[2015] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 83/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**CLOVER ROBINSON**	**APPELLANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**DESNA MAY WILLIAMSON**	**2ND RESPONDENT**
AND	**JANET ELIZABETH BARNETT**	**3RD RESPONDENT**

Leonard Green and Ms Sylvan Nadine Edwards instructed by Chen Green and Co for the appellant

Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the 1st respondent

Wendell Wilkins instructed by Robertson Smith Ledgister and Co for the 2nd and 3rd respondents

29 October 2014 and 16 January 2015

PANTON P

[1] The deceased was the sole holder of the account until about five days prior to her death. On 17 September 2007 the appellant's name was added. She, as caregiver, accompanied the deceased to the bank in question. The deceased was too weak to

transact business and requested that the appellant be added to her accounts so that funds could be withdrawn to pay the bills of the deceased. On the whole, the evidence points to the appellant's name being added to the accounts as a matter of convenience.

[2] My learned brother Brooks JA has comprehensively reviewed the facts and the authorities cited. I agree with his reasoning and conclusion that this appeal ought to be dismissed.

McINTOSH JA

[3] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[4] This is an appeal from the judgment of McDonald-Bishop J (as she then was) handed down on 14 May 2010. In that judgment, the learned judge ruled that Ms Clover Robinson, who was the sole surviving holder of a joint bank account, was not beneficially entitled to the funds in that account. Ms Robinson, in her appeal, has complained that the learned judge ought to have found that the right of survivorship, stipulated in the terms applicable to the account, should have been enforced. In the circumstances, according to Ms Robinson, the estate of the other joint holder, Ms Ruby Noel, deceased, was not entitled to the funds, and the bank, National Commercial Bank (NCB), was wrong to have denied her access to the funds after Ms Noel's death.

[5] The appeal raises the issues of the right of survivorship in respect of jointly held bank accounts and the interaction between that right and the presumption of a

resulting trust, which ascribes beneficial ownership to the person who has provided the funding. Before discussing those issues it is first necessary to outline the circumstances which led to Ms Robinson filing a claim against NCB as well as Ms Noel's estate, represented in the claim by her executors, Ms Desna Williamson and Ms Janet Barnett.

The background facts

[6] There are very few contested issues of fact in this claim. It had its genesis on 17 September 2007 when Ms Noel requested NCB to add Ms Robinson's name as a joint holder with her on her savings and fixed deposit accounts. Prior to that date, Ms Noel was the sole account holder, and, from the evidence, it seems that she had been the sole source of all the funds in those accounts. Ms Noel was elderly and not in the best of health. Ms Robinson was her niece and caregiver.

[7] The reason for having Ms Robinson's name added to the account was critical to the resolution of the claim as it is to the disposal of this appeal. Whereas NCB asserts that, from the circumstances, the addition was only for the convenience of having Ms Robinson conduct business for Ms Noel, Ms Robinson contends that there was no such restriction expressed or intended. The name came to be added in the manner described below.

[8] On 17 September 2007, Ms Noel was very ill. She was so ill that she was unable to go into NCB's branch in Santa Cruz in the parish of Saint Elizabeth, which administered the accounts. A representative of NCB, Ms Trudy Chung, had to go to her

at a motor vehicle, which was parked outside the branch. Ms Chung noted Ms Noel's appearance:

> "She was a bit weak, she looked pale, she was low and she said she had bills to pay." (Page 23 of the record of appeal)

[9] In respect of their interaction, Ms Chung said in cross-examination:

> "I went outside and spoke to Ms Ruby. Ms Robinson was right there. I asked her if she wanted Ms Robinson to be added to the account. She said, Yes [sic], she is unable to sign and she needed money and she had bills to sign [sic]. I asked her more than once..." (Page 23 of the record of appeal)

[10] Although only the savings account had been previously used for Ms Noel's ordinary business, such as bill payment, Ms Chung asked Ms Noel whether she wanted Ms Robinson's name to be added to the fixed deposit account as well. Ms Noel's answer was in the affirmative. Ms Chung's testimony in that regard was:

> "When I went outside I told Ms. Noel that I was adding Ms Robinson [sic] name to both Account [sic]. She didn't disagree she said, 'yes'." (Page 24 of the record of appeal)

[11] Based on that interaction, Ms Chung added Ms Robinson's name to both accounts. On that basis the accounts became joint accounts. Ms Chung prepared a document titled "Account Opening Checklist". She recorded on it, as "additional comments", the following:

> "Clover added to Ruby Noel's a/c 17-9/2007- [sic]
> Spoke with Ms Noel and she agreed to add niece to both [account numbers] 06523143 & 897079690.

> Ms. Noel has suffered her 5th stroke (was told) and is unable to transact business and as a result request that her niece be added. Thumb prints taken as she is unable to sign."

Ms Chung accepted in cross-examination that there had previously been no activity by Ms Noel in respect of the fixed deposit account, which was numbered 897079690.

[12] Although not discussed at the time that the name was added, it was an express term of the contract governing the joint accounts that, in the event of the death of either account holder, the survivor would have had full control of the monies in the account and that NCB would be entitled to pay the monies to the survivor. The relevant term is clause 4.2 of the terms and conditions governing accounts maintained at NCB. Clause 4.2, as recorded by the learned judge, states:

> "4.2 **Effect of Joint Account Holder's Death**
>
> All moneys standing to the credit of a joint account and all interest thereon shall be the joint property of the Customers in whose name the joint account is held. **In the event of the death of any one or more of the Customers, the survivor shall have full control of all moneys then and thereafter standing to the credit of the Customers' account(s)** and of all securities and articles deposited with the Bank in their joint names, **and the Bank may pay or deliver to or to the order of the survivor(s) all monies securities, deeds, documents, and other property (including security boxes and their contents) whatsoever standing to the credit or held by the Bank** for any account in the Customers' joint names." (Emphasis supplied)

[13] Ms Noel died on 22 September 2007; five days after the addition of Ms Robinson's name. Ms Robinson did not initially report the death to the bank. She, however, on 24 September 2007, attempted to withdraw $3,000,000.00 from the

savings account so as to open another account in her sole name. When the Santa Cruz branch denied her request, she, that very day, went to the Black River branch of NCB where she withdrew $500,000.00 from the savings account. Two days later she went to the Mandeville branch to make another withdrawal, but by that time NCB had frozen the account and her request was denied. It was only after that denial that she revealed to NCB that Ms Noel had died.

[14] In October 2007, the executors of Ms Noel's estate laid claim to the funds in the accounts and requested that nothing be paid out from them. NCB's freezing of the accounts and its continuous refusal, thereafter, to allow Ms Robinson any further access to the funds in them, except for money to pay funeral expenses, led her, in April 2008, to file a fixed date claim, with NCB as the only defendant. In the claim, she sought an order for the release of the funds in the savings account and a disclosure by NCB of any other account for which she was a joint holder with Ms Noel. During the case management process, it was ordered that the executors be joined as defendants. That order resulted in Mesdames Williamson and Barnett being joined, although they had not yet been granted probate in the estate.

The hearing

[15] The claim came on for hearing before the learned judge in October 2009. Ms Robinson was the sole deponent in respect of her case. She gave no evidence concerning the circumstances surrounding the adding of her name to the accounts. She stressed, instead, her entitlement to the funds by virtue of being the surviving account holder. She also stressed that:

a. she was the only person who gave Ms Noel any assistance when Ms Noel was ailing;

b. Ms Noel had given specific instructions to her concerning to whom particular property should be delivered, but gave her no instructions concerning any of the monies in any of the accounts; and,

c. Ms Noel gave no instructions to NCB's representative concerning the disposal of any of the funds in those accounts.

She was not cross-examined on her affidavits.

[16] Ms Chung was the only witness for NCB and the only witness who was cross-examined. The relevant portions of her testimony have been set out above. Mr Andrew Daley filed an affidavit on behalf of the executors. He deposed that Ms Robinson had admitted to him that the addition was only for convenience. Ms Robinson denied having done so. Mr Daley was not presented for cross-examination.

The findings in the court below

[17] The learned judge's decision had four major limbs. She found, firstly, that the monies were all provided by Ms Noel and that, as a result, there was a rebuttable presumption that her estate was beneficially entitled to the funds by virtue of a resulting trust. Secondly, she found that, from the circumstances of the adding of Ms Robinson's name to the accounts, it appears that Ms Noel did not intend for Ms Robinson to become beneficially entitled to the monies in them but rather the addition

was solely for Ms Noel's convenience. The convenience, the learned judge found, was Ms Robinson's being able to pay bills for Ms Noel. Thirdly, based on that intention, as found, the learned judge held that NCB was entitled to refuse Ms Robinson access to the funds in the accounts. Fourthly, again based on the inferred intention, she found that Ms Robinson had not rebutted the presumption that the funds belonged to Ms Noel's estate by virtue of a resulting trust.

[18] McDonald-Bishop J based her findings, in large measure, on Ms Chung's unchallenged evidence of what occurred on the day when Ms Robinson's name was added to the accounts. The learned judge accepted that evidence as true. She found Ms Chung to be "an honest and objective witness with no interest to serve...a professional person who simply acted out of concern for her customer who was clearly infirmed [sic] and ailing" (paragraph 86 of the judgment). McDonald-Bishop J also accepted the note, made by Ms Chung when she added Ms Robinson's name, as proof of Ms Noel's intention when she requested the name to be added. The learned judge found that the intention was not to confer a gift on Ms Robinson. She said at paragraph 93 of the judgment:

> "I, therefore, accept the endorsement made by Ms Chung on the Account Opening Checklist as solid proof of the deceased's state of mind and intention at the time the claimant's name was being added. The deceased did not have an intention to confer a gift on the claimant by adding her name to the account. As such a resulting trust arises in her favour which is not rebutted. Accordingly, there is an intention, as disclosed, that serves to militate against the operation of the right of survivorship in favour of the claimant."

[19] In arriving at that conclusion, the learned judge also viewed, as significant, the fact that Ms Robinson gave no evidence concerning the adding of her name to the accounts. She noted this fact on more than one occasion in her judgment. She said at paragraph 75 of the judgment:

> "A thorough examination of the evidence in this case reveals that there is no...evidence of an expressed intention coming directly from the deceased that the claimant should benefit either during her lifetime or on her death. The only thing referring to the right of survivorship is the mandate contained in the standard Bank agreement which of itself is not conclusive."

The learned judge also said at paragraph 79:

> "Now when one pauses to seriously consider what the claimant has said, there is no evidence from her that the deceased at or around the time her name was being added to the accounts personally said anything to her that she intended her to have the proceeds of any account...."

[20] It was based on those findings from the evidence that the learned judge found that the mandate, contained in clause 4.2 of the contract with NCB, was trumped by Ms Noel's expressed intention when she requested the addition of Ms Robinson's name. Whereas she relied heavily on Ms Chung's evidence, the learned judge rejected Mr Daley's evidence. She accepted Ms Robinson's evidence that she did not make any admission to Mr Daley that her name was added only out of convenience.

The appeal

[21] In advancing Ms Robinson's appeal, Mr Green argued on her behalf that the learned judge was wrong to have stressed Ms Chung's note as being influential in deciding the claim. Learned counsel submitted that the note had no more effect than

being a memory aid or a record of observation. He submitted that the Account Opening Checklist should not be considered as an authentic bank document.

[22] Those submissions were made in the context of learned counsel's submission that the decided cases stipulated that "very strong documentary evidence must be tendered to show that the deceased by some unequivocal act in his lifetime did not intend that the survivor be entitled to survivorship" (the headnote in **Reid v Jones** (1979) 16 JLR 512). As there was no such documentary evidence in this case, Mr Green argued, there was nothing to override Ms Robinson's entitlement to the funds in the accounts by way of survivorship.

[23] In addition to those submissions, Mr Green argued that the learned judge also erred in failing to distinguish between the savings account and the fixed deposit account. The latter, he submitted, could not have been caught by the contention that Ms Robinson's name was only added for convenience. He submitted that the learned judge, in failing to distinguish between the two accounts, ignored the clear inference that, as the fixed deposit account was not used to pay bills, Ms Noel must have, in adding Ms Robinson's name to that account, intended Ms Robinson to benefit from it.

[24] Learned counsel also cited, in support of his submissions, the cases of **Shepherd v Cartwright** [1955] AC 431, **Reid v Grant and Reid** (1976) 14 JLR 176 and **Chin v Chin** [2001] UKPC 7.

[25] NCB was content to adopt a neutral stance in this appeal. It made no submissions.

[26] Mr Wilkins, on behalf of the executors, submitted that the evidence supported the learned judge's finding that Ms Noel's addition of Ms Robinson's name as a signatory to the accounts, was solely for Ms Noel's convenience and that there was no intention to confer beneficial ownership of the funds on Ms Robinson. Learned counsel submitted that there was no basis for distinguishing between the savings account and the fixed deposit account. He relied on a number of cases in support of his submissions including **Marshal v Crutwell** (1875) LR Equity Cases 328, **Bank of Nova Scotia Trust Company (Caribbean) Limited v Simeon Smith-Jordan** (1970) 15 WIR 522, **Anthony Papouis v Valerie Gibson-West** [2004] EWHC 396 (Ch) and **Helga Stoeckert v Margie Geddes (No 2)** [2004] UKPC 54.

The law

[27] There are certain well established principles which will assist in the analysis of the issues raised in this case. The major ones are as follows:

a. A gift of pure personalty, by way of transfer, raises a presumption of a resulting trust in favour of the transferor. In **Fowkes v Pascoe** [1874-80] All ER Rep 521; (1875) 10 Ch App 343, James LJ, after outlining the circumstances where an individual had purchased stock in the joint names of herself and her grandson, said at page 524 of the former report:

> "I will assume for the present purpose that all the history I have given of the origin and nature of the relations between them **did not affect the legal presumption of resulting trust**. I will assume, further, that the implication of such a resulting trust does not arise as much in the case of a transfer as in that of a purchase of stock, although that certainly is not the case with regard to a voluntary

conveyance of land, and I will proceed to consider how the evidence stands on those assumptions." (Emphasis supplied)

The principle, although of some vintage, still has currency. The headnote in **Pecore v Pecore** [2007] 1 SCR 795, accurately reveals the view of the Supreme Court of Canada as being consistent with that well established principle. It states in part:

"…The presumption of resulting trust is the general rule for gratuitous transfers…"

b. The presumption is rebuttable, however, and may be rebutted by cogent evidence that the transferor intended the transfer to be a gift to the transferee. The onus of rebutting the presumption is on the person asserting that the transfer was by way of gift. In **Bank of Nova Scotia v Smith-Jordan**, Douglas CJ said at page 527:

"…The onus is on the defendant [transferee] to rebut the proposition that he is a trustee of the balance in the joint account by reason of a resulting trust."

In that case, as well as in **Young and Another v Sealey** [1949] Ch 278 it was held that the presumption had been rebutted by the evidence of the transferee. The presumption of a resulting trust may also be displaced by the presumption of advancement. The presumption of advancement presumes a gift and actually reverses the burden of rebuttal, thereby requiring the transferor, or those acting in his place, to show that a gift was not intended. The presumption of advancement, however, only applies to special

relationships such as a husband and wife and a parent and child. It does not apply to the relationship between Ms Noel and Ms Robinson.

c. The evidence of rebuttal need not be restricted to documentary evidence. In **Reid v Jones**, Bingham J (as he then was) seems to suggest otherwise. He said at page 514:

> "...Thus in terms of the existing circumstances of this case meant that [the persons representing the deceased joint-account holder's estate] **had to produce some documentary proof** to show that what [the deceased joint-account holder] had by some unequivocal act cancelled the original authority or mandate given to the Bank by which the authority authorizing the signatures of her husband [the other joint-account holder] or herself were to be accepted, as a sufficient discharge for any balance to the account or any part of such balance in the said fund...." (Emphasis supplied)

Bingham J was specifically addressing the circumstances of that case. In any event, Bingham J did not seem to have addressed his mind to the concept of a resulting trust that was considered pertinent in **Reid v Grant and Reid**, which he closely assessed. If, however, he was seeking to apply a general principle, Bingham J's view would not have been consistent with the position in other decided cases on the point. At least two cases demonstrate that evidence other than documentary evidence was considered in rebutting the written mandate to the financial institution that held the joint account. For example, in **Young and Another v Sealey** the court relied heavily on the oral testimony of the transferee in arriving at the decision that the transferor intended a gift when she opened bank accounts in their joint names. Further, in **Marshal v Crutwell**, Sir G Jessel MR, in assessing a case where

a husband, with failing health, had transferred his banking account from his sole name to the joint names of himself and his wife, said that he was required to look at all the circumstances in order to decide whether the transfer was for convenience or by way of gift. He said at page 330:

> "…Looking at the fact that subsequent sums are paid in from time to time, **and taking into view all the circumstances (as I understand I am bound to do), as a juryman**, I think the circumstances shew that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account…." (Emphasis supplied)

d. The fact that the terms of the joint account stipulate that the monies in the account are available to either account holder during their joint lives or to the survivor on the death of either or any of them is normally only conclusive of their respective legal interests. The terms form part of a contract which creates a liability in the bank to the account holders. The relevant terms, such as the one in this case, usually only protect the bank if it pays out the sum to one or other account holder or to a survivor. In **Reid v Grant and Reid**, Watkins JA (Ag) (as he then was), in addressing a clause similar in import to clause 4.2, insofar as survivorship is concerned, said, at page 181 of the judgment:

> "…The authority vested by document 4 1 in her [the transferee], if she survived her grandfather [the transferor], to issue a receipt for any outstanding balance on the account in sufficient discharge thereof **served merely to relieve the bank of liability for payment in the stated circumstances and gave her no beneficial interest therein**. Looking then at the situation in law as of [the date

> of execution of document 4 1] **the bare legal title to the fund which vested at common law in the [transferee] as joint holder with the [transferor] carried with it no express beneficial interest in her** and any claim by her that she was entitled beneficially to the fund must depend upon equity…." (Emphasis supplied)

The bank documents are, however, not irrelevant. Although they do not normally speak to the beneficial ownership of the funds they may do so. In **Pecore v Pecore**, Rothstein J, writing for the majority, opined that the court should consider the documents to determine whether they affect the issue. He said at paragraph 61:

> "While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death…**Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it**. Indeed the clearer the evidence in the bank documents in question, the more weight that evidence should carry." (Emphasis supplied)

e. The entitlement to a beneficial interest in the funds in such a joint account will depend on the application of the presumption of a resulting trust and whether it has been displaced or rebutted as mentioned above. The cases mentioned in this judgment almost all included declarations in the bank documents of joint and several entitlements to the funds and yet, on assessment, were decided on one or the other side of the line, concerning beneficial ownership, depending on the surrounding evidence. In **Marshal v Crutwell**, the court found that the transferor's continued strict control of the

joint account, after it was created, was evidence that no gift to the transferee, in spite of the fact that she was his wife, was intended. In **Reid v Grant and Reid**, the retention of control of the account by the transferor was found to be clear evidence that he did not intend a gift to the transferee. Watkins JA, in that case, held that the transferee held the beneficial interest "upon a resulting trust for the estate [of the transferor]" (page 182). In **Stoeckert v Geddes** PCA No 66/1998 (delivered 13 December 1999), the Privy Council concurred with the finding of this court that the transferee had not produced any evidence sufficient to rebut or displace the presumption of a resulting trust. It is true that, in that case, there was no significant consideration of the joint bank accounts as opposed to other property, but the applicability of the finding to those accounts was confirmed in **Stoeckert v Geddes (No 2)**. The cases in which the presumption was rebutted or displaced do not affect the principle that the presumption is the starting point, and that, thereafter, it is the evidence which determines whether it is supplanted. In **Bank of Nova Scotia v Smith-Jordan** the court found that the transferor, based on the evidence of his character and attitude to the transferee, intended a gift. Unfortunately, **Reid v Jones** seems to be the odd case out. This does not mean that it was wrongly decided, but, as mentioned above, Bingham J concentrated on the significance of the document lodged with the bank, without considering the impact of a resulting trust as a relevant factor.

f. The evidence for rebutting the presumption of a resulting trust may show that the transferor, at the time of the transfer, indicated an intention of providing a gift. In **Bank of Nova Scotia v Smith-Jordan**, the transferor insisted that the bank should open a joint deposit account in place of the joint fixed deposit account that it had first opened (wrongly assuming that to have been his initial instructions). Evidence of a later indication of the transferor's intention would also be considered. In **Young and Another v Sealey**, the court considered a document sent by the transferor to the transferee, for his signature in respect of the joint account, some eight years after the account was opened.

g. It is, therefore, the circumstances of each case that must be examined to determine whether the funds provided by the transferor to the joint account will be considered as remaining the property of the transferor in equity or deemed to be a gift to the transferee. In **Pecore v Pecore**, the majority of the court held that the transferee, the daughter of the transferor, had, by successfully invoking the presumption of advancement, displaced the presumption of a resulting trust. In **Papouis v Gibson-West**, the transferee admitted that the addition of her name to the transferor's account "was…as a matter of convenience to allow [the transferee] to pay bills on [the transferor's] behalf" (paragraphs 42 and 43). The court found that admission to be conclusive of the issue with respect to the beneficial ownership of the funds in the account.

The analysis

[28] It is against the background of those principles that the evidence in this case should be assessed. The first factor is, of course, the unchallenged evidence that the monies in both these accounts were, before the addition of Ms Robinson's name, solely held by Ms Noel. There is no evidence that anyone else had any beneficial interest in them. Certainly, Ms Robinson did not assert that she provided any part of these monies. The presumption of a resulting trust in favour of Ms Noel's estate arises in respect of both accounts.

[29] The second factor to be considered is the contractual terms on which the account was held with the bank. Clause 4.2, mentioned in the outline of the background, makes it clear that NCB held the monies in both accounts to the order of either or both Ms Noel and Ms Robinson. This, however, only speaks to the legal interest in the funds in the accounts and is not determinative of the beneficial interest. That contractual term cannot, by itself, rebut the presumption of a resulting trust in favour of Ms Noel's estate. Strictly speaking therefore, if there were no challenge to Ms Robinson's claim on the funds, she would have been entitled, at law, to recover them from NCB. The challenge by the executors fortified NCB's refusal to pay over the monies. It may be that it was in breach of contract to have initially refused her request for withdrawal of the funds, but she has not proved that she suffered any loss from that refusal.

[30] The third factor for consideration is the critical issue of the circumstances surrounding the opening of the joint accounts. As the learned judge pointed out, that

evidence came only from Ms Chung, with whose credibility McDonald-Bishop J was very impressed. From that evidence, and the contemporary note made on the Account Opening Checklist, it can be seen that Ms Noel was clearly unable to handle her affairs as she had previously done. The evidence from Ms Chung, repeated here because of its importance:

> "I asked her if she wanted Ms Robinson to be added to the account. She said, Yes [sic], she is unable to sign and she needed money and she had bills to sign [sic]."

is a clear indication of Ms Noel's intention at the time she requested the creation of the joint accounts. No other reason for their creation has been proffered. The learned judge was entitled to find that no evidence had been produced, concerning the creation of the accounts, which was capable of rebutting the presumption of a resulting trust. This court, not having had the benefit of seeing and hearing Ms Chung, would not lightly disagree with the learned judge's assessment of that witness. Indeed, it would seem, from the evidence, that the learned judge's assessment was quite appropriate.

[31] The fourth factor to be analysed is the evidence concerning the period between the opening of the accounts and Ms Noel's death. The evidence in this regard is quite minimal. No transactions took place before Ms Noel died. There is no explanation for that. It may well be that her deterioration in the short space of time did not allow for any transaction to be done. To attempt to ascribe any other reason would be an exercise in speculation. The result is that there is no evidence whereby it may be said that Ms Noel indicated an intention that the addition of Ms Robinson's name was the conferral of a gift.

[32] Ms Robinson's evidence that she cared for Ms Noel and that Ms Noel gave her instructions about certain property, but not about the bank accounts, does not assist in determining the beneficial interest in the accounts. It should also be said here that Ms Chung's evidence that "she knew that the deceased did not want the claimant to see the balance on the account" (paragraph 10 of the judgment) was also irrelevant to the decision, having been improperly admitted into evidence, since Ms Chung provided no basis for that statement.

[33] Based on all those factors, it must be found that the learned judge was correct in her conclusion that the presumption of a resulting trust had not been rebutted. It followed that she would not have castigated NCB for its initial refusal to honour Ms Robinson's request for the withdrawal of funds from the account. NCB would have been wrong in law in its refusal but, as mentioned above, Ms Robinson would have suffered no loss by virtue of that refusal. The challenge to the learned judge's conclusions must fail and Mr Green's submissions that the effect of clause 4.2 should hold sway cannot be supported.

[34] Similarly, Mr Green's further challenge that Ms Chung's evidence only supplies a reason for converting the savings account and does not address the issue of the fixed deposit account, cannot be sustained, as it has two fatal flaws. Firstly, in the absence of evidence of a contrary intention, the presumption of a resulting trust in favour of Ms Noel's estate would remain unaffected in respect of both accounts. Secondly, the fact that the fixed deposit account had not been previously used to pay bills did not

preclude it from being so used in the future, especially as Ms Noel's health had, apparently, deteriorated badly. It is true that the learned judge did not address submissions to her concerning separate treatment of the accounts but, based on the above analysis, she was correct in her conclusion in respect of both.

Conclusion

[35] In **Pecore v Pecore**, Rothstein J suggested an approach for first instance judges in cases such as the present. He said at paragraph 55:

> "Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted…."

[36] In this case, the learned judge was obliged to begin with the presumption of a resulting trust, as a presumption of advancement was not relevant. Ms Robinson did not supply any reason for Ms Noel's request for her name to be added to the accounts. The only explanation for that request came from Ms Chung and that explanation suggested that Ms Noel's reason was grounded in her own convenience. In addition, the contract entered into with NCB by virtue of the opening of the accounts only spoke to the legal entitlement to the funds in the accounts. The contract did not address the beneficial ownership, to which the presumption spoke. The learned judge could not, properly, on the evidence before her, have found otherwise.

Costs

[37] The learned judge made no order as to costs. She also granted leave to appeal. Although the area of law has decisions which could be said to allow for some

uncertainty, the decisions, with the exception of **Reid v Jones**, all addressed evidence led by the transferee seeking to rebut the presumption of a resulting trust. In this case Ms Robinson led no such evidence and sought to rely, almost exclusively, on the bank document. There is no basis to depart from the normal rule that costs should follow the event and that Ms Robinson should pay the costs of the appeal.

PANTON P

ORDER

1) The appeal is dismissed.
2) The judgment of McDonald-Bishop J handed down on 14 May 2010 is affirmed.
3) Costs to the respondents to be taxed if not agreed.