

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. S-1361 of 2005
C.V. 2007-02698

BETWEEN

VISHAM ALI
(Administrator ad Litem of the estate of Kussum Ali, deceased)

Claimant

AND

SHAIROON KHAN

First Defendant

NAZIM ALI

Second Defendant

JOEY ALI also called
ASHICK ALI also called
JOEY FRANCOIS ASHICK ALI

Third Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Mr. Jagdeo Singh instructed by Mr. Kiel Taklalsingh for the Claimant.

Mr. William David Clarke instructed by Mr. Andre Rudder for the First and Third Defendants.

Dated: the 25th September, 2012

JUDGMENT

INTRODUCTION:

1. Before the Court is the claim of Visham Ali, the Claimant [”Visham”] in his capacity as the Administrator ad litem of the estate of Kussum Ali, the original plaintiff, [“Kussum”] and the mother of the Claimant and the three Defendants called “Shairoon”, “Nazim” and “Joey” in this judgment.

2. Kussum had originally commenced proceedings against the Defendants claiming *inter alia* the following relief:

- (1) against Shairoon, a declaration that Shairoon is liable to account to her for the sum of \$463,000.00 on the ground of fraud and/or breach of trust and an order for payment of the sum of \$463,000.00 or such other sum as the Court thinks fit.
- (2) against Nazim and Joey, declarations (i) that Kussum is the owner and person entitled to all funds held formerly at First Citizens Bank Ltd., Port of Spain Branch, in account No. 1095113 but now transferred to Unit Trust Corporation (“UTC”), Westmoorings; (ii) that they hold all such sums now or formerly at Unit Trust Corporation in trust for her; and (iii) an account, an order for payment and other consequential orders.
- (3) against all the Defendants damages for conspiracy to defraud, breach of trust, breach of fiduciary duty, interest, further or other relief and costs.

3. Kussum was the widow of Ali Hosein who died on the 27th November, 1988 [“Ali Hosein”]. Kussum died on the 2nd August, 2007, leaving a will dated the 22nd October, 2004, in which she appointed Visham executor. By order of Master Paray-Durity made on the 12th March, 2008, Visham was appointed Administrator ad litem to continue these proceedings.

4. Visham and the Defendants are some of the children of Ali Hosein and Kussum. The action has been defended by Shairoon and Joey. Nazim, who lives in England, was served with the Writ of Summons but did not enter an appearance. In addition to Visham and the Defendants, Ali Hosein and Kussum had other 8 children, namely Nairoon Ali D'Andrade, Shimun Ali, Afrina Ali, Azzard Ali, Zanifa Ali Alleyne, Ruby Madoo, Tyab Ali and Nadara Ali.

5. At the date of her death Kussum was approximately 92 years old. Up to the date of their respective deaths Ali Hosein and Kussum both resided at 32 Pro Queen Street, Arima, ["the property"] in which they had a joint life interest with the remainder interest after their deaths being vested in Shairoon and Nadara Ali ["Nadara"] as tenants in common.

6. In the Statement of Claim filed on the 26th July, 2005, Kussum alleged *inter alia* as follows:

- (a) At paragraph 3, that during the year 1988, she and Ali Hosein had a fixed joint deposit at Republic Bank, Arima Branch, with funds in excess of \$200,000.00 and that upon his death she as survivor became entitled to the entire amount in the account.
- (b) That from time to time she gave certain instructions to Nadara to deal with the funds in the said account and that pursuant to such directions the funds were placed in a fixed deposit at First Citizens Trust and Merchant Bank Limited ["First Citizens Trust"]. She complained that she was not given the fixed deposit certificate although she had requested same from Nadara and that the fixed deposit number 1095113 only came to her knowledge after she complained to the Fraud Squad. She stated that on the transfer of funds from Republic Bank to First Citizens Trust the names of the other holders Shairoon and Shimun Ali were placed on the fixed deposit account for convenience and the funds were to be held in trust for her. She alleged that the monies were to be used exclusively for her

and it was not intended that provision should be made for the Defendants or any one of them.¹

- (c) She complained that her Attorney at Law wrote to First Citizens Trust requesting information on the account and received a response stating that the account was joint and several and written consent would be required from all other parties before any information could be released. She complained also that in breach of her trust and by fraud Shairoon closed the fixed deposit account on or about the 25th May, 2002 and caused a cheque to be issued in the name of Shairoon and Joey which they unlawfully deposited in an account at Unit Trust Corporation of Trinidad and Tobago, Westmoorings [“the Unit Trust Corporation”].²

7. In their Defence filed on October 10, 2005:

- (a) Shairoon and Joey admitted that Ali Hosein had a bank account at Republic Bank, Arima Branch, but did not admit that it was in the joint names of Ali Hosein and Kussum and specifically denied that after his death Kussum as survivor became entitled to the entire amount in the said account.³
- (b) They contended that prior to his death Ali Hosein had joint accounts at Republic Bank, Arima Branch, with some of his children including Shairoon and Nadara and that the funds in these accounts belonged to Ali Hosein as his separate property. He instructed Shairoon and Nadara that he had closed the said joint accounts and consolidated them into a single account (“the consolidated account”) at Republic Bank the funds of which were to be held in trust for the benefit of Kussum to pay for her maintenance and medical and other expenses on her behalf during her lifetime and after her death the balance of the said moneys should be divided equally among his children. They further contended that Kussum knew

¹ See paragraphs 4, 5, 6 and 7.

² See paragraphs 11 and 12.

³ See paragraph 2.

of the said trust having been informed orally thereof by Ali Hosein at or about the time of establishing the consolidated account and by Nadara at about the time of the death of Ali Hosein.⁴

- (c) They admitted that a fixed deposit account No. 1095113 was established by Nadara at First Citizens Trust in pursuance of the trust created by Ali Hosein.⁵
- (d) They pleaded that by reason of her knowledge of the trust and her compliance with the arrangements effected pursuant thereto Kussum was estopped from claiming any interest in the moneys or property representing the proceeds of the consolidated bank account or the said fixed deposit account No. 1095113 other than as provided in the trust or from pursuing any of the claims in this action.
- (e) They denied the claim that the funds in fixed deposit number 1095113 at First Citizens Trust were held in trust for Kussum as owner thereof.
- (f) They admitted that the said fixed deposit account No. 1095113 at First Citizens Trust was closed (the date being May 28, 2002 and not May 25, 2002 as pleaded) and that the proceeds thereof in the sum of \$462,523.34 (not \$463,000.00 as pleaded) were used to purchase 23,126.17 units of \$20.00 each in the Money Market Fund of the Unit Trust Corporation in Account No. 2459803-002 at its West Mall Branch, in the names of Nazim and Joey, but denied that the transactions were breach of trust or fraudulent. They contended that said transactions were effected in further pursuance of the trust set out in paragraph 3 of the Defence and that Nazim and Joey had executed a Declaration of Trust made on the 10th September, 2002 in the case of Joey, and on the 8th October, 2002 in the case of Nazim.⁶

⁴ See paragraph 3.

⁵ See paragraph 4.

⁶ See paragraph 5.

- (g) They further alleged that the trust was set up by Ali Hosein against a background that for several years prior to Ali Hosein's death Visham was estranged from him and Kussum and during Ali Hosein's lifetime he was not permitted to visit the home where they lived. Such estrangement continued after Ali Hosein's death in relation to Kussum until in or about 1990 when he went to reside with her at the property. He continued to reside there until in or about December 2000 after which he moved out. He and a female companion, Susan Rodriguez, returned to live with Kussum at the property in or about December 2001 where they resided until her death and for some time thereafter.⁷
- (h) They further alleged that the decision to encash the said fixed deposit account No. 1095113 at First Citizens Trust and use the proceeds thereof to purchase units in the Money Market Fund of the Unit Trust Corporation was taken by Shairoon, Joey, Nazim and Nadara after consultation with other siblings including Nairoon Ali D'Andrade ["Nairoon"] in order to protect the funds from depletion as a consequence of the undue influence which Visham had begun to exercise over Kussum.⁸

8. A Reply was filed on behalf of Kussum on the 13th February, 2007 and *inter alia* Kussum denied the trust pleaded in the Defence.

ISSUES:

9. The main issues for determination are issues of fact:
- (1) Whether Kussum was a joint holder with Ali Hosein of a bank account at Republic Bank, Arima Branch, and, if so, whether after the death of Ali Hosein Kussum as survivor became entitled to the entire amount in the said account.

⁷ See paragraph 13 and the particulars thereunder.

⁸ See paragraph 9.

(2) Whether as claimed in the Defence:

- (i) prior to the death of Ali Hosein he had joint accounts at Republic Bank, Arima Branch, or other banks with some of his children including Shairoon and Nadara;
- (ii) the funds in these accounts belonged to Ali Hosein as his separate property;
- (iii) Ali Hosein instructed Shairoon and Nadara:
 - (a) that he had closed the said joint accounts and consolidated them into a single account (“the said bank account”) at the said Bank;
 - (b) that the funds in the said bank account were to be held in trust for the benefit of Kussum to pay for her maintenance and medical and other expenses on her behalf during her lifetime and after her death the balance of the said moneys should be divided equally among his children.

10. Accordingly, the main issue is the ownership of those funds. In addition, there are issues of law which may arise as to whether a trust was constituted and whether there was a breach of trust or fraud as alleged by Kussum. In addition, several other issues of fact arise on the pleadings and these will be dealt with in this judgment.

11. Since both Kussum and Ali Hosein are deceased, although corroboration as such is not required, the Court must take special care in examining what these deceased persons allegedly said or did not say, and did or did not do. The evidence ought to be thoroughly sifted and jealously scrutinized, and the mind of the court ought to be in a state of suspicion: See **In re**

Garnett [1885] 31 Ch. D. 1 at page 8; and the unreported case of **Waddy Elias & Ors v Nagib Elias Holdings Limited & Ors** H.C.A. Cv. S-1142 of 1994.

12. In addition, where there is an acute conflict of facts, the trial judge must check the impression that the evidence of the witnesses makes upon him against

- (i) contemporary documents, where they exist;
- (ii) the pleaded case; and
- (iii) the inherent probability or improbability of the rival contentions.

[Horace Reid v Dowling Charles & Percival Bain Privy Council App. No. 36 of 1987 (page 6 per Lord Ackner)].

UNDISPUTED FACTS:

13. It is not disputed that there were funds lying in an account at Republic Bank, Arima Branch. What is disputed, however, is the ownership of these funds.

14. Those funds were subsequently transferred to a fixed deposit account at the First Citizens Trust Account No. 1095113 in the names Kussum or Shimun or Shairoon. That account was “broken before maturity” on the 28th May, 2002. The value on the opening of the account was \$330,149.38 and the account was opened on the 23rd February, 2000 with a maturity date of the 23rd February, 2001.

15. According to the evidence of Ms. Marsha Savary, Senior Operations Officer of First Citizens Bank, on the 28th May, 2002, the Central Bank of Trinidad and Tobago gave approval in accordance with section 5 (9)(b) of the Financial Institutions Act, 1993, for First Citizens Trust to repay the proceeds of the said fixed deposit in the amount of \$462,523.34.

16. The request to close the account had been made initially by Shairoon by letter dated the 14th May, 2002 and also by a later letter dated the 27th May, 2002, by Shimun, indicating that the funds were required for further medical treatment for Shairoon in the United States. These two (2) letters were tendered into evidence as part of a bundle “**M.S.1**”; also tendered was a Medical Certificate dated the 13th May, 2002 addressed to First Citizens Trust certifying that Shairoon was suffering from a blood clot in the brain and required treatment abroad. Dr. Nazir Abdool, the certifying doctor, recommended that Shairoon be granted funds from her account to cover the cost of the treatment abroad.

17. Subsequent to the closure of the said fixed deposit account at First Citizens Trust, Nazim and Joey agreed to act as account holders and signed documentation for the purchase of 23,126.17 units in account No. 2459803-002 of the Second Unit Scheme of the Unit Trust Corporation, West Mall Branch in their joint names. The account was opened on the 3rd June, 2002. As at the 14th March, 2011, the account stood at \$661,743.52. On the 21st January, 2004, a sum in the value of \$50,000.00 was withdrawn.

18. Subsequent to this transaction, Police Officer Shivanand Dubay of the Fraud Squad commenced an investigation on behalf of Kussum and in July, 2002, he attended the offices of First Citizens Trust, 50 St. Vincent Street, Port of Spain, and questioned the Manager about the withdrawal of monies from the said First Citizens Trust account.

19. According to Mr. Dubay (who is now an Attorney-at-Law) this was part of an investigation conducted by him regarding the funds of Kussum. According to his evidence, he took a statement from Kussum. Kussum’s statement dated the 15th July, 2002 was tendered into evidence and marked “**S.D. 1**”. The statement was admitted into evidence pursuant to Part 30 of the Civil Proceedings Rules, 1998, as amended, Kussum being deceased.⁹

20. By the said statement, Kussum said:

I am 87 years of age. I am a Pensioner. I live at 32G, Pro Queen Street, Arima.

⁹ See hearsay notice filed on behalf of Visham on the 11th June, 2008.

Sometime in 1988 my husband and I opened a fixed deposit at the Republic Bank Limited, Arima Branch. We opened that fixed deposit with approximately \$200,000.00. I cannot recall the exact amount. My husband Ali Hosein died that same year in 1988.

