

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2006/0376

BETWEEN:

AUSTIN MARTIN, Executor of the Estate of MARY
EDITH DOREEN GRASON, deceased suing herein
by his Attorney WINSTON DERRICK

Claimant/Respondent

And

THE ATTORNEY GENERAL OF ANTIGUA
AND BARBUDA

Defendant/Applicant

Appearances:

Mr. Alfred James for the Claimant/Respondent
Mr. Justin Simon QC, Attorney General for the Defendant/Applicant

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2007: June 21st
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DECISION

[1] **Blenman, J:** This is an application by the Attorney General to strike out a claim.

Background

[2] In the substantive claim, Mr. Austin Martin, suing in his capacity as the executor of the Estate of Mary Edith Doreen Grason, through his attorney Mr. Winston Derrick, alleges that certain lands were owned by Mr. Francis John Goodwin deceased (Mr. Goodwin) namely; Plantation "Gobles" or the Mount situate in the Parish of Saint Phillip in Antigua and Barbuda; Plantation "Elms Creek" situate in the Parish of Saint Phillip in Antigua and Barbuda Plantation Gaynors situate in the Parish of Saint Phillip in Antigua and Barbuda and Plantation or Estate known as "the Grange" situate in the Parish of Saint Phillip in Antigua and Barbuda (the property).

[3] Mr. Martin contends that Mr. Goodwin sold the property to Antigua Syndicate Estates Limited (the company) and the company had mortgaged the property to Mr. Goodwin in order to secure the payment of the purchase price. The mortgage was not effectual since the company failed to pay the purchase price of the property or to comply with the covenants of the mortgage. Accordingly, Mr. Martin alleges that at the date of Mr. Goodwin's death, on 26th July 1966, Mr. Goodwin was seized of the property. Mr. Martin says that Mr. Goodwin, by virtue of his will executed on 27th November 1964, had devised the property to Mary Edith Doreen Grason (Ms. Grason or Mary Grason). The probate of Mr. Goodwin's will was granted on the 8th February 1967.

[4] Ms. Grason died on September 16, 1996 domiciled in England and Wales and (prior to her death) she had executed a will, probate of which was granted to Mr. Martin by the High Court of Justice in England and Wales on 30th October 1996. It is common ground that the will was resealed in Antigua and Barbuda. Ms. Grason's will does not deal with any property which is allegedly situated in Antigua and Barbuda; also the will does not contain a residuary clause.

[5] Mr. Martin further contends that in 1969, the Government of Antigua and Barbuda, by virtue of the Lands of Antigua and Barbuda Sugar Factory Limited and the Antigua Syndicate Estates Limited (Vesting) Act, enacted on 30th December 1969, Cap 240 Laws of Antigua and Barbuda, wrongfully purported to vest the property in the Crown. He contends that the property was not owned by Antigua Syndicate Estates Limited (the company) and therefore the Crown could not have lawfully acquired the property from the company. Having purported to vest the property in the Crown, Mr. Martin complains that the Government of Antigua has unlawfully sold or disposed of part of the property and is therefore liable to compensate Ms. Grason's estate. Accordingly, Mr. Martin has filed a Fixed Date Claim on behalf of the Estate of Mary Grason and seeks a number of declarations including the following:

- (a) That the property belongs to the Estate of Mary Edith Doreen Grason;
- (b) That none of the property is lawfully the subject of or was vested in the Crown in right of the Government of Antigua and Barbuda;

- (c) That the vesting of the property in the Crown was ineffectual and without legal effect;
- (d) That the Claimant as representing the Estate of Mary Edith Doreen Grason is entitled to hold, retain and enjoy possession of the property.
- (e) Alternatively, an order for compensation.

[6] The Attorney General filed an application to have Mr. Martin's claim struck out on the following grounds: (a) Mr. Martin has no locus standi to institute the proceedings since he was granted probate and administration in England and Wales of Mrs. Grason's estate, (b) the claim allegedly relates to real property situate in Antigua and Barbuda which was not disposed of in Ms. Grason's will either by way of a devise or through a residuary clause and (c) Mr. Martin has commenced his claim by way of a Fixed Date Claim in breach of Part 8.1 of CPR 2000.

[7] Mr. Martin, in opposition to the Attorney General's application, maintains that he is lawfully authorized to institute the proceedings and that he has utilized the correct procedure namely Fixed Date Claim in instituting the proceedings. He vigorously opposes the application to have his claim struck out and further contends that in a previous suit in relation to the same issues he had filed a Claim Form and at case management the Master had declined jurisdiction on the basis that he had utilized the incorrect form. Mr. Martin therefore says that it would be unjust in those circumstances for the Court to now direct him to file a Claim Form (when he had done so previously).

[8] The issues that arise for the Court's determination are as follows:

- (a) Whether Mr. Martin is authorized to institute the present proceedings;
- (b) Whether Mr. Martin has utilized the correct procedure in moving the Court; alternatively
- (c) Whether the Court should strike out Mr. Martin's application.

Evidence

- [9] Mr. Martin Camacho, Crown Solicitor (Mr. Camacho) deposed to an affidavit in support of the application to strike out the claim. Mr. Winston Derrick in his capacity as attorney for Mr. Martin deposed to an affidavit in opposition to the application to strike. Both parties exhibited various documents to their affidavits.

Evidence on behalf of the Attorney General

- [10] Mr. Camacho stated as follows:-

"That Mary Edith Doreen Grason died on September 16, 1996 domiciled in England and Wales and at the date of her death was not registered as the proprietor of any lands in Antigua and Barbuda.

That Austin Martin of 35 Tower Road, Orpington, Kent, England the Claimant herein was granted probate of the will of Edith Doreen Grason made on January 10, 1987 by the High Court of Justice in England and Wales.

That the said will of Estate Doreen Grason contains no bequest or devise in respect of any property in Antigua and Barbuda and contains no residuary clause.

The subject matter of the claim is real property in Antigua referred to as "Gaynors Estate". The lands identified by the Claimant as "Gaynors Estate" is registered under the Registered Land Act Cap. 374 in the Crown and has been so registered since February 28, 1978.

That in absence of "Gaynors Estate" being devised by Mary Edith Doreen Grason and in the absence of any residuary clause in the said will, any claim in respect of that property by the executor of her will can only arise as an intestate claim in respect of property in Antigua and Barbuda.

That I am advised and verily believe that as the executor of Mary Edith Doreen Grason's will and the Court appointed administrator of property in England and Wales, the Claimant has no legal authority or right to institute proceedings in respect of property in Antigua and Barbuda."

Evidence on behalf of Mr. Martin

- [11] Mr. Winston Derrick stated as follows:

"I am the Attorney for the Claimant who is the Executor of the estate of Mary Edith Grason, the deceased, who died on the 16th September 1996. The deceased inherited the residuary estate of Francis John Goodwin

who died on the 26th July 1966 by virtue of his will executed on the 27th November 1964 and probate of which was granted on 8th February 1967 by the Supreme Court of the Windward Islands and Leeward Islands.

The Claimant as the lawful executor of the will of Mary Edith Doreen Grason, deceased, is entitled to bring suit in respect of all of her estate both by virtue of the grant of probate and of the will itself probate of which was lawfully granted by the Court in England and Wales and was duly resealed in Antigua and Barbuda. Further I am advised and verily believe that in accordance with the rules of Private International Law applicable in Antigua and Barbuda the Court of Antigua and Barbuda will recognize the grant of probate in England and Wales as establishing the title and appointment of the Claimant as Executor.

Mr. Martin duly appointed executor of the estate of Mary Edith Doreen Grason is the lawful representative of her entire estate and irrespective of the property comprised in that estate or the manner of its distribution and administration in accordance with law.

I am advised and verily believe that the heirs of Mary Edith Doreen Grason are entitled to all her estate which fell into intestacy in the absence of a residuary clause in her will and the executor of her will is entitled to deal with and distribute the part or portion of the estate falling into intestacy in accordance with the law thereto appertaining. Mr. Martin claim as executor of the will of Mary Edith Doreen Grason is in no way affected by the absence of a residuary clause in her will. Gaynor's Estates fell into the residue of the estate of Francis John Goodwin because the purchaser from him repudiated the agreement of purchase and sale as evidenced by the conveyance and mortgage mentioned and referred in the pleadings herein and the fact of non-payment.

This action was initially instituted against the Attorney General of Antigua and Barbuda on March 24th 2006 in Claim No. 0163 of 2006. The Attorney General entered and filed its defence on May 24th 2006 to which Mr. Martin made its reply dated and filed on June 8th 2006. At Case Management on 12th July 2006 the Honourable Master Cheryl Mathurin ordered that this matter should proceed in accordance with Part 8 of CPR 2000. Ground 3 of the Attorney General's application and paragraph 10 of its Affidavit in Support should be rejected since this Court has no authority to overrule the order made by the Honourable Master.

Law

[12] I find it convenient, at this juncture, to refer to one of the relevant Acts namely - the Intestates Estate Act Cap 225 (Intestates Act).

In Section 2 of the Intestates Act "residuary estate" is defined to mean:

“every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate, after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable thereout, which (otherwise than in right of a power of appointment) he could, if of full age and capacity, have disposed of by his will.”

Section 7 of the Intestates Act provides:

“Where any person dies leaving a will effectively disposing of part of his property, this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications-

(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons;

(b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.”

[13] The other statute, that is relevant to the case at bar, is the Probates (Resealing) Act Cap 344 of the Laws of Antigua and Barbuda. (Probate Resealing Act).

Section 2 of the Probate resealing Act provides:-

In this Act –

“Court of Probate” means any Court or authority, by whatever name designated, having jurisdiction in matters of probate;

“probate” and “letters of administration” include confirmation in Scotland, and any instrument having in any other country the same effect which under English law is given to probate and letters of administration respectively;

“Stamp duty” includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted.”

Section 3 of the Probates Resealing Act states:

“Where a Court of Probate in any Commonwealth Country or such other country as Cabinet may approve, has, either before or after the passing of this Act, granted probate or letters of administration in respect of the

estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that Court, and thereupon shall be of like force and effect, and have the same operation in Antigua and Barbuda as if granted by that Court."

[14] Also of some importance is the Real Representative Act Chapter 368 of the Laws of Antigua and Barbuda (The Real Representative Act).

Section 2 of the Real Representative Act states:-

"2(1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment as if it were real estate vested in him.

(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4) This section applies only in case of death after commencement of this Act."

Attorney General's Submissions

[15] The Learned Attorney General Mr. Justin Simon QC submitted that Mr. Martin's purported authority to commence this action is based on the probated will of Mary Edith Grason who died domiciled in England and Wales and whose will names him as one of the executors. It is important to note that the will speaks only to property in England and does not contain a residuary clause. The act of resealing the probate in Antigua and Barbuda pursuant to the Probates (Resealing) Act Cap 344 does not give to the executor any more powers than he already has. In so far as an executor's power is limited to that given under the will, Mr. Martin has absolutely no authority over any property (real or personal) in Antigua and Barbuda whether by way of specific devise or by way of general power under a residuary clause.

- [16] The Learned Attorney General Mr. Simon QC, next said that it cannot be denied that Mary Edith Grason died intestate in respect of any property in Antigua and Barbuda which may have formed part of her estate. The term "intestate" is defined in the Intestates Estates Act Cap. 225 as including "a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate". The Act provides the manner in which the estate of an intestate is to be distributed and expressly provides in section 7 that "where any person dies leaving a will effectively disposing of part of his property, this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to" further modifications listed in the Act.
- [17] Mr. Simon QC further submitted that Mr. Martin must first obtain Letters of Administration in Antigua and Barbuda in respect of the property being claimed and of which Mary Grason died intestate, in order to have the required locus standi to institute this action. The deceased's will confined as it is to property only in England, cannot extend the executor's authority to Antigua and Barbuda. The Learned Attorney General said that it is passing strange that Mr. Martin's affidavit states that the deceased Mary Edith Grason inherited the residuary estate of her father Francis Goodwin whose will was probated in February 1967, and yet made no claim to the lands now being claimed up to her death in September 1996 nor does she in her will acknowledge any interest in the lands. But this, the Learned Attorney General submitted, goes to the substance of the legal action, and will be dealt with at the appropriate time.
- [18] In addition, the Learned Attorney General Mr. Simon QC stated that Part 8 of CPR 2000 sets out the procedure for starting proceedings. Fixed Date Claim Forms are to be used in four stated circumstances, and except for these, a General Claim Form must be used. The main difference is that a first hearing date is fixed upon the issue of a Fixed Date Claim in order to allow for directions by the Court as to the further proceedings in the matter. The substantive action does not arise out of a hire purchase or credit sale agreement; it is not required by any rule or practice direction, and it is not legislated to commence by originating summons or motion. Does this action therefore constitute proceedings for possession of land to justify a Fixed Date Claim Form? Mr. Martin seeks a

declaration that the lands are “the property of the estate of Mary Edith Doreen Grason deceased”; a further declaration “that none of the property is lawfully the subject of or was vested in the Crown”, “that the purported vesting in the Crown of the property was ineffectual and without legal effect”: and a further declaration that “Ms. Grason remains the owner of the part or portion of the property sold or disposed of to third parties by the Crown”. Implicit in the remedies sought is the acknowledgement that the Crown has exercised ownership rights, and is defacto, if not de jure, the owner of the lands. Mr. Simon QC next argued that the Order on Case Management in the earlier filed action was not declaratory. Clearly, Mr. Martin acquiesced in the decision of the Master to decline jurisdiction by seeking and obtaining leave to withdraw his claim. And Part 8 of CPR 2000 covers all manner and form for commencing proceedings. There is no specific direction emanating from the Master as to how Mr. Martin should commence these proceedings. He chose to submit rather than challenge or subsequently appeal. Accordingly, Mr. Martin has chosen the incorrect procedure to institute the proceedings and the Court should strike out his claim.

Mr. Alfred James’ Submissions

[19] Learned Counsel, Mr. Alfred James submitted that Mr. Martin’s authority is derived from his appointment as executor under the will of Mary Edith Grason, deceased. The appointment as executor makes Mr. Martin the legal personal representative of the estate of the deceased which comprises real and personal property falling to the estate. An executor’s power, as legal personal representative, is limited by the terms of the will in respect of property the testator has disposed of by the will. If the will leaves property of the testator undisposed of such property must be disposed of or distributed by the legal personal representative in accordance with the law of intestacy. The legal personal representative represents the whole estate of a deceased person. He is appointed either by will or by a grant of letters of administration where the deceased died intestate. A person dies intestate where he made no will. A person does not die intestate if there is a will. If there is a will but no executor is appointed or if the one appointed is dead or cannot act as executor for some reason the Court may grant letters of administration with the will annexed. The power of an executor of the estate of a deceased person derives from his

appointment as executor by the will. He becomes executor of the whole estate unless the will expressly appoints him executor of a part.

[20] Next, Learned Counsel Mr. James submitted that an executor appointed with respect to a part of an estate can deal only with that part; if his appointment is not limited he is a general executor of the whole estate. An executor of an estate can become responsible for distributing a part of it which fell into intestacy, as is alleged in this case. Ms. Grason had no residuary legatee or devisee named in her will. Her residuary estate fell into intestacy and has to be distributed or dealt with by her executor as such. There is no authority in English law for the grant of letters of administration to part of an estate where the testator died leaving a will and appointed an executor of the estate, the executor being alive and ready to act as executor. Mr. James, Learned Counsel therefore said that the Attorney General's submissions assume that a general executor has no power over such part of the estate as falls into intestacy. The Attorney General cites no authority for this proposition and there is none. Whatever power an executor has is recognized by the resealing of the English probate because of section 3 of the Probates (Resealing) Act Cap. 344 which causes the probate to be recognized in Antigua and Barbuda.

[21] Learned Counsel, Mr. James further submitted that the act of resealing recognized the will and the appointment of the executor which the will made. Further the executor who was granted probate in England is by the act of resealing recognized by the law of Antigua and Barbuda. By the terms of the will of Mary Edith Grason two persons were named as executors, generally. Their appointment as executors carried no words limiting their power as to time or property. They were appointed executors and in further provisions they were given directions as to the distribution of certain property. The will which was evidently home made did not name a residuary legatee or devisee which resulted in property not specifically devised or bequeathed falling into intestacy for distribution in accordance with the law of intestacy. Mr. James said that the residuary part of the estate which the deceased Mary Grason held was in Antigua and Barbuda, and obtained by her inheritance from her deceased father Francis John Goodwin. In Antigua and Barbuda the distribution of property falling into intestacy is regulated by the Intestates Estates Act, Chapter 225.

The contention that the executor's power is limited by Mary Edith Grason's will is not correct. As to the method of limiting an executor's power over property or over a period of time. See: **Parry and Clark on the Law of Succession, 8th ed. Pages 134-5; Phillips Probate Practice 6th ed. pages. 159-160.** On the testator's death the real and personal estate of the deceased vests in the executor appointed by the testator in his will. See: **Woolley v Clark (1822) 5b & Ald 744; Chetty v Chetty (1916) 1AC 603, 608** (as to personality). As to real property it vests under the Real Representative Act, Chapter 368 of the Laws of Antigua and Barbuda.

[22] Mr. James Learned Counsel, next, argued that the Attorney General's submission ignores the distinction between the vesting of the estate in the executor who is the personal representative and the manner in which the part of the estate which was not subject to the naming of a residuary legatee by the will is to be dealt with. Since it was undisposed of by the will it vests, with all other real property belonging to the estate, in Mr. Martin as executor to be distributed by him in accordance with the intestacy law of Antigua and Barbuda. Since the real property in Antigua and Barbuda was vested in the testatrix Mary Edith Grason, at death her personal representative, in whom it vests by statute, is entitled to claim it and to take proceedings to recover it as a general executor. As general executor and statutory trustee he must then deal with the part of the estate which fell into intestacy.

[23] Further, Mr. James said that there could be no dispute that Mary Edith Grason did die partially intestate because she had not by her will disposed of property in Antigua and Barbuda, which her executor claims is vested in him as her personal representative. The Intestates Estates Act, Chapter 225 assumes that there may be a will which leaves a part of the estate undisposed of while effectively disposing of other property as occurred in this case. It provides what the personal representative is to do in respect of the part of the estate not disposed of by will. Section 7 (b) of the Intestates Estates Act provides as follows:

"The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this

Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.”

Mr. James said that it is clear that Section 7(b) provides that the personal representative shall be a trustee under the Act in respect of the undisposed of property. This makes the executor a trustee of it with all the rights of a trustee who must deal with it in accordance with the entitlements under the Intestate Estates Act. On the question of the personal representative being statutory trustee of the part of the estate undisposed of by will Mr. James referred the Court to **Theobald on Wills, 14th ed. Page 784**. He said that the statutory provisions deal with a case where a will leaves a part of the estate undisposed of, as happened in the case at bar.

[24] Mr. James further said that for the purposes of the Intestates Estate Act the expression “intestate” includes a person who leaves a will but dies intestate as to some part of his property. The general understanding is that a person dies intestate where he does not make a will at all. It is only for the interpretation of the Act that “intestate” is defined differently. Further, Mr. James submitted that the distribution by the executor as personal representative, in respect of the undisposed of estate, of which he is a statutory trustee must follow the statutory distribution provided for in section 4 of the Intestates Estates Act. Ms. Grason had blood relations. She refers to the two executors she named in the will as her sons-in-law. Her daughters would have been entitled on intestacy if she had no husband. The distribution of the intestate’s estate by the personal representative is not a matter raised on this application and Mr. Martin is not required to deal with this. Learned Counsel Mr. James further stated that in so far as Ms. Grason was the residuary legatee or devisee in relation to the estate of her father Francis John Goodwin, whose will was probated in 1967, she would have been entitled to claim whatever part of her father’s estate that fell into residue. Her personal representative is entitled to do the same. Mr. James said that so far the Attorney General has put in no defence to the claim and time has run out, no matter involving the obligation of Mr. Martin as personal representative in relation to the undisposed of part of the estate of Mary Edith Grason is before the Court.

[25] On the issue of the procedure utilized, Mr. James stated that the present proceedings replace the other proceedings to which the Master has objected as a matter of procedure, and ruled that the proceedings must take the present form. The Master rejected the procedure previously used by Mr. Martin to bring the claim. The Attorney General raised no objection to what the Master said when a different Claim Form was used and she declined jurisdiction in favour of the one now being used. The Attorney General, in the premises cannot complain. Mr. Martin was not obliged to appeal. Both parties were entitled to appeal if they wished. Mr. James said that the Master declined jurisdiction because she considered that a different Claim Form should have been used. Both parties accepted her decision. Mr. Martin used another form. It was open to the Attorney General to appeal the declining of jurisdiction by the Master. The Attorney General did not do so and cannot complain because Mr. Martin did not. In the result both parties accepted the ruling of the Master to decline jurisdiction because of the Claim Form which was used on that occasion. Mr. James further submitted that the Court ought properly not to strike out the claim.

Further Submissions by Attorney General

[26] The Learned Attorney General further stated that Letters of Administration of the estate of a deceased person are granted where the deceased died wholly intestate. The grant is usually required for the purpose of realizing and administering the estate of the deceased in the United Kingdom, but a grant may be made where the deceased left no estate, where it is for some purpose required to constitute a personal representative of the deceased eg. to enable legal proceedings in connection with the estate to be commenced or defended. The general rule applicable to the Grant of Letters of Administration is that where possible administration is granted to one or more of the persons taking a beneficial interest in the estate of the deceased as enumerated in section 4(1) of the Intestates Estates, Act Cap 225.

[27] Section 49 (a) and (b) of the Administration of Estates Act (U.K) is identical to section 7(a) and (b) of an Intestates Estates Act Cap 225. The Learned Attorney General therefore said that he conceded that the executor of a will which has been probated becomes the

personal representative of the estate in respect of that part of the deceased's property not so disposed of (the partial intestacy) and as such can institute legal action in the name of the estate for title to property claimed or alleged to belong to the deceased. He said that subject to the Court's ruling, the Attorney General is prepared to file and serve its defence within 10 days of the Court's Order, and respectfully requests that all further proceedings in the matter be proceeded with in accordance with the rules governing General Claim Form rather than Fixed Date Claim Form.

Court Analyses and Findings

- [28] In view of the fact that the Learned Attorney General by way of further submissions conceded that Mr. Martin could have properly instituted the present proceedings, initially I was of the view that it was no longer necessary to rule on that issue; however, apart from the fact a ruling was nevertheless requested, the Court is of the view that the issue is of such importance that I should deliver a written ruling on the issue of whether or not Mr. Martin can properly institute the present proceedings, in addition to the other issues.
- [29] By way of introduction, the agreed facts are that Mr. Goodwin, by virtue of his will left the residuary of his property (to which he was entitled) to his daughter Mary Grason. Mary Grason at the time of death left a will. There seems to be common ground that Mary Grason's will does not contain a residuary clause neither does it seek to specifically dispose of the property, which it is claimed that she inherited under the residuary clause of Mr. Goodwin's estate. Ms. Grason's will was admitted to Probate in England and Wales and has been resealed in Antigua and Barbuda.
- [30] It is clear that the substantive case deals with Private International Law Rules in relation to immovable property and more particularly the applicable principles to succession to immovable property. The learned author Professor Winston Anderson in his treatise *Private International Law - Family Law* at page 198 very helpfully states as follows:

"In general, the law of the deceased's last domicile governs succession to movable property while succession to immovable property is determined by the *lex situs*. The basic premise is that judicial determination of rights in respect of immovable property may well affect the interest of the state

and a foreign award given in defiance of territorial law is likely to be a brutum filmen.”

I can do no more than adopt those helpful principles.

- [31] Also at p 198 *ibid*, Professor Anderson, referred to **Re Hoyles [1911] 1 CH 179**, and stated as follows:

“Several of the relevant principles have their genesis in the leading case of **Re Hoyles**. Under the Mortmain Act 1736, which was applicable in the domestic law of both England and Ontario, a domiciled Englishman could not bequeath a mortgage of land in Ontario for the benefit of a charity, and a domiciled Canadian could not bequeath a mortgage of land in Ontario for the benefit of a charity. The testator died domiciled in England in 1888 leaving his personal and real estate to his wife with the proviso that after her death one-third of the residuary estate would go to charity. The property included a mortgage of freehold properties in Ontario.

The court rejected the argument that for certain domestic purposes, mortgages were regarded as personalty, and that the gift was therefore valid under English law as the law of the testator’s last domicile. It was decided that (a) the gift was invalid under the domestic law of both England and Ontario and in effect that the litigation therefore involved a ‘false conflict’, and (b) whether property rights were movable or immovable should as a matter of principle be determined by Ontarian law as the *lex situs*. Moreover, it was asserted that on intestacy, the right to movable property will be decided according to the *lex domicilli*, while the right to immovable property is to be determined by the *lex situs*.”

- [32] In view of the very useful dispositions referred to above, it is clear to me that the right to immovable property is to be determined in accordance with the law where the property is situated.

- [33] I come now to deal in more detail with the first issue namely: whether or not Mr. Martin can properly institute the present proceedings. It is the law that at the death of the deceased his real and personal property vests in the executor named by the will. See: **Woolley v Clark [1852] 5B & Ald 744**. The subsequent grant of probate enables the executor to prove that this has occurred. See: **Whitehead v Taylor [1839] 10 A & E 210**. Further, the executor of an estate is also the trustee of the estate and is authorized upon obtaining probate of the estate to institute proceedings on behalf of the estate. Further, it is the law

that a grant of representation that is made in England and Wales may be resealed in the High Court of Justice of Antigua and Barbuda and will thereafter as treated in Antigua Barbuda as having the same effect as if it were granted in Antigua and Barbuda. It is therefore clear to me, since Mr. Martin has obtained probate of Mary Grason's Estate in England, which probate was resealed in Antigua and Barbuda, he has all of the powers of an executor of the will, as if it had probated in Antigua and Barbuda. For what it is worth, I pause here to state that probate is necessary of every testamentary instrument and act which disposes of real personal property. Without such probate such instrument and act cannot be recognized by any court unless of course letters of administration is obtained with the will annexed.

[34] Having addressed the matter of the resealing of the probate, I turn now to deal with the failure of Ms. Grason to include a residuary clause in her will. This brings into focus the relevant principles in relation to partial intestacy.

[35] A partial intestacy arises where the deceased effectively disposes of some, but not all, of the beneficial interest in property in a will. In **Re Thornber [1937] CH 29, at 36 – 37 Rowen LK** suggested that a suitable clause to include in such a will is the following “In the event of any of my property being undisposed of by this my will I direct that any such property shall be dealt with in a particular way”. Therefore, where as is alleged in the case at bar, Ms. Grason died leaving a will but she allegedly did not dispose of some beneficial interest in her real property she would have died intestate in relation to that part of the undisposed estate. A partial intestacy can also occur where the testator makes a will which disposes of the whole of the estate but not all of the beneficial interest in it. In so far as Ms. Grason did not include a residuary clause in her will she would have died intestate in relation to any property which by her will she has failed to dispose.

[36] However, I am not of the view that Ms. Grason's failure to include a residuary clause in her will in any way undermines the principle that the undisposed part, if any, of her estate would fall to be distributed by her personal representative named in the will and this in accordance with the rules of intestacy. I have no doubt, therefore, that the principles of

partial intestacy are applicable to any undisposed of part of Ms. Grason's estate. Accordingly, I find the submissions advanced by Mr. James attractive, as agreed to by Mr. Simon QC in his further submissions. I accept that the personal representative and in this case (that person is Mr. Martin) by virtue of Ms. Grason's will is also the personal representative of any property not effectively disposed of by her will.

[37] To put the matter beyond any doubt, I am of the respectful view that Mr. Martin is in law the personal representative of any property that falls on intestacy and belongs to Ms. Grason's estate. I am fortified in my view also based on an examination of the very helpful reference to which the Court's attention was adverted by the Learned Attorney General, Mr. Justin Simon QC in relation to section 49(1) of the Administration of Estates Act 1925 which is identical to section 7 (a) and (b) of the Intestates Act Cap 225 *ibid*.

[38] The relevant principle was also discussed by Andrew Borkowskian in his treatise on Succession at p. 27. The learned author said that on a partial intestacy the rules of total intestacy apply to the undisposed of property subject to the provisions of the will. The key statutory provision is section 49(1) which states as follows:

"Where any person dies leaving a will effectively disposing of part of his property, this part of this act (i.e Part IV dealing with the distribution of intestate) shall have effect as respects the part of this property not so disposed of subject to the provisions contained in the will."

The effect of section 49(1) is to make a will for the intestate to the extent that he failed to do so. It is as if there were a statutory provision at the end of the will giving any undisposed of property to those entitled on intestacy. In **Re Buttle's WT [1976] 3 ALL ER 289 at 281** Templeman J stated as follows "The 1925 Act merely fills in the gaps which the testator omits or fails to fill it in himself."

[39] In view of the foregoing, it is clear that Section 49(1) is always applicable on partial intestacy, whether the deceased dies wholly intestate as to a particular property or as to some beneficial interest in that property. Analogously, the same holds true for section 7(a) of the Intestates Act in the case at bar. Accordingly, I am equally satisfied that the real property (if any) of a person who dies intestate falls to be distributed by the personal representative to the persons beneficially entitled on intestacy. I am mindful of the fact that

the issue of whether the property is indeed part of the estate of Ms. Grason arises for determination in the substantive matter.

[40] Let me say finally that, while I find the argument advanced by the Learned Attorney General very attractive I am more persuaded by and accept the submissions of Learned Counsel Mr. James (as subsequently conceded by the Learned Attorney General) namely; that the executor of a will which has been probated becomes the personal representative of the estate in respect of that part of the deceased's property not so disposed of (the partial intestacy) and as such can institute legal action in the name of the estate, in relation to property claimed or alleged to belong to the deceased. Therefore, I am of the respectful view that, Mr. Martin having obtained probate of Ms. Grason's estate, is authorized to sue on behalf of the estate in relation to any of her property that allegedly fall on intestacy.

Procedure

[41] I come now to address what is the correct procedure to be adopted. Mr. Martin instituted his action by way of Fixed Date Claim Form, the Learned Attorney General, Mr. Simon QC stated that he has adopted the incorrect procedure and that he ought to have come by way of Claim Form. Learned Counsel Mr. James is of a different view, as stated earlier.

[42] A perusal of the exhibits in this matter indicates that at Case Management an order was granted on 12th day of July 2006 which states "The Court declined jurisdiction in the Claim Form as presented and granted the Claimant leave to withdraw the Claim" I observe also that the previous action was indeed brought by way of Claim Form.

[43] I am of the respectful view that the rule which governs the present action is Rule 8.1(5) (b) CPR 2000 which provides that Fixed Date Claim Form must be used in proceedings for the possession of land. I am therefore required to interpret and apply this rule. In so doing an integral part of my role is for me to determine whether Mr. Martin's claim is one for the possession of land. I have given very careful consideration to the submissions advocated by the Learned Attorney General; with respect, I am however, not persuaded by his

argument. It seems to me that the intention of the rule is to provide the procedure (Fixed Date Claim Form) that should be utilized by a claimant who seeks to obtain possession of land generally. I am not prepared to give the rule the restrictive interpretation as urged by the Learned Attorney General. For my part, I am not of the view that there is a distinction in the procedure to be adopted for possession of land simpliciter in contradistinction to a claim for example for possession of land against trespasser. With respect therefore, I am of the view that Mr. Martin has utilized the correct procedure namely Fixed Date Claim Form in seeking the remedies in the case at bar.

[44] I am buttressed in my view above based on the fact that among the remedies that Mr. Martin seeks are the following: "a declaration that the claimant as representing the Estate of Mary Edith Doreen Grason is entitled to hold retain and enjoy possession of the property; an order for compensation for the taking of possession of a part or a portion of the said property and its disposal by the Crown without lawful authority while the ownership of the property was and remains vested in Mary Edith Doreen Grason deceased." In my respectful view the first part of the declaration as formulated by Mr. Martin is consistent with a claim for a declaration for possession of the land which brings the claim squarely within Part 8.1(.5)(b), as referred to earlier.

[45] In view of the foregoing and for the above reasons, I am therefore of the respectful view that Mr. Martin has utilized the correct procedure in moving the Court and I so hold.

[46] Further and for the above reasons, I refuse the Attorney General's application to strike out Mr. Martin's claim against the Attorney General.

Conclusion

[47] Accordingly, I hereby dismiss the Attorney General's application to strike out Mr. Austin Martin's claim on behalf of the Estate of Mary Edith Doreen Grason. I order that costs shall be costs in the cause.

[48] In an effort to expedite the hearing of the substantive matter, I further order that the Attorney General files the defence to the claim within 14 days of this Order. Mr. Austin Martin in his capacity as the executor of the Estate of Mary Edith Doreen Grason deceased is to file a Reply, if necessary, within 7 days. The matter thereafter should be referred to the Registrar for an early date to be fixed.

[49] I thank both learned counsel for their assistance.

Louise Esther Blenman
High Court Judge