BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2010 / 0113

BETWEEN

EILEEN PAPONE

And

LOURIE ANTHONY
[Claiming on their own behalf and also as Personal Representatives
of the Estates of Abraham Anthony, deceased and Clarita Anthony, deceased]

Claimants

AND

JAMES ANTHONY
[as Personal Representative of the
Estates of Abraham, deceased and Clarita Anthony, deceased]

Defendant

Appearances:
Mr. Lewis Hunte QC and Mr. Richard W. Arthur Snr of Hunte & Co. Law Chambers for the Claimants
Mr. Glenroy Forbes of Forbes Hare for the Defendant

2010: November 16
2011: July 28

Administration of intestate estates – contentious probate – claim to remove an administrator – whether administrator a trustee – whether breach of trust – return of proceeds of sale – res judicata – limitation of actions – laches and acquiescence

The claimants and the defendant are three of the five surviving children of the same mother and father, both deceased. The defendant was duly appointed administrator of the estates of their parents. Subsequently, a dispute arose over his administration and in 2009, litigation commenced. Following a mediation settlement agreement, by consent order the claimants were added as joint administrators of the estates with the defendant. Since that time, the claimants depose that the defendant has refused to discuss his prior handling of the estate with them, and refused to render an account of any moneys received. The claimants allege that the defendant made two dispositions of land from their father's estate and seven dispositions from their mother's estate without the beneficiaries' consent. Six of the dispositions from the mother's estate took place in 1991 and 1992. In 2010, the claimants brought this action, seeking orders that the defendant pay over to them four-fifths (4/5) of the proceeds of the sale of lands which belonged to the

estates of their parents which he [the defendant] disposed of without the consent of any of the beneficiaries and that he [the defendant] be removed as administrator.

The defendant denies any improper dealings on his part. He says that the beneficiaries were all aware of and agreed to all the disputed transactions and that the claims against him are ill-founded. The defendant also argues that the claimants' claim must fail for because (1) The claimants brought substantially the same action before the courts in the previous claim and are therefore precluded from prosecuting this one by the doctrine of *res judicata*, or cause-of-action estoppel; (2) this claim is an abuse of the process of the court; (3) the majority of claims for account are time-barred; and (4) the claimants were aware of the sale of the parcels of land for many years and are thus estopped from bringing these proceedings. The defendant also says any proceeds of sale received were expended towards the administration of estate land.

On whether the defendant should be removed for committing a breach of trust by failing to administrate the estates,

HELD:

[1] The claim is not barred by res judicata. The terms of the consent order in no way address the lawfulness or otherwise of the disputed dispositions, or the defendant's liability to account or make compensation: Bank of Montreal v. Jarjoura [2007] A.J. No. 1394 followed.

[2] In addition, the claimants are not barred from bringing the claim in their capacity as administrators of the estates because as administrators, they maintain a different interest than they do as beneficiaries: Pentland-Clark v Macelhose [2009] ScotCS CSOH_153 followed.

[3] There has been no previous decision upon the facts in issue and thus there is no re-litigation upon the issues sufficient to ground an abuse of process: Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Schofield Roberts Hill (a firm) [2003] 3 All ER 673 followed.

[4] The claimants succeed in establishing a clear breach of trust in the administration of their father's and mother's estates. The defendant failed to secure any formal written agreement between the beneficiaries to vary the statutory trusts, his first act was to distribute to persons who had no claim over the interests of the beneficiaries and he evidences an unwillingness or inability to protect the assets of the estates for the purposes of the beneficiaries. Accordingly, he is liable for the losses to the estates: Halsbury's Laws of England, Vol. 48, para. 935 and will be removed as the administrator of both estates: Letterstedt (1884) 9 App. Cas. 371 followed.

[5] The Limitation Act has no application to a claim to remove an administrator, nor does limitation provide a defence to a claim by a beneficiary against a trustee who has committed fraud or holds trust assets in his possession: Green v Gaul [2006] EWCA 1124, (CA). The defendant fails to prove that he has not received monies for six dispositions from his mother's estate into his possession and is liable to reimburse the estate for the proceeds of sale.

[6] The defences of acquiescence and laches fail. The defendant cannot show any agreement between the parties which he relied on to his detriment, therefore, in the circumstances it is not unconscionable for the claimants to assert their right to recover the value of these assets for the estate: Green v Gaul [2006] EWCA Civ 1124 (CA).

[7] The court cannot order the defendant to reimburse 4/5 of the proceeds of sale to the relevant estate. The proper class of beneficiaries must be determined by the administrators upon application of the rules of succession: Intestates Estates Act, Cap 34, section 4 – 6. The defendant is liable to reimburse the relevant estate, minus his proper share as a beneficiary.

[8] The claimants do not dispute the intention to subdivide per se, nor do they dispute the receipts or the amounts submitted as sums expended towards the subdivision and excavation of roads on the estate land or that the roads have been cut. Accordingly, these costs were incurred by the defendant in the performance of his duties and the sum of $69,200 is payable as an administration expense of the estate: Williams, Mortimer and Sunnucks Executors, Administrators and Probate 17th ed., p. 634.

JUDGMENT

Introduction

[9] HARIPRASHAD-CHARLES J: This claim is a familial contest over the administration of two intestate estates. The claimants and the defendant are three of the five surviving children of Abraham Anthony and Clarita Anthony, both deceased. The defendant was duly appointed administrator of the estates of their parents. Subsequently, a dispute arose over his administration. Following a mediation settlement agreement, on 18 November 2009, the claimants were added as joint administrators of the estates with the defendant. The claimants now bring this action, seeking principally that the defendant pay over to them the proceeds of the sale of lands which belonged to the estates of their parents which he [the defendant] disposed of without the consent of any of the beneficiaries when he was the sole administrator and that he [the defendant] be removed as administrator.

The Estate of Abraham Anthony

[10] Abraham Anthony died intestate on 26 October 1974. His lawful wife, Clarita Anthony and the defendant were appointed administrators of his estate.

[11] The claimants allege that the defendant, while he was sole administrator of their deceased father's estate, sold Parcel 232 of Block 2637B, Sea Cow's Bay Registration Section ("Parcel 232") to Felicia Jardine, Kimberly Jardine and Gabrielle Jardine for $45,000 and gave Parcel 234 of Block 2637B, Sea Cow's Bay Registration Section ("Parcel 234") to his god-daughter in consideration of natural love and affection.

[12] The defendant admits that Parcel 232 was sold for $45,000 and states

> "....Following several discussions among the parties as well as other siblings it was agreed that a portion of land measuring approximately 1.25 acres would be taken out from the property belonging to the estate of Abraham Anthony and sold. As agreed, the proceeds of the sale would be used to survey and cut roads etc, all in preparation to subdivide and later distribute the real property to the beneficiaries.[1]

[13] He then exhibits five receipts for survey, excavation and other works from 5 June 2007 through 21 May 2010 for a total of $69,200. He claims that this sum was expended on the estate in pursuit of the abovementioned plan.

[14] The claimants deny the existence of any agreement for the sale of Parcel 232.

[15] With respect to Parcel 234, gifted to his god-daughter, the defendant says he has already given an undertaking to take ¼ acre less than that which would have been his share of his father's estate when the land is divided and distributed to the beneficiaries.[2] The claimants say that gifts to other persons do not take priority over the defendant's duty to distribute the estate to the beneficiaries. The claimants ask that Parcel 234 be valued and the defendant, as trustee of the estate, be ordered to return four-fifths of the value to the estate.

The Estate of Clarita Anthony

[16] Clarita Anthony died on 6 March 1991. The defendant was appointed Administrator with Will Annexed of the estate of his deceased mother. In her will, the deceased devised to her seven children the following real property namely: (a) an undivided ¼ share in Parcel 36, Block 2836B Road Town Registration Section; (b) an undivided ¼ share in Parcel 47, Block 2876B Road Town Registration Section; (c) the land at Tom Humphrey, also known as Nibbs Estate, Joe's Hill, Tortola; and (d) ALL THE REST and residue of her estate real and personal …in equal shares".

[17] The claimants allege that while the defendant was sole administrator of the said estate, he disposed a ¼ share of the following lands without their consent:

[1] See paragraph 7 of the First Affidavit of James Anthony affirmed to on 21July 2010 – Tab. 5 of Trial Bundle.
[2] See paragraph 9 of the First Affidavit of James Anthony affirmed to on 21July 2010 – Tab. 5 of Trial Bundle.

Block	Parcel	Date of Transfer	Consideration
2836B	140	1991, November 19th	$16,300
"	143	1991, November 19th	$18,450
"	144	1992, February 28th	$20,000
"	146	1991, December 10th	$17,600
"	150	1991, November 20th	$17,000
"	152	1992, January 17th	$21,400
"	202(*)	2007, July 5th	Unknown
TOTAL			$110,750
¼ of the proceeds of the sale			$27,687.50

[18] The claimants assert that the estate of Clarita Anthony is entitled only to ¼ of the total proceeds of sale of the above parcels which totals $27,687 for the six parcels (140, 143, 144, 146, 150, and 152). In support, they adduce the transfer documents that exhibit the defendant's signature along with the other representative/part owners, which evidence the consideration received. The claimants were unable to locate the transfer instrument for the seventh parcel, 202, but produced a copy of the registration record for Parcel 202 to demonstrate that on 30 January 1998, the defendant was entered as proprietor of ¼ share as personal representative of Clarita Anthony, decd. The claimants ask the court to find that the defendant is a trustee of the proceeds of sale received on behalf of the estate of Clarita Anthony, and that he should return 4/5 of this amount to the estate.

[19] The defendant denies the receipt of any proceeds on behalf of the estate. He says:[3]

> "All beneficiaries of the estate of Clarita Anthony, including the Claimants were ***aware*** of the plans and subsequent decision to transfer/sell portions of the estate in which Clarita Anthony had a ¼ share. The plans included, among other things, the incorporation of Duffs Valley Corporation Ltd., the sale of certain plots of land to generate seed money, and for the further development of the estate. I am advised by my solicitors and I do believe that I acted in good faith and within the ambit of my office of administrator and appointed Mr. Ishmael Brathwaite (as Managing Director of Duffs Valley Corporation) as my agent to dispose of the ¼ interest held by the estate of Clarita Anthony in the lands situated at Road Town Block 2863B Parcels 140, 143, 146, 150, and 152. To this end, I can state that I never personally received any monies from Mr. Brathwaite or any other person in respect of any of the dispositions and/or sales of any of the said Parcels of land."

[3] See paragraph 10 of the First Affidavit of James Anthony in answer to the Claimants' claim sworn to on 21 July 2010.

[20] In a second affidavit filed on 12 November 2010[4], the claimants respond:

> "…[w]e maintain that the estate property disposed of by the defendant was sold without our consents or the consents of his other siblings and that it is not clear what he has done with the proceeds of the sale. If it is true that he never received any monies from someone he appointed his agent then we believe that he should have taken steps to recover the moneys and, having failed to do so, he is not fit to be an administrator and should be removed."

[21] In respect of Parcel 202, the defendant exhibits a copy of the transfer instrument, which shows the signatures of the representatives for the other three persons who signed as ¼ owners of Parcel 202, but not him. He categorically states that he was "not a party" to the disposal and /or transfer of that parcel.

[22] Finally, the defendant says that the only property he has disposed of from the estate of his deceased mother has been property transferred to the beneficiaries of the estate in an effort to dispense with his duties as administrator. He produces copies of the transfer instruments for the following transactions:[5]

Block	Parcel	Date of Transfer	Beneficiary
2836B	254,255,257,258,259,260	2006, June 6th	James Anthony Eileen Papone
"	253	2007, July 9th	James Anthony Beverly Anthony (wife)
"	256	2006, June 12th	David Abednego (nephew)
"	247	2006, May 22nd	Eileen Anthony Georges Poponne - (sister) (Claimant and co-administrator)
"	249	2006, May 26th	Icilma Anthony Rey (niece)
"	248	2006, May 26th	Daisy Anthony Roebuck (sister)
"Application for registration by prescription*	210 - Lot 19	2003, June 25th (date of application. No proof the property was registered)	Louvie Anthony (brother) - (Claimant & Co-administrator)

[4] See paragraph 3 of the Second Affidavit of Eileen Papone and Lourie Anthony.
[5] In the table, the relationship of the beneficiary to the defendant is in brackets.

The present claim

[23] The present claim was filed on 31 May 2010. Previously, in 2009 the claimants filed a claim in the High Court disputing the defendant's administration of the estate and seeking his removal as administrator for failure to administer the estates as required by law.[6] By a Consent Order dated 18 November 2009, the claimants were added as joint administrators of the estates of their deceased parents, along with the defendant. The claimants contend that since that date, the defendant has refused to discuss his prior handling of the estate with them and refused to render an account of any moneys received.

[24] The claimants now seek the following relief namely:

(1) A declaration that the defendant is a trustee of the proceeds of sale of lands comprised in the estates of Abraham Anthony, deceased and Clarita Anthony, deceased where such proceeds have been received by him upon his sale of the said lands as personal representative;

(2) An order that the defendant pay over to the claimants within such time as the court specifies four-fifths of the proceeds of the sale of each of the parcels comprised in the aforesaid estates, that is to say, $58,149.60 to be held by them in trust for themselves and the other two beneficiaries;

(3) An order that:

(a) Parcel 234, transferred by the defendant to his god-daughter in consideration of natural love and affection, be restored to the estate of Abraham Anthony deceased, or

(b) Alternatively, that the said parcel be appraised and the defendant pay over to the claimants to be held in trust for themselves and the other beneficiaries, four-fifths of the appraised value thereof.

(4) An order that the defendant forthwith disclose the name of the transferor and the selling price, if any, of the ¼ share in Parcel 202;

(5) If the ¼ share in Parcel 202 was sold, an order that the defendant pay over to the claimants four-fifths of the selling price thereof to be held by them in trust for themselves and the other two beneficiaries;

(6) If the ¼ share in Parcel 202 was disposed of without consideration

(a) that the ¼ share be restored to the estate of Abraham Anthony; or

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(b) That the ¼ share be appraised and the defendant pay over to the claimants four-fifths of the appraised value thereof to be held by them in trust for themselves and the other two beneficiaries.

(7) The removal of the defendant as administrator of the estates of Abraham Anthony and Clarita Anthony, deceased; and

(8) That the defendant, in his personal capacity, bears the costs of these proceedings.

[25] Briefly put, the defendant denies any improper dealings on his part. He says that the claimants were aware of all the disputed transactions and that their claims against him are ill-founded. Learned Counsel, Mr. Forbes who appears for the defendant argues that the claimants' claim must fail for the following reasons:

1. The majority of claims for account are time-barred;

2. The claimants have brought substantially the same action before the courts in the previous claim BVIHCV2009/0224 ("the previous claim") and are therefore precluded from prosecuting this one by the doctrine of *res judicata*, or cause-of-action estoppel;

3. This claim is an abuse of the process of the court; and

4. The claimants were aware of the sale of the parcels of land for many years and are thus estopped from bringing these proceedings.

[26] The matter was heard on 16 November 2010. There was no oral testimony. Both counsel made concise oral submissions and relied substantially on their written submissions.

The issues

[27] The following issues arise for determination namely:

1. Is the present claim *res judicata* barred by estoppel and/or an abuse of process?

2. Is an administrator of an estate a trustee?

3. Has the defendant committed a breach of trust?

4. Should the defendant be removed as administrator?

5. Is the relief or any part thereof as sought by the claimants barred by limitation, acquiescence or laches; and

6. Is the defendant obliged to pay four-fifths of the proceeds of sale for the disputed parcels to the estate?

Res judicata, estoppel and abuse of process

[28] Learned Counsel, Mr. Forbes submits that the subject-matter of this claim has already been litigated in the previous claim filed on 22 June 2009 by the same claimants against the same defendant. He says the claimants compromised that previous action and agreed to a consent order to discontinue the previous claim so long as they were made joint administrators. Accordingly, says Mr. Forbes, this claim should be barred by the doctrine of *res judicata.* He relied generally on the cases of Collier v Walters, [7] Palmer v Durnford (a firm) [8]and The Sennar.[9]

[29] First of all, the discontinuance of a claim does not prevent a party from bringing a subsequent claim on the same or substantially the same facts. A defendant who wishes that protection must seek a dismissal: see Silva-Douglas v. London School of Economics and Political Science;[10] Khan v Heywood & Middleton Primary Care Trust;[11] Cheltenham Borough Council v Laird[12] and our Civil Procedure Rule, Part 37.8 ("CPR 37.8"). In Silva-Douglas, Reid J. said:

> "…if there is no dismissal it may be possible and desirable for a Claimant to seek to bring fresh proceedings on the same facts; whereas if there is a dismissal the matter will be res judicata."[13]

[30] The doctrine of *res judicata* is based on the policy that there should be an end to litigation and a defendant should not be vexed with the same action twice. As noted by the learned authors of Halsbury's Laws of England, where *res judicata* is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact.[14] It is to be observed that "cause of action' refers to the group of facts, or the 'factual situation' which if proven, will entitle the claimant to obtain a remedy from the court

[7] (1873)LR 17 Eq. 252.
[8] [1992] QB 483.
[9] [1985] 2 All E.R. 104.
[10] [2007] UKEAT 0075_07_1804.
[11] [2006] EWCA Civ 1087.
[12] [2009] IRLR 621, [2009] EWHC 1253 (QB).
[13] See paragraph 15.
[14] Halsbury's Laws of England, 4th ed. Vol.16 at para. 1527 - 1528.

against another person.[15] In order that the defence may succeed, it is necessary to show not only that the cause of action was the same but also that the claimant has had an opportunity to recover and, but for his own fault, might have recovered in the first action that which he seeks to recover in the second. So, where *res judicata* is pleaded, it must be shown that the same point has been actually decided between the same parties. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed.

[31] Upon a plea of *res judicata,* the court is required to identify precisely which issues, or which questions of law and fact, were determined by the previous judgment: Graham Davis and Another v Charles and Others.[16] This task is all the more important where a consent judgment or order is put forward as the basis of the estoppel. In Bank of Montreal v. Jarjoura,[17] it was said:

> "The court must examine the consent order and any agreement, correspondence, or releases leading to its entry, in order to ascertain objectively whether the consent order was intended to finally dispose of all issues in the cause of action… The parties will be precluded by "issue estoppel" from controverting any issue that the parties intended to dispose of through the consent order."

[32] In Dattani v Trio Supermarkets Limited,[18] the court considered the capacity for an estoppel to arise on the basis of a consent judgment. The court cited with approval the following passage from Foskett, The Law and Practice of Compromise (4th ed.) which stated at 6-06:

> "Circumstances may arise when no materials exist with which to determine the disputes apparently compromised in a consent order or judgment. Astonishing it may be, but it is not unknown in practice for a consent order or judgment to appear almost, as it were, out of the blue with the most insubstantial evidence of its background. Unless by inference from such evidence as there may be, the court can conclude the disputes compromised, it would appear that all matters between the parties, except the terms of the actual judgment or order, are at large." [emphasis added]

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[15] *Per Lord Diplock* **Letang v Cooper** [1965] 1 QB 232, 242-3.
[16] (1992) 43 WIR 188, 191 referring to the case of ***New Brunswick Railway Co. v British & French Trust Corporation Ltd*** *[1938] 4 All ER 747 Lord Maugham LC said at page 756:* "The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily and with complete precision, decided by the previous judgment."
[17] [2007] A.J. No. 1394.
[18] [1998] EWCA Civ 158.

[33] In the previous claim, the claimants, in their personal capacity as beneficiaries, sought the defendant's removal on the ground that he had made nine dispositions of land from the estate of Clarita Anthony without giving an explanation or an account and it was feared that the defendant would fail to administer the estates according to law. There was no claim for the defendant to restore the proceeds of sale to the estate.

[34] Dispositions relating to the same nine parcels of land are in issue in this claim, although the parcels are now properly allocated to the relevant estates. The defendant has raised essentially the same defence with the additional plea of *res judicata.*

[35] By Consent Order dated 18 November 2009, the previous claim was compromised in accordance with the terms of a mediation settlement agreement as follows:

1. The claimants be added with the defendant as Joint Administrators of the estates of Clarita Anthony and Abraham Anthony;

2. The Registrar of Lands entered the names of the claimants in the Register of Lands as additional administrators in respect of lands compromised in the said estates;

3. That the costs of the parties to be agreed and borne by the respective estates.

[36] No copy of the original mediation settlement agreement, or its terms, was provided to the court or resides in the court's file. Mr. Forbes' submission that the claim was compromised on the basis that the claimants' claim is discontinued is not borne out by the record and no such order was approved by the court.

[37] As it stands, the court is confronted with a consent judgment that makes no mention at all about the disputed dispositions, nor does it state that the claimants' claim was discontinued or dismissed. There is a clear paucity of information to inform the court exactly what disputes were intended to be resolved by the compromise. Only the pleadings from the previous claim were put into evidence by the defendant in this claim. Having perused the record of the previous claim, the court is left with nothing more than the terms of the Consent Order itself which in no way addresses the lawfulness

or otherwise of the disputed dispositions, or the defendant's liability to account or make compensation therefore.

[38] Accordingly, no estoppel of the issues in contention upon this claim arises upon the terms of the previous Consent Order.

[39] Moreover, the claimants are not barred from bringing the claim in their capacity as administrators of the estates. As administrators, they maintain a different interest than they do as beneficiaries: Pentland-Clark v Macelhose.[19] Thus, no cause of action or issue estoppel arises against the claimants, neither in their individual or personal capacities as beneficiaries, nor in their capacities as administrators.

[40] Mr. Forbes also submits that the claim should be barred on the basis of abuse of process and the rule against re-litigation. He cites Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Schofield Roberts Hill (a firm).[20] However, the principle prayed in aid by learned Counsel has a peculiar application to the challenge of criminal convictions by way of later civil actions. At page 685, Lord Brown – Wilkinson stated:

> "*Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529* establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to relitigate issues decided against him in earlier proceedings if such relitigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. In view of the more restrictive rules of res judicata and issue estoppel it is not clear to me how far Hunter's case goes where the challenge is to an earlier decision in a civil case. But in my judgment where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal."

[41] Lord Steyn added:[21]

> "That leaves collateral challenges to civil decisions. The principles of res judicata, issue estoppel and abuse of process as understood in private law should be adequate to cope

[19] [2009] ScotCS CSOH_153.
[20] [2000] 3 All ER 673.
[21] Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Schofield Roberts Hill (a firm) [2000] 3 All ER 673, at 681.

with this risk. It would not ordinarily be necessary to rely on the Hunter principle in the civil context…."

[42] The principle is not applicable on the facts of these proceedings. The court has already found that *res judicata* is not applicable. There has been no previous decision upon the facts in issue and thus there is no re-litigation upon the issues sufficient to ground an abuse of process.

Is an administrator of an estate a trustee?

[43] The origins of trusts differ from those of administration of the estates of deceased persons in that, whereas trusts were the invention of the Court of Chancery, the law relating to administration of estates was developed by the ecclesiastical courts.[22] However, in many respects, the position of personal representatives (that is, executors and administrators) has been assimilated to that of trustees. For example, section 2 of the Trustee Act[23] provides that "the expressions "trust" and "trustee" extend to…the duties incidental to the office of a personal representative, and "trustee" where the context admits, includes a personal representative…."

[44] Our law is clear: a personal representative, whether an executor or administrator, holds the estate of the deceased person on trust.[24] The defendant, as administrator of the estates of his deceased parents, was under a duty to administer the estates in accordance with the governing law. He cannot distribute the estates as he thinks fit.

[45] In this regard, I am also guided by the Privy Council case of Commissioner of Stamp Duties v Livingston.[25] Lord Radcliffe had this to say:

> "He [the executor] held it [the unadministered property] for the purpose of carrying out the functions and duties of administration, not for his own benefit and these duties would be enforced on him by the Court of Chancery….Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. Kay J. in Re Marsden, Bowden v Layland, Gibb v Layland [1881-85] All E.R. Rep. 993 at p. 996 said: "An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office." He is a trustee "in this sense."

[22] See Gilbert Kodilinye and Trevor Carmichael in Commonwealth Trusts Law, 2nd edition at page 23.
[23] Cap. 303 of the Laws of the Virgin Islands, Revised edition 1991.
[24] Trustee Act, Cap 303, s.3.
[25] [1964] 3 All ER 692 at page 696 C-E.

[46] Further, in Clifton St. Hill v Augustin St. Hill[26], Mitchell J [as he then was] set out the law governing the duties of an administrator. At paragraph 13, he said:

> "An administrator of an intestate's estate is a trustee. It is always the duty of an administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level even than he would in protecting his own interests. He must report and account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a lawsuit. He is not well advised if he then relies on the statutory powers given to him by the Act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a lawsuit being brought by a discontented beneficiary. Further, where the court is satisfied that an administrator acted fraudulently in administering the estate, the duty of sale given by the Act will not protect him. The administrator will, in such a case, be liable to be held personally responsible to make good the loss. For these reasons, among others, an administrator should never proceed to act unilaterally in administering the estate. He should always consult with the beneficiaries and attempt to secure their consent to what he is proposing."

[47] Also, in Freeman v Freeman and Freeman[27], a case from this jurisdiction, Joseph-Olivetti J reviewed the principles relevant to the duties of an administrator. She cited with approval the judicious words of Mitchell J.

[48] Therefore, it is plain that the defendant, as administrator, held the estates of his deceased parents on trust for the beneficiaries and owes fiduciary duties to all of them.

Breach of trust / removal of administrator

[49] Issues [3] and [4] are conveniently dealt with together. The learned authors of Halsbury's Laws of England, 4th edition state that any act by a trustee in contravention of the duties imposed on him by the trust, or in excess of those duties, constitutes a breach of trust. If the breach of trust entails a loss to the trust estate, then, as a general rule, the trustee, is liable.[28] Where a trustee who is also a beneficiary commits a breach of trust, his beneficial interest in the trust property is liable for

[26] Civil Suit No. 402 of 1996, St. Vincent & the Grenadines [unreported] 24 May 2001.
[27] BVIHCV2004/0151, per Joseph-Olivetti J. Judgment delivered on 19 December 2006 [unreported].
[28] Halsbury's Laws of England, Vol. 48, para. 935.

making good the loss occasioned thereby before he can claim anything for himself…[29] A trustee's liability is limited to his own default.[30] He is chargeable only for money and securities actually received by him.[31]

[50] The court, in its capacity as a court of equity, has an inherent jurisdiction to ensure the proper administration of trusts. The court is also vested with jurisdiction to appoint, substitute or remove personal representatives. The same principles apply to the removal of a personal representative as apply to the removal of a trustee.[32] The guiding principle is 'the welfare of the beneficiaries' and the proper execution of the trusts.[33]

[51] In the words of Lord Blackburn in Letterstedt v Broers,[34] "if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust-estate."

[52] The court is unlikely to order removal of a personal representative unless a clear and compelling reason is shown to justify doing so. Insubstantial complaints or complaints which do not sufficiently affect the administration of the estate will be rejected.[35] Friction, hostility or breakdown in the relationship between personal representatives themselves or between personal representatives and beneficiaries can be a ground for removal if shown that the friction is detrimentally impacting on the proper administration of the estate.[36] Misconduct evidencing a lack of competence or honesty is a ground. Not every mistake will suffice: the test is whether the failing complained of is likely to prevent the proper administration of the estate. As stated by Lord Blackburn in Letterstedt at p. 385:

> "But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of

[29] Halsbury's Laws of England, Vol. 48, para. 944.
[30] Halsbury's Laws of England, Vol. 48, para. 962.
[31] Limitation Act, s. 19(1).
[32] Thomas & Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch); [2008] Ch 395
[33] Letterstedt v Broers (1884) 9 App Cas 371
[34] (1884) 9 App. Cas. 371.
[35] Kershaw v Micklethwaite [2010] EWHC 506 (Ch)
[36] Angus v Emmott [2010] EWHC 154 (Ch); [2010] 1 WTLR 531

duty, or accuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity."

[53] In Freeman v Freeman and Freeman [supra], the deceased died intestate and left two plots of land. He was survived by his wife and six children. Letters of administration were granted to two siblings, the defendants. Thirteen years after receiving the grant, the first defendant transferred part of one plot to herself, the remainder to her children, demolished the family home on the other plot and threw away the claimant's belongings that had been stored inside. The Court found that the first defendant had been 'wholly selfish and dishonest, motivated by avarice and with a complete and callous disregard for the rights of the other beneficiaries who were not strangers but full blood relations.' Her actions amounted to a blatant abuse of her duties as trustee of the estate and were inexcusable. The second defendant went along with her, and was also held personally liable. In light of their unconscionable dealings with the estate, Olivetti J found it was only just and proper to remove the defendants from office as administrators.

[54] In the case at bar, the court is somewhat handicapped because the affidavit evidence of the parties was not tested in cross-examination. However, given certain admissions of the defendant, the court is able to discern that his case is as follows:

1. That it was agreed between himself and the beneficiaries that he should sell a part of the estate land to pay for the administration;
2. He was able to sell one parcel to date, namely Parcel 232;
3. Parcel 234 was gifted to his god-daughter for natural love and affection;
4. No portion of the estate of Clarita Anthony was disposed of except such as was transferred to the beneficiaries; and
5. He appointed one Ishmael Brathwaite his agent to administer and he never received any moneys from him.

[55] Turning to the estate of Abraham Anthony, the claimants succeed in establishing a clear breach of trust in the administration of their father's estate. Abraham Anthony died intestate. The law

provides that his administrator holds his estate upon a statutory trust for sale, the proceeds of which are to be divided equally among the children of the deceased, or if any child died before the deceased, his or her share is to be divided amongst their children in equal shares.

[56] In respect of Parcel 232, the defendant pleads that it was sold in furtherance of an agreement between the siblings to raise money to subdivide the land. However, he presents no written evidence of this agreement to subdivide as oppose to sell, nor has he said at what date this agreement was reached, nor how many parcels it was agreed the land would be subdivided into, nor which of the beneficiaries should get which parcels. Nor, as learned Queen's Counsel for the claimants Mr. Hunte submits, is the defendant able to identify where it was agreed the area to be sold was to be taken from. In short, none of the terms of this purported agreement is in evidence before the court.

[57] The claimants do not specifically deny an agreement to subdivide, however, they challenge that there was any agreement on the sale of this particular parcel. They are within their rights to do so. In the words of Mitchell J, an administrator "is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a lawsuit."[37] I therefore find that the sale of Parcel 232 was a breach of trust for which the defendant is liable.

[58] Furthermore, the defendant admitted that Parcel 234 was gifted to his god-daughter for natural love and affection. As far as the evidence discloses, she is not among the beneficiaries of the trust. The defendant's duty is to distribute the assets of the estate to the rightful beneficiaries. He was placed in a fiduciary position to protect the trust property in the interest of the beneficiaries; not to deal with it how he chooses to deal with it. His actions amount to a flagrant abuse of his duties as trustee of the estate and are inexcusable. In my opinion, this is not only misconduct but dishonesty.

[59] Accordingly, he is liable for the loss to the estate.

[37] Clifton Hill v Augustin St. Hill, St Vincent Civil Suit 402 of 1996 (Mitchell J) Judgment 24 May 2001.

[60] In respect of the estate of Clarita Anthony, an even stronger breach of trust is reflected in the defendant's handling of this estate. He admits to participating in six-dispositions for sale, says he never received the proceeds, and that in any event the claimants were aware of a proposed development scheme involving the undivided ¼ share in Block 2836B owned by Clarita Anthony. One-quarter share of proceeds of sale would have represented a value of some $28,287 to the estate of Clarita Anthony at the time of sale.

[61] Again, the defendant failed to secure any written consent and approval to participate in this scheme. He pleads the claimants' awareness, though not their consent. He produced no supporting evidence to show the existence of the alleged Duff's Valley Corporation, or any correspondence between the corporation and himself. He could not provide one scintilla of evidence of the alleged development scheme: no proposal, no subdivision plan, no annual or progress report, not so much as a letterhead. Nor has he provided any correspondence or statement from or to his alleged agent in respect of these dispositions. The only evidence is the transfer documents evidencing the defendant's signature and the consideration received.

[62] Overall, it appears the defendant has failed in his duty to properly inform himself or to seek legal advice in respect of his duties as trustee to administer these estates and has dealt with them as he saw fit. The defendant has failed to complete the administration of his father's estate since his appointment 31 years ago. He failed to secure any formal written agreement between the beneficiaries to vary the trusts and he failed to seek the directions of the court. When he finally embarked on the distribution of estate lands, his first act was to distribute to persons who had no claim over the interests of the beneficiaries. Further, I accept the claimants' assertion that the defendant failed to provide an account of the administration of the estate and his handling the proceeds of sale when previously requested. The court finds that the defendant's actions are such as to inhibit the proper execution of the trusts of the Estate of Abraham Anthony and he is hereby removed as administrator.

[63] He has also failed to complete the administration of the estate of Clarita Anthony, some 20 years after his appointment in 1991. He failed to secure the written agreement and consent of the beneficiaries to pursue the Duff's Valley Corporation investment scheme. He acquiesced in the loss of significant assets to the estate by his failure to pursue any action in respect of the proceeds

for sales which took place in 1991 and 1992. Additionally, he has failed to pursue any action in respect of further alienation of estate land 2007. This evidences an unwillingness or inability to protect the assets of the estate for the purposes of the beneficiaries. In addition, those dispositions which he has made demonstrate that his priorities do not lie with the beneficiaries of the estate. He has twice assented to the transfer of land to himself, albeit jointly. Only three of his siblings have received some land in their own name upon his assent. One of his siblings had to seek registration by prescription. One of them has not received anything at all. Meanwhile, the defendant's wife is not a beneficiary of the estate. His niece and nephew are capable of being beneficiaries of the estate but neither are they necessarily so.

[64] In respect of the application seeking the removal of the defendant, the courts, will on occasions, give the administrator another chance to remedy the default. In this case, the parties consented that the claimants would be appointed joint administrators with the defendant. But, the difficulty is that the defendant has refused to report and/or account since the claimants' appointment. It appears to me that the continuance of the defendant as one of the administrators would be detrimental to the execution of the duties of the claimants. Had the loss to the estates been through inadvertence, I may have given the defendant a chance to rectify the situation. But, it is my firm view that it was a loss due to a breach of duty for personal gain and dishonesty.

[65] Furthermore, again there is no evidence that the defendant is in fact discharging the duty in accordance with the will of Clarita Anthony that the land be divided equally amongst her seven children. It appears that the defendant is giving whoever he wishes in a manner he sees fit. It is in the welfare of the beneficiaries that the defendant be removed as the administrator of this estate also.

[66] For all of these reasons, I hold that the defendant has breached the fiduciary duty that the law has bestowed upon him necessitating his removal as an administrator forthwith.

Limitation, Aquiescence and Laches

[67] A personal representative, like other trustees, may plead the relevant periods in the Limitation Act as a defence. However, the Limitation Act has no application to a claim to remove an administrator:

Green v Gaul.[38] Nor does limitation provide a defence to a claim by a beneficiary against a trustee who has committed fraud or holds trust assets in his possession.[39]

[68] Nevertheless, even where there is no prescribed limitation period, proceedings against a trustee for breach of trust may be barred by laches of the beneficiary, where the laches amounts to acquiescence or has caused the trustee to alter his position to his detriment.[40] The modern approach to these defences is "ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right".

[69] The learned authors of Halsbury's Laws of England state that a party is barred by his laches[41] where the claimant has slept upon his right and acquiesced for a great length of time because court of equity refuses its aid to stale demands. The chief element in laches is acquiescence. Where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act.[42]

[70] With regards to the estate of Abraham Anthony, parcels 232 and 234 were disposed of in 2007, only 3 years before this claim was filed. Accordingly, none of the limitation periods raised by the defendant are applicable to these transfers.

[71] The consent of the beneficiaries would have been sufficient to ground a defence of acquiescence upon any action by the beneficiaries for breach of trust. However, there was no consent to his transfer of Parcel 232 to his god-daughter. Additionally, while the court may find that there may well have been some agreement or expectation on the part of the beneficiaries that their father's estate would have been distributed to them instead of being sold, the court is unable to find that the sale of Parcel 234 was made in pursuance of such an agreement. The defendant can provide no

[38] [2006] EWCA 1124, C.A., para. 22 – 30.
[39] Limitation Act, s. 19.
[40] **Green v Gaul** [2006] EWCA Civ 1124 (CA).
[41] Halsbury's Laws of England, Vol. 16 para. 1476.
[42] Halsbury's Laws of England, Vol. 16 para. 1473.

evidence of consensus on the sale of that particular parcel or any other part of the land sufficient to ground his defence. The defendant cannot show any agreement between the parties which he relied on to his detriment, therefore, in the circumstances it is not unconscionable for the claimants to assert their right to recover the value of these assets for the estate.

[72] With regards to the estate of Clarita Anthony, the defendant fails to prove that he has not received these monies. Pursuant to the Limitation Act, Cap 34, s. 19(1) no period of limitation applies to this claim. In the premises, he is liable to reimburse the estate of Clarita Anthony the sum of $28,287 less his lawful share.

[73] The question then remains whether it is now unconscionable for the claimants to seek recovery of this amount. The dispositions for sale occurred some 18 or 19 years ago. Besides the passage of time, the defendant has not adduced any evidence of what caused him to believe that his siblings would never seek to hold him accountable for the loss of these assets to the estate. Nor has he given any evidence of his detrimental reliance on their inaction. Accordingly, it is not unconscionable to hold him responsible for the loss to the estate, and the defences of acquiescence and laches fail.

Parcel 202

[74] A personal representative is under a duty to maintain and preserve the assets of the estate. The alienation of estate land without his participation and the defendant's utter failure to pursue any remedy in respect thereof clearly resulted in a loss of assets to the estate. This disposition took place in 2007, accordingly, none of the defences of limitation, acquiescence or laches are applicable. Parcel 202 was sold for $50,000. The defendant is liable to reimburse the estate for the value of one-quarter of the proceeds of sale of that parcel, i.e. $12,500.

Proceeds of Sale

[75] The claimants have asked that the defendant pay over four-fifths of the proceeds of sale to the relevant estate. However, the previous death of two of the siblings does not necessarily reduce the class of beneficiaries to merely the five remaining siblings. The proper class of beneficiaries must be determined by the administrators upon application of the rules of succession. The evidence before the court is insufficient to make a determination in this regard. I cannot say that the

defendant is entitled to a 1/5 share in the estate. The administrators are entitled to take legal advice in this respect, or to seek the directions of the court.

[76] The defendant's assertion that he would take ¼ acre less of his father's estate to compensate for the land provided to his god-daughter is no less than what the law requires: See: Halsbury's Laws of England, Vol. 34 at para. 944 where it is provided that "where a trustee who is also a beneficiary commits a breach of trust, his beneficial interest in the trust property is liable for making good the loss occasioned thereby before he can claim anything for himself."

[77] However, since no two parcels of land are alike, the court opines that the defendant's liability should be referenced to the value of the parcel which he has improperly alienated from the estate. The parcel should be valued and the defendant is liable to repay this amount to the estate minus his lawful share.

[78] The defendant contends that he expended $69,200 between 5 June 2007 and 21 May 2010 towards the subdivision and excavation of roads on the estate land. Costs incurred by the personal representative in the performance of his duties, namely, the ascertaining and paying of the debts and liabilities of the estate and the proper distribution of its assets are to be borne by the estate.[43] As I noted, the claimants do not dispute the intention to subdivide per se, nor do they dispute the receipts or the amounts submitted or that the roads have been cut as asserted. Accordingly, the court finds that the sum of $69,200 is payable as an administration expense of the estate. The defendant maintains that the sum of $45,000 received for the sale of Parcel 232 was applied towards these expenses. Accordingly, the amount of $24,200 remains outstanding.

Costs

[79] The claimants have asked that the defendant bear the costs of these proceedings in his personal capacity. Costs in a probate action are at the discretion of the court. This action was necessitated by the defendant's conduct, or should I say, misconduct. In these circumstances, the defendant will bear his own costs personally. The claimant's costs may be reimbursed out of the estates.

[43] Williams, Mortimer and Sunnucks Executors, Administrators and Probate 17th ed., p .634.

Conclusion

[80] In his administration of his parents' estates, the defendant is liable for breaches of trust and must reimburse the proceeds to relevant estate, less his share. In addition, the defendant has shown that he is unable to properly discharge the duties and functions of his office to administer the trusts in the interests of the welfare of the beneficiaries, and for that reason he is removed as administrator of both estates.

[81] The Order of this Court is as follows:

1. A declaration that the defendant is a trustee of the proceeds of sale of lands comprised in the estates of Abraham Anthony, deceased, namely:

   (a) Parcel 232 of Block 2637B;

   (b) Parcel 234 of Block 2637B - to be appraised.

2. The sum of $69,200 which the defendant expended as an administration expense of the estate of Abraham Anthony must be set off against any sums which he is liable to reimburse the said estate;

3. The defendant is a trustee of ¼ of the proceeds of sale of lands in the estates of Clarita Anthony, deceased, namely:

   (a) Parcel 140 of Block 2836B -$16,300;

   (b) Parcel 143 of Block 2836B -$18,450;

   (c) Parcel 144 of Block 2836B -$20,000;

   (d) Parcel 146 of Block 2836B -$17,600;

   (e) Parcel 150 of Block 2836B - $17,000;

   (f) Parcel 152 of Block 2836B -$21,400.

4. The defendant is removed as administrator of the estates of Abraham Anthony, and Clarita Anthony, deceased.

5. The claimants as the remaining administrators are to identify the full and proper class of beneficiaries in order to administer the estates according to law, and to notify the defendant of the value of his proper share.

6. Within six (6) months of the date of notification, the defendant is liable to reimburse the relevant estate, minus his proper share as a beneficiary.

7. The defendant in his personal capacity is to bear his costs in these proceedings.

8. The claimants' costs are to be reimbursed by the estate.

Indra Hariprashad-Charles

High Court Judge