[2019] JMSC Civ. 129

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2017 HCV 01302

BETWEEN	**ANN MARIE LLEWELLYN YOUNG**	**1st CLAIMANT**
AND	**LOUISE HILDA LLEWELLYN (also known as Michelle)**	**2nd CLAIMANT**
AND	**LOUISE HILDA LLEWELLYN (Executrix of the Estate of Messiah Llewellyn)**	**1st DEFENDANT**
AND	**LOREEN LLEWELLYN**	**2nd DEFENDANT**
AND	**AVRIL REINDOLLAR**	**3rd DEFENDANT**

IN CHAMBERS

Jean M. Williams, instructed by DunnCox, for the claimants

Yolande Magnus-Mullings, instructed by Abendana and Abendana, for the defendants

December 6, 2018 and July 5, 2019

WILL – CONSTRUCTION – TESTAMENTARY INTENTION – RECTIFICATION OF WILLS – COURT IS REQUESTED TO INTERPRET AND MAKE ORDERS REGARDING UNCLEAR OR INCONSISTENT PROVISIONS UNDER A WILL – WHETHER INVENTORY AND ACCOUNT REGARDING MANAGEMENT OF ESTATE SHOULD BE PROVIDED BY DEFENDANTS – EFFECT OF POWER OF ATTORNEY - DELAY - LACHES

ANDERSON K., J.

BACKGROUND

[1] Messiah Llewellyn (hereinafter referred to as 'the deceased'), and the 1st defendant, Louise Hilda Llewellyn were married on March 29, 1967. They had six (6) children of the marital union, which included the claimants, Ann Marie Llewellyn Young and Louise Hilda Llewellyn (also known as Michelle), the 2nd and 3rd defendants, Loreen Llewellyn and Avril Reindollar as well as Junior Messiah Llewellyn and Valerie Parline Llewellyn.

[2] The deceased executed a valid last will and testament on May 14, 1976. When that will was executed, all of the children were under the age of eighteen years, save and except for one child. The deceased died testate on June 8, 1985.

[3] The 1st defendant, the widow of the deceased was the appointed executrix of the estate of the deceased. The 1st defendant had obtained a grant of probate on October 3, 1986 from the Supreme Court of Judicature of Jamaica.

[4] The deceased's only son, Junior Messiah Llewellyn died intestate on May 4, 1986. He had no spouse and/or children. Junior Messiah Llewellyn died prior to the issuance of the grant of probate of the deceased's estate. One of the deceased's daughters, Valerie Parline Llewellyn also died intestate on June 1, 2001 without leaving a spouse, but she had two (2) children, Kyle and Daniel Smith.

[5] The claimants, both of 81 Marine Gardens, Ocho Rios in the parish of Saint Ann, brought a claim against the defendants, under the provisions of the ***Interpretation Act*** and ***Wills Act***, on the basis that under the terms of the deceased's will, the property with address at 80 Main Street, Ocho Rios, in the parish of Saint Ann (hereinafter referred to, as, 'the disputed property'), was gifted to the 1st defendant and all of his six (6) children. Since the death of the deceased, the claimants have not received any benefit from said estate. The 2nd Defendant and 3rd Defendant are being sued in their capacity of attorneys, having assumed power of attorney on January 28, 2013.

[6] Under the terms of the deceased's will, a provision was made, which is as follows:

> *'I give and bequeath To my wife, Louise Hilda Llewellyn of St. Ann's Bay, 4 Park Ave, All my Estates, In St. Ann's Bay Ocho Rios, and Priory, 80 main Street Ocho Rios, Cash in Bank, Furniture 46 Main Street St. Ann's Bay, 25 Musgrave Street, St. Ann's Bay, 14 Musgrave Street, St. Ann's Bay, 4 Park Ave St. Ann's Bay, Main Street Priory, All for her own use, and her Six children Ann Marie Llewellyn, Valerie Parline Llewellyn, Loreen Llewellyn, Junior Messiah Llewellyn, Louise Hilda Llewellyn and Avril Maude Llewellyn, 80 Main Street Ocho Rios to go to Junior Messiah Llewellyn.'*

[7] All the real properties devised under the clause for interpretation were jointly held by the deceased and the 1st defendant as joint tenants, save and except for the disputed property.

THE FIXED DATE CLAIM FORM AND AFFIDAVITS FILED

[8] The claimants filed a fixed date claim form on April 19, 2017 and an amended fixed date claim form on October 22, 2018 and supporting affidavits on the basis that, since the death of the deceased, the claimants have not received any benefit from the disputed property. Given the written terms of the deceased's will, this court is requested to interpret and make orders regarding the relevant provision under said will, which touches and concerns the disputed property.

[9] The claimants sought the following orders:

1. *'A Declaration that pursuant to the last will and testament of Messiah Llewellyn, deceased, the Claimants hold an interest in situated at 80 Main Street, Ocho Rios and is described as all that parcel of land part of Little Buckfield known as Rocky Ridge, Ocho Rios in the parish of Saint Ann containing by survey Two Roods Fifteen Perches and five-tenths of a Perch of the shape and dimensions and butting*

as appears by the Plan thereof hereto annexed and being the land contained in Certificates of Title registered at Volume 1084 Folio 669;

2. *An Order that said defendants Louise Hilda Llewellyn, Loreen Llewellyn and Avril Reindollar provide a detailed account of the income derived from the estate of Messiah Llewellyn to the beneficiaries of the estate of Messiah Llewellyn;*

3. *That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all orders;*

4. *Liberty to apply;*

5. *Costs;*

6. *Further and other relief as the Court may deem fit.'*

[10] Ann Marie Llewellyn Young filed an Affidavit on April 19, 2017. Exhibited to that affidavit were:

i. Copies of the last will and testament of the deceased and probate of said will;
ii. Copy of the Certificate of Title registered at Volume 1084 Folio 669 regarding the property known as 80 Main Street, Ocho Rios, described as all that parcel of land part of Little Buckfield known as Rocky Ridge, Ocho Rios in the parish of Saint Ann containing by survey Two Roods Fifteen Perches and five-tenths of a Perch of the shape and dimensions and butting as appears by the Plan;
iii. Copies of the Certificate of Title registered at Volume 528 Folio 14 regarding the property known as 4 Musgrave Street, St. Ann's Bay;
iv. Letter dated September 11, 2012 from Murray & Tucker Attorneys-at-law & Notary Public, exhibited as ALY-4.

[11] In said affidavit, Ann Marie Llewellyn Young, averred that she is unemployed and that since the death of the deceased, she has not received any benefit from the

estate of the deceased. As a result, she had instructed counsel to write to the 1st defendant requesting an account in relation to the estate of the deceased and no response was forthcoming.

[12] Ann Marie Llewellyn Young also alleged that the disputed property is on a long term lease to Singer Sewing Machine Company and is endorsed on the Certificate of Title as Lease No. 732806. There are also eight other businesses on the said property.

