

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION
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5 CAUSE NO. G 430 of 2013
6

7 BETWEEN:

8 PATRICK GEORGE SMITH
9

10 PLAINTIFF

11 AND:

12 1. GREGORY ANTONIO SMITH
13 2. PATRICK GEORGE SMITH JNR.
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15 DEFENDANTS
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19 Appearances:

James Kennedy instructed by Samson &
McGrath for the Plaintiff
Defendants in Person
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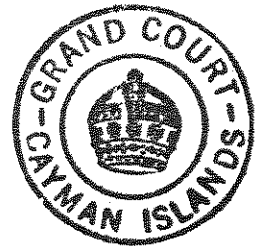
23 Before:

The Hon. Mr. Justice Patrick Brooks (Actg.)

24 Heard:

9th, 11th and 15th July 2014
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26 JUDGMENT
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- 28 1. In July 2009, Mr Patrick Smith signed an instrument of transfer to real
29 property that had been his home for almost thirty (30) years. The transfer
30 stated, in effect, that in consideration of the love and affection that he had for
31 his sons, Gregory and Patrick Jnr, Mr Smith transferred the entire interest in
32 the property to them. The transfer was duly recorded on the land register of
33 the Cayman Islands.

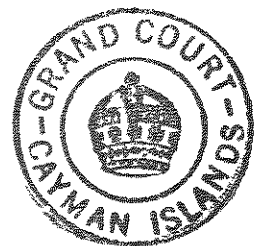
1 2. Subsequent to signing that transfer, relations between Mr. Smith and his
2 sons soured. On his account of the facts, they treated him badly. In
3 December 2013, he filed a claim against them in this court asking that the
4 property be declared to be owned by the three of them in equal shares. He
5 also seeks, in his claim, an accounting from his sons for all the rent that they
6 have collected from tenants of an apartment block Mr. Smith had
7 constructed on the property.

8 3. The basis of his application is that the transfer did not reflect his intention at
9 the time of signing. He asserted that he, at all times, intended to retain an
10 interest in the property until he died. He states that his sons also knew,
11 before he signed the transfer, that that was his intention. He stated that he
12 had told them so. He has proffered no explanation for the transfer document
13 stating as it does, or why he signed it in that condition.

14 4. Unfortunately, his sons have filed no statement of defence to the claim and
15 have not secured attorneys-at-law to assist them. They have, nonetheless,
16 attended court on the occasions that the case has been set for consideration.

17 5. In the absence of a defence, Mr Smith has filed an application asking for the
18 relief set out in his statement of claim.

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BACKGROUND

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6. Before assessing Mr Smith's claim, it is best to set out its background.

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7. The property is located in Grand Cayman and is at Registration Section Prospect, Block 22E Parcel 108. Mr Smith and his late wife Kathleen purchased the land in 1981 and built a house on it. The property became their home. It was used by Mr Smith as security for loans from time to time, and was, all material times, subject to a mortgage, executed by Mr Smith, to Cayman Islands Civil Service Association Co-Operative Credit Union (the Credit Union).

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8. Kathleen died and, thereafter, Mr Smith built the block of apartments on the property. He let the apartments out to tenants and continued to repay the mortgage loan through instalments. That situation continued for a number of years.

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9. Mr. Smith encountered serious health challenges in March 2009 and as a result defaulted in servicing the mortgage loan. He says that he consulted with a representative of the Credit Union. It is after that consultation that he decided to share his interest in the property with his sons. The instrument of transfer was prepared and duly signed in July 2009.

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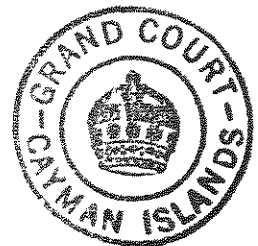
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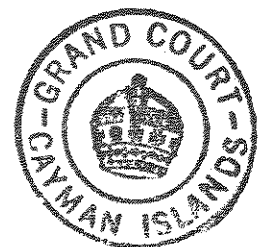
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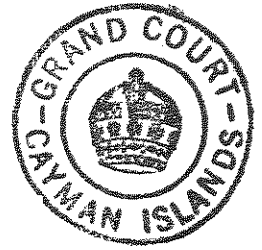
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- 1 10. He asserts that the signed instrument of transfer did not reflect his intention.
2 Instead of his sons being joined with him as co-owners of the property, it
3 caused his entire interest in the property to be transferred to them. He was
4 not, however, made aware of that situation for several months.
- 5 11. The day to day operation of the property continued unchanged until October
6 2009. In that month, Mr Smith states, he went, as usual, to collect rental
7 from his tenants but was rebuffed. He spoke with his sons. Their position
8 was that “they are the sole beneficial owners of the said property and that the
9 plaintiff [Mr Smith] has no title, interest or share in the property or the rental
10 income derived from the property” (paragraph 11 of the statement of claim.).
- 11 12. He filed the present claim in December 2013, but, as mentioned above, his
12 sons, the defendants, filed no defence to enable the court to ascertain their
13 stance in respect of the matter. Although it is not set out in the statement of
14 claim, it is uncontested that the repayment of the mortgage loan is now
15 seriously in arrears and the Credit Union is presently seeking to sell the
16 property to recover its loan and the interest thereon. It is unlikely that Mr
17 Smith or his sons can, either separately or together, secure the monies
18 required to prevent the sale.
- 19 13. It is in that context that Mr Smith’s application came before the court for
20 hearing.
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PRELIMINARY POINT

14. On the first day of the hearing of the application, Mr Kennedy, appearing for Mr Smith, submitted, among other things, that as there has been no defence filed contesting Mr Smith's assertions in his statement of claim, the court should accept those assertions at face value, and, grant the orders that Mr Smith seeks.

15. On his next appearance, Mr Kennedy submitted that the court should hear what the defendants had to say and, if the court were of the view that they had a triable issue to be raised, then the court could make the relevant orders for the matter to be placed for trial. Mr Kennedy relied on the case of *Wallersteiner v Moir*¹ in support of his submission.

16. The court did hear from the defendants, as it always intended to do. Having heard from them, it took time to consider the case, both as to Mr Kennedy's preliminary point as well as substantively.

17. Having considered the matter, the court is of the view that these defendants have had ample time to state their defence but have failed to do so. They have indicated no intention or desire to do so. The claim should not be delayed any further by their recalcitrance. The writ of summons and statement of claim have been in their possession for some time. Other documents have also been served on them. They have ignored the requirements of the Grand Court Rules.

¹ [1974] 3 All ER 217

1 18. On 22 April 2014, a summons filed by Mr Smith, seeking relief under the
2 Partition Law (1997 Revision), came on for hearing before Williams J. The
3 defendants appeared and orders were made concerning another property
4 which was included in Mr Smith's claim. It is not necessary to set out the
5 circumstances of that aspect of the claim as they have been dealt with by the
6 orders made by Williams J.

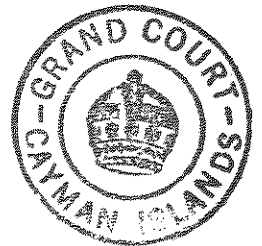
7 19. The point is that the defendants have been aware of this claim for in excess
8 of six months and have not sought to comply with the Grand Court Rules in
9 any manner whatsoever. Mr Smith was right to file his summons applying
10 for judgment in default of defence, as is allowed by GCR O.19 r.7. Even
11 after having heard Mr Kennedy's submissions, the defendants did not seek
12 any adjournment in order to put themselves in a state of compliance.

13 20. The circumstances of this case are very different from those in *Wallersteiner*
14 *v Moir*, where the plaintiff, who had failed to file a reply and defence to a
15 counter-claim, applied for permission to do so. That case is, therefore, not
16 helpful in this context.

17 21. For those reasons, and, based on the view that the court takes of Mr Smith's
18 application, the court has decided to bring the matter to conclusion without
19 further delay.

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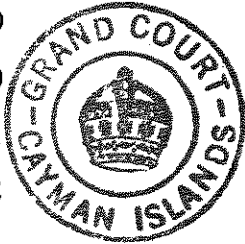


1 *THE APPLICATION*

2 22. The relevant portion of Mr Smith's summons for judgment in default of
3 defence is contained in paragraphs 1 and 2 thereof. Those paragraphs state
4 that he requests:

5 "1. *A declaration that the property at Registration Section Prospect,*
6 *Block 22E Parcel 108 is held by the Plaintiff and Defendants in*
7 *equal one third (1/3) shares.*

8 2. *The defendants do provide an account as of the date of filing of*
9 *the account of all dealings by the Defendants with Registration*
10 *Section Prospect, Block 22E Parcel 108 and of income derived*
11 *from the land that has come into the hands of the Defendants*
12 *within 56 days of the date of service of this order on the*
13 *defendants."*



14 23. Mr Kennedy submitted that the statement of claim asserts that the parties had
15 come to an agreement that Mr Smith would be a co-owner of the property,
16 with his sons, but that the agreement did not come into effect. He argued
17 that by this claim, Mr Smith is seeking the assistance of the court in equity in
18 bringing that agreement into effect.
19

20 24. Learned counsel submitted that, in light of the situation with the debt owed
21 to the Credit Union, Mr Smith did not seek an order to rectify the land
22 register, as a rectification of the register would serve no practical purpose.
23 Mr Kennedy said that the declaration sought, along with the requested
24 accounting, would address the issues between Mr Smith and his sons, and

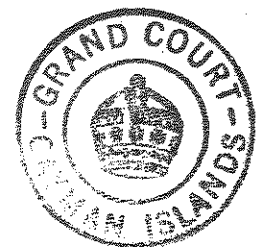
1 address the issue of any equity that the registered proprietors may still have
2 in the property. That equity would manifest itself in any sums due to the
3 registered proprietors after the sale of the property by the Credit Union.

4 25. Learned counsel, however, cited no authorities in support of his submissions,
5 but he did bring to the court's attention the case of *Jones v Kernott*² as well
6 as some material on constructive trusts and mistake. *Jones v Kernott* dealt
7 primarily with people living together as husband and wife, and the indicators
8 of a change of intention by them as co-owners in respect of their holding of
9 the family home. The circumstances are therefore different from those in
10 this case.

11 26. In response to the application and those submissions, Mr Gregory Smith, on
12 behalf of both defendants, argued, in effect, that there had been no mistake
13 made when the transfer document was signed. He stated that the effect of
14 the transaction was well known to all concerned. He said that they all,
15 including Mr Smith, were clearly aware that, by that transaction, Mr Smith
16 was freed from the burden of the mortgage debt and the debt, instead,
17 became the defendants.

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² [2011] UKSC 53

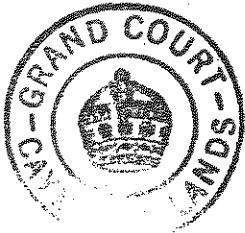
1 27. Mr Gregory Smith's statements, had they been contained in a statement of
2 defence, would no doubt have joined issue with Mr Smith's claim. The
3 sons' position sharply contradicted Mr Smith's assertion that there was an
4 agreement that he would "retain an interest [in the property] as a tenant in
5 common".

6 28. The defendants have however declined to advance their position formally.
7 Accordingly, the other statements made to the court, by both defendants, are
8 not admissible for consideration. This is because they constitute evidence
9 and, as will be explained below, the consideration of evidence is not allowed
10 in applications such as this.

11 ***THE RELEVANT LAW***

12 29. The rule, upon which Mr Smith relies in applying to the court for judgment
13 in default of defence, is GCR O.19 r.7. It states at paragraph (1):

14 *"(1) Where the plaintiff makes against a defendant or defendants a claim*
15 *of a description not mentioned in rules 2 to 5 [dealing with other*
16 *types of claims], then, if the defendant or all the defendants (where*
17 *there is more than one) fails or fail to serve a defence on the*
18 *plaintiff, the plaintiff may, after the expiration of the period fixed*
19 *by or under these Rules for service of the defence, apply to the*
20 *Court for judgment, and on the hearing of the application the*
21 *Court shall give such judgment as the plaintiff appears entitled to*
22 *on his statement of claim."* (Emphasis supplied)



1 30. The highlighted portion of the rule implies two things. Firstly, that the court,
2 in considering its judgment, will only consider the plaintiff's statement of
3 claim. No reference to evidence is allowed in this procedure. This
4 interpretation of the provision, as well as another complementary
5 interpretation that will be set out below, is based on authority of some
6 antiquity. Bowen LJ, in *Young v Thomas*³, summarised a similar provision
7 in the then Rules of the Supreme Court of England & Wales thus:

8 *"...Order XXVII., rule 11, which provides that if the defendant makes*
9 *default in delivering a defence, the plaintiff may set down the action on*
10 *motion for judgment, and "such judgment shall be given as upon the*
11 *statement of claim the Court or a Judge shall consider the plaintiff to*
12 *be entitled to".*" (Emphasis supplied)

13 31. Bowen LJ went on to interpret the effect of the provision highlighted above.
14 He said:

15 *"...There is no doubt that, in determining the rights of the parties in the*
16 *action, the statement of claim alone is to be looked to, and the reason for*
17 *this rule is obvious, namely, that the facts stated therein are taken to be*
18 *admitted by the defendant; and, as has been decided by Lord Justice Kay*
19 *in **Smith v. Buchan** [36 WR 631], no evidence can be admitted as to*
20 *those facts...."*

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³ [1892] 2 Ch 134



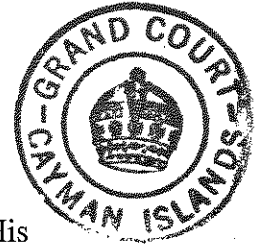
1 32. The second implication to be drawn from the highlighted portion of O. 19 r.
2 7(1) is that the court is not bound to make the order that the plaintiff seeks.
3 Lord Esher MR, in *Charles v Shepherd*⁴, made that clear while assessing the
4 same rule considered by Bowen LJ. He said, at page 624:

5 “...the Court is not bound to give judgment for the plaintiff, even though
6 the statement of claim may on the face of it look perfectly clear, if it
7 should see any reason to doubt whether injustice may not be done by
8 giving judgment; it has a discretion to refuse to make the order asked
9 for.”

10 33. The latter principle was re-affirmed in *Wallersteiner v Moir*.

11
12 34. The question for this court is, to what relief is Mr Smith entitled. His
13 statement of claim raises three issues. The first two turn on the broad
14 principle of mistake. The first is a principle known in law by the Latin term
15 “*non est factum*”. The accepted translation of the term is “not his deed”.

16
17 35. That principle allows for a person who has signed a document to say
18 “although I signed it, that document does not reflect my intention; I should
19 therefore not be bound by it”. In practice, the principle is not easily
20 available to persons. The decided cases emphasise the importance of
21 certainty, especially in the commercial world. As a result, a person who
22 seeks to distance himself from the contents of a document, he has signed,
23 bears a heavy burden of proof in convincing a court that the document
24 should be set aside on the basis that he did not intend to sign it as drafted.



⁴ [1892] 2 QB 622

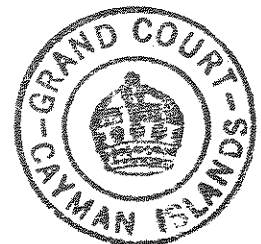
1 This is especially so when the document is one which is clearly intended to
2 have legal consequences.

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4 36. Lord Reid in *Saunders v Anglia Building Society*⁵ made it clear that a person
5 cannot claim the benefit of the principle of *non est factum* just because he
6 has not bothered to inform himself of the contents of the document that he
7 has signed. That person must satisfy the court that he is entitled to the
8 remedy provided by the principle. Lord Reid said at page 963 of the latter
9 report:

10 *“...So there must be a heavy burden of proof on the person who seeks*
11 *to invoke this remedy. He must prove all the circumstances necessary*
12 *to justify its being granted to him, and that necessarily involves his*
13 *proving that he took all reasonable precautions in the circumstances. I*
14 *do not say that the remedy can never be available to a man of full*
15 *capacity. But that could only be in very exceptional circumstances;*
16 *certainly not where his reason for not scrutinising the document before*
17 *signing it was that he was too busy or too lazy. In general I do not think*
18 *that he can be heard to say that he signed in reliance on someone he*
19 *trusted.....”* (Emphasis supplied)

20 37. The remedy provided by a successful claim to the benefit of the principle of
21 *non est factum*, is that the document would be struck out as being void.

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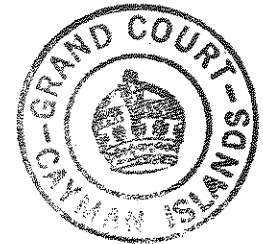
⁵ [1971] AC 1004; [1970] 3 All ER 961

1 38. The second principle raised by Mr Smith's claim is one which allows a court
2 to set aside or rectify a document on the basis that it was executed in
3 ignorance or by mistake. Lord Walker SCJ in *Pitt and another v Holt and*
4 *another; Futter and another v Futter and others*⁶ described it as a principle
5 whereby "a voluntary disposition (typically a gift, outright or in settlement)
6 may be set aside [or rectified] on the ground of mistake". As in the case of
7 *non est factum*, this remedy is only available in restricted circumstances.

8
9 39. In *Pitt*, Lord Walker comprehensively assessed the issues involved in the
10 principle of mistake in the context of a voluntary disposition. In delivering
11 the judgment of the English Supreme Court, he indicated that, in assessing
12 an application for rescission of a document on the basis of the mistake of its
13 maker, the court would normally have to be satisfied that there was a
14 mistake either of the legal character of the transaction or as to some aspect of
15 the facts or law involved in the transaction that was basic to that transaction.
16 He indicated that a mistake must be distinguished from mere ignorance,
17 inadvertence, and misprediction. As a result, forgetfulness, inadvertence or
18 ignorance do not, as such, constitute a mistake, but one or more of those
19 elements can lead to a false belief or assumption which the law will
20 recognise as a mistake. Mere ignorance, even if causative, is insufficient.

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⁶ [2013] 3 All ER 429



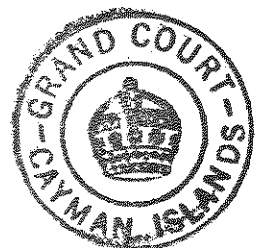
1 40. The previously stringent strictures guiding the analysis of cases were
2 somewhat relaxed by Lord Walker's judgment. He stated that whereas it
3 may not be clear on the facts of a particular case, whether or not a mistake
4 occurred, the court should make a decision based on the justice of the case,
5 and whether it was unconscionable to leave the mistake uncorrected.

6 41. Lord Walker encouraged a close examination of the material that was
7 presented to the court in respect of the application. It is important to note
8 that the relief that a finding of mistake requires, is the setting aside or
9 rectification of the document said to have been so executed.

10
11 42. Apart from the issue of mistake, Mr Smith's claim also calls for analysis, the
12 concept of trust. This is the third aspect raised by the claim. Two particular
13 types of trust are raised by his statement of claim, namely, a resulting trust
14 and a constructive trust. Although the distinction between these two
15 categories of trust is not always relevant, it is, for these purposes, and
16 especially because the defendants are self-represented, appropriate to outline
17 the basic distinction between them.

18
19 43. The learned editors of Underhill and Hayton – Law of Trusts and Trustees
20 (18th Ed) define a resulting trust as being one imposed by law. They state, in
21 part, at paragraph 3.3:

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23



1 *“Resulting trusts are trusts imposed by law on property in the hands of a*
2 *gratuitous transferee (i.e. a transferee who has provided no valuable*
3 *consideration for the transfer) where the transferor is regarded as*
4 *retaining his beneficial interest...In many cases where property is*
5 *gratuitously so transferred, there is evidence that the transferor intended*
6 *to make a gift or loan or, in a very rare case, to abandon his interest in*
7 *the property, in which cases the law will give effect to that intention, and*
8 *no question will arise of a resulting trust being imposed.”*

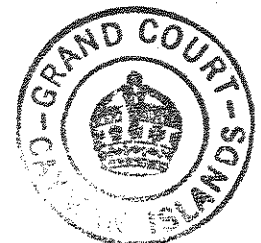
9 44. Philip Pettit, in the fifth edition of his work *Equity and the Law of Trust*,
10 gives examples of a resulting trust. One such example is set out at page 55
11 of his work:

12 *“iii Resulting trust*

13 *The term resulting trust seems to be limited to three fairly well defined*
14 *categories...secondly, where there is a voluntary conveyance or transfer*
15 *into the name of another or into the names of the grantor and another*
16 *where likewise there is prima facie a resulting trust for the grantor;...”*

17 45. It may be convenient to note at this point that natural natural love and
18 affection is not valuable consideration for a promise upon which an action
19 may be maintained (see *Tweddle v Atkinson*⁷). It is also relevant to note that
20 where a resulting trust is presumed to exist, that presumption may be
21 displaced if the gift involved was said to be based on natural love and
22 affection between parties related by blood, as in the case of a father and his

⁷ (1861) 1 B & S 393; (1861) 121 ER 762



1 progeny (see *In re Eykyn's Trusts*⁸; Halsbury's Laws of England 5th Ed Vol
2 22 paragraph 318 note (6)).

3 46. Those principles were summarised in a practical example by the learned
4 authors of Commonwealth Caribbean Law of Trusts – 3rd Ed. They state at
5 page 84:

6 *“The presumption of a resulting trust [as arises where B voluntarily*
7 *conveys his own property to T] is rebuttable by evidence of the real*
8 *intention of B, for example by evidence that he intended to make a gift to*
9 *T. Moreover, where B is the father or husband of T, there is a*
10 *presumption of advancement (or gift) in favour of T. This presumption is*
11 *also rebuttable by evidence that a gift was not intended.”*

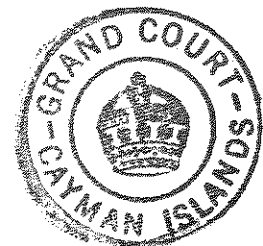
12 47. Constructive trusts are categorised in Underhill and Hayton, at paragraph
13 3.6, as being imposed by a court of equity regardless of the intention of the
14 transferor of the property. They state:

15 *“A constructive trust of property is a trust imposed by equity in respect*
16 *of property...where equity considers it unconscionable for the owner of*
17 *particular property to hold it purely for his own benefit.”*

18 48. Philip Pettit also gives an example of a constructive trust at page 55 of his
19 work:

20

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⁸ (1877) 6 Ch D 115

1 *“A constructive trust is one imposed by a court of equity regardless of*
2 *the intention of the owner of the property. The most important cases of*
3 *what we may perhaps call pure constructive trust are...where a trustee*
4 *makes some profit out of his trust which he will be compelled to hold as*
5 *part of the trust property....”*

6 49. In a resulting trust, therefore, the intention of the transferor is significant,
7 whereas, in the case of a constructive trust, that intention may not be
8 important. In neither category of trust will the fact that things did not turn
9 out the way that the transferor anticipated, be a basis for inferring a trust. It
10 is the circumstances existing at the time of the execution of the document
11 which must be examined.

12
13 50. This was explained by Lord Walker in *Pitt*, when he examined the decision
14 in *Re Griffiths (dec'd)*⁹. Mr Griffiths had executed certain documents on the
15 expectation that he would live at least another seven years after signing
16 them. The benefit of the transactions would only have been realised if he
17 had lived for that period. He died, from cancer, just over a year after
18 signing. Lord Walker explained that were it not for the trial judge’s finding
19 that, at the time that Mr Griffiths signed, he did not have cancer and in fact
20 had a life expectancy of in excess of seven years, the concept of mistake
21 could not have availed Mr Griffith’s estate, and the transaction could not
22 have been set aside.

23

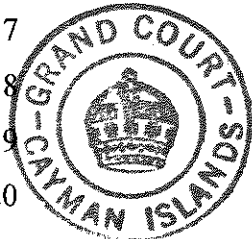
⁹ [2008] 2 All ER 654



1 51. In Halsbury's Laws of England Vol 98 (2013) 5th Edition, the learned editors
2 address, at paragraph 117, the issue of a common intention to share
3 ownership of land. They opine that if there has been at any time, prior to the
4 acquisition of the property, an agreement whereby the parties decide that the
5 property is to be shared between them beneficially, then that "agreement will
6 normally be conclusive".

7
8 52. That opinion is supported by the judgment of Lord Bridge of Harwich in the
9 case of *Lloyds Bank plc v Rosset*¹⁰. His lordship stated that the court will
10 look at, and give effect to the agreement which is directed at the acquisition
11 of the property if it is shown that a party acted upon that agreement to his
12 detriment. He said, at page 132:

13
14 *"The first and fundamental question which must always be resolved is*
15 *whether, independently of any inference to be drawn from the conduct of*
16 *the parties in the course of sharing the house as their home and*
17 *managing their joint affairs, **there has at any time prior to acquisition,***
18 ***or exceptionally at some later date, been any agreement, arrangement***
19 ***or understanding reached between them that the property is to be***
20 ***shared beneficially. The finding of an agreement or arrangement to***
21 ***share in this sense can only, I think, be based on evidence of express***
22 ***discussions between the partners, however imperfectly remembered and***
23 ***however imprecise their terms may have been. Once a finding to this***
24 ***effect is made it will only be necessary for the partner asserting a claim***
25 ***to a beneficial interest against the partner entitled to the legal estate to***
26 ***show that he or she has acted to his or her detriment or significantly***
27 ***altered his or her position in reliance on the agreement in order to give***



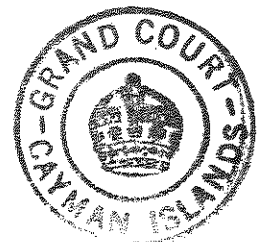
¹⁰ [1991] 1 AC 107

1 *property in this manner was common to both the plaintiff and the*
2 *defendants at the time.*

3
4 *7. On 13 July 2009 the Plaintiff sign [sic] papers **transferring the***
5 ***property to the Defendants for natural love and affection.** The transfer*
6 *papers indicated the property was to be held by the Defendants as joint*
7 *proprietors. This was inconsistent with the intention of the plaintiff and*
8 *inconsistent to [sic] the agreement as made by the parties.*

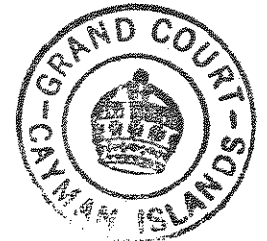
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10 *8. At no stage was the Plaintiff's intention to gift the property to the*
11 *Defendants in whole. **At all times he intended to retain an interest as a***
12 ***tenant in common.** The Plaintiff failed to obtain legal advice prior to*
13 *signing the transfer papers **and mistakenly believed the papers***
14 ***corresponded with his intention** with the property being held as tenants*
15 *in common, not as joint proprietors by the defendants to the exclusion of*
16 *the plaintiff.” (Emphasis supplied)*

17
18 56. It is to be inferred from Mr Kennedy's submissions that Mr Smith is not
19 seeking to rely on the principle of *non est factum*. Nor, although paragraph 8
20 of his statement of claim mentions the concept of mistake, did Mr Kennedy
21 make any submissions in that regard. Learned counsel simply stated that Mr
22 Smith was seeking the assistance of the court in bringing the agreement,
23 made between the parties, into effect. The court divines from that statement
24 that Mr Smith is relying on the concept of a trust, of whatever category the
25 court deems fit, being found to exist.



1 57. It is perhaps best that Mr Smith is refraining to pursue the principle of
2 mistake. Although his statement of claim is deemed admitted, he has, very
3 curiously, omitted to give any details concerning his allegedly mistaken
4 belief. He does not state, for example:

- 5 a. who it was that prepared the transfer document;
- 6 b. how it is that the document came to be in his possession;
- 7 c. whether he read it or had it read over to him;
- 8 d. whether anyone sought to explain it to him;
- 9 e. how he came to sign it in the presence of a notary public Mr Brian P
10 Connolly (who asserted in the jurat to the instrument of transfer that
11 Mr Smith had acknowledged his signature “and that [he] had freely
12 and voluntarily executed the instrument and understood its
13 contents”);
- 14 f. whether his sons had anything to do with the process of securing the
15 document or its execution.



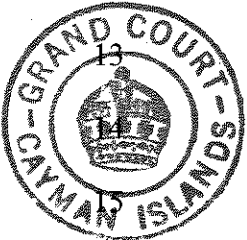
16 58. All the court has is Mr Smith’s bald assertion that although he intended to
17 retain an interest in the property, the document that he signed did not reflect
18 that intention. That assertion is uncontested, as no defence has been filed,
19 but is it sufficient to satisfy the burden placed on Mr Smith of convincing the
20 court that there was in fact a mistake, as opposed to his “not scrutinising the
21 document before signing it [because] he was too busy or too lazy” or “he
22 signed in reliance on someone he trusted” (*Saunders v Anglia Building*
23 *Society*)

1 59. There is no indication that Mr Smith was under any disability whatsoever
2 when he signed the transfer. He has not indicated that his illness played any
3 factor in the matter. At best, he says that he did not have the benefit of legal
4 advice when he signed. That, however, is not a sufficient reason in a fairly
5 straightforward transaction.

6
7 60. The circumstances are particularly unsatisfactory, but in light of the fact that
8 Mr Smith does not seek to set aside or rectify the transfer document, the
9 court will not grant him any relief on the basis of mistake.

10 61. It is now necessary to turn to the issue of trust. One of the elements of a
11 resulting trust is that the person receiving the property in question did not
12 provide any consideration or value in exchange for the transferor parting
13 with his property. It has been shown from the cases cited above, that a
14 father giving property to his sons is presumed to intend that they will
15 become the beneficial owners. The presumption may be rebutted by
16 evidence and, since there has been nothing to contradict Mr Smith's
17 statement of intention, the issue of a resulting trust, which the presumption
18 of advancement would have displaced, remains live.

19
20 62. It can be ascertained from the statement of claim, however, that there was
21 valuable consideration given by the defendants in this case. Despite Mr
22 Smith saying in paragraph 7, that he signed "transferring the property to the
23 Defendants for natural love and affection" (a statement supported by the
24 instrument of transfer itself), paragraph 6 suggests that there was more. The



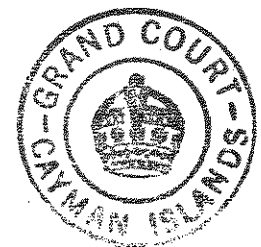
1 defendants were required to take over the burden of the mortgage loan. Mr
2 Smith stated that “the mortgage was transferred to the defendants”. This is
3 the very point that Mr Gregory Smith stressed in his submissions to the
4 court.

5 63. The existence of that burden suggests that they did give consideration and,
6 thereby, militates against a finding for a resulting trust.

7 64. Despite that consideration moving from the defendants to Mr Smith, it is
8 uncontested that the transfer was signed in the context of a common
9 intention between all three. That common intention was that he would
10 continue to hold an interest in the property in equal shares with them.

11 65. That being their agreement, and Mr Smith having acted to his detriment by
12 signing the instrument of transfer and thereby divesting himself of what was
13 previously his alone, it would be unconscionable for his sons to deny his
14 entitlement to a beneficial interest in the property. He, therefore, satisfies
15 the requirements for proving a constructive trust.

16 66. Accordingly, it must be found that the defendants are trustees for Mr Smith
17 in respect of a one-third interest in the property. In other words, he is
18 beneficially entitled to a one-third interest in the property.



1

ORDER

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71. The judgment to which Mr Smith is entitled on his statement of claim is,

3

therefore, as follows:

4

a. The defendants not having filed a defence, there shall be judgment for the plaintiff on the claim.

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b. It is hereby declared that the plaintiff and the defendants are the holders in equal shares of the beneficial interest in the property at Registration Section, Block 22E parcel 108, Grand Cayman (hereinafter called "the property").

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c. The defendants shall, within 56 days of the date of service of this order upon them, or either of them, file and serve an account, as of the date of filing, of all dealings by them with the property and of all income derived from the property that has come into their hands.

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d. The account shall be verified by an affidavit and shall include the information required by the schedule attached to the summons, filed herein on 26 March 2014.

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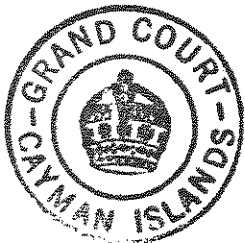
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e. The cause shall be listed for hearing no less than 28 days after the date upon which the account is to be filed by the defendants, at which hearing the accounts shall be taken and an assessment of any sums due to the plaintiff by the defendants shall be carried out.

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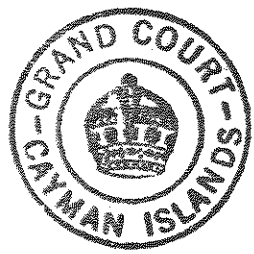
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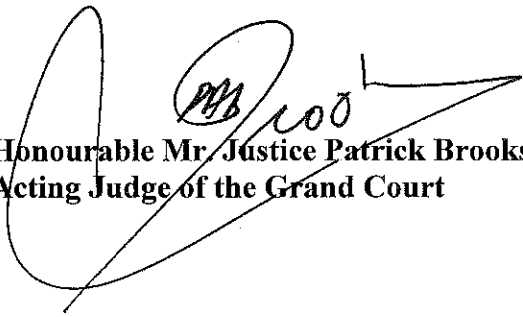
- f. The defendants shall pay to the plaintiff, within 60 days of the date of the result of the assessment, such sums that are found due to him on the assessment.

- g. Liberty to apply.

- h. Costs to the plaintiff to be taxed if not agreed.

Dated this the 15th day of July 2014




**Honourable Mr. Justice Patrick Brooks
Acting Judge of the Grand Court**