**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**PORT OF SPAIN**

**CA T 269/2013**
**C.V. 2011-04237**

**BETWEEN**

**EMLYN QUASHIE**
**(*Administrator Pendente Lite* of the Estate of the Deceased**
**BERESFORD SOLOMON)**

**APPELLANT/DEFENDANT**

**AND**

**AYANA SOLOMON**

**RESPONDENT/CLAIMANT**

**PANEL:**

P. Jamadar, J.A.
N. Bereaux, J.A.
C. Pemberton, J.A.

**APPEARANCES:**

**For the Appellant:** **Mr. A. Beharrylal instructed by Ms. T. Lutchman**

**For the Respondent:** **Ms. D. Palackdharry Singh**

**DATE OF DELIVERY:** May 31, 2019

I have read the judgment of Pemberton J.A. I agree with it and have nothing to add.

_____

/s/ P. Jamadar, J.A.

I have read the judgment of Pemberton J.A. I agree with it and have nothing to add.

_____

/s/ N. Bereaux, J.A.

**JUDGMENT**

**INTRODUCTION**

[1] This matter though filed in the civil courts, had its genesis as a matrimonial matter. At the commencement of this hearing Jamadar, J.A., had this to say,

> *This is a family matter. This is not civil litigation, per se. We have, in the exercise of our jurisdiction to construe the relevant law and principles through the modern approach to be taken in family proceedings.*[1]

Further, it is well recognised that the considerations to be applied when examining a commercial contract may differ to those when matrimonial arrangements are being examined.

[1] See Court Transcript. P. 32. Mar. 17, 2017.

[2] On July 25, 1978, the Appellant, Beresford Solomon (BS) and Ricarda became husband and wife. On February 18, 1980 the union produced a baby girl, the Respondent, Ayana Solomon (AS). By Deed dated October 14, 1980 registered as #22640 of 1980, BS became seised and possessed of a certain portion of land comprising one lot, together with the easements and hereditaments described in the Deed.

[3] Unhappy differences arose and Ricarda approached the court to terminate the union. The parties were granted a Decree Nisi on July 26, 1982. At the hearing of a Notice filed on July 17, 1984 as amended on October 12, 1984, Ricarda testified that despite the consent order by which the trial judge determined the settlement of the property of the marriage as between the parties, BS *inter alia,* agreed to pay to Ricarda the sum of $300.00 per month for AS's maintenance and support. BS, as at October 24, 1984, had not made the payments since January 1984.

**MATRIMONIAL JUDGMENT**

[4] According to the then trial judge, the principles which guided her decision were encapsulated as follows:

> *The Court's first concern must be for the needs of all the members of the family and to ensure that they do not fall below subsistence level – if possible not too far below the standard of living they previously enjoyed.* ***Among these the needs of the children of the family rank highest****.*
> *…. It is not in dispute that the land on which the matrimonial home stands has been conveyed to the husband (the Respondent) by his grandmother – what is now in issue is whether the renovation and addition carried out in the matrimonial home were done by both the respondent and the applicant or by the respondent alone or the applicant alone and if the Court finds that the*

*wife expended the moneys, whether same entitles her to a share in the matrimonial home.*[2] (Emphasis mine)

[5] Based on the evidence and the law, the trial judge found that, in relation to this property, the matrimonial property, Ricarda was entitled to a ½ share in the matrimonial home and a ½ share in the lot of land upon which the matrimonial home stands, that is, part of the land conveyed by way of Deed No. 22640 of 1980. The court ordered BS to convey and complete the conveyance of the subject property within six (6) months from the date of the order failing which, the Registrar was charged to effect the conveyance in fulfillment of the order. In addition, the sum of $8,500.00 was to be paid by BS to Ricarda representing her shares in other assets of the marriage.

**THE APPEAL - THE CONSENT ORDER**

[6] On appeal by BS, the parties agreed to compromise the appeal by way of a consent order dated December 7, 1988. At this time, AS was a minor, eight (8) years old. I shall reproduce the terms of the consent order, where relevant to these proceedings:

> *IT IS BY CONSENT ORDERED that the Order of The Honourable Madame J. Permanand made on the 17th day of February, 1986 be varied in :-*
>
> *(1) That the **Respondent/Appellant do convey to the Petitioner/Respondent in trust for the child of the family AYANA SOLOMON** who was born on the 18th day of February, 1980 **a one half share and interest in the matrimonial property** situate at Miller Street, Buccoo Point more particularly described in Deed number 22640 of 1980 together with the building and appurtenances standing thereon within twenty-one (21) days hereof **and in default that the Registrar is empowered to so do.***

[2] **Matr. 311 of 1981. RICARDA SOLOMON v. BERESFORD SOLOMON.** P. 10. Permanand J.

> *(2) That the Respondent/Appellant do pay to the Petitioner/Respondent the sum of seven thousand dollars ($7,000.00) being the value of the boat "Zion Train" in full and final satisfaction of all the Petitioner/Respondent's share and interest in the said boat on or before the 30th day of November, 1989 and in default the Respondent be entitled to take possession of the said "Zion Train" without prejudice to whatever rights the Respondent/Appellant may have in the said boat …*
>
> *AND IT IS FURTHER ORDERED*
>
> *(3) That the Respondent/Appellant bear the costs of the Petitioner/Respondent here and in the Court/below to be taxed in default of agreement. (Emphasis Mine)*

[7] On November 25, 2000 Ricarda died. By the time of her death, neither Ricarda nor BS had taken any steps to effect the consent order. In 2009, some nine (9) years after she turned eighteen (18) years old, AS conducted a search through Ricarda's papers, whereupon she stumbled upon the consent order.

[8] AS sought the Registrar's assistance in effecting the terms of that order. By Deed dated February 4, 2011 and registered as DE201101139391, the Registrar of the Supreme Court executed the Deed, (the 2011 Deed of Conveyance), as directed by the Court Order. By that Deed, ½ share of the property was conveyed to AS absolutely. which effected a transfer in fee simple of *one half share and beneficial interest in the parcel of land described in the First Schedule…together with the right of way … together also with the buildings thereon and the appurtanences thereto"*[3] BS to AS.

[3] Record of Appeal. Consent Order. Para. 1. P. 251.

**THE FRESH ACTION**

[9] On discovering this some months later, BS brought a fresh action in the Civil Court to set aside the Deed. He alleged that his ex-wife, Ricarda, promised not to pursue obtaining her ½ share, (not withstanding that the property was to be held in trust by her for AS), for BS's payment to her of $7,000.00. BS sought the following declarations:

> 1. *…that Deed No. DE 2011 0113 9391 is null and void and of no effect and that the Registrar General be notified accordingly.*
>
> 2. *…that the Court Order dated 7th December, 1988 is no longer effective as it exceeds the twelve (12) year limitation period for validity of Judgment.*
>
> 3. Alternatively, …*that the Claimant is the equitable owner of the second house on the said property.*
>
> 4. *… that the Defendant is barred by virtue of Section 3, Section 16 and Section 22 of the Real Property Limitation Act Chapter 56:03 from making an entry on the subject property and/or bringing an action to recover land or rent and/or to share in profits and/or taking steps to obtain ownership or an interest in the subject property.*
>
> He sought these Orders,
>
> 1. *…that the Claimant is the rightful owner of all shares and interest in the said property…*
>
> 2. *…that the share and/or interest transferred by Deed No. DE 2011 0113 9391 be held on trust for the Claimant.*
>
> 3. *…adverse possession of the other half share and interest in the said property the Claimant having been in undisturbed occupation, possession and control of the same for in excess of sixteen (16) years.*

[10] AS by way of counterclaim, sought an order for partition of the disputed property, or alternatively, an order for sale in lieu of partition. At the start

of the trial, AS's Counsel conceded, that at the time of the consent order in 1988, there was no matrimonial home on the property, and that the basis of this matter was Ricarda's share in the land, which AS now holds by virtue of the 2011 Deed of Conveyance.[4] Further, BS's claim with respect to adverse possession was not pursued.[5]

[11] The extant dispute surrounds the efficacy of the 2011 Deed of Conveyance registered as DE201101139391. If effective, it follows that the 2011 Deed of Conveyance stands and consequential relief may flow to AS. If found to be invalid and of no effect, the 2011 Deed of Conveyance would be set aside and the entire property falls to be disposed of, as part of BS's estate, since he is now deceased.

[12] The trial judge approached this case from two (2) perspectives, limitation and promissory estoppel. The judgment states at paragraph 13,

> *Both parties take no objection, should the court find in favour of the Defendant's interest, to a sale of the land and payment to her of her share in the proceeds. Further, the Claimant has asked and the Defendant has no objection to the Claimant having first preference to purchase the Defendant's interest.*

[13] The trial judge dismissed the claim and granted judgment to AS on the counterclaim and ordered *inter alia*:

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[4] See paragraph 11 of Rahim J.'s Judgment.

> *The Defendant's Attorney conceded before the trial that there was an error as to the existence of a building on the said property at the time of the making of the order by the court at the divorce proceedings.* ***There was in fact no matrimonial home in existence on the said property. At the heart of the matter, however remains the dispute as to the Defendant's share in the land.*** *(Emphasis Mine)*

[5] Paragraph 12 states,

> *Further, Attorney for the Claimant has withdrawn his claim in so far as it relates to the issue of adverse possession. He accepts and it is agreed by Attorney for the Defendant that the issue is not applicable to these circumstances. (Emphasis Mine)*

(1) That the concerned property be sold in lieu of partition and the proceeds thereof be divided equally between Beresford and Ayana as to ½ share each.

(2) Valuation and cost thereof to be borne equally by both parties.

(3) Beresford be given first option to make a bid for the purchase of the property in 28 days of receipt of valuation report failing which the property is to be sold on the open market, where Beresford is entitled to bid.

[14] This was based on his findings and conclusions of fact, which were,

1. **APPLICABILITY OF SECTIONS 3, 4 AND 16 OF THE REAL PROPERTY LIMITATION ACT – LIMITATION OF ACTIONS**

AS's counterclaim was the enforcement of the consent order arrived at between BS and Ricarda in 1988 in the Court of Appeal. It was not an action for the recovery of land. Even if it were, a cause of action would have arisen in 2011, upon the execution of the 2011 Deed of Conveyance. The counterclaim was therefore maintainable, if necessary, within the limitation period provided for in section 3.

[15] The trial judge examined sections 3, 4 and 16 of the **REAL PROPERTY LIMITATION ACT**[6]. He noted that section 16 of the Act is subject to section 3. Paragraph 24 of the judgment is instructive in this particular case,

> *Thus, the general rule is that an action cannot be brought after 16 years of the accrual of the cause of action. An exception to this rule is where the general time limitation has expired during a disability. In that case, the action can be brought within 8 years of the end of the disability. Section 16 thus makes provision for a situation where the general time limitation has expired.*

[6] **LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO. Chap. 56:03.**

[16] The trial judge found,

> *Under Section 4(c) the cause of action accrues when the Defendant's interest in possession is granted by any instrument (other than a Will) to her. This begs the question as to whether the Consent Order was such an instrument which granted to the Defendant an interest in possession, or whether, the Deed executed by the Registrar was in fact such an instrument.*[7]

He relied on ***Stroud's Judicial Dictionary of Words and Phrases***[8] *which states that, "a writing may include documents which affect the pecuniary position of parties"*[9]*.* In the trial judge's view, an instrument will not be inclusive of a court order.

[17] The trial judge highlighted that the *"key"* is the legal force of the document, which granted the interest in possession. He found that, *"the effect of this order was to mandate that the interest be conveyed. It was not a declaration of a right per se but a directive (by agreement or consent) to take steps towards the creation of the interest."*[10]

[18] The trial judge was of the view therefore that,

> *28…the Deed of conveyance executed by the Registrar is both de facto and de jure, the instrument which created the Defendant's interest in possession, a right which she is now entitled to enforce…*
> *29. The cause of action to recover therefore accrued upon the execution of the Deed No. DE 201101139391 and not before. It means therefore that at the time of the accrual of the cause of action the Defendant was not under a disability. That being the case, the applicable section and limitation period is section 3.*

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[7] See Judgment of Rahim J. at para. 25.
[8] Vol. 2. P. 1367 (7th ed.)
[9] *Op. cit.* Judgment at para. 26.
[10] Id. at para.27.

The trial judge found the cause of action accrued at the date of the 2011 conveyance. The counterclaim was therefore maintainable since it fell within the period of sixteen (16) years as provide for under section 3 of the Act.

**PROMISSORY ESTOPPEL**

[19] BS had not proved on a balance of probabilities that he had acted to his detriment based on a promise made to him by Ricarda. At paragraphs 37 through 41 of the judgment, the trial judge examined and analyzed the law and evidence in this area. The trial judge focused on BS's evidence since AS could not give any evidence in this regard. BS's evidence detailed the alleged promise made between himself and Ricarda during the attempt to reconcile after their divorce. He noted that, "*Ricarda stated that she was only interested in the part of the order dealing with the payment of the $7000.00. Further, Ricarda is alleged by the Claimant to have said that there was no need for him to transfer the half share interest to her because she would not enforce it*."[11] BS's evidence was that in reliance on this promise, he paid Ricarda, the $7,000.00 over a two-month period.[12] The trial judge noted that his evidence also spoke to the eventual end of the relationship in or around 1990, but that they remained civil for AS's sake.

**Demeanour**

[20] In coming to his conclusions on this issue, the trial judge considered *inter alia,* BS's demeanour. At paragraph 41, the trial judge indicated that, *"at times (BS) appeared evasive in answering the questions asked by Counsel…".* BS, "*very often in his testimony hid behind his self-proclaimed illiteracy but seemed to fare very well in his witness statement which shows*

[11] *Op.cit.* Judgment at para. 39.
[12] Id.

*no sign whatsoever that the maker is in fact one who can barely read or write".*

He paid particular regard to the following facts:

*i. It was Ricarda who took divorce proceedings and sought property settlement in order to obtain what she considered to be her entitlement in law.*

*ii. It was Ricarda who would have agreed that her interest in the said property be vested in the child of the marriage for the benefit of the said child. It would mean that the interest of this child would have been at the forefront of her mind.*[13]

[21] The trial judge further indicated that it did not accord with common sense that Ricarda, after initiating proceedings and agreeing to have her interest in the more valuable asset, which was to be held on trust for AS, would release BS from that commitment, in exchange for a $7,000.00 payment, which represented her interest in the less valuable asset, a sum to which she was entitled to from the terms of the consent order. "*It does not appear to the court that a mother in her circumstances would do such a thing in [the] absence of other circumstances."*[14] The trial judge concluded that "*the court is not inclined to believe the Claimant when he testified that such a promise was in fact made. There being no promise there can be no estoppel"*[15]*.*

**THE APPEAL**

[22] The Court of Appeal will not overturn a judge's findings unless there is a material error of law which appears in his judgment nor will the Court of Appeal overturn a judge's findings of fact unless there is a,

[13] Id. at 41.
[14] Id.
[15] Id. at 42.

> *making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence… an appellate court will interfere with the findings of fact made by a trial judge* only *if it is satisfied that his decision cannot be reasonably be explained or justified…*[16].

**ISSUES RAISED ON THIS APPEAL**

[23] The issues may be broadly categorized as relating to:

1. Promissory or Proprietary Estoppel;
2. Whether AS's counterclaim for partition or sale in lieu of partition is statute barred;
3. Whether the terms of the Order created a constructive trust in AS's favour;
4. Efficacy of the 2011 Deed of Conveyance.

   Mr. Beharrylal's submitted, that the questions of law and procedure raised under this head, are as follows:

   - How an order of the court which has been rendered stale by the passage of time, ought to be addressed after one party has died; and
   - The validity of the 2011 Deed of Conveyance Itself.

**CONCLUSION AND DISPOSITION**

[24] On the issues complained of in this appeal, BS failed to demonstrate that the trial judge was plainly wrong and that the court ought to reverse the orders made at trial. There was sufficient evidential basis for the trial judge to come to his conclusions of fact, his application of the law and his decision. We see no reason to trouble them. The appeal is dismissed and

[16] Per Lord Carnwath in **PETROLEUM COMPNAY OF TRINIDAD AND TOBAGO LIMITED v. RYAN AND ANOTHER [2017] UKPC 30** para. 15.

the orders of the trial judge upheld and affirmed for the reasons, which follow.

**SUBMISSIONS OF COUNSEL**

[25] With respect to the chronology of events, both Counsel agreed on Mr. Beharrylal's chronology save for the points at paragraphs 17 and 18[17] which states,

> *17. About February or March 1989 – Beresford and Ricarda resume friendly relations and Ricarda agrees with Beresford she would not enforce the consent order*
>
> *18. 1997 – The house on the property damaged after earthquake…following which the house is demolished and construction of a new house begins*

Ms. Palackdharry Singh's concern with those points is that BS has failed to prove the existence of the oral agreements alluded to in those paragraphs.[18] Those were the agreements to which Ms. Palackdharry Singh was referring to as BS not producing cogent evidence of same. I agree with Ms. Palackdharry Singh. Mr. Beharrylal, in answer to the concern with respect to paragraph 17, referred to paragraph 39 of the trial judge's judgment, which spoke to AS being a child at the time of the alleged promise and therefore, *"could not give cogent evidence as to the promise"*[19]. Further, with respect to paragraph 18, my understanding of Ms. Palackdharry Singh's objection was not in relation to the existence of the earthquake, but to BS's evidence that Ricarda never had any objections to his repairing the matrimonial home after the earthquake. At paragraph 13 of BS's witness statement it reads,

> *I informed Ricarda Solomon of the damage to the matrimonial home and my intention to tear down the home*

[17] See Skeleton Argument for the Appellant. P. 3. Dec. 1, 2016.
[18] See Skeleton Argument for the Respondent. P. 2.
[19] Submissions for the Appellant. Para. 49.

*and she never had any objections about this or expressed any concerns whatsoever about my plans. She also never showed any ownership interest in this property during this time.*[20]

**ISSUE 1**

**PROMISSORY OR PROPRIETARY ESTOPPEL**

**BS's SUBMISSIONS AND ANALYSIS**

[26] Mr. Beharrylal submitted that the trial judge erred in concluding that BS had not made out a case of promissory estoppel. He contended that the judge did not properly assess the evidence as a whole. He identified the following areas:

a. BS's demeanour which he asserted could not be held against him;

b. BS's evidence was the only direct and uncontradicted evidence of Ricarda's promise or assurance not to enforce the consent order. Her promise was not to enforce the conveyance of the ½ share of the matrimonial home and to accept the sum of $7,000.00 instead;

c. Ricarda's non-enforcement of the consent order *"is consistent with her abandoning it for herself and AS, consistent with her promise or assurance to BS, which could only have been intended to directly affect their legal relations because it left BS as the legal and beneficial owner immediately after the 1998 consent order onwards";* and

d. As to the four factors taken into account by the trial judge, Mr. Beharrylal stated:

   i. even though Ricarda was in possession of the consent order, she took no steps to either to effect the conveyance, both of which she was entitled to enforce;

[20] See para. 13 of the BS's Witness Statement.

ii. this showed that Ricarda had in fact **surrendered** her interest in the property and the payment and acceptance of the $7,000.00 is not inconsistent with this surrender;

iii. Ricarda never left a will or any other document referring to the consent order. This *"supports abandonment in favour of the promise or assurance"*;

iv. the fact that no representative of Ricarda's estate attended to give evidence at the trial when there was clear evidence in the matrimonial judgment, that Ricarda was a lady of means. Her property as identified there, *"would go to support as to why she did not feel it necessary to pursue the consent order and the promise or assurance to Beresford i.e. she did not need the property for her or Ayana";*

v. BS's altering his position, to his detriment, by developing the property, in reliance on the promise or assurance;

vi. a material change in the nature of the property, *"which was not consistent with ownership by Ricarda in trust for Ayana";*

vii. that the construction of the new building began openly in 1997 which, he submitted, is consistent with Ricarda's promise or assurance to BS and BS's treating the property as his own despite the consent order; and

viii. that Ricarda never told AS about the consent order, *"which was consistent with her promise or assurance to Beresford and equally consistent with Beresford not mentioning it to Ayana either"*.

**AS's SUBMISSIONS**

[27] Ms. Palackdharry Singh reminded the Court that it was for BS to lead *"credible evidence"* so that, on a balance of probabilities, he would meet with success. Thereafter, her submission on promissory estoppel was brief and succinct. She agreed with the analysis and reasoning of the trial judge and relied on his judgment. She reminded that this equitable doctrine gave BS the right to go to court to seek relief. The court therefore, had a wide discretion to satisfy that equity. She noted that, *"In determining how best to satisfy the equity regard must be had to all circumstances on the case with an eye on avoiding unconscionable results".* In Counsel's view, BS was attempting to defeat an order of the Court of Appeal, *"representing the express agreement and settlement of parties to a marriage which was to benefit their child. Certainly attempting to deprive your own child of a benefit should be viewed as unconscionable".*

**ANALYSIS**

**TRIAL JUDGE'S APPROACH TO FACT FINDING**

[28] In analyzing witness testimony, the fact finder must examine the evidence to determine probative value and relevance to determine whether on a balance of probability, the asserter of facts has proved his case.

**DEMEANOUR**

[29] Trial practitioners and fact finders agree that a *"witness's demeanour ought not to distract…from the content of their evidence"*[21]. There is nothing plainly wrong, however if a trial judge takes demeanour into account when assessing the evidence in the round. In this particular case, I do not think that the trial judge over stepped in taking BS's demeanour

[21] Chris Fife-Schaw. *The Influence of Witness Appearance and Demeanour on Witness Credibility in* ANALYSING WITNESS TESTIMONY 253. (Anthony Heaton-Armstrong, et. al. eds. Blackstone Press Ltd. 1999).

into account in assessing the evidence presented at trial. He was entitled to do so. In fact, at paragraph 42 of his judgment, the trial judge indicated that his judgment was based on reasons, which he expounded, *"the least of which, is the evasiveness of the Claimant",* which he had remarked upon in his judgment.

**OTHER BASES OF ANALYSING EVIDENCE**

[30] From reading the judgment, it is obvious that the trial judge recognized that there were more cogent bases to be used to analyse the evidence and come to his judgment. These were, that evidence of actions or conversations of a deceased person must be approached with caution since the other party is deceased and cannot answer any allegation. I agree with this, especially when the evidence to be considered is direct or oral evidence, as opposed to documentary evidence.

[31] The trial judge stated that, *"what is said by the Claimant must, in the court's view, accord with what is plausible, reasonable in these circumstances and accord with common sense".* In other words, the facts to be derived directly from the evidence, together with any inferences which may be drawn from the evidence to ascertain the relevant facts in the decision making process, must be cogent and probable. I can find no fault with this approach.

**ANALYSIS**

[32] It must be borne in mind, that Ricarda's entitlement was as to one-half of the matrimonial property and not to its entirety. BS retained a ½ share and interest and he remained free to deal with his interest as he thought fit. Mr. Beharrylal laid great store in the fact that Ricarda took no steps to activate and complete her rights under the consent order and this may

have been considered as a surrender or waiver of her rights. There is however, no evidence, save that of BS, as to why she did not further the terms of the consent order. The reason advanced by BS was his payment to her of the $7,000.00, which Counsel asserted, showed that Ricarda surrendered her interest or waived her rights to the property. The trial judge's view was that this was implausible and unreasonable in all the circumstances, since, when the case is examined as a whole - that Ricarda took divorce proceedings, that the fact of the consent order securing her ½ share for her child, and that her insistence on accepting the due payment of the $7,000.00 - do not point to the fact of a surrender of her interest. I agree with the trial judge's view and his reasoning and furthermore, I do not agree with Mr. Beharrylal that the facts in this case point to Ricarda's waiving her rights which she had secured by virtue of the consent order..

[33] Mr. Beharrylal asserted that since the consent order, and the property were not mentioned in Ricarda's Will and there was no evidence of the assets comprising her estate led at trial, these factors were consistent with Ricarda's abandonment of her entitlement to ½ share. These circumstances can admit to another inference that Ricarda did not think that she needed to mention the consent order in her Will as the property had been dealt with *inter vivos*. It was therefore incumbent on BS to lead convincing evidence to support his contention. The trial judge did not find that he did and I can see no reason to depart from his finding.

[34] Mr. Beharrylal also spoke to BS acting to his detriment. This was not really addressed by the trial judge, since once he had disposed of the lack of evidence to convince him that there was a promise, he went no further. Since it has been raised, I propose to answer that submission by referring to the totality of the evidence presented in the case. Paragraph 12 of BS's

witness statement speaks of a 1997 major earthquake, which caused structural damage to the matrimonial home making it unfit for habitation. BS claimed that he informed Ricarda of the damage. Even though she voiced no objections to his intention to tear down the home, the fact remains that he could have done so, as he still had a 1/2 interest in the property. His mere evidence that she had no objections, does not carry his case any further. Paragraph 21 of his witness statement asserts that the construction lasted a period 1997 to 2005/2006. He details his activities at paragraph 23, which to me were consistent with activities of a ½ share owner who had no other place to call home. It does not speak to Ricarda's surrender or abandonment of her ½ interest, as declared by the court to be held in trust for AS[22] or a waiver of her rights under the consent order.

[35] The rest of the BS's witness statement details activities after Ricarda's death. There could be no issue of promise or acting to his detriment based on a promise, and moreover, no issue of Ricarda's surrender or abandonment of her ½ share interest. Whatever the case may be, I agree with the trial judge, that BS did not discharge his burden of bringing evidence, which when assessed on balance of probabilities, proved his entitlement to the entire property based on promissory estoppel.

[36] As to the *"new"* evidence adduced by BS regarding the probate proceedings. It does not advance BS's case. Mr. Beharrylal asked the court to infer, that because Ricarda left $1 million by her Will to AS, AS was properly taken care of, and the Court would do well to accept BS's testimony that Ricarda gave up her entitlement as trustee of the ½ share of the matrimonial home and property. When one looks at both the Will

[22] See Order Permanad J. above, which declared Ricarda's interest as varied by the Court of Appeal, that the property be held in trust for AS.

and Inventory, the value of the Estate is stated to be $12 million. AS was left $1 million, 1/12th of the estate. This alone to our mind belies Mr. Beharrylal's theory that Ricarda would have agreed to forgo the trust created for AS's benefit, by virtue of the consent order, in return for the $7,000.00 payment from BS to which she was entitled by the terms of the said consent order.

[37] Taking into account the nature of the proceedings upon which the consent order was based (matrimonial proceedings), it is more probable that the 1/12th share of Ricarda's estate, left to AS, was predicated on the belief that the child, AS, was also to benefit from the ½ share in the matrimonial property. The introduction of that evidence therefore does not carry BS very far at all. In the premises, BS has not proved to this Court that the trial judge was plainly wrong to dismiss his claim that he is entitled to the entirety of the matrimonial property on the basis of promissory estoppel.

