

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

GRENADA

CLAIM NO. GDAHCV2012/0194

BETWEEN:

IN THE MATTER OF THE ESTATE OF CHARLES PHILLIP, DECEASED

AND

**IN THE MATTER OF SECTION 4 OF THE PARTITION ACT CAP. 225 OF THE 1990
REVISED LAWS OF GRENADA**

[1] ELIZABETH NYACK

[2] MILNER PHILLIP

[3] NALTON PHILLIP

Claimants

and

GRACE PHILLIP

(Personal Representative of the Estate of Charles Phillip, Deceased)

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Ian Sandy for the Claimants

Mr. Andre Thomas for the Defendant

2023: June 6

RULING

- [1] **ACTIE, J.:** The claimants in a fixed date claim filed on 23rd May 2012 seek an order for the partition of land comprising 1 Acre, 2 Roods and 35 Poles (hereafter referred to as "Section D Lot 3") situate at River Sallee, St. Patrick and for the cancellation of all deeds of assent executed by the defendant in respect of the said property.

- [2] The first claimant, Elizabeth Nyack, in an affidavit filed in support of the fixed date claim deposed that Charles Phillip (hereafter referred to as “the deceased”) was at the time of his death seised in fee simple in possession of the disputed property.
- [3] The deceased made his Will on 20th October 1988, and died on 20th June 1989. On 18th September 1989, Probate of the Will of the deceased was granted to the defendant. The defendant between 1998 and 2001 prepared and executed deeds of assent to all the devisees under the deceased’s Will.
- [4] The first claimant states that there was no consultation or agreement by the defendant with herself or the other two claimants in respect of the manner of dividing the property of the deceased.
- [5] The first claimant also complains that the third claimant was given two lots not contiguous to each other. The first claimant states further that the defendant allotted the residue of the estate of the deceased to herself without consultation with the claimants.
- [6] As a result, the claimants ask that this court order the cancellation of all deeds of assent executed by the defendant and the repartition Section D Lot 3.

Defendant’s case

- [7] The defendant in her pleaded affidavit in defence states that in the year 1969, with the consent and permission of the deceased, she entered into occupation and possession of a portion of Section D Lot 3 and constructed a dwelling house thereon. She states that she has been living in the dwelling house since being in possession.
- [8] The defendant states that there was consultation with the claimants regarding the subdivision of Section D Lot 3, and that before the deeds of assent were executed she informed the claimants that the half acre of land devised to her by the deceased would comprise the portion already occupied by her and an additional

portion adjoining that portion. She states that there was no objection to that proposal.

[9] The defendant avers that the portions of land devised to the claimants were surveyed on their instructions.

[10] The defendant contends that she did not consult with the claimants regarding what constitutes the residue as she was of the view that there was sufficient land to allow for the equitable execution of the conveyances.

Legal Analysis

Whether Section D Lot 3 was partitioned equitably

[11] The deceased in his Will made the following devises with respect to Section D Lot 3:

“I give, devise and bequeath one house spot to Dean Phillip absolutely where a concrete building is now being constructed this house spot is from a larger lot of land known as Section D Lot 3 situate at River Sallee, St. Patrick’s.”

“I give and bequeath my chattel house and its contents to Sherlon Phillip absolutely.”

“I give devise and bequeath the spot where my chattel house is not situated to Valin Phillip absolutely. This said spot given to Valin Phillip is also from Section D Lot 3 situate at River Sallee in the parish of St. Patrick’s.”

“I give devise and bequeath quarter of an acre of land from Section D Lot 3 situate at River Sallee, St. Patrick’s to Milner Phillip absolutely.”

“I give devise and bequeath half an acre of land from Section D Lot 3 situate at River Sallee, St. Patrick’s to Grace Phillip, absolutely.”

“I give devise and bequeath quarter of an acre of land from Section D Lot 3 situate at River Sallee, St. Patrick’s to Elizabeth Nyack absolutely.”

“I give devise and bequeath quarter of an acre of land from Section D Lot 3 situate at River Sallee, St. Patrick’s to Nalton Phillip absolutely.”

[12] There were consequently seven devises out of Section D Lot 3, and of the seven includes the claimants and the defendants.

[13] The claimants and Counsel for the claimants argue that under the **Section 4 Partition Act CAP 225**, beneficiaries would have an interest in real property subject to their devise to them. Counsel for the claimants states that each of the beneficiaries would have had to agree to the boundaries and sign each other's deed.

[14] **Halsbury's Laws of England**¹, in stating the trusts and powers of the personal representative of a deceased's estate makes reference to the **Administration of Estates Act 1925** which is now substituted by the **Trusts of Land and Appointment of Trustees Act 1996**. The **Trusts of Land and Appointment of Trustees Act** states that personal representatives have the power to partition land among beneficiaries of full age and absolutely entitled. **Section 7(2)** of the **Trusts of Land and Appointment of Trustees Act** states that:

"the trustees shall give effect to any such partition by conveying the partitioned land in severalty... either absolutely or in trust, in accordance with the rights of those beneficiaries"

[15] Further **Section 7(3)** of the **Trusts of Land and Appointment of Trustees Act** states:

"before exercising their powers under subsection (2), the trustees shall obtain the consent of each of those beneficiaries."

[16] Thus, as far as this court is guided, a personal representative in their exercise of the partition of land under an estate is to have the consent of the beneficiaries in partitioning before same is done.

[17] Evidence of Dorothy Edgar on behalf of the claimants stated that she is the sister of the claimants. She stated that the defendant informed her that she had retained land surveyor, Fred Belfon, to sub-divide the lands. Dorothy Edgar states that the defendant asked her to come witness the survey, and she agreed. During the

¹ (5th edn., 2021) vol. 102, para 1022

survey, Dorothy indicated that the defendant showed the surveyor how the lands were to be divided and that the surveyor put down boundary markers in accordance with same.

[18] Dorothy Edgar stated in her evidence and cross examination that she never had instructions from the claimants to represent them at the survey, she however admits to paying Mr. Belfon after he delivered the plans representing the claimants' lots, and further avers that she took the plans to the office of Tillman Thomas to prepare conveyances for the claimants.

[19] The court totally rejects Dorothy Edgar's evidence. Dorothy Edgar certainly would not have solicited the services of an attorney to complete the transfer of the devise to the claimants otherwise than on the claimants' instructions. It was the claimants who would have paid for the preparation of their individual deeds albeit that, as stated in cross-examination, Dorothy Edgar paid the legal fees of the claimants on the presumption that she would be paid back.

[20] Though Dorothy Edgar states that her actions for doing so were because she believed that the claimants and the defendant had already come to an agreement, this in the court's view is unlikely, as it is the claimants to whom Dorothy Edgar is related. It is more likely, on a balance of probabilities, that she would have had discussions with the claimants of their devised lots, as opposed to with the defendant.

[21] The court rejects the postulation of the claimants that Dorothy Edgar did not act on their behalf. The court finds that even if the authority of Dorothy Edgar to act on the claimants' behalf was not expressed, it was implied. In **Hely-Hutchinson v Brayhead Ltd.**², referred to in the Court of Appeal case of **Applewaite Lave v Barbara Hardtman et al**³ Lord Denning formulated the principle of implied actual authority:

"Actual authority may be expressed or implied. It is expressed when it is given by express words... It is implied when it is inferred from the conduct of the parties and the circumstances of the case..."

² [1968] 1 QB 549

³ NEVHCVAP2020/0005

- [22] The conduct of Dorothy Edgar hereinbefore discussed above, and the circumstance of the deeds of the claimants being recorded since in the year 2001, lend to the conclusion that Dorothy Edgar acted with implied authority in the transfer of the lots in the names of the claimants. The defendant would have merely signed the claimants' deeds in her capacity as personal representative of the deceased.
- [23] Eleven years have passed prior to the filing of the claim since the conveyances to the claimants of their devised property. Conveyances which they dispute were not done on their authority. The claimants proffer no explanation as to the delay in the filing of this action.
- [24] It is clear from the evidence given by the first claimant that the true issue with the conveyances recorded on the claimants' behalf is the locale of their lots. The first claimant lamented in in cross examination that the pieces of land transferred to each of the claimants were not contiguous to each other.
- [25] There was nothing in the Will of the deceased prescribing that the lots devised to the claimants ought to be contiguous. The deceased described the land which was devised to Dean Phillip, Sherlon Phillip and Valin Phillip, hereinabove, however no descriptions as to the portions of land to be conveyed to the claimants were provided by the deceased. The gifts to the claimants solely referred to the area of land, and not location. What is more is that Nalton Phillip, the third claimant, indicated in cross-examination that he was satisfied with the lots of land conveyed to him once they were correct in size. He stated that he relied totally on the first claimant. He further stated that the first claimant sent the money for the survey and preparation of the deeds.
- [26] It is also clear from the evidence of the first claimant, the third claimant and Dorothy Edgar that it was the first claimant who was the main point of reference with respect to the claimants' property, and that direct contact was made between the first claimant and Dorothy Edgar in relation to the property.

- [27] The first claimant was not forthright in her evidence. She categorically denied that she received or had seen a deed or plan. Upon further cross examination however she admits to have received the deed. The court does not accept that the claimants did not have or were not aware of the contents of their deeds. All three claimants make reference to their individual deeds of assent as prepared by the defendant in their evidence in their witness statements.
- [28] The defendant in her pleaded affidavit in defence stated that the partition was done on the instructions of the claimants which the court accepts based on evidence.
- [29] The court cannot now blindly, in excess of twenty-two years after the transfer of the land to the claimants, order a repartition of Section D Lot 3 without hearing from all the parties to whom this action affects, especially in circumstances which suggest that the claimants were complicit in the transfer of their respective lots. The claim was filed some eleven years since the conveyances to the claimants of their devised property, yet no evidence is proffered by the claimants as to the status of the land in 2023, or even as at 2012 when the claim was filed, nor are all the parties to whom portions of Section D Lot 3 were transferred before this court.
- [30] The court thus has to presume that the other beneficiaries have been dealing with and accepting their devised properties as proper. Evidence on behalf of the defendant given by her daughter Maggie Wells, states that there is a concrete house on the half acre portion left to the defendant.
- [31] As a result of the above, the court finds that the partition of Section D Lot 3 was done equitably, under the implied authority of Dorothy Edgar acting on behalf of the claimants.

The residue of the estate of the deceased

- [32] The claimants aver that the deed of gift to Maggie Wells, daughter of the defendant, comprises a part of the residue of Section D Lot 3 and that that

document was executed in 1998, three years prior to the deed of assent to the claimants.

[33] It is not clear from the plans before the court whether the portion of land conveyed to Maggie Wells included property of Section D Lot 3, or of another lot of land in River Saltee, St. Patrick, which is termed in the Will of the deceased as Lot 31A, in which Maggie Wells was given a beneficial interest by the testator. The onus rests on the claimants to prove their assertions.

[34] Maggie Wells however admits in her evidence as to receiving a portion of Section D Lot 3, but the claimants have failed to put this deed before the court. The plan in the Maggie Wells deed before the court demonstrates a boundary with Dean Phillip, who also had a beneficial interest in Lot 31A. It may be, therefore, that the conveyance complained of by the claimants pertains to Lot 31A property, and not Section D Lot 3 property.

[35] The authors of **Halsbury's Laws of England** state the following with respect to the nature of beneficiaries' interests:

"The beneficiaries have no specific interest in any of the property comprising the residue until the residue has been ascertained in due course of administration, but they do have a general title to residue, and this general title constitutes a transmissible interest which is not affected by the completion of the administration, so that their interests remain the same before and after the administration is complete⁴."

[36] In addition, **paragraph 1056 of Halsbury's Laws of England**⁵ states:

"The ultimate object of the administration of an estate is to place the beneficiaries in possession of their interest and accordingly, subject to the terms of the will if any, the personal representative owes the beneficiaries a duty to pay the debts and to ascertain the residuary estate with due diligence. The residuary legatee is not entitled to any particular asset of the testator's estate; his right is to have the clear residue ascertained and to have his share of it paid over."

⁴ (5th edn., 2021) vol, 102, para 925

⁵ (5th edn., 2021) vol. 102, para 1056

And **paragraph 1119**:

“A residuary legatee has a right to insist that the personal representative pay the debts, legacies and funeral and testamentary expenses with due diligence, so that the clear residue may be ascertained and paid over to him, or, if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled¹; but the effect of the bequest is not to vest in him any particular asset of the testator.”⁶

- [37] The interest which is referred to in the above paragraph is taken to refer to that of the residuary legatee in the residue of the estate of a deceased. The court is of the view that the claimants’ claim lacks merit. It is clear that it is the defendant who is the residuary legatee of the estate, and not the claimants, and thus the defendant and not the claimants would have a cause of action in the maladministration of the residue of the deceased’s estate.

Conclusion

- [38] Counsel for the claimants in oral submissions referred to **Partition Act** and stated that there was no compliance since all the parties did not sign. The **Partition Act** requires the consent of all co-owners in undivided ownership to give effect to a partition failing which any co-owner not wishing to remain in undivided ownership may apply to the court for an order for partition. Ideally all parties are to intervene and consent to a partition deed. However, in this matter, the defendant through deeds of assent vested individual lots to the each of the beneficiaries under the testator’s Will. The vesting assents in favour of the claimants were executed at the instance and with the implied consent of their agent, Dorothy Edgar. It is unreasonable for the claimants to seek to challenge their titles on the sole issue that their parcels were contiguous to each other which was not expressly stated in the testator’s Will.
- [39] In summary, the court is of the view that the vesting of the individual lots by the defendant to the respective claimants was done with the concurrence of the claimants through their sister and agent Dorothy Edgar. The claimants have failed

⁶ (5th edn., 2021) vol 102, para 1119

to satisfy their claim on a balance of probability on their assertions that there was no consultation or agreement by the defendant in respect of the partition and vesting of Section D Lot 3.

ORDER

[40] It is therefore ordered and directed as follows:

- (i) The claimants' claim stands dismissed.
- (ii) Prescribed costs to the defendant in the sum of \$7,500.00 to be paid by the claimants within one (1) month of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar