

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2015/CLE/gen/00856

BETWEEN

DENISE BARNES

Plaintiff

AND

PEARL MOXEY

First Defendant

AND

CHARLES MOXEY JR.

Second Defendant

AND

RBC FINCO Finance Corporation of Bahamas Limited

Third Party

AND BETWEEN

PEARL MOXEY

First Plaintiff

AND

CHARLES MOXEY JR.

Second Plaintiff

AND

PEARL MOXEY & CHARLES MOXEY JR
(Personal Representative of the Estate of Charles Moxey Sr.)

Third Plaintiff

AND

DENISE BARNES

First Defendant

AND

EDWIN MOXEY AKA EDDISON MOXEY

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Lady Sharon Wilson with Trevor Lightbourne for the Plaintiff/1st
Defendant by Counterclaim
Lisa Bostwick-Dean with Tavarrie Smith for the Defendants/Plaintiffs
by Counterclaim
Audley Hanna Jr for the Third Party

24-27 October 2017, 15 February 2018

JUDGMENT

WINDER, J

This is title dispute among family members.

1. A chronology of events is perhaps the best way to set out the background to this dispute.

- 9 Jan 1982 Pearl Leona Moxey ("Pearl L.") made her Last Will and Testament. In the Will, Pearl L. devised her house situated at Boyd Road (also described as 24 Constitution Drive), the subject of this dispute ("the Property"), to her two sons Eddison Moxey, the Third Defendant by Counterclaim (Eddison) and Charles Moxey Sr. (Charles Sr.) as tenants in common. Eddison was appointed the Executor by the Will.
- 1 July 1983 Pearl L. died. Charles Sr. continued to occupy the home following the death of his mother. At various times he lived there with his children and the children's mother Camille Yvette Gooding Fleurimond (Yvette). Eddison, at all material times, resided in Grand Bahama.
- 25 Mar 1987 Administration of the real and personal estate of Pearl L. was granted to Eddison by the Supreme Court of The Bahamas.
- 29 Nov 2002 Yvette says that she and Pearl were evicted from the home by Barbara Barnes (Barbara) whilst Charles Sr was convalescing at Barbara's home following a period of hospitalization. Barbara is a sister of Eddison and Charles Jr and resided next door to the Property.
- 20 Jan 2003 Charles Sr. died intestate. At the time of his death he was survived by his two (2) children, Pearl L. C. Moxey (Pearl) and Charles J Moxey Jr (Charles Jr.). Pearl and Charles Jr. say that they occupied the home as children until their father's death. Pearl left the home in November 2002 when evicted with her mother, but Charles Jr

continued residing there until his father's death. Pearl was 17 years old and Charles Jr was 16 years old at the time of Charles Sr's death.

3 Feb 2003 Eddison grants a power of attorney, irrevocable for 12 months, to Barbara. The PA authorizes her, on his behalf to:

- (a) Apply for letters of Administration for Charles Sr.
- (b) To conduct and complete the sale of the Property *out of the estate of the late Charles Sr.*
- (c) To receive the proceeds of sale on his behalf.

8 May 2003 Eddison conveyed the Property to the Plaintiff Denise Barnes (Denise) as executor of the Estate of Pearl L. The conveyance cited the Will and the devise to Eddison and Charles Jr. and was prepared by Attorney Bridgette Francis Butler. Denise purchased the property for the sum of \$100,000 with the assistance of the Finance Corporation of the Bahamas ("Finco"), the Third Party. Francis Butler is the only attorney in the transaction.

Denise is the niece of Eddison and Charles Jr. and resided next door with her mother Barbara during Charles' lifetime.

The entirety of the proceeds of the sale of the property is purportedly divided into two equal parts. One part to Eddison of \$48,107.75 and the other half of \$48,107.75 apparently distributed by Barbara (or at her instructions), as she saw fit to settle what she saw as debts of Charles Sr. Payment of \$6,000 were given to Charles Jr and to Pearl.

Barbara says that she was acting for Eddison as his agent. Among the distributions were payments to herself of \$20,246.76 for services, she says, as caretaker.

30 May 2003 Denise gives a mortgage of the property to Finco.

19 Jun 2003 Denise swears affidavit, in support of application for stamp duty exemptions, indicating the value of the home was appraised, prior to proposed renovations, at \$188,000.

- 31 Oct 2003 Barbara/Eddison commenced an application for the administration of the estate of Charles Sr. Charles Sr. interest in the Property is listed in the schedule of real property notwithstanding the sale to Denise was completed since 8 May 2003. The sales proceeds in the sum of \$48,107.75 is not identified. Application unable to proceed as the interested parties not cleared off.
- 21 Nov 2003 Conveyance and Mortgage of the Property is lodged for recording.
- Circa 2006 Pearl says that she heard Barbara advised Yvette that the house had been left to the sisters. Yvette's evidence is ambivalent and suggests that the conversation may have been since September 2003, closer to Charles Sr's death.
- 2003-2013 Denise expends \$80,000 in renovating the property and or resides in or leases the Property without interruption.
- 21 Dec 2010 Denise enters into a new mortgage with Finco along with Latoya Barnes with respect to the Property and other property in Western New Providence.
- 22 Dec 2010 Barbara writes to Lawyers for Finco seeking to justify the sale outlining her distribution of the proceeds of sale by herself and Attorney Francis-Butler at the time of the transaction.
- May 2014 Pearl says that they became aware that Denise had owned the home and was selling it when Charles Jr saw a "For Sale" sign and contacted the realtor. Pearl says that this caused her to commission the conduct of a search of the title to the property.
- 15 Jun 2015 Pearl and Charles Jr. enters into occupation of the Property
- 19 Jun 2015 Denice commenced this action and Charles Jr and Pearl restrained from trespassing on the Property until trial.
- >8 Jul 2015 Pearl and Charles Jr vacated the Property.
- 8 Jul 2015 Pearl and Charles Jr appointed in a limited capacity as the personal representatives of the Estate of Charles Sr.
- 8 Jul 2015 Order restraining Pearl and Charles Jr from entering the property is set aside.

4 Aug 2015 Court of Appeal reinstated the restraint order.

28 Oct 2015 Letters of Administration granted to Pearl and Charles Jr

2. The claim of Denise is set out in her Statement of Claim, which provides in part as follows:

...

2. By Indenture of Conveyance dated 8th day of May, A.D., 2003 the Plaintiff is and was at all material times the fee simple owner of Lot No. 109 situate in Boyd Subdivision located in the Western District of the Island of New Providence (hereinafter referred to as "the Property"). The said Indenture of Conveyance is duly recorded in the Registry of Records in the City of Nassau on the island of New Providence aforesaid in Volume 8787 at pages 413 to 417. The Plaintiff will rely on the said Indenture of Conveyance at the trial of this action of its full terms and effect.
3. That pursuant to the said Conveyance the Property was granted and conveyed to the Plaintiff by Edwin aka Eddison Moxey, the Executor of the Estate of Pearl Moxey.
4. Mr. Edwin aka Eddison Moxey conveyed the property to the Plaintiff in his capacity as Executor under the administration of the estate for valuable consideration in the amount of One Hundred Thousand Dollars (\$100,000.00) the receipt of which the Vendor acknowledged pursuant to the Conveyance.
5. The Plaintiff obtained a mortgage in the amount of One Hundred Thousand Dollars (\$100,000.00) from the Finance Corporation of the Bahamas Limited to facilitate the purchase of the property. The Plaintiff will rely on the said Mortgage at the trial of this action for their full terms and affect (sic)

...

12. On or about the 12th June 2015 the Defendants wrongfully, unlawfully and without the consent of the Plaintiff entered onto the Plaintiff's property and proceeded to break into the home situate thereon.
13. That thereafter the Defendants continued to reside in the home without the consent and in fact in direct contravention to the wishes of the Plaintiff for an approximate period of three (3) weeks.

3. Pearl and Charles Jr. defended the claim and made a counterclaim along with the Estate of Charles Sr against Denise and Eddison. The Defence and Counterclaim provided in part as follows:

...

2. As regards paragraph 2 of the Statement of Claim, the First and Second Defendants do not admit that the Plaintiff is and was at all material times the fee simple owner of Lot No. 109 situate in Boyd Subdivision located in the Western District of the Island of New Providence (hereinafter referred to as "the Property"). The Defendants instead say that as a result of the intestate death of Charles Moxey Sr., their father, the First and Second Defendant became the beneficial owners of a one-half undivided share in the Property.

...

5. The First and Second Defendants deny paragraph 4 of the Statement of Claim and say that during the time of the purported sale, Edwin Moxey a.k.a. EddisonMoxey aka Eddison Moxey did not have the capacity to convey the interest of the late Charles MoxeySr who died intestate on January 20th, 2003.

PARTICULARS

- i. Edwin Moxey a.k.a. Eddison Moxey held his 50% interest in the Property as a tenant-in-common.
- ii. At the date of the Conveyance Charles Moxey Sr. was deceased. He died intestate on January 20th, 2003. He was not married. He was lawfully survived his two (2) children, Pearl L. C. Moxey and Charles Moxey Jr, the First and Second Defendants herein, who were both minors on the date of his death. In the circumstances, pursuant to section 10 of the *Administration of Estates Act* Charles Moxey Sr.'s interest in the Property became vested in a Justice of the Supreme Court to be held in trust for the Defendants.
- iii. While Edwin Moxey a.k.a. EddisonMoxey was the Executor of the late Pearl Moxey's estate he was not the Administrator of Charles Moxey Sr.'s estate. Indeed up to the date of this Defence and Counterclaim probate of Charles Moxey's estate has not yet been granted.
- iv. Edwin Moxey a.k.a. EddisonMoxey had no legal or actual authority to grant and/or convey Charles Moxey Sr.'s 50% undivided interest in the Property.

...

14. As regards paragraph 12, the First and Second Defendants denies that they wrongfully and unlawfully entered the Property but says that as 50% owners of the home they did not require the Plaintiff's consent and they were entitled to lawfully break into any lock that prevent them for entering into their share of the Property.

COUNTERCLAIM

(Against the Plaintiff and Edwin Moxeya.k.aEddisonMoxey (As Executor of the Estate of Pearl Moxey))

37. The First and Second Plaintiffs, by counterclaim, repeat and rely upon their defence herein.
- ...
47. The Second Defendant, by counterclaim, never issued a Deed of Assent to Charles Moxey Sr. and failed to distribute the estate of the late Pearl L. Moxey in accordance with her wishes.
48. As Charles Moxey Sr. died intestate the First and Second Plaintiffs, by counterclaim, being the only lawful heirs became entitled to his estate including his interest in the Property pursuant to section 4 (1)(b)(ii) of the *Inheritance Act of the Statute Laws of The Commonwealth of The Bahamas*,
- ...
50. That pursuant to section 10 of the *Administration of Estates Act of the Statute Laws of The Commonwealth of The Bahamas*, a judge of the Supreme Court became a trustee of Charles Moxey Sr.'s real estate for the benefit of the First and Second Plaintiffs (by counterclaim) and that any sale or transfer of real estate was to be done with the authority of the Court. The Defendants (by counterclaim) failed to obtain the Court's approval prior to the sale of the Property or at all.
51. The First Defendant, by counterclaim, was not a bona fide purchaser for value without notice.

PARTICULARS

- i. As the first cousin of the First and Second Plaintiffs, by counterclaim, and due to the close-knitted nature of the children of the late Pearl L. Moxey (including but not limited to monthly family business meetings which all aunts, uncles and cousins attended), the First Defendant (by counterclaim) knew or ought to have known that the First and Second Plaintiffs (by counterclaim) had one-half legal and beneficial interest in the Property as the heirs of their father's estate.
- ii. The First Defendant (by counterclaim) was aware that Charles Moxey Sr. died on January 20th, 2003 and still proceeded to purchase the Property in May of 2003 – four (4) months after his death.
- iii. The First Defendant (by counterclaim) and her mother, Barbara Barnes, lived next door to the Property and were aware at all times that the First and Second Plaintiffs' (by counterclaim) lived at the Property with Charles Moxey Sr since their birth and knew that Charles Moxey Sr. always provided for them.
- iv. The First Defendant's (by counterclaim) mother, Barbara Barnes, informed the First and Second Plaintiffs' (by counterclaim) that the dying words of Charles Moxey Sr at the hospital were to "take care of his two kids" and that the First Defendant, by counterclaim, would have known or ought to have known that the dying wish of Charles Moxey Sr. for his children to be provided for.

- v. The same attorney, Mrs. Bernadette Butler-Francis, did the probate of the late Pearl Moxey's Estate; and, she acted for both parties to the Conveyance – namely, the First Defendant (by counterclaim) and the estate of Pearl Moxey. In the circumstances, it cannot be said that the First Defendant, by counterclaim, purchased the Property at arm's length.
- vi. Charles Moxey Sr.'s interest in the Property is recited at recital (b) of the Conveyance.
- vii. The Property was not advertised or put on the market to attract the best market value for the sale.
- viii. The First and Second Plaintiffs' (by counterclaim), nor their mother who would have been their legal guardian at the time of their father's death until they attained the age of majority, were ever consulted, informed or made aware of their late father's interest in the property.

...

54. The Second Defendant, by counterclaim, as the Executor of the estate of the late Pearl L. Moxey and as Trustee of the funds owing to the estate of Charles Moxey Sr. has not presented an account of the estate of the late Pearl L. Moxey or an account of the funds derived from the liquidation of the estate of the late Charles Moxey which he holds or ought to have held for the benefit of the Plaintiffs, by counterclaim.

...

56. The First and Second Defendant (sic) (by counterclaim) deliberately hid from the First and Second Plaintiffs (by counterclaim) that they were entitled to a one-half share in the Property and as a result of their concealment, they knew or ought to have known of the First and Second Plaintiffs' (by counterclaim) interest.

...

AND THE PLAINTIFFS (By Counterclaim) CLAIM:

- (i) An account of the estate of Pearl L. Moxey and of the funds held in trust for the Estate of Charles Moxey Sr.;
- (ii) A Declaration that the Estate of Charles Moxey Sr. and subsequently his sole heirs being the Plaintiffs (by counterclaim) are entitled to one half undivided interest as tenants in common in all that piece parcel or lot of land being Lot No. 109 of Boyd Subdivision in the Western District of the Island of New Providence in accordance with the Last Will & Testament of the late Pearl Moxey (deceased) dated 9th January, A.D., 1982;
- (iii) An Order/Mandatory injunction permanently restraining the First and Second Defendants (by counterclaim) jointly and severally, whether by themselves, their servants or agents from interfering with the First and Second Plaintiffs (by counterclaim) title and possession of their one half undivided interests in all that piece

parcel or lot of land being Lot No. 109 of Boyd Subdivision in the Western District of the Island of New Providence.

AND THE PLAINTIFFS (By Counterclaim) CLAIM AS AGAINST THE SECOND DEFENDANT (By Counterclaim):

- (iv) An account of the Estate of Charles Moxey Sr. and the proceeds of the sale of any and all of Charles Moxey Sr.'s real property, chattel, personal effects, insurance policies, bank account;
- (v) An order directing the Second Defendant to pay all sums found to be due and owing to the Estate of Charles Moxey Sr. to the Plaintiffs in equal shares;
- (vi) An order directing the Second Defendant to deliver and/or release any chattel, personal effects and any and all assets of any kind and nature whatsoever of the Estate of the late Charles Moxey Sr. to the Plaintiffs;
- (vii) An order compelling the Second Defendant (By Counterclaim) to execute the necessary deeds, in his capacity of Executor of the estate of the late Pearl Moxey, to convey and transfer the Plaintiff's (by counterclaim) 50% interest in the Property as tenants in common to them;

AND THE PLAINTIFFS (By Counterclaim) CLAIM AS AGAINST THE FIRST DEFENDANT (BY Counterclaim):

- (viii) 50% of the income from the lease of the Property for the period 2011 – 2013;

AND THE PLAINTIFFS (By Counterclaim) CLAIM AS AGAINST THE DEFENDANTS (By Counterclaim):

- (ix) Damages;
- (x) Interest on the damages pursuant to sections 2 and 3 of the *Civil Procedure (Award of Interest) Act 1992*;
- (xi) Costs; and,
- (xii) Such other relief as the Court deems to be just and equitable.

4. Denise filed a Reply (Amended) and Defence to Counterclaim which provided in part as follows:

...

- 2. The Plaintiff further states that the Defendants do not now, (sic) nor have they ever, had any interest in the property (hereinafter referred to as "the property") by way their fathers purported title or otherwise as the property

was never legally vested in Charles Moxey Sr. or in any other person save the Executor upon the death of the testator, Pearl L.R. Moxey. The Executor then legally transferred the fee (sic)

- ...
5. The Plaintiff however, vehemently denies, that pursuant to the aforementioned bequest any interest in the subject property was legally vested granted or conveyed to any person other than the Executor, at the time of the Plaintiffs purchase of the property. This fact is established by paragraph C of the Conveyance, which states that the Executor had not executed any vesting deed relative to the property prior to the sale to the Plaintiff.

DEFENCE TO COUNTERCLAIM

32. The First Defendant avers that the action brought the Plaintiffs is barred by statute and further and in the alternative puts forth the following Defence.
33. In Defense to paragraph 37 of the Counterclaim, the First Defendant, by Counterclaim, save as otherwise expressed reiterates paragraph 1-31 of its Reply and puts the Plaintiffs.
- ...
41. The First Defendant admits that at the time of the death of Charles Moxey Sr. the Plaintiffs were minors however the First Defendant has no knowledge of the other facts alleged and specifically is not aware of whether the Plaintiffs were put out of the home or what information, if any, they may have received from any other person and puts the Plaintiffs to strict proof thereof.
44. The First Defendant admits that a Deed of Assent was never issued to the late Charles Moxey Sr. and states that the result of the same is as stated at paragraphs 4-6 above. Further the First Defendant states that if and to the extent that this was ultra-virus to the wishes of the Testator that this is matter to be taken up with the Executor alone and not the First Defendant.
- ...
48. The First Defendant states that with regard to the assertions made in paragraph 51 of the Counterclaim inclusive that the issue of whether the First Defendant was a bona fides purchaser for value does not arise in the present circumstances where the power exercised by the Second Defendant was statutory in nature. Further as the First Defendant is in compliance with the provision of the Administration of Estates Act, 2002 namely section 22(2), the sale and the transfer of the legal estate is valid and binding.
49. In defence to paragraphs 51 i of the Counterclaim the First Defendant states while she knew that upon the death of Charles Moxey Sr. his heirs would be entitled to a share in his estate however she denies that she knew that the property formed any part of his estate and denies that it

does in fact form a part of the estate of Charles Moxey Sr. for the reasons states at paragraph 4-6, (sic) 13 and 15 above.

50. In Defence of paragraph 51 ii of the Counterclaim the First Defendant denies the same and that the death of Charles Moxey Sr. four months before the sale has absolutely no relevance to the validity of her conveyance.
51. In Defence of paragraph 51 iii of the Counterclaim the First Defendant admits that she knew that the Defendants lived on the property with Charles Moxey Sr. the length of which is unknown and further the First Defendant is unaware of what her mother did or did not know and puts the Plaintiffs to strict proof thereof.
- ...
53. In Defence of paragraph 51 v of the Counterclaim the First Defendant admits that Attorney Bridgette Francis Butler represented the interests of the First and Second Defendants during the sale of the property.
54. The First Defendant however vehemently denies that this fact is in anyway pertinent or relevant to whether or not the sale was arm's length, and states further that a practicing member of the Bahamas Bar prepared a legal and binding conveyance in the manner prescribed by law as such there is nothing untoward with the said legal representation and further that it is not unusual or even strange for a single attorney to act in such manner to limit the expenses incurred by the parties and puts the Plaintiff to strict proof of their allegations to the contrary.
- ...
58. In Defence of paragraph 51 viii of the Counterclaim the First Defendant is not aware of whether the Plaintiffs or their mother were ever told of the intended interests of Charles Moxey Sr. in the estate of Peal (sic) L. R. Moxey, however the First Defendant strenuously states that the property does not form a part of his estate and further that as a matter of law and specially pursuant to section 22 of the Administration of Estates Act, 2002 that if there was a duty it fell the Second Defendant, alone in his capacity as Executor, to inform any person of their interest in the said estate and further pursuant to section 22 it is not now, nor has it ever been the duty of the First Defendant to inform any person or be cognoscente of any such purported interest.
- ...
66. Furthermore for a period of 12 years after the sale of the property the First Defendant enjoyed open, conspicuous and undisbursed possession of the property either in her personal capacity or by her tenants. In total the First Defendant has resided on the property or has had her agents do so or has engaged in acts such as securing the property and maintaining the same for a period of 12 years and as such the First Defendant's possession of the property has ousted the title of all other persons including the Executor and Plaintiffs.
67. Moreover, the First Defendant states that if it is that the Plaintiffs were unaware of their father's purported interest in the property it was simply

because they did not take reasonable steps to discover the same and not because of any purported concealment on the behalf of the First Defendant.

5. At the trial, Denise gave evidence in her case. Pearl and Charles Jr gave evidence and called their mother Yvette, Levarity Deveaux, Barbara and attorney Bridgette Francis-Butler as witnesses in their case. Eddison was served, entered an appearance and initially participated through attorneys Shurland & Co. However Eddison did not file any pleadings nor attended for the trial, notwithstanding due service.
6. Finco did not call any witnesses but made submissions at the conclusion of the trial.

Issues

7. The principal issues for determination in this dispute are the following:
 - (1) Whether Eddison was entitled to sell the property to Denise after the death of Charles Sr.
 - (2) If not, whether Denise was entitled to rely on the protection afforded under the Administration of Estates Act ("the Act") and to insist on the validity of the sale as a bona fide purchaser for value.
 - (3) Whether the Estate of Charles Sr and/or Pearl and Charles Jr was entitled to an interest in the Property.
 - (4) Whether Pearl and Charles Jr are trespassers?
 - (5) The effect of the Limitation of Actions Act.
 - (6) The impact on Finco.

Whether Eddison was entitled to sell the property to Denise

8. The primary point to note is that Pearl and Charles Jr, whether in their personal capacity or as the administrator of the Estate of Charles Sr, could only be

interested in the undivided one-half interest of Charles Sr which had been devised to him by his mother. At the very least Denise acquired the undivided one-half interest which would have been devised to Eddison. Eddison was free to dispose of this interest without any reference to Charles Sr or his estate.

9. Denise says at paragraphs 33 and 36-38 of her submissions that:

33. Moreover the Learned Authors – Parry, Sir David Hughes, and Donald Charles Potter of *Williams on the Law of Executors and Administrators* Thirteen Edition. Stevens and Sons Limited, 1953 at paragraph 689 elaborate on the power of sale which an Executor possesses and state that – *“It is a general rule of law and equity that a personal representative has an absolute power of disposition over all personal estate of his testator or intestate; and that such estate once disposed of cannot be followed by creditors much less by legatees, either general or specific”*

...

36. At the time of sale the property was vested solely in the Executor and there can be no doubt that he could sell property of a deceased.
37. The Defendants are plainly wrong to assert that Edwin Moxey as Executor of the estate of the Testatrix could not dispose of the property because of a devise under her Will.
38. Any entitlement claimed by the Defendants (whether rightfully or otherwise) cannot prejudice the right of the Plaintiff to ownership of the property.

10. Pearl, Charles Jr and the Estate of Charles Sr. (collectively referred to as “the Plaintiffs by Counterclaim”), say at paragraph 138 of their submissions that:

138. Denise Barnes, the First Defendant (by Counterclaim) having known that her uncle Charles Moxey Sr was survived by 2 lawful children was placed on notice when she purchased his house. Their house. She lived next door to them; she attended their father’s funeral. She used the same lawyer as the vendor, the same lawyer who unsuccessfully tried to probate the Charles Moxey Sr estate. She produced no appraisals. She produced no evidence of the property being placed on the market. She signed a conveyance, which on the face of it, expressly stated that the said property was left to Charles Moxey Sr and the Edwin Moxey in equal shares as tenants in common. She actively participated in a sale where she had actual and constructive notice of Charles Moxey Sr’s interest and sought to deprive his lawful children and heirs-at-law of their interest. She engaged in a purchase that was not an arm’s length transaction. She then filed an action attempting to displace the children from their lawful home.

11. I should indicate here that I prefer the evidence in support of the case for the Plaintiffs by Counterclaim. I did not find Barbara to be an impressive witnesses. She initially led the court to believe that she was completely unaware of an application for the administration of the estate of Charles Sr until confronted with the evidence in the probate registry's file that she received a power of attorney and made the formal application to the Court. I find on the evidence that she was authorized to act on behalf of Eddison in the sale of the property and to compound matters she was considering her own interest, which she says represented over \$20,000 in debts she was expecting from the proceeds of the sale. When recalled, Barbara alleges, in relation to the probate application and the power of attorney, that she merely signed what Attorney Francis Butler place before her. To accept her evidence would suggest that Attorney Francis Butler was acting on a frolic of her own, a finding I am not prepared to make. I am satisfied that Attorney Francis-Butler was being truthful when she indicated that she acted on instructions, albeit those instructions were flawed. I also accept on the evidence that she advised all parties, including Denise, as to the interest of the Estate.

12. I am satisfied that Yvette was told by Barbara, and Pearl heard the conversation, that the Property was left to the sisters and not to Charles Sr. I am inclined to accept Yvette version as to the timing of that conversation, being nearer to September 2003 rather than in 2006.

13. Counsel for Denise also argues, at paragraph 49(i) of the submission, that "the legal representation provided at the time of the sale of the property to the plaintiff could not provide a basis for the allegation that the transaction was not an arm's length transaction." Notwithstanding this submission I am satisfied that this transaction was less than arm's length. I accept that by itself, such a factor would not ipso facto lead me to such a conclusion, but when the transaction is considered, as a whole, that inescapable conclusion must be drawn. The following are noteworthy:

- (a) The Property had remained in the estate of Pearl L., untouched for twenty years following her death, however steps are taken to dispose of it within days of the death of Charles Sr.
- (b) There is consanguinity between the parties – uncle and niece.
- (c) The Property was the homestead of the matriarch of the family and left, by Will, within the family. Barbara grew up in that home with her siblings including Eddison. Denise says that her navel string is in that home and she had fond memories of growing up on the Property, which was next door to her home and with her grandmother.
- (d) Barbara, who was giving instructions on the sale for Eddison, was claiming almost half of the proceeds of sale which were purportedly to inure to Charles Sr.
- (e) There was no evidence of any prior marketing of the Property by Eddison (who was purporting to sell as executor/trustee) in an effort to secure the best price for the Property.
- (f) The sale was at a considerable undervalue, having been appraised by Denise at \$188,000 but being sold, without any effort to market, at \$100,000.
- (g) The same lawyer acted for both parties.

14. Having considered the evidence, and in particular:

- (a) the 3 February 2003 power of attorney speaking to the administration of Charles Sr's estate and a sale of the Property out of Charles Sr's estate; and
- (b) the subsequent filing of the probate application, which:
 - (i) identifies the Property as remaining in the estate and not the sum of \$48,107.75 which was the proceeds of the sale of the Property;
 - (ii) was filed on October 31, 2003 almost six months after the transaction

I am satisfied that Barbara and Francis-Butler were fully aware that the Estate of Charles Sr, which ought to have been represented by his children, were interested in a half share of the Property.

15. Section 22(1) of the Administration of Estates Act provides:

22. (1) A personal representative may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, but before selling for the purposes of distribution, the personal representative shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold, or in the case of dispute of the majority (according to the value of their combined interests) of such persons.

16. Section 22(1) appears to provide only two circumstances under which a personal representative is legally entitled to sell property to which persons are entitled. These are: (a) for the purposes of paying the debts of the estate; and (b) for the purposes of distributing the estate to the persons entitled. Where therefore, as in this case, Charles Sr (or his estate at the relevant time) was entitled under the will to an undivided half interest in the Property, Eddison may only have sold the Property if one of the two conditions existed.

17. Some twenty years after the death of Pearl L the property had not been distributed in accordance with the will. Within days of his death, however, Eddison had already executed a power of attorney to Barbara for the sale of the Property. The power of Attorney was to secure the sale of the property out of the estate of Charles Moxey Sr. Several reasons as to the purpose for the sale of the Property by Eddison, emerge in the bits and pieces of evidence in the trial. These include:

(a) Recital (e) in the Conveyance dated 8 May 2003, after reciting that the Property was left in the will to Eddison and Charles Sr, states that:

"In the course of the administration the Vendor has agreed to sell the said hereditaments to the Purchaser for an estate in fee simple in possession free from incumbrances at the price of One Hundred

Thousand (\$100,000) dollars in the currency of the Commonwealth of The Bahamas."

(b) Barbara says that the Property was sold because Eddison didn't want to live in New Providence. Specifically, her evidence was that, "*Edwin asked Denise about buying the house because he had no intentions of relocating from Grand Bahama to Nassau and he asked Denise about buying the house.*"

(c) Attorney Francis Butler says that it was for the payment of the debts of Charles Sr not Pearl L. Specifically she says that, "*...I can recall, at the time of the death, there were expenses of the estate of Mr. Charles Moxey, regard would have been had to the estate and its expenses as well. And so in respect to the sale our position would have been, with respect to instructions that Mr. Charles Moxey needed to be paid to those expenses. Medical expenses as you would know, I am sure you would have been instructed, he would have been terminally ill and so expenses would have been paid towards those expenses.*"

18. Respectfully, I find that none of the two reasons permitted by Section 22(1) of the Act exists. I am satisfied to find on the evidence that:

(a) The Property was *not* sold for the purpose of the payment of any bills or debts of the estate of Pearl L.

(b) The Property was *not* sold for the purpose of distributing the estate among the persons entitled thereto. Eddison was left an interest as a tenant in common. This is an interest which may be disposed of or distributed to him without regard to the interest of Charles Sr. It also cannot be overlooked that Eddison did not distribute this property as he ought to have during the life of Charles Sr, some 20 years after Pearl L's death.

19. Even if I had been satisfied that there was a proper purpose, I am nonetheless satisfied that there was no effort, at all, as required by Section 22(1), to give effect to the wishes of all of the persons entitled, namely the estate of Charles Sr.

20. According to the Plaintiffs by Counterclaim, at paragraph 16, of their submissions, '[w]hat is also clear is that neither Edwin Moxey (the Second Defendant (by Counterclaim)) nor his agent Barbara Barnes complied with Section 22 of the Act. Therefore, Edwin Moxey was not entitled to sell the whole or any part of the estate of the testatrix in that he did not give effect to the wishes of the persons entitled to the property proposed to be sold.'

I agree. The evidence, which I accept, was that there was no effort to contact the persons entitled to the estate. This was also confirmed by Attorney Francis-Butler in her evidence.

21. It is clear therefore that Eddison did not have the power to sell that undivided one-half interest in the Property which had been devised to Charles Sr., in reliance on Section 22(1) of the Act. The issue then to be determined is whether Denise would be afforded any protection in the circumstances.

Whether Denise may rely on the protections afforded under the Act and Whether the Estate of Charles Sr and/ Pearl and Charles Jr entitled to an interest in the property.

22. Denise says at paragraphs 49 and 50 of her submissions:

49. The Plaintiff was a bona fide purchaser for value without notice

(a) The Defendants have alleged that the sale to the Plaintiff was not at arms-length because the parties used the same attorney and because there was no advertisement of the sale of the property to secure the best value.

(b) The Defendants further alleged that the Plaintiff had notice of their interest in the property.

(c) It is submitted that neither of the above allegations can be sustained by the Defendants.

(i) Using the same attorney

The Defendants called Mrs. Bernadette Butler-Francis as a witness in their cause. It was clear upon the evidence of Mrs. Francis-Butler that the legal representation provided at the time of the sale of the property to the Plaintiff could not provide a basis for the allegation that the sale was not

at 'arms-length'. Mr. Francis-Butler in fact said that she was instructed by the bank in respect to a mortgage being obtained by the Plaintiff. Whilst Mrs. Francis-Butler would have prepared the Mortgage for the bank and the conveyance to the Plaintiff which supported it, her evidence is that she had no direct communication with the Plaintiff. Further, in re-examination by Counsel for the Defendants the witness said –

Q. *Okay. And as it relates to Denise, who the firm was also acting for, the instructions were coming from whom in that regard?*

A. *The instructions came from the bank.*

Q. *From the bank?*

A. *Yes.*

Q. *So you really weren't dealing a lot with Denise, it was primarily with the bank?*

A. *It was with the bank, yes.*

The Defendants are bound by this evidence. Moreover, there is no evidence to show that the legal representation provided by Mrs. Francis-Butler was collusive or that it facilitated collusion or that it provides the basis for an allegation that the sale was not at 'arms-length'.

(ii) Value of the property

The evidence before the Court is that the Plaintiff purchased the property for \$100,000.00, by a mortgage over the property and that she invested some \$80,000.00 in repairs to the property when she purchased it.

The Defendants have led no evidence to suggest that the purchase price of \$100,000.00 was not a fair market value for the property. The Respondents in their application for Letters of Administration have declared and confirmed their belief that the estimated value of 50% interest in the property (which they say that they claim on behalf of their father's estate) is \$50,000.00, the same price the Appellant paid for it.

50. Notice of the interest of the Defendants

(a) Edwin Moxey exercised his right as Executor under the Will of Pearl Moxey to sell the property for distribution.

(b) Charles Moxey himself never got a vested interest in the property. The Defendants cannot therefore have an interest in the property through him.

(c) There has been no evidence whatsoever to show personal knowledge on the part of the Plaintiff of the affairs of the estate of Pearl Moxey out of which she purchased the property. Indeed the uncontroverted evidence of the Plaintiff is that until she had purchased the property, she never knew her grandmother had a Will.

(d) Any claim of notice on the part of the Plaintiff is purely speculative and cannot ground the serious allegation being made by the Defendants.

23. The Plaintiffs by counterclaim say in their submissions:

65. We submit that First Defendant (by Counterclaim) had constructive notice due to the close family relationship, the fact that she lived next door to the Plaintiffs (by Counterclaim), her mother acted as her personal agent and the agent of the executor and that she knew Charles Moxey Sr to have been survived by the Plaintiffs (by Counterclaim). Denise Barnes describes the acts of agency conducted by her mother, on her behalf, at page 31 of the 24 October, 2016 transcript, lines 19-32.

66. The usual question to be asked by the First Defendant (by Counterclaim), especially after reading clause "B" of the conveyance, reading the title search provided by the attorney who acted for all parties and being informed by the same attorney – was to ask – what about Pearl and Charles? Are they not entitled to their father's inheritance? We believe that this very question was in fact asked and thus, the clever scheme to sell the property out of the estate of the testatrix rather than completing the probate of Charles Moxey Sr was devised as a means to get around such an obvious question. Not only did she live next door, but she attended and participated in the funeral of Charles Moxey Sr who had undistributed possession of the home for 27 years and was survived by his lawful children (the Plaintiffs by Counterclaim) at the time of his death. We refer the court to the authority of *Marsden (Supra)*.

70. We further submit that the First Defendant's (by Counterclaim) attorney during the purchase of the house would have reasonably been expected to inquire as to the interest of Charles Moxey. As such, the First Defendant (by Counterclaim) had imputed notice through their agent and attorney who were put on notice and ought to have been put on inquiry. See *Cheshire and Burn's Modern Law of Real Property*.

24. A purchaser of property from an estate is protected by Sections 22(2) and 29 of the Act. Section 22(2) of the Act provides:

(2) A purchaser of the estate or part thereof to which subsection (1) refers shall not be concerned to see that the personal representative have complied with the wishes of those persons referred to in subsection (1), and it shall not be necessary for any person beneficially entitled to concur in such sale.

Section 29, of the Act provides:

29. A person who purchases real or personal property from a personal representative is entitled to assume that the personal representative has acted and is acting correctly and within his powers.

25. It seems to me that these provisions whilst affording protection to a purchaser, do not provide absolute protection in every circumstance.

26. Firstly, the purchaser seeking to rely on this protection must be one who acts in good faith, described by the Plaintiffs by Counterclaim as the *bona fide purchaser*. This interpretation arises as a result of the definition of Purchaser in Section 2 of the Act. It provides:

“purchaser” means a lessee, mortgagee or other person ***who in good faith acquires an interest in property for valuable consideration***, also an intending purchaser and “valuable consideration” includes marriage, but does not include a nominal consideration in money.

In my view, it is only a purchaser who acquires the title in good faith that may rely on the provisions of Section 22 and not be concerned whether Eddison has complied with the wishes of Charles Sr.

27. Secondly, the language of Section 29 is clear that it entitles a purchaser to “assume that a personal representative has acted and is acting correctly and within his powers”. *Entitle to assume* in my view is the same as *may presume*, in which case if the presumption has been rebutted it ought not to have effect. Clearly if the purchaser actually knows, ought to know or is otherwise aware that the personal representative is not acting correctly and within his powers, she could not pray in aid any relief in Section 29. One cannot assume something which she is aware or should be aware is not the case.

28. The inescapable inference to be drawn from the evidence is that Denise was aware of the interest of Charles Sr or that she ought to have known of it.

(a) She is a highly educated woman, and based upon my assessment of her oral testimony, very intelligent.

- (b) She grew with Charles Sr occupying the home where her grandmother lived, exclusively, for the 20 year period prior to his death. He lived there with his girlfriend Yvette and his children during this period. The Property is next door to her home.
- (c) Her mother with whom she has a close relationship and relies, is fully aware of the circumstances and has power over Charles Sr before and purportedly after his death.
- (d) She is aware that Charles Sr had children, who although considerably younger than her, she interacted with. Her evidence is that she baby sat their children.
- (e) She speaks to her attorney as to the progress of the transaction and other particulars of the sale.
- (f) She takes a conveyance from Eddison, which on the face of it shows that the estate of Charles Sr is interested in a one-half interest in the Property.
- (g) This is her family's property, she is not an outsider, someone dealing at arm's length with a seller, unknown to her. She knows that her grandmother died some 20 years earlier and therefore payments of debts nor administering *her* estate could not be the likely purpose of the sale to her by Eddison.

Individually these matters may not be significant but taken together I am satisfied on a balance of probability that knowledge on the part of Denise is the proper inference to be drawn.

29. On the evidence, I am prepared to find that Denise knew or ought to have known that Eddison was not acting correctly and within his powers. It is accepted that all parties utilized the services of Attorney Francis-Butler as their attorney for the sale transaction. According to the evidence, which I accept, Francis-Butler was acting as the agent for both Denise and Eddison. She knew that: (a) neither of the purposes for which the law permitted a sale of the property existed and (b) the wishes of the estate or persons entitled to the estate were not sought prior to the sale.

30. It is perhaps appropriate at this juncture to consider the position of Attorney Francis-Butler in this transaction and what is the effect of my finding that she (Francis-Butler) knew that (a) neither of the purposes for which the law permitted a sale of the property existed and (b) the wishes of the estate or persons entitled to the estate were not sought prior to the sale. As indicated Attorney Francis-Butler drew the conveyance and mortgage and the undisputed evidence was that she acted for all three parties, Denise, Eddison and Finco. I reject the suggestion of Counsel for Denise that Francis-Butler acted primarily for Finco. The evidence of both Francis-Butler and Denise was that Francis-Butler was Denise's attorney for the transaction, both admit to communicating with each other during the course of the representation.

31. In the event I am wrong as to the finding of Denise's actual knowledge, as Denise's attorney, Francis-Butler was her agent for the transaction and as such any information coming to her knowledge must be imputed to Denise. In ***Strover v Harrington [1988] Ch 390*** the English Court found that, in a transaction for the sale of land the knowledge acquired by a purchaser's solicitor could be imputed to the purchaser himself and, if so, he was estopped from denying that he had received information relating to the transaction which had been communicated to his solicitors. ***Browne-Wilkinson V-C*** said at page 409 in ***Strover v Harrington*** that:

"In this, as in all other normal conveyancing transactions...the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the other party relating to that transaction. The solicitors are under an obligation to communicate the relevant information to their own clients. At the very least the solicitors are held out as having ostensible authority to receive such

information...In my judgment such knowledge should be imputed to the principal."

I am satisfied therefore, that in the circumstances of this case, the knowledge of Francis-Butler ought to be imputed to Denise

32. The Plaintiffs by Counterclaim say that "a purchaser, who is not bona-fide, is not protected by *section 22(2) and 29 of the Administration of Estates Act, 2002* and the property may lawfully be followed into their hands. Further, the Court under *section 27 (2)* has the power to make certain declarations and order that a proper conveyance be executed." Section 27 provides:

27. (1) An assent or conveyance by a personal representative to a person other than a purchaser does not prejudice the rights of any person to follow the property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (not being a purchaser) who may have received the same or in whom it may be vested.

(2) Notwithstanding any such assent or conveyance, the court may, on the application of any creditor or other person interested —

(a) order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested;

(b) declare that the person, not being a purchaser in whom the property is vested, is a trustee for those purposes;

(c) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;

(d) make any vesting order, or appoint a person to convey in accordance with the provisions of the Trustee Act.

(3) This section shall not prejudice the rights of a purchaser or a person deriving title under him, but applies whether the testator or intestate died before or after the commencement of this Act.

33. As I have found that Denise is not a purchaser, as defined by the provisions of the Act, the Estate retains the rights, pursuant to Section 27 of the Act to follow the Property into the hands of Denise notwithstanding the vesting of the Property by the conveyance. The Court is empowered by Section 27 (b) and (c) to:

(b) declare that Denise, not being a purchaser in whom the property is vested, is a trustee for those purposes;

(c) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;

34. Whilst it is open to the Court to set aside that part of the transaction which affected the Estate of Charles Sr, namely the undivided half interest, it would seem more prudent, from a conveyancing perspective, to declare that the half interest is vested in Denise as trustee for the estate of Charles Sr, in accordance with Section 27(b) and to give directions for the realizing of that interest by the Estate.

35. I find that, notwithstanding Pearl and Charles Jr are the heirs of Charles Sr, at the time of their admitted entry into the property they had no personal right or vested right to so enter. Additionally, they had not been appointed as administrators of the estate, notwithstanding their right to apply. I am satisfied therefore that they trespassed onto the Property. In the circumstances however, having regard to the fact that ultimately, they are the beneficiaries of an undivided $\frac{1}{2}$ interest in the property, I give nominal damages to Denise of \$250.

The Limitation Act Defence

36. According to Denise, at paragraph 39 and 40 of her submission, by Section 34 of the Limitation Act 1995, the Plaintiffs by Counterclaim were required to pursue their counterclaim by January 2015, 12 years after the death of Charles Jr. through whom they claim. The first issue to note is that the claim of the Estate in this action did not arise at the death of Charles Sr, but after the transfer of the interest of the Estate to Denise on 8 May 2003. This takes the cause of action to expire (on Denise's case) in the ordinary course on 8 May 2015. On January 25, 2016 in a written decision, I refused an application to strike out the counterclaim on the basis of the same limitation defence. At paragraph 24 of my ruling I made the following holding, which I continue to hold, notwithstanding the taking of evidence and an increased evidential threshold. It was stated:

24 On the facts, it seems to me that is the absence of actual knowledge, no one other than a party to the sale transaction could have become aware of the sale to the Plaintiff until the conveyance was lodged for record on November 21, 2003. Mere occupation did not, of itself, connote ownership. Notwithstanding the fact that at least one of the Defendants was still a minor in November 2003 (the other had been an adult for a month), the transaction could have been discovered by a reasonable search of the registry. If there was concealment, time could not began to ran prior to November 21, 2003, in which case the 12-year limitation period would not have expired until November 21, 2015. The Counterclaim having been lodged in August 2015 would therefore have been made during the currency of the limitation period.

37. I am satisfied that the limitation defense ought to fail on the reasoning of my earlier decision as I find that there was deliberate concealment. The evidence at trial, at the very least, was that in September 2003 (If not 2006) Barbara, Eddison's agent by power of attorney, sought to mislead the Plaintiffs by Counterclaim, through their mother/guardian, Yvette, that the property had been left to Charles Sr's sisters. At the time the property had already been conveyed by Eddison to Denise. This was clearly an act designed to conceal from them that Charles Sr's interest in the Property had been sold to Denise by Eddison. No one could have become aware, in the absence of actual knowledge that the transaction took place until the recording of the conveyance in November 2003.

38. It would also appear that Section 30 of the Limitation Act is available to the Estate as their claims, to set aside the conveyance of the Property and recover it for the estate, can be described as a recovery of land claim. Section 30 of the Limitation Act provides:

30. For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

Accordingly, therefore, there would be no accrual of time between the death of Charles Sr and the grant of the letters of administration. Time in relation to the

counterclaim would therefore not start to run until the grant of the letters of administration on 8 July 2015.

The position of the Third Party

39. Finco says that's Section 52 of the Conveyancing and Law of Property Act applies. Section 52 of the Conveyancing and Law of Property Act provides:

52. (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless —

(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act.

40. I am satisfied that Section 52 is applicable but it operates against Denise and the Third Party. As indicated, I have found that Denise is fixed with actual or constructive knowledge and that otherwise knowledge is imputed to her. In my view the conveyance and the mortgage are a part of the same transaction and the knowledge was obtained in the one transaction. Attorney Francis-Butler acted for Finco in the transaction whereupon they acquired an interest in the Property. In the same way Francis-Butler's knowledge is imputable to Denise it is also

imputable to Finco. Further, inasmuch as Denise can only mortgage that which she owned, she was only able to mortgage her half interest in the Property and not that portion which she held on trust.

Conclusion

41. Having regard to my findings above, I make the following orders and declarations:

- (1) I Declare that Denise holds the Property jointly for herself and for the estate of Charles Sr, as trustee. She therefore holds the estate's undivided half interest, in trust as tenants in common with her own beneficial interest.
- (2) I Order that Denise conveys that undivided half interest to the Estate within 90 days of today's date.
- (3) Having made the declaration and order with respect to the estate's interest in the property, I expect the parties to comply with the terms of the Order and recognition of the Estates interest in the property and I make no order for injunctive relief.
- (4) I decline to make any Order that Eddison provide an account as to the estate of Pearl L. Moxey and of funds held in trust for the Estate of Charles Moxey Sr. There is no evidence as to any matters outstanding in the Estate of Pearl L. other than the Property. Pearl L died since 1983 some 38 years ago. Charles Sr lived in the property apparently to the exclusion of Eddison and there is no evidence that accounts were not settled between them during Charles Sr's lifetime.
- (5) I order that Eddison, who on the evidence purported to act for the un-administered estate, do account for any property belonging to the estate of Charles Sr. I order the payment or delivery of any such property to the Estate of Charles Sr.
- (6) I Order Denise to account to the Estate for 50% of the income derived from the lease of the property in the period 2011-2013. Such account may be offset by any funds paid towards the renovation or upgrading of the Property which ought to be property detailed.

(7) Denise and Eddison shall pay the reasonable costs of the Estate of Charles Sr. such costs to be taxed if not agreed.

Dated this 28th day of January 2019

A handwritten signature in black ink, appearing to read 'I W', with a stylized flourish at the end.

Ian Winder

Justice