IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 01249

BETWEEN	**BASIL LOUIS HUGH LAMBIE (Also known as LOUIS LAMBIE)**	**1ST CLAIMANT**
A N D	**HUGH LEVY (Representative of the Estate of LEROY LAMBIE, Deceased)**	**2ND CLAIMANT**
A N D	**SONIA LAMBIE-DAVIDSON (Through her Attorney BASIL LOUIS HUGH LAMBIE)**	**3RD CLAIMANT**
A N D	**MARVA LAMBIE (Administrator Ad Litem for the Estate of MAX LAMBIE, Deceased)**	**1ST DEFENDANT**
A N D	**LISA LAMBIE (Administrator Ad Litem for the Estate of MAX LAMBIE, Deceased)**	**2ND DEFENDANT**

Ms. Camille Wignal and Ms K. Michelle Reid instructed by Nunes, Scholefield, DeLeon & Co. for the claimants

Mr. Keith Bishop instructed by Bishop & Partners for the defendants

Heard: 12th March 2012 and 11 April 2014

Administration of estate – Probate – Interpretation of Will – Doctrine of lapse - Exhibition of inventory and accounts – Delay and the duty to account - Revocation of Probate – Chain of representation - Grant de bonis non – Wills Act – Trustee Act – Limitation of Actions Act 5.28

OPEN COURT

E. BROWN, J

BACKGROUND

[1] The events which form the genesis of this claim are coloured by tragedy. Edith Ethline Lambie, mother of the claimants and the defendant, Max Lambie died tragically in a motor vehicle accident on the 31st October 1964. That tragic passing came in the wake of the passing of her husband, Sydney Augustus Lambie, about two months earlier after a short period of illness. At the time of their deaths the first claimant was a boy of seventeen years, the second claimant and second child for the couple, Leroy Lambie, was already a married man with children and the third claimant and the third child Sonia Lambie-Davidson, was a student at university in Canada. The defendant himself, the primogenital child, was residing in Canada at the time of these events. Indeed, as it was in the beginning so it is in the end as the 2nd claimant and the defendant himself both died before the trial took place.

[2] The defendant's primogeniture and the tragedy of their father predeceasing Mrs Edith Lambie coincided to catapult the defendant to the position of head of the siblings and personal representative of the estates of both parents. By her will of the 7th May 1960, Mrs Lambie appointed her husband as her sole executor, with a provision for the defendant to 'assume responsibility' in the event that the vicissitudes of life unfolded as they in fact did. Sydney Augustus Lambie was also named as the beneficiary of Mrs Lambie's entire estate and the children as residuary beneficiaries in equal shares. In furtherance of this testamentary appointment, the defendant was granted probate of Mrs Lambie's will on the 24th March 1965.

THE STATEMENTS OF CASE

THE CLAIM

[3] By amended Fixed Date Claim Form, the claimants commenced their claim against the defendant on the 2nd April 2007. They sought the following orders:

1. That the defendant be required to furnish and verify accounts in the Estate of Edith Ethline Lambie, deceased.
2. That the defendant do pay over to the claimants, the beneficiaries of the said deceased's estate, any sums found due to the said beneficiaries as per the

account and in accordance with the terms of the Last Will and Testament of Edith Ethline Lambie together with interest thereon at a rate of 1% above the commercial bank's prime lending rate.

3. That the defendant be directed to transfer to the claimants title to all properties, both real and personal, comprised in the estate of Edith Ethline Lambie.
4. That the grant of probate to the defendant of the estate of Edith Ethline Lambie on March24, 1965 be revoked.
5. Costs of this action be awarded to the claimants

[4] In paragraph 7 of the amended Particulars of Claim, the claimants averred that the defendant as executor was under a fiduciary duty to them as beneficiaries to exercise six functions. First, the defendant was to carry out the instructions of the deceased as specified in her Last Will and Testament. Secondly, the defendant was obliged to take all reasonable steps to ensure that the assets of the deceased's estate are distributed in accordance with the terms of her Last Will and Testament. Thirdly, the defendant was under a duty to act prudently and properly in the management of the estate of the deceased as a whole. Fourthly, the defendant was duty bound to keep proper accounts and to comply with all reasonable requests of the beneficiaries for the details of same. Fifthly, the defendant's fiduciary duty extended to the exercise of reasonable care to ensure that the assets of the deceased's estate are as far as possible preserved for distribution to the beneficiaries, and not wasted. Lastly, as a fiduciary, he was not to deal with or dispose of the assets of the deceased's estate in any way prejudicial or damaging to the beneficiaries' interest.

[5] The claimants, in paragraph 8 of the Particulars of Claim, alleged that the testatrix, Mrs Lambie, died possessed of the following assets:

i. Family house, Edge Hill Road, St. Ann's Bay
ii. Hardware store, Main Street, St. Ann's Bay
iii. 35 acre farm, Chesterfield, St. Ann
iv. 15 acre pasture land, Forrest, St. Ann
v. Small house, Salem, St. Ann

vi. Two (2) lots, Bucksfield, St. Ann
vii. Two (2) lots Salem, St. Ann
viii. Four acres, Greenside, Trelawny
ix. 40 acres, Dundee, Salt Marsh, Trelawny, contained in Certificate of Title registered at Volume 969 Folio 304
x. Bank accounts

[6] It was the claimants' further averment, at paragraph 9 of the Particulars of Claim, that, except for the four acres at Greenside, Trelawny, the defendant has failed and, or, refused to properly wind up the estate and distribute the assets. Further that, the defendant has imprudently and, or, fraudulently sold and, or, otherwise dealt with and disposed of the assets in a prejudicial manner. Additionally, the defendant has failed and, or, refused to provide them with any, or any proper account.

[7] The claimants asserted at paragraph 11 of the Particulars of Claim that the property at Dundee, Salt Marsh, Trelawny, has been up for subdivision and sale for the sole benefit of the defendant. Consequently, the first claimant lodged a caveat against the title in 2005. That notwithstanding, the defendant continued to take steps to dispose of the property in a prejudicial manner and without accounting to the claimants.

[8] By virtue of the foregoing, the claimants contended that the defendant has acted improperly, fraudulently and in breach of his duties as executor. The defendant's breach of duty and, or, fraud was particularised as set out below:

i. Failing to carry out all the instructions of the deceased as set out in her Last Will and Testament;
ii. Failing to conclude the administration of the deceased's estate in a reasonable time or at all;
iii. Failing to effect the requisite transfers and dispositions of the assets of the deceased's estate in accordance with her Last Will and Testament;
iv. Failing to render a true and full account of the properties comprised in the deceased's estate;

v. Fraudulently and, or, negligently disposing of the assets of the deceased's estate with a view to depleting same and to deprive the claimants of their interests;

vi. Fraudulently and, or, negligently dealing with and disposing of the assets of the deceased's estate to suit his personal interests solely;

vii. Mortgaging the assets of the deceased's estate for his personal benefit and without any regard for the interests of the claimants as beneficiaries;

viii. Offering for sale and, or, selling the assets of the deceased's estate for his personal benefit and without any regard for the claimants' interests as beneficiaries.

[9] As a result of the defendant's breach of duty and, or, fraud, the claimants said they have been deprived of the benefits of the assets of the deceased's estate. They pleaded an entitlement to two things. First, they said they are entitled to a full and proper account from the defendant concerning his dealings with the assets. Secondly, it was the claimants' assertion that they are entitled to the due transfer to them of their interests in those assets.

THE DEFENCE

[10] Although the defendant admitted paragraph 5 of the amended Particulars of Claim, he denied ever seeing the will of his late father. There the claimants had averred that Mr Sydney Augustus Lambie predeceased Mrs Edith Ethline Lambie on or about the 18th day of August 1964. He further denied ever applying for probate of Sydney Augustus Lambie's estate. To his knowledge and belief, Mrs Lambie was the named executrix of his father's estate and instructed solicitor Douglas Moyston accordingly.

[11] The defendant said that he also appointed Douglas Moyston, by power of attorney, to administer the estate of Edith Lambie. He averred that the circumstance which gave rise to that was the fact of his then living abroad. Upon his return to the island in 1975, the defendant said he was advised by Douglas Moyston that he had presented to each of the claimants a copy of the closing statement on the estate in August 1971.

[12] Issue was joined with paragraph 7 of the Particulars of Claim. The defendant contended that the probate rules do not require the preservation of the assets of the estate for distribution to the beneficiaries. The advice received from Douglas Moyston was that the Executor is only required to distribute the residual proceeds of the estate after paying off mortgages and liabilities. Further, that the Executor may sell any asset of the estate to settle those liabilities and distribute the remaining proceeds to the beneficiaries.

[13] In response to paragraph 7 (i) of the Amended Particulars of Claim the defendant averred that the testatrix made no request for assets to be distributed in "realty" or "chattels to the beneficiaries as the will contained no specifics about her assets except for emoluments from the Ministry of education. The averment continued, "nor did my mother specify how any "chattels"," personalty", or "realty" should devolve and distributed having said "all to her husband". Paragraph 7(ii) was denied. The defendant said Douglas Moyston advised him that the will required no distribution of assets.

[14] In respect of paragraph 7 (iii) of the Amended Particulars of Claim, the defendant counter averred that he acted prudently and properly in the management of the estate. That he did, as he hired a reputable and experienced solicitor to do the requisite legal and accounting services. This solicitor was the solicitor of choice of both parents. Further, the defendant countered that he personally did not execute any transactions associated with his mother's estate. Lastly, the defendant stated that his mother's estate was so heavily indebted, almost to the point of insolvency.

[15] In his denial of the claimants' averment in paragraph 7(iv), the defendant said he saw to it that a proper record of accounts was kept by his solicitor. Additionally, a statement was prepared by Douglas Moyston and a copy given to each of the claimants in August 1971 to the best of his knowledge and belief. The defendant denied the allegations of paragraph 7 (v) and asserted that the assets were never wasted. He again disavowed any obligation to distribute the assets of the estate. The legal advice his solicitor gave was an obligation to distribute the net proceeds of sale.

Notwithstanding that advice, the counter-averment continued, he transferred the only two assets that remained free of liabilities to the first claimant.

[16] Douglas Moyston distributed the proceeds of sale to the claimants. Paragraph 7 (v) of the Defence continued, the defendant repaid three bank loans for the second claimant. For that repayment the defendant said he was never reimbursed. In addition, the only personal expenditure for which the defendant was reimbursed was expenses incurred when he came to Jamaica from Canada to administer the affairs of the estate in 1967. In that case the sum involved was $200.00.

[17] The averment contained in paragraph 7 (vi) of the Amended Particulars of Claim was refuted. The defendant said that the only transactions he did were to transfer the Greenside property to the first claimant and give permission to Citibank to take the two lots at Salem as security for a loan to the first claimant. The latter, the defendant alleged, defaulted on the loan resulting in the auctioning of the lots. The net proceeds of that auction went to the third claimant and her husband, the defendant charged.

[18] Turning to the paragraph setting out the assets in the Particulars of Claim, the defendant admits paragraph 8 (i). However, according to the defendant's recollection, at the time of his mother's death this house was the subject of three mortgages. Two of those mortgages were contracted by his father to purchase cars for the father's friends. This house was sold by Douglas Moyston to clear the mortgages and provided funds for the estate. The hardware store in paragraph 8 (ii) of the Particulars of Claim was admitted. His mother was part owner in joint tenancy with her husband and Eric Lemond. The solicitor's statement reveals that the hardware store was sold. Part of the proceeds went to Eric Lemond and the remainder to clearing expenses of the estate.

[19] As it relates to the Chesterfield property, the defendant declared in paragraph 8 (iii) of the Defence that it was not part of the estate of Edith Lambie. In the recollection of the defendant, Chesterfield was an asset of his father's insolvent estate. It was mortgaged to the Small Business Loan Board. The loan went into default and Chesterfield was auctioned by that Board.

[20] Equally, the 15 acre property at Forest, St. Ann did not form part of Mrs Lambie's estate but, like the Chesterfield property, was part of the estate of Edith Lambie, the defendant contended in paragraph 8 (iv) of the Defence. As he recalled it, a William McKenzie of the same district claimed to have been his father's lessee and the one paying the taxes on the property. According to the defendant, Douglas Moyston advised him that he had no authority to intervene in the matter.

[21] Concerning the same house in Salem, St. Ann, referred to in paragraph 8 (v) of the Particulars of Claim, the defendant admitted this was part of Edith Lambie's estate. To the best of the defendant's knowledge, this property was mortgaged and sold by Douglas Moyston. The proceeds of sale was applied to funeral expenses, estate expenses, mortgages for lots at Greenside, Trelawny, mortgages for lots at Salem, St. Ann and withdrawals by the three claimants. Further, Irma Tully claimed four-tenths of the property, proportionate to her contribution to the purchase price. This claim the defendant said was supported by a letter under Edith Lambie's hand to Irma Tully, dated 26th December 1962. That liability remained outstanding, according to the defendant.

[22] The two lots at Bucksfield, Ocho Rios were not part of Edith Lambie's estate, according to the counter-averment of paragraph 8 (vi) of the Defence. The defendant recalled that Gerald Prestwidge, Edith Lambie's brother, claimed to be the owner of these lots. Prestwidge alleged that he had given Edith Lambie the funds to purchase the lots on his behalf. It was Prestwidge's further allegation that Edith Lambie administered the lots on his behalf. The defendant said he found nothing among his mother's papers to support her ownership. Instead, he found a letter which showed that she conducted business on behalf of Prestwidge while he lived abroad.

[23] That the two lots in Salem, St. Ann numbered among the assets of Edith Lambie's estate was admitted by the defendant in paragraph 8 (vii) of his Defence. However, the defendant repeated his contention, expressed in relation to paragraph 7 (vi) of the Particulars of Claim, regarding the disposal of the asset. It was also admitted that the 4 acres at Greenside, Trelawny belonged to Edith Lambie's estate at paragraph

8 (viii) of the Defence. This property had a balance of $1,300.00 excluding interest owing to the vendor, K.M. McFarlane. This balance was cleared, which consumed the remainder of the funds of the estate. The property was then transferred to the first claimant in or about 1981.

[24] The claim that the 40 acres at Dundee, Salt Marsh, Trelawny belonged to the estate of Edith Lambie was denied. In paragraph 8 (ix) of the Defence, this property was to have been beneficially owned by a constructive trust for which Edith Lambie was the 'custodian trustee'. The defendant so advised the claimants' Attorney-at-Law by letter dated 10th February 2006. This property was neither listed in the inventory filed with the application for probate nor in the closing statement of the estate dated 8th August 1971, prepared by Douglas Moyston.

[25] In the same vein, the defendant denied that there was 'net cash' in the two bank accounts, one of which was significantly overdrawn. In making these averments in paragraph 8 (x) of the Defence, the defendant further said that the bank accounts were in such a 'deficient' state that he had to negotiate a loan with the Bank of Nova Scotia, St. Ann's Bay, to pay Jackson Funeral Parlour and other funeral expenses. The loan was also used to defray household expenses for the three claimants who were then living at the family home at the time of their mother's death.

[26] The defendant failing to wind up the estate as alleged in paragraph 9 of the Particulars of Claim was also denied. The defendant countered that Douglas Moyston wound up the estate in 1971. Further, Douglas Moyston distributed the net cash proceeds. The defendant repeated that the Last Will and Testament of his mother did not require the distribution of assets. Instead, Edith Lambie's Last Will and Testament only required the assets to be used "for the benefit of the children".

[27] The defendant refuted the allegation contained in paragraph 10 of the Particulars of Claim that he imprudently and, or, fraudulently sold, or otherwise dealt with, or disposed of the assets of the estate. The Defence reiterated that the property at Dundee, Salt Marsh, Trelawny was not an asset of Edith Lambie's estate. In addition,

the defendant averred that his Solicitor kept proper accounts and provided a statement of the proper accounts to all the claimants in 1971.

The next counter-averment is best quoted in full:

> *Paragraph 11 is denied and the Defendant will say that an Attorney-at-Law advised him that it is apparent that the Claimants and their Attorneys-at-Law do not give recognition to the concept of the constructive trust as it applies to the property at Dundee, Trelawny despite the preponderance of evidence. The Defendant denies that the property at Dundee, Trelawny is being sold for his "sole benefit" as a portion is being sold in order to finance the installation of roads, water and electrical services as required by the Trelawny Parish Council and for the ultimate benefit of the equitable owners in keeping with the responsibilities of his position as successor to the trusteeship of the property. The Defendant further states that his management of this property is in keeping with the advice he had received from the prior owner and late Solicitor McFarlane, an authority on land trusts, on how a constructive trust should be administered.*

[28] On the subject of the lodging of a caveat by the first claimant, the defendant said the claimants have no equitable interest in the Dundee property which is governed by a constructive trust. His intent, continued the Defence in paragraph 14, is to develop the property in order to distribute the net proceeds to the beneficiaries of the constructive trust. That intent, the defendant said, is in keeping with a commitment he made to Irma Tully in exchange for the removal of the caveat she lodged against the property through Solicitors Manton and Hart in 1974.

[29] At paragraph 15 of the Defence, the validity of the caveat lodged by the first claimant on the basis that the Dundee property is not beneficially owned by the estate of Edith Lambie but by the constructive trust was also challenged. The defendant alleged that Edith Lambie placed the legal title in her name against the instructions and desire of the 'originating-investors', according to a declaration made by Irma Tully, dated 25th October 1974. It was further averred that a notation to that effect was duly registered with the Registrar of Titles in accordance with section 60 of the Registration of Titles Act.

[30] In answer to paragraph 13 of the Particulars of Claim, the defendant said he had no obligation to satisfy the desires of the claimants as they had no interest in the Dundee property. Paragraph 16 of the Defence continued by asserting that the defendant is executing his responsibilities to the beneficial owners by entering into an agreement with a reputable developer to carry out the requirements of the Parish Council. He averred that he has no responsibility to account to the claimants "as to do so would incur the fraudulent conversion of that which belongs to the rightful beneficiaries and/or their heirs and successors of: Dr Cyril Oliviere, Dr Stanley Solomon, Mrs Irma Tully, Miss Avis Allen, Mrs Cleartilda Franklin and Mrs Adel Hamilton." Further, the beneficiaries or their successors communicated with the defendant and expressed concern about the delay being occasioned by the caveat lodged by the first claimant, some even threatened legal action.

The Claimants' case

[31] The 1st claimant filed this claim on behalf of the second and third claimants pursuant to a power of attorney dated 28 January 2007. Clause 1 of the power of attorney authorizes the 1st claimant to "ask, demand, sue for, recover and receive from every person" in the name of the 2nd and 3rd claimants in matters concerning the estates of their mother and father and lands at Dundee, Trelawny ("Dundee lands"). The claimants' claim is for a proper account of the assets of Mrs Lambie's estate. They further claim for the winding up of the estate, the distribution of the assets in accordance with the Will and that the assets of the estate be transferred into their names. The claimants' assert that the defendant has acted in breach of his fiduciary duties by failing or refusing to wind up the estate and distribute the assets in accordance with the Will and for taking steps to dispose of the Dundee lands for the defendant's sole benefit to their exclusion.

[32] The claimants' evidence is contained in two witness statements by Basil Lambie filed on 21 July 2009 and Sonia Lambie filed on 13 August 2009 which are, for the purposes of this action, materially the same. To their knowledge, the following properties formed part of Mrs Lambie's estate:

Real property

i) Family house, Edge Hill Road, Saint Anns Bay, Saint Ann

Basil's evidence is that the house was sold but they are unsure how the proceeds of sale were applied. However, Sonia in her witness statement noted that a "check for a small sum" was sent to her by the Defendant as her share in the proceeds of sale.

ii) Hardware Store, 29 Main Street, Saint Anns Bay, Saint Ann contained in Certificate of title registered at Volume 791 Folio 25 of the Register Book of Titles.

Two-thirds of this property was owned by their parents as joint tenants and the remaining one-third by Mr Eric Lemond. The two-thirds share was vested in the Defendant on transmission. The Defendant along with Mr Lemond sold the entire property to Albert Hew for £7,250.00 on or about 15 June 1965.

iii) Thirty-five (35) acres farm land, Chesterfield, Saint Ann contained in Certificate of title registered at Volume 539 Folio 39.

This property was owned by our father and was registered on transmission to Max who later sold it to Richard Walters for £1,500.00.

iv) Fifteen (15) acres pasture land, Forrest, Saint Ann
v) Small house, Salem, Saint Ann
vi) Two (2) lots, Buckfield, Ocho Rios, Saint Ann

The only evidence available in this regard is a letter that our mother conducted some business on behalf of Mr Gerald Prestwidge (her brother) which may have been in regards to these lots.

vii) Two (2) lots, Beverley, Salem, Saint Ann contained in Certificates of title registered at Volume 946 Folio 425 and Volume 729 Folio 125.

The residue of the proceeds of sale was given by the bank to Sonia Lambie.

viii) Four (4) acres, Lot 21 Greenside, Trelawny contained in Certificate of title registered at Volume 969 Folio 349;

This property was transferred to Basil after liquidating the mortgage on the property from the sale of the small house in Salem.

ix) Forty (40) acres, Lot 17, Dundee, Salt March, Trelawny contained in Certificate of title registered at Volume 969 Folio 304 of the Register Book of Titles.

[33] In respect of the 'Dundee' the claimants aver that, that property was registered on transmission to the Defendant in or around May 1972. The defendant asserted that the property is being held on constructive trust for Irma Tully (their mother's sister), Dr Oliviere, Dr Solomon and Avis Allen (a cousin). The claimants contended that they are the closest surviving relatives of Irma Tully. The other persons named were also deceased and the claimants were not aware of any claims being made against or pursuant to their estates. Further, the defendant administered the estate of Avis Allen and the claimants were equally unaware of any claim by her estate against the Dundee lands. In any event, during their conversations, the defendant had always treated the Dundee lands as belonging to the claimants and indicated his intention to treat with the four of them as the sole owners. The defendant had on one occasion used the lands to secure a mortgage from the National Commercial Bank which later caused the bank to advertise the land for sale. The loan was later settled. The defendant has now taken steps to subdivide the land and dispose of it for his personal benefit.

Chattel/personalty

i) Bank accounts;

There was no money in the two bank accounts. The funeral expenses were covered by a loan from BNS Saint Ann's Bay.

ii) Funds from the Ministry of Education;
iii) Three (3) automobiles;
iv) Furniture and fixtures;
v) Hardware stock from store.
vi) Blackstoneledge (share in land)

Further information

[34] By letter dated 16 August 1973, the defendant wrote to the claimants acknowledging his obligation to provide them with an audited account but he failed to so do. They received cash from the estate on a number of occasions. Sonia had loaned to the defendant the proceeds inherited from their mother's insurance policy to cover funeral expenses and this was later reimbursed to her. Further, given that their father predeceased their mother, his properties would have formed part of their mother's estate.

Defendant's case

[35] In his defence filed on 21 June 2007, the defendant stated that Mrs Lambie's estate was so heavily indebted almost to the point of insolvency. Due to his prolonged absence from the island, he appointed Mr Douglas Moyston under a power of attorney to administer the estate. The defendant further stated that the only two assets that remained free of liabilities were transferred to the 1st claimant and the remaining proceeds of sale were distributed among the claimants. He paid three bank loans for the 2nd claimant.

[36] In his evidence, the properties in the estate were liquidated as follows:

Real property

i) Family house, Edge Hill Road, St. Anns Bay, St. Ann

The defendant stated that this property had three mortgages and only limited net funds from the sale was realized from the home as a result of the mortgages. This amount went into the estate.

ii) Hardware Store

Mr Eric Lemond was successful in a suit claiming partnership in the hardware having sent money from the United States to his father to invest in the business. The proceeds from his mother's one-third share went into her estate.

iii) Thirty-five (35) acres farm land, Chesterfield, St. Ann

This property is not part of Mrs Lambie's estate but was part of their father's insolvent estate and was auctioned by the Small Business Loan Board to cover a mortgage.

iv) Fifteen (15) acres pasture land, Forrest, St. Ann

This property was part of their father's estate and was leased to Mr William McKenzie.

v) Small house, Salem, St. Ann

This property had a mortgage and was sold to cover funeral and estate expenses and the mortgage for the Greenside lots. An amount of $2,000.00 claimed by Irma Tully as share in this property remains outstanding.

vi) Two (2) lots, Buckfield, Ocho Rios, St. Ann

Mr Eric Lemond was successful in a suit claiming one of these lots that was bought by their father on Mr Lemond's behalf.

vii) Two (2) lots, Beverley, Salem, St. Ann

Cash from the estate was used to clear the outstanding mortgage of their mother on these properties. The properties were later used to secure a mortgage of $40,000.00 by First National City Bank to the 1st claimant.

viii) Four (4) acres, Lot 21 Greenside, Trelawny

The defendant agreed that this property was valued $23,000.00 and in 1984 was transferred to the 1st claimant. A balance owing to the vendor, Mr KM McFarlane, was paid from funds supplied by solicitor Moyston to make the property free of debt.

ix) Forty (40) acres, Lot 17 Dundee, Salt March, Trelawny

[37] In relation to the Dundee property, the defendant avers that Edith Ethline Lambie acquired the property undivided as the vendor was not minded to assume the responsibility of subdividing it. The Certificate of Title was retained by the vendor, Mr KM McFarlane because there was an outstanding balance on the purchase price. The solicitor was unable to pay off the balance of $1,721.77 on this property, so neither the defendant nor Douglas Moyston took any action on it. A loan was secured from NCB in

1984 to pay off the balance. Irma Tully had lodged a caveat against the property and there was no basis on which the caveat could be challenged. The loan increased to $231,000.00 in 1998 due to interest charges. This debt was liquidated by a loan from CIBC at King Street. In negotiation with Irma Tully to withdraw the caveat it was agreed that the Dundee lands be liquidated.

[38] In 1999 the subdivision plans were initiated. The 'Hamilton Group' decided to invest in and finance the infrastructure work, thus Ms Adel Hamilton was added as a beneficiary of the constructive trust and given a lien over the property. Iris Russell, the only living sibling of Irma Tully submitted a claim for Ms Tully's share in the Dundee lands. The claimants were aware that the Dundee land is not part of Edith Ethline Lambie's estate. The claimants are not entitled in whole or in part to any proceeds upon liquidation of the Dundee lands as "to do so would incur the fraudulent conversion of that which belongs to the rightful beneficiaries".

Chattel/personalty

i) Funds from the Ministry of Education.
£1,653.6.7 was received by the estate up to 9 August 1971 (page 88 of Bundle)

ii) Three (3) automobiles.
The accompanying notes to Douglas Moyston's statement indicate that the title for one motor vehicle was delivered to the defendant.

iii) Furniture and fixtures.
The furniture was given to Leroy.

iv) Hardware stock from store.
Neither the defendant's witness nor Douglas Moyston's closing statement makes any reference to this.

v) Blackstoneledge (share in land).
This too finds no mention in either the defendant's witness statement or Douglas Moyston's statement.

vi) Property at Lime Hall, Saint Ann

This was sold to wholly cover an overdue loan from the Small Business Administration.

Further information on distribution in witness statement

[39] The claimants received all the free cash by withdrawals from the residual estate after all debts were paid. Loans at CIBC and RBC owed by Leroy were paid from the estate. The solicitor wound up the estate on 19th August 1971 and presented a closing statement.

REASONING

[40] Mr Bishop submitted that the first issue to be resolved is, what Mrs Edith Lambie meant when she used the expression, 'acting in place of his father' in her will. He submitted that "the word 'ACTING' could only mean that Max Lambie was required to benefit in every way that his father would have." By way of emphasis, it was urged that if Sydney Lambie were alive the children could only have benefitted from the 'what-left' of the proceeds of the Ministry of Education. In advancing that meaning, counsel relied on the proposition that the court's task in determining the intention of Mrs Lambie is not to re-write or remake the will but to give effect to the words, if their meaning is clear. He cited ***Julia Josephine Scale and Another v Rawlins and Others*** **[1892] A.C. 342**, as authority for that proposition.

[41] Ms Wignall did not identify the interpretation of the will as an issue for resolution. Her submission in this area was to demonstrate Max Lambie's lack of *bona fides*. To that end, she maintained that the express provisions of the will are clear. In Ms Wignall's opinion, it is axiomatic that the claimants and Max Lambie are entitled to share equally in the residue of the estate. Paragraph 6(1) of the Defence was cited to contrast the different positions. Paragraph 6(1) of the Defence is set out in full hereunder for ease of reference:

> *Sub-paragraph 7(1) is denied and the Defendant will say that the testator (sic) made no request for assets to be distributed in "realty" or "chattels" to the beneficiaries as the said will of Edith Lambie made no specifics about her assets except for emoluments to be received from the Ministry of Education nor did my mother specify how any "chattels", "personalty" or*

> *"realty" should be distributed or to whom her residual estate should devolve and distributed having said "all to her husband".*

Ms Wignall concluded this submission by saying that these averments demonstrate at the very least a misunderstanding of the terms of the will and or, at its highest a misinterpretation, whether dishonestly or negligently. This she said is the implication of the defendant's view that the beneficiaries are not entitled to any portion of the estate.

[42] ***Scale v Rawlins***, *supra*, is a decision of the House of Lords. For the facts, it is sufficient to refer to the headnote:

> *"A testator gave freehold houses to his nephews S and W upon trust to pay the rents and interests to his niece during her life for her separate use, and after her decease "(she leaving no child or children)" he gave one of the houses to S and the two others to W. After making other bequests, the testator gave the residue of his real and personal estate to S and W equally. The niece died leaving children."*

The House of Lords held that the niece took only a life interest. Therefore, at her death the houses passed to S and W equally under the residuary clause, there being no implied gift to her children.

[43] The learning from this case appears to be, that a court of construction must give effect to the intention of the testator or testatrix which is expressed or plainly implied in the language of the will. Whatever was in the mind of the testator or testatrix, in order for the court to give effect to it, that intention must be sufficiently expressed in the words used. Apart from the guidance of the learning provided, ***Scale v Rawlins****, supra*, is distinguishable from the instant case.

[44] Whereas in ***Scale v Rawlins*** the testator had made a gift of his properties upon trust for the life benefit of his niece, in the case at bar, the testatrix made a gift of her entire estate to her husband to be used for his personal use and the benefit of their four children. At the death of her husband any remaining portion of her estate was to be divided equally among the children. This was an absolute disposition to her husband. No trust was created, as it is plain that the testatrix contemplated the possible

dissipation of her estate at the death of her husband by the use of the words, ‘any remaining portion of my estate’.

[45] There does not appear to be any dissent from the understanding that Mrs Lambie made an outright gift of all of her estate to her husband. The difficulty, if difficulty it be, has arisen in light of the view taken by the defence that it was the intention of Mrs Lambie that Max Lambie should benefit in the way she intended her husband. Literally, Mrs Lambie provided that Max Lambie, her first born, should stand in the shoes of his father and give effect to the terms of the will. Max Lambie was to assume the mantle of executor in place of his father. Then, as executor he should carry out the terms of the will.

Terms of the Will

[46] What then were the terms of the will? These may be arrived at by a deconstruction of the will. First, there was the standard revocation clause. Secondly, Sydney Augustus Lambie was appointed sole executor. Thirdly, the executor was directed to pay the just debts, funeral and testamentary expenses of the testatrix. Fourthly, a bequest of all Mrs Lambie’s estate was made to Sydney Augustus Lambie. Fifthly, in what may be described as a residuary clause, any asset remaining at the death of Sydney Augustus Lambie should be equally divided among her four children. Sixthly, provision for Max Lambie to act in the place of his father should the latter enter the Stygian darkness before Mrs Lambie. Lastly, there was what may properly be described as an attestation clause.

Doctrine of Lapse

[47] Since Sydney Augustus Lambie in fact died before Mrs Lambie, a predicate question to be answered is what became of Mrs Lambie’s estate at the time of her death? It is a truism that a living person has no heirs. Therefore, a gift by will fails if the sole beneficiary predeceases the testatrix, according to the doctrine of lapse: **Law of Succession** Parry and Clarke 10th edition page 234. Indeed, a testatrix cannot avoid the doctrine of lapse even by expressly saying so in the testamentary instrument: **Re Ladd** [1932] 2 Ch. 219. In that case the will said “and to the intent that this my will shall

take effect, whether I survive or predecease my husband." Neither is the gift saved by a republication of the will: **Law of Succession** *ibid*. page 236.

Under the section 20 of the **Wills Act**:

> *"Unless a contrary intention shall appear by the will, such real estate, or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator ... shall be include in the residuary devise (if any) contained in such will."*

Put another way, unless the will provides otherwise, a failed devise is included in the residuary clause.

[48] There are two statutory exceptions to this doctrine of lapse and one at common law. First, by virtue of Section 27of the **Wills Act** section 27, a gift of land 'for an estate tail or an estate in *quasi* entail' to a person who dies before the testator takes effect if the beneficiary died leaving a descendant who survives the testator and is capable of inheriting under the entail. Secondly, by section 28 of the **Wills Act** an absolute gift of either real or personal property to a child of the testator takes effect if the child beneficiary died leaving a descendant or descendants who survive the testator. Both statutory exceptions apply only if no contrary intention appears in the will. Thirdly, at common law a gift to discharge a moral obligation recognised in the will does not lapse if, although the intended recipient dies during the lifetime of the testator, the moral obligation is extant at the death of the testator. In this case, the courts have inferred that it was the testator's intention for the gift to pass to the beneficiary's estate: **Law of Succession** *ibid*. Page 243.

[49] The general legal rule may be stated as follows, an absolute testamentary gift to a sole beneficiary lapses if the beneficiary dies before the testator or testatrix. To this general legal rule there are three exceptions. Two of these exceptions, those under the **Wills Act**, apply where the will does not provide otherwise. So that, unless the descendant of the deceased beneficiary can bring himself under one of these exceptions, the gift cannot take effect and must be included in the residual estate of the

testator or testatrix for the benefit of those who, according to the will, should benefit from the residue.

[50] It was an accepted fact that the Sydney Augustus Lambie, the sole named beneficiary under the will of Edith Ethline Lambie, died approximately two months before she did. So, under the doctrine of lapse the general legal rule dictates that the gift to Sydney Augustus Lambie lapsed upon his death. Therefore, unless it can be shown that Mrs Lambie's devise and bequeath of all her estate to Sydney Augustus Lambie falls under one of the exceptions, then her entire estate would fall to be distributed under the residuary clause.

[51] Concerning the first exception, Mrs Lambie would have had to use words of limitation in her will in order to confer on Sydney Augustus Lambie an estate less than a fee simple. She merely said, 'all my estate'. Therefore, the first exception does not apply. The same can be said of the second exception for the simple and obvious reason that the bequest was made to her husband and not her child. Likewise, Mrs Lambie did not say in her will that the gift to her husband was to discharge a moral obligation she had to him. It may therefore be concluded that none of the exceptions are applicable to the gift to Sydney Augustus Lambie, with the consequence that the entire estate fell for inclusion in the residuary clause.

Construction of Will

[52] It is now convenient to consider the meaning contended for by the defence. What was it that the testatrix intended when she used the words, 'acting in the place of his father'? That quotation is a phrase extracted from the last sentence of the will, described above as the sixth provision of the will. For ease of reference the sentence is quoted here,

> *"should my husband pre-decease me, I appoint my eldest son Max Lambie to assume responsibility and carry out the terms of this will as stated above, acting in place of his father."*

[53] The first principle in construing a will is to discover the intention of the testatrix as expressed in the will, reading it as a whole. I think Lord Romer's encapsulation of the principle is impeccable:

> *"I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said." (**Perrin v Morgan** [1943] A.C. 399, 420)*

Viscount Simon L.C. clearly agreed with this statement of the law, evidenced by the following opinion, in the same case at page 406:

> *"The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not ... what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the 'expressed intentions' of the testator."*

[54] To this end, the court of construction cannot rewrite the will: ***Scale v Rawlins,*** *supra*, as counsel for the defendant correctly submitted. Therefore, a court cannot "speculate upon what peradventure may ... have been in the testator's mind; [the court] must find words which are absolute and express," per Lord Halsbury L.C. in ***Scale v Rawlins****, supra*, page 343. Indeed, as Jenkins L.J. said in **Re Bailey** [1951] Ch. 407, 421:

> *"It is not the function of a court of construction to improve upon or perfect testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case."*

[55] In the search for the intention of the testator, to be gathered from the four corners of the will, the words used are to be given their ordinary grammatical meaning, in the first place: **Williams on Wills** 7th edition page 721. In the same vein, a word won't be

given “an artificial, secondary, or technical meaning” without the applicability of the ordinary meaning being demonstrably wrong: **Williams on Wills**, *ibid.* Page 522. Where the word or phrase has more than one ordinary meaning, the meaning intended by the testator is ascertained by a consideration of all the terms of the will: ***Perrin v Morgan****, supra*.

[56] Once again, the dictum of Lord Romer in ***Perrin v Morgan***, *supra*, page 421 is instructive:

> *“Rules of construction should be regarded as a dictionary by which all parties including the court are bound, but the court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning—whether or not, in other words ... the testator has been his own dictionary.”*

[57] The question becomes, who were the persons Mrs Lambie intended to inherit her estate and in what proportion? She expressly left all to Sydney Augustus Lambie. So, in the first place, it was her intention that her entire estate should be inherited by her husband. Secondly, whatever remained at the time of the death of her husband should be inherited by the defendant and the claimants in equal shares. Since Mrs Lambie intended the parties to this claim to inherit equally the residue of her estate at the death of her husband, could she, in the same breath have intended Max Lambie to take an unequal share for the sake of carrying the burden of executorship?

[58] Assuming for the sake of argument that the defence is correct, and such was her intention, how would this impact on the residuary clause? To give effect to the express words used by Mrs Lambie, at the death of Max Lambie the residue would have to be divided equally among the four siblings. Max Lambie would therefore take all, in the first place, and then another share upon the subdivision of the residue. The real question seems to be, did Mrs Lambie intend to alter the disposition of her estate in the event that her husband predeceased her?

[59] The first point to note is that although Mrs Lambie made Sydney Augustus Lambie her sole or primary beneficiary and personal representative, she treated with

these in separate provisions. From this the inference can be drawn that she understood the office of personal representative and the entitlement as beneficiary to be questions to be addressed separately. That is, she did not intend to make her personal representative her sole or primary beneficiary, merely by the fact of being personal representative.

[60] Secondly, when Mrs Lambie made provision for the eventuality of her husband predeceasing her, she used the same word, ‘appoint’, as she did when making Sydney Augustus Lambie her personal representative. There is nothing in her will to suggest that Mrs Lambie intended to use the word ‘appoint’ in a different sense with reference to Max Lambie. Therefore, it seems reasonable to conclude that when Mrs Lambie said she appointed Max Lambie, she was addressing her mind solely to the office of personal representative.

[61] That much seems to be accepted by the defence. The defence contends however, that the addition of the phrase, ‘acting in place of his father,’ alters the testamentary disposition in favour of the defendant. The **Shorter Oxford Dictionary English Dictionary** sixth edition gives three applicable meanings for ‘acting’. The first meaning is ‘performance; execution’. The second meaning is ‘the performance of deeds’. Thirdly, ‘that acts or has power to act’. Applying any of those meanings, it is clear that Mrs Lambie intended Max Lambie to do, not receive something, in the place of his father.

[62] Taking that as the meaning, the phrase ‘acting in place of his father’ bears no secondary meaning different from the context of the sentence from which it is taken. It is merely explanatory of, or superfluous to the preceding words. From the context of the sentence and of the will in general, all Mrs Lambie intended was for Max Lambie to assume the role of executor and thereafter give effect to the provisions of her will. That is the one natural meaning of which the phrase admits. Consequently, to adapt what Viscount Simon L.C. said, if a phrase has one natural meaning, it is right to attribute that meaning to the phrase when used in the will unless the context or other circumstance

which may be properly considered show that an unusual meaning is intended: ***Perrin v Morgan***, *supra*, page 406.

[63] To otherwise interpret the will, particularly in the way the defence has, one would have to insert 'and benefitting' next after 'acting'. Further, to do so would make nonsense of the residuary clause as it would be repugnant to the equal share principle expressed therein. So, to uphold the meaning contended for by the defence the court would have to rewrite or remake the will, the very thing the court is counselled against doing: ***Scale v Rawlins***, *supra*.

[64] In any event, even if the interpretation argued for by the defence was sustainable, the gift to Sydney Augustus Lambie had lapsed, he having died before Mrs Lambie. The entire estate fell to be distributed as residue, once the just debts, funeral and testamentary expenses had been paid. So, there was really nothing for Max Lambie to inherit in place of his father. Max Lambie's inheritance was therefore inextricable bound to that of his siblings and in the proportion dictated under the will.

Revocation of grant

[65] Having decided that the defendant was only appointed sole executor by Edith Ethline Lambie, and with no greater entitlement to the assets of the deceased than his siblings, attention is now turned to the issue of his duties and responsibilities to the claimants. The issue for resolution is whether Max Lambie's execution of his duties and responsibilities was such as to warrant his removal as executor? The claimants submitted that, against the background of alleged improprieties on the part of Max Lambie, especially since Max Lambie is now dead there is sufficient cause to revoke the grant made to him. It was further argued that there is no evidence that Max Lambie died testate and whether any executor so appointed is capable of winding up Edith Ethline Lambie's estate. The claimants put forward the 1st claimant, a retired real estate developer as a fit and proper person to complete the administration of Edith Ethline Lambie's estate.

[66] Mr Bishop, on behalf of the defendant, submitted that in asking for the revocation of the grant of probate, the claimants' first duty is to lay the foundation in law for doing

so. They have failed to come to the court with clean hands as they have benefited from the estate without making full disclosures thereof, the submission went on. Mr Bishop submitted that what is open to the court is the appointment of one or more of the claimants as *administrator de bonis non* and order that they provide the court with an inventory of all the properties owned by Edith Ethline Lambie, but not included in the inventory submitted in 1965 by Max Lambie.

[67] So then, on what basis might the court order the removal of Max Lambie as executor of the estate of Edith Ethline Lambie? This question was considered in ***Dasa Yetman and Zusanna Brechova-Soucek v Susan Evanko*** **SCCA #39/98 dated July 6, 1999.** Langrin JA, with whom the rest of the court agreed, accepted the test to be "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." I hope to be forgiven for arrogating to myself the liberty to henceforth refer to this test as the **Dasa Yetman** test. Langrin JA went on to say:

> *"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."*

[68] The complaint against the defendant is that he has never provided the claimants with a proper account of his administration of the estate of Edith Ethline Lambie. According to the first claimant, the defendant failed to account either for some nine (9) pieces of real estate or the proceeds thereof, in addition to personalty. Without any proper accounting, the first claimant fears that "Max mismanaged them and may have wrongfully disposed of them for his own personal benefit to the detriment of the rest of us as beneficiaries."

[69] The charges of impropriety centre on but are not limited to the Dundee property. This property is said to be forty (40) acres, situated at Dundee, Salt Marsh, Trelawny registered at Volume 969 Folio 304 of the Register Book of Titles. The sole legal owner

was Edith Ethline Lambie. This was acquired by the defendant on transmission on the 31st October, 1964 and entered on the title in May, 1972. The claimants say this property forms part of the estate of Edith Ethline Lambie while the defendant contends otherwise. According to the defendant this was trust property as his mother had told him, and Irma Tully so claimed that it had been bought on behalf of Irma Tully and three others. In furtherance of that view, the defendant took steps to have this property developed and transferred to persons other than the beneficiaries of the estate of Edith Ethlin Lambie.

[70] Since the defendant decided that this was trust property, proceeding to deal with it in the manner he did at the very least raised the spectre of a conflict of interest. The immediate effect of treating this property as trust property was to make himself the personal representative of the sole trustee. The defendant therefore had the power to appoint another person or persons in place of his deceased mother as trustee: **Trustee Act section 10 (1)**. If the defendant felt it inexpedient to make the appointment himself, he was at liberty to apply to the Supreme Court to make the appointment: **Trustee Act section 25 (1**). Instead, the defendant chose to act both as trustee of this disputed property and personal representative of the very estate against which the claim was being made.

[71] The better course for the defendant was to have sought the advice of the Supreme Court. **Under section 41 of the Trustee Act**, the defendant was "at liberty, without the institution of suit, to apply to the court for an opinion, advice, or direction on any question respecting the management or administration" of this asset of the testatrix. Having obtained and acted upon the "opinion, advice, or direction given by the Court" the defendant would have been deemed to have discharged his duty as executor. The defendant would have a complete indemnity for having so acted: **Trustee Act section 54**. That is, provided he was not "guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction."(See the proviso to section 41 of the ***Trustee Act***). In short, the most prudent course open to the defendant was to have asked the court to say whether the Dundee property formed part of the

assets of Edith Ethline Lambie. Indeed, that was the course adopted by the executrix in ***Dasa Yetman and Zusanna Brechova-Soucek v Susan Evanko, supra***.

[72] To have sought the opinion of the court in the matter would have been the first step in the fulfilment of the defendant's duty as executor to protect the assets of the estate against adverse claims***: In re Dellaway dec'd*** **[1982] 3 ALL ER 118**. 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.

[73] Leaving aside the question of the defendant's conduct in respect of the other assets of the estate of Edith Ethline Lambie, the question raised here is can the defendant's conduct in relation to the Dundee property successfully meet the **Dasa Yetman** test? The ultimate goal of the defendant was to put this property out of reach of the other beneficiaries of the estate of Edith Ethline Lambie. That, in my view, is sufficient to say the defendant endangered property belonging to the estate as his action would result in the diminution of the estate both in size and value. It is therefore palpable that the defendant's conduct in relation to the Dundee property falters at the bar of the **Dasa Yetman** test.

Delay and the duty to account

[74] Indeed, Mr Bishop made a tongue in cheek concession in his submission when he said, "there might be merit with respect to the Dundee property in Trelawny but the court would have to take into consideration the issues of delay and laches." Mr Bishop submitted that having waited for forty-seven (47) years to bring this action the claimants should be barred from obtaining an order for Max Lambie to account. In support of this submission Mr Bishop cited the following passage from ***Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*** *(**Williams et al**)* page 66:

> *"But where there has been a great lapse of time since the death, the court has frequently refused to enforce the exhibition of an inventory, for reason and justice prescribe some limitation. Thus an application to compel an executrix to exhibit an inventory after the lapse of eighteen years was rejected and the applicant, in the circumstances, condemned in costs."*

[75] The preceding passage quoted by Mr Bishop appears below the statement of the general rule in the same paragraph in ***Williams et al***. The learned authors said this, "there is no statute or rule of positive law limiting the period within which an application for an inventory and account must be made, and time alone does not preclude an application." The learned authors cited ***Jickling v Bircham*** **(1843) 2 Notes of Case. 463**, in which an order to account and exhibit an inventory was made twenty-four (24) years after death, as their authority for the general proposition.

[76] In ***Ritchie v Rees and Rees*** **1 ADD. 144**, administration with the will annexed was granted to Richard Rees, a creditor of the deceased in 1777. In 1822, that is, approximately forty-five (45) years after death, a decree was issued at the instance of Archibald Ritchie, the legal personal representative of the universal legatee of the original testator. This decree called upon Richard and Robert Rees, sons and executors of Richard Rees who died in1807, to exhibit an inventory of the personal estate and effects of the deceased and render an account of the administration of the estate. Objection was taken based on the lapse of time.

[77] In his judgment, at pages **146-147,** Sir John Nicholl affirmed the general proposition and provided some elaboration:

> *"Now, although no statute or rule of positive law ... has fixed any time certain, within which an inventory and account must be sued; still reason and justice prescribe some limitation to calls of this sort, almost necessarily. If, therefore, this lapse of nearly half a century is not pleaded in bar to the present demand, still it may operate as a bar; provided, that is, it can be taken, in conjunction with circumstances, to afford a reasonable presumption that the estate has been fully administered and disposed of; in which case I shall feel no hesitation in dismissing the parties from the effect of this citation."*

[78] 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. Although ***In re Flynn, decd. Flynn v Flynn and Others*** **[1982] 1 W.L.R. 310** was a case concerned with striking out an action for the revocation of a grant of probate, it confirms that delay must be attend by other circumstances to warrant the invocation of that discretion. The court came to the view, after a review of the authorities, that the claim could only be struck out if it "is otherwise frivolous and vexatious or is for other reasons an abuse of the process of the court," per Slade J at page 318.

[79] A somewhat similar situation to ***Ritchie v Rees and Rees***, *supra,* faced Sir John Nicholl in ***Higgins v Higgins 4 HAGG*****. ECC. 242**. A legatee brought suit for an inventory and account after a lapse of seventeen (17) years. The executrix presented a declaration instead of an inventory. At page 243 of the judgment, Sir John Nicholl had this to say:

> *"I am of opinion that the demand has been sufficiently complied with; for although this lapse of time is not an absolute bar to a disclosure of the deceased's assets, yet after a delay of so many years a full and particular inventory and account cannot reasonably be expected or required, and therefore a declaration has been substituted and produced."*

The court there concluded that in the circumstances a sufficient disclosure of the testator's estate had been made.

[80] I have gleaned the following propositions from ***Higgins v Higgins***, *supra*. First, since lapse of time is not an absolute bar to a claim that an inventory be exhibited and account rendered, in spite of the length of time some disclosure in this regard is required. Secondly, the lapse of time may make it unreasonable to either expect or require a full and particularized inventory and account. Thirdly, having regard to the

lapse of time a declaration or some other summary of the estate of the deceased may suffice, in place of an inventory and account properly so called. In ***Burgess v Marriott 3 CURT.* 425,427** the court was "willing to accept an admission of assets in lieu of an inventory, or any admission which would enable the Court to exercise a discretion, and not to call for an inventory." In the latter case the application was made twenty-seven (27) years after the death of the deceased.

[81] In ***Scurrah v Scurrah 2 CURT.* 920,922** Sir Herbert Jenner said "the Court expects some good ground to be shown for exercising its power of compelling the exhibition of an inventory and account after a lapse of eighteen years." Among the circumstances which resulted in the dismissal of the application were: the fact of the lapse of time post death, the advance years of the *administratrix* (eighty years), the absence of an averment that any assets had come to her hand and the absence of any reason to believe that the estate was not fully administered. The last circumstance confirms the position in ***Ritchie v Rees and Rees***, *supra,* that the court leans against making an order to exhibit an inventory and account where there has been an appreciable lapse of time and the estate has been fully administered.

[82] The learning excised from the cases appears to be no more than a manifestation of the equitable aphorism, 'delay defeats equities, or, equity aids the vigilant and not the indolent'. The following quotation, attributed to Lord Camden L.C. by the learned authors of **Snell's Equity** 31st edition page 99, encapsulates the maxim:

> *"[a court of equity] has always refused to aid stale demands, where a party has slept upon his rights and acquiesced for a great length of time. Nothing call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing."*

According to **Snell's Equity**, delay which operates as a bar to a party obtaining an equitable remedy is technically called *laches*. A lapse of time which cannot properly be described as insubstantial, together with circumstances which would make it inequitable to enforce a claim is the pith and substance of *laches*.

[83] In the instant case, the time within which two of the orders being sought by the claimants are to be brought, namely that the defendant be required to furnish and verify accounts in the estate of Edith Ethline Lambie and the revocation of the grant of probate to the defendant, is not prescribed by the **Limitation of Actions Act**. However, section 28 of the **Limitation of Actions Act** saves the jurisdiction of the court of equity in its treatment of such matters. Section 28 reads:

> *"Nothing in this Part shall interfere with any rule or jurisdiction of any Court exercising equitable jurisdiction in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Part."*

[84] The applicable equitable principles are therefore those compendiously declared by Privy Council in ***The Lindsay Petroleum Co v Prosper Armstrong Hurd, Abram Farewell, and John Kemp*** **(1874) L.R. 5 P.C. 221,239-240**:

> *"Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might be fairly regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."*

As the Privy Council went on to explain, the length of the delay and the nature of the acts done during the interval are the two circumstances of import when considering laches. If the remedy is to be barred by laches or delay, it must be demonstrated that the party acted with 'sufficient knowledge of the facts constituting title to the relief'.

[85] This claim was commenced in 2007, that is, forty-two (42) years after the grant of probate was made to the defendant. So, it would be idle to suggest that this does not constitute a considerable delay in bringing the claim. It was in January of that year that the 2nd and 3rd claimants, by power of attorney, appointed the 1st claimant to act on their behalf for the purpose of enforcing and protecting their rights.

[86] In the interim, the 2nd claimant and her husband bought two lots situated in Beverly, St. Ann from the estate of Edith Ethline Lambie and obtained the proceeds of an insurance policy which named her the sole beneficiary. Part of the proceeds of sale was used to discharge a debt of the 1st claimant at Citibank. Lot 21, which comprised four (4) acres in Greenside, Trelawny was transferred to the 1st claimant and cash disbursements which he describes as 'miniscule' were received by him.

[87] On the other hand, the 1st and 2nd claimants admitted to seeing in the 1980s the statement prepared by Douglas Moyston in 1971. The 1st claimant said in answer to the court that this statement might have been copied to him by the defendant in response to his request for an accounting, although he didn't remember. However, having seen the statement the 1st claimant never spoke to the defendant. Further, although the 2nd claimant did not understand the statement prepared by Douglas Moyston she sought no clarification from him. Additionally, the 1st claimant had seen an inventory of his mother's estate in the 1980s.

[88] Against this background, was there culpable delay on the part of the claimants? To express the question in an elaborative format, would it be practically 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? In my judgment the answer must be in the affirmative as the following analysis will hopefully make plain. While I would not go so far as to say there was a waiver of their right to call for an inventory and account, there was certainly acquiescence.

[89] A convenient starting point is the first proposition extracted from ***Ritchie v Rees and Rees***, *supra*, namely, that delay may operate as a bar whether or not it is pleaded. In the instant case the question of delay finds no expression, direct or oblique, in the defendant's statement of case. Indeed, no questions were asked of the claimants in this

area during cross-examination and the claimants never sought to explain their inactivity for the length of time alleged. While the authority of ***Ritchie v Rees and Rees***, *supra*, is not doubted, the prudence of leaving the question for closing submissions is doubtful. The defendant surely was at liberty to do so but the claimants might have attempted even a short explanation for their inactivity and conduct in the interval, contending as they are, that the estate is not to date fully administered.

[90] Let us turn now to the question of the status of the administration of the estate of Edith Ethline Lambie. The defendant averred in his Defence that the administration of the estate was completed in or around 1983. That, of course, is against the background of the defendant's preceding averments that the claimants have no interest in the Dundee property. However, in my judgment the administration of the estate is to date incomplete. This is evidenced by, if nothing else, the maelstrom of a dispute attached to the Dundee property. In this respect the present case is distinguishable from ***Ritchie v Rees and Rees***, *supra*, as well as ***Scurrah v Scurrah***, *supra*.

[91] In point of fact, the Dundee property was the only point of dispute between the parties before the filing of this claim. This is supported by letters on their behalf to the defendant and the mortgagee of the Dundee property, exhibits CW 1, CW 2 and CW 3. In all those letters it was their assertion "that all costs and expenses relating to the estate have been settled."

[92] The claim for an order that the defendant be required to furnish and verify an account is in some measure based on conjecture fuelled by hearsay and quite possibly, confabulation. The claimants failed to lead any evidence that at least three of the properties for which the order for an account should be made forms part of the estate of Edith Ethline Lambie. In respect of the fifteen (15) acre property at Forest, St. Ann the 1st claimant said under cross-examination that he had seen no title showing this to be a part of his mother's estate but he was going to research it.

[93] Neither had the 1st claimant seen any title in relation to the small house at Salem, St. Ann. The 1st claimant relied for evidence of ownership of the small house at Salem, St. Ann on his mother having told him that it belonged to her and its appearance in

Douglas Moyston's statement. A perusal of Douglas Moyston's statement does not support him in this.

[94] Similarly, there is no documentary proof that Edith Ethline Lambie owned any part of the property at Blackstoneledge. The 1st claimant frankly admitted this under cross-examination but went on to say an aunt told him the property belonged to his mother. However, a one acre property described as Blackstonedge appears in the statement of account prepared and verified by the defendant and dated January 3, 1972. So, it seems this property was accepted at some point to form part of the estate of Edith Ethline Lambie but the 1st claimant's memory apparently failed him under cross-examination.

[95] Further, the claimants erroneously asked for the defendant to account for the lots in Salem, St. Ann. The Particulars of Claim, at paragraph 9, averred that the defendant was in breach of his duties as executor in respect of all the listed properties except that situated at Greenside, Trelawny. Yet, by the time the 1st claimant came to give his witness statement on the 21st July, 2009, he was assisted by his sister, the 3rd claimant, to recall that this land had been conveyed to her and her husband.

[96] The error that was made in relation to the Greenside and Blackstonedge properties epitomises the nature of the difficulties likely to be faced by the parties, not just the defendant, if the court were to make an order for the defendant to account after the passage of so many years. That is, crucial evidence may already have been irretrievably lost to the black hole of time, much to the prejudice of the person to account.

[97] Taking the most favourable view of the lapse of time, the claimants would have neglected to call for an account for at least eighteen (18) years before filing this claim. In other words, assuming in the favour of the claimants that they had sight of Douglas Moyston's statement of accounts in 1989 although the evidence is that the account came to their attention in the 1980s, armed with that knowledge they slept upon their right. On the authority of ***The Lindsay Petroleum Company v Hurd***, *supra*, this was information which should have at least put the 1st and 2nd claimants on notice that they

needed, if need there was, to call upon the defendant to exhibit an inventory and render an account of the estate.

[98] ***Scurrah v Scurrah***, *supra*, demands that good ground be shown to require an account after the passage of the identical period of eighteen (18) years. I understand good ground to include evidence that it would not be unreasonable to place the defendant in a position where he has to exhibit an inventory and render an account in light of the circumstances. These circumstances include the peculiarities of the person to account: ***Scurrah v Scurrah***, *supra*.

[99] The death of the defendant before the trial raises the question of the identity of the person to account and that person's situation. Legally, that burden would fall on the shoulders of the defendant's personal representative. As counsel for the claimants submitted, it is unclear whether the defendant died testate or intestate. Additionally, his appointees in this matter, his widow and daughter, both reside abroad. More importantly, if their interest in this case is to be measured by their attendance, then that interest is non-existent. I am accordingly not in a position to assess the person who would be called upon to comply with the order, were it to be made.

[100] The question of who is to exhibit an inventory and render an account may become moot if Mr Bishop's proposal in this area finds favour with the court. Learned counsel invited the court to consider whether what the defendant has placed before it sufficiently discharges the responsibility to account. This submission ought properly to be viewed against the background of the claimants' assertion before suit that all costs and expenses relating to the estate had been settled. It is highly unlikely that the claimants, through their legal advisor, could have come to that position without having first perused the material available to them. The following documents are before me: Douglas Moyston's statement of account, the defendant's statement of account and ten (10) page letter to the claimants' Attorneys-at-Law and his witness statement.

[101] The position seems to be this, the estate of Edith Ethline Lambie is fully administered save and except for the Dundee property. The claimants themselves were satisfied of this before or at the time the dispute arose in respect of the Dundee

property. Secondly, the claimants themselves have benefitted from the fruits of the estate. Thirdly, the lapse of time has negatively impacted the memory of at least the 1st claimant. Fourthly, gross uncertainty surrounds the identity of the person to account in place of the deceased defendant.

[102] Viewed from this perspective, practically, how can an inventory and account be furnished with the particularity required by a document properly so called? There is no declaration of the assets of the estate before this court. The documents referred to above may loosely be held to be an admission of the assets of the estate, excepting the Dundee property. Conversely, the documents may be regarded as collectively representing a summary of the assets of the estate of the deceased. It appears to me that having regard to the considerable lapse of time and the apparent acceptance by the claimants that the only outstanding matter was the Dundee property, some other summary of the estate and effects of Edith Ethline Lambie must be adjudged to suffice in place of an inventory and account: ***Higgins v Higgins***, *supra* and ***Burgess v Marriott***, *supra*. Accordingly, I hold that the statements of accounts and letter from the defendant and his witness statement collectively provide a sufficient account of the estate and effects of Edith Ethline Lambie, excepting the Dundee property.

[103] Returning to the question of the revocation of the grant of probate to the defendant, I will first consider the alternative suggested by Mr Bishop to make a grant *de bonis non* to one or more of the claimants. According to Halsbury's Laws of England 3rd edition volume 16 para 435:

> *"Where a sole or last surviving executor dies intestate without having fully administered, his administrator does not become the representative of the original testator, and it is accordingly necessary to appoint an administrator to administer the goods of the original testator left unadministered. This is a grant of administration cum testament annexo de bonis non administratis, for short called de bonis non."*

This makes it plain that two conditions must be satisfied before such a grant can be made. 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.

[104] The chain of representation was explained in ***Jamaica Redevelopment Foundation, Inc v Max Eugene Lambie (As Administrator of the Estate of Elaine Vivienne Tully, deceased)*** **[2021] JMCA Civ 12.** At paragraph 10 Morrison JA said:

> *"It is a well known principle of the law of succession that the executor of a sole or last surviving executor of the testator's estate becomes the executor of the testator in the event of the original testator dying without having completed administration of the testator's estate. This is the principle of the chain of representation. It is, however, equally well settled that there is no chain of representation in relation to administrators of an intestate's estate, even where the administrator himself dies testate."*

The question is, has the chain of representation been broken in the instant case?

[105] No positive finding can be made on this issue as the evidence in this area is at best inconclusive. That is, it remains unclear whether the defendant died testate or intestate. If he died testate there would be a chain of representation but if he died intestate the converse would be true. So, I am unable to say whether there is in fact a chain of representation. This difficulty was adverted to in the discussion of the identity of the person to exhibit an inventory and render an account.

[106] However, as already adjudged, a portion of the estate of the Edith Ethline Lambie remains unadministered at the death of the defendant, the sole executor, so the necessity for continued administration of the estate remains. How then must this be achieved? Although the clear impression is left from Mr Bishop's submission that the grant *de bonis non* is to be made instead of revoking the grant of probate to the defendant, there is nothing preventing the court doing both: **The Law of Succession**, *supra*. The learned authors cite **In The Goods of Galbraith [1951] P. 422** as authority for the proposition.

[107] In that case both executors were golden age men who suffered an incapacitating degree of physical and mental infirmity. One was over eighty (80) years and senile while the other was seventy-six (76), ailed for a year and suffered from arterio-sclerosis so debilitating that it warranted medical recommendation of a cessation from any form of work. That made them incapable of executing their testamentary duties. The grant of probate to them was revoked and a grant of letters of administration *de bonis non* with the will and codicils annexed granted to the applicant.

[108] That court relied on **In The Goods of Loveday [1900] P. 154.** The guiding principle appears to be this, in considering the question of the revocation of the grant of probate, "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. In the case before me, the executor has shown himself incapable of continued administration of the estate of Edith Ethline Lambie, not by reason of infirmity of body or mind but his failure of the **Dasa Yetman** test. That without more warrants the revocation of the grant of probate to the defendant and I entertain no hesitation in so doing.

[109] Having revoked the grant of probate to the defendant, the only remaining question is his replacement. Counsel for the claimants submitted that the 1st claimant should be appointed to conclude the administration of the estate. The 1st claimant is well suited to fulfil this function as he is a retired real estate dealer with actual knowledge of the remaining asset of the estate, the submission went. Further, from the evidence, the claimants are the last surviving residuary legatee under the will of Edith Ethline Lambie.

[110] A grant *de bonis non* is subject to the same rules of priority which govern the original application for the grant of probate: **The Law of Succession**, *supra*, page 341; (see also CPR rule 68.11). Therefore, the residuary legatee is next in line to receive the grant. According to **Williams et al**, *supra*, at page 337, where the grant was originally made to an executor and there is a subsequent break in the chain of representation, "the grant of administration (with will) *de bonis non* is made to the residuary legatee or devisee in trust." In its long form, it is a grant of *administration cum testament et de bonis non administratis*: **An Introduction to The Law of Succession** Beresford Hay at

page 57. Although **Williams et al** make the break in the chain of representation a condition precedent to the grant, **In The Goods of Loveday**, *supra*, applied in **In The Goods of Galbraith**, *supra*, makes it plain that a grant *de bonis non* can be made upon revocation of the first grant.

[111] I therefore make the following orders:

1. The grant of probate made to the defendant in the estate of Edith Ethline Lambie on the 24th March 1965 is revoked.
2. A grant *de bonis non* with the will annexed is made to the 1st claimant, Basil Louis Hugh Lambie.
3. The request for an order that the defendant be required to furnish and verify accounts in the estate of Edith Ethline Lambie is refused.
4. Costs to the claimants, to be agreed or taxed.