

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 188 of 2011**

**BETWEEN:**

**ANDELINE MARKETTA BELLAMY**

**PLAINTIFF**

**AND**

**MERVYN JONES**

**FIRST DEFENDANT**

**JULIAN ROYSTON BELLAMY**

**SECOND DEFENDANT**

*Before the Honourable Mr. Justice William Chandler, Judge of the High Court*

**Date of hearing: 2013 October 28**

**Date of decision: 2014 October 16.**

**Beverley Lady Walrond Q.C., with Ms. Nailah Robinson, Attorneys-at-Law for the Plaintiff**

**Ms. Sharon Parris, Mrs. Marvalee Franklyn and Ms. Debra Gooding, Attorneys-at-Law for the First and Second Defendants**

**DECISION**

**INTRODUCTION**

- [1] The Plaintiff is the daughter of Caswell Arenas Reece (the Testator) who died in this Island on the 20<sup>th</sup> June 1996 having made his last will and testament (the will) dated 18<sup>th</sup> July 1994 in which he appointed the First Defendant, his brother-in-law, the sole Executor thereof. She is also the residuary legatee under the will.
- [2] The First Defendant is the duly qualified and acting executor of the estate of the Testator, a grant of probate to the said estate having been made to him on the 4<sup>th</sup> day of October 1996.

[3] The Second Defendant is the grandson of the Testator and one of the beneficiaries under the will. He is the son of the Plaintiff.

### **THE PLAINTIFF'S APPLICATION**

[4] The Plaintiff filed a writ of summons endorsed with a Statement of Claim on the 28<sup>th</sup> day of November 2008 for, *inter alia*:

“(1) a declaration that she is entitled to the beneficial ownership and possession of the property situate at Skeete’s Road, Bank Hall in the parish of Saint Michael under the Will of Caswell Arenas Reece (the testator) dated the 18<sup>th</sup> day of July, 1994 and “(i) a declaration that she is entitled to the beneficial ownership and possession of the property situate at Skeete’s Road, Bank Hall in the parish of Saint Michael under the Will of Caswell Arenas Reece (the testator) dated the 18<sup>th</sup> day of July, 1994 and

(2) rescission of the Deed of Assent dated the 15<sup>th</sup> day of March 2001, made by the First named Defendant as executor of the estate of Caswell Arenas Reece, deceased vesting the said property in the Second named Defendant.”

[5] She also claimed various kinds of injunctive relief which are not the subject matter of this decision.

### **THE SECOND DEFENDANT'S APPLICATIONS**

[6] The Second named Defendant applied by summons filed the 22<sup>nd</sup> January 2009 for an order that the Plaintiff’s writ of summons be struck out as having disclosed no reasonable cause of action and that the cost[s] of and occasioned by this application be borne [sic] by the Plaintiff.

[7] On the 1<sup>st</sup> December 2011 the First and Second Defendants filed another application by way of summons for orders in the following terms:

1. That the statement of Claim filed herein on the 24<sup>th</sup> November 2008, on behalf of the Plaintiff, be struck out as having not disclosed a cause of action or reasonable cause of action against the Defendants.
2. Further and/or alternatively that the Defendant be declared in law to be the fee simple owner of the said land being a dwellinghouse with land attached situate at Skeete’s Road, Bank Hall in St. Michael (hereinafter called the said dwellinghouse).

3. That the Plaintiff and all persons occupying the said dwellinghouse do vacate the same on or before the expiration of three (3) months from the date of the Order.
4. That the Second Defendant do have damages assessed in respect of the Plaintiff's failure/neglect to upkeep and/or maintain the said dwellinghouse.
5. That the Plaintiff do pay the Second Defendant a reasonable sum for her use and occupation of the said dwellinghouse situate at Skeete's Road, Bank Hall in St. Michael.
6. That the Plaintiff do pay the Second Defendant's costs to be agreed and or taxed.

### **BRIEF BACKGROUND**

[8] The Testator made the following devises, the first of which is the subject matter of this suit:

“I **GIVE** and **DEVISE** my stone dwellinghouse situate at Applegrove, Black Rock in the parish of Saint Michael together with its contents to my grandson Julian Royston Bellamy absolutely.”

“I **GIVE** and **DEVISE** my parcel of land situate al Bridge Gap, Goodland in the parish of Saint Michael together with the chattel dwellinghouse standing thereon to my son Charles Arenas Reece of Applegrove, Black Rock, St. Michael absolutely.”.

[9] The will contained a residuary clause in the following terms:

“ALL the rest residue and remainder of my estate real or personal wheresoever and whatsoever I give devise and bequeath to my daughter Andaline Marketta Bellamy of Applegrove, Black Rock, St. Michael absolutely.”

