

- (3) A declaration that the Defendant holds the said interest in the property in trust for the Claimant absolutely or, alternatively for the Claimant and the estate of Owen Phinn in the manner herein before stipulated.
- (4) That the Defendant shall execute a transfer to pass the interest absolutely to the Claimant, or, alternatively to the Claimant and personal representative of the estate of Owen Phinn, within seven (7) days of the date hereof and to deliver up the original duplicate Certificate of Title to the Claimant or her Attorney-at-Law to facilitate the transfer thereof.
- (5) That the Defendant and/or his agents, deliver up possession of the property forthwith to the Claimant and is to refrain from interfering with the Claimant's quiet and exclusive possession and occupation of the property.
- (6) That in the event that the Defendant refuses, neglects and/or fails to sign the requisite transfer or any other documents necessary to effect transfer of the property as ordered herein, then the Registrar of the Supreme Court is hereby empowered and authorized to sign the said Transfer and/or such other documents for the Defendant herein.
- (7) Costs to the Claimant, to be taxed if not agreed.
- (8) Such other orders as this Honourable Court deems fit.

Background

- [2] Mrs. Afflick-Phinn is the widow of the late Mr. Owen Phinn (the deceased). He died intestate on August 07, 2012. They were married on December 24, 2008. Their union produced a daughter who was born on the 18th day of September 2009. The Defendant Mr. Dwayne Phinn is the son of the deceased from a previous relationship. He is therefore Mrs. Afflick-Phinn's step-son.
- [3] Both the deceased and Mrs. Afflick-Phinn worked in the British Virgin Islands (the BVI). The deceased did so from 1999. He worked in the construction industry.

Mrs. Afflick-Phinn commenced working there in 2003. She was employed as a domestic helper.

- [4]** In early 2007, a plot of land located at Hill Side Yallahs in the parish of St. Thomas registered at Volume 1262 Folio 174 of the Register Book of Titles (the property) was purchased for \$700,000.00 using funds contributed by the deceased and Mrs. Afflick-Phinn. It was believed by them that they were the joint owners of this property.
- [5]** Due to their absence from Jamaica, all the financial and other arrangements concerning the purchase of the property were entrusted by the deceased to his sister Ms. Kerry-Ann Phinn.
- [6]** In July 2007 the deceased and Mrs. Afflick-Phinn took possession of the property and commenced construction of a house from their joint resources. This house was their intended family home. They completed a half side of the house by July of 2008 and this was where they stayed whenever they visited Jamaica.
- [7]** As it turned out, the duplicate certificate of title (the title) was issued in the names of the deceased and Mr. Phinn who was a minor at that time living in Antigua with his mother. A caveat was also lodged against the property to protect his interests. Neither the deceased nor Mrs. Afflick-Phinn was aware of this until sometime later.
- [8]** This discovery was made in December 2007 by Mrs. Afflick-Phinn when she received the title. She read the contents of the document to the deceased. The evidence is that he was unable to read. They were surprised to learn that Mr. Phinn held the property with the deceased as joint tenants.
- [9]** According to both Mrs. Afflick-Phinn and the deceased this happened because of the deceased's illiteracy and it was he who had returned to Jamaica to meet up with his sister concerning the sale and the signing of the documents.

- [10] When this fact became known, they commenced legal proceedings in this Court on March 24, 2009 in Claim Number 2009 HCV 01399 to remove Mr. Phinn's name from the title and to substitute Mrs. Afflick-Phinn as the joint owner.
- [11] However, the deceased passed away before the claim progressed. By way of comment, for reasons not known, the provisions of Rule 21.8 of the Civil Procedure Rules 2002 (as amended) (the CPR) were not invoked to continue those proceedings after the deceased's death. The Court is therefore concerned with the current claim that has been instituted by Mrs. Afflick-Phinn against Mr. Phinn who is now the sole legal owner of the property, given the principles of survivorship.
- [12] Since the deceased's death, Mrs. Afflick-Phinn and their daughter have been excluded from the property. The evidence is that the house has been rented.

