



[2023] JMCC COMM. 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00285

BETWEEN	JAMES ROWE	CLAIMANT
AND	ELAINE ROWE	1ST DEFENDANT
AND	ROYDELL THOMPSON	2ND DEFENDANT

Ms. Dennese Smith, Attorney-at-law for the Claimant

Ms. Tavia Dunn instructed by Nunes, Scholefield, Deleon & Co. Attorneys-at-law for the Defendants

Sections 174, 178, and 179 of the Companies Act - Whether the Claimant is entitled to a re-transfer of his shareholdings in the company - Whether a resulting trust was created in favour of the Claimant - Whether the presumption of advancement is displaced - Whether the removal of the Claimant as director is valid - Whether the appointment of the 1st and 2nd Defendants as directors of the company is valid

IN OPEN COURT

Heard on 4th October, 2023 and 30th November, 2023

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

- [1] This case concerns a dispute between a father and a daughter over the proprietorship and directorship of the company General Manufacturing Holdings Limited (GMHL). The Claimant Mr. James Rowe (Mr. Rowe) is one of the founding directors of GMHL. He, along with Mr. Franklin Johnston (Mr. Johnston), established GMHL in May 1987 when his daughter Elaine Rowe, the first Defendant was still a child. GMHL was used to acquire land located at 75 Slipe Road, Kingston 5 in the parish of Saint Andrew registered at Volume 817 Folio 92 of the Register Book of Titles (the land). The land was obtained by way of a mortgage from Mutual Security Merchant Bank in February 1998. The land was and is the sole asset of the company.
- [2] On June 22, 2022, Mr. Rowe filed a Fixed Date Claim Form seeking orders that:
- a. Elaine Rowe be removed as a director of General Manufacturing Holding Company.
 - b. Roydell Thompson be removed as director of General Manufacturing Holding Company.
 - c. Elaine Rowe be removed as Secretary of General Manufacturing Holding Company.
 - d. The 500 shares transferred from James Rowe to Elaine Rowe be returned.
 - e. The 500 shares formerly held by Franklin Johnston be transferred to James Rowe.
 - f. James Rowe be allowed to appoint a company secretary of his choice.
 - g. James Rowe be appointed the sole director pursuant to section 172 of the Companies Act.
- [3] On November 15, 2022, an order was made converting the Fixed Date Claim Form to Claim Form followed by an Order requiring the Claimant to file and serve Particulars of Claim.

[4] The orders sought in the Particulars of Claim differ from what is sought in the Claim Form. Essentially the remedies sought are referred to as declarations as follows:

- a. A declaration that the shares that were transferred to the 1st Defendant Elaine Rowe be re-transferred to the Claimant, James Rowe.
- b. A declaration that the 500 shares purchased from Mr. Johnston with the use of the shares transferred from Mr. James Rowe be transferred to the Claimant, Mr. James Rowe.
- c. A declaration that the 2nd Defendant be removed as Director of General Manufacturing Holdings Limited.
- d. A declaration that the 1st Defendant, Ms. Elaine Rowe be removed as Director of General Manufacturing Holdings Limited.
- e. A declaration that the Claimant, Mr. James Rowe be returned as Director of General Manufacturing Holdings Limited
- f. A declaration that the Claimant not be removed from the premises located at 75 Slipe Road.
- g. A declaration that the 1st Defendant breached the trust of the Claimant.
- h. A declaration that the 1st Defendant used misrepresentation or undue influence to encourage the Claimant to transfer his shares to her. Thus allowing her to acquire 100% share ownership in the company General Manufacturing Holdings Limited.
- i. A declaration that the 1st Defendant was deceptive in her operation with the Claimant, as she didn't explain the transactions, and hid her intentions from the Claimant.

CLAIMANT'S CASE

[5] Mr. Rowe gave evidence that he and his business associate Mr Franklyn Johnston started GMHL in 1987 with One Thousand (1,000) shares divided equally between the two of them as directors. Together they purchased the Slipe Road property. It was agreed that Mr. Rowe would conduct his business as an auto mechanic on the company land and that the space could be rented out to other persons who

carried on various activities on the land. He also stated that the arrangement was that he would pay the mortgage, which was eventually discharged in August, 1995, and that Mr. Johnston, who travelled overseas for a long period of time, would construct a factory on the property. However, although the construction of the factory commenced, it was never completed.

[6] Mr Rowe asserted that in 2017, there was a disagreement between the directors and Mr. Johnston intimated that he wanted to sell the property, exit the company and recover his 50% interest therein. The land was then valued at Sixteen Million Dollars (\$16,000,000.00). Mr Johnston, acting through the company, brought court proceedings against Mr Rowe seeking, *inter alia*, a declaration of ownership in property and an order for recovery of possession. This resulted in a consent order being made which included an order giving Mr Rowe the option to purchase Mr Johnston's 50% shares in the company. He further stated that although his family advised against it, he thought it was a good idea to get his eldest daughter Elaine Rowe involved in GMHL. He approached her and they discussed using his shares as security to obtain a loan to acquire Mr. Johnston's shares in GMHL. He asserted that he signed an agreement with her to the effect that she would re-transfer the 500 shares in the company that he transferred to her and that the shares were transferred to allow her to secure a loan to pay off Mr Johnston.

[7] Mr. Rowe insisted that he signed this agreement only to allow her to secure a loan to pay off Mr. Johnston when he resigned from GMHL. He stated that at no time was there a discussion regarding him leaving GMHL, though he indicated that he was concerned about his age and ability to get a loan since he was up in age. He admitted that he was advised by his then Attorneys-at-law, Caribbean Legal Practice, against the transfer of all his shares to his eldest daughter however, at that time he had a good relationship with her, and he never imagined he would be in this position.

- [8] Upon transfer, Ms Rowe was made a secretary and a director of the company, and this allowed her to approach institutions for the loan. Mr Rowe stated that at no time did he discuss with his daughter leaving the company or his place of work. His intention was that he and Ms Rowe would be shareholders of the company once Mr Johnston received payment for his shares.
- [9] He further stated that he was removed from GMHL without his knowledge and consent and that at no point did he discuss or indicate an intention to resign from GMHL and he was never made aware that he is no longer a director in GMHL. He further asserted that his daughter's attitude towards him changed, and she agitated for the removal of persons who operated a business on the land including him. He stated that Ms. Rowe sought the assistance of the police to remove him from the land and sent a tractor to bulldoze the premises.
- [10] Mr. Rowe asserted that there was no Resolution to remove him as a director in the company, he made no indication that he wanted to resign and that all changes made in the company were unknown to him.
- [11] During cross examination, it appeared that Mr Rowe had a difficulty recalling certain details however he remained adamant that his shares were to be used as security to purchase Mr. Johnston's share in the company and that after the shares were purchased, he and his daughter would own the company in equal shares.
- [12] Mr. Rowe admitted that he was given legal advice regarding the transfer of his shares from GMHL. He also admitted that he was informed that he would no longer be the owner of GMHL once the shares were transferred, however, he went on to say that he thought the shares would be re-transferred to him and that he intended for the shares to be used only as security.
- [13] Mr. Rowe's wife, Mrs. Rosemarie Cynthia Rowe also gave evidence. She did not give evidence regarding the transaction. She was more interested in speaking

about her daughter the 1st Defendant and her personality. I did not find her evidence to be of much assistance in determining the issues raised.

THE DEFENDANTS' CASE

- [14] Ms Rowe was the sole witness for the Defendants. Her evidence was that in 2017, both Directors of GMHL approached her with a proposal to purchase Mr. Johnston's shares. She said meetings were held on August 3, 8 and 15, 2017 to discuss the acquisition and that there were email exchanges in relation to those discussions. She stated that an Agreement for Sale of Shares was prepared by Mr. Johnston's Attorneys-at-law for her to acquire his shares in GMHL and at that time she was made to believe that GMHL was in good standing.
- [15] She indicated that it was her father who sought her assistance with the payment of legal fees and other legal costs in relation to a 2019 claim filed against him where Mr. Johnston, through GMHL, sought declaration of ownership and recovery of possession and that prior to that, she made payments towards outstanding taxes and annual returns for GMHL. She also asserted that a Consent Order was entered into in relation to the 2019 claim on December 10, 2020 and it was agreed that her father would transfer his 50% shares in GMHL to her.
- [16] Ms. Rowe stated that prior to the signing of the Consent Order, Mr. Rowe had meetings with his then Attorneys-at-law Jennifer Housen and Sheryl Markland on November 27 and December 2, 2020, where he expressed an interest in assigning his shares in GMHL to her.
- [17] Ms. Rowe further asserted that even though Mr. Rowe was advised that he would no longer be the owner of the shares in GMHL he proceeded nonetheless to sign a Form of Transfer transferring his 50% shares in GMHL to her making her the sole director of GMHL. She said in keeping with the Agreement between Mr. Rowe, Mr. Johnston and herself, she obtained a loan in the sum of Eight Million Dollars

(\$8,000,000.00) from First Heritage Co-operative Credit Union for the acquisition of Mr. Johnston's shares in GMHL and that on February 24, 2022, she appointed Roydell Thompson as a director of GMHL.

- [18]** Ms. Rowe stated that since the initial discussion in 2017, Mr. Rowe stated that he was getting old and would be stepping down as a director of GMHL. She further asserted that it is a condition of her loan financing that the rental income from the property should be channelled through her member's account at the credit union however, Mr. Rowe and the other tenants in occupation have refused to pay the rent to her even though he collects the rent from the tenants.
- [19]** Ms Rowe stated that on her visit to the Companies Office she was informed that Annual Returns had not been filed since 2004 and GMHL was at risk of being removed from the Register of Companies. She also stated that GMHL was in arrears of property taxes and water in 2018 and was ordered to be sold by order of the Parish Court for non-payment of property taxes. She asserted that in order to put GMHL in good standing, she had to file the outstanding annual returns, pay the penalties for each year as well as to clear up the outstanding property taxes and water bill.
- [20]** During cross-examination, she expressed that the requirement for her to acquire Mr Rowe's shares was contingent upon her complying with an agreement which is not before the Court. She suggested that, that Agreement should be held contemporaneous with the Consent Order made in the 2019 claim between GMHL and her father. She denied that her father gave her the sum of Eight Hundred and Twenty-Five Thousand Dollars (\$825,000.00) as down payment for Mr. Johnston's shares but stated that the sum was payment for services received from her client from her architectural practice. She also denied that there were private meetings with Mr. Johnston relating to the acquisition of the shares.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [21] Counsel for the Claimant, Ms Dennese Smith submitted that Ms. Rowe now holds all 1,000 shares in GMHL under what she described as dubious circumstances. Counsel also submitted that Mr Rowe transferred his 500 shares to his daughter against the advice of his Attorneys-at-law because he trusted his daughter and it was his intention that they would both hold equal shares in GMHL.
- [22] Counsel contended that Ms Rowe is seeking to rely on an agreement which defies the principles of law of contract on the basis that no consideration was offered for the shares and there was no benefit to Mr Rowe for relinquishing his shares. Counsel submitted that the transfer of shares was not intended to be a gift and neither party indicated as such. In support of her contention, Counsel relied on **John Graham v Kristina Graham** [2023] JMCC COMM 41 and referred to paragraph 18 where Barnaby J indicated the following:

*“...I find the dictum of Blake J in **Meisels v Lutchman and others** [2008] EWHC 661 (QB) useful. At para. 72 the following extract from Halsbury's Laws of England 4th edition (2004) vol 20(1) at para. 1 p.3 was regarded as confirmative of the view taken of inter vivos gifts at common law.*

*“A gift made between living persons . . . may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in **possession to another person with the full intention that the thing shall not return to the donor...**”*

[Emphasis added]

- [23] Counsel also relied on paragraph 66 of Barnaby J's judgment where she cited the dicta of Rosthstein J in **Pecore v Pecore** 2007 SCC [2008] 1 LRC 441, [2007] 1 SCR 795, [2007] WTLR 1591 which focused the court's attention on the intention of the parties. Counsel submitted that the fact that Mr Rowe and his daughter had

a good relationship before the transaction was completed meant he would have gone above and beyond to ensure that she was able to secure the loan. Counsel contended that Mr Rowe had every intention to retain his beneficial interest in the company and that the presumption of advancement would be rebutted and would not displace the presumption of resulting trust. It was further submitted that the 1st Defendant's behaviour is oppressive and unfairly prejudicial as once the shares were transferred, Ms Rowe made every effort to evict Mr Rowe from the property owned by GMHL.

