[2017] **JMSC Civ 67**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV04257

BETWEEN	**NATIONAL IMPORT-EXPORT BANK OF JAMAICA**	**CLAIMANT**
AND	**MONTEGO BAY INVESTMENT COMPANY LIMITED**	**DEFENDANT**

Lord Anthony Gifford, Q.C. and Mrs. Emily Shields for the Applicant.

Mr. Nigel Jones and Ms. Jessica Telfer for the Respondent.

Statutory interpretation – Sections 63 and 88 of the Registration of Titles Act – Registered land - Deed of Gift - Whether an unregistered transfer confers ownership of the land upon the transferee – Whether the execution of the instrument of transfer converts the transferor's intention into ownership on the part of the transferee – Sale of land

HEARD IN CHAMBERS: March 14, 2017 and May 5, 2017

CORAM: WINT-BLAIR, J (Ag.)

[1] The Court heard two applications in this matter. The first application concerned the legal position of Ms. Maureen Symister, the daughter of Mr. John Sinclair, deceased.

[2] The application filed on December 5, 2016 by Ms. Symister sought the following orders:

1. “An order that the applicant, Maureen Symister is an interested party for the purposes of these proceedings.

2. A variation of the Final Charging Order granted on the 1st day of February, 2016 and filed in this Court on the 3rd day of February, 2016 to exclude Order 1 which reads – ‘All that parcel of land located at 14 Central Path, Calabar Mews, Kingston 20 in the parish of Saint Andrew contained in Certificate of Title registered at Volume 1302 Folio 860 of the Register Book of Titles from the list of properties which are subject to be charged pursuant to the summary judgment filed on the 18th June, 2015’.

3. Costs and

4. Such further and of the [sic] Orders as this Honourable Court deems fit.”

The background to Ms Symister’s application

[3] A final charging order has been made by this Court over property at 14 Central Path, Calabar Mews, Kingston 20, Saint Andrew, registered at Volume 1302 Folio 860 of the Register Book of Titles. Mr. John Sinclair was its registered proprietor, (“the disputed property). Mr. John Sinclair is now deceased.

[4] Ms. Symister asserted that the disputed property had been given to her in 1990 as a wedding gift by her father. This was an inter vivos disposition. The disputed property cannot therefore be considered a part of his estate and she desired the Court to vary the final charging order to exclude the disputed property.

[5] The second application was brought by the respondent. The respondent is a financial institution which had obtained final charging orders over properties belonging to John Sinclair. An application for an order for the sale of land was filed on June 21, 2016 on its behalf seeking the following orders:

1. “That all that parcel of land located at 14 Central Path, Calabar Mews, Kingston 20 in the parish Saint Andrew, contained in the Certificate of Title registered at Volume 1302 Folio 860 of the Register Book of Titles be sold to satisfy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

2. That all that parcel of land located at Lot # 11 Blairgowrie part of Reading Pen in the parish of Saint James, contained in Certificate

of Title registered at Volume 1448 Folio 575 of the Register Book of Titles be sold to satisfy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

3. That all that parcel of land located at 8 Hopefield Avenue, Kingston 6 in the parish of Saint Andrew, contained in the Certificate of Title registered at Volume 1092 Folio 463 of the Register Book of Titles be sold to satisy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

4. That the 3rd and 4th Defendant's agent, employee or whosoever may be in possession of the property comprised in the Certificate of Title registered at Volume 1302 Folio 860, Volume 1448 Folio 575 and Volume 1092 Folio 463 of the Register Book of Titles through the 3rd and 4th Defendants or with their knowledge, consent or otherwise deliver up possession of the land within seven days from the date of this order.

5. That the Claimant's legal representative shall have carriage of sale.

6. The Claimant is permitted to sell the property at [sic] private treaty.

7. The Claimant is permitted to list the property with real estate agencies and or real estate agents to facilitate the sale at private treaty in accordance with order 6 hereof.

8. The Claimant is entitled to recover the costs of valuations from the sale of the properties.

9. The Claimant is entitled to pay any realtor's fees, taxes and all other fees associated with the sale of the property from the purchase price.

10. The 3rd and 4th Defendants shall sign the Agreements for Sale and the Instruments of Transfer as required by the Claimant.

11. If the 3rd and 4th Defendants fail and/or refuse to comply with order 10 hereof the Registrar of the Supreme Court shall be empowered to sign the Agreements for Sale and Instruments of Transfer for the sale of the properties.

12. The 3rd and 4th Defendants shall within seven days from the date hereof produce the duplicate Certificate of Title for the property in order 1 hereof to Nigel Jones & Company.

13. If the 3rd and 4th Defendants fail and/or refuse to produce the duplicate Certificates of Title for the properties mentioned in Order 1 hereof, the Registrar of Titles shall issue a new title and dispense with the production of the duplicate Certificates of Title upon registration of the transfer.

14. Costs to the Applicant

15. Such further and other relief as this Honourable Court deems fit."

[6] The respondent asserted that the the estate of John Sinclair is justly indebted to it pursuant to a Judgment entered on June 18, 2015 in the sum of US$5,340,785.00 with interest at the rate of 3% per annum from the date of judgment to payment and J$927,161.44 with interest at a rate of 6% per annum from the date of judgment to payment. As well as costs to be agreed or taxed. The judgment debt remained partially unsatisfied at the date of hearing.

[7] Having secured final charging orders over the properties sought in the application, the respondent wished to sell the properties to realize the fruit of its judgment.

[8] Both applications were heard together with that of Ms. Symister heard first. The decision in respect of each application is set out in the conclusion below in the same order.

Background

[9] Ms. Maureen Symister asserts that that she was given the disputed property in 1990 as a wedding gift by her father, Mr. John Sinclair. The instrument of purported transfer is dated March 11, 2013 and was signed by her father John Sinclair before his death. Ms. Symister did not execute the transfer until after the death of her father. The transfer was not registered before Mr. Sinclair died. Ms. Symister now claims that the disputed property had been the subject of an inter vivos disposition to her and should not form a part of her father's estate. The

respondent now seeks to sell the disputed property as it has a final charging order naming the disputed property as one of those charged.

The Issue

[10] The issue both counsel asked the Court to determine in respect of the first application was, what is the position of a transferee named in an instrument of transfer, made pursuant to section 88 of the Registration of Titles Act; when said transfer had been executed but not registered before the death of the transferor.

Submissions - Applicant

[11] Lord Gifford, Q.C. for the applicant submitted that the Court should determine the following issues:

I. The Court should determine the legal position of the transferee at the date of death of the transferor. The transferee was the owner of the land at the date of John Sinclair's death. He having fulfilled his intention to give the land to her by the execution of a transfer, she became its owner. Ownership is separate from registration. Ms. Symister was the owner of the land, she did not give the land back to the estate. Her instructions to cancel the transfer were based on the false representations of her father's counsel when she was told to reimburse the transfer tax paid to effect the transfer.

II. Where the intention of the transferor is plain from the instrument executed by him, that action is effective to create ownership on the part of the donee or transferee even where there is irregularity in the transaction.

III. Section 88 of the Registration of Titles Act provides that the transfer has to be registered. The ownership of registered land is registered so as not to leave the owner vulnerable to others with rival interests which could be registered against the title. In the case of **Diana Johnson v Ivy Johnson** Suit No. E 379 of 2000, Daye, J questioned whether there had been a transfer. The learned judge distinguished between an intended and an actual gift.

IV. The evidence of Ms. Symister is that her father intended to give the land to her by way of gift. He had done everything necessary to convert intention into ownership by executing the instrument of transfer. The property had therefore been given to his daughter before he died. The property did not form a part of his estate. The death of the transferor should not affect the registration process, the transfer can be submitted for taxes to be paid on registration. The transferee of a registrable but unregistered interest had an equitable interest in the subject property and that the legal estate and interest would pass to her upon registration. The Torrens system as used in Australia and Canada allowed for a title in equity to the applicant upon the execution of the instrument of transfer until registration.

V. Counsel for the applicant relied on the case of **Byron Headley v Barrington Headley** (1999) 3 JJC 2611 for the submission that the transfer by way of gift was an expression of the true intent of the then owner. This authority grounded the submission that the property was not properly included in the will of John Sinclair as the transfer by way of gift had the effect of a deed, the validity of which is unimpeachable. John Sinclair signed the transfer document well knowing that the applicant might act in accordance with its content and intending to pass the property to her. Counsel also cited the Privy Council cases of **Abigail v Lapin** [1934] AC 491 at 500; **McEllister v Biggs** (1883) 8 AC 314; **Great West Permanent Loan Co. v. Friesen** [1925] AC 208.

VI. In respect of the requirements for a charging order, it was submitted that the applicant was the beneficial owner of the property. It followed that a charging order should not have been made or enforced against the property in favour of the creditor of the legal owner.

VII. Part 48 of the Civil Procedure Rules ("CPR") shows that equitable owners of land have the right to resist charging orders even if the legal owners owe money to their creditors. Rule 48.1 provide that land includes any interest in land. Conversely, land given to a debtor by an unregistered instrument of transfer means the debtor's equitable interest in the land could also be the subject of a charge.

VIII. Rule 48.3 (2)(h) states that to the best of his information and belief, the debtor is beneficially entitled to the land. The claimant in the instant case makes such a statement through the affidavit of Maria Burke. This confirms that a charging order can only be made if the beneficial ownership is in the hands of the debtor. This interpretation is in line with the procedure in England which is governed by the Charging Orders Act, 1979. Section 2(1) of which provides that "a charge may be imposed by a charging order only on:

(a) any interest held by the debtor beneficially:

(i) in any asset of a kind mentioned in subsection (2) below; or

(ii) under any trust."

By section 2(2) land is one such asset.

IX. In the case of land held by a person as trustee it is necessary under section 2(1)(b) that "the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit." In the instant case, the deceased transferor held the legal title as trustee as he had no beneficial interest.

In light of the foregoing the Court should vary the final charging order to remove any reference to the disputed property.

Submissions – Respondent

Mr. Jones, counsel for the respondent submitted that:

a. It was the applicant who cancelled the transfer which had been duly endorsed. The Torrens system is one of ownership by registration, how would the interest acquired by Ms. Symister in the property be recognized and endorsed on the title?

b. The document purportedly signed by John Sinclair was executed by way of a mark. The transfer document at page 3 was dated March 11, 2013 which suggested that the document was created one month after the death of John Sinclair. In an email from Peter Millingen, counsel for John Sinclair and executor of his estate, to Bjorn, son of the applicant dated March 1, 2013 at 12:48 pm he said the transfer was signed by John Sinclair on or about February 14. The email does not say that Ms. Symister signed the document on that date. Further, Ms. Symister signed while on a visit to Jamaica, witnessed by Peter Millingen, this would have been after the date of her father's death. Therefore all that was required in law had not been done.

c. The document could not have been registered. It was a failed attempt to give the property to Ms. Symister as at the date of the death of John Sinclair as the attempt was incomplete within the provisions of the law. This was so as the witness to John Sinclair's mark failed to indicate his designation as required under the Registration of Titles Act. Cancellation would have been inevitable, as the document could not have been accepted to register Ms. Symister's interest.

d. On the evidence, Bjorn who is the applicant's son, in emails dated April 17, 2013 at 8:33pm and April 29, 2013 at 10:50pm said that he did not have a full understanding of what he was involved in. This was not a disagreement. There is no mention of false representation in the evidence. The affidavits of Maureen Symister are clear and unequivocal. She has now had legal advice, any misrepresentation relied upon by her must have been at the time she made the decision. The information she used to cancel the transfer is not the information she now relies upon.

e. There is no indication in any of the applicant's affidavits where the funds to effect the transfer would have come from.

f. Section 88 of the Registration of Titles Act sets out how registered land is to be transferred. **Headley v Headley** (supra) refers to unregistered land, a deed made in those circumstances would have a different legal effect. The Court of Appeal did not consider the same factors that Daye, J did in **Diana Johnson** (supra). The nature of the property is the distinguishing feature.

g. Counsel also relied upon 20 Halsburys Laws of England, 4th edn, para. 62. The gift was an imperfect one made in expectation of death which rendered it invalid.

h. As a beneficiary, Ms. Symister cannot take preference of over a judgment creditor. Counsel relied on **Basil Louis Hugh Lambie (also known as Louis Lambie) et al v Marva Lambie (Administrator ad Litem for the estate of Max Lambie, Deceased) & Another** [2014] JMSC CIV 44 for the submission that a personal representative must pay the just debts and testamentary expenses of the deceased, collect and realize the assets of the deceased as well as distribute the assets of the estate. He also relied **on Winston O'Brian Smith & Another v Constantine Scott et al** [2012] JMSC Civ 152, in which Mangatal, J at paragraph 14 held that a beneficiary has no legal or equitable interest in the unadministered assets of the deceased's estate. The entire ownership of the unadministered assets is in the deceased's personal representative. (see **Commissioner of Stamp Duties (Queensland) v Livingston** [1965] AC 694.) The true status of a beneficiary is that he has a chose in action to have the estate properly administered.

[12] In response, Lord Gifford, Q.C. argued that, alternatively, the transferor would hold the disputed property in trust for the transferee. Registration may perfect the legal estate, however in the period between execution and registration, the transferee has a beneficial interest. At a minimum, the applicant had a beneficial interest and thus the land is unencumbered and free in the hands of the debtor.

The debtor is beneficially entitled pursuant to Rule 48.3(h). The land cannot be charged or sold unless there is both legal and beneficial ownership in the land.

[13] Further, the affidavit evidence of Ms. Symister remained unchallenged. There was no provision in the fourth schedule of the Act in respect of section 88 of the Act for a donee or transferee to sign. The transfer is complete when the donor or transferor signs. This converts intention into an interest which then passes to the donee and is perfected on registration.

[14] Mr. Jones responded to the submission on the existence of a trust by contending that it was inapplicable to an imperfect gift. The land had not passed to Ms. Symister and her action had created an irreversible position. He cited Rule 30.1(3) of the CPR and in written submissions relied on the dictum of Daye, J in **Diana Ramona Johnson v Ivy Johnson** (supra) for the position that the gift was an imperfect one which the Court could not complete.

The Law

[15] Having considered the submissions of both sides, I undertook a review of the law. In the case of **Byron Headley v Barrington Headley** (1999) 3 JJC 2611 Forte, J.A. affirmed the decision of Brown-Wilkinson, V.C. in **TCB Ltd. v Gray** [1986] 1 All ER 587. **TCB Ltd. Gray** concerned the defendant's intent to enter into a specific transaction through his two companies. He wished funds to be advanced to him by the claimant who in turn wished to have a personal guarantee made by the defendant as principal shareholder of both companies.

[16] There was a plethora of documents to be executed. TCB's standard form guarantee was amended by the addition of a cl 15 at the end of it. The standard form of guarantee as amended was then photocopied. The transaction involved ten guarantees with one to be executed by the defendant personally and nine by third party mortgagees.

[17] The form of guarantee sent to the defendant contained an error, in that it was the form of guarantee containing cl 15 which limited liability under the guarantee. The defendant executed his personal guarantee in this form and returned the documents for checking to the office of his solicitors.

[18] His solicitor Mr. Rowan, spotted the error and called the defendant explaining the problem, his intention was for the defendant to sign the guarantee in unlimited form. The defendant gave his approval for cl 15 to be deleted. Then, Mr. Rowan, under a power of attorney deleted this clause from the guarantee signed by the defendant, initialling the deletion and adding the words "deletion by Robert Rowan as attorney for Victor William Arthur Gray".

[19] A year later, payment was demanded by the defendant on the guarantee, when it was not met the defendant was sued. He argued that the deletion by Mr. Rowan had not been authorized either under the power of attorney or by the telephone call. The defendant's liability was as stated in the clause, meaning he was under no further liability. Further, that the power of attorney was invalid in that it had not been sealed by the defendant and the telephone call had never taken place.

[20] The defendant was found on a weighing of the evidence to have been an unreliable witness, the Court found that the defendant had been required to give an unlimited guarantee and had been so instructed by his advisers. The Court also found that the telephone call had been made and that Mr. Rowan had been expressly authorized to delete cl 15 from the guarantee signed by the defendant.

The Court considered the Powers of Attorney Act 1971 which provided in section 1(1):

> *"An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power."*

[21] It was found that there was no seal or mark on the document to indicate that it had been sealed. In addition, there was no oral evidence to suggest that the

defendant had done anything beyond the mere execution of the document. The Court was unable to make a finding that the document had been sealed as required by the Act and held that it had not. Browne-Wilkinson, V-C stated:

> *"I was pressed by counsel for TCB with a line of cases culminating in First National Securities Ltd. v. Jones [1978] 2 All ER 221, in which the Courts have adopted a benign approach in deciding that a document has been executed as a deed. The Courts have gone a long way towards holding that any document delivered as a deed (even though nothing is done to the document itself at the time of execution) is proved to have been executed under seal. Yet no case in the High Court has been cited to me in which the Court has gone as far as it would be necessary to go in this case, there being nothing to indicate that something amounting to sealing took place beyond the fact that the words of the document refer to it having been sealed. If I were to hold that document was in fact sealed, I would not only be flying in the face of what actually happened, but also disregarding the statutory requirement that the document should be sealed. I think it would be wrong to extend the legal fiction any further and I decline to do so. If it is open to the defendant to raise the point, I would hold that the power of attorney had not in fact been sealed.*
>
> *But is it open to the defendant to raise the point? In my judgment the answer is No since he is estopped from denying that the document was sealed. The defendant has executed a document drawn up as a deed and which says that he has thereunto set his hand and seal. The document states in terms that it was signed, sealed and delivered in the presence of Mr. McGuiness. There is therefore a representation of fact that it was in fact sealed. The defendant executed the document with the intention that it should be relied on as a power of attorney and knowing that TCB were going to rely on it as such. TCB in fact relied on it to their detriment, since they advanced money in reliance on documents executed under the power. The case therefore has all the necessary elements of a classic estoppel."*

[22] The Court then considered the dicta of Danckwerts, J in **Stromdale & Ball Ltd. v Burden** [1952] 1 All ER 59 and Sir David Cairns in **First National Securities Ltd. v Jones** [1978] 2 All ER 221, but ultimately went on to hold that *"in the ordinary case a person so executing a deed is subsequently estopped from*

denying that he has sealed it rather than to find as a fact that something has occurred which we all know had not occurred."

[23] In the case of **Headley v Headley** (supra), there were two contesting claims to a parcel of land known as 'Brissett land'. The appellant claimed the land by way of a Deed of Gift purportedly executed on September 29, 1987 by Mabel Fullett, aunt of both parties. The respondent claimed the land through Mrs. Fullett's will executed on July 9, 1990. The appellant alleged that the respondent who was in occupation of the property did so as a tenant at will who had disobeyed a notice to quit served upon him.

[24] The question which arose for determination was whether the Deed in evidence contained a seal and if not, whether having regard to the wording of the document it could be presumed that it had been sealed. There was no physical seal on the document. Forte, J.A. referred to the case of **TCB Ltd. v Gray** and in analyzing the dictum of Browne-Wilkinson, V-C said that he declined to follow **First National Securities Ltd** relying instead on the doctrine of estoppel. He made no finding that the document was sealed when in fact it was not.

[25] Forte, J.A. in keeping with the dictum of Browne-Wilkinson, V-C. also stated in **Headley v Headley** that he would not declare that merely because the document said that it was sealed that it was when it plainly was not. Forte, J.A. adopting the principle laid down in the **TCB** case stated that Mrs. Fullet would herself have been estopped from raising the point that the Deed was not sealed and would have been obliged to adhere to its contents which gave the right to ownership of the property to the appellant. Consquently, the respondent as her privy claiming title under her would also be estopped from relying on the fact that the Deed was not sealed. "*Mrs. Fullett would have signed the document with the intention of passing the property to the appellant and well knowing that the appellant might act in accordance with its content."*

[26] Counsel for the applicant argued that in the case at bar there was no issue of sealing, the issue was the intent of the transferor which was to transfer by way of gift the disputed property to the transferee. The transfer was an expression of the true intent of the then owner. The transfer by way of gift was a deed, the validity of which was unimpeachable. On the basis of **Headley v Headley**, the property was not properly included in the will of John Sinclair. The latter signed the transfer of gift document with the intention of passing the property to the applicant well knowing that the applicant might act and has acted in accordance with its content.

[27] In my view in looking at the case of **TCB Ltd**, the defendant was estopped from making the argument that the document was not sealed as it then suited him to assert that its content was not applicable to him. This was after he had purportedly signed and sealed the said document. It was a case in which the Court found that his intention was not above board, he took a position at trial which was untenable given the evidence against him and his actions at the material time. The Court did not find that the document was physically sealed as it had not been, however this irregularity was not viewed as lending support to the defendant in his contention that the document had no legal effect.

[28] Similarly, Forte, J.A. in **Headley** also found that the document before him was unsealed. This did not render the content of the document invalid as against the donor or her privy. The donor could not have used the fact that the document was not sealed to advance its case and neither could her privy. The donor would have known that the appellant would have acted upon the content of the document and would have also so intended.

[29] In my view, the case at bar is substantially different on the facts and law from the cases of **Headley** and **TCB Ltd**. In those cases, the donor sought to rely upon irregularities in the formal parts of the document to deny or deprive the other side of that which was promised or agreed upon. The Courts in both cases applied the doctrine of estoppel to effect the agreement declining to allow the legal

irregularities raised by the donor in the execution of the document to lead to an injustice.

[30] The transferor in the instant case did not execute the instrument of transfer until 2013 for a gift purportedly given in 1990. He clearly intended to pass the property to his daughter however it was not he who then sought to apply a different interpretation to its content as in both of the cases above. It was his daughter who sought to move the Court to adopt the intention of the transferor in the face of non-compliance with the legal formalities regarding the execution of the instrument of transfer to which she was a party. She sought to rely on those irregularities to ground her father's intention to convey the disputed property to her. The doctrine of estoppel does not arise in this context. Both **Headley v Headley** and **TCB Ltd.** are distinguishable from the case at bar.

[31] In the case of **Iris Lungrin v Paul Monelal and another** RMCA 8/2003; April 2, 2004, Cooke, J.A. (Ag.)(as he then was) found that the deed of gift whereby one Ivey purportedly gave the appellant the disputed square of unregistered land was not valid to pass the property. The transaction in which the donor's intention to part with possession and ownership of the land was documented and signed by both donor and donee. There was no registration of the interest or the transaction. The learned Judge of appeal held that:

> *"The document purporting to be a deed of gift, which conveys one square of land from Ivey to the appellant, is wholly ineffective. Section 2 of The Record of Deeds, Wills and Letters Patent Act provides that:*
>
> *"2.- (1) A deed made in due form of law and within three months after the date thereof acknowledged by the party or parties that grant the same or proved by the oath of one witness or more in accordance with law, and, recorded at length in the Record Office within the said three months, shall be valid to pass the same without livery, seisin, attornment, or any other act or ceremony in the law whatsoever.*
>
> *(2) No deed made after the year 1681 without such acknowledgment or proof and recording, shall be sufficient to pass*

away any freehold or inheritance, or to grant any lease for above the space of three years."

There is no evidence that the requirements stipulated in 2(1) above have been satisfied. There is no proof by the oath of any witness and there has been no recording in the Records Office. Accordingly, the document was insufficient to pass away any freehold."[1]

[32] On the face of it I find that, the formalities of registration or recording are not optional and have to be observed in order to pass an interest in land.

In the Austrailian text On Equity, Young, Croft, Smith, the learned authors state:

"Where land is under the operation of the Torrens system, the creation or transfer of a legal interest in the land requires:

(a) the execution of a transfer in registrable form by the creator or by the registered proprietor of the interest, and

(b) its registration…

On the learned authors reasoning, is the registration of the transfer which in fact creates or transfers the interest.

[33] Barwick CJ explained in **Breskvar v Hall** (1971) 126 CLR 376 AT 385-386:

The Torrens system of registered title… is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor."[2]

[34] This point was confirmed by the Privy Council in the case of **Abigail v Lapin** [1934] all ER 720 at 724-725 which is set out below:

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[1] Page 53
[2] Page 686, paragraph 10.20

> *"The Real Property Act, 1900 of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout Australasia and in other parts as well. It is a system for the registration of title, not of deed; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers, and privileges thereto belonging or appertaining, is to pass to the transferee."*

[35] Based on the dictum of Cooke, J.A. in the case of **Lungrin v Monelal** above and the Board in **Abigail v Lapin**, it is my opinion that land conveyed by deed must comply with the formalities of the Record of Deeds, Wills and Letters Patent Act. Land previously brought under the provisions of the Registration of Titles Act must comply with the formalities set out therein.

[36] The Privy Council in **McEllister v Biggs** (1883) 8 A.C. 314 found that the appellants argued that the deeds under which the plaintiffs derived title from Guthrie, had not been registered pursuant to the Colonial Act 22 of 1861 which enacted in section 39 that

> *"no instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified in such instrument shall pass."*
>
> *…*
>
> *Their Lordships are of the opinion that, although the deeds did not pass an equitable interest in the land, still they passed to the plaintiffs the equitable right which Guthrie had to set aside the certificate of title to McEllister upon the ground of fraud."*

[37] The Privy Concil affirmed that an unregistered transfer was incapable of passing an interest in land. In **McEllister v Biggs**, the statute specifically provided that the instrument first had to be registered to pass an interest or estate in the land. The deed therefore did not pass an equitable interest before then. In **Abigail v Lapin**, the Privy Council stated that under the Torrens system of registration a

title in equity was conveyed until registration. The Board did not compare a title in equity with an interest in the land. Equitable interests may vary and the manner in which they can be made binding on land may also vary with the interests in question.

[38] In the case before me, the equitable interest claimed by Ms. Symister is one which is not binding on third parties as her interest has not been registered. The deed upon which she relies was never recorded, neither was the instrument of transfer registered. The registration of her interest would have ensured its protection. She did not avail herself of this process by its cancellation.

[39] My conclusion finds support in the Privy Council decision of **Great West Permanent Loan Company v Friesen and others** [1925] A.C. 208. This was a case in which transfers and mortgages having been lodged at the Land Titles office of Saskatchewan for registration were entered in the receiving book in accordance with section 23 of the Land Titles Act of Saskatchewan, some in the day book but none had been entered in the register on the folios constituting the existing certificates of title as provided for by section 27. The Privy Council held that none of the documents were registered within the meaning of section 58 of the said Act.

[40] At page 220 Sir Adrian Knox said:

> *"The word "transfer" when used in connection with a system of registration of titles to land has generally, if not universally, the meaning ascribed to it by s. 2, sub-s. 20 of the Saskatchewan Land Titles Act, 1917 – namely, "The instrument by which one person conveys to another an estate or interest in land under the Act."*
> *The Board could find nothing in the context of the original or modifying agreement to suggest that the word was being used otherwise than in its ordinary and primary meaning.*

[41] Their Lordships compared the provision with that of New South Wales and affirmed Barry v Heider 19 C.L.R 197 in which Griffith, C.J. said: *"In my opinion equitable claims and interests in land are recognized by the Real Property Acts.*

[42] It was held that: “the Sales Company by obtaining the transfers did not while such transfers remained unregistered, acquire any estate in or right to the land comprised in the transfers which it could set up against the registered owners of the land.”

[43] *I adopt the meaning of the word transfer from the* ***Great West*** *decision as applicable to section 88 of the Registration of Titles Act. In that case the Board again reinforced the point that an unregistered transfer did not confer any estate or interest in the land.*

[44] The Registration of Titles Act provides in section 88 as follows:

> *“The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto; and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, of the original lessee, mortgagee or annuitant.”*

[45] I hold that the provisions of section 88 give a starting point at which the interest and estate will pass from transferor to transferee. The word ‘upon’ is the starting point. It means ‘on’ or when an event occurs, which is the same as saying when the properly completed document is accepted for registration or on its being so accepted, then the transferee becomes the proprietor of all that is contained within the instrument. The transferor having done everything he could, the process of registration being a function of a prescribed body over which he has no control

[46] The applicant's counsel has submitted that an equitable interest was conveyed to the transferee upon execution. This created a trust. There was no submission as to exactly what sort of trust would have arisen on these facts. To create a trust, the settlor must do everything which, according to the nature of the property comprised in the settlement was necessary to be done to transfer the property thereby rendering the settlement binding upon her. (see Turner, J: **Milroy v Lord 1862**) 4 De G.F. 264. In the case of land the conveyance must be by deed. If a settlor has done all that is necessary then a completely constituted trust exists which a beneficiary can enforce by equity.

[47] Mr. Jones for the respondent argued that the intention of John Sinclair was to make an inter vivos disposition of the land however mere intention is not enough it was merely a promise or an imperfect gift. There could be no trust in such a situation. He relied on the passage below:

> *"An imperfect gift*[3] *is defined as a gift which rests merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it. A promise made by deed is, however, binding although it is made without consideration. If a gift is to be valid the donor must have done everything, which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. If a gift is intended to be effectuated by one mode for example by actual transfer to the donee, the Court will not give effect to it by applying one of the other modes."*

[48] The classic formulation of that which constituted a transfer of property to a trustee was set out in **Milroy v Lord** (supra) by Turner, J at page 274:

> *"I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual the settlor must have done everthing which, according to the nature of the property comprised in the settlement, was necessary to be done in order to*

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[3] Halsburys 3rd edn para 755

> *transfer the property and render the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual if he transfers the property to a trustee for the purposes of the settlement, or declare that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these must be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the, Court will not give effect to it by applying another one of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."*

[49] The dictum of Lord Turner in Milroy v Lord is on all fours with the law constituting an imperfect gift. The reasoning of the learned judge leads to the conclusion that in this case, the failure to convey the disputed property by way of transfer means that the gift was not perfected before the transferor died. Further, if I could find that there was a trust (which I cannot), it was not completely constituted. There were no submissions from Lord Gifford Q.C. in an area fraught with case law (akin to a maze), as to the path the Court should take with regards to this issue of whether or not there was a trust.

[50] I tend to agree with the submissions of Mr. Jones, in that there is no equity to perfect an imperfect gift. The transferor had not done all in his power to vest the legal interest in the disputed property in the trustee. At the time of his death, something more remained to be done by the Ms. Symister as a trustee. She had not yet executed the transfer. The proper method of transfer prescribed by statute had not been followed as the mark of the transferor had not been witnessed. The clear intention of the transferor is not enough. The trust cannot be completely constituted now that the transferor has died. Equity will not assist a volunteer, as to do so would be tantamount to giving by indirect means what

the Court would not give by direct means, namely, enforcement in favour of a volunteer.

[51] The respondent submitted that for property to be legally transferred under the Registration of Titles Act, the procedure set out in section 88 of the statute must be followed.

[52] I find that the transfer relied upon has not been properly witnessed. The witness to the mark of John Sinclair did not indicate his designation nor did he complete the form as set out in the Fourth Schedule in respect of authenticating the transferor's signature. The document purporting to be a valid transfer failed to meet the required formalities.

[53] In this regard, I adopt the dictum of Daye, J in **Diana Ramona Johnson v Ivy Johnson** Suit No. E 379 0f 2000. In that case, the claimant based her claim on a petition for the dissolution of marriage filed by her father in respect of her mother. In his petition the father had indicated that a parcel of land in St. Thomas was solely bequeathed to the claimant. He also set out that her maintenance should be derived from the proceeds of rental from another property owned by him. The father died. The issue which arose was whether the father's petition had transferred his interest in the premises in St. Thomas to his then nine year old daughter. The learned judge was not presented with a certificate of title for that land.

[54] Daye, J(Ag.) (as he then was) found that the father's intention was to make an inter vivos gift to his young daughter. However, she was not competent as a donee given her age. The learned judge held that:

> *If a title to the land is registered, a gift of legal estate must be made by registered transfer. No registered title was exhibited for the premises in this case. Neither was any reference in any of the affidavits that the premises had a registered title. If this premises was registered the applicant could not claim to receive it by a gift unless she was registered as the transferee. If the premises did*

> *not have a registered title then any gift of it would have to be effected by deed."*
> …
> *It takes the specific formalities already mentioned to transfer the interest in either unregistered or registered land from one person to the other by way of inter vivos gift."*

[55] In an article cited by Lord Gifford, entitled The Torrens System in New South Wales, its author John Baalman set out, the provisions of section 41 of the Real Property Act, 1900 of New South Wales. This section is similar to section 63 of the Registration of Titles Act.[4] The learned author stated that:

> *"On a literal construction, s. 41 appears to deny any efficacy whatever to unregistered instruments. The Courts, however, have consistently declined to give it a literal construction. They have recognised unregistered instruments as being capable of creating interests in land under the Act, corresponding in effect to the interests which those instruments would have created in land under the general law, but enforceable only in equity."*

[56] I am of the view that, both sections 63 of the Registration of Titles Act and section 41 of the Real Property Act, 1900 provide for the need for the registration of instruments concerning registered land. In my view, section 63, like section 41, does not operate to invalidate the unregistered instrument, but suggests that an equitable interest is created by the instrument up to the point at which it is registered. Section 63 defers the passing of the equitable interest created by the instrument. Section 63 is set out below:

[57] **"**When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by

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[4] Page 123.

this Act declared to be implied instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title".

[58] Interestingly, the learned author of the aforesaid article, John Baalman, began his analysis of the act by saying that the object of the Torrens system was ***"to create a new statutory estate resting on the act of registering an instrument, rather than on the act of the party who executes it."*** A statement of the operation of the Torrens system of registration with which I entirely agree and find is applicable to the construction of both sections 63 and 88 of the Registration of Titles Act.

The Intent of the Parties

[59] The Court had to conduct an examination of the intent of the parties in this transaction. Their conduct is directly relevant to a determination of the matter. The applicant bears the burden of proof. It is she who asserted that the donor intended to pass his legal and beneficial interest in the disputed property to her. It is she who asserted that her father had intended to give the land to her as a wedding gift in 1990, yet no transfer document was executed by her until March 11, 2013.

[60] The respondent contended that the transfer document was improperly completed and irregularly executed by Ms Symister after the date of death of John Sinclair. In **Headley v Headley**, Forte, J.A. declined to state that the document under review had been sealed as it plainly had not been. In the case at bar, adopting the approach of Browne-Wilkinson, V-C in **TCB Ltd**. and Forte, J.A. in **Headley** the authentication clause had not been completed as required by the Registration of Titles Act. It plainly had not been. The mark of John Sinclair had not been properly witnessed as a consequence. Evidently John Sinclair had done nothing

to effect the transfer before the March date and no one could have expected that he would have been participating in the execution of this or any other document after the date of his death.

[61] Ms. Symister stated that she should have been given the disputed property free from the payment of any duties or taxes. Her affidavit filed on December 5, 2016 at paragraph 9 stated that her father's will mentioned the disputed property but that it should not form part of his estate based on it having been made a gift to her. The fact that the disputed property is mentioned in John Sinclair's will is evidence that the disputed property could not have been conveyed in 1990 by way of an inter vivos gift. This is an inconsistency in the applicant's position which weakens her case. The evidence of the intention of the transferor which I accept came from the executors of John Sinclair's estate.

[62] Mr. Iran Hurlington, Sergeant of police and Mr. Peter Millingen, Attorney-at-Law and long - standing attorney of John Sinclair filed their joint affidavit on January 30, 2015. In it they stated that they were the executors of the estate of John Sinclair, father of Maureen Symister. They had obtained a grant of Probate dated March 19, 2014. Their affidavit acknowledged that during his lifetime John Sinclair had made and executed a transfer of the disputed property to his daughter Maureen Symister by way of gift. The transfer tax and stamp duty were paid as an advance by the firm of McDonald & Millingen with the expectation that the firm would be repaid. Instead, Ms. Symister's son Bjorn instructed that as agent for his mother, the transfer should be cancelled and the duties refunded to the firm by the Stamp Commissioner. This was done.

[63] Maureen Symister filed a further affidavit on December 20, 2016 exhibiting the cancelled transfer document and email correspondence between her son and Mr. Millingen. Although she had been of the opinion that it was her father's wish that she pay no money regarding the disputed property, it was her evidence that she paid $139,000 in taxes to Tax Administration Jamaica.

[64] In the email correspondence exhibited by Maureen Symister, there is an email sent on Monday, April 29, 2013 at 10:50pm by Bjorn to Peter Millingen. The subject is the disputed property, this email requests that Mr. Millingen cancel the transfer and ask the Stamp Commissioner for a refund. On Tuesday, April 30, 2013 at 9:46pm, Peter Millingen emailed Bjorn advising that the disputed property would then revert to the estate.

[65] The issue between the parties seems to me to be one in which Maureen Symister held herself out as not responsible for the payment of any money in respect of the land being given to her. In this regard, when a request for payment was made, she, through her son, asked for a breakdown of the payment and an invoice. There was some back and forth in the emails and she decided to cancel the transfer. By way of letter dated August 27, 2013, the Commissioner General returned to the firm the sum of $360,000 as a refund on the cancelled transfer between John Sinclair and Maureen Symister. Thus the disputed property was not transferred from John Sinclair to Maureen Symister at her instance.

Analysis

[66] The evidence of Maureen Symister is that she was given the disputed property in 1990 as a wedding gift. The instrument of purported transfer is dated March 11, 2013. This was an imperfect gift. The transferor did not move towards giving legal effect to his intention until he executed the instrument of purported transfer. The date of this execution is said to be February 14 (no year was provided) by the respondent. This was not challenged by the applicant. If the first step was the execution of the transfer document and the only date provided in the evidence is February 14, then that is the date on which it can be inferred he sought to give effect to his intention. The problem with this interpretation is that the respondent made the uncontroverted assertion that John Sinclair was then deceased when Ms. Symister executed the transfer.

[67] Things moved rather quickly after that, the transfer tax and stamp duty were paid by the firm of McDonald & Millingen in order to have the transfer registered. The applicant having crossed the hurdle of ignorance cannot now attempt to retreat into it. She averred her father had told her that she should not have had to pay for the land. It was open on the facts to find that based on this belief she did not believe she should have had to pay the taxes in respect of the land. As she would have had to refund funds advanced by the firm for the transfer tax and stamp duty paid on her behalf she instructed through her son Bjorn, that the transfer be cancelled.

It was the decision of the applicant not to pay to have the transfer registered which led to her registrable interest remaining unregistered. This decision which ended with the cancellation of the transfer does not change the settled legal position.

Conclusion

[68] Section 88 of the Registration of Titles Act makes it clear that **upon** registration of the transfer, the estate and interest in the land passes to the transferee. If the word 'upon' means nothing more than 'on' or 'when' an event happens, in the section this word '**upon'** bridges the gap between one state of affairs and another. This word '**upon'** determines when the property passes. This simply means that registration is the beginning of the process of conveying the land from transferor to transferee. Once upon a time is customarily how a fairytale begins.

[69] The cases all agree that until registration, the transferee does not possess a legal interest in the land but an equitable interest which does not pass before the legal estate. It is the registered transfer which operates to pass both equitable interest and legal estate in the land to the transferee. The transferee of a registrable, but unregistered interest therefore has an instrument which has created an equitable interest in the disputed property. Registration passes both

legal and equitable interests in the property in jurisdictions which operate under the Torrens System of registration.

[70] The applicant now holds only a beneficial interest. Until the transfer is registered, the applicant is not entitled to assert that she is the legal owner of the land however she is entitled to assert a beneficial entitlement to the land.

[71] The applicant's claim to be the owner of the disputed property given to her by way of Deed of Gift fails for want of registration. It is an imperfect gift which this Court cannot complete. This means that the land has reverted to the estate of John Sinclair. In that regard, the executors of the estate of John Sinclair who have been vested with the ownership of the assets of the estate are under a duty to properly administer same according to law. This includes paying its just debts and expenses. The executors are bound to obey the provisions of the final charging order issued by this Court.

[72] There is no evidential or legal basis in the applicant's claim as presented to vary the charging order over the disputed property. The applicant's claim fails.

[73] This Court therefore makes the following orders on the first application:

1. Ms. Maureen Symister is declared to be an interested party for the purposes of these proceedings.
2. The application to vary the final charging order is refused.
3. The costs of this application are awarded to the respondents to be taxed if not agreed.

<u>The Application for an order for sale of land</u>

[74] By way of notice of application filed on June 21, 2016, Mr. Jones sought orders for the sale of certain parcels of land belonging to the estate of Mr. John Sinclair. He supported the application with affidavits from Ms. Maria Burke and Mr. Howard Facey, both legal counsel for the applicant.

[75] The submissions of Mr. Jones in respect of the sale of land have not been answered by Lord Gifford, Q.C. by way of evidence or submissions.

[76] The Court makes the following orders on the second application:

1. That all that parcel of land located at 14 Central Path, Calabar Mews, Kingston 20 in the parish Saint Andrew, contained in the Certificate of Title registered at Volume 1302 Folio 860 of the Register Book of Titles be sold to satisfy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

2. That all that parcel of land located at Lot # 11 Blairgowrie part of Reading Pen in the parish of Saint James, contained in Certificate of Title registered at Volume 1448 Folio 575 of the Register Book of Titles be sold to satisfy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

3. That all that parcel of land located at 8 Hopefield Avenue, Kingston 6 in the parish of Saint Andrew, contained in the Certificate of Title registered at Volume 1092 Folio 463 of the Register Book of Titles be sold to satisfy the Summary Judgment entered against the 2nd, 3rd and 4th Defendants on June 18, 2015;

4. That the 3rd and 4th Defendant's agent, employee or whosoever may be in possession of the property comprised in the Certificates of Title registered at Volume 1302 Folio 860, Volume 1448 Folio 575 and Volume 1092 Folio 463 of the Register Book of Titles through the 3rd and 4th Defendants or with their knowledge, consent or otherwise deliver up possession of the land within seven days from the date of this order.

5. That the Claimant's legal representative shall have carriage of sale.

6. The Claimant is permitted to sell the property by way of private treaty.

7. The Claimant is permitted to list the property with real estate agencies and or real estate agents to facilitate the sale at private treaty in to give effect to order number six hereof.

8. The Claimant is entitled to recover the costs of all valuations from the sale of the properties.

9. The Claimant is entitled to pay any realtor's fees, taxes and all other fees associated with the sale of the property from the purchase price.

10. The 3rd and 4th Defendants shall sign the Agreements for Sale and the Instruments of Transfer as required by the Claimant.

11. If the 3rd and 4th Defendants fail and/or refuse to comply with order number ten hereof the Registrar of the Supreme Court shall be empowered to sign the Agreements for Sale and Instruments of Transfer for the sale of the properties.

12. The 3rd and 4th Defendants shall within seven day from the date hereof produce the duplicate Certificate of Title for the property in order number one hereof to Nigel Jones & Company.

13. If the 3rd and 4th Defendants fail and/or refuse to produce the duplicate Certificates of Title for the properties mentioned in Order number one hereof, the Registrar of Titles shall issue a new title and dispense with the production of the duplicate Certificates of Title upon registration of the transfer.

14. Costs to the Respondent to be taxed if not agreed.