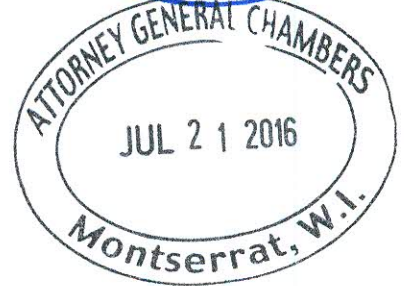


IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF MONTSERRAT

(Civil)



CASE NO: MINIHCV 2011/0009

BETWEEN:

Ashton McCall (The Executor of the estate of James P. Osborne deceased)
William Osborne

Paul Payne

Paul Payne (as representative of Priscilla Osborne Daley)

David Payne

David Payne (as representative of the estate of James Osborne deceased)

Claimants

AND

Eleanor Elizabeth Osborne Bardoule (Personally and as personal of the
estate of James Osborne deceased)

Registrar of Lands

Defendants

Appearances:

Mr. Khari Markham for the Claimants

Mr. David Brandt for the first Defendant

Ms Cedricia Shiell for the second Defendant

2016 April 07

2016 July 19

Judgment

Whether the first named Claimant had title to the land of his deceased grandfather. Whether the first named Claimant had the legal authority to alienate the land of his deceased grandfather. Whether the first named Claimant could acquire a prescriptive title to his deceased grandfather's intestate estate

- [1] **Redhead, J. (Ag):** On the 16th December 1958 James W. Osborne died. At the time of his death, he owned lands described as Block 13/19 Parcel 6 in the St Peter's Registration Section. James W. Osborne died intestate leaving 12 legitimate children. They are all now deceased.
- [2] The first named Claimant Ashton was the grandson of James William Osborne, James P Osborne also known as "Teacher Jim" was the father of Ashton McCall. James P Osborne appointed by his last will and testament of 8th September 2000, the said Ashton McCall to be the executor of the said will.
- [3] On 7th May 2008 the late John Kelsick wrote to James P. Osborne, inter alia in the following terms:

Mr. James P. Osborne

"Dear Mr. Osborne,

I write to you with reference to your father James William Osborne who died in St. Peter's Montserrat, on 16th day of December 1958 on behalf of your niece Mrs. Elenor E Bardouille Nee Osborne of Roseau, Dominica.

A search of the Register of Probates in the Registrar's Office at Brades, has revealed that on the 31st July, an application to the Montserrat High Court for a grant of Letters of Administration of the Estate of James William Osborne filed by Kenneth Allen, Attorney at Law, on behalf of your late Sister Sarah Elizabeth Payne Nee Osborne and yourself. The application was accompanied by a bond entered into by late Sarah E. Payne, yourself and Mr. John Osborne. However no declaration of Assets was filed and no order issuing a grant was made.

The result of this is that the Estate has remained unadministered thus depriving the beneficiaries of the estate under the provision of their due rights and benefits therein.

As you have been advised on the death of your late father intestate and a widower, his estate has passed under the act to his lawful children in equal shares.

On the demise of any of those children leaving issue born in wedlock in the case of male children and issue whether born in or out of wedlock in the case of female children their issue would be entitled to share or shares in the estate in which their parent or parents would have taken, had the estate been administered according to the provisions of the Act by a person or persons to whom a grant of Letters of Administration was issued by the Court.

Mrs. Elenor Osborne Bardouille has instructed me that she is the daughter of your late sister Mary Ellen Osborne also called Mary Elenor Osborne who was born on the 27th July 1913. Mrs. Osborne Bardouille is therefore legally entitled to share with her siblings in the estate of James William Osborne to which her mother was entitled. Having regard to the foregoing I have been instructed that you, your legal advisers and myself meet to discuss the most expeditious way in which the estate can now be administered so that members of the family entitled, can if they wish obtain the portion or portions of the estate to which they are legally entitled. I am also instructed to ask that you let me have a response by 22 March 2008.

