THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-03382

IN THE MATTER OF PART 72
OF THE CIVIL PROCEEDINGS RULES 1998

AND

IN THE ESTATE OF ERNEST CHANCE also called
ERNEST HENDRICKSON CHANCE, Deceased
who died on the 27th day of July 2012

BETWEEN

JENNIFER JOSEPHINE CHANCE	First Claimant
DIRK WATERMAN **also called DIRK WAYNE WATERMAN**	Second Claimant

AND

SEAN CHANCE also called SEAN STAFFORD CHANCE **(Legal Personal Representative of the Estate of Ernest Chance** **also called Ernest Hendrickson Chance, Deceased)**	First Defendant
SEAN CHANCE also called SEAN STAFFORD CHANCE **(in his personal capacity)**	Second Defendant
PAUL CHANCE	Third Defendant
SEAN CHANCE **(Administrator Ad Litem of the Estate of HENRY CHANCE,** **Deceased) Substituted for HENRY CHANCE by the Order** **of the Honourable Madam Justice Margaret Y. Mohammed** **dated 13 April 2017**	Fourth Defendant

Before the Honourable Madame Justice Margaret Y. Mohammed

Dated the 18th September, 2018

APPEARANCES:
Mr. John Heath instructed by Mr. Michael Luckhoo Attorneys at law for the Claimants.
Mr. Marc Campbell instructed by Mr. Andre Rudder Attorneys at law for the Defendants.

JUDGMENT

Introduction

1. The Defendants are the children of Ernest Chance ("the Deceased") who died on the 27th July 2012. The Claimants are also alleging to be the children of the Deceased and are therefore entitled to a share in his estate. The First Defendant is sued in his capacity as the appointed Administrator of the Deceased's estate and in his personal capacity. The Third Defendant and Fourth Defendant ("Henry") are sued as beneficiaries of the Deceased's estate. Henry died during the instant matter and the First Defendant was appointed to represent his interest.

2. The Claimants averred that the Defendants applied for Summary Administration in the United States of America in 2012 ("the Florida application") and subsequently a Grant of Letters of Administration in Trinidad in 2013 ("the Grant"), in relation to the estate of the Deceased. The First Claimant was a part of the Florida application however she refused to sign a Consent and Notice of Waiver form in relation to it. She was not contacted, aware of or involved in the application for the Grant. The Second Claimant was excluded from both the Florida application and the Grant. The First Defendant obtained the Grant on the 27th September 2013. The Claimants are contending that the Grant was obtained by fraudulent means. They have instituted the instant action seeking the following orders against the Defendants:

    (a) An Order that the First Defendant, as Legal Personal Representative of the estate of the Deceased be discharged and removed with immediate effect as administrator of the estate of the Deceased.
    (b) An Order revoking the Grant to the First Defendant.
    (c) A Declaration that the Grant was obtained by fraudulent means and/or without the consent of the Claimants.
    (d) A Declaration that the Third Defendant and Henry in procuring and participating in the application for the Grant to the First Defendant knowingly assisted the First Defendant in obtaining the Grant by fraudulent means and/or without the consent of the Claimants.

(e) A Declaration that the Second, Third and Fourth Defendants hold all property transferred to them by the First Defendant under the Grant pursuant to a constructive trust for the estate of the Deceased.

(f) An Order appointing the Second Clamant in place of the First Defendant as the Administrator of the estate of the Deceased.

(g) An Order that the First Defendant furnish to the Claimants, file with the court, and verify the Accounts of all receipts and expenditure in relation to the estate of the Deceased within thirty (30) days.

(h) Repayment of all monies and/or other property due and owing to the estate of the Deceased in respect of the misappropriation from the estate of the Deceased by way of restitution.

(i) Damages for waste and devastavit in the misappropriation and maladministration of assets belonging to the estate of the deceased, if any, to be assessed after the First Defendant files the accounts as provided above.

(j) Interest.

(k) Costs.

(l) Such further relied as the Honourable Court deems fit.

The Claim

3. The First Claimant was originally known as Jennifer Josephine Thomas. By a Deed Poll in 1994[1] she assumed the name of Jennifer Josephine Chance. She claims that for many years the Deceased encouraged her, her mother and her brother Henry to move abroad and live with him. However while Henry migrated when he was approximately twenty one (21) years old, the First Claimant only did so when she was about thirty five (35) years old as she was working and she had two children to care for thereby making it difficult for her to move abroad.

4. Despite not physically living with the Deceased, the First Claimant alleges that she has always shared a good relationship with him. He supported her and would often send money

[1] Registered at Entry No. 476 Vol 2-1A at page 27

for her, her brother Henry, and her mother, through his mother Rita Roberts although he was living abroad.

5. On the 30th March 1996, the First Claimant visited the Deceased abroad. It was only after this visit that she decided to migrate and live with the Deceased in Miami. Less than two (2) months later the Deceased petitioned the United States Department of Justice to have the First Claimant stay with him in Miami Florida. This petition was approved on the 7th November 1996. At this time the Third Defendant was also living in Miami with the Deceased, however he was at university. Notwithstanding, he visited from time to time during breaks at university.

6. When the First Claimant migrated to the United States she applied for a Green Card but she was given a work permit in the interim. She was subsequently given a Green Card some time in 1998. The First Claimant claims that she had intentions to have her children come live with her. In order to assist with this, the Deceased travelled to Trinidad in 1998 to the United States' Embassy, and arranged the documents for her children who moved with her to New York in 1996 where she went to study.

7. The First Claimant's son eventually moved back to Miami and began living with the Deceased on the 19th October 2007, when he got a job which she claims was arranged for by the First Defendant. While living with the Deceased, her son was responsible for paying the utility bills for the house and the Deceased paid the mortgage.

8. For a great part of her life, the First Claimant was unaware of the existence of the Second Claimant. She only became aware that he was one of her siblings when the Deceased mentioned it to her in 2000. She began communicating with the Second Claimant by telephone from about 2008 onwards. Although she spoke with him on several occasions, she only met him in person when he visited Miami in 2012 to attend the Deceased's memorial service.

9. The Second Claimant averred that he knew the Deceased from around 2000 since he visited his workplace, a barbershop, to have his hair cut. In or around 2007, the Deceased informed

him that he was his biological father. However, the Second Claimant stated that he grew up knowing Leroy Nello Waterman as his father. After the Deceased revealed to the Second Claimant that he was his biological father, the Second Claimant began interacting more with the Deceased who introduced him to his other siblings and relatives, namely the brother and sister of the Deceased, with whom he developed a close familial relationship. He averred that Henry made arrangements for him to visit them in Miami on three occasions between the years 2010 and 2011 and he stayed at the home of Henry in Miami.

10. When the Deceased passed away, the Second Claimant claimed that his family assisted the Defendants with the preparations for the funeral service of the Deceased which was held in Trinidad. He also attended the memorial service for the Deceased in Miami.

11. The Claimants acknowledged that the First Defendant is the Legal Personal Representative of the estate of the Deceased. They claim that after the funeral service for the Deceased, the First Claimant received a copy of the Petition for Summary Administration from the First Defendant and Henry. The Defendants attempted to persuade the First Claimant to execute a document purportedly waiving certain of her rights. However, she refused to sign the said document, as it omitted the Second Claimant. She also indicated her desire to have the document reviewed by an attorney at law for advice.

12. After the funeral of the Deceased, the Second Claimant averred that he purchased the motor vehicle belonging to the Deceased, a Mazda AD Wagon ("the vehicle") which was promised to him at a price of Fourteen Thousand Dollars ($14,000.00) which he deposited into a joint account of the First Defendant and the Deceased.

13. The Claimants also asserted the First Defendant acted fraudulently by knowingly omitting a true and full inventory of all the real and personal assets of the Deceased when applying for the Grant. Specifically, the Claimants pleaded that the Deceased held several bank accounts with various financial institutions and owned properties in Tobago and Saint Ann Village, Mayaro and was beneficially entitled to property owned by his late mother, Rita Roberts[2].

[2] See paragraph 41(i) of the Amended Statement of Case

14. On the 23rd January, 2014, the Claimants through their attorneys sent a pre action protocol letter to the Defendants. The Defendants responded on 7th February, 2014 through their attorneys, asking for 14 days before any further action is taken while awaiting instructions from their client on how to proceed. No response was received however from attorneys acting for the First/ Second Defendant and Fourth Defendant until 23rd June 2015.

15. The Claimants also claim that the First Defendant in his capacity as Legal Personal Representative of the estate of the Deceased or in his personal capacity has failed to distribute any part of the estate to them. He also has not given any or any sufficient reason for his failure to distribute any part of the assets of the estate of the Deceased to the Claimants and as such is preventing the due administration of the estate of the Deceased. He has also failed to properly distribute the assets of the Deceased, which comprised real property within the time delimited by section 12 of the **Administration of Estates Act**[3].

The Defence

16. The Defendants denied that they acted fraudulently in procuring the Grant. They say that at the time of applying for the Grant, they were uncertain as to the true parentage of the First Claimant as they were not privy to a certificate of birth of the First Claimant. Having seen documents that attest to the parentage of the First Claimant from the Claim Form and Statement of Case, the Defendants now admit that the Deceased was the father of the First Claimant and that she is entitled to a share of the Deceased's estate. However they deny that the Second Claimant is a child of the Deceased and therefore he is not entitled to a share of the Deceased's estate.

17. The Defendants averred that they have no knowledge of the Deceased sending money to the First Claimant nor are they aware of the circumstances surrounding the name change of the First Claimant. They are unaware that the Deceased encouraged the First Claimant and her family to migrate and live with him in Miami Florida. The Defendants admitted that the First Claimant visited the Deceased in Miami in or around March 1996. However, the First Claimant left the home of the Deceased some time in or around mid-1996 since

[3] Chapter 9:01

the Deceased and his wife found living with the First Claimant to be difficult and contentious. The Deceased arranged for the First Claimant to live with some friends in New York thereafter where she has continued to live. They averred that they were unaware of the circumstances surrounding the First Claimant applying and/or obtaining a Green Card. The Third Defendant did not recall living with the First Claimant at the house of the Deceased simultaneously. The Defendants denied that the First Claimant spent a lot of time with them while she stayed in Miami. Rather, they averred that the First Defendant lived some 300 miles away at the time and the Third Defendant was away at university.

18. The Defendants admitted that the First Claimant's son moved to Miami and began living with the Deceased. They averred that the First and Third Defendants together with the First Claimant's son contributed to payment of the household utility bills at various points in time from the latter half of 2007.

19. The Defendants denied that the Deceased is the father of the Second Claimant. They averred that the Deceased never informed them that the Second Claimant was his son but he informed that the Second Claimant was desirous of a "father figure" and that was his role towards the Second Claimant. Otherwise, they have no knowledge of the allegations as set out in the Amended Statement of Case by the Second Claimant pertaining to his relationship with the Deceased.

20. The Defendants averred that they were introduced to the Second Claimant in or around 2008 but not as the son of the Deceased. They visited the home of the Second Claimant with the Deceased. They averred that it was a common practice of the Deceased to take them to the homes of various individuals when they visited Trinidad. Although the Second Claimant claims to have travelled to Miami with the assistance of Henry, the Defendants averred that they have no knowledge of Henry making arrangements for the Second Claimant to travel abroad.

21. As it relates to the extent of the Second Claimant's contributions after the passing of the Deceased, the Defendants pleaded that he assisted by way of cleaning the home of the Deceased in Trinidad and running errands for which he was compensated by being allowed

to take several pieces of equipment from the home of the Deceased. He did not however contribute financially to the Deceased's funeral expenses. This was paid for using monies the Deceased had in a Scotiabank account as well as personal funds of the First Defendant.

22. The Defendants explained that although the Second Claimant's name was included in the funeral program as one of his children, this was only done so to avoid any conflict and it was not a recognition that he was a son of the Deceased.

23. The Defendants admitted that in or around August 2012, the Defendants approached the First Claimant for her consent to have the First Defendant act as administrator of the Deceased's estate. The First Claimant sought time to have the document seeking her consent reviewed, before signing it. She later indicated according to the Defendants, that she wished to have no further part in the Deceased's estate which they understood that she was saying that she was not the daughter of the Deceased.

24. The Defendants acknowledged selling the motor vehicle to the Second Claimant since he expressed an interest in it and they had no use for it. However they stated the transaction was not done on the basis of a family relationship.

25. The Defendants averred that the Inventory of Assets reflected the First Defendant's knowledge of all the assets of the Deceased's estate including all of the properties he owned. The Republic Bank account referred to by the Claimants does not form part of the Deceased's estate as it was a joint account held by both the Deceased and the First Defendant. The funds in the Scotiabank account referred to by the Claimants, were used to cover the funeral expenses of the Deceased. The Defendants are unaware of any accounts held at RBC or Unit Trust or of any property outside of what had been listed in the Inventory of Assets. Nonetheless, the First Defendant stated that if indeed these accounts and properties do exist, which the Claimants are required to prove, he stands ready and willing to incorporate these assets into the Deceased's estate and distribute the same to the persons who are beneficially entitled to the Deceased's estate in accordance with the provisions of the **Administration of Estates Act.**

26. Further, monies earned from the rental property of the Deceased has been deposited into the joint Republic Bank account and has been used by the First Defendant solely for the maintenance, repair and upkeep of the Deceased's properties. The Defendants have not divided the monies from the joint account among themselves and at the date of filing their Defence, there was a positive balance. However, there remains outstanding expenses relating to the Deceased's properties which the Defendants anticipate will exhaust the balance held in the account.

27. At the trial the First Claimant, Second Claimant and the First Claimant's son Seon Gonzales, gave evidence in support of their claim. The First and Third Defendants gave evidence in defence of the claim.

28. After the Claimants closed their case and before the Defendants gave evidence, Counsel for the Defendants made a no case submission with respect to the claim by the Second Claimant. Counsel for the Second Claimant requested the opportunity to make submissions in response in writing without prejudice to the Defendants giving evidence in support of their case.

29. In this judgment the issues which the Court is called upon to decide are:

    (a) Whether there is merit in the Defendants' no case submission with respect to the Second Claimant?

    (b) If no, has the Second Claimant proven that the Defendants acted fraudulently in their dealings with the Deceased's estate?

    (c) Has the First Claimant proven that the Defendants acted fraudulently in their dealings with the Deceased's estate?

    (d) If the Claimants have proven their case, are they entitled to the relief sought?

The No Case Submission

30. The crux of the no case submission against the Second Claimant was that his case against the Defendants was grounded on him being a son of the Deceased as this would entitle him

to benefit under the Deceased's estate and be appointed Administrator of same.[4] The Second Claimant failed to get past this initial hurdle since his evidence fell short in meeting the requirements for proving that a father child relationship existed between him and the Deceased in accordance with the provisions of the **Status of Children Act**[5] and the **Family Act**[6]. As such he failed to get past his first hurdle of proving that he had locus standi in the action.

31. It was also submitted that the Attorneys at Law for the Defendants were not put to an election, prior to making the no case submission, as to whether or not they would be calling evidence. Therefore the test which the Court is to apply in determining the no case submission is if the Second Claimant has made out a prima facie case in order to defeat the no case submission.

32. In response, Counsel for the Second Claimant indicated that the Court has the jurisdiction to grant to the Second Claimant the declaratory relief with regard to paternity and that the Second Claimant has proven on a balance of probabilities that he was a son of the Deceased and he is entitled to benefit from the Estate. In support of this position Counsel for the Second Claimant relied on Sections 16 and 20 of the **Supreme Court of Judicature Act**[7] and the learning in the local unreported decision of Rajkumar J (as he then was) in **Trudy Cox v Mark Cox and ors**[8] which was brought to the Court's attention by Counsel for the Defendants. Counsel argued that the language in the **Status of Children Act** and the **Family Law Act** is not mandatory and does not preclude a Court from making an order for paternity.

33. It was also submitted that the Defendants having elected to make a submission of no case to answer and having decided to call evidence, the test to be used is whether the Claimant has established the case on a balance of probabilities.

[4] See sections 2 and 30(a) of the Wills and Probate Act and sections 2 and 24(2) of the Administration of Estate Act.
[5] Chapter 46:07
[6] Chapter 46:08
[7] Chapter 4:01
[8] CV 2011-04815

34. In **Benham Ltd v Kythira Investments Ltd**[9] Simon Brown L.J. stated at paragraph 32 that the correct question for the Judge to consider at the end of a no case submission is:

> "Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was the court's conclusion in **Alexander v Rayson** [1935] All ER 185 and I see no reason to take a different view today, the CPR notwithstanding. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages … Any temptation to entertain a submission should almost invariably be resisted. The Judge in putting the Defendants to an election should ask "Have the claimants advanced a *prima facie* case, a case to answer, a scintilla of evidence, to support the inference for which they contend, sufficient to call for an explanation from the defendants? That it may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendant's not calling any evidence, would not allow it to be dismissed on a no case submission."

35. In this jurisdiction Donaldson-Honeywell J in **Frank General Contractors Limited v M Rampersad Auto Supplies Limited**[10] considered the test which the Court is to apply in determining a no case submission in various circumstances. At paragraphs 9-14 the Court stated as follows:

> "9. The Defendant explained further at paragraphs 8 to 9 of submissions as follows: "Indeed, according to the learned editors of Blackstone's Civil Practice 2015 at paragraph 61:46 [Tab 1]:
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> "Under the CPR it remains the case that, in general, the judge may require a defendant to elect to call no evidence before making a submissions of no case to answer (Blinkhorn v Hall (2000) LTL 13/4/2000; Miller v Cawley [2002] EWCA Civ 1100, The Times, 6 September 2002). However, there may be circumstances where a submission may be entertained without putting the defendant to an election, as in Mullan v Birmingham City Council (1999) The Times, 29 July 1999. The

[9] [2003] EWCA Civ 1794
[10] CV 2015-04013

power to dismiss on a submission of no case to answer without putting the defendants to their election whether to call evidence should be exercised with considerable caution (Boyce v Wyatt Engineering [2001] EWCA Civ 692, The Times 14 June 2001).

Where the court allows a defendant to make a submission of no case to answer without being required to elect whether to call no evidence, the test by which the submission is determined is whether the claim has no real prospect of success (Benham Ltd v Kythira Investments Ltd). **On the other hand, if the defendant is put to his election and decides to call no evidence, the submission of no case to answer is decided on the basis of whether the claimant has established the case on the balance of probabilities (*Miller v Cawley [2002] EWCA Civ 1100, The Times, 6 September 2002*).** It is a serious procedural irregularity for a judge to fail to put the defendant to its election on calling evidence, and then to decide a submission of no case to answer applying the balance of probabilities as the standard of proof (***Graham v Chorley Borough Council [2006] EWCA CIV 92, [2006] PIQR P24).”*** [emphasis added]

Zuckerman states at paragraph 22.79 in Zuckerman on Civil Procedure, Principles of Practice, Third Edition [Tab 2]:-

“In ***Miller v Cawley*** it was said that the test was that of a “reasonable prospect of success”. However, while a reasonable prospect of success may be appropriate in applications of summary judgment, it may not be appropriate in the present context since the question here is whether the claimant has done enough to entitle him to put the defendant to his election. The Benham test has now been endorsed by the Court of Appeal in Graham v Chorley BC. It follows that a plea of no case to answer is likely to be entertained only in those cases where the claimant’s case has suffered a serious collapse. **Needless to say, where the defendant has been put to his election and decided not to call evidence, the court must determine whether the claimant proved his claim on the balance of probabilities**.”[emphasis added]”

10. Further citing the **White Book 2016** at **paragraph 32.1.6** the Defendant highlighted the authors summary of the explanation of Simon Brown L.J. in **Bentham at paragraph 20 of the Judgment** that:

"where a defendant makes a submission of no case to answer, is put to his election and elects to call no evidence, the issue for the judge is not whether the claimant has failed to advance a prima facie case or has "no real prospect" succeeding on the claim. Rather, it is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his case by the evidence called on the balance of probabilities (Miller v Cawley [2002] EWCA Civ 1100, July 30, 2002, CA, unrep., at para.11 per Mance L.J.)."

36. Donaldson-Honeywell J in applying the test in **Benham** concluded that the balance of probabilities test is the standard of proof to be met where the Defendant elects to call no evidence.

37. In the instant case the Court did not call upon the Defendants to elect whether to call any evidence. Therefore, I cannot apply a balance of probabilities test to determine the no case submission. The test which is to be applied in the circumstances of this case is whether the Second Claimant has no real prospect of success.

38. The Second Claimant's evidence was that although his birth certificate bears the name of Leroy Nello Waterman as his father, he is the son of the Deceased. According to the Second Claimant, the Deceased was a regular visitor to his barbershop since around 2000. It was on a visit in 2007 to his barbershop that the Deceased informed him that he was his father. At that time no one else was around. Under cross-examination, the Second Claimant admitted that he did not believe the Deceased right away because up until that point at 35 years old, he knew Leroy Nello Waterman to be his father. He stated that the Deceased recounted to him how he came to know his mother and his relationship with his mother when both the Deceased and his mother lived in Trinidad. He said that upon receiving this news he contacted his mother who verified the information as being true but she stated that she left it alone so that they could all live peacefully. However, despite his mother verifying

that the Deceased was in fact his father, she was not called as a witness in this matter. Further, the Second Claimant testified that his brother Dean was also aware of this information but he was not called as a witness to support his claim. When asked whether his mother knew about these proceedings his response was that he is an adult and he chose to keep his business private. Notwithstanding this revelation to him by the Deceased, the Second Claimant testified that he did not expect that the Deceased would have contributed financially to him since all his needs were being met. He also stated that he does not want to inherit from the Deceased's estate but he believes that what is "right to any person is right to them".

39. The Second Claimant was asked in cross-examination whether there was any documentary evidence that he was a son of the Deceased. He confirmed that there was no such document nor was there any declaration from any court which certified that he was the son of the Deceased. He accepted that there was an equal possibility that Leroy could be his father as could the Deceased. He admitted that although he and the First Claimant are related by blood he has not done any DNA testing to verify their blood relationship but rather under cross-examination he indicated that he intends to do so.

40. The Second Claimant testified that it was through the Deceased he met the First Claimant as well as the Defendants all of whom he knew to be the other children of the Deceased. He said that they spent time together and he annexed photographs which he stated were taken of the Deceased and the First Claimant spending time with him when they visited. He also annexed photographs of them spending time together even after the Deceased had passed away. He testified that he was visited by the Deceased's brother and sister when they came to Trinidad and he had developed a close relationship with them and kept in contact with them via social media and WhatsApp. His evidence was tested and it was shown that he had no evidence of a close familial relationship with the Deceased's siblings. Similarly, most of the photos which he annexed were actually taken after the funeral of the Deceased. Further, he admitted that between 2007 and 2012 the Third Defendant, who he says he was also close too, only visited his home on one occasion despite the Third Defendant being in Trinidad on more than one occasion.

41. According to the Second Claimant, he visited the Deceased in Miami. He said that his visits were arranged by Henry who arranged a "Digi Pass" for him to be able to travel. He said that he paid $1000TT to cover the taxes which he gave to Henry's sister who lives in San Juan Trinidad, and he would then be put unto the Pass and get free flights to Miami to visit them. In Miami he stayed at Henry's house. However he admitted that he had no evidence or documentation to show that Henry organized the Digi pass for him and he admitted that he did not call Henry's sister, who knew of the arrangement as a witness in this matter.

42. According to the Second Claimant, after the Deceased passed away he, his wife and children help to clean up the house, which was his way of contributing, while the First Claimant made all the funeral arrangements. He offered to assist the First Claimant but the First Claimant paid for all the funeral expenses and made the arrangements for the funeral service. He stated that in the programme for the funeral and in the memorial service in Miami his name was included as a son of the Deceased.

43. The Second Claimant testified that he met the First Claimant, through Henry who he said went above and beyond for him after finding out he was his brother. He said that the Third Defendant was never too involved while the First Defendant who was a school principal was always busy.

44. After the Deceased passed away, the Second Claimant said that he purchased the motor vehicle from the First Defendant and Henry. He said he purchased it since neither of them resided in Trinidad and because the Defendants needed funds to do renovations on the Deceased's house. He admitted in cross-examination that he asked the First Defendant's permission of to have some tools which belonged to the Deceased.

45. According to the Second Claimant, around November 2013, while he was in the process of finalizing the purchase of the motor vehicle, upon receipt of some documents from the First Defendant he realized that the First Defendant was issued the Grant. He said upon becoming aware of the Grant, he got a copy of the application and the affidavit and he sent a copy to the First Claimant and her son. He also sought legal advice on the issue. He said that he knew of a document the First Claimant was given to sign by the First Defendant

which she did not sign. He said he knew that the First Claimant was asked to consent to the First Defendant acquiring the power to deal with the Deceased's estate in 2012 but she did not. He too saw the same document which was the Consent and Notice of Waiver form, and he became concerned as to why he was not asked to sign them since he was a part of the family since the Deceased started to treat him as such. However he said nothing about it since he did not want to cause any trouble at the time and he believed that he would have been be included by the Defendants. When it was put to him that it was unanimously decided that the First Defendant would be the executor of the Deceased's estate, he denied it. It was also put to him that he was not given the form to sign as he was not a son of the Deceased, however he denied this.

46. The Second Claimant testified that the Deceased told him of several properties and approximately 10 acres of agricultural land which he had in Mayaro which was passed on to him by family members which are rented out. Despite this he said he did not instruct his attorneys who he had retained since 2014, to do any title searches to ascertain the ownership of these properties until recently.

47. The Second Claimant testified that the Deceased also introduced him to friends and family locally and abroad as his son of the Deceased. He stated that when the Deceased was alive he got along well with the Defendants. Similarly, his wife and children interacted with them and their children in particular Sydney Chance, the daughter of the First Defendant. However, after the Deceased passed away he said that the First Claimant and Henry started to treat both him and the First Claimant badly.

48. The Second Claimant also admitted in cross-examination that: his mother and the Deceased were not married to each other at the time of his conception or at any other time[11]; the Deceased was never listed as his father on his (the Second Claimant's) certificate of birth[12]; and there has never been a paternity order and/or declaration made by a court in this

[11] The Status of Children Act - Section 7(a)
[12] Ibid Sections 7(b) and 8(1)

jurisdiction[13] or a foreign jurisdiction[14] as to the existence of a father/child relationship between the Deceased and the Second Claimant.

49. In this jurisdiction proof of paternity is by: marriage between the mother and father at the time of conception[15]; registration of paternity pursuant to the Births and Deaths Registration Act[16]; a paternity order[17]; or by an order made in a foreign country declaring a person to be the father of a child[18].

50. There was no evidence from the Second Claimant's evidence that he has satisfied the statutory requirements for proof of paternity to establish any locus standi to bring and maintain the instant action. I have understood the Second Claimant's position to be that that even if he has not met the statutory requirements to establish his paternity prior to instituting the instant action based on the evidence, on a balance of probabilities, he has established paternity and based on the learning in **Trudy Cox,** the Court has the power to make such a declaration.

51. In **Trudy Cox** the matter concerned the validity of the will of the Testator. There was no relief sought with respect to a declaration of paternity. However, one of the issues which arose for determination was whether one of the Defendants was a daughter of the testator. Rajkumar J (as he then was) in making the declaration of paternity considered that this was an issue which was filed in the Claimant's list of issues; evidence was led extensively on the issue and that the Court was empowered under sections 16 and 20 of the **Supreme Court of Judicature Act**[19] to deal with and dispose of all matters that can be properly adjudicated upon in a proceeding so as to avoid a multiplicity of proceedings and that there was no reason to avoid such a determination at that stage of the proceedings. The Court also considered sections 9 (5) and 10 of the **Status of Children Act** when considering the

[13] Ibid sections 7(b), 8(2), 8(3) and 10.
[14] Ibid section 8(4)
[15] Section 7 (a) Status of Children Act
[16] Sections 7(b) and 8 (1) of Status of Children Act
[17] Section 10 of Status of Children Act
[18] Section 8(4) Status of Children Act
[19] Chapter 4:01

evidence and the Court was satisfied that there was sufficient evidence to make the declaration for paternity.

63. While the decision in **Trudy Cox** was not appealed, even if I was minded to adopt the approach by Rajkumar J (as he then was) I am still not satisfied that the evidence was sufficient to support a finding that the Second Claimant was son of the Deceased for the following reasons.

64. In seeking to prove that he is the Deceased's son, the Second Claimant has relied almost exclusively on an alleged conversation between the Deceased and himself in or around 2007 where the Deceased represented to him that he (the Deceased) was his (the Second Claimant's) father. In an attempt to buttress this claim, the Second Claimant gave evidence of his various interactions with the Deceased and the Deceased's family members over the years and that the Defendants included him in the Deceased's funeral and memorial programmes as a son of the Deceased.

65. However, the Second Claimant admitted under cross-examination that he has not submitted himself to any sort of scientific testing to determine whether in fact he is the son of the Deceased nor has he asked his co-claimant, i.e. the First Claimant, to submit to a genetic test to determine whether they are siblings. In my opinion this raises serious doubt on the Second Claimant's paternity since at the time of his conception his mother, Edna Whiteman, was involved with Leroy Nello Waterman and that the Second Claimant, up until his 30s, believed Mr. Waterman to be his father; a fact that is still recorded on the Second Claimant's certificate of birth[20]. Therefore, based on the Second Claimant's own documentary evidence there is a strong presumption that Mr. Waterman (and not the Deceased) is the Second Claimant's father and the Second Claimant has failed to adduce the necessary evidence to rebut that presumption.

66. The Second Claimant's credibility was also undermined since in cross-examination he alleged that he has no knowledge of what has become of the estate of Leory Nello

[20] See certificate of birth exhibited and annexed as "DW1" to the Witness Statement of Dirk Waterman

Waterman[21] and whether steps have been taken towards administering same. However this lack of knowledge is not credible since it was the Second Claimant's evidence that he believed Mr. Waterman to be his father until he (the Second Claimant) was in his mid-thirties.

67. In any event, the Second Claimant did not call witnesses who had knowledge of the Deceased's relationship with Edna Whiteman and whether the Second Claimant is a product of this relationship. Most conspicuous was the absence of the Second Claimant's mother, Edna Whiteman who would have been able to shed light on the Second Claimant's paternity.

68. Further, the Second Claimant referred to several other persons whom he alleged had knowledge that the Deceased was his father in his witness statement. These persons included the Deceased's siblings[22], the Second Claimant's brother, Dave Whiteman[23] and a woman that the Deceased lived with, Marilyn Lynder[24]. However none of these persons were called as witnesses to support the Second Claimant's contention that he was a child of the Deceased.

69. Further, there is no written document in which the Deceased has personally acknowledged the Second Claimant as his son. In my opinion if the Deceased treated the Second Claimant as his son and intended him to benefit from his he would have organized his affairs so as to acknowledge the Second Claimant as his son in writing.

70. Even the First Claimant's evidence did not assist the Second Claimant on the issue of his paternity. At first, the First Claimant stated in her witness statement that she learnt of the Second Claimant's existence from the Deceased in 2000[25] yet, later in the said witness statement she stated that she was told by the Deceased that he (the Deceased) only found out about the Second Claimant after divorcing Earlin Clement[26]. This was a clear

[21] At paragraph 11 of the Witness Statement of Dirk Waterman he states that Leory Nello Waterman has passed away
[22] See paragraph 16 of the Witness Statement of Dirk Waterman
[23] Ibid paragraph 12
[24] Ibid paragraph 20
[25] See paragraph 21 of the Witness Statement of Jennifer Chance
[26] Ibid paragraph 22

inconsistency on the First Claimant's part as she had previously stated in her witness statement that the marriage between the Deceased and Earlin Clement was dissolved in November 2005[27]. It follows that the First Claimant had contradicted her own evidence that she learned of the Second Claimant's existence in 2000.

71. In the absence of compelling corroborating evidence, the Second Claimant's assertion of paternity was self-serving and unsupported. For the aforesaid reasons, the Second Claimant has not proven on the balance that he is the son of the Deceased.

72. Having found that the Second Claimant has no locus standi in the instant action, the issue of any alleged fraudulent acts by the Defendants against him do not arise.

Has the First Claimant proven that the Defendants acted fraudulently in their dealings with the Deceased's estate?

73. In **Derry v Peek**[28], Lord Herschell considered the various authorities on the action of deceit and stated the following:

> "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was

[27] Ibid paragraph 8
[28] (1889) 14 App. Cas. 337

no intention to cheat or injure the person to whom the statement was made."[29] [Emphasis Added]

76. Lord Herschell considered that a want of care would not amount to fraud and he stated that:

> "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds."[30]

77. In **Singh v Singh and Tai Chew[31],** Narine J (as he then was) described the test to be applied in cases of fraud as:

> "The burden of proving fraud lies on the person who alleges it. It must be distinctly alleged and distinctly proved. The standard of proof is on a balance of probabilities. However, the standard is flexible, and requires a degree of probability commensurate with the seriousness of the occasion. The more serious the allegation the more cogent is the evidence required to overcome the likelihood of what is alleged. The very gravity of an allegation of fraud is a circumstance which has to be weighed in the scale in deciding as to the balance of probabilities." [32]

78. The relevant law on who is entitled to apply for an estate of a Deceased and who is entitled to benefit are as follows. Section 30 of the **Wills and Probate Act[33]**, states:

> "30. Applications for administration may be made by the following persons, as of course, and in the following order of preference:
>
> (a) in cases of intestacy—
>
> (i) the surviving husband or widow of the intestate;
>
> (ii) the next of kin;
>
> (iii) the Administrator General;
>
> (b) where no executor has been appointed, or the executor is absent from Trinidad and Tobago, or is unable or unwilling to act—

[29] See page 374 of the law report.
[30] Ibid page 375.
[31] HCA 530 of 1991
[32] Ibid page 24
[33] Chapter 9:03

(i) the residuary devisee or residuary legatee;

(ii) a devisee or legatee;

(iii) the next of kin;

(iv) the Administrator General."

79. Section 23 of the **Administration of Estates Act**, provides:

> "23. An estate or interest to which a deceased person was entitled on his death in respect of which he dies intestate shall, after all payment of debts, duties, and expenses be distributed or held on trust amongst the same persons being kin or next of kin in accordance with sections 24, 25, 26 and 26A."

80. Section 2 of the **Administration of Estates Act** defines "kin" as the issue of the deceased and "issue" is defined as all descendants of the deceased whether born within or outside of marriage.

81. It was submitted on behalf of the First Claimant that the Defendants acted fraudulently by primarily two acts (a) knowingly omitting her from being a beneficiary of the estate of the Deceased and (b) omitting several bank accounts with various financial institutions, properties in Tobago and Saint Ann Village, Mayaro and property which the Deceased was beneficially entitled to and which was owned by his late mother, Rita Roberts[34].

82. Counsel for the Defendants submitted the Defendants acknowledged that the First Claimant was entitled to benefit from the Deceased's estate since she was a daughter of the Deceased. However, they contended that the Defendants' conduct in omitting the First Claimant as a beneficiary under the Deceased's estate when applying for the Grant falls short of fraud since at the time of the said application they were uncertain as to the First Claimant's true parentage and they did not falsely represented to their attorney at law that that the First Claimant was not the Deceased's daughter either knowingly or recklessly or carelessly.

83. It was also submitted on behalf of the Defendants that the First Claimant failed to provide any evidence to support her contention that the First Defendant acted fraudulently by

[34] Paragraph 41 (i) of the Amended Statement of Case

knowingly omitting all the real and personal assets of the Deceased when he applied for the Grant.

84. Did the Defendants know that the First Claimant was a daughter of the Deceased at the time of the application of the Grant? This is a question of fact to be determined from the evidence.

85. The First Claimant's evidence was that she was a daughter of the Deceased. Her mother was not married to the Deceased. She is older than the Defendants and in 1994 she changed her name to Jennifer Chance by Deed Poll. She stated that although the Deceased lived abroad and she lived in Trinidad, they shared a good relationship and he often sent money for her, supporting her financially and otherwise. The Deceased assisted her and her children to migrate and for her to obtain a Green Card. She spent approximately three to four months in Miami with the Deceased before moving to New York. She admitted in cross-examination that she did not spend any significant time with Defendants while in Miami, as the Third Defendant was away at university and the First Defendant resided elsewhere in his own home. In 2007 the First Defendant assisted her son, Seon to get a job in Miami as an instrument Technician. Her son lived with the Deceased and he was responsible for paying all the utility bills for the house while the Deceased paid the mortgage.

86. The First Claimant testified that the funeral service and the memorial service programmes for the Deceased were prepared by the First Defendant and they included all of her siblings, including the Second Claimant. She stated that the First Defendant handled the financial aspect of the funeral arrangements.

87. According to the First Claimant, after the memorial service, there was a meeting of the siblings was held on the 26th August 2012 at Henry's home. The First Defendant picked her up to take her to Henry's. The Third Defendant joined the meeting via telephone. Before the meeting she stated that the First Defendant had given her a Petition for Summary Administration and a Consent and Waiver of Notice to sign. These documents excluded Second Claimant and she refused to sign the same despite the First Defendant insisting that she sign it which would give him the authority to deal with the Deceased's estate. She

insisted that she would not sign before taking it to an attorney at law and getting advice on it. She denied that she told the Defendants that she did not want anything to do with the estate. She said she does and still do.