The fixed deposit remained at the Republic Bank Limited until sometime about 1998 I decided to place the entire balance in First Citizens Bank Limited, Chancery Lane, Port of Spain. I decided to do this because my daughter Nadara Ali of #10, Cleaver Rad, Arima was working at First Citizens Bank Ltd. As a result I instructed Nadara to place the money in a fixed deposit at First Citizens Bank Ltd which account was to be held in my name together with my two (2) other daughters Shairoon Khan of 56, Almond Boulevard, Coconut Drive, San Fernando and Shimun Ali of Miami, Florida, U.S.A. I had asked Nadara how much money was placed in the account of First Citizens Bank Limited, but she never told me. She never gave me any documents to show that the account was opened. However, I learnt that the account # was 109 5113. I assumed that the amount that was placed in the fixed deposit account was about \$350,000.00. I also instructed Nadara that she should be in charge of the account but not a signatory.

When Nadara opened the fixed deposit account, I cannot say whether she made it in such a way that all the account holders had to sign in order to access the account or if any one could sign to access it. I did not give her any instructions as to how the account should be opened. I left it up to her to decide. However, I assumed that I could have had access to the account whenever I wanted to. When I had closed off the fixed deposit account at Republic Bank Ltd, Nadara carried me to the Bank and I signed some documents. However, I never signed any document, thereafter.

After the account was opened at First Citizens' Bank, I kept asking Nadara for documents in relation to the account, and also the account balance, but she never gave me any whatever. I never tried to access the account.

On 11th July, 2002, I received certain information (that the said fixed deposit was broken and the balance of money was withdrawn and placed in another account). I don't know what account the proceeds of the fixed deposit were placed. I also wish to state that I hired the services of Attorney-at-Law Wayne Parillon on 16, Queens Park East, Port of Spain to look into the matter. However, I was informed that the Bank does not want to disclose any information to him. Since the account was opened in such a way that myself and any one of the other account holders must make such a request.

As at this date I do not know the balance on the said fixed deposit, and whether for certain it was broken and the money withdrawn.

21. It is also not disputed that Joey gave a statement to Mr. Dubay. That statement was admitted into evidence and marked "S.D. 2". I will return to that statement later in this judgment when I consider Joey's evidence as a whole.

22. On completion of Mr. Dubay's investigation, the file was sent to the Director of Public Prosecutions who directed that no offence of a criminal nature was disclosed by the investigation.

23. On the 10th September, 2002 and on the 8th October, 2002 respectively, Joey and Nazim signed a Declaration of Trust which read as follows:

WE, JOEY ASHICK ALI, of 1M, Ali Hosein Land, Arima, in the Ward of Arima in the Republic of Trinidad and Tobago, and NAZIM ALI, of 36 Gorringe Park Avenue, Mitchum, Surrey, England, CR4 2DG, England, do declare as follows:-

1. We are children of Ali Hosein, deceased, late of 32G Pro Queen Street, Arima, in the Republic of Trinidad and Tobago (“the deceased”) who died on the 26th day of November, 1988 and his wife Kussum, also called Kussum Ali, of the said address.

2. At the date of his death the deceased had moneys jointly with certain of his children in accounts at several banks in the Republic of Trinidad and Tobago. These accounts were eventually closed and the moneys therein consolidated into an account at Republic Bank, Arima Branch, and subsequently transferred to an account No. 1095113 at First Citizens Trust and Merchant Bank Limited, of 50 St. Vincent Street, Port of Spain in the names of the said Kussum, also called Kussum Ali and our sisters, Shairoon Khan and Nadara Ali.

3. Prior to his death the deceased had given oral instructions to those of his children who were joint account holders with him that the moneys in the said bank accounts should be utilized by them to assist in the maintenance of the said Kussum also called Kussum Ali and for payment of medical and other expenses which she might incur during her life and after her death the said moneys should be given equally to all the surviving children of the deceased. At all material times the said Kussum also called Kussum Ali knew of the said instructions of the deceased.

4. On the 28th day of May, 2002 the moneys standing to the credit of the said Account No. 1095113 at First Citizens Trust and Merchant Bank Limited were paid to the said Joey Ashick Ali and Shairoon Khan and utilized to purchase 23,126.17 units of \$20.00 each in the Money Market Fund plan of Trinidad and Tobago Unit Trust Corporation in Account No. 2459803-002 (“the UTC Account”) at West Mall Branch, in the joint names of ourselves, the said Joey Ashick Ali and Nazim Ali.

5. The units comprised in the UTC Account and all additional units purchased or be purchased with the income earned in respect of same are held by us upon trust to utilize

the same for the benefit of the said Kussum also called Kussum Ali during her life and after her death for the children of the deceased as set out in paragraph 3 thereof.

THE COURT'S FINDINGS:

24. Having considered all the evidence and the submissions filed on behalf of the parties, I find in favour of the Claimant in this claim. My reasons are set out hereunder.

THE EVIDENCE:

25. This case has been starved of documentary evidence as to the ownership of the funds which were allegedly in an account [whether a joint account or a consolidated account] at Republic Bank, Arima at the date of the death of Ali Hosein. In her Statement of Claim, Kussum had alleged that she and Ali Hosein had a joint fixed deposit at Republic Bank, Arima with funds in excess of \$200,000.00 and that upon his death she as survivor became entitled to the proceeds of the account.

26. In her Statement of Claim, however, Kussum did not give any particulars of the alleged joint fixed deposit account (such as the account number); neither did she give any particulars of the source of those funds.

27. In her statement given to Mr. Dubay, she did not provide any details of the alleged joint fixed deposit account; neither did she provide any information as to the source of the funds.

28. When Visham gave evidence, he was asked in cross-examination how he knew that the monies (in the alleged accounts) were Kussum's. According to Visham, Kussum sold a piece of land in Cemetery Street in Charlieville and as a result of that sale she had obtained that money, (which presumably was placed in the joint fixed deposit at Republic Bank, Arima). In further

cross-examination, Visham contended that he came to that knowledge because Kussum had told him so on many occasions.

29. Visham's evidence in cross-examination was not accepted by Mr. Clarke who put to him that the proceeds of the sale of the Charlieville property were in fact deposited in an account at Royal Bank, Arima. In re-examination, Visham's evidence was that the property at Charlieville was sold for approximately \$200,000.00 or more.

30. With the permission of the Court, Nairoon gave evidence of her involvement in the sale of the Charlieville property. According to her, at the material time, she worked at a firm of solicitors on St. Vincent Street and so got to know one Mr. Kamal Hosein, Secretary of the Islamic Missionary Guild, which purchased the Charlieville property. According to Nairoon, the sale took place between the years 1976 to 1979 and the Charlieville property was sold for the sum of \$200,000.00.

31. In cross-examination, Nairoon was not sure whether Kussum had a separate bank account whilst Ali Hosein was alive. According to Nairoon, Nadara was the best person to give evidence about Kussum's banking activities.

32. Nadara was also cross-examined about the sale of the Charlieville property. Her initial evidence was that Kussum did not maintain a separate bank account while Ali Hosein was alive. She was also not sure whether the sale proceeds would have been deposited into a joint account with Kussum and Ali Hosein, since she was in school and was not involved in their financial affairs. According to Nadara, Kussum and Ali Hosein had an account at Royal Bank and most likely the sale proceeds would have been deposited into that account. Nadara was sure that the sale proceeds were not part of the funds in dispute.

33. In the circumstances of the case, and on a balance of probabilities, I do not accept Visham's evidence that the proceeds of the sale of the Charlieville property were deposited into the alleged joint fixed deposit account in the names of Ali Hosein and Kussum at Republic Bank, Arima. It is clear to the Court that if that was so, Kussum would have given those instructions to

her Attorneys for the filing of the Statement of Claim, and would also have mentioned that in her statement to Mr. Dubay. Instead, she had merely made bare statements as to the existence of the alleged joint fixed deposit account. In addition, if Kussum had mentioned that to Visham on many occasions, as he contended, then certainly she would have mentioned it to her Attorneys and to Mr. Dubay. I am of the view that Visham's evidence as to the sale proceeds of the Charleville property was of recent fabrication.

34. What the Court is left by way of evidence is Kussum's statement to Mr. Dubay that she and Ali Hosein maintained a joint fixed deposit account at Republic Bank, Arima. The Court also has the evidence of Nadara and Shairoon as to Ali Hosein's instructions to them. According to Nadara's witness statement, Mr. Wayne Parillon, Attorney at Law had written a letter dated 24th September, 2002, complaining about the transfer of funds from First Citizens Trust fixed deposit account No. 1095113. Nadara said that the funds in that account did not belong to Kussum even though she was a joint holder of the said fixed deposit account. These funds had been provided by Ali Hosein in January, 1988 in an initial amount of approximately \$110,000.00 - \$115,000.00.¹⁰

35. At paragraph 15 of her witness statement, Nadara said:

At the time our father told my sister, Shairoon Khan, and me that he proposed to set aside money to be used for looking after our mother after his death. He explained to us that he was concerned about undue influence which my brothers, Visham Ali and Toyab Ali, might exercise over our mother after his death as a consequence of which she might give them funds needed for her nursing care and maintenance. Our father utilized the proceeds of several different bank accounts which were his separate property and consolidated same into a single account at Republic Bank, Arima Branch, in the joint names of Shairoon Khan and myself. At the time I was an officer at the Arima Branch. At our father's suggestion the new account was established in the joint names of our mother, Shairoon Khan and myself upon the condition that withdrawals required 2 signatures since our

¹⁰ See paragraph 14 of Nadara's witness statement.

father had instructed us that our mother should not have any right of withdrawal upon her sole signature. In accordance with his instructions all statements and notices in connection with the account were to be sent to my home or I arranged to collect them from the branch. Our mother knew all the details of these arrangements and even cautioned me once or twice to ensure that statements or notices were not sent to the Property so that Visham Ali would not know of the existence of the account.

36. At paragraphs 16 and 17 of her witness statement, Nadara continued:

In or about March, 1999 I left the employment of Republic Bank and took up employment with FCB Trust as Senior Operations Officer. The funds set aside for our mother's nursing care and maintenance were then transferred to a new fixed deposit account at FCB Trust, being the said account No. 1095113. I did not include my name as an account holder as I was going through a divorce at the time and my husband had threatened to take a share of any money standing in my name.

Because of the poor health of my sister, Shairoon Khan, and my intended departure from Trinidad and Tobago to reside in the United States of America I was concerned about the custody of the moneys in the said fixed deposit. I decided to remove the moneys from FCB Trust and to change the account holders. At my request my brothers, Ashick Ali and Nazim Ali, agreed to act as account holders. The signed documentation for the purchase of 23,126.7 units ("the UTC Units") in Account No. 2459803-002 of the Second Unit Scheme of Trinidad and Tobago Unit Trust Corporation at West Mall Branch in their joint names. The documents were sent by me by fax to Nazim Ali who signed and returned them by post. The proceeds of the fixed deposit account No. 1095113 at FCB Trust in the sum of \$462,523.34 were withdrawn on May 28, 2002 and utilized for the purpose.

37. In cross-examination, it was suggested to Nadara that the monies in the bank accounts [referred to in her witness statement] were for Kussum's use and benefit. Nadara insisted that the money was for Kussum's medical benefit and that that was stipulated to her at the age of 29 when she took control of the financial aspects of her parents. Although Nadara insisted that Ali Hosein had instructed that those monies be used for Kussum's medical benefit, she could not find that evidence in her witness statement.

38. In fact, Nadara had said at paragraph 21 of her witness statement:

I was very surprised to learn of this action instituted on our mother's name against my sister, Shairoon Khan and my brothers, Nazim Ali and Ashick Ali , in which our mother claims payment of moneys from the FCB Trust Account now represented by the UTC Units. At all material times our mother knew that the moneys in the FCB Trust Account were the same funds which our father had set aside for her maintenance and benefit as I myself had told her so.....

39. Shairoon's witness statement contained similar statements. [see paragraphs 11, 12, 13, and 15]. Like Nadara, she said [paragraph 15] that at all material times Kussum knew that the monies in the First Citizens Trust account were the same funds which Ali Hosein had set aside for Kussum's maintenance and benefit.

40. In addition, Nadara conceded that nowhere in her witness statement, did she say that the money was to be split equally among the children upon her mother's death. Indeed, surprisingly nowhere in any of the witness statements filed on behalf of the First and Third Defendant is it said that Ali Hosein had instructed that those monies, set aside for Kussum's maintenance and benefit, were to be split equally among the children upon Kussum's death, although it is contained in the Defence of the First and Third Defendants.¹¹

41. The Court notes that the omission of such an important matter has not been adequately explained by any of the witnesses on behalf of the First and Third Defendants.

¹¹ See paragraph 3 of the Defence of the First and Third Defendants.

42. In addition, in the evidence of Sarah Gayadeen, Customer Service Representative of the Unit Trust Corporation, it was disclosed that on the 21st January, 2004, there was a withdrawal to the value of \$50,000.00. Although Shairoon and Nadara agreed that the withdrawal of the sum of \$50,000.00 was an important aspect of the case, it was not mentioned in their witness statements. Further, Shairoon said in cross-examination that the sum of \$50,000.00 so withdrawn was to take care of Kussum. The impression given to the Court was that the sum of \$50,000.00 was so used for Kussum's care.

