IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 03576

BETWEEN	**SONIA VERONICA GIBBS-DENIS EXECUTRIX for the ESTATE of LESLIE ALEXANDER DENIS, deceased**	**CLAIMANT**
AND	**LESLIE ALEX DENIS**	**1ST DEFENDANT**
AND	**GISELLE JAMES**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. Dian Watson, Attorney-at-Law for the Claimant.

Mr. Patrick Foster Q.C., Miss Tavia Dunn and Mrs. Christine Campbell-Swaby instructed by Salmon & Swaby for the Defendants.

Heard: 25th February 2014; 5th March 2015.

Interim Injunction - Joint Accounts- Interpretation of Will - Presumption of Advancement - Resulting Trust - meaning of "tantamount" - whether serious question to be tried.

BATTS J,

[1] The Claimant filed by way of a Fixed Date Claim on July 23, 2014 a claim against the Defendants for an order that:

> (1) The testamentary expenses of the estate of the deceased be paid from accounts operated by him with JN Fund Managers and Jamaica Money Market Brokers Limited respectively and on which the 1st Defendant is named as a beneficial joint holder and the 2nd Defendant is named as a Trustee joint holder for the benefit of the 1st Defendant due to the fact that the estate is otherwise insolvent.

(2) The Defendants be permitted to deal with and enjoy the benefit of the funds held in the said accounts over and above the amounts required to settle the estate of the deceased.

[2] The Claimant has applied to the court for injunctive relief seeking the following orders:

> *(1) That the Defendants be permitted to deal with the funds in accounts held in JN FUND MANAGERS and JAMAICA MONEY MARKET BROKERS in the names of themselves and the deceased over the amount of SEVENTEEN MILLION FIVE HUNDRED TWENTY-FIVE THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS ($17,525,375.00) which represents the amount of legal fees and testamentary expenses required to settle the estate of the deceased;*
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> *(2) That JN FUND MANAGERS and JAMAICA MONEY MARKET BROKERS be ordered to pay to the estate LESLIE ALEXANDER DENIS or the Attorneys on record the amount of SEVENTEEN MILLION FIVE HUNDRED TWENTY-FIVE THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS ($17,525.375.00)*
>
> *(3) That in the alternative JN FUND MANAGERS and JAMAICA MONEY MARKET BROKERS be restrained from permitting any dealings on the said accounts until a final order is made in this application.*

An interim injunction was granted on July 30, 2014 and was later extended to December 11, 2014. A further extension was sought and ordered by the court to February 25, 2015. Before me the parties made a joint application for variation of the Order of Edwards J made on December 10, 2014 that the affiants were to attend for cross examination. The Order of Edwards J was varied as follows:

> *By consent Order of Edwards J is varied to delete paragraph (5) and insert in its place the following:*
>
> > *The affiants are not required to be in attendance for the purpose of cross examination at the hearing of the Claimant's application for injunctive relief on February 25, 2015.*

[3] The Claimant seeks to have the interim injunction extended until trial, while Mr. Foster Q.C. for the Defendants opposes the application. I made it clear at this stage that the hearing was not as to the substantive matter but for the interim injunctive relief being sought by the Claimant.

[4] The Claimant submits that the deceased orally indicated prior to his death that his testamentary expenses should be paid from the joint accounts which are the subject of the claim. Counsel submitted further that when the deceased in his will used the words “tantamount to his share in the estate”, he was indicating that the bequest should only take effect after all expenses were paid.

[5] The Court’s power to grant injunctions is found in Rule 17.1 (1) (a) of the Civil Procedure Rules. In exercising the discretion to grant interim injunctive relief, Lord Diplock laid down guidelines in **American Cyanamid Co. v Ethicon Ltd. [1975] AC 396**. It is counsel’s submission that in deciding whether or not there is a serious question to be tried, the court is required to investigate the merits of the case to a limited extent, that is, to ascertain whether the Claimant’s cause of action has substance.

[6] The gift in question is money in a joint savings account. Counsel for the Claimant submitted that the intention of the deceased who provided the money for the account must be ascertained. This intention can override the rule of survivorship where a contrary intention is shown. She cited the authority of the Jamaican Court of Appeal in **Clover Robinson v National Commercial Bank [2015] JMCA Civ 3** and submitted that a presumption of a resulting trust arose. Counsel also relied on the case of **Oswald Douglas v Lynford Douglas [2014] JMCA Civ 6** in submitting that the mere fact that a presumption of advancement may arise on the facts of the case will not conclusively determine the matter in the absence of a trial of the issues.

[7] The Defendants submit that the Claimant must demonstrate to the court on the basis of the evidence contained in the affidavits that there is a serious question to be tried. It is accepted that the court is not required to conduct a mini trial at this stage and does not have to resolve conflicts of evidence but it must be satisfied based on the evidence before it that the facts disclose a serious question worthy of proceeding to a trial for resolution.

[8] The Defendants contend that there is no serious question for determination by the court at a trial, as there is no evidential material to support the Claimant’s contention that the money in the account formed part of the estate or that it was the desire of the deceased that his testamentary expenses should be paid from the accounts in question.

[9] It is not disputed that the testator held the relevant accounts jointly with both Defendants. However, the Claimant has averred that the accounts were opened for the benefit of the testator and that the testator sought to control the funds to

the exclusion of the other joint holders. There was therefore no gift to the Defendants.

[10] The testator bequeathed to the 1st Defendant in his will the monies in the said accounts "*of which he is a joint owner, tantamount to his share of his inheritance".* Counsel for the Claimant contends strongly that the use of the word "tantamount" by the testator in his will meant, that the gift will only take effect after payment of testamentary expenses. Moreover, the Claimant has affidavit evidence that the testator told the Claimant and one other witness to his will that his testamentary expenses should be paid from those accounts. I make two observations regarding this contention. Firstly, the Oxford English dictionary defines "tantamount" as being *"amount to as much or equal to or equivalent to"*. Secondly, I noted that the testator was an educated man, being a retired lecturer [See copy Title Vol. 966 F345 Exhibit GJ2]. It will be very difficult if not impossible for the Claimant to prove that the Claimant meant by "tantamount" anything other than that it was the entire gift.

[11] The presumption of advancement applies where a parent places assets in the name of a child; it is therefore assumed that the parent intends to make a gift to that child. This presumption of advancement can only be rebutted by cogent evidence. Further, it is well established that evidence to rebut the presumption of advancement cannot take the form of denials of a transferee's beneficial ownership made by the transferor after the event *[see **Antoni & Anor v Antoni & Ors [2007]UKPC 10(26th February 2007)at** paragraph 20]*.

[12] I agree with the submission of Mr. Foster Q.C. that any evidence to rebut the presumption of advancement must be of things said or done contemporaneously or soon after the opening of the joint account. It would thereby constitute a part of the transaction or context in which the presumption of advancement might have arisen. The Defendants relied on the authorities of **Antoni & Anor v Antoni & Ors (Commonwealth of the Bahamas) [2007] UKPC 10** and **Christy v Courtenay 13 BEAV 96.**I am persuaded that there is no evidence of acts or statements of the deceased which are or could arguably be sufficiently proximate to negative the presumption of advancement.

[13] Without deciding the merits of the case at this point, I find that the case of **Clover Robinson v National Commercial Bank [2015] JMCA Civ 3** relied on by the Claimant does not aid the Claimant's case. I do not find that it can be seriously contended that a resulting trust arises in this case. This is so, as in relation to the first Defendant, it is beyond dispute that the presumption of advancement applies, and there is no evidence before me capable of rebutting that presumption or that the gift failed. In this regard see the bank mandates and the

fact as admitted that the Defendants made withdrawals after the death and hence were signatories to the joint account. The Claimant is however contending that the first Defendant is not entitled to all the sums standing in the accounts, but only that which remains after a deduction of the amount for testamentary expenses (approximately $17million).

[14] The evidence before me suggests that the first Defendant is a joint holder of the accounts and is entitled to the sums in the accounts under the rule of survivorship as well as by virtue of the presumption of advancement. The second Defendant is a trustee of the beneficial interest of the first Defendant. Any purported later bequest by the testator relating to these accounts as gifts would be ineffective. The phrase in the will of the testator that:

> "…*of which he is a joint owner, tantamount to his share of his inheritance".*

is on the face of it , confirmation by the testator of his intention when he made the Defendants joint account holders. The testator it seems to me, did nothing more than affirm in his will that which he had already done years prior to his death when he added the names of the Defendants to the accounts. Justice therefore would not be served in this case if the court were to continue to bar the Defendants from accessing the accounts. Neither, would it dictate that the court should read words into the will, as the Claimant in essence is urging the court to do.

[15] The court should only go on to consider the matter of a balance of convenience and other principles if it is satisfied from the affidavit evidence that there is in fact a serious question to be tried. The Privy Council reiterated these principles in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd. PCA No 61/2008** with regard to the grant of injunctions. The case before me falls in the very difficult category of cases where the grant or refusal of an injunction is likely to have the effect of disposing of the matter. The refusal of the injunction will allow the Defendants unrestrained access to the accounts and hence may deprive the estate of those funds permanently.

[16] It is therefore incumbent on me to be very wary about refusing the injunction. The relative strengths of the parties' respective cases become a matter of critical import. Let me say also that even if this court accepts that the estate is insolvent, as the Claimant submits, that would not seriously impact the determination of the matter because the law of probate adequately provides for the distribution of assets for an insolvent estate. In the result I find that there is no triable issue

and the Claimant has no reasonable or real prospect of succeeding at trial. I therefore refuse to extend the injunction.

[17] I make the following Orders:

1. The Claimant's application for an extension of the interim injunction granted on the 30th July 2014 is denied.

2. Costs to the Defendants to be taxed if not agreed.

David Batts
Puisne Judge