**[2014] JMCA Civ 6**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 136/2012**

**BEFORE: THE HON MR JUSTICE MORRISON JA**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MISS JUSTICE PHILLIPS JA**

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| **BETWEEN** | **OSWALD DOUGLAS** | **APPELLANT** |
| **AND** | **LYNFORD DOUGLAS** | **1ST RESPONDENT** |
| **AND** | **DESMOND DOUGLAS** | **2ND RESPONDENT** |
| **AND** | **SYBIL SAMUELS** | **3RD RESPONDENT** |
| **AND** | **KEITH SENIOR** (as Executor of the Estate of Thelma Rose Baxter Blake) | **4th RESPONDENT** |
| **AND** | **JAMAICA NATIONAL FUND MANAGERS LIMITED** | **5th RESPONDENT** |

**Jeffrey Daley instructed by Betton Small Daley and Company for the appellant**

**Miss Renee Freemantle and Miss Jeroma Crossbourne instructed by Scott Bhoorasingh & Bonnick for the respondents**

**Miss Melissa James instructed by Clinton Hart and Company watching proceedings on behalf of the 4th respondent**

**The 5th respondent unrepresented and not appearing**

**4, 5, 31 July 2013, and 7 February 2014**

**MORRISON JA**

[1] I have read the draft reasons for judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

**DUKHARAN JA**

[2] I have read the draft reasons for judgment of my sister Phillips JA and agree with her reasoning and conclusion.

**PHILLIPS JA**

[3] This is an appeal from the order of DO McIntosh J who on 31 October 2012 extended the interim injunction granted ex parte by F Williams J on 13 December 2011, until the final determination of the claim. McIntosh J granted leave to appeal. He however directed that if the appeal was unsuccessful, the claim should be fixed for one day's hearing on 7 May 2013. He also set 4 March 2013 for a case management conference for orders to be made in relation to the trial.

[4] The decision of F Williams J was as follows:

> "Upon the Claimants' agreeing to be bound by any order as to damages that this Honourable Court may make an interim injunction is granted for a period of 28 days from the date hereof restraining the Jamaica National Fund Managers Limited from disbursing monies from any account that was held by Thelma Rose Blake jointly at their financial institution to any joint holder of the said accounts."

[5] Although no order was made against the National Commercial Bank Jamaica Limited (NCB), that institution decided to freeze all accounts held in the name of Thelma Rose Blake jointly with the appellant and the respondents, in their financial institution, until the outcome of the application in the court below and, then until the determination of this appeal.

[6] On 7 November 2012, the appellant filed his notice of appeal, with four main grounds of appeal which read thus:

> "1. The learned trial judge erred in law in granting the extension of the interim injunction first granted *ex-parte* on 13 December 2011 by failing to have proper regard to the principles for the granting of such injunctions as established in the leading case of **Cyanamid v Ethicon Ltd [1975] AC 396 [1975] 2 WLR 316**:
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> i) The evidence and facts before the learned judge did not establish that there was a serious issue to be tried in that no evidence was presented to the Judge to show or support any change in the nature of the subject bank accounts from joint accounts with unqualified survivorship rights to the surviving joint account holder. The money held on joint accounts where all account holders had equal status and rights of survivorship as set out in the bank's mandates could not have been properly regarded as money belonging to the deceased's estate upon her death.
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> ii) The learned judge failed to obtain a suitable undertaking from the Respondents as to the satisfaction of any award or damages which they may face as a result of the granting of the injunction. The undertaking given in the granting of the *ex parte* interim injunction was unsupported by affidavit evidence to provide the financial basis of the undertaking, that is to say, the Respondents gave no evidence as to how an undertaking would be satisfied in the event that the injunction was found to have been wrongly granted.

2. The learned trial judge erred in further extending the injunction where it was shown that the Respondents had failed to make full and frank disclosure of the bank's mandate under which the subject accounts were held at National Commercial Bank (hereinafter referred to as (NCB) and Jamaica National Fund Managers Ltd. (hereinafter referred to as (JNFM).

i) The details of the joint accounts in question were material facts the learned trial judge ought to have been made aware of and given consideration to.

ii) The fact that a withdrawal on the JNMF [sic] account by the Appellant had been allowed by the 2nd defendant [sic] after the death of the Testator was not taken into consideration by the learned judge. This fact supported the position of the Appellant that the funds remaining on the account after the death of the Testator belonged to [sic] Appellant and were at his disposal. Had the Learned Judge given consideration to the terms and conditions of the [JNFM] Ltd's mandate it would have been clear that the Testator's Will could not effect any change of those terms and conditions of the JNFM's and NCB's mandates hence the need for the 2nd Defendant [sic] to seek written consent from the Appellant to release funds remaining on the account to the estate.

3. There was no evidence before the Learned trial judge that the Testator during her lifetime had ever sought to control the funds on any of the joint accounts to the exclusion of the Appellant

i) The directions in the Testator's Will could only dispose of such sums in any financial institutions as belonged to her absolutely and indefeasibly up to the moment of her death.

ii) Evidence of the testamentary disposition of the funds held on joint accounts should not have been admissible in favour of the testator, applying the principle established in **Shephard v Cartwright (1995) AC 341 (1994) 3 AER 649**

iii) There was no evidence before the Court below that the Appellant was at any time during the operation of the joint account in question holding the funds on resulting trust for the testator during her lifetime.

4. The Will of Thelma Rose Baxter Blake ( the testator) had been prepared for the testator with legal advice by her Attorneys-at-Law without any regard to the bank mandates of JNFM Ltd and NCB under which the respective accounts were held.

i) Both financial institutions by their mandates strictly prohibited the assignment, transfer or bequest of any part of funds held by Joint account holders unless with the consent of the other joint account holder and on notice to the financial institution. No evidence was before the trial judge of any change in the mandate.

ii) The 2nd and 3rd Defendants [sic] did not give any evidence nor was there evidence from any other party that the accounts jointly held with the Testator and the Appellant had been severed or their status changed to one of the Testator being the sole account holder or principal account holder on the subject accounts."

[7] The appeal was heard on 4, 5 July 2013 and on 31 July 2013, we dismissed it with costs to the respondents to be agreed or taxed. We indicated that reasons for the decision would follow. These are the promised reasons.

[8] In my view there are essentially three main issues on appeal:

(i) Are there any serious issues to be tried? And if so, where does the balance of convenience lie?

(ii) Was there non-disclosure by the 1st – 3rd respondents sufficient to discharge the interim injunction?

(iii) Was the undertaking in damages adequate to support the grant of the injunction.

**The background facts**

[9] In their amended fixed date claim form the 1st – 3rd respondents asked the court to restrain NCB and Jamaica National Fund Manages Ltd (5th respondent) (JNFM Ltd) from paying out any funds from any account held by Thelma Rose Blake at their financial institutions to any joint holders in the said accounts, and for declarations that all the accounts held in her name and any other were held in trust for the beneficiaries of her estate. The claim asked for an order that the proceeds of the said accounts be paid over as per the directions of the last will and testament of Thelma Rose Blake dated 29 October 2008, which had been probated 10 March 2010.

[10] The application for an interim injunction was filed on 24 August 2011 on the grounds that the provisions in the will had severed the joint accounts held by the deceased and the proceeds of the accounts therefore fell into her estate. The proceeds, it stated, should be paid out in accordance with the testator's wishes, as set out in her last will and testament, namely equally to all her four children, Lynford Douglas, Oswald Douglas, Desmond Douglas and Sybil Samuels. These beneficiaries included the joint holders of the accounts.

[11] This application was supported by an affidavit sworn to on 21 September 2011 by Lynford Douglas. He deposed that his mother, Thelma Rose Blake, the testator, had died on 25 September 2009. He valued the estate at approximately J$100,450,000.00. He testified that the deceased had worked as a supervisor in England, earning a good salary, had returned to Jamaica, and then migrated to the United States where she had

been deployed as a nurse practitioner for over 20 years. The deceased, he said, had been involved in an accident in the United States and had received a substantial settlement in relation thereto. Additionally, over the years she had invested in valuable real estate. He averred that there were several accounts which the deceased had held jointly with the appellant in some cases, with himself in some cases and on occasion in the names of all three of them, for "ease and convenience".

[12] The accounts are as follows:

> (i) two accounts at NCB, in the names of the deceased, the appellant and himself, in the amount of US$21,934.58 and J$16,406.08 respectively, and one account at NCB Capital Markets in the said names, in the amount of US$216,111.33 (totaling approximately J$20,488,354.34, when converted from United States dollars to Jamaican dollars) and
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> (ii) two accounts at JNFM Ltd in the names of the deceased and the appellant in the amounts of US$500,000.00 and J$250,000.00 (totaling approximately J$43,250,000.00 when converted from United States dollars to Jamaican dollars).

[13] The 1st respondent further deposed that he verily believed that the testator was the sole contributor to all the accounts as he had never contributed to any of the

accounts in his name and to the best of his knowledge the appellant had not contributed to these accounts either. He also stated that he was aware that when the deceased placed him on her accounts she wanted all her children to benefit from the monies in equal shares should she die.

[14] He stated that he also verily believed that the appellant was aware that it was not the deceased's intention for the appellant to benefit from the accounts in his personal capacity.

[15] It was his understanding that that was the reason that she made a provision in her will which stated that all the accounts were held by her solely and, if otherwise stated were only so stated for convenience, and that that provision severed the joint tenancy between himself, the appellant and the deceased. He indicated that should the monies be held by the appellant and himself in their personal capacity it would prejudice the other siblings who were equal beneficiaries in the estate. The other funds held by the deceased solely in NCB (£15,020.85) and the Bank of Nova Scotia (£12,486.70) had, he said, been submitted to the executor of the estate to be distributed accordingly. The accounts held jointly, were the subject of the claim.

[16] The appellant, he stated, had attempted through his attorneys to withdraw funds from NCB, which had decided to freeze all accounts held jointly with the testator. He averred that there were serious issues to be tried. He stated that the matter was urgent as there was a real risk that the funds held in the joint accounts would be paid out to the detriment of the other beneficiaries. He stated further that he, and the 1st and 2nd

respondents were in a position to pay any damages that the court may order and, he gave his undertaking on behalf of the 1st – 3rd respondents to abide by any such order. The last will and testament of the deceased and the grant of probate were duly annexed to the affidavit. The 1st respondent also swore to an affidavit in support of the fixed date claim form which was in similar vein to the affidavit filed in support of the injunction.

[17] Miss Sybil Samuels, daughter of the deceased, also swore to an affidavit on 25 August 2011 in support of the fixed date claim which was really in similar vein to that of the 1st respondent which had been sworn on the same day. Both affidavits were before F Williams J on the hearing of the application for an interim injunction, on 13 December 2011.

[18] We were informed by counsel for the 1st – 3rd respondents in written submissions that although the application for an interim injunction was initially intended to be heard ex parte, Mangatal J (as she then was) had on 30 September 2011 ordered that the application be served, which it was. Nonetheless it was heard *ex parte.* Subsequent to the grant of the interim injunction, an acknowledgment of service was filed by the appellant and orders were made for the parties to file submissions which was done, and the appellant filed an affidavit sworn to on 20 July 2012, in opposition to the fixed date claim form and in support of his ancillary claim.

[19] In his affidavit the appellant denied the value of the estate as stated by the 1st respondent, accepted that the proceeds of the estate should be shared equally as

directed by the will but was adamant that the accounts held by the deceased jointly with him at JNFM Ltd and at NCB were not part of the estate, as his mother could not change the banks' mandate as to how the accounts were held after her death and without notice to him. He gave information in respect of the amount held in the account at JNFM Ltd, and complained that funds had been withdrawn from the account by the 4th respondent with his authorization but without him having obtained legal advice. He claimed that he alone was entitled to the funds in the account by virtue of the terms and conditions relevant to the account (particularly clause 4), which he exhibited. He also said that he had never given any consent for the terms and conditions to be changed, nor had JNFM Ltd, and he had not received before the death of his mother, any notice of her intention to do so. He referred to the will of his mother and said that there had not been any assignment of his mother's interest in the account. Any assignment, he said, could not have been done legally without his prior consent which had neither been asked for, nor given by him. He referred to clause 12 of the agreement with JNFM Ltd. He claimed that he had signed a letter dated 5 November 2009, "unqualified in its terms" in that it gave all the funds to the estate, which had been prepared by the 4th respondent and in respect of which he should have obtained legal advice prior to executing the same. He therefore claimed that the 4th and 5th respondents were negligent in their handling of the accounts and so he was bringing an ancillary claim against them.

[20] The six particulars of negligence of the proposed ancillary claim are of some importance to this appeal and read as follows:

"(i) Failing, neglecting or refusing to advise or to properly advise Thelma Rose Blake that her interest in the said account could not be assigned to her estate.

(ii) The 2nd Defendant [4th respondent] acting for the Estate even where it became apparent there would be a conflict between his role as Executor and his professional and fiduciary duty owed to me and causing me to sign an unequivocal authorization agreeing to allow withdrawal of US$32,000.00 for the payment of death duties and Transfer Tax for the estate from the account without advising me to seek independent legal advice;

(iii) Withholding the funds held on account from me knowing full well that the deceased's estate was not legally entitled to them;

(iv) Failing, neglecting or refusing to attempt to seek my written consent before her death to change the status of the joint-tenancy of the account to accord with Mrs Thelma Rose Blake's intention;

(v) Breaching the fiduciary duty owed to me by preparing a letter which I was directed to sign giving the money on the account to the estate and thereby failing to protect my interest to the advantage of the estate/beneficiaries under the Will of Thelma Rose Blake.

(vi) Breaching or facilitating the breach of its own Client Agreement Terms and Conditions."

[21] The appellant further claimed that, notwithstanding that the funds in the account had been withheld from him, he had withdrawn funds in the amount of US$821.74 which confirmed his entitlement to the funds in the account. He said he could have withdrawn all the funds in the account but had not done so as he knew the funds were his solely and he trusted the 4th and 5th respondents to protect his interests. He said he thought the said letter he had signed on 5 November 2009, related to the payment of death duties, as he knew that the 4th respondent needed access to the funds to pay them.

[22] He claimed that the 1st – 3rd respondents were estranged from the deceased, that he was the only child who had visited her every year and that he had assisted her in her relocation to Jamaica. This, he said, was the reason that his mother had indicated to him that since he was "the only child whom she saw on a regular basis and with whom she had formed a close relationship, she favoured me". He further averred that the terms and conditions on which he held the JNFM Ltd account were the same as those on which the accounts were held at NCB although the latter agreements could not be produced in spite of requests made to the institution, which requests were exhibited. Sample documents, which the bank said existed at the time of the opening and operation of the accounts there, were therefore produced and exhibited in a supplemental affidavit.

[23] The appellant deposed that he continued to obtain notifications from the institutions in his name and his mother's name on the same terms and conditions particularly and namely, that as a joint account holder he had the right to withdraw from the account; that he had an undivided interest in the security which would not be sub-divided or transferred without his prior consent; and that as a survivor he was entitled to the full sum in each account in the event of the death of any of the joint account holders.

[24] In paragraphs 25 and 26 of his affidavit the appellant said this:

> "25. That I verily believe that whilst my mother had honourable intentions she was not properly advised at the time of making her will and so she never notified me or

sought my consent to change the status of any of the bank accounts which we held jointly.

26. Further neither NCB, the 2nd Defendant [executor], whether in the capacity as Banker, or, as Executor, nor the 3rd Defendant, [JNFM Ltd] has ever communicated with me prior to my mother's death to indicate or request any change in the status of my account and my signature to the letter of 5th November 2009 exhibited hereto was given under mistake."

[25] On 27 July 2012 the appellant filed his ancillary claim which in the main encapsulated the information set out in his affidavit including the particulars of negligence, and claimed inter alia, damages for professional negligence and for breach of contract; a declaration that the sums held in JNFM Ltd's account belonged solely to him; an order that the estate pay the sum of US$32,000.00 or any other sums withdrawn from the account for the estate; and a mandatory injunction for the estate to pay over all principal and interest accrued on the said account.

**Excerpts from relevant documentary evidence**

[26] The terms and conditions of the client agreement with JNFM Ltd's account were at the core of this appeal. I have set out clauses 4, 5 and 12 which were referred to specifically in the affidavits and in counsel's submissions:

"4. Where the client comprises more than one person, they shall be deemed to be joint tenants for all purposes in connection herewith unless specific written instructions to the contrary signed by each of such persons are given to JNFM. On the death of any of the persons constituting the client (being survived by any other such person) the Agreement shall not terminate and except in the case of the trustees, the interest of the deceased in the securities will

automatically ensure [sic] to the benefit of the survivor(s) unless otherwise specified.

5. Subject to its policies, JNFM may follow the instructions of any one account holder and, if inconsistent instructions are received or the JNFM reasonably believes instruction from one account holder may not be mutually agreeable to all, the JNFM in its discretion may do any one or more of the following, (i) suspend all activities in the account until written instructions signed by all accounts holders are received, close the account and deliver all asset[s], net of debits and credits to the address of records, or (ii) take other appropriate action.

10. The client(s) may not, (i) assign their rights and obligations hereunder without obtaining the prior written consent of an authorized representative of JNFM, which consent shall not be unreasonably withheld, or (ii) sell, assign, convey, transfer, subdivide, sub-participate or otherwise dispose of all or any part of any Document of Participation acquired by them hereunder, nor create or permit to exist any lien or security interest thereon without obtaining the prior written consent of JNFM, which consent shall not be unreasonably withheld.

12. The client hereby agrees that this Agreement and all the terms hereof shall be binding upon them and their estate, heirs, executors, administrators, personal representatives, successors and assigns. This Agreement shall cover individually and collectively all accounts, joint, single or in a fiduciary capacity, which are held by JNFM for them. This Agreement shall be applicable to all existing transactions between the JNFM and the client as well as all future transactions in the nature contemplated herein and shall remain in effect irrespective of any interruptions in the business relations of you with the JNFM."

Clause 10 of the last will and testament, which was also referred to often, perhaps having more relevance in the arguments in the court below but still of interest in the appeal, reads:

"I FURTHER DECLARE that all or any banking or financial account held by me with any financial bank or institution is owned solely by me and if any such account shall evidence at the date of my death

that such account is held by me jointly with any of my children or anyone else such account is only so held for convenience and does not in anyway create legal or other rights in such accounts and in any event to such joint holder, if any, must be recognized by the bank or financial institution or any Court in the Island of Jamaica or elsewhere as a mere agent or Trustee for all the beneficiaries named herein."

The letter of 5 November 2009 is of great significance and may yet be determinative of the competing contentions of the parties. It is a short letter and is set out below:

"November 5, 2009

Mr. Keith Senior
General Manager
JN Fund Managers Limited
17 Belmont Road
Kingston 5

Dear Mr. Senior,

Estate – Rose Thelma Blake

In keeping with my mother's wishes and her last Will and Testament, this letter serves as my irrevocable letter of direction to hold the funds in her investment account to the order of my mother's four children namely: Linford Douglas (Canada), Sybil Yvonne Douglas-Samuels (U.S.A.), Desmond Douglas (England) and myself, pending the probating of her will. It was her expressed wish that those funds be equally divided and distributed to us following the probating of the Will, less all expenses relating thereto.

Yours very truly,

Oswald Horace Douglas"

## The appeal

[27] I will deal in summary with counsel's submissions on the substantive issues raised on appeal, previously set out herein in paragraph [8].

## Appellant's submissions

Serious issue to be tried

[28] Counsel for the appellant submitted that the learned trial judge failed to have proper regard to the principles established in the leading English case of **American Cyanamid v Ethicon Ltd** [1975] AC 396, [1975] 2 WLR 316, [1975] 1All ER 504, and the Privy Council case from Jamaica, **National Commercial Bank Ja Ltd v Olint Corp Ltd** PCA No 61/2008 (delivered 18 April 2009) with regard to the grant of injunctions. He said that the factors to be considered in the grant of an injunction are (i) Was there a serious issue to be tried? (ii) Where does the balance of convenience lie? (iii) Are damages an adequate remedy? He submitted that there was no serious issue to be tried as there was no evidence to support any change in the terms and conditions relevant to the opening and operation of the joint accounts held by the deceased with the appellant, which terms and conditions were clear and unambiguous, particularly with regard to the rights of survivorship. The monies held in the said joint accounts, pursuant to the bank's mandates, he stated, belonged on the death of the deceased to the appellant solely and not to her estate. There was no evidence, counsel contended, expressing any contrary intention, save perhaps clause 10 of the will of the deceased which was inadmissible and therefore entirely unhelpful. Counsel referred to

**Shephard v Cartwright** (1955) AC 431, (1954) 3 All ER 649, **Reid v Jones** (1979) 16 JLR 512, particularly the dictum of Viscount Simonds in **Shephard v Cartwright** wherein he stated that declarations of parties before or at the time of the purchase or so immediately after as to be considered a part of the transaction could be admissible in evidence either for or against the party who did the act or made the declaration, but subsequent declarations were only admissible as evidence against the party who made them, and not in his favour.

[29] Counsel stated that there was no evidence that the deceased sought to control the funds in the account to the exclusion of the appellant in her lifetime and the directions in the will could only dispose of such sums in any financial institution which belonged to her absolutely and indefeasibly at the moment of her death. The deceased, he said, could also have withdrawn all the funds from the accounts which she did not do, thus electing to have the legal status of equal ownership operate on her death to the benefit of the appellant. Nothing could override that, he stated, and in any event there was no notice of any intention to do so, as the statement in the will could not operate as a severance of the joint tenancy ownership of the accounts. There was, he submitted further, no evidence that the appellant was holding the funds on resulting trust during the deceased's lifetime, and in any event such trust could not extend beyond the life of the deceased (**Russell v Scott** 1936 55 CLR 440). Also, the fact that the appellant had not contributed to the funds in the joint account did not mean that he did not have a beneficial interest in the funds in the account; indeed that

would be so even if he had not known of the existence of the accounts (**Aroso v Coutts & Co** [2002] 1 All ER (Comm) 241).

[30] Counsel submitted that whilst the Supreme Court of Canada in **Pecore v Pecore** [2007] 1 SCR 795, 2007 SCC 17, had held by a majority that the presumption of advancement could no longer obtain in respect of adult children, yet the Privy Council in **Antoni & Anor v Antoni & Ors (Commonwealth of the Bahamas)** [2007] UKPC 10 (26 February 2007) had not made any such distinction between a minor child and an adult child in the application of the legal presumption. Counsel therefore submitted that in the instant case the presumption of advancement was applicable and the declaration in the will made subsequently could not rebut the presumption. Counsel also contended that the letter of 5 November 2009 could not avail the respondents, and rebut the presumption, as they had not sought any declaration as to its binding effect in the fixed date claim form, and there was no claim against the executor with regard to it. Had there been any reliance on the letter, counsel contended, the claim would not have been commenced, as commencing the claim suggested that the withdrawal of the letter by the appellant had been accepted. Additionally, counsel submitted that if the letter had been accepted, there would have been no need for the injunction as there would also have been no serious issue to be tried. Further, counsel argued, since there was no issue taken by the respondents in respect of the appellant's position as to how the letter came into being, those facts if accepted by the learned trial judge should have rendered the letter nugatory.

[31] Counsel submitted further that the law was straightforward and quoted from Paget's Law of Banking, 12th edition, at page 177, namely that "it will normally be clear from the account mandate form that the bank is in privity of contract with each joint account holder," and that "a joint account is in law simply a debt owed to the account holders jointly…", to support the importance of the appellant's position of joint ownership of the monies held in the banks and of the funds belonging to the appellant on survivorship. Counsel said that one should not be swayed by sympathy because the deceased had done all that was required of her, in that she had obtained legal advice and tried to do what she had been advised to do, which unfortunately had not been enough. Counsel emphasized that "[T]he law is what it is", and if the court were to permit severance of joint accounts in this way it would make a mockery of the law relating to the opening and operating of joint accounts. On the above bases counsel submitted that there was no serious issue to be tried, the balance of convenience lay with the appellant, and the injunction ought to have been refused.

**Non-disclosure**

[32] Counsel submitted that when the matter went before F Williams J at the ex parte hearing the 1st – 3rd respondents had not placed all material facts before the judge, as it was their duty to do, including the bank's contracts with the deceased, the appellant and the 1st respondent. He relied on the case of **Jamculture Ltd v Blackriver Upper Morass Development Ltd and Agriculture Development Corporation** (1989) 26 JLR 244 in support of that obligation. As a consequence, the judge had not considered the bank's mandates when making his decision. Counsel

submitted that had the documents been before the learned judge, the interim injunction would not have been granted. Counsel further submitted that on the inter partes hearing the learned judge did not consider and/or address the 1st – 3rd respondents' material breach of disclosure, for had he done so the interim injunction would not have been extended.

**Undertaking in damages**

[33] Counsel's complaint in the written submissions was that at the hearing of the interim injunction the initial undertaking given by the 1st – 3rd respondents was merely a bald statement without any explanation of how or from what financial source the respondents would be able to satisfy any claim for damages. At the appeal, counsel conceded that the only loss being suffered by the appellant is having been kept out of the use of the funds in the accounts, but that loss, he said, was discounted as interest had been accruing on the funds in any event.

**The 1st – 3rd respondents' submissions**

Serious question to be tried

[34] Counsel for the 1st – 3rd respondents also relied on the principles enunciated in **American Cyanamid** and **National Commercial Bank Ja Ltd v Olint**, and submitted that the court ought to find that there is a serious issue to be tried (and in this case the court had so found), once the court is satisfied that the claim was not frivolous or vexatious and has a real prospect of success. Additionally, counsel contended that Lord Diplock had made it clear in **American Cyanamid** that at the

interlocutory stage of the proceedings, the court should not try to resolve conflicts of evidence on affidavit as to the facts, or difficult questions of law which require detailed argument and mature consideration.

[35] Counsel submitted that the 1st – 3rd respondents' claim was founded on equitable principles and in this case grounded on the principle of resulting trust. It was not disputed, counsel argued, that the deceased was the sole contributor of the funds in the joint accounts held by her with the appellant. Further, the statement in her will that any account held with her and her children was so held for convenience and did not create any legal rights, was consistent with the appellant's statement in the letter of 5 November 2009. Counsel suggested that the tenor of the letter and the statement of the appellant in paragraph 25 of his affidavit mentioned earlier herein (in paragraph [24]) indicated that he was aware that the intention of the deceased, honourable or otherwise, was that her children were to benefit equally in respect of all her assets, which included the funds in all the jointly held accounts. Additionally, clause 4 of the agreement with JNFM Ltd made the automatic right of survivorship in respect of the joint account applicable "except in the case of trustees".

[36] The issues therefore which arose for the court's consideration were: Had the presumption of resulting trust been rebutted? What were the testator's intentions with regard to the proceeds in the accounts? Was the appellant induced to write the letter of 5 November 2009? Did the appellant understand the contents of the letter?

[37] Counsel submitted further that the appellant had not claimed that he was entitled to the funds due to the presumption of advancement. The appellant had also never posited his case to say that the funds in the jointly held accounts were a special gift to him from the deceased. To the contrary, his position was that because of the bank's mandate he was entitled to the funds based on the rights of survivorship. Counsel submitted that the presumption of advancement had not been raised on the appellant's pleadings nor had it been argued on his behalf in the application below and had only been raised in counsel's arguments in addendum on appeal. However, argued counsel, the presumption could be rebutted by evidence, and there was evidence in this case which did so, particularly the clear statements made in the appellant's letter of 5 November 2009. In any event, counsel submitted, the proper interpretation to be given to the letter was a matter for the trial judge.

[38] In these circumstances, counsel submitted, the issue which could become apparent was: did the presumption of advancement even arise in the instant case? Counsel relied on the case of **Northall v Northall** [2010] EWHC 1448 (Ch) for the principle that, on the facts, if the presumption of advancement did not arise then the burden fell on the appellant to rebut the presumption of resulting trust. The important point was the intention of the testator at the time of the opening of the account. There was no evidence that the terms and conditions in the agreement with JNFM Ltd had been read over to the deceased when the accounts were opened. Counsel pointed out that the investment objective stated in the agreement was 'retirement', and submitted that the authorities have indicated that even the slightest evidence can

rebut the presumption of advancement; it need not be documentary, but oral evidence, once credible, was acceptable. Counsel also raised the issue as to whether the principle was applicable in Jamaica to the relationship of mother and child and also to adult children. He relied on **Bennet v Bennet** [1879] 10 Ch 474, **Pecore v Pecore** and **Antoni**. Counsel stated that whichever presumption arose in law, it could be rebutted on the facts, but the respective burdens of proof shifted depending on the circumstances.

[39] Counsel approached the principle enunciated in **Shephard v Cartwright** and **Reid v Jones** in this way: she submitted that the law has become somewhat relaxed over the years and the court no longer has the same strict approach to testamentary dispositions, and evidence subsequent to the opening of joint accounts once relative to the said opening of the accounts, can be relevant and admissible; the intention of the deceased/testator is the crucial consideration and evidence of the intention can be gleaned from wherever available and applicable. In the instant case, counsel submitted that there was contemporaneous evidence. The bank's mandate embraced the trust; the clause in the will was not being relied on as a subsequent event but declaratory of the deceased's intention, and the appellant had also on affidavit confirmed the intention of the deceased, that is, that the proceeds in the joint accounts should benefit the beneficiaries in the estate and not the surviving joint holders solely.

[40] On all the above bases counsel submitted that there was a serious issue to be tried, the 1st – 3rd respondents' claim had crossed the threshold laid down by the principles in the leading cases, as the claim was neither frivolous nor vexatious; the

balance of convenience lay with the 1st – 3rd respondents; and the injunction was correctly granted.

**Non disclosure**

[41] Counsel referred the court to the **Jamculture Ltd** case to support the principle that the learned judge exercised his discretion independently at the inter partes hearing and at that hearing the terms and conditions of the agreement with JNFM Ltd were before the court. Counsel made it clear that the documents in relation to NCB had still not been located and so had not been produced, and those were not documents which had ever been in the possession of the 1st – 3rd respondents. The failure therefore to place the same before the judge could not be viewed as contumelious conduct nor would the failure to have done so been considered fatal to the grant of the injunction.

**Undertaking as to damages**

[42] Counsel submitted that the undertaking as to damages had been given by the 1st – 3rd respondents at the ex parte hearing before F Williams J and had been repeated in the order, made inter partes by DO McIntosh J. Counsel indicated that the appellant's only complaint was that the financial source in respect of the undertaking had not been given, but that, counsel commented, did not make the order any less binding. Additionally, in keeping with the principles stated with clarity by Brooks J (as he then was ) in **First Financial Caribbean Trust Company Limited v Delroy Howell et al,** Claim No 2010 CD 00086, delivered 5 May 2011, the court, counsel

submitted, pursues a course which is likely to produce the least unjust result. In the instant case, as the appellant was attempting to remove the funds from the accounts, had he not been restrained, the trial of the competing issues with regard to the entitlement to the funds would have been otiose, as the funds would have been dissipated. In this way the corpus has been protected until the issues have been determined by the court. Further the appellant had not indicated that he would suffer any prejudice in any way, and counsel for the appellant seemed to concede this on appeal.

**Analysis**

[43] Lord Diplock's memorable words in **American Cyanamid** at page 323A bear repeating:

> "The use of such expressions as 'a probability' 'a prima facie case', or a 'strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

In **National Commercial Bank Ja Ltd v Olint**, Lord Hoffmann on behalf of the Board said this:

> "… the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in **R v Secretary of State for Transport**, **ex parte Factortame Ltd** (No 2) [1991] 1 AC 603... What is required in each case is to examine what on the particular

> facts of the case the consequences of granting or withholding of the injunction is [sic] likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low;….."

On any detailed and thorough examination of the dicta of Lord Diplock and Lord Hoffmann, the principles are clear, if there is a serious issue to be tried, the court will take into account all the factors of the case in order to decide whether the grant or refusal of the injunction will produce the most irremediable prejudice to either side.

[44] I will deal with the substantive issues on appeal as I have identified them in paragraph [8] herein.

Serious issue to be tried

[45] In my opinion, the competing issues between the parties revolve around whether the presumption of advancement arises on the claim, in the pleadings or otherwise; whether the presumption of resulting trust exists on the facts and, whether either presumption if applicable can be successfully rebutted on the evidence. I am mindful, however, that the approach of the Court of Appeal at this stage of the proceedings is to review the exercise of the discretion of the judge below in order to ascertain if in extending the interim injunction he had gone palpably wrong. The substantial issues in the claim are yet to be determined in the court below.

[46] With regard to the respective presumptions in law, the judgment of Rothstein J, in **Pecore v Pecore**, delivered on behalf of the majority of the Supreme Court of Canada, gave helpful definitions of the presumptions when he stated that:

> "A resulting trust arises when title to property is in one party's name, but that party. because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original owner;…
>
> While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title….
>
> Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor… In the context of the parent–child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world…"(Emphasis as in the original)

[47] **Pecore v Pecore** was a case relating to a joint account in the names of a father and an adult dependent child, and the interplay between the presumptions was set out in the headnote of the case in this way:

> "The long-standing common law presumptions of advancement and resulting trust continue to play a role in disputes over gratuitous transfers. These presumptions provide a guide for courts where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. They also provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers. The presumption of resulting trust is the general rule for gratuitous transfers and the onus is placed on the transferee to demonstrate that a gift was intended. However, depending on the nature of the relationship between the transferor and transferee, the presumption of advancement may apply and it will fall on the party challenging the

> transfer to rebut the presumption of a gift. The civil standard of proof is applicable to rebut the presumptions. The applicable presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities."

Indeed, what is clear is that the presumptions can be rebutted by evidence of the actual intention of the transferor.

[48] It was highlighted in **Russell v Scott**, with which I entirely agree, that the presumptions merely give rise to the question of onus of proof. The presumption of resulting trust does no more than call for proof of an intention to confer a beneficial interest and the presumption of advancement calls for proof of an intention not to confer a gift in order to rebut it. So in my view, even if the presumption of advancement arises on the appellant's case, he cannot rely on the same as being a conclusive answer to the issue and the same is applicable in respect of the 1st – 3rd respondents and their reliance on the resulting trust. It will ultimately depend on the evidence adduced in the case to rebut the respective presumptions, if the court is satisfied that both arise in the case.

[49] In **Antoni v Antoni**, however, the Board seemed to suggest that once shares in the relevant companies had been placed by the father in the names of the children and that fact was either admitted or proved, the presumption of advancement arose *at once* and it was for the appellant (the stepmother) to rebut the same, with the question as to whether the resulting trust was applicable being examined thereafter, which still only affected, as indicated above, the particular approach to the burden of proof.

[50] The issue was raised by the 1st – 3rd respondents with regard to whether the presumption of advancement is applicable to adult children. Although not so found in the **Pecore v Pecore** case by a majority, the presumption was applied without comment or as a matter of course in **Antoni v Antoni** and in this court, in **Spence v Spence, Taylor and Shirley** SCCA No 104/2004, delivered 27 July 2007, where Harrison P in giving the leading judgment of the court, in what could be considered obiter dictum, stated:

> "Neither has a gift to a child by its parent ever been seen as unable to attract the said presumption because the child has attained adulthood."

This issue therefore still appears to be arguable and may ultimately depend on the particular facts of each case, and, in the instant case, how the learned judge may view the same.

[51] The 1st – 3rd respondents also raised the question of whether the presumption of advancement which traditionally applied to husband and wife and father and child based not only on the liability to maintain but also the moral obligation to do so, also applied with regard to a mother and her child. In **Bennet v Bennet** (over 100 years ago) the court found that there was a moral legal obligation on the part of the father to provide for his child, but there was no such obligation on the part of the mother; thus the presumption of advancement would not apply in such cases. The dictum of Dawson J in the Australian High Court in **Nelson v Nelson** is instructive where he stated:

> "In modern society there is no reason to suppose that the probability of a parent intending to transfer a beneficial interest in property to a child is any the more or less in the case of a mother than in the case of a father…
>
> …. In my view, whether the basis for the presumption is a moral obligation to provide for a child or the reflection of actual probabilities, there is no longer any justification for maintaining the distinction between a father and a mother. In the United States the presumption of advancement applies to a mother as well as a father (see Scott on Trusts (4th edn, 1989), Vol 5 pp 181-182) and that should now be the situation in this country."

[52] The trial court may find it necessary, after hearing comprehensive arguments, to make specific statements with regard to the development of the law, in this regard, in Jamaica, but serious issues do arise as to whether in the instant case as the appellant is an adult child and the testator was his mother, whether the presumption of advancement per se, does apply in the circumstances.

[53] In my view, there are also serious issues of fact arising on the evidence which could rebut the presumption of advancement and must be determined at trial, for instance.

> 1. Whether the court accepts the explanation of the circumstances of the letter of the appellant. Was it a mistake? Was he induced to sign the same? Or was the letter a representation of the wishes and actual intention of the deceased? What was his understanding of her intention? Did he need legal advice to better understand the deceased's wishes? Has

his understanding of her wishes changed subsequent to receipt of the advice?

2. Whether the statement made in the JNFM Ltd's mandate as to the purpose of the account (retirement) indicated the actual intention of the deceased at the time of the opening of the accounts;

3. Whether the court accepts the appellant's evidence of what he believed the deceased's intention was, which formed one of the bases of his assertion of negligence in the ancillary claim;

4. Whether the appellant's evidence supports a conclusion that the funds in the joint account were the deceased's and had not been a gift to him.

[54] The law is that when two or more persons open a joint account they become joint creditors; they have no right of property in any monies deposited with the bank. The relationship between the bank and its customers is that of debtor and creditor. So upon the opening of the account the deceased and the appellant became jointly entitled at common law to a chose in action. They would have had a contractual right against the bank, that is as a debt, but one which fluctuates in amount as monies are deposited and withdrawn (see **Russell v Scott**). The right at law would therefore vest in the appellant. However, the claim that it vests in the deceased's estate would depend on equity, that is, the existence of an equitable obligation making the appellant a trustee for the estate. A true presumption that he is a trustee will be raised by the fact that the deceased paid all the monies into the account. If the presumption of

advancement does not properly arise, prima facie there will be the resulting trust in favour of the estate (**Russell v Scott**). But as indicated, that is a question of the onus of proof. This, in my view, must be a matter for the trial court.

[55] The terms and conditions of the contract with the bank must come under the scrutiny of the court. For example does clause 4, which speaks to the customers being joint tenants for all purposes in connection with the accounts and which addresses the automatic benefit to the survivor, except the case of trustees? Can the language of the conditions mean that the funds were the joint property of the appellant and the deceased in her lifetime (see **Armsworthy v Macdonald** [1942] 1 DLR 110)? Were the conditions particularly with regard to the automatic benefit to the survivor of the account and not the estate, drawn to the attention of or explained to the deceased and if not, what weight should be attached to that particular condition in any event (see **Northall v Northall**)? Does the language of the conditions include a provision for an adjustment of the conditions in the future ("*unless specific written instructions to the contrary signed by each of such persons*"), thereby expressly reserving a right, whether absolute or qualified for control over the subject matter, whereby the rule in **Shephard v Cartwright**, which exists for the discouragement of the manufacture or fabrication of evidence, would not, on principle and in those circumstances, apply? In **Harold George Reid and Another v Herbert Grant and Greta Reid** (1976) 23 WIR 91 Watkins JA, stated at page 94.

> "… the very continuance itself of the joint account as such was reserved for termination, if either party saw fit, by an express notice in writing. The inescapable inference was that

> the deceased as grantor had reserved for future determination the matter of the beneficial ownership of the fund. Whatever then were the initial intentions of the deceased at the time of the establishment of the joint deposit account, if indeed he had any settled intentions at all, he was careful enough by his contemporaneous express reservations to preserve for the future total freedom of action over and control of the fund."

The question would be: had the deceased in the instant case reserved for future determination the matter of the beneficial ownership of the fund?

[56] With regard to the question of the bank's mandate, **Shephard v Cartwright** laid down two rules, namely:

> (i) Acts/declarations made before or at the time of the transfer or purchase are admissible either for or against the maker; and
>
> (ii) Acts/declarations made after the transfer or purchase has been concluded are admissible in evidence only against the maker.

[57] Prima facie, on this basis the statements of the deceased in the will would be inadmissible save against her. However, there are cases which have indicated that evidence of subsequent events may be admissible if the evidence indicates what was the testator's actual initial intention. In **Northall v Northall** Richards J stated that without specific evidence indicating that the survivorship clause had been drawn to the attention of the testator, he would not infer that it had been done, and he was

prepared to look at other evidence in the case to assess whether on paying funds into the joint account, the testator intended to share ownership of the funds or the funds were to remain her own. Additionally, Douglas CJ in the High Court of Barbados, in **Bank of Nova Scotia Trust Co (Caribbean) Ltd v Smith-Jordan** (1970) 15 WIR 522, referring to the Supreme Court case of Nova Scotia, **Armsworthy v MacDonald** stated this:

> "The facts in **Armsworthy v MacDonald** showed that a mother and daughter entered into an agreement with a bank in terms identical with those of the agreement in the instant case. It was held that while the evidence did not support an intention on the mother's part to make a gift of the whole amount to the daughter, the circumstances and the terms of the agreement clearly indicated the creation of a joint tenancy in the moneys with the right of survivorship. The learned Chief Justice who delivered the judgment in which three other judges concurred, examined the deposit agreement and stated that outside of the agreement were other circumstances which threw light on the matter. He then dealt with the evidence relating to the mother's intentions. Graham J., on the other hand regarded the written agreement as conclusive. My own opinion is that the written agreement is not conclusive and is no more than evidence which must be weighed along with the other evidence in the case in coming to a conclusion on what was intended by the person opening the account."

[58] In my view, what the court must endeavour to arrive at is what was the actual intention of the testator at the time of the opening of the account. This is a matter for the trial judge to do based on a review of all the evidence and the circumstances surrounding the same. For instance, were the accounts opened for the purposes of retirement, and so not a gift to the appellant? Or did "retirement" refer to the

deceased and the appellant and was there other evidence from the appellant to support a finding that the monies were a gift to him? Was the statement in the will merely declaratory of what the appellant and his siblings knew was the actual intention of the testator at the time of the opening of all the joint accounts held in her name? Or is the statement in the will expressing an afterthought of the deceased and a change of mind, and therefore inadmissible? What of the accounts held at NCB? What weight should the court give to the terms and conditions stated in the sample documents?

[59] In the light of all of the above it is evident that there are serious questions to be tried, and in the circumstances of this case the balance of convenience clearly favoured the 1st – 3rd respondents.

**Non-disclosure**

[60] In my opinion, this issue does not have as much significance as it might have had if the bank documents indicating all the terms and conditions agreed between the appellant, the deceased and JNFM Ltd had not been before the judge at the inter partes hearing. At that hearing the judge was able to weigh the competing contentions of both sides to see whether the fact that the documents were not before the judge hearing the ex parte application would have sufficiently hampered him in the exercise of his discretion, so as to affect the discretion of the judge hearing the inter partes application not to extend the injunction granted previously. There are issues in the matter relating to both presumptions in law. As indicated, it then becomes a matter of the onus of proof and the evidence available to rebut each presumption and which

evidence the trial judge will find acceptable. There are some authorities which seem to suggest that the bank's documentary evidence may not be conclusive and in any event, the bank documents seem to contain their own inherent ambiguities, require interpretation within the context of this specific case, and in respect of the NCB documentation have not been produced even by the appellant to date. Additionally, this court has said with regard to the presumptions in law that they are "capable of being rebutted by even the slightest of evidence" (per Harrison P in **Spence v Spence, Taylor and Shirley**). As a consequence, at the ex parte hearing there were allegations supportive of the presumption of a resulting trust, and at the inter partes hearing there were allegations in respect of the presumption of advancement, although that contention was not argued. In spite of the well-known doctrine enunciated in the **Jamculture Ltd** decision of this court, and referred to by both counsel as the governing principle on the subject that: " …on an ex parte application *uberrima* fides is required and it is therefore incumbent upon an applicant to make a full and frank disclosure of all material facts" (and I would add even those facts not material to the applicant's case), I do not think that the fact that the bank documents were not before the learned judge on the ex parte application would have made the decision by the judge to extend the injunction palpably wrong.

**Undertaking in damages**

[61] It is patently clear in this case that the funds in the joint accounts were being protected by the injunction and therefore were not at any risk whatsoever. Therefore, the fact that there was no statement in the affidavits concerning the financial source of

the funds to back the undertaking would not have been fatal to the grant of the injunction. The grant of the injunction would definitely have caused the least irremediable prejudice to the appellant. Indeed, as counsel has indicated, as interest continues to accrue on the funds in the accounts, any loss to the appellant, that results in the interim from being kept out of the use of the funds in the accounts, would have been minimal. This aspect of the appeal should therefore not detain us at all.

**Conclusion**

[62] In all the circumstances, the order made by DO McIntosh J was correct. The injunction ought to have been extended until the trial of the claim, which is why we dismissed the appeal with costs as set out in paragraph [7] herein.