[24] Counsel submitted that there is no evidence that the procedure to be observed by Section 130(2) of the Companies Act was followed as there was a unilateral act conducted by the 1st Defendant. Counsel further relied on section 179 of the Companies Act in relation to the removal of a director from a company and asked the Court to find that those procedures were not followed and so they acted in breach of the Companies Act and the Articles of Association of GMHL.

[25] The Reply to the Defendants' Submissions filed on November 21, 2023 was considered however it did not supplement the Claimant's submissions in any material way.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[26] Counsel for the Defendants, Ms. Tavia Dunn commenced her submissions by raising some preliminary points, in particular that the remedies sought in the Particulars of Claim were not sought in the Fixed Date Claim Form and that the declaratory relief 'that the Claimant not be removed from the premises located at 75 Slipe Road' cannot be sought as the registered proprietor GMHL is not a party to the claim. Counsel further contended that the Claimant is under a duty to set out his statement of case as there are no averments that the Defendants have taken steps to remove him from the property and finally, that the remedies being sought in the Claim Form and the Particulars of Claim must be the same.

- [27] Ms. Dunn in response to the Claimant's averment of there being misrepresentation relied on **Leeds City Council v Barclay's Bank plc** [2021] 2 WLR 1180. She submitted that the Claimant in the instant case has not led any evidence of a representation being made by the 1st Defendant, which was false and that he was induced to enter into the contract by any such representation. Counsel further submitted that no evidence was led as to any statement, representation and/or conduct of the Claimant which would have induced him to transfer his 50% shareholding in the company.
- [28] Under the heading of deception, Counsel quoted *Halsburys Laws of England, Misrepresentation (Volume 76 (2019)) 2 Claims for Damages for Deceit Common Law Claim for Damages for Deceit, Para 789 Constituent Elements of a claim for Deceit* and submitted that the Claimant has failed to establish fraud by the 1st Defendant and further emphasized that in order to substantiate a claim for deception, the Claimant would need to satisfy the requirement for a claim for misrepresentation which he has failed to do. Counsel highlighted that the Claimant did not specifically set out in his Particulars of Claim any allegation of fraud and/or details of any misrepresentation in support of his claim.
- [29] As it relates to undue influence and breach of trust, Counsel referenced **Barclays Bank plc v O'Brien** [994] 1 A.C. 180 and submitted that at the time of the transfer of the Claimant's 50% shareholding in GMHL, the Claimant admitted that he had a good relationship with his daughter. Counsel stated that the relationship of parent and child is one of the special relationships that raises a presumption in favour of undue influence however the onus is on the person in whom confidence is reposed to show that the party to whom the duty is owed, in fact voluntarily and freely made an independent and informed estimate of the expediency of the contract or other transaction. Counsel submitted that the evidence shows that the transfer by the Claimant was of his own free will. He in fact admitted that he understood that he was transferring his shares after receiving independent advice. Counsel made

reference to a letter dated December 2, 2020 from the Claimant's then Attorney-at-law where he indicated he had an understanding that he was signing the document and that he was the only person present with his then Attorney-at-law.

[30] Counsel also relied on **Investors Compensation Scheme Ltd. v West Bromwich Building Society** [1998] 1 ALL ER 98, **Wood v Capital Insurance Services Ltd.** [2017] AC 1173 and **Arnold v Britton** [2015] AC 1619 to buttress the position that there was an absolute assignment by the Claimant of his shares in the Company and emphasized that the Claimant received independent legal advice that the shares would be transferred to the 1st Defendant and there is no indication that the transfer would be for a limited purpose.

[31] With respect to the arguments relating to the creation of a resulting trust, counsel relied on the case of **Chen v Ng** [2017] UKPC 27, a case dealing with the transfer of shares in which the Privy Council discussed at length the question of a resulting trust, the issue of nominal consideration and valid consideration and whether the shares were truly intended as a gift. Counsel highlighted for the court's consideration the issue of transfer of shares involving the existence of such a right or by bringing the circumstances within the possibility of a resulting trust rather than the possibility of a gift. She also pointed out that it was expressed that the major virtue of a register of ownership of assets is that it incontrovertibly identifies the person who, is at least prima facie, the owner of an asset, and, subject to any qualifications on the register and throws the onus on any third party who claims an interest in or right over the estate.

[32] In the Reply to the Claimant's Authorities filed November 7, 2023, Counsel for the Defendants submitted in response to **John Graham v Kristina Graham** that the Claimant has led no evidence as to any representation and/or act by the Defendants which coerced him to transfer his shares to the 1st Defendant. She further submitted that the evidence reveals that the Claimant voluntarily transferred his shares and that he was aware of the implications that he would no longer be

the owner of the shares. Counsel further submitted that the letter from Caribbean Legal Practice and note dated December 2, 2020 indicated that there was no intention to return the shares. She further contended that, on a balance of probabilities the presumption of advancement has not been rebutted as it was the intention of the Claimant to make a gift to the 1st Defendant and the principle in **Pecore v Pecore** is inapplicable.

- [33] Counsel also highlighted that the authority of **Bentley Northover v Eric Northover and Others** is inapplicable since the Claimant has predicated his case on sections 213A of the Company's Act and has not led any evidence of oppressive or unfairly prejudicial conduct. Counsel also submitted that **Cecile Thaxtar v Pauline Trowers and Anor** is inapplicable. She submitted that due to the complete breakdown in the relationship of the parties, all attempts to have general meetings of the company proved futile.

DISCUSSION

- [34] The issues that the Claimant wishes to be resolved surround whether he can regain the interest he once had in the company he formed and in its only asset, the property located at 75 Slipe Road. The orders he seeks are geared towards putting him back in control of the company and the property. In order to succeed he would have to establish either that the 1st Defendant did not follow the legal procedure required to act as she did or that she acted contrary to the provisions of the Articles of Association or that she acted with some impropriety that is to say that there was either misrepresentation, deception or undue influence or breach of trust.
- [35] The Defendants have raised a preliminary issue which is that the orders sought in the Claim Form differ from what is pleaded in the Particulars of Claim. The orders sought in the Particulars of Claim are styled as declarations and some of them were not sought in the Claim Form. Those include declarations that the Claimant

not be removed from the premises, that the 1st Defendant breached the trust of the Claimant and that the 1st Defendant used misrepresentation or undue influence to encourage the Claimant to transfer his shares to her and a declaration that she was deceptive in her operations with the Claimant as she didn't explain the transactions and hid her intentions from the Claimant.

[36] It is the Defendants' contention that the remedies sought in the Claim Form and the Particulars of Claim must be the same. Further, that the declaratory relief that the "Claimant not be removed from the premises..." cannot be sought as the registered proprietor of the property is the company which is not a party to the Claim and so the granting of this relief has the potential of affecting the proprietary rights and interests of an entity that is not before the Court.

[37] These preliminary submissions raise two main issues. Firstly, whether the orders sought can be granted. The Civil Procedure Rules (CPR) require a Claimant to set out its case. It is expected that the Claim Form would contain all the remedies sought and that the Particulars of Claim would be consistent with the Claim Form. The way the Claim Form and Particulars of Claim is drafted reflects some inconsistency and lack of clarity as to exactly what is being sought.

[38] Rule 8.7(1) of the CPR sets out what should be included in a Claim Form as follows:

- (a) include a short description of the nature of the claim;
- (b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled);

[39] The provision in subsection (b) above is consistent with **Section 48 (g) of the Judicature (Supreme Court) Act** which provides:

The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on

such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.

[40] The case of **Roxanne Peart v Shameer Thomas** [2017] JMSC Civ.60, not cited before me, dealt with how section 48(g) should be interpreted and Harris J (as she then was) said this at paragraph 77 of the judgment:

“It is clear from this section that once the claim is properly brought, the Court is required to grant all such remedies that any of the parties appear to be entitled to. The words “appear to be entitled to” mean just what they say, that is, not necessarily the remedy which the parties have pleaded or believe that they should be granted. The rationale behind bestowing this power on the Court, in my opinion, is not only to save judicial time and expense, but also to ensure that cases that are before the Court are dealt with justly.

[41] Harris J also examined the provisions of Rule 8.7 and 8.9 of the CPR and arrived at the conclusion at paragraph 79 that “The Court by virtue of section 48 (g) of the Act and rule 8.7 of the CPR is empowered to grant any remedy which the parties may appear to be entitled to even if that remedy is not pleaded”.

[42] This authority as well as the provisions of the CPR and section 48(g) of the Judicature (Supreme Court) Act demonstrate the court’s flexibility in granting remedies to persons entitled to them. The fact that several of the remedies sought in this case appear in the Particulars of Claim as distinct from the Claim Form would not detract from whether the Court can grant any of these remedies if the Court finds the Claimant to be entitled to them. Although it is not desirable to have inconsistent remedies in both documents, since both the Claim Form and the Particulars of Claim form the Claim and the Defendants have not argued that they were unaware of what the Claimant is seeking, although I do not intend to encourage the drafting of unclear pleadings, I see no prejudice that would be occasioned to the Defendants by the failure to include all remedies in the Claim Form. The Particulars of Claim was filed and served on the Defendants so they

would have been well aware of all the remedies that were being sought so the Court is prepared to consider all the remedies sought in both the Claim Form and the Particulars of Claim.

[43] Secondly, on behalf of the Defendants, it was also contended that the declaratory relief being sought, “that the Claimant not be removed from the premises”, cannot be granted as the registered proprietor of the property is the company who is not a party to the Claim and this would affect the proprietary rights of an entity not before the Court. There appears to be some merit in this argument. It is difficult to see how the Court could grant such an order in the first place as there is no claim in this Court here for the Claimant to be removed from the premises. In any event it would be the owner of the premises who would be entitled to bring such a claim. The company is the owner of the premises and as has been pointed out on behalf of the Defendants, the company is not a party to these proceedings. I agree with the submissions that there would be no basis for such a declaration to be made.

[44] Based on the orders sought and the submissions made, the issues to be determined can be summarized as follows:

1. Whether the transfer of shares to the 1st Defendant was done legally?
2. Whether there is evidence of misrepresentation, deception, undue influence or breach of trust on the part of the 1st Defendant?
3. Whether a resulting trust was created in favour of the Claimant?
4. Whether the removal of the Claimant as a director was in accordance with the Companies Act of Jamaica? and
5. Whether the Defendants should be removed as directors?

Whether the transfer of shares to the 1st Defendant was done legally?

[45] Mr Rowe was the major playmaker of GMHL since its inception in 1987. It is evident that he did not want to lose the land where he has operated his business for over

forty years, therefore he made every effort to transfer the shares to his daughter to prevent Mr. Johnston from selling the only asset that GMHL owned. He is now seeking to have all 1000 shares in the company returned to him, that is the 500 shares he transferred to the 1st Defendant and the 500 shares formerly held by Franklyn Johnston which was also transferred to the 1st Defendant. This is important to the Claimant as the company's only asset is the property on which he conducts his business, and the owner of the shares would be the owner of this property. If the Claimant is appointed the sole shareholder, he would be able to take control of the affairs of the company and the property and be able to appoint directors and company secretary and essentially regain control of the company.

[46] In order for the Court to make such an Order, I would have to be satisfied that the manner in which the shares was transferred was in breach of the Companies Act and or the Articles of Association. The parties are agreed as to how the shares formerly owned by Mr Johnston came to be transferred. This followed upon a consent judgment being entered by the Court which required the Claimant to purchase Mr Johnston's interest in the company. The Claimant and the 1st Defendant agreed that the 1st Defendant would purchase Mr Johnston's shares. In order to do so she secured a loan from First Heritage Credit Union in the sum of Eight Million Dollars (\$8,000,000.00), the proceeds of which she used to purchase Mr Johnston's 500 shares.

[47] It is uncontested that it is the 1st Defendant alone who negotiated the loan with the credit union. The security for the loan was reflected in charges being placed on the property in the sum of Eight Million Dollars (\$8,000,000.00) as well as the property registered at Volume 817 Folio 92. The 1st Defendant being the 100% shareholder of the company therefore assumed responsibility for the servicing of the loan. In those circumstances the 1st Defendant legitimately acquired Mr. Johnston's 500 shares in the company. The Claimant has not alleged that there was any understanding that in respect of these shares that they would be given back to him at some point. There was never any discussion for him to pay the loan taken out

by the 1st Defendant or to reimburse her. In those circumstances the transfer of Mr Johnston's shares was in keeping with the law and there is no basis for the Claimant to hold any interest whether legal or equitable in the 500 shares formerly owned by Mr Johnston and therefore no basis on which they can be transferred back to him.

[48] In relation to the shares formerly owned by the Claimant, the evidence is also that the legal process was followed in order to effect the transfer. Mr Rowe accepted that prior to effecting the transfer of all the shares to his daughter, he received independent legal advice from his then Attorneys-at-law, Caribbean Legal Practice as to the effect of transferring his 50% shares in the company to Ms Rowe. He was advised against making such a decision and the consequences of those actions, nevertheless he proceeded against his lawyers' instructions.

[49] On November 16, 2020 a Notice to the Registrar of Companies was signed by Mr Johnston reflecting that "on November 16, 2020 shares for James Rowe five hundred were transferred to Elaine Rowe and the transfer was recorded in the share registry of the company". On December 2, 2020 he signed a letter which demonstrated his understanding that in the event he transfers his shares to his daughter that he is no longer the owner of those shares in the company and that his daughter will be the only owner of these shares and the 50% shareholder with Mr Johnston.

[50] The Claimant thereafter on December 11, 2020 entered into an Agreement with the 1st Defendant and Mr Johnston, by virtue of which Mr Johnston gave his consent to facilitate the 50% share transfer from the Claimant to the 1st Defendant. The stated purpose of the Agreement was as follows:

"Whereas Ms Elaine Rowe is intent on acquiring Mr James Rowe's 50% shareholding in General Manufacturing Holdings Ltd. in order to obtain a loan to purchase the shares of Dr. Franklin Johnston and requires the

consent of Dr. Franklin Johnston, a director and 50% shareholder of General Manufacturing Holding Ltd.”

[51] Although in his evidence Mr Rowe indicated that his understanding was that his daughter would re-transfer the 500 shares in the company to him, the terms in the Agreement speaking to the re-transfer of the shares were conditional and so there would only be a re-transfer if the full purchase price for Mr Johnston’s shares was not paid to him. The clear evidence is that Ms. Rowe paid the full purchase price for Mr Johnson’s shares.

[52] On April 26, 2021, Mr Rowe signed a document titled “Form of Transfer” which was duly stamped by the Stamp Office and the requisite fees paid in which Mr Rowe transferred his 500 ordinary shares to Elaine Rowe for a consideration of Five Hundred Dollars (\$500.00). It is clear that the Claimant took all the steps necessary to transfer his shares to the 1st Defendant so the legal position is that Ms Rowe is the owner of the shares and there would be no basis in law to re-transfer the shares to her.

[53] The Claimant in the pleadings has averred that there was misrepresentation, deception, undue influence or breach of trust on the part of Ms Rowe. If there is proof of any of these factors, it would impact the transfer of shares from Mr Johnston to Ms Rowe and from Mr Rowe to Ms Rowe. It may have an effect on whether the transfer is valid or void or voidable.

Whether there is evidence of misrepresentation, deception, undue influence or breach of trust on the part of the 1st Defendant?

[54] In the pleadings the Claimant alleged that there was deception and misrepresentation on the part of the 1st Defendant. This brings to mind the tort of deceit. The principles laid down **Derry v Peek** (1889) 14 AC 337 are instructive, that, in ‘order to sustain an action of deceit, there must be proof of fraud; fraud is proved when it is shown that a false representation has been made knowingly, or

without belief in its truth, or recklessly, careless whether it be true or false, if fraud be proved, the motive of the person guilty of it is immaterial.

[55] There is no evidence of any deception or misrepresentation on the part of the 1st Defendant. The case of **Leeds City Council v Barclays Bank plc** relied on by the 1st Defendant is also instructive. In order to establish this, the Claimant would have had to prove that the 1st Defendant made a representation to him that was false and that he was induced to enter into this transaction by the representation. Similarly, to substantiate a claim for deception the Claimant would have to prove certain elements which he has failed to do.

[56] In **Beverley Lewis and Harriet Hartley v Cleveland Hartley** [2016] JMSC Civ 34, at paragraph 37, Fraser J opined that undue influence is characterized as a specie of fraud. Fraser J. discussed **CIBC Mortgages plc v Pitt** [1993] 4 All ER 433 where Lord Browne Wilkinson said at page 439:

“...Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right....”. In Re London & Globe Finance Corporation (1903) 1 Ch 728, deceit can amount to fraud; according to Buckley J at page 732: “To deceive is to induce a man to believe a thing is true which is false which a person practicing the deceit knows or believes to be false.”

[57] The effect of undue influence in a transaction is that the transaction may be rendered void and can be set aside. Lord Millet in **National Commercial Bank (Jamaica) Ltd v Hew and Another** [2003] UKPC 51 captured the essence of what is to be understood as undue influence which he indicated possesses two elements. Firstly, there must be a relationship capable of giving rise to the necessary influence and secondly, the influence generated by the relationship must have been abused. At paragraphs 29 to 31 of the judgment, the court pointed out that undue influence arises whenever one party acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from

the relationship between them. Although the fact of the relationship of father and child raises a presumption in favour of undue influence, there is clear evidence to show that at all times the Claimant received independent legal advice. His attorney was at pains to point out to him the legal effect of the transfer of his shares to his daughter. He even signed a document capturing his full understanding of the effects of the transaction. There is therefore no evidence which substantiates the existence of undue influence.

[58] There is also an allegation of breach of trust. Breach of trust can arise in circumstances where a fiduciary relationship is established and the trustee acts in excess of their powers or acts improperly or by act or omission or breaches a core duty such as the duty to act as a prudent man of business towards those for whom he has a moral obligation to provide for (See **Learoyd v Whitely** (1887) 12 AC 727). A fiduciary duty encompasses the duty of loyalty and fidelity. This has not been established here.

[59] In **Beverley Lewis and Harriet Harley et al**, Fraser J also considered **Allen v Imlett and Nicholls** – [1817] Holt NP 641; and **Re Lake, ex parte Dyer** – [1901] 1 KB 710, at 715, per Rigby, L.J. stated that “It is settled law, that, as stated in Halsbury’s Laws of England, 4th ed., at paragraph 942, ‘A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction.’”

[60] In summary there is no evidence of any deception, misrepresentation, undue influence or breach of trust and therefore no basis on which to find that the transfer of shares was not properly and legally done. The 1st Defendant is the legal owner of the 1000 shares in the company.

Whether a resulting trust was created in favour of the Claimant?

[61] In the submissions advanced, the Claimant placed reliance on the authority of **Graham v Graham** (supra), a case involving a father and a daughter in which the court found that a resulting trust was created in favour of the father, the transferor. Counsel for the Claimant contended that the transfer of shares was not intended to be a gift and that neither party indicated such and that the Claimant intended to retain his beneficial interest in the company and the land and therefore the presumption of advancement would be rebutted and would not displace the presumption of resulting trust. Counsel asked the Court to find that the 500 shares transferred to the daughter were held on trust for Mr Rowe pending the completion of the purchase. Further that the Claimant intended to retain his beneficial interests in the company and the said land.

[62] In response, Counsel for the Defendants has not contested that the question of a resulting trust arises but argued that in this case it was the Claimant's intention to transfer the shares to Ms Rowe so she could use it as security and there is no evidence that the shares are no longer held as security. Reliance was placed on **Chen v Ng** to demonstrate that the Claimant has failed to prove the possibility of a resulting trust as the evidence is that a gift was intended. The **Chen v Ng** case is instructive as it demonstrated that 'where an asset or money is transferred for no consideration, there is a rebuttable presumption that the transferee holds the asset or money on trust for the transferor.

[63] It is of note that although the Claimant has now advanced these submissions on resulting trust there was nothing in the pleadings alluding to there being a resulting trust created. The only mention of "trust" was in the context of a breach of trust. I have already stated that the way the pleadings was drafted lacks clarity but based on the provisions of Rule 8.7 and section 48(g) of the Judicature (Supreme Court) Act which I have already discussed, the Court is empowered to consider all remedies which arise on the facts of the case. Furthermore, a resulting trust comes

within the category of an equitable remedy and on a review of cases like **Carmen Williams v Muriel Johnson** [2022] JMSC Civ. 96, there is an established principle that a court can grant an equitable relief not pleaded. My sister Carr J determined that despite the remedy not having been pleaded, based on the provisions of section 48(g) of the Judicature (Supreme Court) Act she had the jurisdiction to determine whether the applicant was entitled to equitable relief.

[64] On the question of prejudice, Counsel on behalf of the Defendants had addressed her mind to the question of resulting trust and in the written submissions advanced formidable arguments in support of the position that no resulting trust was created. I can therefore see no prejudice to the Defendants in considering the merits of the argument relating to whether a resulting trust was created in favour of the Claimant.

[65] The Claimant's reliance on the decision of **Graham v Graham** is well founded as there are some inherent similarities that provide some assistance to this court in determining this seminal issue. The question of whether the Claimant holds the beneficial interest in the shares by way of the creation of a resulting trust must therefore be addressed. The locus classicus on resulting trusts is **Re Vandervell's Trusts (No. 2)** [1974] 1 Ch 269

A resulting trust comes into being where the provider of a property did not intend to benefit the recipient, then equity responds by imposing a resulting trust. ...the presumption of resulting trust is rebuttable by evidence of the real intention of the transferor that he intended to make a gift to the transferee. Where the transferor is the father as in this case and the transferee is the child, there is a presumption of advancement in favour of the child. This presumption is also rebuttable by evidence that a gift was not intended. (Kodilyne p 130).

[66] In the Court of Appeal decision of **Clover Robinson v NCB et al** [2015] JMCA Civ 3, not cited before me, the law on resulting trust was the subject of much discourse. Commencing at page 11, Panton P extrapolated the essential principles:

“The law

[27] *There are certain well established principles which will assist in the analysis of the issues raised in this case. The major ones are as follows:*

- a. *A gift of pure personality, by way of transfer, raises a presumption of a resulting trust in favour of the transferor. In **Fowkes v Pascoe** [1874-80] All ER Rep 521; (1875) 10 Ch App 343, James LJ, after outlining the circumstances where an individual had purchased stock in the joint names of herself and her grandson, said at page 524 of the former report: “I will assume for the present purpose that all the history I have given of the origin and nature of the relations between them did not affect the legal presumption of resulting trust. I will assume, further, that the implication of such a resulting trust does not arise as much in the case of a transfer as in that of a purchase of stock, although that certainly is not the case with regard to a voluntary conveyance of land, and I will proceed to consider how the evidence stands on those assumptions.” (Emphasis supplied) The principle, although of some vintage, still has currency. The headnote in **Pecore v Pecore** [2007] 1 SCR 795, accurately reveals the view of the Supreme Court of Canada as being consistent with that well established principle. It states in part: “...The presumption of resulting trust is the general rule for gratuitous transfers...”*
- b. *The presumption is rebuttable, however, and may be rebutted by cogent evidence that the transferor intended the transfer to be a gift to the transferee. The onus of rebutting the presumption is on the person asserting that the transfer was by way of gift. In **Bank of Nova Scotia v Smith Jordan**, Douglas CJ said at page 527: “...The onus is on the defendant [transferee] to rebut the proposition that he is a trustee of the balance in the joint account by reason of a resulting trust.” In that case, as well as in **Young and Another v Sealey** [1949] Ch 278 it was held that the presumption had been rebutted by the evidence of the transferee. The presumption of a resulting trust may also be displaced by the presumption of advancement. The presumption of advancement presumes a gift and reverses the burden of rebuttal, thereby requiring the transferor, or those acting in his place, to show that a gift was not intended. The presumption of advancement, however, only applies to special relationships such as a husband and wife*

and a parent and child. It does not apply to the relationship between Ms Noel and Ms Robinson.”

- [67] My sister Barnaby J in **Graham v Graham** examined the concept of a resulting trust vis a vis the presumption of advancement specifically as it relates to whether the presumption of advancement is applicable in the case of an adult child. She traced the development of the law regarding presumption of advancement and arrived at the position that the application of the presumption of advancement should not be limited only to minor children in parent-child transfers.
- [68] A question that arose during my deliberation was whether this case falls within the category of there being consideration based on the Transfer Share document which stipulated that the transfer from James Rowe to Elaine Rowe of 500 shares was for a consideration of Five Hundred Dollars (\$500.00). At the time of transfer the 500 shares were valued at some Eight Million Dollars (\$8,000,000.00) so at best this “\$500.00” could be described as nominal consideration. There is however no evidence that the 1st Defendant actually paid this Five Hundred Dollars (\$500.00) to the Claimant so as to take it out of a case where there is no consideration. This issue also arose in the **Chen v Ng** which was relied on by Counsel for the Defendants.
- [69] At paragraph 45 of the **Chen v Ng** judgment, the Privy Council embarked on a discussion concerning whether there was valid consideration when the consideration was not actually paid and where the stated consideration was at best nominal. Reference was made to the well-known decision of **Midland Bank Trust Co Ltd v Green** [1981] AC 513 where Lord Wilberforce referred to nominal consideration as a term of art. The Privy Council however cautioned that “even if the right conclusion on the facts was that no consideration was ever really intended, agreed or payable, it does not follow that the transfer did not operate by way of gift”. The Privy Council determined that two alternative analyses existed, the first was that the parties’ recital that consideration had been paid was inaccurate, and consideration remains payable and the second that the parties’

real agreement was that no consideration should ever be paid. The view was taken that the transfer either gave rise to a resulting trust or was a gift. Since the shares were registered in Ms. Chen's name, the burden was on Mr Ng to prove that he had an interest.

- [70]** Based on the lack of evidence that this Five Hundred Dollars (\$500.00) was paid to the Claimant, I will treat this case as one without any consideration in which case there is a presumption of a resulting trust. If a resulting trust was created, the Claimant would hold the beneficial interest in the shares and as a consequent the beneficial interest in the property. The presumption of resulting trust may be rebutted by evidence that a gift was intended that is to say the presumption of advancement. If the presumption is rebutted there is no scope for equity to intervene in favour of the Claimant. Each case must be determined on its facts. It is however the Claimant who is seeking to prove and so the onus is on him to rebut the presumption of advancement. It is the Claimant who must satisfy me on a balance of probabilities that he did not intend the shares to be a gift to his daughter.
- [71]** Despite the Claimant having defied the clear instructions of his Attorneys-at-law, the question still remains as to whether there is any clear evidence on the part of the Claimant that he intended the shares to be a gift to the 1st Defendant. The 1st Defendant has argued that the evidence is clear as the Claimant received legal advice and it was made patently clear to him that he would no longer be the legal owner of the shares.
- [72]** This does not take away from an examination as to what was the Claimant's intention. Certain facts are uncontroverted. Among these are the fact that the Claimant had been sued by Mr Johnston for his half share of the property, that a consent judgment was entered which required the Claimant to purchase the shares of Mr Johnston. It is not disputed that the Claimant was not in a financial position to purchase the shares himself. It is not disputed that it was under those conditions that he approached his daughter. It would have been evident under those

circumstances that the Claimant wanted to maintain control of his ownership in the company and that it was his livelihood. Despite the 1st Defendant's assertion that the Claimant said he wanted to step down, he maintained his business at all times. At the time the Claim was filed, the Claimant was still collecting rental income from the property which he had refused to turn over to the 1st Defendant. The Claimant has gone as far as to assert that the 1st Defendant made steps to remove the tenants without his knowledge or approval. This is not consistent with someone who wanted to remove himself from the business and this would have been evident to the 1st Defendant. I do not accept that the Claimant expressed to the 1st Defendant that he wanted to step down.

[73] Although it is the Claimant who must rebut the presumption of advancement, the actions of the 1st Defendant are also telling. She has not provided any evidence to substantiate the fact that the shares were intended as a gift to her. The most she has asserted is that he said he intended to step down from the company which I did not accept. She has not led any evidence or asserted that the Claimant ever suggested or said he was gifting her the shares in the company. The Agreement that was signed expressly provided that the purpose of this transfer was for Ms Rowe to obtain a loan to purchase Mr Johnston's shares.

[74] The parties have not denied that this was a purpose for which the acquisition took place. This is as consistent with the Claimant's case as it is consistent with the Defendants' case. It is clear that she would not have been approved a loan if she was not the owner of her father's share. I find that was the essence, the very reason behind the transfer of her father's shares to her and that there was an understanding between father and daughter that the Claimant would maintain his interest in the 500 shares. Despite the fact that he received legal advice that he would no longer be the owner, he proceeded in the way he did because of the element of trust in his daughter that despite what is on paper he would still retain a beneficial interest in the company. I am satisfied on a balance of probabilities that Ms Rowe was aware that the reason behind this was that he wanted her to be

able to secure a loan to purchase the shares belonging to Mr Johnston and that he would keep his interest in the property.

[75] Based on the evidence presented, I am satisfied on balance of probabilities that there was never an intention to create a gift in favour of the 1st Defendant. The sole purpose of transferring the shares to her was for her to obtain a loan to purchase the shares of Mr Johnston and the Claimant at all times maintained a beneficial interest in the 500 shares. I accept that a resulting trust was therefore created in favour of the Claimant and that the 1st Defendant holds the 500 shares on trust for the Claimant and so he is entitled to have the 500 shares re-transferred to him.

[76] Resulting trust would only affect the shares transferred from father to daughter and would have no bearing on the shares Ms Rowe purchased from Mr Johnston. Therefore, the 1st Defendant remains the legal owner of shares formerly held by Mr Johnston and there can be no re-transfer.

Whether the removal of the Claimant as a director was in accordance with the Companies Act of Jamaica and/or the Articles of Association and whether the Defendants should be removed as directors?

[77] The shareholders in a company are distinct from its directors, but they can also be the same persons depending on what is stipulated in the company documents. The Claimant could only be ordered to be reinstated as a director if it is found that he was removed contrary to the provisions of the Companies Act of Jamaica (hereafter "The Act") and/or the Articles of Association of the company.

[78] Section 179(1) of the Act provides that a company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its Articles or in any agreement between it and him. Section 179(2) of the Act further provides that a special notice is required of any resolution to remove a director or to appoint somebody instead of a director so removed at the meeting at which he is removed. On receipt of an intended removal resolution, the company

must forthwith send a copy of the resolution to the director concerned, and the director, whether or not he is a member of the company, is entitled to be heard on the resolution at the meeting.

- [79]** The Articles of Association are the contractual terms which govern the relationship of shareholders with the company. Although this was a small private company, it is still expected that there be compliance with the Articles. The Articles of Association of GMHL are silent on how a director may be removed, however, Article 5 of the Articles of Association provides that a resolution in writing shall be passed and be effective as if the same has been passed at a general meeting of the company.
- [80]** The Claimant alleged that he was wrongfully removed as a director of GMHL since he did not submit a resignation letter and he was not informed that there was a resolution to remove him. He alleged that there were secret meetings between Mr Johnston and Ms Rowe and his absence from meetings, as the only other shareholder and member of the company, resulted in a lack of a quorum, therefore the business decisions taken at those meetings, including those where he was removed from the company as director were void. He further stated that any meetings conducted in his absence that resulted in the decision to have Roydell Thompson appointed as a director and Elaine Rowe as secretary lacked a quorum and those appointments were void and contrary to the Articles of Association of the company.
- [81]** When the documents are examined, the document titled Notice of Appointment of Change of Company Secretary reflects Mr Rowe's signature in the columns in his capacity as director authorising the change in company secretary from Tracey Sutherland to Elaine Rowe on April 21, 2021. His signature also appears in the document titled Notice of Appointment of Change of Directors as authorizing the addition of Elaine Rowe as a director. On February 24, 2022 there was another

Notice of Change of Director. This was signed by Elaine Rowe. There is no evidence that the Claimant had anything to do with this document.

[82] Based on the provisions of section 179 (2) of the Companies Act, the Claimant should have been given notice of a meeting where he was being removed as a director. The 1st Defendant has not indicated that any such notice was given and she has not produced any evidence of that so the uncontested evidence is that he was not given notice or even that any meeting was held. Counsel on behalf of the Defendants has argued that all attempts to have general meetings of the company proved futile however there has been no evidence to show that any attempt was made with the Claimant as required in the company documents or the Act.

[83] The Defendants having failed to comply with the Articles of Association and the provisions of section 179 of the Companies Act, any removal of the Claimant as director of the company is invalid. This position is supported by my sister Wiltshire J in the case of **John Fitzgerald Peart v Sandra Palmer-Peart** [2018] JMSC Civ. 186 at paragraph 26 where she categorically stated that non-compliance with the Articles of Association and the Companies Act invalidates the removal of the Claimant and the appointments made.

[84] Reliance was placed on the **Fitzgerald** case by my sister Palmer-Hamilton J in the case of **Rickie Davis and Dorma Davis v Wellesley Stokes, Keroy Myers, Dalou Wong, Prescilla Stokes and Riviera Insurance Agency Limited** [2023] JMCC COMM 01. Palmer-Hamilton J addressed the issue of the removal of a director commencing at paragraph 49 of the judgment. After reviewing section 179 of the Companies Act, she emphasized the need to abide by the provisions of section 179 at paragraph 52 of the judgment as follows:

“
[52] *I see no need to delve into whether or not the reason for the decision was valid or whether it entitled the Defendants to remove the 1st Claimant as a director. What is important is that, regardless of the reason taken to remove the 1st Claimant as director, the procedure as laid out in section 179 ought to be followed.*”

[85] Palmer-Hamilton J expressed that the proper procedure would not have been followed. This was despite there being a Notice of Change as this just serves to register a change in the directors. She went on to say at paragraph 54 of her judgment that "...Even though it is accepted that the Company operated in an informal manner, there ought to be some form of notice".

[86] I therefore find that in this case the effect of non-compliance with the Act would be that the Claimant's removal would not be valid and any notice reflecting that there is a change would not be reflective of the true position. The Court is prepared to make an Order that the Claimant be reinstated as director.

[87] The Claimant is also seeking an order that the Defendants be removed as directors. Section 178 of the Act deals with the appointment of directors and provides...

"At a general meeting of a company other than a private company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be made, unless a resolution that it shall be so made has first been agreed to by the meeting without any vote being given against it."

[88] It is the Claimant who is seeking the removal of the Defendants so the burden is on him to establish that the appointments as directors were contrary to the provisions of the Act. At the time the new directors were appointed the 1st Defendant would have been the sole shareholder and would have been able to carry out all the powers of a shareholder including the appointment of directors as she desired. It would be for the Claimant to prove that the proper procedure was not followed which he has failed to do.

[89] On March 21, 2021, Mr Rowe executed both a Notice of Appointment of Change of Director and a Notice of Appointment of Change of Company Secretary at the Companies Office of Jamaica appointing Elaine Rowe as a director. Mr Rowe

assented to the appointment of Ms Rowe as a director at a time when he was a director of the company. Therefore, he has failed to prove that she was not properly appointed.

[90] The following orders are granted:

1. That the 500 shares transferred from James Rowe to Elaine Rowe be re-transferred to James Rowe.
2. That the 1st Defendant shall execute a Transfer of Shares document for the 500 shares to the Claimant on or before December 29, 2023.
3. If the 1st Defendant fails to do so the Registrar of the Supreme Court is empowered to sign the Transfer of Shares documents on behalf of the 1st Defendant.
4. That any removal of the Claimant as director is invalid and the 1st Defendant is required to take steps to re-instate the Claimant as director of the company.
5. If the 1st Defendant fails to take steps to reinstate the Claimant as director the Registrar of the Supreme Court is empowered to sign any documents required to reinstate the Claimant as director of the Company.
6. The other orders requested are denied.
7. No order as to cost.

.....
Stephane Jackson Haisley
Puisne Judge