THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2007/0486

BETWEEN:

SABINA JAMES ALCIDE

Claimant

and

(1) MARGUERITE DESIR
(2) MARGUERITE DESIR qua Executrix of the Will of the late Albertha Bella Butcher

Defendants

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mr. Eghan Modeste for the Claimant
Ms. Diana Thomas for the Defendants

2020: March11;
July 7, 17;
2021: May 7; (written submissions)
2023: January 13.

JUDGMENT

Background

[1] **CENAC-PHULGENCE, J**: This decision concerns the assessment of an account rendered by the first and second defendants, Marguerite Desir ("Mrs. Desir") in her personal capacity and in her capacity as Executrix of the Estate of Albertha Bella Butcher ("Mrs. Butcher"), respectively. The claim is of some vintage having traversed the High Court, Court of Appeal, Privy Council, and is now before the

High Court to deal with the account which was provided by the defendants in compliance with the Order of Georges J dated 22nd August 2011 and affirmed by the Privy Council in its judgment dated 26th February 2018.

Summary of the Claim

[2] A summary of the claim is important to provide the context for the defendants having been ordered to render an account of their dealings with the bank accounts and other property of Mrs. Butcher and of the companies under the control of Mrs. Butcher and also to render an account of income and funds from the same which have come into their hands.

[3] The claimant, Sabina James Alcide("Mrs. Alcide") is Mrs. Butcher's niece. Mrs. Alcide and Mrs. Desir are, in accordance with Mrs. Butcher's Last Will and Testament ("Will"), the principal beneficiaries of her Estate. Although Mrs. Alcide did not challenge the Will, she claimed that in the last 18 months of Mrs. Butcher's life, Mrs. Desir, by fraud, undue influence, or by taking advantage of her vulnerability, weakness or incapacity, caused Mrs. Butcher to transfer a significant portion of her assets to her (Mrs. Desir). The High Court judge generally preferred and accepted Mrs. Alcide's evidence of the surrounding circumstances, which the Court of Appeal and Privy Council declined to disturb.

[4] Principal amongst Mrs. Alcide's allegations was that Mrs. Desir caused Mrs. Butcher to form a company, Commercial Warehouses Limited ("CWL"), in which Mrs. Butcher gratuitously allotted Mrs. Desir 50% of the shares, the remaining shareholding was held by Mrs. Butcher. Mrs. Desir then caused Mrs. Butcher to transfer to CWL, her main asset, a commercial property situate at Massade, Gros Islet and registered as Block and Parcel 1257B 6 ("the Property") valued at over $7 million, for the mere sum of $644,000.00. The Property was her largest income earning asset. It was also alleged that Mrs. Desir caused Mrs. Butcher to execute a Power of Attorney appointing herself (Mrs. Desir) attorney with wide ranging powers to take charge of, manage, transact, and administer all Mrs. Butcher's

affairs, business, and property in Saint Lucia in such manner as she thought fit. This extensive power enabled Mrs. Desir to procure her own name on Mrs. Butcher's personal bank accounts and accounts of companies in Mrs. Butcher's name and under her control. Some of these accounts held significant funds which, on Mrs. Butcher's death, Mrs. Desir closed and transferred the funds to her personal account for her personal use and benefit.

[5] It was alleged that Mrs. Desir became acquainted with Mr. and Mrs. Butcher as an employee of the Bank of Saint Lucia ("BOSL") where they held various accounts and therefore also became acquainted with their financial affairs. She began assisting them with financial matters shortly before Mr. Butcher's death on 1st November 2005. Three weeks later, on 22nd November 2005, Mrs. Butcher executed the Power of Attorney in favour of Mrs. Desir, opened the joint bank accounts with Mrs. Desir and executed her Will in which she named Mrs. Desir her sole executrix, and named Mrs. Desir and Mrs. Alcide her sole residuary legatees and devisees. Having been ailing for some time from diabetes and motor neurone disease which caused her physical incapacity, by January 2007, Mrs. Butcher had become immobile, unable to carry out daily activities for herself, and her speech was slurred. Nonetheless, CWL was formed on 8th January 2007 and according to Mrs. Desir the Deed of Sale transferring the Property to CWL was executed on 26th January 2007. However, from the Deed of Sale, it appeared that it was signed by a Notary Royal on Mrs. Butcher's behalf on 10th April 2007, only three days before Mrs. Butcher's death on 13th April 2007.The notarial instrument evidencing the Deed was registered by the responsible Notary Royal on 22nd May 2007.

[6] By virtue of the provisions of her Will, upon Ms. Butcher's death, Mrs. Desir came into control of CWL and the Property, as sole director and three-quarter majority shareholder. As the Court of Appeal noted, only the remaining one quarter of CWL and Mrs. Butcher's half interest in her matrimonial home passed to Mrs. Alcide, as the gifts to her of Island Foods Limited ("IFL") and Bella Warehouse Holding Limited ("BWHL") were empty. The former had already been wound up and the

latter owned nothing at the date of Mrs. Butcher's death. Mrs. Butcher's major assets had been her half interest in the matrimonial home and in CWL.

[7] Mrs. Alcide had been raised by Mrs. Butcher as her own for the first seven (7) years of her life until the Butchers emigrated to the USA between 1981 and 1994. Mrs. Alcide herself migrated to the USA in 2002 to further her studies, funded by the Butchers. By all accounts, Mrs. Alcide was the child the Butchers never had and the object of their affection and remained very close to them despite being unable to travel outside of the USA in and around 2005 to 2007 due to immigration issues.

Procedural History

[8] In light of the above, Georges J found that Mrs. Desir procured her name on the personal bank accounts or accounts of companies in the name, or under her control, of Mrs. Butcher at the BOSL, Royal Bank of Trinidad and Tobago ("RBTT") and the Bank of Nova Scotia ("Scotiabank"). He therefore ordered that Mrs. Desir (in both of her capacities): (i) render an account of her dealings with the bank accounts and other property of Mrs. Butcher; (ii) render an account of her dealings with the bank accounts and other property of the companies under Mrs. Butcher's control; and (iii) render an account of the income and funds from the same which has come into her hands; (iv) as well as render further and consequential accounts. Georges J also found that the Deed of Sale in respect of the Property was executed by Mrs. Butcher, if at all, without independent legal advice and therefore ordered that it be improbated.

[9] On appeal, the Court of Appeal dismissed Mrs. Desir's appeal against the finding of undue influence and her claim of judicial bias but quashed improbation of the Deed of Sale of the Property to CWL, not on the basis of the finding of undue influence, but on procedural grounds.

[10] On appeal to the Privy Council, the Board dismissed Mrs. Desir's appeal against the decision to uphold the finding of undue influence and dismissed Mrs. Alcide's appeal against the decision to quash improbation of the Deed of Sale. The Board ordered that Mrs. Desir, as controlling shareholder of CWL and Executrix of the Estate of Mrs. Butcher, cause CWL to convey to Mrs. Butcher's Estate, its entire interest, unencumbered, in the Property, against contemporaneous payment by the Estate to CWL of $644,000.00. The Board also ordered that the orders of Georges J against Mrs. Desir for the rendering of accounts shall continue in force. Consequently, the High Court gave directions for the rendering of the accounts as had been ordered.

Issues

[11] The issues as agreed between the parties for the Court's determination are as follows:

1. Whether the Account prepared by Mrs. Desir accurately reflects revenue generated by CWL from 2007 to present, which income properly belongs to Mrs. Butcher's Estate?
2. Whether sound accounting practice permits the presentation of accounts beyond any one 12-month period?
3. Whether the sum of $644,000.00 purportedly paid to Mrs. Butcher by CWL for the Property is accounted for?
4. Whether Mrs. Desir has indicated to what use the sum of $881,000.00 by Hypothecary Obligation in favor of BOSL was put and whether all sums caused to be paid by CWL with respect to that debt should be returned to Mrs. Butcher's Estate by her?
5. Whether the dividend payments made to Mrs. Desir by CWL ought to be returned by her to the Estate?
6. Whether Mrs. Desir has accounted for all dividends due to Mrs. Butcher from BOSL?
7. Whether Mrs. Desir has received any dividends from BOSL which she should return to the Estate?

8. Whether Mrs. Desir ever received any monies from bank accounts in the name of IFL?
9. What was the balance in the account of BWHL at the time of Mrs. Butcher's death?
10. Given that it has been suggested that CWL had expenses of $503,797.00 for electricity, whether the tenants all paid for electricity separately or whether the electricity expenses were paid by CWL with the tenants being respectively billed by CWL thereafter?
11. Whether the electricity expense of $503,797.00 is to be repaid by Mrs. Desir?
12. Whether Mrs. Desir is to return to the Estate the management fee of $5000.00 per month amounting to $660,000.00?
13. Whether payments caused to be made by Mrs. Desir for maintenance works upon CWL to Mr. Bretney are justified or ought to be repaid by her to Mrs. Butcher's Estate?
14. Whether the sum of $260,150.00 paid by Mrs. Desir to BWHL from the Estate account is to be refunded to the Estate by her?
15. Whether Mrs. Desir ought to have incurred all legal expenses privately rather than causing such payments to be made by Mrs. Butcher' Estate?
16. Whether Mrs. Desir is to bear the full cost of the Vesting Deed for the Property?
17. Whether Mrs. Desir has failed to provide full bank statements for the following bank accounts held jointly with Mrs. Butcher: BOSL account number 508652000; RBTT account number 1002030633; BOSL account number 508175000, which had a balance of $622,878.63 which was transferred to Mrs. Desir's personal account?
18. What sum, if any, is to be paid by Mrs. Desir to Mrs. Butcher's Estate?

The Evidence

Mrs. Desir's Account and Mrs. Alcide's Challenges to the Account

[12] Mrs. Desir provided her account by Affidavit filed on 28th June 2018. Mrs. Alcide, in response filed a Notice of Omissions on 9th November 2018. Mrs. Desir filed her Affidavit in Reply on 20th November 2018. Additionally, both Mrs. Desir and Mrs. Alcide filed witness statements, and witness statements of Susanna Gurley, Christopher Thome, Adrian Dolcy, Jn Baptiste Bretney and Louise Clovis-Weeks were filed on Mrs. Desir's behalf. Each party instructed an accountant to give evidence on her behalf. Mrs. Malaika Felix ("Mrs. Felix) gave evidence on behalf of Mrs. Desir and Mr. Mark Cadette ("Mr. Cadette") gave evidence on behalf of Mrs. Alcide. The parties jointly appointed an expert witness, Mr. Andrew Brathwaite ("Mr. Braithwaite"), Accountant, to whom both parties put a list of questions. In compliance, Mr. Brathwaite filed a witness statement containing his expert report.

Examination of the Account

[13] I will consider the issues which have been identified and where necessary or convenient some issues will be considered together. The role of an executor is an important one. The executor has a fiduciary duty to administer the estate of a deceased with care and must be able to account for his/her dealings with the estate assets and liabilities. Where an executor is called to account by a court, it is not just a matter of detailing what the monies or assets were applied to,but the Court is called upon to assess the details or informationprovided and ensure that the monies and assets were indeed utilised or pertained to the business of the deceased's estate and were not put to other uses. If the Court finds that the executor has not given proper account of the estate funds and assets, adverse inferences may be drawn and the Court may make the necessary orders to set things right.

[14] The account in this matter is made particularly challenging for several reasons including the time span of the account, April 2007 to June 2018; the multiplicity of bank accounts which the defendants operated; the fact that Mrs. Desir is the executor as well as a beneficiary to the very assets which she is charged with administering; the obvious lack of detail in relation to certain expenses; the

obvious co-mingling of monies; and the findings of the courts at the High Court, Court of Appeal and Privy Council levels.

Discussion

Issue 1-Whether the Account prepared by Mrs. Desir accurately reflects revenue generated by CWL from 2007 to present, which income properly belongs to Mrs. Butcher's Estate?

[15] Mrs. Desir has exhibited financial statements for CWL for the period 2007-2018 prepared by Grant Thornton.Counsel for the claimant, Mr. Eghan Modeste ("Mr. Modeste") submits that these accounts do not accurately reflect the income generated by CWL. He says that Mrs. Alcide's accountant, Mr. Cadette, after review of the statements, has indicated that the accounts operate to understate the income by $797,275.00. The basis of this assertion is that the accounts understate the 2007 balance by $797,275.00 and this deficiency affects all subsequent years of accounting information submitted.

[16] One of Mr. Cadette's major findings according to his evidence is that there is no evidence in the unaudited accounts that the purchase transaction of the Property for $644,000.00 was recorded on the books of CWL in the year 2007, which is a material omission. It is not recorded as a cash or credit transaction. The inference to be drawn he says is that the purchase did not take place on 10th April 2007. The Cash Flow Statement for 2007 suggests instead that the transaction constituted a non-cash capitalization of CWL, whereby an investment property is injected for an equity stake in the company. In such circumstances, the company would be expected to debit the investment property at its fair market value with the corresponding credit entry to the Paid-in-Capital (PIC) account, which is a component of the Shareholder's Equity Statement on the Balance Sheet. It is his position that this could not be recorded in the Cash Flow Statement. This non-compliance with accounting standards, he says, has resulted in the misstatement and distortion of the financial statements presented in that they do not accurately and fully represent the financial position of CWL.

[17] Mr. Cadette says there are also a number of bank disbursements that cannot be attributed to CWL's operations. The retained earnings balance for each year is grossly misstated and an analysis of revenue, accounts receivable and bad debts write off highlight significant differences. Further the Cash Flow Statement does not accurately reflect the changes in current assets and liabilities. Changes in prepaid insurance, income taxes payable, and deferred tax assets liability are not captured. Mr. Cadette notes that the $644,000.00 surfaces in the 2018 reports and is presented as a receivable from the Estate, which pursuant to a court order was to be paid to CWL by the Estate and the Property returned to the Estate.

[18] The Stockholders Equity Statements for the respective years also fails to follow proper accounting procedure. The Stockholders Equity Statements ought to comprise Capital Share, Paid In Capital (PIC), and Retained Earnings. However, PIC is not at all featured in the financial statements presented albeit dividends paid in 2014 (of $100,000.00) and 2015 (of $340,000.00) are recorded to have been paid out of the PIC account. Thus, there is a lack of consistency in the Stockholders Equity account. Additionally, the Retained Earnings reported in the Balance Sheet clearly does not reflect the accumulative effect of Net-Income/Loss and dividends paid.

[19] Mr. Cadette says the most intriguing element in 2007 was the ability of CWL to simultaneously secure mortgage funding in the amount of $881,000.00 with the same date of Deed of Transfer of investment property to CWL. He says that the Cash Flow Statement of 2007 serves to mask the mortgage funds (cash from financing), hence understating the cash balance at year end by the amount of $797,275.00. This was achieved by including in the Cash Flow Statement a non-cash item being the value of the Property (inclusive of plant and equipment).

[20] According to Mr. Cadette, the Statement of Income for CWL cannot be relied on because of the electricity expenses item, which he says must be reviewed in

concert with the tenants. He says there is no supporting documentation to corroborate the expenses reportedly incurred by CWL. He believes the tenants paid rent plus electricity to CWL which needs to be resolved with the assistance of LUCELEC and the tenants' deposits. He believes CWL is not to be and was not being charged with electricity other than installation costs to the various units, accordingly CWL cannot have an electricity expense of over $500,000.00.

[21] He also states that the repairs and maintenance expense is highly questionable to the extent that a high percentage is allocated to electrical and maintenance work conducted by three different entities, and most strikingly to one individual, Mr. Bretney. With respect to Mr. Bretney, he says the frequency of expenses and the nature of supporting documents and the multiplicity of tasks performed is cause for concern. Mr. Cadette also takes issue with the professional fees paid out of CWL's account without any supporting documents.

[22] I highlight some of the cross-examination of Mr. Cadette.

[23] Mr. Cadette admitted that he was trained in New York and that all of his accounting experience has been in New York. He stated that he is familiar with the IFRS[1] for small and medium enterprisesbut teaches and practices the US GAAP[2] standard. Similarly, he is familiar with the IASB[3] but does not teach it to his students.

[24] He indicated that in his practice he has mostly used the indirect method and that most companies undertake the indirect method and proceeded to describe the indirect method as opposed to the direct method. He acknowledged that, without commenting on the numbers, the process which was utilized in preparing the accounts is as he had described it during the cross-examination.

[1]The IFRS Foundation is a not-for-profit responsible for developing global accounting and sustainability disclosure standards, known as IFRS Standards.
[2]Generally Accepted Accounting Principles (GAAP or US GAAP) are a collection of commonly-followed accounting rules and standards for financial reporting.
[3]International Accounting Standards Board (IASB).

[25] It was pointed out to him that Mrs. Felix had stated that the investment property was recorded at fair value and he was asked if he understood that the Property was recorded at fair value at the end of 2007. His position was that as CWL was incorporated in 2007 whatever happened in 2006 had no bearing on CWL. He agreed that the Property could be recorded either at fair value or at cost. In reference to the opening net book amount, it was put to him, and he agreed that a valuation must have existed, but he stated that he did not know how long a valuation is valid for in Saint Lucia. It was put to him that he could not therefore say that Mrs. Felix was wrong in relying on a valuation from the previous year. He insisted that she was, and that the standard requires that there be remeasurement at the end of the financial year and that some kind of valuation ought to have been done at the end of 2007.

[26] Although Mr. Cadette had stated previously that the Property could be recorded at fair value or at cost, he stated that when the Property is initially recorded it must be recorded at cost and at the end of the period of question it may be recorded either at cost or fair value. He stated that this must be done in the company's books but that he had not seen the company's books and that he had not requested them. Mr. Cadette's main contention is that the financials did not record the acquisition and it should have.

[27] It was put to him that in conducting his review he was utilizing the US GAAP and not the IFRS. He insisted that he was not using the US GAAP. It was put to him that he has never used IFRS in practice. His response is that he has reviewed it and it is close to the US GAAP. He was asked about the origin of certain language used by him being stockholders' equity, paid in capital, and capital share. He admitted that all of this terminology comes from the US GAAP and acknowledged that this terminology is not contained in the financial statements. He admitted also that he was not familiar with the Saint Lucia Companies Act, however, he disagreed that that being the case, that he would not be familiar with the language

to be used in the financial statements. It was put to him, and he did not disagree that he criticized the statements because he did not see words like stockholder's equity, capital share and paid in capital and this is because he is not familiar with the language. However, he disagreed that his criticism is misguided. Although he disagreed that contributed capital contains both paid in capital and retained earnings, he did agree that contributed capital is the same as paid in capital. He confirmed that he said that stockholders' equity, that is, the statement of changes in equity, should reflect retained earnings and agreed that the financial statements reflected retained earnings. He also agreed that the financial statements contained the amount paid for shares, being capital for shares, and that it contained contributed capital which is the same as paid in capital. He agreed that the retained earnings were also in the balance sheet and that the financial statements balance, although he sought to say that it does not mean that they are correct. It was put to him that in Saint Lucia the terms he highlighted are not used and therefore his criticism of the financial statements on the basis that they do not use these terms is misguided and is attributable to his lack of knowledge of Saint Lucia law. He insisted that he reviewed the financial statements based on the IFRS standards.

[28] It was put to him that he made a statement that paid in capital is not at all featured in the financials, yet he also said that dividends were paid out of the paid in capital account. He admitted that this was an error and that it was paid out of retained earnings.

[29] Mr. Cadette was asked if it would surprise him to know that the company would be able to get a loan facility when it did not have title and that the Property acted as security for the loan. He responded that he was intrigued and questioned how a company would be able to secure a loan of that size when it does not have title to the Property. He then admitted that he did not know how mortgages operate in Saint Lucia.

[30] He confirmed that his statement that the mortgage funds were masked meant that he did not see from the accountsthe mortgage funds coming in and clarified that he believed that this was inserted to conceal the cash effect of the $881,000.00as the $881,000.00is there as a liability but there was a failure to put that money in cash. In his view, if one obtains a loan from the bank,one gets cash. It was put to him that if you use the proceeds of the loan to pay other debts you would not get cash. He did not disagree but stated that when you get a loan facility it is incumbent upon the company to record the transaction. It was put to him that it was recorded, and his response was that they should have recorded cash of $881,000.00 coming in and the loan liability. The loan liability was recorded but not the cash coming in.

[31] It was put to Mr. Cadette, and he agreed that he did not have any information, nor see any documents and he had not spoken to any of the tenants so that he would know whether the tenants were paying electricity in the past in addition to rent. He stated that he came to this conclusion based on a trend analysis and he saw the trend based on what happened in the past. It was put to him that he did not test the analysis and his response was that in the first couple of years the bills were substantial and then it leveled off in subsequent years so he came to the conclusion that it may have been the case.

[32] It was suggested to him that the tenants made one rent payment which included rent and electricity and he agreed that this was possible. He also agreed that it was possible that when a reduction in rent and a commensurate decrease in electricity was seen, it was because the tenants started paying their own electricity. Again, it was put to him that he did not test his analysis by real information and therefore his statement was speculation. Similarly, it was put to him that he had not conducted any investigation in relation to his comment that the amounts paid for repairs and maintenance were highly questionable. He admitted that he had not done any investigation into whether the repairs and maintenance

were actually done, nor had he investigated what the professional fees were expended for and conceded that he was not questioning the professional fees.

[33] Mrs. Felix gave evidence to assist the Court with its review of the accounts prepared by the firm Grant Thornton which she represents, and which accounts were filed by Mrs. Desir in this matter. She also responds to the affidavit of Mr. Cadette filed on 3rd February 2019. Her evidence is contained in a report prepared by her dated 22nd March 2019 exhibited to her witness statement.

[34] Mrs. Felix states that the basis for accounts to be audited is unknown as there is no requirement for an audit in the Companies Act. Grant Thornton was engaged to compile financial statementswhich complied with the court order. Compilations of financial statements are widely accepted, and the compilation was prepared as guided by ISRS 4410.[4] A compilation engagement is not an assurance engagement and while an accounting firm applies accounting and financial reporting to assist with presentation of financial information, it is not required to verify the completeness or accuracy of information provided by management.

[35] Specifically in relation to Mr. Cadette's assertion that the 2007 cash flow statement understates the cash balance in the amount of $797,275.00, Ms. Felix says there is no basis for this assertion. Her evidence is thatthe cash balance represented in the financial statements was reconciled to the bank statement balance at the end of each year and therefore to say there has been an understatement is misguiding as the bank statements and bank reconciliation can clearly identify that there is no understatement.

[36] Mrs. Felix in cross-examination was able to respond to counsel's questions and was very resolute in her responses. For example, it was put to her that in respect of the Property there was no valuation in 2006 for $9,000,000.00. She insisted that

[4]International Standard on Related Services (ISRS) establishes standards and provides guidance on the accountant's professional responsibilities when an engagement to compile financial information is undertaken and the form and content of the report the accountant issues in connection with such an engagement.

there was and that is what she quoted the fair value figure from. It was also put to her that there was no loan of $881,000.00 taken by CWL and her response was that the financials were prepared based on information that she had, and she insisted that the borrowing figure is what she would have seen as the borrowing as at that date. It was put to her that it was Mrs. Desir who told her that a loan of $881,000.00 had been taken by CWL and that is entirely inaccurate. She responded that being a professional she put together the accounts based on the information she obtained, but at minimum she would have received bank statements, loan statements and the valuation.

[37] It was put to Mrs. Felixthat given that in 2010 the total comprehensive income was $62,510.00 and retained earnings was -$200,000.00but dividends of $200,000.00 were paid, the income in her statements is understated. She disagreed that this shows that the income was understated. Dividends were declared and they were accounted for. It was her position that accounting for dividends declared does not make the statement wrong.

Analysis and Conclusion

[38] It is apparent from Mr. Cadette's cross-examination that he is more familiar with the US standards of accounting, US GAAP than he is with the IFRS standard which is applied in Saint Lucia and was used by Grant Thornton in its preparation of the financials. His accounting experience, practice and teaching was mainly in New York and according to US GAAP. He conceded on three of the issues that he used as the basis for his assertions that the financials were not accurate, that is on dividends, preparation of financials for more than a twelve-month period and on the need for audited financials. Mr. Cadette also appears to have come to conclusions merely on speculation and without any thorough investigation or assessment of relevant documentation, for example on the matter of the electricity amounts paid by CWL and the amounts paid to Mr. Bretney for maintenance and repairs. These conclusions cannot be relied on by this Court as their bases are not established.

[39] Mr. Cadette seems to be unfamiliar with the systems in Saint Lucia as exhibited by his intrigue by the concept of a Deed of Sale and a mortgage being transacted simultaneously. That was important to understanding the loan of $881,000.00. His insistence that the $644,000.00 which was the purchase price of the Property should have been reflected as cash in the financials despite it being apparent that these monies which were part of the $881,000.00 loan were never paid to CWL but were paid to debts of IFL demonstrates a lack of understanding of the transaction. It is an entirely different question as to whether the transaction was prudent as opposed to whether the transaction was accurately captured in the financials and based on the explanation of Mrs. Felix, I am satisfied that it was.

[40] On this issue, I accept counsel for the defendant, Ms. Diana Thomas' ("Ms. Thomas") submissions. I do not find Mr. Cadette's evidence and conclusions to have been substantiated by his evidence.In particular, he has failed to explain how the accounts are understated by $727,275.00 or that the financials provided do not conform to acceptable standards. In short, I do not find Mr. Cadette's evidence to be reliable especially given his concessions after his very adamant statements about certain matters which have been highlighted above. Therefore, I am unable to find any basis to supportMrs. Alcide's contention that the accounts presented are not accurate and are understated by $727,275.00.

Issue 2-Whether sound accounting practice permits the presentation of accounts beyond any one 12-month period?

[41] Mrs. Alcide notes that in the 2018 unaudited accounts, the period January 2017 to April 2018 appears to have been combined and presented as one rather than January 2017 to December 2017 being properly and fully presented and January 2018 to May 2018 being properly and fully presented and this ought to be rectified. This was supported by Mr. Cadette in his analysis of the accounts. Mr. Cadette in his witness statement says that accounting practice and procedure requires that accounts be prepared to reflect a 12-month period, being either a calendar year or

a fiscal year and therefore the financial statement for the period 1st January 2017 to 30th April 2018 is unacceptable.

[42] With respect to the merging of the accounts of 2017 and January to April 2018, Mrs. Desir says she queried same with the accounting firm, and she was advised that when the period is short, it is normally merged in this manner. The information was not omitted, and the numbers on the financials did not change as a result.

[43] This issue was easily settled as Mr. Cadette in cross examination conceded that his statement that accounts are required to reflect only a 12-month period is incorrect and he agreed with the expert Mr. Brathwaite that the accounts may reflect a shorter or longer period with disclosure as to why a 12-month period is not being used. Mrs. Felix, in her evidence, also indicates that it is not unacceptable to prepare a 16-month period financial statement as the standard allows for changes in accounting periods to a maximum of 18 months and that the company must simply disclose the reason for the change. Based on the above, I find no basis for Mrs. Alcide's complaint.

Issue 3-Whether the sum of $644,000.00 purportedly paid to Mrs. Butcher by CWL for the Property is accounted for?
Issue 4-Whether Mrs. Desir has indicated to what use the sum of $881,000.00 by Hypothecary Obligation in favor of BOSL was put and whether all sums caused to be paid by CWL with respect to that debt should be returned to Mrs. Butcher's Estate by her?

[44] Mrs. Alcide notes that Mrs. Desir has omitted to account for the sum of $644,000.00 which was purportedly received by Mrs. Butcher upon the sale of the Property by her to CWL. She notes that there is no record in the Account provided of the sum of $644,000.00 being removed from the bank accounts of CWL on or about the 10th day of April 2007, the date of the Deed of Sale. Additionally, there is no record of the sum of $644,000.00 being received into any bank account of Mrs. Butcher or in the name of the Estate of Mrs. Butcher. She further notes that by Hypothecary Obligation dated 10th April 2007 registered as Instrument Number 2850/2007, the Property was hypothecated by CWL to secure the sum of

$881,000.00 in favor of BOSL. Although this sum appears in the account as proceeds of a loan taken by CWL, there is no specific indication of what these funds were used for. Given that the funds were received as a direct result of Mrs. Desir's control over Mrs. Butcher, Mrs. Desir is required to account for these funds and the manner in which they were allocated.

[45] Mrs. Desir states that she did not receive the sum of $644,000.00 or any sum into her hands. The sum of $881,000.00 went directly to paying off debts of IFL and Mr. and Mrs. Butcher through CWL's bank account. She says that prior to the sale of the Property, it was collateral for an overdraft facility for IFL at BOSL and for a mortgage loan taken by Mr. and Mrs. Butcher for the completion of their dwelling house, and the building of a pool and a wall. She states that she does not have access to the facility letter in the name of Mr. Butcher for the house loan #75008924, however, she was able to find a bank statement as a director of CWL, since the funds used to clear the house loan was from the loan taken by CWL.

[46] Further, she was able to retrieve a copy of the loan facility letter to IFL dated 5th May 2006 showing the overdraft facility of $353,300.00 which shows that the security provided was a first additional mortgage debenture incorporating hypothecs over the warehouse buildings with the Butcher's as surety stamped to cover $680,000.00. She further attaches loan facility letter to CWL dated 6th February 2007 showing that the loan of $881,000.00 was taken to clear overdraft facility of $567,870.67 in the name of IFL and demand loan of $205,347.33 in the name of Mr. Butcher. She also attaches the bank statement for the overdraft account of IFL account # 240589390 dated 29th April 2007 which shows that the sum of $694,557.40 was credited to the overdraft account on 30th March 2007. The bank statement for the mortgage loan #575008924 in the name of Mr. and Mrs. Butcher shows that the sum of $186,442.60 was credited on 30th March 2007. She notes that the total of credits to IFL's account and Mr. Butcher's loan account amount to $881,000.00, the exact amount of the loan taken as shown by the bank statement for CWL loan account #955719287. On that statement the reason for

the loan is stated as “con/debts for liquidation”; ‘con’ being short for consolidation. As far as she is aware all these transactions were done whilst Mrs. Butcher was alive as per her instructions. As the Property was used as security for both loans to IFL and the Butchers, Mrs. Desir says without paying off same, the Property would not be unencumbered today.

[47] In cross examination, Mrs. Desir disagreed that $644,000.00 was to come out of CWL account for the purchase of the Property pointing out that she showed $644,000.00 going to IFL. She accepted that the court found that she exerted undue influence to have the Property in the name of CWL. She also accepted that while the Property was under the name of CWL, there was monthly rental income paid to CWL rather than Mrs. Butcher or her Estate. She also accepted that a loan of $881,000.00 was taken, but with payments of interest, the sum returned to the bank was $1,256,066.00. She however disagreed that the portion of the monthly rental which went to paying the loan by virtue of her undue influence should be returned by her. It was put to her that had the Property remained under the control of Mrs. Butcher, these monies would not have been expended in relation to the loan. Her response was that perhaps there would have been no Property as it was securing the overdraft of IFL.

[48] In cross examination, Mrs. Alcide agreed that there had been a mortgage on the Cap Estate Property and based on documents shown to her that Mrs. Butcher had personally guaranteed a loan in favour of IFL and that the security therefore was a mortgage over the Property. She agreed that for Mrs. Butcher to have died without leaving debt, the personal guarantee would have to have been discharged and that the hypothec over the warehouse would also have to have been discharged. She did not know where the money came from to discharge the debts but she believes that during Mrs. Butcher's lifetime, the companies did not have any debts. She acknowledged that the facility letter shown to her indicates that CWL took a loan to pay off the mortgage but says she does not know if this is something that Mrs. Butcher was forced to sign.

Analysis and Conclusion

[49] Counsel, Mr. Modeste submits that no actual sum of $644,000.00, the purchase price of the Property, was ever handed to Mrs. Butcher; there is no record of that sum being removed from the bank accounts of CWL nor is there any record of that sum being received into any of Mrs. Butcher's accounts. Mr. Modeste suggests that given the High Court findings regarding the sale of the Property to CWL, the sum of $644,000.00 ought to be paid to Mrs. Alcide by Mrs. Desir as this is a sum which has been denied to Mrs. Alcide as a result of the undue influence of Mrs. Desir.

[50] On the other hand, Ms. Thomas submits that while the court rejected the explanation for the sale of the Property at such an undervalue, it made no findings that the transactions, being the sale and the hypothecary obligation, did not take place. The Privy Council at paragraph 65 of its judgment found that the EC$881,000.00 borrowed from BOSL by CWL evidently funded the payment of the $644,000.00 for the Property by CWL to Mrs. Butcher and remarked that 'what happened to that money and the rest of the EC$881,000.00 was a matter for further investigation. I agree with Ms. Thomas that this Court has the power to further investigate the expenditure of the $881,000.00 and the purposes to which it was applied.

[51] What does the evidence show? The documentary evidence shows that the loan monies received by CWL were used to pay off a mortgage loan in the personal names of Mr. and Mrs. Butcher, as well as an overdraft facility in the name of IFL secured by the Property which was then in Mrs. Butcher's name and a personal guarantee of Mrs. Butcher. The following documentation was provided by Mrs. Desir to support the use of the $881,000.00:

(a) Loan Note in the name of Mr. and Mrs. Butcher for the building of a pool and wall for $365,070.00 -17th June 2002 (page 35, Trial Bundle ("TB") C)

(b) Loan activity statement showing payment of the sum of $186,442.60 -30th March 2007 (page 37, TB C)

(c) Current Account Statement showing Overdraft in the sum of $708,622.27 with a payment of $694,557.40 made on 30th March 2007 (page 33 of TB C)

[52] These two payments total $881,000.00 the amount of the loan taken by CWL from BOSL. The stated purpose on loan agreement dated 6th February 2007 is to consolidate debts in segment (1)-Island Foods Limited Overdraft Facility and (2) Epiphane Butcher Demand Loan for orderly liquidation. The evidence produced by Mrs. Desir in relation to IFL shows a loan agreement dated 5th May 2006 for an overdraft facility in the sum of $335,300.00 secured by a first and additional mortgage debenture incorporating a Hypothec over the Warehouse building with Bella Butcher as surety. Mrs. Butcher also signed a personal guarantee for $335,500.00.

[53] In my view, Mr. Modeste's argument is flawed as the $644,000.00 was part of the sum which was used to clear debts which the Property had been used to secure and which were debts of IFL and the Butchers. These debts were supposedly paid on behalf of Mrs. Butcher and therefore her estate must return that money to CWL. In addition, the additional sum of $237,000.00 which makes up the $881,000.00 borrowed from BOSL should also be returned to CWL as again these were funds used to pay debts associated with IFL and the Butcher loan both of which were secured by the Property. That money must be paid back by Mrs. Butcher's estate.

[54] Ms. Thomas argues that since Mrs. Butcher had guaranteed and provided security for the loans, the debts were in fact her debts and would have been debts of the Estate had they not been paid off by CWL from the $881,000.00 loan. She submits that had CWL not paid off the loan totaling $881,000.00 to BOSL in its entirety, neither the Property nor the Cap Estate Property would have been free and clear of encumbrances as at Mrs. Butcher's death. This reasoning was not accepted by the High Court but the fact that the loans existed or that these hypothecs existed

are matters for this Court to consider in deciding whether the $881,000.00 borrowed was used to pay off debts of Mrs. Butcher. Ms. Thomas says by so finding this Court would not be making any decision inconsistent with the existing judgments as the facts are undisputed and are indisputable. I am of the view that the overdraft of IFL was not a debt of Mrs. Butcher, that company being in liquidation with a liquidator to manage its liquidation.

[55] The High Court was clear that the formation of CWL was done with the sole purpose of transferring the Property to it, which Mrs. Desir stood to benefit from significantly. It is true that the Property was held as security for the IFL overdraft and the Butcher loan, however, IFL was a limited liability company and there is no evidence from Mrs. Desir that there was any demand for Mrs. Butcher as surety to pay that loan. Mrs. Desir gave evidence that IFL was in liquidation and that Mr. Vern Gill was the liquidator. Therefore, this is not a debt which should have concerned Mrs. Desir. Likewise with the Butcher loan, Mrs. Desir took it upon herself to have the Property transferred to CWL and secure a loan to pay off debts. Mrs. Desir says that the transfer of the Property and the payment of the debts were done whilst Mrs. Butcher was alive. However, the High Court could not understand the need for the transfer and taking of the loan. Mrs. Desir caused CWL to take a mortgage which was unnecessary as if the Property had remained with Mrs. Butcher, the very rental income could have been used as she desired to pay off whatever loans she had. The very basis for the formation of CWL has been questioned by the Court who has made it clear that Mrs. Desir clearly stood to benefit from the transfer of the Property to CWL.

[56] Having said this, Mrs. Desir has provided an explanation for the use of the $881,000.00 which is accepted based on the documents which she has provided. However, given that the Court has found that the Property was sold to CWL when it was not necessary as the Property generated sufficient revenue to allow Mrs. Butcher to clear off any debts which she desired including the IFL and the Butcher

loan, Mrs. Desir must be made to pay CWL the sum of $375,066.00 which represents the amount of interest which was paid to BOSL on the loan.

[57] I therefore order that Mrs. Desir as executrix of the estate of Mrs. Butcher pay to CWL the sum of $237,000.00 being the difference between loan amount of $881,000.00 and the sale price of $644,000.00. I further order that Mrs. Desir in her personal capacity pay CWL the sum of $375,066.00 being the amount of interest paid on the loan. The amount of $644,000.00 was dealt with by the Privy Council's Order of 26th February 2018 which ordered that sum to be paid by Mrs. Butcher's estate to CWL and does not require any further consideration by me.

Issue 5-Whether the dividend payments made to Mrs. Desir by CWL ought to be returned by her to the Estate?

[58] In relationto Mrs. Desir's Exhibit MD36, Mrs. Alcide notes that it is stated therein that CWL paid dividends of $910,000.00 to Mrs. Butcher's Estate and $550,000.00 to Mrs. Desir. Mrs. Alcide states that she is entitled to 50% of the dividends payable to the Estate and has to date only received the sum of $167,596.45. Mrs. Desir responds that the dividends were paid to the Estate, however, the Estate had expenses throughout. She says income goes into the Estate's account, is reconciled with expenses, and any surplus remaining is paid to the residuary legatees, as outlined in MD 68.

[59] Additionally, Mrs. Alcide states that the 2016 unaudited accounts for CWL for 2007 to 2014 were provided and certain aspects of these have been compared to the unaudited accounts for CWL which were filed on 27th June 2018. In the 2016 unaudited accounts, CWL was stated to have, in 2011, declared and paid dividends of $230,000.00, however in the 2018 unaudited accounts CWL was stated to have, in 2011, declared and paid dividends of $200,000.00. Mrs. Desir states the accounts submitted in 2016 were draft accounts submitted for Mrs. Alcide's feedback, which she never received. She notes that Mrs. Alcide's assertion now is contrary to her previous statements that she had not received any accounting. Mrs. Desir clarifies that on completing the accounts in 2018, when the

accounting firm reviewed the final set of all accounts, they realized that an item was incorrectly allocated and corrected same to reflect $200,000.00 rather than $230,000.00.

[60] Mrs. Alcide also contends that in the 2018 unaudited accounts for CWL, there is no indication of the amounts declared and paid as dividends in 2016 and 2017 and these sums ought to be disclosed. Mrs. Desir states that no dividends were paid for 2016 and 2017 as she was awaiting the final decision from the Privy Council to finalize the Estate accounting and most expenses for the Estate were already paid so there was no specific need for income to manage the Estate at that point.

[61] Mrs. Alcide asserts further that dividends appeared to have been paid only to Mrs. Desir and the payments are disproportionate to the profits for each year and in many instances exceed the purported profits of the company. This is questionable as dividends must be paid out of profits. In any event, Mrs. Alcide says that Mrs. Desir ought to return all income by way of dividends which she received from CWL as such income is a direct result of her exercise of undue influence over Mrs. Butcher.

[62] In cross examination, in relation to the issue of the dividends, it was put to Mrs. Desir that not one cent had been paid to Mrs. Alcide. She accepted that Mrs. Alcide was entitled to shares;however, she stated that she was handling dividends after expenses were paid. Notwithstanding, she acknowledged that dividends could be paid from retained earnings if the directors so decide. She did not agree that dividends paid were misleading and disproportionate to the profits of the company. Several instances were put to her where the company paid dividends greater than its income or when it made losses. She stated that dividends can be paid at different intervals once the directors decide and there is cash flow. Dividends were not paid from profit for the specific years when the dividends paid exceeded income for the year but was based on equity and cash flow. It was put to

her that the true profit of the company was understated and that is the reason the dividends exceeded profits and she disagreed.

Analysis and Conclusion

[63] Mr. Modeste submits that it is trite that dividends are only and can only be paid from profits and that the dividend payments stated to have been made to Mrs. Desir are misleading and understated as in many instances, the dividend payments for particular years exceed the net profit before taxation for these years. He argues that the formation of CWL and Mrs. Desir's positioning within that company were direct products of her exercise of undue influence over Mrs. Butcher. It is his contention that given that Mrs. Desir has acknowledged paying out $1,460,000.00 in dividends notwithstanding the fact that this sum is understated, that sum ought to be paid by Mrs. Desir to Mrs. Alcide.

[64] Mr. Modeste contends that the inconsistency in the unaudited accounts provided in 2016 and those produced in 2018, highlights the unreliability and untruthfulness of the information provided by Mrs. Desir. However, I note one inconsistency highlighted and it is a decrease in the dividend figure rather than an increase. I cannot see how this one inconsistency makes the accounts unreliable.

[65] Ms. Thomas says the dividends received by Mrs. Desir did not form part of the Estate and therefore no Order should be made in relation to them. She notes that the Privy Council while considering the options of the form of order it would make on the dismissal of Mrs. Alcide's appeal, decided not to explore the options stated at paragraphs 65 to 69 of its 21st May 2015 judgment. The Court ordered the transfer of the Property from CWL to the Estate of Mrs. Butcher and while noting that the sole purpose of the formation of CWL was to facilitate the transfer of this Property from Mrs. Butcher to the company, it declined to make orders as regards Mrs. Desir's shareholding in CWL.

[66] Ms. Thomas submits that in order to require Mrs. Desir to pay the dividends declared to Mrs. Alcide, it would mean this Court would have to make an order that Mrs. Desir held Mrs. Butcher's shares in trust for her Estate. As at the date of Mrs. Butcher's death, Mrs. Desir owned two shares and Mrs. Butcher's estate owned two shares. By the residuary clause in the Will, Mrs. Desir and Mrs. Alcide would be entitled in equal shares to the two shares owned by the Estate and in equal shares to any monies left of the dividends which would have been paid to the Estate of Mrs. Butcher.

[67] Ms. Thomas argues that that the defendants need not account for the dividends received by Mrs. Desir as a shareholder of CWL as these did not form part of the estate of Mrs. Butcher and I agree. She goes on to say that Mrs. Alcide became entitled to ½ share in the Property from 26th February 2018 and that prior to that date, she was entitled to ¼ share via the residuary clause in the Will. I do not know that this is even relevant as what is being dealt with here is the dividends which were declared which would have been distributed ½ share to Mrs. Desir and a ½ share to the estate of Mrs. Butcher.

[68] I have reviewed the financial statements and the total dividends declared was $1,460,000.00. This would mean that Mrs. Desir and the Estate of Mrs. Butcher would each have been entitled to $730,000.00 given that they each have equal shares in CWL. However, when one reviews the statement of payments of dividends contained at MD34(b) and MD35(b) of Core Bundle Vol. 1, the total payment of dividends to the estate of Mrs. Butcher is stated as $910,000.00 and to Mrs. Desir as $550,000.00. It therefore means that the estate was overpaid by $180,000.00. Mrs. Desir is therefore to be paid $180,000.00. The amounts paid to the Estate is to be shared equally between Mrs. Alcide and Mrs. Desir after expenses have been paid.

[69] Below is a table which sets out the dividends declared as paid and the amounts paid to the Estate and Mrs. Butcher as per her exhibits to better represent the above analysis.

Date of dividend	Dividend declared	Payment to Estate of Mrs. Butcher	Payment to M. Desir
12/11/2008 12/16/2008	$60,000.00 $10,000.00	$70,000.00	-
11/24/2009	$300,000.00	$100,000.00	$200,000.00
11/12/2010	$200,000.00	$100,000.00	$100,000.00
7/29/2011	$200,000.00	$100,000.00	$100,000.00
6/29/2012	$50,000.00	$50,000.00	-
4/9/2013	$200,000.00	$100,000.00	$100,000.00
4/29/2014	$100,000.00	$50,000.00	$50,000.00
1/27/2015 1/30/2015 2/10/2015 5/20/2015	$50,000.00 $100,000.00 $150,000.00 $40,000.00	$340,000.00	-
TOTALS	$1,460,000.00	$910,000.00	$550,000.00

[70] Given that none of the Courtspronounced on the shareholding in CWL, I do not believe that this Court would be in a position to deprive Mrs. Desir of the dividends declared. Subject to the adjustments alluded to above in the payments made, I make no order for Mrs. Desir to repay the dividends which she was paid on account of her half shareholding in CWL. <u>I would therefore order that the Estate of Mrs. Butcher pays Mrs. Desir the sum of $180,000.00 which represents an overpayment on the dividend amount paid to it and which ought to have been paid to Mrs. Desir.</u>

[71] I make a brief comment on the submission that dividends can only be paid from profits. Mr. Cadette in his statement did agree that the dividends had been paid

out of retained earnings. He suggested that there was no clear dividend policy which gave rise to inappropriate dividend payouts, and this adversely affected the accuracy of retained earnings. The ad hoc dividend payout practice triggered a negative retained earnings balance from 31st December 2009 to 31st December 2016.In his view, the financial manager was grossly negligent in the execution of her duties. Mrs. Felix provided a very detailed explanation of dividend declaration. She was asked about dividends and where the funds to pay dividends are obtained. Her answer was that when you look at a set of financial statements, for example, in 2007, it all balances and there is a movement from year to year. In a set of financial statements there are always debits and they must equal the credit side. Mrs. Felix explained that in a set of financials you have all the assets of a company and you have all the liabilities of the company. What is left is that category called equity. Assets less liabilities equal equity. The statement of changes in equity shows what is left and can be used to pay dividends.

[72] In relation to dividends, she indicated that dividends declared does not mean that they were paid. Once dividends are declared, they are reflected in the financials. She was asked whether dividends should not be paid on profits for any given year,and she responded that dividends can be paid on the net position at the end - on equity. If there is negative equity, then it should not be declared. She said she prepared the accounts based on the fact that dividends were declared. It was put to her that dividends could only have been paid from profits or retained earnings and that in many of these cases dividends far exceeded the profits or retained earnings and therefore should not have been paid. She disagreed and stated again that dividends are paid out of equity and there was sufficient equity to pay dividends.

[73] Mrs. Felix agreed that the dividends exceeded the profits made over the period and she agreed that it did so significantly. However, she disagreed that the dividends areat the very least to be equal to their profits for the year. She disagreed that where there is a loss, dividends ought not to be paid. She also

disagreed that the payment of dividends over the years, in the accounts prepared, suggested a fraudulent approach to payment of dividends because there was sufficient equity to allow for dividends to be declared without causing the company to not be a going concern. The total assets way exceeded the total liabilities and there was sufficient equity to declare dividends.

[74] I believe that this issue was adequately put to rest by Mr. Braithwaite, the independent expert appointed to respond to specific questions. He was asked whether a lack of a clear dividend policy affects the accuracy of retained earnings when preparing accounts. He responded in the negative saying that irrespective of the specific dividend policy, dividends should be reflected in the financial statements and subtracted from retained earnings when declared by the company in accordance with the relevant legal provisions. He was also of the view that it is not necessary for a clear dividend policy to be identified for the purpose of preparing financial statements.

[75] The declaration of dividends was accounted for in the financial statements. The payment of dividends may not have been prudent management on Mrs. Desir's part, but I am of the view based on Mr. Braithwaite's and Mrs. Felix's evidence, there was nothing so out of the ordinary about the dividend declarations. Mr. Modeste's assertion that the financials presented do not show any indication of amounts declared and paid towards dividends in 2016 and 2017 and that the purpose of this omission is to deliberately withhold information regarding dividends is baseless and has no evidential basis and is not a conclusion which this Court can come to given the evidence before it.

Issue 6-Whether Mrs. Desir has accounted for all dividends due to Mrs. Butcher from BOSL?
Issue 7-Whether Mrs. Desir has received any dividends from BOSL which she should return to the Estate?

[76] Mrs. Desir says Mrs. Butcher owned 12,600 shares in Eastern Caribbean Financial Holding Company Limited ("ECFHCL"). She says these shares are to be vested to the residuary legatees, Mrs. Alcide and herself, as to 50% each.

[77] With regard to this item, Mrs. Alcide states she is entitled to 6,300 of these shares and as the shares have not been vested, the share transfer certificate is to be prepared to issue the shares. Additionally, she is immediately entitled to one half of all sums received by the Estate from BOSL by way of dividends. She sets out the dividends received per the Account provided by Mrs. Desir and says the Estate received dividends as follows:

$8,820.00 between December 2007 and December 2008[5]

$24,570 between January 2009 and December 2009[6]

$5,040 between January 2010 and December 2010[7]

$6,930 between January 2011 and December 2011[8]

$1,260 between January 2012 and December 2012[9]

[78] She sets out other sums received as dividends, which appear to be included in those stated above.Mrs. Desir states that all dividends received from BOSL were paid into the Estate's account and accounted for in her Account. The Estate had expenses and after all expenses were reconciled and deducted from income, the surplus was distributed to the residuary legatees under Mrs. Butcher's Will whereby Mrs. Alcide received 50% of the surplus and she received 50%. She is currently in the process of effecting the share transfer per Mrs. Butcher's Will to Mrs. Alcide and herself as to 50% each. She says that in 2019, she understands that ECFHCL has declared dividends for the first time in 5 years and that despite taking steps to change the shareholder to the beneficiaries, ECFHCL still paid dividends to the Estate's account. Presently, the sum of $3,780 was paid to the Estate, half of which will be paid to Mrs. Alcide.

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[5]Ex MD25(b) of Core Bundle 1.
[6] Ex MD 25(d) of Core Bundle 1.
[7]Ex MD 25(f) of Core Bundle 1.
[8]Ex MD 25(h) of Core Bundle 1.
[9]Ex MD 25(j) of Core Bundle 1.

[79] In cross examination, Mrs. Alcide indicated that she had received documents to sign indicating that she had shares and that she has no record of any other shares. She also admitted that she had received a cheque from Mrs. Desir for dividends from BOSL.

Analysis and Conclusion

[80] It is the case that the assets of an Estate can only be distributed after the liabilities and testamentary expenses have been dealt with. From the evidence, Mrs. Alcide admits that she received a cheque for dividends. I am therefore not sure what her complaint is as she does not indicate clearly in the statement of omissions. She is entitled to have 6,300 shares transferred to her by Mrs. Desir as executrix of Mrs. Butcher's Will. She has not shown that the figure which she was paid is inaccurate. Mrs. Desir ought to have produced a statement from BOSL to at the very least verify the sums paid as dividends and <u>I therefore order that Mrs. Desir file a statement from BOSL indicating dividends paid over the period of her tenure as executrix of Mrs. Butcher's Estate until the date of transfer of the shares into the names of the beneficiaries within 30 days of the date of this judgment.</u>

Issue 8-Whether Mrs. Desir ever received any monies from bank accounts in the name of IFL?

[81] Mrs. Desir says she became a signatory on bank accounts for IFL, a company which sold meat and meat products retail, in November 2005. At that time, IFL was being managed by Sandra Anthony, the Executrix of Mr. Butcher's Estate and holder of one of the three issued shares of IFL. By letter to BOSL dated 17th November 2005 from Ms. Anthony and Mrs. Butcher, they requested that she be appointed a signatory to IFL's current account #240589390. Mrs. Desir says, however, that she does not have any documents relating to IFL as Ms. Anthony was in charge of IFL and IFL closed in 2006 with Attorney-at-Law, Vern Gill being in charge of that closure. Mrs. Desir says Mrs. Butcher agreed to take on all the debts of IFL but at the time of her death had not dealt fully with IFL's overdraft

debt. Therefore, Mrs. Desir says she paid IFL's overdraft balance from her personal account in the sum of $11,581.53, exhibiting the bank statement and payment slip in respect thereof. The bank statement provided shows that on 12th June 2008, the overdraft stood at $18,281.53. On that date a payment of $7,000 was made. On 3rd March 2009, the balance of $11,581.53 was paid. The payment slip exhibited in respect of the latter shows that the payment was made from an account # 930337046 and the account name shows Island Foods Ltd. crossed out and replaced with Marguerite Desir.

[82] Mrs. Alcide states that Mrs. Desir provided no evidence of any agreement by Mrs. Butcher to take on all debts of IFL. Mrs. Alcide also states that although Mrs. Desir claims to have paid the debt of IFL in the sum of $11,581.53 from her personal account, she has purportedly refunded these funds to herself with funds belonging to Mrs. Butcher's Estate. Mrs. Alcide says Mrs. Desir is not entitled to any refund of the sum paid, given that this was a debt of a company and not a personal debt of Mrs. Butcher. Accordingly, Mrs. Desir has failed to properly list the sum of $11,581.53 as a debt due from her to Mrs. Butcher's Estate.Mrs. Alcide notes also that although Mrs. Desir was a signatory to this account, she has failed to disclose whether she has received any monies from IFL. She is required to disclose this information.

[83] Mrs. Desir, in her reply, reiterates that IFL had been liquidated prior to Mrs. Butcher's death. The business was not operational, and the only asset remaining was an old truck that was sold for which she received $20,000.00, as declared in her Account and in her previous account on 21st October 2011. She has therefore disclosed the only sum received from IFL. She says, in fact, IFL was in deficit and its overdraft facility was settled by the loan taken by CWL. She says Mr. Gill, the liquidator, has been asked to provide documents evidencing the agreement by Mrs. Butcher to pay the debts of IFL and that the sum of $11,581.53 was properly spent on behalf of Mrs. Butcher or companies under her control.

Analysis and Conclusion

[84] Mrs. Desir was the executrix of the Estate of Mrs. Butcher. Mrs. Butcher owned shares in IFL and therefore Mrs. Desir's only concern as executrix would have been with the shares which fell to Mrs. Butcher's Estate. Mrs. Desir stepped outside of her powers when she paid debts of IFL. Mrs. Desir in her evidence said that IFL's overdraft facility was settled by the loan taken by CWL yet she also says that she used her personal funds to clear the overdraft. It is unclear just which one it is. As submitted by Mr. Modeste, Mrs. Desir has not provided any evidence of any agreement that Mrs. Butcher agreed to take on the debts of IFL. Any payments which Mrs. Desir made from her own funds, she must forego and cannot be reimbursed from Mrs. Butcher's estate. The debt which she says she paid was a debt of IFL and not of Mrs. Butcher. Therefore, <u>Mrs. Desir having refunded herself for the debts which she paid for IFL, she is to pay back the sum of $11,581.53 to the Estate of Mrs. Butcher personally.</u>

Issue 9-What was the balance in the account of BWHL at the time of Mrs. Butcher's death?
Issue 14-Whether the sum of $260,150.00 paid by Mrs. Desir to BWHL from the Estate account is to be refunded to the Estate by her?

[85] Mrs. Desir says that by letter dated 21st November 2005 from Mrs. Butcher to BOSL, Mrs. Butcher requested that she be appointed a signatory on BWHL's BOSL account # 511060399. She says she became a signatory sometime in 2006. BWHL collected rent from warehouses owned by Mr. and Mrs. Butcher. She says however that Mrs. Butcher dealt with this account herself and therefore she does not have supporting documents. She took over dealings with the account after Mrs. Butcher' death in April 2007.

[86] Mrs. Desir says that prior to opening an account for Mrs. Butcher's Estate, she managed the Estate from this BWHL account. She said it made sense to use this account as it had no income after May 2007 and it was the intention of Mrs. Butcher to close BWHL after all warehouse expenses were paid. Also, the funds which were used to pay for all Mrs. Butcher's expenses during her lifetime came

from the BWHL account via standing order to the joint RBTT account # 10020306335 with her (Mrs. Desir). She says that as at 19th October 2011, BWHL's account held an overdraft balance of $58.63 as a result of accumulating bank charges because the account had not been closed as requested. The account has since been closed. Mrs. Desir says she prepared spreadsheets showing income and expenditure for BWHL from April 2007 to November 2009 and a summary of debits and credits for Mrs. Butcher's Estate along with supporting documents. She also provides information about an account #514198006 in the name of Marguerite Desir as Executrix of the Estate of Bella Butcher and additional transactions for the period October 2011 to April 2018.

[87] However, Mrs. Alcide complains that Mrs. Desir has omitted any evidence of the account balance at the time that she took over dealings with the account. The spreadsheets exhibited do not provide first-hand information of the actual sums in the account. Further, the bank statements for this account have been omitted and ought to be disclosed. Mrs. Desir counters that this information has been disclosed at Exhibit MD 25 ref # 1 to 94 as well as pages 1-336 of Volume 2.She also says that BWHL is a company over which Mrs. Butcher had control. She, Mrs. Desir, took control of the account after Mrs. Butcher died and used it for payment of expenses. She says the account had a balance of $143,508.45 at the time of Mrs. Butcher's death.

Analysis and Conclusion

[88] Mr. Modeste in his submissions questions why Mrs. Desir would have to pay funds into the account of BWHL after Mrs. Butcher's death. She had indicated in her affidavit that she managed the Estate from the account in the name of BWHL. Therefore, he submits that Mrs. Desir is saying that she took funds from one of Mrs. Butcher's accounts to pay into another account, the Estate account and then paid funds back into the account which she initially took funds from.

[89] He submits that without question, if such payment was made then the funds for such payment would have been derived from funds which belonged to Mrs. Butcher and therefore if any monies were paid by Mrs. Desir into the account of BWHL should be refunded by Mrs. Butcher's estate. In fact, he argues Mrs. Desir should be made to personally repay the said funds to Mrs. Alcide.

[90] Ms. Thomas in her submissions says that the evidence shows a payment from an account in the name of Mrs. Desir to the BWHL account at MD26. She says no monies were taken from the Estate and that money was in fact credited to it. I pause to note that MD26 is a document with transaction details on the BWHL account provided by Mrs. Desir with no supporting evidence. It does not show which account number the $2,500.00 allegedly paid by Mrs. Desir into the BWHL account came from and the name on that account. In the absence of any supporting evidence, how can Mrs. Desir be refunded this $2,500.00?

[91] In her affidavit filed on 28th June 2018. Mrs. Desir indicates that she closed A/c #508175000 on 24th May 2007, and she took the proceeds of $622,878.63 for her own use as per her then attorney's instructions. She then says she paid into the Estate account #514098006 the sum of $257,650.00 and into Bella Warehouse A/c #511060399 the sum of $2,500.00. I have already found that there is no evidence to show where this $2,500.00 came from. Mrs. Desir has also not shown where the $257,650.00 which she says she paid into the Estate account came from or why she had to transfer funds from her personal account to the Estate account, yet she claims that these monies should be refunded to her, and she has in fact refunded herself $124,600.00.

[92] Mrs. Desir says she paid the sum of $11,581.53 towards outstanding debts of IFL and this time she provides the personal account number from which she paid that amount, being A/c#930337046. I have already found at Issue 8 above that Mrs. Desir must repay this sum as the debts of IFL were separate company debts and not that of Mrs. Butcher's estate. Mrs. Desir says she also paid $400.00 in cash to

Cameron James for Mrs. Butcher's mother as she had been delivering an allowance from Mrs. Butcher to her mother during her lifetime. There is no evidence that after Mrs. Butcher's death Mrs. Desir was to have paid an allowance to Mrs. Butcher's mother. There is no basis for this expenditure and Mrs. Desir cannot claim to be refunded from the Estate for something which she took upon herself to continue doing.

[93] In the 28th June 2018 affidavit, Mrs. Desir says that the total amounts paid by her to the Estate or on behalf of the Estate is $269,631.53. However, when I add $260,150.00, $11,581.00 and the figures appearing in Exhibit MD45 of $4,414.00 and $400.00, it does not add up to $269,631.53. In any event, I find that Mrs. Desir has not shown any basis for repayment of any of the amounts of money which she claims she paid personally to or on behalf of Mrs. Butcher's estate. In giving an account, it is not just about saying what was done with the money, but the basis and documentary evidence must be provided, and that burden is on the person giving the account.

[94] Having made the foregoing findings, it stands to reason that Mrs. Desir ought not to haverefunded herself any money from Mrs. Butcher's Estate. As indicated by Mrs. Desir in her paragraph 48 of the 28th June 2018 affidavit, with the Privy Council order of 26th February 2018, the amount of $622,878.63 from A/c#508175000 is to form part of the Estate. It therefore means that <u>Mrs. Desir is required to pay to the Estate of Mrs. Butcher the full sum of $622,878.63.</u>

Issue 10-Given that it has been suggested that CWL had expenses of $503,797.00 for electricity, whether the tenants all paid for electricity separately or whether the electricity expenses were paid by CWL with the tenants being respectively billed by CWL thereafter?
Issue 11-Whether the electricity expense of $503,797.00 is to be repaid by Mrs. Desir?

[95] Mrs. Alcide notes in respect of Mrs. Desir's Exhibit MD36 that it shows expenses of $503,797.00 for electricity. She states however that CWL should not have incurredany electricity charges because the electricity charges were payable by

the tenants. Accordingly, Mrs. Desir's suggestion that CWL itself paid electricity of $503,797.00 is misleading and the account fails to properly allocate the expenses for electricity as expenses of the tenants. This sum should therefore be returned to Mrs. Butcher's Estate and same has been omitted as an amount due to her Estate.

[96] In response, Mrs. Desir states that initially IFL operated on the Property which was outfitted for electricity for several walk-in freezers and there was no meter panel to breakdown the cost per freezer and per individual warehouse. It was unnecessary to separate the electricity as IFL was Mr. Butcher's business. After Mr. Butcher's death and after IFL closed down, Mrs. Butcher decided to rent the parts of the warehouse from which IFL operated together with the freezers to different tenants. With a single meter, it was difficult to determine how much electricity to charge each tenant.

[97] Initially the rental charged to each was higher taking into account that electricity was included. During that period the electricity bill averaged around $20,000.00 monthly. Mrs. Desir says she realized that most of the rental income went into paying the electricity so rental income was much lower than expected. Mrs. Desir says when she started assisting Mrs. Butcher with the business, she advised her that the business should not pay for electricity for tenants. Mrs. Butcher therefore made an investment into a meter panel, after which the tenants were charged separate amounts for rent and received individual bills for their electricity usage through the meter panel. CWL, however, remained liable for the whole bill since LUCELEC recognized the owner of the Property. The implementation of this new system took some time as it required heavy investment. The rent during the time where there was only one meter included the electricity amounts during 2007 to mid 2008. The amounts for the meter panel and also upgrading to a 3 phase system are all included in the electricity expenses for 2007 and 2008. Mrs. Desir says immediately after she completed implementing the 3 phase system, the electricity bill went down and small amounts represented electricity only for the

common areas. She says the invoices are outlined in CWL's bank statements as shown in Exhibit MD 76 and in the summary of financials in exhibit MD 37 (b) ref# 29. She also notes that there were monthly electricity bills for the surrounding lights for the building which is the responsibility of the landlord and had to be paid monthly even after the meter panel was installed. She sets out the charges to CWL over the period 2007 – 2018:

Year	Electricity Expense
2018	$47,556 (which includes the amount from the tenant who left the bill unpaid)
2017	$8,658
2016	$8,768
2015	$6,624
2014	$9,645
2013	$9,647
2012	$12,877
2011	$44,997
2010	$26,355
2009	$9,264
2008	$183,616
2007	$145,435

[98] In cross examination, it was put to Mrs. Desir, given that she said that tenants were billed directly for electricity, how could the electricity consumption be so high. She stated that every document is there to show what was spent, so there is nothing to hide. She could not recall when tenants started paying their own electricity.

[99] In cross examination, Mrs. Alcide admitted that she was not, at any time prior to the warehouse being vested in her, involved in its management. She acknowledged that the information she received from Mrs. Desir was that the tenants were billed individually however she could not recall when that billing

started. She acknowledged that a building would incur electricity costs generally such as external lighting of common areas and that sort of thing. She also acknowledged that a landlord would be expected to provide infrastructure for electricity. She insisted however that the issue is with how much was expended. When asked if she had any evidence that electricity expenses should not come to $503,000.00, her response was that was a lot of lighting left on to amount to half a million dollars just for electricity.Nonetheless, she insisted that she was not speculating about that and that she did not see any individual bills for each tenant indicating that they had paid any particular amounts for electricity for each month that would amount $503,797.00. Further, she says she was not aware that between 2006 and 2007 some of the tenants were renting the property inclusive of electricity.

Analysis and Conclusion

[100] Whilst Mrs. Alcide has questioned the electricity consumption, she has not provided any evidence to counter or challenge Mrs. Desir's evidence. She has not sought to challenge any of the documents presented by Mrs. Desir in support the electricity charges and expenses. Mrs. Alcide's objections to the electricity expenses are at best speculative. I accept Mrs. Desir's evidence that given the nature of some of the businesses and their consumption of electricity it made sense to have the tenants pay for electricity individually. This would have meant having to install separate meters for every tenant. The evidence does show that the electricity cost incurred by CWL decreased over the period. Mrs. Desir's account of the electricity charges is very plausible and in the absence of any contrary evidence, I make no adverse findings and I find that <u>Mrs. Desir does not have to repay this amount as Mrs. Alcide has submitted.</u>

Issue 12-Whether Mrs. Desir is to return to the Estate the management fee of $5000.00 per month amounting to $660,000.00 and the director's fees of $33,000.00?

[101] In relation to the sum of $660,000.00, Mrs. Desir's evidence is that it represents management fees payable to her as manager of CWL's business and which sum

was being paid before Mrs. Butcher's death. She says it is remuneration for her management services as well as to cover office expenses in the sum of $5,000.00 monthly. Mrs. Alcide objects to this sum. She says that this sum is directly attributable to and consequent upon Mrs. Desir's misdeeds concerning Mrs. Butcher's property, which she caused to be transferred to CWL. In particular, this sum was derived from the rental income generated from the Property. Accordingly, this sum is to be returned to the Estate in full so as not to permit Mrs. Desir to profit from her wrongdoing, impropriety and unlawful conduct. Thus, this amount totaling $660,000.00 has been omitted as due to the Estate.

[102] Mrs. Desir's response is that she managed the rental business from about 2006 and has always been paid for her services. When she started assisting Mrs.Butcher she was receiving $3,000.00 which was increased to $5,000.00 monthly. She says she is entitled to receive management fees for her time and labour spent managing the Property over the years. She used her own resources such as vehicle, telephone, computers and printers. She says she also supervised works being done, received pressure from tenants to resolve matters, and dealt with insurance. She says she undertook full management of the Property using her business knowledge and networking to ensure the Property had tenants without the involvement of a real estate agent. She says she is rightfully entitled to compensation as she cannot and did not work for Mrs. Alcide for free.

[103] In support, Mrs. Desir compares the valuation of the Property of 3rd July 2018 with a previous valuationcommissioned by Mrs. Alcideon 12th December 2008 and concludes that the buildings and general area of the Property have been improved significantly showing an appreciated value of $6,256,906 which is over 195.5% of the initial value. She achieved such a vast difference in value through hard work. She says she maintained a management fee of $5,000.00 monthly notwithstanding inflation and other increased responsibilities.

[104] Mrs. Desir also claims that she is owed Director's Fees for the period April 2007 to April 2018 in the sum of $33,000.00 at the rate of $250.00 monthly. According to her, $15,000.00 is due to Felix Chitolie and $18,000.00 is due to Vern Gill, the other two directors. In response, Mrs. Alcide states that Mrs. Desir is not entitled to Director's Fees as these fees came into her hands as a result of her dealings in Mrs. Butcher's Property and so these funds should be returned to the Estate. Mrs. Desir's response was that she appointed Mr. Chitolie, Mrs. Butcher's long-standing accountant and Mr. Gill, their long-standing attorney-at-law, to act as directors as a matter of good practice and governance. The directors requested a fee of $250.00 monthly which they were entitled to do, and which has been paid, save the outstanding amounts, which were accounted for in the company's financials. According to her, the amount charged is the minimum fee payable.

Analysis and Conclusion

[105] The main thrust of Ms. Thomas' submissions on this issue is that 'if a person works, they must be paid unless they undertook to provide the services for free and that there is nothing in the evidence which shows that Mrs. Desir agreed to work for free'. Ms. Thomas submits that CWL existed, and expenses were borne by CWL for the running of the warehouse rental business including directors and management fees. She further submits that had Mrs. Desir not been a director, or not managed the business, there would have been an expense for these items as someone would necessarily have had to manage the warehouses. She says that Mrs. Desir duties as manager as set out in her affidavit included her own labour, travel expense, telephone expense, office supplies expense, stationery expense and office rental expense.

[106] Ms. Thomas contends that in light of Mrs. Desir's management of the Estate, the law deemed her a trustee. Counsel refers to the case of **Re Jarvis (Deceased); Edge v Jarvis**,[10] where the court held that a trustee would otherwise have been liable to account for the profits of a business as accrued to her, but this would be

[10][1958] 2 All ER 336.

subject to all just allowances for her time, energy and skill, for the assets that she had contributed etc. The case did however indicate that the form of inquiry into the trustee's account must vary according to circumstances and this I find very instructive.

[107] Ms. Thomas further submits that the directors' fees were also a necessary expense of running the warehouse rental business under CWL. It was as a result of Mrs. Desir's skills as director and her management aptitude that led to the sustained increase in the value of the buildingsfrom 2008 to 2018 shown by the value increase from $5,980,560.00 in 2008 to $11,687,500.00 in 2018. The sums claimed both as management fees and director's fees are a just allowance.

[108] Mr. Modeste on the other hand contends that it is clear that Mrs. Desir exerted undue influence over Mrs. Butcher to place herself in a position of power and control and by virtue of such undue influence, she was in a position to collect a monthly sum of $5,000.00 monthly as a management fee until the appointment of Mrs. Andrea St. Rose in October 2018 and who was now responsible for collecting the rents from the Property. Counsel's position is as the $5,000.00 is an amount attributable to her dealings with the Property having transferred same to CWL in 2007 and that this monthly sum was derived from rental income of the said Property, the full amount collected by Mrs. Desir of $660,000.00 as management fees ought to be repaid by her. Otherwise, he says Mrs. Desir would stand to profit from the exercise of her undue influence.

[109] Mr. Modeste argues that the issue in this regard is not whether Mrs. Desir managed the Property or managed it prudently, but whether she should have the benefit of the management fee which is a direct result of her conduct and is money which would come into her hands as a result of her dealing with the Property of Mrs. Butcher. It is counsel's submission that Mrs. Desir should not be permitted to retain the monies irrespective of whether or not she managed anything.

[110] In relation to the director's fees which Mrs. Desir says are owed to her, Mr. Modeste submits that similarly to the management fees, these fees would have been generated from the rental of the Property (the warehouses) owned by Mrs. Butcher before it fell into the hands of CWL. Mrs. Desir should not be permitted to benefit from her undue influence and be paid $33,000.00 as director's fees.

Analysis and Conclusion

[111] It is clear from the decisions of the High Court, Court of Appeal and the Privy Council expressed in various ways that Mrs. Desir formed CWL for the sole purpose of transferring Mrs. Butcher's single largest asset to it That Property comprised several warehouses which generated monthly rental income over the years. Mrs. Desir became the majority shareholder in CWL and therefore the transfer of the Property to that entity to be managed by CWL was of significant benefit to Mrs. Desir.

[112] In the judgment of Georges J dated 22nd August 2011, the findings were clearly stated. The court stated that the commercial entity/enterprise which was 'sold' at such a gross undervalue to Commercial Warehouses Limited (CWL) of which Mrs. Desir was and remains the majority shareholder was in fact the largest revenue earner of Mrs. Butcher's estate.[11] The judge went on to observe that the only person who stood to benefit from that monstrous transaction was Mrs. Desir, the majority shareholder in CWL and its Managing Director and Controller.[12] The transaction of the 'sale' of the Property was referred to as an unconscionable transaction. At paragraph 103 of the judgment, the judge found that actual undue influence was established on the evidence that demonstrated that Mrs. Desir by her conduct acted unfairly and improperly, used coercion on the mind of Mrs. Butcher, overreached, cheated and gained for herself in dubious circumstances personal advantage which resulted in her enriching herself in short order with the fruits of Mrs. Butcher's hard-earned wealth.

[11] Paragraph 50 of the judgment.
[12] Paragraph 52 of the judgment.

[113] The High Court ordered that 1st and 2nd defendants render an account of their dealings with the bank accounts and other property of Mrs. Butcher and of the companies under the control of Mrs. Butcher and that the defendants also render an account of income and funds from the same which have come into their hands. These are findings which were not disturbed by the Court of Appeal or the Privy Council. In its judgment dated 21st May 2015, the Privy Council said that 'it seems clear that CWL was formed and the Deed of Sale executed in anticipation of Mrs. Butcher's death which because of the will, would make Mrs. Desir the controlling shareholder of CWL.' Based on its findings, the Privy Council would have by its judgment dated 26th February 2018, ordered that Mrs. Desir as controlling shareholder of CWL and as executrix of the estate of Mrs. Butcher, cause CWL to convey to the estate of Mrs. Butcher its entire interest unencumbered, in the property known as Massade, Gros Islet 1257B 6 against contemporaneous payment by the said estate to the said company of EC$644,000.00.

[114] It is clear that the Courts took a particular view of the actions taken by Mrs. Desir especially as relates to the transfer of the Property to CWL, a company which was formed a mere three (3) months before Mrs. Butcher died. Whilst the Court did not give any specific order with respect to CWL as it was not a party to the matter, it was clear that CWL was formed by Mrs. Desir for the sole purpose of the 'sale' of the Property to it. The Property transferred is a revenue generating asset and this is the very asset which would have provided the revenue for CWL. This is the very revenue from which Mrs. Desir would have to be paid the management and director's fees. I cannot accept that the Courts at various levels could have said clearly that Mrs. Desir exercised undue influence over Mrs. Butcher and transferred the Property to CWL and not be concerned that Mrs. Desir would have sought to pay herself as Manager and as Director. The Privy Council has ordered that the Property be transferred back to Mrs. Butcher's estate and if that is the case, it cannot be that Mrs. Desir can be permitted to benefit from the revenue which the Property would have generated. That would simply not be right in my view.

[115] This is not about whether Mrs. Desir did the work or not, which is what Ms. Thomas has put forward. This has everything to do with the propriety of allowing Mrs. Desir to benefit personally from actions which have clearly been frowned upon by the Courts at all levels. Whilst the Property was transferred back to Mrs. Butcher's estate, the revenue which it generated over the years should have been that of the Estate but was instead channeled into CWL and ultimately into Mrs. Desir's hands.

[116] <u>I therefore find that Mrs. Desir is not entitled to be paid any director's fees in the sum of $33,000.00. She is also not entitled to be paid any sums as management fees and is therefore to repay to the estate of Mrs. Butcher the management fees for the period 2007 to 2018 in the sum of $660,000.00 or any part thereof which has already been paid to her.</u>

Issue 13-Whether payments caused to be made by Mrs. Desir for maintenance works upon CWL to Mr. Bretney are justified or ought to be repaid by her to Mrs. Butcher's Estate?

[117] Mrs. Alcide took objection to invoices presented by and payments made to one Mr. Jn Baptiste Bretney for repair works to the Cap Estate house, which she says are not justified and are inconsistent. To summarise, the complaints relate to the fact that some of the invoices presented by Mr. Bretney are handwritten, and others are typed. She states that contractors do not issue handwritten invoices and observes more particularly that the later invoices are handwritten and the earlier ones are typed. She questions why a contractor would go from presenting typed invoices to handwritten invoices.

[118] Additionally, she notes two invoices which she says appear to be notes from a diary which is peculiar for a legitimate contractor. She also states her observation that the signature of Mr. Bretney on some of the invoices is not the same as the signature on others, as some are written in block letters and others in cursive. She concludes that they are clearly not written by the same person. She notes that

some are unsigned. There are particular invoices which she highlights, for example, she notes that there is a handwritten invoice dated 23rd June 2008 for the amount of $5,500.00 issued by Mr. Bretney for renovation works and a cheque issued to Mr. Bretney by Mrs. Desir for the same amount of $5,500.00 but dated 20th June 2008.[13] She notes the cheque is issued before the purported invoice and the corresponding work appears to be similar. Further, there is a cheque dated 22nd May 2008 issued by Mrs. Desir to him for the amount of $9,690.00 for work on the Cap Estate house and an undated handwritten invoice by Mr. Bretney to Mrs. Desir in the same sum of $9,690.00.[14] She notes that the total sum paid to Mr. Bretney is $527,884.00 and states that Mrs. Desir must return all monies paid to him.

[119] In cross examination, Mrs. Alcide admitted that it would not surprise her that $36,000.00 had been spent on flooring in 2019 and subsequently in November 2019 that $43,000.00 was paid for electrical work and in January 2020 a roof had been redone costing approximately $69,000.00. She did not disagree that the total for those three items alone over a period of eleven (11) months would amount to $148,000.00 although she said she would have to check the amounts to be certain. She offered as an explanation that tenants had been complaining about the work to be done and that from her estimation this was because much needed work had not been done for many years. She admitted that the buildings had been there for approximately twenty (20) years and that she is aware of a valuation done in 2018 which reported the buildings to be in relatively good condition. She also admitted she had not inspected the buildings and had not been inside them but merely observed them from outside. She based her estimation that work had not been done for many years on a list of work to be done. She agreed nonetheless that the buildings had increased in value over the period 2008 to 2018.

[13]See page 150 and page 157 (cheque #200037) of Vol. 2.
[14]See page 16 (cheque #200031) and page 29 of Vol. 3

[120] Mrs. Desir responds to Mrs. Alcide's assertions about the cost of repairs and maintenance by identifying the cheque which corresponds to each of the invoices with which Mrs. Alcide takes issue. She further states that work was done by Mr. Bretney in respect of each invoice issued and payment made. She also indicates that other contractors who worked on the house during the period provided handwritten invoices and notes that the two different signatures were provided in respect of different documents approximately 9 years apart. She also notes that while estimates may be discussed prior to undertaking a job, during the course of carrying out the job, depending on the level of difficulty, the actual labor and material cost and, therefore, the final cost may change. In cross examination, she disagreed that over the period a considerable sum was paid to Mr. Bretney. She responded that in light of the Property, the sum was reasonable. She indicated that sometimes, if there was an emergency, Mr. Bretney would not have time to prepare an invoice and he would do it after. She indicated that he did not always sign the invoice, if other persons prepared the invoice for him. She disagreed that a legitimate contractor would not have handwritten invoices if he also had typed invoices. She explained that Mr. Bretney does not have a computer and sometimes he would write the invoices.

[121] Ms. Susanna Gurley, Managing Director of Tenderoni Foods,Mr. Christopher Tohme, Managing Director of Fancy Foods, Mrs. Louise Clovis-Weeks, the accountant at Sea Island Cotton Shop ("Sea Island"), all tenants at the warehouses on the Property gave evidence that they knew Mr. Bretney as the maintenance man for the warehouses during their various periods of occupation which in some cases like Sea Island spanned over sixteen (16) years. They all attested to seeing Mr. Bretney frequently up until 2018. All of the tenants gave several examples of the work undertaken by Mr. Bretney at their various warehouses. They all admitted that they had not seen a listing or costing of maintenance work done by Mr. Bretney over the years and that cost would depend on the work to be done and they were not in a position to weigh in on reasonableness of the overall figure. Despite this, Mrs. Gurley insisted that based

on the amount she had spent on renovations on other buildings to rent it; she was in a position to make an assessment as to whether the total cost spent on maintenance looked reasonable.

[122] Mr. Adrian Dolcy also gave evidence in this regard. He is a Structural Engineer and Property Valuer. He says he inspected the Property and the buildings erected thereon on 3rd July 2018 and prepared a valuation report of even date. He found three buildings in good condition and one in bad condition, all about 25 years old. He has seen that the sum of $998,771.00 was expended on repairs and maintenance and in his estimation this amount is a reasonable sum given the condition in which he found the buildings. He says that this expenditure is low for these types of buildings which normally have an annual depreciation of 1% to 2% and an annual expenditure of 15% to 25% of the construction value for maintaining them in good condition, depending on the level of maintenance carried out. In cross examination, Mr. Dolcy admitted that he has not seen a listing of maintenance work done on the Property by any contractor nor does he know the hourly rate of any contractor who worked on the buildings, although he says he is aware of rates generally which are fairly standard in Saint Lucia. He agreed that he was instructed to prepare a valuation by both parties in the matter and acknowledges his statement in his report states that he is neutral in the exercise of preparing the report. He however stated that he undertook a separate exercise to satisfy himself that the sum of approximately $998,000.00 was reasonable which was to look at the maintenance and upgrading done and what a likely maintenance cost per month would be over 11 years and he arrived at a figure in excess of the amount. He did not agree that he was bolstering the position of one of the parties because he did his own calculations and therefore his statement was neutral and independent. He disagreed that having not seen a listing of repairs done he is not in a position to say the sum expended was reasonable.

[123] Mr. Bretney himself gave evidence. He says he is a contractor by trade. He was introduced to Mrs. Butcher by Mrs. Desir, his sister-in-law in 2006. After the death

of Mr. Butcher, he was hired by Mrs.Butcher to make repairs and renovations to three of the warehouses. He says he continued to do repairs after Mrs. Butcher'sdeath when Mrs. Desir took over as landlord.

[124] Mr. Bretney says he worked at the warehouses for over 12 years and also employed workmen. The number of workmen hired depended on the nature and extent of the work. He says all work done required a level of mobilization and transportation. He was also responsible for purchasing all supplies necessary for each job. He says not only was he required to carry out routine maintenance, but he always made himself available to tenants. There were occasions where tenants would call him directly for emergency repairs and he would have to find Mrs. Desir to authorize the work. There were occasions when there was not time to give a pre-estimate before the work was done but he went ahead and did the work anyway. He was also present when large works were being carried out by other contractors. Mr. Bretney says he now understands that the total paid to him over 11 years in the sum of $527,864.00, averaging about $47,987.63 annually and $3,998.97 monthly, inclusive of materials, is being challenged as unreasonable and maintains that the sum paid was reasonable.

[125] In cross examination, Mr. Bretney agreed that the signatures are not all the same on all invoices and says that sometimes he signed one way and at other times he signed differently. He insists that though the signatures may differ, he signed all of them. He also said that when he started working at the Property, he would write his own quotations but that lately he started sending the handwritten invoice to a typing place, to have them typed to make them more official. In respect of the cheque that predates the invoice, he explained that if Mrs. Desir was travelling, she would pay him upfront and then he would do the work.

[126] In relation to the quotation that is unsigned he stated that when the workload is heavy, he would go to a Quantity Surveyor ("QS") and that quotation in question was one the QS prepared for him. Sometimes Mr. Bretney says he would write it

just to get the money to do the work. When asked how an estimate could be given after works were done, he said sometimes he knew what needed to be done to resolve an issue and what the charge would be and that sometimes he would be paid when he wrote the quote and handed it to Mrs. Desir. If it costed more, he would go back to Mrs. Desir and explain where he spent more. He insisted and was adamant that he was never paid a cent for work that he did not do and that he worked hard for and earned every cent paid to him.

Analysis and Conclusion

[127] Counsel for the claimant, Mr. Modeste in written submissions spent a lot of time pointing out what he says are the discrepancies in the handwriting of Mr. Bretney on various invoices. He contends that it is unlikely that any legitimate contractor would go from preparing typed invoices to preparing handwritten and unsigned invoices. He concludes therefore that Mr. Bretney cannot be considered a legitimate contractor and all monies paid to him by Mrs. Desir from the income of CWL ought to be returned to Mrs. Alcide.

[128] Counsel for the defendants, Ms. Thomas countered that in view of the specific evidence from Mr. Bretney in chief, Mr. Dolcy, the tenants of the warehouses and the cross examination of Mr. Bretney all of which was not controverted in any way, the sum paid to Mr. Bretney was reasonable.

[129] From the evidence of the tenants, it was clear that Mr. Bretney did do maintenance work on the warehouses; they interacted with him for many years and knew him as the person who did the maintenance. Whilst they were not able to speak to the reasonableness of the amounts charged and in some cases, did not know what these charges were, I believe their evidence supports the fact that Mr. Bretney did do work for which he ought to have been paid.

[130] In addition, the amount paid to Mr. Bretney was over a twelve (12) year period and would average about $3,700.00 per month which cannot be unreasonable given the nature of some of the maintenance works undertaken. I note the submissions

of the claimant as regards the manner of presentation of invoices by Mr. Bretney, however, the claimant has not shown that the signatures on the various documents are not that of Mr. Bretney. The claimant has made very bald statements in her evidence and has presented no evidence to support her allegations in the face of Mr. Bretney's very clear evidence unchallenged in cross examination, that all of the signatures were his. I found Mr. Bretney to be a truthful witness and I believe his evidence when he says that he would sometimes write out his invoice and sometimes get it typewritten. The fact that he vacillated between the two methods of presenting his invoices or that he sometimes produced the invoices after he had received the cheques for payment does not in my view prove that Mr. Bretney did not do the work. Mr. Bretney appears to be the typical self-employed contractor/builder who does not have a formal company and operates in a very informal way. He is one of many such persons operating in Saint Lucia and handwritten invoices are not uncommon in such cases.

[131] Lastly, Mr. Dolcy's evidence is that he thought that the expenditure of the total sum of $998,771.00 spent on maintenance over an almost eleven (11) year period, given the condition in which he found the buildings, was low. Mr. Modeste sought to suggest that Mr. Dolcy by opining on the reasonableness of the maintenance figures, was essentially bolstering the position of Mrs. Desir when he had been appointed by both parties to provide a valuation of the property. Mr. Dolcy responded that he did not favour any one party and that was not his intention. He made the point that if his figure had been less than what was expended he would have indicated this in his report. He did an analysis and found that the maintenance figure was reasonable. Mr. Modeste suggested that Mr. Dolcy was not in a position to say that the sum expended was reasonable having not seen the repairs done. Mr. Dolcy disagreed.

[132] Mr. Dolcy was an expert witness and as such his evidence had to be given without any regard to the parties in the matter. I therefore do not agree with Mr. Modestethat the fact that Mr. Dolcy conducted an analysis of the maintenance

figure means that he would favour Mrs. Desir. It is common that parties appoint expert witnesses to assist with their cases, but it is also the case that an expert owes a duty to the Court to be fair and to state the facts as they are even if it does not favour the party who engaged them.

[133] Having assessed all the evidence, I find that Mrs. Alcide has failed to show that Mr. Bretney did not undertake the work for which he was paid or that the amount paid to him over the span of almost twelve years was unreasonable. <u>I therefore decline to order Mrs. Desir to repay the sum of $527,884.00.</u>

Issue 15-Whether Mrs. Desir ought to have incurred all legal expenses privately rather than causing such payments to be made by Mrs. Butcher' Estate?
Issue 16-Whether Mrs. Desir is to bear the full cost of the Vesting Deed for the Property?

Fees for Vesting Deed

[134] Mrs. Alcide refers to the sum of $46,661.17 paid by the Estate to the firm of Deterville Thomas & Co. for the execution of a Vesting Deed and for the vesting of the Property in the names of Mrs. Alcide and Mrs. Desirand says she did not consent to the engagement of the firm Deterville Thomas & Co. She says she could have had attorneys execute a Vesting Deed on her behalf without any cost to the Estate and Mrs. Desir should pay this sum back to the Estate.

[135] Mrs. Desir's response is that she is the Executrix of the Estate and had a responsibility to transfer the Property from the Estate to the beneficiaries. The Property was transferred by attorneys Deterville Thomas & Co who gave a generous discount of a 50% reduction in total fees to facilitate the change. Mrs. Desir says her understanding is that she has a duty to transfer the Property, but it is Mrs. Alcide who must pay for it. She says that while Mrs. Alcide required that the Property be vested, at no time did she offer to pay for the vesting assent neither did she indicate that her lawyers would be prepared to undertake the transaction. Further, Mrs. Desir says she has handled all matters relating to the vesting of

properties including the probate, vesting of the house at Cap Estate and other properties, bearing all expenses from the Estate's account. The transactions relating to the Estate were being handled previously by attorney Leandra Verneuil but Mrs. Alcide complained that Mrs. Verneuil should no longer be involved in the transaction. Once she became aware of the Bar Association Tariff of Fees for a Vesting Deed, she inquired of the reasonableness of the fees and was satisfied that Deterville, Thomas & Co were entitled to be paid for their work and so she paid them.

[136] In cross examination, Mrs. Alcide agreed that it was Mrs. Desir's responsibility to see to the vesting of the properties and to pay for it. She also acknowledged that the vesting would attract a cost and that payment would come from the Estate's funds, but she maintains that the cost expended was too high and that her attorney was not consulted on the matter.

[137] In cross examination, Mrs. Desir agreed that she did not consult Mrs. Alcide with respect to the cost of the transfer and stated that she did not think it was necessary to do so. She disagreed that she should bear the cost of the transfer of the Property back to the Estate. She disagreed that if she did not bear that expense, she would be profiting from her wrongdoing.

Analysis and Conclusion

[138] Mr. Modeste submits that Mrs. Desir ought to have used her own funds rather than taken funds from the Estate to meet this expense without Mrs. Alcide's permission. He therefore submits that Mrs. Desir ought to bear the full cost of the Vesting Deed for the Property in the sum of $46,661.17.

[139] As Ms. Thomas points out in submissions, it is the responsibility of Mrs. Desir to vest the property which forms part of Mrs. Butcher's estate. Given that Mrs. Desir was ordered by the Privy Council to cause CWL to transfer the Property to the Estate of Mrs. Butcher, she was obligated once the transfer was completed to vest

the Property in the beneficiaries named in Mrs. Butcher's will, being herself and Mrs. Alcide. As stated in Halsbury's Laws of England:[15]

> "The general costs of administering the estate are testamentary expenses, for this term is not confined to expenses connected with the will,… The estate must therefore bear the costs of obtaining the grant, collecting and preserving the assets, discharging the debts and distributing the balance…."

[140] Ms. Thomas submits that the claimant has not provided any legal basis for any duty of an executor to consult with a beneficiary or notify him/her of his/her legacy. Article 597 of the **Civil Code** of Saint Lucia sets out the process relative to assenting to the vesting of immovable property and nowhere in there does it speak to consulting with the beneficiary before embarking on the vesting of property. In fact, part of the process requires the person in whose favour the conveyance or assent is made to cause the vesting assent to be registered at the Registry of Deeds and Mortgages within two weeks after it has been made in default of which he/she is liable to a penalty for every month it remains unregistered. Mrs. Desir therefore did nothing wrong in getting the vesting deed executed.

[141] Mrs. Desir did what she was required to do. There was no duty to obtain the consent of or to consult with Mrs. Alcide as to which attorney would be used. Most importantly, Mrs. Alcide's position that the legal fees charged for the vesting assent was too high has not been substantiated in any way shape or form. I find no merit in her complaint and <u>Mrs. Desir is not required to repay the sums spent as legal fees for the vesting assent.</u>

Legal fees-Legal proceedings

[142] Additionally, Mrs. Alcide states that Mrs. Desir ought to have incurred all legal expenses privately rather than causing such payments to be made by the Estate as it is specifically her unlawful deeds which led to the filing of the instant claim. The total legal fees expended by her is the sum of $621,479.53.

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[15]Vol. 103, para 1017.

[143] Mrs. Desir responds that all legal expenses were ordered to be paid out of the Estate by Madame Justice Sandra Mason. From her recollection Mrs. Alcide had sought and obtained an injunction against her and against the Estate and was successful. The judge discharged the injunction on the application of her attorney. On the day of the discharge the issue of costs arose, and the court ordered that all costs are to be paid from the Estate. Mrs. Alcide's lawyer and her local representative were both present in court on that day and would have a record. Mrs. Desir says she has not been able to retrieve the judge's notes or a copy of the order to submit to the Court. Additionally, she always understood that the Estate had been sued and had to pay legal fees in relation to the suit.

[144] In cross examination, Mrs. Desir agreed that legal fees were paid in the sum of $621,479.53. It was put to her that it was she who exercised undue influence and not the Estate and so these legal expenses ought to be paid by her and not the Estate. She responded that when the case started, the judge said the costs in relation to the injunction should come from the Estate and from then on, all costs came from the Estate. It was put to her that the Estate ought not to be made to suffer for her misdeeds and the sums ought to be paid by her so that she does not profit from her wrongdoing. She responded that is her understanding that the Estate was also sued and she was representing not only herself but the Estate. It was pointed out to her that she was sued in her capacity as Executrix because of her improper conduct and not the Estate's. She responded that she would not admit that she did anything bad.

Analysis and Conclusion

[145] Mr. Modeste argues that given that it is Mrs. Desir's conduct which led to the filing of the instant claim, she should be made to bear the costs of the legal proceedings personally and not from the Estate funds. Payment of these expenses from Mrs. Butcher's estate would enable Mrs. Desir to have to meet no legal expense for her misdeeds.

[146] On the other hand, Ms. Thomas refers to Mrs. Desir's evidence that Mason J's order discharging the injunction also ordered that legal costs be paid from the Estate. Mrs. Desir indicated that her attempts to obtain this order have been futile and up to present has been unable to produce this Order. In the absence of this Order, this Court is in no position to agree that all legal costs should be borne by the Estate. The payment of legal costs from the Estate to my mind would depend on whether it is matters which properly fall as expenses of the Estate or whether they attach personally to the executor as personal representative of the Estate on account of his/her conduct.

[147] There are two parties to this claim, Mrs. Desir in her personal capacity and Mrs. Desir as executrix of the Estate of Mrs. Butcher and I am of the considered view that in the interests of justice and fairness, the legal fees in relation to this claim in the sum of $621,479.53 ought to be met equally by the two defendants. I therefore find that Mrs. Desir is to repay the Estate of Mrs. Butcher the sum of $310,739.77 being half of the legal expenses incurred.

Legal fees on transfer of Property from CWL to Mrs. Butcher's Estate

[148] Mrs. Alcide also notes that there are two invoices for the same transaction and it appears that legal fees for the transfer of the Property from CWL to the Estate of Mrs. Butcher were charged twice. Each invoice is dated 2nd March 2018 and the sum of $7,690.00 is charged in both invoices thus creating what appears to be a double charge for the legal fees. Mrs. Desir states that there was no double payment of legal fees as traced back to cheque # 410 for $9,735.10 and cheque # 413 for $27,970.00 with Vendor's Tax. She says it appears that the Deed was submitted to the Inland Revenue Department initially without payment of Vendor's Tax and stamp duty and she had to arrange to make the payment afterwards.

Analysis and Conclusion

[149] Having reviewed the invoices referred to by Mrs. Alcide which appear at page 378-380 of Vol. 6 all of which are dated 2nd March 2018, there is no merit to the

complaint which she makes. The invoice at page 378 is stated to be for Government stamp duty ($65.00) and fees ($1,815.00) totaling $1880.00 for a radiation; the invoice at page 379 is for (1) Government stamp duty ($25.00), registration ($40.00) and legal fees ($1,815.00) on a radiation totaling $1,880.00 and (2) Vendor's tax on a deed of transfer for $644,000.00 totaling $27,950.00; the invoice at page 380 is in relation to stamp duty ($12,880.00), copies and registration ($40.00) and legal fees ($7,690.00) totaling $20,610.00. I find no evidence of duplication of the fees charged in relation to the deed of transfer of the sum of $7,690.00.

Issue 17-Whether Mrs. Desir has failed to provide full bank statements for the following bank accounts held jointly with Mrs. Butcher: BOSL account number 508652000; RBTT account number 1002030633; BOSL account number 508175000, which had a balance of $622,878.63 which was transferred to Mrs. Desir's personal account?

BOSL account number 508652000 and RBTT account number 1002030633

[150] Mrs. Desir says the BOSL account was opened on 15th May 2006. The initial deposit was made by Mrs. Butcher from dividends she received from shares she owned in ECFHCL. I note from the bank statement provided at MD 12(a)[16]that the initial deposit was in the sum of $4,160.00. I also note that several deposits were subsequently made and as at 26th March 2007, the account balance stood at $19,112.10. Mrs. Desir says that the only withdrawal she made from this account prior to Mrs. Butcher's death was the sum of EC$1358.45 to purchase US$500.00 for Mrs. Butcher which she handed to her directly but she does not know what Mrs. Butcher used the money for. She however says that she recalls that Mrs. Butcher had asked that the money be given to Mrs. Alcide's daughter who was in Saint Lucia with Mrs. Alcide's husband in April 2007. She says she does not know whether the money was in fact given to Mrs. Alcide's daughter. The bank statement does show a withdrawal of EC$1,358.45. There is no evidence to suggest that the sum was not used for the purpose which Mrs. Desir says it was or that Mrs. Butcher could not have made such a request.

[16]Volume 1 of the Core Bundle.

[151] Mrs. Desir says subsequent to Mrs. Butcher's death, she made two withdrawals – one of $6,010.30 and the other of $11,917.73. Both were made on 22nd May 2007, which she says she transferred to Royal Bank of Trinidad and Tobago ("RBTT") chequing account #1002030633 and closed the BOSL Account #508652000. The withdrawal slips at MD12(c)[17] confirm this.

[152] I note that the statements provided for the RBTT account at MD13(a) to (g) show the respective deposits minus the cost of the bank drafts on 22nd May 2007. Mrs. Desir says the RBTT account was an operating account used to pay all Mrs. Butcher's living expenses and Mr. Butcher's outstanding debts. The RBTT account was a chequing account and she had started using it to cover outstanding cheques and some funeral expenses. She has not shown that the sums transferred were in fact used for Mrs. Butcher's expenses and provides no documentary evidence to support expenditure from this account.

[153] Mrs. Alcide contends that full bank statements for this account have been omitted and need to be disclosed. She says Mrs. Desir only exhibited statements for 2007 and 2018. There are no statements for 2008-2017 and theseought to be disclosed. Mrs. Alcide questions why the need to transfer the BOSL funds to the RBTT account to pay Mrs. Butcher's living expenses when the date of the transfer is over one month after Mrs. Butcher's death. Mrs. Desir's response is that bank statements were presented on 21st October 2011 and that her reference to funds being used for Mrs. Butcher's living expenses was to funds held in the RBTT account. Mrs. Desir says that she is unable to account for cheques written prior to Mrs. Butcher's death as she is unable to find Mrs. Butcher's documents at her residence after her death as it appears that the documents had been removed.

[154] Mrs. Desir counters stating that the full statements for the RBTT chequing account #1002030633 were submitted to Mrs. Alcide from the date the account was opened on 22nd November 2005 to 21st October 2011. She says she also

[17]Volume 1 of the Core Bundle.

presented the bank statements with transactions from 9th April 2007 in her Account. She reiterates that as cheques on this account represent cheques written six months prior to that date, she cannot account for all transactions processed, since Mrs. Butcher also wrote cheques and made withdrawals from her account herself. These cheques were mailed to Mrs. Butcher and not to her, as the account was Mrs. Butcher's primarily. Mrs. Desir also says that she wrote some cheques on Mrs. Butcher's instructions or countersigned cheques where the bank did not recognise Mrs. Butcher's signature and requested her to sign but she would confirm with Mrs. Butcher prior to countersigning. Mrs. Desir says the sum of $6,010.30 needed to be transferred from the savings to the chequing account to avoid the chequing account going into overdraft. After Mrs. Butcher's death, Mrs. Desir says she wrote cheques but cannot recall what they were for.

[155] Further, payments made for funeral expenses and some living expenses were presented as MD 22 (1) ref # 16 totaling $87,503.95. Since July 2007, no cheques were written on this account, hence, the balance has not changed except for bank charges. As a result, she did not see it necessary to send repeated statements for each month with similar balances as they had already been disclosed. The full bank statement was presented again as MD14 (a) to (b) (should be 13(a) to (b)) reflecting the balances on the account during the period 22nd November 2005 when it was opened to 24th May 2007 when it was closed.

[156] Mrs. Alcide states that it is not the case, as alleged by Mrs. Desir, that RBTT was not able to give her copies of the cheques written after Mrs. Butcher's death from this account. According to Mrs. Alcide, in the letter contained in Exhibit MD17, the bank stated that the processed cheques were returned to Mrs. Desir and that it requires two weeks to provide copies of the credits. She says the letter is dated 20th October 2011 and so the corresponding credits ought to be available by now. Additionally, various cheques are clearly in the possession of Mrs. Desir to whom they would have been forwarded by the bank. Accordingly, these cheques have been omitted and ought to be made available by her. Further, whilst Mrs. Desir

has disclosed that this account has a current balance of $1,268.87, she has omitted the opening balance as well as the balance at the date of Mrs. Butcher's death, and this information must also be disclosed.

[157] Mrs. Desir counters that the letter from the Bank did not state that cheques were returned to her, Marguerite Desir, rather only that the cheques had been returned. Mrs. Desir states that she did not receive Mrs. Butcher's mail and did not retrieve documents from her house after she died. She therefore does not have access to the cheques. She reiterates that the persons who were in Mrs. Butcher's home for a considerable time after Mrs. Butcher's death were Mrs. Alcide's family. Mrs. Desir says the statement for the account submitted on 21st October 2011 reflects the opening balance of $95,246.85 on 22nd November 2005. This amount was carried over from a previous account that Mrs. Butcher held with Mr. Butcher and from which, as she understands, they paid their personal expenses. That account was closed by Mrs. Butcher after Mr. Butcher's death and deposited into the joint account with her. She indicates that the statement shows a balance of $30,127.61 on 13th April 2007 which was the date Mrs. Butcher passed away. That balance, however, cannot be a true reflection of the reconciled balance for all outstanding cheques as cheques may take up to six months to be presented for payment. Again, she cannot speak to cheques Mrs. Butcher wrote prior to her death as she did not control the funds. Whilst a joint holder of the account, she did not treat the account as hers until after Mrs. Butcher's death. As stated earlier, she did not have access to Mrs. Butcher's documents after she died. Although Mrs. Butcher was the one who controlled the account from when it was opened on 22nd November 2005, Mrs. Desir says she has provided all bank statements up to 21st October 2011.

Analysis and Conclusion

[158] Mrs. Desir has failed to properly account for the funds which existed in the BOSL account #508652000and was subsequently transferred to the RBTT account #1002030633. In the High Court judgment, Georges J stated at paragraph 68 that the bank balances standing in the joint names of the deceased and Mrs. Desir vested in the estate of Mrs. Butcher on her death and did not without more devolve

to Mrs. Desir. At paragraph 116 Georges J found that Mrs. Desir exerted undue influence to procure her name on the personal bank accounts or the accounts of companies in the name of or under the control of Mrs. Butcher at the BOSL, the RBTT Bank and the Bank of Nova Scotia. It therefore means that the proceeds in these accounts belong to the estate of Mrs. Butcher. These findings were not disturbed by the Court of Appeal or the Privy Council.

[159] Contrary to what Mrs. Alcide states, Mrs. Desir in her evidence says that the RBTT account 'was an operating account to pay all her living expenses and outstanding debts of Mr. Butcher.' She does not say that the transfer of the BOSL account monies into the RBTT account was to pay Mrs. Butcher's living expenses and Mr. Butcher's debt. I believe that is a misstatement of Mrs. Desir's evidence. What Mrs. Desir says is that the RBTT account was a chequing account and she started using it to cover any outstanding cheques and some funeral expenses.

[160] I also note Mrs. Desir's explanation that Mrs. Butcher wrote cheques prior to her death which had a six-month lifespan to be cashed and therefore she was unable to account for the expenses or amounts drawn on the RBTT account and these returned cheques had been taken by someone from Mrs. Butcher's house. I am at a loss to understand how the ailing Mrs. Butcher who could hardly write and had to get the assistance of a Notary to sign a Deed on her behalf in January 2007 wrote all of these cheques which I see cashed against the RBTT account quite curiously from 10th April 2007 (three days prior to her death) up to 8th October 2007. Mrs. Desir pointed the Court to Exhibit MD22 at reference #16 but I am not sure how this supports the payment of funeral expenses against the RBTT account as this refers to 'Grand Totals of Expenses for Summary of Estate A/c 514198006 and Bella A/c 511060399.

[161] It is very difficult to assess the information provided in relation to the RBTT account mainly because Mrs. Desir has not produced the cheque stubs or information on what the amounts cashed from 13th April 2007 onwards were for.

There were about twenty (20) cheques cashed from the date of Mrs. Butcher's death, 13th April 2007 to the end of April alone. Some of these were for significant amounts of money and although Mrs. Desir says she would have written some of the cheques post Mrs. Butcher's death she has failed to provide even an inkling of what these payments would have related to.

[162] Mrs. Alcide's contention that Mrs. Desir has access to the returned cheques from this account is not supported by the 20th October 2011 letter from RBTT Bank. All that letter says is that the cheques would have been forwarded with statements on a monthly basis.

[163] As at 13th April 2007, the balance in the account was $30,127.61. There was a large deposit of $50,000.00 and an almost equally large withdrawal of $20,000.00 both transactions taking place after Mrs. Butcher's death. Mrs. Desir has not accounted for any of these seemingly large deposit transactions after Mrs. Butcher passed.

[164] Given the obvious challenge in not being able to retrieve copies of the cheques written against the RBTT account, it becomes very difficult to assess the dealings with this account. The passage of time also makes this difficult. The absence of the bank statements for 2008 to 2017 to my mind has been explained and I think that explanation is plausible. It is clear from the evidence that as at5th August 2007, the balance in the RBTT account was $1,834.15. In October 2007, the balance was $1,556.37. As at 5th May 2018, the balance stood at $1,268.87 which balance belongs to the estate of Mrs. Butcher. It is clear that the balance in the account remained within the same range between October 2007 and May 2018. I therefore do not think it necessary to have Mrs. Desir provide the bank statements for 2008 to 2017 as requested by Mrs. Alcide.

BOSL account number 508175000, which had a balance of $622,878.63 which was transferred to Mrs. Desir's personal account

[165] In relation to the funds in this BOSL account number 508175000, this matter has been addressed above.

Issue 18-What sum, if any, is to be paid by Mrs. Desir to Mrs. Butcher's Estate?

[166] In light of the foregoing discussion and the conclusions arrived at I make the following orders:

1. Mrs. Desir as executrix of the estate of Mrs. Butcher shall pay to CWL the sum of $237,000.00 being the difference between the loan amount of $881,000.00 and purchase price of the Property in the sum of $644,000.00.
2. Mrs. Desir in her personal capacity shall pay CWL the sum of $375,066.00 being the amount of interest paid on the loan of $881,000.00.
3. The Estate of Mrs. Butcher shall pay Mrs. Desir the sum of $180,000.00 which represents an overpayment on the dividend amount paid to the estate by CWL.
4. Mrs. Desir shall file a statement from BOSL indicating dividends paid over the period of her tenure as executrix of Mrs. Butcher's Estate until the date of transfer of the shares into the names of the beneficiaries within 30 days of the date of this judgment.
5. Mrs. Desir having refunded herself for the debts which she paid for IFL, shall pay back the sum of $11,581.53 to the Estate of Mrs. Butcher. ($5,790.77 to be paid to Mrs. Alcide)
6. Mrs. Desir in her personal capacity shall pay to the Estate of Mrs. Butcher the full sum of $622,878.63. ($311,439.32 to be paid to Mrs. Alcide)
7. Mrs. Desir is not entitled to be paid any director's fees in the sum of $33,000.00 and is also not entitled to be paid any sums as management fees and she shall repay to the Estate of Mrs. Butcher the management fees for the period 2007 to 2018 in the sum of $660,000.00 or any part thereof which has

already been paid to her.(Mrs. Alcide is to paid half of any amount which is repaid, if any)

8. Mrs. Desir in her personal capacity shall repay the Estate of Mrs. Butcher the sum of $310,739.77 being half of the legal expenses incurred. (Mrs. Alcide is to be paid $155,369.88)

[167] In relation to the orders for payments to be made to the Estate of Mrs. Butcher, I note that these monies would fall into Mrs. Butcher's residuary estate. As per Mrs. Butcher's will which was not set aside or improbated, Mrs. Alcide and Mrs. Desir are equal universal legatees and devisees of all the rest remainder and reside of Mrs. Butcher's properties. This essentially means that Mrs. Desir and Mrs. Alcide would each be entitled to one-half of the monies ordered to be paid to the Estate. As Mrs. Desir would be entitled to half of the monies, she simply must pay Mrs. Alcide half of all sums ordered to be paid.

Costs

[168] The account in this matter was ordered by Georges J in the High Court and agreed by the Court of Appeal and Privy Council. The account presented by Mrs. Desir and the omissions and queries submitted by Mrs. Alcide were not all accepted and therefore I am of the view that the appropriate order as relates to costs in relation to the account is that each party shall bear their own costs.

[169] Mr. Modeste in his submissions addressed the question of costs. However, Ms. Thomas has not addressed the issue of costs. As a result, I will not go on to consider costs at this time on the claim. Georges J in his judgment at paragraph 119 ordered that counsel be heard on costs within 14 days and that written submissions be filed in 7 days. Given all that has transpired in this matter, I would therefore order that the parties comply with the order of Georges J and file submissions on costs.

[170] Finally, I must express my sincere apologies to counsel and the parties for the significant delay in delivery of this judgmentand thank them for their patience.

Kimberly Cenac-Phulgence
High Court Judge

By The Court

Registrar