



[2021] JMSC Civ. 160

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU 2019 CV 02912**

**IN THE MATTER of an application concerning ALL THAT parcel of land part of ANGELS, COLES PEN, EBONY PEN AND PENGELLY'S RUN, THE STEWARTY, CREMONA AND WYNTERS PEN RETREAT called FAIRFIELD in the parish of SAINT CATHERINE being the Lot Numbered ONE HUNDRED AND NINETY-SIX on the plan of Angels, Coles Pen, Ebony Pen and Pengelly's Run, The Stewarty, Cremons and Wynters Pen called Fairfield aforesaid deposited in the Office of Titles on the 21<sup>st</sup> day of April, 1989 of the shape and dimensions and butting as appears by the said plan and being the land comprised in the Certificate of TITLE REGISTERED AT Volume 1220 Folio 525 of the Register Book of Titles.**

<b>BETWEEN</b>	<b>SHOCKERA ANNEISHA RACQUEL PINNOCK (Administratrix of the Estate of Maya Anttonette Theresa Blake-Heath (also known as Moya Anthonette Blake-Heath, also known as Moya Schoenian, also known as Moya Antonette Pinnock, also known as Moya Pinnock, also known as Moya Anttoneette Blake))</b>	<b>CLAIMANT/ ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>SASHUANA MESQUITA</b>	<b>DEFENDANT/ ANCILLARY CLAIMANT</b>

**Kaysian Kennedy-Sherman, Craig Neil and Shanelle Johnson instructed by Townsend, Whyte & Porter, Attorneys-at-Law for the Claimant/Ancillary Defendant.**

**Marion Rose-Green, Andrea Lannaman and Sara-Lee Scott instructed by Marion Rose-Green & Co., Attorneys-at-Law for the Defendant/Ancillary Claimant.**

**Heard: 6<sup>th</sup> May and 24<sup>th</sup> September 2021**

**Real Property - Proprietors registered as tenants in common - Purchase price resulting trust.**

**C. BARNABY, J**

## **INTRODUCTION AND SUMMARY CONCLUSION**

[1] Shockera Pinnock, the Claimant/Ancillary Defendant is the Administratrix of the Estate of her mother Maya Anttonette Theresa Blake-Heath, also known as Moya Anthonette Blake-Heath, Moya Schoenian, Moya Antonnette Pinnock, Moya Pinnock, Moya Anttoneette Blake (hereinafter called “Mrs. Schoenian”, “mother”, or “aunt”), who died intestate on the 11<sup>th</sup> September 2010. The Defendant/Ancillary Claimant is the niece of Mrs. Schoenian. On 1<sup>st</sup> December 2005 a transfer of land located at Lot 196 Fairfield, Fairview Park in the parish of St. Catherine (hereinafter called “the Property”) was registered in the names of Ms. Mesquita and Mrs. Schoenian as tenants in common. Also registered on title is a mortgage in favour of the National Housing Trust (NHT) for which Mesquita is the sole mortgagor. The Property which is comprised in the Certificate of Title registered at Volume 1220 Folio 525 of the Register Book of Titles was transferred to the registered proprietors in exercise of a power of sale under mortgage by the NHT.

[2] On behalf of Mrs. Schoenian’s Estate Ms. Pinnock seeks a declaration that the registered proprietors are each entitled to a one half share of the legal and/or beneficial interest in the Property and consequential orders. It is contended that Mrs. Schoenian paid the deposit for the purchase of the Property, made NHT mortgage payments and financed renovations undertaken during her lifetime. Ms. Mesquita defends the claim and brings a counterclaim seeking declarations that she is entitled to the entire legal and beneficial interest in the Property and that Mrs. Schoenian holds the Property on resulting trust for her benefit, among other relief. Central to Ms. Mesquita’s defence and counterclaim are her contentions that she

paid the purchase price for the Property, mortgage sums and the costs of renovations without the financial assistance of Mrs. Schoenian, whose name was added to the title out of mere convenience to protect the interest of Ms. Mesquita's minor son. The Estate contests the counter claim on similar bases as the prosecution of the claim.

[3] On the 6<sup>th</sup> May 2021 the claim and counterclaim came on for trial before me and I reserved a decision until today's date to enable the filing and exchange of written submissions by the parties.

[4] In addition to an assessment as to the credibility of the witnesses, these issues arise for determination of the claim and counterclaim: (i) whether Mrs. Schoenian contributed towards the purchase, renovation and payment of mortgage sums for the Property; and (ii) whether the registered interests also reflect the beneficial interests in the Property. I find that the issues are to be resolved in favour of the Defendant/Ancillary Claimant for reasons which appear below.

### **Credibility of the Witnesses**

[5] There were only two witnesses at trial, Ms. Pinnock and Ms. Mesquita. I find that an assessment of the credibility of both is inescapable as the outcome of the litigation depends largely on the view taken of competing allegations of material facts.