43. On the other hand, Nadara in cross-examination insisted that the sum of \$50,000.00 was never spent on Kussum's care and that it was deposited into an account at the Royal Bank, Arima, that account being now dormant.

44. The Court has also examined Joey's evidence. Joey is an accountant by profession. It is not disputed that Joey gave a statement to Mr. Dubay during his investigation. He agreed in cross-examination that the contents of the statement given to Mr. Dubay were true and correct. The statement to Mr. Dubay was given on the 23rd October, 2002. Joey agreed to having signed the statement after the caution clause¹² and again twice on the last page of the statement. According to Joey, when his sister Shairoon got a stroke at his mother's home he discussed with his mother, Kussum, regarding her deposits at Royal Bank and First Citizens Bank. That was about five (5) months before he gave the statement to Mr. Dubay. Kussum had said to him that she wanted Nairoon's name removed from the Royal Bank account. She also told him that to remove Shairoon's name from the account at First Citizens Bank and put hsi name on it so that if anything should happen to her and she needed hospitalization he could quickly get the money for medicine and hospitalization. According to Joey's statement, he reluctantly did not agree, but after considering the matter he decided to do it.

45. According to Joey, those are the circumstances in which the moneys were placed in his name. The Court notes that Joey's evidence is totally inconsistent with the evidence given by

¹² See first page of Joey's statement "S.D. 2".

Nadara and Shairoon as to the circumstances in which Joey (and Nazim) came to be account-holders of the funds at the Unit Trust Corporation.

46. In addition, Joey told Mr. Dubay that Nadara had suggested that to get a better rate of interest that the monies be placed at the Unit Trust Corporation. This is also inconsistent with the evidence given by Nadara and Shairoon.

47. Joey told Mr. Dubay that Kussum did not know of the above arrangements [to place the monies at the Unit Trust Corporation]. Further, Joey had said in his statement to Mr. Dubay that Kussum had told him that she wanted the monies on his name and on Nazim's name and hence the account at the Unit Trust Corporation was opened in these names. Joey further said that the source of the money was Ali Hosein.

48. Joey further told Mr. Dubay that before Ali Hosein died the money was in other banks until it was placed in an account between Ali Hosein and Nadara. After he died Nadara held the money on trust for Kussum and eventually placed the money at an account at the First Citizens Bank where it accumulated interest.

49. According to Joey's statement to Mr. Dubay, he did not own that money; neither did Nazim. They were holding it on trust for Kussum. According to him, the money was not placed on Kussum's name because for the last three (3) or four (4) years her memory was not very good; she had suffered a stroke and was susceptible to doing something that she did not want. In Joey's view, that was the reason Kussum decided that she did not want the money in her name. According to Joey's statement, if Kussum wanted the money in her name, they would "*abide with her wishes*".¹³ He further said that Kussum catered for that money in her last will and testament.

50. Kussum's purported last will and testament dated the 29th October, 2001 and referred to by Joey was forwarded to the Court by Mr. Clarke and marked "A.A.4" with the consent of the Attorneys. In that will, Kussum referred to the proceeds of her various bank accounts held at

¹³ See penultimate page of Joey's statement.

Royal Bank, Republic Bank, Tunapuna Branch and First Citizens Bank of Trinidad and Tobago Limited, Chancery Lane, Port of Spain and she instructed that those proceeds be divided between her children, including Visham, in such manner as her executors, Nazim and Joey, shall determine in their sole discretion.

51. At his request, Joey added the following paragraph to his statement to Mr. Dubay¹⁴:

My brother Visham Ali who is a policeman, and I regard him to be a corruptible, and susceptible to be co-hurst into devious dealings based on his past records. He is slowly and gradually putting all sort of devious dealings to my mother to get hold of her money or his name on a will and we as the other children know of his records are determined not to give him the chance to get his hands on her money or property.

52. In cross-examination, Joey agreed that he gave the statement to Mr. Dubay at his (Joey's) place of work and when he did so, he was not under any threats. In cross-examination, Joey also contended that when he told Mr. Dubay that he did not own the money and that he was holding it on trust for Kussum, that was only part of the truth. According Joey, if he missed out something from the statement he gave Mr. Dubay, it was not deliberate.

53. Joey was also cross-examined about the Declaration of Trust¹⁵ referred to in detail at paragraph 23 of this judgment. The Declaration of Trust had been signed by Joey on the 10th September, 2002, a little more than a month before he gave the statement to Mr. Dubay. The Court observes that such an important document was not mentioned to Mr. Dubay. According to Joey, when he gave the statement to Mr. Dubay, he forgot about the Declaration of Trust.

