

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2021/0002

BETWEEN:

ELIZA THOMPSON

Appellant

and

CATHERINE THOMPSON

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mrs. Celia Edwards, QC with her, Ms. Celine Edwards for the Appellant
Mr. Alban John with him, Ms. Vern Ashby for the Respondent

2021: September 24;
2022: February 10.

Civil appeal – Land Law – Intestacy – Intestate Estates Act – Real Estate Devolution Act – Duty of administrator of estate - Deed of gift by administrator of estate – Interpretation of deed of gift - Whether administrator can gift property of unadministered estate – Whether the learned judge erred in awarding share of estate - Costs – Discretion of judge to award costs - General principle in awarding costs

Mrs. Petty Thompson (hereafter “Mrs. Thompson”) was the legal owner of a portion of land on the island of Carriacou, which comprised 5 acres 2 roods and 27.287 poles. Mrs. Thompson died intestate in September 1931 and was survived by six of her eight children, including Joseph Thompson (hereafter “Joseph”), Robert Thompson (hereafter “Robert”) and John Thompson (hereafter “John”).

On 29th November 1995, Joseph, the last of Mrs. Thompson's surviving children, was granted letters of administration of her estate. Joseph, in his capacity as administrator of the estate, and with the mistaken belief that he was entitled to the entire estate of his mother, purported to convey Mrs. Thompson's entire estate to the appellant, Eliza Thompson, by deed of gift dated 23rd July 1996 (hereafter "the deed of gift"). The appellant was the widow of Joseph's brother, Robert. The property which Joseph purported to convey to the appellant was described in the deed of gift as measuring one quarter acre (10,292.18 square feet). On 9th February 1998, Joseph executed a will purporting to convey his share of Mrs. Thompson's estate to the respondent, Catherine Thompson, who was John's daughter.

The appellant filed a fixed date claim on 12th February 2015 claiming ownership of the land as described in the deed of gift. The respondent pleaded in her defence that the land was undivided, that Joseph was only one of Mrs. Thompson's surviving children entitled to a share in her estate, that he only held the land in a representative capacity, and that he could not therefore have gifted it to the appellant. In his order dated 17th November 2020, the learned judge found that each of the six children of Mrs. Thompson's who survived her was entitled to a one-sixth share (comprising 41,168.17 square feet) of the land in her estate. The learned judge also found that the appellant is entitled to 10,292.18 square feet, being one quarter acre out of Joseph's one-sixth share in Mrs. Thompson's estate.

The appellant, being dissatisfied with the decision of the learned judge, appealed and the respondent cross-appealed. The main issues which arose for consideration were: i.) whether the learned judge erred in finding that the appellant was entitled to 10,292.18 square feet of Joseph's one-sixth share in Mrs. Thompson's estate; ii.) whether the learned judge erred in holding that the 10,292.18 square feet should come out of Joseph's share of the estate as opposed to his brother Robert's share and iii.) whether the learned judge erred in ordering that the parties bear their own costs.

Held: dismissing the appeal, allowing the cross-appeal in part and making the orders as set out at paragraph 42 (2) of this judgment, that:

1. A grant of letters of administration only empowers the administrator to administer the estate of the deceased in accordance with the laws of intestacy of the country. In Grenada, the laws of intestacy are contained in the Intestate Estates Act and the Real Estate Devolution Act. These Acts provide for the manner in which the estate of a person dying intestate devolves to his heirs and codify the common law principle that a personal representative of the estate of a deceased acts as a trustee for the persons beneficially entitled by law to any property of the deceased. Furthermore, where the estate of the deceased remains unadministered, no beneficiary has an interest in the estate's property. In this case, as evidenced by the operative clause of the deed of gift, Joseph purported to convey the land to the appellant in his representative capacity. As there was no evidence that the one-sixth share of his mother's estate which he was entitled to on her intestacy was vested in him, Joseph could not convey it to the appellant either as grantor or as administrator of his mother's estate in furtherance of his love and affection for the appellant. The appeal is therefore dismissed on this issue.

The **Intestate Estates Act**, Cap. 154 of the Laws of Grenada applied; Section 4 of the **Real Estate Devolution Act**, Cap. 274 of the Laws of Grenada applied; Section 32 of the **Conveyancing and Law of Property Act** considered; **Halsbury Laws of England** 4th edn, vol. 17(2) applied; **Daphne Gumbs v Administrator of the Estate of James Fahie** [2020] ECSCJ No. 86 (delivered 6th March 2020) applied.

2. On the same basis that Joseph could not convey any part of his one-sixth share of the estate to the appellant, either as administrator or as grantor, he could not convey to the appellant all or any part of Robert's share in the land. The appellant's entitlement to any part of her deceased husband's share in the land must be determined by his will, if he died testate, or by the laws of intestacy, if he died intestate. The learned judge could not therefore have allocated a quarter acre of Robert's share in his mother's estate to the appellant, nor can this Court do so. The cross-appeal is accordingly dismissed on this issue.
3. It is a general principle that costs follow the event and a successful party to an action may only be deprived of his costs in very limited circumstances. Where a judge is minded to depart from this general rule, he ought to provide reasons for so doing. Upon a consideration of the appellant's claim in the court below and the fact that she was unsuccessful in that claim, there does not appear to be any basis for the learned judge to have departed from the general rule. The judge also failed to give reasons for his departure from the general rule. In the circumstances, the judge exceeded the generous ambit within which reasonable disagreement is possible and was clearly or blatantly wrong and the order in the court below that the parties bear their own costs must accordingly be set aside. The cross-appeal on costs is therefore allowed.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against paragraph 2 of the order of a High Court judge dated 17th November 2020, by which the learned judge ordered that the appellant is entitled to 10,292.18 square feet of land, being one quarter acre from the one-sixth share of Joseph Thompson in the estate of his mother, Petty Thompson. There is also a cross-appeal by the respondent against paragraph 2 of the order and against the costs order made by the learned judge in paragraph 3.

Background

- [2] Mrs. Petty Thompson (hereafter "Mrs. Thompson") was, at the date of her death, the owner of a portion of land in L'Esterre on the island of Carriacou in the state of

Grenada comprising 5 acres 2 roods and 27.287 poles. On 11th September 1931, Mrs. Thompson died intestate and was survived by six of her eight children.

- [3] On 29th November 1995, the last of her surviving children, Joseph Thompson (hereafter “Joseph”) was granted letters of administration of her estate. By deed of gift dated 23rd July 1996, Joseph, in his capacity as administrator, and in the mistaken belief that he was entitled to the entire estate of his mother, purported to convey the entire estate to the appellant, Eliza Thompson, who was the widow of Joseph’s brother, Robert Thompson (hereafter “Robert”) - one of the children of Mrs. Thompson who survived her. The property which Joseph purported to convey to the appellant was described in the deed of gift as measuring one quarter acre (which is less than 5% of the actual size of the land comprising the estate of Mrs. Thompson).
- [4] On 9th February 1998, Joseph (who had less than 2 years before purported to convey the entire estate of his mother to the appellant) executed a will devising his interest in the estate to the respondent, Catherine Thompson, who was the daughter of Joseph’s brother, John Thompson, another of the children of Mrs. Thompson who had survived her.
- [5] By a fixed date claim filed on 12th February 2015, the appellant claimed that she owned the land as described in the deed of gift to her by Joseph and that the respondent was trespassing on the land. In her defence, the respondent pleaded that the land was undivided, that Joseph was only one of the children who survived Mrs. Thompson and who was entitled to a share in her estate, and that he held the land only in his representative capacity as the administrator of his mother’s estate and could not therefore have gifted it to the appellant. The respondent also pleaded in her defence that the deed of gift executed by Joseph on 23rd July 1996 was null and void.

The decision of the court below

- [6] The learned judge identified two issues to be determined by the court - the first was the extent of the share of each of the surviving children of Mrs. Thompson in her estate, and the second was what was to be done with Joseph's share in the land forming part of the estate of his mother. The judge answered the first question by his order that each of the six children of Mrs. Thompson who survived her was entitled to a one-sixth share (comprising 41,168.17 square feet) of her Carriacou land; and he answered the second question by his order that the appellant is entitled to 10,292.18 square feet, being one quarter acre out of Joseph's one-sixth share in his mother's estate.

The appeal

- [7] The appellant, being dissatisfied with the decision of the learned judge, appealed against paragraph 2 of the order wherein the learned judge held that the appellant was entitled to 10,292.18 square feet out of Joseph's one-sixth share in his mother's estate. The respondent cross-appealed paragraph 2 of the judge's order contending that the judge erred in holding that the 10,292.18 square feet should come out of Joseph's share, rather than from the share of his brother, Robert, who was the appellant's husband and the person through whom she would be entitled to an interest in the land. The respondent also appealed against paragraph 3 of the judge's order wherein the learned judge held that the parties are to bear their own costs, contending that she, as the successful party, was entitled to her costs to be paid by the appellant.

The appellant's case

- [8] The appellant submits that the clear intention of Joseph in the deed of gift was to convey to her the entire estate of Mrs. Thompson (containing 5 acres 2 roods and 27.287 poles) which he believed he was entitled to. This, she claimed, was his intention, even though the schedule to the deed described the land as 'containing by estimation quarter of an acre English Statue Measure'. She contends that at the time Joseph executed the deed, it was thought that Mrs. Thompson's estate only

contained a quarter of an acre, and this was the reason for the incorrect statement of the area of the land.

[9] The appellant concedes that Joseph was not in fact entitled to the entire estate of his mother but, as one of the six children who survived her, he was entitled to a one-sixth share of her estate, which share was therefore transferred to her by the deed of gift.

[10] The appellant relies on the case of **St. Vincent Building and Loan Association v Kenneth Browne et al**¹, where Byer J reviewed relevant authorities on the question of what prevails in the divergence between a description of the boundaries of a parcel of land in a deed and a statement of the area of the land in the same deed. The learned judge quoted the following extracts from paragraph 329 of Halsbury's Laws of England²:

“The title deeds of the parties concerned constitute the primary evidence and must be considered first; and the boundaries as indicated in the title deeds prevail if they are clear and unambiguous.”

“... where a deed refers to known physical and natural objects by means of which the boundaries of land conveyed are described, and also contains a statement of area, the former controls the latter in case of discrepancy”

Byer J concluded in the case before her, and the appellant asks this Court to likewise conclude in this case, that the description of the land in the deed eclipses the statement in the deed of the area of the land.

[11] The appellant also relies on section 32 of the **Conveyancing and Law of Property Act**³ which states:

“(1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on, the property conveyed or expressed

¹ SVGHCV2019/0077 (delivered 17th September 2020, unreported).

² Halsbury Laws of England 5th edn., vol. 4.

³ Cap. 64 of the Revised Laws of Grenada.

or intended so to be, or which they respectively have power to convey in, to or on the same.

(2) This section applies only if and so far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies only to conveyances made after the commencement of this Act.”

- [12] The appellant contends that since there was no contrary intention expressed in the deed of gift to her, the only possible effect of the deed was to convey Joseph’s entire entitlement in the land to her, which the learned judge found was one-sixth of the 5+ acres of land left by Mrs. Thompson. The appellant therefore submits that by the time Joseph made the will in 1998, he had already transferred his entire share in the land to her by virtue of the deed of gift and he had no interest left to convey to the respondent.

The respondent’s case

- [13] The respondent references paragraph 341 of **Halsbury’s Laws of England**,⁴ where it is stated that:

“The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right. The entire ownership of the property comprised in the estate of a deceased person, both legal and equitable, which remains unadministered is in the deceased’s legal personal representative for the purposes of administration.”

She contends that Joseph at all times held the lands in his representative capacity as administrator and not in his own right. She asserts that the operative part of the recitals in the deed of gift refers to Joseph in his capacity as administrator, and that nowhere in the operative part of the deed was there an expression by which Joseph, in his personal capacity, conveyed the land to the appellant. She submits that the Letters of Administration only placed Joseph in possession of the land for the sole purpose of administering the estate of his mother, Mrs. Thompson.

⁴ Halsbury Laws of England 4th edn.(reissue), vol. 17(2).

- [14] The respondent also submits that the deed of gift was ambiguous and fraught with erroneous statements, premises and descriptions and should be declared void or, if it is determined that it was effective to convey anything, it only conveyed what the appellant was entitled to inherit through her husband, Robert.
- [15] The respondent argues that there is nothing in the deed of gift on the basis of which it can be concluded that Joseph intended that the quarter acre of land which he purported to convey to the appellant should come from his personal share in his mother's estate, instead of from the share of his brother, Robert. In support of this argument, the respondent pointed out that Joseph's house was not mentioned in the deed. She contends that the will, on the other hand, specifically devised to her Joseph's home and the land on which it stood, evidencing a clear intention on Joseph's part to leave his share in the land to her. She therefore urged this Court to dismiss the appeal and allow the cross-appeal.

Discussion and analysis

- [16] Both parties to the appeal have accepted that there were several errors in the deed of gift. It is also accepted that the determination of this appeal turns largely on this Court's interpretation of the deed of gift executed by Joseph, by which deed he purported to convey the entirety of his mother's estate to the appellant. This therefore warrants an examination of the relevant provisions of the deed.
- [17] The first clause of the deed identifies the parties to the deed. It describes Joseph as both the Administrator and the Grantor and describes the appellant as the Grantee.
- [18] The first recital speaks to Mrs. Thompson's entitlement to the lands described in the schedule and describes her as the deceased.
- [19] The second, fifth and sixth recitals read as follows:
- Second - "The deceased died on the Eleventh day of September One Thousand Nine hundred and thirty-one at L'Esterre aforesaid intestate leaving her lawful son as the only person entitled to her estate her surviving".

Fifth – “AND WHEREAS by the death intestate of the Deceased the Grantor hereinabove mentioned became entitled to the estate”.

Sixth – “AND WHEREAS the Grantor is desirous of conveying the said hereditaments to the Grantee to the intent that the whole legal estate and beneficial interest therein shall be vested in the Grantee”.

[20] The operative clause of the deed reads as follows:

“...in pursuance of the premises and of the said desire and in consideration of the natural love and affection for the Grantee the Administrator as Personal Representative hereby CONVEYS and CONFIRMS unto the Grantee ALL THAT the hereditaments set out and described in the Schedule hereto TO HOLD the same UNTO and TO THE USE of the Grantee in fee simple to the intent that the Grantee may henceforth stand seised of the entirety of the said hereditaments free from any resulting trust in favour of the Grantor.”

[21] It clearly appears from the language used in the deed of gift that Joseph was under the impression that he was entitled to the entirety of his mother’s estate. This is clearly evidenced by the second recital quoted above, wherein he identifies himself as ‘the only person entitled to her estate her surviving’. Section 4 of the **Intestate Estates Act**⁵ sets out the manner in which the estate of a person dying intestate shall devolve to his or her heirs. In accordance with this section, the entire estate of Mrs. Thompson could not have passed to Joseph only, when 6 of her children survived her and, although the other 5 (apart from Joseph) were deceased at the time that Joseph executed the deed of gift, each of them left surviving heirs to whom the share of each would devolve.

[22] It also appears that Joseph purported to convey the land to the appellant in his representative capacity, as evidenced by the following words in the operative clause – ‘the Administrator as Personal Representative hereby CONVEYS ...’ However, Letters of Administration empower the administrator to administer the estate of the deceased in accordance with the law of intestacy, which in Grenada is contained in the **Intestate Estates Act** and the **Real Estate Devolution Act**⁶ and which provides

⁵ Chapter 154 of the Laws of Grenada.

⁶ Cap. 274 of the Revised Laws of Grenada.

for the property of a widow or widower, with children born in wedlock, to pass in equal shares to each of his or her surviving children and, if the children who survive the parent die before the administration of the estate, their shares devolve to their respective heirs.

[23] Counsel for the appellant made a valiant attempt to persuade this Court that it ought to look beyond the clear words of the deed of gift and find that the intention of Joseph was to convey the land to the appellant as a grantor of his share in the estate of his deceased mother. But this argument must fail for reasons which will become apparent.

[24] The learned authors of **Halsbury's Laws of England**⁷ explained the nature of the interest of the personal representative in paragraph 341 of volume 17(2). Although this extract has already been quoted in paragraph 13 above, I repeat it here for context and emphasis:

“The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right. The entire ownership of the property comprised in the estate of a deceased person, both legal and equitable, which remains unadministered is in the deceased's legal personal representative for the purposes of administration.”

[25] Since Joseph had not administered the estate of his mother, the only capacity in which he was therefore entitled to transfer the property of the estate was in his capacity as administrator of the estate, because there is no evidence of him or anyone else being vested with a share of the estate. Where an estate remains unadministered, no beneficiary has an interest in the estate's property, even in property which was specifically devised by will.⁸ In order to have been able to transfer the property from himself as grantor to the appellant as grantee, Joseph would have had to first execute a vesting deed transferring the land or some part of it to himself. Until this is done, he could only transfer an interest in the land as

⁷ 4th edn. reissue, volume 17(2).

⁸ *Daphne Gumbs v Administrator of the Estate of James Fahie* [2020] ECSCJ No. 86 (delivered 6th March 2020).

administrator in accordance with the provisions of the **Intestate Estates Act** and the **Real Estate Devolution Act**. In any event, even if the Court was minded to go along with the appellant's argument that when one reads the recitals in the deed of gift it is clear that Joseph was not conveying the land to the appellant as administrator, the recitals in the deed are nevertheless subordinate to the operative clause of the deed, which clause is pellucid that Joseph purported to convey the land to the appellant in his representative capacity as the administrator of the estate of his mother.

- [26] Section 4(1) of the **Real Estate Devolution Act** codifies the principle that a personal representative is acting as a trustee and not for his own benefit. It provides that:

“Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.”

- [27] The appellant sought to rely on section 32 of the **Conveyancing and Law of Property Act**, which is set out in full in paragraph 11 above. She argues that, since there is no contrary intention expressed in the deed of gift, the only possible effect of the deed of gift was to convey Joseph's entire entitlement to her. This too must fail.

- [28] Section 32(1) of the **Conveyancing and Law of Property Act** presupposes that the party doing the conveyance is the grantor. The section applies to persons who have already been vested with an interest in the property, which Joseph was not. The section also speaks to ‘all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on, the property conveyed’, but Joseph purported to convey the entire estate of his mother, when in fact he would only have been entitled to a one-sixth share in the estate. It is clear therefore that section 32 could only have assisted the appellant if the conveyance to her was made by Joseph as the grantor and not as the administrator, because the

administrator cannot convey property to a non-heir on the basis of his love and affection for the grantee. He could convey his own property to someone in consideration of his love and affection for the person, but he could only convey the property of the estate as administrator in accordance with the applicable law, contained in the **Intestate Estates Act** and the **Real Estate Devolution Act**.

- [29] To be clear, the one-sixth share of his mother's estate to which Joseph was entitled on her intestacy was not vested in him and so he could not convey it to the appellant as grantor. Joseph could not also convey his or any share to the appellant as administrator in consideration of his natural love and affection for her. A person is free to convey his property to another person in consideration of his natural love and affection for that other person or for any other lawful purpose, but he cannot convey the property of an estate of which he is the administrator in consideration of his love and affection for some other person. An administrator is limited to transferring the property of the estate to another person in accordance only with the laws of the country governing the administration of the estates of deceased persons and not in accordance with any feelings which he may have for the other person.

Cross-appeal

- [30] On her cross-appeal, the respondent argued that the learned judge erred when he ordered that the appellant was entitled, by virtue of the deed of gift, to a quarter acre or 10,292.18 square feet out of Joseph's entitlement to one-sixth of his mother's estate. She submitted that what in fact the appellant was entitled to receive by virtue of the deed of gift was a quarter acre from the one-sixth share of her deceased husband, Robert, in the estate of his mother.
- [31] The respondent is correct in her submission that the judge erred when he held that the appellant was entitled to a quarter acre of Joseph's share in his mother's estate. Just as he found that the deed of gift was not valid to convey Joseph's share in his mother's estate to the appellant, so too the deed of gift was not valid to convey any part of Joseph's share in his mother's estate to the appellant. The invalidity of the

gift of the land to the appellant is not because of the quantum of land purported to be conveyed to her by the deed, but because of the capacity in which and the basis on which Joseph purported to convey the land to her. Joseph purported to convey the land to the appellant, not in his personal capacity, but in his capacity as administrator of the estate of his mother, and on the basis of his natural love and affection for her (the appellant).

[32] The respondent is not correct, however, in her submission that the judge ought to have found that the deed of gift conveyed to the appellant a quarter acre out of Robert's share in the estate of his mother. On the same basis that Joseph could not convey any part of his one-sixth share of the estate to the appellant, either as administrator in consideration of his natural love and affection for her, or as grantor when the land was not vested in him, he could also not convey to the appellant all or any part of Robert's share in the land.

[33] The 5 acres 2 roods and 27.287 poles of land in Carriacou which comprised the estate of Mrs. Thompson had not been partitioned and allocated to the heirs of Mrs. Thompson when Joseph executed the deed of gift. He also never purported to convey to the appellant the share or any part of Robert's share in the land. In any event, the appellant's entitlement to any part of her deceased husband's share in the land would be determined by his will, if he died testate, or by the laws of intestacy, if he died intestate, and the administrator of the estate of Robert's mother would have no authority as such to determine who are the heirs and entitled to succeed to the estate of his deceased brother, so as to be authorised to convey his brother's estate or any part of it to his brother's widow, absent any evidence of letters of administration taken out on Robert's estate or probate granted of any will of Robert. The learned judge could not therefore have allocated a quarter acre of Robert's share in his mother's estate to the appellant as Robert's widow, nor can this Court do so.

Interpretation of deed of gift

[34] Having regard to the conclusions already arrived at in this judgment, it may not be necessary to address the issue of the judge's reliance on Joseph's will in interpreting the deed of gift, but the issue was addressed by both parties, and it may be useful, in the interest of completeness, to at least briefly address it.

[35] The general rule of construction, whether in interpreting a statute, a contract, or other instrument, is to ascertain the intention of the party or parties from the words used in the statute, contract, or other instrument. Lord Neuberger, in the UK Supreme Court decision of **Marley v Rawlings**,⁹ explains it this way:

“When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.”

[36] In a similar vein, Upjohn LJ in **Johnstone v Holdway**¹⁰ (quoting Wright J in **Callard v Beeney**)¹¹ stated that:

“The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor.”

He continued, ‘[i]n construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed so as to place the court in the situation of the grantor.’

[37] These cases clearly indicate that it is open to a court in interpreting a deed to have regard to ‘the facts known or assumed by the parties at the time the document was executed’ and that ‘in construing the deed the court is entitled to have evidence of

⁹ [2014] UKPC 2.

¹⁰ [1963] 1 QB 601.

¹¹ [1930] 1 QB 3.

all material facts at the time of the execution of the deed'. There is no authority, however, for the court to use subsequently occurring events to interpret a deed, statute, contract or other instrument. It was, therefore, clearly inappropriate to interpret the deed of gift by reliance on a subsequent document, in this case a will which was executed 19 months after the execution of the document being construed. The judge accordingly erred when he sought to use the fact of Joseph having made a will in February 1998 and the contents of that will as a basis to interpret the deed of gift executed in July 1996 as not intending to convey Joseph's entire share in the estate of his mother to the appellant. This error by the judge does not, however, impact on my finding here, independently of any will, that the deed of gift was not effective to convey any part of Joseph's share in the estate of his mother to the appellant.

Costs

- [38] The respondent has challenged the costs order made by the learned judge on the basis that the appellant's claim for the entirety of Mrs. Thompson's estate failed and so she (the appellant) should have been ordered to pay the respondent's costs.
- [39] This Court is mindful of the fact that a costs order made by a trial judge is made in the exercise of his discretion and that an appellate court will hesitate to interfere with the exercise of discretion by a judge in the court below, except in defined circumstances. This has been clearly expressed in numerous cases from this Court and does not need repetition or elaboration.
- [40] The general rule is that costs should follow the event unless there is sufficient reason to the contrary. If the judge is minded to depart from the general rule, he should say why he is doing so. Having considered the issue which was brought before the court below, namely, the appellant's claim to entitlement of the entire estate of Mrs. Thompson, and the fact that she was unsuccessful in that claim, there does not appear to be any basis for the learned judge to have departed from the general rule. Moreover, the judge did not give a reason why he did not order costs

to follow the event. In so doing, the learned judge exceeded the generous ambit within which reasonable disagreement is possible and was clearly or blatantly wrong. The order made by the learned judge in the court below that the parties are to bear their own costs will accordingly be set aside and substituted with an order that the appellant shall pay prescribed costs to the respondent in the court below. In accordance with rule 65.5(2)(b) of the **Civil Procedure Rules 2000**, the claim will be treated as a claim for \$50,000.00 and prescribed costs calculated based on that amount. This would yield a cost award of \$7,500.00. I do not, however, think that it is just and fair for the respondent to be awarded the full amount of \$7,500.00. I will accordingly discount the award by 30% to reflect the fact that the respondent did not win every argument in the lower court and was not vindicated in this Court on her unsuccessful arguments.

- [41] As to costs on this appeal, insofar as the respondent has successfully resisted the appellant's appeal against the judge's order denying her Joseph's entire share in his mother's estate and that she (the respondent) succeeded in her cross-appeal to the extent that the award of the quarter acre out of Joseph's share of his mother's estate will be set aside, will entitle her to a cost award on the appeal. Again though, the respondent will not get the full amount of the costs that would normally be awarded. On the appeal, the respondent pursued an unnecessary and baseless argument to the effect that the appellant should be awarded a one quarter acre of land from Robert's share in the estate of his mother by virtue of a deed of gift which she (the respondent) contended was invalid, and more so when there is no evidence of what, if any, is the share of the appellant in Robert's estate. The respondent also persisted with another unnecessary and baseless argument that the trial judge was entitled to interpret the deed of gift by reference to a will executed 19 months after the execution of the deed. I will accordingly award the respondent two thirds of the costs in the court below but discount the costs award by 40% to reflect the fact that the respondent did not prevail on all the issues which he canvassed in the Court of Appeal.

Disposition

[42] In light of the foregoing, I make the following orders:

- (1) The appeal is dismissed
- (2) The cross-appeal is allowed to the extent that paragraphs 2 and 3 of the order of the learned judge dated 17th November 2020 are set aside and replaced as follows:

“2. The share of Joseph Thompson in the estate of his mother, Petty Thompson, will devolve to his heirs in accordance with the provisions of his will (if he died testate) or the provisions of the Intestate Estates Act (if he died intestate).”

“3. The respondent is awarded prescribed costs in the court below in the amount of \$7,500.00, discounted by 30% to reflect the fact that she did not prevail on every argument.”
- (3) The respondent is awarded two-thirds of the discounted costs in the court below on the appeal, which amount will itself be discounted by 40%.
- (4) For the avoidance of doubt, the mathematical consequence of these costs awards is \$5,250.00 cost in the High Court and \$2,100.00 in the Court of Appeal, yielding a total costs award to the respondent of \$7,350.00.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar