

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2013/0019

BETWEEN

AUDREY FREDERICK Claimant

AND

JOSEPH FENTON Defendant

Appearances

Mr Warren Cassell for the claimant.

Mr Jean Kelsick for the defendant.

2019: OCTOBER 15, 26

DECEMBER 2, 13, 20

JANUARY 14

MAY 11¹

JUDGMENT

Concerning ownership between siblings of deceased mother's home

¹ Ruling delayed owing to coronavirus pandemic closing courts; originally due on 26.03.20 and completed for that date.

- 1 **Morley J:** The claimant Audrey wishes it declared she owns the downstairs flat in her late mother's home, who was Jane Fenton. Her three siblings resist, led by the defendant Joseph², who said in evidence on 26.10.19 the whole house should be jointly owned by all four of them.
- 2 Following trial on 15 and 26.10.19 I was asked to decide who owns what, and if any sibling owes another rent. Judgment was due on Monday 02.12.19. On 29.11.19, being the Friday before the Monday, Counsel Kelsick sent unsolicited submissions to ignore what Joseph had said at trial, and instead to award the whole house to him. More legal submissions were filed by Counsel Kelsick on 05.12.19. The case was mentioned on 13 and 20.12.19, with further inter partes argument considered on 14.01.20, and final judgment due today.

Prior history

- 3 In this case, there was an earlier judgment dated 18.09.17, in which I had decided Audrey, then represented by Counsel David Brandt, did indeed own the downstairs. However, that decision was without hearing from her siblings, as it was said Joseph had not been contactable, and so a short trial had proceeded in his and their absence on 14.09.17. In that first trial I was told by Audrey there had been little contact with the siblings after Jane's death on 19.03.12, and now she had no way of contacting them. Having heard from the siblings in the second trial, I am uncomfortable what I was told in the first was not true. Though Audrey is the eldest by a different father, I am persuaded this has been a close family for many years, Audrey in Boston and the others in New York, so that finding Joseph or the others should have been readily possible. Though Joseph had moved from his home in the Bronx, I am left with the impression Audrey did not try very hard to find him, probably to make her claim easier to offer in his absence. Once the siblings learned of the judgment, there has been a deluge of paperwork offered, including multiple bank reports, to contest what had been first filed.

² The parties will be so referred for ease of reading, and no disrespect is intended by not writing out full names and titles, or the legalese of whether claimant or defendants.

- 4 The first judgment was appealed by Counsel Kelsick, inter alia on the ground that clause 2 of Jane's Will was a legal nullity. Without deciding the matter, the Court of Appeal remitted the case for re-trial now that the siblings were active parties.

The facts

- 5 In her Will of 06.01.10, Jane said in clause 2:

'I devise the downstairs dwelling flat of my house...to Audrey...who constructed the said flat absolutely and the upstairs portion of my house to...Mable...William [Joseph]...and John..., in equal shares notwithstanding that Joseph Fenton's name is on the deed since the house was paid for by me absolutely and his name was added as security in case I could not make the payments and to which he has never paid any monies for'.

- 6 This clause has been the source of the siblings falling out with Audrey. They are incensed she wants the downstairs exclusively for herself, and dispute she paid for it. Joseph and Audrey have each tried to lock each other out of the flat. The case has grown and grown, so that at trial there were seven witnesses called³, with 29 pages of witness statements and 228 pages of exhibits. A lot of material was filed to show who paid for what concerning the whole history of Jane's home. It is easy in this case to become lost in the paperwork.

- 7 What I find happened in this case is as follows:

- a. Jane was gifted some land and in 1992 a house was built on it in which she lived, being plot 13/18/21. Various financial contributions were made by her children. Joseph was put on the title deed so she could get a mortgage to pay for the build, as she was elderly and would not be able to raise a loan alone. It was not intended Joseph would keep the house on her death all to himself, and he has specifically agreed to this in court in evidence on 26.10.19, saying on oath in the presence of his sisters Audrey and Mabel, is brother John being on skype, the house should jointly be in the names of all four children.

³ The four siblings, Mabel's husband John, the builder John Ryan, and Montserrat lawyer Hogarth Sergeant.

- b. In 1997, the volcanic eruptions meant that Jane left Montserrat to live mostly with Mabel for many years, and in 2009 Jane went finally to live with Audrey. From Jane leaving Montserrat, the property has been intermittently rented out, and indeed during trial on visiting the locus on 26.10.19 there were tenants upstairs.
- c. In 2002, there was a family meeting at which I find Audrey was present (though denied by her) to discuss building a downstairs apartment in the area where there had been understorey parking. Audrey had said building the flat had been agreed exclusively with her mother, with her siblings not involved: I find this was not so. Thereafter financing it presented certain complications in which there have been competing claims as to who paid for what.
- d. When Jane (dob 13.04.1919) came to live with Audrey, she was quite elderly and in decline. On her death certificate for 19.03.12 from Boston it notes she had been suffering dementia. She made her Will with Audrey holidaying on Montserrat on 06.01.10 shortly after having come to stay with Audrey in Boston, visiting local lawyer Hogarth Sergeant, where clause 2 above was drafted, and her signature looks obviously shaky. A question arose in the trial whether she lacked testamentary capacity or had been unduly influenced by Audrey.
- e. However, the court does not need to decide this question to rule on clause 2. It falls foul of **s101 Registered Land Act cap 8.01 (LRA)**, which says:

101. (1) Where the land...is owned jointly, no proprietor is entitled to any separate share in the land, and consequently—

(a) dispositions may be made only by all the joint proprietors; and

(b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving jointly.

- f. The effect of the section on analysis is to render clause 2 of no legal effect. As can be seen in **s101(1)(b) LRA**, where Joseph held title jointly with Jane, on her death the plot was ‘*to vest in the surviving proprietor*’, being Joseph. Per **s2 LRA**, a disposition means ‘*any act inter vivos by a proprietor whereby his rights in or over his land... are affected*’. On this definition, a disposition would include creating a trust. As can be seen in **s101(1)(a) LRA**,

concerning jointly owned land disposition can only be made by all the owners, which had not occurred here when Jane sought to give Audrey the downstairs flat in her Will: Joseph had not agreed. This may be a common misperception among Montserrat folk. Where land is jointly owned, it appears the local legislation mandates that the survivor takes all, and the person dying cannot readily leave a share to another.

- g. It is puzzling the court's attention was not drawn, with emphasis, in the first trial to **s101 LRA** by Counsel Brandt, who is highly experienced, suggesting he would have known of it, and knowing the tribunal was then a visiting judge, unfamiliar with every section of local legislation, and who would expect to be able to rely on him to assist the court as to any striking features of the local law. This is particularly so where there is trial in the absence of a defendant, meaning counsel is under a duty of *uberrima fides*. It appears no legal submissions were filed during the first trial. It would arguably be professional misconduct to have said nought if he knew better.
- h. It follows no matter what Jane intended, whether demented or not, no matter who paid for what, no matter what rent was being paid to who, Audrey could not get the flat under the Will, either as devised directly to her, or as being held in trust by Joseph for her.
- i. With this stark legal reality in mind, it is not necessary to examine all the financial records and the many unhappy arguments between the siblings. As to rents, insofar as either party seeks compensation for rent not paid or shared, I find neither has met the burden of proving exactly what is owed by who, and so make no order.
- j. During the trial Mabel was a compelling and reliable figure. She explained how the three fell out with Audrey over Jane's house, where the Will seemed a manipulation of their elderly mother. The house was meant to be shared between them all, and still can be. The flat was and should be for holidays from the US, for any of the siblings, and their family members, requiring merely some coordination between all. She explained the right thing would be for all to own it jointly, including Audrey, and to which Joseph agreed.

Undoing the evidence

- 8 Sensing the court would order the property owned by all four, Counsel Kelsick has tried to undo the evidence, and head off what he anticipated would be the judgment on 02.12.19. His short point is that Joseph is the surviving legal owner, having been a joint tenant with his mother, so the property demises wholly to him: all siblings get nought, and it does not matter what he said to them and the court on 26.10.19.
- 9 I do not accept this. By his words on oath he has created a legitimate expectation in the mind of Audrey the claimant, and the others, she would at least have a joint share in the property. Moreover he spoke directly to the court. There is something offensive in seeking to undo his sworn words, such that he should be estopped. By his words on oath he gave up his claim to exclusive ownership. Borrowing loosely from the doctrine of proprietary estoppel, in my judgment Joseph should be fixed to his evidence, such that its consequence is I order the Land Registry to record plot 13/18/21 jointly owned by the four siblings.
- 10 If I am wrong to do so, I declare at the very least Joseph, in light of what he said in court, holds legal title for the benefit equally in equity of the four siblings, such that his mother's home is not his to sell or control wholly for his own financial gain.
- 11 There shall be no order as to costs. I had considered awarding some costs to Joseph, but will not, in light of his volte face, leading in my mind to unwarranted further litigation and hearings.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

11 May 2020