

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHMT 2002/232

BETWEEN:

1. EMMANUELLA JN. PHILLIP
2. PATRICIA CALIXTE
3. THERESA MOORE
4. FRANCIS JN. PHILLIP
5. MARTINUS JN. PHILLIP
6. WINSTON JN. PHILLIP

Claimants

AND

MARTHA JN. PHILLIP

Defendant

CONSOLIDATED WITH
CLAIM NO. SLUHCV 1998/0413

BETWEEN:

1. MARTHA JN. PHILLIP
2. THERESA MOORE
3. FRANCIS JN. PHILLIP
4. EMMANUELLA JN. PHILLIP

Claimants

AND

MARTINUS JN. PHILLIP

Defendant

Appearances:

Kenneth Monplaisir QC and Charmaine Nathaniel for the Claimants in claim
2000/232

Peter Foster and Renee St Rose for Martha Jn Phillip

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2005: June, 24
July 14, 29

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Introduction

[1] **SHANKS J** These two consolidated claims arise from a bitter and tangled family dispute about a three storey wooden house in Soufriere. Martha Jn Phillip, the First Claimant in claim 1998/413 and the Defendant in claim 2000/232, claims that she is entitled to 100% of the property. The Claimants in claim 2000/232 (with the apparent exception of Martinus who gave evidence on Martha's behalf) say that she is only entitled to 1/16th of the property while her mother Emmanuella, the First Claimant, is entitled to a half share and her seven siblings (including the five other Claimants) are also entitled to 1/16th each.

Background facts

[2] The property was purchased by Emmanuella and her husband Charles in 1974. Charles died in 1976. By a designation and vesting deed dated 25 June 1995 Emmanuella as administratrix of Charles's succession vested his half share of the property in the names of their eight lawful children. The effect of that vesting was that Emmanuella held a half share and each of the children a 1/16th share. The Land Register, which had shown Charles and Emmanuella as each owning a half share of the property, was amended on 6 July 1995 to show Emmanuella, Theresa (the Third Claimant in claim 2000/232), Francis (the Fourth Claimant) and Martinus (the Fifth Claimant) as trustees for sale.

[3] There is a deed of sale dated 21 January 1997 which on its face records a sale of Emmanuella's half share to Martha for \$30,000. The deed had the effect that Martha became entitled to 9/16th of the property. It was registered with the Registrar of Lands

on 13 February 1997 and resulted in the Land Register being amended to show the trustees for sale as Theresa, Francis and Martinus (and not Emmanuella any longer). Emmanuella's evidence is that she never signed this deed of sale and that she never received \$30,000 for her half share and the Claimants in claim 2000/232 say the deed should be improbated.

[4] There is then a deed of sale dated April 1997 which has never been registered in any way whereby Emmanuella, Theresa, Francis and Joyce Jn Phillip (another sister but not a party to either claim) are named as trustees for sale of a half share of the property and sell it to Martha for \$20,000. The deed appears to be signed by Emmanuella, Patricia (the Second Claimant in claim 2000/232) as attorney for Theresa, and Francis. Martha says that this deed reflected an agreement that the other half of the property would be sold to her so that she would own the whole outright. The Claimants in claim 2000/232 (with the exception of Francis) deny that there was an agreement to sell Martha the other half share of the property and deny signing the draft deed or (in the case of Theresa) any power of attorney in favour of Patricia giving her authority to deal with the property. They ask that the deed be declared null and void.

[5] It is not disputed that following a visit to St Lucia in May 1997 Theresa sent Martha \$19,197 from England in September 1997 and that Martha has spent this sum. Theresa's case is that this money was sent to pay for the renovation of the property so that it could be used for a family business, that it was not spent for that purpose and that Martha should therefore repay it. Martha says (at paras 25 and 26 of her

statement) that the money was sent so that she could buy furniture for a house Theresa owned in Soufriere and that that is exactly what she used the money for.

[6] Claim 1998/413 was filed on 13 May 1998 and brought in the names of Martha, Theresa, Francis and Emmanuella against Martinus by originating summons supported by an affidavit sworn by Martha. The claim was that the Emmanuella, Theresa, Francis and Martinus had agreed as trustees for sale to sell the property (apparently as a whole) to Martha for \$20,000 and that Martinus, having agreed to the transaction, had neglected and refused to do his duty as trustee for sale and execute the April 1997 deed. The summons asked that Martinus be removed as a trustee and Joyce be substituted in his place. It appears that the summons was heard on 23 July 1998 in the absence of Martinus and an order made by an unnamed judge to the effect that the Registrar of the Court was authorised to execute the April 1997 deed on behalf of Martinus. In spite of that order the Registrar was never invited to sign the deed. The Claimants in claim 2000/232 say that Martha's affidavit was fraudulent in that she knew that there had been no such agreement and that the draft deed was not in fact signed as she had alleged and they seek a stay of the order of 23 July 1998.

[7] On 15 December 1999 Theresa, Francis and Emmanuella filed a summons in claim 1998/413 seeking a "revivor" of the matter and a stay of execution of the order of 23 July 1998 on the grounds that they did not know of the claim notwithstanding it was brought in their names, that there was no agreement to sell to Martha and they did not sign the draft deed, and that Martha was behaving fraudulently in relation to the property. The summons was supported by affidavits made by the three of them and by

one made by Martinus. That summons has never been heard but claim 1998/413 was ordered to be consolidated with claim 2000/232 by Charles J on 7 March 2002.

[8] Meanwhile on 21 September 1999 Joyce and Juliana (another sister who is not a party to either claim) executed a deed of sale whereby they sold $\frac{2}{9}$ ths of a one half share in the property to Martha for \$27,776. It appears that the deed is wrong to state that Joyce and Juliana are selling $\frac{2}{9}$ ths of one half of the property since they each held $\frac{1}{8}$ th of one half (or $\frac{1}{16}$ th) and it is clear that the intention was that they should sell the whole of their beneficial interest in the property (see the recitals to the deed). In any event the deed was registered at the Land Register as instrument 4141/99 which shows Martha as having $\frac{11}{16}$ ths of the property as a consequence of the transaction (ie that Joyce and Juliana had sold $\frac{2}{16}$ ths) and no issue has been taken about this. It is said, however, that the deed was made without the knowledge of the Claimants in case 2000/232 and pursuant to some kind of fraud and that it too should be improbated.

[9] Claim 2000/232 was filed on 10 March 2000. It has finally come on for trial in July 2005.

The issues

[10] The issues I must resolve are these:

- (1) whether the deed of sale dated 21 January 1997 should be improbated;
- (2) whether there was a binding agreement for the sale of the other half share in the property to Martha in 1997;

- (3) the effect of the order of 23 July 1998;
- (4) the basis for the payment of \$19,197 by Theresa to Martha and whether Martha should be ordered to repay it;
- (5) whether the deed of sale dated 21 September 1999 should be improbated.

Deed of Sale dated 21 January 1997

[11] The deed of sale states that it was executed before Allan Louisy as notary and it appears perfectly regular on its face. Martha's evidence is that she and her mother signed the deed in Mr Louisy's presence at her mother's house in Soufriere. Joyce's evidence was that she remembered the occasion when the deed was signed and that Mr Louisy and Martha were in the room with the mother and she (Joyce) was hovering in the door way as her mother was signing.

[12] The mother's evidence is that she never signed the deed and never intended to transfer her share in the property to Martha and that the first she heard of the deed was in December 1999 when she learnt about claim 413/1998. She denied knowing or having met Mr Louisy though when pressed she admitted she had heard of him. The mother was born in 1922 and it is not disputed that she has suffered some strokes and that in January 1997 she was recuperating from a below knee amputation of the left leg carried out at St Jude hospital on 27 November 1996. There is no evidence however that she was incapable of signing her name on 21 January 1997.

[13] Since the deed of sale appears regular on its face on general principles the burden of proof would clearly be on the mother to show that she did not execute it and, since her

case amounts to an allegation of forgery against Martha, compelling proof would be required to satisfy that burden. Mr Foster for Martha also referred in his closing written submissions to Arts 173 to 189 of the Code of Civil Procedure and maintained that the requirements of the Code as to a claim for improbation had not been met. This point may be valid but it was not developed in great detail and was not raised until after the trial. In any event, I do not think the mother has come close to satisfying the burden of proof lying on her. Indeed, having seen her and Martha give evidence, I am quite satisfied that she did sign the document in front of Mr Louisy as it records and that she is deliberately misleading the court when she now denies it.

[14] The deed records that the sale of the mother's half share in the property was made in consideration of the sum of \$30,000 paid before execution. Martha's witness statement at para 18 mentioned three payments totalling only \$10,000 and Martha was cross-examined at length about what payments she had in fact made. She was somewhat bemused by this cross-examination and I think justifiably so since her case was that her mother was really making a gift of the half share in recognition of the fact that she had helped her out in relation to the amputation and its aftermath. I do not think that the fact that \$30,000 in cash was not paid for the half share is of any significance. I accept Martha's evidence about the half share really being a gift and that the deed of sale was prepared by Mr. Louisy on the instructions of the mother. In any event my understanding is that having signed the deed expressly acknowledging receipt of a payment of \$30,000 the mother is estopped from denying that it was made.

[15] In paras 16 to 19 of his written submissions dated 15 November 2004 Mr Monplaisir QC for the Claimants in case 2000/232 also raised a substantial case that the deed

dated 21 January 1997 may have been obtained by undue influence exerted by Martha over her mother. This case, however, was not pleaded in the statement of claim (as it undoubtedly should have been). I will not therefore consider it further save to say that, given the conclusions I have reached on the evidence, I doubt that any such case would have succeeded.

[16] In the event I reject the claim that the deed dated 21 January 1997 should be improbated or that any change should be made in this respect to the Land Register.

Agreement on sale of other half of property

[17] The other half share in the property was owned in equal proportions by Theresa, Patricia, Francis, Martinus, Winston, Joyce, Juliana and Martha. It is Martha's case that during the early part of 1997 it was agreed that this share would be sold to her so that she would own the whole property outright (see her witness statement para 29). It is axiomatic that such an agreement (ie to sell *a share* in the property) could only be made by or on behalf of the proprietors in common of the relevant share and not by trustees for sale who have power to sell the legal title to the whole property and then hold the proceeds of sale on trust for the proprietors in common but no power to sell the underlying shares.

[18] Francis gave evidence (on which he was not challenged in cross-examination) that he agreed to sell the half share of the property to Martha and that he spoke to Martinus and Winston on the telephone and they also agreed (see para 2 of his statement: he gave his evidence at the outset of the case out of order because he had to return to the

US Virgin Islands urgently). I accept that evidence and accordingly reject Martinus's evidence that he never promised to sell any land to Martha.

[19] Martha's evidence is that her mother spoke to Theresa in England and that Theresa agreed the proposal and that consequently she (Martha) spoke to Theresa and Theresa asked her to have documents prepared to allow for a transfer of the half share. This led to the deed dated April 1997 which was also prepared by Mr Louisy, which purported to effect the sale of the half share by trustees for sale. Notwithstanding their denials I am quite satisfied that that deed was signed by Patricia pursuant to a power of attorney granted to her by Theresa dated 17 March 1997: these documents speak for themselves and the answers given in cross-examination about them by these two ladies were thoroughly unconvincing. I therefore infer that both Patricia and Theresa agreed to sell their respective shares in the property to Martha before Patricia signed the deed.

[20] There was no suggestion that Joyce and Juliana did not agree that the half share should be sold to Martha during 1997. I am therefore satisfied that all Martha's seven siblings who were co-owners of the father's half share did consent to the sale of their respective parts of that half share to her.

[21] However, there is no clear evidence as to agreement on the all important matter of price. There was no suggestion that Francis, Martinus, Winston, Joyce or Juliana ever agreed on any particular price. The deed prepared by Mr Louisy which was signed by Patricia on behalf of Theresa records a price of \$20,000 for the entire half share. However, Martha stated that she obtained a valuation of the property at a later stage at

the instigation of Theresa (it is dated 2 June 1997 and gives a total value of \$228,440) and that Theresa wrote on a piece of paper (produced by Martha at p29 of the bundle) the amount that each sibling was entitled to on the basis of that valuation and that she (Martha) was willing to pay those amounts.

[22] Given this lack of clarity on the terms of the sale I do not think that it would have been open to the court, even if Martha had been asking for it, to have granted an order for specific performance against the other co-owners requiring them to transfer their shares to her. In fact Martha has never sought such an order, no doubt for good reason. Instead Mr Foster seeks to rely on the deed prepared by Mr Louisy and the order Martha has already obtained enabling the Registrar of the Court to execute the deed on behalf of Martinus.

The order of 23 July 1998

[23] The application in case 1998/413 was brought in the names of Martha, Theresa, Francis and Emmanuella. Theresa and Emmanuella have sworn affidavits to the effect that they never gave authority for the application and their evidence on the point was not contradicted or challenged in cross-examination. Martinus swore an affidavit saying that, although he was served with the application, following a conversation with Martha he believed that she had discontinued. This evidence was also not challenged. The order was undoubtedly made in the absence of Martinus (it so records) and the order does not state which judge made it.

[24] I have jurisdiction to review an order made by the court in the absence of one of the parties if there is some explanation for that absence and it might have made a

difference to the outcome. In this case, taking account of all the circumstances I mention above, I think I should accede to the application that I review the order.

[25] On reviewing the order of 23 July 1998 (which authorises the Registrar to execute the deed of April 1997 on behalf of Martinus) I am satisfied that the whole claim was misconceived and that the order should be set aside and the originating summons in case 1998/413 dismissed for the following reasons:

- (1) As I have said, trustees for sale cannot sell *shares in* a property owned by proprietors in common: they can only sell the legal title to the whole property and then hold the proceeds of sale on trust for the proprietors in common.
- (2) A related point is that the complaint against Martinus was not really that he was refusing to act as a trustee but that he was refusing to give effect to an existing agreement made by him and the other proprietors in common in their capacities as such;
- (3) In any event the registered trustees for sale in April 1997 were Theresa, Francis and Martinus. As I understand it Juliana should also have been named as a trustee for sale under section 62(2) of the Land Registration Act 1984 since her name appears next in the list in para 2 of the designation and vesting deed executed by Emmanuella dated 25 June 1995. The deed dated April 1997 should not therefore have named Emmanuella or Joyce as trustees for sale but should have included both Martinus and Juliana with Theresa and Francis.
- (4) The deed recorded a consideration said to have been paid of \$20,000. It is clear that that consideration cannot have been paid and would

need to be paid to the trustees (including the Registrar). More importantly, as I have already said above in paras 21 it is not clear that the parties ever agreed to a price of \$20,000 and by the time the application was made Martha says she was willing to pay the amounts set out by Theresa on the handwritten sheet at p29 of the bundle, so that the deed the Registrar would be executing would certainly not reflect the true agreement of the parties in relation to the price.

The payment of \$19,197

[26] I have set out the rival contentions on this matter at para 5 above. Apart from the evidence of the two ladies concerned there was nothing to indicate where the truth might lie on the issue. Theresa's evidence on the point was very short and vague and, although Martha's evidence was not entirely satisfactory, in general I preferred it to that of Theresa. Further I noted that while Martha's case on the issue was put to Theresa, Theresa's was not put to Martha for some reason. I therefore reject Theresa's claim for re-imbusement of the \$19,197.

The deed of sale dated 21 September 1999

[27] There was no evidence before the court of any kind of fraud in relation to this deed of sale. Joyce gave evidence on behalf of Martha and it was not suggested to her that she did not intend to transfer her share in the property to her sister. Juliana also gave evidence on behalf of Martha to the effect that she was the one who offered her share to Martha and that she received \$20,000 odd for it. This allegation of fraud ought not to have been pleaded or pursued.

[28] The point about lack of consent of the trustees and the Claimants in case 2000/232 is also misconceived. Section 63(2) of the Land Registration Act 1984 prevents a proprietor in common dealing with his or her share without the consent of the other proprietors only if the transfer is to someone who is not a proprietor in common (ie to an outsider). In this case, Joyce and Juliana were proprietors in common with Martha. It was open to them to transfer their shares to her without the consent of the other co-owners.

Result

[29] Unless persuaded otherwise I would propose to make a declaration to the effect the property is held on trust for sale with the beneficial shares being as follows: Theresa 1/16th, Francis 1/16th, Martinus 1/16th, Winston 1/16th, Martha 11/16ths and Patricia 1/16th. The trustees for sale ought to be registered as Theresa, Francis, Martinus and Winston but in any event I would propose to make an order for sale of the property so that the parties can realize their assets as soon as possible. Save for that declaration and order I will dismiss all the claims in both cases and set aside the order of 23 July 1998. I will also hear the parties on costs.

Murray Shanks
HIGH COURT JUDGE (Ag)