

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2022/0157

Formerly CLAIM NO. GDAHCV2018/0110

BETWEEN:

LAURALEE CROSS

Claimant

and

REPUBLIC BANK (GRENADA) LIMITED

Defendant/Ancillary Defendant

and

GARVIN MC QUILKIN

Ancillary Claimant

Before:

The Hon. Mr. Justice Raulston L. A. Glasgow

High Court Judge

Appearances:

Ms. Karen Samuel for the Claimant

Mrs. Amy Bullock-Jawahir for the Defendant/Ancillary Defendant

Mr. V. Nazim Burke for the Ancillary Claimant

2022: May 18;
June 7; (Further submissions)
December 13.

JUDGMENT

- [1] **GLASGOW, J.:** The claimant (Ms. Cross) has instituted this claim against the defendant (the bank) wherein she states that she is entitled to the beneficial interest of the proceeds of a joint account which she previously held with Lionel Akins (the deceased). Ms. Cross argues that her entitlement to the entire balance in the account in the sum of \$2,000,000.00 arises by virtue of the right of survivorship after the deceased's death. The ancillary claimant (Mr. Mc Quilkin) pleads that Ms. Cross is not entitled to the entire proceeds on the account since the deceased instructed the bank to transfer the sum of \$995,262.27 from that account to another account prior to his death.

Claimant's case

- [2] It is Ms. Cross' case that since September 2001, the deceased established an account with the bank for their joint benefit. The deceased died on 15th November 2017. Thereafter, Ms. Cross pleads that she instructed the bank to transfer the remaining funds in the account amounting to \$2,000,000 to her account in the United Kingdom. However, the bank refused to accede to her request. Ms. Cross claims that the bank's failure to honour her request deprives her of the benefit of the funds in the account. Therefore, she claims for loss and damages in the sum of \$2,000,000 together with orders for declarations and interest, among other relief.

Defendant's case

- [3] In response to the claim, the bank denies that the deceased established the account jointly with Ms. Cross'. The bank response is that the account was a personal chequing account in the deceased's name to which he thereafter added Ms. Cross as a joint holder. The bank argues that it had a lawful basis for freezing the account and it was bound by a legal duty of confidentiality owed to the deceased and his estate with respect to transactions conducted on the account. Mr. Roger Patrice, Manager of the bank's Carriacou branch where the joint account was held, testifies in his witness statement that the Bank noted some inconsistencies in the authorisation for a transfer of moneys and requested more information from the

deceased. The bank also explains that they paid a visit to the deceased's home to confirm the authorisation for the transfer. Ultimately, the account was frozen while the bank purportedly sought legal advice concerning the transfer.

- [4] Further, the bank admits that it received correspondence from Ms. Cross expressing the view that the bank ought to refuse the deceased's instructions (the mandate). However, the bank claims that it provided Ms. Cross with a reasonable explanation as to why it was unable to accede to her request. Additionally, the bank contends that the documents which were disclosed to Ms. Cross show that the deceased had an intention which was contrary to the survivorship principle, in that the deceased did not intend for all of the monies in the account to belong to Ms. Cross. Therefore, the bank counterclaims for a declaration as to the true ownership of the monies in the account.

Ancillary claimant's case

- [5] Mr. Mc Quilkin is the deceased's grandson. Mr. Mc Quilkin claims that on or about 9th November, 2017 the deceased executed documents authorising and requesting the bank to transfer the sum of \$995,262.27 from the joint account held with Ms. Cross to another joint account which the deceased held with Mr. Mc Quilkin. He explains that the instructions from the deceased were accompanied by a medical certificate from one Dr. Tyron Davis confirming that the deceased was competent to make financial and other decisions despite his illness. He states that officers of the bank also attended the deceased's home to confirm his instructions to effect the transfer. After the visit, the bank did not provide any indication that there was an impediment to carrying out the deceased's instructions. The deceased died on 15th November 2017 but the bank did not carry out his mandate to transfer the funds before his passing.
- [6] Mr. Mc Quilkin pleads that the bank owed the deceased a contractual duty to carry out his instructions and in failing to do so, the bank breached its contractual

obligations. Further, he pleads that the bank owed the deceased a duty to carry out his instructions in a timely manner and with the skill reasonably expected of a banker and that by failing to do so the bank was negligent in discharge of that duty. Mr. Mc Quilkin claims for declarations and orders that the bank pays the sum of \$995,262.27 to him, among other relief.

Evidence

Ms. Cross' evidence

- [7] On 28th September, 2020, Ms. Cross filed a witness statement in this matter. Ms. Cross states that she is the deceased's daughter and that she is ordinarily resident in the United Kingdom. Ms. Cross avers that she received correspondence dated 18th September 2002 from the deceased together with an account card which he instructed her to sign and return to the bank's branch in Hillsborough, Carriacou. Ms. Cross asserts that, having regard to the correspondence she received over the years from the deceased and the account card she signed, she understood that the monies held in the account were to be shared jointly and to be held solely by her upon the deceased's death. Sometime after the deceased's death, she visited the bank to provide instructions for the funds on the account. Ms. Cross states that the bank requested her to produce the deceased's death certificate.
- [8] On or about 27th November 2017, Ms. Cross produced the deceased's death certificate and instructed the Bank to transfer the sum of \$2,000,000.00 to her account in the United Kingdom. However, when she returned the following day, she was informed by the bank's Branch Manager, Mr. Roger Patrice, that the account had been frozen. Mr. Patrice disclosed that prior to the deceased's death, he received a request from the deceased to transfer half of the monies from the account. Ms. Cross then inquired why the request was not dealt with when it was received. Mr. Patrice informed her that he was not allowed to divulge any information and advised her to obtain legal advice. Therefore, Ms. Cross states, she retained counsel, Ms. Karen Samuel, who wrote to the bank requesting the basis for its

refusal to comply with the mandate. In response to the correspondence, the bank through its Attorneys, Renwick and Payne, suggested that she should settle the matter with the deceased's estate and provide the bank with a release. Being dissatisfied with the bank's response, Ms. Cross filed these proceedings seeking relief.

The Bank's evidence

Roger Patrice

- [9] Mr. Roger Patrice is the officer in charge of Republic Bank's Carriacou Branch. Mr. Patrice states that he knew the deceased held various accounts at the bank. The deceased held a savings account no. 1703399 to which he later added Ms. Cross as a joint holder. He states that as joint holder of the account either the deceased or Ms. Cross could have accessed the monies held therein. The deceased held another account with the bank which was a chequing account no. 32000049. Mr. Mc Quilkin was named as a joint holder of the latter checking account.
- [10] On or about 12th November 2017, Mr. Mc Quilkin visited the bank to conduct a transaction. Mr. Mc Quilkin informed him that he wanted members of the bank to visit the deceased at his home because the deceased wanted to conduct a transaction, but he was weak and unable to write. Mr. Patrice suggested to him that he should have a Justice of the Peace (JP) witness the written letter given by the deceased. Thereafter, Mr. Mc Quilkin returned to the Bank accompanied by one Mary Noel who produced a letter of instruction dated 9th November 2017 requesting that the bank transfer the sum of \$1,890,524.55 from the joint account held with Ms. Cross to the joint account held with Mr. Mc Quilkin. The letter was witnessed by Theophilus Adams, Justice of the Peace. Mr. Patrice states that he inquired from Mr. Adams whether the contents of the first letter were read over to the deceased to which he replied in the negative. In view of this, Mr. Patrice avers that he was unable to conduct the transaction and requested another letter.

- [11] During that same day, Mr. Patrice states that Mr. Mc Quilkin returned with a new letter of instruction dated 9th November 2017 with instructions to transfer the sum of \$995,262.27. Mr. Mc Quilkin also produced a medical report from Dr. Tyron Anthony Davis dated 13th November 2017 confirming that the deceased was of sound mind. Mr. Patrice states that he again spoke with Mr. Adams (JP) to confirm whether he asked the deceased the sum of money that he desired to transfer. Mr. Adams confirmed that the deceased wanted to transfer half of the monies in the account.
- [12] The following day, 14th November 2017, Mr. Patrice states that he sent an internal report to his supervisor about the events of the previous day and awaited further instructions. Mr. Patrice deposes that where there is information that a customer is aged or in ill health, it is customary for the bank to consult head office as to whether any special documents or evidence or even legal advice is required before the bank can comply with the written instruction. This, he says, would then delay the transaction depending on the circumstances. On or about 30th November 2017, Mr. Patrice testifies, Ms. Cross visited the bank and attempted to withdraw all of the monies in the account which she previously jointly held with the deceased. However, she was informed by the bank that the account had been frozen.

Mc Kie Griffith

- [13] Mr. Mc Kie Griffith's evidence is like Mr. Patrice's evidence. At the material time Mr. Griffith served as the acting Manager, Retail Services at the bank. Mr. Griffith states that on 13th November 2017 he received correspondence from Mr. Patrice about a transaction at the branch in Carriacou with a customer who was elderly and in poor health. He testifies that he forwarded that correspondence to Mr. Clifford Bailey, the General Manager of Operations for the bank to notify him of the situation and to await further instructions. The following day, Mr. Griffith states that he received further correspondence from Mr. Patrice about the events that occurred the previous day with attachments including a new letter of instruction witnessed by a JP and a doctor's report. Thereafter, Mr. Griffith states that he met with Mr. Bailey who stated that given the inconsistencies in the two letter they were concerned that there might

be some form of undue influence. Therefore, Mr. Bailey instructed him to place a hold on the account pending verification of the documents, a report from Mr. Patrice and a legal review from the bank's attorneys as to how to proceed.

Mr. Mc Quilkin

- [14] Mr. Mc Quilkin states that on 9th November 2017 he visited the deceased at his home accompanied by Ms. Noel. The deceased informed them that he wished to transfer monies from his account with Ms. Cross to the one he held with Mr. Mc Quilkin. Mr. Mc Quilkin and Ms. Noel then visited the bank to find out what would be required to complete the transfer. Mr. Patrice informed them that a letter signed by the deceased in the presence of a Justice of Peace stating his instructions would suffice. Mr. Mc Quilkin then prepared the letter with Ms. Noel's assistance.
- [15] On 13th November 2017, the letter was signed in the presence of Theophilus Adams, JP who then also signed and affixed his stamp. Mr. Mc Quilkin and Ms. Noel then returned to the bank. However, Mr. Patrice informed them that due to the sum of money involved the bank would need to verify whether the deceased was in the right state of mind. As such, Mr. Mc Quilkin states that the bank requested a letter from a medical doctor confirming that the deceased was of sound mind.
- [16] Mr. Mc Quilkin contacted Mr. Adams and asked him to join him at the house together with Dr. Davis. When Dr. Davis and Mr. Adams arrived at the home, they suggested that the two of them should go inside to speak with the deceased privately. Thereafter, Dr. Davis advised that, having examined the deceased, he was satisfied that he was of sound mind. Mr. Adams indicated that the deceased instructed that only one-half of the monies amounting to the sum of \$995,262.27 in the joint account no. 1703399 ought to be transferred to account no. 32000049. The following day (14th November, 2017) Mr. Mc Quilkin testifies that he collected Dr. Davis' letter and delivered it to the bank.

Shenell George

- [17] Ms. Shenell George, an officer of the bank, indicated to him that she together with Mr. Patrice would like to speak with the deceased personally. Later that same day, Ms. George and Mr. Patrice visited the home and spoke to the deceased privately. Mr. Mc Quilkin states that Mr. Patrice apologised for the back and forth and assured him that the transfer would be done by the end of the following business day. However, that following day Mr. Patrice advised that he was awaiting instructions from Head Office in Grenada. Mr. Mc Quilkin states that the deceased died late that night.

Mary Noel

- [18] Ms. Mary Noel tendered evidence in support of Mr. Mc Quilkin's case. Most of Ms. Noel's evidence is like Mr. Mc Quilkin's evidence. Her evidence indicates that she was a witness to the events with respect to the execution of the transfer letter at the home of the deceased. On 13th November 2017, Ms. Noel testifies that she prepared two transfer letters. However, the first transfer letter was rejected by Mr. Patrice, the Manager of the bank. Mr. Patrice informed her and Mr. Mc Quilkin that because of the amount of money involved he required a new transfer to be prepared and executed. Mr. Patrice advised that the new transfer letter was to be signed in the presence of a JP and must be accompanied with a letter from a medical doctor confirming that the deceased was of sound mind to give instructions.
- [19] The new transfer letter dated 9th November 2017 authorised Mr. Mc Quilkin to transfer the sum of \$995,262.27 from account no. 1703399 to account no. 32000049. Ms. Noel states that the contents of the letter were read over to the deceased by Mr. Adams (JP) in presence of herself, Mr. Mc Quilkin and Wilma Mc Quilkin. Thereafter, the deceased acknowledged the contents of the letter. After the deceased acknowledged the letter, she states that Mr. Adams guided the deceased to make an "X" in the area indicated for his signature. She states that to the best of

her knowledge the letter provided that one-half of the money in the account was to be transferred.

Theophilus Adams

- [20] Mr. Adams states that he together with Dr. Davis visited the deceased's home to speak with him privately. While at the deceased's home they asked Mr. Quilkin, his mother Wilma Mc Quilkin, and Ms. Noel to remain outside while they went to speak with the deceased. Mr. Adams testifies that Dr. Davis attended to the deceased in his room and after his examination, Dr. Davis pronounced him to be of sound mind. While in the room, Mr. Adams states that he asked whether he wanted to transfer all of the monies. However, the deceased did not answer. Thereafter, he asked the deceased whether he wanted to transfer half of the money in the account with Mr. Mc Quilkin to which he answered "yes". Therefore, a new letter of instruction was drawn up by Mr. Mc Quilkin with Ms. Noel's assistance authorising Mr. Mc Quilkin to transfer the sum of \$995,262.27 from account no. 1703399 to account no. 32000049.

Discussion and Analysis

Whether upon Lionel Akins' death, the beneficial interest in the proceeds of the joint account passed to Ms. Cross by way of survivorship

- [21] Counsel for Ms. Cross, Ms. Karen Samuel, submits that in determining whether the beneficial interest in a joint account should immediately vest in the surviving joint account holder, the court must examine the surrounding circumstances. Ms. Samuel explains that the law in relation to co-ownership of real property applies equally to co-ownership of personal property¹.
- [22] Counsel for the bank, Mrs. Bullock Jawahir, recites the principle that the rule of survivorship of a joint account is not a rigid one and may be rebutted if it can be

¹ See Halsbury's Laws of England, (4th edn.) Vol. 35 at paragraph 1143

shown that a contrary intention of one or more of the parties exists. The bank contends that it was presented with sufficient information to conclude that the deceased did not intend for all of the monies in the account to vest in Ms. Cross upon his death. Its view is that the transfer letter requesting a transfer of half of the monies in the account with Ms. Cross clearly shows a contrary intention.

[23] Counsel for Mr. Mc Qulkin, Mr. Burke, states that in determining whether the principle of *jus accrescendi* applies, this court must be guided by the principles distilled in **Whitlock & Another v Moore**². In this case, Mr. Burke says, the only instrument that appears to have been signed by Ms. Cross and the deceased is the document referred to as a “signature card”, which is silent on the issue of the right of survivorship of the account. Therefore, in the circumstances, a presumption arises that the money is held on trust for the transferor and must pass to the estate of the deceased.

[24] The account in issue was a joint account. Generally, under the common law, where there is joint ownership of the legal title in property there is a presumption that the parties intended to share that beneficial ownership of the property jointly, unless a contrary intention is shown. This principle of law was explicated in **Stack v Dowden**³, where the House of Lords held at para. 56 that:

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, **the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership.**” (My emphasis)

[25] In relation to joint accounts, the Australian High Court in **Russell v Scott**⁴, stated at pages 450-451 that:

“The contract between the bank and the customers constituted them joint creditors. They had, of course, no right of property in any of the moneys deposited with the bank. The relation between the bank and its customers is that of debtor and creditor. The aunt and the nephew upon opening the

² [2017] UKPC 44

³ [2007] UKHL 17 or [2007] 2 AC 432

⁴ (1936) 55 CLR 440

joint account became jointly entitled at common law to a chose in action. The chose in action consisted in the contractual right against the bank, i.e., in a debt, but a debt fluctuating in amount as moneys might be deposited and withdrawn. At common law this chose in action passed or accrued to the survivor.”

And at pages 448-449 that:

“A person who deposits money in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship (*Standing v. Bowring* (9) ; *In re Shields*; *Corbould-Ellis v. Dales* (10) ; *Re Reid* (11); *Lindley on Partnership*, 7th ed. (1905), p. 380). The vesting of the right and title to the debt or chose in action takes effect immediately, and is not dependent upon the death of either of the persons in whose names the money has been deposited.” (My emphasis)

[26] In construing the true intention of joint account holders, the Privy Council in **Whitlock & Another v Moore**⁵, stated at paragraph 33 of the judgment that:

“Where the parties to a joint account have declared their beneficial interests in it in signed writing, it would be both extraordinary and unsatisfactory for the courts to have to resolve a dispute about their beneficial interests by an open-ended factual inquiry about their subjective intentions, or the subjective intentions of whichever of them provided the money. If the dispute is about beneficial survivorship, one of the original account holders will have died, and be unable to give direct evidence of intention. If the presumption of a resulting trust would otherwise leave the money beneficially part of the estate of the first to die, evidence of intention by the survivor will always be self-serving. The account may have been opened many years previously, and it will often be pure chance whether any independent witness of the opening of the account can assist, either with evidence of the deceased’s intention, or with a recollection of whether the deceased had the terms of the account opening form explained, before signing it. Above all, the expense and delay involved in a fact-finding inquiry of that type will far exceed that of the occasional case where the signed declaration raises a real issue of construction.” (My emphasis)

[27] In essence, the Privy Council in **Whitlock** is stating that in order to ascertain whether the parties to a joint account intended that the beneficial interest is to be shared, the court ought to examine the written terms of the contractual document to determine

⁵ [2017] UKPC 44

the manner in which they stated their intentions as to sharing. Where there are terms expressly stated in the document and signed by the parties, setting out the extent of their respective interests then those terms will govern how their beneficial interests are to be shared, unless the parties subsequently vary the terms of the agreement or enter into a contrary agreement..

[28] In my view, this case can be distinguished from the facts of **Whitlock**. In that case, there was an expressed declaration in the joint account documents that the proceeds of the account will pass to the surviving account holder by right of survivorship. However, in this case, there is no express intention or declaration as to how the beneficial interest of the joint account with Ms. Cross was to be shared. I note that the bank filed a list of documents, but I have not been furnished with any documents which express or declare the manner of sharing in the account that is to say, whether both parties are equally entitled to the full amount or part of the moneys deposited to the account .The bank only referred to the joint account agreement between Mr. Mc Quilkin and the deceased which is not in dispute. In the absence of an express declaration of the beneficial interest in the proceeds of the account, I would advert to the general principles distilled in **Russell v Scott** to the effect that *“[a] person who deposits money in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship.”*

[29] I find that when the joint account was created with Ms. Cross and the deceased as beneficiaries, both account holders were vested with a chose in action with respect to the sums existing in the account. As Mr. Patrice stated in his evidence, both parties shared the account jointly and as such were able to withdraw monies from the account as they so desired. Therefore, the beneficial interest of the entire proceeds of the joint account or the chose in action passed upon the deceased's death to the surviving account holder (Ms. Cross) by way of survivorship. Ms. Cross was in principle entitled to the entire proceeds of the account at the date of the deceased's death. However, this is not the end of the matter. The facts reveal that

the deceased during his lifetime instructed the bank to transfer the sum of \$995,262.27 from that joint account to another account that he held with Mr. Mc Quilkin.

The validity of the transfer from the joint account

[30] This brings into sharp focus the validity of the instructions or mandate to transfer those moneys. Ms. Samuel submits that the instructions of a bank's customer to pay are determined by notice of that customer's death. Once the bank became aware that the deceased had died, then the bank's authority to obey the deceased's mandate had determined. I disagree with this submission. On the facts, it is clear the mandate given by the deceased to transfer the monies was executed during his lifetime. Once the bank was satisfied that the deceased had properly and competently executed that mandate, the instructions were then immediately efficacious and ought to have been immediately performed. It cannot be the case that the bank was relieved of its obligation to the deceased which preceded the deceased's demise by the bank's own inaction and failure to comply. It may have been a different issue if the facts disclosed that the bank and the deceased were still in the process of verifying his instructions. However, this is not the case in this instance and as such that issue does not trouble this court.

[31] The Bank accepts that it received a transfer request dated 9th November, 2017 which on its face was authorised by the deceased. The transfer request stated as follows:

"I Lionel Akins is of sound mind and wisdom and I hereby certify, that I have appointed and authorised my grandson Garvin Mc Quilkin to:

1. Transfer the amount of \$ 995,262.27 from account number 1703399 to account number 32000049..."

[32] The bank further accepts that Mr. Mc Quilkin complied with all its required verification measures, including a notarised letter from one Mr. Theophilus Adams, Justice of the Peace. The bank also requested the services of a medical doctor who examined the deceased to satisfy the bank's concern that the deceased possessed

the requisite sound mental capacity to execute or authorise such a transfer of monies. With respect to mental capacity to carry out transactions, Kennedy LJ in **Masterman-Lister v Brutton & Co (Nos 1 and 2); Masterman-Lister v Jewell and another**⁶, stated:

“It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity.”

- [33] Ms. Samuel in her submissions argues that “there were red flags to mental capacity” and that these “red flags” rebutted the **Masterman-Lister** presumption of the deceased’s competence to manage his affairs. In **Masterman-Lister**. Chadwick LJ stated at paragraph 62 of the judgment that “*at common law at least, the test of mental capacity is issue-specific.*”
- [34] There are no disputations about the bank’s finding that the deceased possessed the requisite sound mental capacity to issue the transfer request. Apart from Ms. Cross’ assertions, she has not led any evidence to rebut the presumption that the deceased possessed the requisite mental capacity to execute the transfer letter outlining his instructions. I accept the JP and Mary Noel’s evidence as witnesses to the letter of transfer along with the independent evidence of the medical doctor, Dr. Tyron Davis, that the deceased had sufficient mental capacity to authorise such a transfer.
- [35] Additionally, Mr. Roger Patrice, in his evidence⁷, stated that he together with another bank official visited the deceased’s home to confirm his instruction to transfer the monies. Mr. Patrice states that “*I visited Mr. Akins at his home together with my colleague, Shenell George. I spoke with Mr. Akins who confirmed that he knew me and confirmed his wish to transfer half [sic] by nodding his head as he could not speak.*”

⁶ [2003] 1 WLR 1511 at paragraph 17

⁷ Paragraph 16 of the Witness statement of Roger Patrice

- [36] The sum total of the foregoing leads me to conclude that the instructions contained in the transfer letter were valid and therefore the bank was and is obliged to transfer the sum of \$995,262.27 to the ancillary claimant's account with interest.

Resulting trusts

- [37] Mr. Burke submits that the only document that appears to be signed by Ms. Cross at the time when she was added to the account by the deceased is a document referred to as a "signature card". Mr. Burke submits that the "signature card" is silent on the issue of survivorship. Therefore, counsel concludes that a presumption arises that the monies in the account are held on trust for the deceased's estate⁸. In other words, Mr. Burke argues, the deceased retained the beneficial ownership of the proceeds of the account and as such his estate is entitled to it.

- [38] It is trite law that a resulting trust is usually presumed where one person voluntarily transfers his own property in the name of himself and another. The learned authors of the **Halsbury's Laws of England**⁹ stated that a resulting trust arises:

"Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person or some presumption of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferor." (Underling supplied)

- [39] The parties do not dispute the fact that the entire proceeds on the account were contributed by the deceased thereby raising a presumption of a resulting trust in his favour. But it is also quite well understood that a resulting trust is one of the presumptions of equity and as pointed out by the authors of **Elements of Land Law**¹⁰ -

"The presumptions of equity are... only that – presumptions, based on standardised expectations of human action and reaction. As Lord Diplock observed in *Pettitt v Pettitt*, the equitable presumptions as to intention are

⁸ Paragraph 25 of the Ancillary claimant's submissions filed on 21st October, 2020

⁹ Halsbury's Laws of England, (Volume 98 (2019), Para.139.

¹⁰ Elements of Land Law, Kevin Gray, Susan Francis Gray, 3rd Edn at pages 676-677

“no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn **in the absence of any evidence to the contrary... It follows that presumed intentions ultimately prevail only where there is no convincing evidence of the actual intentions of the parties.** The presumption of resulting trust is therefore rebuttal, in whole or in part, by any evidence (including parol evidence) which unambiguously demonstrates that B, although providing all or part of the financing in the name of A, did not actually intend to take a beneficial interest.. Evidence of countervailing intention sufficient to oust the presumption of resulting trust can be provided in a number of ways. Whether the presumption is rebutted in any of these ways is ultimately a matter of probability and credibility, **determined with reference to the facts of each individual case.**” (My emphasis)

[40] I have above concluded that the facts of this case indicate that this was a joint account to which all the relevant law including the principle of *jus accrescendi* applies. That finding on the facts conclusively dissolves any presumption that the deceased set up this joint account with the intention that he or his estate should retain a beneficial interest in any or all of its proceeds upon his demise.

[41] In any event, Mr. Mc Quilkin did not make a claim for resulting trust on his pleadings but raised it on submissions. Under the Civil Procedure Rules rule 8.7A parties are required to set out the parameters of their case in their pleadings and cannot introduce new facts or contentions without leave of the court. In the recent decision of **National Lotteries Authority v Jerome De Roche**¹¹, Ward JA elucidated:

“The claimant must plead the essential facts that constitute its case, and those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail. CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree.”

[42] For the foregoing reasons the claim for resulting trust is refused.

¹¹ GDAHCVAP2021/0025 at para. 1 of the headnote

Mr. McQuilkin's claim for breach of the bank's duty

- [43] On this score, Mr. Burke for Mr. McQuilkin submits that it is settled law that the bank-customer relationship is contractual in nature. Further, counsel argues, a bank has a duty under its contract with its customers to exercise reasonable care and skill in carrying out the customer's instructions as explained by the court in **Karak Brothers Company Ltd v Burden**¹². Counsel maintains that the duty to exercise reasonable care and skill included a duty to carry out the deceased's mandate in a prompt and efficient manner¹³.
- [44] The bank's response is that when the first set of written instructions were brought to its attention by Mr. Mc Quilkin it acted in furtherance of its duty to carry out investigations into the deceased's health and state of mind. The bank's position is that the verification of the authenticity of the transfer letter was not to protect its own interest, but to protect the interest of the account holders. The bank formed the view that the first transfer letter did not represent the deceased's intention since the deceased in the second letter only desired to transfer half of the monies in the account. However, as I have found above, by the time of the deceased's passing, the bank had already satisfied itself that the deceased possessed the requisite mental capacity to issue instructions about the transfer and that there was nothing precluding the bank from executing the instructions.
- [45] This view is compounded when one looks at the nature of the contract in this case. The bank gave evidence that the joint account was set up in such in a manner that either account holder were able to withdraw or transfer monies from the account without the other's consent. Therefore, there was nothing in principle which prevented the deceased from transferring monies out of the joint bank account as he so desired without Ms. Cross' consent. The bank had a duty, once it was satisfied that the instructions were properly made to execute the transfer of the monies as instructed by the deceased prior to his death.

