

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2018/0416

BETWEEN:

JOHNATON BARLEY

Claimant

and

CYNTHIA BAILEY FONTENELLE

In her capacity as Executrix of the Estate of Ceasarius Barley

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Carlton Amsterdam of Counsel for the Claimant

Ms. Sherene Francis and Mr. Andie George of Counsel for the Defendant

2021: March 17; 31 (written submissions)
June 30.

JUDGMENT

[1] **CENAC-PHULGENCE J:** In this claim, the claimant, Mr. Johnaton Barley (“Mr. Barley”) claims against Mrs. Cynthia Bailey Fontenelle (“Mrs. Fontenelle”) in her capacity as the executrix of the estate of Mr. Ceasarius Barley, (“the deceased”) seeking the following orders:

- (a) an order removing Mrs. Fontenelle as the executor of the estate of the deceased;
- (b) an order that Mrs. Fontenelle provide a full detailed account of the estate of the deceased;
- (c) an order appointing Ms. Jasmattie Sangaroo as executor/administrator of the estate of the deceased;
- (d) further or other relief.¹

¹ Amended Claim filed 8th February 2009, page 1 of Trial Bundle (TB).

- [2] Mr. Barley is the son of the deceased and Ms. Jamattie Sangaroo. Mrs. Fontenelle is the sister of the deceased and the aunt of Mr. Barley. The deceased died in March 2016 having left a last will and testament ("the Will") executed on 13th May 2009² in which he named Mrs. Fontenelle and Ms. Sangaroo as executrices of the Will. Mr. Barley was a minor at the time of his father's death, being only fifteen years old.
- [3] Under the Will, Mr. Barley and Gibson Barley are the only named beneficiaries. By the terms of the Will, the following bequests were made to Mr. Barley at clauses 5 and 6 respectively:
- (a) Nissan 14-seater bus, registration number HC5976 and route band registration number 1197 for the Vieux Fort/Augier Route;
 - (b) Concrete dwelling house measuring 20 by 20 feet.
- [4] Mr. Barley was also named as the residual legatee in relation to the remainder of the deceased's movable and immovable property, real or personal and wherever it may be situated.

Claimant's Case

- [5] Mr. Barley's allegation is that Mrs. Fontenelle failed to administer the deceased's estate as it relates to the personal property of the deceased and further she contends that the deceased does not own the house which he willed to Mr. Barley and it is only an extension valued at \$16,000.00 which the deceased owned. Mr. Barley however alleges that the deceased is the owner of the house and that this is confirmed by a letter dated 23rd November 2011 from the Chambers of Nicholas Jean Baptiste. He also alleges that Mrs. Fontenelle claimed that the deceased did not own land despite the residuary clause in the Will.
- [6] Mr. Barley further alleges that to date he has not received the deceased's waist bag with his money, gold rings, other personal effects or the keys to the house left to him. Mr. Barley therefore alleges that Mrs. Fontenelle has failed to act in

² Page 62 of TB.

his best interests and seeks her removal as executor and revocation of the grant of probate made to her.

Defendant's Case

- [7] Mrs. Fontenelle in answer to the claim avers that the grant of probate was made to her solely because Ms. Sangaroo was invited to join the application by letter dated 29th June 2016 but she did not accept the invitation and it was in the best interests of the deceased's estate that the application be made by her.
- [8] Mrs. Fontenelle further avers that the deceased was only entitled to the Nissan 14-seater bus with registration number HC5976 and attached to the route band registration number 1197 as well as a 20 by 20 feet concrete extension to the dwelling house belonging to the deceased's and her late parents Marian and Joseph George.
- [9] She avers that without her intervention or involvement as the executrix of the estate of the deceased, Mr. Barley through his mother, Ms. Sangaroo took control of the 14-seater bus and it was registered in Ms. Sangaroo's name. Therefore, the only remaining property to be dealt with in the administration of the deceased's estate is the 20 by 20 feet concrete extension which was erroneously stated in the deceased's will as 'a concrete dwelling house measuring 20 by 20 feet'. Mrs. Fontenelle avers that the deceased and Ms. Sangaroo were aware that the house to which the extension was attached was that of the deceased's parents and therefore the deceased could not have intended to gift the entire house to Mr. Barley. The entire house it is alleged is much larger than 20 by 20 feet which is the size of the dwelling house outlined in the Will. As a result of this error, Mrs. Fontenelle alleges that she has been unable to complete the administration.
- [10] Mrs. Fontenelle alleges that due to her uncertainty as relates to the gift of the 20 by 20 feet structure, she commissioned a valuation which valued the 20 by 20 feet extension at \$16,000.00. She exhibits a valuation dated 20th November 2017. A subsequent valuation dated 16th February 2019 was presented to address the incorrect parcel number which had been stated in the previous

valuation and had not indicated the size of the respective sections of the entire dwelling house.

