

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

Claim no. MNIHCV2013/0019

BETWEEN

AUDREY FREDERICK Claimant

and

JOSEPH FENTON Defendant

Appearances

Mr David Brandt for the claimant.

2017: September 14

September 18

JUDGMENT

- 1 **Morley J:** Audrey is Joseph's older half-sister¹. He cannot be found. Their mother Jane, who died on 19.03.12, in her Will² left the downstairs flat in her home in Baker Hill, being plot 13/18/21, 'absolutely' to Audrey, and the upstairs portion to Joseph and his siblings Mable and John. However, from December 2012 Joseph changed the locks and denied Audrey access.

¹ First names will be used for ease of reading and no disrespect is intended to any interested party.

² Exhibit (Ex) AF.B, attached to affidavit of claimant signed on 08.08.13.

Audrey wants her ownership of the downstairs legally recognised so that she can take possession, and seeks some money for lost rent.

- 2 What has complicated this case is that in 1989 at the Land Registry, Jane put Joseph jointly with her as proprietor of the plot. On Jane's death, Joseph has claimed that he then owns the plot, as the surviving joint proprietor, which is why he excluded Audrey, saying by letter³ on 19.11.12 from his attorney Kenneth Allen QC that she would henceforth be a trespasser.
- 3 To conduct this action, efforts were made to find or alert Joseph. In the end, the case was heard on 14.11.17 in Joseph's absence, and Audrey gave evidence by skype represented by Counsel Brandt. For the reasons which will follow, I will order that Audrey is recorded at the Land Registry as the owner of the downstairs flat, and she is to be paid some lost rent.

Trial in absence

- 4 Audrey and her half-siblings, by Jane, do not get along. There has been no direct contact since Jane's death.
- 5 Audrey is 71 and lives in Boston, USA.
- 6 Mable is 69, Joseph (aka William) is 67, and John is 65.
- 7 Audrey believes Mable and John live in New York though she is not sure.
- 8 Joseph had an address at 740 E 228 St, Bronx, NY 10466-4212, USA.
 - a. After receiving the exclusion letter of 19.11.12, Audrey instructed Counsel Brandt to write on 05.02.13⁴ to Joseph at the Bronx address, to which Attorney Allen responded on Joseph's behalf on 08.04.13⁵ (showing Joseph did indeed use the address at that time).
 - b. A fixed date claim form was filed by Audrey on 15.08.13.
 - c. Permission to serve the claim form and papers outside the jurisdiction under rule 7.5 Civil Procedure Rules (CPR) 2000 was granted on 23.08.13 by Master Dorsette-Hector.

³ Ex AF.E.

⁴ Ex AF.F1.

⁵ Ex AF.F2.

- d. Attempts to serve court papers on Joseph at the Bronx address failed, and a process server named Bryan Carson reported on 03.09.13 that the occupant there said Joseph only ever used the address for mail.
 - e. In addition, Audrey sent her half-sister Yvonne (same father) to the Bronx address in 2016 but Joseph was not found.
- 9 Importantly, on 06.05.14, Redhead J granted leave to serve the claim form by way of advertisement in two consecutive issues of the Montserrat Reporter, which then occurred on 16.05.14 and 23.05.14. As this case proceeded toward a hearing, there were further alerts in the newspaper on 01.04.16, 17.06.16, 01.07.16, 23.02.17, 01.03.17, and 25.08.17.
- 10 In addition, Audrey gave evidence that in 2015 she had spoken to Sharon Allen, Joseph's tenant at the property, who told her that Joseph had been back to Montserrat, and Audrey believes this must mean he has been informed of the proceedings, given the adverts, and as it is common local knowledge within so small a community as Montserrat where the population is only about 5000.
- 11 Moreover, Counsel Brandt diligently sought from Attorney Allen any further contact address, to which the reply by email on 03.05.17 was *'I do not have an address for Joseph Fenton and do not even know if he is still alive'*.
- 12 I am satisfied that there has been appropriate service of the claim form and papers. This occurred in May 2014, following the decision of Redhead J, and since then even further efforts have been made, to the credit of the claimant and her counsel. Further, I find it probable that Joseph knows of this action and is ignoring it, as there is clear evidence that the Bronx address was being used by him in November 2012, the occupant in September 2013 knew who he was, and his tenant Sharon Allen has reported seeing him on Montserrat in 2015 where he would have learned of the action.
- 13 In the circumstances, that service has been made by the adverts, and my finding Joseph probably knows anyway, I have been satisfied on application that trial in his absence can and should proceed under rule 39.4b CPR 2000, as being in the interests of justice, the action

being now four years old, and three years after service by advert, bearing in mind that justice delayed is justice denied.

The story of the downstairs flat

- 14 Audrey gave evidence on oath by skype for about an hour. Her daughter Jacqueline Skerritt was in the room with her helping with the skype link, and sometimes repeating questions as Audrey is hard of hearing, though did not participate otherwise. Audrey's affidavit of 05.08.13 was accepted and she was asked questions by the Court and her counsel.
- 15 On 05.09.09, Jane signed a typed document⁶, with several spelling and grammar mistakes, witnessed by Thomas Bunter and Winston Dyal, in which she records how in August 2002 she gave Audrey permission *'to build another foundation on bottom of my home...this entitle her to own the property of this home. If there should be any problems with this property...if her other siblings should fight for ownership of the existing property...Audrey does have power to fight any seekers who should want to take the property from her'*. This document clearly shows that Jane anticipated there would be trouble with Joseph and his siblings allowing Audrey to use the flat, and she wished to make clear she intended Audrey to take an interest in the flat independent of her half-siblings.
- 16 Audrey then employed Ryan Investments to build the flat from September 2009, completed in about December 2009, which was then mostly rented out for about EC\$800 per month from January 2010. This period of rent shows the flat was indeed rentable, so that it is realistic for Audrey to claim she lost income when excluded.
- 17 Jane spent her final time with Audrey and died at Audrey's home in Boston on 19.03.12. In her Will of 06.01.10, (for which Audrey was executor, and for which probate was granted on 11.10.12), she said *'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*

⁶ Ex AF.C.

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'.

- 18 As stated, probate being granted on 06.10.12, Joseph then excluded Audrey on 19.11.12, she has had no rent or access since December 2012, and there was some legal correspondence in early 2013, with action commencing 15.08.13.
- 19 Since 2012, Audrey has been back to Montserrat about twice a year, and she would like to continue returning, perhaps for good, and live in the flat. She has only ever expected the flat to be rented out on a short term basis, and has not expected an income every month of the year.
- 20 At one point while Jane was alive, Audrey spent EC\$3110.89 helping to repair the upstairs following hurricane Hugo in 1989, and over time EC\$12049 was deducted by the Montserrat Building Society from her joint account with Jane to pay the mortgage. In her claim, Audrey had asked to recover these sums from Joseph, which Counsel Brandt has not pursued, it being agreed on discussion with the Court that these sums are not actionable as offered.

Findings of fact

- 21 On reviewing the materials and affidavit, and on hearing Audrey on oath, from the available evidence I find the following:
- a. Audrey owns the downstairs flat.
 - b. She has suffered loss of use of the flat and therefore been denied a rental income of about EC\$6000 per annum, since December 2012, meaning that to date Joseph should pay her EC\$28500⁷.

Flat ownership

- 22 A narrow legal question is how to articulate Audrey's ownership of the flat. It is not straightforward and had not been analysed by counsel, whose rudimentary pleadings had asked for 'exclusive possession' and an injunction restraining exclusion.

⁷ Anticipating around 7.5 months rental income per year at EC\$800pm, totalling EC\$6000; and the EC\$28500 being EC\$6000 x 4.75, being the approximate number of years from December 2012 to the present.

- 23 From the evidence available it appears clear from her Will that Jane only made Joseph joint proprietor of the plot in 1989 in case she had trouble paying the mortgage. He never received an unfettered interest. Jane retained primary ownership and control over the disposal, and said so very clearly in her Will. In the end, the mortgage was paid from a joint account between Jane and Audrey, not by Joseph. In addition, it appears clear from the document of 05.09.09, witnessed to raise its legal standing, that Jane was aware of trouble between Audrey and her half-siblings and sought to separate Audrey's interest from theirs, by declaring she had separate and 'absolute' ownership of the downstairs flat.
- 24 I find that on a balance of probabilities, from the available evidence, Joseph has never owned the plot independent of the interests of Audrey and his siblings. The nature of his ownership has always been a trust. On Jane's death, his sole ownership ought to have been qualified at the Land Registry as ownership 'as trustee', per *s122 Registered Land Act Cap 08.01*: namely in trust for Mable, John, and Joseph as joint owners as to the upstairs, and in trust separately and exclusively for Audrey as to the downstairs flat.
- 25 As to the plot, it is the Court's understanding that it consists of land with a house on it. Within the house are two accommodations, built largely over the same footprint of land. In equity, under the trust, the siblings are joint proprietors of upstairs, Audrey is sole proprietor downstairs of the flat there, and in respect of each other, the siblings and Audrey are separately proprietors in common as to the plot⁸. I find this must have been the intention of Jane when trying to settle her children's interests, whether in 2009 or in her Will, where she said in her Will that she was trying to 'devise' interests 'absolutely' (whether or not the Will is effective).
- 26 It appears that any garden and other land was always attached to the upstairs, as the downstairs was only built three years before Jane's death, while the plot has been in the family from before 1989. Over that land, to give effect to separate ownership of the downstairs flat, it must have been Jane's intention that Audrey has a right in perpetuity to pass over it, and if needed with free licence to park a vehicle on it, so to gain access to her flat.

⁸ For the distinction between being a joint proprietor and a proprietor in common, see *s100 et seq Land Registration Act Cap 08.01*.

- 27 The percentage value of each share in common can be determined by the value of *'the downstairs flat plus parking and access'* as against the value of *'upstairs plus land'*.
- 28 It follows therefore that as a separate interest to the siblings, Audrey has the right to occupy or rent or sell or devise the flat. Though it exists within the footprint of the house, the flat is separate, and separately owned.
- 29 Consideration has also been given to whether she owns a lease of the flat in perpetuity, where Joseph is her landlord as holding registered title, but has no right to exclude her, nor charge rent, and she can sell or devise the lease, though he retains ownership in law (though not equity) of the plot. However, the Court has settled on proprietorship in common, rather than a lease, because Jane spoke in her Will of devising the plot *'absolutely'*, suggesting she always intended more.
- 30 The practical effect of this judgment is three-fold:
- a. I direct that the Land Registry amend the recorded ownership of plot 13/18/21 as being by Joseph Fenton **as trustee** for Mable Veronica Armstrong, Joseph William Fenton, John Roosevelt Fenton, and Audrey Elaine Frederick, under s23 *Land Registration Act*.
 - b. I declare the trust to be first that Mable, John, and Joseph ('the siblings') are joint proprietors as to the upstairs dwelling plus land of plot 13/18/21, and second that Audrey is the separate and exclusive proprietor of the downstairs flat (with access and parking in perpetuity), so that the siblings as one joint party, and Audrey as a separate second party, are proprietors in common of the land interests pertaining to the plot, under s100 *Land Registration Act*: in short, in equity, Audrey owns the plot as a proprietor in common with the siblings⁹.
 - c. Finally, as requested from the outset of the claim, I grant an injunction, so that Joseph is hereafter restrained from preventing or interfering with Audrey's exclusive possession of the flat.

⁹ If this analysis is shown elsewhere to be wrong in law, then in the alternative, it seems to the Court *obiter dictum* that at the very least Audrey owns a lease, so that the trust would be that Mable, Joseph, and John are joint proprietors of plot 13/18/21, and in that trust, pertaining to the plot, Audrey owns a lease from Joseph (as presently the registered proprietor) of the downstairs flat since September 2009 in perpetuity, for no future rent (with access and parking), to be registered under s25 *Land Registration Act*.

Costs

- 31 In addition to ordering that Joseph must pay EC\$28500 in lost rent, because Audrey has succeeded in her claim I order that Joseph pay her reasonable costs, assessed after discussion with Counsel Brandt, and adjusted down by the court, to be EC\$5000.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

18 September 2017