

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2013/0070

BETWEEN:

DAPHNE GUMBS

Claimant/Defendant to Counterclaim

and

ADMINISTRATOR OF THE ESTATE OF JAMES FAHIE (deceased)

First Defendant/Counterclaimant

and

FRANKIE FAHIE, ADMINISTRATOR OF THE ESTATE OF HOWARD JAMES FAHIE (deceased)

Second Defendant

Appearances: Ms. Marie Lou Creque, Counsel for the Counterclaimant
Mr. David Penn and Ms. Sheryl Rosan, Counsel for the Defendant to the Counterclaim
Ms. Ruthilia Maximea and Ms. Nellien P. Bute, Counsel for the Second Defendant

2020: 6th March

JUDGMENT

[1] **ELLIS J:** Daphne Gumbs, the Claimant herein (now deceased) brought her claim against the First and Second Defendants in which she contended that she was the caretaker of Howard James Fahie (“the Testator”) during his lifetime. The Claimant sought the following relief:

- a) That her name be entered on the land register as proprietor, with absolute title, on the portion of the land demarcated as Lot 1 of subdivision plan # CA-2940B-025-T located at East Central Registration Section, Block 2940B Parcel 38 where the house was built.
 - i. Relief through promissory and proprietary estoppel;
 - ii. Ownership of the house.

- iii. The market value of the house.
- iv. Legal and beneficial interest to the demarcated share of land on which the house is built.
- b) Legal costs; and
- c) Further or other relief as the court deems fit.

[2] The factual background to that Claim discloses that the Testator died leaving a Will in which he appointed his son Frankie Fahie as the executor of his estate. In clause 10 of the Will, the Testator devised the small two-storey building located at Long Trench to the Claimant. Unfortunately, as at the date of the Testator's death, the land on which the house was built (Block 2940B Parcel 38 located in the East Central Registration Section) was registered in the name of the Testator's father, James Fahie (deceased). James Fahie died intestate and upon his death, his children, Hyacinth Hodge (nee Fahie) and the Testator (who were also beneficiaries under the estate of James Fahie) were granted letters of Administrators in their father's Estate. The administrators' names were thereafter added to the land register as proprietors by transmission. Both administrators are now deceased; however, on 28th September 2012, Patsy Lake and her mother, Otencia Fahie were appointed as administrators *de bonis non* in the estate of James Fahie. Otencia Fahie later died leaving Patsy Lake as the sole Administrator. The estate of James Fahie is yet to be fully administered.

[3] The Claim was vigorously defended by both the First and Second Defendants who contended that while the Testator may have had a beneficial interest in the land as at the date of his death, he had no legal title to the land upon which he purported to construct the two storey building. By way of Counterclaim, the First Defendant/Counterclaimant ("the Counterclaimant") also claimed:

- a) An injunction restraining the Claimant from collecting any rents on behalf of the estate of James Fahie.
- b) An account of all rents collected on behalf of the estate of James Fahie, deceased.
- c) Possession of the property which forms part of the estate of James Fahie, deceased and which the Claimant's (daughter) occupies.
- d) Costs, and;
- e) Further relief as the court deems fit.

- [4] Both the Counterclaimant and the Second Defendant relied extensively on the decision of Rawlins J. in **Doreen Fahie v Frankie Fahie and Sharmaine Fahie (in their capacity as executors of the will of James Howard Fahie) and Daphne Gumbs**.¹ In that case the claimant, who was the widow of the Testator sought to challenge the devises made in his Will. She argued that they were defective because she had an equitable interest in the relevant properties. She sought a declaration that the properties which those clauses purport to devise (including the property which is the subject of this Counterclaim), are her properties. She further prayed for an order that Daphne Gumbs give an account for all rents collected from the property from 7th December 2001.
- [5] In that case, the administrator, Hyacinth Hodge (nee Fahie) advanced that the land on which the disputed houses stood comprised about 8 acres which were owned by her father James Fahie, who gave directions prior to his death that the land was to be divided between his 5 children. The land was never divided but remained registered in the name of the administrators of James Fahie's estate.
- [6] At paragraph 19 of his written judgment, Rawlins J (as he then was) found as follows:
- “The land is registered in the names of the testator and Hyacinth Hodge, his sister. They are holding it for the beneficial owners. Since the land has not been sub-divided, the true beneficiaries of the land and the houses thereon are the heirs of James Ferdinand Fahie. When, therefore the testator purported to devise the disputed houses on that land by clauses 8 and 10 of the Will, he was giving that in which he did not have a defined interest at that time. It may be definitively determined when the estate of his father is administered.”
- [7] However, later, at paragraph 20 of the judgment Rawlins J held:
- “Initially, I found that the result of the foregoing was that the devises contained in these clauses of the Will fail, are invalid and fall into the residue for the benefit of the residuary legatees under clause 11 of the Will. However, in submissions that I entertained today, I agreed with Mr. Carrington that the issue who takes the beneficial interests under clauses 8 and 10 of the Will in the circumstances of this case have not been fully ventilated. A Court may or may not be able to give effect to the stated intention of the testator in those clauses. The issue should arise for consideration under Part 67 of the Rules prior to the grant of probate. I urge the executors of the Will of the testator to issue a claim under part 67.4 of the Rules at the earliest convenient time.”

¹ BVIHPB 2002/0040

[8] With regard to the claim for an account of rents, Rawlins J. held at paragraph 22:

“No sufficient evidence has been adduced to prove that Daphne Gumbs collected rents to warrant an order for Daphne Gumbs to account for rents allegedly collected by her. My advice is that only the executors should collect any rents or other monies that come to the estate of the testator from the disputed properties. They should hold those monies on an interest bearing account in their joint names. Withdrawals should only be made from that account on both signatures and should only be used for the purpose of the upkeep of the properties or to assist with the administration of the estate as far as legally permitted. The monies in the account should be held on trust for the eventual beneficiaries of the disputed properties.”

[9] In an application filed on 1st July 2014, the Counterclaimant sought to have the Claimant's Claim and her Reply and Defence to Counterclaim struck out. The Counterclaimant's application was successful. However, the Counterclaim remained extant. By application filed 18th November 2014, the Counterclaimant applied for summary judgment on the Counterclaim. However, as summary judgment is not available in proceedings commenced by way of Fixed Date Claim Form, that application was unsuccessful. The Counterclaim was instead set down for trial. The Court notes that in the interim, Daphne Gumbs passed away and by order of the Court Denise Carey was appointed to carry on proceedings.

The Parties' Cases

[10] The Counterclaimant freely admits that the estate of James Fahie has not been completely administered on behalf of its beneficiaries. She agrees that the Testator is a beneficiary of the estate of James Fahie, but she contends that the two-storey building and the land on which it sits (“the Property”) forms part of the estate of James Fahie. She further submitted that the Daphne Gumbs (now herein referred to as “the Defendant to the Counterclaim”) is not the legal owner or a beneficiary of same and that her admitted collection of rents is unlawful since she is not the beneficiary or the administrator of the estate of James Fahie, deceased.

[11] In her Defence to the Counterclaim, the Defendant to the Counterclaim pleaded that it is an established fact that the Testator was a legally appointed personal representative of his father James Fahie's estate and that the Testator constructed and owns the 2 storey-building. She reiterated that the Testator promised her the Property and subsequently devised the same to her.

Following this, Hyacinth Hodge attempted to honour this promise when she directed the subdivision of the land so that the Testator's portion could be demarcated and vested in the Defendant to the Counterclaim. She further contended that she had paid for this subdivision and that she was permitted by one of the then administrators (Carmen Fahie) to enter and reside in the Property.

- [12] The issues to be determined in this Counterclaim therefore continue to revolve around the status of the Property which was devised in clause 10 of the Will of the Testator. This requires the Court to first consider whether the Counterclaimant has the *locus standi* to bring this Counterclaim.

Does the Counterclaimant have the relevant *locus standi*?

- [13] In order to commence an action as an administrator of the intestate estate, the administrator must have been issued with a grant of letters of administration.² In the case at bar, the Counterclaim was brought by the administrator *de bonis non administratis*, Patsy Lake on behalf of the estate of James Fahie. Such a grant arises where a sole or last surviving executor or administrator to whom a grant has been made dies without having fully administered the deceased's estate and the chain of representation does not apply. In those circumstances, it is necessary to appoint under a second grant, an administrator to deal with that part of the estate which remained unadministered.
- [14] The scope of the authority of an administrator acting under such a grant is well understood. Such an administrator has all the rights, duties and powers of a general administrator, but they are subject to the immediate control of the court. An administrator *de bonis non* therefore has the same power and authority with respect to the estate left unadministered as the original representative³ and as that representative has the same property in the estate devolving upon him as the deceased had when living, so he has the same power to bring actions in that respect.
- [15] Counsel for the Counterclaimant submitted to the Court that the Counterclaim was validly instituted as she is the lawfully appointed administrator of the estate of James Fahie. As such, Counsel

² Caudle v LD Law Ltd. [2008] EWHC 374 (QB); [2009] 2 ALL ER 1020.

³ Catherwood v Chabaud (1823) 1 B & C 150.

argued that she was entitled to institute any claim for the benefit of the estate of James Fahie as well as defend the estate in any claim.

- [16] The Court is satisfied that by Order dated 28th September 2010, Ms. Lake was appointed as co-administrator *de bonis non* of the estate of the late James Fahie together with Otencia Fahie. It is not disputed that Otencia Fahie is now deceased, leaving Ms. Lake as the sole administrator. It follows that at the time when this Counterclaim was filed, Ms. Lake had the requisite standing to bring the Counterclaim. Having so concluded, the Court must now consider the relief claimed in the Counterclaim.