54. In addition, in answer to questions from the Court, Joey insisted that the monies referred in the will he mentioned to Mr. Dubay ["A.A.4"] were not part of the funds in dispute, but were

¹⁴ See the last page of Joey's statement.

¹⁵ Agreed Document 1 in the Agreed Bundle.

Kussum's residual money which had come from the sale by Kussum of certain rice lands in Charleville and which she had separately. The Court had pointed out to Joey at that time that that was unlikely since he was speaking to Mr. Dubay about monies which had been at First Citizens Trust and not some other separate monies.

55. In my view, it is unlikely (as contended by Joey) that in the year 2002 when he gave the statement to Mr. Dubay, he forgot some aspects of the matter, but that he remembered those aspects correctly when he did his witness statement in the year 2009. The Court finds that Joey was a totally unreliable witness. In my judgment, the evidence advanced on behalf of Shairoon and Joey suggested that they as children of Kussum were concerned about Visham's influence on Kussum and were prepared to take whatever steps they had to, to ensure that the monies did not fall into Visham's hands. In all the circumstances, the Court does not consider that the witnesses of the First and Third Defendants were credible. I agree with Mr. Singh that their evidence did not support their pleaded case. In my judgment, their evidence supported Kussum's claim that the monies belonged to her.

56. The Court has considered the evidence in the light of the principles set out at paragraphs 11 and 12 of this judgment. I am of the view, that in the year 2002, there was a concerted effort by Shairoon, Joey, Nazim, and Nadara to ensure that monies belonging to Kussum did not fall into Visham's hands. Accordingly, the funds were moved to the Unit Trust Corporation; Kussum's name was removed and the Declaration of Trust was signed. I agree with Mr. Singh that the Declaration of Trust was a sham. The Court notes that the Declaration of Trust was signed some fourteen (14) years after the death of Ali Hosein without any explanation for that delay. I also find that the Declaration of Trust was part of the concerted plot to ensure that Kussum could not have control over those funds and that all her children including the main actors in this action would benefit from those funds. I also find that the inclusion of the clause in the Declaration of Trust as to Ali Hosein's instructions that the funds were to be divided equally to all his surviving children after Kussum's death was a part of that concerted effort of Nadara, Shairoon, Joey and Nazim to ensure that the monies did not fall solely into Visham's hands.

57. In all circumstances, and having regard to all the evidence and on a balance of probabilities, I find that the monies in the First Citizens Trust account and moved to the Unit Trust Corporation account belonged to Kussum. In the circumstances, I will grant the declarations sought in the Statement of Claim. In the circumstances, I do not consider it necessary to determine many of the other issues raised by the parties. The evidence clearly establishes that these monies belonged to Kussum absolutely.

58. Although Mr. Clarke has raised the issue of a resulting trust in his closing written submissions, the Court notes that the First and Third Defendants have not pleaded any facts which support a resulting trust in favour of Ali Hosein; neither is there any evidence advanced on behalf of the First and Third Defendants to support a resulting trust in favour of Ali Hosein.

ORDER:

- (1) The Court hereby declares that Kussum Ali (who died on the 2nd August, 2007) [“Kussum Ali”] was the owner and the person entitled to all funds held formerly at the First Citizens Bank Mortgage and Trust Company Limited Account No. 1095113 and transferred to the Unit Trust Corporation of Trinidad and Tobago standing in the names of the Nazim Ali and Joey Ali in the sum of \$661,743.52 as at the 14th March, 2011 [“the Unit Trust Account”] together with the interest accruing thereon.
- (2) The Court hereby declares that Kussum Ali was the owner of \$50,000.00 withdrawn from the Unit Trust Account and now lying in a dormant account at RBC Royal Bank (Trinidad and Tobago) Limited (Arima Branch) together with the interest accruing thereon.
- (3) That the sums referred to at paragraphs 1 and 2 of this Order shall be paid to Visham Ali, Administrator ad Litem of the Estate of Kussum Ali, to be held in trust for the persons entitled to the estate of Kussum Ali and to be disbursed to such persons in accordance with the lawful directions of Kussum Ali and in accordance with the law.

4. The Defendants shall pay to Visham Ali, Administrator ad litem of the Estate of Kussum Ali prescribed costs in the sum of \$87,380.76 to be held in trust for the persons entitled to the estate of Kussum Ali and to be disbursed to such persons in accordance with the lawful directions of Kussum Ali and in accordance with the law.

.....
Maureen Rajnauth-Lee
Judge