[13] She contended that the deceased had made adequate provisions for the 1st defendant, his wife, when he purchased the property situated at 1 Newly Street, Ocho Rios in the parish of Saint Ann, which is a commercial property, containing an upstairs and downstairs and which houses eight shops on the upstairs and a meat shop on the entire downstairs.

[14] A further affidavit of Ann Marie Llewellyn Young was filed on April 9, 2018, which provided the date of birth of all the children born to the deceased and the 1st defendant. It also referred to a 'half-blood sister', by the name of Albertha Laucher, who is a daughter of the deceased, from a prior marriage.

[15] On October 22, 2018 a further, further affidavit was filed by Ann Marie Llewellyn Young. Exhibited to that affidavit was:

i. A copy of a power of attorney granted by the 1st Defendant to the 2nd and 3rd Defendant on January 28, 2013.

[16] By virtue of the foregoing, the 1st claimant contended, that subsequent to the filing of the fixed date claim form, it came to her attention that the 1st defendant had granted a power of attorney to the 2nd and 3rd defendants. As a result, the 2nd and 3rd defendants have intervened in the estate of the deceased and are obliged to provide an account of their stewardship.

[17] The 1st defendant, also known as Michelle, filed an affidavit on April 19, 2017. In said affidavit she averred that, she is a safety officer and that since the death of

the deceased, she has not received any benefit from the estate of the deceased. As a result, she also instructed counsel to write to the executrix requesting an account in relation to the estate of the deceased and no response was forthcoming.

[18] She also surmised that the disputed property is on a long term lease to Singer Sewing Machine Company and is endorsed on the Certificate of Title as Lease No. 732806. There are also eight other businesses on the said property. It was also alleged by her, that the deceased had made adequate provisions for the 1st defendant when he purchased the property situated at 1 Newly Street, Ocho Rios in the parish of Saint Ann.

[19] The 1st defendant also deponed that, she had expended approximately two million dollars ($2,000,000.00) on the property at 1 Newlyn Street, Ocho Rios in the parish of Saint Ann, to renovate same, as it was then, in a poor state of repair.

[20] She further deponed, that she occupied a shop on the ground floor, in which she operated a meat shop and consequently the business failed, due to the actions of the 1st defendant.

[21] In response to the claimants' affidavit evidence, a response of the 1st defendant, who is the executrix of the estate of Messiah Llewellyn, was filed on October 18, 2017. Exhibited to that affidavit were:

i. A copy of certificate of title for the property at 25 Musgrave Street, Saint Ann's Bay, registered at Volume 1291 Folio 314 of the Register Book of Titles. This depicted that the premises was newly registered in the 1st claimant and her children's names.
ii. Copy of a letter dated February 25, 2005, to the 2nd claimant from Michelle Movery, a copy of the Moverys' deposit receipt and copies of some of the receipts evidencing repayment of the Moverys.

[22] In said affidavit, the 1st Defendant averred that she is a retired housewife and the executrix of the last will and testament of the deceased. She averred further, that

the deceased had devised various parcels of land to her and their six children named in this claim. The deceased had in fact, transferred the same parcels of lands to her and himself as joint tenants by way of gifts, so that on his death, said parcels of land did not fall to his estate, to allow for distribution thereof in the manner stipulated under his will. She also averred that she was advised by her attorneys-at-law, that the deceased was free to dispose of his properties during his lifetime as he deemed fit and his will does not take effect until his death, nor does it preclude him from otherwise disposing of said properties, prior to his death.

[23] She also purported that the only property that would have been left to be distributed was the disputed property. She claimed that, based on legal advice, the disputed property would have been left to his son - Junior Messiah Llewellyn, and that it was manifestly clear based on the will, that his son was to receive that property. She maintained that the disputed property belonged to their son and that during the deceased's lifetime, the deceased had expressed those sentiments.

[24] She stated further, that Junior Messiah Llewellyn had died intestate, with no spouse or children and as such, based on legal advice, she is now the sole beneficiary of said property, based on the laws of intestacy. With this notion, she contended that the claimants have no interest in the disputed property. Hence, the claimants have derived no benefit from said property and there is no duty to provide the claimants with a detailed account of the income earned.

[25] The 1st defendant contended that the claimants were not being truthful when they asserted that they derived no benefits from the estate of the deceased. She highlighted that, the claimants were financially dependent on her and she personally obliged and assisted them, which is oftentimes, to her own detriment and examples of such detriment, were specified. She outlined two instances where she had to expend monies to rectify issues that arose because of the claimants. In the first instance, she stated that she had allowed the 2nd claimant to occupy a commercial space, rent-free, at 1 Newlyn Street, Ocho Rios, in the parish of Saint Ann, to operate a meat shop. The 2nd claimant wanted to expand the business and

needed financing. On that basis, she utilized her property at 25 Musgrave Street, Saint Ann's Bay as collateral, for a loan to assist the 2nd claimant. She further deponed, that the 2nd claimant had not utilized the loan which she (the 1st defendant) had secured to assist her in the renovation and expansion of said property. According to the 1st defendant, the 2nd claimant did not pay back the loan, which resulted in the Musgrave property being put up for sale. She averred that, in order to prevent the sale, she had to pay back the loan and the expenditures that were associated with the purchase of the property from the prospective buyer, which included the purchaser's legal fees.

[26] The 1st defendant noted that, it was the 1st claimant who had negotiated with the buyer purportedly on her behalf, to sell that property and did so, entirely without her consent. She also alleged that, she later found out that the property was registered in the names of the 1st claimant and the 1st claimant's children. Given that it was for the benefit of her grand-children, she averred that she conceded to the ownership of the property, remaining in their names.

[27] The second circumstance concerned the property situated at lot 256, Vista Del Mar, Drax Hall, in the parish of Saint Ann, which was owned by the 2nd claimant. The 2nd claimant in that regard, had sought to sell that property. She had contracted to sell that property to Michael and Sheila Movery and then entered into an agreement to sell that said property to another party. The Moverys threatened legal action, for the return of three million, five hundred thousand dollars ($3,500,000.00). The 2nd claimant could not have paid back the monies and the 1st defendant asserted that she assisted the 2nd claimant to pay the Moverys, by means of monthly instalments, in respect of which, a letter and receipts were exhibited.

[28] The 1st defendant denied that the 2nd claimant expended monies for the renovation of 1 Newlyn Street, Ocho Rios in the parish of Saint Ann and that she was the reason for the failure of the 2nd claimant's business. In fact, the 2nd claimant had sold her business to Marcia Edwards for one million dollars ($1,000.000.00).

[29] In response to the further, further affidavit of the 1st claimant, a response of the 2nd defendant was filed on November 21, 2018. The 2nd defendant deponed that she was a businesswoman and her evidence was the same as that of the 1st defendant, as regards the disputed property.

[30] The 2nd defendant deponed that the 1st defendant, who is her mother, is not physically well and that as such, a power of attorney was executed on January 28, 2013, in favour of her sister-Avril Reindollar and herself. She pointed out that the claimants do not speak to their mother, so they would have no knowledge of her limitations. She also highlighted that the 1st defendant had undertaken to ratify any and all actions taken by her sister and that given the legal advice which she has been given, she is of the belief that the claimants have no interest in the disputed property and that there is no duty owed to said claimants, to provide a detailed account of the income earned at said property.

[31] A response of the 3rd defendant was also filed on December 12, 2018, in response to the further, further affidavit of the 1st claimant. The 3rd defendant deponed that she was a manager and asserted similar views to those of the other defendants regarding the disputed property and her mother's illness, which gave rise to a power of attorney being executed on January 28, 2013 in favour of her sister-the 2nd defendant and herself. She is also of the belief that the claimants have no interest in the disputed property and that there is no duty owed to the claimants as regards the income earned at said property.

THE SUBMISSIONS OF THE CLAIMANTS

[32] Counsel for the claimants opened their submissions by highlighting the facts of the case and the defendants' arguments. Counsel then relied on section 23 of the ***Wills Act*** and made reference to four cases on which, much reliance was placed: ***Dacosta v Warburton and Kenny*** *(1971) 12 JLR 520;* ***Rekennie Taylor v Ethel Brown*** *(1975) 13 JLR 255;* ***Re Jones. Richard v Jones*** *[1898] 1 Ch. 438,* and ***Davis v Administrator General*** *(1965) 9 JLR 200.*

[33] Counsel submitted that with the deceased having transferred all six (6) of the properties to himself and the 1st defendant, that means that those properties were held as a joint tenancy, which gives rise to the right of survivorship and upon the death of the deceased, the 1st defendant would take these properties absolutely. As regards the disputed property however, which was in the deceased's name solely, this property would form part of his estate and is the only property of the seven (7) properties mentioned, which would have been left in the will.

[34] Counsel submitted further, that the words used by the deceased in the will places no limitation on the gift. In fact, the words, '*all for her own use and her six children.'* clearly demonstrated that a contrary intention was meant and the case of ***Dacosta v Warburton and Kenny*** *(1971) 12 JLR 520* was relied on. Counsel also stated that, the purported gift to the deceased's son, is to be considered a 'gift over' and relied on ***Rekennie Taylor v Ethel Brown*** *(1975) 13 JLR 255.*

[35] Further, counsel for the claimants maintained that in the circumstances, **section 23 of the *Wills Act*** is most applicable and that an absolute gift was made of the disputed property. Counsel highlighted that this meant that the claimants were entitled to a share of the property. Additionally, as the executrix of the deceased's estate, the 1st defendants must give an account to the beneficiaries regarding the disputed property. In formulating this point, counsel reiterated the case of ***Davis v Administrator General*** *(op. cit)* and averred that the executrix is to exhibit a true and perfect inventory of all and singular the estate and effects of the said deceased and to render a just a true account thereof, whenever required by law so to do.

[36] The claimant's counsel concluded her submissions by asking the court, to grant the declaration and orders sought.

THE SUBMISSIONS OF THE DEFENDANTS

[37] Counsel for the defendants began her submissions by alluding to the contentions of the parties. The claimants' contention was that under the terms of the deceased's will, the disputed property was gifted to the 1st defendant and all six of her children, whilst it is the defendants' contention that the disputed property was gifted to Junior Messiah Llewellyn absolutely and that consequent upon the death of Junior Messiah Llewellyn, the property would pass to his estate and devolve to the 1st defendant, as the sole beneficiary of his estate, pursuant to the ***Intestates' Estates and Property Charges Act.***

[38] The defence counsel had found the need to state the rules of interpretation of wills by highlighting that a testator is entitled to dispose of his property as he sees fit and reliance was placed on ***Vaughan v Marquis of Headfort*** *(1840) 10 Sim 639*. Further, the claimant's counsel contended that it is the duty of the court, to determine as best as it could, what was the deceased's intention from the words used to express that intention. The court in this regard, must avoid conjecture or guess-work and the case of ***Abbot v Middleton*** **(1858) 7 H.L.C 68** was heavily relied on, wherein it was stated:

> *'the use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is what that which he has written means.'*

[39] Contrary to the claimants' assertion, it was counsel for the defendants' position that, the court had to ask itself, what was meant by the written words used by the testator in this particular case. In construing the testator's intention, the court must at first, give effect to the words as declared by the testator. Reliance was placed on the case of ***Perrin v Morgan [1943] AC 399***. Counsel contended that 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 court should also resolve any ambiguity by relying on well-established principles, regarding the construction of wills.

[40] It was submitted further, by the defence counsel, that there is a certain degree of indulgence that is allowed when interpreting wills. In fact, this indulgence is granted to the testators who are regarded as *'inopus cosilii'* resulting quite unfortunately, in the will being the subject of the 'caprices of language'. Counsel urged the court that in construing this will, greater latitude ought to be given because the testator was, at the material time, *'inopus cosilii'* (devoid of or without counsel). Therefore, the court must rely on the general principles of construction as a compass, to navigate through the maze of words used by the testator, to ascertain the true meaning of the words used, in which counsel listed some useful construction on the interpretation of wills.

[41] Counsel also referred to the guiding principle of the interpretation is that the court must sit in the 'arm-chair' of the testator and try to determine as best as it can, what was intended by the testator. It is argued that the court must get to know the testator, his habits and knowledge which can be ascertained from his will and the surrounding circumstances. Counsel urged the court to draw inferences in respect of the testator's intention, by highlighting some of the personal information about the deceased and what was elucidated from the affidavit evidence.

[42] Counsel contended that the disputed property, was devised absolutely to Junior Messiah Llewellyn, but that its inclusion in the earlier listing of properties was simply to place same under the control of the 1st defendant for his benefit until he became of age, to receive the vested legal interest. This counsel emphasized, can be buttressed by reading the will as a whole. Counsel emphasized further, that the use of the words *'to go to Junior Messiah Llewellyn'* shows a separation of this property from the others and the giving to his son, Junior Messiah Llewellyn. The fact that the property was firstly entrusted to the 1st defendant with such words ***'for***

own use' and not to Junior Messiah Llewellyn, 'for his own use' as was done for Albertha Laucher simply demonstrates an appreciation that Junior Messiah Llewellyn, being a minor, was not free to take an immediately vested interest in the property, as it was restricted due to his minority at the time.

[43] Counsel also contended, that there has always been a unique treatment of the property given the segregation from others as demonstrated in the inter vivos gift to the wife before the testator's death, the testator has set apart the property from the others.

[44] Counsel asserted that, if the court was to adopt the claimants' position that the disputed property was intended for the wife and the (six) 6 children, then how can the specific devise thereafter to Junior Messiah Llewellyn be reconciled? Technically the claimants would be asking the court to rewrite the will of the deceased by cutting out, or totally omitting the specific devise to Junior Messiah Llewellyn. Counsel highlighted jurisprudence that it is not the business of the court to rewrite wills, but instead, the function of the court is to construe the testator's will. Reliance was placed on: In re ***Bailey. Barrett v Hyder*** *[1951] Ch. 407*.

[45] Counsel also found the need to remind the court that if it is the view that there are two provisions under the will, which are not easily reconcilable, the court need not try to perfect the deceased's will, or embark on speculation as to what was meant. Counsel has invited the court to invoke the accepted rule of construction that where there is repugnance or inconsistency between gifts in the will, the latter device prevails. In these circumstances, the later, more specified gift of the disputed property to Junior Messiah Llewellyn ought to be treated as destroying the earlier sections of the clause; reliance was placed on: ***In the Matter of an Application by Emmanuel Joseph, in the Republic of Trinidad and Tobago, in the High Court of Justice, Claim No. CV2009-01852.***

[46] Counsel ended her arguments by stating that the testator's words, '*80 Main Street, Ocho Rios in the parish of Saint Ann*', are clear and unambiguous. Further, the

intent of the testator and his directive as expressed in these words, are straightforward.

LEGAL ISSUES

[47] The legal issues that have arisen in respect of this claim are as follows:

i. The main issue is whether or not the claimants are entitled to any benefit from the disputed property; and the other issue is:
ii. Whether or not there is a duty on the part of the defendants, to render a detailed account to the claimants, as regards their alleged administration of the disputed property.

LAW

[48] According to the ***Wills Act***, **section 19**, '*Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will*.'

[49] The object of the construction of a will is to ascertain the testator's expressed intention, that is, the intention which the will itself affirms, either expressly or by implication. The court is concerned with determining what the testator meant by the words used in the will. See: ***Abbott v Middleton*** (1858) 7 HLC 68. If the words are clear, effect will be given to them, even if it was not what the testator intended.

[50] It is most opportune at this juncture, to make reference to the issue of the conflict which arose in the provision bequeathing the disputed property and how it is that a testator's intention is to be determined by a court and also, as to how a will should be interpreted by a court.

[51] The principle of law in interpreting a will is well established. In construing a will, the court has to ascertain the intention of the testator as expressed in the will, whilst

reading the will as a whole. In ***Perrin v Morgan*** *[1943] A.C. 399,* at page 420*,* Lord Romer has emphasized that:

> *'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.'*

[52] It was also agreed at page 406 by Viscount Simon L.C. in ***Perrin v Morgan*** (op. cit) that:

> *'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.'*

[53] Predicated upon the above, the case of ***Roy Buchanan, Erica Buchanan Trust, Kevin Buchanan and Jean Hall (Executrix of the Estate of Ulysses, Jabez Buchanan, deceased*** *[2016] JMSC Civ 57*, has exemplified the use of the principle laid down in ***Perrin v Morgan*** (op. cit). and has also cited the case of ***Scale v Rawlins*** [1892] A.C. 342 at p.343. At paragraph 38, Campbell J in the ***Roy Buchanan Case*** (op. cit) opined that:

> *'…a court of construction cannot rewrite a Will……The 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;* ***Scale v Rawlins*** *[1892] A.C. 342 at p.343). Similarly, according to Jenkins L.J. in* ***Re Bailey*** *[1951] Ch. 407 at page 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.'

[54] Lord Hoffmann in the Privy Council case of ***Charles v Barzey*** *[2003] 1 WLR 437* at page 439, paragraph B, stated that:

'the interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words which she used.'

[55] In ***Charles v Barzey*** (op. cit) reliance was also placed on the case of ***Re Potter's Will Trust*** *[1944] Ch 70* at page 77 where Lord Greene had stated that:

'It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected ...'

[56] Regarding issues of inconsistency mentioned above in ***Charles v Barzey*** (op. cit) and specifically where there is a gift that is given to more than one person in a will, the law according to ***Halsbury's Laws of England,*** *4th edition*, Volume 50, page 340, at paragraph 473 has established that:

'where an inconsistency arises through a gift to one person and a subsequent gift in the same instrument of the same thing to another person, it has been held, in order to reconcile the gifts, that both the donees take

the gift together as joint tenants or tenants in common or succession according to the nature of the gifts.'

[57] The above was exemplified in the cases of ***In Re Alexander's Will Trust*** *[1948] 2 ALL ER 111**,*** in which the gift was of a divisible article and each donee took a moiety (a share) and ***Sherratt v Bentley*** *[1824-1834] All ER 613*, where Sir John Leach, M.R. and Lord Brougham, L.C. examined the two principles of construction of wills that a court may embark on, without declaring a will, void for uncertainty. Sir John Leach, M.R., at first instance, opined at page 615, paragraph I that:

'In this most inaccurate will it is impossible to give effect to every expression used by the testator, several of those expressions being necessarily inconsistent with each other. There are, however, two principles of construction upon which it appears to me that a court may come to a conclusion without the necessity, which, if possible, is always to be avoided, of declaring the will void for uncertainty. First, if the general intention of the testator can be collected from the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by mistake or ignorance on the part of the testator as to the force of the words used; secondly, where the latter part of the will is inconsistent with a prior part, the latter part of the will must prevail.'

[58] Lord Brougham, L.C. on appeal, espoused the principles outlined by Sir John Leach M.R. In a part of his judgment, found at page 619, he stated that:

'It must then be admitted that the great weight of authority, both of LORD COKE and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant, and not rendering it all void for uncertainty. How far that repugnancy could be got rid of by presuming an intention to give each legatee an equal moiety, where the very same thing is given first to one and then to another, there being no expressions excluding such intention, might be a different question. The

repugnancy, which existed in those other cases, may be said not to arise here. If in one part of a will an estate is given to A, and afterwards the testator gives the same estate to B, adding words of exclusion, as "not to A," the repugnance would be complete, and the rule would apply. But if the same thing be given first to A and then to B, unless it be some indivisible chattel, as in the case which LORD HARDWICKE puts in ***Ulrich v. Litchfield****, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by LORD COKE, and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation.'*

[59] Roxburgh J, in the case of ***In Re Alexander's Will Trust*** (op. cit) also agrees with and adopts the positions taken by Lord Brougham, as it concerns where the very same gift is given first to one and then to another.

ANALYSIS

[60] It is an agreed fact that the disputed property's address is 80 Main Street, Ocho Rios, in the parish of Saint Ann. The other listed properties were held by Louise Hilda Llewellyn, along with the testator, as joint tenants. This means that, regarding those properties held as joint tenants, there is a single interest and the right of survivorship - jus accrescendi, applies. Therefore, on the death of a joint tenant his rights are extinguished and the property becomes vested in the surviving joint tenant. In the case at bar, those properties with the exception of the disputed property, are vested in the 1st defendant.

[61] The over-arching issue in the case at bar, is whether or not the disputed provision in the will of the deceased, which is undoubtedly, on the face of it, an unclear

provision, can be interpreted in a manner, that provides that the claimants are entitled to benefit from the disputed property, which formed a part of the deceased's estate. In determining that issue, the court has to consider whether the testator had bequeathed the said property to his wife and six (6) children (which includes his only son) or exclusively to his only son, Junior Messiah Llewellyn, who died intestate.

[62] Following careful analysis of the various authorities mentioned above and a thorough examination of the will, it can most certainly be seen that in the last will and testament of the deceased, the provision in question, is rather ambiguous. In fact, the most difficult and crucial question in this case, is whether the circumstances of the case, have produced a latent ambiguity. The court notes that, in respect of the disputed property, the deceased's will has provided in one instance, that the property is bequeathed to the 1st defendant, all for her own use and her six (6) children, including the deceased's son, Junior Messiah Llewellyn. In another instance, however, at the conclusion of that same provision, the disputed property is to go solely to the deceased's only son, Junior Messiah Llewellyn.

[63] This court is of the view that, this provision is conveying an intention on the part of the testator to bequeath the disputed property to different individuals, being Louise Hilda Llewellyn, all for her own use and her six (6) children and exclusively to his only son Junior Messiah Llewellyn. Having considered the myriad of cases aforementioned, this court is of the view that it cannot make a determination, that it was the intention of the testator to bequeath the disputed property, to one individual over the other, given the construction of the will. If this court were to find that either the claimants or the 1st defendant is or are to receive the benefit of the disputed property, it would have had to have engaged in speculation, or rewriting of the testator's will, and that is not the function of a court.

[64] Having regard to the facts before this court, regarding the fixed date claim form having been filed on the basis of seeking an order for a, '*A Declaration that*

pursuant to the last will and testament of Messiah Llewellyn, deceased, the Claimants hold an interest in situated at 80 Main Street, Ocho Rios and an Order that said defendants Louise Hilda Llewellyn, Loreen Llewellyn and Avril Reindollar provide a detailed account of the income derived from the estate of Messiah Llewellyn to the beneficiaries of the estate of Messiah Llewellyn,' it can indeed be appreciated that there is a difference in facts with the case at bar and the authorities specified above.

[65] There are cases which have provided much guidance and which bear some resemblance to the case at bar. There is in fact, a well-established doctrine that if one finds two repugnant provisions in a will, (as one finds here), and the same gift is given to two different people, the later disposition prevails. ***In Re Alexander's Will Trust*** *(op. cit),* Roxburgh J. at page 112 opined that:

> *'I have to recognise the force of that doctrine which is well established and of long standing. I have also to recognise its unsatisfactory practical operation in a case such as the present when it seems to me to be a reasonable supposition that though sub-cl 31 stands later in this will the testatrix may have reconsidered cl 19 at a later stage. I do not hold as a fact that she did.'*

[66] ***In Re Alexander's Will Trust*** (op. cit)*,* the testatrix by a clause of her will, bequeathed '*my five row diamond bracelet to a beneficiary and by a subsequent clause she bequeathed my diamond chain bracelet*' to another beneficiary. The first of these clauses had been amended in the will as originally drawn and the amendment had been initialled by the testatrix, so it was clear that the testatrix's mind was specifically directed at the execution of her will to that disposition. The testatrix, at the date of her will and at the time of her death, as for many years previously, possessed only one diamond bracelet containing eight rows of diamonds, which, according to extrinsic evidence, she generally referred to as 'my five row bracelet,' sometimes as, 'my chain bracelet' and sometimes as, 'my diamond bracelet.'

[67] Whilst in ***Sherratt v Bentley*** (op. cit), by his will, William Harrison, had bequeathed the sum of four hundred pounds (£400) to his executors. Said sum was bequeathed to other relatives and said sum of four hundred pounds (£400) bequeathed unto his loving wife Margaret Harrison, to dispose of the same in whatever way and in such manner, as she may think proper. The will contained the usual clauses authorising the executors to reimburse themselves, their reasonable costs and charges, and declaring that they should severally be answerable for their own wilful neglect or default only. The testator appointed his wife, Margaret Harrison, and his brother-in-law, William Sherratt, as executrix and executor. After the death of the testator, his widow, Margaret Harrison married the defendant Bentley, who survived her, and, upon her death, became entitled, by virtue of an appointment made in execution of a power reserved to her on her second marriage, to whatever interest she took under the will of Thomas Harrison. The issue was upon the construction of the will, and the material question was whether under the will, Margaret Harrison took the real and personal estate of the testator absolutely, or for life only, or whether, as was insisted on behalf of the testator's heir-at-law and next of kin, the will, or the greater part of it, was void for uncertainty.

[68] Though the cases are different in the gifts that were bequeathed, it can be argued that the one element that is consistent with all the cases, is that there was a gift that was bequeathed to more than one individual in the same will and it was intended for those individuals to benefit from said property. From the case law, it is clear that the court ought to be reluctant to render a gift devised in a will, void for uncertainty. In the circumstances underlying this claim, uncertainty pertains to who is to benefit from the disputed property, based on how the relevant provision in the deceased's will is written. To avoid this uncertainty, this court will have to examine the will itself in order to construe the testator's intention.

[69] There are legal authorities which specify that, where there are two provisions in a will, which are inconsistent with each other, the later provision will revoke the former provision, meaning that the provision further on in the testator's will, will

invalidate the former provision, which is closer to the beginning. In the given circumstances, what this would mean, if it were to be applied, is that, based on how the provision was written in the deceased's will, the gift of the disputed property to the 1st defendant, all for her and her six (6) children would be revoked by the testator's subsequent gift of the disputed property to his only son, Junior Messiah Llewellyn, exclusively.

[70] On the basis that the later disposition prevails, the disputed property would have gone solely to the deceased's son, Junior Messiah Llewellyn. Junior Messiah Llewellyn died prior to the issuance of the grant of probate of the testator's estate. As such, his disposition would be governed by the ***Intestates' Estates and Property Charges Act***. Junior Messiah Llewellyn died without any child or spouse and accordingly, the property would then go to his mother, the 1st defendant, Louise Hilda Llewellyn.

[71] It is this court's considered view that the application of such a rule would not, in fact, yield a result which is consistent with this court having properly construed the testator's intention. The court is inclined to concur with a well-known suggestion of James LJ in ***Boyes v Cook*** *(1880) 14 Ch D 53*, at page 56, which was also highlighted, in the case of ***Marley v Rawlings and another*** *[2015] AC 129,* paragraph 23 that:

> *'when interpreting a will, the court should "place [itself] in [the testator's] arm-chair", is consistent with the approach of interpretation by reference to the factual context.'*

[72] James LJ in **Boyes v Cook** (op. cit), has opined, also at page 56, that:

> *'You may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention.'*

[73] Furthermore, the Vice-Chancellor, Sir Shadwell in ***Vaughan v Marquis of Headfort*** *(1840) 10 Sim 639* at page 765 had postulated that:

> *'if possible every word in a will ought to have that meaning given to it which in common fairness of construction it is capable of receiving.'*

[74] This court, in putting itself in the testator's arm-chair, will seek to interpret what the testator had intended and ultimately, this court must interpret the words of the testator/testatrix, without rewriting his will. In ***Vaughan v Marquis of Headfort*** (op. cit), the testatrix, Margaret Vaughan made her will, dated the 7th of November 1836, and containing the following bequests, *'I leave two houses in Foley Place and Two Thousand Pounds (£2000) to the Honourable Lady Cockburn, Forty Thousand Pounds (£40,000) in the three per cent. Reduced annuities to the Marquis of Headfort and his children, to be secured for their use.'* The testatrix died eleven days after the date of her will. As at the time of her death, Lord Headfort had six (6) children, all of whom were still infants. The questions raised on behalf of the Marquis of Headfort and his children were, firstly, whether the legacy to the marquis and his children was specific or general and secondly, whether the marquis and his children took the *Forty Thousand Pounds* (£40,000) as joint-tenants, or whether the marquis was entitled to it for his life, with remainder to his children. In analysis of the questions raised, the Vice-Chancellor Sir Shadwell concluded at page 765 that:

> *'the words in that case are: '£40,000 in the three per cent. Reduced annuities to the Marquis of Headfort and his children.' If it stood there, the marquis and his children would be joint-tenants; but then it goes on: 'to be secured for their use.' Now it would be absurd to hold that those words apply to the marquis; as he might have taken his own share, and either secured it for himself or spent it. Those words therefore do not comprehend the marquis; but the plain meaning of them is that the fund is to be secured for the children from the dominion of their father; and, in my opinion, there is quite enough in this will to justify the Court in holding that the father is to*

take for his life, and his children after his decease; and that construction will let in any children of the marquis that may be born hereafter.'

[75] In considering the circumstances of the case, the court has not gathered from the language and reading the will as a whole and examination of the words in this case, that the testator had intended for the disputed property to be given solely to his son. What is obvious however, is that, the testator wanted his son to have a discernible interest in said property, which is by no means different from the 1st defendant, Louise Hilda Llewellyn and his six (6) children, to have a benefit in the disputed property. Given the inapplicability of the rule that one later provision prevails over the former, this court must then ask itself whether the uncertainty can be removed or reconciled, without rendering the will void for uncertainty.

[76] This court is of the view that the uncertainty can be reconciled, as the subsequent gift, is entirely reconcilable with the former gift. It has been established based on ***Charles v Barzey*** (op. cit), ***Sherratt v Bentley*** (op. cit) and ***In Re Alexander's Will Trust*** (op. cit) that where the same gift is given to two different persons in different parts of the same instrument, each may take a moiety (a share) as joint tenants, or tenants in common, or succession, according to the nature of the gifts.

[77] From the words of the will, it can be gleaned that the testator had intended for the 1st defendant, and her six (6) children, to benefit from the disputed property. Junior Messiah Llewellyn is one of the 1st defendant's six (6) children. So it can be presumed that the testator had intended to give each beneficiary an equal moiety (equal share) given that there was no expression excluding such intention.

[78] As established in, ***In Re Alexander's Will Trust*** (op. cit), the 1st defendant along with the children could have held the property as joint tenants or tenants in common. Further, in the case of ***Webbs v Wool*** *61 (1852) E.R. 343,* the following was stated by The Vice-Chancellor, Sir R. T. Kindersley:

'Now there is one rule of construction almost elementary which appears to me to apply to this case; viz., that if there are two clauses or sentences, or

two branches of one sentence in a will, capable of two different constructions, according to one of which the two clauses would be contradictory, but according to the other of which the two clauses would be in accordance with each other, the rule is to adopt that construction which reconciles the two, instead of that which makes them contradictory.

Now, here there are, not two sentences, but two parts of the same sentence; and if I put on the latter a construction which will have the effect of creating a trust for the benefit of the children, I shall make the two branches of the sentence contradictory; is there, then any construction which can be put on the last branch which will prevent a contradiction? I think there is, and that I may fairly put this construction on the latter branch of the clause, that it is not introduced for the purpose of creating any trust for the benefit of the wife and children, that is, a trust which the children could enforce, but merely for the purpose of declaring that, giving all his property to his wife for her own use and benefit, making her absolute mistress of it by the first branch of the clause, he means by the latter branch of it to indicate that he reposes in his wife full confidence that she will dispose of it for the benefit of herself and children, but without intending to impose on her any obligation which this Court could enforce.'

[79] Based on the established laws and the circumstances in the case at bar, it is best to adopt the construction that reconciles the uncertain provision. This court is satisfied, on a balance of probabilities, that the testator had intended for the 1st defendant, and her six (6) children, to each have a benefit in the disputed property. There is no evidence before this court to conclude otherwise. ***In Re Alexander's Will Trust*** (op. cit), there was the use of extrinsic evidence whereby the testator's personal maid, had sworn in her affidavit that she was fully familiar with all the personal jewellery owned by the testatrix during that period. The personal maid averred that she had seen and was familiar with the eight row diamond bracelet which was in question in that case. There having been no objection to the evidence given by the personal maid and there having been no assertion which conflicted

with what she stated regarding the bracelet, it was not a fact in issue and thus, was accepted by the court. Comparatively, in the case at bar it was stated in the response of the 1st defendant, executrix of the estate of Messiah Llewellyn, filed on October 18, 2017, that during the testator's lifetime, the deceased had always maintained to her, that the disputed property belonged to his son. This cannot be relied on, however, given that it is not an agreed fact and there therefore exists factual conflicts, as between the parties to this claim, with respect to that and other aspects of their respective evidence. This factual conflict was not tested in cross-examination and therefore, flowing from the decision in **Western Broadcasting Services Ltd v Seaga** [2007] 70 WIR 213, with this court not being in a position to assess the credibility of the respective witnesses on the averments contained in their respective affidavit evidence, this court cannot make a finding in respect of those factual conflicts. In that regard therefore, this court is only left to consider that the testator wanted his wife and children, which included his only son, to all have a benefit in the disputed property.

[80] The case at bar is a civil case and there is a burden of proof and standard proof that must be considered and the maxim the 'he who asserts must prove,' applies. It follows that, the parties who carry the legal burden, are the claimants, in relation to this claim. What this means, is that they have the, 'burden,' of proving their claim.

[81] According to ***Murphy on Evidence 11th ed., (2009) at p. 79, '****If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defence is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond mere denial (sometimes referred to as an 'affirmative defence') the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant's case*.'

[82] It is irrefutable that every party must prove each necessary element of his claim. The test is not whether the claimant's case is more probable than the defendant's case, but whether the claimant's case is more probably true than untrue. Therefore, the claimants' case is measured by reference to an objective standard of probability.

[83] The standard of proof in civil cases for the discharge of the legal burden of proof, is proof on the balance of probabilities. This means that the tribunal of fact must be able to say, on the whole of the evidence, that the case for the asserting party has been shown to be more probably true, than untrue. According to ***Murphy on Evidence*** (op. cit) at p. 111, *'if the probabilities are equal, i.e., the tribunal of fact is wholly undecided, the party bearing the burden of proof will fail.'*

[84] Therefore, it was for the claimants to have satisfied this court, by means of the evidence, on a balance of probabilities, that the interpretation which they have asserted as the one to be given to the relevant provision in the deceased's will, is the one which ought to be given to same, by this court, and also that since the death of the deceased they have not received any benefit which is derived from said estate. The 1st defendant has denied that latter - mentioned assertion and in her defence, posited that the property would have been left to her son, Junior Messiah Llewellyn, and that it is manifestly clear, based on the will, that his son was to receive that property. She maintained that the property belonged to their son and that over the deceased's lifetime, he himself had expressed those sentiments. No evidence has been provided to disprove same. The 1st claimant further asserted that she had expended approximately two million dollars ($2,000,000.00) on the property at 1 Newlyn Street, Ocho Rios in the parish of Saint Ann, to renovate same, as it was then, in a poor state of repair. The 1st claimant also asserted, that she had operated a meat shop and consequently the business failed, due to the actions of the 1st defendant. There was however, no evidence adduced, in an effort to prove those assertions. In fact, the 1st defendant has denied this in totality and has put forward her own assertions that the claimants were financially dependent on her and that she personally obliged and assisted

them, which is often - times to her own detriment and examples of such detriment were given, but were not proven. Again, none of those assertions were tested on cross-examination as could have been done, if application for same to be permitted by this court, had been made, pursuant to ***rule 30.1*** of the ***Civil Procedure Rules***.

[85] As a result of all of the above, it is this court's considered view that, the disputed property should be shared amongst the claimants and the defendants, which is equivalent to the testator's wife, that being the 1st defendant, Louise Hilda Llewellyn and the testator's six (6) children. Regarding Junior Messiah Llewellyn and Valerie Pearline Llewellyn, their benefit from the disputed property, would enure to the benefit of their estates. The deceased son's interest, based on the applicable provisions of the ***Intestates' Estates and Property Charges Act,*** would go to the mother, given that he had no spouse or children. It should also be noted that Valerie Pearline Llewellyn died intestate, without leaving a spouse. She however, had two children. Accordingly, her benefit should go to her two children, according to the provisions of the ***Intestates' Estates and Property Charges Act***.

[86] The court therefore finds that based on the construction of testator's will, the testator had intended for the 1st defendant and the four (4) children along with the two (2) deceased children's estates, to have a benefit in the disputed property.

[87] Given such a conclusion, the issue of whether or not there is a duty on the part of the defendants to render a detailed account of income earned from the disputed property, consequent upon the interpretation of the will, now arises. Since the death of the deceased, thirty-four (34) years has passed.

Claim for a detailed account of the income derived from the deceased's estate

[88] The claimants have requested an order, by an Amended Fixed Date Claim filed on October 22, 2018, that the defendants Louise Hilda Llewellyn, Loreen Llewellyn and Avril Reindollar provide a detailed account of the income derived from the disputed property to the beneficiaries of the estate of Messiah Llewellyn. According

to ***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.'*

[89] The case of ***Basil Louis Hugh Lambie (Representative of the Estate Leroy Lambie, deceased) v Marva Lambie (Administrator Ad Litem for the Estate of Max Lambie, deceased) et al*** *[2014] JMSC Civ 44* is rather instructive on this area. In fact, in that case, several cases on the issues of delay and laches, were considered by the presiding Judge. This court concluded that delay in and of itself, was not a bar to the obligation to provide an inventory and an account. In said case whilst making reference to the text-***Williams, Mortimer and Sunnucks on Executors, Administrators and Probate***, this court highlighted at paragraph 75, that:

> *'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.'*

[90] In ***Ritchie v Rees and Rees*** *(1822)162 ER 51*, Richard Wall died some time in the year 1777. In the month of November in that year, administration of the goods of the deceased (with the will annexed) was granted to Richard Rees, a creditor, upon the renunciation of Martha Wall, widow of the deceased, his sole executrix and universal legatee. Martha Wall survived her husband Richard Wall only a few weeks, and died intestate, leaving two children, a son John, and a daughter

Martha. John Wall died in the year 1815, having first made his will, and appointed his wife, Mabell Wall, his universal legatee, but no executor. Mabell Wall died in the year 1819, without having taken probate of her husband's will, and appointed Archibald Ritchie, her sole executor. Archibald Ritchie took probate of the will of Mabell Wall; and, subsequently, obtained letters of administration (with the will annexed) of the goods of John Wall; as also of the goods of Martha Wall, mother of John Wall, and universal legatee of the original testator. Martha Kell (formerly Wall), daughter of Richard and Martha Wall, and sister of John, was still living. In 1822, that is, approximately forty-five (45) years after the death of Richard Wall, 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.

[91] Sir John Nicholl in ***Ritchie v Rees and Rees*** (op. cit), at page 52 paragraphs 146-147, stated in his judgment, that:

> *'Now, although no statute or rule of positive law, with which I am acquainted, 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.'*

[92] ***Ritchie v Rees and Rees*** (op. cit), at page 52, paragraph 149, also made reference as to whether or not there is proof of a surplus to be administered and if there was a surplus, she (daughter of Richard and Martha Wall) would have been

entitled to a share and the remaining share to her brother. Further, given that the parties in the case had an interest in the effects, they were entitled to call for an inventory and accounts.

[93] In the ***Basil Louis Hugh Lambie Case*** (op. cit), it was stated that:

> *'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 attended 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*.'

[94] The case of ***A Higgins v Higgins*** *(1832) 162 ER 1435* also concerns a quite similar situation. A legatee brought suit for an inventory and account setting forth debts due to, and larger debts due from, the estate, but annexing no vouchers nor accounts, held sufficient after a lapse of seventeen (17) years. The executrix presented a declaration instead of an inventory. At page 1435, 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.'

[95] E. Brown J, in his judgement, in the ***Basil Louis Hugh Lambie Case*** had made some propositions and opined at paragraph 80, that:

> *'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.'*

[96] E. Brown J, in his judgement, suggested at paragraph 81, that:

> *'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.'*

[97] E. Brown J, also opined at paragraph 82 that:

> *'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.'

[98] E. Brown J, in ***Basil Louis Hugh Lambie Case*** (op. cit) also stated that:

'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.'

[99] 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.'

[100] The issue of delay most certainly arose in the case at bar. The claim was commenced in 2017, that is, thirty-one (31) years after the grant of probate was made to the 1st defendant. So, it is clear that there has been a considerable amount of delay in bringing this claim, as part of which, the claimants are seeking the relief

of an order of this court requiring the defendants to account for administration of the deceased's estate, up until now.

[101] Against this background, the question that is considered is whether or not there was culpable delay on the part of the claimants. E. Brown, J. in ***Basil Louis Hugh Lambie Case*** (op. cit), had expressed this very question in a more elaborate form whereby it can be referenced to this fact pattern as: Would it be practically unjust to order the defendant to furnish and verify accounts in the estate of Messiah Llewellyn, 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 a detailed account of income earned from the disputed property or by that conduct and neglect, have, though not waiving that remedy, the claimants put the defendant in a situation in which it would not be reasonable to place them, if the claimants were now to be allowed to assert the remedy? This question can be answered with a simple, 'yes'. Following my analysis, I am of the considered view that the court tends to exercise its discretion regarding the issue of granting an order for inventory and accounts of a deceased's estate. No cases have stated, that delay will bar such an application. The outcome of such an application though, will depend on the circumstances of each case.

[102] The most appropriate starting point is the first proposition taken from ***Ritchie v Rees and Rees***, (op. cit) where delay may operate as a bar, whether or not it is pleaded. In the instant case the question of delay was not fully considered more than the norm, given that the defendant was of the belief that the claimants had no interest in the disputed property, hence they did not find the need to explain their inactivity or provision of any information to the claimants. Further, the claimants, have not stated why they waited so long, given that the will was probated in 1986 and both claimants were adults at the time, who, if they were of the belief at the time that the benefit that was willed to them by the deceased was not forthcoming, they could have made a claim at that time, requesting similar orders as requested now. The claimants have not provided any evidence explaining the lengthy delay.

[103] It should be duly noted that even though the cases ***Ritchie v Rees and Rees*** (op. cit)***, Higgins v Higgins*** (op. cit) and ***Basil Louis Hugh Lambie Case*** (op. cit.) are distinguishable from the case at bar, the principles enunciated in those cases, are helpful.

[104] The income purportedly derived from the disputed property, was a point of dispute between the parties before the filing of this claim. This is supported by letter dated September 11, 2012 written by Murray & Tucker, Attorneys-at-law on the claimants' behalf, requesting an account in relation to the estate of the deceased to which no response was forthcoming. That letter was exhibited and marked as 'ALY-4' and attached to the affidavit of Ann Marie Llewellyn Young, which was filed on April 19, 2017. The claim for an order that the defendant be required to furnish and verify a detailed account of income earned from the disputed property, is in some measure based on the presumption of each parties' interest in the property. The claimants led evidence that the property was a part of the estate of deceased and it was solely owned by the deceased (presenting titles of all properties, specifically 80 Main Street, Ocho Rios that it is on a long term lease to Singer Sewing Machine Company and is endorsed on the Certificate of Title as Lease No. 732806). There are also eight other businesses on the said property. This is acceptable, but I will reiterate that there was no evidence presented, accounting for the lengthy delay in requesting the inventory and accounts.

[105] Taking the most favourable view of the lapse of time, the claimants would have neglected to call for a detailed account for at least thirty-one (31) years before filing this claim. In other words, assuming in the favour of the claimants that they were aware of their benefits for some length of time, but slept upon their right, should the order be granted? On the authority of ***Basil Louis Hugh Lambie Case*** (op. cit), good ground is to be shown to require an account after the passage of a period of thirty-one (31) years. Based on the affidavits and supporting documents filed, there is evidence to actually show that the claimants were in fact receiving monetary benefits from the 1st defendant, which goes to the section of the will, that speaks to benefit of the children. Further, after the letter was sent in 2012 to the

defendants, a claim was not filed until 2017, approximately five (5) years later. Clearly there was no sense of urgency. The claimants continued to sleep on their right.

[106] Given the length of time I am of the belief that it would be practically unjust to give a remedy, because of the claimants' conduct, given the undue delay, especially in the absence of there being any explanation for that delay. The delay is most material in the case at bar and in this case, it would most certainly be unreasonable to put the defendants in a situation, to account for so many years. There was awareness on the part of the claimants as to what were the deceased's assets, after the will was probated. Therefore, if at any stage thereafter, the claimants had wished to obtain from the 1st defendant an accounting as to any income gained from any of those assets, there was no reason why such accounting could not have been sought, much earlier. After a delay of so many years, a full and particular inventory and account cannot reasonably be expected or required. Delay in that regard has operated as a bar.

[107] It is also important to note that, in the case at bar, it was put forward by the claimants, that the 1st defendant had given to the 2nd and 3rd defendants, a power of attorney. A copy of the power of attorney was marked and exhibited as "ALY-1" and attached to the further, further affidavit evidence of the 1st claimant, filed on October 22, 2018. As a result of the power of attorney, the claimants had filed an amended fixed date claim form on October 22, 2018, to include the 2nd and 3rd defendants. This court is however, of the view that it would have been more appropriate to request for the 1st defendant to provide a detailed account of the income derived from the estate of Messiah Llewellyn, given that she was the one who had the duty to administer the deceased's estate. Nonetheless. The above stated laws and analysis in the circumstance, would still apply, whereby, it would be practically unjust and unreasonable to put the 1st defendant in a situation, to account for so many years.

[108] Furthermore, after a thorough examination of the power of attorney it was observed that no reference pertaining to the deceased's estate, was stated. In fact, it only spoke to the 1st defendant's estate and for the 2nd and 3rd defendants to act in relation to her estate, in all respects as she would have done. Therefore, the responsibility of administering the estate of the deceased remained vested in the 1st defendant, notwithstanding, her having granted, a power of attorney to the 2nd and 3rd defendant. In these circumstances the claim against them, cannot be maintained at all.

[109] As regards the costs of this claim since, it is that of the two primary reliefs sought in this claim, of the parties have been successful as to one or the other of same, I am of the considered opinion that each party should bear, his or her own costs.

[110] My orders as regards the claimant's amended fixed date claim form are therefore, now as follows:

1. It is declared that, pursuant to the last will and testament of Messiah Llewellyn, deceased, the claimants hold an interest in, the disputed property, situated at 80 Main Street, Ocho Rios and which is described as all that parcel of land part of Little Buckfield known as Rocky Ridge, Ocho Rios in the parish of Saint Ann containing by survey Two Roods Fifteen Perches and five-tenths of a Perch of the shape and dimensions and butting as appears by the plan thereof hereto annexed and being the land contained in the certificate of title registered at Volume 1084 Folio 669.

2. The relief sought in the claimants' said amended fixed date claim, regarding, an order that the defendants provide a detailed account of the income derived from the estate of Messiah Llewellyn, to the beneficiaries of the estate of Messiah Llewellyn, is denied.

Hon. K. Anderson, J.