[2013] JMSC Civ 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 01243

IN THE MATTER OF THE ESTATE OF CLIFFORD A GAYLE (Deceased) late of Cave P.O. of the parish of Westmoreland

AND

IN THE MATTER OF THE Intestates' (Estates and Property Charges) Act

AND

IN THE MATTER OF AN APPLICATION under the Partition Act

BETWEEN	**LLOYD GAYLE**	**FIRST CLAIMANT**
AND	**CEDRIC GAYLE**	**SECOND CLAIMANT**
AND	**SYLVIA GAYLE**	**DEFENDANT**
	(as the Executrix of the Estate of	
	CLIFFORD GAYLE, Deceased)	

IN CHAMBERS

Arlean Beckford instructed by Arlean Beckford and Co for the claimants

Michael Palmer instructed by Palmer and Smart for the defendant

February 20 and June 7, 2013

INTERPRETATION OF WILL – WHETHER WIFE HAD LIFE INTEREST – WHETHER SUBSEQUENT DEVISE VOID FOR REPUGNANCY – SECTION 23 OF THE WILLS ACT

SYKES J

[1] Messieurs Lloyd Gayle and Cedric Gayle are brothers, two of ten children produced by the testator Mr Clifford Gayle. Both gentlemen have filed an application asking the court to interpret the will of Mr Clifford Gayle. Mr Clifford Gayle was a farmer and butcher who acquired a fair amount of real estate in his life time. At the time of his death in April 1969, he was married to the defendant, Mrs Sylvia Gayle, now Mrs Henry. Mrs Henry was appointed one of the executors and she was also named as a beneficiary. Mr Lloyd Gayle has died since the application was filed. Mrs Augustine Amantine Gayle (Mrs A), his widow, was substituted for him.

[2] Mrs Henry has formed the view that under the terms of the will, twenty two acres of land at Mount Ricketts were hers absolutely, that is to say, she had an estate in fee simple absolute which had no other rights attached to it. Messieurs Lloyd Gayle and Cedric Gayle did not agree. They believed that she has only a life interest, and after her death, they and other named beneficiaries would inherit the estate in fee simple in respect of the twenty two acres. Mr Lloyd Gayle had lodged a caveat against the title on June 16, 2008. The caveat lapsed and the land was

transferred to Starline Construction and Realty Limited (Starline) under an agreement for sale between Starline and Mrs Henry.

[3] This state of affairs led Mr Lloyd Gayle and his brother to launch this application in which they are asking the court to declare the interests of the all beneficiaries, including Mrs Henry, under the will of Mr Clifford Gayle. However, during the application it became clear that the real issue between the parties was whether Mrs Henry took a fee simple absolute (and consequently full rights of disposition) or a life interest in respect of the twenty two acres of land at Mount Ricketts. This judgment concerns only this acreage and no decision is made regarding the other bequests and devises since there is now no issue between the parties in respect of the other dispositions.

[4] The resolution of this application depends on the proper interpretation of the relevant provisions of the will. The will that has led to this application is as follows:

> *THIS IS THE LAST WILL and testament of me Clifford A Gayle of Cave P.O. Westmoreland in the County of Cornwall.*
>
> *I HEREBY revoke all wills and testamentary instruments heretofore by me made. I appoint Franklin Gayle of Mearnsville Westmoreland and Sylvia Gayle of Cave, Cave P.O. Westmoreland to be the Executors of this my will. I direct my Executors to pay my just debts and funeral and Testamentary Expenses.*
>
> ***I give and bequeath to my wife Sylvia Gayle** all that portion of land part of Mount Ricketts approximately (22*

acres) twenty two acres to receive fifty percent (50%) of all proceeds after expenses are cleared ***during her life time****.*

She is to take care of my mother and pay her funeral expenses. ***At the death of my wife*** *the said twenty two acres (22 acres) of land is to be given to my sons Franklyn, Bernel, Lloyd and Keith. All balance of money owed to me on the portion of Mount Ricketts sold recently is to be paid to my wife Sylvia Grant and she is to give titles to the recent buyers. I give and bequest to my son Keith and my daughter Babeth Joy all that portion of land at Mearnsville (1½ acres) One and a half acres more or less and a dwelling house. This land and house must not be sold at all. I give and bequeath all that portion of land called Thompson land (part of Lindores) 6 acres more or less to my sons Franklin, Bernel and Lloyd and my daughter Hazel, Pearline, Vivian to be divided equally.*

I further agree and give to my wife Sylvia Gayle authority to give to my step daughter (Ruby) Mrs Iris Powell the sum of Fifty Pounds (£50) as soon as it is available.

I give to my executors the said Franklin Gayle and Sylvia Gayle the sum of Twenty-five pounds.
(emphasis added. Other than added emphasis the will is reproduced as it was in the original).

[5] Several affidavits have been filed. Mr Lloyd Gayle's affidavit in support of his application gives the background leading up to the application. The most important portions stated that since the probate of his father's will (which occurred on March 20, 1970), Mrs Henry, has not accounted to him or the other beneficiaries in

respect of her stewardship of his father's estate. He alleged that he heard that the twenty two acres were about to be sold and he feared that it will be sold at an undervalue. He further stated that he had lodged a caveat to prevent the transfer of the twenty two acres until the will had been interpreted. Unfortunately, as is now known, the caveat lapsed and the transfer was effected.

[6] Mr Lloyd Gayle's affidavit is relied on and supported by, his wife, Mrs A. Mrs A's affidavit added the following information. She said that in August 2009, she and her husband secured a valuation of the property (the twenty two acres). The valuators stated that the property was valued at JA$30,500,000.00.

[7] Mrs Henry also filed affidavits. She filed two affidavits of the same date. She began by stating that she entered into a sale agreement with Starline for the sale of 225 acres. The acreage seems to be a mistake. In the submissions before this court, it is common ground that it is twenty two acres which are in dispute.

[8] Mrs Henry stated that she is not 'currently holding funds on account of income generated from the estate ownership of the property' (paragraph 7 of affidavit of November 10, 2010 intituled in part 'in response to notice of application for court orders). In paragraph 9 of the same affidavit she says that she is 'unable to render a full account of the moneys collected and held by me as the documents to inform me of the various transactions cannot be located by my attorneys at law … despite my request for the file to be forwarded to my present attorneys at law.'

[9] In her other affidavit of the same date Mrs Henry accepted that she entered into a sale agreement with Starline for JA$12,000,000.00. According to her, the agreement was dated April 4, 2009. The purchaser was said to be in possession of the property since March 2008.

[10] Under cross examination it turned out that the selling price was set by the Starline. Starline got the valuation. None was done by Mrs Henry. The claimants

secured another valuation which stated that the property was grossly undervalued. Their report stated that market value was JA$35,000,000.00 with a forced sale value of JA$27,000,000.00.

Interpretation of the Will

[11] Mr Palmer submitted that under the rules of construction developed in relation to wills, Mrs S had absolute interest and therefore any later disposition what purported to cut down the full extent of the interest she received was void for repugnancy. Counsel further submitted that clear words cannot be controlled by subsequent words. According to learned counsel, the clear words of giving Mrs S an absolute interest were these:

> *I give and bequeath to my wife Sylvia Gayle all that portion of land part of Mount Ricketts approximately (22 acres) twenty two acres …*

Counsel took the view that the rest of the sentence -

> … *to receive fifty percent (50%) of all proceeds after expenses are cleared during her life time.*

- is of no moment and should be regarded as an attempt to cut down the absolute interest devised in the earlier part of the sentence. The clause stating that the land should go to others after the death of wife, according to counsel, had no legal significance.

[12] Mr Palmer relies on the Court of Appeal of Jamaica's decision in **DaCosta v Warburton and Kenny** (1971) 12 JLR 520. That case is indeed authority for the proposition stated by Mr Palmer but the rub lies in the application of the principle.

[13] In looking at the rival submission advanced before this court, one has to bear in mind the warning of Bovell CJ in **Gravenor v Watkins** (1871) LR 6 CP 500. His Lordship said that, 'It is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. The Court must in each case endeavour to ascertain the meaning of the testator from the language he has used' (p 504). This principle was restated by Smith JA in **DaCosta**. Smith JA emphasised that it 'is unwise to base a decision on a previous case in which no principle of law is established, but which is based purely on questions of fact or on the construction of a particular document' (page 525 C).The principle outlined by **DaCosta** is applicable but as Smith JA and Bovell CJ said, the key is the wording of the will and not so much the principle itself which is clear enough.

[14] In **DaCosta** the relevant parts of the will were in these terms:

> *I give and bequeath to my wife Josephine Lucille my property known as 52 North Street, Kingston. … I direct my said executor Josephine Lucille that in the event of her selling the property known as 52 North Street, she must give to my grandchildren by my daughter Thelma Kenny one quarter of the proceeds of such sale after expenses paid.*

[15] The issue that arose was whether Josephine Lucille had a fee simple absolute or whether the direction that if there was a sale part of the proceeds should go to the grandchildren had the effect of giving Josephine Lucille only a life interest. In other words should the later direction be regarded as repugnant to the initial disposition to Josephine Lucille and therefore disregarded?

[16] It is important to note that the gift to Josephine Lucille was stated in clear and absolute terms. No words of limitation appeared in the same sentence or even several sentences afterwards. It was only at the end when the testator spoke of

what should happen in the event of a sale that any suggestion of words of limitation on the extent of the estate given to Josephine Lucille arose.

[17] In interpreting wills the Court of Appeal set out the steps and the way in which the doctrine of repugnancy operates. Fox JA made the important point that while it is true to say that the doctrine of repugnancy (which is the principle relied on by Mr Palmer) applies to the construction of wills the starting point is always to decide 'the extent and nature of the estate intended to be given to the wife' (page 523 F).

[18] Smith JA, like Fox JA, held that the first step in interpreting wills is to 'decide … the nature and extent of the estate … which was given' (page 525 F). Then if 'the legal effect of the devise is that she obtained absolute ownership of the property then the attempts to benefit [others] out of the same property would clearly be void for repugnancy' (page 525 F).

[19] In coming to this conclusion, Smith JA did not accept the submission of Mr Frankson which was to the effect that one looks at the whole will and see what the intention was and then one goes to the specific devises and bequests to see who should get what and for what period. If the overall intention is that a person should benefit from the same property as another person who had previously received a gift of the same property in the same will then that shows that the true intention of the testator was that the first beneficiary can only have a life interest. Mr Frankson was relying on section 23 of the Wills Act which stated that when property is devised or bequeathed then an absolute interest in given unless a contrary intention appears. According to learned counsel, one has to look at the entire will and not just the words of the bequest to see if a contrary intention is shown. According to Mr Frankson, since there was a direction to distribute the proceeds of sale of the property later in the will, then that was a contrary intention gathered from looking at the will as a whole. Therefore Josephine Lucille took only a life interest.

[20] He further submitted that a contrary intention appeared that the first devisee did not take absolutely because the terms of the will showed that the testator intended that other persons should benefit from the same property. In simple terms, Mr Frankson was submitting that a gift to two persons of the same property in the same will means that the first gift will always be reduced to a life interest because of the second gift. This is so regardless of how absolute the language is in relation to the first gift. Mr Palmer, in the case before this court, was relying on the rejection of this argument by Smith JA to say that the submission advanced now, by Miss Beckford, is no different from Mr Frankson's submission forty two years ago. It was a bad argument then, it is a bad argument now.

[21] By contrast, Mr Vivian Blake, opposing counsel in **DaCosta**, took the view that the earlier devise in the will under consideration gave an estate in fee simple absolute. The later clauses in the will purported to give an interest in the same property to other beneficiaries. These later clauses were said by Mr Blake to be void for repugnancy. This was the argument advanced by Mr Palmer before me.

[22] Smith JA recognised the wording of section 23 of the Wills Act but held that contrary intention in that provision did not have the meaning attributed to it by Mr Frankson. His Lordship stated at page 526C:

> *In my opinion, the contrary intention referred to in s. 23 is not so much a disposition or direction which shows an intention that some person other than the original devisee should benefit, as one from which it can reasonably be inferred that the testator did not intend that the devisee should take the whole estate or interest in the real estate devised which he had power to dispose of by will.* ***Such an inference can only be drawn, in my view, if it can be ascertained with certainty that a recognisable estate or interest, inconsistent with the estate or interest previously***

> ***devised, has been created in favour of some other person.*** (my emphasis)

[23] Graham Perkins JA, the third member of the court, held, among other things, that where a testator sought to attach to an absolute gift conditions or qualifications that are repugnant to such a gift then those conditions or qualifications are void. Thus any restriction on an absolute gift such as one hindering the right of the devisee or legatee to enjoy full rights of alienation whether by way of sale or otherwise would be repugnant and void. Mr Palmer endorses this position unreservedly.

[24] From what has been said, there can be no doubt that the actual wording of the will is, quite literally, the most decisive factor.

[25] Mr Palmer sought to say that once the magic words, '*I give and bequeath*' are used, that fact without more means that the whole estate passes and no subsequent words can limit the extent of the estate given by these words. No case was cited for such an absolute position and neither has the court found any. If Mr Palmer was correct it is nothing short of remarkable that none of the three Justices of Appeal in **DaCosta** held that the words seized upon by Mr Palmer were decisive of the issue. What they held was that on a proper construction of the will the absolute interest was given to Josephine Lucille.

[26] In this case, the words are:

> ***I give and bequeath to my wife Sylvia Gayle*** *all that portion of land part of Mount Ricketts approximately (22 acres) twenty two acres to receive fifty percent (50%) of all proceeds after expenses are cleared* ***during her life time*** (emphasis added).

[27] The meaning of this sentence, despite its inelegance, in clear enough. A limitation has in fact been placed on the gift. The testator is saying that Mrs Henry has the right, during her life time, to enjoy fifty percent of proceeds (meaning net revenue) after expenses are cleared. It would not make sense to interpret this to mean, Mrs Henry received an absolute gift but during her life time she could only use fifty percent of the net revenue. This is inconsistent with an absolute gift. One of the characteristics of an absolute gift is that the beneficiary has full rights of free disposition of gift and proceeds from gift. The words are read as a whole and interpreted in their context.

[28] The very next sentence in the will supports this conclusion. The testator said:

> *She is to take care of my mother and pay her funeral expenses.*

[29] It appears that the other fifty percent of the net proceeds were to be use to care for the testator's mother and pay for her funeral.

[30] The next sentence after this states:

> ***At the death of my wife*** *the said twenty two acres (22 acres) of land is to be given to my sons Franklyn, Bernel, Lloyd and Keith.*

[31] It seems to this court that the testator has made provision for the use of the proceeds, the use of the land and what should happen to the land after his wife's death.

Conclusion

[32] What is clear is that the testator did not intend that Mrs Sylvia Henry should have a fee simple absolute. She was given the land to enjoy fifty percent of the net profit for herself. The will did not specifically state what should become of the other

fifty percent of the net profit but presumably, from the context, that was the portion to be used to look after the testator's mother as requested in the will.

[33] Therefore, on a proper interpretation of the will, this court holds that Mrs Sylvia Henry has a life interest in the twenty two acres contained in volume 1409 folio 630 of the Register Book of Titles with the fee simple absolute, on her death, passing to Franklyn, Bernel, Lloyd and Keith.

[34] This is as far as this court can go on this on this aspect of the claim. Miss Beckford indicated that she is not pursuing the order and declarations set out in paragraphs 1 – 9 of the amended fixed date claim form. She is confining her remedy to damages, costs and interests. Damages or any loss suffered has to be assessed in open court. Costs to the applicants to be agreed or taxed.

Disposition

[35] The declaration of the court are:

a. On a proper interpretation of the will of Clifford Gayle, Sylvia Grant (now Sylvia Henry) has a life interest in twenty two (22) acres of land registered at volume 1409 folio 630 of the Register Book of Title.
b. On the death of Sylvia Gayle (now Sylvia Henry) the land passes to the named beneficiaries, Franklyn, Bernel, Lloyd and Keith, sons of Clifford Gayle.
c. Costs to the applicants to be agreed or taxed.
d. Leave to appeal granted.
e. Execution of order stayed until matter determined on appeal.