*Ms. Pinnock*

[6] Ms. Pinnock initiated the claim against Ms. Mesquita on the 15<sup>th</sup> July 2019, approximately nine years after Mrs. Schoenian's death. Her affidavit in support of the claim was also sworn and filed on the said date. It speaks to her receiving a grant of administration in her mother's Estate; taking steps to identify its assets; and offers a description of the Property which corresponds with the details appearing on the certificate of title. She also avers to the fact that the Estate was not receiving any benefit from the Property or making mortgage payments to the NHT; and that she was advised and verily believes that Ms. Mesquita had neglected or failed to

respond to a written invitation from her Attorneys-at-Law to purchase the interest which she says Mrs. Schoenian's Estate holds in the Property.

[7] Absent from the affidavit filed in support of the claim is any averment by Ms. Pinnock as to the circumstances under which Mrs. Schoenian and Ms. Mesquita came to be registered on the title to the Property as tenants in common. It was not until the 6<sup>th</sup> January 2021 that Ms. Pinnock filed a second affidavit sworn on 30<sup>th</sup> December 2020, setting out the circumstances in which she says Mrs. Schoenian contributed financially to the acquisition, renovation and mortgage in respect of the Property.

[8] Ms. Pinnock's affidavit follows Ms. Mesquita's affidavit in response to the claim which was sworn and filed on the 18<sup>th</sup> and 30<sup>th</sup> September 2019 respectively, and her counterclaim filed 1<sup>st</sup> October 2019. In those documents Ms. Mesquita sets out in great detail the circumstances on which she intends to rely in response to the claim and in prosecuting the counterclaim.

[9] Having regard to the foregoing chronology, the following exchange between Counsel for the Defendant/Ancillary Claimant and Ms. Pinnock during the latter's cross examination is unsurprising.

*Counsel: I put it to you that your account as given in your second affidavit was taken from information given in Ms. Mesquita's Defence and Affidavit.*

*Pinnock: No.*

*Counsel: I put it to you that the said information was distorted and used for your benefit.*

*Pinnock: No. I disagree.*

*Counsel: I put it to you that is why your first affidavit is void of any facts or details.*

*Pinnock: I disagree.*

[10] Protestations notwithstanding, it was elicited from Ms. Pinnock during cross examination that she migrated to the United States in 2002. When

asked by Counsel for Ms. Mesquita, “[w]hen after that you first returned to Jamaica?” she responded, “2007 to live”. On this evidence Ms. Pinnock would not have been in Jamaica between 2004 and 2005 when the transaction for purchasing the Property began and concluded.

[11] Additionally, it was her written evidence, contained in the first affidavit that

*“[a]s Administrator of the Estate [she] took steps to identify all its assets so that [she] may effectively discharge [her] responsibility to distribute the assets to the beneficiaries of the Estate and pay the Estate Debts. I identified property registered at Volume 1220 Folio 525 of the Register Book of Titles which on the 1<sup>st</sup> day of December, 2005 was transferred under power of sale by the National Housing Trust [NHT] to the Defendant, Sashauna Mesquita and my mother Moya Schenian (sic) as Tenants-in-Common...”*

[12] This was confirmed by her in cross-examination and when asked what steps she took to “identify” the assets of the Estate she stated “[a]ll the property she owned. I went to the tax office and they gave me all information of property on which tax being paid.” When it was put to her in cross-examination that she “knew absolutely nothing about the house in dispute” she replied, “I know about the house but not tenancy in common. Cousin told me it was more joint tenancy.”

[13] I find it difficult to believe that Ms. Pinnock would have had need to take the step she did to identify the Property if she knew of its existence and that it formed a part of her mother’s Estate, or rely on the say so of her cousin Ms. Mesquita as to the nature of the interest held by her mother, if she had prior knowledge of the circumstances of the Property’s acquisition. Rather than being quelled by Ms. Pinnock’s averments in her second affidavit, the difficulty is amplified. I find it particularly telling that while she says that the information contained in the affidavit is true to the best of her knowledge, information and belief, she does not state the source of material information. She does not say that she perceived for herself or that her mother told her of the circumstances under which the

Property came to be purchased, registered in the names of the co-tenants, renovated or how the mortgage payments were financed.

- [14] In these premises, notwithstanding Ms. Pinnock's denial during cross examination that her first affidavit was devoid of facts, that her second affidavit was taken from Ms. Mesquita's defence and affidavit, distorted and used by her, I harbour serious doubts about the sincerity of much of her evidence. In particular, her account as to the circumstances under which the Property came to be acquired and registered in the names of Mrs. Schoenian and Ms. Mesquita as tenants in common, which is at the centre of the parties' dispute.

*Ms. Mesquita*

- [15] It was submitted on behalf of the Claimant/Ancillary Defendant that Ms. Mesquita is a deceptive witness, the consequence being that she should not be believed. Allegations made during exchanges between Counsel for the Defendant/Ancillary Claimant and Ms. Pinnock during cross examination were called in aid. The relevant exchanges appear on the record as follows.

*Counsel: I put it to you that the house, the disputed house is not a duplex. It is a single family home.*

*Pinnock: I disagree. It is a duplex to my knowledge.*

*Counsel: You agree that two entrances do not make a house a duplex?*

*Pinnock: I disagree.*

*Judge: Why do you say it is a duplex?*

*Pinnock: Because of the separation between both parts of the house. Two separate kitchens, two separate bathrooms, a family living on each side of the house. You could not go from one side.*

...

*Counsel: I put it to you that you knew absolutely nothing about the house in dispute.*

*Pinnock: I know about the house but not tenancy in common. Cousin told me it was more joint tenancy.*

*Counsel: What is the name of that cousin?*

*Pinnock: Sashauna Mesquita.*

*Counsel: I put it to you that Ms. Mesquita told you no such thing.*

*Pinnock: I disagree.*

*Counsel: When did she tell you that, before you went to your lawyer?*

*Pinnock: After my mother died. Cause I was going over there. Because of the purchase. My mom passed away so she couldn't regroup anything from the interest. It would go to her Estate.*

*Counsel: Did you tell your lawyer that?*

*Pinnock: After I went to the tax office, I was telling my lawyer but they warned me against hearsay.*

[16] There was no re-examination of Ms. Pinnock in respect of any part of the foregoing exchanges and perhaps more significantly, it was never put to Ms. Mesquita on cross examination that she had told Ms. Pinnock that the interest held by her and Mrs. Schoenian “*was more joint tenancy*”. Ms. Mesquita not having had the opportunity to respond to the allegation which was raised for the first time on cross examination, I will not use it as the basis for concluding that she said the words attributed to her or that she engaged in deceit with a view to disenfranchising Mrs. Schoenian’s Estate as contended by the Claimant/Ancillary Defendant.

[17] To like end the Claimant/Ancillary Defendant also relies on the failure of Ms. Mesquita to take any step to have the Property transferred to her solely after she learnt that Mrs. Schoenian was ill. It is entirely possible that among the responses which could have been given by the witness had the allegation of an improper motive been put to her, is that she did

not wish to burden her ailing aunt with such matters. It was never put to Ms. Mesquita however. Consequently, I do not attribute any deceit or dishonesty to the witness in this regard.

[18] It was also Ms. Mesquita's evidence that she was the only person in contact with the Attorneys-at-Law during the course of the transaction to acquire the Property. The Claimant/Ancillary Defendant's Counsel referred to that evidence and correspondence from Watson & Watson dated 26<sup>th</sup> November 2004 in submitting that Ms. Mesquita was deceptive. The correspondence was addressed to both Ms. Mesquita and Mrs. Schoenian. Ms. Mesquita explained, consistent with her affidavit evidence that Mrs. Schoenian was living overseas at the time of the transaction and that she received and passed information between the said Attorneys-at-Law and her aunt. I accept Ms. Mesquita's explanation and do not find her evidence in this and other regards incapable of belief.

**Whether Mrs. Schoenian contributed towards the purchase, renovation and payment of mortgage sums for the Property.**

[19] It is contended by Ms. Pinnock that Mrs. Schoenian contributed to the deposit to acquire the Property, to the servicing of the mortgage and renovation of the Property whilst she was alive. This is the basis for her claim that the registered co-tenants are entitled equally to the beneficial interest in the Property. The evidence does not permit me to agree with the contention.

**Convergence on the Parties' evidence**

[20] It is the common evidence of the parties that Mrs. Schoenian helped to raise Ms. Mesquita and that they enjoyed a close relationship as a result. Ms. Mesquita regards their relationship as akin to that of a parent and child.

[21] It is not disputed that Mrs. Schoenian, even after she emigrated to the United States in about 1990, continued to be supportive of Ms. Mesquita

and would provide financial assistance, including the payment of examination fees whilst she attended school.

[22] Neither is it disputed that the Mrs. Schoenian returned to Jamaica from time to time, and was registered as proprietor of a number of properties as a tenant in common with others, including her husband; that she took ill in 2009; and died on the 11<sup>th</sup> September 2010.

[23] Ms. Pinnock also concedes that the Estate has not made any mortgage payment on the Property; that none of the receipts issued in respect of sums paid towards the acquisition of the Property or payment of the mortgage reflect payment by Mrs. Schoenian; and that Ms. Mesquita is the sole registered mortgagor of the NHT.

#### **Purpose of Property acquisition**

[24] It is nevertheless Ms. Pinnock's evidence that her mother was a business woman and that even within the context of family relationships property ownership was regarded as an investment. She offers as an example the fact that her mother held a marital home with a husband as tenants in common. It is also her testimony that her mother had always said she learnt that property must be held separately between co-owners. Even if this belief was held by Mrs. Schoenian and shared with Ms. Pinnock, or the property was held by her and her husband as tenants in common on the basis that it was an investment, it does not assist me in coming to the conclusion for which Ms. Pinnock advocates. In fact, on cross examination Ms. Pinnock disclosed that she did not know that her mother and Ms. Mesquita held the Property as tenants in common and alleged that it was Ms. Mesquita who told her after the death of Mrs. Schoenian that it was "*more joint tenancy*". There is no evidence that Mrs. Schoenian had represented to any of the witnesses or any other person that the Property was acquired by her as an investment.

