

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0158

BETWEEN

CORNELIUS DA SANTOS

of Park Hills

CLAIMANT

and

KATHLEEN DO SANTOS

also known as

KATHLEEN DA SANTOS JACK

also known as

KATHLEEN JACK

formerly of Park Hill, presently residing in Canada

FIRST DEFENDANT

and

TROY JACK

of Prospect

SECOND DEFENDANT

and

THE BANK OF ST. VINCENT AND THE GRENADINES

(formerly the National Commercial Bank (SVG) Limited

THIRD PARTY

Appearances:

Mr. Parnel R. Campbell Q.C., Ms. Mandela Campbell with for the claimant.

Mr. Samuel Commissiong for the first and second defendants.

Third party absent and unrepresented.

2016: Sept. 22
Oct. 5
Nov. 15

JUDGMENT

BACKGROUND

- [1] Henry, J.: This case surrounds a dispute between a father and daughter over ownership of land. Mr. Cornelius Da Santos has alleged that in 1993 he decided to buy lands at Belle Vue but had only part of the purchase price. He claimed that he, his wife Deltash and their daughter Kathleen¹ entered into a family arrangement whereby Kathleen undertook to secure a loan for the balance of the purchase price from her then employer, the Bank of St. Vincent and the Grenadines Ltd. (**'the bank'**)². He alleged further that in pursuance of this agreement, Kathleen obtained the loan on his behalf at the preferential rate **offered to the bank's employees**. He claimed that her name was placed on the Deed of Conveyance as the ostensible owner, on the understanding that she held it in trust for him. He averred that it was always his responsibility to repay the mortgage which he did.
- [2] **Kathleen's** ex-husband Troy Jack was made a defendant. Mr. Da Santos alleged that Kathleen agreed as part of the divorce settlement between them, to assign her interest in the land to her ex-husband, for the benefit of their daughter Rhianna. Mr. Da Santos maintained that the land is his and that his daughter holds it in trust for him. He has sought declarations that he holds all beneficial interests in the land and that his daughter and her ex-husband hold the equity in redemption in trust for him. He claimed among other things an order transferring the property to him and an injunction restraining Kathleen and Mr. Jack from doing anything to alienate or destroy his interest in the land. Mrs. Jack and Mr. Jack have denied that Mr. Da Santos repaid the mortgage or holds any interest in the land. Mr. Jack pleaded that he has no interest in the land apart from his desire for his daughter to have a good tertiary education.

¹ She has since married and has been divorced. Mrs. Kathleen Da Santos Jack will be referred to interchangeably as Mrs. Jack and Kathleen for simplicity and cohesion. No disrespect is intended.

² Formerly the National Commercial Bank (SVG) Limited.

[3] The Bank of St. Vincent and the Grenadines (**'the bank'**) was joined as a defendant but took no active part in the proceedings. Mr. Da Santos claimed against them a declaration that they hold the legal estate in the lands as mortgagee, subject to a resulting trust in his favour and an injunction restraining them from further alienating his interest in the land or doing anything to adversely affect those interests. He also sought an order that the bank release and reconvey to him the legal estate in the land when the subsisting mortgage is discharged.

ISSUES

[4] The issues are:

1. Whether Kathleen Da Santos-Jack and/or Troy Jack hold the subject land in trust for Mr. Cornelius Da Santos?
2. To what interest if any, is Mr. Cornelius Da Santos, Mrs. Kathleen Da Santos-Jack or Mr. Troy Jack entitled?
3. To what, if any relief is Mr. Da Santos entitled?

ANALYSIS

Issue 1 – Does Kathleen Da Santos-Jack and/or Troy Jack hold the subject land in trust for Mr. Cornelius Da Santos?

[5] All of the parties testified and were cross-**examined**. **Mr. Da Santos' sole witness** was his sister Isula Sherman. His **son Haneff Da Santos testified on Kathleen's behalf**. **Their witness statements** and summaries were admitted as their evidence in chief along with the supporting documentary exhibits.

[6] Mr. Da Santos is 70 years old. He has been a farmer for most of his life. At one time, he cultivated about four parcels of land including the disputed property. Sometime around 1993 the subject lands were offered for sale at the price of \$35,000.00. Mr. Da Santos was given first preference to purchase but could not afford the full purchase price. He testified that although the market value of the property was in the region of \$61, 500.00, the sellers gave him a discount because of his long-standing relationship with them.

[7] He attested that he had only half of the purchase price and needed to borrow the balance. Under

cross-examination, he explained that he had about \$26,000.00 in a joint account with his wife. It is common ground that \$17,500.00 of that amount was used for the down-payment. Mrs. Jack testified that her mother withdrew the monies and which was then applied towards the securing the loan. It is not disputed that the bank advanced the sum of \$20,000.00 to Mrs. Jack to cover the balance of the purchase price. Certified copies of the Deed of Conveyance³ and the mortgage Deed number 2816 of 1993⁴ were produced. The property is described in the Schedule to the Mortgage Deed as:

‘ALL THAT LOT PIECE OR PARCEL OF LAND situate at Belle Vue in the State of Saint Vincent and the Grenadines being in extent four acres and fifteen poles ... and butted and bounded Northerly and Easterly by Estate Road Southerly by lands of Lloyd Wilson James and Westerly by lands of Carey De Freitas and known and described as Lot Number 20 on a plan in the possession of the vendors ... TOGETHER with all ways waters watercourses rights lights liberties privileges and easements thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto.’

[8] Mr. Da Santos maintained that **the loan was secured by him in Kathleen’s name. He averred that he fully serviced the loan through monies earned from plying the banana trade and from his trucking business.** He explained that his earnings from the sale of bananas and plantains:

‘came into the house, put on the table and go to pay the bank.’

Kathleen insisted that she paid all monthly mortgage payments of \$450.00, with monies from her own savings and salary and with assistance from her mother who was a day care supervisor. She claimed that her father was in no position financially to pay the full purchase price of \$35,000.00 because he was only a small farmer.

[9] Mrs. Jack asserted further that because he had two children (her brother and her) attending school and he had a household to run, her father to her knowledge, made no contributions towards servicing the loan. She acknowledged that she was then no longer in school and ultimately retracted her

³ Deed number 2815 of 1993 registered on 22nd September, 1993.

⁴ Registered on the 22nd day of September, 1993.

statement that her father had 2 children to maintain. By his own reckoning, Haneff was 17 years old at that time and had almost completed his secondary education. There is no evidence that he pursued tertiary education. No evidence was provided as to when he started to earn an income. Mrs. Jack and Mr. Da Santos were frugal with the truth on issues in dispute and made concessions for the most part only when incontrovertible evidence contradicted their accounts. They were not reliable witnesses. The court therefore had to rely in large measure on circumstantial evidence to resolve conflicts in their testimony.

[10] Mr. Jack stated that he is aware that Kathleen personally serviced the loan with contributions from her mother. He averred that at times he personally collected cheques from Mrs. Da Santos for this purpose and took them to Kathleen at the bank. He admitted that he was unable to say that Mr. Da Santos made no contributions towards the loan repayment. Haneff Da Santos testified that his father made no payments towards the mortgage. He too recalled collecting monies from his mother which he took to Kathleen to apply towards the mortgage. He insisted that all payments were made by his sister Kathleen and mother Deltash. He acknowledged that he did not have a good relationship with his father as they had a falling out which led to him leaving the family home around 2006.

[11] In response to questions posed by the court, Mrs. Jack said that the monies for the down payment were withdrawn from a joint account held by her mother and father. She added:

'It was never discussed that the land be purchased for Mr. Da Santos. The entire transaction was in the interests of the family. Not just for one family member. To this day, it is still for the best interests of the family. Myself, my brother Haneff, my mom Deltash and father Cornelius Da Santos were **to be the beneficiaries of that agreement.'**

Her brother Haneff acknowledged this to be the case. That is very compelling testimony and perhaps the most poignant evidence given in the entire case.

[12] It speaks volumes and it confirms that the Da Santos family had entered into a family arrangement whereby Mrs. Jack would secure a loan from the bank to complete the purchase price of the land, on the understanding that the family members would gain an interest in it. Mrs. Da Santos Jack however persisted in her assertions throughout that her father made no contributions to the purchase of the

land. I cannot ignore her clear statement **and her brother's confirmation** regarding the family arrangement **or her acknowledgement that the down payment came from her parents' joint bank account.**

[13] The mortgage was fully repaid without default. Subsequently, the disputed land was further mortgaged to finance surgery for Mr. Da Santos and thereafter to secure an educational loan for Mrs. Da Santos Jack. The loan for medical expenses was secured by Mrs. Deltash Da Santos, Haneff Da Santos and Kathleen Da Santos by mortgage Deed No. 2786 of 1998⁵. The educational loan was registered as mortgage Deed No. 4741 of 2006.⁶ It was negotiated and finalized solely by Kathleen Da Santos when there was still a balance on the previous mortgage. All three loans were obtained from the bank. The second loan was also fully satisfied but not the third. It is subject to a power of sale in the event of breach of the repayment obligations.

[14] Kathleen and Troy Jack submitted that Mr. Da Santos could not access a loan from the bank because he could not satisfy the bank that he had a regular income from which to service the loan. They contended **that his evidence of a 'family arrangement' is a hoax and must be rejected** as there is no evidence that he ever made a payment towards the mortgage. They submitted that there was never any suggestion of the need for a trust, the conveyance does not include any reference to such a trust and the alleged intention to create a trust was not in writing. They argued also that the concept of a **trust was 'wholly irrelevant and unnecessary to the purchase of the land because it provided no needed money to satisfy the bank's interest or having the loan repaid.'** They contended that Mr. Da Santos is not entitled to a share in the land.

[15] Mr. Da Santos conceded in his written submissions that having regard to the totality of the evidence **and his children's acknowledgement that the land was purchased as 'a family affair', his interest in the subject property would be restricted to a half beneficial share and interest absolutely.** He submitted that he and his wife having provided the initial payment of half of the purchase price, they thereby were constituted as joint beneficial purchasers of the land in equal shares.

⁵ Registered on the 2nd day of September, 1998.

⁶ Registered on 24th November, 2006.

[16] Mr. Da Santos submitted correctly that the court is empowered by the Trustees Act⁷ (**'the Act'**) to make an order transferring land from a trustee to a person who is beneficially interested in it, if the trustee refuses to do so and further that the court may also order that costs and other related expenses be paid or raised from the subject land. He cited the case of Green v Green⁸ as an authority which outlined the legal principles on which the court operates in determining whether a claimant owns a beneficial interest in property.

[17] In this regard, he rehearsed Lord Hope's statement that:

'... the question ... is whether a common intention can be inferred from the parties' conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties' words or conduct. It is for the court to determine what inferences can reasonably be drawn, and each case must depend on its own facts. Where the most likely inference from the parties' conduct is that the beneficial interest was not to belong solely to the party in whom the legal interest is vested, the court must determine what in all the circumstances is a fair share.'⁹

[18] Mr. Da Santos has pleaded that a resulting trust was created when the property was conveyed to Mrs. Da Santos Jack. In his written submissions, he resiled somewhat from that position and argued that a constructive trust was thereby created and that in any event nothing turns on the nomenclature. **The learned authors of Halsbury's Laws of England**¹⁰ explained that while resulting and constructive trusts arise by operation of law, their requirements are distinct and their effects may be different. They explained further that a constructive trust:

'is automatically imposed in circumstances where it is unconscionable

⁷ Cap 494 of the Revised Laws of Saint Vincent and the Grenadines, 2009, sections 22 (g), 30 and 32.

⁸ [2002] UKPC 4.

⁹ Ibid. at para. 11 of Green v Green.

¹⁰ 4th Ed. Reissue, 1995 at para. 524.

or contrary to fundamental equitable principles for the owner of particular property **to hold it purely for his own benefit.**¹⁰

[19] The learned authors noted that a resulting trust may either be presumed or automatic and that while a presumed resulting trust **'arises from the application of a rebuttable presumption ... that property purchased wholly or partly (by one person in another person's name is held by the former in trust for the latter); an automatic resulting trust arises where ...'** the owner of property transfers it to another person on trusts but for some reason such transfer fails to dispose wholly of the beneficial ownership in accordance with the trust, whereupon the undisposed part is vested in the transferee on trust for the transferor.

[20] **The Act describes 'trust' and 'trustee'**. Those terms apply equally to implied trusts and:

'... cases where the trustee has a beneficial interest in the trust property and the duties incident to the office of personal representative of a deceased person'.¹¹

There is accordingly no requirement for a trust to be in writing as urged by Mr. and Mrs. Jack. Likewise, a trust may exist even if the trustee is one of the beneficiaries of the trust. I will now examine the facts against the foregoing guiding principles.

[21] Mrs. Jack admitted that **her father made contributions towards the family's welfare**. Haneff said that his father was a hard-working man who cultivated bananas, plantains and peanuts. He testified that his parents, his sister and he contributed to the household expenses including grocery bills, a position affirmed by Kathleen. In this regard, he averred that when his father travelled to Trinidad for surgery, he had the responsibility to tend the plants which his father had under cultivation. He explained that he reaped and sold the produce and applied the income towards utility bills and other expenses such as construction of a shed to store the bananas and gave his parents the balance when they returned from Trinidad.

¹¹ Section 2 of the Act.

[22] It seems to me that the Da Santos family arranged their affairs in a manner which is not unusual among working class and middle income families in Saint Vincent and the Grenadines and indeed throughout the Eastern Caribbean, whereby expenses are defrayed from a common pool of the **parents' earnings with input from adult children**. This joint and collaborative approach in their case also extended to management of resources from the sale of bananas. Although Mrs. Da Santos Jack claimed that her father made none of the mortgage payments, she implied that he might have done **so in concert with her mother without her knowledge. This coincides with Mr. Da Santos' account. I therefore accept Mr. Da Santos' testimony that he brought his earnings to the home for the family's benefit and that a portion was applied towards the mortgage payments.**

[23] There was no suggestion that Mr. Da Santos made no contributions towards the savings held at the bank. In fact, Mrs. Jack acknowledged that her parents maintained a joint account from which the down payment was made. It is trite law that proceeds in a joint account belong to the account holders. I therefore find that Mr. Da Santos was an equal owner of those funds. By acknowledging that her parents **provided the down payment for the land for the family's benefit, Mrs. Jack has effectively conceded that a resulting trust was created to achieve this, when the property was conveyed into her sole name and the mortgage effected.**

[24] I accept **Cornelius Da Santos' and Kathleen Jack's testimony that the down payment for the property was made from a joint account held between Mr. and Mrs. Cornelius Da Santos.** I believe too that the monies which the late Mrs. Da Santos contributed to the monthly repayments were made on behalf of her husband and her since they pooled their resources for the purposes of savings and with respect to payment of household expenses as attested to by the children.

[25] Furthermore, **Kathleen's and Hanef Da Santos' admission that the family had an agreement regarding ownership of the land leads to the ineluctable conclusion that the negotiation of the mortgage, conveyance to Kathleen and repayment of the mortgage sum were approached in this collaborative manner and in pursuance of the family arrangement to acquire the property for their collective benefit.** The narrative provided by the parties supports the concept of a presumptive resulting trust as pleaded by Mr. Da Santos. In light of all of the evidence, I draw the irresistible

inference that the Da Santos family pooled parts of their income not only to meet household expenses but also to directly and indirectly service the first two mortgages. Mr. Da Santos has made out a *prima facie* case of a presumptive resulting trust based on a common intention between him, his wife and Kathleen to jointly share ownership of the property. Mr. and Mrs. Jack have failed to rebut that presumption.

[26] None of the parties claimed that Hanef Da Santos made any contributions towards the purchase or is entitled to a share in the property. Neither did he. I have no difficulty therefore in finding that the purchase of the subject property was a family decision which involved Mr. and Mrs. Cornelius Da Santos and their adult daughter Kathleen Da Santos. In view of the referenced legal principles, I find that Mrs. Da Santos Jack at all times held the property on a presumed resulting trust for her father, her mother¹² and herself. **On her death Deltash Da Santos'** interest passed to her estate.

Issue 2 – To what interest is Mr. Cornelius Da Santos, Kathleen Jack or Troy Jack entitled?

[27] Interestingly, none of the parties exhibited any documentary evidence of the contributions each allegedly made towards the first or second mortgages. No evidence was supplied signifying what difficulties, if any, were experienced in obtaining such records. The court therefore has no hard data from which to assess their individual contributions.

[28] Cornelius Da Santos submitted that the parties disagree sharply on how the first mortgage and second mortgages were repaid. That is true. He claimed that he serviced them in their entirety. There **is no dispute that the third mortgage was solely Kathleen's responsibility.** Mrs. Da Santos Jack, her ex-husband and brother stated that she and her mother had no assistance from her father with respect to the first mortgage. Kathleen claimed too that she alone serviced the second mortgage. Mr. Da Santos contended that a finding on this issue will be crucial because by September 1998 the acquisition of the land would have been complete and the equities would have become certain as a matter of trust law.

¹² Or her mother's estate.

[29] Mr. Da Santos argued further that it would be reasonable for the court to infer that he substantially made the payments in respect of the first two mortgages with minimal assistance from his wife. He submitted that his earnings from his farming and trucking would have made it easy for him to afford the payments towards the first loan. He invited the court to find that his daughter was not required to make any contributions towards the purchase price, did not do so and that the land is held by her in trust for her parents in equal shares. He concluded that the beneficial interest in the property does not belong to Mrs. Da Santos Jack and that it would be inequitable to permit her to retain the entire beneficial interest.

[30] Mr. Da Santos cited the case of *Cupid v Thomas*¹³ and relied on the headnote which states:

'If a party to an informal relationship (is) unable to establish ... a resulting trust by reason of payment of part of the purchase price ... she can only claim an interest ... if she can show that the parties had a common intention that they should share a beneficial interest in it. In the absence of an indication that one party has contributed to the expenses of the household from her earnings and of property so as to enable the court to find such common intention, a claim to resulting trust will fail.'¹³

[31] He also relied on dictum from *Abdoul Hack v Raheiman*¹⁴ in which R H Luckhoo JA opined:

'The common intention necessary to establish a resulting trust is a **question of fact.'**¹⁴

Luckhoo JA also posited that the imputation of a trust may be drawn by inference from the **parties'** evidence and the circumstances surrounding the acquisition of the property even if the evidence is imprecise and not comprehensive. **In such instances, the court may draw an inference that a party's** contributions were substantial. Mr. Da Santos acknowledged that as stated by Baroness Hale in the Privy Council decision in *Abbott v Abbott*¹⁵,

"the parties' whole course of conduct must be taken onto account in

¹³ (1985) 36 W.I.R. 182.

¹⁴ (1977) 27 W.I.R. 109 at 115 d-j.

¹⁵ [2007] UKPC 53.

determining their shared intentions as to its ownership¹⁵.

[32] Mr. Da Santos submitted that the court should find that he and his deceased wife purchased the land and made all of the mortgage repayments in respect of the first mortgage. He argued that consequently he and his wife acquired the land beneficially, that Kathleen Da Santos Jack holds the **equity in redemption in the lands as mortgagor in trust for him and his late wife's estate in equal shares**. Mrs. Da Santos Jack and Troy Jack made no submissions regarding the respective interests of the parties in the subject property.

[33] Mr. Da Santos has quite correctly identified the applicable legal principles which guide the court in determining what interest a party has in property which is the subject of a resulting trust. The court is required to examine the **parties'** conduct over the course of their dealings to ascertain in what proportions they intended to share the beneficial interest. Those intentions may be inferred, imputed or actual.¹⁵ In this regard:

'There are ... two separate questions: first, was it intended that the parties should share the beneficial interest in a property conveyed to one of them only; and second, if it was so intended, in what proportions was it intended that they share the beneficial interest.'¹⁶

[34] This court does not have before it empirical data from which to make an exact calculation of the respective contributions made by Kathleen and her parents towards acquiring the subject property. It must therefore impute or infer from the circumstances what were the Da **Santos'** common intentions. From **Kathleen's and Haneff Da Santos'** accounts **and Mr. Da Santos' belated acquiescence**, they all embarked on the undertaking to purchase the land for the mutual benefit of all family members.

[35] With the exception of Haneff Da Santos who was then a minor and unemployed, they acted on that agreement, by jointly defraying the mortgage debt and sharing all household expenses. Kathleen Da **Santos' monthly income was** stated to be in the range of \$1300.00 and \$1400.00; **Mrs. Da Santos'**

¹⁶ Ibid at para. 4 of the Abbott case per Baroness Hale of Richmond.

was about \$900.00 and Mr. Da Santos' fluctuated based on the harvest cycle. I do not accept his claim that he earned an average of \$3000.00 every fortnight. One would have expected his savings to have been considerably more in such a case and he would have been able to repay the loan without assistance from anyone. There is just insufficient credible foundation on which to make such a finding.

[36] Taking into account that they each had individual needs and obligations which would have reasonably necessitated that they retain part of their income to discharge them, I feel justified in concluding that they each contributed roughly equal aggregated amounts towards the first and second mortgages. Mr. Da Santos was disabled from all accounts for a considerable period after his surgery. He would have had to rely on assistance from the other family members including Kathleen to defray the second loan. I infer from all the circumstances that their respective contributions matched their common intentions to own the property equally as facilitated their contributions to its acquisition. I find therefore that Mrs. Kathleen Da Santos-Jack, Mr. Cornelius Da Santos and the estate of Deltash Da Santos are each entitled to a $\frac{1}{3}$ beneficial interest in the subject property. It is declared that Kathleen Da Santos-Jack holds the equity of redemption in the property for them in equal shares.

[37] Mr. Jack made no contributions towards acquisition of the property and he admitted that his interest is limited to a desire to provide for his daughter's tertiary education. This desire is captured in paragraph 9 (3) of the settlement agreement in which he and Kathleen recorded their undertakings in respect of the ancillary matters arising from their divorce. It describes the subject property as 'the Belle Vue land'. That agreement was registered as Agreement No. 196 of 2010.¹⁷ Paragraph 9 (3) states:

'In order to protect and preserve the legal and beneficial interests in the Belle Vue land the Wife will assign the legal and beneficial interests therein to the Husband who will discharge the mortgage loan thereon and in due course to use the same by way of mortgage to assist Rhianna with her tertiary education. Simultaneously the entire legal and

¹⁷ On 20th January, 2010.

Beneficial interest in the Belle Vue land is to be devised to Rhianna.'

There is no evidence that any deed or other binding agreement has been executed to this effect. None of the other clauses purported to convey or assign any interest in the property to Mr. Jack.

[38] While this agreement imposed an obligation on Mrs. Da Santos Jack to assign her interests in the Belle Vue land to Mr. Jack and ultimately to convey the subject property to him, this has not been done. **The land remains vested in Kathleen Da Santos' name** subject to the mortgage for her education expenses. Mr. and Mrs. Jack will need to consider and determine how to proceed with respect to that provision. It is not necessary for this court to make any pronouncements on it. The relevant orders in this judgment will address ownership of the respective beneficial interests in the subject property.

Issue 3 – To what, if any relief is Mr. Da Santos entitled?

Equity in Redemption

[39] In view of the foregoing, Cornelius Da Santos is entitled to have conveyed to him $\frac{1}{3}$ of the legal and beneficial interest in the subject property. This cannot be accomplished during the currency of the existing mortgage. However, there is nothing precluding Mrs. Jack from conveying to him and the **legal personal representative of Mrs. Da Santos' estate their respective** $\frac{1}{3}$ interest in the Equity of Redemption. Kathleen Da Santos Jack is accordingly required to execute on or before 9th December, 2016, a Deed conveying the Equity of Redemption in the subject property to Cornelius Da Santos, the estate of Deltash Da Santos and herself in equal shares. The Registrar of the high court shall effect the transfer if Mrs. Jack fails to do so. The expenses associated with execution and registration of the said deed are to be shared equally by the beneficiaries and if necessary are to be raised from the subject property.

Injunction

[40] A permanent injunction may be granted if the court considers that it is just and equitable to make **such an order in light of the claimant's** behavior, its consequences and all the circumstances. Mrs. Da Santos Jack resides out of the jurisdiction. Mr. Da Santos claimed an injunction restraining Kathleen and Mr. Jack from doing anything to destroy his interest in the land; or from failing to duly and

faithfully discharge their financial obligations to the bank thereby jeopardizing his rights and interests in the equity of redemption. Mr. Jack was never a party to any of the mortgages with the bank. He undertook separately with Mrs. Jack (as part of their divorce settlement) to service the third mortgage in exchange for an assignment to him of the legal and equitable interests in the subject property. Such assignment was never effected. It was a part of the settlement that in due course Mr. Jack would negotiate a mortgage over the subject land to finance Rhianna's **tertiary education and** subsequently transfer all interests in the property to Rhianna. This has not taken place.

[41] Mr. Da Santos claimed that neither Mrs. Jack nor Mr. Jack has faithfully made the repayments to the education mortgage and that the bank has taken steps to foreclose. No evidence was presented to the court regarding the status of the loan or whether the land has since been sold. The court apprehends that unless she is restrained, Mrs. Jack might take steps to further alienate Mr. Da Santos' **interests and frustrate him in accessing the** related benefits and that damages would not be adequate compensation. In this regard, I am mindful that she admitted making an arrangement with her **ex-husband that was contrary to the family's expressed** intentions to hold the property as a common asset. Her recent admission **that the property was acquired for the family's benefit is also** germane. It is therefore ordered that Kathleen Da Santos Jack, her servants and agents are restrained from further alienating the subject property and from doing or permitting or causing any act, deed or thing to be done whereby the interests of **Cornelius Da Santos' and the estate of Deltash** Da Santos in the property would be eroded or destroyed.

[42] Mr. Jack testified **that it was Mrs. Jack's responsibility to repay that** third loan. That is the import of the mortgage and there is no evidence that Mr. Jack bound himself to the bank or to Mr. Da Santos to repay that loan. No factual or legal basis has been established from which the court can legitimately find that Mr. Jack assumed such an obligation. I therefore make no order restraining Mr. Jack from doing anything to destroy Mr. Da Santos' interest in the subject land or to compel him to service the outstanding mortgage. Similarly, **in the absence of evidence as to Mrs. Jack's capacity to service that** loan, I make no order compelling her to do so.

[43] Mr. Da Santos requested that an order be made preventing the bank from alienating the lands or doing anything to adversely affect his interests. Such an order would destroy the bank's right to foreclose on the loan in the event of default and would be unjust. I therefore make no such order. Mr. Da Santos' request for an absolute and unconditional order compelling the bank to release and re-convey the property to him after Mr. and Mrs. Jack have fully and finally discharged their financial obligations to the bank, can be granted only if the property has not been or is not sold by the bank pursuant to its power of sale. For obvious reasons, the court may not make such an unqualified order. It may however **attach conditions to an appropriately worded order to protect Mr. Da Santos' and the bank's respective interests.**

[44] It is therefore ordered that the bank shall release and convey the subject property to Mr. Cornelius Da Santos, Mrs. Jack and the estate of Deltash Da Santos in the event and on condition that:

- (1) **The subject property has not been or is not subsequently disposed of pursuant to the bank's power of sale under the mortgage deed;**
- (2) the loan secured by Mortgage Deed No. 4741 of 2006 is, has been or is subsequently fully and finally discharged in accordance with the terms of the said mortgage, by Mrs. Jack, her servants and/or agents; and/or Mr. Cornelius Da Santos, his servants and/or agents and/or the legal **personal representative of Deltash Da Santos' estate or his/her servants and/or agents;** and
- (3) All associated bank expenses and costs arising from the mortgage have been satisfactorily discharged.

Rectification of Settlement Agreement

[45] Mr. Da Santos sought rectification of the Settlement Agreement by deleting paragraph 9(3). He pleaded that the provision purported to alienate his interest in the subject lands. Subsequently, He accepted by his written submissions that the paragraph:

'... merely expresses an intention to benefit the daughter ... (and) does not convey any interest to the daughter.'¹⁸

He submitted rightly that although Mrs. Jack has not yet disposed of the property but has arranged to do so she is still regarded as a trustee. I do not consider it necessary to make an order to rectify the

¹⁸ Paragraph 17 of the Claimant's Submissions filed on 13th October, 2016.

settlement agreement or grant a declaration as to the import of its provisions since Mr. and Mrs. Jack both have notice of and are bound by the orders in this judgment in relation to the rights and interests of all parties. Those orders adequately address any concern which an order of rectification would seek to do.

Costs

[46] Mr. Da Santos has proved his case against Mrs. Jack but not against Mr. Jack or the bank. He is entitled to recover costs from Mrs. Jack. Mr. Jack is entitled to recover costs from Mr. Da Santos. Mrs. Jack shall pay prescribed costs to Mr. Da Santos. Mr. Da Santos shall pay prescribed costs to Mr. Jack. No order of costs is made against the bank.

Miscellaneous

[47] As trustee, Mrs. Jack has a duty to account to the beneficiaries regarding management of the trust property. Although Mr. Da Santos did not seek such relief, it is just and equitable that he and Deltash **Da Santos' estate be provided with such particulars. It is accordingly ordered that Kathleen Jack** shall ascertain from the bank the status of the 2006 mortgage and whether the bank has exercised its power of sale over the subject property. She is to notify Mr. Cornelius Da Santos in writing on or before 22nd November, 2016 of her findings and include a comprehensive statement of all pertinent details including the outstanding amounts (if any), maturity date and copies of any demand notes. Mrs. Jack is required to file in the high court on or before 30th November, 2016 a copy of that statement for the attention of the registrar.

ORDER

[48] It is accordingly declared and ordered:

1. Kathleen Da Santos Jack holds the legal and beneficial interests and the equity of redemption in the property described in Deed No. 2815 of 1993 (**'the subject property'**) on a presumptive resulting trust for Mr. Cornelius Da Santos, the estate of the late Deltash Da Santos and herself in equal shares.
2. Kathleen Da Santos Jack is required to ascertain:

- (1) from the bank the status of the 2006 mortgage;
 - (2) whether the bank has exercised its power of sale over the subject property;
 - (3) supply Mr. Cornelius Da Santos on or before 22nd November 2016, with a comprehensive written statement of her findings and all pertinent details including the outstanding amounts (if any), maturity date and copies of any demand notes; and
 - (4) file in the high court on or before 30th November, 2016 a copy of that statement for the attention of the registrar.
3. In the event that the bank has not exercised its power of sale over the subject property or **otherwise alienated the mortgagor's interest:**
- (1) Kathleen Da Santos Jack shall on or before 9th December, 2016, execute a Deed conveying the Equity of Redemption in the subject property to Cornelius Da Santos, the estate of Deltash Da Santos and herself in equal shares; and
 - (2) Cornelius Da Santos, Kathleen Jack **and Deltash Da Santos' estate** are to equally share the expenses associated with preparing and registering the said deed, or alternatively they may be raised from the property.
 - (3) Kathleen Da Santos Jack, her servants and agents are restrained from further alienating the subject property and from doing or permitting or causing any act, deed or thing to be **done whereby Cornelius Da Santos' and the estate of Deltash Da Santos' interests in the subject property could be eroded or destroyed.**
4. The bank shall release and convey the subject property to Mr. Cornelius Da Santos, Mrs. Jack and the estate of Deltash Da Santos in the event and on condition that:

(1) The subject property has not been or is not subsequently disposed of pursuant to the **bank's power of sale under the mortgage deed**¹⁹;

(2) the loan secured by Mortgage Deed No. 4741 of 2006 is, has been or is subsequently fully and finally discharged in accordance with the terms of the said mortgage, by Mrs. Jack, her servants and/or agents and/or Mr. Cornelius Da Santos, his servants and/or agents and/or the legal personal representative of Deltash Da **Santos' estate or his/her servants and/or agents**; and

(3) All associated bank expenses and costs arising from the mortgage have been satisfactorily discharged;

such conveyance to be effected as soon as reasonably practicable after full and final satisfaction of the mortgage obligations **by the parties and/or Deltash Da Santos' estate**, its servants or agents.

5. Mrs. Jack shall pay prescribed costs of \$7500.00 to Mr. Da Santos pursuant to CPR 65.5.
6. Mr. Da Santos shall pay prescribed costs of \$7500.00 to Mr. Jack, pursuant to CPR 65.5.
7. No order of costs is made against the bank.

[49] I am grateful to counsel for their submissions.

.....
Esco L. Henry
HIGH COURT JUDGE

¹⁹ No. 4741 of 2006.