

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: D 132 of 2007



BETWEEN SIDEY ALFARO RODRIQUEZ PETITIONER
AND EVORT EARL EBANKS RESPONDENT
AND RHONDA LUE EBANKS INTERVENER

IN CHAMBERS
THE 14TH NOVEMBER, 2013; 21ST FEBRUARY 2014
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

Appearances: Ms Kate McClymont of Broadhurst LLC for the Petitioner
 Ms. Sheridan Brooks of Brooks & Brooks for the Respondent
 Mr. Anthony Akiwumi of Stuarts Walker Hersant for the
 Intervener

Third party Intervener in divorce proceedings – allegations that matrimonial home transferred to her in breach of Petitioner’s interests in it – death of Respondent – whether Intervener proceedings survived death of Respondent.

JUDGMENT

1. The issue to be resolved is one of jurisdiction. It is whether the court might proceed to render judgment upon a dispute over matrimonial property in the context of divorce, in respect of which a third party relative has intervened and in circumstances where the Respondent husband has died.
2. The background to this unusual situation derives from the breakdown of the marriage between the Petitioner and now deceased Respondent and the filing of the divorce petition nearly seven years ago in Cause D132 of 2007 (the “Divorce Action”).

3. While the divorce cross-petition was proven in the Divorce Action on the 29th August 2007; the division of matrimonial assets and other ancillary matters have been unresolved.
4. The central and very vexed issue to be resolved relates to the true beneficial ownership of a residential property, which was for a number of years occupied by the Petitioner, the Respondent and their two children as the matrimonial home.
5. The property became registered in the name of the third party Rhonda Lue Ebanks, a sister of the deceased Respondent, in circumstances which the Petitioner alleges were aimed at defeating her beneficial interests in the property. The following chronology sets the factual background to the Petitioner's claim.
6. Rhonda Lue Ebanks will be referred to by name or as the "Intervener", interchangeably as the context requires.
7. In 1991, the Petitioner and Respondent commenced their relationship. They married on the 22nd November 1992 in the Cayman Islands; the Petitioner who is from Costa Rica, having moved to the Cayman Islands to be with the Respondent.
8. On 1st March 1994, the first child of the marriage, Eric, was born. On 14th December 1995, Jessica, the second child, was born.
9. On 8th May 1997, the property was purchased as undeveloped land in the joint names of the Respondent and his mother Jannitta Ebanks. She predeceased him on 18th February 2006 but by then the property had been transferred into her name alone.
10. At the time of purchase a charge in the amount of a loan of CI\$45,000 had been secured against the title to the property in favour of Barclays Bank. The

Petitioner claims that the purchase price of the property – CI\$60,000 – was covered in part by the proceeds of that loan and in part from savings of CI\$15,000 which herself and the Respondent had accumulated. This, she says, was income from their family business called EvCo Tours, a tour bus operation which also figures in the matrimonial dispute.

11. The loan of \$45,000 from the bank had been taken in the names of the Respondent and his mother Jannitta Ebanks. This, says the Petitioner, had come about on the Respondent's assurance to her that his mother's involvement was needed only because of her stronger financial position with the bank, which would facilitate securing the loan. His mother undertook no actual obligation to repay the loan. The Petitioner says that she had personally undertaken to see to the repayment of the loan from the income of EvCo Tours as well as indirectly from the salary she received from her employment at another bank; that her salary was treated for all purposes as family income.
12. In May 1997, the clearing and filling of the property (which was swamp land) and the construction of the matrimonial home commenced.
13. Sometime between 1997 and 1998, the Petitioner discovered for the first time that the property was registered in the joint names of the Respondent and his mother.
14. On 12th July 1999, the property was subdivided into two parcels, with both parcels remaining in the joint names of the Respondent and his mother.
15. In March 2000, the Respondent and Petitioner with their children moved into the house which was then in an unfinished state. It had been built on one of the

parcels of the sub-divided property. The Petitioner claims to have taken an active role in its construction.

16. On 7th March 2000, the Respondent and his mother transferred legal title to the sub-divided portion of the property upon which the matrimonial home stands – Parcel 431 Rem 3 – to the mother alone. The other portion – Parcel 530 Rem 3 – remained in the joint names of the Respondent and his mother. These transactions, when they took place, were unknown to the Petitioner.
17. On 17th April 2000, Parcel 530 Rem 3 was sold to Brac Realty and Investments Company Limited for CI\$83,000. The Petitioner has been given no account of that money. She points to the fact that soon after, in May 2000 the remaining loan and charge over the property which had been granted to Barclays Bank were paid off and discharged.
18. The Petitioner, Respondent and children continued to live in the matrimonial home except for a period of a year in 2003-2004 when she moved to Costa Rica with the children. She explained that this was to allow them to appreciate that side of their culture and heritage and to become fluent in Spanish – a move that was agreed with the Respondent.
19. On 18th February 2006, the Respondent's mother died intestate and on 8th August 2006, letters of administration were granted to Rhonda Lue Ebanks (the Intervener) and Yduleen Sue Buckeridge. Both are sisters of the Respondent.
20. On 11th April 2007, the matrimonial home – Parcel 431 Rem 3 – was transferred into the name of Rhonda Lue Ebanks by her and her sister – acting as co-

administrators of their mother's estate and has remained registered in the sole name of Rhonda Lue Ebanks since then.

21. On 19th July 2007 the Petitioner filed the Divorce Proceedings and on 10th August 2007 the Respondent filed his answer and cross-petition.
22. In September 2007, the Petitioner was required to vacate the matrimonial home by order of Levers J. and moved into rented accommodations where she was joined by her daughter Jessica. Jessica wished to live with the Petitioner, despite the order of Levers J. that she reside with the Respondent.
23. The Respondent remained throughout in occupation of the matrimonial home until his death on or about 26 August 2013. Eric resided sometimes there with him and sometimes with the Petitioner.
24. On 6th November 2008, the Petitioner filed a summons in the Divorce Action seeking to join Rhonda Lue Ebanks as a second respondent to the proceedings but on 25th–26th March 2009 Rhonda Lue Ebanks resisted that application at a contested hearing.
25. Directions were given on the 26th March 2009 for the hearing of the claim to the property as a separate but preliminary issue.
26. The Order of 26th March 2009 was in the following terms:

*“...Upon the Proposed Second Respondent electing not to be joined to (the) proceedings but having been made aware that in her absence the Court may determine the Petitioner's beneficial interest in the property at Block 25B Parcel 431 Rem 3;
It is hereby ordered that:*

1. *Points of claim limited to the specific issue of the Petitioner's asserted beneficial interest in the property at Block 25B Parcel 431 Rem 3 to be filed and served within 21 days;*
2. *Points of defence limited to the same issue to be filed and served 21 days after the service of the points of claim;*
3. *Witness Statements on the issue to be filed and served within 21 days after the close of pleadings stipulated in paragraphs 1 and 2 above;*
4. *The matter to be set down for a hearing on the preliminary issue to determine the extent, if any, of the Petitioner's asserted beneficial interest in the Property at Block 25B Rem 3."*

27. The trial of the preliminary issue and the final hearing of the Petitioner's summons for ancillary relief, were adjourned on a number of occasions between 15th September 2010 and 28th February 2011 due to the illness of the Respondent who was by then receiving chemotherapy.
28. A fixture on 28th February 2011 was vacated upon Rhonda Lue Ebanks' appearance and application that she be joined as an intervener, despite having resisted joinder on 25th March 2009.
29. Her application by summons to be joined as intervener to the trial of the preliminary issue was granted on 28th February 2011 but the hearing adjourned because of the unavailability of her attorney.
30. The following directions were embodied in the ruling issued by me on the 28th February 2011 on her application to intervene:

“Now that she wishes to be heard, I intend to hear from her. And if she is to be heard, it would not be appropriate that she should be denied representation when she is to be cross-examined, nor the benefit of having the other parties cross-examined by her attorney. I consider that the appropriate disposition this morning, having regard to the unavailability of her attorney for continuation today and tomorrow, is to adjourn the matter for a final hearing date with directions for Ms. Ebanks (the proposed intervener) to be immediately served with the evidence in the case and for her to file any further affidavit evidence upon which she seeks to rely within one month.

The case will then be set for a final hearing at the first available and convenient date thereafter.”

31. The Intervener filed her affidavit within one month as required and the final hearing was then listed for 5th – 6th September 2011.
32. Five days prior to that listing, Mr. Akiwumi as attorney for the Intervener raised an application that as the judge, I recuse myself from dealing with the matter. While consternations were expressed at the timing of such an application, written submissions were required and the matter was adjourned. Following receipt of the written submissions, the recusal application was refused and a decision in writing handed down on 24th January 2012.
33. The final hearing was then relisted for 27th -28th February 2012. It was heard for only one day due to lack of Court time but some evidence was taken.

34. The hearing continued on 16th-17th October 2012 (having been adjourned again at length to allow among other things, for the treatment then being undertaken by the Respondent) and was completed on 3rd April 2013, when the evidence of the Intervener herself was taken.
35. Final written submissions were then called for in respect of the disputed claim to the property; already defined as the preliminary issue on whether the property located at Parcel 431 Rem 3 is a matrimonial asset. Time limits were set.
36. Submissions on behalf of the Petitioner were eventually filed out of time (notwithstanding extensions of time having been granted) on 30th September 2013. No submissions were or have been filed on the preliminary issue on behalf of either the Respondent or the Intervener. The Respondent having died, Ms. Brooks and Mr. Akiwumi now argue that the action has abated entirely upon his death on 26th August 2013 and that the court no longer has jurisdiction to conclude the matter.

The Arguments

37. Ms. Brooks submits that at the time when she was required to file her written submissions in response to those filed on behalf of the Petitioner on the preliminary issue, the Respondent had died. She therefore no longer had a client from whom to take further instructions. Moreover, as there was no will and no one appointed as administrator of her client's the Respondent's estate, she could not obtain instructions to represent the estate insofar as it may continue to have an interest in the property.

38. Further, that on the authority of *Dewitt v Dewitt*¹, the Divorce Action which was personal to the Respondent and the Petitioner, did not survive his demise.
39. It follows, submits Ms. Brooks, that there is now no jurisdiction in the Court to continue in any way with the Divorce Action, including so as to make any order as regards the ownership of the property or any final order as regards the distribution of matrimonial assets.
40. In this she is supported by Mr. Akiwumi on behalf of the Intervener, submitting further that the Petitioner has no further recourse in these proceedings but instead should consider suing her attorney for having failed to file her written submissions on the preliminary issue as directed and before the death of the Respondent.
41. As to that latter submission, apart from noting its obvious convenience, I would only note that wittingly or not, it implicitly accepts that the Court would have been able to render a decision upon the preliminary issue provided only that the submissions had been finally presented before the Respondent died.
42. Nonetheless, as the jurisdiction of the Court is not something that can be bestowed or removed merely by the admissions in arguments of parties to a dispute, the issue must be resolved.

The Law

43. I begin the examination of the law with the case of *Dewitt v Dewitt*² relied upon by Ms. Brooks.

¹2011 (1) CILR 298

²Above.

44. This was a case in which the husband applied for financial provision in divorce proceedings. At the initial hearing, this Court had determined which assets were matrimonial assets; that their distribution should take place on an asset-by-asset basis; that certain assets should be distributed to either the husband or the wife, and ordered further disclosure concerning the value of certain other assets. Before any further hearing could take place and thus before a final order of dissolution was made, the husband died.
45. The husband's executors applied for an order confirming that certain assets formed part of his estate, submitting inter alia, that the initial ruling concerning the division of assets was an effective disposition of the assets concerned for the purposes of section 21 of the Matrimonial Causes Law – the statutory provisions governing the distribution of assets on divorce.
46. The wife sought an order declaring inter alia, that the awarding of the matrimonial assets was unaffected by the proceedings, submitting that (a) as the Court had not pronounced a decree of dissolution, it had not validly made an order effecting the division of matrimonial assets under section 21 of the Matrimonial Causes Law; ... (d) the earlier ruling on division of assets was merely provisional and would not take effect without a decree of dissolution and.... (e) in light of the husband's death, the court no longer had jurisdiction to consider fresh evidence, to distribute matrimonial assets or to pronounce a decree of dissolution.
47. It was held, dismissing the petition as abated, among other things, that (1) the court would order that the proceedings had not affected the ownership of the parties' assets; (2) moreover, after the husband's (the petitioner's) death the court

no longer had jurisdiction to effect the division of assets. Since a divorce petition was a personal action, and there was no statutory provision providing otherwise, it would not survive the death of one of the parties. After the husband's death, therefore, the court could no longer consider fresh evidence, distribute matrimonial assets or pronounce a decree of dissolution.

48. I state immediately that there is no basis for departing from the principle recognized and applied in *Dewitt v Dewitt* insofar as it applies to this case as a proceeding in divorce joined *in personam* as between the Petitioner and the Respondent.

49. I am therefore bound to regard the Divorce Action as abated and no further order can be made in it which would purport to affect the rights of the Petitioner and Respondent *inter se*, including as to their respective rights to matrimonial assets.

50. And I should add that this is irrespective of whether or not a decree of dissolution was inevitable; as indeed it plainly was on the facts of this case where the marriage had irretrievably broken down and the petition already declared proven by the court.

51. An argument to the effect that the inevitability of the petition being proven would preserve jurisdiction was raised in *Dewitt v Dewitt* and dismissed on the facts of that case. There a decree of dissolution could not have been regarded as inevitable for, among other considerations, the fact that the mutual petitions which grounded the cause for divorce had not yet been proven.

52. But here, as in *Dewitt v Dewitt*, the more important and fundamental consideration – that which goes to the jurisdiction of the court – is the fact that the

law regards the petition as an action *in personam*, and so as being abated upon the death of either party to it. Whether or not dissolution of the marriage was inevitable, jurisdiction in divorce ceases upon the death of either party at any time before dissolution. In the trenchant words of Bowen LJ “*a man can no more be divorced after his death than he can after his death be married or sentenced to death.*”³

53. Those words were uttered in the context of a case where a husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived. Upon the application of his legal personal representative to revive the divorce suit for the purpose of applying to make the decree absolute, it was held that he could not do so. The divorce suit having been entirely personal to the husband, no interest in it survived so as to devolve to his legal personal representative. The case fell within the rule: *actio personalis moritur cum persona* – an action *in personam* dies with the person.

54. This is a rule of which Bowen LJ said on behalf of the Court of Appeal as long ago as 1883⁴:

“*Whatever its wisdom or policy, the rule with certain limitations and explanations is as old as the English law*”.

55. He went on to explain⁵:

“*There was, however, a species of personal actions to which the rule in question was not extended. These were such as were*

³*Stanhope v Stanhope* (1886) 11 PD 103 at 108

⁴*Phillips v Homfray* (1883) 24 Ch. D. 439 at 456.

⁵Op. cit, *ibid* – citing *Pinchin's case* 9 Rep. 86b and *Wheatley v Lane* 1 Wms Saund. 216a.

founded upon some obligation, contract, debt, covenant, or other duty to be performed.”

56. Bowen LJ then proceeded in his judgment to examine the many decided cases which settled the principle that where property was wrongfully acquired for the benefit of the deceased an action to recover the property or its value survived as against his executor.
57. Such would be an action for declaration of a constructive trust of the kind claimed by the Petitioner against the Respondent and the Intervener here.
58. *Phillips v Homfray* was reaffirmed by the Court of Appeal in the following year⁶ and is still relied upon for the propositions which it decided⁷.
59. There is, thus, a legitimate further question to be addressed in this case whether the circumstances of a dispute having been joined between the Petitioner and the Intervener upon the latter’s intervention, allows the court to determine that dispute as a separate issue notwithstanding the death of the Respondent.
60. As a first step, it is necessary to define the nature of that dispute. I have regard to the following factors in particular:
- (i) While the dispute arose in the context of the Divorce Action, it involved a third party who intervened to ensure that no declaration of rights in relation to Parcel 431 Rem 3 was made contrary to her registered legal interest in it.
 - (ii) The nature of the dispute upon which she intervened had earlier necessitated directions for the filing of particulars of claim by the

⁶ In *Batthyany v Walford* (1887) 36 Ch. D. 267 at 279

⁷ See Rules of the Supreme Court (“RSC”) 1999 Ed. Notes to O.15 r.7 at p. 234

Petitioner and particulars of defence by the Respondent. These had been filed respectively on 8th April 2009 and 28th April 2009 and ran respectively to five and four pages of pleadings. The dispute as framed by those pleadings involved a claim by the Petitioner for

“A declaration that the property is held by (the Intervener) upon constructive trust for the Petitioner and the Respondent in equal shares alternatively in such shares as the Court shall determine;”

And for his part, at paragraph 28 of his defence; a prayer by the Respondent:

- “(a) That this Honourable Court makes a Declaration that the Petitioner has no interest, whether legal, equitable or otherwise in the same home;*
- (b) Such further and/or other Order/Declaration as this Honourable Court shall deem appropriate.”*

So became defined, the preliminary issue for trial.

(iii) The Intervener filed affidavit evidence setting out her position in support of the Respondent’s defence and in support of her own legal claim to the property.

(iv) In support of her claim in response to the Respondent’s Defence, the Petitioner issued her summons seeking the declaratory relief on 8th May 2009 and filed her affidavit in support of her summons on 14th May 2009.

She testified and was cross-examined at length by Ms. Brooks for the Respondent and by Mr. Akiwumi for the Intervener.

(v) The Defence of the Respondent was supported by his *viva voce* evidence and that given by the Intervener; and the Intervener was cross-examined by Ms. McClymont for the Petitioner, as was the Respondent himself.

61. The circumstances described at paragraphs (i) – (v) above in my view describe a *lis* tried between the parties; in the nature of third party proceedings, which was distinct from the Divorce Action. The question then is whether this *lis* can be regarded as having survived the death of the Respondent and the abatement of the Divorce Action.
62. Unlike in the Divorce Action itself, the objective of the *lis* has not been to obtain orders of the Court in relation to the disposition of matrimonial property. Such an objective would no longer be possible in the matrimonial proceedings which are abated: see *Dewitt v Dewitt* and *Stanhope v Stanhope* (both above).
63. But I might not ignore the fact that here, a person who was not a party to the Divorce Action was allowed to intervene for the specific purpose of resolving the Petitioner's claim to an equitable interest in property (Parcel 431 Rem 3) in respect of which the Intervener holds the legal title. On the basis of the case authorities discussed above⁸, that claimed interest, in the nature of a beneficial entitlement, survives the death of the Respondent and, to the extent a declaration of trust could have bound him, could continue to bind his estate.

⁸ *Phillips v Homfray* and *Batthyany v Walford*

64. A declaration of trust could certainly also bind the Intervener who intervened in seeking to prevent the grant of a declaration of interest in the property: there is no abatement or defect when the cause of action survives or continues in some person who is before the court: per Fry J in *Eldridge v Burgess* (1878) 7 Ch. D 411; *Re Shepherd* (1890) 43 Ch. D. 131 at 136 C.A.
65. So where, for instance, a co-plaintiff who has a separate cause of action or a co-defendant severally liable, dies, the action is not abated as between the surviving parties and may proceed as between them; even if the deceased party and his/her representative are not affected. See the RSC 1999 Ed. P234; 15/7/3, citing *Arnison v Smith* (1889) 40 Ch. D. 567 and *Lloyd v Dimmock* (1878) 7 Ch. D.398.
66. Case law, going as far back as the early days of the Judicature Act 1876, recognises the duty of the Court to avoid a multiplicity of legal proceedings with respect to all matters in dispute between the parties, requiring that all issues are brought together properly and conveniently and dealt with in one action.
67. That case law found expression in the RSC upon which the Grand Court Rules (“GCR”) are patterned. In this regard GCR Order 15.r6 (2)(b)(ii) applies where it provides:

“(2) *Subject to the provisions of the rule, at any stage of the proceedings in any cause or matter the court may in such terms as it thinks just and either of its own motion or on application –*

(a) ...

(b) *Order any of the following persons to be added as a party, namely –*

(i) *Any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

(ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”⁹*

68. Here a “*question or issue*” framed in terms of the preliminary issue was joined between the Petitioner on the one side and the Respondent and Intervener on the

⁹ And, as the notes to the RSC further explain at p.219 (op. cit):

“This rule prevents an action being defeated by the misjoinder or non-joinder of parties, and it provides for any necessary amendment in respect of the parties to an action being made at any stage of proceedings (*Van Gelder v Sowerby Bridge Soc. (1890) 44 Ch.D. 374 at 391 and 394 C.A.*). It does away with the plea in abatement, by which an objection to the non-joinder of parties was raised before the Judicature Acts, and with demurrers for want of parties (*Kendall v Hamilton (1877) 4 App. Cas. 504; ...* This rule should be construed so as to effectuate what was one of the great objects of the Judicature Acts, namely to bring all parties to disputes relating to one subject –matter before the Court at the same time so that the dispute may be determined without the delay, inconvenience and expense of separate action and trials (per Lord Esher M.R.; in *Bryne v Brown (1889) 22 QBD 657 at 666-7....*)”

other. The preliminary issue thus became, also on the basis of the case authority discussed below, a cause of action as between those parties.

69. According to the notes to RSC Order 15/1/2 the words “*cause of action*” comprise every fact (though not every piece of evidence) which it would be necessary for a plaintiff to prove, if traversed, to support his right to the judgment of the Court – (citing *Read v Brown (1888) 22 Q.B.D. 128*, per Lord Esher M.R. at p. 131). Further: “*If the plaintiff alleges the facts which, if not traversed, would prima facie entitle him to recover, then he makes out a cause of action*”, per Esher M.R. in *Coburn v Collidge [1897] 1 Q.B.702 at 707 C.A.*, approved and applied in *Central Electricity Board v Halifax Corp [1963] A.C. 78*; see, per Lord Reid at p. 800). The RSC text there continues to explain that the phrase comprises every fact which is material to be proved to enable the plaintiff to succeed (citing *Cooke v Gill (1873) L.R.8 C.P. 107* per Brett J at p.108.) and the words have been defined as meaning “*simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person*” (per Diplock LJ in *Letang v Cooper [1965] 1 Q.B. 232 at 242*).

70. So regarded, it is clear that the Petitioner’s claim for a declaration of constructive trust (and consequential orders) filed on 8th April 2009, became a cause of action against the Respondent which, on the authority of the case law discussed above, was capable of surviving and did survive the death of the Respondent. As noted above, the Respondent’s defence was filed on 28th April 2009 and thus was joined the cause of action into which the Intervener later intervened.

71. So, notwithstanding that the proceedings were originally commenced as matrimonial proceedings and entirely *in personam* as between the parties to the marriage, a separate cause of action emerged into which the Intervener was allowed to intervene in the exercise of the discretionary inherent jurisdiction of the court. As discussed above, the objective was in broad terms the same as would guide the court in the issuance of third party proceedings: namely (a) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action, and (b) to prevent the same or substantially the same questions or issues being tried twice with possibly different results. See GCR Order 16 r. 1 (1) (c).
72. I note of course that the GCR are expressly generally disapplied to matrimonial proceedings to the extent those are governed by the Matrimonial Causes Rules 1986, as amended (“MCR”). See GCR O.1 r.2(4)(A). But that fact – particularly where the MCR do not purport to be categorical on the subject – may not be regarded as preventing the court, in the proper management of matrimonial proceedings, from resolving third party claims which affect the beneficial interests of the parties to the marriage – in this case by way of intervener proceedings. Nor, in my view, would the Court be prevented from relying on the case law upon which the RSC and GCR are based, for guidance in the exercise of the inherent jurisdiction. Nothing in the MCR addresses the question of third party joinder or intervener proceedings in circumstances like the present¹⁰.

¹⁰MCR Rule 12 recognizes the possibility of “further pleadings after a reply” to a petition and rule 17 recognizes that a co-respondent or other respondent may be heard “on any question of damages”. This seems to follow on Rule 9(b) which states that where a petition alleges that the other party to the marriage

73. Accordingly, as is explained in the RSC 1999 Ed., the Notes at p.274:

*“Generally speaking, where a defendant issues and serves a notice on another person who is already a party to the action or who is not, the respective parties stand in relation one to another as if the defendant has brought a separate action against that other person (citing *McCheane v Gyles* [1902] 1 Ch. 287 at 301; *Johnson v Ribbins* [1977] 1 WLR1458 at 1464 per Goff LJ, CA). The proceedings which thereby arise have or may have, as it were, a life of their own, quite independent to the main action. They create a “lis” between the parties in question which will remain to be disposed of by the Court in the event of all the other issues falling away. For example, where the main action is settled (*Stott v West Yorkshire Road Car Co. Ltd.* [1971] 2 Q.B. 651). [Or as here, I would add, where the “main action” has been abated by the death of the Respondent].*

74. This, ultimately, is the position at which I consider these proceedings to have arrived as between the Petitioner and the Intervener: the “lis” joined between them over the true beneficial entitlement to Parcel 431 Rem 3 acquired a life of its own, has survived the death of the Respondent and remains to be resolved by the Court.

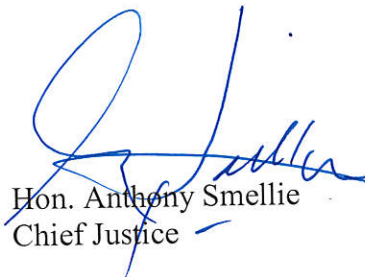
“has been guilty of an improper association other than adultery with a person named, the person shall be made a respondent in the cause”.

Rule 22 provides that the Court shall hear an application by an intervener who, under the Juveniles Law 1995 [now repealed and replaced by the Children Law] would be entitled to make an application for provision for a child of the marriage.

75. Even if the GCR rules as to joinder of parties – by way of third party proceedings or intervener summons – apply only by analogy, given that the “main action” was a matrimonial proceeding – that provides no compelling reason to conclude that the cause of action as between the Petitioner and the Intervener should not be resolved in the manner of the *lis* created between them when the Intervener was ordered to be joined. She intervened in a cause of action which was clearly defined for the resolution of the issue of ownership of the property.
76. I hold that the *lis* survives to be resolved and should be deemed severed from the Divorce Action (to the extent they could have in reality been joined) from the moment the Divorce Action abated upon the death of the Respondent.
77. The Intervener can suffer no prejudice from this decision as all the relevant evidence has been adduced, including the evidence of the Respondent in support of his and her case. That is evidence which could no longer be obtained were the cause of action to be ordered – as the result of the position she now argues – to be tried anew. On the other hand, there would be significant wasted costs involved in requiring the Petitioner and Intervener to again plead and try the cause of action between them.
78. I therefore now order the Intervener to comply with the earlier directions (given as long ago as 3rd April 2013 and well before the death of the Respondent) to submit her closing arguments in writing in response to those of the Petitioner.
79. While any person appointed to represent the estate of the Respondent would be at liberty also to make closing submissions because the cause of action joined in the *lis* has not been abated by his death, my understanding is that no such person has,

as yet, been appointed. Moreover, as he is reported to have died intestate, and as the Divorce Action abated upon his death, it is the Petitioner herself who may stand in the position of representative of his estate, as it seems she remains in law his widow, his surviving wife for the purposes of the Succession Law. This being the likely situation, it was recognized that no just purpose would be served in insisting upon separate submissions on behalf of his estate.

80. The Intervener will have 14 days from the delivery of this ruling to submit her written arguments.


Hon. Anthony Smellie
Chief Justice



21st February 2014