88. According to the First Claimant, the reason she did not sign the Consent and Waiver Notice was because she felt that the Defendants were trying to trick her. She said that sometime in 2013 she learned that the First Defendant was the Legal Personal Representative of the Deceased's estate having obtained the Grant. She learnt that the affidavit accompanying the application for the Grant listed the Third Defendant and Henry as the only other children and next of kin of the Deceased. This prompted her to inform the Second Claimant through her son Seon, to get an attorney at law in Trinidad. A pre-action protocol letter was issued on their behalf by their attorney to the Defendants on the 23rd January 2014 which was followed by an exchange of correspondence between attorneys for both sides.

89. After the 2012 meeting, the First Claimant admitted in cross-examination that she stopped speaking to both the First and the Third Defendants because she was hurt, but not Henry. All information that she knew regarding her family and in particular with respect to Henry, was information she learned through her son Seon who was still in contact with them.

90. Seon Gonzales is the First Claimant's son. His evidence was that his mother migrated to the United States of America to live with the Deceased in Miami, Florida in 1996. In or around 1998, the Deceased travelled to Trinidad to sign the documents which allowed for him and his sister to go to the United States to live. Shortly after moving to Miami Florida in the United States of America, he then moved to New York at his mother's home where he stayed for a year. He then returned to Trinidad for the summer period in 2007. In October 2007, he once again returned to the Deceased's house in Florida to live as he had accepted a job in Miami as an Instrument Technician. At the Deceased's house, there was an agreement with the Deceased that he would be responsible for paying all the utility bills for the house while the Deceased would deal with the Mortgage. In cross-examination however, he admitted that when the Third Defendant was there, the latter paid it and when the Third Defendant left, he took over. He denied that the First Defendant paid the utility bill or even a portion thereof. According to Seon, he has always tried to keep in contact

with his uncles, the Defendants and Henry. However, his mother has not. He also attended the hospital where his uncle Henry was at when he got injured. He states that he would visit him constantly and tried to assist him when and where possible.

91. According to the First Defendant, he first learnt of the First Claimant in 1980 when she visited the Deceased at their home in Trinidad. At that time she was around 19 or 20 years old and he was 11. In a subsequent visit, he learnt that she was the daughter of the Deceased when the Deceased mentioned it to his mother.

92. He stated that he never had a familial bond or relationship with the First Claimant. He was aware that in or around March 1996 the First Claimant stayed with his mother and the Deceased at their Miami home for a few months. At that time he did not live at the home. Although he was living elsewhere he visited his parents' house and saw the First Claimant there on at least one occasion where he interacted with her for a brief moment. In June of that year he was informed by the Deceased that the First Claimant had moved to New York and his interactions with her at that point were almost non-existent. He testified that even after the First Claimant moved out and her son came to live with the Deceased, he would still visit from time to time as the Deceased entrusted him with paying the various bills of the house whenever the Deceased was in Trinidad.

93. The First Defendant testified that after the Deceased's death, there was a meeting where he gave to the First Claimant a Consent and Notice of Waiver form which she accepted but she stated that she wanted to have it reviewed before signing. He stated that when he contacted her in October 2012 to inquire about the Consent Form she indicated to him that she did not want to do anything with the Deceased's estate. He said he took these comments to mean that she was not the daughter of the Deceased and/or not a beneficiary of the estate. The First Defendant also testified he was unable to find a birth certificate or any other documents among the personal effects of the Deceased which indicated that the First Claimant was the daughter of the Deceased and he did not ask her to produce it.

94. In cross-examination the First Defendant acknowledged that the First Claimant is his half-sister and that after he learnt that she was his half-sister he looked at her like a sister. He

accepted that he told his Attorney at law in Florida that the First Claimant was his sister and that she had an interest in the Deceased's estate when he petitioned to get summary administration on Florida. He said that one of the documents his Florida Attorney at law gave him for the First Claimant to sign was a Consent and Waiver Notice. He admitted that the First Claimant told him that she had an interest in the Deceased's estate. He acknowledged that prior to the application in Florida for the Deceased's estate, he did not ask the First Claimant for a copy of her birth certificate since he accepted that she was his sister and that she had an interest in the Deceased's estate. He accepted that he did not ask Henry for his birth certificate but that it was among the documents he had and that Henry's birth certificate has three asterisks next to father's name. He acknowledged that this did not mean that Henry was not a child of the Deceased. He admitted that in the application for the Deceased's estate in Florida, the petition was supposed to include a benefit for the First Claimant. He said that he understood the refusal of the First Claimant to not be involved in the application of the estate in Florida meant that she was not the daughter of the Deceased.

95. The First Defendant accepted that he needed the consent of his siblings for the application for the Grant in Trinidad and he admitted that he never informed the First Claimant that he was making the application, neither did he request her consent. He denied obtaining the Grant using improper means since he honestly believed that the Claimants were not children of the Deceased and as such they were not beneficiaries of the estate. He disagreed with the suggestion when put to him that he made the application in Trinidad and deliberately misled the Court by stating that only the Third Defendant and Henry were his siblings.

96. The Third Defendant's evidence was that he was a son of the Deceased. The First Defendant is his brother while Henry, now deceased was his half-brother. He stated that he was about 12 or 13 years old when he learnt that the First Claimant was his half-sister and that he was an uncle. He was told of this by the Deceased and he accepted it. Despite learning of her, he stated that he had little to no relationship with her. He is unaware of what the Deceased did, if anything at all, in terms of caring for the First Claimant. He saw her for the first time and according to him possibly the only time, in or around March 1996

at his parents' home in Miami. When he returned from his school break in or around June 1996, she was no longer staying there.

97. Sometime in 2007 the First Claimant's son, Seon came to live at the Deceased's home in Miami. He too was there but had soon moved out. He said there was probably a month's overlap between when Seon moved in and when he moved out. While he was there with Seon, he said that he paid his share of the household bills and expenses. Although he moved out, he returned regularly to check on things when the Deceased visited Trinidad. He also said that he had visited the Miami home quite often as he had taken Seon under his wings and showed him the "ins and outs" of Miami.

98. After the passing of the Deceased, he testified that he participated via telephone in a meeting between the Claimants and the Defendants. His understanding of the meeting was to determine who should be the executor of the Deceased's estate for which he said it was agreed that it will be the First Claimant. There was also a conversation about the First Claimant signing a legal document which she indicated she would need time before doing so, however she did not.

99. He agreed in cross-examination that the document which the First Claimant did not want to sign was a consent for the First Defendant to be the administrator. He was informed by the First Defendant that the First Claimant had indicated that she wanted no part of the Deceased's estate. He said he personally never heard the First Claimant make such utterances. To him her not wanting to be part of the estate meant that "she did not want nothing to do with anything" but this to him did not mean that she was saying she was not the daughter of the Deceased. Notwithstanding, and having previously acknowledged her as his sister, he said he only disavowed her as his sister when she did not sign the document. Despite knowing that the First Claimant was alive and entitled to benefit from the estate of the Deceased, he still signed the consent even though the First Claimant's name did not appear therein as at that time he did not acknowledge her nor did he consider her to be his sister.

100. In cross-examination, he acknowledged that he accepted Henry to be a son of the Deceased although he had not seen Henry's birth certificate. He said that it was based on the Deceased's words and the Deceased treated him as a son.

101. In my opinion, the First and Third Defendants were not witnesses of truth when they asserted that they were not certain that the First Claimant was the Deceased's daughter at the time when they gave instructions to their attorneys at law in Trinidad to apply for the Grant, since they did not have any proof. It was clear from their evidence that the First and Third Defendants share a close relationship as brothers, and therefore they share information concerning the Deceased and the First Claimant. Even if the Defendants did not interact with the First Claimant regularly while the Deceased was alive, they still considered the First Claimant to be their sister up until the death of the Deceased and after, even in the absence of proof of paternity of the First Claimant. The Defendants did not have any document proving the paternity of Henry but they continued to treat him as a brother even after the Deceased died and up until he (Henry) died in 2017. Further, their actions demonstrated that they were aware that the First Claimant was the Deceased's daughter since they included her in the Summary Application made in the United States. This was after the First Defendant said that he had gone through the personal things of the Deceased after the latter's death and he did not find any document proving that the First Claimant was the daughter of the Deceased.

102. Even if the First Claimant did not wish to have any dealings with the Deceased's estate and she ceased communicating with the Defendants after the 2012 meeting, I do not accept that this is a reasonable explanation for the Defendants to believe that the First Claimant was not the Deceased's daughter since all along until they gave her the Notice of Consent to sign for the Florida application, they treated her as such and believed that she was the Deceased's daughter.

103. In my opinion the Defendants were well aware of the First Claimant's paternity and they knowingly omitted to inform their local attorneys of this information when they were giving instructions to apply for the Grant. Based on their own evidence they could not have honestly believed otherwise. In my opinion they acted recklessly when they failed to give

this information to their attorneys at law in Trinidad when they gave instruction for the application for the Grant. It was open to them to inform their attorneys at law that the First Claimant was a daughter of the Deceased, their lack of proof of paternity, her lack of co-operation with respect to the Florida application and her lack of communication with them. But there was no evidence that they did so.

104. I now turn to the next question of fact which is the First Claimant's allegations that there are assets which were omitted from the Inventory.

105. The First Defendant's evidence in chief was that the Inventory of Assets included with the application for the Grant reflected his knowledge of the Deceased's assets. He stated that he did not know about any of the properties or bank accounts that are pleaded at paragraph 41(i) of the Amended Statement of Case and that neither the Claimants nor their attorneys have provided him or his Attorneys with any documents that show that the assets form part of the Deceased's estate. He also stated that as recorded in the Inventory of Assets, the Deceased's estate comprises his property at Pierreville Street, Mayaro. Since the Deceased's passing, he, Henry and the Third Defendant have made efforts to have the property rented and maintained. They set up an account with Republic Bank, held in their names, in which the rental income they receive from the property is deposited.

106. In cross-examination the First Defendant admitted that the estate of the Deceased is paying the WASA rate for the Mayaro property and that there were three other properties for which there were no deeds. He stated that the Inventory included two pieces of land and one structure. He also stated that on the three other properties there were wooden structures on them and that the estate of the Deceased was receiving rent from three other properties apart from the property in Mayaro. He admitted that the Inventory did not have the three other properties listed so that it was incorrect.

107. Therefore based on the evidence of the First Defendant elicited in cross-examination, the inventory in the application for the estate of the Deceased, which was attached to his witness statement was not correct and which he knew to be incorrect since there were three other properties which the Estate continues to receive rent from which are not included in the Inventory.

108. The Third Defendant's evidence demonstrated that he too was aware of the other properties which were omitted from the Inventory of the application for the Letters of Administration. In cross-examination, the Third Defendant admitted that there were other properties apart from the property in the inventory which formed part of the Deceased's estate. He admitted that there were three houses which were rented and which Henry facilitated. He said that after Henry died, he took over.

109. The Defendants were all aware of the other properties which were not listed in the Inventory and which were income generating. To this extent, the Defendants appeared to have knowingly omitted information which they were aware of prior to the instruction for the preparation of the Inventory, and in this regard they acted fraudulently.

110. However, there was no evidence led by the First Claimant to demonstrate the existence of the other assets which she alleged in the Amended Statement of Case. To this extent it cannot be said that the Defendants knowingly concealed the information which the First Claimant alleged from being included in the Inventory.

111. I have concluded that the Defendants acted fraudulently when they applied for the Grant since they knowingly and recklessly concealed the information about the First Claimant being a daughter of the Deceased and therefore they knowingly sought to deprive her from her share of the Deceased's estate. Further, they also knowingly did not include all the income generating properties in the Inventory which impacts on the share which the First Claimant is entitled to.

If the Claimants have proven that the Defendants acted fraudulently are they entitled to the reliefs sought?

112. The First Claimant has called upon the Defendants to (a) furnish and verify all accounts of the estate of the Deceased within thirty (30) days of the Court order; (b) for an Order to discharge the First Defendant from acting as administrator of the estate of the Deceased; (c) to revoke the Grant to the First Defendant; (d) to appoint the Second Claimant in place of the First Defendant as the Administrator of the Estate of theDeceased (e) to award the Claimant damages for waste and devastavit of the assets which form the estate of the

Deceased : and (f) order the repayment of all moneys which were misappropriated from the Estate.

113. The Defendants are not disputing that the First Claimant is entitled to benefit under the Deceased's estate and in this regard, the Defendants are not opposed to the Court making a declaration to record that fact. However, they argued that the orders being sought to have the First Defendant removed as administrator of the Deceased's estate and to have the Second Claimant appointed in his place should be refused outright.

The accounts of the estate of the Deceased and repayment of funds to the Estate

114. The law places the duty on the Administrator, in the instant case on the First Defendant, to furnish and verify the accounts of the Estate of the Deceased. It is a mandatory requirement on the part of the administrator even if there was no application calling upon him to do so.

115. Sections 68 and 72 of the **Succession Act**[35] provides as follows:

> "68. (1) Within twelve months from the date of granting of Probate or Administration, as the case may be, every personal representative shall file with the Registrar an account showing-
>
> *(a)* his receipts and disbursements of the deceased's estate;
>
> *(b)* that all sums due in respect of the said estate for death duties have been duly paid;
>
> *(c)* the debts of the deceased and the extent to which they have been paid.
>
> (2) If any personal representative neglects or omits to file an account under subsection (1), the Administrator General or any other person alleging himself to be interested in the deceased's estate may, by summons in the prescribed form, call upon such personal representative to show cause why he should not file such account.

[35] Chapter 9:02

(3) Upon return of such summons, the Court may direct that such account be filed within such time as the Court may specify and, in case of default, the personal representative is liable to attachment.

(4) A personal representative is entitled, as against the estate, to the costs and expenses of and attendant on the rendering and filing of an account under subsection (1), provided it is filed within the twelvemonth period specified therein, but not otherwise

116. Section 72 provides that:

"72. The personal representatives are under a duty to-

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the Court, exhibit on oath in Court a full inventory of the estate and, when so required but without prejudice to section 68, render an account of the Administration of the estate to the Court."

117. The First Defendant did not file as part of his witness statement an account of the estate of the Deceased thus far. In light of my previous finding, and the evidence of the Defendants of additional properties which were not included in the Inventory, I therefore order the First Defendant to file an Amended Inventory to reflect all the properties of the Deceased forthwith, and to file an account of his administration of the Deceased property from the date of the Grant to the date of this judgment within thirty (30) days of this order. The said account is to be surcharged and falsified by a Registrar of the Supreme Court.

The discharge of the First Defendant as administrator of the Estate of the Deceased

118. **Section 28 of the Wills and Probate Act** empowers the Court to discharge a person who has been appointed the administrator of an estate. It states:

"The Court may by decree in any suit discharge a representative from his office, and, upon any such discharge, may (if necessary) grant administration to any person

or persons, which administration shall be as valid as if the representative so discharged had died."

119. **In the Goods of Loveday**[36] stated as follows:

"After all, the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I could see no good reason why the Court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive and inefficient. If the court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and it turns out that the person so appointed will not or cannot administer, I do not see why the court should not revoke an inoperative grant and make a fresh grant."

120. Counsel for the Claimants argued that in light of the conduct by the First Defendant the Court should revoke his appointment and instead appoint the Second Claimant.