The Parties in the Claim

- [13] I believe it is important and relevant, given the outcome of this matter, to highlight at this time some details as to how the Defendant has treated with this claim.
- [14] Mr. Phinn is no longer a minor. He was an adult when these proceedings commenced. The records of the Court show that he was personally served in Antigua with the Fixed Date Claim Form (FDCF) and supporting documents on April 03, 2014 by Mr. Rowan Knight, a bailiff employed to the High Court of Justice in Antigua. (See the Affidavit of Service of Rowan Knight sworn to on May 01, 2014 and filed July 07, 2014)
- [15] Before he was personally served, Mrs. Afflick-Phinn had also obtained an order from this Court on July 13, 2013, dispensing with personal service of the FDCF and supporting documents, and was permitted to effect service on Mr. Phinn's paternal grand-mother Mrs. Vivene Phinn.
- [16] The Court is satisfied that Mr. Phinn has been properly served and is aware of these proceedings for the following reasons:

i) On September 23, 2013 Mr. Orville Fray personally served Mrs. Vivene Phinn with copies of all the documents in the claim, which she accepted, having admitted that she was Vivene Phinn. (See Affidavit of Service of Orville Fray sworn to on October 22, 2013 and filed on November 15, 2013)

- ii) On July 11, 2014 when the matter came up for first hearing before King J it is noted in the Minute of Order that Ms. Kimberly Bowen (an attorney-at-law) who was present representing Mr. Phinn although she was not properly on the record.
- iii) On September 22, 2014 the records of the court show that Mrs. Vivene Phinn was present representing Mr. Phinn.
- iv) On April 21, 2015 when the matter came up again for first hearing before Shelly-Williams J (Ag) (as she then was) Mr. Phinn was present.
- v) On June 11, 2015 when the matter came up for hearing neither Mr. Phinn nor his grand-mother was present. The Court contacted Mrs. Vivene Phinn via telephone and was told that an attorney-at-law had been contacted to represent Mr. Phinn in the proceedings. However, no such person appeared on that day and there were no document(s) on file which tended to show that there was an attorney-at-law on record as representing him.
- vi) The records also indicate that each time the matter came up for hearing and Mr. Phinn was absent, notices of the adjourned hearing were served on him, as well as, Mrs. Vivene Phinn.

[17] The point of rehearsing all of this history is to indicate that the Defendant has neither filed an acknowledgement of service nor any pleadings in this matter. The claim is therefore undefended.

[18] As a consequence, when the matter came up for hearing before me on November 20, 2015, I applied the provisions of Rule 27.2 (8) of the CPR and treated the first hearing of the matter as a trial. That rule states:

The court may, however, treat the first hearing (of the Fixed Date Claim Form) as the trial of the claim if it is not defended or the court considers that the claim can be dealt with summarily.

[19] I made this decision because Mr. Phinn was served personally with the claim from April 03, 2013. The matter has come up several times for first hearing since then. At one such hearing Mr. Phinn was present. On November 20, 2015 when the matter again came up for hearing before me (it had done so previously on June 11 and July 30, 2015) Mr. Phinn would have had over two and a half (2 ½) years since he was served to defend the claim. He has not done so.

[20] It has not escaped my attention that Mrs. Afflick-Phinn must have been put to considerable expense as some of those notices of adjourned hearing were personally served on Mr. Phinn in Antigua, even though he had made no attempt to properly defend the claim.

[21] As a result, on November 20, 2015 I formed the view that the time had come to address the matter. I found the undue delay on the part of the Defendant, in light of the overriding objectives of the CPR to deal with cases before the court expeditiously and justly, simply unacceptable and untenable.

[22] The Administrator General has been served as an interested party in this claim, no doubt, to protect the interests of the minor child of the deceased and Mrs. Afflick-Phinn depending on the outcome of the proceedings.

The Evidence

[23] Much of the evidence given by Mrs. Afflick-Phinn can be found in paragraphs 2 to 12 above and need not be repeated.

- [24] She also relied on the affidavits that were filed by both her late husband and herself in Claim number 2009 HCV 01399. Her affidavit in that matter contains evidence which is similar to the affidavit she filed in support of the FDCF in this matter.
- [25] In the deceased's affidavit sworn to December 16, 2008 and filed on March 24, 2009 he stated that at the time that the property was purchased his son Mr. Phinn was 14 years old.
- [26] He and Mrs. Afflick-Phinn were both working and residing in the BVI at that time. They had pooled their resources and sent money from their joint savings to his sister Ms. Kerry-Ann Phinn with instructions to purchase the property in dispute on their behalf.
- [27] He subsequently came to Jamaica and was taken by his sister to an attorney's office to sign the documents for the purchase and transfer of the property. He averred that he was illiterate and his sister took the documents from the attorney who was leaving for court and gave them to him to sign, which he did.
- [28] He did not speak to the attorney. The documents were not read to him. He was unaware that he and Mr Phinn would hold the property as joint tenants. This was contrary to his instructions and intention, as the property was rightly owned by Mrs. Afflick-Phinn and him.

Submissions

- [29] Learned counsel Mrs. Anderson-Byfield provided the court with both written and oral submissions for which the Court is thankful.
- [30] She has submitted that the legal principles which will determine the outcome in this matter fall within the equitable realm of constructive or resulting trusts.
- [31] Mrs. Anderson-Byfield has put forward that for the Court to find that a constructive trust has arisen in Mrs. Afflick-Phinn's favour she would need to

demonstrate that she acted to her detriment by placing reliance on promises or representations made to her at the time of and/or subsequent to the acquisition of the property; and that it would be inequitable for Mr. Phinn to claim sole beneficial ownership in the property.

[32] She is asking the Court to accept her evidence that she made monetary contributions to both the acquisition of the property and construction of the house. This she did because it was agreed between the deceased and herself that they would be the legal and beneficial owners of the property.

[33] She further advanced that although she has not produced any receipts or documents to substantiate her financial contributions, the deceased's assertions made prior to his death, clearly support her position. The Court, she contends, has more than sufficient evidence to find that Mr. Phinn holds the entire beneficial interest in the property upon trust for her.

[34] In the alternative, learned counsel argues that if the Court is not convinced that Mrs. Afflick-Phinn contributed to the purchase of the property and construction of the house, then the Court should carefully consider the following circumstances of the case:

- (a) Mr. Phinn was a minor at the time the property was bought and the house constructed. Therefore the inescapable inference is that it was the deceased who undertook the full payment of the purchase price and all the costs associated with the construction of the house;
- (b) The intention of the deceased, which was clearly articulated in his sworn affidavit before his death, was that at the time of its acquisition, the property was to have been registered in his name and that of Mrs. Afflick-Phinn's. He also stated that the addition of Mr. Phinn's name on the title was a mistake.

(c) The deceased initiated legal proceedings to sever the joint tenancy.

[35] Mrs. Byfield-Anderson further maintains that given these circumstances it is open to the Court, in the alternative, to find that Mr. Phinn holds his legal interest in the property upon a resulting trust in favour of the deceased during his lifetime and upon his death, for his estate.

[36] As a result, the estate of the deceased, in which the parties, as well as, the minor child of the union would be beneficiaries on intestacy, would be entitled to the absolute interest in the property. To this end, the laws of intestacy would bring about equity and justice for all.

[37] She relies on the authorities of **Muschinski v Dodd** 160 C.L.R. 583, **Grace McCalla v Eric McCalla and Others** 2005HCV00233, **Eves v Eves** [1975] 1 W.L.R. 1338, **Baumgartner v Baumgartner** 164 C.L.R. 137 and **Calverley v Green** 155 C.L.R. 242.

The Issues

[38] The critical questions to be resolved are:

- (1) Who holds the beneficial interest in the property?
- (2) In what quantum?
- (3) And on what legal principle/basis?

The Law

[39] The discussion on the law can be commenced with what I regard as a helpful quotation from the **McCalla Case** (supra). Sykes J who delivered the judgment of the Court, at paragraph 60 said:

“A claim to an equitable interest in property by any person other than the legal title holder ... inevitably involves the proposition that the legal title holder is holding all or some part of the property as trustee for the claimant.”

Constructive trusts

[40] This type of trust arises from the interpretation of the facts before the court. Traditionally a constructive trust would arise in cases where property was acquired by fraud, improper means and in breach of principles of equity. It is also usual to find in cases where a constructive trust has been proved that the successful party would have established by evidence that he/she acted to his/her detriment in reliance on a promise or representation made by the holder of the property.

[41] However, I agree with Sykes J in **McCalla** when he said at paragraph 73 that:

“The difficulty with the constructive trust is that it defies a comprehensive definition that adequately captures all the circumstances in which it is applied...”

[42] For example in the case of **Giumelli v. Guimelli** 196 C.L.R. 101, a decision of the High Court of Australia, the constructive trust was defined at page 118 as:

“A remedial response to the claim to equitable intervention made out by the plaintiff. It obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties.”

[43] In another case from the High Court of Justice of Australia Deane J in **Muschinski v Dodd** (supra) describes the constructive trust in this manner:

“In its basic form the constructive trust was imposed as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights. This was consistent with the traditional concern of equity with substance rather than form. In time, the relationships in which the trust was recognised and enforced to protect actual or presumed intention became standardised and were accepted into conveyance practice... Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.” (Emphasis supplied)

Resulting Trusts

[44] In **Calverley v Green** 155 CLR 242 the Court stated the equitable rules that created a resulting trust. Gibbs C.J. in **Muschinski** restated them in this way:

“Where, on a purchase, a property is conveyed to two persons, whether as joint tenants or as tenants in common, and one of those persons has provided the whole of the purchase money, the property is presumed to be held in trust for that person, to whom I shall, for convenience, refer as “the real purchaser.” However, a resulting trust will not arise if the relationship between the real purchaser and the other transferee is such as to raise a presumption that the transfer was intended as an advancement, or in other words a presumption that the transferee who had not contributed any of the purchase money was intended to take a beneficial interest...

However, the presumption that there is a resulting trust may be rebutted by evidence that in fact the real purchaser intended that the other transferee should take a beneficial interest. Where both transferees have contributed the purchase money, the intentions of both are material, but where only one has provided the purchase money it is his or her intention alone that has to be ascertained. The evidence admissible to establish the intention of the real purchaser will comprise “the acts and declarations of the parties before or at the time of the purchase ... or so immediately thereafter as to constitute a part of the transaction”.

[45] Therefore, where there are a number of purchasers of any disputed property the law assumes that, in the absence of evidence to the contrary, the multiple purchasers hold the beneficial interest in proportion to each purchaser's contribution to the purchase price. This is the case whether or not the purchasers' names appear on the title.

[46] The upshot of this principle is that if B puts up the whole purchase price but the title is in the name of another, in the absence of an explanation, equity would say that B was the 100% beneficial owner and would regard the legal title holder as a trustee for B.

[47] This passage reinforces the notion that those who do not contribute to the acquisition of property, in general, have no equitable/beneficial interest in the property. Therefore when one wishes to determine if a resulting trust exists, it is the intention of the settlor that is of significance.

[48] In **Pettitt v Pettitt** [1969] 2 W.L.R. 966 Lord Upjohn stated:

“It is far more likely [not inevitably] to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the contrary if the property be conveyed in the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.”

[49] The authority of **Pettitt v Pettitt** also establishes that, generally, where one or more of the nominees is a child or children of the purchaser, this operates to rebut the resulting trust as a circumstance of evidence. This principle is equally applicable in circumstances where a wife is a nominee. This is what is normally referred to as a presumption of advancement. However, it is trite law that like with any presumption that of advancement can also be rebutted by evidence.

[50] However Lord Diplock in **Gissing v Gissing** [1970] 3 W.L.R 255 effectively eroded the boundaries that previously existed between resulting, implied and constructive trusts when he said:

“A resulting, implied, or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired, and he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”

[51] Before **Gissing** it was unheard of that a resulting trust could arise because of a person acting to his/her detriment. Lord Diplock has effectively equated a resulting trust to a constructive trust.

[52] However, I found of great assistance the words of Lord Bridge of Harwick in **Lloyds Bank plc v Rosset** 1991 1 AC 107 at pages 132 -133 as to my mind they have brought some clarity to this area of the law. He said that if there was to

be some finding of an actual “agreement, arrangement or understanding” between the parties it must:

“...be based on evidence of expressed discussions between the partners, however imperfectly remembered and however imprecise their terms may have been.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as to the conduct relied to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.”

[53] Finally Baroness Hale in **Stark v Dowden** [2007] 2 AC 432 also brought further illumination to this aspect of the law. The facts of that case concerned “the effect of the conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home.” As can be seen, those facts are clearly distinguishable from the case at bar. However, it is the approach that the Court took to resolve the issues in that matter that I find to be most enlightening.

[54] At paragraphs 58 and 59 of the judgment, she stated:

“The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prima facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated...a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

The question is how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties’ financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have a contrary intention? Or is that the contrary can be proved by looking at all

the relevant circumstances in order to discern the parties' common intention?"

[55] She answers the questions posed in this way at paragraph 60:

"...The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[56] I have embarked upon this somewhat lengthy discussion of this area of law despite the observations of some eminent jurists that to do so may seem to be "a distinctly academic exercise" Per Lord Hope of Craighead in **Stack** at paragraph 3. I have done so because of the parties who are involved, the unusual features of this case and the fact that Mrs. Afflick-Phinn has put her case on alternative bases. As Lord Hope said in **Stack**:

"Traditionally, English law (and I would add Jamaican law as well) has always distinguished between legal ownership in land and its beneficial ownership. The trusts under which the land is held will determine the extent of each party's beneficial ownership." (Emphasis supplied)

And this, after all, is the critical issue that the Court is bound to resolve.

Analysis and Disposal

[57] The features of this claim are somewhat remarkable. It was far more difficult to resolve than appeared initially. Mr. Phinn now holds the legal title for the disputed property as he is the surviving joint tenant. His deceased father was the other. Mrs. Afflick-Phinn is the widow of the deceased and his step-mother.

[58] Mrs. Afflick-Phinn is seeking one of two remedies in equity. She is asking the court to find that she is the holder of the entire beneficial interest in the property by virtue of a constructive trust; or in the alternative, that the Defendant holds the property on a resulting trust in favour of the deceased during his lifetime and consequent upon his death, for his estate.

[59] On the evidence, which is unchallenged since the claim is not defended, the following elements emerge:

- i) Although her name does not appear on the title, Mrs. Afflick-Phinn made financial contributions to the acquisition of the property and the construction of the house;
- ii) She did so with the deceased, her late husband, from their combined resources and savings;
- iii) At the time that the property was purchased and the house constructed the Defendant was a minor and a student. He resided with his mother in Antigua and therefore could not have made any financial or other contributions to either its acquisition or the subsequent construction of the house.
- iv) When it was discovered that Mr. Phinn was registered as a joint tenant on the title with the deceased, they (the deceased and Mrs. Afflick-Phinn) commenced legal proceedings to have his name removed and that of Mrs. Afflick-Phinn's substituted. I construe this as an act to sever the joint tenancy that existed between the deceased and his son;
- v) Both Mrs. Afflick-Phinn and the deceased, who was the other joint tenant and who could well be regarded, given the title, as the 'real purchaser', expressly stated that the property rightly belonged to them and that the house was constructed from significant amounts of money contributed by both of them. They also stated that it was their shared intention that they were to be the joint owners of the property.

[60] Learned Counsel for Mrs. Afflick-Phinn has submitted that if the Court should find that she did not advance any of the purchase money for the property, then it would be open to find that the deceased is the 100% beneficial owner of the property and Mr. Phinn, the legal title holder is the trustee for him. That beneficial interest, upon the deceased's death and intestacy, would now pass to his estate.

- [61] She makes this submission on the basis that Mr. Phinn was a minor at the time and was not in a position to make any contributions (direct or otherwise) to the acquisition of the property and the construction of the house. Therefore the presumption would be that it was the deceased who paid in full for the property and the construction of the house. This would make him the “real purchaser”. Additionally, his act of instituting legal proceedings against Mr. Phinn could be construed as rebutting any presumption of an advancement/gift to him.
- [62] These submissions resonate from the authorities of **Pettitt, Calverley** and **Muschinski**. If a resulting trust is found to exist, she continued, this would allow for the distribution of the property among the deceased beneficiaries which would include Mrs. Afflick-Phinn and his children in accordance with the laws of intestacy. I suspect that if this course is embarked upon, it may well be felt that this is what ‘justice and good conscience’ require.
- [63] However, to borrow the words of Baroness Hale in **Stark** what does a “search of the circumstances of this case reveal?” Would the outcome above be in keeping with the evidence presented in this case?
- [64] I find that it would not.
- [65] Firstly, I am convinced that Mrs. Afflick-Phinn made direct contributions to both the purchase of the property and the building of the house. This must have been done by her as a result of some expressed or implied arrangement that she would acquire an interest in the property. This conduct would, as Lord Bridge said in **Lloyds Bank**, “readily justify the inference necessary to the creation of a constructive trust.”
- [66] Secondly, following the guidelines provided by Baroness Hale in **Stark**, what was the “shared intentions” of Mrs. Afflick-Phinn and the deceased, “actual, inferred or imputed with respect to the property in light of their whole conduct to it?” Happily, in this case, their shared intentions do not have to be inferred or

imputed. Neither are the terms of the agreement or arrangement between them “imprecise” nor “imperfectly remembered.”

[67] The unchallenged evidence of the deceased and Mrs. Afflick-Phinn, which I accept, expressly states that each had a common intention to share equally in the legal and beneficial interest in the property.

[68] I say so because it is the evidence that Mrs. Afflick-Phinn contributed money to the acquisition of the property and the construction of the house. She is supported by the deceased on this issue. They pooled their resources. The money to purchase the property and construct the house came from their joint savings. The deceased also said that the property was to be jointly owned by them and the house was to be their matrimonial home. In fact during his lifetime the house was utilised by them both as such.

[69] The deceased commenced legal proceedings to sever the joint tenancy that existed between himself and Mr. Phinn, his minor son at the time, before he died. He asserted that his son’s name was placed on the title contrary to his instructions and gave evidence of the surrounding events which caused what he tactfully termed “a mistake”.

[70] In those proceedings he embarked upon taking steps to have Mrs. Afflick-Phinn’s name substituted on the title as the joint owner in place of his son. I draw the inescapable inference that this was how strongly he felt about Mrs. Afflick-Phinn getting her fair share of the property that they both had worked together to acquire and to give effect to the expressed agreement or arrangement that they had in relation to its ownership. This aspect of the evidence, I find, rebuts the presumption of an advancement/gift to the Defendant by the deceased, his father.

[71] I am therefore convinced that the time of the acquisition of the property, it was their shared intention that they would hold the legal and beneficial interest in the property.

- [72] What is also obvious from the evidence is that it was never the deceased's intention that his son should have a legal or beneficial interest in this property. This is clearly apparent from both the contents of the FDCF and the deceased's supporting affidavit in the earlier claim, that the property was intended to have been held by him and Mrs. Afflick-Phinn as joint tenants.
- [73] The Court is therefore compelled to honour that position, no matter how difficult it may seem. In the circumstances of this case I am of the view that to allow the Defendant to retain the beneficial ownership of the property would be contrary to equitable principles.
- [74] Therefore taking into account the evidence, submissions and law, I find that the Defendant holds the property as a trustee upon a constructive trust for the Claimant and she is beneficially entitled to the property absolutely.
- [75] In conclusion, I make the following comments. Applying my common sense and experience to the aspect of the evidence which surrounds the signing of the documents for the purchase and transfer of the property; and taking into account the Jamaican cultural norms and reality, I do not find it strange that the deceased would have entrusted his business in regard to the purchase of the property to his sister while he was residing and working abroad.
- [76] It is not odd to me that he was illiterate and would not have appreciated the ramifications of signing the documents he did without the benefit of independent legal advice. He was dealing with, after all, a trusted sibling. There is no evidence that anything happened between them that should have put him on his guard.
- [77] It seems to me, having accepted the evidence of the deceased, that his illiteracy was taken advantage of and used as a tool to perhaps safeguard the future inheritance of his child. I say so because at the time the property was purchased the deceased and Mrs. Afflick-Phinn had not yet been joined in holy matrimony and their union had not yet produced a child. It could well be that the situation would have been otherwise if this were so.

[78] I have no doubts whatsoever that the deceased's sister, by doing what she did at that time, would have felt that she was acting in the best interest of her nephew, Mr. Phinn. However, this decision ought properly to have been taken by his father and certainly not exercised at the expense of another who expended significant sums of money to acquire the property and construct a house on it.

[79] I also wish to apologise to Mrs. Afflick-Phinn for the delay in the delivery of the judgment which was due to a number of factors including illness. The delay is sincerely regretted.

Orders

[80] It is declared that the Claimant is solely entitled to the beneficial interest in all that parcel of land part of Hill Side, Yallas in the parish of St. Thomas registered at Volume 1262 Folio 174 of the Register Book of Titles.

[81] It is declared that the Defendant holds the property upon a constructive trust for the Claimant absolutely.

[82] The Defendant shall execute a transfer to pass the legal interest to the Claimant within fourteen (14) days of the date hereof and shall deliver the duplicate certificate of title to the Claimant or her attorney-at-law to facilitate the transfer.

[83] The Defendant and/or his agents shall deliver up possession of the property forthwith to the Claimant and shall refrain from interfering with the Claimant's possession and occupation of the property.

[84] The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the transfer of the property should the Defendant be unwilling or unable to do so within fourteen (14) days of being notified in writing.

[85] Costs to the Claimant, to be taxed if not agreed.

[86] The Claimant's attorney-at-law is to prepare, file and serve the orders made.