[10] Under and by virtue of a deed of assent executed under hand on the 15<sup>th</sup> day of March 2001 and recorded in the Land Registry of Barbados on the 23<sup>rd</sup> March 2001 the Executor assented to the vesting in the Second named Defendant of “ALL THAT land (formerly part of a larger area of land containing by admeasurements Twenty-four thousand nine hundred and eight square feet or thereabouts) erroneously stated in the last Will and Testament of the said **CASWELL ARENAS REECE**, deceased as being situate at Applegrove, Black Rock in the parish of Saint Michael in this Island but in fact situate off Bank Hall Cross Road in the parish of Saint Michael in this Island containing by estimation 295.05 square metres which represents a metric conversion from Three thousand one hundred and seventy-six square feet or thereabouts (inclusive of 33.44 square metres being a metric conversion from three hundred and sixty square feet in the area of a Road formerly a roadway twelve feet wide but now a Public Road) **ABUTTING**

and BOUNDING on lands of Wilbert A Cadogan et ux on lands of one Mrs. Denner on lands now or late of W C Skeete and on lands now or late of B Price and separated therefrom by a Road formerly a roadway twelve feet wide but now a Public Road or however else the same may abut and bound together with the dwellinghouse thereon.” (the property).

[11] The Plaintiff filed an affidavit on the 24<sup>th</sup> November 2008 in support of the injunctive relief in which the Plaintiff deposed that she had been residing on the premises with the full knowledge of the First named Defendant and had carried out works on the property on the understanding that the property was hers. She also deposed that the First named Defendant had, by the deed of assent, purported to vest the property in the Second named Defendant despite the residuary clause in the will devising the residuary estate (which included the property) to her and despite the fact that the property was not devised to the Second named Defendant.

[12] In her affidavit filed on the 3<sup>rd</sup> February 2012 the Plaintiff deposed at paragraph 11 that:  
“I do not deny that for many years, I thought the house rightfully belonged to the Second Defendant. Because we had a good relationship, I still thought of it as a family home, but I obtained his permission before making any modifications. These included: replacing the entire roof tiling the entire house, fixing the kitchen sink and completely repainting the house. My sister also made changes. The Second Defendant always told me that I could do whatever I liked with the house and that he would give it to me. My daughter Gail also assisted in the maintenance.”

[13] The Plaintiff resided at the property with the consent of the Second Defendant for a period of time. During that time the Plaintiff and the Second Defendant got on well. The relationship deteriorated and the Second Defendant withdrew his consent, serving a notice to quit upon the Plaintiff. The Plaintiff filed an urgent application by way of writ of summons for injunctive relief. She disputes the Second Defendant’s ownership of the property. Neither affidavit speaks specifically to the nature of the dwellinghouses owned by the Testator.

[14] On the 25<sup>th</sup> November 2008 the Plaintiff obtained an order by consent restraining the Second Defendant, his servants or agents or otherwise from withholding or doing any act calculated to withhold the water supply and/or the supply of any utility to the residence of the Plaintiff at Skeete’s Road, Bank Hall in the parish of Saint Michael.

[15] The Court also ordered that the Plaintiff’s Writ of Summons would be continued as if commenced by way of an Originating Summons.

[16] Affidavits were filed by the First and Second Defendants and witnesses on behalf of the Second Defendant which will be considered later in this decision.

## **THE ISSUES**

[17] The issues that arise for the Court’s determination are:

1. Whether or not the Plaintiff's claim discloses a cause of action or any reasonable cause of action.
2. Whether the Court can rectify the will of the testator to replace the words "Applegrove, Black Rock" with "Skeete's Road, Bank Hall".
3. Whether upon the proper construction of the will, the stone dwellinghouse passed to the Second Defendant despite the inaccurate description or whether it formed part of the residuary estate of the deceased.

### **Issue No. 1**

#### **The Plaintiff's Submissions**

[18] Whether or not the Plaintiff's claim discloses a cause of action or any reasonable cause of action. The written submissions filed on the Plaintiff's behalf on the 28<sup>th</sup> October, 2013 did not address this issue.

#### **The Defendants' Submissions**

[19] The Defendants submitted that the Plaintiff ought to have commenced her action by originating summons instead of a writ of summons. Ms. Parris contended that the writ merely presented a prayer for relief and that, since the writ was issued, the Plaintiff failed neglected and/or refused to amend the originating process to reflect clearly and properly the cause of action against the Defendants. In consequence, the Defendants had to garner what they could from the affidavit filed in support by the Plaintiff. This was prejudicial to the Defendants since it was by way of the originating process that the Plaintiff's claim against the Defendants should have been clearly delineated.

[20] She conceded that the Defendants had consented to the matter being continued as if commenced by way of originating summons but also submitted that such consent should not be construed as consent to a defect in pleadings. She urged the Court to strike out the originating process for failure to conform to the Rules of Court.

[21] It is important to note that counsel also submitted that "The standard of the Court is so high, in this regard, that even in situations where the Plaintiff has set out a cause of action and the pleadings surrounding the same are still not as precise as they can be an application for further or better particulars may be granted."

### **THE LAW**

[22] **Order 18 Rule 19(1) of The Rules of the Supreme Court, 1982 of Barbados (RSC)** provides that:

“ The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) .....
- (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) ....

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

(2) No evidence shall be admissible on an application under Paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

[23] Order 18 Rule 19 of the RSC is identical to Order 18 Rule 19 of the Rules of the Supreme Court 1965 of the United Kingdom. In the Supreme Court Practice 1999 (UK) otherwise known as the White Book at page 349 the learned authors opine as follows:

- i. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in **Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, C.A.**);
- ii. So long as the statement of claim or the particulars (**Davey v. Bentinck [1893] 1 Q.B. 185**) disclose some cause of action, or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (**Moore v. Lawson (1915) 31 T.L.R. 418, C.A.**; **Wenlock v. Maloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.**).

[24] In **Re Macro (Ipswich) Ltd and Another; Macro and Others v Thompson and Others [1994] BCC 781**, there was a motion to strike out passages in a petition under s.459 of the Companies Act 1985 against Earliba Limited as disclosing no cause of action. Arden J, quoting **Fletcher Moulton J in Dyson v AG [1911] KB 410 at 419**, said that “a party is not to be driven from the judgment seat” except where the claim is obviously bad or almost incontestably bad.

## Discussion

[25] The endorsement of claim on the Writ of Summons is a general endorsement and states that:

“The Plaintiff’s claim is for:

1. A Declaration that she is entitled to the beneficial ownership and possession of the property situate at Skeete’s Road, Bank Hall in the parish of Saint Michael in this Island under the Will of Caswell Arenas Reece dated 18<sup>th</sup> day of July, 1994;

2. Rescission of the Deed of Assent dated the 1<sup>5th</sup> March, 2001 made by the First-named Defendant as Executor of the Estate of the said Caswell Arenas Reece, deceased vesting the said property situate at Skeete's Road, Bank Hall in the parish of Saint Michael in this Island in the Second-named Defendant;
3. An interim and permanent injunction restraining the First-named and Second-named Defendants whether by themselves, their servants and/or agents or howsoever from trespassing, harassing, removing or doing any act calculated to lead to the removal and/or eviction of the Plaintiff and her licensees from residing in or using the said premises;
4. An order that the said Second-named Defendant immediately do all such things as may be necessary to restore or have restored the water supply to the said premises at Skeete's Road, Bank Hall in the parish of Saint Michael in this Island;
5. That the said First-named Defendant do all such acts as are necessary to vest the legal and beneficial estate in the property situate at Skeete's Road, Bank Hall, in the parish of Saint Michael in this Island in the Plaintiff in keeping with the terms of the Will of the said deceased;
6. Damages for conversion and trespass;
7. Interest on the said damages pursuant to the Supreme Court of Judicature Act from the date of the filing of the Writ until payment thereof;
8. Costs;
9. Such further and other relief as to the Court may seem just."

[26] This endorsement in its natural and literal meaning reveals a statement of claim for a specific declaration in relation to the Plaintiff's alleged beneficial ownership of property situate at Skeete's Road, Bank Hall, Saint Michael.

[27] Paragraph 2 of the statement of claim is also clear in the relief which is being sought by the Plaintiff in relation to the deed of assent therein mentioned. Paragraphs 3 to 9 are also clearly reliefs sought by the Plaintiff.

[28] Ms. Parris' submission that the Plaintiff's cause or causes of action are not clearly identified in the endorsement must be considered in light of the consent order which allowed the matter to proceed as if commenced by originating process.

[29] In the absence of the consent order made by **Goodridge J.** the Plaintiff would have had to file and serve a full statement of claim containing all the necessary pleadings of fact upon which the claim was based. This was obviated by the order of **Goodridge J.** It is now necessary to examine the order of **Goodridge J.** This order clearly states "IT IS HEREBY ORDERED BY THE COURT **WITH THE CONSENT OF THE PARTIES being present in court:**" (emphasis mine). The judge clearly ensured not only that the order was by consent but that the parties to the action were present and consenting. Counsel on all sides and their clients could not and cannot plead ignorance of the significance of this order. The affidavit of the Plaintiff in support of the injunction was

filed on even date with the writ of summons namely the 24<sup>th</sup> November 2008. It contained the particulars of facts on which the Plaintiff relied to ground her claim for relief. It is unnecessary to repeat them here since I have already adverted to them earlier in this decision. The affidavit clearly provides the cause of action that the Plaintiff was alleging that the property was not devised to the Second Defendant but fell into residue of which she was the beneficiary. The last Will and testament of the deceased was annexed to the affidavit as exhibit “A”. Exhibits “C” and “D”; letters from Mrs. Marvalee Franklyn and Mr. Edmund R. King, Attorneys-at-Law respectively clearly demonstrate the issues over which the parties took issue.

[30] Having consented to the continuation of the matter as ordered by **Goodridge J.** the Defendants cannot now successfully contend that the Court should divorce the affidavit evidence from the writ which now stood as an originating summons. It is trite law that the originating summons must be accompanied by an affidavit setting out the factual basis of the claim. The affidavit in support obviated the need to file a statement of Claim. In any event the learned judge’s order rendered such a filing impossible. Earlier I adverted to Ms. Parris’ observation about further or better particulars, this course was open to the Defendants if they thought that the facts were not clearly defined, however, they declined to request any such particulars.