121. It was submitted on behalf of the Defendants that this relief should be refused since the existence of a contentious relationship is not a ground for the removal of an administrator. In support of this position the Defendant relied on the cases of **Kershaw v Micklewaithe & Or**[37] and **National Westminster Bank Ltd v Ward and ors.**[38]

122. In the English case of **Kershaw v Micklethwaite & Ors** the Claimant, Mr. Kershaw, sought to remove the Defendants, some of whom were the Claimant's sisters, as executors of the will of Mr. Kershaw's mother. The Court expressed the view that friction and hostility between an executor and beneficiaries is, of itself, not a good reason for removing the executor[39]. Mr. Justice Newey stated as follows:

[36] (1900) P. 154 Jenne P. at page 156
[37] [2010] EWHC 506 (Ch)
[38] [1971] WLR 1376
[39] See paragraph 11 of the judgment.

> "As I have already said, however, I do not consider that friction or hostility between an executor and a beneficiary is of itself a reason for removing the executor. Mr. Child suggests that, on the facts of this case, the hostility between Mr. Kershaw and his sisters has the potential to create difficulties in the administration of the estate. While, though, it may well be that the administration of the estate could be carried out more quickly and cheaply were Mr. Kershaw and his sisters to be on good terms, I do not think that the potential problems are such as to warrant the executors' removal. As I see it, the poor relations between the parties need not and should not either prevent or impede substantially the administration of the estate.[40]" [Emphasis Added]

123. In **National Westminster Bank Ltd. v Ward and Others** the administrator bank, through lack of knowledge, failed to include certain beneficiaries when applying for letters of administration. It followed that the subsequent grant of the letters of administration included some beneficiaries, but not others, as the only persons entitled to benefit from the estate. In delivering the judgment of the Court, Plowman J. stated:

> "But in my judgment the mere fact that the letters of administration state that these children of John are "the only persons entitled to share in her estate" does not of itself preclude next-of-kin of an equal degree from participating, and in my judgment it is unnecessary to have the letters of administration either revoked or amended in order to give the children of Michael the share to which they are clearly, as a matter of law, entitled."[41]

124. Based on the evidence of the First and Third Defendants they knowingly executed the application for the Grant which omitted to state that the First Claimant was also a child and next of kin of the Deceased. They also knowingly failed to include the three other properties in the Inventory, although they were aware of them existing and collecting rent from them. In my opinion such actions constitutes a breach of the First Claimant's duties as Administrator.

[40] See paragraph 28 of the judgment.
[41] See page 1380 of the law report.

125. However, I am mindful that the First Defendant as the Administrator is also a beneficiary of the estate of the Deceased and the Second Claimant whom the First Claimant advocates to be appointed instead, has no interest in the Deceased's estate. I have also taken into account that the Defendants have now stated that they acknowledge that the First Claimant is entitled to a share of the Deceased's estate. For these reasons, I have decided against removing the First Defendant as the Administrator of the Deceased's estate.

Liability in damages for waste and devastavit of the assets belonging to Estate of the Deceased

126. **Halsburys Laws of England**[42] describes the nature of devastavit as:

> **"1542.Nature of a devastavit.** A personal representative in accepting the office accepts the duties of the office, and becomes a trustee in the sense that he is personally liable in equity for all breaches of the ordinary trusts which in courts of equity are considered to arise from his office. The violation of his duties of administration is termed a devastavit; this term is applicable not only to a misuse by the representative of the deceased's effects, as by spending or converting them to his own use, but also to acts of maladministration or negligence."

127. In considering whether to make a finding that the First Defendant, who is the appointed administrator of the Deceased's estate, misused the Deceased's effects by spending or converting them to his own use or performed acts of maladministration or negligence, the Court must examine the First Defendant's conduct *after* he obtained the Grant, since this was when he was legally appointed and he became the trustee of the Deceased's estate.

128. According to the First Defendant's evidence in chief, he sold the vehicle to the Second Claimant for the sum of $14,000.00. The Mayaro property which is listed in the Inventory has been rented and the moneys has been deposited into a Republic Bank account in his name, the third Defendant's and Henry's name. After Henry passed away, the Defendants' uncle has been overseeing and maintaining the Mayaro property and the First Defendant gives Phillip money to maintain the Mayaro property and that the rental income from this

[42] 4th ed Vol 17 at paragraph 1542

property is barely sufficient to cover the cost of repairs, maintenance and upkeep. However, in cross-examination it was revealed by both the First and Third Defendants that rental income is received from three properties. There was no evidence that the interest in any of the properties have been transferred to the beneficiaries.

129. Based on the evidence, the Defendants have been dealing with the estate of the Deceased to the exclusion of the First Claimant. However there was no evidence from the First Claimant to demonstrate that the proceeds of the income from the Deceased's estate were being used for the First Defendant's own benefit. There was also no account from the First Defendant setting out the income and the moneys he spent on the assets in the Deceased's estate. In my opinion I would only be able to make a finding on the issue of waste and devastavit in the maladministration of the assets belonging to the estate of the Deceased after a true and proper account of the estate has been produced. To do otherwise would be to embarking on speculation without evidence.

Conclusion

130. I have found that the Second Claimant has no locus standi in the instant action since he failed to satisfy the statutory requirements for proof of paternity. I therefore uphold the no case submission made by the Defendants against him. The issues of any alleged fraudulent acts by the Defendants as against him do not arise and his claim is therefore dismissed.

131. I decided that the First Defendant would remain as administrator of the estate of the Deceased and the Grant issued to him will not be revoked. However the First Defendant is now mandated to file an Amended Inventory as well as an account of his administration of the estate of the Deceased from the date the Grant was issued to him to the date of judgment.

132. Although the status of the First Defendant as Administrator is being maintained, I have found that the Defendants acted fraudulent since they knowingly and intentionally concealed from their attorneys at law when applying for the Grant that the First Claimant was their sister and a beneficiary of the Deceased's estate. They also withheld pertinent information concerning the three other income generating properties and assets which the

First Claimant is entitled to benefit from when they submitted the Inventory in relation to the estate of the Deceased.

133. With respect to the First Claimant's assertion of several other assets which she alleged in her claim, I have found that she failed to provide any evidence to support her claim. Although the Inventory the First Defendant provided did not accurately reflect all of the properties which ought to form part of the Inventory of the Deceased's estate, it cannot be said that the First Defendant knowingly concealed the assets which the First Claimant alleged were not included in the said Inventory from her.

Order

134. In light of my findings I make the following orders:

(a) It is declared that the Grant was obtained by fraudulent means and/or without the consent of the First Claimant.

(b) It is declared that the Third Defendant and Henry in procuring and participating in the application for the Grant to the First Defendant knowingly assisted the First Defendant in obtaining the Grant by fraudulent means without the consent of the First Claimant.

(c) It is declared that the Second, Third and Fourth Defendants hold the First Claimant's share of any property transferred to them by the First Defendant under the Grant on trust for the First Claimant.

(d) The First Defendant to file an Amended Inventory to reflect all the properties of the Deceased forthwith and to file an account of his administration of the Deceased's estate from the date of Grant to the date of this judgment within thirty (30) days of this order. The said account is to be surcharged and falsified by a Registrar of the Supreme Court.

(e) After the account has been surcharged by the Registrar of the Supreme Court, the First Defendant is to repay to the Deceased's estate, any monies and/or other property of the estate of the Deceased which has been misappropriated from the said estate.

(f) Liberty to apply with respect to any damages for waste and devastavit in the misappropriation and maladministration of assets belonging to the estate of the Deceased, if any, to be assessed after the First Defendant files the accounts as provided above.

(g) I will hear the parties on costs.

Margaret Y Mohammed
Judge