COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2020/CLE/GEN/00645

KEVIN SANDS

Plaintiff

AND

SAMANTHA ROLLE

AND

TANYA ROLLE
(as Administrators of the Estate of Joseph Rolle)

Defendants

SAMANTHA ROLLE

AND

TANYA ROLLE

Defendants

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mrs. Hope Strachan for the Plaintiff** **Mrs. Stephanie Wells for the Defendants**
Judgment Date:	**10th September, 2021**

Civil – Equitable Remedies - Joint Tenancy – Severance – Severance by course of dealing – Severance by acts done – Implied intention of severance must be made clear by both joint tenants – Will – Property owned as joint tenant bequeathed to third party as fee simple absolute – Whether joint tenant knew of gift in Will in his lifetime – Presumption of resulting trust – No presumption of resulting trust between joint tenants – Joint tenants hold legal interest and equitable interest – No presumption of resulting trust where one co-owner provided more of the purchase price than another co-owner – Constructive Trusts – Proprietary Estoppel

JUDGMENT

1. The Plaintiff, Mr. Kevin Sands **(the "Plaintiff")** sought the following relief:

(1) declaration that he was entitled to a beneficial interest in Lots No. 22 and 23 inclusive of the dwelling house situate thereon on Lewis Street, Nassau Village, New Providence **(the "Home");**

(2) a declaration that the Defendants, Tanya Rolle **(the "First Defendant")** and Samantha Rolle **(the "Second Defendant") (collectively referred to as the Defendants")** held the Home on trust for themselves and the Plaintiff in portions to be determined by the Court.

(3) an injunction restraining the Defendants, their servants or their agents from evicting him from the Home or otherwise dealing with the same before a decision was made by this Court.

(4) In the alternative damages for breach of trust and/or breach of contract and for compensation for the repairs carried out on the Home as a result of the Defendant's failure to notify him of their claim.

2. The Plaintiff's claim emanated from an alleged oral agreement made sometime around December 2007 between himself, his Great-Grandmother, Melinda Geneva Rolle **(Melinda")** and his Grand-Mother, Eleanor Ingraham **("Eleanor")** whereby it was agreed that he would be able to live indefinitely in the Home, which was owned by Melinda, upon his completion of certain badly needed renovations and repairs. He carried out minor renovations on the Home from December 2007 to mid-2009 and certain major renovations from 2017 to 2018 at his own expense, which amounted to twenty-three thousand dollars.

3. The Plaintiff further claimed that after Melinda's and Eleanor's deaths, he entered into possession of the Home in November 2017, with the permission of Eulalee Rolle, who was the Executrix of Melinda's estate **("Eulalee")** and remained in undisturbed possession until July 2018 when the Defendants made their claim to the Home.

Defence

4. The Defendants pleaded that Melinda purchased the Home with a portion of her pension money along with money provided to her by her son and their father Joseph Rolle now deceased **("Joseph").** The two purchasers obtained a small mortgage to assist with the purchase which they both paid off in a short period of time. They also pleaded that Joseph assisted Melinda financially with paying certain bills and purchasing groceries. Melinda initially lived in the Home alone until 2005 when Eleanor and her husband Oscar Ingraham **("Oscar")** moved into the home because Eleanor was ill and unemployed. Oscar and Eleanor never paid anything to reside in the Home. The Defendants added that after Eleanor's death, Joseph asked Oscar to vacate the Home and as a result of his refusal Joseph had the utilities disconnected.

5. They denied that there was any oral agreement and that the Plaintiff recognized Joseph as the surviving owner of the Home, and consequently recognized that the Defendants were the owners of the Home. The Plaintiff had in recognition of their ownership offered

them Fifty Thousand Dollars to purchase the Home, which they rejected. They had also applied to the Magistrate Court to evict the Plaintiff. The Plaintiff had never tried to occupy the Home during Joseph's lifetime nor did he carry out any repairs to the Home during Melinda's lifetime.

6. The Defendants denied that the Plaintiff acted to his detriment occupying and repairing the home and instead insisted that he had occupied the home as a tenant, rent free, for sixteen months and had failed to pay rent in the amount of forty thousand dollars. They added that he knew that Eulalee had no right in law to allow him to reside in the Home and that any loss he incurred was as a result of his recklessness. They also denied that a trust had been created in his favour and that he was not entitled to a beneficial interest in the Home and had no equitable or legal right to seek a restraining order against them.

7. By counter claim, the Defendants pleaded that the Plaintiff and family were trespassers who should be removed from the Home. They claimed that a fair rent for the Home would be one thousand dollars per month and that the Plaintiff unlawfully occupied the Home from November 2017. The Defendants further pleaded that the Plaintiff unlawfully carried out repairs to the Home after being summoned to the Magistrates Court for an application to evict him from the home.

8. The Defendants claimed that the Plaintiff refused to cease carrying out the repairs to the Home, refused to recognize and in fact ignored the law of survivorship, that he unlawfully erected a large gate to barricade himself in and deprived the Plaintiffs from the enjoyment of their inheritance. They further pleaded that he did not acquire an interest in the Home and sought to recover the unpaid rent in the amount of forty thousand dollars at the rate of one thousand dollars per month along with damages for loss of opportunity to rent the Home, loss of income from the Home along with an injunction restraining the Plaintiff from entering the Home, a declaration that the Plaintiff had no right to be in the Home, possession of the Home and mesne profits.

Evidence

9. The Plaintiff, a Building Contractor, claimed that pursuant to an oral agreement between Melinda and Joseph they acquired the Home as joint tenants on 17th January, 1991. She was seventy three years old at the time. He added that the purchase price and mortgage installments were provided by Melinda from her pension monies received after her retirement. Eleanor and Oscar moved into the Home in 2005 and Melinda executed her Last Will and Testament on 12th January, 2005 by which she devised the Home to Eleanor.

10. Sometime around April 2007 the Plaintiff orally agreed with Melinda and Eleanor to carry out badly needed repairs to the Home in exchange for living there indefinitely before and/or after their respective deaths. He added that after Melinda's death, Eleanor and Oscar remained in the Home and he continued to carry out repairs to the Home.

11. Eleanor died shortly thereafter and Oscar remained in the Home. He continued to carry out minor repairs to the Home until Oscar's death in 2015. He claims that he has

suffered loss and damage because the Defendants failed to notify him of their claim prior to his acting to his detriment and expending monies on the Home. He wanted to live in the Home promised to him by Melinda and Eleanor.

12. Under cross-examination, the Plaintiff stated that in 2007 he did not live in the Home. He added that to his recollection Joseph was never involved with the Home and that at the time of Eleanor's death he asked the Defendants to produce documents in respect of their claim which they never did. He confirmed that he was summoned to the Magistrate Court by the Defendants in their attempt to compel him to accept that the Home in fact belonged to them.

13. On the advice of his attorney, unsuccessful ex curia discussions were held. Thereafter, he again attempted to discuss the issue of ownership with the hopes of seeing the documentation that they possessed. He also informed them that he had carried out repairs to the Home based on the oral agreement and maintained that he held an interest in the Home. The Plaintiff denied speaking to the Defendants' brother and making offers of twenty thousand and fifty thousand dollars for the Home.

14. He unclogged the sink and toilet, changed the door and fixed the window operators. He added that due to a small leak in the roof, he changed the sheetrock in addition to the shingles which had blown off. He also stated that he had to change a window in the home. He did whatever Melinda and Eleanor asked him to do. He added that he and Eleanor, who was retired and receiving a pension at the time, paid the electricity bill and bought food and Oscar, who worked as a contractor paid for groceries and took care of the Home.

15. At one point his cousin Leapie lived in the Home but he never saw the Defendants there. He did however see Joseph visit. The only mortgage discussion he was aware of when Joseph was alive, was that Melinda had purchased the Home with her pension money and that she had paid off the mortgage using her pension money. He did not have firsthand knowledge of any agreement between Melinda and Joseph, he was aware that the only reason Melinda obtained the mortgage with Joseph was because at her age she could not obtain a mortgage on her own.

16. Whenever Melinda received her pension money, Joseph would pay the electricity bill and water bill for the Home out of that money, but he did not know how much she received. He was not aware of the Defendants' mother cooking food and sending it to the Home as every time he visited the Home he would have to purchase food for them to eat.

17. He stated that if he had had any idea that the Defendants owned the Home, he would not have occupied it and that upon finding out that information he spoke to his attorney about recovering the money he spent on the Home to allow him to invest it for his family as he was the father of six children. He added that he had never thought to pay rent because it was his great grandmother's home and that she did not know that Joseph had conveyed the Home with her as a joint tenant. The first time he saw the conveyance was just before receiving the Magistrates Court summons, in a family chat during the latter

part of 2018, because his cousin had stated that she was looking for the land papers to bail her husband out of jail.

18. He denied being told by the Defendants that he should not put any money into the Home and in fact moved into the Home around November 2016. He was not aware of anyone attempting to evict Oscar from the Home and that if they wanted him to be removed they could have initiated similar Court proceedings as they had for him. He added that Oscar had never moved because as far as he was aware the Home was his wife's home left to him upon her death.

19. During re-examination, the Plaintiff confirmed that he only became aware of the Defendants ownership of the Home upon appearing in the Magistrate Court in 2018. He added that when he moved into the Home, he closed up the existing well in the front of the yard as it was contaminated and dug a new well, and connected and paid for all utilities in the Home.

20. He reiterated that Joseph nor the Defendants ever lived in the Home and that Joseph only came to the Home to visit and talk with Melinda. He confirmed that once or twice Joseph brought tuna and cold grits for Melinda. The meeting held with the Defendants was at their home in Sunshine Park where Joseph lived. He confirmed that he learned of the conveyance in the family chat in either February or March in 2018 and that prior to being served with the said summons, the Defendants did not speak with him.

21. Between Melinda's and Eleanor's death, he never heard anything from Joseph. After Joseph's death the Defendants never resided in the Home. He knew that by Melinda's Will, the house was left to Eulalee who knew that he had moved into the Home and who had never told him that he had to move out. Eulalee gave him permission to continue the work that he was doing. He confirmed that he had erected the gate prior to the court proceedings due to the frequent flow of vehicles in the area and to avoid other vehicles parking in the yard.

22. Eulalee Rolle, the aunt of the Plaintiff, daughter of Melinda and sister to Eleanor and Joseph (**"Eulalee"**), in her evidence in chief, stated that after her mother's lifetime of hard work in the civil service, she wanted to fulfill her dream of owning a home. As she was seventy three at the time, she asked Joseph to assist her in obtaining a mortgage from the Bahamas Mortgage Corporation over the Home but used her savings and pension money to purchase it.

23. Eulalee confirmed that Melinda lived alone in the Home from 1991 to 2005. Thereafter, Eleanor and Oscar lived in the Home until their deaths. She confirmed that she, Melinda and Eleanor orally agreed that the Plaintiff could reside in the Home pursuant to his completion of repairs and renovations on the Home. She added that Melinda had always said that she would leave the Home to her sister and confirmed this by her Will.

24. The Plaintiff carried out repairs and renovations to the Home which were approved by her from 2007 to 2009 and up to 2015. The Defendants did not claim ownership of the Home until 2018 when they applied to the Magistrate Court to remove the Plaintiff from

the Home. She understood that the Defendants made their claim through their father, Joseph, because his name was on the Conveyance.

25. The Plaintiff and his family lived in the Home from November 2017 until July 2018 with her permission. During this time, he made further repairs to the Home and spent a considerable amount of money to do so. She was of the view that Joseph was not entitled to full ownership of the Home because he did not provide the purchase money nor did Melinda intend for him to pass it on to his children. She added that she wished to honor the wishes of Melinda and Eleanor's oral agreement made with the Plaintiff.

26. Upon cross-examination, Eulalee accepted that she could not speak to the agreement made between Melinda and Joseph on the acquisition of the Home but to her knowledge, her mother was the only owner of the property.

27. Melinda had confirmed with her Attorney that she wished , Eulalee, to be in charge of her estate as she knew that she would share and that Joseph was not involved in that process. She believed Joseph never made any repairs to the Home. Eulalee further maintained that Melinda used the money that she worked for and her pension money to purchase the Home and that she could not have asked her for any money because she was paying for her own Home where she lived.

28. Eulalee knew that Joseph could not provide any money towards the Home because she and her sister had to assist him with money to keep his house as he had a mortgage over his house. The Defendants never spoke to her and she believed that if Melinda had signed anything with him she would have told her. Eulalee denied that Melinda would have purchased the Home with Joseph and upon being directed to the conveyance between Melinda, Joseph and the Bahamas Mortgage Corporation, she claimed that Joseph had fixed it as he was wicked and never did anything for Melinda. She added that he would have signed the conveyance without their mother knowing because she could not see properly.

29. Ms. Barbara Jane Davis, the daughter of Eleanor, niece of Joseph and cousin of the Plaintiff and Defendants **("Ms. Davis")**, testified that she was familiar with the Home as it was where Eleanor resided. Eleanor lived with Melinda until her death and she visited her at the Home frequently. Joseph never resided in the Home and she never saw the Defendants visit Melinda nor did she see them prior to 2017, when they claimed ownership of the property.

30. Ms. Davis testified that Melinda had worked all her life, mostly as a janitress and that she was not able to afford a home until she retired. Melinda used her retirement money in addition to money saved to purchase the Home. She added that despite not knowing the legal details surrounding the purchase, Melinda always told her, Eleanor and her other family members that Eleanor would inherit the Home as was confirmed in the Will.

31. Under cross examination, Ms. Davis confirmed that Leapie, whose real name was Jason, lived in the Home. She also confirmed that Eleanor had never contributed financially to the Home. She added that she had visited the Home regularly but was not

aware that the Home was owned by Joseph and Melinda. She added that she had only become aware of this after the Plaintiff took up residence there and the First Defendant had enquired about it. Ms. Davis stated that she was present when the Plaintiff offered to make a payment of fifty thousand dollars to them after the inquiry and after he had put so much money into the Home.

32. Joseph, to her knowledge, had never assisted Melinda financially because he would collect her pension money and use that money to pay her bills. She could not confirm if he ever spent any of his own money when the pension was not enough to cover the bills. She added that while she did see Joseph visit, she never saw the Defendants visit. She herself visited often because her mother, Eleanor, lived there. Ms. Davis also added that Joseph did things around the Home every now and then.

33. She knew know that her grandmother would give Joseph money to pay bills but she could not say how much and that he had access to her pension and her savings. Her grandmother received her pension money about a month after her retirement.

34. Upon re-examination, Ms. Davis clarified that the Plaintiff had previously stayed at the Home with his mother when he was younger but then moved to Freeport prior to Eleanor's death. She added that the Plaintiff carried out repairs around the Home when asked by her mother because his mother knew that he was good at that type of work. She was not aware of anyone asking Oscar to move out of the Home and that he was never asked to pay any rent.

35. Ms. Davis further testified that the First Defendant had approached her after the Plaintiff took up residence in the Home in either 2017 or 2018 to ask her who had given the Plaintiff permission to live in the Home. She told the First Defendant that she nor Eulalee had a problem with him staying in the Home because as far as she was aware, the Home was left to her mother. The First Defendant then told her that the Home belonged to she and her sister and showed her the Will to support this. She in turn showed the First Defendant the Will and two months later the Plaintiff was served with a Summons to appear in the Magistrate Court.

36. While Joseph was supposed to pay the utilities from Eleanor's pension money which he collected, most of the time there would be no electricity in the Home and the water would be turned off. She did see improvements to the Home after the Plaintiff had carried out certain repairs such as fixing the roof, changing the gate and doors and that he had also made changes to the interior of the home which were all done before the Summons was served on him.

37. Prior to her father's death in 2015, Ms. Davis would visit the Home to take him dinner every Sunday but after his death she did not visit as often. After the Plaintiff moved in, she still did not visit very often but did attend to see the repairs which he had made before the Summons was issued. She was not aware of any renovations made to the Home by the Plaintiff after he had received the Summons.

38. Ms. Davis was recalled as a witness because of the late production of a Royal Bank of Canada bank draft issued to the Bahamas Mortgage Corporation with a notation on it that it was "Re Mr. Joseph Rolle" and which was dated 9th January, 1991 in the amount of $28,800.00. This date coincided with the date Melinda purchased the Home. Ms. Davis stated that she had not seen the bank draft before but confirmed that when Melinda received her pension money she gave some of the money to Joseph to purchase the Home as he was in charge of receiving her pension money. She was shown the conveyance and confirmed that the consideration was Thirty Two Thousand Dollars and that Melinda had a savings account which Joseph had access to.

39. Ms. Davis added that Melinda's grave was unmarked because upon her death, Joseph had found out about the Will and instigated an argument over it at the funeral home. The next day he took her body from the funeral home and buried her at Spikenard Graveyard in an unknown grave, without their knowledge.

40. The First Defendant, in her evidence in chief, stated that Eleanor did not inherit the Home as Melinda died before Joseph who became the absolute owner of the Home. She added that as the absolute owner he left the Home to her and the Second Defendant in his will. While Joseph's will was being probated, the Plaintiff did not enter a caveat or challenge the estate in any way. The First Defendant also confirmed that the Plaintiff had asked her, her brother and the Second Defendant to purchase the Home and they each informed him that it was not for sale.

41. The Plaintiff initially offered them Twenty Thousand Dollars and after that offer was rejected he increased the offer to Fifty Thousand Dollars which they also refused. They sought an order from the Magistrate Court for the Plaintiff to vacate the Home and that it was only after that appearance and the rejected offers that the Plaintiff invested money into the Home, including the erection of a large wrought iron gate at the entrance to the Home.

42. The First Defendant recalled that every week Joseph took both she and her sister with him to visit Melinda at the Home. Whenever she had visited Melinda she never saw the Plaintiff at the Home nor did she see any boys clothing in the Home which would have indicated to her that a male resided there. Melinda had a job with the Bahamas Government and Joseph would give her money to assist her with her expenses.

43. Joseph would complain to them that Eleanor, who moved into the Home along with Oscar when she was ill, lived there but never contributed financially to the upkeep of the home. Even after Eleanor's death, Oscar remained in the Home and refused to spend any money on the Home.

44. Under cross-examination, the First Defendant testified that after her father's death in 2012, Oscar remained in the Home and that upon his death in 2015 an unknown person moved into the Home because it was empty. She added that they never made contact with that person because he/she was only in the home for approximately one month. During this occupation, there were no utilities operational because they had all been disconnected by Joseph.

45. She was aware that the utilities were presently connected in the Home. She admitted that she nor the Second Defendant ever lived in the Home. While Joseph had never initiated court proceedings against Oscar, she did formally ask him to vacate the Home. She added that after Oscar's death in 2015, she and the Second Defendant spoke to Ms. Davis about her removing her belongings from the Home.

46. After Ms. Davis removed her belongings from the Home, they cleaned out the Home and placed office furniture inside of it. She was advised by the Plaintiff that the office furniture was not there when he moved into the Home. It was not an option for her to move into the Home after Oscar's death because the Home was in a state of disrepair and she would not have been comfortable living there nor would she have allowed anyone to rent it.

47. The roof, kitchen, windows and doors all needed repairing. While she was not aware of the relationship the Plaintiff had with Melinda and Eleanor, she was aware of the arrangement between Melinda and Joseph, and that they owned the Home together as joint tenants. Despite her young age at the time the Home was purchased, the arrangement was public and everyone knew that it was owned by both of them; however, Joseph never lived in the Home as he had his own house.

48. She maintained that the Plaintiff only carried out substantial repairs to the Home in 2017. She learned about the gate being erected after their appearance in the Magistrate Court. She never visited the Home and they no longer had access to the Home because the Plaintiff had changed the locks once he moved into the home in 2017.

49. She and her sister, the Second Defendant, had a very good relationship with their father Joseph with no secrets between them, which is how they knew about his Will, which she had a copy of while he was alive. She added that while the probate of Joseph's estate was finalized in 2017, they had dealt with the Home before then. She also stated that Joseph only did minor repairs to the Home.

50. The First Defendant further testified that the Plaintiff and his mother Esther never lived in the Home. She heard about Melinda's Will but, she had actually never seen it. She also could not attest to the oral agreement. They had never requested any arrears of rent from the Plaintiff while before the Magistrate Court nor thereafter as the matter was then set to be heard before the Supreme Court.

51. The First Defendant confirmed that there was a discussion between herself, the Second Defendant and the Plaintiff after their appearance in the Magistrate Court. She and the Second Defendant refused the Plaintiff's offer to purchase the Home.

52. She witnessed Joseph providing Melinda with money in addition to taking her to the food store to buy groceries. She was aware that Joseph handled all of Melinda's affairs. Her allegations of Oscar not assisting financially with the Home were based on conversations that she had heard.

53. The Second Defendant, in her evidence in chief, confirmed the First Defendant's evidence. She added that the Plaintiff had approached her brother in the United States about purchasing the Home. Her brother informed him that it was owned by herself and the Second Defendant. She knew that there was never an oral agreement between the Plaintiff, Melinda and Eleanor nor between the Plaintiff and Joseph. She and the First Defendant would visit Melinda several times a week with Joseph who would purchase food and other items for the Home.

54. The Second Defendant further stated that the Plaintiff only spent Forty Thousand Dollars on the Home after he was told not to do so and after his offers to purchase were rejected. He never lived in the home in 2007 and he was aware that Eulalee could not give him any permission to occupy the Home. She maintained there was no proper or lawful trust instrument created between the Plaintiff, Melinda or Joseph and as such that he was not entitled to a restraining order against the Defendants.

55. During cross examination, the Second Defendant testified that she had discovered that there was a mortgage over the Home but it was paid off in one payment however, she was not present when that happened. She added that Joseph had mentioned to her that a portion of the money came from her grandmother and a portion of the money came from him, but that there was no confirmation of their respective contributions. She maintained that because the Home was purchased as joint tenants it was owned by both of them.

56. She identified a cheque from Joseph to the BMC in the amount of Twenty Eight Thousand Dollars dated 9th January, 1991, which represented payment of the full amount of the mortgage and added that prior to the discovery of same she did not know the full details of the transaction and that she only knew what she was told by Joseph.

57. After Joseph's death she visited the Home frequently and saw repairs carried out to the Home in either 2016 or 2017. The Second Defendant additionally testified that Eulalee did not live in the Home and was being untruthful in her evidence about having to assist Joseph with paying the mortgage on his home in Sunshine Park as there was no mortgage on the house as it was built by Joseph's construction company.

58. She additionally stated that it may have been Melinda's pension money used to repair the Home but she was not aware that it was used to pay off the mortgage. Further, as Joseph was a contractor he would have had to actually repair the Home in any event.

59. During and after her school years, she would accompany Joseph who would daily carry food to Melinda and that on a monthly basis they would purchase groceries for the Home. She admitted that there was a dispute over where her grandmother should have been buried as her father had buried her in Spikenard Cemetery in an unmarked grave against the wishes of his siblings.

60. She was shown the conveyance of the Home but stated that she could not explain why it was not lodged for recording until January 2009, a month before Melinda passed, if it was executed in 1991 and that her father never told her why it was not recorded until

then. She could not confirm whether the RBC account from which the bank draft was issued was an account that was beneficially owned by both Joseph and Melinda.

61. Upon re-examination, the Second Defendant stated that her grandmother did not have a funeral, but that she did have a coffin paid for by Joseph and that she did not know whether any of his other siblings helped in any way nor whether they made any effort to mark her grave. She stated that, while she did not know when Melinda received the pension money, she believed that it would have been around 1991 or 1992.

62. She added that prior to Melinda's purchase of the Home, she would also visit her when she lived on Kemp Road, as she had to go home with her after school because she attended the same school where her grandmother worked. Her father tended to the upkeep of the Home such as fixing cracks in the walls, window, kitchen and leaking roof whenever it was needed, around the time it was purchased and throughout the time she lived there.

ISSUES

63. By the Agreed Statement of Facts and Issues filed the 25th July 2019, the parties agreed the following facts : - :

    1. The action relates to the ownership of Lot Number 22 & 23, Block No. 14 in the Nassau Village Subdivision.
    2. The property was conveyed to Melinda Geneva Rolle and Joseph Rolle.
    3. The Defendants are the executors of the Estate of Joseph Rolle, deceased.
    4. The Plaintiff is the grandson of Melinda Geneva Rolle (deceased) and the nephew of Joseph Rolle (deceased).
    5. The late Melinda Geneva Rolle died testate.
    6. The land Melinda which is the subject matter of this Action was held as joint tenants by the late Melinda Geneva Rolle and Joseph Rolle.

64. The parties agree that the issues in dispute are:

    1. The rules of joint tenancy upon death.
    2. Whether a contract or a trust was established by the actions of the deceased and/or her daughters?
    3. What effect does a constructive trust have on the rules of joint tenancy upon death or a joint tenant?
    4. What is the effect of the rule where one joint tenant provides all or most of the purchase money for property?
    5. What is the effect of the evidence of the intention and actions of Melinda Geneva Rolle with respect to the ownership of the subject property?
    6. What effect (if any) does the Will of Melinda Geneva Rolle have on the issue of ownership of the subject property?
    7. Where a third party acts to his detriment and experiences loss upon such action is he entitled to be compensated?

8. Does that third party have a right to claim as constructive trustee and if so what remedies are available to him?
9. What loss and damage is such a third party entitled to?

65. These issues can be determined by the consideration of two main issues:

65.1 Whether the joint tenancy was severed as a result of Melinda's Last Will and Testament and her actions during her life.

65.2 Whether a resulting or constructive trust was formed in favour of the Plaintiff?

ISSUE ONE – Whether the joint tenancy was severed as a result of Melinda's Last Will and Testament and her actions during her life?

66. In The Law of Real Property, Fifth Edition by Sir Robert Megarry and H.W.R. Wade, where at pgs. 417, 418 and 419 a joint tenancy was described as:

> **"A gift of lands to two or more persons in joint tenancy imparts to them with respect to all other persons than themselves the properties of one single owner. On the death of one joint tenant, his interest in land passes to the other joint tenants by right of survivorship (ius accrescendi). The right of survivorship does not mean that a joint tenant cannot dispose of an interest in the land independently. He has full power of alienation inter vivos, i.e. during his lifetime, though if, for example, he conveys his interest, he destroys the joint tenancy by severance and turns his interest into a tenancy in common."**

67. The Plaintiff admitted that there was no alienation during Melinda's life as there was no conveyance by her, no partial alienation by a joint tenant as there was no mortgage, life interest or other act of partial alienation given or performed by Melinda before she died and no alienation in equity as there was no evidence that any contract existed between the Plaintiff and Melinda.

68. He contended however that a unilateral declaration in writing or even a course of conduct could be accepted as sufficient to sever the joint tenancy which would create a tenancy in common if the intention to terminate the joint tenancy was made clear to the other joint tenants. The Plaintiff submitted that while Melinda did not execute a written declaration, there was a course of conduct alluded to that could reasonably be interpreted as an indication of such an intention.
69. The Plaintiff submitted that even though a Will could not sever a joint tenancy, Melinda had devised the Home to Eleanor which demonstrated her intention to sever the joint tenancy. By her conduct, he maintained that Melinda acted as if the Home was solely hers as she had engaged his services to repair the Home and gave him permission to reside there in return. Joseph never resided in the Home.

70. He relied on Griffiths L.J's findings in **Bernard v Joseph (1978) C.A. 391**, where he held that it was the intention as to beneficial ownership at the time a house was bought that was crucial and that the contributions made by the parties to the acquisition were examined to establish that intention.

71. The Plaintiff submitted that while the Home was purchased in 1991, fourteen years later on 12th January, 2005, before the death of Joseph, Melinda demonstrated her intention to assert her sole ownership in the property through the making of her Will. From this act, although it was not expressly stated, it was her intention to sever the joint tenancy.

72. The Plaintiff further submitted that the principles equity confirmed the ability of a party to sever a joint tenancy. In **Lake v Gibson (1729) 1 eq. Ca. Abr. 290, 291** it was held that where purchase money was provided in unequal shares, the purchasers were presumed to take beneficially as tenants in common in shares proportionate to the sums advanced.

73. The Defendants conversely have submitted that based on the Inheritance Act, 2002, Melinda's interest would have passed automatically to Joseph who survived her upon her death. Section 20 of the Inheritance Act states,

> **"Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, the deceased's share in the property shall upon his death pass automatically to the surviving joint tenant or tenants and shall not be treated for the purposes of this Part as part of the net estate of the deceased."**

74. They maintain that the devise of the Home in the Will was redundant as Section 20, operates outside of the purview of Wills. Any property held by joint tenants and purported to be devised as a gift under a Will, would only be operable in the estate of the last surviving joint tenant. They inherited the Home jointly pursuant to Joseph's last Will and Testament as he was the last surviving joint tenant.

75. They submit that the Plaintiff had no locus standi as he had never challenged the Grant of Probate obtained in the estate of Joseph. The Defendants additionally contended that the adding of Joseph's name to the conveyance and to the mortgage were detrimental to Joseph as it would have limited his disposable means. They added that Joseph assisted Melinda with funds to assist her with mortgage payments, food, utility payments and other expenses as she was retired and living on a small pension.

DECISION

76. This is a family dispute over the ownership of and right to occupy property.

77. There are two primary types of co-ownership of real property, ownership as tenants-in-common and ownership as joint tenants. Under a joint tenancy, each tenant is entitled to the whole land as the whole estate is vested in the joint tenants as an indivisible entity. Flowing from that ownership is the well-known doctrine of ius accrescendi, where after the death of one of the joint owners, the surviving joint owner(s) would automatically become entitled to all of the estate at the exclusion of the heirs of the deceased co-owner.

78. Sampson Owusu in his text Commonwealth Caribbean Land Law, discussed Joint Tenancy as follows:

> "Under joint tenancy, every tenant is said to be "wholly entitled to the whole" of the land. Each owns the whole property subject to the equal interest of the others. That is, to all intents and purposes, each joint tenant is in exactly the same position as any of the other joint tenants with respect to the enjoyment of the land. According to Dixon J.,
>
> > In contemplation of law, joint tenants are jointly seised for the whole estate they take in land and not one of them has a distinct or separate title, interest or possession.
>
> Thus
>
> > From the point of view of their interest in the land they are united in every respect. They therefore constitute a single owner from the outside. But as between themselves they have separate and equal rights. A joint tenant cannot lay claim to any specific portion of the property as his own. For totum tenet et nihil tenet, ie., as Watkins J.A. stated in Paton v. Roulstone, "in beneficial joint tenancy, each joint tenant holds nothing by himself but holds the whole together with his fellows."

79. As the Defendants rightfully submitted, S. 20 of the Inheritance Act also preserves the right of survivorship of a joint tenant to the share of a deceased joint tenant.

> 20. "Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, the deceased's share in the property shall upon his death pass automatically to the surviving joint tenant or tenants and shall not be treated for the purposes of this Part as part of the net estate of the deceased."

80. However, a joint tenancy can be expressly or impliedly severed, provided that all of the parties to the joint tenancy are made aware of the intention to severe. In **Joan May Lightbourne v Wenzel James Lightbourne SCCiv App No. 67 of 2014** the Court of Appeal set out the court's jurisdiction on the severance of a joint tenancy which Conteh JA stated followed the principles formulated by Vice Chancellor Sir Page Wood in **Williams v. Hensman (1861) 1 John & H 546.**

> "48. As Lord Denning noted in Burges v. Rawnsley (1975) 3 All ER 142: "Nowadays everyone starts with the judgment of Page Wood V-C in Williams v. Hensman where he said: 'A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share...Secondly, a joint tenancy may be severed by mutual agreement. And in the third place, there may be a severance by any course of dealing sufficient to intimate that that the interest of all were treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected..." at p 146 g to 147 a [Emphasis added]
>
> 49. Lord Denning then continued: "In that passage Page Wood VC distinguished between severance 'by mutual agreement' and severance by a 'course of dealing'. That shows that a 'course of dealing' need not amount to an agreement, express or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that there should no longer be held jointly but be held in common. I emphasize that it must be made clear to the other party." Ibid at p.147 a to b. [Emphasis added]"

81. In **Lightbourne**, Conteh JA held that the Court, had been satisfied by the appellant's act of taking out a summons for orders for the appraisal and sale of the properties. He added that the net proceeds divided equally between the appellant and the respondent affected a severance of the joint tenancy, as it was found that the summons clearly fell within either the first or the third rule adumbrated by Sir Page Wood VC in Williams v. Hensman.

82. He held however that not every summons taken out by a joint tenant would effect severance as much would depend on the terms, contents and object of the summons and supporting affidavit. He added that if the summons clearly showed an intention to have the court order a sale and division of the proceeds of sale among the joint owners then that would be indicative that the applicant sought the imprimatur of the court that the property is held in common and no longer jointly.

83. Equity therefore has provided co-tenants of a joint tenancy some leniency in order to sever a joint tenancy. I consider this to be an important use of the Court's equitable jurisdiction as it will assist laypersons who have entered into real estate transactions with no understanding of either of the concepts of joint tenancy or tenants in common. It can also assist laypersons who have been wrongfully advised by their counsel on these concepts and have a contrary intention. As the authorities have shown, it can assist with the breakdown of relationships, during which the intention to hold property together in a certain way has been diminished or modified as a result.

84. This jurisdiction recognizes and adheres to the three rules formulated by Page Wood V-C, by which a joint tenancy can be severed. These three rules are :

    84.1 An act of any one of the persons interested operating upon his own share may create a severance as to that share,
    84.2 Mutual agreement,
    84.3 Any course of dealing sufficient to intimate that the interest of all were treated as constituting a tenancy in common

85. In **Hansen Estate v. Hansen, 2012 ONCA 112 the Ontario Court of Appeal** considered that a testamentary disposition of property held by joint tenants fell under the third rule in **Williams v. Hensman**. The time honoured test was whether there was a course of dealing sufficient to intimate that the interests of the parties were mutually treated as constituting a tenancy in common. Therefore, the third rule of severance operates in equity to prevent one party from asserting a right of survivorship which would not do justice between the parties.

86. Winkler CJO in delivering that Court's judgment, stated:

> **"[7] A proper application of the course of dealing test for severing a joint tenancy requires the court to discern whether the parties intended to mutually treat their interests in the property as constituting a tenancy in common. It is not essential that the party requesting a severance establish that the co-owners' conduct falls into a formulation found to have had the effect of severing a joint tenancy in other**

> cases. The court's inquiry cannot be limited to matching fact patterns to those in prior cases. Rather, the court must look to the co-owners' entire course of conduct – in other words the totality of the evidence – in order to determine if they intended that their interests were mutually treated as constituting a tenancy in common. This evidence may manifest itself in different ways. Each case is idiosyncratic and will turn on its own facts."

He further stated:

> "[36] Rule 3 governs cases where there is no explicit agreement between the co-owners to sever a joint tenancy. In contrast, rule 2 is engaged where a mutual agreement to sever is claimed to exist. This distinction between rule 2 and rule 3 is significant. What follows from this distinction is that the proof of intention contemplated by rule 3 does not require proof of an *explicit* intention, communicated by each owner to the other(s), to sever the joint tenancy. If such proof were required, then rule 3 would be rendered redundant because a communicated common intention would be tantamount to an agreement. Instead, the mutuality for the purposes of rule 3 is to be inferred from the course of dealing between the parties and does not require evidence of an agreement."
>
> .....
>
> "[38] The phrase in rule 3 – "the interests of all were mutually treated" – requires that the co-owners knew of the other's position and that they all treated their respective interests in the property as no longer being held jointly. Such knowledge can be inferred from communications or conduct. The requirement that the co-owners knew that their interests in the property were being mutually treated as held in common was emphasized in *Williams v. Hensman*, at p. 867:
>
> > It will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.
>
> [39] While the determination under the course of dealing test is an inherently fact-specific assessment, the underlying rationale for rule 3 is that it is a means of ensuring that a right of survivorship does not operate unfairly in favour of one owner (or owners) where the co-owners have shown, through their conduct, a common intention to no longer treat their respective shares in the property as an indivisible, unified whole. For example, in the context of negotiations between spouses who are in the midst of a marriage breakdown, even failed or uncompleted negotiations can lead to a severance because "the negotiation of *shares* and separate interests represents an attitude that shows that the notional unity of ownership under a joint tenancy has been abandoned" (emphasis in original): *Principles of Property Law*, at p. 347."

87. Winkler CJO,, recognized that a testamentary disposition could not, in itself, sever a joint tenancy. He posited:

> "[63] I recognize that a testamentary disposition cannot, in itself, sever a joint tenancy: "the right of survivorship takes precedence over any disposition made by a joint tenant's will": *Sorensen's Estate*, at p. 35, citing Megarry and Wade, *The Law of Real Property* (London: Stevens & Sons Ltd, 1957), at p. 369. A declared intention not communicated to a co-owner is, on its own, insufficient, on its own, to establish a mutual intention to sever a joint tenancy. And I accept that no greater weight should be given to such a unilateral expression simply because it is found in a testamentary document. That said, the intention shown by Mr. Hansen's decision to leave his estate to his daughters is relevant in determining the

existence of a course of dealing under rule 3. Specifically, his decision to do so supports the case for severance insofar as the decision is consistent with other evidence that the spouses mutually treated their interests in the property as no longer being held jointly."

88. Section 32 of the Wills Act allows the Court to consider extrinsic evidence of a testator's intentions where any part of a Will appears to be meaningless and where the language used appears to be ambiguous. Section 32 states,

> **"32. (1) This section applies to a will —**
> **(a) in so far as any part of it is meaningless;**
> **(b) in so far as the language used in any part of it is ambiguous on the face of it;**
> **(c) in so far as evidence, other than evidence of the testator's intentions, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances. Interpretation of wills.**
> **(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.**
> **(3) Nothing in this section affects the will of a testator who dies before the commencement of this Act."**

89. I am tasked with determining whether Melinda and Joseph, in their lifetimes, both acted as though there was no intention to own the property as joint tenants but as tenants in common. This task is difficult as much of the evidence before me, is not firsthand evidence of Melinda and Joseph who are both deceased. Instead, I have to consider second hand evidence of the parties and their witnesses, who were not parties or witnesses to the initial agreement or the purchase of the Home by Melinda and Joseph.

90. I find it prudent to start with the documentary evidence tendered as direct evidence of Melinda and Joseph's dealings during their lifetime. By the conveyance dated the 17th January, 1991, Melinda and Joseph purchased the Home from the Bahamas Mortgage Corporation in fee simple as joint tenants, for the sum of Thirty-two Thousand dollars. A bank draft from The Royal Bank of Canada was made payable to the Bahamas Mortgage Corporation in the amount of Twenty Eight Thousand, Eight Hundred Dollars dated 9th January, 1991.

    On 12th January, 2005, Melinda executed her Last Will and Testament and devised the Home to her daughter Eleanor in fee simple absolutely.

91. On 8th January, 2009, the Registrar General indicated that the conveyance was lodged for recording by Joseph, some eighteen years later. On 16th August, 2012 Joseph executed his Last Will and Testament and, *inter alia*, devised the Home to the Defendants.

92. The documentary evidence does not suggest that both parties mutually sought to sever the joint tenancy and create a tenancy in common. It is not readily apparent that, Joseph knew of the Will during his mother's lifetime or his mother's intention to bequeath the Home to Eulalee in fee simple. The late recording of the conveyance may beg the question of his knowledge then but what it does show is that he was confirming his position as a joint tenant. The evidence suggests that Joseph only became aware of

such an intention upon or around the time of the death of Melinda on the 3rd February, 2009.

93. His actions upon his mother's death, of removing her body from the funeral home and burying her in an unmarked grave, are not indicative of any agreement or acceptance of the disposition. This lack of agreement is emphasized by the execution of his Will some seven years later when he devised the Home to the Defendants.

94. Additionally, having considered the evidence of the witnesses, I accept that the majority of the money used to purchase the Home was contributed by Melinda and that Joseph was only involved as a result of Melinda's age at the time the Home was purchased. In the Privy Council's decision of **Whitlock and another v Moree [2017] UKPC 44** which followed **Stack v Dowden [2007] UKHL; [2007] 2 AC 432,** the Law Lords opined that:

> **"25..... Indeed, in the context of joint residential property, the presumption that the beneficial interest accrues to the provider of the money has now been replaced by the opposite assumption, namely that the beneficial interest follows the joint legal title unless the contrary is shown: see Stack v Dowden [2007] UKHL; [2007] 2 AC 432, paras 53 and following."**

95. I accept that Joseph collected and used her pension money towards the monthly maintenance of the Home, in addition to carrying out minor repairs to the Home and visiting the Home. Additionally, I accept that Eleanor and her husband were allowed to reside in the Home but were never able to substantially contribute to the Home. Likewise, I accept that it was Melinda's intention to leave the Home to Eleanor as was evidenced in her Will and that she and Eleanor agreed that the Plaintiff should carry out the repairs on the Home, who as a result carried out certain repairs. Melinda intended to sever the joint tenancy but there is no evidence of making Joseph aware of such an intention.

96. Further, Joseph's acts during his life time do not suggest that he intended to own the property as a tenant in common. His will was executed after the death of Melinda. There was nothing done during his life to suggest otherwise.

97. I also accept that only after the deaths of Melinda, Eleanor, Joseph and Oscar did, the Defendants in fact address their claim to the Home in 2017, prior to the Plaintiffs occupation of the Home , which prompted the Plaintiff to make an offer to purchase the Home.

98. In considering the evidence in its totality, I find that the Last Will and Testament of Melinda could not dispose of her interest in the Home, as during both her and Joseph's, lifetime, there were no mutual acts which could constitute a severance of the joint tenancy. As a result, after Melinda's death, her share in the Home automatically transferred to Joseph who became the sole owner of the Home.

ISSUE TWO – Whether there was a presumption of a resulting trust or a constructive trust as a result of the oral agreement between the Plaintiff, Melinda and Eleanor?

99. The Plaintiff submitted that a presumed resulting trust arose in circumstances where one party purchased property in the name of him/herself and another party. Further, that the degree of proprietal interest would be determined by the amount of the purchase price provided by the parties respectively and, that contributions to the acquisition of property which entitled the contributor to an interest in the property would include deposit payments and mortgage payments.

100. He contended that Melinda's conduct in her lifetime was sufficient to sever the joint tenancy between herself and Joseph and that he was entitled to a licence to reside in the Home based on the oral agreement as the payment of all of the purchase money by Melinda favored the creation of an implied resulting trust in Melinda's favor. She was therefore entitled to full ownership of the Home

101. In the alternative, the Plaintiff contended that a constructive trust of Melinda's interest was created in favor of her daughters, Eleanor and Eulalee and himself during her lifetime.

102. The Plaintiff relied on **Cowcher v Cowcher (1972) 1 W.L.R. 425** which provided an example of how far the law was extended to recognize the circumstances of the creation of a resulting trust. In **Cowcher**, instead of H paying 60 pounds sterling per month and W paying 30 pounds sterling per month of a 90 pounds sterling mortgage, W paid 30 pounds per month towards housekeeping which was sufficient to establish a resulting trust.

103. The Plaintiff submitted that while there was a strict view that payments for building extensions to a house fell foul of the rule of implied resulting trust, the exception to this rule was where there was some agreement to the contrary or where one party's conduct estopped the other party from denying the claim. While the Law of Property and Conveyancing Act required all agreements related to land to be in writing, this prerequisite however, did not prohibit the creation of resulting or constructive trusts and relied on. Nathan & Marshall, Cases and commentary on the Law of Trusts, 7th Edition where Hayton J stated:-

> **"A constructive trust may be imposed to benefit A if an agreement existed for A to acquire an interest in the property and it would be fraudulent or unconscionable for B to plead the lack of writing."**

104. The Plaintiff further relied on **Hussey v Palmer (1972) 3 ALL ER 744** where Lord Denning held that money paid by a Mother-in-Law for an extension to her Son-in-Law's house, gave her a proportionate equitable interest in the house under a constructive trust because justice and good conscience required it along with the equitable proprietary estoppel principle.

105. The Plaintiff also relied on **Hodgson v Marks (1972) Ch. 892** where Lord Denning stated:

> **"Whenever a purchaser takes the land impliedly subject to the rights of a contractual licensee, a court of equity will impose a constructive trust for the beneficiary...when a licensee is in actual occupation neither the licensor nor anyone else who claims through him can disregard the contract except a purchaser for value without notice."**

106. The Defendants, on the other hand, maintained that Eleanor only resided in the Home because she was ill and financially unstable. They argued that Eleanor did not have the legal right or capacity to give the Plaintiff the right to enter into possession of the Home. They further contended that the Plaintiff never invested anything at all in the Home while Melinda, Eleanor or Joseph was alive.

107. Likewise, they submitted that the Plaintiff could not rely on the principle of proprietary estoppel because there was no evidence to suggest that the Plaintiff confronted Joseph during his lifetime nor was there evidence to suggest that the Plaintiff attempted to enforce his purported rights against Joseph.

108. They relied on several authorities in support of their contention that the Plaintiff could not rely on proprietary estoppel. The first being **Dobson v Griffey [2018] EWHC 1117 (CH)** where it was stated,

> **"24. The doctrine of proprietary estoppel operates in a similar way. First of all the defendant landowner by his words or conduct makes an assurance to or creates an expectation in the claimant. It need not be the promise of a specific right or interest, as long as it is clear enough in all the circumstances: see *per* Lord Walker in *Thorner v Major* [2009] 1 WLR 776, [29]. At this stage this is not an enforceable obligation. It does not comply with the relevant formalities rules. But, assuming that it is intended to be relied upon by the claimant, and it is relied upon, to her detriment, such that it becomes unconscionable for the defendant to resile from it, an equity is thereby raised against the defendant. The equity thus created is an interest in the property which does not need to comply with any relevant formalities rules, because it operates by way of *imposing* a trust on the defendant to satisfy it, and constructive trusts are outside the scope of those rules: see the Law of Property Act 1925, s 53(2). The claimant is then entitled to an appropriate remedy to satisfy the equity. This may be an order for the defendant to perform the promise itself. Or it may be something else, perhaps the payment of money by the defendant to the claimant."**

109. In **Hussey v Palmer (1972) 3 ALL E.R. 744**, the Plaintiff, Mrs. Hussey, an elderly woman, was persuaded by Mr. Palmer, the Defendant and his wife (who was the daughter of the Plaintiff) to sell her house and live with them; which Mrs. Hussey did. However, as the Defendant's house was too small for all of them to live comfortably, the Plaintiff, with the approval of the Defendant and her daughter paid for the construction of an additional bedroom onto the house at the costs of £607.00. Later due to conflicts between the parties, the Plaintiff moved out of the house and sought from the Defendant, the financial costs of the additional bedroom which the Defendant refused.

110. Lord Denning MR ruled that the Plaintiff had obtained an equity in the property and that the Court must look at the circumstances of each case to decide in what way the equity

can be satisfied. Lord Denning ruled that the Plaintiff had an interest in the property proportionate to the amount paid by her.

111. The Defendants reiterated that the Plaintiff only invested in the Home in 2017, after his offers to purchase it were rejected. As Melinda was dead, the Plaintiff only could have made an agreement with Joseph to establish a constructive trust but there was no proof of its existence.

DECISION

112. In **Lockhart v. Ferguson [2011] 2 BHS J. No. 16**, Adderley J discussed how the presumption of a resulting trust would usually arise.

> **"16 The well settled principle that there is a presumption of resulting trust in favor of the person who provided the funding to purchase the property applies. The question in this case is whether there was any agreement between the parties and if so what were its terms and whether those terms constitute evidence of an intention to rebut the presumption of a resulting trust."**

113. In **Lockhart**, the plaintiff and the defendant were romantically involved for almost five years. The Defendant was unmarried and lived alone and the Plaintiff was married and lived with his wife and children. However, he saw the Defendant every night. During the course of their relationship, the Plaintiff purchased property the title for which was placed solely in the Defendant's name, although, he provided the funds for the deposit, the stamp duty, the legal fees and the monthly mortgage payments.

114. There was a breakdown in the relationship and the Plaintiff requested that the Defendant convey the property to him. The Defendant refused as she claimed that the property was gifted to her by the Plaintiff. The Plaintiff denied that the property was a gift as it was his intention to construct six units on the property, to build three first, sell two and give one to the Defendant.

115. The Court found that the Defendant acted as the Plaintiff's agent in securing the mortgage but she had a proprietary interest as the evidence rebutted the presumption of a resulting trust solely in favor of the plaintiff and showed that there was an intention that each party should benefit equally.

116. In **Sweeting v. Finlayson - [2010] 3 BHS J No. 36**, Adderley J. stated that to conclude whether there was a presumption of a resulting trust, he had to decide as a question of fact, what was the common intention of the parties. In that case, the question for determination was whether the defendant held property on an implied constructive or resulting trust for herself and the plaintiff based on an implied term that the defendant agreed that he would have an interest in the property.

117. In **Sweeting**, in or about 1996 the defendant started to build a house on her land from personal resources. She reached as far as the foundation or possibly the belt course. The plaintiff, began to assist her in completing the house. The defendant moved in to the house in 1998. The Plaintiff claimed to have moved in with her during 2001. The house was fully completed around 2005. In March 2006 the relationship between the

plaintiff and the defendant ended at the instance of the defendant and the plaintiff was barred from the house by the defendant.

118. At the time the plaintiff started contributing to the building of the house, he was no longer married and he, had discussed marriage with the defendant and had also discussed that the house would become the matrimonial home. This evidence was not denied or contradicted by the defendant. Adderley J stated that even though there may have been a common intention to move into a house which would serve as the matrimonial home, on its own, that did not mean that there was a common intention that the claimant would acquire a beneficial interest in the defendant's property. He added that one must have regard to what a reasonable man would infer from their words and actions.

119. Having reviewed the evidence in its entirety, Adderley J held that in the context in which the plaintiff commenced with assisting with the building of the house and the actions that followed, there was a common intention of the parties that the plaintiff would have a beneficial interest in the house as the matrimonial home. More importantly, the house was a fixture and by law became a part of the land therefore his interest was vested in the property. As a result, he declared that the property was held by the defendant on trust for herself and the plaintiff.

120. Likewise I must decide whether there was a common intention between Melinda and the Plaintiff for him to have a beneficial interest in the Home. I have previously accepted that there was in fact an oral agreement between Melinda, the Plaintiff and Eleanor whereby it was agreed that the Plaintiff could live in the Home if he carried out repairs to the Home. I do not accept however that the repairs carried out to the Home during Melinda's lifetime were major.

121. The evidence of the Plaintiff and his witnesses suggest that Melinda stated that the Plaintiff could live in the Home indefinitely, but there was no suggestion that he would own the Home, as the Home was devised to Eleanor, who in addition to the Plaintiff would have other heirs who could inherit the Home upon her death. Accordingly, I do not accept that there was an intention for the Plaintiff to acquire a beneficial interest in the Home, only a right to live there.

122. In any event, how does Melinda and the Plaintiff's oral agreement and their subsequent common intention, if any, weigh against the conveyance executed between Melinda and Joseph which expressly states that Melinda and Joseph purchased the Home as joint tenants. More importantly, can there be a presumption of a resulting trust if it has been found that there was clearly no intention by Joseph to sever the joint tenancy.

123. In **Whitlock and another v Moree (supra),** the Privy Council, although ultimately making a finding in relation to the presumption of a resulting trust with respect to a joint bank account, discussed the presumption with respect to property. Lord Briggs discussed the common law position:

> **21. Under the common law, legal title to (as opposed to beneficial ownership of) property in co-ownership can only be joint title. Survivorship, that is the devolution**

of those legal rights upon the survivor or survivors of joint owners is an inevitable, indeed inherent, aspect of joint legal title.

22. In sharp contrast, joint ownership (often called joint tenancy), with a right of survivorship, is only one of numerous ways in which property may be co-owned beneficially. The interposition of a trust between the persons with legal title and the beneficial owners means that there is an almost infinite variety of ways in which the property may be beneficially co-owned, even when the beneficial owners are the same as those holding the legal title.

23. There are well-established principles which assist the courts in resolving disputes as to beneficial ownership of property, and the order in which what may be described as the contents of an equitable toolkit are to be deployed for that purpose. Thus, where the relevant property is transferred to the legal holders by a written instrument, a statement as to the beneficial ownership of the property in that instrument is usually conclusive: see *Vandervell v Inland Revenue Commission* [1967] 2 AC 291, at 312 per Lord Upjohn. The same passage makes clear that any question whether the instrument does address beneficial ownership, and any issue as to what that beneficial ownership is, falls to be decided as a matter of construction of the instrument, which is an objective process, in which evidence as to the subjective intention of the maker of the instrument is inadmissible. See also *Inland Revenue Commission v Raphael* [1935] AC 96, per Lord Wright at 142-143. Of course, the binding effect of instruments of that kind is subject to the usual equitable challenges such as fraud, duress, undue influence, misrepresentation and rectification, and to the more restricted common law doctrines of *non est factum* and mistake: see generally *Goodman v Gallant* [1986] Fam 106, at 114A-117D.

24. Next, the co-owners receiving a transfer of property into joint names may themselves declare their agreement as to the beneficial interests on which that property is or is to be held and, if they do so in a written instrument, such as the conveyance to them, the identification of those beneficial interests will again be a matter of construction of the instrument, and recourse to doctrines of resulting, implied or constructive trust is impermissible: see *Pettitt v Pettitt* [1970] AC 777, per Lord Upjohn at 813 and *Gissing v Gissing* [1971] AC 886, per Lord Diplock at 905.

25. Persons acquiring property, in particular residential property in joint names, at least in England, have a notoriously poor track-record in making an express declaration as to their beneficial interests in relation to the property. In the numerous cases where this has not been done, equity has recourse to a variety of techniques for establishing what those beneficial interests are. They include the constructive or common intention trust, the implied trust and the resulting trust. Generally speaking, the resulting trust is the solution of last resort, where the intention of the joint holders of the property as to their beneficial interests cannot otherwise be ascertained. Indeed, in the context of joint residential property, the presumption that the beneficial interest accrues to the provider of the money has now been replaced by the opposite assumption, namely that the beneficial interest follows the joint legal title unless the contrary is shown: see *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432, paras 53 and following."

Lord Briggs concluded:

"29. The application of this simple analysis based upon established principles about the ascertainment of beneficial interests in co-owned property leads the Board to this conclusion: that where two or more holders of a joint account all sign an account opening document (or separately sign identical documents) which, on their true construction, declare or set out their respective beneficial interests in the property constituted by the account (loosely, the money in the account), then

those are the beneficial interests of the account holders, pending any subsequent variation of them by agreement or otherwise, and an examination of the subjective intentions of the account holders, or of those of them who place money in the joint account, is neither relevant nor permissible. Still less is recourse to the doctrine of presumed resulting trusts permissible, because the potential beneficial owners have declared what are their beneficial interests by signed writing. Further, this must be *a fortiori* the position where the accounting documents contain an express assignment of the type found in clause 20 in the present case, although this is not in the Board's view necessary for the application of this principle.

30. A number of consequences flow from this conclusion. The first is that the question whether the attention of an account holder was drawn to the terms of any such declaration as to beneficial interest, or had it explained, is in principle irrelevant, unless of course a case of mistake or *non est factum* is being deployed, or the document is challenged on the basis of fraud, duress, undue influence, misrepresentation and the like, or if it is sought to be rectified. In all those cases the onus lies squarely on the person challenging the effect of the document, and no such case has been advanced in these proceedings. The reason why the extent to which the document has been read, explained to or understood by an account holder is irrelevant is because the document is determinative of itself in relation to the beneficial interests in the account, rather than merely a guide, of infinitely variable weight, to the common intention of the account holders or to the intention of those of them who deposited money in the account.

31. The second is that there is plainly no room for the application of the doctrine of presumed resulting trusts, in favour of an account holder who places money in the account, as Mr Lennard did in this case. This is because the account holder is a party to the document which is determinative of the account holders' beneficial interests, and because they have been ascertained by the primary tool for the determination of any dispute as to beneficial interests, namely the terms of the document creating or transferring the property, just as much as beneficial interests in other types of co-owned property are determined by a conveyance, a transfer or a declaration of trust.

32. The third consequence is that, where such a document upon its true construction does deal with the beneficial interests of the account holders, the question what precisely those interests are is a question of law (like any other question of construction) and not a fact-finding exercise. Provided therefore that there is no factual uncertainty about the terms of the relevant document, an appellate court is as well placed as the trial judge to apply the law, that is, to construe the document. To this general proposition may be added this caveat: that the first instance and appellate courts which sit habitually in the jurisdiction where the relevant documents were created and signed may sometimes be better placed than this Board, because they may be better attuned to the context of business life against which the document falls to be construed.

33. This is all as it should be. 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."

124. The Privy Council held that there is no presumption of a resulting trust by one party for another where there is a document signed by the parties which states that the property would be owned by them as joint tenants. That signature by the parties on a formal document would constitute their intention to hold both the legal interest and the beneficial interest. Accordingly, there was no presumption of resulting trust established by Joseph in favor of Melinda.

125. I find that the oral agreement and repairs carried out by the Plaintiff would not be able to supersede the conveyance executed by Melinda and Joseph, as I am not satisfied that there was any severance of the joint tenancy. Had the joint tenancy been severed, the property would have been owned by Melinda and Joseph as tenants-in-common, and her share of the Home could have evolved to her estate upon her death and the presumption of a resulting trust based on the oral agreement could thereore be considered. Further, there was no intention by Melinda to give the Plaintiff an interest in the Home, only the right to live there.

126. Additionally, the renovations on the Home were not agreed to by both the Plaintiff and Joseph nor the Plaintiff and the Defendants. Accordingly, there could be no presumption of a resulting trust formed in favour of the Plaintiff.

127. On the issue of constructive trusts, I adopt the findings of Winder J in **Bodie and another v. Storr (Administratrix of the estate of Joseph Alexander Storr) - [2017] 2 BHS J. No. 94**, where he discussed the concept of a constructive trust:

> **"14 According to the learned authors of *Hanbury & Martin Modern Equity (20th ed)*, a constructive trust is one which arises by operation of law and not by reason of the intention of the parties, expressed or implied. The principle, they say, is that where a person who holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another, he will be compelled to hold the property on trust for that other. (See *Soar v Ashwell [1893] 2 QB 390*) A constructive trust is said to arise where, in the absence of a declaration of trust, the trustee has induced another to act to their detriment in the belief that if they do so they would acquire a beneficial interest in the land. See: *Gissing v Gissing [1971] AC 881.***
>
> **15 I should add that the Plaintiffs do not specifically raise constructive trust and they do not aver or state that they acted to their detriment. In any event, the sharing in the payment of the mortgage for a home and its utilities, in circumstances where the First Plaintiff and her two children also occupy the premises and consume the utility services cannot, ipso facto, be acting to their detriment. Further, whilst the examination of the evidence is a matter reserved for trial, it cannot be ignored that the evidence as to payments to the mortgage and utilities produced by the First Plaintiff in her affidavit, shows that these payments were, in large measure, made entirely from the personal checking account of the deceased and not by her as she alleges.**

16 The Plaintiffs have not shown, by case law or otherwise, where equity and good conscience would, in the present circumstances, compel the deceased's estate to hold the property on trust for them. Perhaps they will seek to do so at trial."

128. The joint tenancy was not severed. During the lifetime of Melinda, there was no mutual agreement between herself and Joseph that the Plaintiff would be able to enjoy or occupy the Home if he effected certain repairs to it. Accordingly, no constructive trust was created between the three. As for Melinda alone, she induced the Plaintiff to effect repairs to the Home in exchange for his living there but, no substantial repairs were made until after both her and Joseph's death, when the Home had passed, by operation of law, to the Defendants who had urged the Plaintiff not to continue with the repairs.

129. I therefore do not consider that during the lifetime of Melinda, a constructive trust was created. Additionally, I do not consider that a constructive trust was created between the Defendants and the Plaintiff.

COUNTERCLAIM

130. The Defendants seek from the Plaintiff, forty thousand dollars, which sum would represent the rental value of the Home from November 2017 to March 2019. They also seek an additional sum for loss of opportunity to rent the Home and loss of income from the Home. They seek these sums as a result of the Plaintiff negligently residing in the Home, despite having knowledge of their ownership of the Home and after being warned to not to reside in the Home.

131. Having considered the evidence in its totality, I accept that after the death of Oscar in 2015, the home was vacant and in disrepair. As a result, the Plaintiff, in order for the home to become habitable, had to carry out renovations and repairs to the Home amounting to $22,088.20. As the Home was in a state of disrepair and could not be lived in, the Defendants would not have lost any rental opportunity or loss of income if the Plaintiff was not in the Home. There was no evidence tendered by the Defendants that supplies were purchased or plans were made to renovate the Home. I therefore decline to make any order for the repayment of the Forty Thousand Dollars and loss of rental opportunity and loss of income.

132. The joint tenancy was not severed between Melinda and Joseph. There were no substantial repairs and renovations carried out to the Home by the Plaintiff, during Melinda's lifetime and the Plaintiff was aware of the Defendants' claim to the Home prior to his 2017 occupation and renovation of the Home. Notwithstanding, repairs were carried out by the Plaintiff which alternatively would benefit the property of the Defendants. As a result, I hereby order that the Plaintiff be reimbursed a quarter of the $22.088.20namely $5,522.054, which was the sum spent on the renovations of the Home, less, a deduction for the rental of premises for a period of three years.

133. There was no agreement between the Plaintiff and the Defendants for him to carry out the repairs and renovations to the Home in exchange for his indefinite residence in the

Home. Joseph nor the Defendants held the Home upon trust for Melinda or subsequently for the Plaintiff and the Plaintiff is not entitled to a beneficial interest in the Home. The Plaintiff's claim for an injunction therefore falls away.

134. The Defendants are awarded their costs of this action to be taxed if not agreed.

Dated this 10th day of September 2021

Hon. Madam Justice G. Diane Stewart