Is the Counterclaimant entitled to possession of the Property?

- [17] It is now established law that whilst an estate remains unadministered, no beneficiary has an interest in any of the estate's property, even in property which has specifically been given to him or her by the will. The rights of beneficiaries of unadministered estates extend no further than a right that the estate will be properly administered. This principle was summarised by Lord Browne-Wilkinson in **Marshall v Kerr**⁴ as follows:

"In English law the rights of a testamentary legatee in the unadministered estate of a testator are well settled: see Lord Sudeley v. Attorney-General [1897] A.C. 11 and Commissioner of Stamp Duties (Queensland) v. Livingston [1965] A.C. 694. In the absence of evidence to the contrary, the law of Jersey must be taken to be the same. A legatee's right is to have the estate duly administered by the personal representatives in accordance with law. But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate."

... And 'it is crucial to appreciate that the property settled by [the legatee] comprised, not the assets in the deceased's estate... but a separate chose in action, the right to due administration of his estate.'

- [18] The implication of this is that even if a person is a beneficiary under a will, be they a residuary beneficiary or even a specific legatee of the property in question, he or she has no right, legal or equitable, to occupy the property without the permission of the personal representative. On the other hand, the personal representative holds the property in law and equity, subject to what amounts to a fiduciary duty to administer the estate properly and distribute it according to the terms of the will or intestacy rules. Therefore, if possession of the property is required for the proper

⁴ [1995] 1 AC 148.

administration of the estate, a personal representative should be able to take steps to obtain possession.

- [19] If the occupier fails to vacate at the end of the notice period, then the personal representative may commence a claim for possession of land against him or her (and their family if they occupy with them) as a trespasser or trespassers.
- [20] Of course, all of this depends on whether, the beneficiary has any other independent right to occupy the property, for example under a constructive trust or a proprietary estoppel. If not, then the continued occupation of the property is deemed to be with the permission of the personal representative.
- [21] Counsel for the Counterclaimant argued that the Property which was devised under clause 10 of the Testator's Will forms part of the estate of the late James Fahie which remains unadministered. She submitted that there is no evidence before the Court which would disprove the fact that Ms. Lake is not entitled to possession of the premises, as it was never challenged that the Property forms part of the estate which she is obliged to administer, i.e. the estate of the late James Fahie. She submitted that once the grant was made, Ms. Lake is obliged to administer the estate of James Fahie according to law.⁵ In the words of Counsel, this would entitled her to *"literally get onto the property, assess the condition of the buildings, do evictions if necessary, properly account for the rent collected, maintenance of the buildings and ultimately, the distribution of the Estate"*.
- [22] With regard to the findings of Rawlins J in **Doreen Fahie**, Counsel submitted that the learned Judge found that the Testator did not have a defined interest (in the Property) which he could give in his Will. As to paragraph 20 of the judgment, Counsel submitted that there was no determination of who would take beneficial interest under the Testator's Will as it had not been fully ventilated. She noted that the learned Judge observed that *"A Court may or may not be able to give effect to the stated intention of the testator in those clauses"* and she explained that this was so because the gifts may fail depending on the agreed position of the remaining heirs of the beneficiaries.

⁵ ANUHCv 2006/376 Austin Martin, Executor of the estate of Mary Grason v AG of Antigua and Barbuda (delivered 21st June 2007, unreported).

[23] The Counterclaimant in the case at bar asserts that “*the estate of James Fahie, deceased has not been completely administered on behalf of his beneficiaries.*” This is not surprising as administration is complete only after debts and legacies have been paid, accounts prepared and any land or other assets remaining in the estate have been vested in those beneficially entitled by means of assents.

[24] The Counterclaimant further pleads that:

“...the house and land that the claimant occupies forms part of the estate of James Fahie, deceased, and she is not the legal owner or beneficiary of same and that the claimants admission of collection of rents is unlawful since she is not the beneficiary or administrator of the estate of James Fahie deceased.”

[25] In concluding her arguments, Counsel for the Counterclaimant noted that the **Doreen Fahie** matter was raised in the Probate Division of the Court while the instant Counterclaim is pursued in the Civil Division. She submitted that probate issues are of no relevance in this counterclaim, neither is the issue of prescription.

[26] It is common ground between the Parties that prior to his death, the Testator constructed the dwelling house on lands which form part of the estate of James Fahie prior to that estate being administered. The legal conundrum which this created was usefully recounted at paragraph 19 of the judgment of Rawlins J in **Doreen Fahie v Frankie Fahie et al.**:⁶

“The land is registered in the names of the testator and Hyacinth Hodge, his sister. They hold it for the beneficial owners. Since the land has not been sub-divided, the true beneficiaries of the land and the houses thereon are the heirs of James Ferdinand Fahie. When, therefore, the testator purported to devise the disputed houses on that land by clauses 8 and 10 of the Will, he was giving that in which he did not have a defined interest at the time. It may definitively be determined when the estate of his father is administered.”

[27] However, this is not where the matter ends. Later, at paragraph 20 of the judgment, the learned Judge went on to observe:

“Initially, I found that the result of the foregoing was that the devises contained in these clauses of the Will will fail, are invalid and fall into the residue for the benefit of the residuary legatees under clause 11 of the Will. **However, in submissions that I entertained today, I agreed with Mr. Carrington that the issue who takes the beneficial interests under clauses 8 and 10 of the Will in the circumstances of this**

⁶ BVIHPB 2002/0040.

case have not been fully ventilated. A Court may or may not be able to give effect to the stated intention of the testator in those clauses. The issue should arise for consideration under Part 67 of the Rules prior to the grant of probate. I urge the executors of the Will of the testator to issue a claim under Part 67.4 of the Rules at the earliest convenient time.” Emphasis mine

[28] In the Court’s judgment, this finding is critical to the outcome of this Counterclaim because it recognises that the administration of the estate of James Fahie remains in a state of flux such that the assets of that estate have not been settled. Moreover, it recognises that preliminary litigation would be necessary in order to determine the status of the Property devised under clause 10 of the Testator’s Will. ECSC CPR Part 67 was specifically enacted for this purpose. Part 67.4 permits an executor, administrator or trustee to issue a claim for any relief or for the determination of any question without bringing an administration claim. Part 67.4 defines the “determination of any question” to include any question arising in the administration of the estate of a deceased person.

[29] ECSC CPR Part 67 therefore provides for a very useful procedure, by which an administrator can obtain an authoritative answer to any question which may arise in the administration of the estate in respect of which he may be uncertain, or where opinions may be divided. In **John Paul Dejoria v Gigi Osco-Bingeman**,⁷ Barrow JA noted:

“An Executor need not wait until litigation, in the sense of a cause of Action arises, and by this procedure, he may avoid triggering such litigation. This procedure provides for answers to be obtained in proceedings that are non-adversarial, time saving and cost effective because among other things, it is not intended to resolve factual disputes. It is a specialized procedure that is available only to Administrators, Executors and Trustees, because the rule mentions only them as the person who may issue a claim. The limitation on the availability of the procedure naturally follows from the definition of “any question” that confines that reference to a question that arises in the Administration of the Estate.”

[30] It seems to the Court that a claim under Part 67.4 would have been essential on the facts of this case. Although in her witness statement filed on 21st March 2014, Ms. Lake stated that she was not aware of any agreement between Hyacinth Hodge (deceased) and Howard James Fahie (deceased) for the latter to build a house on the land in issue, in her oral testimony before this Court, she confirmed that the Testator constructed the 2 storey building on the land in question. Although she could not recall the year in which it was constructed she testified that the Testator

⁷ Civil Appeal No.4 of 2005 Anguilla (delivered 24th April 2006, unreported).

was given permission to build on it by her Aunt Hyacinth who at the time was in charge of the estate. The Testator constructed the first building in which he resided. However, he thereafter built two other buildings although he has been forbidden to do so.

[31] This is crucial evidence. It requires Ms. Lake as administrator of James Fahie's estate to consider the nature of the interest which the Testator had in the Property at the time of his death. It may well be that the Testator may have had undivided beneficial share in James Fahie's estate, but the facts disclose a possibility that the Testator may have had an independent equitable interest in the Property under a resulting or constructive trust or by virtue of proprietary estoppel.

[32] If this was proved, it would impact the proprietary interest which the Testator would have had in the Property as at the date of his death. This is because the general principle in constructive trust is that where a person who holds property in circumstances in which in equity and good conscience, it should be held and enjoyed by another, he will be compelled to hold the property on trust for that other. Such an equitable or beneficial interest may even give rise to the Testator (*qua* beneficiary under the trust) depending on the circumstances, requiring the constructive trustee to transfer the Property to him. It may further mean that the Testator could properly devise his equitable interest in the Property to the Defendant to the Counterclaim under his Will.

[33] The learned Rawlins J foreshadowed these issues at paragraphs 18 and 20 of his judgment, when he noted:

[18] "The second difficulty relates to the status of the buildings with respect to the land on which they stand. They fall within guideline 4 set out by Sir Hugh Wooding CJ in **Mitchell v Cowie (1964) 7 W.I.R. 118, at page 119**. They are fixtures which are so attached to the land that they form a part of the land. This brings into operation the maxim *quid quid plantature in solo solo cedit* (that which is annexed to the land becomes part of the land)."

[20] "I agreed with Mr. Carrington that the issue who takes the beneficial interests under clauses 8 and 10 of the Will in the circumstances of this case have not been fully ventilated."

[34] In his closing submissions, Counsel for the Defendant to the Counterclaim, argued that the evidence before the Court does not support the exercise of discretionary power in favour of the Counterclaimant, because having been gifted the Property under clause 10 of the Will, the

Defendant has a legitimate interest in the estate of the Testator which interest, a court has yet to finally determine. Until such time, he argued that the Court ought to maintain the status quo between the Parties until that final determination is made.

[35] Counsel for the Defendant to the Counterclaim reiterated that an ECSC CPR Part 67.4 claim would first have to be ventilated in accordance with the direction of Rawlins J, as equity follows the law. Before there can be a determination as to whether anyone is wrongfully in possession of the property, as a trespasser or whether the Counterclaimant has a superior title, he submitted that there must first be a determination as directed Rawlins J, to determine who takes a beneficial interest under clause 10 of the Testator's Will.

[36] For the reasons which are already set out, the Court finds much force in these arguments. There are three buildings (including the building in issue) that have been constructed by the Testator who is also an acknowledged beneficiary under the estate of his father, James Fahie. As the Property in question appeared to have been constructed by the Testator with the consent or with the acquiescence of the then administrator, it is at least arguable that that he would have had an independent beneficial interest in the Property which could go to the legatees under his Will.

[37] At this stage it is therefore not clear what is the nature and extent of the interest which the Testator has in the Property and ultimately whether it falls within the estate of James Fahie or the Testator or both. The Court is satisfied that these are questions which must be determined as a matter of urgency under ECSC CPR Part 67.4.

[38] The Court is not however satisfied that the relief claimed in the Counterclaim is necessarily contingent on these matters being resolved.

[39] The case at bar is essentially a claim for possession of land. In commencing such an action, a claimant alleges that he is entitled to possess a legal estate and the defendant is wrongly keeping him out of possession of it. The claimant will normally seek as a remedy, an order that he be put in possession of the property and compensation for having been wrongly kept out of possession (mesne profits) in the meantime. In order to succeed in such a claim, the claimant must show a

better title to the legal estate than the defendant (or anyone claiming through him) holds. Under English common law, title is a relative concept. It matters not that a third person, who is not a party to the claim, has an even better title to possession than the claimant, provided that the claimant has a better title than occupant, he is entitled to succeed against him. The remedy granted to a claimant is an order that he shall have possession (and that the occupant shall give up possession). This was affirmed in the case of **Dunford v McAnulty**⁸ where Lord Blackburn stated:

“...in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against anyone, and those who sought to turn the man in possession out must shew a superior legal title to his.”

[40] Notwithstanding its vintage, this dictum provides an adequate summary of the current state of the law which is instructive. This dictum must now be applied to the decidedly peculiar context of this case. The evidence before the Court is that the land in question, (Parcel 2940B Parcel 38), is currently registered in the name of Hyacinth Hodge *qua* administrator of James Fahie. It is common ground between the Parties that Hyacinth Hodge is deceased and that on 28th September 2012, Patsy Lake was appointed as *administrator de bonis non* in the estate of James Fahie. As at that date, the unadministered estate of James Fahie vested in Ms. Lake. She is therefore entitled to such real and personal estate as remains in specie and has not been administered by the original administrator.⁹ She has succeeded to all the legal rights which belonged to the first administrator in his representative capacity and at law has the whole of the ownership of the assets so vested.¹⁰

[41] A beneficiary in possession is not at law a trespasser but a person who, subject to the claims of the administration, is entitled in equity to a share of the proceeds of sale, rents and profits until sale.¹¹ However, pursuant to the dictum in **Marshall v Kerr**, a beneficiary has no interest in any part of a testator's estate, even where the property which has been specifically gifted to him under the Will. Not only does the legal ownership of the property not vest in the named beneficiary at the time of the death of the testator, nor does the equitable ownership. This emerges from the Privy Council's

⁸ (1883) 8 AC 456 at 462.

⁹ Wankford v Wankford (1704) 1 Salk 299 per Lord Holt.

¹⁰ Eastbourne Mutual Benefit B. S. v Hastings Corporation [1965] 1 WLR. 861; Commissioner of Stamp Duties (Queensland) v Livingston [1965] AC. 694 pp 712, 713.

¹¹ Williams v Holland at page 744.

decision in **Commissioner of Stamp Duties (Queensland) v Livingston**.¹² The reason for this is that prior to the administration of the deceased's estate, there is no specific property capable of constitution of any trust in favour of the beneficiary, because until there has been an assent, it cannot be certain that a particular asset will be needed for the payment of debts or other liabilities. Instead, the beneficiary merely has personal right to compel the personal representative to duly administer the estate.

[42] It is also clear that the beneficiary has no right, legal or equitable, to take possession of or to occupy the property without the permission of the personal representative of the testator even though the testator expressly directed that he do so, because otherwise a testator may effectively defraud his creditors. If he does go into possession, a representative may commence legal proceedings in order to secure an order for possession.

[43] In this case, the administrator seeks possession not against the heir of the estate which she administers (in this case the Testator), but rather, against a purported devisee under that heir's estate. In relation to the Testator's estate, the Court is satisfied that the Defendant to the Counterclaim has no legal or equitable interest in the Property. In support of her right to remain in occupation, she continues to rely on the devise in the Testator's Will. In that regard, the Court is satisfied that her rights would not extend to occupation, instead, they extend no further than a right to have the estate of the Testator properly administered. The Defendant to the Counterclaim also contended that Carmen Fahie, the former executor of the Testator's estate, permitted her to enter and reside on the Property. In the Court's judgment, on the strength of **Williams v Holland**, this alternative position would not assist her.

[44] The modern position in a claim for possession of land has been usefully summarised by the learned authors in **Clerk and Lindsell on Torts**.¹³

“ (a) If the claimant is not in possession and is suing an occupier for ejectment, he claims a right to possession based on the strength of his title so he must show that title for *“possession is good against all the world except the person which can show a good title.”*

¹² Although the Board in that case was concerned with the residuary estate, the observation apply with equal force in the case of a specific bequest or devise.

¹³ Twentieth Edition Sweet and Maxwell paragraphs 19 – 71.

“Since title to land is relative, the claimant may show a better title by his title independently of prior possession, to own the land. In such case where the claimant produces a documentary or paper title the defendant may challenge it by pleading *jus tertii* that is that the claimant has no such legal title as alleged and that the title belongs to another person.”¹⁴

[45] In **Asher v Whitlock**,¹⁵ a claimant with a better title than the defendant recovered possession, although as the land in question was an encroachment on manorial waste, neither party had title against the lord of the manor. The Court held as follows:

“On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed, and that the rule should be discharged.”

[46] In the case at bar, it is apparent that the Counterclaimant *qua* administrator of the estate of James Fahie holds the documentary or paper title to the Property. On the facts of this case, this represents a better title than the Defendant to the Counterclaim who is a potential beneficiary in possession. Even if it could be argued that the Testator had an independent beneficial interest in the Property, the quality of title held by the administrator of James Fahie estate would still be superior to that held by Ms. Gumbs and anyone who claims possession through her.

[47] The Court is guided by the dictum in the Victorian case of **Lu v Yu**¹⁶ In that case, the plaintiff, Lu, was the sole registered proprietor of a domestic property in Reservoir. The defendant had occupied the property for 17 years after the plaintiff purchased it. Yu argued that he had occupied the Reservoir property based on a domestic arrangement with the plaintiff, Ms. Lu. As a result of that long-standing domestic arrangement, an implied resulting or constructive trust arose over the domestic property in Yu's favour. The domestic arrangement cooled and ended abruptly in 2019. The plaintiff, Ms. Lu, applied to the Supreme Court for an order for possession under Order 53 of the **Supreme Court (General Civil Procedure) Rules 2015**. That rule is designed to remove squatters and trespassers from primarily residential real estate. Ms. Lu alleged that Mr. Yu had been living in the house without her permission and had not paid her any rent. The defendant, Yu, claimed an equitable interest in the property as a result of the implied trust. These arguments

¹⁴ *Asher v Whitlock* (1865) L.R. 1 Q.B. 1 at 5 per Lord Cockburn.

¹⁵ (1865) L.R. 1 Q.B. 1; and see: *Allen v Roughley* (1995) 94 C.L.R. 98.

¹⁶ [2019] VSC 499.

set up an interesting battle between an owner's right to possession of property against a squatter against the beneficiary of a trust's equitable right under a trust to a trust asset.

- [48] The court agreed that the defendant occupier did have a claim to a resulting or constructive trust by virtue of the long-standing domestic relationship. Such an equitable interest could give rise to the defendant beneficiary (under the trust) requiring the implied trustee (Ms. Lu) to transfer the registered interest in land to him. That would ultimately give the defendant, Mr. Yu, a right to possession. This conclusion is based upon the legal principle that a beneficiary has the power to force a trustee to give the beneficiary an interest as a joint tenant or a tenant in common with the trustee. The Court relied on the following dictum of Stirling LJ, who expressed the principle in **Jennings v Mather**.¹⁷

"A trustee has for his protection a right to have costs and expenses properly incurred by him in the administration of the trust paid out of the trust property, and the amount of such costs and expenses constitutes a first charge upon that property. A Court of Equity will not take trust property out of the hands of the trustee without seeing that such costs and expenses are reimbursed to him, and that he is relieved from personal liability in respect of them; and, when the legal title to trust property is vested in the trustee, he has a right to resort to that property, without the assistance of the Court, for the purpose of indemnity against liabilities properly incurred by him in the administration of the trust."

- [49] The Court then had to consider whether the plaintiff trustee's right to possession of the property prevailed over the defendant beneficiary's equitable right under the implied trust. The Court concluded as follows:

"It does not result in denying an interest in the property to Mr. Yu, indeed it clearly proceeds on the assumption that he has an equitable interest arising under a resulting or constructive trust. His caveat will, for the present, remain. So too will the Trust proceeding, in which he claims an interest in the property, subject to Mr. Lu formulating a satisfactory pleading and expeditiously prosecuting the claims he seeks to make. He will, however, have to give up possession to Ms. Lu to enable her to exercise her right to indemnity. Any sale of the property will, in the current state of the proceedings, involve the net proceeds of sale being held in trust to abide the outcome, if any, of Mr. Yu's claim to an equitable interest in the property."

- [50] Accordingly, the court made orders for possession of the house. The beneficiary, Mr. Yu, had to leave. However, the flipside for the trustee plaintiff was that although Ms. Lu was entitled to recover possession, she could not deprive the defendant beneficiary's interest in that property.

¹⁷ [1902] 1 K.B.1 page 6.

- [51] In **Williams v Holland**,¹⁸ a testator died having by his will left a house on trusts under which his four children were entitled to the proceeds of the trust for sale thereof in equal shares. One room in the house was occupied, when testator died, by Mrs. H, one of his children, and her husband. The house was subject to a mortgage and the executor desired to sell the house and use the money for purposes of administration, the cash in the estate having been exhausted. Mrs. H claimed to remain in the house as a beneficiary entitled to an undivided fourth share therein and wished the executor to assent to the vesting of the house in the children subject to the mortgage, instead of selling it. No assent had been made. On 31st December 1963, the executor gave Mrs. H and her husband notice to quit the house on 3rd February 1964.
- [52] On appeal from an order made in an action brought by the executor against Mrs. H and her husband, ordering possession and payment of mesne profits from the date of testator's death, the court held that the executor was clearly entitled to possession for the purposes of administration. The court also held that until 3rd February 1964, Mrs. H and her husband were not trespassers, but were in possession by virtue of Mrs. H's entitlement as beneficiary to an undivided quarter share of the proceeds of sale of the house; accordingly they were not liable for mesne profits for any period prior to 3rd February 1964, but thereafter they were trespassers and were liable for mesne profits. The Appeal was dismissed as regards to possession but allowed in part as regards mesne profits.
- [53] In the Court's judgment, the Defendant to the Counterclaim's position (and those claiming through her) is even more tenuous. She may be the beneficiary under the Testator's will and she may have come into possession with the permission of the Testator or a former executor of his estate, but her right to possession (if it operates) would not prevail against the superior title of the Counterclaimant. Accordingly, the Counterclaimant would be entitled to demand possession of the Property.
- [54] For completeness, the Court also entertained submissions from Counsel for the Second Defendant which were advanced in support of the Counterclaim. Counsel submitted that that claim seeks to re-litigate an issue which has already been decided in prior proceedings. She submitted that there has been no new evidence advanced nor a change in circumstances demonstrated to circumvent

¹⁸ [1965] 1 WLR 739.

the issue estoppel generated in the **Doreen Fahie** case. Should the Court not find that the issue estoppel applies, counsel for the Second Defendant submitted that a further bar of abuse of process should preclude the Defendant to the Counterclaim from re-litigating. The Second Defendant's legal submissions failed to appreciate the fact that the claim advanced by the Defendant to the Counterclaim had been struck out for some time. These submissions were of little assistance to the Court.

Is the Counterclaimant entitled to account of rents?

- [55] Under the laws of the Virgin Islands, property in the hands of a representative is often regarded as assets though it was never in the hands of the deceased. It follows that income such as rental income of a testator's residuary estate accruing after the testator's death will be considered assets of the estate. It follows that the personal representative must take control of the property, making certain that it is secured and managed. This includes ensuring that all pertinent communication about the property, such as property tax bills, utility bills, etc., is directed to him.
- [56] The Counterclaimant relies on the evidence of the now deceased personal representative of the Testator's estate, Mr. Frankie Fahie. At paragraphs 48 – 53 of his witness statement, he contended that Defendant to the Counterclaim had leased out the two apartments in the top floor of the building and had been receiving rent payments (at least in respect of one of the apartments since 2006). Unfortunately, the Defendant to the Counterclaim failed to make any application to have his evidence admitted notwithstanding that he was unavailable for cross examination. In the absence of such application and where his evidence was untested, this Court could ascribe little weight to this evidence.
- [57] The Counterclaimant's evidence also did not advance her case. At paragraph 13 of her witness statement she pointed out that the Claimant had admitted collecting rents and she suggested that such rental payments should have been collected on behalf of the estate of James Fahie. However, when she was cross examined, she was unable to provide any credible evidence as to the alleged tenancies or the rents collected. When she was asked who had been collecting rental payments in respect of the 2 storey building following the death of the Testator, she indicated that she had no knowledge. When questioned by the Court, it became clear that she was relying on

what she had been told by Frankie Fahie. Eventually she admitted that she has no knowledge about the collection of rents for the 2 storey building.

- [58] In the Court's judgment, while the case for the Counterclaimant is essentially untraversed, the evidence is too tenuous to support this claim for relief. As in the **Doreen Fahie** case, no sufficient evidence has been adduced to account for rents allegedly collected by the Defendant to the Counterclaim. The purported admission by the Defendant to the Counterclaim is set out in pleadings which have been struck out before she passed away and in her witness statement which was not admitted as a result. However, the weakness of this claim for relief goes deeper.
- [59] Under the common law, only a lawfully appointed personal representative can collect rental income which accrues to an estate. In the case at bar, it is unclear which personal representative would be so entitled because the status of the Property remains unclear. And so, 17 years after the decision in **Doreen Fahie**, having not taken the necessary steps to issue appropriate claims under Rule 67.4 so that these issues can finally be resolved, this Court is satisfied that this claim for relief must be refused.
- [60] Having said this, it is clear that at the date of her death, the Defendant to the Counterclaim was not the lawful personal representative of the estate of either James Fahie or the Testator. She therefore has no authority to collect rents accruing to either estate.
- [61] Personal representatives are obligated to act as prudent persons in the care and management of the estate and to act in a manner consistent with the will of a deceased or the laws of intestacy and not in conflict with any applicable estate administration laws. Once they have obtained a grant, as a matter of priority, they must take steps to compile an inventory of all the so-called estate assets i.e. the property of which the deceased died possessed. Thereafter, they must undertake the herculean task of marshaling or getting in and protecting the assets of the estate. This involves locating, identifying, and taking possession of all the deceased's assets which are controlled by the estate administration.

- [62] The next critical step for any representative is to determine who are the legitimate creditors of the estate and begin the task of raising the cash necessary to pay off the debts. All lawful debts and obligations of the estate must be paid or provided for prior to distribution to any beneficiary and the law requires due diligence on the part of the representative. The deceased's legal and equitable real and personal estate to the extent that he had any beneficial interest in it are assets which must be utilized for the payment of his debts and liabilities.
- [63] Where the estate is solvent, the representative must pay all the debts. In cases where it is determined that the estate may be insolvent (more debts than assets), a prudent representative must defer all disbursements and distributions until a determination has been made that all claims have been identified and all claims against the estate can or cannot be paid from existing assets. In order to safeguard himself, he should seek to advertise for claims against the estate and settle the order of priority in which the debts are to be paid. It is only when the representative has completed the critical task of settling all claims, expenses and taxes of the estate of that a representative can then proceed to distribute what remains of the estate assets to the beneficiaries in accordance with the laws of intestacy.
- [64] Having obtained a grant of probate, the administrator must therefore consider what portion of the deceased's estate is liable for the payment of his debts and further what is the order in which the various properties comprised in a deceased's person's solvent estate are as between beneficiaries liable to contribute towards the payment of such debts. It follows that a representative must determine what property is to be the subject of this inquiry. Only then could the representative proceed to marshal these assets. In the case of the estate of James Fahie, this would require the administrator *de bonis non* to determine what is the state of the Property and whether and to what extent the Testator may or may not have an independent beneficial interest in the same. In the case of the Testator's estate, this would mean that the personal representative would need to determine whether the devise under clause 10 would fail.
- [65] This Court concurs with the exhortation of Rawlins J. - a claim under ECSC CPR Part 67.4 should have been issued at the earliest convenient time. The fact the personal representatives of both the estate of James Fahie and Howard James Fahie have failed to do so is inconceivable given that

this Property has been the subject of repeated litigation. There can be no effective administration in the absence of a determination of these critical issues.

Is the Counterclaimant entitled to costs?

[66] Generally, courts would order that costs be paid to the successful party in the claim on a prescribed basis. This being an unvalued claim, costs would therefore be assessed on the value \$50,000.00. However, given the findings herein and the fact that both Counterclaimant and the Defendant to the Counterclaim have been partially successful, this Court is satisfied that the costs should be neutral. The Court will therefore make no order as to costs.

[67] **The Court's Order is therefore as follows:**

- i. **Judgment is entered for Counterclaimant in respect of the claim for possession of the Property.**
- ii. **The Defendant to the Counterclaim will yield up possession within six (6) months of the date of this judgment.**
- iii. **The Counterclaimant's claim for an account of rents is dismissed.**
- iv. **No order as to costs.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar