that the hotel would have never been sold to Mr. Dayes at the price it was sold for had it not been for her involvement. The document in evidence as the Vendor's Mortgage makes no mention of this condition. In fairness, this document seems to have been prepared by or at the instance of Mr. Dayes and such a condition would have been primarily for the benefit of the Moshas. As such, this evidence would not serve to confute Ms. Palmer's claim.

[49] Under cross-examination, Mr. Leonard Green, Mr. and Mrs. Dayes' then Attorney-at-Law with conduct of the sale of the hotel and property, made it abundantly clear that Ms. Palmer's continued employment was not a condition in the agreement for sale nor was she a part of the negotiations for sale. When asked by Counsel Mrs. Shields if Ms. Palmer's name was even mentioned in negotiations he answered, in the negative.

⁹ Witness Statement of Cavell Palmer dated 19th October 2021, paras 7-8

Further, Mr. Green had stated under cross-examination that he did not know of the Moshas having any difficulty in selling the business. Again the absence of such a clause in the Agreement for sale does not controvert Ms Palmer's claim.

[50] Mrs. Dayes stated in her witness statement that they were already acquainted with the Moshas, having previously purchased a piece of land from them situated in Savanna-La Mar. She asserts that it was in the course of those discussions that she came to be aware that the Moshas wished to sell the hotel. No challenge was made to her in respect of this evidence. Though Ms. Palmer acknowledges this previous sale, she does not assert that she introduced Mr. Dayes to the Moshas. As will become clearer, the credibility of Ms. Palmer was challenged and found wanting in several respects. For now, the Court will state that it accepts the evidence of Mrs. Dayes where they differ unless otherwise stated.

[51] Following the transfer of the property registered on the 22nd July 2014, Mr. Dayes registered the business as a partnership in only the names of himself and Mrs. Dayes on 27th August 2014.¹⁰ This action directly contradicts and in fact refutes any agreement made by Mr. Dayes with Ms. Palmer to operate the hotel as partners. This registration, in and of itself, was an indication that the intention of Mr. Dayes was to operate the business jointly with Mrs. Dayes. The absence of Ms. Palmer's name from the partnership documents is consistent with the evidence of Mrs. Dayes that no partnership was formed with Ms. Palmer to operate the hotel. On both Mrs. Dayes and Ms. Palmer's account, Mr. Dayes was a meticulous businessman. He owned and operated several businesses with Mrs. Dayes. Therefore, he quite likely understood the nature and implication of a document such as the registration of partnership.

¹⁰ Certificate of registration for the Kibo Hotel Exhibit "MD6" in the Defence to Amended Particulars of Claim and Counter Claim dated 12th November 2021

[52] Further this was a significant investment. There was no challenge to Mrs. Dayes evidence that she and Mr. Dayes operated all their businesses jointly or that the initial deposit, itself significant, came from their joint resources. It would seem strange that Mr. Dayes intended to cut his wife out completely from the ownership of the hotel business by a 50:50 partnership with Ms. Palmer. In fact, Mrs. Dayes was intended to be integral to the operation of the hotel on the premise of Ms. Palmer's own account, that Mrs. Dayes controlled the hotel accounts and refused to add her to any of the business accounts (Mr. Dayes could have elected to open new accounts with her). Further, Ms. Palmer's evidence is that Mrs. Dayes was content to have her manage the hotel as she "*benefitted financially*" and received "*substantial income*" from it. All this evidence supports the Court's view that the registration of the partnership in the names of Mr. and Mrs. Dayes represented Mr. Dayes' intention that the hotel business belonged to himself and his wife.

[53] If he had in fact intended to form a partnership with Ms. Palmer from the acquisition of the property, the Court is forced to ask itself, why would he not add Ms. Palmer's name as a partner in the business when registration of the business was effected one month after the purchase of the property. In response to this question, Ms. Palmer, in her witness statement, stated that Mr. Dayes had advised her that his only reason for not adding her name to the acquisition of the hotel property was because Mrs. Dayes would have needed to co-sign with him on any loan documents for the business accounts jointly registered in the names of Mr. Dayes and Mrs. Dayes.¹¹ This position does not account for the fact that the purchase price involved the use of the Dayes' joint resources which, together with their usual course of dealing, I find to be the reason Mrs. Dayes was registered as a co-owner of the property.

[54] As an incidence of the partnership agreement, Ms. Palmer seeks to rely on, the fact that she resided at the hotel premises in order to efficiently manage its operation.¹² Evidence adduced from Ms. Palmer during cross-examination contradicts this assertion.

¹¹ Witness Statement of Cavell Palmer dated 19th October 2021, para 10

¹² *Ibid.*, para 26

In cross-examination Ms. Palmer admitted that she had lived at the hotel prior to its sale to Mr. and Mrs. Dayes. When probed by Counsel Ms. Shields as to the reason for which the Moshas had allowed her to reside at the hotel, it was uncovered that Ms. Palmer's marriage had deteriorated and the Moshas sought to give refuge to her and her daughter at the hotel. Counsel Mrs. Shields in her submissions had contended that Ms. Palmer was allowed continued residence at the hotel owing to her position as merely a manager of the hotel. This is a material inconsistency in that Ms. Palmer contended that her residence at the hotel is an incidence of her co-ownership/partnership. This inconsistency is damaging to her credibility. As Counsel Mrs. Shields submitted, her residence could be incidental to her duties as manager of the hotel, or it could be a benefit of the intimate relationship she shared with Mr. Dayes. Her continued residence at the hotel could not be said to be solely or clearly by virtue of her ownership stake in the hotel, and, therefore did not assist me in making a determination as to whether a partnership existed.

[55] Another incidence of the partnership relied on by Ms. Palmer is that she shared in the profits of the business. To this end her evidence was that in conjunction with her salary, she would receive drawings via cash, cheque or by use of the business credit card. The credit card she asserts was a shared card in the name of Mrs. Dayes and to which had a credit limit of One Million Seven Hundred and Fifty Thousand Dollars **(JMD\$1,750,000)** whilst Mrs. Dayes' limit was Two Hundred and Fifty Thousand Dollars **(JMD\$250,000)**. Ms. Palmer alleges that the card she was entrusted with had a much higher limit than that of Mrs. Dayes because it was used to operate the business and it was understood that as a partner, her monthly drawings would be paid from said card.¹³ Mrs. Dayes, when questioned on this in cross-examination, stated that it was decided between Mr. Dayes and herself that Ms. Palmer was only given this card in order to pay the expenditures of the hotel. Mrs. Dayes refutes the allegations that the card was given to Ms. Palmer in order to facilitate drawings. She further explained that Ms. Palmer would abuse the card by spending on things which did not concern hotel expenditure, and,

¹³ Witness Statement of Cavell Palmer dated 19th October 2021, para 14-15

consequently, she had to close the account. It is not alarming that Ms. Palmer would have been given a card limit higher than Mrs. Dayes, as was stated by Ms. Dayes, its purpose was to pay for the expenditures of the hotel. The evidence shows that the majority of the purchases were so related. What I find to be important is the fact that the card which Ms. Palmer possessed was in the name of Mrs. Dayes. Ms. Palmer was never a signatory nor joint account holder to any of the business bank accounts. Ms. Palmer stated in her witness statement that Mrs. Dayes denied her access to the business banking account by refusing to agree to have her name added to the accounts.¹⁴ This is consistent with Mrs. Dayes' position that she was not a partner in the hotel business. Again, the issuance and use of the credit card are not shown to be related to Ms. Palmer's ownership stake in the hotel.

[56] I would like to point out that Mrs. Dayes' integral role in the finances of the hotel belies the claim by Ms. Palmer that the Dayes, in the course of their marriage separation, had agreed on an amicable division of their resources.¹⁵

[57] Ms. Palmer further relied on the fact that her personal home was used in order to accommodate hotel guests. By her own account she was to be paid for this at an agreed rate. Again this arrangement cannot be said to have come about by virtue of her ownership in the business.

[58] Counsel Mrs. Shields had tendered into evidence payslips of Ms. Palmer in support of the proposition that Ms. Palmer was an employee by virtue of the fact that she was receiving a salary. Ms. Palmer contended that these salary slips reflected drawings and were prepared for tax purposes. The previously discussed case of **Stekel** has already established that a partner need not benefit from the profits of the business and can simply receive a salary. Megarty J in **Stekel** stated:¹⁶

¹⁴ Witness Statement of Cavell Palmer dated 15th October 2021, para 13

¹⁵ Witness Statement of Cavell Palmer dated 15th October 2021, para 11

¹⁶ [1973] 1 WLR 191, pg 199-200

It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship...

*If, then, there is a plain contract of master and servant, and the only qualification of that relationship is that the servant is being held out as being a partner, the name "salaried partner" seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm. **At the other extreme, there may be a full partnership deed under which all the partners save one take a share of the profits, with that one being paid a fixed salary not dependent on profits.** Again, "salaried partner" seems to me an apt description of that one: yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding up, thereby satisfying the point made on section 39 by Lindley at p. 13... It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if "salaried partners" who are true partners, though at a salary, are in a minority, that does not mean that they are non-existent. [emphasis mine]*

[59] Ms. Palmer's position however is not that she was a salaried partner, but a partner entitled to share in the profits on a 50:50 basis. By Ms. Palmer's own account, these salary slips were only prepared to meet tax obligations and she took most of her drawings in cash as this would not have required the input of Mrs. Dayes. I do not find Ms. Palmer to be reliable on this issue. In the first place, Ms. Palmer did not speak to the existence or purpose of these salary slips in her witness statement. In addition, there is no evidence produced by her, save for the use of the credit card in support of her "drawings". For example, no such item of expenditure is recorded or noted on the accounting records. I am inclined to accept the submissions of Counsel Mrs. Shields that the salary slips, more likely than not, represented the salary paid to Ms. Palmer as manager of the hotel.

[60] Mr. Daley also submitted that the autonomy Ms. Palmer had over the use of the credit card, the use of blank cheques and the general operations of the hotel was evidence of the agreement that she was an equity partner. Ms. Palmer was, save for possibly Mr. Dayes, the most senior operative at the hotel which, from the evidence, would be classified as a small hotel. Such autonomy would not be unusual in those circumstances.

[61] Another submission by Counsel Mr. Daley is that the Last Will and Testament of Mr. Dayes is an indication of Mr. Dayes' intention for Ms. Palmer to have a share in the Kibo Hotel business. I do not accept this position. The alleged Will of Mr. Dayes devises sixty percent **(60%)** of his interest in the property registered at Volume 1401 Folio 468 and Volume 1520 Folio 294 of the Register Book of Titles not an interest in the Kibo Hotel business. It is well accepted that a business does not run with the land it is situated on, they are two separate assets. Therefore, should the Court accept that the Will is validly made, the only intention of Mr. Dayes that can be inferred is his intention to give her his sixty percent **(60%)** interest in the property. The evidence indicates that Mr. Dayes understood the difference between the ownership of the property and ownership of the business. He held the property in a 60:40 share with his wife but formed the partnership operating the Hotel as a 50:50 share with his wife. There was no dispute to the evidence that Mr. Dayes was an experienced businessman who was also the owner of other joint property. He utilized the services of an attorney in these transactions and whose duty it would have been to explain to him the effect of these arrangements. The reliance on the handwritten notes as to how Mr. Dayes intended to distribute his estate is similarly misplaced. If she was already a partner, there was no need to give her fifty percent of the business.

[62] Other conduct relevant to the question of whether a partnership existed between Mr. Dayes and Ms. Palmer was the evidence of Ms. Palmer that on several occasions she raised with Mr. Dayes the issue of documenting her interest in the hotel and property.¹⁷ This he refused to do on each occasion. She contended that his refusal was based on his intentions to protect her from the wrath of his family should they become aware of her interest in the hotel. The Court finds this to be an implausible reason since such a document could easily be kept between them both. The absence of any documentary evidence from this astute businessman is more indicative of the absence of such an arrangement.

¹⁷ Witness Statement of Cavell Palmer dated 15th of October 2021, para 27

[63] There is yet a further lens through which the Court must view the evidence given by Ms. Palmer and that is her credibility. As seen before, there have been some contradictory evidence given by her on material points. A further example is a conflict in her evidence with evidence given by Mr. Jagdath. He spoke to the “*many occasions*” that he acted as driver for Mr. Dayes on his commute from Montego Bay to Savanna-La-Mar after he acquired the Kibo Hotel. Mr. Jagdath stated:¹⁸

I understood based on my observations that Mr. Dayes was indeed separated from his wife, the Defendant, since he practically lived at the Hotel and went back to Fairfield Montego Bay, St. James where the family home was located, occasionally.

From the Court’s observation of the witnesses Mr. Jagdath was generally unchallenged leaving his testimony intact.

[64] Ms. Palmer on the other hand was extensively cross-examined and this revealed many inconsistencies in her evidence. She was combative, aggressive and had to be prodded to answer several questions. I am aware that a witness displaying these characteristics is not necessarily untruthful but in view of the contradictions in her evidence, and her hesitation to admit to damaging evidence, she generally did not impress the Court as a truthful witness. Her attitude on the stand was in stark contrast to Mrs. Dayes who seemed to be earnestly answering the questions posed to her. On the whole, the Court formed the view that Mrs. Dayes was the more reliable witness.

[65] The Court has examined the conduct of Mr. Dayes and Ms. Palmer in a discrete way but has also examined whether cumulatively they paint a different picture. The Court does not consider that they do, as they all point back to Ms. Palmer’s role as manager of the hotel and intimate partner of Mr. Dayes. I have also taken into account the findings on the credibility and reliability of Ms. Palmer in coming to this determination.

¹⁸ Witness Statement of Cavell Palmer dated 15th October 2021, para 5

[66] Upon careful consideration of the evidence, the Court is unable to conclude that the conduct of Mr. Dayes and Ms. Palmer were as a result of their oral agreement to purchase the property and operate the hotel as equal partners. I do readily accept that Ms. Palmer was heavily involved in the operation of the Kibo Hotel and played an instrumental role in ensuring its successful operation. However, I find that this was in her capacity of a manager employed to the hotel. Such further liberties as she was afforded was as a consequence of her intimate relationship with Mr. Dayes.

[67] The Court finds conclusively that the Claimant has failed to prove, on a balance of probabilities, that there was an agreement made between her and Mr. Dayes to purchase the property and/or operate the hotel as equal partners, or at all.

SUB-PARTNERSHIP

[68] Counsel Mr. Daley submitted that were the Court to find that a partnership did not exist in the operation of the hotel, then the Court should find in the alternative that a sub-partnership was formed between Ms. Palmer and Mr. Dayes. The fallacy of this argument is immediately apparent. It is an undisputed fact that Mr. Dayes and Mrs. Dayes were registered as partners in the Kibo Hotel business.¹⁹ In accordance with **The Partnership Act**, Mr. Dayes would have needed the consent of Mrs. Dayes to admit Ms. Palmer to the partnership.

[69] In **Lindley & Banks on Partnership** (17th edition), the Learned Judge in reference to Lord Lindley defines a sub-partnership as follows:²⁰

A sub-partnership is as it were a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the

¹⁹Certificate of registration for the Kibo Hotel Exhibit "MD6" in the Defence to Amended Particulars of Claim and Counterclaim dated 12th November 2021

²⁰ Lindley & Banks on Partnership (17th edition), pg 108-109

parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a sub-partnership, that is to say, it makes the parties to it partners inter se; but it in no way affects the other members of the principal firm.

Where a sub-partnership is created, the terms of the head partnership will not be incorporated as a matter of implication, so that it cannot be assumed that the sub-partnership will endure for the same term as the head partnership.

It follows from the fact that a sub-partner will not become a partner in the head partnership that he will not be liable to the creditors of that firm; his indirect participation in the profits of the head partnership is naturally not sufficient to found any such liability. Moreover, the sub-partnership and the head partnership will, in the current editor's view, be distinct entities for the purposes of the insolvency legislation.

[70] Ms. Palmer's evidence is that she entered into an oral partnership agreement with Mr. Dayes before the hotel and property were purchased. Using Ms. Palmer's account, this would have meant that the partnership with Mr. Dayes and herself would have been the original partnership agreement, and the partnership agreement with Mr. and Mrs. Dayes the sub-partnership. However, as stated earlier the registration of the business in the names of Mr. and Mrs. Dayes alone, negated the existence of any prior agreement between Mr. Dayes and Ms. Palmer. The Court finds that the Claimant has failed to show, on a balance of probabilities the existence of a sub-partnership between herself and Mr. Dayes.

PROMISSORY ESTOPPEL

[71] The Halsbury's Laws of England 5th Edition defines the doctrine of Promissory Estoppel as:

When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.

Of important note is that the doctrine can only operate as a shield and not a sword, hence, it is a defensive equity. A claimant may rely on the doctrine if it forms a part of an independent cause of action.²¹

[72] In the oft-cited case of **Crabb v Arun District Council** [1975] 3 All E.R. 865 (“**Crabb**”), though the Court treated the matter as one of Proprietary Estoppel and not Promissory Estoppel, I find the case useful in illustrating the general operation of estoppel as a remedy of equity. In **Crabb**, the Council had, by its word and conduct, led Mr. Crabb to believe that he had acquired a right of access to his land from another access point. In reliance on that belief the Mr. Crabb sold part of his land, leaving the remainder landlocked. The Council then proceeded to demand payment from Mr. Crabb for an easement through its land. The Court found that the Council, having knowledge that Mr. Crabb intended to sell the portions of his land separately, must have known then that Mr. Crabb must have thought that he had acquired a right to the second point of entry. However, the Council did nothing to disabuse him of his belief. On this premise, equity prevailed against the Council and the court found that Mr. Crabb should be given free access to the second point of entry.

[73] Lord Denning in explaining the nature of equity in **Crabb** enunciated;²²

*The basis of this proprietary estoppel as indeed of promissory estoppel is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as “estoppel”. They spoke of it as “raising an equity”. If I may expand that, Lord Cairns said: “It is the first principle upon which all Courts of Equity proceed”, that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties, see **Hughes v. Metropolitan Railway** (1877) 2 A.C. at page 448.*

What then are the dealings which will preclude him 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

²¹ See *Waltons Stores (Interstate) Ltd v Maher and Another* [1988] LRC (Comm) 933 pg 943-944

²² [1975] 3 All E.R. 865, pg 871

*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 – then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a Court of Equity will not allow him to go back on that promise, see **Central London Property Trust v. High Trees Houses** (1947) K.B. 130: **Richards (Charles) v. Oppenheim** (1950) K.B. 616, 623.*

*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) L.R. 1 H.L. at page 170 Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged'. In **Birmingham Land Co. v. London and North Western Railway** (1888) 40 Ch. D. at page 277, Lord Justice Cotton said that "... what passed did not make a new agreement but what took place . . . raised an equity against him." And it was the Privy Council who said that "the Court must look at the circumstances in each case to decide in what way the equity can be satisfied", giving instances: see **Plimmer v City of Wellington Corporation** (1884) 9 A.C. at pages 713-4.*

From this it can be gleaned that the birth of the doctrine of Promissory Estoppel stems from the court's need to safeguard against unconscionable actions of one party to another.

[74] In accordance with the foregoing authorities, the essential ingredients which must exist in order for the doctrine of Promissory Estoppel to arise are (1) there must be a clear and unequivocal promise that the promisor will not insist on his strict legal rights (2) the promisee must have acted in reliance on that promise and (3) it would be inequitable for the promisor to resile from his promise. However, there is controversy as to whether there must be detrimental reliance on said promise. Some authorities simply require for the individual's course to be altered based on said reliance whilst others require for there to be a detriment suffered based on one's reliance. In **Manhertz (Huntley G) and anor v Island Life Insurance Company Limited SCCA NO 24/2006 (delivered 27/06/2008)**, an appeal treating with promissory estoppel, the Court of Appeal commented on how

such a controversy should be dealt with. Smith JA in referencing the dicta Peter Gibson L.J. in **Emery v UCB Corporate Services Ltd.** [2001] ALL ER (D) said:²³

*The question as to whether or not detriment is required for the operation of promissory estoppel has been judicially described as controversial. However, what is clear is that the long list of cases on this point establishes that in order for promissory estoppel to arise, it must be unconscionable for the promisor to resile from his promise- see **D&C Builders Ltd. v Rees** (1966) 2 Q.B. 617 and **Emery v. UCB Corporate Services Ltd.** (2001) All ER (D) 226 (Apr, | [2001] EWCA Civ. 675. In the Enroy case Peter Gibson, L..J, said at para 27:*

"A promissory estoppel in my judgment, arises where:

- (1) there is a clear and unequivocal promise that strict legal rights will not be insisted upon;*
- (2) the promisee has acted in reliance on the promise; and*
- (3) it would be inequitable for the promisor to go back on his promise.*

At paragraph 28 he continued:

"Some commentators express the second condition in terms of the promise altering his position to his detriment (see for example Snell's Equity 13th Edition 2000) paragraph 39-08) but that is controversial, see for example Chitty on Contracts, 28th edition 1999) paragraph 3-089). However, the fact that the promise has not altered his position to his detriment is plainly most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise."

The promisor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. If the promise shows that he had acted to his detriment in reliance on the promise, then clearly it would be inequitable to allow the promisor to resile from his promise. However, it may not be necessary to show detriment in order to establish such inequity. Where, for example, the promise shows that he had been led to act differently from what he otherwise would have done, that might suffice to enlist the helping hand of equity. However, as Gibson LJ said the fact that the promise has not altered his position to his detriment is most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his

²³ SCCA NO 24/2006 (delivered 27/06/2008), paras 37-38

promise (see the Emery case (supra) and Hughes v Metropolitan Railway (supra))

[75] I take the foregoing to mean that the material consideration is whether the promisor should be allowed to resile from his promise. Whilst it may not be necessary to show detrimental reliance in order to avail one's self to the helping hand of equity, if one is able to show a detrimental reliance then this fact would clearly highlight why the promisor should not be allowed to resile from his promise. I find that the latter simply strengthens the case of the party who relies on promissory estoppel.

[76] A full answer to whether such a claim can be sustained is given in **Greville v Venables** [2007] EWCA Civ 878 ("**Greville**"). In **Greville**, the defendant operated an equine business which the claimant became involved with. The parties had a personal relationship, however, this relationship deteriorated and they parted company. The claimant alleged that pursuant to an express oral agreement he and the defendant were in a partnership in relation to the equine business. The court directed that the preliminary issue for determination was whether there was a partnership between the parties. At first instance the court held there was no oral agreement to operate the business as a partnership. On appeal, on the question whether a partnership could be implied from conduct, was raised. The court stated:²⁴

*[41] I have mentioned that the particulars of claim include an alternative allegation of partnership by estoppel. That seems to me a somewhat extraordinary proposition as between the two parties to the alleged partnership. I can understand such an allegation by a third party, to whom two or more people, with one or more of whom he deals, had been held out as partners, but as **between the parties to the alleged partnership either there is or is not a partnership agreement, express or implied. Partnership by estoppel is not a true alternative basis for a contention that the Claimant and the Defendant carried on business in partnership together.** In the absence of the actual but inconclusive discussions between **the Claimant and Defendant, the holding out would be strong evidence in support of an implied agreement, as the judge said. Given those discussions, the holding out is irrelevant to the issue of partnership or no. There is no pleaded case of a representation by the Defendant to the Claimant that there was or***

²⁴ [2007] EWCA Civ 878, paras 41-42

would be a partnership between them, relied on by the Claimant to his detriment. It is difficult to see how such an allegation could be made, given that the partnership would result from an agreement between them, express or implied, as to which a representation by one party to the other would be beside the point. I see no substance in the estoppel case, and it seems to me in any event it would have been comprised within the preliminary issue. The Claimant alleged that there was a partnership. If the Defendant were estopped from denying it, the result should be that the Claimant's allegation is not resisted and the court should declare that there was a partnership; that is to say, on that premise the court would have answered the first of the preliminary issues accordingly.

[42] In dealing with the point of partnership by implied agreement on its merits, I have passed by the preliminary question of whether the Claimant should be entitled to contend at all that there was a partnership on any other basis than the oral agreement in March 2004, which he alleged in the particulars of claim. Miss Newman said that all necessary facts from which a partnership could be implied from conduct were already alleged. That is a fair comment by itself, but they are alleged in support of the case for an oral agreement. It would have been thoroughly misleading if they were to be relied on to support in the alternative a distinct fallback case of partnership implied from conduct. (Emphasis mine)

The essence of **Greville** is that the two positions are mutually exclusive. Promissory/proprietary estoppel is not available as a “fall back” position where the case as here, is based on an express oral agreement. Ms. Palmer therefore cannot succeed on this ground.

VALIDITY OF WILL

[77] In determining the validity of a Will the starting point is the presumption that the Will was duly executed in accordance with **S. 6 of The Wills Act**. However, such a presumption can be rebutted if there is evidence before the Court which calls into question the validity of the Will.²⁵ The crux of Mrs. Dayes' counterclaim is an alleged forgery of the

²⁵ See *Supple v Pender and another* [2007] EWHC 829 (Ch)

Last Will and Testament of Mr. Dayes. She contended that the mark purporting to be the signature of Mr. Dayes on the purported Will was not made by him.

[78] In **Fuller v Strom** [2002] 2 All ER 87 (“**Fuller**”), a case concerning the alleged forgery of a Will, the court established that in cases of forgery the burden of proof lies on the individual challenging the Will and the nature of inquiry is the civil standard i.e. on a balance of probability. **Fuller** was later supported by **Vaccianna v Herod** [2005] EWHC 711 (Ch) (“**Vaccianna**”), a case also concerning forgery, where Blackburne J pointed out that the standard of proof was the normal balance of probabilities test. He stated:²⁶

*Insofar as the learned editors there say the standard of proof is not that of a criminal proceeding because a probate action is a civil proceeding, I wholly agree. **The standard of proof is on the balance of probabilities. Insofar as they appear to be suggesting that, notwithstanding that the civil standard of proof applies, something more than a mere balance of probabilities is required, it seems to me one has to tread very warily. The more serious the allegation (and an allegation that somebody has purported to forge somebody else's signature is a serious allegation), convincing evidence is required.***

[emphasis mine]

[79] In **Vaccianna** neither the defendant nor the attesting witnesses attended trial. No response was proffered to the expert witness and the defendant failed to comply with an order to produce an up-to-date signature contemporaneous with the Will. The totality of the facts in tandem with the evidence of the expert resulted in a finding of forgery by the Court. This is distinguishable from the case of **Fuller**, where a joint handwriting expert found that there was “*very strong positive evidence*” of forgery. The trial judge held that a finding of forgery would essentially mean that the witnesses present at the time of the signing of the Will were guilty of fraud. Having heard the witnesses’ evidence, the trial Judge declined to make a finding of forgery. There was no appeal from this aspect of the judgment.

[80] Similarly, in the case of **Wyniczenko v Plucinska-Surowka** [2005] All ER (D) 245 (Nov) (“**Wyniczenko**”) the defendant contended that the testatrix's signature on the

²⁶ [2005] EWHC 711 (Ch), paras 21

Will was forged. One expert witness concluded that there was “*very strong evidence*” that the signature was forged whilst the findings of the other expert were inconclusive. Having considered all the evidence, the court stated that though there was a real possibility of forgery, it was not satisfied on the balance of probabilities that the Will was forged. The court derived support of this finding from the observations of Lord Nicholls in **Re H and others (minors) (sexual abuse: standard of proof)** [1996] 1 All ER 1, who opined:²⁷

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

*Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. **The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.***

...

This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters. [emphasis mine]

In essence, depending on the seriousness of the allegation, more convincing evidence will be required in order to surmount the improbability of the event occurring and in turn prove the allegation.

[81] What is indubitably clear from the authorities cited above is that expert evidence though immensely helpful in the court making its determination, is not a stand-alone in persuading the Court towards its findings. In **Clarke v Beckford et al** JM 1993 CA 33, a case concerning forgery, Wright, J.A. made the following observations;

The peril facing expert evidence is that, like any other evidence tendered, it may for good reason, be rejected. The trial judge had the benefit of listening to and observing this witness testify as he compared the disputed signature with the accredited signatures of the testatrix. Further, he had the benefit of addresses from counsel for both parties who examined his evidence in great detail and then he demonstrated in his judgment his

²⁷ [1996] 1 All ER 1, pg 16-17

assessment of the evidence before concluding that he preferred the real evidence to the comparison evidence.

The Court in **Fuller** summed up the role of expert witnesses as follows:

*The training of experts enables them to identify facts which a lay witness or a judge could not identify, without expert help. Such evidence may truly be described as scientific and the radiologists' evidence as to when an injury occurred falls plainly within this category. **But some expert evidence may amount to no more than the drawing of inferences from facts observable as much by the expert as by a lay witness; and the inferences to be drawn from those facts may be capable of being drawn as much by the expert as by a lay witness. Of course, in such a case, the views of the expert are entitled to be given great weight. After all, the expert's training and experience will have equipped him or her to draw these inferences. But in relation to this type of expert evidence the judge, I think, is entitled to form his own view, having regard to, and balancing, the other evidence available to him in the case.***

...

In the circumstances, I consider that I am not only free to decide the forgery issue for myself but that it is my responsibility to do so, taking into account all the evidence before me...

In essence, expert evidence is persuasive, therefore, as in the case of **Wyniczencko**, if the facts do not support the findings of the expert, the Court may depart from said findings.

(a) *Evidence of Expert Witnesses*

[82] Mrs. Dayes in mounting a challenge to the purported Will of Mr. Dayes has the onus of establishing forgery on a balance of probability. To this end, Mrs. Dayes primarily relies on the evidence of Ms. Beverley East as a handwriting expert. Ms. East in regard to her qualifications gave evidence that she has been practising the science of forensic document examination for thirty-two **(32)** years and is the president of Strokes & Slants which operates in three **(3)** countries. She is qualified through Felix Klein in New York and acquired a Bond Solon Expert Witness Certificate from Cardiff University Law School in Manchester, England. She is a member of the National Association of Document Examiners, the Scientific Association for Forensic Examiners and the International Association of Document Examiners. Ms. East has worked on various handwriting identification cases and has written several articles which include the authenticity of the

handwriting of several prominent figures. Additionally, Ms. East has lectured at numerous major universities and has provided training seminar for several banks in Jamaica. No challenge was made to her expertise and she was certified as an expert witness for the Court.

[83] For the purposes of examination and comparison, Ms. East received the last page of the purported Last Will and Testament of Mr. Dayes, which she labelled as “Q1”, in conjunction with other documents which contained the known signature of Mr. Dayes, labelled as follows:²⁸

- K1. *Job Sheet from King Alarm Systems dated 09/12/19 signed by Wessell Dayes*
- K2. *Scotiabank cheque # 642 Pay to the order of Austin Harrison for the sum of \$30,000.00 signed by Wessell Dayes*
- K3. *Scotiabank cheque # 649 Pay to the order of Print-X Digital for the sum of \$12,4000.00 signed by Wessell Dayes*
- K4. *Scotiabank cheque # 654 Pay to the order of Cavell Palmer for the sum of \$180,000.81 signed by Wessell Dayes*
- K5. *Scotiabank cheque # 643 Pay to the order of Island Products for the sum of \$26,147.84 signed by Wessell Dayes*
- K6. *Scotiabank cheque # 647 Pay to the order of Jamaica Biscuit Company for the sum of \$17,039.81 signed by Wessell Dayes*
- K7. *Scotiabank cheque # 655 Pay to the order of Island Product Ltd for the sum of \$49,160.96 signed by Wessell Dayes*
- K8. *Handwritten note written by Wessell Dayes*

[84] In examining the documents Ms. East notes that the documents provided were examined for handwriting characteristics such as; line quality, speed of writing, letter form, size, construction, relationship, placement online, spacing, range of variation, rhythm and skill level. She presented the following findings:²⁹

²⁸ Expert report of Ms. East dated 9th August 2021, pg 3

²⁹ Ibid., pg 5

Graphic 2 demonstrates the four significant characteristics evident in the known signatures of Wessell Lloyd Dayes. Habitual writing patterns evident in all signatures are:

- 1. Tremor evident in all signatures*
- 2. The positioning of the signatures starts on the signature line.*
- 3. Uneven pressure line quality throughout. Genuine signatures always show uneven pressure line quality.*
- 4. The signatures are created with a continuous stroke with no pen lifts.*

...

Graphic 6 illustrates an enlarged image of the X mark. There are several aspects of this X mark that is inconsistent with someone who is ill.

- 1. Evidence of embellished initial stroke*
- 2. The line quality is too severe*
- 3. Formation of the middle intersection too precise*
- 4. The positioning of the X mark placed through the signature line*
- 5. No evidence of tremor in the line quality*
- 6. Uncharacteristic movement with an additional stroke*

...

The line quality reflects the degree of fluency of the movement involved in the formation of the stroke. In this instance Mr. Dayes line quality on documents represented as known samples do not show any smooth line quality on any of them. Evidence of smoldering, shaky tremor is evident during the period of time 2017-2020. It would be highly impossible to suddenly create a smooth line quality of writing when a deteriorating form of writing already exists.

[85] Ms. East further noted that the known signature of Mr. Dayes affixed on a document dated nine (9) days from the date of the “X” in question shows no tremor, smoldering or shaky line quality. Thus, Ms. East questions the reason for the change in formation when Mr. Dayes’ signature was not difficult to write. She notes that there are many unexplainable differences between the known signature of Mr. Dayes and the questioned “X”. On this premise, she concludes that the “X” on the purported Will does

not bear the authentic “X” of Mr. Dayes. The evidence of Ms. East was not contradicted by cross-examination.

[86] Ms. Palmer relies on the expert evidence of Dr. Fielden Fairclough in asserting that Mr. Dayes suffered from multiple medical conditions which would have impaired his ability to write properly, hence the mark of an “X” as opposed to his usual signature. Dr. Fairclough is a registered Medical Practitioner with over ten **(10)** years’ experience in practice. He obtained a Bachelor of Medicine and a Bachelor of Surgery from the University of the West Indies Jamaica. Dr. Fairclough worked at the Savanna-La-Mar Public General Hospital for five **(5)** years.

[87] Dr. Fairclough gave evidence that Mr. Dayes was initially seen as a patient on 16th December 2019. He notes that on said date Mr. Dayes exhibited symptoms of “*dizziness, weakness in all joints and limbs, not able to grip any objects firmly as he normally would, not able to ambulate without assistance, loss of appetite, slurry speech and Pityriasis (rash on the body)*”.³⁰ Dr. Fairclough prescribed Mr. Dayes medication for his prostate, Diabetes Mellitus Type II, Hypertension and retention of water around his heart. On 17th December 2019, following Mr. Dayes undergoing blood work at Micro Labs Limited, Mr. Dayes’s condition worsened and he returned to the office of Dr. Fairclough for a referral to be taken to Savanna-La-Mar Public General Hospital for further medical care. The deceased was hospitalized for approximately two weeks. On 8th January 2020, Mr. Dayes visited the office of Dr. Fairclough with the results from the blood work previously done. Upon review of the results, Dr. Fairclough concluded that the patient was suffering from renal impairment, Diabetic Ketoacidosis, bacteria in the stomach, pancreatic impairment and Prostactic enlargement. He further observed that Mr. Dayes was weaker than he was on the previous visit and he complaint of severe headaches, joint pains and that the *Pityriasis (rash on the body)* was still on his body and he still unable to ambulate without assistance. Dr. Fairclough prescribed further medication and advised that Mr. Dayes

³⁰ Medical Report of Dr. Fielden Fairclough dated 11th October 2021

should be readmitted due to significant derangements found in his blood studies as well as to ensure compliance with medication. On 27th January 2020 and 13th February 2020, Mr. Dayes presented with the same symptoms as previously stated. On the former date he was referred for further blood work. The deceased visited Dr. Fairclough's office on 27th February 2020 and he was referred to have a Magnetic Resonance Imaging (**MRI**) performed on his brain. From these tests Dr. Fairclough concluded as follows:

...severe complications from his medical conditions in the form of Cerebrovascular Ischaemia, Diabetic Neuropathy, renal failure, Gouty, Arthritis and Peripheral Vascular disease which would have caused significant limitation in his ability to firmly grasp any objects as well as even ambulate about on his limbs in order to perform simple basic activities required for maintenance of his daily livelihood.

[88] It is in light of the foregoing evidence that Counsel Mr. Daley contended that due to Mr. Dayes's generally poor health, he was unable to write his full signature and consequently he made a "X". He further argued that the shakiness in Mr. Dayes' handwriting was also owing to his illnesses.

[89] Dr. Fairclough's evidence supports the evidence given by Ms. East. Ms. East found that the "X" written on the questioned Will, though it had the appearance of shakiness, had had no tremor in its formation, a feature present in his previous known signatures. Dr. Fairclough's evidence is that his illness would have produced tremors in his writing. His evidence is not therefore contradictory of the evidence given by Ms. East.

[90] As will be shown below, the unreliable nature of the evidence given by Ms. Palmer and her witness Detective Constable Bunting leave the conclusions drawn by Ms. East intact.

EVIDENCE OF WITNESSES

[91] Ms. Palmer, in her witness statement, did not address the counterclaim filed 24th November 2020 as amended 6th April 2021, 17th June 2021 and 12th November 2021. Under cross-examination, Counsel Mrs. Shields adduced that Ms. Palmer was present with Mr. Dayes when the Will in question was signed. Ms. Palmer recounts that on 18th December 2019, Mr. Dayes had fallen ill and needed to be taken to the hospital. She

avers that whilst driving Mr. Dayes to the hospital Mr. Dayes asked to be taken to the offices of his Attorneys-at-Law, Chen, Green and Company. To this she complied, without, apparently, any question. She does not give any evidence of knowing that Mr. Dayes had made contact with his attorneys and for what purpose. Ms. Palmer then states that whilst at the Attorney's office, without being summoned by either her or Mr. Dayes, Mrs. Angelle Green-McNeish, and Ms. Peru, employees of the law firm Chen Green and Co, Attorneys at Law, went into the car to speak with Mr. Dayes whilst she came out of the car and went into a nearby store. She gives no evidence of having any conversation with them at all or indeed showing any interest in the meeting between Mr. Dayes and the two women. Ms. Palmer then returned to the car and Mr. Dayes asked to be taken to the police station. Again she complied without question. She further asserted that she did not recall how many people were in the car. When asked if her daughter was in the car, she stated that she could not recall. Whilst at the police station Ms. Palmer states that she once more came out of the car and spoke with some individuals she knew whilst the parties in the car concluded what was taking place. She then notes that, subsequently, Mrs. Green-McNeish returned to the office whilst she returned to the car and took Mr. Dayes to the hospital. During cross-examination Counsel Mrs. Shields asked Ms. Palmer if she knew what was taking place during both visits, to this she categorically responded no. Mrs. Shields then proceeded to ask if she had enquired at any point in time as to the reasons for the visits and to this she responded in the negative.

[92] In cross-examination Ms. Palmer stated that she only became aware of the existence of the Will of Mr. Dayes after his death. Simply put, Ms. Palmer's evidence is that even after Mr. Dayes was discharged from the hospital following the foregoing series of events, Mr. Dayes still had not informed her of what he had done, except to say, contact Mr. Green if anything should happen to him.

[93] The evidence of the attesting witness, Detective Constable Johana Bunting, asserts that on 18th December 2019, whilst stationed at the Savanna-La-Mar Police Station in the parish of Westmoreland, herself and Constable Dwayne Elliot were approached by Mrs. Green-McNeish to witness the execution of the Will of Mr. Dayes.

Under cross-examination by Counsel Mrs. Shields, Constable Bunting revealed that upon approaching the car on the passenger side she saw Mr. Dayes seated in the front passenger seat and Ms. Palmer and her daughter were in the back of the car. No mention was made of the presence of Ms. Peru at this point in time, so it would seem that Ms. Peru did not accompany the parties to the police station. Constable Bunting further stated that before Mr. Dayes signed the Will she had asked several questions in order to satisfy herself that he wasn't being forced to sign the document. Following this, Constable Bunting avers that herself and Constable Dwayne Elliot witnessed Mr. Dayes sign the Will. When asked by Mrs. Shields if whilst the foregoing was taking place, the people she saw in the car remained in the car, Constable Bunting responded in the affirmative. This evidence as to the whereabouts of Ms. Palmer at the time the Will was being executed is in direct contradiction with the evidence of Ms. Palmer. Ms. Palmer has maintained that she stepped outside of the car at the police and went to speak with individuals she knew.

[94] The evidence of Constable Bunting is that prior to Mr. Dayes executing the Will, she had asked questions in order to satisfy herself that deceased wasn't being forced to sign the document. Cross-examination in relation to this went as follows:

Mrs. Shields: So you read the document to yourself and then asked Mr. Dayes some questions. What questions did you ask?

Constable Bunting: I asked how he was doing? If he knew why he was there? Things like that. I can't remember all the questions I asked him but I asked him those.

...

Mrs. Shields: Apart from those questions that you asked Mr. Dayes, you didn't ask him anything else?

Constable Bunting: No they left.

At no point in time did Constable Bunting state that Mr. Dayes knew and approved the contents of the Will in question. By her own admission she read the Will to herself. Therefore, it would appear that the Will was never read over to Mr. Dayes by her. Neither did she give any evidence of it being read over to Mr. Dayes by Constable Elliott in her

presence. This is in contradiction to her attestation on the purported Will that Mr. Dayes signed the Will after it was read over and explained to him.

[95] These discrepancies in narrative of the occurrences on the 18th are material. In ordinary course of dealings, one would expect that if an individual in the condition of Mr. Dayes, having been referred by his doctor for treatment in a hospital, asked to make stops at his attorney's office and the police station, that some question would be asked of him. This is especially so where they shared an intimate relationship and, as Ms. Palmer alleged, cared for each other. Ms. Palmer was strident that at no point in time was she aware of what Mr. Dayes was doing. It appeared that her curiosity was not aroused by this unprecedented state of affairs. Her seriously ill intimate partner desired to attend upon his lawyer before going to the hospital, and further asked to be driven to the police station, and said nary a word to his 'beloved' as to the reasons for this delay. This was especially so when such reasons touched and concerned her directly. In the meanwhile, said partner maintained an aloof stance to such events, in his sick state. This evidence beggars belief.

[96] I also find the supposed secrecy of Mr. Dayes to be questionable. Ms. Palmer's evidence is that she tirelessly sought to have him formalize their arrangement in writing for her protection, which he had consistently, hitherto, failed to do. To say that on the occasion he chose to do so he said nothing at all to her strains credulity. The inconsistencies therefore make sense. Ms. Palmer seemed intent on removing herself from any influence on the actions of Mr. Dayes in order to give credibility to the claim that he executed his Last Will and Testament on that occasion.

[97] Mrs. Green-McNeish, integrally involved in the execution and preparation of the purported Will, was not called to give evidence though she remains in the employ of Chen Green and Co. No explanation was given for her absence, especially considering developments which would allow for giving evidence via video conference. I draw an adverse inference against Ms. Palmer for the omission of this evidence.

[98] In all the circumstances the Court is inclined to the belief that no signing of a Will was done by Mr. Dayes on the occasion and in the manner alleged. The Court accepts

the evidence of the expert witness Ms. East. The Court finds that on a balance of probabilities, the Defendant has met the burden of proof that the "X" marked on the purported Will was a forgery and propounds against the validity of the purported Last Will and Testament of Wessell Dayes made on the 18th of December 2019.

[99] The Court notes that Orders were sought with respect to the estate of Mr. Dayes, however, the Court declines to grant any such Orders as the estate is not represented in this action.

ORDERS

1. The Orders and Declarations sought by the Claimant are refused.
2. Orders numbered 1, 2 and 3 of the Order of Batts J made on the 3rd day of November 2020 and amended by Brown Beckford J on the 3rd day of June 2022 are vacated.
3. Judgment for the Defendant on the Claim and Counterclaim as follows:
 - (a) That the Claimant vacates the room she occupies at the Kibo Hotel on or before August 31st 2023. That there shall be no engagement between the Claimant and the Defendant, her servants and or agents during this period.
 - (b) That the Claimant, within 24 hours, delivers all records and documents pertaining to the Kibo Hotel to the Defendant's agent, Dian Wilson, who shall prepare a record of such documents to be agreed by the Claimant.
 - (c) The Claimant gives an accounting of all income reviewed by her and any expenditure made by her, in the management of the hotel from the 3rd of November 2020 to the 31st of July 2023.
 - (d) That an audit of the Kibo Hotel's accounts, property and assets be carried out by auditors to be agreed by the Claimant and the Defendant. That there shall be liberty to apply with respect to this Order.

4. That the Last Will and Testament of the deceased, **WESSELL LLOYD DAYES**, dated 18th December 2019, is a forgery and is hereby declared null and void, as the signature purporting to be that of the deceased is not in fact his signature.
5. That the deceased, **WESSELL LLOYD DAYES**, died intestate and his estate is to be distributed in accordance with The Intestates' Estates and Property Charges Act.
6. Costs to the Defendant on the Claim and Counterclaim.
7. Defendant's Attorney-at-Law to prepare, file and serve Formal Order.

Judge