**ISSUE 2**

**WHETHER AS's COUNTERCLAIM FOR PARTITION OR SALE IN LIEU OF PARTITION IS STATUTE BARRED**

[38] I thank Counsel for their submissions. AS's counterclaim is for partition or in the alternative, a sale and division of proceeds of sale. This is provided for under the **PARTITION ORDINANCE[23],** which provides that a party or parties may bring a suit for either partition or sale of the property and this presupposes that the party bringing the suit, has an interest or is *"presumptively interested in the property under review"*. The basis of AS's counterclaim, was the declaration of Ricarda's ½ share interest by Permanand J. as varied by virtue of the consent order in the Court of Appeal, declaring a trust in AS's favour, together with the 2011 Deed,

[23] **LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO. Chap. 27. No. 14.**

which effected the terms of the consent order. I agree with the trial judge's finding that this fresh action concerned the enforcement of those terms of the consent order. This allowed AS, to maintain the suit for partition, pursuant to the **PARTITION ORDINANCE**.

[39] I have looked at that Ordinance and also the **REAL PROPERTY LIMITATION ACT[24] ("RPLA").** I can find no provision, which limits the time for seeking such relief by bringing such an action, whether by claim or counterclaim. The *"action"* contemplated by the **RPLA** through sections 3, 4 and 16, refers to one in which a landowner is asserting his right to **recover** land or rent, or make entry or distress. Even if such an action was contemplated by AS, I agree further with the trail judge that any right which AS may have had to bring an action, would have accrued in 2011, on the date on which the 2011 Deed of Conveyance was executed.

**ISSUE 3**

**WHETHER THE TERMS OF THE CONSENT ORDER CREATED A CONSTRUCTIVE TRUST IN AS's FAVOUR?**

[40] A preliminary question is whether a constructive trust, in favour of AS, was created by the consent order.

**ANALYSIS**

[41] The trial judge found that the effect of the consent order was to mandate that the interest be conveyed. He opined that it was not a declaration of a right per se, but a directive by agreement or consent, to the parties take steps towards the creation of an interest in favour of AS. Whilst I agree with the trial judge's conclusion that the key to this case lay in the legal force of the 2011 Deed of Conveyance and that that Deed created AS's

[24] **LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO. Chap. 56:03.**

interest in possession, which gave her *locus standi* to maintain the counterclaim, I am not in agreement with his route to that conclusion.

[42] Of relevance is, whether Ricarda's and BS's failure to comply with the terms of the consent order, or at best, to seek a variation of the consent order, based on BS's allegations of a change of heart, constitute them as constructive trustees for AS's benefit. Since Ricarda is deceased, the question is posed in relation to BS alone.

[43] This consent order varied the order of Permanand J. (as she then was). The starting point has to be the order of Permanand J., which declared Ricarda to be entitled to a ½ share of the matrimonial home and the ½ share of the land upon which it stood and that BS **must** convey that share to her. This was subject to a time limit of six months from the date of the order and if he failed to convey, the Registrar was empowered to convey the ½ share, as provided for.

[44] The Court of Appeal then varied that order, to the extent that that ½ share, already created by the order of Permanand J., became impressed with a trust, in favour of AS. The mandate for BS to execute that conveyance was 21 days, but the Registrar was empowered to do so, should he have defaulted. Neither party complied with that order. That, to my mind, at once, would have the effect, of making both Ricarda and BS, constructive trustees of the property, for the benefit of AS. Can that trust be defeated by the non-compliance with the consent order of the court, whether by Ricarda or BS or both? Put another way, is it equitable to allow both Ricarda and BS to defeat the clear purpose and intent of the consent order, by simply not complying with it, or as in this case, raising the issue of

promissory estoppel to defeat AS's counterclaim when they were both in clear breach of the court order?

[45] Ricarda's part in this saga is relevant. For a number of years, the undisputed fact is that Ricarda did nothing in furtherance of the terms of the consent order. There was no independent evidence as to why Ricarda declined to put the terms of the consent order into effect. The trial judge was faced only with BS's assertion that he and Ricarda had agreed between themselves not to effect the terms of the order. The trial judge was not inclined to believe BS's explanation of Ricarda's promise and was not inclined to believe BS when he testified that such a promise was made. This formed a large part of Mr. Beharrylal's submissions. I must emphasize and reiterate that Mr. Beharrylal has not convinced me that the trial judge's assessment of BS's evidence and his findings was plainly wrong. Any suggestion of waiver by Ricarda, was not supported by the evidence and I reject it.

[46] For my part, based on the evidence led in this regard at the trial, and in keeping with the basis upon which the original proceedings were brought and the consent order arrived at, that is, family proceedings where the welfare of the child is of paramount importance, I cannot say that the trial judge's assessment of BS's evidence, his findings and determination were plainly wrong.

[47] Mr. Beharrylal argued robustly against the proposition that BS was to be regarded as a constructive trustee. Ms. Palackdharry Singh was of the opposite view. Ms. Palackdharry Singh quoted Snell, which stated,

> *It has been said for example that a constructive trust is imposed by equity in order to satisfy the demands of justice and good conscious or that it will arise whenever the*

> *circumstances are such that it would be unconscionable for the owner of the property…to assert his own beneficial interest in the property and deny the beneficial interest of another.*[25]

The wording of the order is unfortunate and I do not think it can be denied that the parties did not intend to create a trust over Ricarda's ½ share. Baroness Hale's dicta in **ABBOTT v. ABBOTT**[26] is apposite. Paragraph 2 of her judgment stated, *"the inferences to be drawn from the conduct of husband and wife may be different from those to be drawn from the conduct of parties to more commercial transactions"*[27]. I would agree with paragraph 4 of the **ABBOT** judgment where Baroness Hale opined that, *"the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases"*[28] whether in terms of determining whether any party should have a share or interest in the matrimonial home and the proportion of that share and interest. In that regard the modern approach has been stated thus,

> *the law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.*[29]

[48] In this case, we have a consent order entered into by the parties and there is no evidence to show that what was stated was not their shared intentions at the time of the order. Mr. Beharrylal asserts that neither the

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[25] See Skeleton Arguments for Respondent. P. 4. Feb. 18, 2017.

[26] **LYNNE ANNE ABBOTT v. DANE NORMAN LAWRENCE ABBOTT [P/C NO 142/2005] (ANTIGUA AND BARBUDA); [2007] UKPC 53.**

[27] Id.

[28] Id. at para. 4.

[29] Id. at para. 6 referring to Lord Walker, Lord Hoffmann and Lord Hope in **STACK v. DOWDEN [2007] UKHL 17 at para. 60.**

High Court nor Court of Appeal in the matrimonial matter, declared a constructive trust in existence. How then is the court order to be interpreted?

[49] The intention from the Permanand J. order and moreover of the courts was for Ricarda to get the ½ share in the matrimonial property. It is clear that BS was never to enjoy the entire property. If that was the decision of the court, as reduced in the consent order, which was never appealed, how could BS by flouting its terms, claim that he is entitled to the entirety? This means that the intention of the parties, as well as the court, could be varied or defeated by subsequent events, in which the evidence of change of intention is less than credible. No plausible evidence was led that on a balance of probabilities, that Ricarda wanted to give up her ½ share in the matrimonial home and land upon which it stood. I have already said that the payment of $7,000.00 to Ricarda would not have extinguished this interest. Further, there is no time limit on the recognition that a constructive trust was created, save if *laches* is raised, which was not an argument led in the court below. However, this can be defeated. The evidence is that as soon as AS discovered the existence of the consent order, which was for her benefit, she acted with alacrity. This is undisputed.

[50] Mr. Beharrylal argued that there is a serious problem with enforcement many years after and submitted that,

> *where the subject matter is substantially different from that originally contemplated, with one party now deceased. This can only have [a] devastating and disproportionate effect on the appellant who is now much older, in a different state of health and has less of an earning capacity due to his older years, compared to his position in 1988 if the order had been enforced,*

do not gainsay that BS has deliberately flouted the order. The intention of the order remains constant unless altered by the court. The equitable principle that a party cannot benefit from his own misdeeds is very evident here. The responsibility for carrying out the court order did not lie on Ricarda alone. It cannot be denied that BS did a wrong by not executing the conveyance. There is no doubt, BS received a tangible benefit from the consent order – his admitted remarriage[30], without his having lived up to his end of the bargain. Should he be allowed to benefit from his wrong and moreover, claim the entirety of the property, which was not reflected in "the parties' shared intentions" at the relevant date, the date of the consent order? I do not think that it can be seriously argued that the answer is yes.

[51] There are two other equitable principles at play, which persuade me to hold that a constructive trust was created by the terms of the consent order. They are: (1) that equity shall not suffer a wrong to be without equity; and (2) equity looks to intent rather than form. Since equity will not suffer a wrong to be without an equity and, per Romilly M.R. if a court finds, *"that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance",* then AS was well within her right to pursue the court order and request the Registrar to transfer her ½ share to her absolutely. In other words, equity requires that if the wording of the consent order failed to create the trust, exhibited by its substance and the intent of the parties, the trust shall not fail.

[30] *Infra* para. 1.

**ISSUE 4**

**EFFICACY OF THE 2011 DEED OF CONVEYANCE**

[52] Although this was not argued before the trial judge and was raised only before this court, since the issue arose on the pleadings, Mr. Beharrylal was allowed to advance his arguments.

[53] One of the issues raised by Mr. Beharrylal was how an order of the court which has been rendered stale by the passage of time, ought to be addressed after one party has died. He submitted that the order of the Court was rendered stale by the passage of time. Mr. Beharrylal did not elaborate on what he thought constituted a stale order. I have not found any definition, nor has he supplied any as to when an order of the court is rendered stale. Mr. Beharrylal relied on Order 45 Rule 10 of the **RULES OF SUPREME COURT ("RSC")** which deals with conditional judgments. I agree with Ms. Pallackdharry Singh that the terms of this order do not admit to such a characterization. The consent order was final in its terms, mandating BS to convey a ½ share of the property to Ricarda, in trust for AS. Furthermore, the order does not mandate that Ricarda alone had carriage of the obligations under the order. To my mind, Order 45, Rule 10[31] does not apply. Order 46 Rule 2(1) is also inapplicable, since no time limit was put on the efficacy of the order. The only stricture put on the Deed conveying the property to Ricarda, in trust for AS, was that it was to be executed within 21 days of the date of the order. The court in its wisdom provided further, that the Registrar was empowered to sign the

[31] Order 45 Rule 10 states,

> *A party entitled under any judgment or order to any relief subject to the fulfilment of any condition who fails to fulfil that condition is deemed to have abandoned the benefit of the judgment or order, and, unless the Court otherwise directs, any other person interested may take any proceedings which either are warranted by the judgment or order or might have been taken if the judgment or order had not been given or made.*

conveyance, should BS refuse to do so. Again, no time limit was set for the Registrar to sign the conveyance. Therefore, the references to Order 45 and Order 46[32] do not carry BS's case anywhere. I therefore find that this was a final order, not subject to the strictures of Orders 45 and 46 of the RSC and that the order was still enforceable.

