

IN THE SUPREME COURT OF JUDICA RE OF JAMAICA**CLAIM NO. HCV 2112 OF 2005**

BETWEEN	OWEN CODNER	CLAIMANT
AND	ALLECIA CODNER	1ST DEFENDANT
AND	NIGEL RAMBARAN	2ND DEFENDANT

Mr. K. West for the Claimant.

Ms. Audrey Clarke for the Defendants.

Heard: 26th and 27th October 2009

G. Brown, J. (acting)

The Claimant is the 1st Defendant's father and a retired accountant. He was separated from his wife.

The 1st Defendant was a student at the University of Technology and resided with her father at #2 Hope Boulevard, Hope Pastures.

In 2002 they opened a joint certificate of deposit account at the Liguanea branch of Victoria Mutual Building Society (VMBS).

On the 1st July, 2005 the 1st Defendant without the knowledge and consent of the Claimant withdrew the sum of \$6,422,000.00. She purchased a house with \$4,400,000.00 and gave the 2nd Defendant \$2,021,349.78 to purchase furniture.

The Claimant reported the matter to the Matilda's Corner Police. She was subsequently arrested and later convicted for fraudulent conversion.

He filed a claim to recover the sum that he alleged was wrongfully withdrawn from the deposit account.

The action against the 2nd Defendant was discontinued at the close of the Claimant's case.

The 1st Defendant had also filed a counter claim against the Claimant for false imprisonment and malicious prosecution. This was also discontinued.

It was the Claimant's contention that the 1st Defendant had no beneficial interest to the money in the account and was a mere trustee. He had opened the account with either \$600,000.00 or \$300,000.00 and added her name for convenience as he trusted her. He was sickly and in case of emergency she could withdraw money to assist him. He admitted that money was taken from a savings account in her and her mother's name but he said it was actually his.

He said he kept the certificate of deposit and from time to time made additional deposits to it including rent he collected for his brother-in-law. He had to account to him for this. He had also sold his two properties including one at Calabar Mews and deposited the proceeds of sale first to a savings account at VMBS and then transferred to the certificate of deposit account. In May 2005 when the latter expired he made the final deposit. He kept these certificates in his drawer. He also kept a record of each deposit in a ledger which the 1st Defendant was aware of. She assisted him in making the entries. He said that this money was to be used to construct a guest house and she would be the manager.

The 1st Defendant on the other hand contended that she was entitled to the money and did not need his consent to withdraw it. He had given her the money as a gift. She denied that she was a mere trustee and relied on the equitable principle of advancement.

She testified that the Claimant asked her to add his name to her account and she agreed to his request. He was teaching her to save and did not want her to squander the money. She should only use it to purchase a house for herself. She kept original certificate of deposit. When he sold his properties he deposited the proceeds of sale in the account and told her that the money was hers. The Claimant denied these assertions.

Ms Clarke in her written submission on behalf of the 1st Defendant stated;

“The legal position is that it is clear that where a man purchases shares with his own funds and registers them in the name of a stranger or jointly in his name and that of the stranger, there is a resulting in favour of the purchaser. On the other hand if they are purchased in the name of a child or in the joint names of the man and his child or one to whom the purchaser stands in loco parentis, there is no such resulting trust but a presumption of advancement... As is always the case with presumptions, they are rebuttable. It has been posited however, that in respect of the presumption of advancement relative to the father child relationship in particular, it should not give way to slight circumstances.”

She argued that the Claimant had failed to rebut the presumption of advancement in the instant case as **“no significant circumstances have been outlined in his evidence to discharge it. The mere assertion that he was suffering from certain illnesses and wished the funds to be available at his daughter’s disposal in the event he was incapacitated or otherwise unavailable, does not constitute sufficient evidence.”**

It was clear from the evidence that a sum of \$600,000.00 was withdrawn from the savings account in the Defendant and her mother’s name and was used to open the certificate of deposit. The defendant was a student and no substantial income. She lived at home with her father who assisted her from time to time. He paid her each time she worked for him. She described their relationship *“as on and off, sometimes he would be nice and other times not nice. He did not pay for my tuition fee all the times.”*

On the 1st July 2005 she said they had a quarrel, as a result she withdrew the money and purchased the house and fixtures. She did not tell her father of the decision to do so and he was therefore unaware of her actions. She claimed that she had kept the original certificate of deposit in her possession and denied that she removed it from his desk drawer.

The Claimant on the other hand maintained that he had the original certificate in his drawer and he alone had the key. When he returned home that day he found his room ransacked, the night-table broken into, a pass book and some money missing. This caused him to rush to VMBS where he discovered that the 1st Defendant had attended earlier and withdrew the money from the certificate of deposit.

It was clear from the evidence that at the time when the certificate of deposit was opened, either party could make deposits or withdrawals as there were no restrictions or limitations. Upon the death of either party, the survivor would be entitled to the fund. It was his intention that she could withdraw money from the account if he became ill.

After the account was opened, there was no dispute that only the Claimant made deposits to it. These included the proceeds of sale of his two real properties and the rental income for his brother-in-law. The 1st Defendant had made no contribution and was therefore a mere volunteer. Any claim by her that she was entitled to the money must depend upon equity.

The Defendant had no documentary evidence to support her account that the money in the account was a gift. There were no independent witnesses. The parties relied solely on their testimonies.

The Claimant was indeed a retired accountant and was very meticulous with his financial affairs. He kept a record of each deposit in his ledger including the sums that the 1st Defendant claimed he had given to her. He also kept the certificates of deposits. He sold his real properties and deposited the proceeds of sale to this account. He also deposited trust money i.e. rent for his brother-in-law to the account. This action by him showed that he had retained total freedom of action over and control of the funds in the account. This was not consistent with someone who had given away the money in the account to his daughter.

The Claimant was an elderly gentleman and was concerned about his health. He trusted the Defendant and therefore opened the account with her. She breached this trust when she withdrew the money and converted it for her own selfish use.

I preferred the Claimant's evidence over the Defendant's and was satisfied on a balance of probability that he never told her that the money could only be used by her to purchase a house. This was a contrived defense on her part as she sought to justify her fraudulent action.

I was also satisfied that the Claimant had rebutted the equitable presumption of advancement and therefore the defendant was a mere trustee. She had no beneficial interest in the funds. The Claimant is therefore entitled to recover the money she withdrew from the account.

I therefore make the following orders:

1. A Declaration that the Claimant is the sole beneficial owner of Certificate of Deposit No. 22637706.
2. That the dwelling house at 119a Mount Royal Estate be transferred to the Claimant and the Registrar of the Supreme is empowered to execute the transfer if the Defendant fails to sign it.
3. The Defendant is to surrender the registered title forthwith to the Claimant or his Attorney at Law.

4. The Defendant is to quit and deliver up possession of the said premises within seven (7) days hereof.

Judgment for the Claimant on the claim and counter-claim in the sum of \$2,021,349.78 with interest @ 12% p.a. from the 1st day of July, 2005 until paid against the 1st Defendant with costs to be agreed or taxed.

Judgment for the Second Defendant against the Claimant with costs to be agreed or taxed.