### **Allegation of Prejudice**

[31] The Defendants allege prejudice in that they were forced to garner from the affidavit in support of the injunction what the cause of action was. In light of my findings above and in light of the fact that all counsel filed written submissions, declined to cross examine any of the deponents and consented to the Court ruling on the issue of the construction of the will in the absence of any viva voce evidence, it cannot be seriously maintained that any prejudice has been occasioned the Defendants.

### **Disposal**

[32] In the premises, the Court overrules the submissions of counsel for the Defendants and dismisses the application to strike out the originating process as disclosing no or no reasonable cause of action.

### **Issue No. 2**

[33] Whether the Court can rectify the will of the testator to replace the words “Applegrove, Black Rock” with “Skeete’s Road, Bank Hall” in the devise to the Second named Defendant.

[34] The Plaintiff submitted that the general principle was that a will, properly executed by the testator, must be taken to be the true intention of his wishes. If the testator made a mistake, it is not the Court’s function to correct that mistake for him or to create a new will. Counsel relied upon **Jarman on Wills 1st Edition Vol 1 at pg 349.**

[35] The Defendants did not specifically deal with this issue in their written submissions.

## THE LAW

### The Court's Power to Rectify

[36] Rectification is an equitable remedy by which the Court can modify the terms of a written instrument so as to give effect to the intention of the parties to it (**Joscelyne v Nissen [1970] 2 Q.B. 86, [1970] 1 All ER 1213, CA**). Under the common law, which is applicable to Barbados, there is no jurisdiction to rectify a will. In England by virtue of Section 20 of the Administration of Justice Act, 1982, the English courts were given power to rectify wills where the testator died prior to 1 January 1983. **Section 20 of the Administrative Justice Act 1982 of UK** provides that:

“(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.”

### Discussion and Disposal

[37] There is no comparable statutory provision in Barbados. The court has no inherent power to rectify the will and, therefore, in the absence of statutory power, the Court declines to make an order for rectification of the will.

### Issue No. 3

[38] Whether upon the proper construction of the will, the stone dwellinghouse passed to the Second Defendant despite the inaccurate description or whether it formed part of the residuary estate of the deceased.

### THE PLAINTIFF'S SUBMISSIONS

[39] Counsel for the Plaintiff filed written submissions in response to the Defendants' summons to strike out the Plaintiff's claim on 28 October 2013. Ms. Robinson stated the general principle was that a will, properly executed by the Testator, must be taken to be a true intention of his wishes. She said that it was not the Court's function to correct a mistake that the Testator made in his will, relying upon **Jarman on Wills**, 1<sup>st</sup> edition, Volume 1 at pg. 349:

[40] Counsel further submitted that where the words of the description in a devise did not fit any property with accuracy, either at the date of the will or at the date of death of the testator, the gift failed. However, she conceded that this general principle was subject to exceptions, as for example, where an error was apparent on the face of the will, or when

the doctrine of *falsa demonstratio* applied. This doctrine will be defined more amply later in this decision. Counsel cited **Re Matthews, Ballarat v Matthews [1917] VLR 1 (Matthews)** and **Moore v Phelan [1920] 1 IR 232 (Moore)**.

[41] Counsel referred to **Section 74 of the Succession Act, Cap. 249** of the Laws of Barbados which she submitted ought not to be taken to have extended the common law principle so as to permit judicial re-writing of will. Courts, she opined, only permitted rectification where the contradiction was apparent on the face of the Will.

[42] Counsel relied upon the opinion of four dissenting judges of the United States Supreme Court in **Patch v White (1886) 117 US 210, 6 Sup Ct 617 (Patch)** who, quoting Jarman on Wills, stated:

“If there is any proposition settled in the law of wills, it is, that extrinsic evidence is inadmissible to show the intention of the testator, unless it be necessary to explain a latent ambiguity. Where there is no latent ambiguity there no extrinsic evidence can be received. ... The opinion of the court in this case allows, what seems to us be an unambiguous devise, to be amended by striking out a sufficient description of the premises devised, and the blank thus made to be filled by ingenious conjectures based on extrinsic evidence. This in the face of the statute of frauds in force in the District of Columbia, where the premises in controversy are situated. The decision of the court subjects the title of real estate to all the chances, the uncertainty, and the fraud attending the admission of parol testimony, in order to give effect to what the court thinks was the intention of the testator, but which he failed to express in the manner required by law.”

[43] The Plaintiff also relied upon **Barber v Wood (1877) 4 ChD 885 (Barber)** and **Miller v Travers (1832) 8 Bin 244; 131 ER 395 (Miller)**.

[44] Counsel for the Plaintiff submitted that the testator had given “a stone dwellinghouse at Applegrove, Black Rock” to his grandson but the Testator owned no such property. She pointed out that there was no contradiction on the face of the will and no ambiguity. Moreover, that the will had been admitted to probate and affidavits were sworn attesting to the Testator’s reading of the will and agreeing to the contents. She argued that the Defendants had referred to weak hearsay evidence of the Testator’s supposed intentions which he allegedly confided to the Executor.

[45] Counsel submitted finally that ‘following the precedents in **Miller** which remain good law’ the Court should refuse to substitute mere conjectures about the Testator’s intention in place of the will which he perused and duly executed. She therefore, asked the court to deny the Defendants the relief sought.

#### **SUBMISSIONS OF THE DEFENDANTS**

[46] Ms. Parris submitted that the question to be answered was whether the gift to the Second Defendant was vitiated by the inaccurate description and therefore fell to the Plaintiff, the

residuary legatee since such a “stone dwelling house” did exist but not at the locality named in the Will.

- [47] She stated that it was a cardinal rule that the Court, in interpreting or construing a will, would do all in its power to give effect to the intention of the Testator. Judicial rules had therefore evolved which enabled Learned Judges to determine whether or not bequests, legacies and/or devises failed for uncertainty. One such rule was to employ the natural or ordinary meaning of the words used in order to identify with clarity the beneficiary and the subject which had been devised or bequeathed. Counsel relied upon **Samuel v Offner [1909] 1 Ch. 60 CA** and **Re Fleming’s Will Trust (Ennion v Hempstead Old People’s Housing Ltd et al [1974] 3 All. E.R 323**.
- [48] Counsel submitted that the description of the Donee in the present matter was in no way erroneous and that the Testator always intended to benefit the Second Defendant. She further submitted that there was no error in the description of the property. The Testator “clearly described it as his ‘stone dwelling house’”. The Testator was seised of a stone dwelling house at the date of his will and the date of his death. From all the evidence it was the only stone dwelling house that he owned. She pointed out that the error in the will occurred in respect of the location, namely Skeete’s Road, Bank Hall, St. Michael as opposed to Applegrove, Black Rock, St. Michael. She stated that the devise to the Second Defendant was clearly identifiable even though described as being in the wrong locality and in such a circumstance the devise ought to stand. She referred to the “benevolent rule” of construction and relied upon the decision in **Doe D Winter v Perratt (1843) 6 Man & G 314 at 359 HL (Perratt)**.
- [49] She cited the case of **Re Roberts, Repington v Roberts-Gawen (1881) 19 ChD 520** and submitted that the Testator’s intention was to be ascertained from an examination of the whole will, construed with any admissible extrinsic evidence. Counsel stated that the extrinsic evidence as contained in the Affidavit of the First Named Defendant and the affidavits of Dorril Lowe and David Neblett, filed in support of his contention did not reveal that the Deceased had any other stone dwelling houses. The other properties were timber/chattel houses.
- [50] She invited the Court to apply the *Falsa Demonstratio Non Nocet Cum De Corpore Constat* Rule (the *Falsa Demonstratio* Rule) referred to later in this decision and relied upon **Anderson v Berkley [1902] 1 Ch. 936 (Anderson)**.
- [51] Counsel cited the following cases where the Courts applied the *Falsa Demonstratio* Rule:
1. **Re Milner-Gibson-Cullum, Cust v A-G [1924] 1 Ch 456.**
  2. **Nicholls v Perkins (1920) 125 LT 62.**
  3. **Re Dorman [1994] 1 WLR 282, [1994] 1 All ER 804.**
  4. **Tann v Tann (1863) 2 New Rep 412 and,**
  5. **Re Mayell, Foley v Wood [1913] 2 Ch. 488.**

- [52] Ms. Parris submitted that even where the *falsa demonstratio* rule was rejected the Court should still give effect to the Testator’s intention relying upon **Cowen v Truelift (1899) 2 Ch. 309**.
- [53] She further submitted that the rules of interpretation demonstrated a deliberate attempt by the Courts to arrive at the intention of the Testator so as to give effect to a gift or bequest. Extrinsic evidence was usually admissible to determine or prove this intention including whether there existed any person or property described in the Will. In support of her submission, she cited the case of **Boyes v Cook (1880) 14 Ch. D. 53 at 56**.
- [54] Counsel also submitted that the Testator clearly identified the subject matter of the devise and its donee. He clearly described this house as a “stone dwellinghouse” which stood in stark contrast to the two other “chattel dwelling houses” which he possessed. The erroneous statement that the property was situate at “Applegrove in the parish of Black Rock” did not vitiate the devise.
- [55] Finally, it was submitted that the extrinsic evidence showed that the Testator only had one stone dwelling house and, in such a case, he intended the Donee to have the same. Relying upon **Cowen v Truefitt Ltd [1899] 2 Ch 309**, she submitted that the Testator’s intention could not be usurped or vitiated by a common mistake. The mistake in this matter was in respect of the address of the property and urged the Court to declare that the devise to the Second Defendant was not void and he was, accordingly, the fee simple owner of the property and entitled to possession of the same.

## **THE LAW**

- [56] In interpreting a will, the Court must ascertain and give effect to the intention of the testator as expressed in his will. In **Williams on Wills 8<sup>th</sup> edition Vol. 1** at page 535 paragraph 49.1 the principle is stated thus:

“In construing a will the object of the court is to ascertain the intention of the testator as expressed in his will when it is read as a whole in the light of any extrinsic evidence admissible for the purpose of its construction.

...