Yours Very Truly,

Kelsick & Kelsick

John C Kelsick"

- [4] I am of the opinion that the above letter was well written, simple and legally clarifies all the issue in this case. By simple I mean, that the letter was written in such a manner that it could be understood by the average man.

"Section 4 (1) mandates:-

- (a) The residuary estate of an intestate shall be distributed in the manner or to be held on the trust mentioned in this section namely....."

- (b) if the intestate leaves issue but no husband or wife the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate.....”

- [5] In spite of that letter from Mr. Kelsick to Mr. Osborne on 7th May 2008, yet on 8th September 2008, exactly 5 months after he had written the letter to James Osborne¹, the latter purported to make a will of the estate of James W. Osborne who died on 16 December 1958. James P. Osborne at no time had title to Block 13/19 Parcel 6 St Peter's Registration Section passed to James P. Osborne. Simply put James P. Osborne never owned Block 13/19 Parcel 6 St. Peter's Registration, *Nemo dat quod non habet*.
- [6] In about 1997-1980 the Government of Montserrat commenced a land adjudication process of all lands on the island under the provision of the land Act².
- [7] James P. Osborne submitted a claim under the land adjudication Act to be registered as proprietor of Block 13/19 Parcel 6 St. Peter's Registration in the capacity of Personal Representatives of his father James William Osborne's estate. The claim was denied as it was unsupported by letters of Administration or grant of probate. James P Osborne's name as a consequence was never entered on the land register.
- [8] On 27th July 1967 James P. Osborne and Sarah Elizabeth Payne Nee Osborne made an application to the High Court of Montserrat for a grant of Letters of Administration of the estate of James William Osborne. The said estate included Block 13/19 Parcel 6 St. Peter's Registration. No order issuing this grant was made.
- [10] Ashton McCall, the first named claimant is pursuing this claim as Executor of James P. Osborne. In his witness statement this claimant said, inter alia that he was the grandchild of the late James William Osborne who died in or about the year 1958. He is the son of the late James P. Osborne also known as "Teacher Jim." Teacher Jim was the son of the late James William Osborne. The second, third and fourth Claimants are grandchildren of the late James William Osborne.

¹ Intestate Estates Act CAP 03.04

² Cap 8.07 of the Lands Adjudication Act of Montserrat

- [11] In his witness statement he alleged that for a period exceeding fifty years (50) Teacher Jim remained in possession of the land at St. Peter's Montserrat which was previously in the possession of his grandfather, James William Osborne said that the land is now described as Block 13/19 Parcel 6.
- [12] Ashton McCall in his witness statement said that he is aware that for a period exceeding fifty years, Teacher Jim occupied Block 13/19 Parcel 6 exclusively and built a structure on the land, paid his property taxes and received receipts for them, albeit in James William Osborne's name as the property was still registered in that name, leased portions of the land to third parties, including a portion of the land down by the Bay to Dawey, collected rents, granted rights of way and even conveyed portions of the land to third parties. The acts referred to herein were done with Elenor's knowledge and that of her mother, whom he called Aunt Mom.
- [13] On the 8th of December 2008, Teacher Jim made his last will and testament and appointed Ashton McCall his sole executor. Additionally, he devised real Property forming part of Block 13/19 Parcel 6 to a number of persons to include his sister Priscilla, his grandniece Shirley Osborne, Julian Wade, Williams Osborne/second Claimant) and the first named Claimant Ashton McCall.
- [14] The above seems to suggest that Joseph Osborne obtained title to Block 13/19 Parcel 6 by a adverse possession. In the Laws of Real Property³ the learned authors tell us, **it is a general principle that a trustee can never obtain a title by adverse possession against his beneficiary."**
- [15] In my considered opinion, Ashton McCall being in occupation of the intestate land, Block 13/19 Parcel 6, held that parcel of land on trust for the issue of the intestate.
- 'If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trust for the issue of the intestate'.⁴
- [16] The purported will made by James P. Osborne was of no effect. It follows therefore that any appointment or devise purported to be made under the purported will of James P. Osborne is of no effect, null and void. The appointment of Ashton McCall, the first named

³ 5th edition. Sir Robert Magerry and Wade P 1043

⁴ Interstate Estates Act S 4 (11) (b)

claimant is null and void and of no effect. Ashton McCall therefore has no locus standi to bring the action as executor of The Estate of James P. Osborne.

[17] The claimants in their statement of case contended that James P. Osborne took possession of the lands now described as Block 13/19 Parcel 6 immediately or shortly following the death of his father and the possession referred to exclusively and adverse to the interest of the estate of the deceased James William. Osborne.

[18] I make the observation that his possession could not be adverse to the interest of the beneficiaries.

[19] The claimants also alleged in their statement of the case that the possession of the deceased James P. Osborne was not obtained with the permission or consent of anyone. For a period exceeding fifty years James P. Osborne occupied the land, carried out acts of possession in respect thereof to include but not limited to paying the property taxes, building structures, entering into agreements with third parties, granting rights of way, collecting rents and conveying portions to parties.

[20] I make the observation that James P. Osborne had no legal authority to do any of the above, unless he was the registered proprietor of Block 13/19 Parcel 6. I draw the inescapable inference that James P. Osborne was aware that he needed to be registered as the proprietor of Block 13/19 Parcel 6 in order to lawfully deal with the intestate estate for the following reasons-

James P. Osborne approached the Registrar of lands with a view to be registered as proprietor of Block 13/19 Parcel 6.

[21] On 27th July 1967 James P. Osborne along with Sarah Elizabeth Payne Nee Osborne made an application to the Montserrat High Court for a grant of letters of Administration of the deceased on behalf of Sarah and himself. The order issuing the grant was not made.

I also refer to the letter from Mr. J. C. Kelsick to Mr. James P. Osborne in which he outlined with clarity and simple language the legal situation concerning an intestate estate.

[22] Mr. James P. Osborne, (Teacher Jim) should have no difficulty in understanding the contents of the letter as he was a teacher. Moreover as indicated in the said letter from Mr. Kelsick he was represented by a lawyer at the time.

[23] Finally, on this point on the 21st July 1980 James P. Osborne submitted a claim to the adjudication officer with a view to being registered as proprietor of Block 13/19 Parcel 6 in the capacity of personal representative of his father's, James William Osborne's Estate. This claim form was accompanied by a supporting affidavit. The claim was incomplete in that the capacity in which he made the claim was unsupported by letters of administration or grant of Probate. The application was denied. James P. Osborne was never entered in the land register as absolute owner of Block 13/19 Parcel 6.

[24] In my considered opinion the above failed actions of James P. Osborne to be entered as absolute owner of Block 13/19 Parcel 6 demonstrate clearly that he needed to do so in order to legally transfer the land.

[25] Mr. Markham, Learned Counsel for the claimants in his written submissions argued that some five days after filing the claim, the claimants applied for an injunction against the first named defendant. The application was made on 27th April 2011 and an order was granted.

[26] Learned Counsel for the claimants submitted –

“The injunction meant to maintain the status quo as it related to the land and by extension protecting the interest of Teacher Jim's estate. Notwithstanding the order which prohibited the first defendant from carrying out any acts of administration in her capacity as personal representative to the estate of James William Osborne, she deliberately (i) mutated Block 13/19 Parcel 6 into Parcel 67 and 68 and (ii) applied and obtained title in her name as personal representative of the estate of her (sic) Mary Elenor Osborne to Block 13/19 Parcel 67. This parcel mutated from 13/19/6 measures 5.4 acres and represents a third of the land.”

[27] First of all I make the observation that the legal estate was never in 'Teacher Jim's name.' He never had the fee simple. However, that did not give the first defendant the right to disobey the order of injunction as the order of injunction is binding until set aside (see **Isaac v Robertson**⁵)

⁵ (1985) 43 WIR

[28] Learned Counsel, Mr. David Brandt, on 29th April 2009 wrote to Mrs. Priscilla Daley in the following terms:

Mrs. Priscilla Daley,
Rocklands
Montserrat

Dear Mrs. Daley,

I act for Miss Elenor Osborne. According to my instructions you are one of the two surviving children of James William Osborne [the other was James P. Osborne] and his wife who are both deceased.

I am further instructed that letters of Administration was not granted to anyone in respect of Mr. James William Osborne who died interstate.

My client is hereby requesting that you either take out letters of administration for the estate of the said James William Osborne (deceased), or renounce your right to do so.

May I hear from you which of the options you will exercise (if any) by noon on 7th May 2009 or my client will exercise her legal rights in this matter.

Yours very truly

David S Brandt

Cc Elenor Osborne"

[29] Ms Priscilla Daley did not exercise any of the options outlined to her in the letter of Mr. Brandt. What then were the legal rights of Mr. Brandt's client Ms Elenor Osborne with the failure of Ms Priscilla Osborne to exercise one of the options outlined to her in the letter from Mr. David Brandt? His client was one of the grandchildren of James William Osborne.

She is entitled to an unspecified interest with the other surviving grandchildren in the estate of James William Osborne. The grandchildren are therefore entitled to share in the estate of the deceased James W. Osborne. I do not know if the first named defendant has priority among the grandchildren to apply for letters of administration. Whether this is so or not I don't think it is appropriate in the circumstances to grant letters of administration to one individual in the intestate estate.

[30] James P. Osborne died in the year 2009. On 31 July 1967 James P. Osborne and Sarah Payne Nee Osborne made application to the Montserrat High Court for a grant of letters of administration of the estate of James W. Osborne. Unfortunately the order issuing the grant was not made. I do not know the reason for the refusal but in my considered opinion this was the proper way to go about the administration of the intestate estate of James W. Osborne.

[31] Mr. Brandt on behalf of first named defendant in his skeleton arguments contended that this action is brought by Ashton McCall the executor of the estate of James P. Osborne, deceased, William Osborne, Paul Payne, Paul Payne as representative of the estate of Priscilla Osborne Daley, David Payne as representative to the estate of Sarah Payne.

[32] Mr. Brandt argued that in order for this to take place, the claimants must show that each child of William Osborne had children. In order for this to be proved, the claimants must produce birth certificates. This they have failed to do. Mr. Brandt contended that no birth certificates have been produced, therefore the court is not in a position to ascertain whether the children of William Osborne had any children and as a result how many shares the land is to be divided into.

[33] I agree entirely with the Brandt's argument.

[34] Mr. Markham Learned Counsel on behalf of the claimants in his skeleton arguments contended that the actions of the first defendant in registering Block 13/19 Parcel 67 in the name of her mother's estate in defiance of the court order to be deemed void and the registration revert to her as personal representative to the estate of James William Osborne; alternatively;

(ii) That the actions of the first defendant in registering Block 13/19 Parcel 67 representing one third of the entire Rocklands estate in the name of her mother's

estate deemed a breach of a fiduciary duty and the registration be set aside and revert to her as personal representative to the estate of James William Osborne.

[35] Learned Counsel, Mr. Markham asked that the first defendant be removed as personal representative of the estate of James William Osborne; alternatively that Mr. Paul Payne be appointed joint personal representative with the first defendant. That the estate of James P. Osborne ("Teacher Jim") to be deemed to have had an overriding interest in the land formerly described as Block 13/19 Parcel 6 and the first defendant be ordered to pay damages (to be assessed) for her unlawful dealings with the deceased personal property and overriding interest at Rocklands St. Peters. That the estate of Priscilla Daley be deemed to have an overriding interest in the land formerly described as Block 13/19 Parcel 6 and the first defendant be ordered to pay the damages (to be assessed) for her unlawful dealings with the deceased personal and real property and overriding interest at Rocklands St. Peters.

[36] I have the greatest difficulty in appreciating how the estate of James Osborne and estate of Priscilla Daley could be deemed to have an overriding interest. In the Law of Real Property the Learned authors⁶ instruct us:-

"Overriding interest bind the proprietor of registered land, even though he has no knowledge of them and no reference is made to them in the register. In general, they are the kind of right which a purchaser of unregistered land would not expect to discover from a mere examination of the abstract and the title deeds but from which a purchaser of registered land would not expect to discover".

[37] In the case at bar the proprietor of the registered land was James W. Osborne, deceased on intestacy, Rocklands would have passed unto his children and then his grandchildren as the case may be.

[38] In my considered opinion, if the estate had been properly administered James P. Osborne and Priscilla Osborne the two then surviving children of James William Osborne would have had priority. Their failure to administer the estate, their unclaimed interest would have passed unto their children, if any, into equal shares at their death. As was said above James William Osborne had 12 children all of whom are deceased.

⁶ By Sir Robert Megarry and HW.R Wade

- [39] Mr. Brandt learned counsel for the first defendant made the observation that no birth certificate has been produced by the claimants to show if any of the siblings of William P. Osborne had children and if so how many of them are alive.

The only persons shown to be alive are Ashton McCall, Paul Payne, William Osborne, Elenor Osborne Bardouille.

- [40] Mr. Brandt contended that Sarah Payne, deceased, daughter of James W. Osborne got her share 2.25 acres.

- [41] There is a very interesting letter dated 3rd September 2008 written by Kenneth Allen Q.C in response to Mr. John Kelsick's letter of 7th May 2008. In that letter Mr. Allen named all of the 12 children and some of the grandchildren of James W. Osborne alias Governor, in that letter he stated that in the last years of his life, Governor who was a tanner and his wife Elenor were ailing and unable to work, they were maintained and cared for by Jim who was a public school head master and an artisan. He [Jim] lived with his parents except when away on Government duties and he kept the Rocklands home in good repair.

The only child living in Montserrat was Mrs. Sarah Payne who regularly helped Jim to look after their parents and did so alone whenever Jim was away. In appreciation James William Osborne gave her gifts of lands at Cheap End inter vivos

- [42] According to Mr. Allen QC, "in light of the foregoing it was always Governor's intention that Jim (having taken care of Sarah and Priscilla inter vivos) should inherit his entire estate. In fact, shortly before his death he wrote to Sonny, the son who was practicing medicine in Tortola to the effect that after his death that none of them should come to Montserrat making noise with Jim about land..."

- [43] "The basic principle of the law of limitation is that a claimant cannot bring proceedings for recovery of land more than 12 years after the cause of the action occurred. The act gives effect to the policy that where any person claiming any interest to land as owner or otherwise allows others to remain in possession of land without acknowledging their title in paying rent, their rights, or even their paper title, if they had one should eventually be extinguished. This is so even if the owner held a certificate of title under the Torrens System and you would recall that the Act now repealed contained an indefeasibility clause. There are numerous reported cases in our jurisdiction confirming this principle; more recently there are two landmark cases in the House of Lords and the Privy Council which have put to rest any lingering doubt on the matter..."

- [44] Unfortunately Learned Counsel did not cite any of the cases mentioned. I make the observation that title to land cannot pass by word of mouth. From the above it seems to me that the gift of lands by "Governor" to Priscilla was not part of Block 13/9 Parcel 6.
- [45] As I said above that the law of limitation cannot benefit James P Osborne to defeat the interest of those who are entitled to benefit in the intestate estate of James W. Osborne.
- [46] Mr. Markham in his Skeleton Arguments contended that the transfer of land (for valuable consideration) by Teacher Jim to Julian Wade be honoured by the personal representative and that the second defendant be ordered to register the said transfer. Indeed the personal representatives, in my opinion, could honour the transfer to Julian Wade.
- [47] I make one observation in this regard. Although at the time Julian Wade purchased the land from Teacher Jim, the latter was in actual occupation, a search of the Register would have revealed that Teacher Jim did not have the registered title to Block 13/19 Parcel 6 and therefore could not pass title to Wade.
- [48] Finally, the Claimants alleged fraud by the 1st named defendant. Mr. Brandt argued that fraud is proven, when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, not caring whether it is true or false. If fraud is proved, the motive of the person guilty is irrelevant (*Derry v Peek*⁷)
- [49] Fraud must be specially pleaded. No particulars of fraud have been pleaded. Moreover the 1st Defendant's application for Grant of Letters of Administration was published in *Montserrat Reporter*, a newspaper that has national circulation. The letter from Mr. Kelsick to James P. Osborne, in my opinion the allegation of fraud cannot be maintained.
- [50] On the question of mistake, Mr. Brandt argued that a mistake has been described as an incorrect expression of the final decision made in the land Register. (*Skelton & others v Skelton*⁸)
- [51] In my considered opinion the mistake does not have to emanate from the applicant, the first named defendant in this case, having regard to the issues in this case I am of the view

⁷ 1886 – 1890 AER 122

⁸ [1986] 37 WIR 177

that the mistake originated from the 2nd named Defendant in registering the first named Defendant as proprietor.

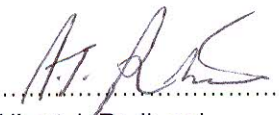
- [52] In my judgment, the estate of James W. Osborne Block 13/19 Parcel 6 is in a chaotic situation. This is so because James Osborne having died intestate, the persons who were entitled to take out Letters of Administration and administer the estate according to the Law failed to do so for over fifty years.
- [53] Mr. Brandt argued that Paul Payne and David Payne as representatives of the Estate of Sarah Payne are not entitled to benefit in the subject lands for the following reasons: Before his death, the said William James Osborne the registered owner of the land gave Sarah Payne through whom Paul Payne and David Payne claimed 2.25 acres of the land registered as Parcel and Block 13/19/14 St. Peter's Registration Section as her shares of the said land. The said parcel was mutated on 2 July 1984 and subdivided into parcels 13/19/24 and 13/19/13 St. Peters Registration Section.
- [54] The said Sarah Payne sold 13/19/24 to several persons and gave part of 13/19/13 to the said Paul Payne.
- [55] Having regard to the foregoing, it is therefore declared that on the death of William James Osborne intestate, his estate passed under the Intestacy Act of Montserrat⁹ to his twelve (12) lawful children in equal shares. On the demise of any of those children leaving issue born in wedlock in the case of male children, and the issue whether born in or out of wedlock in the case of female children, their issue would be entitled to the share or share in the Estate of their parent or parents. They would have benefitted had the estate been administered according to provisions of the Act by a person to whom a Grant of Letters of Administration would have been issued by the Court.
- [56] The purported devices made by James P. Osborne under his purported last will and testament are null and void.
- [57] The Registrar of Lands is hereby ordered to cancel all dealings in relation to Block 13/19 Parcel 6 made by James P. Osborne and be brought in as land under the intestacy.

⁹ CAP 3.04

[58] It is also hereby declared and ordered that the first named defendant in registering Block 13/19 Parcel 67 in her name is null and void and of no effect and is hereby set aside and reverts to the Estate of James William Osborne.

[59] Paul Payne, as the third named Claimant and Elenor Elizabeth Osborne Bardouille are here appointed as Personal Representatives of the Estate of James William Osborne to administer and distribute the same in accordance with the provisions of the intestacy Act of Montserrat.

[60] In the exercise of my discretion I order each party to bear his or her own costs.


.....
Albert J. Redhead
High Court Judge