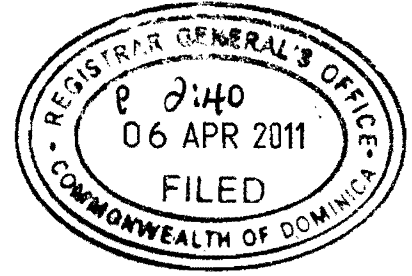

COMMONWEALTH OF DOMINICA

DOMHCV2004/0370

BETWEEN:

ESLYNE RHYNER **Claimant**

And

IAN MOREAU **Defendant**

Before: **The Hon. Justice Brian Cottle**

Appearances:

Mrs. Zena Dyer for Claimant

Ms. Laurina Vidal for Defendant

[2010: July 7th]

[2010: August 5th, 6th]

[2011: April 6th]

JUDGMENT

[1] **COTTLE J:** This matter came up for trial on 27th July 2010. At the end of the trial both sides were allowed time to file written closing submissions. The defendant filed submissions on August 5th and the claimants on August 6th 2010. Unfortunately the case file with the submissions was inadvertently filed away and not returned to the judge for consideration. It may be that as the

filing of the submissions coincided with the court long vacation that this occurred. After a delay of many months the parties enquired of the court office. The error was discovered and the file was passed to the judge. The court offers the parties sincere apologies for the mishap.

[2] This claim concerns the estate of Mr Charles Ryner who died on 23rd July 2004. Mr. Ryner left two wills. The first is dated 10th December 2000. It names the defendant as Executor. The defendant has applied for and been granted probate of this will. The application was granted on 28th July 2004, less than one week after the death of Mr. Ryner, having been made the day before.

[3] The second will is dated 22nd July 2004 and the claimant is the named executrix. The claimant brings this claim seeking the revocation of the earlier grant of probate to the defendant and a pronouncement in solemn form the validity of the later will. Other heads of relief claimed were not contested by the defendant. The parties agree that the remaining issues for determination are whether the first or second will is valid, and whether the actions of the claimant in denying the defendant access to the estate property was wrong. If the claimant's actions are found to have been wrong the defendant seeks damages in compensation.

[4] As the later will would revoke the earlier will if that later will is valid I begin by examining this question. The 2004 will was prepared by Attorney at Law Mrs. Francine Baron-Royer. It was executed at the Princess Margaret Hospital one day before Mr. Ryner died. As noted above, it names the claimant as one of two executors, the other being Mr. Joseph Gregoire. The will appears on its face to be regular in form. The defendant, in his amended defence and counterclaim, says that the 2004 will is not valid as the deceased did not know or approve of the contents of that will as he lacked testamentary capacity at the time the will was executed. The defendant also pleads that the 2004 will was not the act of a free and capable testator.

The Evidence

[5] In support of the 2004 will, the claimant called Mr. Joseph Gregoire. He was witness to the execution of the will. Mr. Gregoire is a chartered Civil Engineer with several decades of experience. He had known the deceased since they

were boys. He testified that the deceased was fully conscious and appeared to understand. He made his bequests of his own free will and appeared to understand what he was doing. This evidence was not challenged at cross examination.

[6] The claimant also called Mr. Hendricks Paul. Mr. Paul was consultant surgeon at the Princess Margaret Hospital at the relevant time. The Medical Practitioner testified that upon admission to the Princess Margaret Hospital Mr. Ryner was conscious and well oriented in time place and person. There was no abnormal behaviour. In the opinion of Mr. Paul, the deceased retained testamentary capacity up to his death. Mr. Paul's evidence in this regard was not challenged on cross examination.

[7] Leon Auguiste also gave evidence. He was a patient who was on the same ward with Mr. Ryner. He testifies that he held sensible conversations with Mr. Ryner up to the night before Mr. Ryner died. Importantly he denies that Mr. Ryner was comatose.

[8] In his pleadings the defendant had averred that Mr. Ryner had been admitted to the hospital in a "comatose and/or unconscious state." He added that the testator remained in that state until he died.

[9] The defendant gave evidence. He also called Evalina Baptiste on his behalf. In his witness statement the defendant did not adduce any evidence that the testator was comatose at the hospital. Indeed he made no reference to the testamentary capacity of the deceased at all. He avers that in 2003 Mr. Ryner executed two memoranda of transfer giving to him all of the real property Mr. Ryner owned.

[10] As Mr. Ryner was illiterate, he had the Learned Magistrate Ms. Evelina Baptiste attend and read the memoranda to Mr. Ryner and explain them to him. The Learned Magistrate witnessed Mr. Ryner make his mark. The memoranda were later presented to the Registrar of lands and the defendant was issued with Certificates of Title.

[11] As it turned out, the memoranda were void and of no effect as they did not comply with the provisions of the Illiterates Protection Act of Dominica. At this

trial, this was admitted by the defendant. These Certificates of Title must be returned to the Registrar of lands and cancelled. The real property in question forms part of the estate of Charles Ryner.

[12] The Learned Magistrate Ms. Baptiste swore a witness statement. She read over the memoranda of transfer. She ascertained from Mr. Ryner that it was truly his desire to make an inter vivos transfer of his property to the defendant. When she was sure that this represented his wish she witnessed Lennox Joseph sign the memoranda of transfer as witness after she had read over the memoranda to Mr. Ryner and he had signified his understanding and consent. Ms. Baptiste was not able to offer any evidence as to the testamentary capacity of Mr. Ryner at the time of his hospitalization and subsequent death.

The Law

[13] For a will to be valid, a testator must have testamentary capacity at the time the will is executed. Lord Cockburn CJ in Banks v Goodfellow (1870) LR S QB549 laid down three criteria to demonstrate such capacity. The testator must have an understanding of the business in which he is engaged. He must have a recollection of the property he means to dispose of. He must also be aware of the persons who are the object of his bounty.

[14] Counsel for the defendant argues that at the time of his making the second will the testator would have believed that he had already disposed of his property inter vivos. The fact that he purports to dispose of property by will which he had previously alienated, demonstrated that he was not then of sound disposing mind and memory. Why else, counsel asks, would he have failed to mention to counsel preparing his latest will, that he had already disposed of the property?. All of this, concludes counsel for the defendant, ought to cast doubts on the validity of the 2004 will.

[15] The second issue which falls to be determined is the amount of damages due to the defendant for the claimant's alleged trespass. In his counterclaim the defendant says that on 23rd July 2004 the claimant wrongfully entered the premises at Potter Street and padlocked the doors and nailed shut the windows and doors with a view to denying the defendant access. He says

that he had up to then operated his tailor shop from the premises and the claimant's action caused him to lose his business, including his machinery, equipment and stock in trade.

[16] He was prevented from performing two contracts which he had in hand, thereby being forced to forego $23, 204.00 in income. The machinery and equipment is valued at $12,500.00. He claims damages for trespass and mesne profits at the rate of $1,000 per month until the property is returned to him.

[17] The claimant, in her witness statement, says that the defendant did not reside at the Pottersville property. He used a shed on the premises to conduct his business. He was permitted by Mr. Ryner to occupy the shed without payment of rent. She says that on the day that the testator died, the defendant began taking away the personal belongings of Mr. Ryner. He took away the television set and had the stove and refrigerator ready for removal.

[18] Upon discovering this, she stopped the defendant. She informed him that she would be changing the locks and gave him the opportunity to remove his possessions from the premises. She further told him that he could inform her at a later date and she would open up to permit his access to get his goods.

[19] The defendant went to the police and reported that he was a legal tenant of Charles Ryner and was being wrongfully locked out. He wished to recover certain material and equipment. The defendant was accompanied to the premises by a police officer, Cpl. Eloi. He removed all of his material that he wished. The defendant never asked the claimant for further access. He did not return to the police to seek further assistance.

[19] To her witness statement, the claimant appended the police report of Superintendent George and an application by the defendant dated 9th January 2004. In that application the defendant was approaching the Tenancies and Rent control authorities to register his tenancy of the premises at Pottersville at a rental of $300.00 per month.

[20] The court carefully considered all the evidence and concluded that the defendant could not be relied on. On the question on the validity of the will his

pleading that the testator was comatose was contradicted by the medical and eyewitness evidence led by the claimant. Also the defendant did not challenge these witnesses. He failed to give any evidence in support of his pleaded position.

[21] I therefore conclude that the testator possessed testamentary capacity and the 2004 will was validly executed. Being later in time, it had the effect of revoking the 2000 will. The question raised by the inclusion of property in the will that had been the subject of the failed inter vivos disposition is not sufficient to outweigh the positive evidence of the testator's capacity. Probate of the 2000 will is revoked and the court pronounces in solemn form for the 2004 will.

[22] The defendant's position on the question of the trespass alleged is equally weak. Since the defendant was not entitled to possession either by virtue of the 2000 will or the memoranda of transfer it cannot be said that he was in possession of the property. Indeed his application for registration as a tenant demonstrates that he had no confidence in the alleged inter vivos transfer. He would not seek to have himself registered as tenant of the premises which he knew belonged to him.

[23] He seeks mesne profits of $1,000 per month yet he says to the rent control authorities that the rental was $300.00 per month. I do not believe that he would get the assistance of the police to recover some material and yet leave behind $12,500.00 worth of equipment. In short I reject his evidence entirely.

[24] The counterclaim is dismissed. Judgment is entered for the claimant. The probate of the 2000 will is revoked. A grant is made in solemn form for the 2004 will. The claimant did not pursue the other relief pleaded when the matter came on for trial.

[25] The defendant will pay the claimant prescribed costs in the sum of $14,000.00

Justice Brian Cottle

High Court Judge