The object is to ascertain the expressed intention of the testator i.e. the intention which the will itself declares either expressly or by necessary implication. As Lord Simon L.C. put it in *Perrin v. Morgan*.

“The fundamental rule in construing the language of the will is to put on the words used the meaning which, having regard to terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are the ‘expressed intentions’ of the testator.”

- [57] **Section 74 of the Succession Act, Cap. 249 of the Laws of Barbados** provides that: “Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will.”

**Section 84** provides that:

“If the purport of a devise or bequest is capable of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative shall be preferred.”

### **Discussion**

[58] The question is: Did this property pass to the Second Defendant notwithstanding the misdescription in the devise?

[59] The answer to that question lies in the rules of construction employed by the courts in assisting them in ascertaining the intention of the testator as contained in his will. Amongst these is the *falsa demonstratio* rule which was defined in **Williams on Wills, 5<sup>th</sup> edition** at pg. 486 as follows:

“If the words of description, when examined, do not fit any property with accuracy, and if there must be some modification of them in order to place a sensible construction of the will, then the whole must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and generally how the subject intended by the testator can be identified and for this purpose evidence of extrinsic facts may be regarded. In such cases, the words are presumed to be a misdescription of a subject existing and with regard to which the will may validly operate.”

[60] In **Anderson v Berkley [1902] 1 Ch. 936** at **940**, the Court held that where there are various terms used to describe a subject matter (whether a person or property) and some are sufficient to ascertain the subject matter with certainty but others add a description which is not true, these other terms are not allowed to vitiate the gift.

[61] Though predating the passage of **Section 84 of Cap. 249**, this decision clearly illustrates the purport of Section 84 namely that a mere misdescription should not vitiate a gift if there is an interpretation of the gift which will render it valid.

[62] Even though there is no power to rectify a will under the common law, the courts still had jurisdiction to omit words from a codicil if it was proved that they had been included through fraud or by mistake: **Re Morris (deceased), Lloyds Bank Ltd v Peake [1971] P 62 (Re. Morris). In Re Morris Latey J** found that a solicitor had made an error in drafting a codicil containing the clause “I revoke Clauses 3 and 7 of my said Will” whereas the clause should have read “I revoke Clauses 3 and 7(iv) of my said Will” so as to be consistent with similar bequests in the testatrix’s will.

[63] The learned judge said:

“In my judgment, wherever the line is drawn, this case on its facts falls into the category where the court has power to do what it can by omission. The

introduction of the words ‘Clause 7 (iv)’ was *per incuriam*. The solicitor’s mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip. He knew what the testatrix’s instructions and intentions were, and what he did was outside the scope of his authority. And he did, of course, without knowing and approving what he himself was doing. How can one impute to the principal the agent’s knowledge and approval which the agent himself has not got? Accordingly, I hold that the testatrix was not bound by this mistake of the draftsman which was never brought to her notice. The discrepancy between her instructions and what was in the codicil was to all intents and purposes total and was never within her cognizance.

Accordingly, the case is one in which the court has power to rectify, using that word in a broad sense, so far as it can. Which is the proper course? To pronounce against the instrument in its entirety? Or to exclude part and admit the rest? Certainly to reject the whole instrument would come much nearer to giving effect to the testatrix’s dispositive intentions (both in the number of beneficiaries and in the amount involved) than would the admission of the whole instrument. But is the instrument severable, and can one get nearer still by excluding part? In my judgment, I can. I cannot add ‘(iv)’ after ‘7’ but, if ‘7’ is excluded, cl 1 of the codicil would read as follows: ‘1. I revoke Clauses 3 and ( ) of my said Will.’”

- [64] It is convenient to dispose of Ms. Robinson’s submission that it was not the court’s function to correct a mistake that the testator made in his will since a properly executed will must be taken to be a true intention of his wishes. Counsel relied upon an extract from **Jarman on Wills 1<sup>st</sup> edition Volume 1 at pg 349** in which the learned authors opine as follows:

“As the law requires wills, both of real and personal estate (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator’s intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources.”

- [65] It is clear that counsel’s submission cannot be upheld in the face of the statutory provisions of **Section 84 of Cap. 249**. Her submission is also contrary to the principles established in the case law. In **Re Morris** Latey J quoted approvingly the decision of Sachs LJ in **Crerar v Crerar** (1956 unreported) and held that the fact that a testator read and executed a document raised a *prima facie* inference that he knew and approved its contents but there was no rule precluding the court from considering all the evidence in order to arrive at the truth, whether fraud was suggested or merely mistake.
- [66] In relation to the benevolent rule of construction referred to by Ms. Parris in her submissions, in **Perratt Lord Brougham** said “We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favour of one view rather than another, before we reject the whole. It is true the heir-at-law shall only be disinherited by clear intention; but if there be ever so little reason in favour on one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator than that the whole should be void ...”
- [67] This rule is consistent with the view that the devises in a will shall be interpreted, wherever possible, so as to uphold the intention of the Testator where there is uncertainty or ambiguity. The uncertainty in this matter is in relation to description of the property. The benevolent rule is consistent with the rationale behind the *falso demonstratio* rule.
- [68] It is uncontroverted that the Testator did not have a stone dwellinghouse located at Applegrove, Black Rock in the parish of Saint Michael, however, he did own such a dwellinghouse located in Bank Hall in the parish of Saint Michael.
- [69] We must remember that the devise must be interpreted in the context of Barbados and, in so doing, the Court reminds itself of the words of **James LJ in Boyes v Cook (1880) 14 Ch. D. 53** at **56** where he said:  
“...you may place yourself, so to speak in the [Testator’s] armchair and consider the circumstances by which he was surrounded when he made his will to assist you at arriving at his intention.” Indeed every litigant under a will “has a right to require that a court of construction, in the execution of its office, shall-by means of extrinsic evidence-place itself in the situation of the Testator, the meaning of whose language it is called upon to declare.”
- [70] It is worthwhile to reproduce the devise here.  
“I **GIVE** and **DEVISE** my stone dwellinghouse situate at Applegrove, Black Rock in the parish of Saint Michael together with its contents to my grandson Julian Royston Bellamy absolutely.”

[71] The other uncontroverted facts are that the beneficiary of the devise is the Testator's grandson who is particularly named therein. It is also certain that the object of the devise is a stone dwellinghouse or a wall house in the Barbadian vernacular. This description sets it apart from a chattel dwellinghouse or moveable property. A stone dwellinghouse cannot be separated from the lands on which it is built since whatever is attached to land becomes part of it under the doctrine *quicuid plantatur solo, solo cedit*.

[72] The Second Defendant filed an affidavit on July 22<sup>nd</sup> 2009 which he deposed that his grandfather had only one stone dwellinghouse which is the subject matter of the action before the Court. He filed a second affidavit on the 1<sup>st</sup> day of December 2011 in which he also deposed that his grandfather (the Testator) had three properties at the time of his death, namely a chattel dwellinghouse situate at Applegrove, Black Rock, a chattel house situate at Bridge Gap, Goodland, St Michael and a stone dwellinghouse at Skeete's Road, Bank Hall, Cross Road, St Michael.

[73] The affidavit evidence of the witnesses for the Second Defendant shows that the Testator (referred to in some of the affidavits is Bailey) had only one stone house and it was situate at Bank Hall, Saint Michael. In the affidavit of Mervyn Jones filed on the 10th day of December 2012, the witness deposed, *inter alia*:

- "1) ...
- 2) That as far as I am aware the Testator was the owner of only one stone dwellinghouse and that dwellinghouse was located at Skeete Road, Bank Hall in the parish of St Michael and not Applegrove, Black Rock, St Michael.
- 3) That the Testator was the owner of a chattel dwellinghouse situate at Applegrove, Black Rock, St Michael but that house was constructed on rented land and was left to his wife Eurah Reece during her life time and at her death it was to pass to the Testator's daughter Marietta Reece, absolutely.
- 4) That to the best of my knowledge the Testator never owned any land at Applegrove, Black Rock, St Michael and never built any stone dwellinghouse at the said Applegrove, Black Rock, St Michael."

[74] In the affidavit of Dorril Lowe filed on the 22<sup>nd</sup> day of July 2009, the witness deposed that:

- "1) I recalled going with Bailey to Kingsland in Christ Church to view some property there. He wanted to purchase the property for one of his children. After he saw it he liked the location and later he purchased this property for his eldest child, Barbara Bellamy for about \$25,000.00.
- 2) Bailey had another property in Bridge Gap, St Michael which he stated was for his son Charles Reece. He always repeated to me and all and

sundry that Charles had worked from the time he was 15 years of age and had assisted him well and that he was to have that house.

- 3) With regards to that property in Bridge Gap, St Michael everyone was around Bailey knew that without a doubt Bailey wanted Charles to have the Bridge Gap property. Bailey and Charles had a good relationship even though Bailey used to complain that Charles was laid back, and he didn't have a business head but he would always recognize that Charles was a hard worker.
- 4) I also recall how Bailey came to buy the property at Skeete's Road, Bank Hall, St Michael. It was a concrete property. I was the one who heard it was for sale and I gave Bailey the information. We went and looked at the property together. Bailey subsequently purchased it. He made it clear and was very adamant that the property was for his grandson Julian Bellamy because he knew that Julian would take care of it."

[75] In his affidavit filed on the 22<sup>nd</sup> day of July 2009, David Neblett deposed, inter alia, that:

- “1) ...
- 2) That I knew Mr. Reece from the time I was four (4) years of age until his death in 1996. He was familiarly known as “Bailey” but would sometimes be referred to as Caswell. I shall hereinafter refer to him as “Mr. Reece”.
- 3)...
- 4)...
- 5)...
- 6) It was within my knowledge that Bailey owned other properties. These being in Skeete's Road, Bridge Gap and Applegrove. The one in Bridge Gap he rented. When he was going to buy the property in Skeete's Road I went with him to see it. At that time I was a loans officer at the bank and he wanted to ensure that he was paying a good price for the property. I told him that it was worth it and he purchased the property.
- 7) This property at Skeete's Road was a concrete house and it was the only concrete house that I knew him to have. After he purchased the property he moved into the house at Skeete's Road leaving his wife in Applegrove.
- 8) The other two properties that the deceased had were wooden houses. I recalled that Julian used to go into the business from a young boy and help his grandfather in the shop. The deceased wanted to see his efforts carried forward and after he realized that

his only helpful son Charles seemed not to be interested in the business he started to groom young Julian.”

- [76] These deponents were never cross examined and their affidavit evidence is unchallenged. There is no suggestion that they are not witnesses on whose evidence the court cannot rely. Accordingly I accept their evidence in relation to the properties owned by the deceased as true. This evidence is not admissible to show the testator’s intention, that must be gathered from the will itself. It is admissible to assist the court in construing the devise. In interpreting the devise, I also apply section 74 of Cap. 249 which allows extrinsic evidence to be admitted to “show the intention of the Testator and to assist in the construction of...a will”.
- [77] In **re Mayell, Foley v Wood [1913] 2 Ch. 488**, the Testator directed in his will that “my two freehold cottages or tenements, with their appurtenances, situated at Trowbridge, known as Nos. 19 and 20, Castle Street,” to be sold by auction and the proceeds to be divided between two of his daughters. At the date of his will and death the testator owned freehold premises known as Nos. 19 and 20, Thomas Street, Trowbridge. He also owned other premises in Castle Street. The Court held that in the description of Nos. 19 and 20 the words “Castle Street” ought to be rejected as *falsa demonstratio* merely, and that Nos. 19 and 20, Thomas Street passed under the specific devise, the testator having no other houses in Trowbridge so numbered.
- [78] The Court asked the question “Can this will be so read as to pass these two houses, in other words, are the words ‘Castle Street’ an essential part of the description, or are they mere *falsa demonstratio*?” **Warrington J** said:  
“Whatever view may be taken of this question, the evidence placed before is plainly admissible. It is not evidence of intention but of material facts which a court of construction must know before it is in a position to interpret the will. It is clear on that evidence that there is no subject-matter completely answering the whole of the description. Part of the description consists of the word “my” and that part is plainly incorrect if ‘Castle Street’ means Castle Street. Again, if the words ‘Castle Street’ are omitted there is no difficulty in identifying the property intended to be devised. In...other words, there is a sufficient description of the property which the testator intended to devise without resorting to the words Castle Street.”
- [79] The only dwellinghouse the Testator had at Applegrove, Black Rock in the parish of St. Michael was a chattel dwellinghouse which he devised in the will. There is no doubt that the Testator intended to give the stone dwellinghouse to the Second Defendant. Part of the description of the devise in paragraph 3 consists of the words “my” and “stone”. Moreover, the location of the dwellinghouse is in “the parish of St. Michael”. The

question is whether these descriptions are sufficient to pass the property to the Second Defendant, without using the words “at Applegrove, Black Rock”.

- [80] If the words “at Applegrove, Black Rock” were removed from the devise, it would read “I **GIVE** and **DEVISE** my stone dwellinghouse situate in the parish of St. Michael together with its contents to my grandson Julian Royston Bellamy absolutely.” On the totality of the evidence, I find that there was an error in the description of the devise in this matter. In interpreting the devise I consider that the *Falsa Demonstratio* Rule is applicable.
- [81] I, therefore, hold that that the Testator intended to give his stone dwellinghouse at Skeete’s Road, Bank Hall to the Second Defendant. Thus, the devise does not fail for uncertainty. It follows therefore that the stone dwellinghouse situate at Skeete’s Road, Bank Hall does not fall into residue.
- [82] It only remains for me to dispose of the submission that I should follow the opinion of the dissenting judges in **Patch**. **Patch** stands upon its own peculiar facts. The dissenting judges were of the opinion that the devise was unambiguous, they were also of the view that the effect of the findings of the majority of the Court in relation to the Statute of Frauds in the District of Columbia, where the facts occurred, was a relevant consideration. This distinguishes that case from the one before me. Having regard to my findings above, the submission that the Court should follow the reasoning of the four dissenting Judges in **Patch** is overruled.

#### **DISPOSAL**

- [83] In the circumstances it is declared that the Second Defendant is entitled to the beneficial ownership and possession of the property being a stone dwellinghouse with the land attached thereto situate at Skeete’s Road, Bank Hall in the parish of Saint Michael and devised to him under the Will of Caswell Arenas Reece (the testator) dated the 18<sup>th</sup> day of July, 1994.

**AND IT IS ORDERED** that:

- (1) The Plaintiff’s application for rescission of the Deed of Assent dated the 15th day of March 2001, made by the First named Defendant as executor of the estate of Caswell Arenas Reece, deceased vesting the said property in the Second named Defendant is refused.
- (2) The Defendants’ applications filed on the 22<sup>nd</sup> day January 2009 and the 1<sup>st</sup> day of December 2011 respectively to strike out the Plaintiff’s originating process as not disclosing any or any reasonable cause of action is dismissed.
- (3) All other matters including issues relative to costs are adjourned for a date to be fixed at the request of counsel for all parties.

**William J. Chandler**  
**Judge of the High Court**