[54] Mr. Beharrylal did not address the issue of how the court should deal with an order after the death of one of the parties. In this case, I have determined that Ricarda's death did not absolve BS from his obligation to convey a ½ share of the property to her and that property be held in trust for AS. It may have been tidier for the Registrar to convey to Ricarda's estate, which then could have conveyed the freehold to AS. That would have left no dispute or doubt regarding the terms of the order and it would have been in line with the learning in **BESWICK v. BESWICK[33].** The question is, whether it was open to the Registrar to convey the property, the subject of the consent order, directly to AS. Based on the finding, that BS was a constructive trustee for AS, there was nothing to prevent the Registrar from conveying directly to AS, *"a half share and beneficial interest in the*

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[32] Order 46 Rule 2(1)states,

*(1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:-*

*a) Where six years or more have elapsed since the date of the judgment or order;*

*b) Where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;*

*c) Where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;*

*d) Where under the judgment or order any person is entitled to relief subject to the fulfilment of any condition which it is alleged has been fulfilled;*

*e) Where any goods sought to be seized under a writ of execution are in the hands of a receiver appointed by the Court or a sequestrator.*

[33] [1966] 3 WLR 396.

*parcel of land described therein…".* The role of the Registrar was to execute the conveyance, instead of BS. Since AS was the beneficiary of the constructive trust, it was open to her to obtain the fruits of the order as the beneficiary. The fact that one of the parties has died does not affect the other party for whose benefit the order was made, to seek the fruits of the order. Neither does the death of one party absolve the other party from observing the terms of the order.

**The 2011 Deed of Conveyance Itself**

[55] The recitals in this Deed speak to the following,

(a) the terms of the consent order of the Court of Appeal, comprising the Honourable the Chief Justice Bernard and Sharma and Edoo JJA;

(b) the fact that Ricarda died on 25 November 2000 **without BS having conveyed to her** in trust for AS, the ½ share and interest in the matrimonial property;

(c) AS's birth on February 18, 1980; the fact that as at the date of conveyance AS was no longer a minor and that she had called upon BS *"to convey a ½ share and interest"* in the property to her absolutely; and

(d) that BS "*had refused and/or failed to execute the said deed…and in obedience to the said order the Registrar…has agreed to execute…"*

[56] The operative part of this Deed, speaks as follows, *"…in pursucance of the premises and of the said order, the Registrar…**for and on behalf of the Respondent (BS) HEREBY CONVEYS UNTO (AS)** a one half share and beneficial interest…in* (the subject property) ***TO HOLD the same unto and***

***to the use of (AS) in fee simple to the intent that (BS) and (AS) together hold the parcel of land as tenants in common".***

[57] Since therefore, Ricarda was deceased and AS had come of age at the time of the executing of the conveyance, there was no impediment against vesting in AS the entire legal and beneficial estate in the share of the matrimonial property which was to be held in trust for her as a minor. The Deed was therefore valid and effectual to pass Ricarda's ½ share and interest.

**CONCLUSION**

[58] BS was not successful on this appeal in that he failed to demonstrate, on the totality of the evidence, that the trial judge was plainly wrong. This is so since,

(1) there was no evidence of a promise made to sustain a plea of promissory estoppel;

(2) AS's counterclaim or sale in lieu of partition is not statue barred;

(3) by the terms of the consent order, BS was a constructive trustee of Ricarda's ½ share and interest in the matrimonial property; and

(4) that the deed executed by the Registrar, vesting in AS a ½ share an interest in the matrimonial property, in fee simple, absolutely, was valid to effect such a conveyance.

We therefore see no reason to trouble the trial judge's orders.

[59] I regret that this matter could not have been settled so as to bring much needed peace and closure to both parties before BS's demise. It is my hope that those who remain can come to some workable agreement for the enjoyment of the property.

For the above reasons, I now make the following order.

**ORDER:**

1. That the appeal filed on November 28, 2013 is dismissed.
2. The Orders of the trial judge are affirmed in part, in that,
    *i. The property comprising 1 Lot more or less situate at Buccoo Village in the Island of Tobago measuring 92 feet along the Northern and Southern boundary and bounded on the North by a 12 feet Road Reserve to Miller Street and partly by other portions of the same lands on the south by the sea on the East and lands of Sarah Barlton and on the West by lands of Lovenia Miller or howsoever otherwise the same may be bounded and abutted or described is to be sold in lieu of partition and the proceeds of sale are to be divided between Mr. Solomon's Estate and Ms. Solomon in equal half share.*

    *ii. The said property is to be valued prior to sale by a valuator to be agreed between the parties within 28 days, the cost of which is to be borne equally by both parties.*

    *iii. …*

    *iv. Following the valuation report, Mr. Solomon's Estate shall be given first preference to make a bid for the purchase of the property within 28 days, failing which the property is to be sold on the open market at which Ms. Solomon will be entitled to bid.*

    *c. Mr. Solomon's Estate to pay to Ms. Solomon the prescribed costs of the claim in the sum of $14,000.00.*

*d. Mr. Solomon's Estate to pay to Ms. Solomon the prescribed costs of the counterclaim in the sum of $14,000.00.*

**FURTHER**,

By consent:

3. Costs on the appeal to be paid by Mr. Solomon's Estate to Ms. Solomon assessed at 2/3 of costs awarded in the High Court.
4. Stay of this Order for 28 days.

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/s/ C. Pemberton, J.A.