

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2018/0042

BETWEEN

OLIVE OSBORNE

Appellant

(AS LAWFUL ATTORNEY FOR NOEL OSBORNE)

AND

THE REGISTRAR OF LANDS

1<sup>st</sup> Respondent

JANETTE CYNTHELIA LEE

2<sup>nd</sup> Respondent

APPEARANCES

Mr Jean Kelsick for the Olive Osborne.

Ms Cedricia Shiell for the Lands Registrar.

Ms Chivone Gerald for Janette Lee.

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2019: MARCH 27

APRIL 1

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RULING

On a strike out application concerning a late appeal against the Land Registrar

- 1 Morley J: I am asked to rule on an application to strike out an appeal against a decision on 06.07.17 of the Lands Registrar (LR) to register Janette Lee (Janette) as the lawful owner of plot

13/06/104 which had been unclaimed. Olive Osborne (Olive)<sup>1</sup> challenged the decision on 09.08.17 in the name of her father Noel Osborne (Noel), then 86, at a time when she did not have formal power of attorney, which was not drawn up until 23.08.17, and not filed until 11.09.17, after which the LR offered a statement in response dated 28.09.17. Formal appeal to the High Court was then not filed until 23.10.18.

- 2 The primary argument for striking out is:
  - a. The application of 09.08.17 was out of time and without power of attorney, so that the proceedings which have followed have been a nullity; and
  - b. In any event, the delay from the date of decision by the LR on 06.07.17 to the date of formal appeal being lodged on 23.10.18, being 16 months, is so far outside contemplated time limits that in my discretion I should not allow the appeal to go any further forward.

3 **This action is between cousins: Noel is Janette's uncle.**

4 **On the face of the paperwork, Janette's claim for 13/06/104 was properly processed.** The application was for prescriptive title of unclaimed land, meaning Janette was saying there had been 12 years uninterrupted occupation by her. It was lodged on 12.05.17, and supported by affidavits from Janette, George Gerald, and William Bentin, all dated 12.05.17 (though not in the case papers). Notice of the application was given in writing inter alia to Olive who though in the UK owns a house nearby, the application was advertised in the local paper on 19 and 26.05.17, and was displayed on lampposts, on the property, and at the LR office.

5 Olive claims she did not receive notice of the application, per para 24 of her affidavit filed on 23.10.18. During the hearing on 27.03.19, Counsel Kelsick explained she only learned on 25.07.17 that title to the land had been issued to Janette when then visiting Montserrat and while on the land clearing it.

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<sup>1</sup> Names will be as bracketed to help ease of reading with no disrespect intended as to listing full names or whether an appellant or respondent.

- 6 Hitherto unclaimed, ownership of the land was not until 06.07.17 registered at the Land Registry, (set up in 1979). However, it had long been in hands of the family, led by Abraham Weekes, great grandfather to Olive and Janette. **By a letter dated 04.01.88, Ann O'Garro, Noel's aunt,** purported to give sections of her land to Noel at Nixons and Soldiers Ghaut, which at Nixons is said to be the land in issue. Noel by his affidavit filed on 23.10.18 reports he went to the UK in 1960, returned in 1972, living on the land with his family in a chattel house with water and electricity, Janette came to live on the land after Hurricane Hugo in 1989 in a separate house on the other side of a stream, and Noel returned to the UK in 2007 where he has been since.
- 7 The irk on the part of Olive is that Janette has claimed all the land, when her claim should only be for some of it, namely the section on which she lived on the other side of a stream. Without formal legal assistance, and without formal power of attorney, Olive therefore filed on 09.08.17 the notice of intention to appeal the decision of 06.07.17 using form RL21. It is of special interest **to Olive to know exactly what was said in the affidavits in support of Janette's application of 12.05.17** because prescriptive title cannot have arisen in 2017 if Noel was on the land in 2007, being only 10 years earlier, when prescriptive title requires 12 years.
- 8 **Olive's appeal** is under s 147 Registered Land Act cap 8.01, which reads:

#### Appeals

147. (1) The Crown or any person aggrieved by a decision, direction, order, determination or award of the Registrar may within 30 days of the decision, direction, order, determination or award, give notice to the Registrar in the prescribed form of his intention to appeal to the court against the decision, direction, order, determination or award.

(2) On receipt of a notice of appeal, the Registrar shall prepare and send to the Court and to the appellant, and to any other person appearing to him from the register to be affected by the appeal, a brief statement of the question in issue.

(3) On the hearing of the appeal, the appellant and the Registrar and any other person who, in the opinion of the Court, is affected by the appeal may, subject to any Rules of Court, appear and be heard in person or by a legal practitioner.