[25] It is also Ms. Pinnock's evidence which Ms. Mesquita denies, that there was a history of joint business ventures between the latter and Mrs. Schoenian prior to the acquisition of Property. She said her mother had

purchased hair which Ms. Mesquita was required to sell but that there had been constant dispute as to the absence of money to replenish stock. She also says that her mother had purchased two (2) cars to be operated as taxis, one being reserved for her mother and the other for Ms. Mesquita. She goes further to say that Ms. Mesquita was required to collect proceeds from the taxi operated for her mother's benefit but that the taxi was reputed stolen and her mother lost income as a result. It is her further evidence that notwithstanding these failings, Mrs. Schoenian continued to have faith in Ms. Mesquita because they were family. Other than Ms. Pinnock's averments, the sincerity of which give me pause, there is no other evidence of a joint business venture between the co-tenants. While Ms. Mesquita admitted that her aunt assisted her in any way she could, and I harbour no doubt that she would have contributed to Ms. Mesquita's welfare because of the relationship they shared, I am unable to find that the acquisition of the Property was the product of a joint business venture between the two.

**[26]** There is no dispute that Ms. Mesquita was a contributor to the NHT in 2004 or that she wanted a place for herself and her minor son. It is her testimony that she learnt of the availability of the Property through a man she had known since childhood, who was at one point the fiancé of Mrs. Schoenian. She also states that she went to look at the Property with Mr. Fenton, her boyfriend and although it was a mere shell, she regarded it as having some promise.

**[27]** It is also Ms. Mesquita's evidence that she was renting at the time but this is disputed by Ms. Pinnock who says she was staying with Mrs. Schoenian parents. In this regard Ms. Pinnock exhibits undated correspondence from Ms. Mesquita to Mrs. Schoenian complaining about those living conditions. Ms. Mesquita does not deny that she wrote to her aunt but denies that these letters were written in 2004. It is her evidence that they were written whilst she was a student and facing difficulty at home. It is her further evidence that she was living at Inswood Villa with her boyfriend at the time the property was identified and purchased. In that respect she

exhibits receipts issued to her by the NHT in 2004 for the payment of contributions which bear that address. There is also a letter from Watson & Watson, Attorneys-at-Law who appear to have had conduct of the sale of the Property dated 26<sup>th</sup> November 2004 that their client had accepted the offer to purchase the Property. The letter was addressed to both Ms. Mesquita and Mrs. Schoenian in care of an Inswood Villa address. There is no evidence of the latter having had such an address in this jurisdiction. I therefore find on a balance of probabilities that when she sought to acquire the Property in 2004 Ms. Mesquita was renting and was not resident with the parents of Mrs. Schoenian as stated by Ms. Pinnock, who was then resident overseas.

**[28]** It is Ms. Mesquita's further evidence that she hoped to acquire a mortgage from the NHT but that the entity would not allow her to do so if a minor's name was on title. She therefore determined that a trusted family member should be placed on title in his place. Her grandmother and Mrs. Schoenian who had both raised her came to mind. She approached her grandmother first and was advised that due to ill health she should approach her aunt. Discussions were therefore had with Mrs. Schoenian in 2004 and it was agreed that her name would be placed on the title to the Property on condition that if anything should happen to Ms. Mesquita, she would ensure that the property would go to her son. It does not appear from the evidence that Ms. Mesquita was either represented by an Attorney-at-Law or was the recipient of independent legal advice at the time the Property was being purchased.

**[29]** While it was admitted by Ms. Mesquita during cross examination that a younger sister who had reached her majority could have been placed on title, I do not find it unusual or surprising that a person in Ms. Mesquita's position, and who honestly held the belief that the placement of a trustworthy relative on title would protect her son's interest would select the available of her only two maternal figures, her aunt. In the circumstances I will accept Ms. Mesquita's explanation for the registration of Mrs. Schoenian on the title to the Property as a co-tenant.

## Property composition and occupation

- [30] It is Ms. Pinnock's evidence that the Property has a duplex upon it. She appears to rely on what she regards as the divisibility of the physical structure in contending that Mrs. Schoenian and Ms. Mesquita held and intended to hold the Property as tenants in common. Ms. Pinnock exhibits several photographs which she says demonstrates that the structure on the Property is a duplex but having looked at them, they have not assisted me in coming to the conclusion that it is a duplex.
- [31] In any event, where a party proposes to rely on a common intention for determining interest in property, it is the intention at the time of acquisition which is regarded as relevant. In evidence is a Valuation Report dated 24<sup>th</sup> February 2005 which was prepared by Douglas Property Rentals and Auctioneering Services Limited following an inspection of the Property on the 22<sup>nd</sup> February 2005. The Property is described as an *"[i]ncomplete single storey dwelling house comprising: one master bedroom ensuite with bathroom and built in clothes closet, one bedroom ensuite bathroom and clothes closet, two other bedrooms, one other bathroom, one powder room, one passage, one combined living, dining and kitchen area, one washroom, one side porch and one verandah (sic)."* I accept that this is an accurate description of the structure on the Property at the time of purchase.
- [32] This evidence notwithstanding, Ms. Pinnock maintains that the structure on the Property is a duplex and that Mrs. Schoenian resided in one-half of the said duplex during her lifetime while Ms. Mesquita resided in the other half with her son. It was her evidence that her mother returned to Jamaica and remained here for months at a time to transact business. It is also Ms. Pinnock's evidence that she lived at the Property for some eight months on her return to Jamaica and was able to observe its layout.
- [33] Ms. Mesquita denies that the Property was or is a duplex; that her aunt ever had keys to or stored items at the house; or that Ms. Pinnock had ever lived or stayed over. It is her evidence that Mrs. Schoenian only

stayed at the Property once when a relative was getting married in 2007 and that otherwise she would stay at property at 72 Tryall Heights where her parents lived. It is the common evidence that Ms. Pinnock and Ms. Mesquita's son enjoyed a good relationship and Ms. Pinnock had gone to the Property to pick him up on occasion, which no doubt provided opportunity to see the house.

[34] Whatever may be the current state of the Property, and I am not satisfied on the evidence that it is a duplex, at the time of its acquisition it was not so structured as seen in the Valuation Report used to acquire the mortgage. It is therefore my view that it is unlikely that equal divisibility of the structure would have been the basis of any common intention between the registered proprietors to acquire an equal beneficial interest in the Property as tenants in common.

[35] Several receipts and other documents were exhibited by Ms. Pinnock to show that her mother transacted business in Jamaica. The issue dates on the receipts and other documents precede the acquisition of the Property however and are incapable of assisting the court in determining whether or not Mrs. Schoenian lived at the Property.

[36] Of the evidence given by the witnesses of the description and occupation of the Property, I find Ms. Mesquita's to be more probable and reject Ms. Pinnock's contentions that the house on the Property is a duplex or that divisibility suggested or means that the registered tenants in common intended that each would have an equal beneficial interest in the Property.

### **Funds for purchase, mortgage and renovations**

[37] It is Ms. Pinnock's evidence that Mrs. Schoenian sent remittances for the payment of the deposit, monthly mortgage and renovation of the Property. Remittances are said to have been sent to Mrs. Schoenian's father Mr. Joseph Blake through Western Union and given to Ms. Mesquita. This is denied by Ms. Mesquita who says that she never received financial assistance from Mrs. Schoenian's father or collected money from him, and that through discussions with Mrs. Schoenian she became aware that

monies were sent to Mr. Blake for materials to do work on property located at 68 Tryall Heights which was owned by Mrs. Schoenian. It was also Ms. Pinnock's evidence that monthly rental income from this address in the amount of \$8,000.00 was collected by Ms. Mesquita for paying the mortgage on the Property.

**[38]** Although Western Union receipts were exhibited in Ms. Pinnock's affidavit, as well a letter of authorization from Mrs. Schoenian to a local bank authorising her father to have use of her bank card, the receipts are dated 2010 while the letter of authorization is dated 7<sup>th</sup> October 2009. The receipts and letter were therefore generated long after the payment of any deposit to acquire the Property. More significantly however, the documents are incapable of establishing that any of the funds remitted or which may have been accessed by Mr. Blake were given to Ms. Mesquita for the deposit, payment of a monthly mortgage, renovations to the Property or for any other purpose.

**[39]** While Ms. Mesquita accepts that Mrs. Schoenian rented out property at 68 Tryall Heights she denies that rental of \$8,000.00 per month from that property was collected by her to contribute to monthly mortgage payments on the Property. It is Ms. Mesquita's evidence that it was Mr. Blake, Mrs. Schoenian's father who collected the rental income from that property and used it for his own maintenance and the payment of Mrs. Schoenian's insurance.

**[40]** I accept the evidence of remittances being sent to Mr. Blake and that he was authorised to access Mrs. Schoenian's bankcard. Mr. Blake was not a witness in these proceedings however and there is no evidence of Ms. Pinnock having seen the remittances or withdrawals from her mother's account being given to Ms. Mesquita by Mr. Blake for the purpose of acquiring or renovating the Property, paying the monthly mortgage or some other purpose. There is also no evidence as to how Ms. Pinnock would have come to the knowledge that Ms. Mesquita was collecting the rental income from 68 Tryall Heights. In all these circumstances I am

unable to find that monies were handed over to Ms. Mesquita or collected as Ms. Pinnock alleges.

- [41] It is further contended by Ms. Pinnock that based on Ms. Mesquita's salary at the time of the acquisition of the Property, she could not afford it except with financial contributions from Mrs. Schoenian. In that regard she exhibits a payslip bearing Ms. Mesquita's name dated 20<sup>th</sup> February 2004 which shows a net pay for a period as \$5,962.63. The payslip was issued by Prime Sports (Jamaica) Limited where Ms. Mesquita in her evidence averred she was paid fortnightly.
- [42] Ms. Mesquita denies Ms. Pinnock's contention. It is her evidence that the monies for the acquisition, renovation, and mortgage payments were raised exclusively of Mrs. Schoenian. Ms. Mesquita supplies a number of copy receipts as exhibits to her affidavit, which shows her as the payor of the sums for purchasing the Property.
- [43] Among the receipts is one from Watson & Watson dated 3<sup>rd</sup> January 2005 in respect of the sale of the Property to "*Sashauna Mesquita et al*". This represented the initial payment of \$330,000.00, \$220,000.00 of which was the deposit and \$110,000.00 as a further advance. The sums were paid via NCB cheque # 005061. It is Ms. Mesquita's evidence that where payments were said to be made by cheque they were by way of manager's cheques.
- [44] She also supplies a receipt issued by Watson & Watson on 25<sup>th</sup> January 2005 showing the payment of \$5,750.00 for preparation of the sale agreement. Ms. Mesquita was named as the sole payor on both receipts, in fact she was so named on all the receipts issued by Watson & Watson.
- [45] In seeking to challenge Ms. Mesquita's integrity, it was suggested that she had instructed the lawyers to put only her name when issuing receipts. This was flatly rejected by Ms. Mesquita. In the absence of any evidence, which could ground such a suggestion, which has the potential to impute impropriety on the part of persons who are not party to the litigation, I

regard the suggestion to the witness as most unfortunate. I find that the receipts speak for themselves as to the identity of the payor.

- [46]** Also exhibited is a letter from the firm dated 14<sup>th</sup> February 2005 addressed to Ms. Mesquita at the Inwood Villa address, confirming that the Agreement for Sale had been executed by the parties to the transaction and that they would be proceeding to have it stamped. The Statement to Close was presented and it showed that a balance of \$1,935,995.00 was outstanding which the firm indicated was to be paid by 31<sup>st</sup> March 2005 or in lieu thereof, a letter of commitment was to be supplied.
- [47]** A commitment letter dated 27<sup>th</sup> July 2005 from the NHT to Watson & Watson indicating that Ms. Mesquita was being processed for a loan of \$1,000,000.00 was also exhibited. It states that the sum of \$900,000.00 was to be used by Ms. Mesquita for purchasing the Property and the balance of \$100,000.00 to make the Property habitable. The total of the commitment letter was \$1, 026,818.63 which comprises the loan amount, service charge and moratorium interest.
- [48]** Ms. Mesquita's evidence is that she paid the balance of the closing price, which stood at \$1,035,995.00 taking into account the mortgage sums, in two instalments. The first was made on the 18<sup>th</sup> April 2005 in the amount of \$867,820.00 via two cheques drawn on NCB and RBTT Banks (cheques numbered 005434 and 1110124 respectively) and a cash payment of \$16,000.00. She submits a receipt from Watson & Watson in proof. The second was made on the 11<sup>th</sup> July 2005 in the sum of \$169,000.00 by cheque number 1110761 drawn on RBTT Bank. A receipt from Watson & Watson and a copy cheque were submitted in proof. The latter payment came from \$250,000.00 which she says was loaned to her in July 2005 and deposited to her RBTT account numbered 0121090061071 on 5<sup>th</sup> July 2005. The loan was from a friend named Alicia Brown with whom Ms. Mesquita says she has since lost contact.
- [49]** There is no evidence of Ms. Mesquita maintaining an account at NCB or that the absence of such an account operated as a bar to purchasing a

managers cheques from that institution. Further, NCB was not the bank to which Mrs. Schoenian issued instructions for card access by her father.

- [50]** In light of the allegation that Ms. Mesquita could not afford the Property except with the financial assistance of Mrs. Schoenian and Ms. Mesquita's contention and counter claim to the contrary, the enquiry must turn to whether or not she has demonstrated by her evidence that she had the funds used to acquire the Property, make renovations and pay the mortgage sums. In these regards it is Ms. Mesquita's evidence that she maintained accounts at RBTT Bank, Victoria Mutual Building Society (VMBS), Jamaica National Bank (JN), and the Churches Co-operative Credit Union (CCCU). She exhibits extracts of account information from the first three named institutions and a transaction record from the CCCU.
- [51]** At trial, it was discovered that copies of all relevant extracts from the RBTT passbook were not exhibited in Ms. Mesquita's affidavit. Counsel explained that their omission was an error and asked that the passbook, which was then in court be admitted into evidence. There being no objection to the document being admitted and the Claimant/Ancillary Defendant's Counsel having been permitted to inspect and take photographs of its pages, the request was acceded to and the passbook admitted into evidence.
- [52]** Following a cash deposit of \$112,000.00 on the 20<sup>th</sup> September 2004 to the RBTT account, there was a balance of \$339,391.44 from which \$320,000.00 was withdrawn on the said date leaving a balance of \$19,391.44. There is no evidence of the use to which Ms. Mesquita put the funds withdrawn. Suffice it to say that the account was not replenished to that level prior to her Initial Payment of \$330,000.00 on 5<sup>th</sup> January 2005 and payment for drafting the sale agreement on 25<sup>th</sup> January 2005. On 3<sup>rd</sup> January 2005 the account had a balance of \$1,305.57.
- [53]** The transaction record from CCCU dated 23<sup>rd</sup> February 2005 shows that Ms. Mesquita withdrew \$20,000.00 from her account at that institution and had shares of 475,920.10 remaining as that date.

- [54]** The record from JN begins at 7<sup>th</sup> June 2004 and ends the 31<sup>st</sup> March 2008. There was not a lot of account activity during the period and it had a balance at a high of \$326,503.20 on 23<sup>rd</sup> February 2005. Following two withdrawals on the 9<sup>th</sup> and 10<sup>th</sup> March 2005, the latest of which was in the amount of \$325,000.00, the balance was reduced to \$1,112.95. There is again no explanation as to the use to which Ms. Mesquita put the funds withdrawn.
- [55]** By the 18<sup>th</sup> April 2005 the RBTT account had been replenished and the balance stood at \$376,339.18, \$376,000.00 of which was withdrawn on the same day a receipt was issued by Watson & Watson in the total sum of \$867,820.00 paid via RBTT and NCB cheques, as well as a cash payment of \$16,000.00.
- [56]** The RBTT account was again replenished on the 5<sup>th</sup> July 2005 by a cash deposit of \$250,000.00, taking its balance to \$251,812.24 from which the sum of \$169,000.00 was withdrawn. As stated previously Ms. Mesquita's evidence is that this deposit was received from a friend and paid to Watson & Watson who issued a receipt in the amount on the 11<sup>th</sup> July 2005.
- [57]** The extract from the account maintained at VMBS begins and ends with transactions on 6<sup>th</sup> July 2004 up to 13<sup>th</sup> October 2004 respectively. While the balance on that account went as high as \$347,748.24 in September 2004, the last transaction record shows a balance of \$62,375.71.
- [58]** On Ms. Mesquita's evidence she withdrew substantial sums from at least two accounts while the purchase of the Property was being contemplated, which sums could no doubt have been used towards its acquisition. For the first time during cross examination she said she often withdrew sums from her accounts for placement in fixed deposit. Unsurprisingly Counsel for the Claimant/Ancillary Defendant suggested that that evidence was contrived to meet the needs of trial. Although Ms. Mesquita denies the suggestion there is really no evidence of the use to which Ms. Mesquita put some of the funds she withdrew from her accounts.

- [59]** Admittedly, the banking records presented by Ms. Mesquita are incapable of proving the source of the funds in them or how payments on the receipts issued in her name came to be made on each occasion. Bank records were not the only evidence put up in proof of the ability to finance acquisition of the Property however.
- [60]** It is also Ms. Mesquita's evidence that she was Employed to Prime Sports (Jamaica) Limited at a casino between 2002 to 2005 and earned "approximately" \$6,500.00 per fortnight after deductions; and that after an increase in salary she had earned approximately \$7,962.77 net. She did not supply pay slips or other documentary evidence of her earnings and no explanation for their absence was offered. There was no dispute as to the authenticity of the payslip dated 20<sup>th</sup> February 2004 and exhibited in Ms. Pinnock's affidavit which shows a net pay of \$5,962.63. This money cannot, by any means, be regarded as a substantial salary. In any event, Ms. Mesquita says that most of the funds she acquired during that employment were not from her salary but tips from customers which could be very substantial, and that she also gambled frequently. There was no challenge to these aspects of the witness' evidence.
- [61]** Ms. Mesquita also avers that she supplemented her employment income by operating two (2) licensed hackney carriages (taxis) during 2003 to 2008 and had a net income of between \$12,000.00 to \$15,000.00 weekly. While suggestions were put to Ms. Mesquita during cross examination that Mrs. Schoenian had bought her a taxi and also operated taxis on the island, which suggestion were denied, there was no challenge to her evidence as to the number of vehicles she operated or of her weekly net income from the endeavour.
- [62]** Also unchallenged is Ms. Mesquita's evidence that she participated in multiple partner schemes and that her boyfriend gave her money, which she would save. It was admitted that the amount of her boyfriend's assistance had not been stated in her affidavit evidence and it was not supplied during cross-examination.

- [63]** In respect of renovations to the Property, it was Ms. Mesquita's evidence that they commenced in about 2006 and that in a bid to save money, both her and her boyfriend who is a contractor, put in sweat equity. She explained, which I accept, that she does not have receipts for material purchased for renovations as they had become old and faded. She had thrown them away as she did not anticipate that they would be required for court proceedings. This was unchallenged. It is her evidence that a one-bedroom flat was first completed to enable her and her son to move onto the Property.
- [64]** In the face of the foregoing evidence which went substantially unchallenged; and taking into account that Ms. Mesquita acquired a NHT mortgage to assist not only with almost half of the purchase price but the renovations of the Property to make it habitable, I find that she has demonstrated that she had the capacity to fund the purchase and renovation of the Property without financial assistance from Mrs. Schoenian.
- [65]** It is the unchallenged evidence that during Mrs. Schoenian's lifetime and before she was said to have taken ill, Ms. Mesquita was in arrears in respect of property taxes from 2005 to 2012; and had fallen into arrears with her mortgage payments to the NHT. In consequence of her financial difficulties she sought a moratorium from the NHT but this was refused by letter dated 30<sup>th</sup> December 2008 and her liability for outstanding mortgage payments confirmed by letter from the NHT dated 26<sup>th</sup> January 2009. As at 27<sup>th</sup> May 2019 NHT arrears stood at \$5,446.66 and property tax arrears, including for the year 2012 were cleared. There is no evidence of Mrs. Schoenian contributing to the discharge or reduction of any of these liabilities during her lifetime and it was conceded by Ms. Pinnock that the Estate has not paid any mortgage in respect of the Property. Ms. Mesquita has demonstrated by her evidence that although she experienced financial difficulty she was able to meet these obligations in respect of the Property without financial assistance from Mrs. Schoenian. It was therefore not

improbable that she also acquired, renovated and paid the mortgage during her aunt's lifetime without her financial assistance.

[66] In all the foregoing premises I find that on a balance of probabilities it was Ms. Mesquita, without the contribution from Mrs. Schoenian, who paid the purchase price for the Property, and saw to its renovations and the payment of mortgages sums. I also find on a balance of probabilities that Mrs. Schoenian was endorsed on the certificate of title together with Ms. Mesquita not on account of any financial contributions she made but because there was agreement between both registered co-tenants that her name would be so placed for protecting the Property for the benefit of Ms. Mesquita's minor son should anything happen to Ms. Mesquita.

**Whether the registered interests also reflect the beneficial interests in the Property.**

[67] It is contended on behalf of Mrs. Schoenian's Estate that her beneficial interest and that of Ms. Mesquita in the Property have always remained separate and distinct as tenants in common. I am unable to agree.

[68] It is well settled that absent rebutting circumstances, it is presumed that the person who supplies the purchase money intends the purchase for his own benefit and not for the benefit of another. The presumption arises notwithstanding that the conveyance or part of it is registered in that other's name. This well established and incontrovertible principle was one of the subjects of the decision of Sykes, J (as he then was) in **Grace McCalla v Eric McCalla and others** Claim No. 2005 HCV 2335 delivered on the 3<sup>rd</sup> August 2007, a case cited by the Claimant/Ancillary Defendant. There a number of authorities were cited including **Pettitt v Pettitt** [1970] A.C. 777, 813-814 where Lord Upjohn remarked as follows.

*My Lords, all this is trite law but I make no apology for citing the judgment of Eyre C.B. in 1788 in the leading case of Dyer v. Dyer (1788) 2 Cox, Eq.Cas. 92, 93, 94, set out in full in White and Tudor's Leading Cases in Equity, 9th ed. (1928), Vol. 2, 749 -*

*"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive - results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence.*

*... the learned editors of White and Tudor were careful to remind their readers at p. 763 that "all resulting trusts which arise simply from equitable presumptions, may be rebutted by parol evidence. ..." This doctrine applies equally to personalty.*

*These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence...*

[69] In **Halsbury's Laws of England** (5<sup>th</sup> edn, 2014) vol 47, at para 230 the following appears.

*A **resulting trust** may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a **resulting trust** in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended.*

[70] Having regard to my earlier findings that the Property was purchased, renovated and the mortgage obligations honoured by Ms. Mesquita without the financial assistance of Mrs. Schoenian, and that the latter's name was placed on title as a means of protecting the Property for the benefit of Ms. Mesquita's minor son, I find that the interest registered to Mrs. Schoenian was held by her on resulting trust for Ms. Mesquita. While there is a familial relationship between the registered co-tenants, it is not in the nature of the relationships which give rise to the presumption of

advancement, which is capable of rebutting the presumption of a resulting trust. In my judgment there is also no circumstance of evidence that Ms. Mesquita intended to part with beneficial ownership of the property by gift or otherwise to her aunt so as to rebut the presumption of a resulting trust.

[71] Accordingly, I find that although registered as a tenant in common on title with Mrs. Schoenian, it is Ms. Mesquita who is entitled to the entire beneficial interest in the Property.

## **ORDERS**

[72] For the reasons stated, it is ordered as follows:

1. Judgment for the Defendant against the Claimant, the claim is accordingly dismissed.
2. Judgment for the Ancillary Claimant against the Ancillary Defendant on the counterclaim.
3. It is declared that the Claimant/Ancillary Defendant, Shockera Anneisha Racquel Pinnock, Executrix of the Estate of Moya Schoenian holds the beneficial interest in the property known as Lot 196 Fairfield, Fairview Park in the parish of St. Catherine and comprised in the certificate of title registered at Volume 1220 Folio 525 of the Register Book of Titles in the names of Moya Schoenian and Sashauna Mesquita as tenants in common on resulting trust for the Defendant/Ancillary Claimant, Sashauna Mesquita.
4. The Defendant/Ancillary Claimant, Sashauna Mesquita is declared entitled to the entire legal and beneficial interest in the property known as Lot 196 Fairfield, Fairview Park in the parish of St. Catherine and comprised in the certificate of title registered at Volume 1220 Folio 525 of the Register Book of Titles.
5. The Registrar of Titles shall forthwith cancel the certificate of title for the property comprised in the certificate of title registered at Volume 1220 Folio 525 of the Register Book of Titles and issue a

new title in the sole name of the Defendant/Ancillary Claimant,  
Sashauna Mesquita.

6. Costs to the Defendant/Ancillary Claimant to be taxed if not sooner  
agreed.

**Carole S. Barnaby**  
**Puisne Judge**