¹² (1972) All ER 1210

¹³ See Alliot J in *Lipkin Gorman (a firm) v Karpnale Ltd.* [1987] 1 WLR 987 at page 1006

[46] But is this the charge of breach of duty one that Mr. Mc Quilkin can make? I am of the view that this claim for breach of duty is not maintainable by Mr. Mc Quilkin since he was not privy to the contract with the bank. He was neither debtor nor creditor nor did he hold any relationship with the bank as banker and account holder in respect of the account in question.

[47] Generally at common law, banks have a duty to customers to exercise reasonable care and skill. Webster JA [Ag.] in **Clement Lawrence et al v First St. Vincent Bank Limited**¹⁴ restated the principle that for a duty of care to be imposed, three elements must be satisfied:

“Following the decision in *Donoghue v Stevenson*, the test has evolved into a three-way test that is best summarised by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman and Others* as:

“What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

The three elements of the test are therefore: (1) reasonable foreseeability of damage; (2) a relationship characterised by proximity or neighbourhood between the wrongdoer and the person damaged; and (3) that the law would consider it fair, just and reasonable to impose a duty of care.” (My emphasis)

[48] The bank’s evidence is that they received a request to transfer monies to an account and had some concerns about the nature of the instructions and therefore requisitioned further information from the parties involved. It can hardly form a basis of complaint that the bank was not duty bound to investigate those concerns especially in light of the amount of money involved in the instructions. Additionally,

¹⁴ SVGHCVAP2014/0016

the bank was aware that the deceased was an elderly person who may have been influenced to give this instruction or may have lacked the mental capacity to do so. The bank took a few days to seek legal advice on the transfer request and to satisfy itself that the deceased possessed the requisite mental capacity

[49] I find that the bank acted reasonably and was not in breach of its obligations when it took a few days to verify whether the deceased wished to transfer the large sums in question and whether he possessed the mental capacity to do so. The various steps taken by the bank to have further instructions accompanied by a doctor's and JP's verification and the bank officers visiting the deceased were all quite appropriate actions to take in furtherance of the bank's legal duty to the account holders in this case. But these were all matters pertaining to the holders of the joint account in question. In this case as I have stated, Mr. Mc Quilkin was not a co-owner of this joint account and therefore there was no relationship of banker and client between him and the bank. The bank did not owe him any duty to exercise reasonable care and skill as a customer nor would it be fair and just for the court to impose such a duty of care in these given circumstances. The bank owed a duty of care to the deceased (now passed to his estate) and Ms. Cross as creditors and customers. The cause of action subsisted among the deceased, Ms. Cross and the bank. Mr. Mc Quilkin's claim for breach of duty whether contractual or otherwise must fail.

[50] However, the foregoing finding does not absolve the bank of its obligation to carry out the instructions given by the deceased before his passing. As I have stated above, once the bank had taken the various steps to satisfy itself that (1) the deceased wished to make the transfer of half the sums in the account; and (2) possessed sound mental capacity to issue that instruction, the bank should have immediately carried out his instruction. This means that to date that the bank owes a duty to carry out those instructions. The point was not explored by the parties but I am sanguine that I am correct that the deceased's estate has a sufficient basis to (1) insist that the bank so comport itself; or (2) to bring a claim if actions contrary to the deceased's instructions are taken by the bank.

Conclusion

[51] For these reasons, I find that the claimant, Ms. Cross, is entitled to the sums standing to the joint account held with the deceased further to the bank fulfilling the deceased's instructions to transfer half the sums therein to Mr. Mc Quilkin.

Order

[52] It is hereby ordered as follows:

- (1) The claim filed by Lauralee Cross (Ms. Cross) is granted in part.
- (2) The claimant is entitled to the sum standing to the joint account held with the deceased further to the bank fulfilling the deceased's instructions to transfer half the sums therein to Mr. Mc Quilkin;
- (3) The bank is therefore ordered to transfer half the sums held by the deceased in the joint account with Ms. Cross to the joint account that the deceased held with Mr. Mc Quilkin. This transfer is to be done with respect to all sums (inclusive of interest) standing to the credit of the joint account held with Ms. Cross as at the date of the transfer.
- (4) In view of each party enjoying partial success on their respective claims, each party shall bear their own costs.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar