EASTERN CARIBBEAN SUPREME COURT

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2013/0095

BETWEEN:

PEARLINE IANTHEA ATKINS nee JAMES

Claimant

and

CALVIN JAMES

Defendant

Appearances:

Ms. Constance V. Mitcham Q.C. with Mrs. Rivi Warner-Lake of Counsel for Claimant
Mrs. Marguerite A. Foreman with Ms. Teshari John of Counsel for Defendant

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2016: November 11th

JUDGMENT

[1] CARTER J.: On 5th August 2013, the claimant filed a claim against her brother, the defendant in this matter for *"delivery up of her original Certificate of Title, Registered in Book N2 Folio 99, of the Register of Titles of the island of Saint Christopher"* (hereinafter referred to as "the Certificate") which the claimant asserts *"was being wrongfully detained by him."*

BACKGROUND

[2] In the statement of claim filed 5th April 2013, the claimant set out the basis of her claim of right to the Certificate of title:

> *"1. The claimant is and was at all material times one of the registered proprietors named on an original Certificate of Title registered in Book N2 Folio 99….*

3. On the 13th May 1988, the said Certificate of Title was granted to Ivy James, the mother of the claimant and defendant, Clive Nathaniel James, the brother of the Claimant and Defendant and Pearline Ianthea James, the claimant in this matter, as joint tenants of the property contained in the said Title.

4. The claimant is aware that the said Title was subsequently paced in a safety deposit box at the St. Kitts Nevis Anguilla National Bank.

5. The said Clive Nathaniel James died on 31st October 1995 leaving the claimant and her mother the said Ivy James as the two remaining proprietors of the said property.

6. Ivy James, mother of the claimant and defendant died on 14th November 2002, leaving the claimant as the sole surviving proprietor named on the said Certificate of Title and the sole owner entitled to possession of the said title.

8. Sometime in the month of November 2002…the defendant requested the claimant to accompany him to the Chambers of J.D.Quinlan, Solicitor, from whom he said he had received some correspondence and wanted to know what it was all about.

9. …At the time the Claimant was also shown the said original certificate of Title by the Defendant.

11. Between the months of May to August 2012 the claimant made several demands to the defendant and his Solicitor, through her former Solicitor, for the said original Title to be immediately delivered to the claimant…but it was not returned to the claimant or to the claimant's Solicitor…

12. By letter dated the 8th November 2012 addressed to the defendant in person, the claimant … requested the delivery up of the said original Title documents by 15th November 2012 but the defendant has failed and or refused to deliver up the said original Title document to the Defendant or to her Solicitors."[1]

[3] As a result of the above circumstances, the claimant avers that "*the defendants' refusal to deliver up the said Certificate of Title document, and the delay that has resulted…has inconvenienced the claimant in the use of her property and [the Claimant] has suffered loss and damage.*"

[4] The claimant therefore seeks:

"(i) Delivery of the Original Certificate of Title registered in Book N2 Folio 99;

(ii) Damages;

[1] Statement of claim filed 5th April 2013

(iii) Costs; and;
(iv) Such further and other relief as the Court deems just."

[5] In response to the claimant's arguments of entitlement to the Certificate, the defendant filed a defence on 17th May 2013 and an amended defence and counterclaim on 27th May 2013.

[6] The defendant in his Amended defence, pleads that their mother, Ivy James, was the sole registered proprietor named on an original Certificate and that the original Certificate of Title was registered in Book U1 Folio 22 of the Register of Titles. Additionally, that on 13th May 1988, Ivy James transferred the land at Durant Avenue (hereinafter referred to as "the disputed land") to herself, Clive James and the claimant as joint tenants stating that this Certificate of title was registered in Book N2 Folio 99 and dated 13th May 1998.

[7] His position is set out in this way in the said Amended Defence and Counterclaim:

"(a) Ivy James (mother of the Defendant and the Claimant, now deceased) acknowledged to the defendant that it was wrong for her not to have put the defendant's name on the title in the first place, since it was the defendant who paid the purchase price of the land, and she executed a Memorandum of Transfer ceding her half share of the land to the defendant, and asked the claimant whether the claimant would likewise transfer her half share to the defendant. The decision of Ivy James to transfer her half share of the land to the defendant and her request to the claimant to release her half share to the defendant were embodied in a Solicitor's letter to the claimant dated 19th August, 2002, and signed by Ivy James in the presence of both the Solicitor who prepared the Memorandum of Transfer and Mr. Samuel Benjamin H. Leader, a former Bailiff of the High Court…
(b) Acknowledgment of the letter referred to above was received from a Solicitor for the claimant in a letter dated 28th November, 2002. This letter acknowledged that the claimant received the "Memorandum of Transfer which was apparently intended to transfer the land in its entirety to Mr. Calvin James [the Defendant alone" and the Solicitor requested delivery up of the Certificate of Title on the ground that "notwithstanding whatever Mrs. Ivy James might have intended during her life-time, the fact remains that on her death the land vests in Pearline Ianthea Atkins, the sole surviving owner"
(c) On 4th December, 2002, the Solicitor for the Defendant replied to the Claimant's solicitor to the effect that the Certificate of Title would be retained on two grounds-

(i) that the defendant had paid the purchase price and all outgoings in connection with the acquisition of the land and the title thereof, and
(ii) that the defendant was of the opinion that the relevant joint tenancy has been severed in the lifetime of Ivy James"[2]

[8] The defendant therefore denies that the Certificate is wrongfully retained, that the claimant has suffered any loss or damage as a result thereof or that the claimant is entitled to the remedies claimed.

[9] The defendant's counterclaim is grounded as follows*:*

"(i) the taking of the grant in the name of Ivy James in circumstances where the defendant paid the purchase money and all outgoings with respect to the acquisition of the land, created a trust of the legal estate which results to the defendant as "the man who advance[d] the purchase money" and
(ii) Ivy James severed the joint tenancy in her lifetime. The effect of this is to deny any right of the ius accrescendi to the claimant and accordingly any right to the delivery up of the certificate of title to the claimant for her benefit alone"[3]

[10] The defendant accordingly seeks the following from the claimant:

"(a) An order that the claimant be directed, within fourteen (14) days of the making of the Order, to execute the Memorandum of Transfer (which the claimant received in a letter from Ivy James, dated the 19th August, 2002) transferring the land registered in Book N2 Folio 99 of the Registrar of Titles for the St. Christopher Circuit to the defendant as sole registered proprietor
(b) Costs and
(c) such further or other relief as to the Court seems just"

[11] The claimant filed a Reply and Defence to the Amended Counterclaim wherein she joined issued with the Defendant on his amended defence and maintained that she was the sole remaining proprietor of the Certificate. In her Defence to the Counterclaim she denied that Ivy James severed the joint tenancy by any lawful means and denied any knowledge of any payment by the Defendant for any land contained in the Certificate. She asserted that *"in any event the Statute of Limitation*

[2] Amended Defence and Counterclaim filed 27th May, 2013
[3] Defendant's counterclaim filed 27th May 2013

will debar the Defendant from seeking to collect monies he suggests was due to him since 1969, over 44 years ago."[4]

[12] At trial the claimant gave evidence on her own behalf and the defendant also gave evidence and called one witness in support of his case.

[13] The issues which arise for the court's determination on the claim and counterclaim are intertwined. The claimant stands by the provisions of the Title by Registration Act (hereinafter referred to as "the TRA") and the indefeasibility of her title as registered owner of the disputed land under the provisions of that Act. The Defendant's position as evidenced in his Amended defence is also the basis of his counterclaim. His defence that he is entitled to retention of the certificate because he paid the purchase for the disputed land in 1969, is also the basis of his counterclaim wherein he asserts that there was a trust of the legal estate which results to him as a direct result of this payment for purchase of the disputed land, the subject of the Certificate.

THE TITLE BY REGISTRATION ACT

[14] Learned Queen's Counsel for the claimant based her submissions in support of the claimant largely on the statutory authority of the TRA. Counsel referred specifically to the following provisions.

Section 5 (1) of the TRA states:

> *"Dealings with lands brought under this Act.*
> *(1) From and after the time when any land is brought under the operation of this Act, all dealings with such land shall be in the forms and governed by the principles set forth in this Act, and all such dealings shall take effect from the date and act of registration, and not from the date of the execution or delivery of any instrument or document, or otherwise, save as in this Act provided. "*

[15] Section 8 of the Act refers to the Certificate of Title:

> *"Certificate of title to be indefeasible.*

[4] Defence to Counterclaim filed 18th July 2013. See CAP 5.09 Rev Ed. 2009 –Limitation Act

All certificates of title granted under this Act, and all notings of mortgages and encumbrances on the same, shall be indefeasible."

By Section 19 of the TRA:

"Provisions where certificate of title has been wrongly issued.
(1)Any person aggrieved by the issue of a certificate of title under this Act may, institute a suit as plaintiff against the Attorney-General as defendant, claiming damages for the injury he or she may have sustained.
(2)Every such suit shall be governed by the provisions of the Crown Proceedings Act, Cap. 5.06 and if the plaintiff shall recover any damages, the same shall be paid out of the Consolidated Fund."

[16] Section 9 of the Act gives absolute power to the registered proprietor to deal with the land. It states:

"Powers of registered proprietor.
In every certificate of title a registered proprietor or proprietors shall be set forth of the land to which it relates, who shall have the absolute power to deal with the land in any manner in which land may be dealt with under this Act, any rights for life, or rights in the land for terms of years, or any other limited or conditional rights, being hereby declared to be encumbrances on the lands, and requiring to be constituted as such in the manner in which encumbrances are constituted under the provisions of this Act."

[17] By Section 10 of the TRA, the registered proprietor is given the fullest right to deal with the land held under the Act.

"Right of registered proprietor.
The right of the registered proprietor named in a certificate of title to the land comprised in a certificate of title granted under this Act shall be the fullest and most unqualified right which can be held in land by any subject of the Crown under the law of England, and such right cannot be qualified or limited by any limitations or qualifications in the certificate of title itself, unless such limitations and qualifications were inserted in any Crown grant in place of which the certificate of title has been issued or as in the case of mortgages and encumbrances, when these are noted on the certificate of title."

[18] Relying on these provisions, Learned Queen's Counsel for the claimant also submitted that: "*It is to be noted that from the time of the original registration of the land in 1969 to the Defence and Counterclaim in 2013, some 44 years had elapsed while the Defendant did nothing to register any interest in the land".*

[19] Counsel for the defendant submitted to the court that while the defendant did not dispute that both the Original Certificate of Title issued on 26th March 1969 and the Certificate fail for consideration in light of the statutory protections of the TRA and are, of course, "indefeasible" as such, that the indefeasibility of the said Certificates of title does not adversely affect the Defendant's case.

[20] Counsel's argument was that "*The genus of Ivy James' name as Registered Proprietor on the First Certificate of Title is clear*"[5]. However Counsel invited the court to consider the capacity in which Ivy James held that title of Registered Proprietor, that it was this capacity that was fundamental to the Defendant's case.

[21] Counsel argued that: *"The Defendant was not seeking to defeat the legal title but was rather seeking to have the Court find that he is owner as beneficiary for whom Ivy James holds the land on trust."* Counsel referred the court to the Court of Appeal case of *Creque v Penn*[6] which she submitted approved the principle that indefeasibility of title does not exclude the possibility of a right of action for a personal remedy between the original parties to a transaction.

[22] In the case of Joseph Maynard and Carlyn Lawrence Maynard Barzey The duly appointed Attorney of record of Norma Barnes Maynard v Michelle Kalski, The **intended Administratrix of the Estate of Pamela Kalski dec'd**.[7] Alleyne J.A considered the import of the indefeasibility provision under the provisions of the TRA Cap 279, which is expressed on almost identical terms with the present incarnation, the TRA. He stated thus:

> *"More important, and this is the issue on which the appeal was argued, is the nature and effect of a certificate of title. Section 4 of the Title by Registration Act CAP. 279 provides that immediately after the issue of a first certificate of title the former title to the land shall 'cease and determine'. Section 8 of the Act provides that 'All certificates of title granted under this Act ... shall be indefeasible.' The word 'indefeasible' is defined in the First*

[5] 6.4 of Defendant's closing submissions filed 7th August 2015
[6] Privy Council Appeal No. 36 of 2005
[7] Saint Christopher Civil Appeal No.19 Of 2003

Schedule to the Act 2 as 'express(ing) that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any Court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, ... except on the ground of fraud connected with the issue of such certificate of title, ... or that the title of the registered proprietor had been superseded by a title acquired under the Limitation Ordinance, by the person making the challenge..."[paragraph 13]

[23] He went on further:

"Whatever the right, title or interest of the Appellants to the disputed property might have been, upon the issue to the Respondent of a First Certificate of Title to the land on 14th June 1999, all such right, title or interest ceased and determined in accordance with section 4 of the Title by Registration Act, and the Respondent obtained an indefeasible title, which was open to challenge only on the basis of fraud 'connected with the issue of the title" [paragraph 15]

[24] In that case the Court of Appeal concluded that the appellants had not shown that the certificate of title had been obtained by fraud. At paragraph 19, Alleyne J.A. clarified the basis of any challenge to a certificate of title by an allegation of fraud:

"More importantly, the certificate of title was issued in compliance with the order of the Court of Appeal, albeit a consent order, and the statement of claim in the action, including the particulars of the alleged fraud, do not assert, nor form the basis for proving, that there was fraud 'connected with the issue of the certificate of title'."

[25] In the recent Court of Appeal case of Nicholls, Mitcham and Anor. v Richard Rowe and Mark Secrist and Others[8], Kentish-Egan J.A (Ag.) provided an elucidating judgment on matters intimately relevant to the instant case. In that case, in the context of an appeal by persons holding an unregistered memorandum of transfer, against the decision of the Board of Assessment of Lands regarding compensation upon the compulsory acquisition of lands, the Learned Justice of Appeal stated thus:

"Interests in land registered under the TRA
[58] The TRA gives a guarantee of indefeasibility of title to and of interests in land. As the Board underscored, it is the adaptation in Saint Christopher and Nevis of the Torrens system of land tenure. In order to back the

[8] SKBHCVAP2011/0015 delivered on January 11th 2016

guarantee of indefeasibility, the TRA sets up an intricate statutory scheme for: (i) registration of title to and transfer of land; (ii) for registration of all dealings in land that are intended to change or affect the ownership of land and; (iii) for registration of all dealings that are intended to increase or diminish mortgages and encumbrances over the land. In its carefully crafted provisions, it lays down the cardinal principles that underpin the indefeasibility of title.

[59] Sections 8, 9 and 10 together with the comprehensive definitions of the terms 'indefeasible' 'encumbrance and 'note', (set out and discussed in paragraphs 29 to 31 above), are the provisions paramount to indefeasibility of title to land. To this list must be added sections 43 and 52, which provides for priority as between encumbrances and mortgages according to their respective date of registration.

[60] With the unique exception of equitable mortgages, each of these provisions establishes definitively that subject to the provisions of the TRA, an interest in land exists under that Act when it bears the stamp of indefeasibility by notation in the register as well as on the duplicate certificate of title. Registration and noting on the certificate of title are the sine qua non of the existence of interests in land under the TRA and this is so whether the interest has its origins in law or in equity"

[26] Specifically in relation to the facts of that case the Learned Justice of Appeal was clear that:

"[61] This availability of an encumbrance as the vehicle to note on the certificate of title, an interest arising in equity, sets to naught the argument of the MKS Respondents that the TRA recognises legal interest only and does not recognise equitable interests. No such distinction can be found in the provisions of the TRA. It sets to naught too, the misplaced and expansive submission of the appellants that the TRA cannot be used to defeat equitable interests in land. This is an engineered assertion that begs the answer to the question whether the TRA embraces equitable interests. The short response is that, one must look to the provisions of the TRA in order to determine the degree of recognition or the degree of protection that is given to claims to equitable interests in land."

[27] From the foregoing, there is no doubt that the provisions of the TRA do no preclude the defendant's assertion to a personal remedy against the claimant. In the instant case, the defendant is by his defence and counterclaim asserting an equitable interest in the disputed land. The TRA does not preclude the assertion of such a claim. However, it has not been argued that the defendant has or had sought to

register this equitable interest in the disputed land. The consequence of this lack is that the claimant maintains her position as the registered owner of the land and that as per the TRA her position as registered owner is not subject to the interest that the defendant now asserts.

[28] If, as Counsel for the defendant has submitted, the defendant is not seeking to defeat the legal title of the claimant, the Certificate being the embodiment of such title and authority in the registered owner of the disputed land, upon what basis can the defendant insist upon retention of the Certificate? This Court is unable to follow the defendant's argument that this right to a personal remedy against the claimant assists the defendant or provides a defence to the claim for the return of the Certificate.

[29] The issue of whether the defendant has a claim to a personal remedy against the claimant is a separate issue entirely.

THE SEVERANCE OF THE JOINT TENANCY

[30] The claimant's evidence with regard to this issue was as follows:

> *On one of the days during this period while making the funeral arrangements, the defendant requested that I accompany him to the Chambers of J.D. Quinlan, Solicitor concerning some correspondence he had received and wanted to know what they were all about. As he requested, I accompanied him. When I got there it became apparent that the Solicitor was acting on behalf of the defendant. I was handed a letter dated the 19th of August, 2002 along with a Memorandum of Transfer and asked to affix my signature to the memorandum of Transfer and to transfer my interest in the Title to the defendant.*
> *At this juncture I was told that my mother had already signed over her share of the interest in the land at Durant Avenue to the defendant and I was shown a signature purporting to be that of my mother on the Memorandum of Transfer. In addition, I was also shown the Original Certificate of the Title registered in Book N2 Folio 99 of the Register of Titles of Saint Christopher that was missing from the safe deposit box.*
> *I refused to sign the Memorandum of Transfer or any other document transferring the property in favour of the defendant of any one.*[9]

[9]Claimant's witness statement filed 23rd January 2014

[31] The defendant gave evidence that:

> *"My mother must have been trying to correct all of what I assume she saw as her "wrongs" to me because she also took me to Mr. J.D. Quinlan who became my Solicitor to have documents prepared to transfer both her interest and whatever interest Ianthea had sought to acquire in the Durant Avenue property transferred to me. My mother, Ivy James signed a document titled "Memorandum of Transfer of Land contained in a certificate if Title registered in Book N2 Folio 99 of the Register of Titles for the Island of saint Christopher", which is the land the subject of the claim herein. I know, having spoken to my mother and knowing the truth about how the land was acquired that Ivy James intended by that document to have the said land transferred to me and to have a new Certificate of Title issued in my favour. As explained to me by my then Solicitor, Ivy James by that signature severed the joint tenancy in her lifetime and therefore the principle of survivorship between Joint Tenants does not operate. [10]*

[32] The claimant addressed this matter of severance in closing submissions to the court.

> *"The Defendant further stated that his mother had severed her joint interest in the land and transferred it to him by an unregistered Memorandum of Transfer. However, if the filed unsigned and unfiled copy of the Memorandum of Transfer is to be believed, it does not disclose any intention to sever an interest in land, but is merely a request to the Claimant to transfer her entire interest in the land to the Defendant for the sum of $5.00."*

[33] The Defendant's submissions relied on passages of Halsbury's Laws of England[11] to the effect that:

> *"10.1…Where a legal estate (not being settled land) is vested in joint tenants beneficially, any tenant may sever the joint tenancy in equity by notice in writing to the other joint tenants……"*

[34] Counsel for the defendant submitted that:

> *"Ivy James then purported to attempt to sever the joint tenancy. But herein lies a problem. Although she proceeded to carry out the mechanics of severance, including her letter of 19 August 2002 which might have been regarded as the requisite "notice" under section 10.1 hereinabove, the question is whether she actually severed and what would be the effect of whether she legally severed or whether she did not."*

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[10] Defendant's witness statement filed 29th January 2014

[11] Halsbury's Laws of England Vol. 39 paragraph 534 and 540

[35] In her examination of this the essential question in relation to this issue it appears to this court that Counsel went back on her own argument when she concluded that:

> *"All other things being equal, and the other two joint tenants being deceased, the Claimant would expect to take on the survivorship principle. However, if we accept the learning set out in Halsbury's Laws at paragraph 10.1 hereinabove, for severance to be effected, the legal estate would have to be vested in the joint tenants beneficially. We have argued that under the First Certificate of Title Ivy James did not hold beneficially, had made no effort to hold beneficially and the joint tenants under the Second Certificate of Title did not hold beneficially on transfer from Ivy James and, as joint tenants had themselves made no efforts to hold beneficially. The legal estate could not have been vested in the joint tenants beneficially."*

[36] It is trite law that where parties hold land as joint tenants the principle of *jus accresendi* ensures that upon the death of a joint proprietor the property held under the joint tenancy passes by law to the other owners of the land. The evidence as led at trial does not disclose that there was any act of severance on the part of Ivy James. There was at best some evidence that Ivy James was seeking to have the claimant transfer her interest to the defendant but this Court is not satisfied that this was communicated to the claimant or even to the authenticity of the document relied upon by the defendant as evidencing or communicating this intention. In any event the defendant, by the submissions put forward to this Court on his behalf, has departed from his previous assertion that the joint tenancy had been severed. So that, even if the court were to find that the joint tenancy of a beneficial interest could have been severed by Ivy James in that her purported request of the claimant could constitute such notice, the evidence has not been established that the claimant and Ivy James held the land as joint tenants beneficially. There is no evidence that the purported attempt to sever the joint tenancy succeeded.

RESULTING TRUST

[37] In seeking to assert a right to the disputed land the defendant asserts his interest in the disputed land was as the beneficiary of a resulting trust.

[38] The defendant's submission on this issue was that the court should find that a resulting trust had been created in favour of the defendant for the reasons set out in his counterclaim outlined at paragraph 9 above. Indeed as has been noted above, the defendant's argument was to the effect that the resulting trust was both his defence to the claim and the basis of his counterclaim that the claimant transfer her interest in the disputed land to him.

[39] The claimant sought to dismiss this argument of a resulting trust by stating simply that: *"The Defendant, being a minor at the date of the registration of the land in his mother's name in 1969, was incapable of creating a trust."* The claimant referred the court to Section 4 of the Trusts Act Chap. 5.19 which states as follows:

> *"Creation of a trust.*
>
> *(1) Any person (who is not a minor or an interdict or a bankrupt) may create a trust for any lawful purpose, …"*

[40] Counsel for the claimant emphasized that: *"It is to be noted that from the time of the original registration of the land in 1969 to the defence and counterclaim in 2013, some 44 years had elapsed while the defendant did nothing to register any interest in the land. This was compounded by the fact that he had absolutely no evidence in writing or otherwise to establish that he had purchased the land at age 17 with his mother as his trustee."*

[41] The defendant argues he *"did not and did not have to actively or expressly create a trust but that the trust automatically came into existence by the operation of law and that the Defendant not being at the age of majority does not adversely affect the principle of a trust resulting to him."*[12]

[42] Firstly, Counsel for the defendant argued, by virtue of Section 13 of the Trusts Act a common trust could arise by conduct. This section she emphasized bolstered her

[12] Paragraph 5:2 of the Defendant's submissions.

argument that a trust could be created *"without the Defendant positively creating a trust."*

[43] Section 13 of the Trusts law states that:

"(1) A trust which is not

(a) a charitable trust;

(b) a spendthrift or protective trust; or

(c) a unit trust;

is a common trust.

(2) A common trust may come into existence in any manner.

(3) Without prejudice to the generality of subsection (2), a common trust may come into existence by oral declaration, or by an instrument in writing (including a will or codicil) or arise by conduct."

[44] While it is evident that a trust could be created by conduct, this does not take away from the general provision in Section 4 of the Trusts Act that a trust cannot be created by a minor. It would seem to this court that Section 4 is not qualified or limited in its application by Section 13 which describes the manner in which a trust can be created but it does not in any way address or expand the clear meaning of Section 4 as to who can create a trust. The Defendant being a minor in 1969 could not have created a trust.

[45] If this court is incorrect in its interpretation of Sections 4 and 13 it will go on to consider the argument for a resulting trust.

[46] Counsel for the defendant in her submissions argued on the authority of Halsbury's Laws of England, Fourth Edition reissue, Vol. 20, paragraph 40 - that:

> *"Where a person buys real or personal property and pays the purchase money, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child nor wife, prima facie there is no gift, but a resulting trust for the person paying the money..."*

[47] Counsel also cited:

> *"Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfer property to another or himself and another jointly, then as a rule, unless there is some further indication of an intention at the time to benefit the other person or some presumption of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferor…."* [13]

[48] Counsel for the Defendant admitted that this presumption in equity, that it was the intention of the person who provided the purchase money that the person (or persons) to whom the legal title is conveyed should hold it on trust for him is, like any other presumption, a rebuttable one. Where a court finds that there is evidence that a gift was intended or there was evidence that the purchaser intended to advance a loan or make a gift, it cannot be assumed that the legal titleholder holds the property on resulting trust for the person who provided the funds.

[49] It is for the court to decide whether the evidence produced is sufficient to rebut the presumption of a trust or to find evidence of a gift. Where no special relationship exists, the onus is on the party seeking to rebut the presumption of a resulting trust to show that no trust was intended. The court must seek to establish what had been the intention of the party paying for the property in having the property transferred. In seeking to determine this intention, the court will look at the circumstances of the transaction in order to seek to find the party's intention.

[50] The defendant's position is that the court should find that no gift was intended, given the surrounding circumstances, these circumstances being that:

> *(i) "At the time of the Defendant's purchase of the land he had not reached the then age of majority and, therefore, it was not possible for him to hold the land in his own right;*
> *(ii) The son/mother relationship does not fall within the category of relationship which would imply a gift;*
> *(iii) There is no other evidence by which the presumption that no gift is intended can be rebutted.*

[13] Halsbury's Laws (4Th edn. Reissue) vol. 48, para 607

(iv) The evidence from the Defendant is that he did not give the land to his mother, Ivy James, as a gift."

[51] Counsel for the defendant invited the court to consider that if the court accepted that a resulting trust had been created, the result was that: *"A trustee cannot dispose of trust property without the consent or approval of the person for whom he holds the trust and even then unless otherwise agreed, cannot convey, transfer or otherwise dispose of the property other than as property in trust for the Beneficiary."*[14]

[52] On this issue counsel concluded:

"The Defendant's uncontroverted evidence is that he could not hold property in his own right in 1969 as he was only 19 years old then and the age of majority was 21. The Defendant's evidence is that he did not give this land to his mother as a gift. That being the case, Ivy James held the property by way of resulting trust for the Defendant. …We say that the fact that the title was held by certificate of title rather than by deed does not adversely affect the resulting trust principle."

[53] This is clearly the crux of the defendant's argument. The court has examined closely the evidence of the parties on this issue. The claimant states in her evidence that:

"*So far as she is aware, her mother purchased the land in question at Durant Avenue, Basseterre, St. Kitts which was formerly owned by the Herbert Family. The land was originally registered in the name of her mother only, namely Ivy James, on a Certificate of Title Registered in Book U1 Folio 22 of the Register of Titles of St. Christopher and dated the 26th day of March 1969. At the time of this Registration the Claimant was almost 8 years old and her brother the Defendant was approximately 17 years old. Both the Claimant and Defendant were minors since at that time in 1969 the age of majority was 21*."

[54] Under cross examination she maintained:

"I am aware my mother bought lands at Durant Avenue. I was 8 at the time. I don't know anything about purchasing the land. My mother gave me a gift, a certificate of title. It was legally hers. I can't say for sure that my brother purchased or not. I don't know who purchased what…
I don't know that Calvin James paid for the land in 1969. I don't know if the land is the same as the later certificate of title. I did not provide any funds for purchases of lands in 1969. I was only 8 years old. I cannot assist the

[14] Paragraph 8.3 of the defendant's submissions

court as to the intention of the defendant or mother at the time of purchase. I was 8 years old. I did not advise Calvin that my name [was] added to Certificate of Title…"

[55] The claimant could not give direct evidence as to the circumstances in which the trust situation is stated to have arisen. Instead her evidence was of her knowledge of the mother's work and sources of income at the relevant time.

"When my parents became married, my mom was seamstress and made clothes for different people, from clothing to wedding dresses. When married, she had orders. We had relatives in England who had lived with my mom and when he went off to England he sustained our family in conjunction with my dad by sending clothing, monetary items. The relative was named William Thompson, he lives in Birmingham, England. My dad also gave her an allowance to help with household expenses and she saved some from that."

[56] The defendant's evidence-in-chief was that:

"8. I paid for the land which is the subject of the disputed Certificate of title and, although I cannot now find the relevant receipt, I believe that what I have to say will convince this Honourable Court that is more likely than not that I did pay and that therefore I am entitled to be the Registered proprietor.
9. It was in or about 1969, over 40 years ago, when the claimant would have been 8 years old that I paid over to a Mr. Shefton Warner, now deceased, the relevant sum for the land in question. He was responsible for selling it. I needed a loan to purchase the land and I recall that it was the very first loan that I had ever taken out.
10. I had been working at the Bata shoe Store in 1969. I was 19 years old at the time of the purchase of the land. I was doing well and had earned the respect of the General Manager, Mr. Denzil Renwick. He encouraged me to go through with the purchase of the land and agreed to sign the mortgage with the Bank of America as my guarantor for me to get the loan to purchase the land at Durant Avenue. I cannot now remember the exact purchase price but I believe that it was approximately $3,000.00. I have completed a search on the Registry for the details of the transfer, but have been unsuccessful as I was advised that the transfer was one of the documents that was destroyed in the Court House fire in 1982.
11. After I was granted the loan and I physically went to Mr. Shefton Warner at his place of work which was a company called J.W. Thurston which was the forerunner to the present TDC Company Limited which was formed in 1973. I paid him the total purchase price and received a receipt for payment. After that, I had the responsibility to repay the loan at the Bank of America, which I paid every month." [15]

[15] Defendant's witness statement filed 29th January 2014, Para 8 - 11

[57] His evidence under cross-examination was that:

> *"I was 19 years old when the property was purchased. I am aware of the age of majority was 21. I was working at BATA Shoe Store and purchased it for approximately $3000.00. The purchase price, I don't remember the exact amount of purchase price. Salary was base salary and cash based. The salary was $200.00 every fortnight. Banks do take a mortgage on the property. The bank did take a mortgage."*

[58] In Westdeutsche Landesbank v Islington,[16] the principle was stated thus:

> "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. …. (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest".

[59] The court must assess the evidence as to the circumstances surrounding the purchase. The defendant states to the court that he was able to make this purchase of the land that had been offered for sale to his parents because they were the renters on the property at the time. His evidence was that he worked for $400.00 per month at the time and while just nineteen (19) he was able to secure a loan for the purchase with the assistance of the General Manager of the Bata Shoe Store where he worked who acted as guarantor for him to get the loan to purchase the disputed land. He could produce only three receipts purportedly receipts for the loan. These receipts were not clear as to their purpose. The defendant was not able to produce any other documents evidencing his purchase of the land. His explanation for this lack was to the effect that all documents had been left with his mother and he was unable to recover these after her death. He stated that he could not find any other receipts relating to the purchases as it was some forty-four (44) years ago.

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[16] [1996] AC 669 per Lord Browne Wilkinson

[60] However the court has looked to the documents submitted by the defendant in support of his contention that he paid the purchase price for the loan. Specifically the court has looked to the letter which was admitted as part of the defendant's witness statement and which was not challenged by the claimant. In this letter Ms. Ivy James the mother of both parties states: *"…you alone paid for the land from a loan that you get from Bank of America."*[17] There is also a document entitled a "Statement of Understanding" which was purportedly signed by the deponent Benjamin Payne when he was retained by Ivy James to "*oversee all construction work"* to be carried on for the construction of a three bedroom concrete bungalow house on the disputed land. The document was signed by Ivy James as well. The document refers to the fact that, *"Mrs. James has informed me that the said property was purchased by her first son Calvin James for her personal use and benefit."* [18]

[61] Having considered all of this evidence, this Court accepts, on a balance of probabilities, that the evidence discloses that the defendant paid for the disputed land, for which the certificate is the subject of this claim.

[62] The further question on this issue is whether a resulting trust has been proved in favour of the defendant. As outlined above, a presumption of a resulting trust may arise in circumstances where as in this case the defendant paid the purchase price of the land held by his mother, Ivy James. The court must consider whether there is any evidence proved to rebut this presumption.

[63] The first matter which impressed itself on the Court as it considered this matter is the fact that Ivy James placed no qualification on the nature of the transfer, that is the transfer of the disputed land to her in 1969. While she acknowledged that the defendant paid for the loan to acquire the land, she makes no reference to the defendant being entitled to the land by virtue of his having paid for it or of her holding

[17] Bundle of agreed documents at Tab
[18] Bundle of agreed documents at Tab

it for his ultimate benefit. It is interesting to note also that there is no mention made of any transfer to the defendant on that basis.

[64] The entire tone and tenor of the letter that has been produced by the defendant[19] was that Ivy James was remorseful for not having included the defendant as one of the joint tenants in 1988 when she transferred the disputed land to herself, the claimant and her other child, the now deceased, Clive James. Further a close consideration of the Statement of Understanding referred to at paragraph 56 above was: *"Mrs. James has informed me that the said property was purchased by her first son Calvin James* ***for her personal use and benefit."*** [20] (emphasis mine)

[65] In Fowkes v Pascoe[21] the main issue that arose was with regard to the evidence that of presumption of a resulting trust. A resulting trust may be rebutted by evidence of intention.

[66] In that case, a testator bought shares in the name of herself and the defendant (the son of her daughter-in-law). By her will, she left the residue of her estate to her daughter-in-law and thereafter to the defendant and his sister. The question arose as to whether the shares bought in the name of the defendant and the testator were gifted to the defendant or held by him on resulting trust for the testator. The Court of Appeal held that on the evidence, the shares had been gifted to the defendant. At the same time, as the purchase of the shares, the testator had purchased other shares in the name of herself and her companion. The court found that if she had intended all the shares to be held beneficially for herself, there would have been no point in the separate but contemporaneous transactions. The evidence to rebut the presumption was that she meant it as a gift. It was the close relationship that allowed the court to accept that it was a gift.

[19] Agreed document at Tab of the Bundle of documents
[20] Bundle of agreed documents at Tab
[21] (1875) L.R. 10 Ch. App. 343

[67] The court held that it would be very different if she had purchased a stock in the joint names of her and her solicitor and the presumption would have been more difficult to rebut in that situation. But as it was, because of the family relationship, the presumption of the resulting trust was rebutted. In the instant case, if this court were to employ a similar analysis, the fact the Ivy James disposed of the property in the way that she did in 1988 is the strongest evidence that this property was not transferred to her to hold on trust for the defendant. The manner in which she dealt with the property was as absolute owner and this more than anything is evidence of a gift in the context of a resulting trust.

[68] There are other matters that the court has considered in relation to this specific issue. The evidence of the defendant is that the land was put in his mother's name because he was a minor at the time. However his evidence on this matter is not consistent. In his witness statement admitted as his evidence in chief, the defendant states that:

> *"After I paid Mr. Shefton Warner for the land we got the Certificate of Title. In 1969 I was not 21 years old yet – the legal age of majority at that time – I could not hold title on my own or with Mom so the Certificate of Title, Book U2 Folio 22 dated the 26th day of March 1969 was registered in Mom's name."*

[69] At trial and under cross examination his evidence was that:

> *"The land was registered in 1969 and recorded at the High Court Registry in St. Kitts. I was not aware that my mother had taken the land in her own name. In 1969 when I was a minor, I was not aware that land was in her name…I paid for the land in 1969. I was a minor. I paid for land because of dad and boss, but I was not aware that the Certificate of Title was not in my name. The document was registered in High Court Registry… I could not purchase it but I paid for the land."*

[70] These statements are clearly contradictory and an important factor as the court considers the evidence of a presumption of a resulting trust and the defendant's evidence in support of same.

[71] It is noteworthy that the defendant makes no mention of any request by himself to Ivy James to transfer the disputed lands to him during her lifetime. This is curious given the nature of the defendant's account of how the disputed land was acquired. The defendant states that he only transferred the land to his mother because he was under the age of majority. On this account, by 1971 he would have had the capacity to hold the land on his own behalf and in his own right. The evidence is that the land was not transferred to his siblings and mother as joint tenants until 1988, yet there is no evidence that the defendant had sought to have this property transferred to him during that period. The court cannot ignore this evidence of the passage of time in the context of the assertion of this equitable right.

[72] The evidence is that even after the death of Ivy James the defendant did not rely on an entitlement to the disputed land based on a resulting trust. He sought to rely only on the purported severance of the joint tenancy and request of Ivy James to the claimant to transfer her portion of the land to him, as his basis to entitlement to the disputed land.

[73] Having considered these matters this Court finds that the evidence presented by the defendant in support of his assertion to a resulting trust is not supported by the documentary evidence such as it was in this case. The matters noted by the court above lead this court to the conclusion that the transfer of the disputed land to Ivy James in 1969 was a gift to Ivy James. The presumption of the resulting trust is rebutted by the evidence.

THE LIMITATION ACT

[74] Counsel for the claimant also raised for the court's consideration whether the defendant could sustain any action, here by way of counterclaim, against the claimant having regard to the provisions of the the Limitation Act Cap 5.09.

[75] Section 6 (3) of the Limitation Act, after dealing with Crown lands and religious lands, states as follows:

> *"No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some person through whom he or she claims, to that person:"*

[76] However, the court notes the Court of Appeal's approach to the question of Limitation in the context of the Title by Registration Act. In observations by the Learned Chief Justice, she states: *"It is doubted that the general limitation protection contained in the Public Authorities Act can be prayed in aid so as to trump the clear and expressed provision of section 19 of the Title by Registration Act which specifically and expressly provides for a person who is 'aggrieved by the issue of a certificate of title' to institute a suit for damages for injury sustained, and the conjoint effect of section139 of the Act. Section19 contains no time limitation for the institution of such a suit and if Parliament wished to impose a time limitation for bringing the suit in relation to a certificate of title it could easily have done so by the insertion of simple language to this effect. The fact that there is no such limitation suggests that such was not the intention."* [22]

[77] However, the court's findings on the other issues mean that there is no need to make any further determination on this issue of limitation.

[78] The claimant in conclusion of submissions to court states the following:

> *"It is clear that the Claimant is the legal owner of the land contained in the Certificate of title registered in Book N2 Folio 99 of the Register of Titles of the Island of St. Christopher, dated the 13th day of May 1988. She is therefore entitled to:*
> *(1) The return of her Certificate of Title*
> *(2) damages for the wrongful detention of her title document, and*
> *(3) the costs of this action."*

This Court agrees.

Court's Order

[22] SKBHCVAP2014/0017-Nelson Spring Condominium Homeowners Association v Beach Front Condominium holding Company Ltd and Ors. [noted as observations by the learned Chief Justice only]

[79] (1) Judgment for the claimant.

(2) The Defendant shall within 14 days of this Order deliver to the claimant the Original Certificate of Title registered in Book N2 Folio 99 of the Register of Titles.

(3) The counterclaim is dismissed.

(3) Damages to be assessed.

(4) Costs to the claimant to be prescribed costs to be assessed if not agreed.

Marlene I. Carter
Resident Judge