



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 03959

BETWEEN	HAROLD BONFIELD		CLAIMANT
AND	LESTER EDWARDS	1 st	DEFENDANT
AND	ROY EDWARDS (Both Executors of the estate of Haman Lee Smith)	2 nd	DEFENDANT
AND	MARVIA SMITH	3 rd	DEFENDANT

Charmaine Patterson of Charmaine Patterson & Associates for the Claimant.

Dorothy Lightbourne Q.C. and Ramon Foster of Lightbourne & Hamilton for the Defendants.

Real Property – Tenants in Common – Legal and Beneficial Interest – Common Intention – Trusts

Heard 4th and 15th April 2016 and 16th September 2016

IN CHAMBERS

CORAM: DUNBAR GREEN J.

Background

[1] The claimant, Mr. Harold Bonfield, is registered on the Certificate of Title for property situated at 6 Windsor Road, Kingston 2 in the parish of Kingston, as

tenant in common with his deceased uncle, Mr. Haman Lee Smith. They are also both registered as joint mortgagors with the Victoria Mutual Building Society (VMBS) in relation to the property.

[2] By Fixed Date Claim Form filed 5th July 2013 he seeks the following orders:

- i. a declaration as to the respective interest of the claimant and the 3rd defendant in the property known as No. 6 Windsor Road, Kingston 2 in the parish of Saint Andrew, and being all the land comprised in the Certificate of Title registered at Volume 269 Folio 63 in the Register Book of Titles;
- ii. that the 3rd named defendant apply for and obtain a grant of Letter of Administration in the estate of the said Haman Lee Smith to enable the notation of death in the transfer of the property;
- iii. if the 3rd defendant fails to apply and obtain the Grant of Administration within one (1) year of the court order the claimant is permitted to apply to have the Administrator of Jamaica appointed Administrator to deal with the estate of the said Haman Lee Smith;
- iv. that the property be valued and shared in accordance with the order of this honourable court;
- v. that the 3rd defendant be given the option to purchase the interest of the claimant in the said property, within sixty (60) days of the court order;
- vi. that the party intending to purchase the interest of the other be required to make an offer to the other party within twenty one (21) days of receipt of the valuation report;
- vii. that the parties are to agree to a valuator to satisfy paragraph (v) above. If the parties fail to agree on a valuator within fourteen (14) days of being requested to do so then the Registrar of the Supreme Court is empowered to select a valuator from the list below:

- a) C.D. Alexander Realty Ltd.
 - b) D.C. Tavares & Finson Realty Ltd.
 - c) Allison Pitter & Co.;
- viii. that if the parties cannot agree to the purchase of the other's share then the property is to be sold on the open market, and the proceeds divided between the parties in accordance with the court's order;
- ix. the Registrar of the Supreme Court is authorised to sign all and any documents necessary herein, if either party refuses or is unable to sign; and
- x. the claimant's attorney-at-law is to have carriage of sale.

[3] The first and second defendants, executors of the estate of Haman Lee Smith, and the third defendant, his widow, are opposed to the claim on the basis that the deceased had no intention of establishing a true tenancy in common with the claimant, and had only done so as a convenient vehicle through which he could obtain a mortgage. This position was committed to writing by the claimant who swore an affidavit ("1999 affidavit"). In it he stated that he had been asked by his uncle to sign as a joint purchaser of the property because his uncle would not have otherwise qualified for a mortgage due to his age. The claimant also stated that he had made no financial contribution to the purchase price and had no obligation to make mortgage payments.

[4] The defendants have asked the court to make the following orders:

- i. a declaration that the claimant has no beneficial interest in the property;
- ii. a declaration that the deceased was entitled to the sole legal and beneficial interest in the property;

- iii. a declaration that the claimant holds his legal interest in the property on trust for the deceased; and
- iv. that the Register of Titles be altered to reflect that the deceased was the sole legal and beneficial owner of the property.

Agreed Documents

[5] Several documents were exhibited including the death certificate of Haman Lee Smith; his will; grant of probate; marriage certificate of Marvia and Haman Lee Smith; receipts in relation to the payment of mortgage, maintenance and property tax; and an affidavit and letter signed by the claimant.

The Evidence

Mr. Bonfield (Claimant)

- [6] The claimant relied on affidavits filed on 5th July 2013, 19th March 2014, 23rd October 2014 and 8th December 2014. He was also cross-examined.
- [7] His evidence was that he would assist his uncle, Haman Lee Smith, whenever he had 'big jobs'. This was the case in mid-1990 when his uncle got a job to paint the Terra Nova Hotel. On that occasion, according to the claimant, his uncle withheld some of his pay and told him that he would save it to do something "big" for him. This turned out to be the purchase of a property on Windsor Road, which his uncle told him would be for the benefit of both of them.
- [8] He said that the property was purchased in 1999 aided by a mortgage of Seven Hundred Thousand (\$700,000.00) which was taken out in both their names at VMBS.

- [9] The claimant stated that he stayed at the house whenever he was in Kingston but did not live there. Elsewhere in his evidence he also said that after the property had been purchased and refurbished he lived there. He said, prior to that, he and his uncle had occupied rented premises together at Ellis Avenue in Kingston. However, in cross-examination, he said he had lived in St. Thomas all his life.
- [10] In cross-examination he said that most times he would be paid \$2500 per week but he did not know how much of the pay was taken by his uncle. Sometimes he received \$1500 and other times \$2000. His uncle kept some of his pay as he thought fit.
- [11] The claimant was shown the document referred to as the "1999 Affidavit" (exhibit MS-2) which states, in part:

AFFIDAVIT OF HAROLD BONFIELD

...2. That I was asked by HAMAN LEE SMITH to sign as a joint purchaser in land situate at 6 Windsor Road, Kingston 2 in the parish of Kingston.

3. That this signing is to facilitate a mortgage from Victoria Mutual Building Society for which HAMAN LEE SMITH age if he applies alone would disqualify him.

4. That I have no financial contribution in the purchase of number 6 Windsor Road and further that the mortgage will be paid by HAMAN LEE SMITH.

5. In the premises I pray that I be relieved of any financial obligation to Victoria Mutual Building Society and further that I have no beneficial interest in the said property known as 6 Windsor Road Kingston 2...

- [12] The jurat carries the signature of someone purporting to be a Justice of the Peace and a signature attributed to Harold Bonfield. It is dated 20th August 1999.

There is no name for the JP, no seal or the place or parish at which the "affidavit" was sworn.

[13] The document is endorsed in two places, as follows:

- i. "Original seen 10/1/2006", followed by a signature; and
- ii. "Mr. Bonfied (sic) visited the office explaining that this Affidavit is not valid as the property is his and this was signed under duress", followed by a signature and the date 2008/07/21.

[14] The claimant agreed that he had signed the "1999 affidavit" but denied that this was done in 1999. Instead, he said, it was signed at the office of Mr. Chully Williams in June or July 2008 when he had gone there with the third defendant to identify her as the widow of Mr. Haman Lee Smith.

[15] The claimant said Mr. Williams told him to sign the document and he did so without reading it, asking any questions or having any discussion. He also said that when he signed, "the document already had on a signature where it says, 'Justice of the Peace'...and to how mi frighten mi just sign."

[16] He told the Court further that after he left Mr. Williams' office he told the third defendant, "the document I sign I feel something wrong." He then returned to Mr. Williams' office and Mr. Williams gave him the document to read and he read it. He said Mr. Williams also gave him a copy which he took to VMBS the following day. Elsewhere in his evidence, the claimant said that on his return to Mr. Chully Williams' office it was Mr. Williams who read the document to him and told him what it said.

[17] He denied writing a letter to VMBS, but when confronted with the exhibited letter dated 21st July 2008, the claimant identified the signature as his but said that somebody had written the letter on his behalf. However, he said he had asked no-one to write that letter and did not know who wrote it. He said it was signed at

VMBS and had been given to him by Ms. Patricia Fisher. This was at the time he delivered the "1999 affidavit" which he had signed at Mr. Williams' office.

[18] The letter states, in part:

This is to advise that the Affidavit of Harold Bonfield dated 20th day of August 1999 was done under duress.

I also wish to inform the Society that the items listed therein were not made by me and in particular item no. 5. It was never my intention to be relieved of any financial obligation from the Victoria Mutual Building Society and will always be interested in the said property known as 6 Windsor Road, Kingston 2...

[19] He admitted to walking around the premises after his uncle died but denied that he had visited frequently. Also, he had not paid any contribution to the mortgage because his uncle said those payments would be made from the rental of the property and he knew that the property was rented up to sometime in 2010.

Mrs. Marva Smith (3rd defendant)

[20] The third defendant relied on affidavits filed on 17th February 2014, 4th December 2014, 8th December 2014 and 12th April 2016. She was also cross-examined.

[21] She told the court that Mr. Haman Lee Smith died on the 7th April 2007 and his will was probated. He had devised the subject property to her and his daughter.

[22] The third defendant said she had no personal knowledge of the circumstances in which the premises had been purchased. She was shown the property in 1999 and told by her late husband that he had purchased it for One Million One Hundred Thousand Dollars (\$1,100,000.00).

- [23] It was her evidence that after her husband's death she continued to pay the mortgage from rent until 2008 when the tenants left. Thereafter, she paid the mortgage from her "dressmaking", her husband's pension and funds from her son in the United States. This amounted to approximately one million dollars. She also paid property taxes and made improvements to the premises, totalling approximately one million four hundred thousand dollars (\$1,400,000.00). Receipts were exhibited in support of some of these payments.
- [24] The third defendant said she had been given the original "1999 affidavit" by her husband and after his death she had taken it to her attorney-at-law, Mr. Chully Williams.
- [25] She said that prior to her marriage, Mr. Haman Lee Smith lived at Ellis Avenue where she visited him and performed chores. He was the only one living there. After the property was purchased repairs were carried out up to 2000. During the period, she cooked for the workmen. Subsequently, she resided in the back building on the property and thereafter married Mr. Smith and lived with him there. At no time did the claimant live, stay or visit the premises. She said he only started to visit after her husband's funeral which he never attended.
- [26] The third defendant denied that the property was rented up to 2010. She said it had fallen into disrepair since 2008 and could not be rented.

Mr. Chully Williams

- [27] Mr. Williams relied on his affidavit filed on 4th December 2014. He was cross-examined.
- [28] His evidence was that he had met the claimant sometime after Mr. Smith's death when he and the third defendant attended his office. He was shown a copy of the "1999 Affidavit" and the claimant told him he had signed it. Mr. Williams said he

was not the one who had prepared the document and it was not prepared in his office.

[29] Under cross-examination, Mr. Williams said that he had met the third defendant before she had visited with the claimant. She had shown him the "1999 affidavit" and he told her it seemed "straight forward."

[30] Mr. Williams strongly denied asking the claimant to sign the "1999 affidavit" and said it was already signed by him and he admitted to signing it. Mr. Williams also admitted to asking the claimant whether he wished for him to prepare the transfer document. He said he might have prepared the transfer but did not know whether the claimant had come in to sign it.

Mr. Lester Edwards (1st defendant)

[31] The first defendant relied on affidavit filed 10th March 2014. He did not attend the trial because of illness and filed a medical report to that effect. His affidavit was similar in content to the second defendant's and will therefore be given similar weight.

Mr. Roy Edwards (2nd defendant)

[32] The second defendant relied on his affidavit filed on 21st May 2014 (paragraphs 6-16 redacted for hearsay). He was cross-examined.

[33] He said that Mr. Smith, his uncle, had not asked him to sign on the loan because he needed someone younger and "found Harold to join with him."

[34] In cross-examination the second defendant said he had a close relationship with his uncle and they discussed his business affairs including the property but the

actual transaction was not discussed with him. He said Mr. Smith had employed persons to assist him with his painting job at Terra Nova and the claimant was one of those who assisted.

Ms. Patricia Fisher

[35] Ms. Fisher relied on her affidavit filed on 5th April 2016. She was also cross-examined.

[36] She was employed to VMBS as manager of the Mortgage Centre. Prior to that she had been manager of the Processing Unit. She had been with VMBS for upwards of thirty years.

[37] Her evidence was that she had received correspondence from counsel in November 2014 which caused her to review the loan file. She found a copy of the "1999 affidavit" on which there were two notations. The file also contained the claimant's letter dated 21st July, 2008. She attributed the 2006 notation, "Original seen 10/1/2006", to Ms. Carol Wilson, an employee at VMBS, with whom she had spoken about the said document when she was manager of the Processing Unit.

[38] Ms. Fisher said it was she who had made the '2008 notation' on the "1999 affidavit" and at the time Ms. Wilson's note was already endorsed thereon.

[39] It was never put Ms Fisher that she had received any document from the claimant or had given him any letter to sign in 2008.

Submissions

[40] I have sought to do justice to counsel's submissions, as summarised below.

Claimant's Submissions

- [41] It was submitted that it was Mr. Smith's intention that the claimant should benefit from the property. It was also submitted that the claimant had contributed to the purchase of the property from savings withheld from his pay and there was no need for the claimant to contribute to mortgage payments as his uncle had told him that the payments would be made from rental of the property.
- [42] It was submitted further that the "1999 affidavit" had been signed as a consequence of undue influence, not on the 20th August 1999 but at Mr. Chully Williams' office in 2007 or 2008.
- [43] Counsel referenced sections 2 and 6 of the **Record of Deeds, Wills and Letters Patent Act** and Part 30 of the **Civil Procedure Rules** (CPR) and submitted that the "1999 affidavit" was invalid for the following reasons:
- i. it lacked the full name of the person before whom it was sworn or affirmed;
 - ii. it lacked the requisite stamp that was mandatory for a Justice of the Peace, prior to the passage of the **Justice of the Peace Official Seals Act**; and
 - iii. it was sworn to or affirmed before the Attorney-at-Law representing the third defendant.
- [44] Counsel submitted that in the absence of fraud or evidence to the contrary, a registered owner of land had an indefeasible title and where there was joint legal ownership a presumption of joint beneficial ownership existed. Counsel submitted further that there is a presumption of equal shares unless there was an express declaration of trust or a common intention as to shares.
- [45] In finality, counsel submitted that the claimant was entitled to an equal share in the beneficial interest of the property. *Walker v. Hall* [1984] FLR 126, para 31 and *Stack v. Dowden* [2007] UKHL 17, para 56 were referenced as authorities which supported those submissions.

Defendants' Submissions

- [46] The defendants submitted that there was no "*common intention*" that the claimant should benefit from the property and his name only appeared on the title as a matter of convenience. In such circumstances, applying the decision in *Mavis Wallace v Vernal Clarke*, Claim No. 2003 HCV 0852, the claimant's legal interest in the property was defeated. The court may follow Baroness Hale's guidelines at paragraph 69 of *Stack v. Dowden* [2007] UKHL 17.
- [47] The court could not infer a common intention where there was no clear evidence as to its existence (*Springelle v Defoe* (1992) 2. FL.R. 388). Further, even had there been that intention, it may have changed overtime. *Jones v. Kernott* [2011] UKSC 53 was referenced to support the latter point.
- [48] It was submitted that the claimant could not have signed the "1999 affidavit" in Mr. Chully Williams' office, in 2007 or 2008, because VMBS had it in their possession from as early as the 10th January, 2006. The claimant had sought to mislead the court as to circumstances under which the "1999 affidavit" had been signed.
- [49] There were inconsistencies between the claimant's *viva voce* and affidavit evidence and the cross-examination revealed that he was not truthful. On that basis, it was more probable that he had not been credible in his evidence as it relates to his early dealings with the deceased, the intentions of the deceased, the circumstances under which his name was placed on the title and how the "1999 affidavit" had come to be signed by him.
- [50] The "1999 affidavit" should be accepted as an express declaration relinquishing the claimant's beneficial interest in the property as it provided irrefutable evidence of the nature and extent of the beneficial ownership.

[51] *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669 and *Mavis Wallace v Vernal Clarke* (supra) were cited as authority for the proposition that where property is transferred to a person who paid nothing for it, there is a presumption of a resulting trust. This applies in the instant case because the claimant made no contribution to the purchase price, payment of the mortgage loan or towards maintenance or upkeep of the property, and therefore could not have acted upon any detriment.

[52] Accordingly, Mr. Smith had the right to give all interest in the property to his daughter, Sandra Smith and the third defendant.

[53] The following points were raised specifically in response to the claimant's submissions:

- i. the defendants submitted that the **Records of Deeds, Wills and Letters Patent Act 1681** is inappropriate for the purpose of validating the affidavit dated 20th August, 1999. The affidavit ought not to be seen as either a *deed*, *will* or *letter* but rather as an express declaration that the claimant had no interest in the property. The definition of affidavit as outlined in Section 3 of the **Interpretation Act** was submitted for the court's consideration as well as section 2 of the **Voluntary Declaration Act, 1842**;
- ii. the CPR should not be seen as retroactive and there was no formal requirement in 1999 for an affidavit to be stamped with the seal of a Justice of the Peace;
- iii. citing Anderson J at paragraph 7 in *Cynthia Bravo v Avis Baxter and Vincent Graham*, Suit no. 2005 HCV 00326, the defendants submitted that a registered owner having an indefeasible title did not mean that there could be no legitimate challenge in equity; and

- iv. *Stack v Dowden* did not apply because the property in question does not relate to a joint tenancy.

Issues for Determination

[54] The following issues arise for determination:

- (i) the validity and or effect of the affidavit of Harold Bonfield dated 20th August, 1999;
- (ii) whether the claimant and his deceased uncle had a 'common intention' that the claimant should benefit from the property; and
- (iii) whether the claimant holds a beneficial interest in the property on trust for the estate of the deceased.

Analysis

Agreed Evidence

[55] It is common ground between the parties that the claimant and Haman Lee Smith are the registered tenants in common for the property and that it was purchased in 1999 at a cost of one million one hundred thousand dollars (\$1,100,000.00), of which seven hundred thousand dollars (\$700,000.00) was a mortgage loan from VMBS for which they are the joint mortgagors.

[56] It has also been agreed that Mr. Smith requested the claimant to join him on the loan because he needed to do so with a younger person in order to qualify. Mr. Smith would have been about 76 years old at the time of the purchase.

[57] Also, at the time of trial, Probate had already been granted to the first and second defendants in relation to Mr. Smith's Will.

Validity of Affidavit

- [58] Counsel on behalf of the claimant submitted that the "1999 affidavit" was defective because it did not conform to the requirements of the CPR, the **Record of Deeds, Wills and Letters Patent Act** and the **Justice of the Peace Official Seals Act**.
- [59] Counsel's contention is unavailing because the document was not prepared for any court proceeding or as a required document for establishing interest in property. In my view, it declares and describes the claimant's personal position and intent in relation to the property. It is to be treated no higher than one would a letter and the title "affidavit" and form add nothing to its efficacy. The important thing is that he signed the document.
- [60] If the "1999 affidavit" had been required by statute or the CPR for a declaration in relation to one's beneficial interest in property then that would have been another matter. The absence of the Justice of the Peace's name and place where it was sworn might arguably have invalidated the document, for those purposes, because such requirements would go to the verification of the claimant's signature to give it evidential efficacy. Suffice it to say the CPR would not have applied because it came into force in January 2003 and does not apply retroactively.
- [61] I have considered that the claimant has not disputed that he signed the "1999 affidavit". It can therefore be relied on by the defendants to ground their argument that there was no common intent between the claimant and his uncle that he would enjoy a beneficial interest in the property.

Common Intention and Legal and/ or Beneficial Interest

- [62] The claimant has asserted the right of having an indefeasible title as provided in the **Registration of Titles Act**. Section 68 of the Act provides:

No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

[63] Section 70 provides:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from of the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, ...

[64] As the Privy Council established in ***Gardener and Anor v. Lewis*** [1998] 53 WIR page 236 and applied by Anderson J. in ***Cynthia Bravo v Avis Baxter et al*** Suit No. HCV 00326/2005 delivered 12th October 2006 at pages 4-5, "indefeasibility" pertains only to legal title and does not affect interests which exist in equity.

[65] Counsel also referred to a number of authorities pertaining largely to the treatment of property in cases of co-habitation and marriage or where the contribution of the parties to the purchase price was established (or not) and beneficial interest needed to be determined. ***Laskar v Laskar*** [2008] EWCA Civ

345 was a case where a mother and daughter purchased property as an investment and their respective contributions to the purchase price was established. In ***Panton v Roulstone*** (1976) 14 J.L.R. 279 there was no evidence of contribution by the co-owners and the court found that they held the beneficial interest as tenants in common but took account of evidence that established a common intention that the survivor was entitled to the full beneficial interest. ***Springette v Defoe*** [1992] 2 F.C.R. 561 dealt with whether common intention could be inferred from uncommunicated intention. In ***Stack v Dowden*** [2007] UKHL 17 the court discussed common intention and the application of the law of trusts in determining beneficial interest in property. ***Jones v Kernott*** [2010] UKSC 53 clarified the principles in ***Stack v Dowden***. ***Wallace v Clarke*** [2013] JMSC Civ.146 applied the principles established in ***Stack v Dowden*** and ***Jones v Kernott***.

[66] I have found it necessary only to focus on ***Stack v Dowden*** and ***Jones v Kernott***. The other cases either involved some facts which are materially different from the instant case or risk repetition because ***Stack v Dowden*** and ***Jones v Kernott*** provide adequate exegesis of the authorities and applicable law. Although they dealt with joint tenancy between spouses, the legal principles are useful in the matter *sub judice*.

[67] I should also say that counsel for the claimant cited two cases which I did not find helpful or relevant in determining the issues before me: ***Midland Bank Limited v David Crossley-Coke*** [1969] IR which deals with security for costs; and ***White v White*** [2001] 1 AC 596 on ancillary relief pursuant to the **Matrimonial Causes Act**.

[68] In ***Stack v Dowden*** [2007] UKHL 17, para 3, Lord Hope of Craighead said that in distinguishing 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. In this context, he says, "joint beneficial ownership means

that that the shares are presumed to be divided between the beneficial owners equally.”(para 4). But his Lordship also made the observation that:

Parties are, of course, free to enter into whatever bargain they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts. (para 5)

[69] I deduce from those statements that the presumption of joint beneficial ownership is rebuttable by evidence of a “real” bargain between the parties which demonstrates beneficial ownership than would be assumed from what is shown on the title. This displacement of the presumption of common ownership by evidence which shows the contrary, takes the issue from “the realm of the law of property to the law of obligations” and “opens the door to evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and its upkeep and improvement...” (para 8).

[70] Lord Walker of Gestingthorpe agreed that the correct approach lies, “not in contract law but in looking for a beneficial interest under a trust of some sort” and that it may only be academic whether the trust is regarded as a resulting trust or a constructive trust (para28).

[71] At paragraph 60, Baroness Hale said, “the presumption of resulting trust is not a rule of law” and she cites the following statement by K Gray and SF Gray in *Elements of Land Law*, 4th edition 2005, 884 at para 10:21:

In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of

resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down... Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust)...But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts.

[72] Even though, as he said, there is much debate as to the nature of resulting trust, Lord Walker opined that it may be useful in cases where the relationship of the parties amount to “an emotional and a commercial partnership.”

[73] Although the claimant in the instant case did not go so far as to describe the relationship with his deceased uncle as “emotional” and one of “commercial partnership”, he framed the acquisition as arising in circumstances of a close family relationship linked to a business association. Yet, his evidence made no reference whatsoever to any discussion between them as to the extent of any contribution to the purchase price or share in the property.

[74] The approach I will take follows the summary of the law by Chadwick LJ in **Oxley v Hiscock** [2005] Fam 211, para 69, which Lord Walker cited with approval at paragraph 35 of his judgment in **Stack v Dowden**:

But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that...the answer is that each is entitled to that share which the court considers fair

having regard to the whole course of dealing between them in relation to the property...

[75] Lord Walker said that Chadwick LJ's summary "was directed at cases where there is a single owner" (para 36). However, I do not interpret that statement to mean the reasoning is limited only to cases of single ownership.

[76] The phrase "the whole course of dealing between them in relation to the property" is not a writ for the court to consider matters at large. In **Jones v Kernott** [2010] UKSC 53, para 46, Lord Walker and Lady Hale said:

...The primary search must always be for what the parties actually intended, to be deduced objectively from their words and their actions.

[77] At paragraph 51(3) the court referred to the sort of evidence which might be relevant, as outlined by Baroness Hale of Richmond in **Stack v Dowden** [2007] 2 A.C. 432, para 69:

In law, "context is everything"...Many more factors than financial contribution may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the house was acquired in their joint names;...the nature of the parties' relationship; ...how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property ... The parties' individual characters and personalities may also be a factor in deciding where the true intentions lay...

[78] In this case I will examine the evidence in relation to why the property was acquired in the joint names of the claimant and his deceased uncle, how the property was financed, and other conduct evidencing common intention.

- [79] I found the claimant to be very liberal with his concept of truth. He was evasive in his answers and contradicted himself both in respect to his *viva voce* and affidavit evidence.
- [80] He contradicted himself when, on the one hand, he said that he lived in St. Thomas all his life, and on the other, said he lived with his uncle at rented premises at Ellis Avenue and at the property after it was refurbished. The evidence of the third defendant is preferred. I accept her evidence that when she visited Mr. Smith at Ellis Avenue he had lived alone. I also believe her that during the time the property was under repairs and subsequently, the claimant never lived there or visited.
- [81] The claimant's lack of credibility is further revealed when the title is examined. It records the claimant's address as Whitehall in St. Thomas whilst Mr. Smith's is Ellis Avenue.
- [82] The claimant also gave two different versions in relation to how he became aware of the contents of the affidavit. On the one hand, he said the affidavit was read to him and its contents explained by Mr. Chully Williams while on the other, he said he had read it himself.
- [83] It is also not believable that he would have gone to Mr. Chully William's office to sign a document to say he knew the third defendant but did not have any discussions with Mr. Williams when he became aware that far from such a harmless act he would have instead signed away his rights to the property.
- [84] This court does not believe the claimant that the affidavit was signed in 2008 and in the circumstances he described. If that were so, on his evidence, he would have taken an affidavit to VMBS knowing the contents to be false and having signed it supposedly under duress. This behaviour would be most peculiar to say the least.

- [85] Also, whilst at VMBS he would have been given a letter which he said he signed, refuting the "1999 affidavit" but not knowing how it came to be prepared. On his evidence, there would have had to be a soothsayer at VMBS who read the claimant's mind and prepared the letter without his request or participation.
- [86] This evidence is illogical if only because he would have engaged in two contradictory acts, contemporaneously, without any explanation.
- [87] The court accepts the evidence of the third defendant that she had been given the original affidavit by her husband and after his death in 2007 she had taken it to the office of Mr. Chully Williams. I believe Mr. Williams that he had shown the affidavit to the claimant who admitted that he had signed it. Mr. Williams' evidence was supported by the third defendant.
- [88] I therefore reject the claimant's evidence that the "1999 affidavit" had been signed at Mr. Chully William's office and that he was rushed into doing so or did so under duress. According to him, he had gone to Mr. Williams' office with the third defendant to establish that he knew her as the wife of the deceased. In those circumstances, there would have been no reason for him to sign any document in haste and without reading it or be "frightened" into signing his name.
- [89] The scenario the claimant described alluded to a conspiracy of sorts between Mr. Chully Williams and the third defendant to trick him into signing the affidavit. This supposedly happened in 2008 but I heard unchallenged evidence from Ms. Fisher of VMBS that there was a record of the "affidavit" being seen in 2006 and that this notation was already on the affidavit when she made her own in 2008.
- [90] Since I do not accept the claimant's evidence that he signed the affidavit in 2008 and in the circumstances he described, this court has found no evidence on which it could conclude that he did not read the contents of the "1999 affidavit" and that he did not know what he was signing before he did.

- [91] In all the circumstances, I find that the "1999 affidavit" was signed on the date recorded on the document, that is 20th August 1999 and that it was done proximate to the date of the Transfer.
- [92] The claimant was unable to say how much was supposedly taken from his pay, what share in the property would have been intended for him or any discussion whatsoever about even the intention to purchase the property. There is an absence of evidence in relation to any dialogue between the claimant and the deceased about the property. On this evidence, the court is inclined to the view that he made no contribution to the purchase of the property. I find, as elicited in cross-examination, that he had been made a co-mortgagor because the deceased uncle would not have otherwise qualified, albeit he said that was not the sole reason.
- [93] Although, as he claimed, the rent should pay the mortgage, there was no evidence that the claimant took any steps to satisfy himself that this was being done either during his uncle's lifetime or after. He made no payments for property taxes or for repairs and upkeep of the property either in the uncle's lifetime or after. There is no evidence that he conducted himself in any way, in relation to the property, until after the uncle's death when he asserted rights to a beneficial interest.
- [94] A testamentary disposition cannot by itself be proof of common intention. However, taken together with the contents of the "1999 affidavit" and other evidence, the devise of the entire property by Mr. Smith goes to proof of a common intention between himself and the claimant as to the beneficial interest. I take particular note of the statement by the claimant that he had been asked by his uncle to sign as a joint purchaser in order to facilitate the mortgage from VMBS and the express declaration that he had made no financial contribution. He also stated that the mortgage would be paid by Mr. Smith and that he had no beneficial interest in the property.

[95] I am satisfied that the parties were in one accord as to the true beneficial ownership of the property.

[96] I find that the property was acquired pursuant to an understanding and agreement between the parties that the entire beneficial interest in the property was to be Mr. Smith's. In arriving at this conclusion I have accepted as authentic and truthful, the claimant's written declaration that he did not contribute to the purchase price and was not intended to have any share in the property. He was a co-mortgagor only to facilitate the purchase. I therefore find that he holds his interest on trust for the estate of the deceased.

[97] There will be judgment for the defendants.

[98] Accordingly, I make the following orders:

- i. it is declared that the claimant holds his legal interest in property known as no. 6 Windsor Road, Kingston 2 in the parish of St. Andrew, being all the land comprised in Certificate of Title registered at Volume 269 Folio 63 in the Register Book of Titles, on trust for the estate of Haman Lee Smith absolutely;
- ii. it is declared that the said estate is the sole beneficial owner of the said property contained in Certificate of Title registered at Volume 269 Folio 63 in the Register Book of Titles;
- iii. the claimant is to execute a transfer of the interest in the said property registered in his name to the first and second defendants, executors of the estate of Haman Lee Smith. This is to be done by 30th November 2016;
- iv. in the event of the claimant's failure, neglect or refusal to transfer the registered interest as ordered above, the Registrar of the Supreme Court is hereby empowered to sign the Instrument of Transfer and all other documents necessary to effect the transfer;

- v. Costs of this action to the defendants to be taxed if now agreed; and
- vi. Liberty to apply.