SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2007/016

HENRIETTA TAYLIAM

Appellant

and

FELICITA THOMAS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson Baptiste	Justice of Appeal [Ag.]

Appearances

Mr. Eghan Modeste for the Appellant
Mr. Shawn Innocent for the Respondent

2009: July 8;
November 20.

Civil Appeal – Land – possession – constructive trust – whether document signed by a justice of the peace on behalf of the declarant and so subscribed is a statutory declaration – whether document is valid – inter vivos gift – whether the property passed under the will –

The respondent brought a claim in the court below for possession of a wall building situate on land at Aux Lyon, in Saint Lucia. The building was occupied by her mother Georgiana Tayliam during her lifetime. The respondent had expended monies on the construction of the building with the intent that her mother would live in it until her death. She therefore claimed that her mother held the building in trust for her. She also relied on a document purporting to be a statutory declaration of her mother executed on 10th July 2000 in which her mother acknowledged that the respondent had constructed the building and that it was 'to revert to' the respondent in the event of her mother's demise. Her mother however, did not actually sign the declaration. It was signed on her behalf by a Justice of the Peace who also signed as the witness. The appellant, being the granddaughter of Georgiana Tayliam (and the defendant in the court below), challenged the authenticity of the 'Statutory Declaration' and further asserted that the construction of the wall building was by way of gift by the respondent to her mother and that the respondent's mother had in turn devised the building to the appellant by her Will dated 31st December, 1999, in which she named the appellant as her sole executrix and in which she devised all her right title and interest in the immovable

property situate at Aux Lyon, Dennery as well as her real and personal moveable and immovable to the appellant. The trial judge gave judgment for the respondent on her claim and held that the building was held on trust for the respondent and further held that it did not pass under the Will of Georgiana Tayliam to the appellant. In coming to this conclusion the learned judge relied in part on the instrument said to be a statutory declaration. The appellant appealed this decision and challenged the validity of the 'Statutory Declaration'.

Held: dismissing the appeal and awarding costs in the sum of two thirds in the court below to the respondent:

1. That the Justice of the Peace having placed the "X" on behalf of the deceased on the instrument, in the circumstances given by him in evidence, it thereby became the "X" of the respondent's mother (now deceased) to all intents and purposes. Accordingly, the instrument having been proved by evidence, took effect as a 'private writing' and is valid and effective as the statements of the mother capable of being relied upon for their full terms and effect.

   John Bertram Goddard v Laurent John [1974] 3 WLR 550 followed.

2. That the instrument as well as all the evidence led at the trial was sufficient evidence on which the trial judge could have concluded that the wall building in which the deceased lived until her death was not a gift from the respondent but rather that it was held on trust for her by the mother.

3. That even on the assumption that the respondent's mother purported to pass the wall building under her Will to the appellant, such a bequest would be incapable of taking effect, the same being property held on trust for another.

JUDGMENT

[1] **GEORGE-CREQUE, JA.:** This appeal arises from the judgment in which the trial judge ruled in favour of the respondent (Ms. Thomas). The learned judge found that the respondent's mother Marie Georgiana Flavius, also known as Georgiana Tayliam ('the Deceased'), held a wall building situate at Aux Lyons, Dennery (and in which the Deceased lived until her death) in trust for her (Ms. Thomas). The trial judge found, further, that it was never the Deceased's intention to dispose of the said wall building by Will to the appellant (Ms. Tayliam). Ms. Tayliam is a niece of the respondent and a grandchild of the deceased. In arriving at this decision, the trial judge relied, in part, on a document adduced as a Statutory Declaration. In this declaration the deceased, on 10th June 2000, stated that her daughter, Ms. Thomas, had built the house with her own funds and that should anything happen to her (the Deceased), the wall building was to revert to Ms. Thomas. The document further stated "*That this Statutory Declaration is sworn to prevent any of my children, grandchildren or relatives from claiming the said building.*"

The grounds of Appeal

[2] The appellant contends that the trial judge erred:

(1) In upholding and relying on the document as a Statutory Declaration the same being invalid by virtue of the fact that it was not signed or subscribed by the Deceased and thus could not be relied on for establishing the intention of the Deceased.

(2) In holding that a trust existed between the Deceased and Ms. Thomas in respect of the wall building. The appellant says the funds used in the construction amounted to an inter vivos gift by Ms. Thomas to the Deceased.

(3) In holding that the wall building did not pass to Ms. Tayliam under the Deceased's Will.

Background

[3] A few background facts are essential for putting the issues in perspective:

(1) It is accepted that Ms. Thomas, in 1997, with the use of her funds constructed the wall building in which her mother Ms. Georgiana lived until her death.

(2) Ms. Tayliam, occupied a building in close proximity but detached from the wall house.