[11] The dwelling house is situate on property which belonged to the deceased's parents and to which the deceased is entitled to a share of the half share of his deceased father Joseph George aka Joseph Barley's estate along with his thirteen other siblings. However, the shares have not yet been distributed by the administratrix of the deceased's father's estate.

[12] Mrs. Fontenelle denies the existence of a letter dated 23rd November 2011 which Mr. Barley alleges confirms the deceased's ownership of the dwelling house and avers that the said letter does not by itself provide sufficient evidence of ownership of property. Mrs. Fontenelle says that the deceased's parents gave him permission to occupy the dwelling house with his family and she is not aware of any gift to the deceased of same during his lifetime. In any event, the property was held in community so the deceased's mother if she had given the property to the deceased could only have given her share.

[13] Mrs. Fontenelle denies being aware of any waist bag with money, gold rings or other personal effects or other personal belongings of the deceased or that she ever had any of these items in her possession. It is her case that she has always acted in the best interest of the deceased's estate and Mr. Barley. She says she did this by commissioning the valuation of the 20 by 20 feet extension and seeking to ascertain ownership of the dwelling house.

[14] Mrs. Fontenelle avers that Mr. Barley is not entitled to the relief which he seeks as he has not proven that there are grounds for her removal as executrix of the deceased's estate and/or replacing her with Ms. Sangaroo and therefore prays that the claim be dismissed with costs.

Case Management Directions

[15] By order dated 30th September 2019, after having referred the matter to mediation which proved unsuccessful, the Court gave directions for the filing of an account by way of affidavit of the dealings with the estate by Mrs. Fontenelle

which was filed on 2nd December 2019. A response to the said account was filed by Mr. Barley on 17th February 2020 and thereafter, the Court gave directions for the trial in relation to the account which had been provided and for cross-examination based on the affidavits which had been filed.

Preliminary Issue:

- [16] At the trial, counsel for defendant, Ms. Sherene Francis (“Ms. Francis”) raised the issue that certain statements made in Mr. Barley’s affidavit ought to be struck out as they are inadmissible hearsay. I propose to fully address the evidence and the objections in my analysis of the evidence below.
- [17] Counsel points to CPR 30.3(2) which states that an affidavit may contain statements of information and belief (a) if any of the Rules allow it and if the affidavit is for use in an application for summary judgment or for any procedural or interlocutory application provided the affidavit indicates which of the statements in it are from the deponent’s own knowledge and which are matters of information and belief and the source of any matters of information and belief.
- [18] I believe that the starting point is to establish that while CPR 30.3 appears to allow hearsay evidence in affidavits if certain criteria are met, this is restricted to applications for summary judgment or procedural or interlocutory applications. This rule does not afford a deponent in a trial that luxury. He must speak from his knowledge of the facts and in this regard, hearsay statements in the context of a trial would be inadmissible. He is not permitted the luxury of even stating his source of information and belief. What I observe is that Mr, Barley has made statements in his affidavit which appear to be from his knowledge but from cross-examination it was seen that in many instances he had no personal knowledge of the matters but relied on things which he had been told. He does not say that anyone told him anything but makes statements as if he is possessed of knowledge of the particular matter/s.
- [19] It is therefore for the Court to analyse the evidence taking into account counsel’s objections and determine whether the evidence would be accepted at all or if accepted, the weight which will be attached to same.

Issues for Determination

- [20] The issues for the Court's determination in this claim are:
- (A) Whether Mrs. Fontenelle as executrix of the estate of the deceased has given a proper account of the administration of the deceased's estate?
 - (B) Whether Mrs. Fontenelle should be removed as executrix of the deceased's estate?
 - (C) If yes, whether Ms. Sangaroo should be appointed as executrix/administrator of the deceased's estate?

Discussion

- [21] Issues (A) and (B) will be addressed together as issue (A) may impact issue (B).

Issue A: Whether Mrs. Fontenelle as executrix of the estate of the deceased has given a proper account for the administration of the deceased's estate?

Issue B: Whether Mrs. Fontenelle should be removed as executrix of the deceased's estate?

- [22] Mrs. Fontenelle in her affidavit of account filed on 2nd December 2019 provided her account of dealings with the estate.³ This was part of the relief claimed by Mr. Barley. Counsel for the defendant, Ms. Francis in closing submissions makes the point that Mr. Barley did not need the Court's intervention to request an account as he was well aware of many of the matters concerning attempts to settle the matters of the estate in respect to the gifts to him from as early as February 2017.

- [23] Whilst this may be the case, a beneficiary has a right to an account in relation to the deceased's estate. This finds support in the case of **Clifton St. Hill v Augustin St. Hill**⁴ where Mitchell J said:

"An administrator of an intestate's estate is a trustee. It is always the duty of an administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level even than he would in protecting his own interests. He must report and account. ..."

³ Pages 52-56 of TB.

⁴ Civil Suit No. 402 of 1996, St. Vincent & the Grenadines [unreported] 24 May 2001 at paragraph 13..

The Role of an Executor/Administrator

[24] It is well established that there is a high degree of care, diligence, personal and fiduciary obligations involved in the administration of an estate. The duties of a personal representative must not be taken lightly, and he/she must act as a prudent person in the care and management of the affairs of the estate and where there is a will, act in manner that is consistent with the will.

[25] An executor's responsibilities entail firstly compiling an inventory of all the assets of the deceased which he possessed at the date of death. Secondly, the executor must determine the debts owed by the estate and seek to pay off these debts before there can be any distribution of any estate assets to any beneficiary. Once all the debts of the estate including testamentary expenses have been paid, then the executor is in a position to distribute what is left of the estate to the beneficiaries.

[26] In **Estelle Wheatley v Darwin Blyden et al**⁵, Ellis J referred to the case of **Re Marsden**⁶ where Kay J said:

"It seems to me as plain as can be, that where an executor accepts that office he accepts the duties of the office and he becomes, in the language of Williams on Executors, a trustee in this sense: "An executor is personally liable in equity for all breaches of the ordinary trust which in Courts of Equity are considered to arise from his office."

[27] It is the case that if a beneficiary believes that the deceased's estate is not being properly administered, he can apply for the court to exercise its discretion to remove an executor/administrator. Blenman J in the case of **Viola Richardson et al v Albert Hughes**⁷ put it thus:

"It is the law that a personal representative may be removed either by the revocation of his grant or by the appointment of a substituted personal representative or by the termination of the appointment. If the grantee commits a serious breach of his duties, the Court, in an appropriate case, will revoke the grant and make a new one in order to secure the proper administration of the Estate."

⁵ BVIHCV2012/0302, delivered 12th April 2012, unreported.

⁶ (1884) 26 Ch. D. 783 at 789.

⁷ Claim No. AXAHCV 0036/2007 delivered 1st February 2012 at paragraph 102, unreported.

An analysis of the account of Mrs. Fontenelle and the relevant facts in this case

Refusal to hand over gifts and undue delay in settling the deceased's estate

- [28] In her account, Mrs. Fontenelle stated that as far as she was aware the deceased's estate comprised:
- (a) A concrete extension built onto a family house located on family land belonging to the estate of the deceased's parents on Block and Parcel 1021B 14;
 - (b) 14-seater minibus which the deceased drove during his lifetime;
 - (c) Route band no. 1197 for the operation of the minibus;
 - (d) A wooden building/shed situate on family land in Augier;
 - (e) The deceased's share, rights or interest as an heir in the estate of his father, Joseph Barley who predeceased him.
- [29] It is Mr. Barley's case that Mrs. Fontenelle as executrix has failed to hand over the gifts left to him in the Will in a timely manner. In fact, in cross-examination, when asked whether he knew what took place when probate is granted, his answer was that he expected that the 'person who probated it would hand over the stuff.' At paragraph 4 of his affidavit filed 17th February 2020, Mr. Barley says that 'for over a year after Probate we did not even receive the most basic of the gifts passed to me in the form of the bus and contents of his pouch.'
- [30] Mr. Barley in his affidavit evidence says that at the time of the probate he was a minor and his mother, Ms. Sangaroo acted on his behalf. At paragraph 3 of his affidavit, he says that his mother did attempt to probate the Will but she was prevented from doing so because Mrs. Fontenelle had filed a caveat. He continues that subsequently there was dialogue between the two attorneys representing Mrs. Fontenelle and Ms. Sangaroo and it was agreed that they would file the application for the probate but rather Mrs. Fontenelle applied for probate alone.
- [31] The undisputed evidence is that Mrs. Fontenelle applied for and obtained probate of the Will solely by grant of probate dated 6th December 2016. That is after she had through her then legal practitioner written to Ms. Sangaroo, the

other named executrix inviting her to make a joint application for the grant of probate of the Will. A letter dated 29th June 2016⁸ inviting Ms. Sangaroo to join in making the application for probate was exhibited as “CBF 1” showing that the said letter was served on her and her legal practitioner on 30th June 2016. There is no evidence of a response to that letter by Ms. Sangaroo and in cross examination, Mr. Barley admitted that he was not aware of this letter and that there was no evidence that Ms. Sangaroo had co-operated with Mrs. Fontenelle as he had stated in his defence.

- [32] The evidence of Mr. Barley as relates to what transpired with the grant of probate and what discussions were had with attorneys as he speaks to in paragraph 3 of his affidavit is hearsay and inadmissible. He as much admitted that he did not know when these discussions took place and he could not say for sure that they did take place. He was not aware that Mrs. Fontenelle had invited his mother Ms. Sangaroo to take out the grant with her jointly by letter dated 29th June 2016. He could not say whether his mother ever responded to the letter, and he admitted that there was no evidence that his mother ever co-operated with Mrs. Fontenelle in making a joint application. Mr. Barley did not even know when the probate was granted despite his apparent keen interest in the matter, and he admitted in cross-examination that it was his mother who had told him about the probate. This evidence is unreliable and leaves Mrs. Fontenelle’s evidence as regards the circumstances surrounding her making the application for probate alone unchallenged.

14-seater bus and route band and personal effects

- [33] Mrs. Fontenelle in her affidavit of account says that prior to administration of the deceased’s estate being completed, Ms. Sangaroo took the 14-seater bus along with the route band and subsequently had it registered in her name. At the time, Mr. Barley was a minor and Ms. Sangaroo as his mother acted on his behalf. The said bus and route band are still in the possession and control of Mr. Barley and/or Ms. Sangaroo. She says as far as she is aware the 14-seater bus and

⁸ Page 57 of the Trial Bundle.

route band were the only personal property to which the deceased was entitled or was owned by him at the date of his death.

[34] In cross-examination, it became clear that the bus was not in Mrs. Fontenelle's possession after the deceased's death but was in the possession of the police. When asked whether she had handed over the keys to the bus, she responded that she did not have the keys to the bus as they were in the police officer's possession. She also said that she did not know of anything else that the police had apart from the keys. She was adamant that she did not know about any pouch with money and other personal effects like gold rings.

[35] Mr. Barley in his evidence says Mrs. Fontenelle never released the bus to him, and it was only after one Officer Francis of the Vieux Fort Police Station was advised that he could be in trouble for not handing over the keys and the bus that this was done. No indication of dates was given for when this all occurred. The evidence as relates to what was said to one Officer Francis is not knowledge which Mr. Barley would have at all. As to what may or may not have been said to Officer Francis that evidence is clearly hearsay and is rejected by this Court.

[36] Mr. Barley says in his affidavit that as far as he knows the deceased had at least one other savings account, but no mention has ever been made of this nor has he or his mother been able to get their personal belongings from the house. Curiously, no application has ever been made to get information about this account or to get their possessions from the house. Mr. Barley makes very bald statements most of which are not within his personal knowledge which makes his evidence very unreliable. It is also noteworthy that though it would appear that Ms. Sangaroo would have had knowledge of all that transpired with the bus and the police, she did not give any evidence in response to Mrs. Fontenelle's account.

[37] The deceased died in March 2016. The probate was only granted in December of 2016⁹ which is when the executrix would have been able to and would have

⁹ See page 61 of TB.

the legal authority to deal with the estate and vest or hand over any of the bequests in the Will. In cross-examination, counsel Ms. Francis put to Mr. Barley that the probate was granted nine (9) months after the deceased died which he agreed to. Mr. Barley was asked when the keys to the bus were handed over, and he could not recall. However, he did know that it was after the probate was granted.

[38] The evidence reveals that three (3) months after the grant of probate, counsel for Ms. Sangaroo wrote a letter dated 15th March 2017¹⁰ to counsel for Mrs. Fontenelle regarding among other things the bus. That letter was preceded by a letter from counsel for Ms. Sangaroo dated 14th February 2017¹¹ in response to a letter from counsel for Mrs. Fontenelle dated 7th February 2017. The 14th February 2017 letter requested that the keys and relevant paperwork for the bus be handed over to Mr. Barley's mother. It is clear that there was communication between counsel for Mr. Barley and Mrs. Fontenelle about the deceased's bus from as early as February 2017, just a few months after the grant of probate.

[39] Mr. Barley admitted in cross-examination that his evidence that for over a year he did not receive the most basic gifts given to him by the Will would not be correct. It is clear from the evidence that Mr. Barley's mother obtained possession of the bus and the keys to the bus without the intervention of Mrs. Fontenelle, the duly appointed executrix even after the grant of probate and no explanation has been provided for this. How then can Mrs. Fontenelle be asked to account for something which was not in her possession and which was clearly obtained without her exercising her duties as executor? The bus and route band cannot be an issue as it has been in Mr. Barley's possession from since a few months after probate was granted albeit they would have been part of the deceased's estate and ought to have been dealt with by the executrix.

[40] I also note that in his evidence Mr. Barley speaks of the keys and contents of the deceased that were allegedly handed over by one Officer Francis at

¹⁰ Page 103 of TB

¹¹ Page 102 of TB.

paragraph 5 of his affidavit in response to the account. However, it remains a mystery what contents of the deceased is being referred to. There is a cloud of mystery which surrounds the death of this deceased and the matter being in the possession the police which both the claimant and the defendant have chosen not to elaborate on. If there were contents other than the bus then Mr. Barley's statement at paragraph 5 seems to suggest that these were handed over to Ms. Sangaroo, his mother and not Mrs. Fontenelle.

- [41] Interestingly, in closing submissions, Mr. Carlton Amsterdam, ("Mr. Amsterdam") counsel for Mr. Barley states 'the defendant failed to secure the minibus after the passing of the deceased, and it was left out to the elements for over a year and it deteriorated by the time the claimant obtain[ed] possession.' There was no evidence led by Mr. Barley to this effect in his pleadings or in his affidavit in response. It cannot simply be introduced in submissions. Even if this were his evidence, it would be very difficult to simply accept this bald statement in light of the fact that the bus appears to have been in police custody from the deceased's death until sometime in early 2017. From Mr. Barley's evidence, they got the bus after the probate was obtained. It is unclear how Mrs. Fontenelle failed to secure the bus when it was in police custody.

Concrete Dwelling House

- [42] Mrs. Fontenelle says Ms. Sangaroo as the claimant's next friend had made a claim for the entire house where the deceased lived prior to his death. She says she had difficulty ascertaining the gift referred to in the Will as 'a concrete dwelling house measuring 20 by 20 feet' because as far as she knew the deceased did not own the house for himself, but he had built an extension onto the unfinished dwelling house which their mother had given him permission to occupy about the mid-1980's when he got his girlfriend pregnant. The deceased married in 1986 and made the old house their home until his divorce in about 1998. There was no community between the deceased and his ex-wife. About two years after he executed his Will, the deceased built an extension onto the house he was previously permitted to occupy despite protests from their mother.

[43] Mrs. Fontenelle says in order to ascertain the value of the property, she commissioned a valuation dated 20th November 2017 which valued the structure at \$16,000.00.¹² A subsequent valuation of 16th February 2019¹³ confirmed the said valuation and provided some more details about the structures. That valuation showed that the dwelling house comprised two sections neither of which measured 20 by 20 feet. The two sections were an older section approximately 30 by 25 feet about 40 years old and a newer section approximately 24 by 19 feet about 5 years old.

[44] Mr. Barley's evidence is that it was always the deceased's intention to pass his house to him and references two documents which he asserts supports this:

- i. a document titled Will of Ceasarius Barley which purports to essentially give the same gifts as in the Will to him except that the dimensions of the house are not stated but the document says "in our presence, Johnaton Barley signed this document and declared it to be his will and we at his request, and in his presence, and in the presence of each other, have signed as witnesses." Curiously, it is then signed by Gregory Isidore and Ceasarius Barley presumably as witnesses. That document is undated. Mr. Barley in cross-examination said he was asked to sign this document and he did.
- ii. a letter dated 23rd November 2011 to the deceased from the Chambers of Nicholas Jean-Baptiste in which he is writing on behalf of the deceased's mother and says to the deceased that he has unlawfully proceeded to carry out expansion on the residential building located on family land. I am yet to understand how this establishes the deceased's intention to pass the house to the Mr. Barley.

[45] Neither of these documents supports Mr. Barley's assertions as it is only the Will which can speak to the deceased's intentions and the gifts he intended to give. In this regard, I agree with counsel for the defendant, Ms. Francis that Mr. Barley's evidence about the deceased's intentions is irrelevant. These documents have no evidential value in my opinion.

¹² Page 21 of TB.

¹³ Page 32 of TB.

- [46] Mr. Barley states at paragraph 9 of his affidavit in response that despite the residuary clause which empowers the administrator to act on his behalf to ensure that he obtains what he is entitled to, she has failed to act accordingly. It is unclear what this means. He says he has suffered loss because he was prevented from occupying the property which has now been vandalized and is in a state of disrepair. There is no evidence of what that loss is.
- [47] It is clear that Mr. Barley is of the view that the reference to the 20 x 20 feet dwelling house reference in the Will refers to the entire structure located on the land. Mrs. Fontenelle however contends that the deceased does not and never owned the structure which is their parents' house but built an extension to that house which is what he must have been referring to in the Will. Whilst this is not a matter which I have been asked to pronounce on, I believe it is important to deal with it as it will assist in the assessment of Mrs. Fontenelle's actions as executrix.
- [48] Mr. Barley in cross-examination agreed that the land where the dwelling house is his father's family land and that the house referred to in the letter of 23rd November 2011 written on behalf of the deceased's mother, Ms. Marie Barley was the same house in which the deceased lived. Both Mr. Barley and Mrs. Fontenelle have produced valuations of the structure/s on the property accepted as 'family land'. The valuation report of Richard Samy dated 21st August 2019 presented by Mr. Barley shows a structure with a previous section of 644.07 square feet valued at \$69,559.56 and a newer section of 450 square feet valued at \$49,500.00. It does not indicate the age of the structures.
- [49] The valuation report of Dominic Mathurin dated 16th February 2019 presented by Mrs. Fontenelle shows the structure as having an older part measuring 720 square feet about 40 years old valued at \$45,000.00 and a newer part measuring 375 square feet about 5 years old valued at \$16,000.00.
- [50] Mr. Barley at paragraph 10 of his affidavit evidence seeks to challenge the valuations presented by Mrs. Fontenelle. It is noted that the initial valuation

report obtained by Mr. Barley dated 11th August 2016 presented a valuation for the entire structure and did not separately value the extended portion as did the later report of 21st August 2019. Mr. Barley states in his affidavit that the valuation reports presented by Mrs. Fontenelle 'seems woefully flawed in terms of content and eventual value'. However, Mr. Barley has produced no expert evidence in support of his contentions. He is not an expert and certainly cannot speak to the adequacy or otherwise of any valuation.

- [51] What is referred to in the Will is 'a concrete dwelling house measuring 20 x 20 feet on family land at Augier aforesaid including all my rights and interest in the said parcel of land'. 20 x 20 feet is 400 square feet. When one examines the two valuations it is clear that the description in the Will is more aligned with the square footage given for the newer part of the structure in the Richard Samy valuation of 450 square feet and in the Dominic Mathurin valuation of 375 square feet. I am of the view that taking all the available evidence into consideration, the description in the Will could not have been referring to the whole structure, new and old parts which is stated as having a total square footage of 1095 square feet and 1094.07 square feet respectively in the two valuations. It could only be referring to the extension or as described in the valuations 'the newer section'.

Relations Between the Parties

- [52] There is a suggestion by Mr. Barley in his affidavit in response that Mrs. Fontenelle was upset when she was informed that the bus and contents of the deceased were handed over to presumably his mother, Ms. Sangaroo. He also says that he and Ms. Sangaroo have been prevented from occupation of the property and instead the house has been vandalised and is in a state of disrepair. It is also his evidence that he and his mother have never been able to get their personal belongings from the home.
- [53] In cross-examination, Mr. Barley explained that he was living with his mother at a friend at the time of the deceased's death and had 'been there for a day or two, not long'. When asked whether he had gone back to the house since the death of his father, Mr. Barley at first said no and then said he went back for his

books. He went on to say that Mrs. Fontenelle gave access and said that he could take his books and nothing else. He could not recall when this had occurred. He also said that Mrs. Fontenelle did not tell him directly that he could not go into the house but she was one of the reasons they could not go there. Asked to explain what he meant, he then said that whenever they went there the remaining family members would cause problems. He also said that he could not go to the house because the police had the keys from the time of the deceased's death. In view of this latter statement, it was a little unclear how Mrs. Fontenelle was the one who prevented him from going to the house.

[54] Asked how Mrs. Fontenelle prevented him from going into the house if the keys were in the police's possession, his answer was that if she got the probate, then she should have handed over the keys to the property. He then in answer to Ms. Francis' question as to whether Mrs. Fontenelle needed to hand over the keys for him to get into the house, said yes because the house was seized. When asked whether when he got his books from the house, Mrs. Fontenelle had handed over any keys to him, he said no. When asked whether he would have had access to the house whether or not he was handed the keys, he responded, yes. It is clear that Mr. Barley had access to the house to get his belongings although he insists it was only his books that he was allowed to take. Despite all this, neither Mr. Barley nor Ms Sangaroo on his behalf made any attempt to retrieve their other belongings in the face of Mrs. Fontenelle allegedly preventing access to the property.

[55] On this matter, in cross-examination, Mrs. Fontenelle said that she and Mr. Barley had a good relationship but admitted that at present and after probating the Will there has been no communication between them. She admitted to not communicating with Mr. Barley but spoke to matters being handled by her attorney. Counsel for Mr. Barley, Mr. Amsterdam suggested to Mrs. Fontenelle in cross-examination that there has always been 'bad blood' between her, Mr. Barley and Ms. Sangaroo to which she responded that there was no 'bad blood'. It was also suggested to her that she has done everything in her power to hinder the gift left for Mr. Barley, to which responded that she had never done such.

[56] Without the relevant timelines and information as to what was actually released by the police and to whom, it is very difficult to follow Mr. Barley's story. It does seem though that as early as August 2016 and before the grant of probate in favour of Mrs. Fontenelle, Ms. Sangaroo had access to the property as she commissioned a survey of the property. The resulting report has attached to it pictures of both the interior and exterior of the structure. On an assessment of the evidence presented, I do not believe that Mr. Barley or his mother did not have access to the house.

Deceased's interest in the estate of his father Joseph George aka Joseph Barley

[57] Mrs. Fontenelle says that the estate of their father, Joseph George aka Joseph Barley has not yet been administered and she acknowledges that the deceased would be entitled to 1/13 share (1/14 in defence) of his father's share in the property (Block and Parcel 1021B 14) which was held in community with his wife. This is the same parcel of land where the dwelling house with the extension is situated. The respective shares in the parcel of land and dwelling house have not yet been administered and vested by the administrator of their father's estate. Mrs. Fontenelle says she will endeavour to distribute the deceased's share to Mr. Barley once the administration of the father's estate is completed.

[58] Mrs. Fontenelle avers that the deceased could only give what he had and was entitled to at the date of his death but Mr. Barley and Ms. Sangaroo have refused to accept this.

[59] Mr. Barley in cross-examination agreed that in order for him to get his father's share of the property, that it has to be subdivided. He accepted that from February 2017, Mrs. Fontenelle had through her lawyer by letter dated 21st February 2017 advised that the deceased's entitlement in his father's share of the property was approximately 4,133 square feet and that she, Mrs. Fontenelle was not the named administrator in relation to that property and was therefore unable to do anything in relation to that property.

- [60] The evidence shows that Mrs. Fontenelle is not the administrator of the estate of Joseph George aka Joseph Barley and is not in a position to vest property which has not itself been vested in the deceased's estate. The only thing which Mrs. Fontenelle can do is to make enquiries about the status of the administration of the estate of Joseph George aka Joseph Barley.

Liabilities and Testamentary Expenses

- [61] Mrs. Fontenelle avers that as far as she knew, the deceased had no known creditors. His funeral expenses were borne by the deceased's FIP burial plan held with the Laborie Credit Union and significant assistance from family/siblings and without contribution from either Mr. Barley or Ms. Sangaroo. On the deceased's death, the sum of \$14,925.60 was paid to Ms. Sangaroo but she is not aware of whether it was all used towards the burial. A letter dated 1st December 2019 from the Laborie Credit Union provides details of the Family Indemnity Plan (FIP) and confirms payment to Ms. Sangaroo of the said amount on 15th April 2016.¹⁴ There was no challenge to this evidence by Mr. Barley.

Conclusion

- [62] In **Estelle Wheatley** at paragraphs 64-65, Ellis J summarised the position very clearly as relates to removal of an executor. She said:

“[64] „, it is also clear that the removal of an executor is not a simple task. **Much will depend on the particular facts of the case and whether they disclose that there are clear and compelling reasons that would adversely affect the administration and the welfare of the beneficiaries. Bad relations between parties will generally not be enough.** Further, a court will always take into account the fact that a testator has chosen his personal representatives. Such a decision will generally not lightly be interfered with. **The Court will also consider whether the cost of removal, hand over and replacement may be disproportionate to the issue in dispute.**

[65] Ultimately, the test for removal of an executor is based on whether there is prejudice to the estate or the beneficiaries' welfare. **Simple speculation is not enough – there must be clear and persuasive evidence.**” (my emphasis)

¹⁴ Page 65 of TB.

[63] In the case of **Kershaw v Micklethwaite**¹⁵ Justice Newey referred to the case of **Thomas & Agnes Carvel Foundation v Carvel**¹⁶ where Lewison J said at paragraph 44 thus:

“It is common ground that, in the case of removal of a trustee, the court should act on the principles laid down by Lord Blackburn in *Letterstedt v Broers* (1884) 9 App Cas 371, and that in the case of removing a personal representative similar principles should apply....”

[64] It is understandable that an executor faced with such circumstances as confront Mrs. Fontenelle in this case would need to take some time to sort out and determine the best way to achieve the wishes of the deceased. It is clear from the valuations presented that the concrete dwelling house referred to in the Will could only mean the extension built and which is referred to as the newer part/section in the valuations presented by Mr. Barley and Mrs. Fontenelle. It is difficult to give over an extension which is part of an existing structure or vest an interest in the land, where the existing structure or the parcel of land does not belong to the deceased solely. Such situations demand that an executor come up with creative ways to honour the wishes of the deceased whilst ensuring that the duties as executor are not in any way compromised.

[65] Mrs. Fontenelle was not even given a chance to try to sort out the deceased's estate and was faced with a claim against her as early April 2017, a few months after probate was granted. That claim was discontinued and then she was faced with this claim filed in August 2018 and amended in February 2019. The evidence reveals that there was communication between counsel for Mrs. Fontenelle and Mr. Barley's mother, Ms. Sangaroo concerning the bus and what needed to be done from as early as February 2017, a mere two months after the grant of probate. It is clear that there was dialogue between the parties. It is also noteworthy that when the first claim was filed in April 2017, Mr. Barley's mother had already secured possession of the bus and route band, clearly without Mrs. Fontenelle's involvement, albeit that Mrs. Fontenelle was now the appointed personal representative for the deceased's estate, acts which could be considered as intermeddling in the estate of the deceased. Mrs. Fontenelle

¹⁵ [2010] EWHC 506 (Ch).

¹⁶ [2008] Ch 395.

also undertook valuations of the structure to ascertain the value of the extension. That does not strike me as an executrix who is dilatory and not interested in administering the deceased's estate.

[66] Both counsel for the claimant and the defendant have referred and relied on the case of **Estelle Wheatley**. However, I am of the view that that case is distinguishable from this case. In **Estelle Wheatley**, the facts were that the executors failed to take up a grant of administration until 15 years after the death of the testator, 13 years had elapsed since their appointment and administration and distribution of the deceased's estate was largely incomplete. The court also found that the delay in complying with their duties was largely unjustified and unexplained and a clear breach of their duties as executors. This is not the case here.

[67] It is clear from the evidence and the mere fact that this claim has been filed, that the relationship between Mr. Barley, Ms. Sangaroo and Mrs. Fontenelle is not the best and may very well have been further strained with the ongoing litigation. However, I am not of the view that the relationship is so acrimonious that Mrs. Fontenelle cannot pursue administration of the deceased's estate and fulfil her role as executrix. Indeed, Justice Newey in **Kershaw v Micklethwaite**¹⁷ was of the following view applying the principles in **Letterstedt**:

“Similarly, I do not think that friction or hostility between an executor and a beneficiary will, of itself, be a good reason for removing the executor. On the other hand, a breakdown in relations between an executor and a beneficiary will be a factor to be taken into account, in the exercise of the court's discretion, if it is obstructing the administration of the estate, or even sometimes if it is capable of doing so. ... for a breakdown in relations to warrant an executor's removal, the breakdown must at least have the potential to cause difficulty in the administration of the estate.”
(my emphasis)

[68] It is the case that Mrs. Fontenelle admitted that she did not check any other financial institution to see whether the deceased had any other accounts. And perhaps she ought to have done so. However, it is very clear from the case law

¹⁷ At paragraph 9.

that this infraction is not enough to warrant removal of an executor. As has been established, Mrs. Fontenelle is not the administrator of Block and Parcel 1021B 14 in relation to the half share of her and the deceased's father, Joseph George aka Joseph Barley and is therefore not in a position to vest property which still forms part of his estate. She therefore cannot be faulted for not being able to transfer that gift as provided for in the Will. I have stated earlier that the most that could be done is for Mrs. Fontenelle to obtain an update on the status of the administration of the property in question to be able to provide an update to Mr. Barley.

[69] Justice Newey in **Kershaw v Micklethwaite** made this pronouncement which is very helpful and which I adopt:

"Even if things could have been handled better in certain particular respects, there is, in my judgment, no scope for any substantial criticism. In any case, as Lord Blackburn said in Letterstedt at pages 385 to 386, "... it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees", which will induce Courts of Equity to remove a trustee (or, I would add, an executor)."¹⁸ (my emphasis)

[70] The fact that someone else may have dealt with matters in a different manner is not enough to remove an executor. Having considered all the evidence, I therefore do not see that Mrs. Fontenelle has failed to administer the deceased's property. She has provided an account of the estate of the deceased. Mr. Barley on the other hand, has failed to prove any basis for removal of Mrs. Fontenelle as executrix of the estate of the deceased, Ceasarius Barley.

[71] The claim seeks the removal of Mrs. Fontenelle and appointment of Ms. Sangaroo as administrator. Having found that there is no basis for Mrs. Fontenelle's removal, there is no need to consider issue C-whether Ms. Sangaroo should be appointed. The Court must also consider what removal of the executrix and revocation of the grant of probate would mean. It would mean that a new proposed appointee would have to make an application for a new grant of letters of administration with will annexed de bonis non. This would

¹⁸ At paragraph 22.

be incurring expense which in my view is unnecessary and unwarranted in the circumstances of this case. I hardly doubt that appointment of a new administrator of the deceased's estate would be able to achieve anything more than has been achieved so far. It is my hope that counsel for the claimant and defendant can have discussions to better assist the parties to understand the complexity of the circumstances of this case. I am of the view that a lack of appreciation for the intricacies of administration of estates may be responsible for Mr. Barley's misgivings as relates to Mrs. Fontenelle's performance as executrix and further discussions between the parties may assist to bridge the gap.

Order

[72] In light of the foregoing discussion, I dismiss the claim with prescribed costs to be paid by the claimant to the defendant in the sum of \$7,500.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar