IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2010: No. 48

IN THE MATTER OF THE ESTATE OF BRUCE MONTGOMERY TUCKER (DECEASED)

BETWEEN:

JAHMEEKAH IFARAR WILSON

First Plaintiff

-and-

JAHMON FARI WILSON

Second Plaintiff

-v-

CALVIN LEROY JONES

Defendant

JUDGMENT

(In Court)

Dates of Trial: February 14-15, 2011
Date of Judgment: February 25, 2011

Mr. Paul Harshaw, Harshaw & Co.,
for the Plaintiffs

Mr. Kenrick James, James & Co.,
for the Defendant

Introductory

1. The Plaintiffs' claim reflects the theme of an old blues song:

> "*Them that's got shall get*
> *Them that's not shall lose*
> *So the Bible said and it still is news*
> *Mama may have, papa may have*
> *But God bless the child that's got his own*
> *That's got his own…*"

2. The Plaintiffs (born in 1984 and 1983, respectively) are the children of the late Bruce Montgomery Tucker and the Defendant is their paternal grandfather. It is common ground that the Plaintiffs together and the Defendant are each entitled to own legally 50% as tenants in common of a property at 2 Industrial Park Southampton ("the Property"). The Plaintiffs seek a declaration that the Defendant is only the legal owner of his share and that he holds this interest on trust for them, in accordance with the wishes of their late father and grandmother communicated to him orally prior to the date when he acquired his share of the Property.

3. The Plaintiffs contend that the Defendant's name was only placed on the deeds to the Property before their father's untimely death to protect it from dissipation at a time when they were minors. The Defendant contends that this claim is wholly invented and that his son intended to convey both legal and beneficial interest in 50% of the Property out of the natural affection he had for his father. The Plaintiffs themselves were barely teenagers when the relevant transfer took place in 1997, and rely wholly on the evidence of three witnesses who were adults at the time: an aunt, an uncle and a family friend. Their case stands or falls on whether or not the Court accepts these witnesses as essentially truthful or, as the Defendant contends, deliberate liars.

4. At the beginning of the trial. I ruled that the Plaintiffs were entitled, in effect, to set aside the Order dated November 4, 2010 made in their absence striking out their original Summons seeking out to strike-out two Witness Statements filed on behalf of the Defendant. I rejected the renewed application in respect of one Witness Statement and acceded to it in relation to the Witness Statement of the Plaintiffs' former lawyer, reserving the issue of costs.

5. In addition to recording the Court's findings in relation the substantive claim, I also set out below the reasons why I refused to admit the evidence of the Plaintiffs' former lawyer, Edward King. The Defendant sought to call Mr. King as a witness with a view to discrediting the 1st Plaintiff's account of certain communications with him which account

was set out in an Affidavit sworn in support of an interim injunction application at the beginning of the present proceedings.

Factual findings: uncontroversial facts

6. The Defendant formed an extra-marital relationship with the deceased's mother, Dorothy Viola Tucker in or about 1961 as a result of which the Plaintiffs' father was born. At his birth, she owned the Property subject to a mortgage. The 1st Plaintiff was born on February 27, 1984; the 2nd Plaintiff, her older brother, was born on March 2, 1983. Before they reached their teen years, in or about 1994, their mother moved out of their lives and they were primarily cared for by their father and members of his family, including his mother. After the deceased's mother became ill in 1995, she voluntarily conveyed the Property to her herself and her son as joint tenants on April 17, 1995. She died on April 7, 1996, and her son became sole owner of the Property. On December 12, 1997, the deceased voluntarily conveyed the Property to himself and his father, the Defendant, as tenants in common. At all material times the deceased suffered from drug addiction. He died intestate on or about January 17, 2004.

7. There is no documentary support for the trust which forms the basis of the Plaintiffs' claim, either in the conveyancing file documents produced or otherwise.

The Plaintiffs' case

8. The Plaintiffs personally gave no evidence which directly supported their claim.

9. The first significant witness was Mr. Soares, a mature man who says he made the acquaintance of the Plaintiffs around 2001-2002. In or about the summer of 2002, he gave the 1st Plaintiff a lift home at her request and she introduced him to her mother. Mr. Soares was initially interested in renovating the house and was shocked at its state. He had previously owned two disaster recovery companies in California which returned damaged properties to a habitable condition. He did some painting and cleaning up but seemingly was never formally employed to do any work. He spoke to the Plaintiffs' father and subsequently the Defendant. The deceased told him that the Property was in his father's name because he was concerned that creditors would take it. When he spoke to the Defendant, he recalled that the Defendant said the Property had his name on the deeds because his son owed him money in respect of health expenses incurred when the deceased was a child. Mr. Soares was bemused by this. The childhood expenditure was mentioned, but not in connection with the voluntary conveyance in his Witness Statement. When it was suggested that the witness would not likely have been told by the deceased that his mother intended to give the Property to the Plaintiffs when they reached adulthood, Mr. Soares insisted that the deceased spoke freely with him and said surprising things. One example was he told the witness he would discover how hard it was to be old, when it was obvious that Soares was older than the deceased.

10. In his cross-examination of the 2nd Plaintiff, Mr. James elicited the fact that Mr. Soares' main relationship was with his sister rather than himself. He testified that he helped her

with "*certain stuff ...personal stuff*". Mr. Soares gave the impression that he was interested in the welfare of the family as a whole, without denying that his initial point of contact the 1st Plaintiff, who he encountered packing groceries at a supermarket and once gave a lift home to on his bike at her request. Mr. James never positively put to Mr. Soares that he had any specific motive for giving perjured evidence, be it a commercial interest in the Property or an intimate personal interest in the 1st Plaintiff. She appeared to be sufficiently attractive and personable to inspire a well meaning stranger who became aware of her difficult circumstances to seek to assist her and her family in any way he could. It was clearly implied by the Defendant's counsel that Mr. Soares from the first had a more than philanthropic interest in the 1st Plaintiff. Mr. Soares rebuffed the somewhat incredible suggestion that, when he first met the Defendant in the summer of 2002, he proposed buying out the Defendant's interest for the benefit of the latter's then 18 year-old granddaughter, in the mildest possible manner, simply indicating that he "*did not remember that part*" of their discussions. He appeared completely oblivious to counsel's insinuations.

11. The Defendant called him a liar, yet Mr. Soares appeared throughout his testimony to be a very down to earth and uncomplicated person who freely admitted being sympathetic to the Plaintiffs' cause based on a chance exposure to their impoverished living conditions several years ago. The Court was given no positive reason to find him to be a perjurer.

12. The Plaintiffs' next witness and the most important one overall was Mrs. Roslyn Anderson, their aunt and elder sister to their late father. She was an obviously partisan witness who was not reluctant to express her disapproval of the Defendant, who was not her own father. She described her mother as the primary caregiver for the Plaintiffs who conveyed the Property to their father shortly before her death in the expectation that it would be left for them. After she died, Mrs. Anderson heard that her brother was planning to sell the Property and go to Jamaica. She asked her brother to put her name on the Property to protect it and he promised that he would. When he did not follow through, she asked the Defendant to see if he could get his name on the deeds to protect the Property. She was pleased when this actually happened. At some point in the late 1990's, the Defendant promised that he would pay to have the Plaintiffs' names put on the deeds when they reached 21 years of age. She raised this with him after the 2nd Plaintiff reached 21 and the Defendant said it made more sense to wait until both children reached that age. She never followed up to ensure that this actually happened.

13. Mrs. Anderson agreed that when the Property was advertised in the newspaper for sale, her son put in a bid for the Property. This suggested that the initial response to discovering that the Defendant was asserting his own substantive rights over the Property was not to assert the present equitable claim; indeed, the Plaintiffs initially sought and failed to obtain financing to buy out their grandfather's interest in the Property. This is hardly surprising as the doctrine of resulting trust upon which the Plaintiffs relied at trial is only superficially familiar to the average lawyer; it would be unheard of to the average non-lawyer. No specific motive for lying was put to Mrs. Anderson. Bearing in mind her eagerness to cast the Defendant generally in a bad light, the crucial aspects of her

evidence were remarkable only for their brevity and simplicity. A colourfully talkative woman, it seemed difficult to believe that, if she wished to invent a claim for her niece and nephew against the Defendant, she would be capable of restraining herself sufficiently to concoct a story as brief and colourless as the most significant parts of her evidence in this matter.

14. Mr. Ewing Tucker was the Plaintiffs' third key witness, and is the older brother of the deceased. He explained how his mother's hard work at Inverurie Hotel paid for the Property ("*my mother carried a lot of trays for that Property*") and necessitated his being raised by extended family members. He was upset at the fact that his sister Roslyn, who was closer to matters relating to the Property, had not put his name on the deeds instead of the Defendant's. He said that she told him that she put the Defendant's name on the deeds. He understood this happened so that the deceased would not sell the Property ("*because of the sort of life he was leading*") and it could be protected for the eventual benefit of the children. He assumed that his mother would have trusted the Defendant to see that "*those children got the Property*". He testified that their father was close to his children, but was not really capable of even looking after himself. He recalled one day at Warwick Workman's Club where he encountered the Defendant and asked him when he was going to put the children on the Property; the Defendant replied that he would do so when the 1st Plaintiff reached 21.

15. His understanding about the Property being intended for the children came both from his mother before her death and his brother before his death from an overdose. His mother also said that she wanted his sister Roslyn's name on the deeds but that never happened. Like his sister, he doubted that the deceased cared enough about his father to give him the Property outright. He said his brother told him that he trusted him and wished that he had put Mr. Tucker's name on the deeds rather than his father's name.

16. Again, no motive for Mr. Tucker inventing the crucial portions of his evidence (principally the admission made by the Defendant) was put to him or advanced. The Defendant simply branded him a liar. Mr. Tucker appeared to be an extremely respectable and somewhat distinguished older man who, despite his obvious partisanship, gave his evidence in a very restrained and straightforward manner.

The Defendant's case

17. The Defendant's Witness Statement joins issue with the Plaintiffs' claims and takes issue with numerous points of background detail and/or seeks to justify his actions as executor, matters which do not impact directly on the present dispute in legal terms. His annexed Chronology is more detailed and probably accurate than the dates asserted by the Plaintiffs in terms of his relationship with their grandmother. Most significantly, in both his written evidence and his oral testimony, he contended that he had a better relationship with his son than the Plaintiffs' witnesses would have the Court believe. For instance, he claims to have borrowed money to pay for heart surgery which his son (born in 1961) had in 1972 (this was disputed by Mrs. Anderson although it is unclear what personal knowledge she would have had about this matter). He stated that his son did work release

with him in 1988 having spent time in prison, and did further stints with him in later years. He implied that he took more interest in his son despite his addiction problems than his siblings did and states that he was solely responsible for his son's funeral expenses.

18. As far as the Property is concerned, he says it was purchased on August 24, 1970 for $40,800. The Plaintiffs' grandmother acquired sole title to the Property on July 24, 1978, with her former co-owner acknowledging that she had solely contributed to the initial purchase. The Defendant states that he laid a driveway and began an extension to the kitchen. He also points out that the Plaintiffs were not consistently residing at the Property for many years. Their mother, according to Mr. Jones' Chronology, was in Jamaica between 1994 and 2002. Most significantly, he denies that his son ever mentioned that the conveyance to him of a 50% share of the property was for protective reasons and denies (a) agreeing to hold his interest for protective reasons and (b) saying to his sister or anyone that he would put the Plaintiffs' names on the deeds when they reached 21 years of age. His son transferred the interest to the Defendant because he "*revered him*". Until December 2009 and into 2010 the 2nd Plaintiff was interested in selling his share of the Property.

19. The Defendant's oral evidence was generally given in a straightforward and credible manner. Nevertheless, he did also reflect a degree of defensiveness and defiance in his demeanour. He offered no suggestions as to why Mrs. Anderson, Mr. Tucker and Mr. Soares should all have given false evidence about the nature of his interest in the Property. However, he did assert that Mr. Soares offered to buy the Defendants share for the benefit of the 1st Plaintiff when he first met the Defendant. The latter assertion was put to Mr. Soares, who stated that he did not remember such a proposal. Soares stated in his Witness Statement and oral testimony that he was initially interested in doing renovation work and that he spoke to the Defendant at the deceased's suggestion in or about the summer of 2002, the timing of which was not challenged.

20. This assertion seemed somewhat curious, partly because it was not mentioned in the Defendant's Witness Statement or Chronology, which positively relied on other attempts to purchase his interest in the Property on the part of the Plaintiffs after their father's death. It also seemed curious because at this juncture, the Plaintiffs' father was still alive and only 41 years old, so it seems improbable that any active consideration of either of his children acquiring any formal legal interest in the Property would have arisen at this time. Moreover, it also seems inherently unlikely that Mr. Soares (who at this time lived on a boat) would have openly proposed such a substantial investment for the benefit of a teenage girl, a girl and whose family he had only just met. If this remarkably generous proposal was made in 2002, it would clearly suggest that Mr. Soares was capable of saying anything at the present time to assist the 1st Plaintiff to acquire the Defendant's interest in the Property. However, Mr. Soares was not challenged when he implied that he was no longer as close to the Plaintiffs family as he then was.

21. Another aspect of the Defendant's evidence which was somewhat curious was the way in which he characterised the relationship between himself and his son. In the Chronology attached to his July 9, 2010 Witness Statement, the following entry appears without elaboration:

> "*1972 Bruce has heart surgery. Calvin borrowed money to help pay for surgery.*"

22. In paragraph 9 of Mr. Soares' earlier May 28, 2010 Witness Statement, as explained in the most animated part of his oral testimony, Mr. Soares asserted that he was "*horrified*" when the Defendant (a) suggested that his son owed him a debt in respect of medical expenses the Defendant paid for him as a child, and (b) advanced this debt as the reason for his son's gift to him of a 50% interest in the Property. Counsel did not put to the witness that either of these assertions was positively untrue. Is the Defendant's denial that he agreed to transfer his interest in the Property to the Plaintiffs' motivated by a sense of grievance based on the belief that his son was indebted to him in respect of the medical expenses he paid for when his son was a child? The Defendant seemed to go beyond demonstrating that he had a close and supportive relationship with his son into the realms of self-aggrandisement when he asserted that his son's gift was motivated in part by the fact that he "revered" the Defendant. Nevertheless, this assessment was supported by a witness, Mr. Ingham.

23. In summary, the assertion that Mr. Soares, Mrs. Anderson and Mr. Tucker had all conspired to concoct a false explanation as to the basis on which his interest in the Property was held seemed improbable, in the absence of any obvious or plausible explanation as to why they should do this. On the other hand, the Defendant's explanations as to (a) why his admittedly vulnerable son should gift him 50% of the Property, and (b) how he took more care of his son (including paying for his funeral) than did his siblings, may be construed as shedding at least some light on his motivations for insisting that he is not merely a trustee of his grandchildren's beneficial interest in the Property. In addition, the Defendant has an obvious commercial interest in refuting the Plaintiffs' claim.

24. Ms. Karen Esdaille gave largely uncontroversial evidence based on her review of the conveyancing file in relation to the Property. She confirmed that there was no evidence that the firm where she works as a conveyance (now known as Appleby) was instructed to make the Defendant's interest in the Property subject to a trust in favour of the Plaintiffs.

25. Mr. Maxworth Ingham gave evidence on behalf of the Defendant and (a) contradicted the 1st Plaintiff's denial that she lived for a period at his home, (b) supported the Defendant's version of his relationship with his son by asserting that the deceased "idolized" his father, and (c) stated that the deceased (who was like a brother to him) neither mentioned the idea of the Property being conveyed to the Defendant for protective purposes nor mentioned his children having an interest in the Property, but rather simply said he wanted his father's name on the deeds because at that time the deceased was establishing

a closer relationship with his father. His Witness Statement also supported the Defendant's evidence that the Plaintiffs' mother went to Jamaica for some years. In answer to the Court, Mr. Ingham said that there was never any question of his friend selling the Property, nor going to Jamaica. Mr. Ingham's general demeanour was somewhat defensive but he gave his evidence in a confident manner. His evidence at its highest raises doubts as to the key elements of the Plaintiffs' case; it does not directly contradict them.

26. It was in any event credible that the 1st Plaintiff inaccurately recalled whether she stayed with the Inghams as opposed to occasionally visited them; it is also credible that the deceased might not mention his children acquiring any interest in the Property. He was a young man who had not made a will and, if he applied his mind to the question, would have assumed they would inherit whatever interest he had upon his death. It also credible that the deceased gave his friend the impression that he was proud of his father; it is somewhat curious that Mr. Ingham went so far in his Witness Statement as to characterise this as idolizing his father. Small boys may idolize football heroes and even fathers; grown men rarely do. It is also somewhat surprising that the deceased is said to have told his friend, on a date which is unclear, that his father had borrowed money for him to have heart surgery as a young boy. This is a matter which the Defendant places great stock by; would the deceased have regarded it as quite so significant as well?

27. I was not readily able to accept Mr. Ingham's oral testimony under cross-examination (in response to the suggestion that he was speculating as to the motives for the voluntary conveyance) that the deceased made it explicit to him, in discussing putting his father's name on the deeds, that he wished to do this as part of strengthening his relationship with his father. His Witness Statement omitted these important assertions, merely stating: "*There were many occasions following his mother's death in 1996 when he told me he was going to put his father on the deeds of Olive Cottage with him. In such conversations he never told me that he wanted his children to have an interest in the Property…*" Mr. Ingham went out of his way in his Witness Statement to give detailed support for a peripheral limb of the Defendant's case, namely the high regard the son had for the father; yet he omitted to mention in that Statement what would, if accepted, be the best possible and most obvious support for the Defendant's case: the fact that when the deceased was discussing putting his father's name on the deeds, the explicit reason was improving their relationship.

Reasons for refusing leave to adduce evidence of Plaintiffs' former attorney

28. Mr. Harshaw objected to the production in evidence of testimony from the Plaintiffs' former attorney which essentially went to their credit and contradicted the account set out in the 1st Plaintiff's First Affidavit (sworn in support of the initial interim injunction application) of instructions given to and advice received from her attorney. The Affidavit acknowledged that privilege *might* have been waived by the relevant averments, without conceding that waiver had occurred. In light of the issues as they appeared at trial, it seemed obvious to me that the complaints made by the 1st Plaintiff about her previous attorney, Edward King, were wholly misconceived.

29. My primary reason for excluding the rebuttal of these unfounded complaints was that this evidence was irrelevant save as to credit in circumstances where the Plaintiffs' credibility had no relevance at trial. They could give no evidence capable of supporting their claim. It made no sense to use Court time to explore non-issues, having regard to the Overriding Objective.

30. However, assuming the evidence was of some but marginal relevance, I would in any event have excluded it on the grounds that privilege had not been waived. Although the 1st Plaintiff's First Affidavit did potentially waive her own privilege, I would resolve the ambiguity about whether she also waived privilege on behalf of the 2nd Plaintiff in favour of protecting legal professional privilege. As Meerabux J held in *Re Braswell* [2001] Bda LR 41, upon which Mr. Harshaw relied, legal professional privilege is an incident of the constitutional right to a fair hearing protected by section 6 of the Bermuda Constitution. Lawyers should, as the Plaintiffs' counsel submitted, ordinarily take the precaution of seeking the protection of a Court order before disclosing communications with their past or present clients.

Legal findings: elements of the Plaintiff's claim and the burden of proof

31. Mr. James sought to challenge the legal validity of the Plaintiffs' claim in reliance on section 3(1) of the Conveyancing Act 1983. I find that section (a) only requires writing to evidence contractual claims, and (b) does not exclude equitable claims. It provides as follows:

> "*No action may be brought* ***upon any contract*** *for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized to act on his behalf.*" [emphasis added]

32. Bermudian courts have routinely upheld the existence of equitable interests in land based on oral assurances and/or promises alone: see e.g. *Perinchief-v- Raynor* [1995] Bda LR 19 (Court of Appeal); *Darrell-v- Peets-Swan* [2008] Bda LR 50 (Wade-Miller J), both proprietary estoppel cases; and *Richardson-v-Tuzo* [2007] Bda LR 1 (Ground CJ), a constructive trust case.

33. Mr. Harshaw for the Plaintiffs advances what for local purposes appears to be a novel claim based on the doctrine of resulting trust. I accept that where there is oral evidence that, notwithstanding the reference to natural love and affection in a deed of voluntary conveyance, a transfer was not intended to operate as a gift, there may be a resulting trust in favour of the transferor: *Hodgson-v- Marks* [1971] 2 All ER 684 at 689 (CA). This was a case where the transferor conveyed a house to a lodger whom she did not want her nephew to evict, on the oral understanding that it was to remain hers though in his name. She subsequently discovered that the legal owner sold the property; the English Court of

Appeal unanimously held that she remained the equitable owner by virtue of a resulting trust, despite the fact that the express trust failed in law for want of writing.

34. It is certainly arguable that where the presumption of advancement does not apply, because the transfer is not made from one spouse to another or by a father to a child, a resulting trust is presumed: '*Snell's Principles of Equity*', 28th edition (Sweet & Maxwell: London, 1982) page 187. But Russell LJ in *Hodgson-v- Marks* considered this question to be "*debatable*". Although this question may merit reconsideration in light of fuller argument in future cases, I am unable to find for present purposes that a presumption of a resulting trust in favour of the grantor arises in relation to any voluntary conveyance to which the presumption of advancement does not apply. I find that where the presumption of advancement does not apply to a voluntary conveyance, the evidential bar which a resulting trust claimant must meet may, depending on the facts of a particular case, be somewhat lower than where the presumption of advancement does apply. This is because it may, in many cases where the presumption of advancement does not apply, be somewhat easier to suggest that it is inherently improbable that an outright gift was intended.

Factual Findings

35. The crucial factual issue which arises for determination is whether or not the Defendant was transferred his interest in the Property for his own benefit or for the benefit of the Plaintiffs, his grandchildren. Because the transferor died in 2004, there is no direct evidence as to what his intentions were. In my judgment, having regard to the admitted fact that the deceased's ability to function normally was impaired by chronic drug addiction[1], the most important question is whether or not the Plaintiffs have proved that the Defendant knew when the voluntary conveyance was executed that he was not the recipient of an outright gift but was merely protecting the Property until the Plaintiffs came of age. If he persuaded the deceased to "put him on the deeds" at the request of his son's older sister having promised to do so for the ultimate benefit of his grandchildren, in my judgment his interest was transferred subject to a resulting trust in favour of his son, irrespective of precisely what the son's subjective intentions were.

36. The Plaintiffs have satisfied me through the evidence of their witnesses that it is more likely than not that: (a) their Aunt Roslyn was concerned about the risk of her vulnerable brother disposing of the Property after their mother's death in 1996; (b) as a result she attempted in vain to persuade her brother to put her name on the deeds, quite possibly because they were not that close; (c) when these efforts failed she approached her brother's father, who she rightly believed would likely have more influence over her brother than she would, and asked him to try and get his name on the deeds; (d) the Defendant agreed to assist to protect the Property, and told his brother's sister when the goal had been achieved; and (e) after the death of the deceased, when the Defendant was asked by Mrs. Anderson and Mr. Tucker whether he had put their names on the deeds, the Defendant promised to do so when the younger Plaintiff reached 21. Since the age of

[1] The Defendant himself described how his son often lacked the strength to get up, let alone work. Mr. Soares described how the deceased complained of the effects of "old age".

majority was only lowered from 21 to 18 in 2001, all parties concerned probably assumed that the Plaintiffs would not reach full age until they were both 21 years old, on February 27, 2005 (the 2nd Plaintiff would have gone 21 on March 2, 2004) [2].

37. The inconsistencies between the various witnesses' accounts as to what concerns prompted the Defendant's holding a joint interest in the Property for protective purposes does not undermine the common theme which runs through them all. Mrs. Anderson says she heard that the deceased was going to sell up and go to Jamaica; although she did not elaborate on this concern, it is common ground that the Plaintiffs' mother was at this time in Jamaica. The idea that the deceased having lost his mother might have wished to rejoin the mother of his children would not have been wholly incredible. Even if this specific fear was groundless, it was not materially inconsistent with Mr. Tucker's more general concern that his younger brother was simply not capable of being responsible and could not be trusted as sole owner of the Property after his mother's death. This concern is entirely believable in light of the deceased's admitted drug problem. Mr. Soares' version was that the deceased told him that the Defendant had become co-owner to protect the Property from creditors. Bearing in mind that this was said on or about the first time the two met, it is entirely plausible that the Plaintiffs' father would give to a stranger a sanitized version of what risks the property was being protected from when it was conveyed to the Defendant. The common thread which runs through each account is that the Property was conveyed to the Defendant not outright but to preserve it for the benefit of the Plaintiffs.

38. The Defendant's counsel when cross-examining Mrs. Anderson suggested that if it was always intended to make provision for the Plaintiffs, an express trust could have been created when the Property was conveyed to the deceased by his mother on a joint tenancy basis. No satisfactory answer was provided to this question. The failure to make express provision for the Plaintiffs in 1995 when their grandmother was ill and their father was only 34 is insufficient, in all the circumstances, to undermine the credibility of the crucial evidence upon which the Plaintiffs rely.

39. It is impossible to believe that the Plaintiffs' three key witnesses could be sufficiently devious to fabricate a fictional account with such subtle and plausible differences and each stand up to cross-examination in such a convincing manner. The notion that the deceased would have wished to leave the Property to his children seems inherently credible, irrespective of how imperfect their relationship might have been. The notion that the deceased would have wished to give his father half the Property as an outright gift seems inherently improbable. It is perhaps a notorious fact that traditional Old World notions of fatherhood have become modified by New World slavery for many men in the African Diaspora including Bermuda. This may explain why (as I find occurred) the Defendant explained his joint ownership of the Property to Mr. Soares as occurring because of a debt his son owed him in respect of medical expenses he paid when his son was a child. While in this respect the Defendant appeared to turn traditional notions of

[2] The Age of Majority Act 2001 lowered the age of majority from 21 to 18 with effect from November 1, 2001. The 1st Plaintiff would have attained majority on her 18th birthday in 2002 and the 2nd Plaintiff would have attained majority on November 1, 2001, pursuant to the provisions of section 3 of the 2001 Act.

fatherhood on their head, he enthusiastically embraced an amplified version of old world paternal respect. But having regard to all the evidence, I am satisfied that the deceased himself adhered to a more traditional notion of fatherhood and, having inherited the Property from his mother, intended to pass it on to his own children, as he told Mr. Soares, Mrs. Anderson and Mr. Tucker.

40. In any event, I am also satisfied that the Defendant implicitly admitted on dates uncertain to Mrs. Anderson and Mr. Tucker that he was obliged to transfer his interest to the Plaintiffs when they both attained the age of 21 years. This aspect of the Plaintiffs' case I found to be particularly credible. Mrs. Anderson said that she spoke to the Defendant at her home after the 2nd Plaintiff was 21, and he said it was better to wait until both children were 21 years old. Such a suggestion made eminent sense. Mr. Tucker, probably getting the year date completely wrong, stated in his Witness Statement that in 2008 he asked the Defendant when he was going to put the Property in the children's name and was told when the younger child reached 21. As she would have gone 21 three years earlier in 2005, it is not credible that the Defendant said this in 2008. And if Mr. Tucker was involved in fabricating this important admission, I find it impossible to believe he would have been so careless about the timing issue in his Statement. In my judgment it is inherently probable that these conversations took place shortly after the deceased's death in January 2004. Anderson and Tucker would likely have been focussing on what was going to happen to their brothers' children's inheritance immediately after their father died, and the 2nd Plaintiff went 21 years old some six weeks' later.

41. I reject the Defendant's version of the key events as simply lacking in credulity. It appeared to me that his case represented a version of events reflecting the truth as he would wish it to be, rather than as it actually is. I accept entirely, however, that his son had a far higher regard for the Defendant than the deceased's siblings were willing to acknowledge and that his role in the deceased's life was probably far greater in the later years than was recognised by his siblings. I further accept that the Plaintiffs initially sought to buy out his interest before asserting their present claim. It also seems likely, although this background issue was not directly addressed, that the Defendant has incurred significant expense as the sole executor of his son's estate for which he deserves to be recompensed; the Plaintiffs as beneficiaries of their father's estate must surely meet the liabilities of the estate from their own resources or out of the assets of the estate, which may well ultimately necessitate a sale of the Property.

Conclusion: relief

42. It follows from the above findings that the Plaintiffs are entitled to a declaration that the Defendant holds one-half legal interest in 2 Industrial Park Road in Southampton Parish in the Islands of Bermuda on trust for the Plaintiffs in equal shares.

43. I will hear counsel as to costs although it is difficult to see any obvious reason why costs (including the costs of the privilege argument) should not follow the event.

Dated this 25th day of February, 2011 _____
KAWALEY J