[2023] JMSC Civ 246

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV04189

BETWEEN	**MERVALYN BROWN-ROBINSON (Executor for the Estate of Bartley Robinson)**	**CLAIMANT**
AND	**IONIE FERGUSON (Executor for the Estate of Bartley Robinson)**	**1ST DEFENDANT**
AND	**MYRTLE ROBINSON**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Nico Pagon instructed by Mayhewlaw for the Applicant

Denise Senior-Smith and Ms. Rochelle Ashman instructed by Oswest Senior-Smith & Company for the Respondent

INTERLOCUTORY APPLICATION- Striking Out-Summary Judgment, Fraud, Resulting Trust – Proprietary Estoppel

Heard: May 25, 2023 and November 24, 2023

O. Smith (Ag)

[1] As a preliminary matter, I believe it would be remise of me not to extend my apologies and at the same time thanks to counsel in this matter. When the application was heard on May 25, 2023, it was adjourned for ruling on a date to be announced. Unfortunately, the matter was not noted in my diary and so it remained until counsel

communicated with the court that the ruling was outstanding. So, my apologies for the long interval and thank you for the gentle reminder and your understanding.

BACKGROUND

[2] This matter touches and concerns property located at Greenwich Park in the parish of Saint Ann comprised at Volume 1385 Folio 623 in the Register Book of Titles ("the subject property").

[3] On or about April 23, 2012, Myrtle Robinson ("the Defendant") became the registered owner of the subject property. The Defendant obtained title from her father Bartley Robinson ("the deceased") by way of gift. On or about November 25, 2012, the 1st Claimant and the deceased wed. On or about August 21, 2019, Bartley Robinson passed away leaving a Will reading;

> "I give, devise and bequeath all my real and personal estate whatsoever and wheresoever, including all my furniture and other household contents at my home at Lot 124, Greenwich Estate, Saint Ann and all other property which I have power to dispose of by will, to my wife **Mervalyn Brown-Robinson** absolutely".

[4] It is important to note for these purposes that the Will was witnessed on November 24, 2016.

[5] The Claimants Mervalyn Brown-Robinson and Ionie Ferguson, both executors for estate of Bartley Robinson, commenced this matter by way of Claim Form and Particulars of Claim filed October 30,2020. The Claimants then filed an Amended Claim Form and Particulars of Claim on October 7, 2022, seeking the following orders:

> 1. *A Declaration that the Estate of Bartley Robinson is entitled to the legal and beneficial interest in All that Parcel of Land part of GREENWICH PARK in the parish of SAINT ANN being the Lot numbered ONE HUNDRED AND TWENTY FOUR on the plan of part of Greenwich Park aforesaid deposited in the Office of Titles on the 6th day of May, 2005 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in the Certificate of Title registered at Volume 1358 Folio 623 of the Register Book of Titles*

occupied by the deceased and the Claimant during his lifetime and currently occupied by the Claimant.

2. *That the Registrar of Titles be ordered to cancel the Certificate of Title registered at Volume 1385 Folio 623 of the Register Book of Titles by way of section 71 of the Registration of Titles Act and issue a new Certificate of Title in the names of the Claimants as the Executors of Bartley Robinson.*

3. *That in the alternative the Defendant holds the said property on trust for the Estate of Bartley Robinson and that the Registrar of Titles be ordered to cancel the Certificate of Title registered at Volume 1385 Folio 623 of the Register Book of Titles and issue a new Certificate of Title in the names of the Claimants as the Executors of Bartley Robinson.*

4. *In the alternative the Defendant is estopped from obtaining possession of the subject premises*

[6] The Claimants also seek to challenge the title of the Defendant alleging that the title was obtained by fraud. Particularly:

i. *That the Defendant caused a Transfer to be lodged at the Titles Office defeating the interest of the deceased knowing full well the deceased did not intend to dispose of his entire interest in the property permanently.*

ii. *That the Defendant caused a Transfer to be lodged disposing of the entire interest of the deceased in the property without the knowledge and consent of the deceased that the same would not have been transferred back to him as agreed:*

iii. *That the Defendant dishonestly procured ownership of the subject property solely and withheld the Duplicate Certificate of Title from the deceased with a view to defeating any interest or demand made by the deceased;*

Particulars of Fraud

[7] On December 16, 2021, the Defendant filed a Notice of Application to Strike out Claim/Summary Judgment. Thereafter, an Amended Notice of Application for Striking out of Claim/Summary Judgment was filed on March 29, 2023, this is application before me for consideration. The defendant seeks the following orders:

1. *That the Claimant's Statement of Case be struck out;*
2. *Alternatively, that summary Judgment be entered for the Defendant on the Claim and on the Ancillary Claim;*
3. *In the further alternative, mediation in this matter be dispensed with and the matter be set down for a Case Management Conference.*
4. *Costs to the Defendant to be taxed if not agreed;*

Issue

[8] The issues to be determined are:

- Whether the claimant's case have a real prospect of success.

- Whether the claimant's statement of case discloses reasonable grounds for bringing the claim.

The Law

[9] Rule 26.3 of the Civil Procedure Rules grants the court the authority to strike out the whole or parts of the Statement of Case under certain circumstances:

1. *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*

   a. *that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*

   b. *that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*

   c. *that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*

   d. *that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[10] **Rule 15.2** Reads:

> *The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue.*
>
> *(Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)*

[11] **The Registration of Titles Act** governs the proprietorship and the transfer of registered land. Under the Act, any interest or estate in land which is conferred on an owner, remains indefeasible and can only be invalidated by fraud. The relevant sections are 68, 70 and 71.

Section 68 reads:

> *"No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power".*

[12] It is my understanding that once a certificate of title has been duly registered, it cannot be challenged, invalidated, or declared void due to any informality or irregularity that may have occurred during the application process or prior to the registration of the certificate. Furthermore, any certificate of title issued in accordance with the provisions outlined in the Act is deemed as admissible evidence in all Courts, serving as proof of the information stated therein and the corresponding entry made in the Register Book.

Subject to the subsequent operation of any statute of limitations, the certificate of title is considered conclusive evidence that the individual mentioned in the certificate is the rightful owner, possessor, or holder of any estate, interest, or power relating to the land described in the certificate. In simpler terms, once a certificate of title is registered and issued, it carries significant legal weight and provides strong evidence of ownership or authority over the registered property, which can only be challenged within the limits set by applicable statutes of limitation or fraud.

[13] By virtue of section 68 therefore, although a certificate of title is indefeasible it is subject to the Statute of Limitation. If that were not so, the principle of extinction of title could not operate against registered land.

[14] Sections 70 and 71 of the Act speak to the indefeasibility of a registered title and specifies that it can only be set aside by reason of fraud. Section 70 so far as applicable reads:

> *"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser..."*

Section 71 of the Act provides:

> *"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual*

> *or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."*

[15] In **Fels v Knowles** (1906) 26 NZLR 620, the New Zealand Court of Appeal, while interpreting their Land Transfer Act, which shares similarities with our Registration of Titles Act, articulated the concept of ownership authenticity for registered lands under a title:

> *"The cardinal principle of the statute is that the register is everything that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration on the title under which he takes from the registered proprietor has an indefeasible title against the entire world."*

[16] In **Registrar of Titles v Ramharrack** SCCA No. 80 of 2002 delivered on July 29, 2005, P. Harrison J.A., as he then was, described the indefeasibility of the title of a registered proprietor of lands in this way:

> *"Under the Registration of Titles Act, the registered proprietor of any estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud."*

[17] The foregoing establishes the definitive nature of ownership under the Registration of Titles Act. In the absence of fraud, an unassailable interest in the land is conferred upon a registered proprietor. This interest persists unless and until unimpeachable evidence demonstrates its acquisition through fraudulent means. Consequently, it is imperative to note that the court will and ought to refrain from interfering with a registered title unless fraud is pleaded and proven.

[18] Carolyn Tie J in the case of **Maureen Simpson (Executor of Estate Winnifred Simpson, deceased) and Doreen Richard v Ronald Simpson et al** [2017] JMSC Civ 163 at paragraphs 49 to 57 examined sections 68, 70 and 161(d) of the Registration of Titles Act. She then referred to and relied on the case of **Assets Co Ltd v Mere Roihi** in which Lord Lindley delivered the judgment. She highlighted page 210 of that judgment and thereafter, at paragraph 52 and 53, summarized the relevant principles as follows:

[52] The Act itself provides no definition for fraud. The definition for same however has been established in numerous authorities, many of which accept the dicta of Lord Lindley in ***Assets Co Ltd v Mere Roihi*** *[1905] A.C. 176 at 210;*

> *"...that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. . . The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

[53] From the above, the following principles can be extracted: -

i. *Fraud involves an element of dishonesty.*
ii. *The fraud must be actual as opposed to constructive or equitable.*
iii. *In order to invalidate a registered title, the fraud in issue must be brought home to the registered owner or to his agent.*
iv. *Abstaining from enquiries which may have revealed a fraud in circumstances where suspicions have been aroused may constitute a fraud on the part of the registered owner.*
v. *Presentation for registration of a forged or fraudulently or improperly obtained document does not amount to fraud if the person so presenting honestly believed that the document was genuine.*

SUBMISSIONS

Applicant's submissions

[19] It was submitted on behalf of the defendant that the Claimants' allegation of fraud concerning the subject property is vague in that it fails to detail or outline the alleged fraudulent acts committed by the Defendant. Counsel cited the case of **Henry Charles Johnson v Sagicor bank Jamaica Ltd, The Registrar of Titles and Valerie Brown-McIntosh** [2020] JMSC Civ 240, which emphasizes the need for detailed particulars to substantiate claims of fraud.

[20] Moreover, the familial relationship between the Defendant and the deceased, does not inherently infer fraudulent intent. Citing **Beverley Lewis, Harriet Hartley v Cleveland Hartley** [2016] JMSC Civ. 34, counsel contended that the allegations suggest a deceitful transaction, requiring a conspiracy. However, the evidence presented fails to satisfy the threshold to substantiate the allegations of fraud.

[21] The Affidavit of Marsha Smith, Attorney-at-Law who had conduct of the transfer to the defendant, indicates that the deceased understood and acknowledged the transfer. Counsel further submitted that the absence of a specific bequest in the deceased's subsequent Will for the disputed property, along with the lack of prior claims against the Defendant, raises doubts about the deceased's intention to retain ownership.

[22] Furthermore, the timing of the property transfer in relation to the deceased's marriage to the 1st Claimant was highlighted to argue that there is no clear connection between the Claimants and the property. As the property was transferred before the marriage of the deceased and the 1st Claimant, thus the deceased could not have devised the property to the 1st Claimant due to his lack of interest in the subject property at the time of the Will's creation.

[23] Counsel argued that fraud within the current legal context necessitates "actual fraud" involving dishonesty or moral turpitude. Constructive or equitable fraud is insufficient in such a claim. The burden of proving fraud requires substantial, cogent evidence, which the Claimant hasn't provided.

[24] Counsel asserted that the allegations of fraud are vague and general, failing to specify material facts that would be essential for the court to recognize fraudulent conduct, citing the case of **Wallingford v Directors of Mutual Society etc and Official Liquidator** [1880] 5 AC 685.

[25] Additionally, it was posited that alternative interpretations are possible, it was suggested that the deceased simply wilfully transferred his interest in the subject property to the Defendant after his divorce, which by virtue of the nature of the relationship between the deceased and the defendant is not farfetched and does not without more infer dishonesty.

[26] Counsel also requested that in the event her application was granted, judgment should be entered in favour of the Ancillary Claimant, for recovery of property and an assessment of damages for the 1st Claimant's occupation of the premises.

Respondent's Submissions

[27] The deceased, through his Last Will and Testament, devised the property in question to the 1st Claimant. This Will, prepared by the Warren A. Richmond Law Firm on November 24, 2016, specified the property as belonging to the 1st Claimant.

[28] Despite a transfer purportedly made to the Defendant by gift in 2012, the Claimants contest this and argued that the deceased never intended to fully transfer his interest in the property to the Defendant. They also argue that the property was treated as the matrimonial home and was supposed to reflect the interests of both the deceased and the 1st Claimant.

[29] The deceased and the 1st Claimant were married on November 25, 2012, and lived together until the deceased's passing in August 2019. Throughout their marriage, the deceased treated the property as his own and verbally expressed to the 1st Claimant that it belonged to him. The 1st Claimant also considered it her home and acted accordingly.

[30] The Claimant's assert that the deceased repeatedly requested that the Defendant transfer the title back to him and the 1st Claimant. They submit that the Defendant refused to comply, despite the deceased seeking legal advice to pursue legal action against her for this purpose.

[31] The Claimants accuse the Defendant of fraud on several grounds, including:

i. Lodging a transfer at the Titles Office, defeating the deceased's interest in the property knowingly.

ii. Disposing of the deceased's entire interest in the property without his knowledge or consent.

iii. Dishonestly acquiring ownership and withholding the title to defeat any claims made by the deceased.

[32] The 1st Claimant contends that she relied on the deceased's assurance that the property was the matrimonial home and that she acted to her detriment based on this belief, treating the property as her home, and invoked the principle of estoppel.

[33] Referencing **Trillian Douglas v Commissioner of Police** (2017 JMSC Civ 183), the 1st claimant emphasized the court's discretionary power to strike out a statement of case to prevent misuse of court procedure or when a case is "plain and obvious," "unsustainable," or "unarguable."

[34] The Claimants contend that the Defendant's Defence does not have sufficient legal basis and is not substantiated by evidence. They argue that the Defendant's statement of case is not specific and fails to disclose a reasonable Defence against the allegations made by the Claimants regarding the transfer of the subject property.

[35] Further, the Claimants argue that despite the property being transferred to the Defendant and registered in her name, it was not intended as an outright gift. They rely on the principles of Resulting Trust, specifically citing the Canadian case of **Pecore v. Pecore** 2007 SCC 17 and **Hodges v. Marsh** [1971] Ch 892. These cases hold that in instances where a transfer is made gratuitously, the burden of proof shifts to the recipient

(Defendant in this case) to demonstrate, on a balance of probabilities, that the transferor (deceased) intended to make a full and irrevocable gift.

[36] The Claimants contend that the Defendant did not provide any consideration or payment for the property transfer, and it was undertaken without the deceased's intention for a permanent transfer. This aligns with Resulting Trust principles, where it becomes incumbent on the Defendant to substantiate the deceased's intent to gift the property entirely.

[37] The Claimants assert that the Defendant's failure to provide evidence demonstrating the deceased's clear intention for a gift should be enough to establish a resulting trust, and thus the Defendant holds the property on trust for the benefit of the deceased's estate or the 1st Claimant.

[38] The 1st Claimant asserts that she and the deceased treated the property as their matrimonial home based on assurances given by the deceased regarding ownership. She therefore acted on the belief that she had an interest in the property due to the assurances provided by the deceased.

[39] Counsel argued that the actions of the 1st claimant, based on the assurances previously given, could be considered detrimental reliance, further supporting the claim of proprietary estoppel.

[40] In **Pecore** a father put money into a joint bank account with his daughter. He did so on the advice of his financial advisor in order to avoid probate fees. The father told the Canada Revenue Agency that they were his assets and dealt with them in his tax returns. His daughter could not access the account without his consent. The residue of the estate was to be left to the daughter and her disabled husband. There was nothing left to the other children. Upon the death of the father, the daughter claimed the assets as her own. The husband, with whom she was divorced, sued. The daughter claimed a presumption of advancement on the basis that all the funds were hers. The husband argued that she held the accounts for the benefit of her father’s estate and therefore it should fall into residue. Thus, the issue was whether or not the daughter had possession over the bank

account or if the account was part of the estate. The court's decision surrounded the general issue of the operation of presumption of advancement. The court held that in the absence of proof, the presumption of a resulting trust is a general rule for gratuitous transfers and the onus is placed on the transferee to show that a gift was intended.

[41] Therefore, the defendants request that the court exercises its authority to strike out or dismiss the claimant's statements of case due to the absence of reasonable grounds; hindering the just disposal of the proceedings, and potentially constituting an abuse of the court's process.

Application for Summary Judgment

[42] Brooks JA in **ASE Metals NV v Exclusive Holiday of Elegance Ltd** [2013] JMCA Civ 37 said:

> *[18] In carrying out its task, a court considering an application for summary judgment, so far as factual issues are concerned, should not seek to conduct a 'mini trial'. Lord Woolf MR, stated at page 95 of Swain v Hillman:*
>
> > *"...the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*
>
> *[19] The court does not, however, have to accept everything which a party places before it. The court in ED & F Man established this at paragraph 10 of that judgment:*
>
> > *"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable..."*

[43] When a court considers an application for summary judgment, it should not aim to replicate a full trial to resolve factual disputes. The objective is not to delve deeply into all factual controversies but to determine if there's a real prospect of success for either party.

The aim is to dispose of cases summarily where there's no genuine chance of success for one side.

[44] The purpose of the summary judgment provisions is to swiftly dispose of cases that lack a genuine chance of success, avoiding unnecessary delays and costs associated with a full trial.

[45] While the Court does not conduct a full-fledged trial, it does not blindly accept everything presented by the parties. The court should analyse the factual assertions made by the parties, and if it becomes evident that certain claims lack substance, especially when contradicted by clear documentation, the court may decide that those issues can be resolved early. This early resolution saves the time and expense of proceeding with a trial when the outcome seems inevitable based on the available facts.

[46] Thus, I must remind myself that the Court's role in summary judgment is to swiftly weed out cases where there's no real prospect of success based on the presented facts, without conducting a detailed trial but rather assessing whether the assertions made by parties have any genuine substance. If it becomes apparent that certain claims lack merit or are contradicted by clear evidence, the court may dispose of those issues early to avoid unnecessary trials.

Has the Claimant satisfied the requirement of Fraud

[47] The substance of this claim brought by the claimants is fraud. The Particulars of Fraud as pleaded by the claimants are:

> i That the defendant caused the Transfer to be lodged at the Titles Office defeating the interest of the deceased knowing full well the deceased did not intend to dispose of his interest permanently.
>
> ii. That the defendant caused a Transfer to be lodged disposing of the entire interest of the deceased in the property without the knowledge and consent of the deceased that the same would not be transferred back to him as agreed; and
>
> iii. That the defendant dishonestly procured ownership of the subject property solely and withheld the Duplicate Certificate of Title from the deceased with a view to defeating any interest or demand made by the deceased.

[48] These are all factual assertions, if they prove to be insubstantial I ought properly to dispose of the issues dependent on those assertions. The Particulars of Fraud under (i) and (ii) can be disposed of together. Fraud must be specifically pleaded and specifically proven. I find that while the claimants may have crossed the first hurdle, they have yet to attempt the second. The evidence before me, particularly from Marsha Smith, is that after the court made the orders in relation to the division of property between himself and his ex-wife, the deceased subsequently purchased his ex-wife's 25% share in the subject property. Based on Ms. Smith's affidavit filed on September 16, 2022, the deceased gave instructions for the subject property to be transferred into his daughter's name. Accordingly, the Instrument of Transfer was prepared. Both the deceased and the defendant attended the offices of Ernest A Smith & Company and executed the Transfer.

[49] Fraud in these circumstances must involve actual dishonesty, the sequence of events averred to by Ms. Smith discloses no dishonesty. In fact, she further deponed that it was explained to him that the effect of the transfer would be to transfer his entire interest to the defendant. He understood and executed the Transfer.

[50] The Transfer was registered before the deceased's marriage to the 1st claimant. The 1st claimant has not presented any evidence to this court indicating that the defendant had anything to do with the registering of the Transfer. In any event, the act of registering a legally executed document denotes no dishonesty. I will take it a step further, even if the transfer had been forged or fraudulently or improperly obtained, before the claimants can successfully prove fraud, they would have to demonstrate that the defendant knew that the Transfer was not genuine.

[51] Finally, in the third Particulars of Fraud, the 1st claimant pleaded that the defendant dishonestly procured the subject property solely. Again, the affidavit evidence of Ms. Smith undermines this assertion. The deceased transferred the entirety of the subject property to his daughter fully equipped with the knowledge of and the impact of his actions.

[52] The second limb of the third particulars of fraud is that the defendant withheld the title with a view to defeating any interest that the deceased had. The 1st claimant in her particulars and affidavit in response to the application, stated that during her marriage the deceased advised her that the defendant had the title to the property and had refused to return it despite several demands. However, without more, a person divests himself of any legal interest in real property upon the execution of an Instrument of Transfer. Therefore, after the Transfer was executed, the deceased held no interest in the property.

[53] The circumstances of the transfer as outlined above do not lend themselves to an inference of dishonesty. The defendant has denied that any demands were made of her to return the title or that the deceased commenced any legal action against her. The only evidence put before this court by the 1st claimant is a handwritten letter which she purports was written by the deceased and sent to the defendant. The letter is undated and unsigned and does not assist in proving the elements required to ground a claim of this nature. Similarly, the letter from Attorney-at-law Kori Soares dated October 7, 2022. This letter is exhibited in the affidavit of Mervalyn Brown-Robinson filed on October 28, 2022. It refers to a consultation he had with the deceased in January 2019 about the subject property being transferred into his name. The existence of this letter to my mind provides no support for the 1st claimant's assertions that the deceased made several demands of the defendant. Infact, it supports the defendant's assertion that no legal action was commenced against her by the deceased, after all the letter makes reference to a consultation, nothing further. The circumstances of his attendance on the offices of Mr. Soares are unknown to the date. I find that the claimants have not demonstrated that they have a real prospect of success on this ground.

Resulting Trust

[54] The law presumes that there is a resulting trust where property is transferred by one person into the name of another, typically involving a close relationship like family or friends, in circumstances where the transferee makes no contribution to the purchase price.

[55] Historically, this presumption arises most frequently in scenarios where:

i. The transferor did not intend to gift the property to the legal title holder. Instead, the presumption is that the transferor intended for the legal title holder to hold the property on behalf of the transferor or another beneficiary.

ii. The legal title holder either did not provide any value for the property or is in a fiduciary relationship, like a trustee, implying an obligation to handle the property for the benefit of someone else.

iii. There is a close relationship such as between family members, friends, or those in confidential relationships. In those cases, the law presumes that the transferor didn't intend an outright gift, especially when there's no evidence or clear intention to the contrary.

[56] This presumption can be rebutted if evidence is presented that demonstrates a clear intention to gift the property outright or to establish a different beneficial ownership arrangement. Such evidence might include explicit declarations, written documentation, or other forms of proof showing the true intentions of the parties involved in the property transfer.

[57] Panton P, as he then was, in the case of **Robinson (Clover) v National Commercial Bank Ja. Ltd. & others** [2015] JMCA Civ 3 sought to highlight the established principles to be considered by the court deliberating on the presumption of a resulting trust. I will set out his reasoning in its entirety:

> *"[27] There are certain well-established principles which will assist in the analysis of the issues raised in this case. The major ones are as follows:*
>
> a. *A gift of pure personalty, by way of transfer, raises a presumption of a resulting trust in favour of the transferor. In* ***Fowkes v Pascoe*** *[1874-80] All ER Rep 521; (1875) 10 Ch App 343, James LJ, after outlining the circumstances where an individual had purchased stock in the joint names of herself and her grandson, said at page 524 of the former report:*
>
> *"I will assume for the present purpose that all the history I have given of the origin and nature of the relations between them* ***did not affect the legal presumption of resulting trust****. I will assume, further, that the implication of such a resulting trust does not arise as much in the case of a transfer as in that of a purchase of stock, although that*

> *certainly is not the case with regard to a voluntary conveyance of land, and I will proceed to consider how the evidence stands on those assumptions." (Emphasis supplied)*

*The principle, although of some vintage, still has currency. The headnote in **Pecore v Pecore** [2007] 1 SCR 795, accurately reveals the view of the Supreme Court of Canada as being consistent with that well established principle. It states in part:*

> *"…The presumption of resulting trust is the general rule for gratuitous transfers…"*

b. *The presumption is rebuttable, however, and may be rebutted by cogent evidence that the transferor intended the transfer to be a gift to the transferee. The onus of rebutting the presumption is on the person asserting that the transfer was by way of gift. In **Bank of Nova Scotia v Smith Jordan**, Douglas CJ said at page 527:*

> *"…The onus is on the defendant [transferee] to rebut the proposition that he is a trustee of the balance in the joint account by reason of a resulting trust."*

*In that case, as well as in **Young and Another v Sealey** [1949] Ch 278 it was held that the presumption had been rebutted by the evidence of the transferee. The presumption of a resulting trust may also be displaced by the presumption of advancement. The presumption of advancement presumes a gift and actually reverses the burden of rebuttal, thereby requiring the transferor, or those acting in his place, to show that a gift was not intended. The presumption of advancement, however, only applies to special relationships such as a husband and wife and a parent and child….*

c. *The evidence of rebuttal need not be restricted to documentary evidence. In **Reid v Jones**, Bingham J (as he then was) seems to suggest otherwise. He said at page 514:*

> *"...Thus in terms of the existing circumstances of this case meant that [the persons representing the deceased joint account holder's estate] had to produce some documentary proof to show that what [the deceased joint-account holder] had by some unequivocal act cancelled the original authority or mandate given to the Bank by which the authority authorizing the signatures of her husband [the other joint-account holder] or herself were to be accepted, as a sufficient discharge for any balance to the account or any part of such balance in the said fund...." (Emphasis supplied)*

*Bingham J was specifically addressing the circumstances of that case. In any event, Bingham J did not seem to have addressed his mind to the concept of a resulting trust that was considered pertinent in **Reid v Grant and Reid**, which he closely assessed. If, however, he was seeking to apply a general principle, Bingham J's view would not have been consistent with the position in other decided cases on the point. At least two cases demonstrate that evidence other than documentary evidence was considered in rebutting the written mandate to the financial institution that held the joint account. For example, in **Young and Another v Sealey** the court relied heavily on the oral testimony of the transferee in arriving at the decision that the transferor intended a gift when she opened bank accounts in their joint names. Further, in **Marshal v Crutwell,** Sir G Jessel MR, in assessing a case where a husband, with failing health, had transferred his banking account from his sole name to the joint names of himself and his wife, said that he was required to look at all the circumstances in order to decide whether the transfer was for convenience or by way of gift. He said at page 330:*

> *"…Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances (as I understand I am bound to do), as a juryman, I think the circumstances shew that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account…." (Emphasis supplied)*

d. *The fact that the terms of the joint account stipulate that the monies in the account are available to either account holder during their joint lives or to the survivor on the death of either or any of them is normally only conclusive of their respective legal interests. The terms form part of a contract which creates a liability in the bank to the account holders. The relevant terms, such as the one in this case, usually only protect the bank if it pays out the sum to one or other account holder or to a survivor. In **Reid v Grant and Reid**, Watkins JA (Ag) (as he then was), in addressing a clause similar in import to clause 4.2, insofar as survivorship is concerned, said, at page 181 of the judgment:*

> *"…The authority vested by document 4.1 in her [the transferee], if she survived her grandfather [the transferor], to issue a receipt for any outstanding balance on the account in sufficient discharge thereof **served merely to relieve the bank of liability for payment in the stated circumstances and gave her no beneficial interest therein**. Looking then at the situation in law as of [the date of execution of document 4 1] **the bare legal title to the fund which***

> ***vested at common law in the [transferee] as joint holder with the [transferor] carried with it no express beneficial interest** in her and any claim by her that she was entitled beneficially to the fund must depend upon equity…." (Emphasis supplied)*

*The bank documents are, however, not irrelevant. Although they do not normally speak to the beneficial ownership of the funds they may do so. In **Pecore v Pecore**, Rothstein J, writing for the majority, opined that the court should consider the documents to determine whether they affect the issue. He said at paragraph 61: "While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death…Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry." (Emphasis supplied)*

e. *The entitlement to a beneficial interest in the funds in such a joint account will depend on the application of the presumption of a resulting trust and whether it has been displaced or rebutted as mentioned above. The cases mentioned in this judgment almost all included declarations in the bank documents of joint and several entitlements to the funds and yet, on assessment, were decided on one or the other side of the line, concerning beneficial ownership, depending on the surrounding evidence. In **Marshal v Crutwell,** the court found that the transferor's continued strict control of the joint account, after it was created, was evidence that no gift to the transferee, in spite of the fact that she was his wife, was intended. In **Reid v Grant and Reid**, the retention of control of the account by the transferor was found to be clear evidence that he did not intend a gift to the transferee. Watkins JA, in that case, held that the transferee held the beneficial interest "upon a resulting trust for the estate [of the transferor]" (page 182). In **Stoeckert v Geddes** PCA No 66/1998 (delivered 13 December 1999), the Privy Council concurred with the finding of this court that the transferee had not produced any evidence sufficient to rebut or displace the presumption of a resulting trust. It is true that, in that case, there was no significant consideration of the joint bank accounts as opposed to other property, but the applicability of the finding to those accounts was confirmed in **Stoeckert v Geddes (No 2)**. The cases in which the presumption was rebutted or displaced do not affect the principle that the presumption is the starting point, and that, thereafter, it is the evidence which determines whether it is supplanted. In **Bank of Nova Scotia v Smith-***

***Jordan** the court found that the transferor, based on the evidence of his character and attitude to the transferee, intended a gift. Unfortunately, **Reid v Jones** seems to be the odd case out. This does not mean that it was wrongly decided, but, as mentioned above, Bingham J concentrated on the significance of the document lodged with the bank, without considering the impact of a resulting trust as a relevant factor.*

f. *The evidence for rebutting the presumption of a resulting trust may show that the transferor, at the time of the transfer, indicated an intention of providing a gift. In **Bank of Nova Scotia v Smith-Jordan**, the transferor insisted that the bank should open a joint deposit account in place of the joint fixed deposit account that it had first opened (wrongly assuming that to have been his initial instructions). Evidence of a later indication of the transferor's intention would also be considered. In **Young and Another v Sealey**, the court considered a document sent by the transferor to the transferee, for his signature in respect of the joint account, some eight years after the account was opened.*

g. *It is, therefore, the circumstances of each case that must be examined to determine whether the funds provided by the transferor to the joint account will be considered as remaining the property of the transferor in equity or deemed to be a gift to the transferee. In **Pecore v Pecore**, the majority of the court held that the transferee, the daughter of the transferor, had, by successfully invoking the presumption of advancement, displaced the presumption of a resulting trust. In **Papouis v Gibson-West**, the transferee admitted that the addition of her name to the transferor's account "was…as a matter of convenience to allow [the transferee] to pay bills on [the transferor's] behalf" (paragraphs 42 and 43). The court found that admission to be conclusive of the issue with respect to the beneficial ownership of the funds in the account.*

[58] In sum, the principles can be distilled as:

i. While these matters usually concern a conveyance of land, A transfer of pure personalty (such as stocks) in someone else's name raises a presumption of a resulting trust in favour of the transferor.

ii. The presumption of resulting trust can be rebutted by strong evidence indicating that the transfer was intended as a gift to the recipient. The burden of proof lies with the person asserting that the transfer was a gift.

iii. Evidence used to rebut the presumption of resulting trust is not limited to documentary proof. Oral testimony, circumstances

surrounding the transfer, and the intentions of the parties involved are crucial in determining ownership.

iv. While bank documents may not decisively determine beneficial ownership, they can provide evidence of the transferor's intentions regarding the ownership of funds in the account upon their death.

v. Continued control or management of the joint account by the transferor after its creation can be considered as evidence against the intention of making a gift.

vi. Each case's unique circumstances are essential in determining whether the funds provided by the transferor are considered a gift or remain the property of the transferor in equity.

[59] Brooks J In **Granville Scott v Yvonne Adocia Scott-Robinson** Claim No. 2009 HCV 01885 sought to distil how the Court should approach the presumption of advancement/ resulting trust. He examined the case of **Lavelle v Lavelle and Others** [2004] EWCA Civ. 223 (delivered 11/2/04) which he summarized as follows:

> *"...a father who had purchased an apartment in his daughter's name succeeded in rebutting the presumption of advancement. There was evidence that the reason for the purchase in her name was to avoid inheritance tax. It was also a significant factor that although he used the apartment for only three months of each year, it had from the outset, been remodeled and furnished to meet his needs. The rest of his family did not reside there but there was some evidence that they visited the apartment "weekly".*
>
> *In giving the judgment of the Court of Appeal, Lord Phillips, MR was of the view that a less rigid approach should be "adopted to the admissibility of evidence to rebut the presumption of advancement". He said at paragraph 19:*
>
> > *"In these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as*

> *part of the overall picture. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them." (Emphasis supplied)*

*It is also of some significance, although by itself not conclusive, that the purchaser (the father of the legal owner) retained the title deeds to the property purchased. In **Warren v Gurney and another** [1944] 2 All ER 472, Morton L.J. quoted Coke on Littleton to the effect that the title deeds are "sinews of the land". The retention, coupled with other evidence of intention was accepted to displace the presumption. Of much significance in that case was the statement made by the purchaser to the solicitor acting in the purchase. The evidence, given and accepted as true, was from a son of the purchaser of the property:*

> *"Father required property made in my sister's name, so that there could be no trouble at a later date, as [the sister's husband] had to pay for it at a later date. Father said he should keep the deeds as security." (Emphasis supplied)*

[60] Case law has however moved on from **Pecore v Pecore** as evidenced in the case of **Re Karl Eric Watkin Wood and another (as the joint trustees in bankruptcy of Karl Eric Watkin) v Watkin** [2019] EWHC 1311 (Ch) ICC. Judge Barber at paragraphs 91 to 93 asserts that the presumption of advancement exists between parent and adult child:

91. Mr Pickering next submitted that, to the extent that the presumption of advancement extended to children who were not minors, it only applied to children over 18 years old who were still 'financially dependent' on their parents.

*92. Again, I do not accept this submission. Although the issue of financial dependence is undoubtedly a factor relevant to the strength of the presumption (Laskar at paragraph 20), the historic rationale for the presumption is based on parental affection as well as parental obligation: see by way of example **Grey v Grey** (1677) 36 ER 742 (HC Ch) at page 743, where, at the elemental stage of development of the doctrine, the court identified natural affection as a rationale:*

'…. For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and ergo, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law….'

> *See too **Sidmouth v Sidmouth** (1840) 48 ER 1254 at p1258, **Scawin v Scawin** (1841) 62 ER 792 and **Hepworth v Hepworth** (1870) LR 11 Eq 10.*
>
> *93. Whilst, as clear from Lord Neuberger's obiter remarks in **Laskar**, the presumption may be weaker (and therefore more readily rebuttable) in the case of an adult child who is financially independent, I reject the submission that it does not exist at all."*

[61] The cases above support the view that the circumstances of each case should guide the court in deciding whether a resulting trust exists. The circumstances of each case should also guide the court's application of the presumption of advancement in resolving the issue.

[62] Two issues arise for consideration here. First, does a resulting trust arise? If yes has the defendant produced sufficient evidence to rebut that presumption. Secondly, does the presumption of advancement apply? If yes, has the Respondent/claimant provided adequate evidence to rebut the presumption?

[63] The claimants in support of their claim that a resulting trust exists argue that the property was transferred to the Defendant by the deceased as a means to secure his property until the end of litigation with his then wife. However, that matter (Bartley Robinson v Nelsie Jean Robinson Claim No. 2010/ M02688) concluded on November 14, 2011. The Court awarded Nelsie Jean Robinson a 25 percent interest and the deceased a 75 percent interest in the subject property. Subsequently, the deceased purchased his ex-wife's interest.

[64] Pursuant to the order of the court, the law firm of Ernest A. Smith & Company had carriage of sale. The transfer to the deceased was completed on February 15, 2012, for the consideration of $3,125,000. Then, in April 2012 the deceased transferred the property to the defendant. It is evident that the resolution of the matter between the deceased and Nelsie Jean Robinson had no bearing on the transfer of the subject property to the defendant.

[65] Of note is the affidavit of Marsha Smith in which she avers that the deceased throughout his life made no representation to her that he intended the 1st claimant or

anyone else to have an interest in the property except his daughter. This evidence is closer in time to the Transfer when he had the full benefit of the impact of his decision.

[66] The presumption that there is a resulting trust can also be rebutted if it is proven that the transferee contributed to the purchase price. In the case at bar, by letter dated November 29, 2010, attorney-at-law Marsha Smith indicated that the monies to secure a settlement between the deceased and his then wife came from the defendant. In addition, the defendant insists that monies for the purchase also came from a joint account held by her and her father, the bank book for which is in the claimant's possession. In addition, her affidavit, filed on April 21, 2023, she deponed that she, her daughter and her father went to the St. Ann's branch of the Bank of Nova Scotia on January 13, 2012, where a cheque was drawn on their joint account and paid to Ernest Snith and Company for the purchase of the ex-wife's share in the subject property. The claimant's response to this evidence has been lukewarm.

[67] At the time the deceased transferred the subject property to the defendant, he had just finished a claim for division of property. He had counsel who acted for him throughout the entire process. When he purchased Nelson Jean Robinson's 25% interest, he also had the benefit of counsel. At the time of the transfer to the defendant he was advised by counsel as outlined in the affidavit of Marsha Smith discussed at paragraph 49 above. It also should not go without mention that the Transfer was recorded as having been made by way of gift. This in my view provides clear evidence of his intention at the time of the transfer.

[68] In the circumstances, whether the matter is approached from the stance that the defendant contributed to the purchase or that the transfer was indeed a gift, an evaluation of the issues does not in my view demonstrate that the claimants have a real prospect of success.

[69] On the other hand, if a gratuitous transfer was made, the presumption of advancement may be applicable. The defendant was an adult at the time of the Transfer and from all indications was financially independent. However, the fact that the deceased

had just finished a court case concerning the subject the property with his former wife, the fact that the defendant is his only child and his age at the time of the transfer are circumstances in my view that are capable of rebutting a resulting trust. This should also be considered against the backdrop of the title being in the possession of the defendant. Although the deceased remained in occupation, based on the averments of the defendant, this was an agreement they entered into, that although she was the legal owner, he would reside there until he died. This she deponed was the reason she did not serve a Notice to Quit until after her father died.

[70] The claimants/respondents have presented two documents in an attempt to rebut any presumptions that may arise: a handwritten letter, allegedly written by the deceased and a letter from Korie Soares, Attorney at law. The 1st claimant exhibited a handwritten letter in her affidavit which she asserts the deceased wrote to his daughter. Three things arise for consideration, first, why is the letter in the possession of the claimant and not the defendant? This clearly supports the assertions made by the defendant that she did not receive any such letter. Secondly, the document is unsigned and undated. Thirdly, there is no evidence that the handwriting is or is not that of the deceased. I can therefore attach little weight to it. I am also guided by the words of Lord Phillips, MR in **Lavelle v Lavelle**, as such I ascribe more weight to words and events more proximate to the time of the transfer to the defendant.

[71] I have also considered the circumstances surrounding the deceased's visit to an attorney in January 2019. Mr. Robinson passed away in August 2019. A few months before his death, according to Mr. Soares, the deceased attended on his office to discuss property being transferred from the defendant to him. This desire was not communicated to the defendant or her attorneys until three years after the passing of the deceased and two years after this claim was filed. The evidence before me discloses that the deceased was very ill and, in my view, as stated in **Lavelle v Lavelle**, may have had a change of heart years after he transferred the subject property to the defendant. This carries very little weight in the circumstances.

[72] On a whole, whether the Court applies the presumption of resulting trust, or the presumption of advancement, the Claimants' case is unsustainable. I find, based on the evidence before the Court, that the Claimants have not demonstrated that they have a real prospect of success on this ground at trial.

Proprietary Estoppel

[73] Proprietary estoppel arises when a person is prevented from insisting on their strict legal rights due to the dealings that have taken place between the parties. This can occur when there is a promise made by one party and based on that promise the other party acted to his or her detriment. There is no requirement for there to be a binding contract, all the law requires is a promise made with the intention for the other party to act in reliance on that promise and the party does. See **Crabb v Arun District Council** [1975] 3 All E.R. 865

[74] The claimants have put no evidence before this court of any promise made by the deceased or that they consequently acted to their detriment. This ground seems to be based on the 1st claimant's assertion that the deceased told her it was their matrimonial home. However, the subject property does not fit within the definition of family home/matrimonial under **the Property (Rights of Spouses) Act, (PROSA).**

[75] Section 2(1) of **PROSA** states that a:

> *"family home" means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;"*

There is no issue that at the time the deceased and the1st claimant were married, the property was jointly owned by the deceased and the defendant. Therefore, although they resided in the subject property it was not the matrimonial/family home.

[76] To support her assertion that because it was the family home she acted to her detriment, the 1st claimant exhibited tax receipts. There is one tax receipt which indicates

that the sum of $19,275.00 was paid by the1st claimant in June 2021 and a receipt for plumbing supplies in the sum of $10,470.94, less a discount of $785.32. The former was paid after this claim was filed while the latter expenditure was made after the passing of the deceased. These hardly rise to the threshold of acting to one's detriment.

[77] I am mindful that as I have previously stated, I am not to conduct a mini trial, however, applications of this nature are intended to save expense and avoid unnecessary waste of the court's resources. Even more importantly, in the interest of justice, a party should know whether the case before the court, on the part of the claimant, is likely to succeed or fail. As such, the court must examine and analyze the material before it in order to determine whether the assertions made by the parties warrant a trial.

[78] In this case, after reviewing the issues raised by the parties, I have formed the view that were the parties to file witness statements and proceed to trial there is nothing else to be revealed. The parties without aid, ventilated the issues in this case in pursuance of this application. I have had the benefit of not only the Particulars of Claim and the Defence but also, in support of the Amended Notice of Application for Striking out Claim/Summary Judgment filed on behalf of the defendant, the applicant filed five affidavits deponed to by Myrtle Robinson (2), Marsha Smith and Leslie Ann Stewart (2) while the Respondents in opposition filed three affidavits, all three deponed to by the 1st claimant. The affidavits from the parties were replete with assertions and exhibits supporting their case. I therefore examined all the material put before me to determine if the claimant has a real prospect of success.

[79] It is in the circumstances outlined above that I find that the claimants do not have a real prospect of successfully defending the claim.

1. Order granted in terms of paragraph 2 of the Amended Notice of Application for Striking out of Claim/Summary Judgment filed on March 29, 2023.
2. In relation to paragraph 8 A of the Ancillary Claim Form and Particulars of Claim filed on May 26, 2021. Recovery of Possession within 60 days of this order.
3. Pretrial Review for Assessment of Damages is fixed for March 6, 2024, at 3pm for half an hour

4. Leave to appeal is granted.

5. Cost to the Defendant/ Ancillary Claimant to be taxed if not agreed.

…………………………………………………

Opal Smith
Puisne Judge (Acting)