

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2014-00043

BETWEEN

COHEN PHILLIPS

Claimant

AND

JOYCELYN QUASHIE PHILLIPS

First Defendant

CAROL HORSFORD

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. L. Holder instructed by L. Rajpaul for the Claimant

Mr. A. Arnold for the First Defendant

Ms. S. Lawson instructed by Ms. A. Mottley for the Second Defendant

Judgment

1. The Claimant seeks possession of property situate at 29A All Fields Trace, Hampden, Lowlands, Tobago together with the house situate thereon. (“the property”). He claims possession by virtue of having obtained title by way of adverse possession through the grant of an application to bring the disputed land under the Real Property Ordinance Chapter 27 No. 11 (now the Real Property Act Chapter 56:02“the RPA”).
2. The First Defendant was the former wife of Vernon Phillips who died on the 22nd September, 2012 (“the Deceased”). The Claimant is the son of the deceased.
3. The Second Defendant is the half-sister of the Claimant being the daughter of the Deceased from another relationship and is named as Executor in the purported last Will and testament of the deceased made the 18th August 2012. The Second Defendant has been joined in these proceedings by way of order of this court.

The Claim

4. It is the Claimant’s claim that by the Certificate of Title registered in Volume 5510 folio 213 (“the Certificate of Title”), he became the registered owner of the property as well as the house thereon subject however to a right of occupation of the house by the First Defendant. The right of occupation of the First Defendant was conferred by Court Order made by the Honourable Madam Justice Gobin on the 4th July, 2008 in High Court Proceedings MA T067/2005 (“the Court Order”). Those proceedings were instituted between the deceased and the First Defendant.
5. In the previous proceedings the Honourable Madam Justice Gobin ordered that:
 - i. The building be valued (the house);

- ii. The Deceased to pay the First Defendant 40% of the value of the house in full satisfaction of all her rights, title, share and interest in the matrimonial property arising out of the marriage celebrated on the 6th June, 1985;
 - iii. Upon payment of the said lump sum the First Defendant to deliver up vacant possession of the house to the Deceased within two weeks of payment.
6. According to the Claimant, up to the date of the Deceased's death there had been no compliance with the order.
7. The Claimant claims that the First Defendant continues in occupation of the house to date but has no right to so continue in occupation save and except as in accordance with the terms of the Court Order.
8. The Claimant alleges that by letter dated 28th December, 2012, he indicated to the First Defendant that he had title to the property and that he wished to pursue settlement of the Order with her. He received no response to this letter. On or about 5th February, 2013, he obtained an updated valuation of the house and thereafter wrote to the First Defendant by letter dated 12th April, 2013 indicating his readiness to carry out the terms of the Order with respect to the payments due to the First Defendant by the Deceased. The Claimant claims that the First Defendant responded through her attorney by letter dated 18th April, 2013 but did not indicate in this letter that she was prepared to accept payment of the sums due to her pursuant to the Order or to deliver possession of the house to the Claimant.
9. Further, the Claimant claims that by his attorney he sent two further letters dated 30th April, 2013 and 10th June, 2013 to the First Defendant seeking an out of Court resolution of the matter but no response was received.

The Defence and Counterclaim of the First and Second Defendants

10. The First Defendant claims the Claimant's Statement of Case discloses no cause of action. That the Claimant is not entitled to possession of the house and is not entitled to any relief sought. It is the case of the First Defendant that before the Deceased's death, he told her that she could live in the house for as long as she wanted. That the Deceased told her that he had no money to pay her and he was sorry for what he had done.
11. The First Defendant claims that the Deceased left a Will and according to that Will he left his daughter, the Second Defendant as executor. The First Defendant further claims that the Second Defendant informed her that she could remain in the house as long as she wanted. She alleges that she has a legal and an equitable right to remain on the house until her death.
12. According to the First Defendant, the Claimant in his application to bring the disputed land under the Real Property Ordinance Chapter 27 No. 11 (now the Real Property Act Chapter 56:02 "the RPA") fraudulently omitted to inform the Registrar General that there an encumbrance by way of a judgment existed in respect of the property.
13. The First Defendant claims that the Claimant's application to bring the disputed land under the RPA was fraudulently obtained on the following basis:
 - i. The Claimant did not have the requisite possessory title at the time of the application.
 - ii. In the said application, the Claimant failed to disclose that there was a High Court action concerning the house situate on the property and that the said Order had been appealed. Additionally, the Claimant did not say that the matter was awaiting a decision in the Court of appeal.

- iii. That the Deceased falsely swore and declared that the Claimant was the one that built the house.
14. As such, the First Defendant counterclaims that the Certificate of Title was fraudulently obtained and seeks a declaration that she is entitled to remain in possession of the house.
15. According to the Second Defendant the property was acquired in or around 1952 by the Deceased and Vida Phillips, her parents. The Deceased and Vida Phillips purchased the property from Pearl Smith, Jack Prescod and Kenwick Prescod but never received a Deed of Conveyance for the same.
16. The Second Defendant claims that in or around 1958, whilst still married to Vida Phillips, the Deceased and Adina Winchester commenced a relationship. That Adina Winchester is the mother of the Claimant. Adina Winchester bore five children with the Deceased and in or around 1966, they built a small wooden structure on the property. Adina Winchester died in or around 1982 and the Deceased married the First Defendant in 1985.
17. The Second Defendant alleges that the house, which forms part of the property, occupied by the First Defendant was built sometime around 1991 by the Deceased and the First Defendant and became their matrimonial home. That the Deceased and the First Defendant resided at the house together even during the divorce proceedings and subsequent property settlement by the order of the court.
18. The Second Defendant claims that the Deceased was not happy about the Court Order and told her that he never wanted the First Defendant to leave the house. That the Claimant knew that the Order had been appealed since he, the Claimant coerced the Deceased into appealing the same. Subsequently, the Deceased died testate having made a Will dated 18th August, 2012 and appointed her as his Executrix of his estate.
19. According to the Second Defendant, the Deceased maintained that the house belonged to the First Defendant since the First Defendant worked extremely hard to acquire the

house. She alleges that the Deceased also said that the First Defendant is to live in the house until her death and bequeathed a life interest in the house to the First Defendant.

20. After the death of the Deceased, she in her capacity as Executrix, informed the First Defendant that she could remain in the house as long as she wanted.

21. The Second Defendant claims that the Claimant does not have standing to act on behalf of the Deceased's estate, therefore he, the Claimant did not have the necessary capacity to indicate to the First Defendant his readiness to enforce the Court Order.

22. The Second Defendant avers that the Claimant obtained the Certificate of Title by fraud or in alternative; it was obtained through undue influence. In this regard the Second Defendant claims:

- i. That at the time of the RPA application, the Claimant fraudulently and deliberately declared in his Statutory Declaration dated 30th April, 2007, that he had the requisite possessory title however he did not since he went to Trinidad to live shortly after the house was built.
- ii. That the Claimant fraudulently and deliberately declared in his Statutory Declaration to have constructed the house. The Claimant was a young man when the house was being built therefore, he made no financial contributions towards the building of the house. Thus, it was the Deceased and the First Defendant who built the house.
- iii. That the Claimant deliberately and fraudulently declared at paragraph 17 of his Statutory Declaration that he was not aware or ever heard of any litigation of the property.
- iv. That the Deceased may have consented to the RPA application in an effort to fraudulently dispose of the house to deprive the First Defendant of the same.

- v. That the Claimant never had full and uninterrupted control of the property since the First Defendant was in occupation and control of the house.
- vi. When the Deceased became aware of the seriousness of consenting to give the Claimant all his rights and interests in the ownership of the property he, the Deceased immediately caused a Caveat to be entered forbidding the registration of and/or dealing with the Estate or Interest on the 26th March, 2012, thereby revoking his consent to the RPA application. The Deceased died on the 22nd September, 2012 and the caveat lapsed without action thereafter. It was then that the application was successful and the Certificate of Title was issued to the Claimant.

23. The Second Defendant therefore claims inter alia, a declaration that the Will dated 18th August, 2012 is the true and last Testament of the Deceased, a declaration that the Certificate of Title was obtained by fraud and an order that the Certificate of Title be cancelled.

The Claimant's response to the First and Second Defendants' Reply and Defence

24. The Claimant claims that he did not have knowledge of the appeal lodged until he was served with the First Defendant's Defence and Counterclaim and avers that the appeal was dismissed by Order of the Court of Appeal dated the 20th November, 2012. It is accepted by all parties that the appeal was dismissed for non compliance. The Claimant further avers that the dismissal of the appeal cleared off any encumbrance the First Defendant had on the property.

25. Further, the Claimant claims that the Deceased by his own admissions had no estate in the property of out which he, the Deceased could grant the First Defendant a life interest in such. Moreover, the Claimant claims that the Will had not been admitted to probate.

26. The Claimant avers that the First Defendant does not have any legal or equitable right to remain in the house until her death and further avers that the First Defendant's right of occupation is only, as limited by the Court Order, to two weeks beyond the date of payment to her of 40% of the value of the house.

27. The Claimant claims that he did not obtain the Certificate of Title by fraud and states that in making the RPA application, he fully disclosed all information to his knowledge relevant to the application. The Claimant puts the Second Defendant to strict proof of fraud. The Claimant further claims that he did not obtain the Certificate of Title against the wishes of the Deceased.

28. The Claimant alleges that the execution of the Will does not conform to the Wills and Probate Act Chapter 9:03. In this regard the Claimant avers:

- i. That the Deceased did not execute the Will;
- ii. In alternative, if the Deceased did execute the Will, which was not admitted, then:
 - a) The Deceased was not in a fit mental state to understand the meaning and gravity of such a document to validly execute the same;
 - b) The execution of the Will was obtained by undue influence of the First Defendant. The First Defendant took advantage of the old age of the Deceased and his weakened state, knowing his mind to be greatly impaired and thereby induced him to make the said Will. The influence of the First Defendant over the Deceased was so complete that he was not a free agent and the Will was not the offspring of his own volition but was obtained by the importunity of the First Defendant.
 - c) The implied gift or acknowledged estate in the Will of a life interest automatically failed since the Deceased possessed no such interest at the

time of the making of the Will and the First Defendant was at no time seised of such an interest in her own right.

Issues

29. In the court's view, the issue of the respective rights and entitlement of the deceased and the First Defendant held in the property has already been litigated by determined by way of the Order of Gobin J. The issues in this case therefore revolve around acts which have occurred subsequent to the pronouncement of the order. The following issues thus fall for determination:

- i. What is the entitlement of the First Defendant under the terms of the Order of Gobin J.
- ii. Does the Claimant have the jurisdiction to initiate and maintain these proceedings.
- iii. If he does in fact have jurisdiction, is the Claimant entitled to possession and an order that the Second Defendant do accept the payment as set out in the order. Resolution of this issue is dependent on whether the Claimant fraudulently obtained the Certificate of title, in that he told deliberate lies or deliberately omitted salient facts in his affidavit in support of his application for the vesting order;
- iv. Whether the Will was validly executed and whether probate should be granted in solemn form.

The Evidence

The Evidence of the Claimant

30. The Claimant called five witnesses including himself, namely, Dr. Andrew Belle, Angela Phillips Ackbar, Heather Phillips and Ann Phillips Brebnor.
31. According to the evidence of the Claimant his father, the Deceased, Vernon Phillips died on the 22nd September, 2012 and mother, Adina Winchester died in the year 1982. The Claimant testified that he was born in Tobago and grew up with his parents and siblings, namely Heather Phillips (“Heather”), Wesley Phillips (“Wesley”), Ann Phillips-Brebnor (“Ann”) and Angela Phillips-Akbar (“Angela”) on the property. During cross-examination, the Claimant testified that he would not have been alive when the Deceased acquired the property, therefore the Claimant’s knowledge about the property was what he was told.
32. It is the evidence of the Claimant that the Deceased had about six children with another woman prior to the relationship with his mother, Adina Phillips and the Deceased lived with that woman and those children at Bon Accord, Tobago. That they never lived at the house situate on the property. When his mother died the only children living in the house were Ann, Angela and he. That Heather and Wesley were at that time living in Trinidad.
33. According to the evidence of the Claimant, about a year after his mother died, the Deceased developed a relationship with the First Defendant and left the house on the property to live with the First Defendant at her home at Mason Hall. The Claimant testified that the Deceased and the First Defendant married in 1985 while living at Mason Hall. The house in which he grew up was a one bedroom wooden structure with outdoor toilet facilities. In 1982, he, the Deceased and his siblings had a discussion about replacing the wooden house on the property with a concrete house.

34. Construction of the new house began in or about 1987 and continued until in or about 1997. The Deceased and he were the main financial contributors to the construction of the new house although Wesley made a small financial contribution. Ann and Angela were unemployed at that that time and made no financial contribution. Heather was however employed but made no financial contribution.
35. According to the evidence of the Claimant, the Deceased did not assist physically with the construction of the new house. Most of the physical labour was done by the Claimant and Wesley assisted in the digging of the foundation, the cesspit and the soak away whenever he visited. During cross-examination the Claimant testified that he did the labour out of love and affection for the Deceased.
36. At this time the Claimant was working for a company called Trinidad and Tobago Electrical Company as a trainee electrician and worked on the house after his day's work and on weekends so that the construction of the house only progressed when money was available as no loan was acquired to build the house.
37. In 1988 he joined the Police Service and was assigned to the Western Division, St. James, Trinidad. During this time he purchased material for the construction of the house from Second Crossing Hardware at D'Abadie, Trinidad and from other hardware stores and shipped them to the property in Tobago by boat. On his days off he would go to Tobago to assist physically in the construction of the house.
38. The completed house was a concrete structure comprised of three bedrooms, a kitchen, a living room, a dining room, two toilets, two bathrooms and a front and a back porch.
39. In the early 1990's while the house was still incomplete, the Deceased moved into the house to live and the First Defendant followed him shortly thereafter. Ann also lived with them. Ann married in 2000 and moved out leaving the Deceased and the First Defendant. During cross-examination the Claimant testified that the house belonged to the Deceased who paid the electricity and water rates.

40. In the year 2003, the Deceased, Ann and he held discussions concerning the title to the property. That the Deceased had no paper title to the property, but had a house built on the property and had been living on the property for about fifty years. The Claimant testified that it was agreed between them that he would approach lawyers with all the papers the Deceased had concerning the property.
41. The Claimant testified that he visited numerous attorneys before the RPA application was finally completed. That he made the RPA application with the Deceased's express and written consent and did not exert any undue influence on the Deceased. It is the evidence of the Claimant that the Deceased's consent was given twice to him, first by affidavit sworn by the Deceased on the 8th July, 2008 and then again by statutory declaration made by the Deceased on the 2nd May, 2011.
42. According to the evidence of the Claimant, his RPA application was based on the Deceased's possession and control of the property for about fifty years together with his consent to, approval of and permission to him to make the RPA application. The Claimant testified that the RPA application was also based on the fact that he was very much involved in and instrumental to the construction of the house on the property. That his RPA application was also based on the fact that he had grown up on the property and lived there during his adult life. It is the evidence of the Claimant that it was the Deceased's intention that the property would be for the benefit of his children by Adina Winchester only. A decision was taken by the Deceased to give effect to that intention by having the property brought under the RPA in the Claimant's name. That the Deceased trusted him to carry out his intention by dividing the property between his siblings and him once he obtained the title.
43. The Claimant testified that he did not give notice of the Deceased's appeal of the Court Order in his RPA application because he did not view it as an encumbrance on the property.
44. In October, 2012, he obtained the Certificate of Title for the disputed land.

45. According to the evidence of the Claimant, he had a very close relationship with the Deceased but the Deceased remained a man with his independent mind. The Claimant testified that the Deceased was still strong and in relatively good health. He testified that it was not his decision but that of the Deceased, to bring the property under the RPA in the Claimant's name. That he agreed with the Deceased's decision knowing the reason for it. Further, the Claimant testified that he exerted no influence over the Deceased for this decision.
46. It is the evidence of the Claimant that the Deceased suffered a stroke in the year 2005 and he, the Claimant brought the Deceased to live with him in Trinidad. In November, 2005, the First Defendant successfully petitioned the Court for a divorce and she, the First Defendant also applied by Notice dated 16th August, 2006 for an order that she be granted a half share of the house on the property. The First Defendant was however granted a lump sum award to be quantified by calculating forty percent of the value of the house on the property.
47. The Claimant testified that he knew that the Deceased appealed the Court Order and that he did not coerce the Deceased to make this appeal. That the Deceased told him that he did not feel that he should have had to pay the First Defendant forty percent of the value of the house on the property since she, the First Defendant had her own home at Mason Hall which he, the Deceased considered to be the matrimonial home. It is the evidence of the Claimant that he was not aware before the start of these proceedings that the appeal had been dismissed.
48. The Deceased returned to live at his house in the latter part of 2006 but continued to visit Trinidad for medical attention. That in the early 2007, his wife and he would go every weekend to Tobago to assist the Deceased since the Deceased was bedridden. He arranged for a care giver through the Department of Social Services in Tobago to look after the Deceased from Monday to Friday from 9:00 am to 2:00 pm. That he made an arrangement with his cousin, Martha Balfour to provide the Deceased with three meals a day. This was paid for out of the Deceased's pension cheques, which he the Deceased

signed. During this time the First Claimant continued to reside in the house but took no responsibility for providing care for the Deceased.

49. During the years 2006 to 2008, he took the Deceased in a wheelchair to attend the court hearings with respect to the First Defendant's application for divorce and property settlement. At that time the Deceased lived in the living room of the house and the First Defendant occupied the master bedroom. Further, the Claimant testified that this living arrangement continued until the Deceased's death.

50. Sometime in the year 2006 Wesley returned to live in Tobago in rental accommodation with his wife and children. When the Deceased returned to Tobago in 2007, Wesley moved into the house on the property to assist in looking after the Deceased. Wesley was in charge of seeing that the Deceased visited the clinic regularly. During cross-examination the Claimant testified that he initially gave Wesley instructions to take care of the Deceased however there was a breakdown in the relationship between he, the Claimant and Wesley.

51. Early in the month of January, 2012, he noticed that the Deceased's feet were badly swollen and contacted a doctor to visit the Deceased. The Claimant testified that it appeared that Wesley had stopped taking the Deceased to the clinic and the doctor recommended that the Deceased regular clinic visits resume.

52. The Deceased called the Claimant every day at around 6:00 am to let him know about his general welfare. He would also call the Deceased during the day to find out how things were with the Deceased. That towards the end of the month of January 2012, he noticed that the Deceased's calls became less frequent. He and his wife nevertheless journeyed to Tobago to visit the Deceased. Upon arrival he noticed that the Deceased spoke freely with them once the First Defendant and Wesley were not around but once either of them was around the Deceased would not speak to them at all.

53. He testified that on the occasions that he visited the Deceased, with the help of his wife or one of his sisters, they would bathe the Deceased. That it was only on these occasions

that the Deceased would receive a bath since the care taker would only sponge bathe the Deceased. Once the First Defendant or Wesley was around the Deceased would not allow them to bathe him and the Deceased would not take any food from them in the presence of either the First Defendant or Wesley. Therefore, the Claimant testified that the Deceased appeared to be afraid of the First Defendant and Wesley.

54. According to the evidence of the Claimant, sometime in March 2012 Wesley telephoned him and told him that he and his wife should not come back to the house. That by this time the Deceased stopped calling. In the month of March 2012, Wesley stopped Martha Balfour from bringing the Deceased's food and let her go. Further, Wesley was in charge of cashing the Deceased's pension cheques to pay Martha Balfour.
55. On the 18th February, 2012, he and his wife visited the Deceased and whilst talking to him the First Defendant came home and started an argument with them in the presence of the Deceased. That the First Defendant told them not to come back there and took up a cutlass and threatened to chop them if they did not leave. He reported the incident to the Old Grange Police Station that day but took no further action.
56. It is the evidence of the Claimant that he and his wife next visited the Deceased in Easter of 2012. On that occasion he noticed that the Deceased surroundings were poorly kept and that the Deceased health appeared to have deteriorated. That the Deceased speech was feeble, his thoughts were disorganized and uncharacteristically of him, his mind appeared absent and he had a vacant stare. The padding to prevent the Deceased from getting bed sores was missing. The Claimant testified that he and his wife were prevented from doing anything for the Deceased such as bathing him or giving him anything to eat because of strong opposition from Wesley and the First Defendant.
57. After Easter 2012, all their visits to the Deceased were closely monitored either by the First Defendant, Wesley or Wesley's wife or children. On one occasion while visiting they found the Deceased naked, cold and trembling. The Deceased complained to them about how he was being treated.

58. For the last six months or so prior to the purported date of execution of the Will, the Deceased was under the exclusive care and control of the First Defendant, Wesley and the Second Defendant. The Deceased was bedridden and could do nothing for himself. Therefore, it is the Claimant's evidence that the Deceased relied on others to bring him food, medication, arrange doctor visits, take him to the clinic, cash his pension cheques, operate his bank accounts, wash his clothes and bathe him. The Claimant testified that in the six months prior to the Will being made, he was unable to assist the Deceased in having any of those things done and the Deceased refused his assistance and appeared to be doing so because he was afraid of the First Defendant and Wesley. The Deceased was hospitalized on more than one occasion during this period and he, the Claimant was unable to obtain any details of the hospitalization.
59. The Claimant testified that it appeared to him that from the month of February 2012 to August 2012, the Deceased was being deliberately and systematically terrorized by the First Defendant and Wesley. That this was done to weaken and overpower the Deceased who had often expressed resolve that the property was for the benefit of the children of his second union only and that the First Defendant was not entitled and should get nothing from the Deceased, not even the money awarded to her by the Court Order.
60. It is the evidence of the Claimant that he has read the contents of the Will and it contained a number of statements that are untrue and in one instance directly contradicted earlier assertions made by the Deceased.
61. The Claimant testified that he believes that the Will of the Deceased was crafted by some other person or persons and was executed without the knowledge and consent of the Deceased. That he formed this belief because of the untrue statements and contradictions therein coupled with the bad treatment meted out to the Deceased for the six months or so prior to the Will, the blocking of the Claimant's free access to the Deceased during those months and the fear displayed by the Deceased in the First Defendant and Wesley.

62. It is the evidence of the Claimant that he was aware of the Caveat that was lodged on the 26th March, 2012 purportedly on behalf of the Deceased. The Deceased never spoke with him about the Caveat and did not retract his consent to the RPA application. That as far as he was aware the Caveat lapsed and was never renewed.
63. **Dr. Andrew Belle**, the Chief Medical Officer of Scarborough General Hospital was summoned by the Claimant to give evidence as to the medical records of the Deceased prior to his death.
64. Dr. Belle testified that the records showed that the Deceased was hospitalized regularly between the years 2011 and 2012. That the Deceased was hospitalized during August and September 2012 and was diagnosed with swelling of the right foot, Congestive Cardiac Failure, general swelling of the limbs, hypertension, hearing and visual problems.
65. Dr. Belle testified that there were no direct pronouncements made with regard to the mental status of the Deceased.
66. **Angela Phillips-Akbar** testified that she is one of the sisters of the Claimant and the daughter of the Deceased. That she read the contents of the Will of the Deceased and that she never received any monies from the Deceased's gratuity as stated in the Will. The Deceased did not have any share in the property situate in Culloden and that this property is owned by Mercy Bobb, the sister of the Deceased.
67. During cross-examination, Angela testified that she did live in the house situate on the property and that it was owned by the Deceased.
68. **Heather Phillips** testified that she is one of the sisters of the Claimant and the daughter of the Deceased. She did not receive any monies from the Deceased's gratuity as mentioned in the Will and that as far as she was aware the Deceased did not have any

share in the property situate in Culloden. The property in Culloden was owned by Mercy Bobb, the sister of the Deceased.

69. During cross-examination, Heather testified that she lived in the house situate on the property but could not remember the year she left. She further testified that when she left the concrete house was not built as yet and that the Deceased owned the house.

70. **Ann Phillips-Brebnor** testified that she is one of the sisters of the Claimant and the daughter of the Deceased.

71. Ann testified that she did not receive any monies from the Deceased's gratuity as mentioned in the Will and that as far as she was aware the Deceased did not have any share in the property situate in Culloden. That the property in Culloden was owned by Mercy Bobb, the sister of the Deceased.

72. It is the evidence of Ann that sometime in 2003, the Deceased, the Claimant and she had a discussion regarding obtaining the ownership of the property and the house which was constructed on the property. Ann testified that it was agreed between the three of them that the Claimant would approach lawyers to regularize the ownership of the property. That it was further agreed that the property would be put in the name of the Claimant as he had constructed the house thereon with his monies. Ann further testified that the Deceased agreed to give his consent for the RPA application for the property to be made in the name of the Claimant. During cross-examination Ann testified that the Deceased was the owner of the property and the house thereon.

73. According to the evidence of Ann, notwithstanding the fact that the Claimant worked in Trinidad from 1988, the Claimant continued to live with her and their sister Angela in a small wooden structure situate on the property before the new house was constructed. She testified that the Claimant would return to his home in Tobago on his days off. During cross-examination, Ann testified that she could not remember when the construction of the new house started. She further testified that she lived in the new house but could not

remember the year she commenced living in the new house. Upon completion of the new house, the Claimant maintained a room in the house in which he had all his personal belongings and appliances.

74. During cross-examination Ann testified that the Deceased was in control of the house and that the Deceased gave the Claimant control of the house but could not recall when this occurred. She also testified during cross-examination that the First Defendant lived in the house but could not recall when she started living there. The Deceased suffered a stroke in 2005 and the Claimant took him to Trinidad to look after him since the relationship between the Claimant and the First Defendant deteriorated.

75. Sometime in the year 2006, the Deceased returned to the house in Tobago and would visit Trinidad regularly for medical attention. For months thereafter the Claimant and his wife visited the Deceased every weekend to look after him and then eventually about three weekends a month. That the Claimant would go to Tobago to carry the Deceased to his clinic and doctor visits and she also assisted with looking after the Deceased. During the time the Deceased was bedridden until his death, she would often prepare meals and took clean clothing for the Deceased.

The Evidence of the First and Second Defendants

76. The First Defendant gave evidence that she married the Deceased at Scarborough Methodist Church, Scarborough, Tobago. The marriage was dissolved on the 23rd June, 2009. Before he died, the deceased told her that she could live as long as she wanted in the house on the property. The First Defendant testified that the Deceased told her that he had no money to pay her and that he was sorry for what he had done and they agreed that she would live in the house until she died. During cross-examination, the First Defendant testified that the Deceased told this to her when he returned to her, some five years before he died.

77. The First Defendant testified that the Deceased informed her that he left a Will and by the Will he left his daughter, the Second Defendant as Executor. That the Second Defendant informed her that she could remain in the house as long as she wanted. During cross-examination, the First Defendant testified that the Deceased informed her of the Will a week before he died.
78. The First Defendant testified that she did receive letters dated 12th April, 2013, 30th April, 2013 and 10th June, 2013 from the Claimant's Attorneys and that her Attorney by letter dated 18th April, 2013 responded to the Claimant's Attorneys.
79. It is her evidence that the Deceased informed her that he gave instructions to an Attorney to lodge a Caveat against the property to stop the Claimant from getting the property. That despite the Deceased's caveat forbidding the registration or any dealing with the property, the Claimant was still able to get the Certificate of Title to the property.
80. The Court pauses at this stage to comment that the demeanour of the First Defendant was such that she refused to answer questions in cross-examination and appeared to be very hesitant and unsure in respect of those questions which she did in fact answer.
81. The Second Defendant gave evidence on her own case. She testified that she is the elder, half-sister of the Claimant as they share the same father. Most of her evidence has been set out above by this court when setting out the Second Defendant's Defence and Counterclaim and what follows is that which was not so set out.
82. According to the evidence of the Second Defendant sometime after Hurricane Flora (1963), she observed the Deceased and Adina built a small wooden structure on the property and began to live there with their five children. When the Deceased and Adina started living there, her oldest daughter who was about three months at that time lived with them for seven (7) years. She stated that she is aware that Adina died in or around 1982 and the Deceased married the First Defendant in 1985. That the Deceased brought

the First Defendant to her home prior to the death of Adina and informed her that he had found the First Defendant and was going to marry her.

83. The Second Defendant testified during cross-examination that she became aware of the Claimant's RPA application when the Deceased called her and told that the Claimant put an advertisement in the papers concerning the property. On the 18th August, 2012 she was at the home of the Deceased when Wesley brought a lawyer to the house. The First Defendant was however not at home on that day. She further testified that she did not know who prepared the Will. She became aware of the Will after the Deceased died and received it sometime in 2012. She submitted the Will to Lex Caribbean to apply for the Grant of Probate for the Deceased's estate, which comprised amongst other things the house, however, to date they have not commenced the application. She testified further that when she took the Will to Trinidad for investigation, it was found that the Claimant's name was on the property and the lawyers told her they could not do anything so she took the Will back to Tobago.

84. During cross-examination the Second Defendant testified that she knew that the Claimant got the Certificate of Title by fraud because the Deceased told her that the Claimant took his hand and signed the papers stating that he, the Claimant was going to get the Deceased's electronic Birth Certificate. This material evidence is not supported in her pleaded case and neither is it set out in her witness statement. Further no suitable explanation has been provided for its omission. It appeared to this court and the court finds that bit evidence was manufactured by the Second Defendant in a last minute attempt under cross examination to bolster her case. As a consequence, the evidence of this witness is tainted on this material issue in the court's view. It is clear that the second Defendant seemed prepared to make up evidence on a whim so that the court finds it very difficult to trust what she says on other material issues.

Issue 1

85. An order of the court is to be interpreted, so long as there is no uncertainty in the meaning of the words, according to the natural and ordinary meaning of the words used. The Honourable Madam Justice Mohammed in **Riad Marketing Limited v Eckler Chemicals Limited** CV 2015-00670 at paragraph 10 set out the test which is reflected in **Euro Bltz 21 (PTY) Ltd and anor v Secena Aircraft Investments Ltd CC (102/14) [2015] ZASCA 21 (19 March 2015)**. Although of persuasive authority, the position articulated in this case is reflective of the law as applies to this jurisdiction. The Supreme Court of South Africa having considered the rules of interpretation to be applied to a court order stated at paragraph 6:

“It is trite law that the rules applicable to the interpretation of documents are applicable to the interpretation of a judgment or order of court. The test in this regard is well established. If there is no uncertainty in the meaning of the words the court’s intention must be established primarily from the meaning of the judgment or order as construed according to the usual, well-known rules of interpretation of documents. If, however, uncertainty arises from the judgment or order, regard may be had to extrinsic and the surrounding circumstances relevant to the granting of such judgment or order such as the evidence, both oral and documentary, that was adduced before the trial and submissions made. Trollip JA described the test as follows in Firestone South Africa (Pty) Ltd v Gentiruco A G: ‘First, some general observations about the relevant rules of interpreting a court’s judgment or order. The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order. The court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 A.D. 82 at p. 87; West Rand Estates Ltd. V New Zealand Insurance Co. Ltd., 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the

judgment or order can be asked to state what its subjective intention was in giving it (cf. Postmasburg Motors (Edms.) Bpk. V Peens en Andere, 1970 (2) S.A. 35 (N.C.) at p. 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court’s granting the judgment or order of the court a quo and its reasons therefore, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick’s case, supra, 1928 A.D. at p. 87, read with Delmas Milling Co. Ltd. V Du Plessis, 1955 (3) S.A. 447 (A.D.) at pp. 454F-455A; Thomson v Belco (Pvt.) Ltd. and Another, 1960 (3) S.A. 809 (D).”

86. The order of Gobin J is in this court’s view clear and unambiguous in its terms. The terms are in no way uncertain. It determines at paragraph two that the First Defendant in this case has a share and interest in the said building as a result of the property being matrimonial property consequent upon the marriage entered into on the 6th June 1985. Paragraph two also sets out that the Deceased is to pay to the First Defendant, the value of her share which has been determined by the court to be forty percent of the value of the building. From this order several matters are abundantly clear in the court’s view and the court so finds.

87. Firstly, the effect of the order is to vest in the First Defendant a share or interest in the property to the extent of forty percent of the value of that property. Secondly, it appears that consistent with the clean break principle, Gobin J ordered that the First Defendant’s share and interest in the building was to be realized by way of the sale of the building. Upon payment of the value of her share and interest, the First Defendant would be required to vacate the premises, she no longer having an interest. Thirdly, the order conferred unto the First Defendant a proprietary right to a forty percent share in the building and an entitlement to be compensated for that share. It means that so long as the First Defendant’s share has not been realized by way of compensation for her share, she maintains a right and entitlement to a forty percent share of the building. It also

means that, the building being matrimonial property, the payment must come from the deceased against whom an order has been made to the lump sum payment in return for the surrender of her share and interest.

88. Fourthly, it appears on the evidence of the Claimant, that his father had purchased the land in the year 1952 but never received a Deed. He was therefore the owner of the land upon which he built a house. It follows that when Gobin J made the order which referred to the building only, it would have to be on the basis that the concrete building being affixed to the land was matrimonial property. It could not have been the case that for the purpose of the order, the building which was affixed was to be treated as separate and distinct from the land to which it was affixed. Should this have been the case, the Learned Judge would no doubt have treated with the issue of the land in her order. Further, it is an established principle that houses which are affixed to land, run with the land as distinguished from chattel houses. See the well known authority of *Mitchell v Cowie* (1964) 7 WIR 118.

89. Further the terms of the order in this case confers with absolute certainty, the duty to make that payment on the shoulders of the deceased and now his estate. It means that either the Legal Personal Representative or the Executor of the Will of the deceased if his Will is found to be valid, is duty bound to make the payment to the First Defendant at which time she shall vacate the premises. In other words the order compels the deceased to buy out the share and interest of the First Defendant.

90. The entitlement of the First Defendant under the order therefore is no more or no less than that which is set out above.

Issue 2 (a)- Does the Claimant have the jurisdiction to initiate and maintain these proceedings

Law

91. In *Ingall v. Moran [1944] 1 All ER 97* the plaintiff issued a writ in an action claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly two months after the date of the writ. The Court of Appeal held that the action was incompetent at the date of its inception by the issue of the writ. Scott, L.J. stated at pages 164- 165: "*As the writ was issued on September 17th, 1942 and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ falsely (although no doubt quite innocently) alleging that he issued it as administrator... Such an action was, in my opinion, incapable of conversion by amendment into a valid action... It is true that when he got his title by a grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all... The old was, in truth, incurably a nullity. It was born dead and could not be revived.*"

92. In *Ingall* supra, Luxmoore, L.J. said at page 169: "*I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued.*"

93. Therefore, from *Ingall* supra, the general position at common law appears to be that a person who is not an executor or who has not obtained letters of administration of the deceased's estate may not bring an action for the benefit of the estate.

Submissions

The Submissions of the Defendants

94. It is the contention of the Second Defendant that the Claimant has no standing to bring an action for the relief sought against the First Defendant since he is seeking to deal with the Estate of the Deceased, notwithstanding the fact that he has not been appointed the Legal Personal Representative of the Estate of the Deceased.
95. Counsel for the Second Defendant submitted that it is trite law a Deceased's assets upon death vests in the Executor of the estate in the event of testacy and in the Administrator General in the event of intestacy: Hamel Smith J (as he then was) discussion in Walcott v Alleyne HCT 92 of 1985. That those assets must be divested by the executors/administrators to the beneficiaries out of the estate by some manner.
96. Counsel for the Second Defendant further submitted that the Claimant has admitted that the property belonged to the Deceased and that he had partial ownership of the property as he had access to the same. It was argued by Counsel for the Second Defendant that the property was in fact owned by the Deceased, therefore any action with respect to this property must be dealt with by the Legal Personal Representative of the Estate of the Deceased that is, in the person of the Second Defendant. Counsel for the Second Defendant further argued that this Court should therefore conclude that the Claimant has no standing/locus in bringing this action.

The Claimant's Submissions

97. Counsel for the Claimant submitted that the Claimant's right to bring this action stems from his right to possession of the property. That the First Defendant's continued occupation is a fetter upon the Claimant's right to possess and to fully enjoy the fruit of his title to the property.

Finding

98. It is clear to this court that the Claimant cannot step into the shoes of the deceased as it were because the estate of the deceased vests in the Administrator General unless this court finds the purported Last Will and Testament proven in which case the Executor named therein, the Second Defendant will be vested with the necessary authority and jurisdiction to demand that the First Defendant vacate the building upon being paid for her share and interest in the building. The Claimant has no jurisdiction to act on the part of the estate.

99. Indeed this state of affairs appears to be recognised by Attorneys at Law for the Claimant who submit that the claim is brought by him in his capacity as registered proprietor of the property, he having obtained a vesting order. That his claim is for possession and is unconnected to the terms of the order of Gobin J. The Defendants have challenged the bona fides of the process used by the Claimant in obtaining the title to that parcel of land so that the Claimant would only have jurisdiction to bring a claim for possession as title owner should that title be found to have been obtained without fraud.

Issue 3

Law

100. **Section 141 of the RPA** is clear in terms on the indefeasibility of title under the system of registration. It states as follows:

“141. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which, such proprietor or any previous proprietor of the estate or

interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

101. Section 143(b) of the RPA reads as follows:

“143. No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases: (b) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud; or as against a person deriving, otherwise than as a transferee bona fide for value, from or through a person so registered through fraud.”

102. **Section 154 of the RPA** deals with the offence of fraud and provides as follows:

“If any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of, any grant, certificate of title or other instrument, or of any entry in the Register Book, or of any erasure or alteration in any entry in the Register Book or in any instrument or form issued by the Registrar General, or fraudulently uses, assists in fraudulently using, or is privy to the fraudulent using of, any form purporting to be issued or sanctioned by the Registrar General, or knowingly misleads or deceives any person hereinbefore authorised to demand explanation or information in respect of any land or the title to any land which is the subject of any application to bring the same under the provisions of this Act, or in respect of which any dealing or transmission is proposed to be registered or recorded, such person shall be guilty of a misdemeanour, and shall be liable to a fine of two thousand four hundred dollars, or to imprisonment for three years; and any grant, certificate of title, entry, erasure, or alteration so procured or made by fraud shall be void as regards all persons who may be parties or privy to such

fraud".

103. The meaning of fraud was considered by Wooding CJ., in **Roberts v. Toussaint and Others (1963) 6 WIR 431 at 433** wherein his Lordship stated as follows:

“Moreover, in actions in which a registered title is being impeached, fraud means some dishonest act or omission, some trick or artifice, calculated and designed to cheat some person of an unregistered right or interest: See Waimiha Sawmilling Co. v. Waione Timber Co.(1)([1926] A.C.101 at pp.106-107).”

104. In **Waimiha Sawmilling Co v Waione Timber Co (1) (1926] AC 101 at page 106,** Lord Buckmaster went on to state that “fraud” in actions seeking to affect a registered title meant **actual fraud** or **dishonesty** (emphasis mine) of some sort and was to be distinguished from constructive or equitable fraud which denoted transactions having consequences in equity similar to those which flow from actual fraud.

Submissions

The Defendants’ Submissions

105. Counsel for the Second Defendant submitted that it is accepted that a party must plead all material fact that he intends to rely upon in support of his claim and the fraud alleged must not only be distinctly alleged but also distinctly proved: **John v Allsop; Inniss; Weekes; Weekes, Jaglal; Jaglal H.C.4559/2010. CV.2010-04559.** That it is also accepted that that the Registration of Title confers on the proprietor indefeasibility of title, except in the case of fraud.
106. It is the contention of Counsel for the Second Defendant that in order for the Defendants to be successful in impeaching the Claimant’s Title to the property, they must

make out the case of fraud as per sections 141 and 143(b) of the RPA. Counsel for the Second Defendant accepted that the Privy Council in the case of Assets Company Limited v Mere Roihi [1905] AC 176 stated that the fraud contemplated by these sections is actual fraud, that is, dishonesty of some sort not what is called constructive or equitable fraud.

107. Counsel for the Second Defendant submitted that under cross-examination by Counsel for the Second Defendant, the Claimant testified as follows:

- i. That at the time of the RPA Application, he was not in possession of the property for thirty (30) years;
- ii. That he never lived in the property alone;
- iii. That he was based in Trinidad from 1988;
- iv. That his father provided the finances to construct the house;
- v. That he did the labour on the house as a son and out of the love and affection towards father;
- vi. That the structure belonged to his father;
- vii. That he did not contend that the property belonged to him during the matrimonial proceedings;
- viii. That at the time of the RPA Application, there was a claim adverse to his title by the First Defendant;
- ix. That in 2007 he was in partial control of the property;
- x. He accepted that the Deceased had control of the property;

xi. He accepted that he never gave the First Defendant permission to occupy the property

108. Therefore, it was the submission of Counsel for the Second Defendant that the above admissions made by the Claimant under cross-examination proved that he was never in possession and control of the property and therefore he knowingly made false declarations to obtain the Certificate of Title.

109. Counsel for the Second Defendant submitted that upon making any order affecting the estate or interest of any proprietor of land registered under the provisions of the RPA it shall be lawful for the Court or a Judge, in any case in which such proceeding is not herein expressly barred, to direct the Registrar General to cancel any certificate of title or instrument or any entry or memorial in the Register Book relating to such land, estate or interest, and to substitute such certificate of title or entry or to make such other entry as the circumstances of the case require; and the Registrar General shall give effect to such order.

The Claimant's Submissions

110. Counsel for the Claimant submitted that by the Claimant's Statutory Declaration dated 30th April, 2007 in support of the RPA application, the Claimant disclosed that the application was based upon the Deceased's fifty (50) year old possession of the property. That the Claimant did not assert that his application was based upon his sole possession but also upon the Deceased. Counsel for the Claimant further submitted that it was not in dispute that the Deceased had been sufficiently long in possession of the property as to acquire title by adverse possession.

111. It was submitted that the Deceased swore to an affidavit dated 8th July, 2008 and on the 2nd May, 2001 made a Statutory Declaration in support of the Claimant's RPA application. That these documents proved that the Deceased consented and fully

supported the Claimant's application and further that the Deceased had divested himself of all his estate and interest in the property in favour of the Claimant.

112. It was also submitted that the Honourable Madam Justice Gobin was careful not to encumber the property by her Order. Counsel for the Claimant contended that the First Defendant had no estate or interest in the property, neither by the Court Order nor otherwise therefore the Claimant could not have perpetrated any fraud against her. That the fraud contemplated by the RPA cannot merely be a statement made which was or maybe untrue but one which goes further and causes a person entitled to be cheated out of the land by the applicant bringing the said land under the RPA and not disclosing the said person's interest or estate in the said land.

113. The Claimant argues that no fraud has been perpetrated against the First Defendant. That the Claimant's statement in his Statutory Declaration dated 30th April, 2007 that he was not aware of any litigation with reference to the property does not assist the First Defendant's claim of fraud since it did not lead her to being cheated out of anything by the Claimant.

114. Counsel for the Claimant contended that if the Court Order was different, that is, if it affected estates in the property and gave the First Defendant an estate in the property, then the Claimant's failure to disclose the said estate in the five years his application took to be processed, from 2007 to 2012, would have been material to the issue of the Certificate of Title in his name and entitled the Court to cancel it. Counsel for the Claimant further contended that as things stood there was no proof or even an allegation that the First Defendant lost anything that she was entitled to.

115. It was argued that the Deceased divested himself fully of the property in favour of the Claimant before he died and made the Will. Therefore, it is the argument of Counsel for the Claimant that the house being affixed to the property as to be incapable of being removed therefrom without completely destroying it, is in law a part of the land, so that the house too belongs to the Claimant.

116. Counsel for the Claimant submitted that for the Claimant to have perpetrated fraud, the Deceased would have had to be a party to it which is absurd since the Deceased's entitlement to the property was undisputed and indisputable. Counsel for the Claimant argued that the Deceased had the right to deal with the property however he wanted and he chose to give it to the Claimant.

117. Counsel for the Claimant further submitted that the Deceased's support of the Claimant's application amounted to a gift inter vivos of the property to the Claimant and no Legal Personal Representative of the Deceased's estate can dispute the said gift on the basis of any fraud on the Deceased's part.

The Second Defendant's Submissions in Response

118. The Second Defendant has argued that at the time of the Claimant's RPA application, the Claimant was well aware that First Defendant had made an application for property settlement and the Claimant's application was to defeat her application. That this is the only logical conclusion one can reach to when taking the evidence as a whole. Therefore, Counsel for the Second Defendant submitted that the fraud perpetrated against the First Defendant was quite evident.

119. It was further submitted that if the Claimant is asking the Court to find that the house situate on the property cannot be separated, therefore when the Court ordered that the First Defendant be entitled 40% of the house that the property became encumbered by creating for the First Defendant an interest/estate in the property.

120. Further, Counsel for the Second Defendant submitted that if the Court finds that the Certificate of Title was obtained fraudulently then it goes to the fact that the Claimant has no right to bring this claim for possession.

121. Counsel for the Second Defendant argued that while the Deceased's entitlement to the disputed land was undisputed and indisputable, the fact that the Deceased falsely swore to a Statutory Declaration giving all his interests and rights in the ownership of the property solely to the Claimant on the basis that he constructed the concrete building on the property less than a year after the First Defendant made her Application for property settlement should excite the suspicion of the Court.

122. It is the argument for the Defendant that although the Deceased may have consented in 2007 to the Claimant's RPA application, the Deceased essentially revoked his consent in 2012 when he lodged the Caveat. That the Claimant should not be able to rely on the Deceased's initial consent to justify his acquisition of legal title to the property.

Finding

123. The Claimant's application to bring the lands under the provisions of the RPA, was first made in December of 2007. The application of the First Defendant for property settlement was made on the 16th of August 2006. The order of Gobin J was made on the 4th July 2008. The full application has been admitted into evidence in these proceedings. It demonstrates that at the time the application was first made and the applicant swore to and filed his declaration in support the order of Gobin J had not yet been made. The Claimant testified that he did not give notice of the Deceased's appeal of the Court Order in his RPA application because he did not view it as an encumbrance on the property. It follows that he had known of the order of Gobin J at the time it was made or shortly thereafter. It also follows that prior to the swearing to his supplemental declaration of the 31st July 2009 and again that of the 2nd May 2011 and that of the 9th July 2012, he was well aware of the order of Gobin J but made no mention of it whatsoever. It means that he maintained the matters set out in his first declaration, paragraphs 14, 15 and 17 of which read as follows;

“14. I am not aware of any....encumbrances or claim affecting the said parcel of land or that any person has any claim, estate or interest in the said parcel of land at law or in equity in possession or in expectancy”

“15. There is no person in possession or occupation of the parcel of land adverse to the estate or interest of the applicant and I am not aware of any claim adverse to the applicant’s or his predecessors in possession.”

“17. I am not aware nor have ever heard of any litigation with reference to the said parcel of land”

124. But after July 2008, these statements became untrue and the Claimant had the opportunity to and failed to correct them. He knew that the First Defendant was his father’s wife, was occupying the premises and had instituted litigation to secure her share and interest in the matrimonial home. What is even more, is that before the grant of his application he was fully aware that an order had been made wherein it was held that the First Defendant in fact held a forty percent share in the building (which this court has already held also included the land). But again he failed to correct his original statement under oath.

125. It is a fact that the competing interest of the First Defendant may have in law been a bar to the success of his application and the court is of the view that it is to be reasonably inferred as a matter of common sense that this is why the Claimant essentially hid the fact of the interest held by the First Defendant from the Registrar General. The hiding of those material facts is to be equated with dishonestly representing that a particular material set of facts exists when in fact they do not.

126. What is even more troubling in this case, is that despite the deceased’s original statutory declaration of consent, the deceased who at the time would have been ill and had to be assisted, swore to a statutory declaration some four (4) days after the pronouncement of the order by Gobin J on the 8th July 2008 and again on the 2nd May

2011, indicating that he had given his consent. No mention was ever made of the order of the court in those statutory declarations.

127. But are these material omissions sufficient in law to amount to fraud in the context in which it is used in the legislation.

128. In *Assets Co. Ltd. v. Mere Roihi supra*, it was determined that there can be no going behind a current registered owner in accusations of fraudulent dealings in real estate unless they were directly involved in the alleged dishonesty. In *Assets Co. Ltd supra*, Lord Lindley at 176 page 210, said that the sections of the then New Zealand Acts to which his Lordship referred:

“..... appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

129. The Honourable Hamel Smith J (as he then was) said in HCA No. T92 of 1985 Lenore Walcott (Sole Executrix of the last will of CATHERINE ALLEYNE, deceased v John Clement Alleyne) at page 10;

“Fraud does not necessarily arise from one’s express declarations only. Sometimes, and more often than not, it hides its head in what one fails to disclose”

130. If a person dishonestly makes a false representation with the intention of gaining for himself or another or causing loss to another or exposing that person to risk or dishonestly fails to disclose information which he is under a legal duty to do with the intention of gaining for himself or another or causing loss to another or exposing that person to risk or dishonestly abuses a position in which he is expected to safeguard the financial interests of another person with the intention of gaining for himself or another or causing loss to another or exposing that person to risk he is guilty of fraud: Halsbury’s Laws of England, Volume 25 (2010) paragraphs 1-429, Volume 26 (2010) paragraphs 427-792.

131. Having regard to the facts set out above and to the findings thereon by this court, the court is of the opinion that there is a clear inference to be drawn on the evidence that the Claimant hid relevant information in relation to the First Defendant’s legal interest in the property in a dishonest effort to have title to the property vested in him alone. In so doing his actions were clearly designed to have the result of depriving the First Defendant of her share and interest in the property. It was therefore his intention to fraudulently deprive her of her share. The fact that the Claimant made an offer to fulfill the terms of the order by paying to her that which is due does nothing to assuage his previous dishonest withholding of material information which more likely than not would have affected an equity interest in the property.

132. The effect of the success of the Claimant’s application to bring the property under the RPA was the the virtual extinguishing of the First Defendant’s right and entitlement under the order. Taken to it’s logical conclusion, the Claimant having obtained a

Certificate of Title, he could have refused to pay anything to the First Defendant and there would have been no adverse consequences to the property because of his indefeasibility of title. The fact that he makes an offer does not detract from the dishonest act perpetrated against the First Defendant. The court is therefore of the view that the Claimant's actions in this case can only be categorized as fraudulent.

133. Where the evidence demonstrates in no uncertain terms that a Claimant has benefited through his own fraudulent actions the court is duty bound to act. This court therefore finds that fraud has been made out by the Second Defendant and an order will be made that the Certificate of Title be set aside.

Issue 4

Law

134. According to **section 42 of the Wills and Probate Act** ("the WPA"), a Will is duly executed if the testator complies with the statutory requirements to the satisfaction of the Court. The material formalities for due execution of a Will is that it must be in writing, signed by the testator or someone acting under his direction and done in the presence of two or more witnesses who also attest the Will in the presence of the testator and of each other.

135. Whenever the circumstances under which a Will is prepared raise a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless the suspicion is removed. Thus where a person propounds a Will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him; or where the testator is of extreme age; or where knowledge of the contents of the Will is not brought home to him; or the Will was

prepared on verbal instructions only, or was made by interrogatories; or where there was any concealment or misrepresentation; or where the Will is at variance with the testator's known affections, or previous declarations, or dispositions in former Wills, or a general sense of propriety: *Halsbury's Laws of England 4th Edition Vol 17 paragraph 907.*

136. In *Banks v Goodfellow (1870) L.R 5 QB 549* it was held that mental capacity means that the testator must be of "sound disposing mind and memory". In essence what must be determined is that the deceased had sufficient mental capacity to understand the testamentary act. In *Barry v Butlin (1838) 2 Moo Pcc 480* it was determined that the burden of proving this lies with the person propounding the Will.

Submissions

The Defendants' Submissions

137. Counsel for the Second Defendant submitted that the Will was duly executed in a manner which satisfies the formal requirements of section 42 of the WPA.
138. It was also submitted that in the common law tradition, testamentary capacity is the legal term of art used to describe a person's legal and mental ability to make or alter a valid Will. That this concept has also been called sound mind and memory or disposing mind and memory.
139. It is the contention of the Second Defendant that the issue of the Deceased having no Testamentary capacity was not pleaded by the Claimant, however he did raise some concerns about the Will being crafted by other persons and was executed without the Deceased's knowledge and consent.

140. Counsel for the Second Defendant relied on the authority of *Doreen Fernandes v Monica Ramjohn Nadeau, Ian Ramjohn, Marilyn Ramjohn et al CV. 2006-00305*, wherein the Honourable Mr. Justice Stollmeyer, (as he then was), stated at page 15 and 16:

“The requirements for testamentary capacity and for knowledge and approval are separate. ...Testamentary capacity, which the Claimant must show in this case, requires the capacity to understand (in the sense of the ability to do so) certain important matters relating to a will namely: the nature of the act and its effects, and the extent of the property being disposed of. The testator must also be able to comprehend and appreciate the claims to which he might give effect (Hoff v. Atherton [2004] EWCA Civ 1554 paragraph 33, referring to Banks v. Goodfellow (1870) LR 5QB 549 at 565.) If there is evidence of actual understanding then that proves the requisite capacity...”

“Knowledge and approval requires proof of actual knowledge and approval of the contents of the will (Hoff v. Atherton paragraph 33). This is a further and a separate test (Hoff v. Atherton at paragraph 27).”

“Further, it may well be [per Chadwick JA at paragraph 64 of Hoff v. Atherton] that where there is evidence of a failing mind - - and, a fortiori where evidence of a failing mind is coupled with the facts that the beneficiary has been concerned in the instructions for the will - - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that a testator did know and approve the contents of his will - - that is to say, that he did understand what he was doing and its effect - - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time he signed the document, but needs to be satisfied that he did, in fact, know Page 17 of 25 and approve the contents - - in the wider sense to which I have referred.”

141. Counsel for the Second Defendant submitted that Dr. Andrew gave evidence that there were no record of any direct pronouncement on the mental status of the Deceased.

142. Therefore, Counsel for the Second Defendant submitted that if the Deceased was mentally incapable to execute a Will, the medical record would have reflected such. That with no such pronouncement the Deceased had the Testamentary Capacity to execute a Will.

The Claimant's Submissions

143. Counsel for the Claimant argued that the Deceased at the date of the Will had gifted inter vivos all his estate and interest in the property to the Claimant by his consent to the Claimant's application to bring the property under the RPA in the Claimant's name. That the Deceased never withdrew his consent from the Claimant's application. Further, Counsel for the Claimant argued that after the Deceased's death that consent and gift fully matured into title with the issue of the Certificate of Title with respect to the property in the Claimant's name. That the Will was never probated, but if it had been probated, the inventory of the Deceased's estate could not have included the property.

144. Counsel for the Claimant submitted that the purported Will of the Deceased contained contradictions and false statements such as the gift inter vivos of a substantial amount of the Deceased's gratuity to his daughters Heather, Ann and Angela which was never received by them, the statement that he gave the Claimant monies from his First Citizen Bank account which was never received by the Claimant, the statement that Vida Phillips bought the property and the First Defendant helped to build the house thereon and the gift of property at Culloden to the Second Defendant that was not owned by the Deceased.

145. Further, it was submitted that the Will lacks the execution clause inserted when a Will is prepared by lawyer and that the Deceased lacked the means or capacity to make a

type written Will. That there is no evidence as to who prepared the Will and whether that said person prepared the Will in accordance with instructions received from the Deceased. Moreover, Counsel for the Claimant submitted that there is no evidence as to when or where the Will was prepared and there were no witnesses to give any evidence as to the execution of the Will.

146. Counsel for the Claimant submitted that there was no evidence that a medical practitioner was present at the time of the execution of the Will. That there was evidence that from about May 2012 until September 2012, the Deceased was under the exclusive control and supervision of the First Defendant, the Second Defendant and Wesley. Further, that there was evidence that the Deceased did not leave the house by himself to go anywhere during that period.

147. Counsel for the Claimant further submitted that the Defendants during cross-examination testified that on the 18th August, 2012, the Deceased was home, they, the Defendants were both on the property and there were no visitors. That this is inconsistent with the Will having been made on the 18th August 2012.

148. Counsel for the Claimant submitted that the circumstances surrounding the preparation and execution of the Will should excite the suspicion of the Court and the Second Defendant was under a burden to remove that suspicion: *CV 2008-01955 Jim Watts v Dwight Cruickshank and Sylvan Cruickshank and CV 2009-04594 Jim Watts v Dwight Cruickshank and Sylvan Cruickshank page 24 paragraphs 86, 87 et seq to paragraph 92 and CV 20120-00247 Lincoln Robinson v Cecelia Changoor paragraphs 62 and 69.* Further, Counsel for the Claimant submitted that the Second Defendant has not put forward any evidence to remove this suspicion and the Will should therefore not be admitted to probate.

Finding

149. By order of this court an affidavit of testamentary scripts was filed on the 4th November 2014. The document which purports to be the original Will is annexed to that affidavit. It is clear to the court that the document does not comply with the legislative formalities required for the creation of a valid Will in that there is no evidence either on the face of the Will itself or in any other form that the document was signed by the testator in the presence of two or more witnesses who attest the Will in the presence of the testator and of each other.
150. Pursuant to the order of this court for witness statements to be filed, the Second Defendant filed a witness statement by Marjorie Alfred, a purported witness to the Will. However, Ms Alfred was not called as a witness and therefore her witness statement was not relied on. In any event a witness statement is an unsworn document which carries no weight in the absence of agreement or a hearsay notice unless the witness swears an oath and adopts the statement. As a consequence the court is left with no evidence that both witnesses were present at the same time and in the same place as the purported testator and did then see him execute his Will and proceeded to attest the Will in his presence and the presence of each other.
151. So that the case of the Second Defendant in relation to her counterclaim that the court do pronounce in favour of the Will is a non starter because of the absence of formalities. It is therefore wholly unnecessary, in the court's view to treat with the capacity of the deceased to make a Will and suspicion arising for the surrounding circumstances.
152. The estate of the deceased therefore remains vested in the Administrator General until such time as a Grant of Representation is issued.

Disposition

153. The court must treat with one further argument. The Claimant alleges that the effect of the consent by the deceased to the application of the Claimant to bring the property under the provisions of the RPA was that of an inter vivos gift of the property to the Claimant. The court does not accept this submission. The Claimant has clearly stated that the basis of his application has been his ownership and possession having expended a large sum of money in building the house. This claim has been destroyed in cross-examination when he acknowledged that he was but a boy at the time the house was built and that it was really his father who was in possession. It is in this context that the Claimants seeks to turn his submission into one of a gift by his father during his lifetime.

154. Even if one accepts this submission, it is axiomatic that one can only gift that which one possesses in any event. To that extent the inter vivos gift could only be limited to the sixty percent (60%) share held by the deceased at the time of his death and nothing more.

155. The practical effect of the ruling of this court therefore is that the First Defendant remains entitled to be compensated for her forty percent share and interest in the property by the deceased's estate by virtue of the order of Gobin J. Until then she maintains her share and interest. There being no Legal Personal Representative of that Estate, an entitled party or parties may wish to obtain a grant so that the estate may be administered. It therefore also means that the Certificate of Title having been set aside, the property forms part of the estate of the deceased. The issue of money expended on the property by the Claimant is a matter to be sorted between the Claimant and the estate.

Costs

156. In relation to costs, the Claimant has lost the claim but has succeeded on the issue of the validity of the purported Will. Both Defendants have succeeded on their counterclaim in relation to fraud. However, the Second Defendant has not succeeded in her attempt to prove the purported Will. Probate of the purported Will was not pleaded by

the First Defendant. The orders for costs shall reflect these positions consistent with the general principle that costs are to follow the event.

157. The court will therefore make the following order;
- a. Judgment for the First and Second Defendants on their Counterclaims as follows;
 - i) It is declared that Certificate of Title registered in Volume 5510 Folio 213 (hereinafter referred to as “the Certificate of Title”) was obtained by fraud.
 - ii) The Certificate of Title is hereby set aside.
 - iii) The Registrar General is directed to cancel the Certificate of Title.
 - b. It is declared that the purported Last Will and Testament of the deceased made on the 18th day of August 2012 is not valid and probate is refused.
 - c. The Claim is dismissed.
 - d. The Claimant is restrained from evicting and/or compelling the First Defendant to vacate the house which she presently occupies on the premises save and except in the event that the Claimant obtains a Grant of Representation of the estate of the deceased and acts lawfully in that capacity pursuant to the terms of the order of Gobin J.
 - e. The Claimant is to pay to the First Defendant the costs of the Claim on the prescribed scale based on the value of the claim being one for \$50,000.00.
 - f. The Claimant is to pay to the First Defendant the costs of her Counterclaim on the prescribed scale based on the value of the claim being one for \$50,000.00.
 - g. The Claimant is to pay to the Second Defendant one half of the costs of the Claim on the prescribed scale based on the value of the claim being one for \$50,000.00.

- h. The Claimant is to pay to the Second Defendant one half the costs of her Counterclaim on the prescribed scale based on the value of the claim being one for \$50,000.00.
- i. The Registrar of the Supreme Court is to forward a copy of this order to the Registrar General.

Dated this 29th day of February 2016

Ricky Rahim
Judge

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