[2024] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00034

BETWEEN	**EVON REID** **(Executor of the Estate of Easton Douglas)**	**APPELLANT**
AND	**JACQUELINE DOUGLAS BROWN**	**RESPONDENT**

Written submissions filed by Ms Carol Davis instructed by Carol Davis & Co for the appellant

Written submissions filed by Mrs Georgia Gibson Henlin KC and Miss Stephanie A Williams instructed by Henlin Gibson Henlin for the respondent

23 October 2023 and 3 May 2024

Sale of Land – Sale of property held as joint tenants - Severance of joint tenancy – Sale of an interest from one co-owner to another – Liability for the payment of transfer tax - Liability for the payment of property tax - Liability for the payment of attorney's fees on transfer - Section 3(1) of the Provisional Collection of Tax (Transfer Tax) Order, 2013 - Section 2(1) of the Transfer Tax Act – Sections 2(1), 4 and 8 of the Property Tax Act

Civil procedure – Accounts and inquiries – Sale of land transaction – Whether attorney-at-law with carriage of sale the proper accounting party – Whether orders may be made which prejudice the attorney-at-law without having personally served the attorney-at-law with notice of the proceedings in which such an order is sought – Civil Procedure Rules, Part 41

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

FOSTER-PUSEY JA

[1] I have read the draft judgment of my learned sister V Harris JA. I agree with her reasoning and conclusion. There is nothing that I wish to add.

D FRASER JA

[2] I, too, have read the draft judgment of my learned sister V Harris JA and agree with her reasoning and conclusion.

V HARRIS JA

[3] This is an appeal against the decision of a judge of the Supreme Court ('the learned judge') made on 15 May 2023, whereby he dismissed an appeal filed by the appellant in the Supreme Court against orders made by the registrar of the Supreme Court on 27 September 2019.

The proceedings in the court below

[4] The history of these proceedings began with the filing of an amended fixed date claim form by Mrs Myrna Douglas on 28 April 2005 for declarations of her interest in properties acquired during her marriage to Mr Easton Douglas, now deceased (whose estate is the appellant represented by his executor, Mr Evon Reid). One of the properties, situated at 14A Carvalho Drive, Kingston 10, in the parish of Saint Andrew, registered at Volume 1303 Folio 984 of the Register Book of Titles ('the property'), is the subject of this appeal. The property was owned by Mr Douglas and the respondent, Mrs Jacqueline Douglas Brown, his daughter, as joint tenants ('the co-owners').

[5] Upon the initial application coming before Campbell J in the Supreme Court on 8 July 2015, during the lifetime of Mr Douglas, the learned judge made an order, among other things, for the sale of the property. Further to that order, Mr Douglas exercised his option to purchase Mrs Douglas Brown's interest in the property.

[6] The agreement for sale, drafted by Mr Douglas' attorney-at-law, Ms Carol Davis, who had carriage of the sale, was dated 21 December 2015. Mr Douglas and Mrs Douglas

Brown were named as the vendors, with Mr Douglas also named as the purchaser. The agreement for sale sought to convey the one-half interest in the property attributable to Mrs Douglas Brown to Mr Douglas for $10,500,000.00. The sale was completed in March 2016.

[7] Mrs Douglas Brown, through her attorneys-at-law Henlin Gibson Henlin, took issue with certain sums that Ms Davis deducted from the proceeds of sale, such as the transfer and property taxes, and attorney's fees for the transfer. The parties could not agree on this matter. As a result, in accordance with one of Campbell J's consequential orders for an account to be taken by a registrar of the Supreme Court, on 13 May 2016, Mrs Douglas Brown filed her application for the taking of accounts. That application, which was made pursuant to rule 41.2(2) of the Civil Procedure Rules ('the CPR'), named Ms Davis as the respondent. Mrs Douglas Brown sought an account of the sum paid to Ms Davis under the sale of her interest to Mr Douglas pursuant to Campbell J's order and demanded payment by Ms Davis of all monies due to her on the taking of such accounts, as well as costs.

[8] The application came before a registrar of the Supreme Court ('the registrar') on 6 December 2016 and 25 January 2017. In her report dated 27 September 2019, the registrar made the following orders:

> "1. Carol Davis is ruled to be the accounting party.
>
> 2. Transfer tax to be equally bourne [sic] by the parties.
>
> 3. Attorneys [sic] cost on transfer to remain.
>
> 4. Property tax amended to refer to the year 2014-2015. Each party liable to pay one-half (½) property taxes for that period.
>
> 5. Accounting party to pay the amount found outstanding of **Two Hundred and Eighty-Three Thousand Six Hundred and Seventy-Five Dollars ($283,675.00)**." (Emphasis as in original)

[9] In response, on 14 October 2019, Ms Davis filed a notice of appeal in the court below on behalf of Mr Douglas, along with an application for an extension of time to file

the notice of appeal, which was amended on 24 January 2020. On 23 September 2022, Lindo J granted the extension and fixed the hearing of the appeal before a judge of the Supreme Court for 25 November 2022. It is that appeal that the learned judge heard and determined.

[10] The learned judge heard the appeal of the registrar's report on 3 March 2023, and he delivered his decision on 15 May 2023, dismissing the appeal and awarding costs in favour of Mrs Douglas Brown. His orders were as follows:

> "1. Appeal is dismissed.
>
> 2. Costs to [Mrs Douglas Brown] to be agreed or taxed.
>
> 3. Leave to Appeal is granted."

The appeal

[11] The disquiet surrounding the registrar's decision persisted, and on 22 May 2023, Mr Douglas' notice of appeal and written submissions were filed in this court. The following nine grounds of appeal were proffered:

> "1. The Learned Judge erred [in] failing to set aside the Orders of the Registrar pursuant to the Appeal of the Registrar's Order set out out [sic] in the Registrar's report filed on 30th September, 2019.
>
> 2. The Learned Judge erred in dismissing the appeal against the Registrar's Order, ordering transfer tax to be equally bourn [sic] by the parties.
>
> 3. The Learned Judge erred in dismissing the appeal against the Registrar's order in that it was Jacqueline Douglas Brown who [p]ursuant to the Order of the Court was transferring her 50% of the land registered at Volume 1303 Folio 984 (hereinafter the said land) and that as the Vendor of her 50% share she was responsible for the payment of transfer tax on the said land.
>
> 4. The Learned Judge [erred] in dismissing the appeal against the Order of the Registrar in that in law the joint ownership of the said land [h]ad been severed by operation of law and/or by agreement, and as the owner of 50% of the said land it was Ms. Douglas Brown

who was transferring her 50% of the said land to the Defendant and as such she was liable for the payment of transfer tax.

5. The Learned Judge erred in dismissing the Appeal against the Registrar's Order in that in that [sic] Ms. Douglas Brown had agreed and represented in writing that she would pay the transfer tax, and the [sic] Mr. Easton Douglas had relied on that representation and Ms. Douglas Brown would be estopped from claiming that the transfer tax paid by her now be repaid to her.

6. The Learned Judge erred in ordering that each party was liable to pay ½ property taxes for the period 2014-2015.

7. The Learned Registered [sic] ordering that each party was liable to pay ½ property taxes for the 2014 -2015 period in that in the year 2014 to 2015 the said Ms. Douglas Brown and [Mrs Myrna Douglas] had from April 2005 obtained an injunction 2005 [sic] restraining [Mr Douglas] from visiting or interfering with [Mrs Myrna Douglas'] possession of the said land, and the said Ms. Douglas Brown and [Mrs Myrna Douglas] remained in possession of the said land to the exclusion of [Mr Douglas] until on or after 2016. Further the Learned Judge erred in failing to set aside these orders of the Registrar because the Registrar failed to quantify these sums, and further ordered that all sums referred to in the Registrar Report (presumably including the tax adjustment) be paid by Ms. Carol Davis the Attorney-at-law for [Mr Douglas].

8. The Learned Judge erred in dismissing the appeal against the Registrar's Order ordering Ms. Carol Davis as the accounting party to pay the sum of $283,675 in circumstances where Ms. Carol Davis was never a party to the claim herein and further was not personally served with any proceedings herein. In the circumstances the said Order was in breach of Ms. Davis [sic] constitutional rights as set out in s l6(2) of the Charter of Fundamental Rights and Freedoms.

The Learned Registrar erred in ordering Ms. Carol Davis as the accounting party to pay the sum of $283,675 in circumstances where Ms. Davis throughout the proceedings acted only as Attorney-at-law for [Mr Douglas].

9. The Learned Judge erred in dismissing the appeal against the Registrar's order ordering Ms. Carol Davis as the accounting party to pay the sum of $283,675 in circumstances where Ms. Carol Davis did not have in her possession pursuant to any account between the

> parties the said sum of $283,675 and would therefore have been required to pay the said sum from her own pocket."

Discussion

[12] As indicated earlier, by order dated 8 July 2015, Campbell J had empowered the registrar to "take all necessary accounts with respect to the sale" of the property. Subsequent to the sale of the property, Mrs Douglas Brown filed her application for the taking of accounts. The registrar was asked to review, among other things, monies deducted from the proceeds of sale for attorney's fees, property taxes and transfer tax.

[13] The outcome of the registrar's orders was that Mrs Douglas Brown was to be refunded one-half of the transfer tax and property tax payment, which, in total, amounted to $283,675.00. That sum was to be paid by Ms Davis, who, being the attorney-at-law with carriage of sale, was designated as the accounting party.

[14] Pursuant to Part 62 of the CPR, Ms Davis appealed the registrar's decision before the learned judge. The learned judge, having heard the matter by way of a re-hearing (in accordance with rule 62.9(1) of the CPR), decided to dismiss the appeal and affirm the registrar's decision. We were not provided with any judgment or notes of proceedings from which we could ascertain the learned judge's reasons for that decision. In the absence of any reasons, this court is required to evaluate the material that was before the registrar to determine whether the learned judge was correct in dismissing the appeal.

[15] The grounds of appeal and corresponding written submissions raise three questions for this court's consideration. The questions are:

(i) Who was liable to pay the transfer tax?

(ii) Who was liable to pay the property tax?

(iii) Did the registrar err in appointing Ms Davis as the accounting party?

Who was liable to pay the transfer tax? (Grounds two to five)

[16] This issue arose upon Ms Davis' deduction of the full amount due for the payment of transfer tax from the proceeds of sale payable to Mrs Douglas Brown. Upon the taking of accounts, the registrar directed that the co-owners should equally bear the transfer tax. Correspondingly, one-half of the transfer tax payment that was deducted was found to be outstanding, forming part of the sum due to Mrs Douglas Brown. The learned judge affirmed those orders after dismissing the appeal against the registrar's decision.

Submissions on behalf of the parties

[17] Counsel Ms Davis prefaced her argument on this issue by pointing out that Mr Douglas and Mrs Douglas Brown were registered on the certificate of title for the property as joint tenants. Once a joint tenant files proceedings along with an affidavit in court, the joint tenancy is severed, she submitted, citing **Re Draper's Conveyance** [1967] 3 All ER 853 in support. Accordingly, since Mrs Douglas Brown was transferring her 50% interest in the property to her co-owner, the joint ownership of the property was severed by operation of law and/or by agreement. The sale price represented her 50% interest in the property, and so she was liable to pay the transfer tax assessed on that 50%. Effectively, Mr Douglas was the transferee, whereas Mrs Douglas Brown was the transferor.

[18] Counsel further submitted that by virtue of the agreement for sale, Mrs Douglas Brown agreed to pay the transfer tax, and Mr Douglas relied on that assurance. Mrs Douglas Brown was, therefore, estopped from seeking to have one-half of the transfer tax returned at this stage (**Annie Lopez v Brown et al** [2015] JMCA Civ 6 was cited in support). For those reasons, Ms Davis asserted that the learned judge and the registrar erred when they required the co-owners to share the transfer tax payment equally.

[19] On the other hand, counsel for Mrs Douglas Brown, Mrs M Georgia Gibson Henlin KC (along with Miss Stephanie A Williams), took the position that, because the co-owners were joint tenants, Mr Douglas was a transferor and transferee. She submitted that it is

an established conveyancing practice where joint vendors are selling their interest to the other that the transfer tax is shared equally between them. Counsel further contended that the provision in the agreement for sale stating that Mrs Douglas Brown should pay the transfer tax was inconsistent with the law. She posited that, in accordance with section 18 of the Transfer Tax Act, the allocation of transfer tax applies notwithstanding anything to the contrary agreed by the parties. In any event, she submitted, Mrs Douglas Brown agreed to pay the transfer tax under duress.

[20] King's Counsel also argued that the court's order did not sever the joint tenancy; it simply stipulated the value Mr Douglas should pay to Mrs Douglas Brown upon the transfer of her joint and indivisible interest to him. Since there was no stipulated percentage interest in the property, the unities of time, title, possession, and interest between the co-owners were maintained. She contended that the agreement for sale prepared by Ms Davis supported that view. It named both co-owners as the vendors, and the instrument of transfer named them both as the joint transferors. Consequently, the transfer tax should have been apportioned equally between the parties. At any rate, the sale was subject to an account being conducted by the registrar as stipulated by Campbell J's order, so it was open to the registrar to ensure that the sale was conducted in accordance with the law and established practices.

Law and analysis

[21] By virtue of the Provisional Collection of Tax (Transfer Tax) Order, 2013 (which was still in force at the time of the transfer), section 3(1) of the Transfer Tax Act was deleted and substituted with the following:

> "Subject to and in conformity with the provisions of this Act, **tax shall be charged at the rate of five per centum of the amount or value of such money or money's worth as is**, or may be treated under this Act as being, **the consideration for each transfer** after the 1st day of April, 2013 **of any property**; **and tax charged in respect of any such transfer shall be borne by the transferor**." (Emphasis supplied)

[22] Further to the valuation, the co-owners agreed to the sale price of $10,500,000.00 (also referred to as the 'purchase price'), representing Mrs Douglas Brown's one-half interest in the property. The applicable transfer tax of 5% would be imposed on the transferor. The parties share that understanding; however, their discord rests on their opposing views as to who is the transferor.

[23] In section 2(1) of the Transfer Tax Act, the terms "transfer" and "transferor" are defined as such:

> " **'transfer' means any legal or equitable transfer by way of sale**, gift, exchange, grant, assignment, surrender, release, or other disposal, and includes a transfer by or at the order or direction of a court of competent jurisdiction or by way of compulsory acquisition and **'transferor', in relation to such a transfer of property, means the person from whom the property is so transferred**;" (Emphasis supplied)

[24] As already established, the co-ownership of the property by Mr Douglas and Mrs Douglas Brown took the form of a joint tenancy. The nature of a joint tenancy is such that, together, both co-owners hold one estate with no divisible shares. This is significant in these circumstances because, for Mrs Douglas Brown to convey an interest in the property distinct from that of Mr Douglas, the joint tenancy would need to be severed.

[25] In **Carol Lawrence et al v Andrea Mahfood** [2010] JMCA Civ 38, Morrison JA (as he then was) examined the governing principles with respect to the severance of a joint tenancy and observed as follows:

> "[26] The three methods of severing a joint tenancy are therefore: by alienation by one of the joint tenants of his share in the property, by mutual agreement between the joint tenants and by a course of dealing between them. In respect of Page Wood V-C's second method (mutual agreement), ***Burgess v Rawnsley*** [[1975] 3 All ER 142] makes it clear that an oral agreement for the sale of his interest by one joint tenant to the other will suffice to effect a severance, even though that agreement may be unenforceable for the want of writing. But in order to effect a severance by this method, there must be an agreement, since, as Sir John Pennycuick observed

> (at page 447), 'one could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for £X and the other makes a counter-offer of £Y'. However, an agreement to sever need not be express, but can be inferred from a course of dealing (see per Browne LJ at page 444), which was Page Wood V-C's third method, although, as Sir John Pennycuick also observed (at page 447), this method is not 'a mere sub-heading of the second, [but covers]...acts of the parties, including...negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed'. …"

[26] Later in his judgment, Morrison JA reviewed Mummery LJ's consideration of the ways in which a joint tenancy can be severed in **Marshall v Marshall** [1998] EWCA Civ 1467. In light of the facts of this case, the following excerpt is noteworthy:

> "[30] …
>
> 'Secondly, a joint tenancy can be severed by an agreement to sever. Whether or not there is such an agreement is a question of fact in each case. There need not be an express agreement in terms to sever or to hold the property as tenants in common. There may be an agreement to sever where the agreement is to deal with the property in a way which necessarily involves severance. The agreement need not be actually performed, or be specifically enforceable or even be legally binding. As pointed out by the Court of Appeal in ***Burgess v Rawnsley***, the significance of an agreement is as an indication of a common intention to sever, rather than as giving rise to enforceable contractual obligations and rights.'
>
> …"

[27] I am firmly of the view that, in the circumstances of the present case, the approach mentioned above was implemented. There may not have been precise words stating their intention to sever the joint tenancy, but it was not required. In order for Mrs Douglas Brown to distinguish, value, and sell her interest in the property to her co-owner, severance of the joint tenancy was unavoidable. The agreement for sale, being a legally binding contract, solidified their common intention to sever their joint tenancy.

[28] It is trite that upon the severance of the joint tenancy, if the co-owner's respective shares are not clearly specified, the presumption is that they own the property in equal

shares. Therefore, irrespective of whether Campbell J had indeed stipulated that they held equal shares in the property, there is no evidence that either of the parties sought to rebut the presumption that they would each hold a one-half share of the interest therein. Moreover, the sale price for Mrs Douglas Brown's interest represented the one-half value of the property as ordered by Campbell J.

[29] Similarly, in **Winston Newell v Tastey Newell** [2020] JMCA Civ 44, it was held that the mutual agreement of the parties had severed the joint tenancy. In that case, Mr and Mrs Newell were registered as joint tenants of the disputed property. They subsequently entered into an agreement for Mrs Newell to purchase Mr Newell's interest. Both parties were named as the vendors in the agreement for sale, while Mrs Newell was named as the purchaser. Additionally, there was a clause that stated that the transfer tax was to be borne by the vendor. However, Mrs Newell paid one-half of the transfer tax assessed on Mr Newell's one-half interest. Mr Newell's attorney at law, who had carriage of the sale, relied on that payment to assert that they should also share his legal fees for the transfer.

[30] This court found that the severance of the joint tenancy was palpable given that Mr Newell not only identified his distinct interest in the property but also ascribed a value of $10,750,000.00, upon which transfer tax was assessed. Furthermore, since Mr Newell was transferring his one-half interest to Mrs Newell, he should be regarded as the sole true vendor.

[31] To my mind, the agreement for sale in the present case also demonstrates the severance of the joint tenancy:

"<u>AGREEMENT FOR SALE</u>

...

> **VENDOR: Easton Wentworth Xavier Douglas**, Chartered Surveyor previously of … and **Jacqueline Ann Yvonne Brown**, Architect/Planner of …
>
> **PURCHASER: Easton Wentworth Xavier Douglas Snr**, Chartered Surveyor of … and/or nominee. …
>
> **DESCRIPTION OF PROPERTY:**
>
> **50 % Interest of ALL THAT parcel of part of NUMBER FOURTEEN CARVALHO DRIVE part of NUMBER SIXTEEN HOPE Road in the parish of Saint Andrew** containing by the survey Five Hundred and Ninety-three Square Metres and Eight Hundred and Twenty-five Thousandths of a Square Metre of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being part of the land comprised in Certificate of Title aforesaid deposited at the office of Titles on the 4th day of December, 1997 of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1303 Folio 984 of the Register Book of Titles.
>
> **AGREED SALES PRICE:**
>
> $10,500,000 (Ten Million Five Hundred Thousand Dollars) …" (Emphasis as in original)

[32] It is immediately apparent that the subject of the conveyance was not the whole interest in the property but rather the 50% interest attributable to Mrs Douglas Brown, valued at $10,500,000.00. Although both Mr Douglas and Mrs Douglas Brown were named as the vendors, Mr Douglas was the only purchaser. Ms Davis has explained that, in drafting the agreement for sale, she referred to Mr Douglas as a vendor because he was a registered owner of the property. That may well be so, but given the purpose of the agreement for sale, which was to transfer Mrs Douglas Brown's 50% interest in the property to Mr Douglas, Mr Douglas could not be the vendor of that 50%. Although the parties signed the agreement sale as drafted, it was incorrect to have referred to Mr Douglas as a vendor.

[33] Correspondingly, the agreement for sale expressly identified that only a 50% interest in the property was being transferred. In accordance with the Transfer Tax Act,

the transfer tax was calculated on the value of that one-half legal and equitable interest in the property. Applying the principles in **Winston Newell v Tastey Newell**, it is logical to assert that Mrs Douglas Brown must be regarded as the sole "transferor" and true vendor since she is the person from whom the interest in the property is being transferred. This position was correctly reflected in the agreement for sale, which stipulated who should pay the transfer tax as follows:

> "**TRANSFER TAX:**
>
> To be borne by the Vendor Jacqueline Ann Yvonne Brown [Mrs Douglas Brown]. " (Emphasis as in original)

[34] Upon executing the agreement for sale with that clause, Mrs Douglas Brown consented to pay the entire transfer tax, which amounted to $525,000.00. It is immaterial that she had previously expressed her unwillingness to do so. As indicated in her letter dated 8 December 2015, she conceded to Mr Douglas' request that she exclusively bear the transfer tax payment. That obligation accords with the Provisional Collection of Tax (Transfer Tax) Order 2013 and would be enforceable under the agreement for sale.

[35] For those reasons, I am of the view that Mrs Douglas Brown, being the transferor of her one-half interest in the property, was solely responsible for the payment of the transfer tax. Accordingly, the learned judge erred in affirming the registrar's order in this regard. These grounds, therefore, succeed.

[36] The issue of estoppel was also raised as a ground. However, in the light of the outcome of the appeal, it is not necessary to examine and rule on the arguments made on that principle.

Who was liable to pay the property tax? (Grounds six and seven)

[37] In the "Amended VENDOR'S STATEMENT OF ACCOUNT" dated 12 February 2016 and the "Further Amended VENDOR'S STATEMENT OF ACCOUNT" dated 5 April 2016, Ms Davis listed "Outstanding taxes for 2010-2016" in the amount of $42,350.00, which she deducted from the proceeds of sale to be paid over to Mrs Douglas Brown. These grounds

of appeal have sought to challenge the registrar's order that the statement be amended to refer to the year "2014-2015" and further that each party is liable to pay one-half of the property tax for that period.

Submissions on behalf of the parties

[38] Ms Davis argued that from 2005 to 2016, Mrs Douglas Brown was the person in possession, and so it was her responsibility to pay the property taxes. During that time, she did not pay rent to Mr Douglas. Additionally, she rented a portion of the property and retained all the proceeds from the rental without accounting to Mr Douglas. Counsel also noted that the registrar failed to quantify the amount to be paid in relation to the property tax, although it appeared to be included in the sum of $283,675.00 that Ms Davis was ordered to pay. She understood that the registrar was instructing her, in her capacity as the accounting party, to reimburse one-half of the property tax deduction. She argued that, as attorney-at-law for Mr Douglas, she had no duty to pay any part of that sum that may have been due by the co-owners.

[39] Conversely, counsel for Mrs Douglas Brown submitted that Ms Davis was seeking to improperly introduce evidence that was not before the registrar by way of the notice of appeal. As such, she should be precluded from relying on it. Mrs Gibson-Henlin argued further that Ms Davis incorrectly deducted the sum of $42,350.00 from the amount due to Mrs Douglas Brown for the property taxes for the period between 2010 and 2016. The co-owners should have divided that sum equally at best. In any event, that sum was incorrect since Mrs Douglas Brown exclusively paid the property taxes from 2010 to 2014. Accordingly, she contended, the learned judge did not err in upholding the registrar's appointment of Ms Davis as the accounting party responsible for the payment of the sum due as she had conduct of the sale, "orchestrated and directed the misallocations", and as such was the appropriate person to repay it.

Law and analysis

[40] The Property Tax Act mandates that property tax is to be paid every year (section 2(1)) by the person in possession of the property (section 4). If the property charged with property tax is in the possession of more than one person, then payment can be enforced against all or any of the persons in possession (section 8).

[41] In a letter dated 13 April 2016, counsel Miss Stephanie A Williams wrote to Ms Davis regarding the sum deducted for property tax from the proceeds of sale due to Mrs Douglas Brown. She stated that the entire amount for 2015-2016 (pursuant to the receipt provided by Ms Davis indicating payment) was incorrectly deducted since Mr Douglas was in possession of the property. In any event, she stated, the property taxes were to be apportioned equally between Mr Douglas and Mrs Douglas Brown. For the period 2010-2014, the property taxes, which in total amounted to $113,020.00, were exclusively paid by Mrs Douglas Brown, as demonstrated by receipts and a certificate of payment of property taxes. Counsel further contended in her letter that Mr Douglas was indebted to Mrs Douglas Brown for one-half of that sum.

[42] It is observed that the exhibited copy of the property tax payment advice issued by Tax Administration Jamaica indicated several payments made by Mrs Douglas Brown between 2006 and 2013. Concerning those years, $15,250.00 plus a penalty of $1,525.00 was paid for 2010-2011 and 2011-2012, and $15,255.78 was paid for 2012-2013. Ms Davis also provided the court with a copy of the property tax receipt for 2015-2016, which amounted to $42,350.00 ($38,500.00 plus a penalty of $3,850.00).

[43] It seems to me, however, that the focus should be on the payment of property tax for 2015 to 2016, especially since there is a receipt evidencing that payment, which corresponds with the period between the order of Campbell J made on 8 July 2015 and the sale of the one-half interest, which was completed in March 2016. To my mind, it is clear that the reference by Ms Davis to the years 2010-2016 in the Vendor's Statement of Account was an error and that the sum of $42,350.00 on that statement represented the property tax payment for the period of 2015-2016 (as stated on the receipt).

[44] Property tax is calculated on the unimproved value of the entire parcel. The law clearly states that it is to be paid by the person or persons in possession of the charged property. What is evident from the material before the court is that there is a dispute regarding who was in possession of the property during the period 2015-2016. Ms Davis' position is that Mrs Douglas Brown was in possession and would be liable to pay the property tax owed for that year. Counsel for Mrs Douglas Brown asserts that Mr Douglas was in possession and, therefore, was responsible for making the payment. It appears that there was no resolution of this question. In light of this unresolved issue, it seems fair and reasonable to me that the obligation to pay the property tax for the relevant period should fall on both co-owners as the registered proprietors of the property.

[45] Additionally, concerning the years previous to 2015-2016, the limited evidence before the court did not allow for a mathematical calculation of the parties' respective apportionments for property taxes for those periods, and there seems to be a live issue (which is unnecessary to resolve) as to which co-owner paid the property tax in each given year. Moreover, this court is bereft of evidence as to the arrangement, if any, between the parties for the payment of property taxes during their joint ownership. In any event, the payments made for those years were not a part of the statement of account, and so were not genuinely included in the statement prepared by Ms Davis.

[46] Finally, it is curious that the registrar ordered that the reference to the property tax be amended to refer to the period 2014-2015 in the face of the receipt from Tax Administration Jamaica, which shows that the payment in question was made for 2015-2016. In the absence of any written reasons, I presume that this was a mistake. Nevertheless, for the reasons I have stated above, I concur with her decision to divide the property tax payment equally among the co-owners. Therefore, only one-half of that sum ($42,350.00), amounting to $21,175.00, should have been deducted from the proceeds of sale as representing Mrs Douglas Brown's one-half share of the payment for property tax. Since the full amount was deducted, Mr Douglas is liable to reimburse Mrs

Douglas Brown for the sum of $21,175.00. For those reasons, save for the incorrect reference to the period of 2014-2015, these grounds cannot succeed.

Did the registrar err in appointing Ms Davis as the accounting party? (Grounds eight and nine)

[47] The application for the taking of accounts sought to join Ms Davis as a party to the proceedings in the capacity of "the accounting party". Ms Davis indicated in her written submissions that she attended the hearing as the attorney-at-law for Mr Douglas; however, upon realising that an order would be made against her in her personal capacity, she excused herself. Her reasons being that she was not a party to the dispute and was not served personally with the application, and further, she could not properly represent herself and Mr Douglas. The registrar proceeded to make certain orders, two of which directly related to and affected Ms Davis. The first order named her as the accounting party, and the fifth order stated that the accounting party should repay the outstanding sum of $283,675.00 to Mrs Douglas Brown.

Submissions on behalf of the parties

[48] Ms Davis' primary contention in this regard was that she served as the attorney-at-law for Mr Douglas to facilitate the sale of the property. Upon its completion, all monies were paid in accordance with what she deemed to be the agreed statement of account. Consequently, the registrar's order would effectively ask her to pay the outstanding sum out of pocket. She noted that despite Mrs Douglas Brown's effort to include her as a party, she was not joined as a respondent to the proceedings, and no documents were personally served on her in that capacity. Moreover, there was no hearing as to her personal liability. Notwithstanding, the registrar made certain orders against her. Those orders, Ms Davis submitted, would be in clear breach of her constitutional rights since they were adverse to her interest and made in circumstances where she did not have a fair hearing or any hearing at all in her personal capacity in accordance with section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter').

[49] Conversely, counsel for Mrs Douglas Brown contended that Ms Davis was the only person who could be called upon to account for the funds received and disbursed following the sale of the property since she had carriage of sale and collected and disbursed all sums in relation to the sale. It was as per the statement of account prepared by Ms Davis that Mrs Douglas Brown was improperly charged, counsel submitted. Also, it was inaccurate for Ms Davis to say that the statement of account was agreed upon in circumstances where Mrs Douglas Brown's attorneys-at-law indicated their issues with it upon the payment of the net proceeds of sale to them on behalf of Mrs Douglas Brown.

[50] Mrs Gibson Henlin submitted that since Ms Davis received money on behalf of Mrs Douglas Brown, she had a duty to pay all reasonable sums related to the sale from the sale price and pay over the remainder. Ms Davis assumed personal responsibility for the "safe keeping of the purchase price", and "[a]ny improper disposal of it on the instructions of one of the parties renders the stakeholder liable to the other for its loss" (**Dimurro v Charles Caplin & Co** (1969) 211 EG 31 and **Tudor v Hamid** [1988] 1 EGLR 251 were cited in support of this point). Pursuant to Campbell J's order, Ms Davis was the stakeholder of the purchase price she received on behalf of Mrs Douglas Brown. Counsel submitted that the attorney with carriage of sale, although not a party to the sale transaction, will be the party to account for money received pursuant to the agreement for sale (counsel referred to the case of **Capital & Credit Merchant Bank Limited v The Real Estate Board; The Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 29). Accordingly, she agreed with Ms Davis being named the "accounting party" and argued that it is open to her to recover the funds from Mr Douglas' estate.

[51] Additionally, it was contended that Ms Davis did not object to the proceedings on the basis that she was not personally served, nor did she allege an infringement of section 16(2) of the Charter before the registrar or the learned judge. In any event, the Supreme Court has original jurisdiction in respect of a breach of constitutional rights and freedoms, and it is not appropriate for those matters to be traversed for the first time in this court (reference was made to the case of **Chen-Young v Eagle Merchant Bank** [2018] JMCA

App 7). It was also submitted that this argument is unmeritorious because Ms Davis received notice of the proceedings and participated. It was, therefore, open to her and her client to arrange for separate representation. For those reasons, counsel posited that Ms Davis should be precluded from relying on that contention. Therefore, the outstanding sum ought to be paid either by Ms Davis as the accounting party or Mr Douglas' estate, which has benefitted from her "machinations".

Analysis

[52] Counsel Ms Davis has taken issue with being appointed as the accounting party in relation to the application before the registrar; however, neither party has provided this court with any authorities to challenge or support that order. The term "accounting party" is not explicitly defined in the CPR. Nonetheless, a basic understanding of the meaning of "the accounting party" is implicit in its use in rules 41.3, 41.4, and 41.6 of the CPR. As I perceive it, since Mr Douglas' attorney-at-law had carriage of the sale, he is the party on whose behalf she prepared the statement of account, received certain payments, disbursed necessary sums, and delivered the net proceeds of the sale to the other party.

[53] In circumstances where Ms Davis was not properly joined as a party, it cannot be denied that there are serious issues as to the fairness of the registrar's orders. This court is, however, at a disadvantage in determining those issues of fairness since the parties have expressed divergent accounts of the issues taken before the registrar and the learned judge. That uncertainty is exacerbated by the absence of any reasons or record of the proceedings to enable this court to ascertain whether the learned judge was plainly wrong in dismissing the appeal.

[54] Despite those deficiencies, I am satisfied that expressing a conclusive view on this issue is unnecessary. By my calculation, it is clear that the sum of $283,675.00 comprises one-half of the transfer tax payment amounting to $262,500.00 and one-half of the outstanding property tax in the amount of $21,175.00 for 2015-2016. In the light of my conclusions on the preceding issues, the payment of those sums has been otherwise addressed. Since it is my judgment that the full payment for transfer tax should be borne

by Mrs Douglas Brown and the one-half payment for the outstanding property tax should be repaid to Mrs Douglas Brown by Mr Douglas' estate, the registrar's order that Ms Davis should make the payment in this regard cannot stand.

[55] Before concluding, I wish to observe that I had some concerns about the registrar's order directing that "Attorneys cost on transfer to remain" in circumstances where 50% of Ms Davis' fees for the transfer were deducted from the proceeds of sale payable to Mrs Douglas Brown, although Ms Davis did not act for her and the agreement for sale provided that each party should bear their respective attorneys' costs. However, since there is no counter-notice of appeal from Mrs Douglas Brown complaining about this order, it stands.

Conclusion

[56] After carefully reviewing the proceedings in the court below, I find that the learned judge was demonstrably wrong in his decision to dismiss the appeal against the registrar's orders. In my judgment, the respondent, Mrs Douglas Brown, is responsible for the total amount assessed for transfer tax as the sole transferor and true vendor. However, the appellant, Mr Evon Reid, in his capacity as the executor of the estate of Mr Easton Douglas, is to pay over to the respondent, Mrs Douglas Brown, the total sum of $21,175.00, which represents one-half of the property tax for the period 2015-2016. Also, the manner in which Ms Davis was ruled to be the accounting party was plainly wrong. Finally, having regard to the circumstances of this case and this court's unfettered discretion on the issue of costs, I would also recommend that there be no order as to costs both here and in the court below.

FOSTER-PUSEY JA

ORDER

1. The appeal is allowed.

2. The decision of the learned judge affirming the order of the registrar of the Supreme Court given on 25 January 2017 is set aside.

3. The order of the registrar that attorney's cost on transfer to remain is affirmed.

4. The order of the registrar that Ms Carol Davis is ruled to be the accounting party is set aside.

5. The order of the registrar that "property tax amended to refer to the year **2014-2015**. Each party is liable to pay one-half (½) property taxes for that period" is set aside. Substituted therefor is an order that each party is liable to pay one-half of the outstanding property tax for the period 2015 to 2016.

6. The order of the registrar that transfer tax is to be equally borne by the parties is set aside. Substituted therefor is an order that Mrs Jacqueline Douglas Brown, as the sole transferor, is liable to pay the total amount assessed for transfer tax.

7. Mr Evon Reid, as the executor of the estate of Easton Douglas, is to pay the sum of $21,175.00, being one-half of the property tax for 2015 to 2016, to Mrs Jacqueline Douglas Brown.

8. No order as to costs both here and in the court below.

9. The order as to costs shall stand unless either party files and serves written submissions proposing a different order within 14 days of the date of this order. The other party shall file and serve its response within 14 days of being served. The court shall consider any submissions on costs on paper and deliver its decision thereafter.