

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

SAINT LUCIA

Case Number: SLUHCV2023/0150

BETWEEN

BRENDA MESMIN

Executor of the Last Will & Testament of

MARIE ROSE MESMIN (deceased)

Claimant

-and-

[1] **BANK OF SAINT LUCIA LIMITED**

[2] **MARILYN MESMIN**

Defendants

Before the Honourable Mr. Justice Alvin S. Pariagsingh

Appearances: Mrs. Lydia B. Faisal and Mr. Nigel R. Faisal for the Claimant.

Mr. Leslie Prospere and Ms. Joelle Greene for the First Defendant.

2025: February 24, 25 – Trial
April 28 – Closing Submissions
May 12 – Submissions in Reply
June 18, 20 – Submissions in response to Court's questions
June 27 – Decision

JUDGMENT

**Contract, Negligence, Fiduciary Duty, Banker/Client Relationship, Resulting Trust,
Articles 849, 851, 1034, 1035 and 1036 of the Civil Code of Saint Lucia**

INTRODUCTION:

[1] **PARIAGSINGH, J** : - Having heard two (2) days of evidence from five (5) witnesses and considered three hundred and thirty-one (331) paragraphs of submissions across seventy-four (74) pages, I must now resolve what appears, at first blush, to be a simple issue: Did Ms. Marie Rose Mesmin, the deceased, convert the joint account she held

with her daughter Marilyn, the Second Defendant, back into her sole account, as it was prior to 2009?

DISPOSITION:

- [2] For the reasons that follow, I find that the joint account mandate signed by the deceased and the Second Defendant on 13th March 2009, did not on its true construction set out the beneficial ownership of the funds in the joint account; **Whitlock v Moree**¹ is distinguished on the facts of this case. The 2009 mandate simply addresses the payment of the funds to the survivor upon the death of the other joint account holder but does not address the beneficial ownership of the funds.
- [3] I adopt the reasoning of the majority in **Whitlock**, and the reasoning in **Aroso v Coutts & Co**². On the evidence in this case, I find that the funds in the joint account were entirely beneficially owned by the deceased. The evidence overwhelmingly supports this finding, in particular: the Second Defendant never asserted ownership of the funds during the deceased's lifetime and treated the money in the joint account as belonging to the deceased; in her email dated 15th April, 2019, the Second Defendant acknowledges that she was added to the account merely for convenience and had no records of any credits to the account.
- [4] When the deceased executed the Customer Information Update Form on 20th July 2012, it was her stated intention and her instruction to the First Defendant that she wanted to convert the existing joint account into her sole account. From the evidence, the Court holds that the proper procedure to effect the deceased's intention was not followed, and that it was the First Defendant's obligation, at the very least, to inform the deceased that her intention and instruction could not be carried out without the Second Defendant's consent. I find that the Bank failed to do so.

¹[2017] UKPC 44

² [2002] 1 All ER (Comm) 241

- [5] I also find that the First Defendant, having selected and completed the Customer Information Update Form on 20th July 2012 for the deceased, was affixed with notice of an inconsistency between the acceptance and declarations signed by her in 2009 when the joint account mandate was signed and in 2012 when the Customer Information Update Form was signed. In selecting the forms, completing them, and directing the deceased where to sign with an "X," the Bank imposed upon itself a fiduciary duty, one which it breached. In those circumstances, the First Defendant ought to have acted prudently and should not have permitted the account to be emptied by the Second Defendant.
- [6] I find that the First Defendant through its employees were negligent in selecting, filling out and allowing the deceased to sign a Customer Information Update Form which was inconsistent with her joint account mandate and seeking to, by itself resolve the inconsistent acceptance and declarations forms in favour of the 2009 mandate and totally ignoring the inconsistent position expressed in the 2012 document. This breach of duty by the First Defendant caused the Second Defendant to have continued access to the funds in the joint account post 2012 and caused the estate to suffer losses in the sum of \$177,895.13 when the Second Defendant withdraw this sum from the account.
- [7] Further the evidence, which I accept, is that the deceased communicated her clear instructions to the First Defendant that she wanted to remove the Second Defendant's name from the account, believing those instructions, and the form she signed, to be effective. The deceased's intention is further confirmed by her subsequent execution of a will, in which she bequeathed all her property to be shared equally among her children. Despite there being no specific gift of the funds in her will, the general bequeath is consistent with the deceased believing that her instructions were effective by her signing of the 2012 document and her stated intentions as communicated by the deceased to her children, whose evidence I accept.
- [8] I decline to entertain the First Defendant's attempt to raise a preliminary point for the first time in closing submissions. To allow it would be to allow a masterclass in trial by ambush and procedural unfairness, which would offend the overriding objective of

dealing with cases justly, with proper regard for the efficient use of the court's resources. This would also be in breach of the order made by Master Saunders³, which directed that all applications, including evidential objections, were to be filed at least 28 days before the pre-trial review.

[9] In any event, the First Defendant, by its conduct, has waived and/or acquiesced in any alleged breach of Articles 849, 851, and 853 of the Civil Code. This is evidenced by its failure to (1) apply to strike out the claim, (2) object to participating in these proceedings, and (3) appeal the order of Innocent J dated 24th July 2023, by which the Court permitted the Claimant to amend her designation in this claim from "Beneficiary" to "Executor".

[10] I find that the First and Second Defendants are jointly liable to the estate of the deceased for the sum of \$177,895.13 withdrawn by the Second Defendant and permitted or facilitated by the First Defendant between 13th January 2021 and 24th August 2022.

[11] The Claimant is entitled to damages against the First Defendant in the sum of \$177,895.13 being the loss caused to the estate by its breach together with interest and prescribed costs thereon.

[12] The Second Defendant holds the sum of \$177,895.13 on trust for the estate of the deceased. The Claimant is also entitled to judgment in default against the Second Defendant for the sum of \$177,895.13, together with interest and costs pursuant to her request for default judgment filed on 31st July 2023, with her costs summarily assessed in the sum of \$1,000.00 for that application.

[13] The First and Second Defendants are also liable for the Claimant's costs of the interim injunction application, to be assessed if not agreed within 28 days from today.

³ Made on 17th June 2024

THE CLAIM:

[14] By her amended statement of claim filed on 10th May 2023 the Claimant, in her capacity as one of the executors of the estate of Marie Rose Mesmin, the deceased, seeks the following relief:

- 1) A declaration that the owner of the funds in Bank of St. Lucia (BOSL) Account No. 320200820 after the death of the primary account holder, Marie Rose Mesmin, was her estate.
- 2) A declaration that the first defendant wrongfully permitted the second defendant to withdraw the sum of \$177,595.13⁴ from BOSL Account No. 320200820, in light of the instructions contained in the updated CIF of July 20th 2012, that the funds in that account should be paid to the estate of primary account holder upon her death.
- 3) A declaration that the second defendant knew and understood the limits of her involvement with BOSL Account No. 320200820, and that the funds belonged to the estate of the primary account holder upon the primary account holder's death.
- 4) A declaration that the second defendant holds on trust for the claimant, the sum of \$177,595.13 together with interest at the rate of 6% from the date of the death of Marie Rose Mesmin, until payment in full.
- 5) An order that the defendants are jointly and severally liable to pay to the claimant the sum of \$177,595.13 together with interest at the rate of 6%, from the date of the death of the deceased until payment in full.
- 6) General damages for negligence, breach of contract and or fiduciary duty on the part of the first defendant and breach of trust on the part of the second defendant.
- 7) Interest on all sums awarded for such period and at such rate as the Court deems fit.
- 8) Prescribed costs.

[15] The Claimant states that she is one of two executors of the estate of her mother, the deceased, who died on 7th September 2017 in England.

⁴ Accepted by both parties in their written submissions to be \$177,895.13

[16] The deceased died testate, having made and published her last will and testament, which was admitted to probate in England on 3rd December 2018. The grant of probate issued in England was resealed in this jurisdiction on 18th February 2021.

[17] During her lifetime, the deceased was a customer of the First Defendant and held a savings account, number 320200820 (the “account”). The account was first opened at the Soufeiere branch of the First Defendant on 12th August 2004 by the deceased, just over thirteen years before the death of the deceased. The Second Defendant was made a joint account holder with the deceased in 2009.

[18] Both the Claimant and the Second Defendant are children of the deceased. They are sisters and both beneficiaries under the deceased’s last will and testament.

[19] On 13th March 2009, approximately four and a half years after the account was opened, the deceased added the Second Defendant to the account. The Customer Information Form – Maintenance (CIF) signed that same day provides, at page 2:

“... All monies deposited into this account from time to time and the interest thereon must be paid upon: either signature and **in the case of either death, on the signature of the survivor.**”

[20] The CIF also states that the account holders agreed:

“... Any cheque or orders for payment of money payable to me/either of the undersigned, may be deposited to the individual/joint account conducted with you in my/our name.”

[21] The Claimant contends that the effect of adding the Second Defendant to the account was to convert it into an “and/or” account, giving both the deceased and the Second Defendant equal rights to deposit into and withdraw from the account. Upon the death of one, the surviving account holder would be entitled to the funds.

[22] On 20th July 2012, just over three years after the Second Defendant was added to the account, the deceased attended the Soufriere branch of the First Defendant and

completed a Customer Information Update Form. Her intention was (1) to revoke the joint nature of the account and (2) to designate her estate as the sole beneficiary of the funds upon her death.

[23] Under the “Acceptance and Declaration Agreement” section of the form dated 20th July 2012, the following appears:

“I/We hereby agree, declare and confirm with the Bank of Saint Lucia (the bank) that as of the dates stated below and at all times while this account is maintained, all monies deposited in this account from time to time and the interest thereon are to be paid upon my signature, **and in the case of my death to my estate.**”

[24] The Claimant’s case is that the funds originally deposited into the account belonged solely to the deceased and came from the Halifax Building Society in England. The Claimant contends that all deposits into the account were derived from proceeds of a property sale in England and from the deceased’s pension. She maintains that the Second Defendant made no deposits into the account.

[25] Relying on the deceased’s unequivocal intention expressed in the Customer Information Update Form of 20th July 2012, the Claimant contends that the deceased’s subsequent last will and testament dated 22nd March 2013, in which she treated the funds as part of her general estate and bequeath of it to all of her children equally evidences that the deceased treated the funds as belonging to her as of the date of the making of her will.

[26] The Claimant contends that the First Defendant was under a contractual and fiduciary duty, as well as duties implied into the banking relationship, to:

- 1) Exercise reasonable skill and care in carrying out the deceased’s instructions;
- 2) Manage and protect the deceased’s property with due regard to her expressed instructions;
- 3) Exercise due diligence and reasonable care in understanding the deceased’s needs and instructions as reflected in the Customer Information Update Form

of 20th July 2012, including the duty to provide advice, explanation, resources, forms, assistance, and a process to give effect to those instructions; and

- 4) Account to the deceased for the funds in the account, ensuring that all withdrawals were consistent with her authorisation.

[27] The Claimant contends that the First Defendant breached these duties. The breaches are summarised as follows:

- 1) Failing to provide the appropriate advice, guidance, and method to assist the deceased in effectively achieving her expressed objectives;
- 2) Failing to provide the Claimant, as executor, with a statement of the account upon request in July 2021, and maintaining a pattern of non-disclosure, only asserting in December 2021 and again by letter dated 19th April 2023 that the funds in the account belonged to the Second Defendant;
- 3) Refusing a meeting in 2018 with the Claimant, her brother Michael, and her sister Lucy concerning the account;
- 4) Permitting or facilitating a withdrawal of \$24,384.91 (or £6,500.00) on 17th September 2017 for the deceased's burial expenses;
- 5) Intentionally misleading the Claimant and acting in a manner inconsistent with the contractual and fiduciary obligations owed to the deceased and her personal representative.

[28] As regards the Second Defendant, the Claimant's case is that she was added as a joint account holder in 2009 for convenience only, to assist the deceased with withdrawals when she could not attend the bank herself.

[29] The Claimant relies on an email dated 15th April 2019 from the Second Defendant to the Claimant's solicitor in England, copied to the co-executor Vince Mesmin, and contends

that the Second Defendant is estopped from departing from the admissions contained in that email.

[30] The Claimant asserts that although the Second Defendant knew and accepted the limited nature of her interest in the funds, the First Defendant nonetheless permitted her to withdraw \$177,595.13 from the account between 14th January 2021 and 8th August 2021, leaving a balance of \$779.27 as of 27th April 2023.

[31] The Claimant contends that the Second Defendant's conduct amounted to a breach of trust and a breach of her fiduciary duty to the deceased.

[32] The Claimant further alleges that the First Defendant acted in bad faith. This is said to be evidenced by its failure to provide timely information about the account and its engagement with the Claimant's legal representative concerning ownership of the funds, without disclosing that the majority of the funds had already been withdrawn by the Second Defendant. The Claimant states that she was misled into applying for an interim injunction to prevent the funds from being withdrawn, only to learn, through disclosure orders, that most of the money was already gone.

[33] The Claimant seeks recovery of the withdrawn sums, contending that without them, the administration of the deceased's estate remains incomplete.

THE DEFENCE OF THE FIRST DEFENDANT:

[34] The First Defendant admits that the deceased initially opened the account in her sole name and later converted it into a joint account on 13th March 2009, with the deceased as the "primary holder of the joint account". It contends that the account was governed by the terms of the Bank's joint account mandate.

[35] With respect to the Customer Information Update Form completed on 20th July 2012, the First Defendant states that, at the time, it had initiated a broad update of its customer bio-data records. This update was intended to ensure the Bank held current information for its customers, including changes to names, marital status, postal and residential

addresses, occupation or employer, telephone contact details, and national identification records.

[36] The First Defendant claims that the deceased was invited to its Soufriere branch on 20th July 2012 solely for the purpose of updating her personal bio-data using the Bank's standard Customer Information Update Form. It contends that this purpose was specifically explained to the deceased, who understood and agreed to it.

[37] The First Defendant further states that the form used on 20th July 2012 contained standard declarations applicable to individual account mandates and was not suitable for amending a joint account mandate. It argues that, at the material time, the deceased could not have used that form to effect any amendment to the terms of the joint account mandate.

[38] The Bank's position is that if the deceased wished to change the joint account structure, including removing an account holder, the proper procedure would have been to close the existing joint account and open a new one. The Bank asserts that all customers seeking to close a joint account or remove an account holder were required to do so by mutual consent.

[39] The First Defendant denies that any contractual terms were implied into its agreement with the deceased. It maintains that the joint account mandate contained all relevant terms and, even if any were implied, the Bank complied with them. It asserts that it acted in accordance with the deceased's instructions and discharged its obligations with reasonable skill, diligence, and care.

[40] Additionally, the First Defendant contends that it was not competent to provide the deceased with any legal or financial advice concerning her alleged intentions, as expressed in the completed Customer Information Update Form.

[41] The Bank denies any allegation that it withheld information from or misled the Claimant. Instead, it states that it advised the Claimant to direct her inquiries to the Second

Defendant, on the basis that the Second Defendant, as the surviving joint account holder, became the legal owner of the account funds upon the deceased's death.

THE REPLY:

[42] The Claimant joins issue with the First Defendant on its Defence. She asserts that she has no knowledge of any widespread update of customer personal bio-data records at the relevant time. She further contends that the handwritten form completed by the deceased is distinct and separate from the joint account mandate.

[43] The Claimant avers that the First Defendant was aware that the funds in the account belonged exclusively to the deceased, who was the primary account holder. She contends that the deceased was given the relevant form after informing the Bank Clerk of her intention and needs.

[44] The Claimant states that the deceased was barely literate and did not obtain the form herself from across the Bank's counter; rather, the form was selected for her, based on her expressed instructions, and completed with assistance from Bank staff.

[45] The Claimant further argues that, having two separate mandates signed by the deceased, the original joint account mandate and the 2012 Customer Information Update Form, the Bank could not lawfully choose to rely on one while disregarding the other.

ISSUES FOR DETERMINATION:

[46] The issues arising for determination fall into two broad categories: (i) issues of fact; and (ii) issues of law. There is also a preliminary point raised by the First Defendant which I will dispose of first before resolving the issues of fact and law in the substantive claim.

[47] The issue for determination on the preliminary point raised by the First Defendant is: Whether the Claimant has the requisite locus standi to bring this claim, being a joint executor who is neither acting jointly with the co-executor nor expressly authorised by

the co-executor to pursue the claim, amounts to a breach of Article 849 of the Civil Code, and consequently renders the claim liable to be struck out.

[48] The issues of fact on the substantive claim which arise for resolution are:

- 1) Whether the funds held in BOSL Account No. 320200820 belonged solely to the deceased, Marie Rose Mesmin, or whether the Second Defendant made any contributions to the account.
- 2) Whether, by completing the Customer Information Update Form on 20th July 2012, the deceased intended to revoke the joint nature of the account and designate the funds therein to her estate upon her death.
- 3) Whether the First Defendant, through its agents, was made aware of the deceased's expressed intention to alter the disposition of the account, and whether it assisted in preparing the Customer Information Update Form accordingly.
- 4) Whether the deceased was capable of understanding the nature and effect of the documents she signed on 20th July 2012, and whether she was duly informed of the correct procedure for amending the joint account mandate.
- 5) Whether the Second Defendant was aware, and accepted, that she was added to the account in 2009 solely for the purpose of assisting the deceased with access to the account, and not as a beneficial co-owner.
- 6) Whether, following the death of the deceased, the Second Defendant withdrew the sum of \$177,895.13 from the account with knowledge that the funds belonged to the estate and not to her personally.
- 7) Whether the First Defendant misled, or withheld information from the Claimant or her legal representatives regarding the status of the account after the

deceased's death, and whether it failed to disclose that the funds had been substantially withdrawn by the Second Defendant.

- 8) Whether the branch manager of the First Defendant refused to meet with the Claimant and her siblings in or about 2018 regarding the said account, and whether such refusal hindered the Claimant's ability to administer the estate.

[49] The issues of law on the substantive claim which arise for resolution are:

- 1) Whether the completion and signing of the Customer Information Update Form dated 20th July 2012 was legally effective to revoke the 2009 joint account mandate.
- 2) Whether, upon the death of the deceased, the funds in the joint account passed to the Second Defendant by right of survivorship, or whether they formed part of the deceased's estate to be distributed in accordance with her will.
- 3) Whether the First Defendant owed fiduciary duties to the deceased and/or to the Claimant as personal representative of the estate, beyond those arising under the express terms of the joint account mandate.
- 4) Whether any contractual terms were implied into the banking relationship between the deceased and the First Defendant, including obligations to give effect to her instructions, to provide appropriate advice or assistance, and to ensure compliance with her expressed intentions.
- 5) Whether the Second Defendant holds the sum of \$177,895.13, or any part thereof, on trust for the estate of the deceased, and is thereby accountable to the Claimant as executor.
- 6) Whether the First Defendant is liable in negligence and/or breach of contract or fiduciary duty for permitting the Second Defendant to withdraw the funds, contrary to the deceased's instructions.

- 7) Whether the Claimant is entitled to judgment against the Defendants, jointly and severally, for the sum of \$177,895.13 together with interest, and whether she is also entitled to general damages for negligence, breach of contract, or breach of trust.

THE EVIDENCE:

Evidence of the Claimant, Ms. Brenda Mesmin:

[50] Brenda Mesmin, the Claimant, is the daughter of the deceased, and one of the executors of her estate. She confirmed that her mother passed away on 7th September 2017 in England, where her will was admitted to probate. That probate was later resealed in Saint Lucia. The deceased had seven children, including Brenda and the Second Defendant, Marilyn.

[51] Her account of events closely mirrors the case she has pleaded. She said the account was opened in 2004 in her mother's sole name while she was in Saint Lucia. In 2009, her sister Marilyn signed as an applicant on the second page of the Customer Information Form. At the time, Brenda didn't fully grasp what that meant legally, but she later understood that it turned the account into a joint one.

[52] According to her, things changed in July 2012. Her mother went back to the bank and filled out new documents, a Customer Information Update Form and an Acceptance and Declaration Agreement, because she wanted to remove Marilyn from the account and make sure the funds would go to her estate when she passed away. Those forms, Brenda said, bear her mother's signature and the bank's stamp. She also referred to her mother's passport copy, which she says supports the authenticity of the documents.

[53] She explained that in March 2013, her mother made a will in England, stating that her estate should be shared equally among all her children and their descendants. To her mind, that will was consistent with the earlier steps taken at the bank. She insisted that all her siblings, including Marilyn, knew the money in the account came from their

mother's pension and the proceeds of her house in England. Marilyn, she said, had openly admitted she had not contributed anything to the account.

[54] After her mother's passing, Brenda visited the Soufriere branch of the Bank in August 2018 with her siblings, Michael and Lucy. They brought the will and death certificate and asked for information about the account but were turned away. She said they were not allowed to meet the branch manager, even though they waited for quite some time. A letter from her solicitor followed in July 2021, but the bank took months to reply. When it finally did, by December 2021, it told her the money belonged to Marilyn, without mentioning that most of it had already been withdrawn.

[55] It was not until after she obtained a court order that she discovered Marilyn had withdrawn nearly the entire balance between January 2021 and August 2022. That led her to press for more information, which she eventually received through the bank's solicitor. The documents included transaction records, signature cards, and other account materials.

[56] She believes the bank knew about her mother's death by at least 22nd September 2017, when Marilyn withdrew over \$24,000.00 for funeral expenses via a wire transfer to England. Even then, the bank said nothing to the estate. Brenda feels that this lack of disclosure forced her into costly and avoidable legal proceedings.

[57] She also referred to an email from Marilyn in April 2019, sent to the estate's solicitor in England, in which Marilyn said she had been added to the account for convenience. Despite that, she later withdrew almost all the money.

[58] During cross-examination, Brenda said her mother had moved to the UK in the 1950s or 60s and was a housewife. She described her as illiterate, unable to read or write, but able to sign her name in cursive, which she did regularly. Brenda said her mother was clear in expressing herself and could give instructions, but she wouldn't have understood the legal effect of documents like bank mandates.

[59] She accepted that back in 2009, her mother and Marilyn had a good relationship, and they did not object to her being added to the account for convenience. Brenda admitted she was not in Saint Lucia in July 2012 and did not go with her mother to the bank. She also did not ask her sister Lucy, who lived locally, to go either. At the time, she did not know about the visit, so she did not advise her mother to seek legal advice.

[60] She confirmed that she never told Marilyn about their mother's plan to remove her from the account and that there was no written consent from Marilyn to that effect. She agreed that there was no evidence showing the bank knew her mother was illiterate and said she had not thought it necessary to raise that in a public banking environment.

[61] She also accepted that she received Marilyn's April 2019 email refusing to return the funds and knew at that point there was a dispute. However, she did not send that email to the bank. She also agreed that her solicitor's letter of July 2021 did not explicitly say there was a dispute between the estate and Marilyn, although she believed the bank should have appreciated the situation.

[62] She remained firm that her mother had made it known that she wanted Marilyn removed from the account, and that the bank, having accepted and stamped the forms, should have acted accordingly. She denied that the funds belonged to Marilyn and maintained that the bank had no right to transfer them without notifying the estate.

[63] Brenda concluded her evidence by urging the Court to grant the relief she seeks, in line with her mother's wishes and estate planning.

Evidence of Mr. Michael Mesmin:

[64] Michael Mesmin is the son of the deceased, and the brother of both the Claimant and the Second Defendant. In his witness statement, Michael expressed his support for the claim brought by his sister Brenda and recounted what he described as their mother's clear intention concerning the funds held in her Bank of Saint Lucia account. He resides and works in the United Kingdom.

[65] Michael recalled that during a visit to Saint Lucia in 2012, their mother had made a deliberate decision to remove Marilyn's name from the joint account. He said this intention was known to the family and was shared among all the siblings. According to him, the account had initially been placed in both the deceased's and Marilyn's names purely for convenience, to allow Marilyn to assist with transactions on her mother's behalf. However, he maintained that their mother never intended that Marilyn should inherit the funds in the account after her death.

[66] He stated that after returning to the United Kingdom in 2012, the deceased informed her children that she had gone to the bank to remove Marilyn from the account, and that she believed the account was once again in her sole name. Michael said that this understanding was reflected in the will she executed following that trip, in which she directed that her entire estate be shared equally among all her children and grandchildren. He claimed that their mother believed the funds in the account formed part of her estate.

[67] Michael said he was shocked and dismayed to learn that the Bank had later transferred the entire balance to Marilyn, despite what he believed to be clear documentation showing that their mother had taken steps to revoke the joint account. He maintained that Marilyn never contributed to the account and had never withdrawn funds for her own benefit during their mother's lifetime, respecting the limited purpose of the joint arrangement.

[68] His evidence was also that Marilyn knew that the deceased went to the bank in 2012 to remove her name from her account. In cross examination he maintained that Marilyn told him that she knew that the deceased went to the bank to remove her name from the account. He also accepted in cross examination that he did not ask Marilyn to attend the bank in 2012 to allow the deceased to remove her name from the account nor did he make an inquiry of the bank.

[69] He recalled travelling to Saint Lucia in August 2018 with Brenda and visiting the Bank with their sister Lucy. Although they produced their mother's will and death certificate, they were given no information about the account. He said they were told the manager

was unavailable and described their treatment as dismissive. He supported this account by referring to his passport, which he said evidences his travel to Saint Lucia during that period. After their return to England, Lucy attempted to follow up with the Soufeiere branch manager but was again unsuccessful.

[70] Michael concluded that his mother genuinely believed she had done all that was necessary to ensure her wishes were respected and to avoid any dispute among her children. He stated that had she known the Bank would not act on her instructions, she would have taken further steps to ensure her account was dealt with in accordance with her intentions.

[71] In cross-examination, Michael maintained that his mother was unable to read or write properly. He acknowledged, however, that he had not included in his witness statement any direct quotations or specific details of what his mother said in 2012, as he had not been present when she visited the bank. His evidence was that he knew she intended to remove Marilyn's name from the account.

[72] He reiterated that upon her return to England in 2012, his mother made a will that reflected her intention for her entire estate to be shared equally among her children. He admitted that he did not advise her to obtain legal advice, even though she was 78 years old at the time. Nor did he ask Lucy to accompany their mother to the bank. He further accepted that he did not ask Marilyn to go to the bank with their mother, and that he did not see the documents she signed in 2012.

Evidence of Ms. Lucy Mesmin:

[73] Lucy Mesmin is the daughter of the deceased and the sister of both the Claimant, and the Second Defendant. She is also the sister of Michael Mesmin. Lucy resides in Soufeiere, Saint Lucia, and gave her statement in support of Brenda's claim.

[74] She recalled that in 2012, her mother travelled from England to Saint Lucia and stayed at the same house where she lives. During that visit, the deceased told her that she intended to remove Marilyn's name from her bank account. The reason she gave was that she did not want to leave behind any trouble among her children after her passing.

According to Lucy, her mother also said that whatever she left should be shared equally among her children.

[75] Lucy stated that when the deceased returned from the Bank, she told her that she had sorted things out and that the account was now in her sole name. The deceased said that the Bank had given her the necessary forms, which she had signed to make the change.

[76] Lucy also recalled accompanying Brenda and Michael to the Bank in August 2018, during their visit to Saint Lucia. Brenda showed a bank representative a copy of their mother's will and death certificate and asked for information about the account. Lucy said that they were told no information could be provided and were not permitted to speak with the branch manager. She described the Bank's treatment as dismissive and said they all felt poorly treated.

[77] After Brenda and Michael returned to England, Lucy said she tried to follow up on the matter by visiting the Soufeiere branch on her own. Despite repeated attempts, she was never able to speak with the manager. On one occasion, she said she waited for more than two hours before leaving, having not been seen.

[78] Her evidence supports the claim that their mother had taken steps to remove Marilyn from the joint account, and that the family understood the account to be solely in Marie's name at the time of her death.

[79] In cross-examination, Lucy said her mother had been a supervisor in a hospital or at least she thought so. She also admitted that she thought her mother was literate although, she was not raised by her mother. She explained that her mother typically spent six months in Saint Lucia and six months in England. When in Saint Lucia, her mother would stay with her at her home.

[80] Lucy said it was normal for her mother to go to the bank herself to withdraw cash. She maintained that in 2012, her mother told her she wanted to remove Marilyn from the account to avoid any family conflict after her death. Lucy did not accompany her mother

to the bank because she did not think it was necessary. She added that Marilyn had been the one to go with their mother in 2009, at the time when the account was made joint, as Marilyn was living in Saint Lucia then.

[81] She said that when her mother returned from the bank in 2012, she told her that Marilyn's name had been removed from the account. However, Lucy accepted that her mother did not show her any forms or documents to that effect.

Evidence of Petra Saul:

[82] Petra Saul is currently employed as Acting Assistant Manager – Customer Relations at the Soufriere Branch of the Bank of Saint Lucia. She has worked with the Bank for 25 years and has held her current position for six months. In 2004, she was a Customer Service Representative at the same branch, under the supervision of then Branch Manager, Mr. Cornelius Sidonie. Her responsibilities at that time included opening customer accounts and addressing customer queries.

[83] She confirmed that she knew the deceased, as a customer of the Bank. She recalled attending to the deceased on 13th March 2009 when she came to the branch with her daughter, Marilyn. On that occasion, the deceased requested that her sole savings account, number 320200820, be converted into a joint account. Ms. Saul stated that she prepared the Customer Information Form- Maintenance ("CIF") and confirmed that the deceased was recorded as the primary account holder. The form was signed by the deceased and supported by a copy of her passport. It was co-signed by Ms. Saul and another Bank officer, A. Mitchell, on 16th March 2009.

[84] In her witness statement, Ms. Saul stated that the deceased appeared to her to be literate and of sound mind. Under cross-examination, she accepted that this view was based on her brief conversation with the deceased and on the fact that the deceased was able to sign her name. She acknowledged that the deceased had not written anything other than her signature and accepted that this was not mentioned in her written statement.

[85] Ms. Saul confirmed that the joint account mandate signed in 2009 instructed the Bank to act on either signature, and, in the event of death, on the signature of the survivor. She explained that this was the basis on which the Bank permitted Marilyn to access and withdraw funds from the account after the deceased's death.

[86] Regarding the events of 2012, Ms. Saul explained that the Bank had initiated a general exercise to update customer bio-data, including information such as names, marital status, addresses, employment, contact details, and identification documents. She said that the forms completed for the deceased on 20th July 2012, the Customer Information Update Form and the Acceptance and Declaration Agreement, were part of this administrative update.

[87] She acknowledged that those forms were not completed in the handwriting of the deceased, except for the signature. She did not personally attend to the deceased on that occasion and was therefore unable to say whether the contents of the forms were read to her or whether any explanation was provided. She confirmed that it was Bank practice for officers to assist customers in completing forms and to point to the place where a signature was required.

[88] She agreed that while the 2012 form was used for routine updates, it was also a form of agreement. She accepted that it had been stamped and signed by both the Bank and the deceased and was valid on its face. However, she explained that where a customer intended to remove a joint account holder and revert the account to sole ownership, Bank policy required that the joint account be closed, and a new sole account opened under a different number. That procedure was not followed in this case.

[89] Ms. Saul confirmed that Marilyn did not sign any form in 2012 to remove herself from the account, and there is no record indicating that the deceased was informed that Marilyn's consent was necessary. She had no personal knowledge of the interaction between the deceased and the Bank officer who dealt with her in July 2012. She also confirmed that her witness statement did not describe how she assessed the deceased's literacy or whether anything was explained to her at the time.

[90] She stated that the Bank first received formal notice of the deceased's death on 23rd August 2022, at which time the death certificate was uploaded to the Bank's electronic system and a note was placed on the account. However, she acknowledged that withdrawals had been made by Marilyn before that date, including one on 22nd September 2017 for funeral expenses. She confirmed that withdrawals were made by Marilyn on 22nd September 2017, 13th January 2021, 15th June 2021, and 11th August 2021. She said the Bank acted on the 2009 joint mandate in authorising those transactions.

[91] Ms. Saul admitted that the Bank did not respond to the letter from the Claimant dated 12th July 2021 until several months later. When asked whether the delay was acceptable, she responded, "no".

[92] She agreed that the 2012 Acceptance and Declaration Agreement was not flagged or made visible within the Bank's system in a way that would alert a reviewing officer to its contents. While the document was scanned to the customer's profile, no special note or flag was added to indicate that the deceased had given instructions to revert the account to sole ownership.

[93] She acknowledged that Crystal Alexander, the Bank's Digital Branch Manager, was still employed with the Bank and that she had not brought to court the computer note referred to in her witness statement concerning the deceased's death. She further confirmed that no details of that note were provided in her statement.

[94] When asked whether there were two competing mandates on the account, the 2009 joint mandate and the 2012 declaration, Ms. Saul answered in the affirmative. She explained that the Bank assumed the 2009 mandate remained operative. She did not state that the 2012 instructions had been revoked, nor did she produce any record showing that the deceased's instructions were rejected or formally set aside by the Bank.

[95] When asked how the Bank responded to the existence of two conflicting mandates, Ms. Saul confirmed that no legal advice was sought and that the Bank did not apply to the court for direction. Instead, it continued to act on the 2009 joint mandate.

[96] She further admitted that there is no record showing that the deceased was ever told her request could not be honoured without Marilyn's consent. Nor is there any note or document indicating that the Bank ever informed Marie Rose that her 2012 instructions would not be carried out.

Evidence of Arleta Rate-Mitchell:

[97] Arleta Rate-Mitchell is currently employed as the Senior Manager for Retail Banking at the First Defendant and is based at the Financial Centre in Castries. She has been with the Bank for 33 years and has served in various roles over that period. In 2004, she was the Branch Accountant at the Soufriere Branch, where her responsibilities included supervising operational staff such as tellers and customer service officers, and overseeing branch cash and general operations.

[98] Ms. Rate-Mitchell stated that she did not personally know the deceased and had no direct interaction with her. Under cross-examination, she confirmed that her knowledge of the deceased was derived from a review of the Bank's records and from what others had told her. She also acknowledged that, prior to reading the Claimant's witness statement, she was unaware of any efforts by the Claimant or her siblings to engage with her concerning the account, and she did not recall being approached directly.

[99] She explained that in 2004, customers opening savings accounts were only required to sign a simple signature card. In 2008, the Bank updated its procedures and introduced new account documentation that could be scanned into its electronic systems. She said that on 13th March 2009, the deceased and her daughter, Marilyn, the Second Defendant, came to the Bank and converted Account No. 320200820 from a sole account into a joint account. Ms. Rate-Mitchell stated that she authorised the change. The joint account mandate, which was exhibited to her witness statement, included a survivorship clause providing for payment "upon either signature, and in the case of death, on the signature of the survivors."

[100] She further explained that in 2012, the Bank undertook a general update of its customer records to ensure accuracy of information relating to name, marital status,

address, employment, contact information, and identification documents. Customers were invited to complete Customer Information Update Forms as part of that process. One such form was completed by the deceased on 20th July 2012. Ms. Rate-Mitchell noted that Marilyn was not present to complete the form at that time.

[101] In cross-examination, Ms. Rate-Mitchell confirmed that she did not personally interact with the deceased during the 2012 visit. She was asked whether the Bank's standard "prototype individual mandate" was ever shown or read to the deceased, and she said she could not confirm that, as she had no personal knowledge of what occurred during the interaction. She stated that it was Bank practice to explain documents to customers prior to execution, but she could not say whether this was done in the deceased's case.

[102] She confirmed that she had verified a transaction on 16th March 2009, three days after the joint account was created. When asked whether the 2012 Customer Information Update Form showed any updates to the deceased's name, marital status, or other personal details, she replied in the negative.

[103] At paragraph 17 of her witness statement, she had indicated that Marilyn was unavailable to complete the 2012 form. When asked how she knew this, she admitted that her conclusion was based solely on what appeared on the form, not on anything she was personally told.

[104] She was also asked about a version of the Bank's General Terms and Conditions for Bank Accounts dated 2018. Ms. Rate-Mitchell acknowledged that the 2018 version was not shown or read to the deceased, but she stated that an earlier version would have applied at the relevant time. She maintained that any differences between the two versions were immaterial to the issues in this case.

[105] When asked in cross-examination whether she understood that the present proceedings arose from the Bank's treatment of the Claimant, she said yes. She also agreed that the Bank could have handled matters better to achieve the outcome the Claimant was seeking.

[106] Ms. Rate-Mitchell concluded her statement by stating that she had reviewed the Bank's electronic records relating to the joint account and identified five posthumous transactions:

- 1) 22nd September 2017 – \$24,384.91 via wire transfer to the United Kingdom;
- 2) 13th January 2021 – \$3,912.38 via Manager's Cheque to the Accountant General;
- 3) 15th June 2021 – \$154,552.60 via wire transfer to Marilyn Mesmin;
- 4) 11th August 2021 – \$19,130.15 via wire transfer to Marilyn Mesmin;
- 5) 24th August 2022 – \$300.00 cash withdrawal by Marilyn Mesmin.

[107] She confirmed that the Bank received a letter from the estate's attorney dated 12th July 2021 requesting information about the account. She stated that the Bank subsequently provided a copy of the joint account mandate and other relevant documents. Based on her review of the Bank's policies and the 2009 joint account mandate, she expressed the view that the Bank acted appropriately in permitting the withdrawals.

Assessment of Witnesses:

[108] Overall, I found the Claimant and her witnesses to be credible, and I accept their evidence on a balance of probabilities. I also found the First Defendant's witnesses, to be credible.

[109] The Court did not draw any adverse inference from any of the witnesses or find them to be untruthful. The Court found the First Defendant's witnesses to be very forthright and honest, making all reasonable concessions where necessary.

[110] The Court did however discount the First Defendant's evidence on some issues as the witnesses were unable to speak to material issues relevant to the key factual findings set out below.

ANALYSIS:

Summary of the parties' written submissions:

[111] The Claimant submits that the First Defendant wrongfully permitted her sister, the Second Defendant, to withdraw the sum of \$177,895.13 from their mother's joint account after her death. She says the Bank's actions were in breach of contract, fiduciary duty, and its implied duty to act with reasonable care and skill.

[112] Her primary case is that the deceased had clearly and unequivocally revoked the joint nature of the account when she signed a Customer Information Update Form (CIF) on 20th July 2012. That form stated: **"All monies deposited in this account from time to time, and the interest thereon are to be paid upon my signature, and in the case of my death to my estate"**. It was signed by the deceased, witnessed by a bank employee, stamped by the Bank, and entered into the Bank's internal system.

[113] The Claimant submits that this document must be taken at face value. She says it reflects her mother's intention to cancel the right of survivorship that existed under the earlier 2009 joint account mandate, and that it replaced it with a clear direction for the account proceeds to form part of her estate. This, she argues, was further confirmed by the deceased's last will dated 22nd March 2013, which bequeathed all her estate to be equally shared by her children.

[114] She submits that the Bank failed in its duty to assist her mother in implementing this change. Given the deceased's advanced age and limited literacy, she could write her name but not read or draft documents independently, the Claimant contends that the Bank ought to have either provided the appropriate form or at least informed her mother if the form she signed would not be effective. The evidence, she says, shows that her mother believed she had done all that was necessary.

[115] In addition to this, the Claimant argues that Marilyn contributed nothing to the account, which was funded solely from the deceased's pension and the proceeds of a property sale in England. In the absence of any contribution or intention to gift, the Claimant says the legal presumption of a resulting trust should apply, meaning the funds belonged to the deceased and not to the joint account holder.

[116] She acknowledges in her submissions that **Whitlock** held that a signed joint mandate should be treated as conclusive in the absence of a dispute about construction. However, she invites the Court to distinguish that case on the facts, or alternatively to be guided by Lord Wilson's dissenting opinion, which favours a contextual, intention-based approach. In her case, she says the 2012 form plainly modified the 2009 arrangement, and the Bank is estopped from asserting otherwise.

[117] On the issue of the Bank's conduct after her mother's death, the Claimant points to the fact that the death certificate was provided to the Bank on 19th September 2017, but the Bank allowed Marilyn to make five withdrawals totalling over \$177,000 between January 2021 and August 2022. She says the Bank took no steps to verify her authority and failed to freeze or suspend the account. Even after being approached by the estate's attorneys in 2021, the Bank refused to provide any information until compelled by court order. She characterises this as a breach of fiduciary and statutory duty, and as evidence of bad faith.

[118] In her reply submissions, the Claimant also responded to the Bank's late argument that she had no standing to act alone as co-executor. The Bank relied on Article 849 of the Civil Code, which provides that co-executors must act jointly unless the will states otherwise. The Claimant submits this objection is procedurally barred. She points out that:

- 1) The Bank never pleaded this issue in its Defence, in breach of CPR 10.7, which prohibits reliance on unpleaded facts without permission or agreement;

- 2) The Court itself amended her designation from “beneficiary” to “executor” by order dated 25th April 2023, and the Bank made no application to set aside or vary that designation;
- 3) The Bank complied with disclosure orders and correspondence initiated by her as executor without raising any issue as to her capacity;
- 4) The matter proceeded to trial with both parties treating her as properly authorised.

[119] She relies on a number of cases in support of her procedural argument, including: **Stein v Chodiev**⁵– where the court refused to allow a new issue to be raised in closing due to prejudice to the opposing party; **Lombard North Central PLC v Automobile World (UK) Ltd**⁶– reinforcing the principle that parties are bound by their pleadings; **UK Learning Academy Ltd v Secretary of State for Education**⁷– confirming that deviation from pleadings which causes prejudice is not permitted; **Law Society of Kenya v Mutyambai**⁸ –highlighting that courts must determine issues strictly within the boundaries of the parties’ pleaded cases; and **Lindsay v O’Loughnane**⁹ – where the court criticised “cavalier” pleading practices that confuse the scope of the trial.

[120] The Claimant submits that the Bank’s failure to raise the issue earlier deprived her of an opportunity to address it through evidence or amendment. She invites the Court to find that she is properly before the Court and that the point cannot be entertained at this late stage.

[121] The First Defendant submits that it acted in accordance with the terms of its customer mandate and is not liable in contract, negligence, or fiduciary duty for the withdrawals made by Marilyn following the death of the deceased.

⁵ [2014] All ER (D) 185 (Apr)

⁶ [2010] EWCA Civ 20

⁷ [2020] EWCA Civ 370

⁸ (2020) 48 BHRC 631

⁹ [2025] EWHC 973 (KB)

[122] In her further submissions, the Claimant contends that she is invoking both the legal framework in **Whitlock** and **Aroso**. She submits that where the mandate is not clear, or is silent or ambiguous, the Court ought to allow the presumption of resulting trust to apply.

[123] The Bank's core position is that the account in question, Account No. 320200820, was governed at all material times by a joint account mandate executed in March 2009. That mandate expressly permitted withdrawals by either party during their lifetimes and contained a survivorship clause providing that "in the case of either death, on the signature of the survivor" the funds were to be paid. The First Defendant argues that this was a binding contractual term between the Bank and its customers, and that it was duty-bound to follow that mandate unless and until it was properly revoked.

[124] The Bank acknowledges that the deceased signed a Customer Information Update Form (CIF) on 20th July 2012, but it disputes the legal effect of that form. It says the 2012 CIF was part of an internal compliance exercise initiated by the Bank to update customer records such as name, marital status, address, occupation, and identification. According to BOSL, that form did not replace or override the operative joint mandate executed in 2009.

[125] The First Defendant contends that the 2012 form was not a recognised method for revoking or amending a joint account arrangement. It says that if a customer wanted to remove a joint holder, the accepted practice was to close the joint account entirely and open a new account in a sole name. It maintains that the deceased did not take this step. The Bank says that its staff would not have had authority to effect such a change through a CIF and that the deceased was never told otherwise.

[126] To support its position, the Bank places significant reliance on the majority decision in **Whitlock**, where the Privy Council held that in disputes over the beneficial ownership of joint bank accounts, courts should look first and foremost to the terms of the signed mandate, rather than embarking on a subjective inquiry into the account holders' intentions. The First Defendant relies on the statement of Lord Briggs, who wrote at paragraph 33 of the judgment that it would be "extraordinary and unsatisfactory" for

courts to resolve such disputes based on retrospective factual investigations, particularly when one party has died and cannot testify. The First Defendant says this case provides clear authority that the 2009 joint mandate must govern the account in question.

[127] The Bank also argues that there was no evidence that it was ever put on notice that the deceased intended to revoke the joint account. It says it was never advised by the deceased that she wanted to exclude Marilyn from the account and that it had no reason to suspect the 2012 CIF was intended as such. Even if the deceased held that belief, the Bank maintains that it cannot be held responsible where it simply followed the express terms of a still-valid mandate.

[128] As to the withdrawals made by Marilyn, the Bank says these were all in accordance with the 2009 joint mandate. It notes that after the deceased's death in September 2017, Marilyn contacted the Bank in her personal capacity, provided the death certificate, and submitted written instructions for transfers. The Bank facilitated those transactions in keeping with its records. It contends that it had no legal or factual basis to prevent those withdrawals at the time.

[129] On the claim of fiduciary duty, the Bank denies that such a relationship existed beyond the ordinary duty owed under a banker–customer contract. It says that a fiduciary obligation does not arise merely because the customer is elderly or unassisted. The Bank also says it had no obligation to provide legal advice to the deceased about estate planning or the effect of her instructions, particularly where there was no evidence of any inquiry made by her to that effect.

[130] As to the implied contractual terms alleged by the Claimant, namely, that the Bank was obliged to give effect to the deceased's intentions or provide guidance, the Bank rejects these. It argues that the relationship was governed solely by the express terms of the mandate, and that the Court should be cautious about implying additional duties into standard banking relationships. The Bank submits that it exercised reasonable care and skill in acting on the customer's written instructions and cannot be faulted for failing to interpret a document (the 2012 CIF) that was not intended for altering joint account arrangements.

[131] The Bank also strongly disputes the allegation of bad faith. It says that it was unaware of any family dispute or estate-related claim to the account until it received a letter from the estate's UK solicitor in 2021. It maintains that until that point, it had acted in good faith, according to the surviving mandate, and had no obligation to second-guess the instructions of the joint account holder who survived.

[132] Finally, the Bank raises a procedural objection. In its closing submissions, it argued that the Claimant, as one of two executors named in the deceased's will, had no legal authority to act alone. It relies on **Article 849 of the Civil Code of Saint Lucia**¹⁰, which states that joint testamentary executors must act together unless the will provides otherwise. The Bank points out that neither the will nor the grant of probate authorises Brenda to act independently, and that her co-executor, Vincent Mesmin, has not participated in the claim. It argues that her standing is defective and that the claim ought to be on that basis.

[133] The Bank does not accept the argument that its failure to raise this issue earlier amounts to waiver. It submits that questions of standing and legal capacity go to the jurisdiction of the Court and can be raised at any time. In any event, it says the absence of Vincent Mesmin means the claim is procedurally flawed and incomplete.

[134] In its further written submissions, the First Defendant urged the Court to follow the majority decision in **Whitlock** emphasizing that **Aroso** was a first instance decision. It contends that the majority in **Whitlock** were acutely alive to **Aroso** which was determined more than a decade ago.

[135] Additionally, the First Defendant reemphasized the point that the Claimant did not plead any exceptions to the general principles in **Whitlock** nor did she plead sufficiently the literacy of the deceased.

¹⁰ Chapter 4:01 of the Revised Laws of Saint Lucia

Resolution of the preliminary point raised by the First Defendant in its closing submissions:

[136] The First Defendant, has taken the position, raised for the first time in its closing submissions, that the Claimant lacked the legal authority to bring this claim on her own.

[137] The Bank relies on **Article 849 of the Civil Code**, which provides that executors appointed under a will must act jointly unless the will expressly authorises them to act separately. It states:

“849. If probate have been granted to several joint testamentary executors, who have the same duties to perform, **they have all equal powers and must act together, unless the testator has otherwise ordained.**

Nevertheless if any of them be absent those who are in the place may perform alone acts of a conservatory nature and others requiring dispatch.

The executors may also act generally as attorneys for each other, unless the intention of the testator appears to the contrary, and subject to the responsibility of the one who grants the power. The executors cannot delegate their duties generally to others than their co-executors, but they may be represented by attorney for determinate acts.

Executors exercising these joint powers, are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him or her.

They are responsible only each for his or her share for the property of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorised to act separately.”

[138] Since the will of the deceased names both Brenda and Vincent Mesmin as co-executors, and since there is no clause in the will allowing either to act independently, the First Defendant argues that the Claimant’s action was improperly constituted from the start.

[139] The First Defendant suggests that this is not a mere technical oversight, but a fatal defect, going to the root of her legal standing. It says the issue was not waived by its

failure to raise it earlier because, in its view, standing is a matter of jurisdiction that can be raised at any stage. No cases are cited by the Bank to support this proposition.

[140] In response, the Claimant submits that the First Defendant's reliance on **Article 849** is not only belated, but procedurally unfair. The issue was not raised in the First Defendant's defence or at any other point during the life of the claim. The Claimant points out that when the action was first filed in 2021, she was described in the claim form as a beneficiary. It was only following a hearing in April 2023, that the Court, on its own initiative amended her designation to "executor". The Bank raised no objection at that time. It did not appeal that order, nor did it apply to stay the proceedings on the ground that both executors had not been joined. It took no point about Article 849 during disclosure, pre-trial review, or at trial.

[141] The Claimant argues that this conduct amounted to waiver, or at the very least, acquiescence, and that the First Defendant should not now be allowed to reverse its position and rely on an objection it deliberately chose not to make earlier. She relies on **CPR 10.7**, which requires that any matter the Defendant intends to rely on as a defence must be expressly pleaded in the defence statement. She also invokes the general principle that issues not raised in pleadings cannot be introduced for the first time at the eleventh hour.

[142] In support of this, the Claimant refers the Court to several authorities, recited above, in the summary of submissions. The Claimant contends that even if **Article 849** required both executors to act together, that objection ought to have been made at the outset. She submits that the First Defendant has had multiple opportunities to take the point but failed to do so, choosing instead to engage in full litigation, including pre-trial disclosure, witness preparation, and trial, without any hint of procedural challenge. She argues that it would now be highly prejudicial and contrary to the overriding objective to allow the first defendant to succeed on a ground it never raised until all the evidence had closed.

[143] She also points out that had the Bank raised the objection earlier, any perceived defect could have been easily cured, either by adding Vincent as a co-claimant or

securing his written consent. She says that the Court should not allow a technical objection to defeat a claim that has already been fully ventilated on its merits.

[144] I agree entirely with the Claimant. Permitting the First Defendant's belated attempt to raise what ought to have been the subject at an application to strike out would be to permit the First Defendant to conduct a masterclass in trial by ambush and procedural unfairness, which would offend the overriding objective of dealing with cases justly, with proper regard for the efficient use of the court's resources. This would also be in breach of the order made by Master Saunders on 17th June 2024, which directed that all applications, including evidential objections, were to be filed at least 28 days before the pre-trial review. In any event, the First Defendant, by its conduct, has waived and/or acquiesced in any alleged breach of Articles 849, 851, and 853 of the Civil Code. This is evidenced by its failure to (1) apply to strike out the claim, (2) object to participating in these proceedings, and (3) appeal the order of Innocent J dated 24th July 2023, by which the Court permitted the Claimant to amend her designation in this claim from "Beneficiary" to "Executor".

[145] In the event I am wrong in not permitting this late attempt to raise a preliminary matter, I would have in any event dismissed the objection. This is not a case where the Claimant was acting in defiance of **Article 849** or trying to mislead the Court about her capacity. Her original claim was brought as a beneficiary. It was the Court, acting to regularise the pleadings, who amended her status to that of executor. That change took place on the record and with the First Defendant's knowledge. The First Defendant chose not to challenge it and actively participated in the litigation thereafter.

[146] The argument that standing defects can be raised "at any time" has limited force where the objection relates not to the Court's jurisdiction, but to the procedural authority of a party to act alone in a representative capacity. The issue was not that the Claimant lacked locus standi altogether, but that she may have required her co-executor's concurrence. That is a procedural point, curable by amendment, if needed, not a jurisdictional one that voids the proceedings entirely.

[147] Given the authorities cited by the Claimant and the First Defendant's silence for over two years, the Court finds that the First Defendant is barred by its conduct from raising this objection at this late stage. The Court also concludes that, even if there was a technical irregularity, it caused no injustice, was entirely curable, was waived by the First Defendant and should not be allowed to derail the substantive resolution of the claim. The overriding objective under **CPR 1.1** favours case management decisions that avoid unnecessary costs and delay. Striking out or adjourning the claim now would serve neither.

[148] In my view, the **Article 849** point, though grounded in statutory language, must fail due to; the Bank's prolonged silence on the issue, the lack of prejudice caused by the Claimant's sole representation, and the Court's wide discretion to allow procedural regularisation where needed.

[149] In the circumstances, even if I permitted the belated procedural objection, which I do not, I would have in any event dismissed the objection and allow the judgment to proceed on the merits.

Resolution of Issues of Fact:

Whether the funds held in BOSL Account No. 320200820 belonged solely to the deceased, Marie Rose Mesmin, or whether the second defendant made any contributions thereto.

[150] The evidence supports a clear finding that the funds in the account beneficially belonged solely to the deceased. The Claimant's evidence, which was uncontroverted, was that the monies in the account came from her mother's pension and from proceeds of the sale of her property in England. The evidence of Michael Mesmin confirmed this when he added that the Second Defendant never contributed to the account and never withdrew funds for her own benefit while their mother was alive. Crucially, the Claimant refers to an email sent by Marilyn in April 2019, in which Marilyn accepted she was added to the account merely for convenience. In this email Marilyn states as follows:

“... I will release funds pertaining to my mum’s estate but in accordance with splitting of funds with regards to my mum’s Will I will not be splitting any funds with my siblings, those funds are mine now (I am the sole ownership of that account) to do what I want with it.”

[151] Later in the same email, Marilyn states:

“The circumstances I **was added to the bank account in St. Lucia was mum wanted a member of her family to be able to have access to withdraw funds if she was unable to attend the bank**, so mum said to me she wants me to add my name on that account so I became the second in command on that account in March 2009”.

[152] There is no documentary evidence or testimony from Marilyn herself to suggest she made any deposits or had any beneficial entitlement. Neither Arleta Rate-Mitchell nor Petra Saul, who both gave evidence for the Bank, indicated that Marilyn had made contributions. Arleta confirmed that the deceased was recorded as the “primary account holder”.

[153] Accordingly, the Court finds, on the balance of probabilities, that the funds were derived exclusively from the deceased’s assets and were beneficially owned by her.

Whether, by completing the Customer Information Update Form on 20th July 2012, the deceased intended to revoke the joint nature of the account and designate the funds therein to her estate upon her death.

[154] I am persuaded by the evidence of the Claimant and her witnesses that the deceased intended to revoke the joint nature of the account in July 2012 and to designate the funds to her estate. The signed Customer Information Update Form dated 20 July 2012 contains a declaration in clear terms that **“in the case of my death [the funds are] to be paid to my estate.”** This language is not ambiguous and is not consistent with a routine bio-data update as the Bank sought to suggest, and which I do not accept.

[155] All three of the deceased’s children who gave evidence; Brenda, Michael, and Lucy, confirmed that the deceased had told them, that she intended to remove Marilyn’s name

from the account and that the funds would go to her estate. Michael stated that the deceased believed the account was in her sole name after completing the 2012 forms, and this belief was reflected in her will made in March 2013. Lucy similarly recalled her mother saying that she wanted to avoid conflict among the children after her death and had taken steps at the Bank to remove Marilyn.

[156] Although none of the witnesses were present at the Bank on the day the form was completed, Petra Saul confirmed that the form was not filled out by the deceased herself, save for the signature, and that it was standard practice for Bank officers to assist. This suggests the deceased's wishes were communicated and acted upon by the Bank to some extent.

[157] On the balance of probabilities, I find that the deceased intended to revoke the joint arrangement and believed she had done so in July, 2012.

Whether the First Defendant, through its agents, was made aware of the deceased's intention to alter the disposition of the account and assisted in preparing the Customer Information Update Form accordingly.

[158] Although no Bank officer gave direct evidence of having explained the 2012 form to the deceased, Petra Saul accepted that the form was completed by a Bank officer and was then signed and stamped. She also confirmed that Bank officers routinely assist customers, especially those not using electronic means.

[159] When the deceased left the Bank in July of 2012 there were now two documents executed by her in its possession which gave inconsistent instructions as to what is to happen with the funds in the account on the death of the deceased. The evidence is that no steps were taken to alert staff of the 2012 document's significance. Petra Saul confirmed that no effort was made to clarify the discrepancy. There is no evidence that the deceased was informed that her instructions could not be given effect without further action.

[160] There was no evidence of the terms and conditions being given to the deceased nor was it put into evidence. It was accepted that the terms and conditions put into evidence

was a 2018 version and could not have been what was presented to the deceased, if any was presented at all.

[161] There is no direct evidence on this issue. No one can speak to what conversations the deceased had with staff at the bank in July 2012. The evidence from the three witnesses for the Claimant is that the deceased's intention was to remove Marilyn's name from the joint account. The independent evidence is a form, prepared by Bank staff on the instructions of the deceased which expresses a different mandate from a joint account. Whether this form is generic or was deliberately chosen for the deceased after hearing her instructions, the act of selecting and completing the form rest entirely with the Bank. So too, is the discretion of the Bank's employee not to fill out a form if the instructions given by the customer are not possible to be carried out at the relevant time. The fact that the deceased, by her statements and her will acted in a manner contrary to what is in the joint mandate, on a balance of probabilities I find that the First Defendant through its agents were made aware that that the deceased's intention was to remove the Second Defendant from the joint account in July 2012.

[162] Further, although the Bank advanced that the deceased was invited by the Bank to attend, there is no evidence of that, whether by letter or telephone log. On a balance of probabilities, I find that the deceased attended the Bank on her own, not on an invitation to participate in a Bio-Data Update, with specific instructions and intentions to remove the Second Defendant's name from her account.

[163] On a balance of probabilities, given the deceased's statements to her children that she had removed the Second Defendant's name from the account and the execution of her subsequent will, I find that deceased gave instructions in July 2012 to remove the Second Defendant's name from the joint account.

[164] Taking this evidence together, the Court finds that the Bank was made aware of the deceased's instruction, and its staff assisted her in completing the forms. It took no steps to correct her assumption that her instructions were implemented and that the transaction was completed.

Whether the deceased was capable of understanding the nature and effect of the documents she signed on 20th July 2012, and whether she was duly informed of the correct procedure to amend the joint account mandate.

[165] Brenda and Michael both stated that their mother was not literate in the conventional sense. They said she could not read or write properly but could sign her name in cursive and could express herself clearly. This is supported by the fact that the deceased signed her will in 2013 and dealt with property transactions during her lifetime. Lucy's evidence was different. Her evidence was that her mother was a supervisor in a hospital in England. When asked in cross-examination if her mother could read or write she responded, "I think so but I was not raised by her". Although her evidence of her mother's occupation was inconsistent, I do not find that her evidence on the literacy of her mother to be contradictory to the other witnesses for the Claimant. She simply said what she believed. Lucy confirmed that her mother was confident that she had reverted the account to her sole name. All three children maintain that their mother had a clear and consistent intention and believed she had acted effectively.

[166] On the other hand, Petra Saul and Arleta Rate-Mitchell conceded that there was no evidence that the form was explained to the deceased, and they could not confirm whether she was told that her request could not be carried out without further formal steps.

[167] The First Defendant made heavy weather of the issue of the deceased's literacy not being properly pleaded. I am not persuaded by this argument. The issue of the deceased being barely literate is raised in paragraph 7 of the Amended Reply.

[168] In any event, the Bank is under a duty to ensure that the form its staff selects and fills out for a customer aligns with that the customer instructions are. Further, the bank staff servicing the customer is under an obligation to ensure that a customer knows and understands what they are signing, in this case, I find that the Bank breached this duty. It did not ensure that the correct form was selected for the deceased, that is one that updates a joint mandate and advise the deceased that she could not revoke the joint mandate with the form they prepared for the deceased to sign.

[169] This is not a duty to advise on financial or estate planning or to give legal advice but to satisfy itself that the customer it is serving understands what the Bank's process and procedure is to achieve what the customer's instructions are. In this case, the Bank in my respectful view fell short of this.

[170] From the evidence, I accept that the deceased could have understood and gave instructions. This does not necessarily translate into being able to read or write. It means the customer must know what they must do and what is the bank's process for something to be achieved. In this case, there is no evidence that the deceased was told that she would not be able to remove the Second Defendant's name from her account unless both of them signed a document and closed the account.

[171] These conversations and advice may be better captured by the Bank by having a certificate of advice document that is signed by a Bank official of a certain rank or above and having the fact of the conversation and advice having been given to an elderly customer, witnessed by either a relative or third party. Such a process will protect both the Bank and customers and should be considered.

[172] Given the deceased's demonstrated ability to make decisions, express her intentions, and execute documents, the Court finds that she understood the basic effect of what she was doing, even if she was not advised of the full procedural requirements, which I also find.

Whether the second defendant was aware, and accepted, that she was added to the account in 2009 for the sole purpose of facilitating access to the deceased and not as a beneficial co-owner.

[173] The only evidence that directly touches on Marilyn's intentions comes from the Claimant's reference to the email dated 15th April 2019, sent by Marilyn to the estate's solicitor. The relevant portions of that email, set out above, include Marilyn's acknowledgment that she was added to the account for convenience.

[174] This admission aligns with the testimony given by family members and is not contradicted by any other evidence. It is further supported by the fact that, during the deceased's lifetime, Marilyn did not withdraw funds for her personal use and there is no record of her asserting any ownership or having made any contributions to the account.

[175] On the balance of probabilities, I find that Marilyn understood and accepted that her role was that of a signatory for convenience, and not as a beneficial owner of the funds in the account.

Whether, following the death of the deceased, the second defendant withdrew the sum of \$177,895.13 from the account, with knowledge that the funds belonged to the estate and not to her personally.

[176] The Bank's own records, as reviewed and summarised by Ms. Arleta Rate-Mitchell, show that Marilyn withdrew \$177,895.13 from the account between January 2021 and August 2022. By that time, Marilyn had already been made aware of the Claimant's position and had, in 2019, admitted in correspondence that she was added to the account for convenience.

[177] Brenda also gave evidence that, through her solicitor, she wrote to the Bank in July 2021 requesting information about the account. Ms. Petra Saul admitted that the Bank did not respond until several months later and failed to disclose that the majority of the funds had already been withdrawn.

[178] On the totality of this evidence, I find that Marilyn acted with knowledge that the funds did not beneficially belong to her, and that the withdrawals she made were in disregard of the estate's interest.

Whether the first defendant misled or withheld information from the claimant or her legal representatives concerning the status of the account following the death of the deceased, and whether it failed to disclose that the funds had been substantially withdrawn by the second defendant.

[179] Brenda's evidence, corroborated by Michael and Lucy, is that the Bank refused to provide any information when they visited the Soufriere branch in person in 2018.

Despite presenting their mother's will and death certificate, they were denied access to the branch manager and received no meaningful assistance.

[180] Ms. Petra Saul accepted under cross-examination that the Bank did not respond to the Claimant's solicitor's letter until several months later and admitted that the delay was not appropriate. Ms. Arleta Rate-Mitchell also acknowledged that the Bank could have handled the matter better.

[181] The First Defendant, through its solicitor's correspondence, proceeded on the basis that the operative mandate was the 2009 joint account mandate, under which the funds were deemed to pass to the Second Defendant by right of survivorship upon the death of the deceased.

[182] While the First Defendant did not act with the promptness and efficiency that could reasonably have been expected, I do not find that it misled or deliberately withheld information from the Claimant or her legal representatives regarding the status of the account following the deceased's death.

Whether the First Defendant's branch manager refused to meet with the Claimant and her siblings in or about 2018 in relation to the said account, and whether such refusal contributed to the claimant's inability to administer the estate.

[183] Brenda, Michael, and Lucy all gave consistent evidence that they visited the Bank in 2018, presented the deceased's will and death certificate, and were denied any opportunity to meet with the branch manager. Lucy stated that she followed up on multiple occasions and, on at least one visit, waited for hours without being seen.

[184] There is no evidence from the Bank to contradict this account. Ms. Petra Saul confirmed that she was unaware of any such attempts.

[185] On the balance of probabilities, I find that the Bank failed to properly engage with the estate representatives at a critical time. This failure contributed to the delay and frustration experienced in the administration of the deceased's estate.

Resolution of the Legal Issues:

Whether the completion and signing of the Customer Information Update Form dated 20th July 2012 was legally effective to revoke the 2009 joint account mandate.

[186] The Claimant submits that the 2012 CIF, completed and signed by the deceased, was an unequivocal direction that the funds were to be paid to her estate upon death. She argues that the Bank accepted this instruction, retained the form, and never informed the deceased it was ineffective or that a different procedure was required. The Claimant characterises this as a revocation of the survivorship clause in the 2009 joint account mandate.

[187] She relies on the Privy Council decision in **Whitlock**, indicating that the evidence in this case falls within the exception in the majority decision and aligns with the minority decision. This she contends is on the basis that her mother's conduct constituted a subsequent and clear departure from the earlier mandate. The Claimant urges the Court to follow Lord Wilson's dissenting view, favouring a contextual and intention-based approach to resolving ownership over joint accounts.

[188] The Bank, on the other hand, contends that the 2012 CIF was a routine compliance document, not intended to revoke the existing joint mandate. It relies on the majority in **Whitlock**, which held that banking disputes concerning survivorship rights must be determined by the plain language of the mandate, rather than extrinsic evidence of intention. The Court must note at this juncture that the court in **Whitlock** was preoccupied with the question of whether the wording of the clause was dispositive of the beneficial ownership of the funds in the joint account, and not who the funds should be paid to upon the death of the other, that is, survivorship rights. Whilst the two questions may seem to be two sides of the same coin, to consider survivorship rights without first considering the beneficial ownership of the funds, which the Bank has done in this case, would be to put the cart before the horse.

[189] The evidence confirms that the deceased approached the Bank with a specific intention to remove Marilyn as a joint holder. The form she signed was filled out by bank

staff, and her signature was marked with an “x” to indicate where she should sign. There is no evidence that she was told the form would not have the effect she desired, nor is there any indication that the Bank advised her that a different form or process was required.

[190] The Bank’s argument is that the 2012 form was merely a bio-data update and incapable of modifying the account mandate. However, its own witnesses, particularly Ms. Petra Saul, accepted in cross-examination that the document contained a clear instruction as to the payment of funds upon death. The Bank further admitted that the form was accepted without objection and retained in the scanned record of the account. At no point was any effort made to clarify with the deceased or her representatives that the form would not be followed. The Bank further states that the procedure to remove a joint account holder would involve closing the joint account with the mutual consent of the parties and then opening an individual account in the name of the deceased. This was not done.

[191] Based on the evidence, the Court finds that the deceased signed the 2012 CIF believing it would remove Marilyn from the account and direct the funds to her estate. The form was witnessed, stamped, and retained. No Bank official informed the deceased that a different process was needed.

[192] While the Bank’s internal policy required closure and re-opening of the account to effect a change in survivorship status, there is no evidence that this policy was ever communicated to the deceased, nor that she was provided with the appropriate form or guidance. In fact, as stated above, the terms and conditions were not put into evidence, and on a balance of probabilities, the Court is of the opinion that at that point in time in 2009, none may have existed to accompany the 2009 mandate. A later version, 2018, was produced by the Bank but that is of no relevance to this case.

[193] Despite the deceased’s intention and her belief that the account was converted, the Bank’s failure to communicate and carry out the proper procedure, and the actual procedure for the removal of a joint account holder, the Court finds that the 2012 Customer Information Update Form was merely administrative in this instance and did

not operate to revoke the survivorship clause under the 2009 mandate. What it did do however, is to create an inconsistent document with the 2009 mandate with respect to whom funds in the joint account were to be paid out after the death of the deceased.

Whether, upon the death of the deceased, the funds held in the joint account passed to the second defendant by right of survivorship or whether they formed part of the deceased's estate to be distributed under her will.

[194] An important feature of **Whitlock** is the specific facts of that case. In particular, there was evidence before the Court of the terms of the standard banking document creating the joint tenancy between Mr. Lennard and Mr. Moree. The starting point of assessing the First Defendant's heavy reliance on **Whitlock** is ascertaining whether the facts in that case are comparable to the facts in this case. At paragraph 2 of the majority decision delivered by Lord Briggs one of the most fundamental terms on which that case turned, clause 20 is set out in its entirety, it reads:

'JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder).'

[195] By this clause, the Bank ensured that in opening or converting a regular account into a joint account, the parties to the mandate agreed that, subject to their subsequent contrary agreement in writing, all money now or later credited was joint property; and specifically assigned such money to the other party to make their agreement legally effective.

[196] In the instant case, the evidence before me on the converting of the sole account of the deceased into a joint account between her and the Second Defendant, is a two-page document with information under specific headings A to F. For the present purposes, I will summarize the information in A to E: A- account holder personal details containing the information of the deceased only; B- Primary Account Holder Contact Information-

sets out a phone number but does not say to whom it belongs; C- Primary Account Holder Address Details – sets out a mailing address of Soufriere Post Office but does not state whose address it is; D – Joint Account Details – sets out the Second Defendant's name and date of birth as well as a "CIF" number; E- Account Profile sets out the amount of signatures required, 1 and indicates that there were no ATM card numbers; and F – Agreements and Declarations – set out the specific agreements of the parties. For the purpose of making a factual comparison to the case of **Whitlock**, set out above, the material parts will be reproduced:

"F. AGREEMENTS AND DECLARATIONS

To Bank of Saint Lucia

I/We agree to open an account in my/our name. All monies deposited in this account from time to time, and the interest thereon must be paid upon:

- ☐ My signature and in the case of my death, to my estate.
- ☐ Our signature, and in the case of our death, to our estate.
- ☒ Either signature, and in the case of either death, on the signature of the survivors.

I/We hereby agree that any cheque or orders for payments of money payable to me/either of the undersigned may be deposited to the individual/ joint account conducted with you in my/our names.

I/We hereby agree that dormant/inactive accounts with balances below \$20.00 may be closed without further notice, at the discretion of the Bank. Where a reminder notice is issued for dormant/inactive, accounts, the Bank may levy a fee for the issuing of such notice.

Please indicate which of the account signatories should sign instructions for the account

- ☐ Signatory ☒ Any signatory ☐ All signatories
- ☐ combination of signatories (please specify) :
relationship to the primary account holder: daughter."

[197] Notably, there is no comparable clause to clause 20 in the mandate of 2009 in this case. If anything, the mandate in this case recognizes that the deceased was the primary account holder. This is inconsistent with the very nature of the facts in **Whitlock**. In **Whitlock**, the opening documents did not create any primary account holder and only mention Moree's rights as joint account holder, to sign to make withdrawals or upon the deceased's death to sign and be paid the proceeds.

[198] As stated above, the General Terms and Conditions put into evidence was not the one signed by deceased. It was a generic prototype issued in 2018. There simply no evidence before the Court that the deceased signed or agreed to any clause similar to what was the subject of contention in **Whitlock**.

[199] The First Defendant, on the evidence, has not satisfied me that the terms and conditions of the joint mandate are sufficiently similar to the one, clause 20, on which **Whitlock** was decided. I find on the facts of the case at bar, the terms of the mandate are sufficiently different from clause 20 in **Whitlock** to distinguish it. In my opinion, the 2009 mandate failed to address beneficial ownership altogether, and skips to the survivorship rights. That is, the mandate does not address beneficial ownership of the funds in any way.

[200] At the risk of bring repetitive, the headnote for **Whitlock** states: “At the heart of the appeal law two questions: (i) did cl 20 deal with the beneficial ownership of the joint account or merely with the bare legal title to the chose in action against the bank represented by the account; and (ii) was the fact that L and M opened the joint account by means of a signed written application containing cl 20 determinative of its beneficial ownership as at the date of L’s death?” There simply is no comparable clause in the 2009 mandate, to clause 20 in **Whitlock**..

[201] Additionally, the majority in **Whitlock** held that established principles about the ascertainment of beneficial interest in co-owned property led to the conclusion that where two or more holders of a joint account all signed an account opening document (or separately signed identical documents) which, on their true construction, declared or set out their respective beneficial interest in the property constituted by the account (loosely, the money in the account), then those were the beneficial interest of the account holders, pending any subsequent variations of them by agreement or otherwise.

[202] Again, there is no evidence before me that the document signed by the deceased and the Second Defendant which on its true construction, declared or set out their respective beneficial interest in the money in the joint account.

[203] I have already found that the account was solely funded by the deceased, and the Second Defendant made no contributions. The Claimant's evidence, supported by other family members, was that Marilyn was added to the account purely for convenience and not as a co-beneficiary. This was not contested in any meaningful way by the Second Defendant, as she has not defended this claim and the 2012 form reflects the deceased's intention to undo any survivorship arrangement.

[204] In these circumstances, the Claimant's argument that the presumption of resulting trust should apply, absent evidence of intention to gift, is accepted. The deceased's intention not to confer beneficial ownership on Marilyn is even more apparent by the manner in which Marilyn acted during her lifetime in not making any withdrawals from the account. The evidence is that the first withdrawal by Marilyn was to meet the funeral expenses of the deceased and the others were done almost four (4) years later.

[205] There is no clear and unambiguous position stated in the mandate of 2009 or any other evidence before me that the funds were intended to, agreed to or assigned to be beneficially owned. This being the case, the Court must examine the extrinsic evidence. I am of the view that the Second Defendant's conduct and acknowledgment in her email of 2019 all lend to the inescapable conclusion that the Second Defendant held the money on resulting trust for the deceased.

[206] The funds belonging to the estate, the question then arises; was the Bank aware of the intention of the deceased and should it have allowed the Second Defendant to withdraw the sums. I am of the view that the Bank was aware of the intention of the deceased to remove the Second Defendant from the account in 2012. More so, it failed in its duty to her to give effect to her instructions, even if that meant communicating to her that her instructions could not be carried out in the absence of the Second Defendant.

[207] More so, the Bank had at the date of the death two inconsistent instructions. One in the joint mandate of 2009 and one saying the money should pass to the estate of the deceased in 2012. No one else but the Bank was responsible for this inconsistency and

confusion. The Bank could not arrogate unto itself the power to decide and determine which instructions was the lawful or correct one, that is 2009 or 2012.

[208] Relying on the general terms and conditions of a joint account in this case is a fallacy. No such terms and conditions signed by the deceased has been put into evidence. So, to accept the prototype put into evidence by Mrs. Rate – Mitchell is to assume that this document was given to the deceased, she read it, or it was read to her and that she understood and accepted it. There is no such evidence in this case.

[209] In my view the failure by the Bank to advise the deceased of its process and/or inability to give effect to her instructions, deprived her of the opportunity to get the Second Defendant to comply or at least request her to comply with the procedure outlined, to close the joint account and open a new one.

[210] Further, the Bank's conduct has also caused the deceased to act in a manner consistent with believing that she did all that she had to do. Equity regards as done that which ought to be done. This principle must apply to ensure fairness and prevent the Bank from benefiting from its failure to fulfill its obligation.

[211] For all these reasons, I hold that the funds belong to the estate.

Whether the First Defendant owed fiduciary duties to the deceased and/or to the claimant as personal representative of the estate, beyond those arising under the express terms of the bank's standard joint account mandate

[212] I find that the deceased had limited literacy and relied on Bank staff to assist her in completing the relevant forms. The Bank's own witnesses confirmed that the deceased's signature was guided, and the form filled out for her. They also accepted that the form was accepted, stamped, and uploaded without clarification or correction.

[213] The Claimant argues that the First Defendant's conduct fell below the standard expected of a financial institution, especially in light of the deceased's vulnerability and dependence on the Bank's staff. She submits that the First Defendant assumed a

position of trust by preparing documents for the deceased and failing to explain their legal effect.

[214] She relies on the principle that fiduciary duties may arise where a customer reposes trust in the institution, citing **Woods v Martins Bank Ltd**¹¹, where a bank was held liable for providing incorrect advice to a vulnerable client.

[215] The Bank denies owing any fiduciary duty, stating that it merely facilitated the deceased's instructions and was not under a duty to give legal advice is not sufficient.

[216] That said however, based on the Court's findings above, that the deceased signed the form with the assistance of bank staff, who never explained that the form was ineffective, the Court finds that a fiduciary duty arose in these particular circumstances. The First Defendant's failure to ensure the deceased's instructions were properly executed amounts to a breach of that duty.

Whether any contractual terms were implied into the banking relationship between the deceased and the first defendant, including obligations to give effect to her instructions, provide appropriate advice or assistance, and ensure compliance with her express intentions

[217] The Claimant submits that the relationship between the Bank and its customer included an implied duty to act with reasonable skill and care, including the duty to ensure that customer instructions were correctly and lawfully implemented. She argues that the Bank's failure to inform the deceased that the 2012 CIF would not revoke the mandate constitutes a breach of this duty.

[218] This submission aligns with established common law principles, including the duty described in **Barclays Bank plc v O'Brien**¹², where the Court found that banks are under a duty to take reasonable steps to explain legal implications where they are aware of potential misunderstanding.

¹¹ [1959] 1 QB 55

¹² [1994] 1 AC 180

[219] The Bank again maintains that it was not required to provide legal advice and that it acted within the bounds of the existing mandate.

[220] The Court, having accepted that the deceased acted under a misapprehension and that the Bank did nothing to clarify the effect of her instruction, finds that the First Defendant breached its implied contractual duty.

Whether the Second Defendant holds the sum of \$177,895.13, or any part thereof, on trust for the estate of the deceased, and is thereby accountable to the claimant as co-executor

[221] Although Marilyn did not know that her mother had tried to revoke the joint account in 2012, and genuinely believed she could continue operating the account, the Claimant submits that equity imposes a resulting trust where a person receives funds not beneficially theirs.

[222] This position is supported by cases such as **Westdeutsche Landesbank Girozentrale v Islington LBC**¹³ and **Foskett v McKeown**¹⁴, where the courts imposed trusts to recover misappropriated property.

[223] The Bank does not comment directly on this issue but denies liability for Marilyn's actions.

[224] The Court holds that, while Marilyn acted without knowledge of wrongdoing, the equitable ownership of the funds remained with the estate, and she therefore holds the funds as a trustee.

Whether the first defendant is liable in negligence and/or breach of contract or fiduciary duty for permitting the second defendant to withdraw the funds in question, contrary to the deceased's instructions

[225] The Claimant submits that the Bank was formally notified of the deceased's death in September 2017, and that it had the 2012 CIF in its records. Yet it allowed Marilyn to make substantial withdrawals between January 2021 and August 2022. The Claimant

¹³ [1996] AC 669

¹⁴ [2001] 1 AC 102

argues that the First Defendant was on notice that the funds were subject to the estate and should have frozen the account or verified the withdrawals with the estate's representatives.

[226] This conduct, she submits, breached both the Bank's common law duty of care and its contractual duty to act prudently.

[227] In my view, the Bank was negligent in several fronts in this case. Firstly, the 2009 joint mandate which was adduced into evidence is woefully deficient when compared to clause 20 in Whitlock, as it was not clear and unambiguous as to who would beneficially own the money in the joint account. Secondly, the bank breached its duty to the deceased when it did not advise her that her desired instructions could not be executed without Marilyn's consent. Thirdly, the Bank was negligent when it arrogated unto itself the power to resolve the inconsistency between the 2009 mandate and the 2012 CIF which contained a material difference with respect to the payment of funds upon death.

[228] The First Defendant submits that it acted on the basis of the 2009 mandate and only became aware of any dispute when contacted by the estate's UK attorneys in 2021.

[229] The Court has found that the Bank had sufficient notice of the death and the revised instruction from 2012. The Bank did nothing to try to ascertain how the conflicting instructions of 2009 and 2012 are to be reconciled. Instead, it chose to decide which was valid.

[230] In failing to act prudently and freeze the account or to query the withdrawals, the Court finds that First Defendant acted negligent and in breach of its duty.

Whether the claimant is entitled to judgment against the defendants jointly and severally for the sum of \$177,895.13 together with interest, and whether she is entitled to general damages for negligence, breach of contract, or breach of trust

[231] The Court has found that the funds belonged to the estate and were wrongfully withdrawn by Marilyn with the assistance, or at minimum, the acquiescence, of the Bank. The Claimant is therefore entitled to a money judgment for the full sum withdrawn.

[232] Given the shared responsibility for the misapplication of the funds, the Claimant's argument that judgment ought to be awarded jointly and severally against both defendants, succeeds. The Court find merit in this submission and agrees. But for the Bank's unilateral decision to distribute the funds according to the 2009 joint mandate which is silent on the beneficial ownership of the funds, the Second Defendant would not have been able to access the funds. The Bank's breach directly caused the damage suffered by the estate jointly with the Second Defendant.

[233] Issues of double compensation of the Claimant, unjust enrichment and indemnity all arise. The Bank chose in this claim not to seek by way of ancillary claim a contribution or indemnity by the Second Defendant. In this regard, the Court can do no more than to order the sum withdrawn to be restituted jointly by both Defendants.

[234] Whilst the judgment against the First and Second Defendants is a joint liability, the Court notes that the Second Defendant holds the sums withdrawn on trust for the estate, and the estate cannot be double compensated. As such, if the First Defendant provides restitution of the sums withdrawn to the Claimant, the debt cannot be enforced against the Second Defendant or vice versa.

[235] As to interest, the Claimant seeks 6% from the date of death. Given the delay in restitution and lack of any challenge to the rate, the Court grants interest as prayed.

Application for default judgment against the second defendant:

[236] By request filed on 31st July 2023, the Claimant applied for judgment in default of an acknowledgment of service against the Second Defendant. Evidence of service of the claim on the Second Defendant was provided in an affidavit of service filed on 21st July 2023. The time limited for the filing of an acknowledgment of service by the Second Defendant has long since expired.

[237] By order made on 13th February 2024, it was directed that the application for default judgment would be determined upon the completion of the matter against the First Defendant.

[238] Having regard to the reasoning set out above, I am satisfied that judgment ought now to be entered against the Second Defendant. While the judgment against her arises by default and the judgment against the First Defendant is on the merits, both Defendants are liable for the full loss caused. The First Defendant enabled the misapplication of the funds; the Second Defendant received and retained them in breach of trust. In the circumstances, joint and several liability is appropriate.

THE INTERIM INJUNCTION:

[239] On 24th April 2023, the Court granted an interim injunction against the First Defendant, restraining it, inter alia, from giving effect to any instructions issued by Marilyn Mesmin. The costs of the interim injunction were reserved to the judge hearing the application on the return date.

[240] On the return date, 22nd May 2025, the Court ordered that the injunction be continued against both Defendants until the determination of the substantive claim or until further order of the Court.

[241] In light of my findings, I am minded to order that all sums standing to the credit of the account of the deceased, if any, be forthwith paid to the executors upon their request.

[242] The Defendants are also jointly liable for the Claimant's costs of the application for injunctive relief filed on 21st April 2023. These costs are to be summarily assessed by this Court in default of agreement between the parties within fourteen days of the date of this judgment, upon the application of either party.

COSTS:

[243] The general rule is that costs follow the event. The First Defendant shall pay the Claimant's costs of the claim on the prescribed scale, calculated based on the value of the awards made, inclusive of pre-judgment interest.

[244] The Second Defendant, who has not defended the claim and against whom default judgment is now entered, shall also pay the Claimant's costs. However, given that the judgment is joint with the First Defendant and having regard to the nature and extent of the work involved in obtaining default judgment, I summarily assess those costs in the sum of \$1,000.00, which I consider proportionate to the procedural steps taken.

[245] Finally, before concluding this judgment, I wish to make it clear that the decision herein is highly fact-specific. It is not to be taken as the Court making any general pronouncement on the legal position concerning beneficial ownership of joint property as discussed in **Whitlock**.

[246] I also wish to record my sincere appreciation to Counsel for both parties for their well-researched and carefully written submissions. It is the Court's earnest hope that it may be so ably assisted in every matter.

ORDERS:

[247] For the reasons above, I make the following declarations and orders:

- 1) It is declared that the funds held in Bank of Saint Lucia Account No. 320200820 at the time of the death of Marie Rose Mesmin on 7th September 2017 formed part of her estate and did not pass to the Second Defendant, Marilyn Mesmin, by right of survivorship.
- 2) It is declared that the Second Defendant holds the sum of \$177,895.13, being the amount withdrawn from the said account between January and August 2021, on trust for the estate of the deceased.
- 3) It is declared that the First Defendant, Bank of Saint Lucia Ltd, acted in breach of contract, negligence, and fiduciary duty in failing to give effect to the deceased's written instructions dated 20th July 2012 and in permitting the Second Defendant to withdraw the said funds.

- 4) Judgment is entered in favour of the Claimant against the First and Second defendants jointly and severally for the sum of \$177,895.13, together with interest thereon at the rate of 6% per annum from 7th September 2017 until payment in full.
- 5) The First Defendant shall pay the Claimant's prescribed costs of this claim based on the value of the awards made \$177,895.13 plus pre-judgment interest for 2,850 days in the sum of \$83,342.65 in the total sum of \$261,237.77 calculated in the sum of \$37,373.78.
- 6) The Second Defendant shall pay the Claimant's costs of this claim, summarily assessed in the sum of \$1,000.00.
- 7) The First Defendant shall pay all sums standing in the credit of the account of the deceased, if any, to the executors upon their request.
- 8) The Defendants shall also pay the claimant's costs of the application for injunctive relief filed on 21st April 2023, to be summarily assessed by this Court in default of agreement between the parties within twenty-eight days of this judgment on the application of either party.



Alvin S. Pariagsingh
Judge

By the Court,


Deputy Registrar