COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Divisions

2020
CLE/gen/No.01042

BETWEEN

SHARON MATHER

Plaintiff

AND

CHRISTOPHER JOHN WHEATON

Defendant

Before: The Hon. Madam Justice J. Denise Lewis-Johnson
Appearances: Alexander Mallis for the Plaintiff
Chizelle Cargill with Tonesa Munnings for the Defendant
Hearing dates: 16 March, 17 March, 23 March and 25 March 2022

Equity – Real property – Presumption of advancement - Mother purchasing property in joint names of daughter and son-in-law – Whether funds were provided out of a parent's natural love and affection - Whether presumption sufficiently rebutted - Intention of the donor at the time of acquisition – Relevant considerations.

JUDGMENT

Introduction

1. By an Amended Generally Indorsed Writ of Summons and a Statement of Claim both filed 26 March 2021, Sharon Mather ("the Plaintiff") claims against Christopher Wheaton ("the Defendant"), inter alia, the sum of $358,780.00 representing the Defendant's one-half of the debt incurred with the Plaintiff for the acquisition by the Defendant and his wife of Townhouse 17A situate upon a portion of Lot 17 Sandyport Farms, in the Sandyport Development, and other related fees associated with the purchase advanced by way of loan to the Defendant and his wife.

2. The Defendant denies the Plaintiff's claims and maintains that at no time did he enter into a loan arrangement with her. He alleges that any sums advanced by the Plaintiff to him, and his wife were voluntarily given as gifts and not as a loan.

Background

3. The Plaintiff is the mother of Alana Wheaton ("Alana") and the mother-in-law of the Defendant. Alana has filed a Petition in the Supreme Court of The Bahamas for a dissolution of the marriage in February 2019 and proceedings are presently ongoing.

4. The Defendant and Alana were married on 15 June 2002.

5. The Defendant is a Canadian citizen residing in The Bahamas.

6. In 2005 the Defendant migrated to The Bahamas from Canada to be with Alana, who had moved to Nassau at the end of 2004. Due to the costs associated with relocation, the couple was not in a position financially to secure a home to their desired standard.

7. The Plaintiff offered the couple the use of her condominium unit at Conchrest on West Bay Street in Cable Beach rent free.

8. Once the couple found a prospective home, the Plaintiff provided funding to the couple to complete the purchase of the property.

9. In 2006, the Plaintiff advanced, certain sums, on behalf of the Defendant and Alana, for the purchase of Lot 17A Sandyport Farms, in the Sandyport Development. The Defendant and Alana hold the property as joint tenants.

10. Shortly after the purchase was completed, the couple sent monthly payments of approximately $1,630.00 to the Plaintiff until February 2019 which coincides with when the marriage broke down.

11. In 2006, the Defendant and Alana obtained Homeowner's Insurance for the Property. The Plaintiff has paid the Homeowner's Insurance premiums for the property from 2006 to date of the trial of the matter and is cited as Mortgagee/Loss Payee on the homeowner's insurance policy.

12. The Defendant obtained term life insurance with Atlantic Medical in 2016. He assigned his interest in the Atlantic Medical life insurance policy to the Plaintiff purportedly as a collateral security. The Plaintiff paid the premiums for the Defendant.

13. During the Amnesty Period in 2013, the Plaintiff has made payments toward the real property taxes outstanding on the Property.

14. In May 2019, the Plaintiff received a payment of approximately $1,630.00 from Alana, solely.

15. On 30 March 2020, in response to a formal legal demand made by the Plaintiff, Alana executed a mortgage in favour of the Plaintiff to secure the debt of $359,595.00 against her one-half interest in the property. The said mortgage is recorded in Volume 13419 at pages 555 to 564. The Defendant has refused to sign a Mortgage.

Issue

16. The issues which arise for determination are:
    a. Whether the money advanced by the Plaintiff to the Defendant and Alana, to purchase the Property was advanced as a gift or a loan?
    b. If the purchase money was given as a loan:
        i. How much money was advanced by the Plaintiff to the Defendant and Alana to purchase the Property?
        ii. What were the terms of the loan for the Purchase Money. Was interest to be applied? If so, what was the rate of interest to be applied? What was the period of repayment for the Purchase Money?
    c. Whether the monthly sums given to the Plaintiff by the Defendant and Alana were intended to be loan payments for the Purchase Money?
    d. If the Court finds that the monthly sums were given to the Plaintiff as repayment of a loan for the Purchase Money:
        i. How much has the Defendant and Alana paid to the Plaintiff in monthly installments to date?
        ii. Were the installment payments interest only payments, principal payments or blended payments?
        iii. What, if anything, is the Plaintiff entitled to be repaid with respect to the Purchase Money?
    e. Whether the money paid by the Plaintiff for the Homeowners Insurance Premiums on the Property was a loan to the Defendant and Alana? If so:
        i. How much money has the Plaintiff paid for the Homeowners Insurance for the Property?
        ii. What were the terms of repayment for the loan for the Homeowners insurance premiums?

iii. Is the Plaintiff entitled to repayment of the sums paid by her, or any other sum, for the Homeowners insurance premiums?

f. Whether the money paid by the Plaintiff for the Defendant's Life Insurance Premiums was a loan to the Defendant and Alana? If so:
   i. How much money has the Plaintiff paid for the Life Insurance Premiums?
   ii. What were the terms of repayment for the loan for the Life Insurance Premiums?
g. Whether the money paid by the Plaintiff for the Real Property Taxes for the Property was a loan to the Defendant and Alana? If so:
   i. How much money has the Plaintiff paid for the Real Property taxes?
   ii. What were the terms of repayment for the loan for the Real Property Taxes?
   iii. Is the Plaintiff entitled to repayments of the sums paid by her, or any other sum, for the taxes?
h. Whether the Plaintiff Is entitled to recover from the Defendant any other sums claimed by her in the Statement of Claim and if so, what sum is justly due to the Plaintiff?

The Evidence

Sharon Mather

17. The Plaintiff testified that she originally agreed to provide financing to the couple in the form of a bridge loan from funds which she saved for her retirement. According to her, at this time she had a good relationship with the couple. On this basis she provided the initial deposit of $52,000.00 made out to the office of Gus Constantakis by FINCO draft.

18. The Plaintiff avers that she initially proposed a loan of $500,000.00 based upon a term of 25 years and an interest rate of 6% per annum with monthly interest only payments and periodic balloon payments from time to time on the principal. She claims that the purpose of the loan was to provide a structure by which the couple could afford the home, while providing her with a stable income for her senior years and if and when they could finance to pay her out, they would.

19. The terms are evidenced in a copy of the proposal letter drafted 21 March 2006; the letter was unsigned by the couple. Further, she acknowledges that the terms in the draft mortgage letter dated 21 March 2006 are inconsistent with the terms pleaded in the Statement of Claim.

20. During cross-examination the Plaintiff confirmed that there is no document between the parties that set out the settled terms of a loan agreement. She claims that the parties operated based on a verbal agreement.

21. While she accepted that she instructed the insurance provider to list her as mortgagee or loss payee on the documents, she furthered explain that she would not have been named as such without the express knowledge and consent of the couple.

22. From the time that she began paying the insurance premiums in 2006, she never once demanded that the Defendant and Alana repay the premium to her, nor did she request that they contribute at all to the premium amounts.

23. The Plaintiff further indicated that she paid the insurance premiums over the years in order to protect her investment in the manner in which any bank will pay a policy to protect its security.

24. She admitted during her oral testimony that she never sent the couple any correspondence asking them to repay the purported loan from 2006 to 2020.

Gus Constantakis

25. Mr. Constantakis confirmed that the Plaintiff agreed to provide bridge financing to the couple to purchase the home. He further recalled that the deposit monies were provided by the Plaintiff and made to his office by FINCO draft, but this was not in dispute.

26. Under cross-examination Mr. Constantakis indicated that he in fact does not recall communication with the Defendant directly regarding the terms of the agreement for sale as the events occurred almost 17 years ago, and he no longer had the file. He also revealed that he did not make any application for Central Bank approval on behalf of the couple nor did he prepare a loan agreement for the parties.

Lori Lowe

27. Mrs. Lowe's stated that in April 2006 her offices were instructed to prepare a mortgage from Christopher and Alana Wheaton to Sharon Mather.

28. Mrs. Lowe claims that it was the Plaintiff who provided the instructions to prepare a draft mortgage over the property. She confirmed that she never received any instructions from The Defendant or Alana with respect to the mortgage.

29. She testified that due to an administrative oversight the mortgage was never executed.

Christopher Wheaton

30. The Defendant recalled that he and Alana sold their home in Canada to which they made a profit of $100,000.00. He avers that it is very likely that they used some of the money to contribute toward the purchase of the Sandyport property.

31. The Defendant admits to receiving certain sums from the Plaintiff, but states that they were intended as a gift to the parties and the sums related solely and exclusively to the purchase price of the property. The sums were provided out of the natural love and affection for the Plaintiff's daughter. There was no agreement for repayment at the time of making the offer.

32. He testified that due to his former knowledge of mortgages in Canada, he would have never agreed to an interest only loan with the Plaintiff as such an arrangement would not have benefitted him and Alana.

33. The Defendant proclaims that it was the Plaintiff that took the lead in overseeing the purchase process and engaged an attorney, Gus Constantakis, to act on his and Alana's behalf in the sale. It was his understanding that, as part of her offer to help, she would cover any incidental costs associated with purchasing the property, which included closing costs and attorney fees.

34. According to him, as an expression of his gratitude, he wanted to try to repay the Plaintiff for her kindness as best as he could. He claims that it is for this reason that he and Alana began making voluntary monthly payments to her.

35. He conceded during cross examination that there are no thank you letters or notes, email or correspondence expressing gratitude or anything of that nature before the court.

36. The Defendant states that the Plaintiff is only claiming that a debt is owed to her due to the contentious divorce proceedings he and Alana are involved in.

Order 73 Rule 2

37. The Defendant submits that as the present action is one for the recovery of money purportedly lent, it should be considered a money lending action and attract the provisions of **Order 73 Rule 2 of the Rules of the Supreme Court**.

38. **Order 73 Rule 1 (2)** of the RSC provides:-

> **(2) In these Rules —**
> ---
> **"money-lending action" means any action for the recovery of money lent or for the enforcement of any agreement or security relating to money so lent, being an action brought by the lender or an assignee, and includes any action to which section 3 of that Act applies.**

39. Rule 3 also provides:

> **(3) Every statement of claim in a money-lender's action (whether indorsed on the writ or not) must state —**
> **(a) the date on which the loan was made;**
> **(b) the amount actually lent to the borrower;**
> **(c) the rate per cent, per annum of interest charged;**
> **(d) the date when the contract for repayment was made;**
> **(e) the fact that a note or memorandum of the contract was made and was signed by the borrower;**
> **(f) the date when a copy of the note or memorandum was delivered or sent to the borrower;**
> **(g) the amount repaid;**
> **(h) the amount due but unpaid;**
> **(i) the date upon which such unpaid sum or sums became due; and**
> **(j) the amount of interest accrued due and unpaid on every such sum.**

40. The Defendant that the Plaintiff has failed to plead her case in accordance with requirements set out in **Order 73, Rule 2 of the Rules of the Supreme Court** and suggests that in the exercise of its inherent jurisdiction, the Court should not entertain any claims advanced by the Plaintiff for the recovery of a loan where the particulars have not been pleaded in compliance with Order 73 Rule 2 of the RSC.

41. Support for the Defendant's argument was garnered from the case of **Gordon v. Venice Bay Holdings Limited and others; Venice Bay Holdings Limited and another v. Nicholas Gordon; Bailiwick Investments Limited v. Venice Bay Holdings Limited; Venice Bay Holdings Limited v. Baliwick Investments Limited [2009] 1 BHS J No. 41**, where Lyons J considered the effect of a failure

to plead a money lending action in accordance with the provisions set out at Order 73 Rule 2.

42. Lyons J proclaimed:

> **"as Order 73 r 2 applies, the Plaintiff in each respective action is required to plead particulars of the date on which the loan was made and the amount of interest accrued due and unpaid on every such sum. If not pleaded in the statement of claim, the pleading is deficient and is hence irregular.**
>
> **This irregularity can only be pleaded [cured : sic] by amendment to the pleading, not by provision of further and better particulars. As it is the original pleading that is irregular, it stands to reason that it is to this irregular pleading that the party concerned must turn so as to cure the irregularity. [emphasis added]**

43. The Court wishes to highlight the words of the Honourable Dame Anita Allen, P in **Anson Springer v Francois Burrows SCCivApp & CAIS No. 60 of 2013**;

> **"The Respondent asserted that the case was an action based on a promissory note and properly grounded in Order 73 of the Rules of the Supreme Court as a money lending action. -**
>
> **We found that while Ord. 73, Rule 1(2) defined what a money lending action is, it seems that its intent and purpose is to regulate persons who are in the business of lending money and taking security. Money Lenders have a special connotation in law. They have to be licensed, for example, and the Respondent cannot be said to be a money lender for the purposes of the Act. We do note however, that Rule 2 states that "every statement of claim in a money-lender's action ...", which is often misinterpreted as meaning that anytime one person defaults on a money loan to another, it should be brought under the Money Lending Act."**

44. I refer to Order 2 Rule 1 which states:

> **"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings,**

any step taken in the proceedings, or any document judgment or order therein." [Emphasis Added]

45. In Tiffany **Glass Ltd. v. F Plan Ltd (1979) 31 WIR 470**, Kelsick JA held:

> **"Entry of an unconditional appearance to a defective writ waives any objection to the jurisdiction of the court as well as any irregularity in the commencement of the proceedings. So also does any fresh step taken, with the knowledge of the irregularity, with a view to defending the action on its merits. See the note to Order 2, rule 2, in the Supreme Court Practice 1979, page 10, and the cases there cited. In my judgment the failure to comply with Order 6, rule 2(1)(c), was an irregularity which was waived by the Defendant when it entered an unconditional appearance to the writ."**

46. Considering Order 2 Rule 1 and all the fresh steps taken by the Defendant, the Defendant has waived any and all irregularities.

47. Further, I do not believe that the current action is suited to be brought under Order 73. The Rules makes provisions for those who can be deemed 'money-lenders'. The average man who lends funds, or in the present case a mother to a child and her son-in-law cannot, for the purposes of Order 73, be viewed as money lenders. The Plaintiff is not in the business of lending money. Before us is a simple debt action.

48. Accordingly, I find the argument without merit. The Defendant has taken numerous fresh steps in this matter thereby accepting, waiving and curing any irregularity that existed.

Presumption of advancement

49. The Defendant's main contention is that he claims to benefit from the presumption of advancement either directly relying on the doctrine in loco parentis or collaterally, through Alana as the daughter of the Plaintiff. It is submitted on behalf of the Defendant that any sums provided by the Plaintiff to the Defendant and Alana were given as gifts, gratuitously, and not as a loan.

50. The law is well-established that when a donor purchases property in the name of another there is a presumption that the recipient holds the said property on a resulting trust. Where the transactions involve a closer relationship between the parties, a presumption of advancement applies, and the recipient is vested with

the legal and beneficial interest in the property. The presumption is rebuttable once evidence is produced that demonstrates a contrary intention. The burden of proof rests on the donor to show some other intention. In this case the onus is on the Plaintiff **(Stack v. Dowden [2007] UKHL 17).**

51. The presumptions were discussed by Viscount Simonds in the case of **Shephard v Cartwright [1955] AC 431 at 445**. His Lordship proclaimed:

> **'I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: Finch v Finch (1808) 15 Ves 43.**
>
> **It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well-settled law on this subject. It is, I think, correctly stated in substantially the same terms in every textbook that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell's Equity, 24th ed., p.153, which is as follows:**
>
> **'The acts and declarations of the parties before or at the time of purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.'**

52. The Privy Council in **Antoni and Another v Antoni and Others [2007] UKPC 10** outlined the approach to take when determining whether the presumption has been rebutted. The Court stated that the judge ought to begin with the presumption that the parent intended to benefit the child whom he had caused to become the legal owner of the property. The judge should then ask himself what evidence there was to rebut the presumption. The evidence must focus on the intention of the parent at the time of the transaction.

53. In **Lavelle v Lavelle and Others [2004] EWCA Civ, 223** Lord Phillips, MR stated that rigid rules should be discouraged when admitting evidence to rebut the presumption of advancement. He opined:
"in these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them."

54. In **Granville Scott v Yvonne Adocia Scott-Robinson Claim No. 2009 HCV 01885**, Brooks J stated that it was also of some significance, although by itself not conclusive, that the purchaser (the father of the legal owner) retained the title deeds to the property.

55. Similarly, in **Warren v Gurney and another [1944] 2 All ER 472**, Morton LR quoted Coke on Littleton stating that title deeds are "sinews of the land".

56. The authorities establish that retention, coupled with other evidence of intention can sufficiently rebut the presumption. I am satisfied that the Plaintiff has met the standard of rebuttal for reasons stated later.

The Sandyport Property

57. I am tasked with determining whether the monies advanced by the Plaintiff to the Defendant and Alana for the purchase of the Sandyport property were done as a gift or a loan.

58. As the authorities have clearly stated, the starting point in this case is the presumption that the Plaintiff intended to gift to her daughter and son-in-law. The onus is on her to rebut the presumption.

59. The parties agree that the Plaintiff advanced $520,000.00 for the purchase of the Sandyport property. The question, therefore, is whether the Plaintiff has tendered sufficient evidence to rebut the presumption that the money was a gift to her daughter and the Defendant.

60. I will also address the issue raised by the Defendant regarding the Statute of Limitations.

Letter dated 21 March 2006

61. The letter dated 21 March 2006 sets out the terms of a purported loan from the Plaintiff to Alana and the Defendant for financing the purchase of the property. The letter is dated the same date as the FINCO draft for the deposit for the purchase of the home.

62. The Plaintiff contends that she did not retain a signed counterpart of this letter. Nevertheless, the existence of this letter is a clear indication of the intent of the Plaintiff at the time that the deposit was put forward negating any questions of a gift.

63. The Defendant claims to have never seen the letter. The repeat payment of time of at the time was created there is no dispute that the letter was created at the time of payment of the deposit. Counsel for the Defendant argues that the discrepancies between the terms outlined in the 21 March 2006 letter and the terms pleaded in Statement of Claim are an attempt on behalf of the Plaintiff to create a supposed interest rate based on the sums that the Defendant and Alana voluntarily gave to her monthly. While that may be arguable, what it does is show a clear intent to be repaid and that the funds advanced were not a gift.

64. Further, it is asserted that the draft mortgage is nothing more than a draft and the Plaintiff has put forward no evidence to suggest that the Defendant and/or Alana were involved in or aware of this process or that they had agreed to the same.

65. Mrs. Lowe gave evidence that she received instructions from the Plaintiff to prepare a mortgage in the exact terms as the 21 March 2006 letter. The Plaintiff submits that this corroborates her intention at the time the advancement was made and that steps were taken to have a mortgage document prepared. Clearly someone contemplating a gift would not have been involved in the discussions with two attorneys concerning a loan and would not have retained an independent attorney for the preparation of a mortgage document if she was intending a gift.

66. The Defendant maintains that he was not a party to any discussion with Mrs. Lowe for her to prepare a mortgage on his behalf or otherwise, nor was he aware of this document before it was disclosed in the current action. Mrs. Lowe in her oral

testimony also confirmed that she never met with or engaged in any discussions with the Defendant in this regard.

67. Given the evidence led by all parties, the Plaintiff was the person organizing the affairs of the purchase by making the deposit, obtaining insurance, sending emails and retaining the attorney. Thus, the Defendant not being aware of this document is not indicative that a loan was not intended.

Letter dated 26 April 2006

68. In the 26 April 2006 letter, the Plaintiff encloses copies of the documents necessary for Mr. Constantakis to make an application to Central Bank in connection with the Defendant's permission to borrow Bahamian dollars. Mr. Constantakis could not confirm whether the application was made as he no longer had the file.

69. There is no evidence before this court that the actual application was made. I accept the Plaintiff provided the information and wished the application to be made. Further evidencing her intent to provide a loan.

70. The Defendant argues that no such application was ever made. The steps taken to have an application made is evidence of the Plaintiff's intent on creating a loan.

71. The fact that the application was not made is irrelevant to supporting the Plaintiff's claim.

Calendar Notes

72. The Plaintiff also adduced into evidence that on 20 March 2006, she wrote a note in shorthand on a calendar page which documents a conversation she had with Mr. Constantakis regarding the Defendant being approved by Central Bank or a financial institution to borrow money.

73. During the trial, the Plaintiff explained that the marks were shorthand, Gregg-style as opposed to Pitman style, and she garnered this skill having being trained as a secretary to take dictation in shorthand.

74. Counsel for the Plaintiff submits that the shorthand notes, taken together with the letter dated 21 March 2006, and the evidence of Mr. Constantakis and Mrs. Lowe, make it clear that The Plaintiff did not intend to make a gift. The Court found the Plaintiff to be a truthful witness and accepts this evidence.

Monthly payments of $1,630.00

75. It is not in dispute between the parties that the sum of $1,630.00 was paid every month to the Plaintiff from an account jointly owned by the Defendant and Alana Wheaton.

76. The Plaintiff avers that these represented payments of interest only on what was a 'Bahamian-style' mortgage. The Plaintiff presented bank records from the Royal Bank of Canada showing clear pattern of payments.

77. The payments ceased in February 2019, with one final payment by Alana Wheaton in May 2019.

78. Under cross examination the Defendant wavered on his standpoint with the monthly payments. On the one hand he confirmed that he was aware and in agreement with the payments being made yet also indicated that he never technically made these payments.

79. The Defendant testified that the payments were made as a sense of honour or duty. He further claimed that the sense of honour evaporated when not only the marriage broke down but when the Plaintiff turned her back on him. Which is why he stopped making the payments.

First Demand Legal Mortgage

80. A First Demand Legal Mortgage was executed by Alana Wheaton in favour of the Plaintiff which contains the supposed terms of the verbal agreement.

81. The recital of the mortgage provides:

> **"(C) The Lender advanced to the Borrower and the said Christopher J. Wheaton the following monies (hereinafter "the said sums"):- the purchase price ($520,000) and closing costs required to purchase the said hereditaments ($66,000), and since then has advanced additional monies towards the payment of Real Property tax ($20,000) and household insurances ($72,000) as well as general improvements ($20,000) in the aggregate total of $698,000 in the currency of the Commonwealth aforesaid (hereinafter "the Currency") upon the agreement that the repayment thereof with interest thereon at the rate of 3,75% per annum would be secured by First Demand Legal Mortgage;**

(D) That from the date of the purchase through to February 2019 the Borrower and the said Christopher J. Wheaton made interest payments to the Lender on a consistent monthly basis however since February 2019 NO payments have been forthcoming and outstanding interest has accrued in the sum of $21,190.00 which outstanding amount of interest is being capitalized and added to the said sums;

(E) That the total amount owed by the said Christopher J. Wheaton and the Borrower to the date of these presents is the sum total of the said sums and outstanding interest is now Seven hundred and Nineteen thousand One hundred and Ninety dollars ($719,000.00) in the currency of the Commonwealth of The Bahamas (hereinafter "the Total Sums");

(F) That the Borrower for her part acknowledges that she is responsible to the Lender for one half of the Total Sum being the amount of Three hundred and Fifty thousand Five hundred and Ninety-five dollars ($359,595) (hereinafter called "the Mortgage amount") together with interest thereon and has agreed to provide the Lender with this security in the manner hereinafter appearing.."

82. The Plaintiff submits that the recitals may be considered as corroborative to her evidence and the Plaintiff's witnesses' evidence.

83. The Plaintiff also indicated that since 25 April 2012, she has been in control of the title documents for the property. Counsel for the Plaintiff submits that this act alone - possession for the Title Deeds to the exclusion of the documentary Owner - is an act synonymous with what has long been held or recognized to be an "Equitable Mortgage" and taken together with the factors identified above all point to the advance of monies the basis of this action not having been a gift, but rather a loan. This is supported by the case of **Warren v Gurney and another [1944] 2 All ER 472.**

Homeowner's Insurance Policy

84. The Homeowner's Insurance took effect in respect of the Sandyport property around the date of closing. At paragraph 6, page 2 of the Homeowner's Insurance Application dated 18 June 2006, the question asks the applicant whether a bank or finance company has a financial interest. The answer is written 'Sharon Mather', Sandyport Drive, West Bay Street, N.P., BH."

85. The Plaintiff submits that this is a clear indication that the funds advanced for the purchase were not a gift but rather intended that the Plaintiff would have an interest in the property in the same way a Bank or Lending institution does when it holds a mortgage.

86. The Defendant however has stated that he was "one hundred percent" not involved in the process of insurance. He claims that the homeowner's insurance was done at the insistence of the Plaintiff. It is asserted that the Defendant not being involved does not change the Plaintiff's intent by listing herself as loss payee.

87. Pursuant to an email dated 15 June 2006 between the Wheaton's and Fintan Mooney of CMA insurance, Alana refers to having met Mr. Mooney and confirms that 'we' had received the proposal sent, a contradiction to the evidence led by the Defendant.

88. The emailed proposal addresses 'Sharon, Chris, Alana and Vance and expresses gratitude to them for inviting Mooney to their home last night, rebutting the Defendant's assertion of lack of knowledge.

89. During cross examination the Defendant however, firmly held the position that he does not recall, and this was all done without his acknowledgment.

90. Once again, the Defendant stated that he agreed to what was being done but was not involved in the process. Further, that anything done was done in good faith.

Defendant's Life Insurance Policy

91. The Defendant executed a Collateral Assignment Form for his Life Insurance Policy with Atlantic Medical in favor of the Plaintiff.

92. During cross examination the Plaintiff confirmed that she completed the life insurance documents and it is very likely that she included the collateral assignment form which followed. The Plaintiff indicated that this assignment was done in an effort to secure collateral security for the monies advanced to the Defendant for the acquisition of the Sandyport property and ancillary costs. This act again supports her intent on a loan.

93. The Defendant claimed however that he was forced to complete the collateral assignment form. He argues that the Plaintiff has produced no evidence in support of her claim that the assignment was done in acknowledgment of a loan by the Defendant.

Decision

94. The Court is tasked with determining whether the monies advanced by the Plaintiff for the acquisition of the Sandyport property was a gift or a loan. In the absence of express documentation setting out the agreed terms of the parties, the parties' intentions must be ascertained from the actions surrounding the transaction.

95. Based on the witnesses' oral testimony, the evidence presented, and the authorities cited I find that the Plaintiff sufficiently rebutted the presumption of advancement. The evidence indicates that at the time of making the payment, she did not intend for it to be a gift.

96. There were numerous acts done by the Plaintiff, which by themselves might not have been conclusive, but taken together as a whole they demonstrate that she intended for it to be a loan. Viscount Simonds in the case of **Shephard v Cartwright** stated that 'the acts and declarations of the parties before or at the time of purchase, or so immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or declaration'. Having regard for the letters of 21 March 2006 and 26 April 2006 setting out the terms of a loan; the instructions for an application to the Central Bank; Calendar notes made in March of 2006 which spoke to legal instructions regarding a loan and borrowing approval for the Defendant; the monthly payment of $1,630.00 to the Plaintiff; the draft First Demand legal mortgage and the payment of the Homeowner's and Life Insurance Premiums there is evidence of intention to create a loan. Together with the fact that the Plaintiff has contacted numerous attorneys discussing the terms of a loan she wished to be put in place, she retained the title deeds, and she was listed as mortgagee/loss-payee on the insurance documents, considered as a whole is overwhelmingly evidence of a rebuttal for the presumption of advancement. Further, the case law has established that the possession of title deeds is an act synonymous with an equitable mortgage.

97. The Court does not accept the couple's payment of $1,630.00 every month as consideration of a 'gift'. It was a payment as a result of a loan. I accept that it was an interest only payment and that the Plaintiff foresaw the Defendant and Alana obtaining financing to satisfy their loan from her. As much as the Defendant attempted to plead ignorance on his behalf of what occurred, every act required his consent, whether expressly or by implication. The acts of the Plaintiff demonstrates that she wanted to protect her investment and all steps taken by her were to that end.

98. Unfortunately, Alana Wheaton was not called before the Court to discuss the First Demand Legal Mortgage or what was agreed if anything between her, the Defendant and the Plaintiff.

99. The Court finds that the Defendant's evidence of not being involved and not being aware of the Plaintiff's activities on the home regarding the engagement of lawyers, the insurance on the home and his life insurance to be untruthful.

100. The Defendant's evidence that the Plaintiff was in complete control of this process, having identified the insurance provider and was the contact person, thus making the funds spent a gift does not explain or justify why the Plaintiff was listed as loss payee on the insurance nor is there a reasonable explanation provided by the Defendant as to why she was the beneficiary of his life insurance.

Closing costs

101. The Plaintiff claims the repayment of $66,000.00 which represents the closing costs for the purchase of the property. In support of this claim the Plaintiff has disclosed a copy of a statement of account from Mr. Constantakis dated 17 August 2006.

102. The Defendant submits that on a review of the Statement of Account, the sums claimed by the Plaintiff as closing costs are not easily identifiable or readily ascertainable from this document. It should be noted that the Plaintiff has produced no closing statement to further verify the $66,000 claimed.

103. The Defendant also contends that it is unknown when the supposed breach in the obligation to repay occurred, which, has prevented him from advancing a limitation defence. Counsel for the Defendant submits that if the closing costs were paid in April 2006 and these sums were immediately repayable, then the Plaintiff's claim for repayment falls outside of the prescribed limitation period as set out at **Section 5 of the limitation Act**.

104. Additionally, Counsel for the Defendant submitted that it is not open to the Plaintiff to argue that this purported loan would have also formed part of the terms of agreement that applied to the Purchase money advanced for the property as she confirmed that apart from the change in interest rate, the purported loan terms relating to the purchase money were not altered going forward.

105. The Court finds that the closing costs were a part of the loan and are due and owing. The sum became outstanding when the Defendant ceased making the monthly interest payments in February 2019. That is when the breach occurred and the time commenced for the limitation period. The transaction could not be completed without payment of closing costs. When the borrower fails and or refuses to pay these sums, they are added to the principle amount outstanding.

Real Property Taxes

106. The Plaintiff has disclosed an Accounts Receivable Inquiry from the Ministry of finance, for Lot17A in the name of Christopher and Alana Wheaton, which outlines the sums due in real property taxes for the Sandyport property.

107. The Defendant acknowledges that the Plaintiff offered to pay certain sums, for real property taxes for the property. He argues however that she has disclosed no evidence to show that the sums actually paid by her amounted to $20,000.00. it is submitted on behalf of the Defendant that monies paid towards the real property taxes were given as a gift and not as a loan. this is why she was unable to produce any support for her claims.

108. The Plaintiff has accepted that she has not put forward any evidence to show what, if anything, she paid for real property taxes. Nor was there any discussion with Alana or the Defendant as to when the couple would repay the real property taxes if at all. On the bases of this admission the Court finds no sums outstanding for real property tax paid by the Plaintiff.

Other Sums

General Improvement and Expenses

109. The Plaintiff seeks to recover $20,000.00 with respect to general improvement and expenses.

110. The Defendant argues that the Plaintiff has failed to produce any evidence to support her allegation that any sums were advanced to the Defendant for the purpose of maintenance and other expenses.

111. There is no evidence before the court as to how the Plaintiff arrived at the $20,000.00 expenditure on general improvement and expenses. She has adduced no evidence as to what improvements were carried out on the home from the point of purchase.

112. There is no evidence before the Court as to how the Plaintiff arrived at the $20,000.00 expenditure on general improvement and expenses. She has adduced no evidence as to what improvements were carried out on the home from the point of purchase. As such, no award shall be recoverable under this head.

113. It is not clear what the general improvements are and specifically the cost associated with them. In these circumstances the Court does not award the Plaintiff the sum of $20,000.00. I am certain the Plaintiff spent funds on the maintenance and upkeep of the property. However, they would be considered gifts of a loving parent. No costs shall be paid under this head.

Interest

114. In her Statement of Claim filed 26 March 2021, the Plaintiff makes a claim for $19,500.00, being half of the interest outstanding from March 2019 up to the end of February 2020 and continuing.

115. The Defendant contends that it is unclear exactly how this figure was arrived at. At a reduced interest rate of 3.75% of $260,000 (half the purchase price of the property) for the period of March 2019 to February 2020 is $9,750.00 and not the $19,560 as claimed.

116. From the evidence presented interest was always payable on the purchase price. While I accept there were discrepancies in the percentage amount for the interest, after considering the circumstances of this case and assessing the oral testimonies, I find that a percentage rate of 3.75% is appropriate. I find the monthly payment represented interest payments.

117. Having found that there was a loan, it follows that interest is due and is to be applied to the principle. I am of the view that a preferential rate would have been given by the Plaintiff and that rate should continue until the loan is satisfied.

Conclusion

118. In reaching a decision one of the factors the Court was mindful of is evidence based on recollection, added to that is the relationship between the parties. The Defendant and the Plaintiff's daughter are in the midst of a divorce. No doubt this also impacted the veracity of the parties' evidence.

119. In **Gestmin SGPS SA v Credit Suisse (UK) Ltd and another [2013] EWHC (Comm)**, Leggatt J. stated:-

[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

120. He further stated:

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

121. The Defendant submits that the court "should approach Ms Mather's evidence with caution given the length of time that has passed since the events" have occurred. I accept that submission and must apply same to the Defendant as well. The rose-colored glasses of family harmony have been taken off and the evidence led can be tainted by time and circumstance.

122. Based on the demeanor of the parties I found the Plaintiff to be a credible, truthful witness and I accept her evidence. I found the Defendant's evidence to be untruthful, at times, particularly as it relates to what the monthly payment of $1,630.00 to the Plaintiff represented.

123. Having regard to the law and the evidence led together with the submissions from Counsel, for all the reasons stated above the Court finds that the Plaintiff has rebutted the presumption of advancement and find that a loan exists and that the purchase monies, closing cost, homeowner's insurance premiums, and life insurance premiums were a loan to the Defendant and Alana. It is unlikely that the Plaintiff would use her retirement funds giving away all and making herself destitute.

124. The Plaintiff is therefore entitled to:

Purchase Price	$260,000.00
Closing cost	$33,000.00
Homeowner's insurance premiums	$40,966.38
Total	**$333,966.38.**

125. The Plaintiff is also entitled to interest on the above sums at the rate of 3.75% per annum, to accrue until satisfaction of the loan. I found that the term of the loan was 25 years.

126. The Court finds that the monthly sums paid by the Defendant and Alana to the Plaintiff were interest payments.

127. The repayment of all premiums paid on the Life Insurance policy of Mr. Wheaton to date in the amount of $14,837,20 without interest.

128. The Real Property tax payment, if any, were gifts.

129. The sums advanced for general improvements and expenses were gifts.

130. The Court was asked by the Plaintiff to consider an alternative of Resulting trust/Constructive trust. This was not pleaded by the Plaintiff. I accept the Defendant's assertion that "the facts of this case, as framed by Ms. Mather, suggest that the transaction between the couple and Ms. Mather was one of a loan, giving rise to a legal action of debt. These facts therefore exclude the implication

of the creation of a trust, enforceable in equity." It is therefore found that no resulting or constructive trust exists.

131. The Plaintiff having not succeeded on all of her grounds is entitled to 80% of the costs to be taxed if not agreed.

Dated this 24th day of March 2023, A.D.

Hon. Madam Justice J. Denise Lewis-Johnson