(3) The Deceased, made a Will on 31st December, 1999 in which she named Ms. Tayliam her sole executrix. In the Will she devised 'all her right title and interest in the immovable property situate at Aux Lyon, Dennery', as well as all her property real and personal moveable and immovable to Ms. Tayliam.

(4) On 10th July, 2000, the deceased, visited a Justice of the Peace (JP), Mr. Harrison A. Smith and purportedly executed a Statutory Declaration stating the fact that Ms. Thomas had constructed the wall building at 'Aux Lyon, that she (the Deceased) had been in occupation of the building and that in the event of her demise, the building was to revert to Ms. Thomas.

(5) The Deceased died sometime in August, 2003.

(6) Ms. Tayliam, holding the view that the wall building passed to her under the deceased's Will, entered into occupation of the wall building by removing a lock placed thereon by Ms. Thomas who then brought a claim for possession of the building claiming that the building was hers and that the Deceased held it on constructive trust for her.

The validity of the Statutory Declaration

[4] Counsel for Ms. Tayliam conceded that if the Statutory Declaration is valid then the remaining grounds of appeal have little chance of success. He contends however that the document is not a Statutory Declaration of the Deceased, and is invalid, because of the lack of observance of the formalities for so constituting the document. He pointed to the fact that it was not the Deceased who placed her "X" on the document but rather the JP who placed the "X" on her behalf; that the JP in turn then purported to witness the "X" rather than having the same witnessed by another JP.

[5] Ms. Tayliam relies on the **Statutory Declarations Act**[1] section 3 which states:

> "In any case where confirmation of any written instrument or allegation, or the proof of any debt, or the execution of any document or other matter is required, It is lawful for the judge………. justice of the peace, notary royal,….. to take the declaration of any person voluntarily making the same before him.. in the Form contained in the schedule."

The Form provides for the signature of the declarant and the signature of the person before whom the declaration is made. Ms. Tayliam accordingly contends that the document is not a Statutory Declaration.

[6] Ms. Tayliam further contends that a Statutory Declaration executed before a JP has similar effect and value as a Notarial Instrument and accordingly that Article 1139 of the **Civil Code** applies. The relevant part of Article 1139 of the Code states as follows:

> "A notarial instrument other than a will is authentic if signed by all the parties, though executed before only one notary.
> If the parties or any of them be unable to sign, it is necessary to the authenticity of the instrument that it be executed by one notary in the actual presence of another subscribing notary or of a subscribing witness. …"

[7] It appears to me that on a close reading of both section 3 of the **Statutory Declarations Act** and Article 1139 of the **Civil Code** the focus is on proof or establishment of the authenticity of an instrument as distinct from touching upon its validity. Ms. Tayliam, in her pleaded case before the court below[2] stated thus:

[1] Cap. 2.14 Revision of Laws St. Lucia
[2] At paragraphs 1 and 2 of her Defence

"2. It is denied that the said Georgiana Flavius who in her lifetime was also known as Georgiana Tayliam (hereinafter referred to…) ever signed the said Statutory Declaration whether as alleged … or at all.
3. Further the Deceased has never been known to make a mark and her signature has always been made in her full name"

Clearly what was being challenged was the authenticity of the instrument rather than its form. It is not surprising that the JP was called to lead evidence with regard to the execution of the instrument.

[8] In JP Smith's witness statement, which was treated as his examination in chief, he said that he knew the Deceased since childhood and that she was called "Georgie". He stated that in 2000 Georgie came to his house and told him she wanted him to prepare a paper stating that the house she lives in belonged to Ms. Thomas (called Freda) and that after her death no one should have claim to it. He said he wrote out her request on a paper and she went away and had it typed and returned some days later with the typed document. He read the document over to her. She said she understood it and that it was exactly what she wanted and agreed to it. That *he asked her to* sign it and gave her a pen to do so. She said she could not sign her name. He asked her to make her mark which he said he witnessed and he then signed in his capacity as JP. He said she was quite frail but not sick. In cross examination however, the JP's evidence at page 128 of the Record went like this:

"A. I read it to her, I told him (sic) what is type on it, and then she told me she agree. That is what she wanted.
Q. And what happened?
A. Well I told her to sign it.
Q. You told her to sign it?
A. yes
Q Uh- huh
A. She told me she cannot sign her name
Q She told you she cannot sign her name?
A. yes
Q. Yes, go on.
A. So I took it. I sign it, I ask her her name, she told me her name. I tell her to put a cross between her name
Q You put a cross between her name?
A. Yes
Q Okay
A. Because she cannot sign."

Then at page 129 of the Record:

"The Court: who put the cross on the paper?
The witness: Well I put it, because she said she cannot sign, and her hand was trembling so. I .. put the mark for her" .

[9] In my view the trial judge was entitled, in light of the unchallenged evidence of the JP, to find that the instrument was proved despite the lack of strict adherence to the formalities laid down in section 3 of the **Statutory Declarations Act** or Article 1139 of the **Civil Code**.

[10] Article 1139 falls under the general rubric in the **Civil Code** entitled 'Proof by Writing.' Article 1138 deals with and lists 'authentic writings' which require no further evidence in proof of their authenticity. Article 1139 merely sets out the circumstances in which a notarial instrument will require no further proof by evidence of its authenticity. Similarly, section 3 of the **Statutory Declarations Act** merely sets out the formalities required for proving a written instrument on its face, without requiring further evidence in proof of it.

[11] Assuming, for the sake of argument, that the Deceased had placed her mark which was not subscribed by and in the presence of a JP and were she alive, surely, she would be in a position to give evidence of the fact that she had placed her mark thereon. It could not then be argued that the statements made in the document were not her statements.

[12] In the instant case, the JP has clearly said that he placed the mark for her since she was unable to sign. Accordingly, it becomes the mark of the Deceased, proved by evidence of the JP. The fact that he then signed as the subscribing witness does not thereby make it any less her mark binding her to the statements contained therein. What could not have happened was the acceptance of the instrument as having been proved without further evidence. But this further evidence was clearly provided by the JP of the time and manner of execution of the instrument.

[13] Article 1153 of the **Civil Code** speaks of 'private writings' and states:

"A writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, has effect as a 'private writing', if it have been signed by all the parties; … ."

[14] The case of **John Bertram Goddard v Laurent John,**[3] a decision of the Privy Council on appeal from the West Indies Associated States Supreme Court – Court of Appeal (St. Lucia)[4] is instructive on this issue. In that case, the parties had entered into an oral agreement for a lease with an option to purchase. Subsequently the lease was signed by the parties and then certified later by a notary royal as having been signed in his presence when in fact it had not been so signed. The tenant brought an action for specific performance of the option to purchase and was successful at trial. The Court of Appeal on an appeal brought by the landlord reversed the trial judge on the ground that the lease purported to be a notarial instrument and as such an "authentic writing" within article 1139 of the **Civil Code**, but as it had not been signed before a notary, it was not authentic and the court could not found judgment on it. On appeal to the Privy Council by the tenant it was held, overturning the Court of Appeal, that a lease could either be proved under articles 1138 to 1151 of the Civil Code as an 'authentic writing' or by 'private writing' under articles 1153 to 1160; that when the parties signed the document it was a 'private writing' and the improper action of the notary in purporting to confer on it the higher status of an 'authentic writing' did not operate to deprive it of the lower status which it had hitherto enjoyed and, accordingly, the tenant having proved the document as a 'private writing' was entitled to exercise the option to purchase the property.

[15] It is my finding therefore, that, whilst the document may not be accorded the status of a statutory declaration nonetheless, in my view, it takes effect as an ordinary 'private writing'. The JP having placed the "X" on behalf of the Deceased in the circumstances given by him in evidence, it thereby became the "X" of the Deceased to all intents and purposes and thus a 'private writing' made by her as if she herself had been physically capable of placing the mark thereon. The fact that it was then subscribed by the same JP as a witness to the placing of the mark, thereby seeking to accord it the status of a statutory declaration does not destroy its effect as a 'private writing' as proved by the unchallenged evidence of the JP.

[16] Apart from the challenge to the manner of execution of the instrument, nothing more was put forward to impugn the validity of the instrument. Accordingly, in my view, the instrument, having been proved by evidence, took effect as a 'private writing' and is valid and effective as the

[3] [1974] 3WLR 550

[4] As it was then styled, now styled The Eastern Caribbean Supreme Court.

statements of the Deceased, capable of being relied upon for their full terms and effect. I therefore find that ground 1 of this appeal accordingly fails.

Was the wall building held by the Deceased on a constructive trust

[17] The appellant contended that monies expended by Ms. Thomas on the wall building were by way of gift to the deceased. The appellant made reference to paragraph 19 of the witness statement of Ms. Thomas in which she stated thus:

> "When I built the house ... Joseph Talium built the house, I gave him the money and he bought all the materials. My mum was 84 years old. She thanked me and said all my life I never had a wall house and now I am old you have given me one and she thanked me"

However, these statements must be read in the context of what Ms. Thomas stated in other parts of her witness statement. At paragraph 21 for example she stated thus:

> "My Mum and I never discussed a Will. The house was built by me and I spent all of my personal funds to build it. I built it so that my mum could live as comfortable as she could in her later years. It was common knowledge that the house was mine and that I would be in my possession of it when my mother died. It was not my Mum's house. …."

[18] The trial judge was entitled to consider the totality of the evidence having seen and heard the witnesses as she stated at paragraph 24 of her judgment. At paragraph 24(6) the judge stated:

> "Despite the discrepancies in their testimony, I accept the evidence of Claimant and her witnesses… concerning their involvement in the construction of the said concrete house financed by the Claimant. I find that in 1997/98 it was the Claimant who with her own money constructed the house for her old deceased mother to live in comfortably until her death, …."

[19] At paragraph 24(8) of her judgment, the trial judge continued thus:

> "The Statutory Declaration was voluntarily made by the deceased in the manner described by Mr. Smith, so as to make it clear to the Defendant and other relatives who were warring with the Claimant that the house belonged to the Claimant. After the deceased had made her Will, it is probable that because of what the Defendant and her witnesses were saying concerning the Will that the deceased in her wisdom decided to indicate by this Statutory Declaration that the house built by the Claimant for her to live in was excluded from the dispositions under her Will".

[20] The elements which must be present for establishing a constructive trust are well settled and were cited by the trial judge in reliance on the cases of **Green v Green**[5] and **Grant v Edwards.**[6] The two elements are that (1) it must be shown that there was a common intention that both parties should have a beneficial interest in the property and (2) the claimant acted to his/her detriment on the basis of that common intention.

[21] It was open to the trial judge to accept the evidence of the JP and to be satisfied as to the authenticity of the instrument. It follows that it was quite proper for her to rely on it in arriving at the conclusion as to the common intention of Ms. Thomas and the Deceased in respect of the wall building. Based upon the instrument as well as all the evidence led at the trial there was ample evidence on which the trial judge could have concluded, as she did, that the wall building in which the Deceased lived until her death was not by way of gift from Ms. Thomas. Rather, that it was held by the Deceased on trust for Ms. Thomas, the person who had expended the monies in constructing it, and to conclude that it was intended for the Deceased to enjoy the use of the building during her lifetime. Apart from the attack on the validity of the instrument no other basis for disturbing the judge's findings has been put forward by counsel for Ms. Tayliam.

[22] Much was made by counsel for Ms. Tayliam of the fact that the trial judge stated that the instrument was evidence of the common intention of the deceased and Ms. Thomas when in fact Ms. Thomas testified that she was not aware of the 'Statutory Declaration.' This reasoning, in my view, is much too limited and overlooks the evidence of Ms. Thomas as to their common intention in constructing the wall building. The instrument simply confirms and reinforces that common intention expressly stated from the standpoint of the deceased in the instrument. Put together, in my view, it is right to say that the instrument shows what their common intention was. Accordingly, I find that this ground of appeal also fails.

The wall building not passing under the Deceased's Will

[23] It is common ground that the devises under the Will were in general terms and described no specific property save for monies said to be in bank accounts which in fact turned out not to be the

[5] Privy council Appeal No. 4 of 2002
[6] [1996] Ch. 638

case.[7] Ms. Tayliam contended that the wall building could be the only immovable property at 'Aux Lyon' to which the Deceased was referring in her Will as there was no other immovable property. However, the trial judge found that the Deceased also had an interest in a kitchen and one room structure in which Ms. Tayliam lived as well as an interest in other family lands mentioned by Ms. Tayliam and her witnesses [Judgment para. 24(10)]. Based on the evidence it was open to the trial judge to find that the Deceased did not regard the house as hers. I consider that the trial judge, having concluded that Ms. Georgina held the wall building on constructive trust for Ms. Thomas, also rightly concluded that there was never any intention by the Deceased to dispose of the house in question under her Will by devising it to Ms. Tayliam. Even had the Deceased so done, the latin maxim *"Nemo dat quod non Habet"* - (*"no one can give that which he has not"*) would be quite apt in the circumstances. This accords with Article 817 of the **Civil Code** which states that:

> "the bequest of a thing which does not belong to the testator, whether he was aware or not of another's right to it , is void even when the thing belongs to the heirs or legatees charged with payment of it… ."

Accordingly, even on the assumption that the Deceased purported to pass the wall building under her Will to the appellant, such a bequest would be incapable of taking effect being property held on trust for another, the Deceased being incapable of passing a better title than she herself had to the property in question.

[24] There is no basis for disturbing the judge's finding to the effect that the wall building did not pass to Ms. Tayliam under the Will which was clearly in recognition of the status of the Deceased as a constructive trustee as well as in keeping with her declared statements and intentions, contained in the instrument. This conclusion is also supported by the other evidence alluded to by the trial judge. Accordingly, in my view, this ground of appeal also fails with the result that all grounds having failed, the appeal ought to be dismissed.

7 The Trial judge found at paragraph 24 of her judgment that the Deceased did not have a bank account.

Conclusion

[25] For the reasons given above I would dismiss this appeal. I would also order Ms. Tayliam to bear the costs of this appeal, which costs shall be two thirds of the costs awarded below in accordance with CPR 65.13.

Janice George-Creque
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]