

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2025/0022 (formerly GDAHCV2015/0298)

**IN THE MATTER OF THE ESTATES OF ESAU FLEARY AND MARY FLEARY,
DECEASED**

AND

**IN THE MATTER OF THE PARCEL OF LAND BEING A PORTION OF THE
FORMER BRITON ESTATE SITUATE AT PETIT CARENAGE IN THE ISLAND OF
CARRIACOU IN THE STATE OF GRENADA**

BETWEEN:

[1] ERASTUS P. FLEARY
(the personal representative of the estate of Esau Fleary, deceased)
[2] HILDRED CHARLES
[3] GODWIN RICHARD FLEARY
(together the personal representatives of the estate of Mary Fleary, deceased)
Claimants

and

[1] JUNIOR DAVIDSON
[2] LUCY JANE DAVIDSON-FLEARY
(the personal representative of the estate of James Cuthbert Fleary, deceased)
Defendants

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. V. Nazim Burke and Mr. Omari Thompson for the Claimants

Mr. Nigel Stewart and Mr. Kristopher-Ross Fields for the Defendants

2025: May 13th.

ORAL RULING

- [1] **ACTIE, J.:** Esau Fleary died on 1st December 1971 leaving his wife, Mary Fleary and nine children, including the claimants and James Cuthbert Fleary (hereafter referred to as “Cuthbert”, “Cuthbert Fleary” or “James Fleary”).
- [2] The first claimant was granted Letters of Administration in the estate of Esau Fleary on 10th May 1984. Mary Fleary died on 17th August 1983, and the second and third claimants were granted Letters of Administration on 5th December 2013.
- [3] The claimants state that in 1995 Cuthbert Fleary, one of the nine children of Esau and Mary Fleary, constructed his home and fenced 10,769 sq. ft. of a portion of the land comprising One Acre (1 Acre) in Carriacou forming part of the estate of Esau Fleary, without discussion with the Administrators of the estates of Esau and Mary Fleary.
- [4] The claimants state that access to their parents’ house was rendered landlocked by the fencing of Cuthbert, however Cuthbert Fleary provided access to the Fleary family and their visitors through the land he occupied by the positioning of three gates along the fence. The claimants aver that these gates were used by the family to access their parents’ house.
- [5] Cuthbert died on 17th April 2013, and the claimants state that his stepson, the first defendant, has been in occupation of his house. The claimants further state that the first defendant locked the three gates, preventing access through the portion of land fenced by Cuthbert to their parents’ house.
- [6] By fixed date claim form filed on 24th July 2015, the claimants claim, among other things, a declaration that the estate of Cuthbert Fleary is entitled to one-eighth share of each of the parcels of land comprising the estate of Esau Fleary and Mary Fleary; an order restraining the defendants from entering or remaining on any portion of the land other than the Cuthbert portion; and costs.
- [7] The second defendant, who is the widow of James Cuthbert Fleary, states that the house built by Cuthbert in 1995 was done with the knowledge and approval of the beneficiaries of the estates. The second defendant contends that Cuthbert

fenced a portion of the land with the understanding that the portion would be allotted to him.

Legal Analysis

- [8] The court failed in the several attempts to have the matter settled amicably. It is not disputed that by Esau and Mary Fleary's dying intestate, **Section 4** of the **Intestate Estates Act** is applicable. **Section 4** prescribes, as relevant to the extant matter, that the children of a person who dies intestate become entitled to the whole of their estate in equal shares if the intestate leaves no husband or wife.
- [9] Esau Fleary died in 1971. Surviving him was his wife, Mary Fleary and their nine children. Consequently, upon Esau's death, his wife Mary would be entitled to one-half share of his estate, and his nine children, the remaining one-half share equally. However, Mary also died intestate on 17th August 1983. As such, it is not disputed that the one-half share to which Mary was entitled upon Esau's death, would transfer to their nine children in equal shares.
- [10] It is established law that whilst an estate remains unadministered, no beneficiary has an interest in any of the estate's property¹. The rights of beneficiaries in unadministered estates extend no further than a right that the estate will be properly administered.
- [11] In **Marshall v Kerr**², as relied on by Ellis J. (as she then was) in **Daphne Gumbs v Administrator of the Estate of James Fahie**³, Lord Browne-Wilkinson stated:
- "...A legatee's right is to have the estate duly administered by the personal representatives in accordance with law. But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate."**
- ... And 'it is crucial to appreciate that the property settled by [the legatee] comprised, not the assets in the deceased's estate...but a separate chose in action, the right to due administration of his estate.'"** [emphasis mine]

¹ GDAHCVAP2021/0002 Eliza Thompson v Catherine Thompson

² [1995] 1 AC 148

³ BVIHCV2013/0070

[12] Applying the jurisprudence to the facts, the estate of **Esau Fleary**, deceased devolved to the first claimant who was appointed Personal Representative. It is the evidence that the first claimant although taking an oath to administer the estate in accordance with the Laws of intestacy since 10th May 1984, some thirty one (31) years before the claim was filed in 2015, has failed to administer the estate. It is the evidence that the first claimant resides out of the jurisdiction and appears to be unable to effectively administer the estate, but has failed to appoint an agent to act on behalf of the estate, neither have any of the beneficiaries made an application to have the personal representative substituted in light of his inability (or incapacity) or unwillingness to administer the estate.

[13] The second and third claimants do not have standing to bring an action against the defendants, as it is only after the vesting of Esau's interest in the beneficiaries that their share entitlement could be satisfied. The second and third claimants, the defendants, and the other beneficiaries to the Esau Fleary estate, only have an inchoate interest pending the vesting by the first claimant as Personal Representative . Secondly, the first claimant who has standing to bring the action has failed to file a witness statement and accordingly cannot deploy any evidence in support of the claim at the trial today

[14] The defendants have raised the principle of proprietary estoppel to establish an interest beyond their legal entitlement. In **Thorner v Major**⁴, considered by our Court of Appeal in the recent decision of **Mathilda Nelson v Alexis Alcide**⁵, Lord Walker⁶ stated that:

“...if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in *Dann v Spurrer* (1802) 7 Ves 231 at 235–236, 32 ER 94 at 95:

'this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement”

⁴ [2009] 3 All ER 945

⁵ SLUHCVP2018/0002

⁶ [2009] 3 All ER 945

[15] It is the defendants' case that the claimants in standing by and allowing James Cuthbert Fleary, one of the nine siblings to construct his dwelling house and fence the subject property at his expense and further allowing both the deceased and the defendants to occupy the subject property in excess of 20 years, must be taken to have acquiesced to the occupation such that it is now unconscionable for the claimants to reduce the quantity of land which the defendants may occupy. The defendants rely on the English Court of Appeal decision in **Jones et al v Stones**⁷.

[16] The defendants seek the dismissal of the claim. Considering the first claimant's failure to file his witness statement and his inability to deploy evidence in support of the claim and the second and third claimants' lack of standing, the court is led to the ineluctable dismissal of the claim.

[17] The parties agreed costs in the sum of \$5,000.00. The issue arising is whether wasted costs should be ordered against the legal practitioner for the claimants for the failure to file the witness statement for the first claimant.

[18] **Rule 64.8 (1) and (2)** provide for wasted costs as follows:

"In any proceedings the court may by order –
(a) direct the legal practitioner to pay; or
(b) disallow as against the legal practitioner's client,
the whole or part of any wasted costs.

(2) In this rule –
"wasted costs" means any costs incurred by a party –
(a) as a result of any improper, unreasonable or **negligent act or omission on the part of any legal practitioner or any employee of the legal practitioner; or**
(b) **which, in the light of any act or omission occurring after they were incurred,**
the court considers it unreasonable to expect that party to pay. (my emphasis)

[19] Counsel at trial made a valiant effort for the court to consider the matter on filed submissions to which counsel for the defendants strenuously objected. The court

⁷ [1999] 1 WLR 1739

is of the view that the claim is facts sensitive which required the first claimant's evidence to be tested in his witness statement pursuant to Part 29.8. This condition is taken by the court to have been accepted by counsel for the claimants, given the application made by the claimants, a week before the trial, for the first claimant to be permitted to "be directly examined-in-chief". The court further notes that in the affidavit in support of the claimant's application, the first claimant deposes that:

"(i) By case management order dated July 11, 2016, the Honourable Justice Wyante Adrien-Roberts ordered, inter alia, that the parties are to file and serve witness statements on or before November 22, 2016, which are to stand as examination-in-chief.

...

(iii) my present Attorneys... were always of the mistaken view that a Witness Statement has been filed on my behalf"

- [20] The court having given the legal practitioner an opportunity to make oral submissions in opposition to an order for the payment of wasted costs does not accept the reasons proffered for the omission of the first claimant's witness statement. The legal practitioner as an officer of the court is under an obligation to ensure compliance with the CPR 2023 Revised Edition and also to advise the claimants on the laws of administration of estates. The omission of the first claimant's witness statement, which is a necessity to deploy the evidence to support the claimants' claim, is in the court's view a gross omission on the part of the legal practitioner who would have filed the trial bundle in preparation for the trial today. A whole day set aside for the trial is lost which is not in keeping with the overriding objective of the CPR. The court however accepts that the failure of the first claimant as the personal representative of Esau Fleary's estate to administer the estate, resulting in the occupation and assertion of ownership by the defendants of the disputed area albeit as inchoate beneficiaries as unreasonable. It is the evidence that the estate of Essau Fleary consists of many more parcels of land which have not been administered. It is hoped that the first claimant will make every effort to administer the estate or the remaining beneficiaries shall apply for his removal as personal representative having regard to the inordinate delay and failure to administer the estate. The court taking all into consideration apportions the costs and directs that the legal practitioner for

the claimants shall pay wasted costs in the sum of \$2,000.00 and the claimants shall pay the sum of \$3,000.00.

ORDER

[21] For the forgoing reasons it is ordered as follows:

- (1) The claimants' claim stands dismissed.
- (2) The legal practitioner for the claimants shall pay wasted costs in the sum of \$2,000.00 pursuant to CPR 64.8.
- (3) The claimants shall pay costs in the sum of \$3,000.00.
- (4) The total costs in the sum of \$5,000.00 shall be paid to the defendants within thirty (30) days of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar