BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV0051 of 2016

BETWEEN

EUSTACE DOUGLIN **CLAIMANT**

AND

DEBORAH DANIEL **DEFENDANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: March 8

Mr. Chester Sue for the Claimant who is present

Mr. Alrick Scott in attendance with Ms. T'Shara Sealy for the Defendant

DECISION

INTRODUCTION

[1] This is a claim in respect of the ownership of a parcel of land comprising about 7559 square feet with a dwelling house thereon situate at No. 97 Kew Road, Bank Hall, St. Michael.

[2] The Claimant, Eustace Douglin is seeking possession of the said parcel of land with the dwelling house (the property) in his capacity as

heir-at-law, whereas the Defendant is seeking to have the matter dismissed on the basis that the Claimant has no standing.

THE FACTS

[3] It is not disputed that Teddy Douglin (the Deceased) died intestate in this Island on the 3rd December, 1959 and that he was the owner of the abovementioned property, which was conveyed to him by an Indenture of Conveyance dated the 23rd October, 1958. Nor is it disputed that the Claimant is the first son and heir-at-law of the Deceased.

[4] The Defendant's position in seeking to have the matter dismissed is that the Claimant has no *locus standi* to bring a claim for the property since he is not the legal personal representative or administrator of the estate. The Defendant contends that generally a party entitled to administration of an estate cannot do any acts as administrator of the estate until Letters of Administration have been granted. Since the administrator derives his power from the Letters of Administration, the Claimant cannot have the redress sought in his application as by his own admission at paragraph 4 of his affidavit he deposes that there has been no formal process of administration with respect to the estate of the Deceased. It is therefore the Defendant's position that in order for the Claimant to be successful in his application, he must first

obtain Letters of Administration. The Defendant relied on the case of *W. Ankford v W. Ankford* and the text *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, page 103 para. 8-10 to support his submissions.

[5] The Defendant also contends that according to Rule 8.4 of the CPR there are deficiencies in the claim form in that the Claimant must state the representative capacity in which he is suing and the Claimant has not done so. Furthermore pursuant to Rule 8.5 of the CPR the Claimant must include a short statement of the facts he intends to rely upon and state the nature of his claim as well as the relief sought and this has not been done. He has therefore requested that the application should be dismissed with costs to the Defendant.

[6] In responding to the Defendant's claim that the application should be dismissed the Claimant contends that the claim form clearly sets out that the nature of the claim sought is for possession of land and this is supported by the affidavit of the Claimant filed on 18th January, 2016 outlining the nature of the claim and the relief sought.

[7] With respect to the Claimant's capacity to bring this action, it is contended that the Claimant is bringing this action in his personal capacity as the oldest son and heir-at-law of the Deceased and not in the name of the Deceased's estate. His position is that prior to 1975

when the Succession Act came into being, real estate in Barbados passed from seed to seed, that is, to the oldest son as heir-at-law. This was the common law position which existed and was applicable to Barbados at the time, however the same position did not exist in England and therefore the authorities cited by Counsel for the Defendant are not applicable to the present situation. In short the Claimant's case is that he is the heir-at-law and that title to the land vested in him on his father's death.

THE ISSUES

[8] The issues for determination are:

(i) Whether the Claimant as heir-at-law is entitled to possession of the property notwithstanding that the estate has not been administered.

(ii) Whether the Claimant has *locus standi* to bring a claim for the property since he is applying in his personal capacity and not as legal personal representative.

(iii) Whether the Claimant's case should be dismissed for failure to comply with Rules 8.4 and 8.5 of the CPR.

THE LAW

[9] The general rule is that where a person dies intestate, his estate vests in the legal personal representative.

[10] The Succession Act, Cap. 249 (the Act) which came into effect on the 13th November, 1975 governs the law of intestacy. **Section 3** of the

Act speaks to the devolution of real and personal estate in the following terms:

> (1) The real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve and became vested in his personal representatives.
>
> (2) The personal representatives for the time being of a deceased person shall be the representatives of the deceased in regard to his real and personal estate, and shall hold the estate as trustees for the persons by law entitled thereto.
>
> (3) …
>
> (4) This section shall apply to property vested on any trust in a deceased person solely as it applies to his real and personal estate.

[11] **Section 4** of the Act addresses the abolition of descent to heir, curtesy, dower and escheat. It provides:

> "(1) all existing modes, rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, whether operating by the general law of custom of any locality or otherwise howsoever,… shall be abolished."
>
> (2) Nothing in this section shall effect the descent or devolution of an entailed interest."

[12] **Section 6** further states that:

> "Where a person dies intestate or dies testate but leaving no executor surviving him, his real and personal estate, until administration is granted in respect thereof, shall vest in the Public Trustee."

[13] However in the instant case the Deceased died intestate on the 3rd December, 1957, that is before the Succession Act which was passed in 1975. It is therefore necessary to consider the law in existence before this Act. The Real Property (Devolution) Act, Cap. 247 came into force on 31st May, 1935. **Section 106(5)** of the Act (The Succession Act) the savings law clause, preserves **Section 3(1)** of the Real Property (Devolution) Act and states:

> "Except to the extent to which any provision of this Act expressly provides to the contrary, the law relating to succession of the property of deceased persons and to the devolution, administration, testamentary disposition and to distribution in intestacy of such property, in force immediately before the commencement of this Act shall continue to have effect in relation to the estate of a person, or to the Will of a testator, who has died before such commencement."

[14] **Section 3(1)** of the Real Property (Devolution) Act provides:

> "Real estate, to which a deceased person was entitled for an interest not ceasing on his death, and notwithstanding any testamentary deposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as chattels real devolve on the personal representative from time to time of a deceased person."

[15] **Section 5(1)** of this Act provides:

> "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey land to any person entitled thereto as his heir, devise, on otherwise, and may make the assent or conveyance, wither subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such

> charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance:"

[16] The Inheritance Act 1891-3 was in force before the Real Property (Devolution) Act and **Section 3** of that Act provides that descent shall always be traced from the purchaser but the last owner shall be considered to be the purchaser, unless the contrary be proved. The following pre 1975 rules of descent were therefore applicable to an intestate's estate:

> "1. Inheritance shall lineally descend, in the first place, to the issue of the last purchaser in infinitum.
>
> 2. The male issue shall be admitted before the female.
>
> 3. Where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit, but the females shall inherit all together…"
>
> See *Tristram and Coote's Probate Practice Appendix VII Instructions and Statutory Will Forms A7:02.*

[17] So that even though it is established that the real estate of a Deceased person devolves, notwithstanding any testamentary disposition thereof, on the personal representative, that is, the executor or the administrator, it has been held by **Williams C.J.** in the Barbados case of *Welch v Broomes et al BB 1981 H.C. 37* that failure on the part of an heir-at-law to take out Letters of Administration, does not by itself

bar him from claiming ownership of the property. He supported this proposition by referring to **North J.** in *John v. John [1898] 2 Ch. 573* at page 576 where he stated that unless and until an administrator is appointed, the legal estate vests in the heir-at-law and again in the case of *Re Griggs Exp London School Board [1914] 2 Ch. 574 CA* where the Court pronounced that until a legal personal representative is appointed, freehold property is vested in the heir.

[18] Therefore based on the above it would seem that the legal estate of the Deceased vests in the Claimant as heir-at-law and as such he is entitled to claim possession of the property.

[19] With respect to the issue whether the Claimant has *locus standi* to bring a claim for possession in his personal capacity as a legal personal representative, again it must be stated that the general rule is that a person has no right to commence proceeding as administrator before Letters of Administration have been issue to him – *Chetty v Chetty [1916] A.C., 603*.

[20] In *Williams, Montimer and Sunnicks on Executions, Administrators and Probate 2008*, the authors pointed out the following at page 103 para 8-10:

> "…an executor may perform most acts appertaining to his office before probate. However, for an administrator, the general rule is that a party entitled to administration can do nothing as administrator before Letters of

> Administration are granted to him. This is because he derives his authority entirely from the appointment of the Court."

[21] In the case of *Bartlett v Kirton BB2009 CA 5*, the issue to be determined was whether the Respondent who brought proceedings to establish his title to a right of way could commence proceedings in his personal capacity as opposed to his capacity as personal representative. The Court determined that at first instance, the Respondent should not have been allowed to commence proceedings in his personal capacity and declared the proceedings a nullity. At paragraph 24 of the judgment, the Court referred to the Privy Council's case of *Chetty v Chetty, supra* and a line of cases which followed, in support of their decision, while noting that interlocutory proceedings could have been taken which would have allowed the case to be stayed pending the Respondent obtaining Letters of Administration or Probate of the Will. However this case is not on all four with the case at bar as the Respondent in that case was not an heir-at-law and therefore the property did not vest in him upon the death of the Deceased. In the instant case, the Claimant is the heir-at-law and at the time of the Deceased's death, the Act not being in force at that time, the property would have vested in him, since as held in

Welch v Broomes, supra, the Claimant was not barred from bringing an action in his personal capacity.

[22] So that even though from the facts the Claimant has failed to administer the Deceased's estate, based on the authority of *Welch v Broomes, supra*, the Claimant's failure to take out Letters of Administration is not in itself a bar which would prevent him from bringing an action for possession of the property in his personal capacity since as heir-at-law the property vests in him unless and until an administrator is appointed.

[23] It now becomes necessary to determine what is the effect for failure to comply with Part 8 of the CPR.

[24] Part 8 of the CPR specifies the mode of commencing proceedings and provides at Rule 8.1(1) that a proceeding is started by filing in the Registry the original and one copy for sealing of:

(a) the claim form

(b) subject to Rule 8.2, the Claimant's statement of claim; or

(c) where any rule or practice direction so requires an affidavit or other document.

[25] Rule 8.1(4) provides that a claim form must be in Form 1, with or without sanction except in the circumstances set out in sub-rule (5). Rule 8.1(5) provides that a Form 2 (fixed date claim form) must be used:

(a) in proceedings for possession of land;

(b) in claim arising out of hire purchase or credit sale agreements;

(c) whenever its use is required by a rule or practice direction; and

(d) where by any enactment proceedings are required to be commenced by originating summons on motion.

[26] Therefore proceedings for possession of land must be commenced using a Form 2 (fixed date claim form) as was done in the instant case.

[27] Rules 8.4 and 8.5 stipulates however what must be in the claim form. Rule 8.4(1) provides that the main form must include:

(a) a short description of the nature of the claim;

(b) the remedy that the Claimant is seeking;

(c) an address for service.

[28] Pursuant to Rule 8.5(1) the Claimant must (1) include on the claim form a short statement of the facts on which he relies, (2) the claim form or statement of claim must identify or annex a copy of any document which is necessary to the Claimant's case, (3) the Claimant may not rely on any allegation or factual argument not set out in the statement of claim, but which would have been there, unless the Court gives permission, (4) where the claim form seeks the recovery of any property the Claimant's estimate of the value of that property must be

stated and (5) the statement of claim must also include a certificate of truth in accordance with Rule 3.12.

[29] Rule 3.12(7) stipulates that a certificate of truth given by a litigating party must be in the following form:

> "I [name] certify that I believe that the facts stated in this [name document] are true."

[30] By Rule 3.13(1) the Court may strike out any statement of claim which has not been verified by a certificate of truth.

[31] Though it is true that a statement of truth in the exact terms is not included on the claim form, there is a statement by the Claimant in the following words:

> "I certify that all facts set out in this claim form are true to the best of my knowledge, information and belief."

[32] The Court is satisfied that although the exact words were not used that the certificate signed by the Claimant satisfies the requirement of Rule 3.12(7), therefore the Court will not strike out the statement of case due to this procedural error.

[33] With respect to the brief description of the nature of the claim being "possession of land", the Court relies on *Halsbury's Law of England Vol. 39(2) at para. 265* which states:

> "The Plaintiff in his statement of claim must state his title with sufficient particularity to show how he derives his title to the land. A mere general statement that he is entitled under certain documents is not enough. He must

> set out their effect, although it is not necessary to give the exact words unless they are material. If he has not himself been in possession, he must trace his title from a person who has been in possession, and show the successive links in his title…"

[34] Even though the claim form is brief, the affidavit of Eustace Douglin does provide the necessary information necessary to satisfy his claim.

DISPOSITION

[35] In light of the foregoing, the Courts find in the instant case that:

(i) The Claimant as heir-at-law is entitled to make a claim for possession of the property notwithstanding that the estate has not been administered.

(ii) The Claimant does have *locus standi* to bring a claim for possession of the property.

(iii) Pursuant to Rule 26.4(3) the Court exercises its discretion in favour of the Claimant and order that the procedural errors or failures referred to above be amended by the Claimant.

(iv) The Claimant be granted leave to file and serve his statement of claim within 14 days.

(v) The Defendants will be permitted to file and serve a defence within 14 days of the service of the statement of claim on them.

(vi) The costs of this application be costs in the cause.

PAMELA A. BECKLES
Judge of the High Court