(4) The Court may make such order on the appeal as the circumstances may require, and every such order shall be given effect to by the Registrar.

(5) The costs of the appeal shall be in the discretion of the court.

- 9 Notice of intention to appeal should have been filed within 30 days, namely by 05.08.17, and was therefore four days late. **Because the language in s147(1) records that the grievance 'may' be filed within 30 days, and is therefore not mandatory, there remains a discretion to extend the time. I do so here as the time difference of four days is not unreasonable, particularly as there will be an issue as to whether Olive had de facto notice of Janette's application of 12.05.17.**
- 10 Turning to the point the proceedings are a nullity because started on 09.08.17 without power of attorney, reliance is placed by Counsel Gerald on *Millicent Bass v Julian Daniel* 2017 MNIHCV2016/0024. In that case Millicent sought accounts from Julian about his handling of the estate of Joseph Daly, and she gave a power of attorney to her husband Joseph Bass to bring action. Master Actie declared the proceedings a nullity because Millicent did not have letters of administration concerning the Daly estate, nor **was she an executor to Daly's will**, and so she could not pass to her husband a power of action concerning the estate she did not have.
- 11 Counsel Gerald advances the argument a power of attorney is the same; that to act for the living there should be a power of attorney, while for the dead letters of administration, and that absent either the proceedings are a nullity.
- a. To my mind, though the argument has been advanced with some spirit, this is not so. The grant of letters of administration is the result of a decision by the court or court registrar on behalf of a subject, now deceased, and who can no longer make any decision, so that the grant is a judicial decision by a third party, where by death control of his or her affairs has been lost by the subject.
  - b. This is different from the grant of a power of attorney, which is a decision by a living person, capable of it, and not by a third party, so that control of the grant remains in the hands of the subject. This must mean that in contemplation of proceedings a living subject can communicate, plausibly, a willingness to grant a formal power of attorney, for example by letter or email, upon which the grantee might then rely to commence proceedings expediently, though the formal power is drawn up and registered later.
  - c. If the registration is unreasonably delayed, or the proceedings were in fact commenced without knowledge or agreement by the grantor (whose power of attorney is only sought

later either as an act of persuasion or afterthought), then the proceedings may be struck down.

- d. In this case, there was a delay of only 14 days, from 09.08.17 to 23.08.17 before the formal power of attorney was signed by Noel in the UK, and further delay of 19 days placing it on the record on 11.09.17 so far away as Montserrat. Neither delay is unreasonable, given on **Olive's case she discovered the land problem while on Montserrat, away from Noel**, who was 86, and who it might be thought would need a little time for Olive to coordinate the paperwork once back with him.
- 12 This dictum is not to be taken as invitation to launch land claims and worry about power of attorney later, but it must be right that there will be occasional situations where some flexibility is only fair.
- 13 It follows therefore that the ratio here is a launch of proceedings, where time is pressing, and there has been plausible communication there will be a formal power of attorney granted, pending its registration within a reasonable time frame, is not automatically a nullity.
- 14 Turning to the delay in launching the appeal at the High Court, from after the LR statement of 28.09.17 to High Court filing on 23.10.18, there would be good reason to stop the action, but for the failing of previous counsel. It is quite clear from email correspondence that Olive thought the High Court action had been put into motion by her previous counsel, MW<sup>2</sup>, who I recall was in September 2017 ill, and who it seems just did not get it done. While I do not wish to enquire **overlong into counsel's failing**, it is plain the delay was no fault of Olive, and so it would not be fair to prevent her appealing.
- 15 I remind myself that striking out an action is a draconian event, to be used sparingly as a discretion, and for the reasons above will not occur here.

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<sup>2</sup> MW will not be formally named, noting no lawyer on Montserrat has professional insurance against negligence, about which this court expresses deep concern.

- 16 Moreover, there is a parallel application to extend time to file the appeal from what should have been 05.08.17 to the date the power of attorney was formally filed on 11.09.17, which for the reasons above I grant, as I do to 23.10.18 if needed.
- 17 There remains an application for the LR to cease to be a party, as this is an appeal, which seems in principle correct, and which I will also so order, subject to 48 hours liberty to Counsel Kelsick to file a counter argument, as a skeleton submission supported by authority, then to be argued later.
- 18 Distilling the orders:
- a. The application to strike out is dismissed.
  - b. The application to extend time is granted to either or both 11.09.17 and 23.10.18, as needed.
  - c. The application for the LR to cease to be a party is granted (as qualified).
  - d. The appeal shall proceed to hearing.
  - e. The costs shall remain in the cause.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

1 April 2019