



[2022] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 04891

**IN THE MATTER of the ESTATE of
SILAS ROBINSON, late of Mocho, in
the parish of Clarendon, Testate.**

AND

**IN THE MATTER of Property located at
Lot 44F at Sheckles, Four Paths, in the
parish of Clarendon.**

BETWEEN ERROL GEORGE ROBINSON

CLAIMANT

**AND HEMANS ROBINSON
Executor of the Estate of Silas Robinson Deceased**

1ST DEFENDANT

JOY HUNTER

AND

2ND DEFENDANT

IN CHAMBERS VIA ZOOM

**Mr Garfield Haisley instructed by Paige and Haisley for the claimant.
Mr Michael Howell and Miss Janet Smith for the first defendant
Miss Jeromha Crossbourne instructed by Scott, Bhoorasingh Bonnick for the
second defendant.**

Dates Heard: February 28, March 1 and 2, 2022 and November 4, 2022

Whether claimant entitled to disputed property - Whether executor in breach of fiduciary duty - Whether executor negligent – Whether defendant has intermeddled in the estate of deceased - Whether claimant is entitled to an accounting.

PETTIGREW COLLINS J

THE CLAIM

[1] The claimant filed a Fixed Date Claim Form on December 11, 2018. By a Further Amended Fixed Date Claim Form filed August 27, 2021 the claimant sought the following:

- (i) A Declaration that the claimant is entitled to property located at Lot 44F at Sheckles, Four Paths in the parish of Clarendon pursuant to the last Will and Testament of his father, Silas Robinson deceased and pursuant to Property Option Agreement numbered RR-EX-V744 dated August 19, 2002 executed between the late Thelma Robinson deceased, Executor of the Estate of Silas Robinson deceased and Jamalco.
- (ii) A Declaration that the first defendant, in his capacity as the sole surviving Executor of the Estate of Silas Robinson, has acted negligently and breached his fiduciary duty owed to the claimant.
- (iii) An Order that the Grant of Probate made to the first Defendant on the 14th day of February 1978 be revoked and that a Grant of Administration de bonis non with will annexed be made to Mrs Olga May McDonald (nee Robinson) of 7 Union Court, May Pen P.O., Clarendon.
- (iv) In the alternative to order (iii) above, a Mandatory Injunction compelling the first defendant in his capacity as the sole surviving executor of the estate of Silas Robinson deceased to take the steps necessary to cause ownership, possession and control of property located at Lot 44F at Sheckles, Four Paths in the parish of Clarendon to be given to the claimant.
- (v) An Order that the first defendant be required to furnish the claimant with an accounting of all the rental income generated by the said property since the death of the life tenant, Mabel Robinson deceased on August 18, 2011.

- (vi) An Order that the first defendant do pay over to the claimant, any sums found to be due to the claimant as per the said accounting.
- (vii) A Declaration that the second defendant has intermeddled in the Estate of Silas Robinson deceased by entering into a lease agreement with a tenant concerning the rental property located at Lot 44F at Sheckles, Four Paths in the parish of Clarendon and by collecting rent from the said tenant.
- (viii) An Order that the second defendant immediately ceases to collect rent with respect to property located at Lot 44F at Sheckles, Four Paths in the parish of Clarendon and ceases all other acts of intermeddling in the Estate of Silas Robinson deceased.
- (ix) An Order that the second defendant be required to furnish the claimant with an accounting of all the rental income collected by her concerning the said property since the death of her mother Thelma Robinson deceased August 26, 2013.
- (x) An Order that that the second defendant do pay over to the claimant, any sums found to be due to the claimant as per the said accounting.
- (xi) Costs to be costs in the claim.
- (xii) The claimant be granted such further or other relief as may be just in the circumstances.

AGREED FACTS

[2] The claimant and the first defendant are the sons of Silas Robinson who died testate on February 24, 1977. The first defendant is also the executor of the estate. The second defendant is Silas Robinson's granddaughter and the daughter of the other executor Thelma Robinson who died on August 26, 2013. The witness Twinrose Ebanks is the sister of the second defendant. At the time of Silas Robinson's death, his estate included five and one-half acres of land on which is situated a two-bedroom dwelling house in Mocho, Clarendon. By his Will, he granted his wife Mabel Robinson a life interest in the dwelling house and devised the said dwelling house and one acre of land to the claimant Errol Robinson. He

devised the remainder of the land equally among his other eight children. The Will was admitted to probate on February 14, 1978.

- [3]** Sometime after Silas Robinson's death, Jamalco expressed an interest in acquiring the five-and-one-half acres of land to mine for bauxite. On August 19, 2002, Jamalco and Thelma Robinson with Hemans Robinson's consent, entered into an arrangement which was captured in Property Option Agreement numbered RR-EX-V744 dated August 19, 2002. The relevant provisions recorded on the document evidencing the agreement are that: (i) the estate of Silas Robinson was to be given two lots of land at Sheckles, Four Paths, Clarendon with the rest of settlement land to be identified in the general Mocho area; (ii) the original dwelling house consisting of two rooms, living room and verandah, along with outside bathroom and outside toilet were to be measured and a house of equal area constructed at Sheckles for Mrs. Mabel Robinson; (iii) the addition to the original house connected by roof to be measured and a house of equal area constructed at Sheckles for Errol Robinson.
- [4]** In accordance with the information recorded on the document evidencing the original agreement, Jamalco constructed a three-bedroom house at lot 44F at Sheckles to replace the extension to the original dwelling house (the disputed property) and a two-bedroom house at lot 44N to replace the original dwelling house. On the instructions of the executors, Jamalco assigned lot 44N to the claimant and lot 44F to Thelma Robinson. The claimant was given possession of the two-bedroom house at lot 44N in Sheckles in 2013.
- [5]** In 2002, Mabel Robinson moved out of the family house at Mocho and went to live with Thelma Robinson. Later, in 2006, Mabel Robinson moved in to lot 44F at Sheckles. Mabel Robinson died on August 18, 2011.
- [6]** Lot 44F was tenanted to Everton Lalah. This is evidenced by tenancy agreement dated March 17, 2015.

THE ISSUES

[7] The issues which arise for consideration in this claim are as follows:

1. whether claimant entitled to disputed property;
2. Whether the grant of probate should be revoked and a grant of administration de bonis non made;
3. Whether the second defendant intermeddled in the estate; and
4. Whether the claimant is entitled to an accounting

THE CLAIMANT'S CASE

[8] The claimant and his sister Olga McDonald gave evidence in support of the claim. Mrs McDonald's evidence is for the most part reflective of that of the claimant. Where it differs it will be set out.

[9] The claimant alleged that in or about 1995, he extended the two-bedroom family house located at Mocho by adding two-bedrooms, a bathroom and a kitchen and resided there with his mother Mabel Robinson, his wife and his children until he migrated to the United States of America on June 18, 2002. He stated that the executors, by instructing Jamalco to assign lot 44F to Thelma, acted fraudulently and in breach of their fiduciary duty owed to him, as Thelma was not entitled to receive a house either under the Will of Silas Robinson or pursuant to the Property Option Agreement.

[10] The claimant averred that after Mabel's death, instead of handing over possession of the disputed property to him, the executors allowed Everton Lalah to remain in occupation of the house and continued to collect rent from him, none of which was paid over to the claimant or otherwise accounted for.

- [11] The claimant further stated that after Thelma death, the second defendant without legal justification, took control of the disputed property and started collecting rent from the tenant and eventually entered into a tenancy agreement with him.
- [12] It was also the claimant's evidence that the executors maintained control of the disputed property despite numerous demands made by him for possession to be given to him and for steps to be taken to cause Jamalco to issue titles to him for both lots. He referred to a letter of demand dated July 2, 2013 that his attorney-at-law George Clue wrote to the first defendant. According to the claimant, despite the demand, the first defendant failed to take any steps to cause possession of the said property to be delivered to him and for the title to same to be issued in his name.
- [13] The claimant also stated that due to the failure of the first Defendant to take any action, he sued the second defendant and Everton Lalah in the May Pen Parish Court for recovery of possession but the court ruled that he had no locus standi to bring the matter, as the disputed property still formed a part of the estate of Silas Robinson and that the appropriate party to have brought such an action on behalf of the estate was the first defendant, the only surviving executor. Further, he highlighted that the first defendant gave evidence on behalf of the second defendant during the trial in the May Pen Parish Court. The first defendant he said, disputed his entitlement to the disputed property and resisted his attempts to gain possession of it.
- [14] The claimant highlighted further that despite having made several further demands of the first defendant to take steps to cause possession of the said property to be delivered to him, the first defendant has refused to act, while the disputed property continues to be occupied by the tenant and remains under the control of the second defendant. He stated that since Thelma death, the first defendant has shown no interest in finalising the administration of the estate and as a consequence, Jamalco has been unable to issue titles to the claimant for the said properties.

- [15] The claimant gave evidence that he has no knowledge of the value of his father's estate but that he is aware that the second defendant collected rental income for several years from the tenant at the disputed property and that the tenant still occupies the disputed property. Also, that he is unable to provide any details regarding his father's estate's liabilities as he has not received such information from the first defendant.
- [16] In respect of the claimant's request that a Grant of Administration de bonis non with Will annexed be made, the claimant told the court that Mrs. McDonald is a fit and proper person to act as personal representative of his father's estate as she is a responsible and business-like person who does not have any interest adverse to the interest of any other beneficiaries. Additionally, that she resides in Jamaica where his father's properties are located which makes it more practical for her to finalise the administration.
- [17] In response to Joy Hunter and Joyce Ebanks' evidence, the claimant contends that Joyce Ebanks migrated to England in the 1960's and she only returned to Jamaica after Silas Robinson's death and shortly before Mabel Robinson's death. Therefore, he said, most of what Joyce Ebanks stated is either a fabrication or hearsay at best. Additionally, he denies knowing that Joy Hunter is no longer in possession of the disputed property.
- [18] In cross examination, the claimant agreed that when Joy and Twinrose left the original two-bedroom house, they went to Four Paths where their mother built a four-bedroom house that was unfinished at the time they moved to live in it. When it was suggested to the claimant that he moved into the two-bedroom house when Joy and Twinrose moved out of it in 1980-1981 he said "*I lived with my mother, I take care of my mother and I didn't move.*"
- [19] The claimant acknowledged receiving a house consisting of two bedrooms on a one-acre lot in 2013. I understood him to be saying that that house represented the house he built. When asked if he was talking about the one acre of land with a two-bedroom he said "*yes, that was my house that I build. I got the house, I don't*

know about the land cause the land don't distribute". When asked if the house was on one acre of land, he claimed that he didn't know but that he knew he was supposed to get the house that he built.

[20] It was the claimant's response in cross examination that the case involving Joy Hunter in the Clarendon Parish Court was about the property that Jamalco handed over to his mother. He stated that that was the information given to him by Hemans Robinson. He stated that he did not know that Thelma was given the three-bedroom house or if it was the executor who rented lot 44F.

[21] During cross examination by the attorney for the second defendant, the claimant admitted that he was not present when the Property Option Agreement was signed. He also agreed that there was a passage between the original house and the two-bedroom extension. Later, he said that he built the house then made the passage. His further explanation on that matter though audible, was unintelligible. When asked if when the second house was built there was an inside bathroom, the claimant said no. Later when he was asked whether a bathroom was added to the house at any time he said that he built the bathroom on the house at the same time.

[22] When asked if he agreed that the two-bedroom house at lot 44N replaced the original house that his father built he said no. When asked what replaced the original house that his father built he said "*My understanding as to why I received lot 44N is because it is my house, it build in my name.*" He thereafter said that the three-bedroom house at lot 44F replaced the house his father built. The claimant denied being given his entitlement under the Will.

[23] In re-examination, the claimant clarified that when he agreed that there was no inside bathroom at the second house, he thought counsel was referring to the original house. He stated that when he built the extension it was built with a bathroom.

Olga McDonald

- [24] Mrs. Olga McDonald stated that she lived in the family home in Mocho until 1984 when she moved to May Pen. She said that in 1992 she migrated to England but visited Jamaica regularly. On her visit in 1995, she said saw the claimant extending the original two-bedroom dwelling house by adding two more bedrooms, a bathroom and a kitchen. She further stated that the claimant resided at the house with his mother, his wife and children until he migrated to the United States in or about 2002. Mrs. McDonald said that she returned to live in Jamaica permanently in 2005. Mrs. McDonald disputed the evidence of Joy Hunter and Joyce Ebanks. She stated that Thelma never constructed any house on her father's property.
- [25] She expressed her willingness to act as personal representative of Silas Robinson's estate as she is a responsible and business-like person who does not have an adverse interest of any of the beneficiaries.

FIRST DEFENDANT'S CASE

The defence

- [26] The first defendant in his Defence contended that the two-bedroom dwelling house which the claimant said he extended was in fact constructed by Thelma a few months after Silas Robinson's death in 1977.
- [27] He further averred that after the executors entered into the Property Option Agreement with Jamalco, there were several verbal and written amendments to the Agreement between the parties.
- [28] The first defendant denied that he acted fraudulently and in breach of his fiduciary duties owed to the claimant. He expressed that Jamalco was instructed to transfer the three-bedroom house to Thelma because she was the one who constructed the extension to the original house. Further that the three-bedroom house was based on Jamalco's own measurement of the extension to the original house. He also stated that Jamalco, with the authority of the executors constructed the three-

bedroom house on three-quarter acres of land, based on the devise to Thelma by her father.

- [29]** The first defendant admitted that under the Will, Thelma was not entitled to receive a house. However, he said, the extension to the original house did not exist at the time of Silas Robinson's death and therefore could not have been bequeathed by his Will. He averred further that the extension to the original structure was constructed solely by Thelma with the knowledge and consent of both the executors and the life tenant. On this basis he said, the extension to the original house belongs entirely to Thelma.
- [30]** He further averred that the claimant received all that he is entitled to under the Last Will and Testament of Silas Robinson in that the said Will bequeathed the house (as existed at the time of the testator's death) on one acre of land to the remainder man, the claimant. It was the first defendant's averment that at the time of Mabel Robinson's death, the disputed property was already vested in Thelma by means of her entitlement to approximately three-quarter acres of land pursuant to the Last Will and Testament of Silas Robinson. Further, that the house was built pursuant to the Property Option Agreement, to give her the value of the extension she had built at the family land that was later acquired by Jamalco.
- [31]** The first defendant denied that he ever rented out or allowed a tenant to remain at lot 44F as he never had possession of the property.
- [32]** It was also his averment that he had no duty to take action on behalf of the claimant as in his capacity as executor the first defendant had already completed distribution of the property bequeathed to both the claimant and the co-executor. Further, that the estate is not yet finalised mainly because of the lawsuit filed by the claimant. He informed the court that the gift of the house on the one acre of land to the claimant was constructed sometime prior to 2013 but the claimant refused to accept it at the time.

[33] The first defendant denied all allegations of negligence and/or breach of fiduciary duty. He alleged that he acted with the utmost trust and honesty and loyalty to all beneficiaries in carrying out his duties as an executor and did so with the highest standard of care. Further, he expressed that he was guided by the principles of fairness in the welfare of the beneficiaries, while bearing the desire of the testator in mind.

Evidence of Joyce Ebanks

[34] Joyce Ebanks was granted power of attorney dated May 12, 2020 by the first defendant to defend the matter on his behalf. She gave evidence on behalf of the first defendant.

[35] Miss Ebanks' evidence is that the addition to the original dwelling house was constructed by Thelma due to the overcrowding in the family home and that the construction was done a few months after Silas Robinson died. Later, she stated that she could not remember exactly when Thelma built the house but it was sometime between 1978 and 1979. She also said that from her understanding, the claimant added some zinc to cover the path between the original house and the house that Thelma built in order to create a covered walkway between the two houses.

[36] It was her further evidence that the house mentioned in the Property Option Agreement was intended for Thelma Robinson and not Mabel Robinson and this was clarified in subsequent letters from Jamalco dated September 23, 2014 and June 29, 2018.

[37] She additionally stated that the claimant was the first beneficiary to be given his entitlement under the Will of Silas Robinson in full and he has no further personal interest in the said Will. Therefore, she said, the claimant has no justifiable interest for the Grant of Probate to the first Defendant to be revoked.

[38] She further expressed her disagreement with the appointment of Mrs. Olga McDonald as the personal representative for a Grant of Administration de bonis

non with will annexed as according to the affiant, she is not a fit and proper person. She opined that the reason for her view is that Mrs McDonald is incapable of being fair, impartial or trustworthy.

[39] During cross examination, Miss Ebanks said she was living in England in 1978 and 1979 when Thelma constructed the two-bedroom house. While she did not witness Thelma carrying out the construction, she said she sent money to her to help with the construction. Miss Ebanks disclosed that after she migrated in the 1960's, her next visit was in 1977 after her father's death and it lasted for six weeks. Following that visit, Miss Ebanks said she next visited Jamaica in 1982.

[40] She acknowledged that she was not in Jamaica when the claimant added zinc to cover the path between the original house but she came and saw it. She was unable to say how long Thelma Rbinson lived in the house she said Thelma constructed. She was also unable to say when Thelma moved out of the house although she had said in her witness statement that Thelma moved in 1981. She indicated that when she visited Jamaica in 1982, Errol Robinson and his girlfriend were living in the two-bedroom house constructed on the family land.

[41] She stated that Thelma put Everton Lalah in possession of lot 44F. However, she was unable to say when Mr Lalah took possession, how much rent he paid, how long he occupied the property or the total amount of rent collected from him. Nevertheless, she revealed that the property is currently rented for \$22,000 which is being paid to her bank account for over a year. The rent she said is used to maintain the house and the rest is in the bank.

SECOND DEFENDANT'S CASE

The defence

[42] The second defendant in her Defence, denied that the claimant extended the family home and averred that her late mother Thelma Robinson constructed the house with the knowledge and consent of the first Defendant. She said the only

work the claimant did to her mother's house was to create a covered walkway by attaching some zinc between her mother's and grandfather's houses.

[43] She stated in her Defence that after Thelma and her daughters moved from the property, Thelma permitted Mabel Robinson to occupy the property. Further, the second defendant admitted that Thelma dealt with Jamalco with the permission and consent of the first defendant. However, the second defendant disputed the authenticity of the Property Option Agreement and put the claimant to strict proof of it. She further expressed that as far as she was aware, there were several verbal and written amendments to the original arrangement between the parties.

[44] She averred that lot 44N was assigned to the claimant as representing the house to which he was entitled as remainder man under the Will and that lot 44F was assigned to Thelma Roinson as representing land to which she was entitled under the Will and replacement of the house constructed on the property. Further, that Jamalco was properly instructed to assign lot 44F to Thelma.

[45] The second defendant also denied taking control of the disputed property without legal justification and that she is in possession of the property and is collecting rent from same.

Evidence of Joy Hunter

[46] Miss Hunter stated that during Mabel's occupation of the property, Thelma Robinson added a bathroom to the house. She recalled that in about 2000 her aunt Joyce visited Jamaica, demolished a house and gave Thelma bathroom fixtures which were installed in the bathroom Thelma built. In cross examination, she gave the year of this occurrence as 2002.

[47] In her Affidavit in response to the claim, the second defendant said she was doubtful as to whether her mother signed, understood or had an appreciation of the terms of the Property Option Agreement as they had never discussed it. Nevertheless, she said that based on representations Thelma made to her during her lifetime, it was her view and understanding that the three-bedroom house at

the disputed property was constructed by Jamalco as replacement for the structure she built on the property.

- [48]** She denied that the executors acted fraudulently and in breach of their fiduciary duty. She stated that to her knowledge, lot 44N was assigned to the claimant as his entitlement under the Will of Silas Robinson. Further, that lot 44F was assigned to Thelma as land to which she was entitled under the Will and replacement for the house she constructed on the property. She exhibited to her Affidavit in response sketch plans for the house Jamalco built.
- [49]** The second defendant further stated that she is uncertain when Everton Lalah first started to occupy the property. However, he was allowed to remain in possession of the premises as caretaker. She said that it was with the consent of the executors of the estate of Thelma and knowledge of the first defendant that she entered into an agreement with Everton Lalah for the rental of the property for one year commencing from March 17, 2015 for \$15,000.00 per month. She gave evidence that Mr Lalah made payments for four months and then defaulted.
- [50]** The second defendant denied that she is in control of the premises. She disclosed to the court that she had commenced a claim in the Clarendon Parish Court for recovery of possession and outstanding rental against Mr Lalah which was consolidated with the claim filed by the claimant against her and Mr Lalah.
- [51]** She further stated that although she was successful in the parish court she did not wish to retain possession of the property while it was contentious so she gave up possession to the first defendant and turned over sixty thousand dollars (\$60,000.00) which was collected from the rental to Silas Robinson's estate. She stated further that the claimant is aware that she is no longer in possession of the property and denied that she has been collecting rental income for several years.
- [52]** Further, she expressed disagreement with the appointment of Olga McDonald as the personal representative of the Estate of Silas Robinson. According to her, Mrs McDonald is not a fit and proper person to act as she is incapable of being

impartial, fair and trustworthy. Furthermore, she stated Mrs. McDonald's interests are aligned with those of the claimant.

[53] Miss Hunter was permitted to amplify her affidavit evidence. She said her mother met someone who bought her the land in Four Paths and started to build the house for her but it was incomplete. Miss Hunter also stated that she was not aware of the claimant doing farming. She said he used to sell things such as banana, orange, pear and anything in season that her grandmother had on the property to higglers in the area.

[54] In cross examination Miss Hunter said construction of the house in Four Paths began in 1980. She stated that when she moved in with her mother and sister, only a bedroom and bathroom were completed. Further, she stated that after she and her family moved to Four Paths, the claimant constructed the pathway. She said she met Mr Lalah for the first time in 2013 after her mother died. She further stated that she never controlled lot 44F she only did what she was told and her sister told her to make a contract with Mr Lalah after their mother died because he was living there and not paying rent. Miss Hunter informed the court that Mr Lalah vacated the premises in 2018 or 2019 and that her sister told her that Hemans said to hand over the sixty thousand dollars (\$60,000.00) rent to her aunty.

Evidence of Twinrose Ebanks

[55] Miss Ebanks gave evidence on behalf of the second defendant. She stated that in the 1970's her mother Thelma Robinson, started constructing a storeroom, a house and a chicken coop on the family land shortly after Silas Robinson's death. She highlighted that it was a man by the name of Eddy Bailey and another by the name of Val who were charged with building the house. She recalled helping to fill the house with stones when the floor was going and that when they moved in the roof was not fully completed.

[56] Miss Ebanks stated that she along with her mother and her sister only lived in the house for a short time before they moved out and the claimant moved in.

[57] She gave further evidence that after she migrated to England in 1993, her mother improved the house and added an inside bathroom which she helped to fund by sending money to her mother to pay the workmen. Miss Ebanks also disapproved of the appointment of Olga McDonald as personal representative of Silas Robinson's estate. She expressed that Mrs McDonald is unfair and not impartial and that the only reason the claimant seeks to have her appointed is so that she can carry out his wishes.

[58] In cross examination, this witness stated that Thelma started the construction when her grandfather died in 1977 or 1978. She further revealed that her mother received a home improvement loan from NHT and built on the land and that when they moved in, one bedroom, a kitchen and a bathroom were completed.

CLAIMANT SUBMISSIONS

[59] Mr Haisley, submitted that the court Will have to resolve the factual issues of whether the extension to the original structure was constructed by the claimant or by the late Thelma Robinson; and whether the three-bedroom house located at lot 44F Sheckles, Four Paths, Clarendon was assigned to Thelma Robinson by Jamalco because she was entitled to same or because they were instructed to do so by the executors of Silas Robinson's estate. He argued that the documentary evidence is overwhelmingly in favour of the resolution of these issues in the claimant's favour.

[60] Mr Haisley placed significant reliance on the Property Option Agreement. He argued that this document is of paramount importance because it is a legally binding contract which forms the basis of the resettlement exercise between Silas Robinson's estate and Jamalco; and it was the first documentation touching and concerning the resettlement exercise. Counsel highlighted that the terms of the Agreement are clear and unambiguous. He directed the court to the clause which states that the extension to the original dwelling house would be measured and a house of equal area will be constructed at Sheckles, Four Paths, Clarendon for the claimant. Mr Haisley submitted that the clear and logical inference from this clause

is that during their communication with Silas Robinson's executors, Jamalco was informed that the extension made to the original house at Mocho, Clarendon was made by the claimant.

[61] He urged the court to consider that the very person who the defendants allege to have constructed the said house/extension was one of the persons dealing directly with Jamalco at the time that the Property Option Agreement was prepared and is a signatory to that agreement.

[62] Further counsel argued, the defendants have not provided any plausible explanation for the inclusion of that clause in the Property Option Agreement and the fact that it is diametrically opposed to their current contention. Counsel pointed out that the first defendant merely states that "*Jamalco and the executors of Silas Robinson's estate made several verbal and written amendments to the original arrangement between the parties*" without providing any tangible proof of these alleged amendments.

[63] Additionally, counsel pointed to the first defendant's purported reliance on the contents of the letter dated June 29, 2018 from Jamalco to Mr Garfield Haisley to support the allegation that there were agreed amendments to the original agreement, and submitted that the natural and ordinary meaning of the contents of that letter is that by assigning lot 44F to Thelma Robinson, Jamalco was merely yielding to directives received from the executors of Silas Robinson's estate who had the power to give those directives even if they contravened the terms of the Property Option Agreement. Furthermore, Mr Haisley pointed out that in Joyce Ebanks' affidavit, she stated that "*Jamalco was instructed to transfer the three-bedroom house to Thelma Robinson*".

[64] Counsel submitted that the appearance of Thelma Robinson's name on the sketch plan relied on by the second defendant, is not proof that she is entitled to that house, but is consistent with the fact that Jamalco was acting in accordance with directives received from the executors of Silas Robinson's estate.

- [65] Mr Haisley relied on the case of **Howard Jacas (Executor of the estate Sylbert Juan Jacas, deceased) v Bryan Jacas** Claim No. 2014 HCV 02984-unreported in support of his submission that a special fiduciary relationship exists between an executor and the beneficiaries of an estate and if the executor fails to carry out his functions in the prescribed manner, or is negligent in his execution, he may be held personally liable to the beneficiaries of the estate.
- [66] Further, Counsel submitted that the test developed by Langrin JA in **Dasa Yetman and Zusanna Brechova-Soucek v Susan Evanko** SCCA No. 39/98 and applied by E. Brown J in **Basil Louis Hugh Lambie et al v Marva Lambie (Administrator ad litem of the estate of Max Lambie deceased) et. al** Claim No. 2007 HCV 01249 should be applied to the circumstances of the instant case. He argued that the conduct of the first defendant has not only endangered the trust property, but also demonstrates a clear lack of honesty and fidelity on his part. Further, counsel submitted that that conduct, in addition to his failure to account to the claimant for income generated by the disputed property, warrants his removal by the court and the making of a Grant of Administration de bonis non with will annexed to Mrs. Olga McDonald.
- [67] In the alternative, counsel advanced that if the court finds that the acts and omissions of the first defendant are not sufficiently egregious to warrant his removal as executor, the interests of justice can still be served by making in the alternative, an order compelling him to take the necessary steps to cause possession and ownership of the disputed property to be given to the claimant.
- [68] Based on the affidavit evidence counsel says, it is clear that the disputed property was rented and generated income at some point even if the first defendant was not directly involved in the renting, that does not absolve him of his responsibility as the executor of the estate to account to the claimant for the income generated. Furthermore, the second defendant, by admitting that she intermeddled in the estate by renting it and collecting rental income is also under an obligation to account to the claimant for the funds she received.

FIRST DEFENDANT'S SUBMISSIONS

[69] Mr Howell on behalf of the first defendant in his closing submissions stated that it is a question of fact whether the claimant or Thelma Robinson constructed the two-bedroom-extension. He asked the Court to consider the entire evidence when determining this question. Further, he submitted that the claimant never raised the issue of ownership of the disputed property until after Thelma's passing in 2013 and he did not raise it after Mabel's passing in 2011. Counsel argued that the claimant's claim to entitlement to the three-bedroom house arising from the ownership of the extension is a recent invention that cannot be supported by the preponderance of the evidence.

[70] Counsel further submitted that even if one could treat the extension to the original two-bedroom dwelling as a part of Silas Robinson's estate, it was not specifically bequeathed in the Will. Furthermore, because the Will has no remainder clause and the claimant would have no automatic right to it. Additionally, he argued that since the claimant has failed to prove that he constructed the extension to the original dwelling house, then he is not entitled to possession and control of the disputed property.

[71] On the issue of whether the first defendant acted negligently, Mr Howell advanced that when the evidence of Joyce Ebanks is considered, it is obvious that the first defendant was guided by the principles of fairness in the welfare of all beneficiaries while bearing in mind the wishes of the testator.

[72] Additionally, counsel relied on the authority of **Angus v Emmett** [2010] EWHC 154 and submitted that it is clear that the claimant cannot prove that the first defendant's acts or omission has created any danger to the property in the estate or that the first defendant has acted in any way dishonest. He highlighted that the Agreement calls for a like for like exchange as stated by the claimant himself. Also, that in some instances, the beneficiaries themselves have agreed to accept cash in lieu of land while the claimant himself has received his bequest under Silas Robinson's Will and has expressed satisfaction with his gift. Further he pointed out

that no other beneficiary has shown any dissatisfaction with the action of the executors. As a matter of fact, he said, it is the claimant's own action in taking legal action that may have caused the delay in the completion of the estate.

[73] Additionally, counsel stated that the claimant is asking the first defendant to breach his duties to the beneficiaries, including himself, thereby potentially exposing himself to legal action by seeking the declaration set out at paragraph 1 of the claimant's Amended Fixed Date Claim Form. Mr Howell concluded this point by urging the court to find that the claimant has not provided any evidence to support his allegation of the first defendant's breach of duty and/or fraud and therefore the claimant has failed to prove any of his allegations and his claim must fail.

[74] Mr Howell, underscored that in this case the executors were required to pay the just debts, funeral and testamentary expenses and distribute the items in the estate. He submitted that the first defendant has executed his duties as best as he could in conformity with the Will and has acted in good faith in relation to all the beneficiaries. Additionally, he argued that the claimant has not provided any evidence of any unadministered part of the estate so as to show a need to revoke the Grant of Probate and to grant administration de bonis non to Olga McDonald over the objection of the surviving beneficiaries. Furthermore, he submitted that if such a revocation of the Grant of Probate becomes necessary, then the first in line for such grant would be the executors of the deceased executor based on the principle of the chain of representation. Finally, he submitted that in light of the above, the claimant's prayer for an order for accounting must fail.

SECOND DEFENDANT SUBMISSIONS

[75] Counsel for the second defendant Miss Crossbourne addressed the preliminary issue which arose at trial concerning whether the two-bedroom house at lot 44N represents the original dwelling house. She argued that based on the pleadings, the claimant's affidavit and his submissions, it is common ground between the parties that the three-bedroom house at lot 44F was the replacement for the house

constructed after Silas Robinson's death and the two-bedroom house at lot 44N was the replacement for the original house.

[76] Consequently, she submitted that it would go against the basic essence of fairness to allow the claimant during the course of cross examination to resile from what was essentially agreed facts. It is unfair she argued, as the defendants, believing the facts were not in dispute, would not have led evidence in specific proof of these facts. Counsel argued that it would be unnecessary and an ineffective use of judicial time, there being common ground, to lead evidence proving facts which were not in dispute. Counsel urged the court not to accept what the claimant has stated in cross examination to be his evidence on this point, as to do so, the court would in effect be permitting the claimant to amend his pleadings at this stage which would be unjust in all the circumstances.

[77] Additionally, counsel asked the Court to note that it is not the executors who dictated which house represents and replaces which. This was done by Jamalco and is based on the size of the original and second house respectively. The executors' role, counsel said, is to give instructions on how the houses are to be assigned. To support this argument counsel asked the court to consider the June 29, 2018 letter, which according to counsel puts the issue beyond doubt.

[78] In addition, counsel proffered that the disputed property being the replacement for the second house and not the original house, the claimant cannot be entitled to same under the terms of the Will. Furthermore, the claimant is already in receipt and in possession of his full entitlement under the terms of his late father's Will.

[79] Miss Crossbourne further submitted that the claimant's claim to lot 44F is grounded in the Will and the Property Option Agreement. However, she argued the agreement could not in and of itself have created any interest in the disputed property in favour of the claimant and he has not pleaded any legal or equitable ground on which he seeks to rely in the alternative. Moreover, counsel argued, the claimant contends that he constructed the second house on the family land but this without more is insufficient to ground any legal or equitable interest. For this

reason, counsel submitted, the claim must fail and it is unnecessary to determine who constructed the house. Nevertheless, counsel urged the court to find that the second house was constructed by Thelma Robinson if it disagrees with this submission.

[80] Counsel further advanced that no reliance can and should be placed on the Property Option Agreement as evidence of any acknowledgment by Thelma Robinson, as it is clear on the face of the document that the relevant portion being relied on by the claimant is set out below Thelma's signature. Further, the claimant was not present at the signing of the document and could not therefore speak to the content of the document at the time of signing. In other words, counsel contended that there is nothing to show whether the portion which fell below Thelma Robinson's signature was present at the time she signed and there is nothing to show whether she knew of or approved of the content which fell below her signature. Further, counsel maintained that it cannot be taken that Thelma Robinson accepted, acknowledged, agreed to or approved of the statement that the house was to be constructed "for Errol Robinson". Also, that it cannot be relied on as evidence of her having acknowledged that Errol Robinson constructed the extension.

[81] Additionally, counsel urged the court to note that the Property Option Agreement does not actually state that the second house/extension was constructed by Errol Robinson. The claimant was not a stranger to the property. He and his family were in occupation of the house at the time. Counsel argued that it is therefore not difficult to see how an error in transcribing could have come about by the drafter of the document. According to counsel, it is possible that the relevant portion was not written in at the time of signing and Thelma Robinson therefore simply did not have the opportunity to correct it.

[82] Miss Crossbourne submitted that all the surrounding circumstances are consistent with an intention from the outset that of the two houses to be built one was for Thelma Robinson. Furthermore, counsel submitted that if as the claimant

contends, he is entitled to the disputed property, the claimant having already been given one acre of land, would in effect be depriving other beneficiaries of their interest under the Will if he were to be given the second parcel of land.

[83] Counsel for the second defendant urged the court to accept the second defendant's witnesses as witnesses of truth. She stated that they were unshaken in their evidence that it was their mother, Thelma Robinson, who constructed a house on her father's land after his death. On the other hand, she asked the court to reject Olga McDonald's evidence. Counsel argued that the complete change in position regarding which property represented the original house is a testament to their lack of credit. It is clear submitted counsel, that the claimant wishes to have Olga McDonald appointed as Administrator so that he can gain possession of the disputed property. It is telling she said, that all the other beneficiaries of the estate oppose this appointment.

[84] According to counsel, the claimant has not led evidence which establishes on a balance of probabilities that the second defendant has intermeddled in the estate. She relied on **Sykes & anor v Sykes & anor**: (1870) LR 5 C P 113 in support of her argument that wrongful intermeddling occurs where there is an assumption of authority which only an executor or administrator can lawfully exercise. Where however, the act is done as agent for the rightful executor, no liability would result. Further, she stated that it is not in dispute that the second defendant acted with the knowledge and consent of the lawful executor who himself had the power to let the property.

[85] It was also counsel's submission that the claimant is not entitled to an account of rent nor the rent collected by the defendants. However, counsel argued that if the court were to find that he is entitled to an account then it was submitted the account given in the second defendant's evidence is sufficient as she set out the period for which she was collecting rent and the total sums collected.

[86] Further, counsel underscored that the claimant has offered no evidence that the second defendant was collecting rent prior to March 2015. Accordingly, counsel

urged the court to reject this evidence especially in light of the fact that the claimant is prone to set out his opinions, views and beliefs of facts.

DISCUSSION

WHETHER CLAIMANT ENTITLED TO DISPUTED PROPERTY

[87] It was the claimant's pleaded case that pursuant to the original Property Option Agreement, dated August 19, 2002, the three-bedroom house at lot 44F at Sheckles was intended as the replacement for what he described as the extension to the original house and that at lot 44N was the replacement for the original structure. However, he resiled from that position when cross examined and stated that the replacement was lot 44F. The following is what transpired during the cross examination:

Q. You agree that the two bedroom at lot 44N is what replaced the original house that your father left?

A. No

Q. What replaces the original house that your father left?

A. I don't understand.

In response to a question put by the court, the claimant said "my understanding as to why I received lot 44N is because it is my house, it built in my name.

The question which followed was

Q. Are you saying it is the three bedroom at lot 44F that replaces the house your father built?

A. yes.

The claimant thereafter denied that he was aware that Jamalco had said in a letter dated June 2018 that the two bedroom at Sheckles replaced the original dwelling house.

- [88]** There is no question that based on what appeared in the document evidencing the original agreement, lots 44F and 44N were to be assigned as part of the exchange of the lands belonging to the estate of Silas Robinson. Nowhere does it state in the document put in evidence, that lot 44N was intended as the replacement to the original structure. It is further indicated in that document that the original structure would be measured and a house of equal size built for Mabel Robinson. Further, that the addition to the original structure would be measured and a house of equal size built for Errol Robinson. It is noteworthy that by virtue of the arrangement as recorded, Thelma Robinson was to receive cash.
- [89]** Based on the letter of June 29, 2018 from Jamalco to the attorney-at-law for the claimant and the second defendant, the two-bedroom house at lot 44N was said to be the replacement for the original structure and the three-bedroom house at lot 44F, for the addition. By then the lots had been assigned; 44F to Thelma and 44N to the claimant. In fact, it is evident that there had been an assignment of the lots accordingly as early as August 14, 2003 based on the sketch plans relied on by the second defendant. It is noteworthy that these sketch plans appear to have the signature of the first defendant appended as having approved the plans. The indication in the June 2018 letter is that instructions are that the assignment of the lots was made as per the instructions of the executors.
- [90]** Counsel for Miss Hunter is correct in her contention that there is nothing to show whether the writing which fell below Thelma's signature was present at the time Thelma signed the Property Option Agreement and there is nothing to show whether she knew of or approved of the content which fell below her signature and so it cannot be taken that Thelma agreed to or approved of the statement that the house was to be constructed for Errol Robinson. A statement that the house was

to be constructed for Errol is also not necessarily conclusive evidence that she acknowledged that Errol Robinson constructed the extension.

[91] To argue that the court cannot as a matter of law rely on the information which appears below the signature is one thing. The presence of that information and the absence of any other information however, begs the question as to when, logically, the information would have been recorded. It was open to the claimant to present evidence as to the circumstances of the making of that document given that Thelma's signature appeared close to the end of the printed content on the document and the information regarding the assignment of the replacement units fell below the signature. That was not done. The court takes the view that the information recorded was intended as representing what was agreed. But this court cannot say that Thelma agreed to, or approved of the information recorded below her signature. While I see no basis for speculating that anyone was mistaken in recording the information, I will simply not place any reliance on that information as accurately recording what was agreed.

[92] Notwithstanding, my conclusion that it cannot be taken that Thelma agreed to or approved of the information recorded below her signature, I am very firmly of the view that it was the claimant who constructed the addition to the original structure.

[93] The fact that the claimant was inconsistent regarding the aspect of his evidence having to do with which house was intended as the replacement for the original structure, and was not the most coherent witness, do not in totality define my view of him as a witness. I nevertheless accept his evidence and that of his witness, his sister Olga, that he constructed the house. Mr Howell on behalf of the first defendant sought to establish from the claimant in cross examination that the claimant could not afford to construct the house because he had very limited resources. The claimant however testified that he continued in his father's tradition of farming. Thelma it would appear, was also someone of limited means. The evidence is that she was a live in domestic helper. It was the evidence that she received some help from the first defendant's witness Joy Ebanks in constructing

the house. That evidence I reject. I do find it odd that Thelma who was at the time someone of modest means, would in a relatively short time after erecting a house on what was then land belonging to her father's estate, moved on to erect a house elsewhere. I am of course mindful that the evidence is that someone bought her the land. I note that Miss Hunter stated in her defence that after Thelma and her daughters moved from the property, Thelma permitted Mabel Robinson to occupy the property. However, in her Affidavit in response, she stated that sometime after herself, her mother and sister moved from the extended part of the house, the claimant moved into the house along with his girlfriend and his girlfriend's brother and that her grandmother Mabel did not move to the house with them. I advert to this evidence to make the point that there have been inconsistencies on the part of the defence as well.

[94] The focus in cross examination seem to have been on the position that by virtue of amendments to the Property Option Agreement, and the plans relied on by the second defendant, the claimant was assigned the two-bedroom house located at lot 44N. That assignment as observed earlier was evident for the first time in the plans dated August 14, 2003. It is to be remembered that the evidence as per letter from Jamalco dated June 29, 2018 which was admitted in evidence as exhibit 4, is that Jamalco acted in accordance with the instructions given by the vendors/ executors. The evidence of the claimant is that while he was aware that Jamalco had an interest in the land, he was never a part of the negotiations. Thus the fact that he was assigned that house and that he accepted it is entirely separate from the question of what he was entitled to as per the Will of his late father.

[95] The question arises as to whether a finding that he constructed the house necessarily means that he is entitled to both lots 44F and 44N. It is the contention of the second defendant that even if the court finds that the claimant constructed the extension, it was constructed on the family land and so the fact that he constructed it is without more, insufficient to ground any legal or equitable interest in the property. The second defendant is seeking to "blow hot and cold at the same time". She relies on the assertion that her mother constructed the house to say

that it now belongs to herself and her sister. Yet she wishes this court to say that even if the claimant constructed it, he is not without more entitled to it. In any event, in the peculiar circumstances of this case, the claimant on the basis of equitable principles would be entitled to the house by virtue of his expenditure in constructing it. This is not a case where by virtue of debt or other estate expenses the assets of the estate were liquidated.

[96] The undisputed evidence is that based on the Will of Silas Robinson, the claimant is entitled to the house that existed as at the date of his father's death and one acre of the land. The evidence which I accept is that lot 44N consists of one acre of land while lot 44F consists of $\frac{3}{4}$ of an acre. What this means is that the claimant would be receiving more than he is entitled to. When it is understood however that the Property Option Agreement entered into allowed for the construction of two separate houses to replace two structures that were joined together, then it is perhaps not unreasonable on the part of the claimant to expect to receive both houses in circumstances where it was the executors who gave instructions as to whether it was to be one replacement house, or whether it would be separate houses on the same lot, or separate houses on separate lots.

[97] At least one of those executors knew with certainty who was responsible for constructing the addition to the original structure. It was that very executor who gave the instructions to Jamalco. The first defendant accepted that the now deceased Thelma Robinson was authorized to carry out the transaction with Jamalco. The company clearly acted in accordance with the dictates of the executors of the estate of Silas Robinson. Where however the making of a declaration by this court that the claimant is entitled to lot 44F could result in a beneficiary being deprived of his entitlement under the Will, then some adjustment should be made.

[98] Ultimately, the estate of Silas Robinson is to be distributed in accordance with his Will. By virtue of that Will, each of the other beneficiary is entitled to just over half of an acre of land, based on the size of the land that was to be divided among all

of Silas Robinson's children. It is almost certainly the case that Jamalco took into consideration the amount of land that the estate was entitled to receive when assigning the land space to each of lot 44F and 44N. There is no evidence that Jamalco is prepared to award a further 4 ½ acres of land apart from the portions already contained in lots 44F and 44N or compensation in lieu of 4 ½ acres of land. It seems reasonable and logical to assume that the allotment of three-quarters of an acre consisting of lot 44F is part of the exchange.

WHETHER THE GRANT OF PROBATE SHOULD BE REVOKED AND A GRANT OF ADMINISTRATION DE BONIS NON MADE

The Law

[99] At paragraph 23-24 of **Howard Jacas (Executor estate of Sylbert Jacas, deceased) Bryan Jacas and Bryan Jacas (attorney of Thelma Jacas)** [2014] JMSC CIV 190, Simmons J set out the duty of an executor. She stated:

“[23] The duty of an executor is to administer the testator's property and to carry into effect the terms of the will. In Re Stewart; Smith and another v Price and others 5 ITELR 622 at 630, Laurensen J in his examination of the role of an executor stated: - “An executor is the person appointed by a testator or testatrix to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers, namely to:

- *Bury the deceased;*
- *Make an inventory of assets;*
- *Pay all duties, testamentary expenses and debts;*
- *Pay legacies;*
- *Distribute the residue to the persons entitled; and*
- *Keep accounts.*

The learned author, G Nevill, in Maxton (ed) Nevill's Law of Trusts, Wills and Administration in New Zealand (8th edn, 1985) notes at ch 20, p 407:

'But before proceeding to discuss the technicalities of the duties it seems opportune to mention that in the case where a will has been left, many of the duties here set out are really facets of the one primary duty of an executor, to propound and maintain the will by which he has been appointed. Let others attack that document if they wish. It is not for him to aid and abet them in their design of rewriting the testator's directions a little nearer to their heart's desire. It is not for him unwarrantedly to thwart them.'

The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. The most obvious element of that relationship is the requirement imposed in equity that the trustee will deal with those assets with the utmost probity which, in turn, requires that the trustee will not on any account allow him or her to have or acquire any personal interest in those assets without the express and informed consent of the beneficiary. There is, in addition, a further aspect to an executor's fiduciary responsibilities, namely a duty to act even-handedly between the beneficiaries. It is within this area of responsibility that the obligation not to unwarrantedly thwart claims arises''.

[24] An executor's title is derived from the will and he may pay or release debts as well as get in and receive the testator's estate even before probate is granted. He holds the assets of the estate for the sole purpose of carrying out his duties and functions and is therefore in a fiduciary position in relation to those assets and may be held liable if he is negligent or reckless in his management of the estate. It is for this reason that he is bound by his oath to "faithfully collect, get in and administer according to law all the real and personal estate of the deceased" and to "render a just and true account of" his "executorship whenever required by law so to do"

[100] In **Basil Louis Hugh Lambie and anor v Marva Lambie and another**, the claimants commenced a claim against the defendant in his capacity as executor of their mother's estate for breach of duty and/or fraud. The claimants claimed that the defendant never provided a proper account of his administration of the estate, failed to account for nine pieces of real properties which formed part of the estate, failed to account for the proceeds of the sale of some these properties and failed to account for some personal property. The claimants asked the court to order the defendant to furnish and verify accounts, transfer to the claimants the real and personal property to which they are entitled and to revoke the grant of probate issued to the defendant. One of the issues for the court's determination was

whether Max Lambie's execution of his duties and responsibilities was such as to warrant his removal as executor

[101] In examining the basis for removing an executor, Brown E, J at paragraph 67 of the judgment, relied on **Dasa Yetman and Zusanna Brechova-Soucek v Susan Evanko SCCA #39/98 dated July 6, 1999**. In that case, Langrin JA with whom the rest of panel of the Court of Appeal agreed stated "***that the general rule for the removal of a trustee is that his acts or omission must be such as to endanger the trust property or to show a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity.***" Brown J went on to quote Langrin JA as follows:

"the conscience of a court of equity would not permit her to continue if there was any misconduct on her part. It is trite law that an executrix is clothed with a fiduciary character in relation to the beneficiaries under the Will and if the executrix obtains a personal advantage at their expense, she holds it as a constructive trustee for them."

[102] Further, at paragraph 72, Brown J highlighted that,

"It is trite that it is incumbent upon a personal representative to discharge three functions in relation to the estate of the deceased. First, the personal representative is to pay the just debts and testamentary expenses of the deceased. Secondly, the personal representative is to collect and realise the assets of the deceased. Thirdly, an executor or administrator is to distribute the assets of the estate. There can be no effective management of the estate without the proper collection and realization of the assets of the deceased, which must of necessity include their protection from adverse claims."

[103] The learned Judge concluded that the defendant, by becoming trustee of a property which the testatrix held on trust for other beneficiaries and which the beneficiaries of the estate contended formed part of the testatrix's estate created a conflict of interest. According to Brown J, the defendant should have sought the opinion, advice and direction of the court as to the best course to take in these circumstances. If he had done so, he would have discharged his duty as an executor. Further, Brown J found that the actions of the director warranted his

removal as executor based on the test in **Dasa Yetman**. He reasoned that the defendant's actions endangered the property as his actions would diminish the size and value of the estate.

[104] The learned Judge also considered that two conditions must be satisfied before a grant of Administration de Bonis Non can be made. At paragraph 102 he said

“First, there must have been a prior grant to the legal personal representative who has died. In the case before me there is no dispute concerning whether a grant of probate was made to the defendant and that he has since died. Secondly, the chain of representation through proving executors must have been broken. “a grant de bonis non cannot be made so long as the chain of representation through proving executors continues” per Messrs Parry and Clarke in The Law of Succession 10th edition, page 340-341.

[105] The learned judge was unable to say whether the chain of representation was broken. To determine whether to revoke the grant of probate he relied on the principle in the **Goods of Loveday** [1900] P. 154 which is authority for the proposition “that *the real object... is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto,*” per Jeune P at page 156. He reasoned that the executor had shown himself incapable of administering the estate based on the **Dasa Yetman** test and as a result of that, revoked the grant of probate and appointed the first claimant as an Administrator de bonis non as he was a residuary legatee and was next in line to receive the grant based on the order of priority in CPR 68. 11.

Discussion

[106] The claimant relies on the failure of the first defendant to take steps to cause possession of lot 44F to be delivered to him. He has set out in his affidavit the particulars of negligence and breach of fiduciary duty on the part of the first defendant. Those particulars are as follows:

- (i) Refusing or neglecting to take any steps to safeguard the claimant's interest in the property located at lot 44F at Sheckles, Four Paths in the parish of Clarendon;

- (ii) Refusing or neglecting to take any steps to cause possession of same to be delivered to the claimant and for title to same to be issued by Jamalco in the claimant's name;
- (iii) Instructing Jamalco or permitting the late Thelma Robinson to instruct Jamalco to assign property located at lot 44F at Sheckles, Four Path Clarendon to her contrary to the Will of Silas Robinson deceased and contrary to the terms of the Property Option Agreement numbered RR-EX-V744 dated August 19, 2002;
- (iv) Assisting and facilitating attempts of the second defendant to resist the claimant's attempt to gain possession of the said property and to deprive him of same;
- (v) Failing to take any or any reasonable steps to ensure that the assets of the deceased's estate are distributed in accordance with the terms of the Last Will and Testament; and
- (vi) Failing to account to the claimant for the rental income generated by the said property since the death of Mabel Robinson deceased on August 18, 2011.

[107] Joyce Ebanks on behalf of Hemans Robinson asserted that the executors made a good faith interpretation of the Will when they instructed Jamalco to give a two-bedroom house on one acre of land to the claimant. She asserts that the claimant was given his full entitlement under the Will. Evidently the court rejects those assertions. The claimant is entitled to that which represents the addition to the original structure on the basis that he is responsible for its construction. Even though at the time of the construction, the property had not been administered and so had not yet passed to the claimant, he derived an equitable interest in the house based on his expenditure for the construction.

[108] In order to determine whether Hemans Robinson should be removed from his position as executor, this court must decide whether his acts or omission are such as to endanger the property of the estate or whether there is such a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity.

[109] The administration of the estate required the executors to distribute the property of Silas Robinson in accordance with his Will. Because of Jamalco's interest in the estate property and the subsequent exchange of the estate lands, a decision had to be made as to what proportion of the newly allotted lands represented the claimant's interest based on the provisions of the Will. This is not a case where there are any allegations of waste on the part of the only remaining executor. It is however alleged among other things, that he has facilitated conduct on the part of the second defendant which amounts to intermeddling and has failed to safeguard the claimant's interest in the disputed property.

[110] I accept Mr Haisley's submission that a special fiduciary relationship exists between an executor and the beneficiaries of an estate and if the executor fails to carry out his functions in the prescribed manner, or is negligent in his execution, he may be held personally liable to the beneficiaries of the estate. It has been said that the disputed property was assigned by Jamalco on the instructions of the executors. However, it is also the undisputed evidence that it is the now deceased executor Thelma Robinson who dealt directly with Jamalco. Based on the evidence, she acted on behalf of both executors in the dealings with Jamalco. In fact, the Property Option Agreement bears her signature. The evidence does not reveal the whereabouts of the first defendant as at the time when the extension was done to the original structure. It is therefore not entirely clear whether he has personal knowledge as to who constructed the extension. However, it appears from the evidence that the first defendant in the least approved of the later directives given to Jamalco which led to the house being assigned to Thelma. This is evidenced by his signature on the plans dated August 14, 2003.

[111] The first defendant's contention as expressed by his attorney (by power of attorney) is that the claimant's court action has frustrated his efforts to finalize the distribution of the estate. This claim was brought on December 11, 2018. An amended claim was filed on the January 11, 2020. The Further Amended Fixed Date Claim Form was filed on the August 27, 2021. It is not entirely clear when the dispute arose as to the ownership of lot 44F. It is evident however that by July 2,

2013, which was prior to the death of Thelma, the claimant was asserting that the first defendant had failed to transfer the disputed property to him. It is therefore not correct as the first defendant contends through Mr Howell, that the claimant never raised the issue of ownership of the disputed property until after Thelma's passing in 2013.

[112] I cannot help but note that the executors were dilatory in administering the assets of the estate. The evidence is that Silas Robinson died in 1977. The filing of this claim certainly cannot explain the delay which occurred prior to 2002 when the Property Option Agreement was entered into, nor that prior to 2011.

[113] There was no explanation offered as to why up to August 17, 2002, the date of the Property Option Agreement, the assets of the estate remained undistributed, even though Probate in the estate was granted on February 14, 1978.

[114] Had the extended period of initial delay not occurred, Jamalco would have had to deal with the individual owners among whom the land ought to have been distributed. Be that as it may, the question of resolving the dispute as to the ownership of lot 44F did not arise before the death of Mabel Robinson. The undisputed evidence is that she died on the August 18, 2011. The first defendant's involvement in settling that dispute came about when claims were brought in the Parish Court. In fact, he very clearly supported the position that the property had belonged to Thelma by giving evidence on behalf of the second defendant in that case when the matter involving said dispute was before the Clarendon Parish Court. The claimant also sought to have the matter addressed in the Clarendon Parish Court. He did not give evidence as to when the claim was brought but Miss Hunter's claim for rent was brought in or about February 2017. The evidence is that that claim was consolidated with the claimant's claim.

[115] The following points are also worthy of note. The remaining executor has not participated directly in these proceedings. He has acted through a representative. The evidence reveals that he resides outside of the jurisdiction. The question of

his availability to carry out the functions vested in him by the Will of Silas Robinson becomes a live one.

[116] Ultimately, it appears that the only matter standing in the way of completion of the distribution of the estate is to whom the property at lot 44F should be assigned. Jamalco is now required to either assign lands or make cash payments to those beneficiaries who have not received their benefit from the Will. Jamalco has made it abundantly clear and with good reason, that it has put on hold any further action with respect to the issuance of title to the resettlement lands because of the court action. The company has further stated that it will continue to be guided by the remaining vendor/executor as it relates to its outstanding obligation to provide outstanding resettlement lands to the estate. There is no indication that the company is averse to making the cash compensation to the beneficiary/beneficiaries who have not yet received their entitlement and who have opted or will opt to receive such cash in lieu of land. It is also to be noted that all the living beneficiaries of the Will of Silas Robinson except the claimant and his witness have indicated their opposition to Olga McDonald the claimant's witness being appointed as administrator de bonis non. It is uncertain whether the claimant and Olga are the only persons whose entitlements have not been settled.

[117] It is reasonable to say that the claimant has made out the allegations of negligence against the first defendant in at least one respect, namely, that he has refused or neglected to take any steps to safeguard the claimant's interest in the disputed property located at lot 44F.

[118] The settlement of benefits to the claimant does not depend on Jamalco making any further distribution. It is dependent on the order the court makes as to his entitlement. For that reason, this court sees no need to revoke the Grant of Probate since the breach of duty does not involve fraud or a degree of dishonesty or want of capacity as would require such extreme decision.

WHETHER THE SECOND DEFENDANT INTERMEDDLED IN THE ESTATE

The law

[119] The question arises as to whether the second defendant may be considered as an executor de son tort. In the case of **Howard Jacas (Executor of the estate Sylbert Juan Jacas, deceased) v Bryan Jacas** (supra), Simmons J (as she was then) at paragraph 26 of the judgment explained the concept thus:

*Where a person intermeddles in an estate in such a way as to denote the assumption of authority or an intention to exercise the functions of an executor he may be treated as an executor de son tort. Such a person is liable to be sued by the rightful representative, beneficiaries and even creditors. It should also be noted that the slightest acts of interference are sufficient to attract that designation. A definition of this term was given in *Peters v. Leeder* (1878) 47 L.J.Q.B. 573 where Lush J said:*

*“An executor de son tort is ‘one who takes upon himself the office by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the Court to administer’ (See *Williams on Executors*, cap 5.)*

The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise.”

Discussion

[120] The second defendant denied taking possession of the disputed property without legal justification. She stated that when she made checks with Jamalco in respect of the status of titles for the disputed property, she was informed that the title would be transferred to the beneficiaries of the estate of Thelma Robinson. She also stated that Thelma died leaving a Will dated May 30, 2011, (which was exhibited) in which she named Twinrose Ebanks and Clinton Robinson as her executors, and Twinrose Ebanks and herself as the beneficiaries of the disputed property. It was always her understanding she said, that her mother was the owner of lot 44F. It was also her evidence that she let the property to Mr Lalah on the instructions of her sister Twinrose (who presumably acted in her capacity as an executor), and with the full knowledge of the first defendant.

[121] It is noteworthy here that Miss Hunter is saying that she acted on the instructions of an executor of her mother's estate; not on the instructions of an executor of the estate of Silas Robinson. It cannot be said either that she acted as an agent of the executor of Silas Robinson's estate. Even though as counsel contends, she acted with the knowledge of the first defendant and he was evidently in support of her conduct, based on her perspective, the first defendant's consent was not required. It cannot properly be said therefore, that she acted with his consent and thus in my view, there was wrongful intermeddling since the person on whose authority she acted had no authority to act or to give instructions to the second defendant in respect of the disputed property. In other words, it is not correct as counsel contends, that the second defendant acted as agent for the rightful executor and so no liability should result. Ultimately, the second defendant wrongfully assumed control over the disputed property and is required to account to the claimant for all rents she collected in respect of the property.

WHETHER THE CLAIMANT IS ENTITLED TO AN ACCOUNTING

The Law

[122] An accounting may be required in order to obtain information from a personal representative of an estate in relation to property which forms part of the estate and is designed to provide information as to the manner in which the administration of the property has been carried out.

[123] In **Basil Louis Hugh Lambie and anor v Marva Lambie and another** (supra), Brown J also considered whether it would be unjust to order the defendant to furnish and verify accounts in the estate of Edith Ethline Lambie, either because the claimants have, by their collective conduct, done that which might fairly be regarded as equivalent to a waiver of the right to call for an account, or by that conduct and neglect have, though not waiving that remedy, put the defendant in a situation in which it would not be reasonable to place him if the claimants were now to be allowed to assert the remedy.

[124] The learned judge held that the statements of accounts and letter from the defendant and his witness statement collectively provided a sufficient account of the estate and effects of Edith Ethline Lambie, with the exception of one particular property.

[125] Brown J in considering the defence of delay and laches raised by the defendant as it pertains to the furnishing of accounts almost 47 years after the testatrix's death examined **Ritchie v Rees and Rees** 1 ADD 144 and at paragraph 78 stated

“The following propositions may be culled from Ritchie v Rees and Rees, supra. First, delay may operate as a bar to the claim to exhibit an inventory and account whether or not it is pleaded. Secondly, the fact of delay by itself cannot operate as a bar to the claim. Thirdly, delay is but one factor to be considered together with other relevant circumstances. Fourthly, delay will operate as a bar to the claim where a consideration of the fact of delay and other circumstances lead to a reasonable presumption that the estate has been fully administered and disposed of.”

Discussion

[126] There is no excessive delay in bringing this action, hence no question of laches arising in this claim that would stand in the way of the court directing that account be given. The period for which the account is required does not extend beyond 2011.

[127] Miss Crossbourne on behalf of the second defendant, argued that if the court were to find that the claimant is entitled to an account, then the account given by the second defendant in evidence is sufficient since she has set out the period for which she was collecting rent and the total sums collected.

[128] The second defendant's evidence in this regard was that she commenced collecting rent as at March 17, 2015 and this evidence has not been effectively disputed. Neither was her evidence that Mr Lalah made payments for four months and then defaulted. Additionally, she detailed that she brought a claim against Mr Lalah in the Clarendon Parish Court and obtained judgment in the sum of three hundred and sixty thousand dollars (\$360,000.00) plus attorney's costs of forty thousand dollars (\$40,000.00) and costs in the sum of five thousand and sixteen

dollars (\$5,016.00). She stated that Everton Lalah requested time to pay as well as an extension of time within which to vacate the property. The second defendant stated that she agreed that he would leave at a later date but would pay an additional forty-five thousand dollars (\$45,000.00) for his continued occupation and that he would pay the judgment debt in instalments.

[129] The second defendant informed the court that she has not collected any money on account of the judgment debt from Mr Lalah personally and all sums were paid to her attorney-at-law. Based on the advice of her attorney-at-law the second defendant disclosed that to date three hundred and fifty thousand dollars (\$350,000.00) apportioned as follows was collected from Mr Lalah:

- Forty-five thousand dollars (\$45,000.00) for his continued occupation of the premises
- Forty-five thousand and sixteen dollars (\$45,016.00) towards costs and
- Two hundred and fifty-nine thousand and eighty-four dollars (\$259, 984.00) on account of the judgment debt.

[130] The first defendant has also not disagreed that the second defendant gave up possession of the disputed property to him and turned over sixty thousand dollars (\$60,000.00) which was collected from the rental to Silas Robinson's estate. She did not state precisely when Mr Lalah vacated the property.

[131] Based on that evidence, it is reasonable to say that the second defendant has given sufficient account in relation to her handling of funds collected in relation to the disputed property. All that is left for her to do is to state when it was that Mr Lalah vacated the disputed property. She is not entitled to retain any of the sums collected for rent. It is the claimant who is entitled to same.

[132] The first defendant as the only surviving executor is also required to furnish an account of the rent collected in respect of the disputed property as at the date of

death of Mabel Robinson, since the claimant's interest in the property should have been assigned to him as at that time.

COSTS

[133] The general rule is that costs follow the event. It is no different in estate matters unless the litigation is caused by the conduct of the deceased or the residuary beneficiaries, in which case, the court may order that the costs be paid out of the estate. If the circumstances lead reasonably to an enquiry having to be made, then the appropriate order may be no order as to costs. There is no special circumstances which takes this case outside of the general rule, so the claimant is entitled to his costs from the defendants.

CONCLUSION

[134] The claimant is responsible for the construction of the extension to the original house. The claimant has made out the allegations of negligence against the first defendant in at least one respect, namely, that he has refused or neglected to take any steps to safeguard the claimant's interest in the disputed property. The court sees no need to revoke the grant of probate to the first defendant although he will be compelled to act so that the claimant's interest in the disputed property is realized. The second defendant has intermeddled in the estate of Silas Robinson by assuming control of the disputed property. She did not do so as the agent of the first defendant. The claimant is entitled to an account from her, but having regard to the information provided by her to the court, she has given sufficient account except in one minor regard. The claimant is also entitled to an account from the first defendant.

[135] In light of my findings and conclusion, I make the following declarations and orders:

- (1) A Declaration that the first defendant, in his capacity as the sole surviving Executor of the Estate of Silas Robinson, has acted negligently and breached his fiduciary duty owed to the claimant.

- (2) Within 90 days of the date hereof, the first defendant shall provide the claimant and/or his attorney-at-law with an accounting of all the rental income generated by the disputed property located at lot 44F at Sheckles, Four Paths in the parish of Clarendon, since the death of the life tenant, Mabel Robinson deceased on August 18, 2011.
- (3) An Order that the first defendant do pay over to the claimant, any sums found to be due to the claimant as per the said accounting.
- (4) A Declaration that the second defendant has intermeddled in the Estate of Silas Robinson deceased by entering into a lease agreement with a tenant concerning the property located at lot 44F at Sheckles, Four Paths in the parish of Clarendon and by collecting rent from the said tenant.
- (5) Within 90 days of the date hereof, the second defendant is to pay to the claimant the rental income generated from the rental of the disputed property for the period of March 17, 2015 to the date of expiration of Mr Lalah's tenancy.
- (6) A Mandatory Injunction is granted to compel the first defendant in his capacity as the sole surviving executor of the estate of Silas Robinson deceased to take the steps necessary to realize the claimant's interest in the disputed property.
- (7) The claimant is entitled to the value of the house (excluding the land) which is located on lot 44F at Sheckles, Four Paths in the parish of Clarendon pursuant to Property Option Agreement numbered RR-EX-V744 dated August 19, 2002 executed between the late Thelma Robinson deceased, Executor of the Estate of Silas Robinson deceased and Jamalco and pursuant to the Last Will and Testament of his late father, Silas Robinson deceased, but he is not entitled to the three quarter acres of land on which the house is situated.
- (8) The parties to this claim are invited to make submissions to the court within 30 days of this order as to how the claimant's interest in the disputed property is to be realized. In the absence of submissions:
 - (i) a valuation of the disputed property is to be conducted within 30 days of this order. A separate valuation of the land (excluding the building) is also to be provided.

- (ii) The claimant shall be given the first option to purchase the disputed property. If the claimant exercises the option to purchase the property, he shall pay the value of the land only. (That is the difference in price between the value of the disputed property and the value of the building located on the property).
 - (iii) If the claimant wishes to exercise the option to purchase the disputed property, he shall do so within 90 days of the valuation.
 - (iv) The proceeds of sale of the land shall be paid to the estate of Silas Robinson.
- (9) There shall be liberty to apply.
- (10) Costs to the claimant against the first and second defendants to be taxed if not sooner agreed.

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A. Pettigrew-Collins
Puisne Judge