EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2012/302
BETWEEN:

ESTELLE WHEATLEY

Claimant

And

DARWIN BLYDEN

1st Defendant

BASIL BLYDEN

2nd Defendant

Appearances: Mrs. Hazel-Ann Hannaway-Boreland and Ms. Kisha Frett, Counsels for the Claimant
Mr. David Abednego and Ms. Karen Reid, Counsels for the 1st Defendant
Mr. Terrence Neale and Ms. Elizabeth Ryan, Counsels for the 2nd Defendant

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2017: April 12

JUDGMENT

[1] **Ellis J.**: This matter before the Court is a Fixed Date Claim brought by the Claimant as one of the beneficiaries of the Estate of the late Abraham Blyden, (the Testator) against the Defendants who are the joint executors of the Estate, alleging breach of trust in carrying out their duties as executors and seeking the following relief:

i. An order that the Defendants given an account of their dealings with the estate of Testator since their appointment.

ii. A declaration that the Defendants have breached their duties as trustees of the Estate and as such are personally liable for those breaches and any consequential loss to or diminution in the value of the Estate.

iii. An order that any loss or diminution in value of the Estate as determined by the new personal representative appointed by the Court, be deducted from the Defendants'

entitlements as beneficiaries, subject to such amount being first sanctioned and approved by the Court on an application by the personal representative under CPR Part 67 or such other applicable provision of the Law.

iv. An order that grant of probate to the Defendants (or if the Court finds it to be a grant of Letters of Administration with will annexed) dated September 2004 be revoked and that the Defendants both be removed as personal representatives of the Estate.

v. An order that Marva Wheatley-Dawson be granted letters of administration (with will annexed) and that the Registrar issue such letters of administration to her as the attorney for the Claimant, for the Claimant's use and benefit upon Marva Wheatley – Dawson taking the necessary oath.

vi. Further and/or alternatively that the Court by order appoints such other person as the beneficiaries nominate or failing such nomination within 30 days of the order, that the Court appoints a receiver from the list of qualified insolvency practitioners in the BVI to administer the Estate with the fees payable to such person being a cost to the Estate to be approved by the Court.

vii. A declaration that the Claimant is entitled to have the lands located at Registration Section East Central Block 3139B Parcel 51 (hereinafter referred to as Lot 3) and Registration Section East Central Block 3139B Parcel 57 (hereinafter referred to as Lot 7) transferred to her as part of her entitlement as beneficiary to the Estate without the value of the dwelling house located on Lot 7 being included in the calculation of the benefit received from the Estate and/or alternatively that the Claimant be reimbursed for her expenditure in respect of Lot 7.

viii. An order that all transfers and dealings in respect of Registration Section East Central Block 3139B Parcel 51 Lot 3 since 5th November 2012 be declared void.

ix. An order that the Estate bears the costs of the survey and subdivision of the Estate and that the beneficiaries including the Claimant be reimbursed their contributions.

x. An order that the Defendants personally bear the Claimant's costs of this claim in equal shares.

xi. Such further and other declaration, directions and orders as the Court sees fit.

[2] This Court will first address the claims for relief set out in subparagraphs 1 (vii) and (viii) above.

GENERAL

[3] There is a high degree of care, diligence, personal and fiduciary obligation involved in the administration of an estate. A personal representative is obligated to act as a prudent person in the care and management of the estate and to act in a manner consistent with the will of a deceased or the laws of intestacy and not in conflict with any applicable estate administration laws.

[4] Depending on the scope of a particular estate, an executor's responsibilities may be onerous. As a matter of priority, he must take steps to compile an inventory of all of the estate assets i.e. the property of which the deceased died possessed. Thereafter, he must undertake the colossal task of marshalling or getting in and protecting the estate.

[5] The next critical step for any executor is to determine who are the legitimate creditors of the estate and begin the task of raising the cash necessary to pay off the debts. All lawful debts and obligations of the estate must be paid or provided for prior to distribution to any beneficiary and the law requires due diligence on the part of the executor. The deceased's legal and equitable real and personal estate to the extent that he had any beneficial interest in it are assets which must be utilized for the payment of his debts and liabilities.

[6] Where the estate is solvent, the executor must pay all of the debts. In cases where it is determined that the estate may be insolvent (more debts than assets), a prudent executor must defer all disbursements and distributions until a determination has been made that all claims have been identified and all claims against the estate can or cannot be paid from existing assets. In order to safeguard himself, he should seek to advertise for claims against the estate and settle the order of priority in which the debts are to be paid.

[7] It is only when the executor has completed the critical task of settling all claims, expenses and taxes of the estate that an executor can then proceed to distribute what remains of the estate assets to the beneficiaries.

Rights of a beneficiary before assent

[8] It is within this legal context that the Claimant has sought to advance an equitable entitlement to have certain estate assets known as Lot 3 and Lot 7 transferred to her on the basis that the Testator gifted them to her during his lifetime. The Claimant concedes that the Testator took no steps to legally transfer the said lots to her during his lifetime and during these proceedings she failed to advance any documentary evidence to substantiate that there had been compliance with BVI Registered Land Ordinance[1] which prescribes at section 37 (1) that:

> "37. (1) No land, lease or charge shall be capable of being disposed of except in accordance with this Ordinance and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Ordinance shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.
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> (2) Nothing in this section shall be construed as preventing any unregistered instrument from operation as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged of by some other person thereunto by him lawfully authorized"

[9] Section 37 must be read together with the following statutory provisions of the Ordinance:

> "87. No part of the land comprised in the register shall be transferred unless the proprietor has first subdivided the land and new registers have been opened in respect of each subdivision.
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> 106. (1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.
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> 107. (1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument."

[10] Although it is common ground between the Parties that during his lifetime, the Testator indicated his intention regarding certain parts of his property, he took no steps in line with that prescribed in sections 87, 106 or 107 of the Registered Land Ordinance to effect the transfer to any one of his heirs. Although there is evidence that parties may have carried out construction on parts of the

[1] Section 37(1) to be read together with section 87, 106 and 107 of the Registered Land Act Cap 229

Estate in reliance of purported promises no one has contended that the particular property would have fallen outside of the estate on the basis of promissory or proprietary estoppel.

[11] In the Court's judgment all undisposed property at the time of the Testator's death, forms part of his estate and falls to be determined in accordance with the terms of his will and the general rules of succession.

[12] The relevant clause of the will provides that the Testator's estate is to be divided between his 10 children in equal shares. No specific bequests were made and certainly none concerning the subject Lots 3 or 7.

[13] The legal position was clearly set out in the following excerpt from Williams, Mortimer and Sunnucks, Executors Administrators and Probate[2] where the learned authors observed:

> "Until assent or conveyance a person interested under the will or intestacy has an inchoate right transmissible to his own representatives. He cannot, however, without the authority of the representatives take possession of the property, even though the testator expressly directs that he shall do so… Should he go into possession the representatives may sue him in ejectment, trespass or trover, according to the circumstances. Thus, although he is actually in possession of property specifically bequeathed, and the assets are fully adequate to the payment of debts, he has no right to retain it in opposition to the representatives, by whom, in such a case, an action will lie to recover it.
>
> A residuary legatee has no interest in a defined part of the estate until the residue is ascertained, nor can income be ascribed to unascertained residue. His right, which is of course transmissible, is to have the estate properly administered and applied for his benefit when the administration is complete."

[14] This general position has been applied by the English courts in Mead v Lord Orrery where at paragraph 240, the Lord Chancellor noted*;*

> "…It is undoubtedly a good disposition in law, and has vested the legal interest in Bennet, the Master, as a security for the receiver; and the executors who assigned had not bare authority, but the interest in the thing assigned, for neither residuary or specific legatees have any interest without the assent of executors."

[15] The position is perhaps best illustrated in the case of residuary legatees. In Lall v Lall[3] the widow of an intestate sought to defend an action for possession of the matrimonial home on the ground

[2] 17th Edition at page 1050 and Williams on Wills -

that the provisions of Schedule 2 to the *Intestates' Estates Act, 1952*, [1] conferred on her a sufficient interest in the matrimonial home to give her a *locus standi* as a defendant. No grant of representation to the intestate's estate had been made, but an application was pending for a grant to the Official Solicitor, limited to enabling him to defend the action.

[16] On the question whether the Defendant had a sufficient *locus standi* to defend the action, the Court held in a decision delivered by Buckley J, that:

> "(i) Just as a residuary legatee who had an interest in the totality of assets in an estate had not an equitable interest in a particular asset, so a surviving spouse, who had in some sense a particular interest in the matrimonial home under the Act of 1952, had no equitable interest in it that was recognisable by law; and, as the defendant could not have a locus standi unless it was based on an interest recognized by the law in property, she had no locus standi to defend the action."

[17] In his reasoning Buckley J relied on the Privy Council decision in *Commissioner of Stamp Duties (Queensland) v. Livingston*,[4] and the conclusion which was arrived at in that case is summed up in the last passage of the citation made by Plowman J:

> "Therefore, while it may well be said in a general way that a residuary legatee has an interest in the totality of the assets (though that proposition in itself raises the question what is the local situation of the 'totality') it is in their Lordships' opinion inadmissible to proceed from that to the statement that such a person has an equitable interest in any particular one of those assets, for such a statement is in conflict with the authority of both [Sudeley (Lord) v. Attorney–General[6]] and [Dr. Barnardo's Homes v. Special Income Tax Commissioners[7]] and is excluded by the very premise on which those decisions were based."

[18] The analysis of this case law reveals that the Claimant has neither a legal nor equitable interest in Lot 3 and therefore cannot advance her claim that the said Lot be transferred to her. In respect of Lot 7, the Claimant also has not advanced a proprietary interest which is recognizable at law or in equity. Instead, she wisely asserts that she may be entitled to compensation for improvements to the property. In the Court's judgment, the Claimant is not entitled to insist upon the transfer of either Lot 3 or Lot 7.

[19] During the course of the trial, Counsel for the Claimant vehemently stressed that the Defendants knew of the Testator's intention that she be given both Lot 3 and Lot 7, notwithstanding that during

[3] [1965] 1 WLR 1249

his lifetime he failed or neglected to make a legally binding *inter vivos* gift. Without more, this could only give rise to a moral obligation which would in any event be subject to the Defendants' duty not to unfairly disadvantage one beneficiary over the other. In other words, actions taken by the executor cannot prefer or benefit one beneficiary more than the other. Instead, he must deal with all beneficiaries on an even handed basis.

[20] Happily, during the course of the trial it became clear that the Defendants had in fact taken steps to distribute that part of the estate located at East Central Registration Section Hope Hill. As part of this distribution, the Defendants have prepared an instrument of transfer which should vest Lot 7 in the Claimant. For reasons which are incomprehensible to the Court, the contemplated vesting was not brought to the attention of the Claimant although it has not been retracted. In the premises, the Court will order that the transfer in respect of Lot 7 is to be effected within 7 days of this Order. With this order, any consequential request for compensation for improvements to Lot 7 would fall away.

[21] The Claim for relief in respect of Lot 3 is denied.

Invalidation of all transfers and dealings in respect of Registration Section East Central Block 3139B Parcel 51 Lot 3 since 5th November 2012

[22] The Claimant also asks this Court in any event to invalidate all transfers and dealings after 5th November 2012 (when the Claim Form in this matter was issued), carried out in respect of Lot 3. It is not in dispute that by Instrument of Transfer No.225 of 2013 dated 5th February 2013, the Defendants vested Lot 3 in one of the lawful beneficiaries to the Estate, Ianta Eliza Benjamin. On that same date (5th February 2013) and by Instrument of Transfer No. 226 of 2013, the Second Defendant together with his wife Thelma Blyden purchased Lot 3 from Ianta Benjamin for the sum of $10,000.00.

[23] The Claimant relied on the evidence of Alda Benjamin, the eldest child of Iante Benjamin who recounted the background to the transactions. When she gave her oral evidence Ms. Benjamin disputed the validity to Instruments 226 of 2013 which transferred title to Lot 3 to the Second Defendant and his wife for the purchase price of $10,000.00. She contended that at the time of the

transfer, her mother suffered from dementia. However, she later conceded that she had no evidence to substantiate this. The Court notes that this *viva voce* evidence was never raised in her witness statement and in fact directly conflicted with her description of her mother's coherent and lucid interactions prior to her death. This inconsistent evidence created significant doubt as to the veracity and reliability of this witness.

[24] Ms. Benjamin questioned the speed with which the transaction was conducted and when she was reexamined she implied that there must have been a prearranged plot hatched by the Second Defendant and his wife. The Court has no doubt that Iante Benjamin and her immediate family regretted the sale of the property to the Second Defendant and his wife. It is apparent that it was sold for a price which was below its estimated value ($45,000.00). However, the Court also notes from Alda Benjamin's own evidence, (see: paragraph 4 of her witness statement) that the purchase price of $10,000.00 was suggested by her with no apparent demur from Iante Benjamin.

[25] The Benjamins clearly would now like to challenge the validity of that sale, but thus far they have chosen not to do so. What is clear to the Court, is that they do not seek to challenge the vesting of Lot 3 in Iante Benjamin.

[26] Counsel for the Claimant submitted that in purporting to purchase Lot 3 at the undervalued price of $10,000.00 from an aged and ailing Iante, shortly before her death and after the Claimant had commenced this action (which clearly set out her claim for relief in respect of Lot 3), the Defendants intended to place this asset beyond the reach of this Court. The Claimant's case is put no higher than that. Fraud has not been specifically pleaded. Instead, Counsel relied on the SVG unreported judgment in Eddie Wilson v Jemma Alexander et al 361/1996. Having reviewed the facts of that case, the Court is satisfied that they bear little relation to the facts of the case at bar.

[27] In that case, Elma Wilson died leaving no will. She was survived by her husband, Russell Mathias Wilson and their eight children. The Plaintiff was one of the eight children. Her widower Russell Wilson, and Ruthford Cox were granted Letters of Administration to her estate. At the date of the death of Elma Wilson, Russell Wilson was still a relatively young man of about 50 years. He soon began an intimate relationship with a young woman, Jemma Alexander, the First Defendant. A son, Dexter Alexander, (the Fourth Defendant) was later born of this relationship.

[28] The children of Elma Wilson were never given any part of the land left by their mother. Russell Wilson and his co-administrator Ruthford Cox sold or gave most if not all of it away. In one such deed he conveyed half an acre of the estate to Jemma Alexander for her son, Dexter Alexander for the purchase price of $8,000.00. The plaintiff asked the court to set aside the conveyance to Jemma Alexander.

[29] Mitchell J was satisfied on the evidence that Russell Wilson acted in breach of his duties as administrator of the estate when he purported to transfer the house and land to the Defendants. The learned Judge did not accept that Ms. Alexander had in fact paid any part of the purchase price. Instead, he was of the view that that Russell Wilson wanted to leave the land and house that he now viewed as his own, to his son Dexter who had no claim on any part of the estate of Elma Wilson. He therefore concluded that Russell Wilson wanted to cut his wife's children out of the estate. On this basis the learned Judge had no reservations in voiding the purported sale and ordering that the property be returned to the estate.

[30] The points of distinction are critical. There is no doubt that there were egregious breaches on the part of Mr. Wilson who failed to vest any of the estate in the rightful beneficiaries. Instead, he deliberately chose to cut out them out in favour for his paramour and his son neither of whom were legal entitled to benefit from the estate. This is not the case here.

[31] In the case at bar, the Defendants transferred Lot 3 to a lawful beneficiary of the estate. It may well have been that there was an intention to purchase this property once the vesting was done, but the Court is not persuaded on the narrow evidence presented that this was anything other than an arm's length transaction. Certainly, while it is clear that an executor cannot properly purchase assets from himself *qua* executor, an executor's dealings with legatees/beneficiaries (although subject to scrutiny) are not invariably voidable.[4] The law since 1888 is clear:

> "The fact that a trustee has sold trust property in the hope, subsequently realized, of being able to repurchase it for himself at a future time, is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate at the time, and there was no agreement or understanding existing at the time of the first sale that the purchaser should sell or reconvey the property to the trustee. The fact that the trustee many years

[4] *Re Postlethwaite (1888) 37 WR 200, CA*; and see also *Dover v Buck (1865) 5 Giff 57*; and *Baker v Peck (1861) 9 WR 472*; but cf *A-G v Lord Dudley (1815) Coop G 146*.

afterwards made a handsome profit by repurchasing and selling the property makes no difference."

[32] However, the Defendants vested Lot 3 in Iante Benjamin while they were well aware that the claim had been issued in which the Claimant sought specific relief in respect to Lot 3. While the Court is concerned that the Defendants would have chosen this potentially imprudent course, it is clear that there was no injunctive relief in place and no registered caveat prohibiting dealings with the property.

[33] During the course of the trial, the Court repeatedly asked Counsel for the Claimant to provide any authority which would support nullification of a transfer solely on the basis that property was transferred while it was the subject of a legal dispute (pre-judgment) and where there was no embargo in place. Counsel was unable to assist the Court. Fortunately, the courts in the region have addressed this issue.

[34] The ancient common law doctrine of *lis pendens* prescribes that during the pendency of any suit in which the right to immovable property is in question, neither party to the litigation can transfer or otherwise deal with such property so as to affect the rights of the opponent. *lis* is deemed to commence from the date of the presentation of the claim and to continue until the suit or proceeding has been disposed of by a final judgment or order, and complete satisfaction or discharge of such judgment or order has been obtained. In many jurisdictions, this doctrine has been accorded statutory force. This does not appear to be the case in this Territory where the operating regulatory regime is the Registered Land Ordinance Cap 229.

[35] The scope of this doctrine was explored in the Anguillan judgment of George-Creque, J (as she then was) in Patricia Ann Hurst Willard V Paragon Holding Ltd.[5] At paragraph 8 of the judgment the learned Chief Justice made the following observation:

> "The English cases Bull -v- Hutchens and Bellamy -v- Sabine are informative as to the nature of the common law doctrine of 'lis pendens.' Notice of a 'lis pendens' does not create any lien or charge on property. It is not necessarily a notice of an incumbrance. It merely amounts to a notice of a claim the subject of a suit which may possibly be unfounded. The Common Law of England was declared to be applicable to Anguilla by

[5] AHCV/2006/0088

virtue of the Common Law (Declaration of Application) Act 5 and still applies to the extent that it has not been altered by any written laws of Anguilla. The Registered Land Act of Anguilla came into force in the early 1970s and brought into being a registered land system in respect of all lands in Anguilla. Accordingly, proof of title by deed is a thing of the past. A Condominium Act was passed into law in Anguilla, in 1982. These written laws make provision for inspection of land registers and searches to be conducted in respect of entries contained thereon."

[36] At paragraph 9 and 10 she continues:

> "The question then is whether this ancient common law doctrine has been rendered otiose by virtue of these legislated regimes governing land and all interests therein. Counsel for the Applicants relied on the case of T Damodaran s/o P-v- Raman a decision of the Privy Council on appeal from Malaysia, where all lands in Malaysia were subject to the National Land Code which made the Torrens system of registration of title to land applicable to Malaysia. It is common ground that the Registered Land Act of Anguilla brought about a modified Torrens system of land registration in Anguilla. In that case where a lis pendens order had been entered on the register of title relating to the land in question, Lord Diplock opined at page 502 with regard to the Torrens System of registration of title to land thus: "the whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings with land particularly those relating to such matters as notice of encumbrances and trusts". He then cited with approval the Court of Appeal of New Zealand in relation to corresponding legislation in force there, where that court said thus: "The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud, on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes ---- has an indefeasible title against all the world. Nothing can be registered which is not expressly authorized by the statute.
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> Section 23 of the Registered Land Act of Anguilla also assures indefeasibly of title in respect of a registered proprietor. Lord Diplock then referred to the system of private caveats provided for under the statute which has the effect of preventing any dealing with land by the registered proprietor so long as such caveats remain in force whilst leaving the registered title unqualified and intact in respect of any claims to title or registrable interest in land. I have already referred to the private caveat mechanisms employed under the Registered Land Act, namely cautions, restrictions and inhibitions contained in Part 8 of that Act under the general heading 'Restraints on Disposition". In relation to the provision of such a system of private caveats, Lord Diplock opined at page 503 as follows: "This method of protecting claims to land and to registrable interests in land under the Torrens System is wholly inconsistent with the concept of lis pendens as it was developed as part of the land law of England" which in theory was to ensure that so long as title to property was being litigated the parties to the litigation were incapable of alienating it so as to avoid a judgment of the court being frustrated. The Privy Council concluded that entry of the lis pendens order was a mere 'brutum fulmen' as it served no useful purpose.

[37] The learned Judge concluded at paragraph 11 that:

> "In essence, the purpose of the Notice is to give notice of the very matters in respect of which all prospective purchasers and all persons would be deemed to have constructive notice. In my view, the legal position of any prospective purchaser is not affected to any greater or lesser extent by virtue of the existence and circulation of the Notice or by the lack of it. It is not contemplated within the scheme of the Condominium Act and less so under the Registered Land Act which clearly incorporates its own regime of private caveats. It is not contemplated under CPR 2000 and is not filed with the court. In my view it has no legal efficacy, is wholly superfluous and can only be considered as a 'brutum fulmen'. In a pending action where title to registered land is in dispute, the proper way to suspend the registered proprietor's right to deal with the land is to employ one of the methods as may be suitable for lodging a caveat against the title as provided for under the Registered Land Act." Emphasis Mine

[38] In the premises and because of the conclusions drawn by this Court relative to the Claimant's entitlement to Lot 3, this Court finds that there is no basis for the relief claimed. It has not been contended that Lot 3 falls outside of the estate (or is not an estate asset), neither has it been demonstrated that the Claimant had any legal or equitable entitlement to Lot 3. Moreover, it is clear that it was transferred and vested in a legitimate beneficiary to the estate, Iante Benjamin who clearly would have been entitled to a share of the estate in Hope Hill. The Court is simply not persuaded that the vesting was motivated by anything other than an intention to comply with their responsibilities to distribute the estate in an even-handed manner. Nullification of all dealings could potentially leave one beneficiary at a distinct disadvantage when it is clear that they have all been vested with an equal share in the Hope Hill Estate.

[39] Whether the subsequent transfer to the Second Defendant and his wife could be nullified on the basis of undue influence or inadequate consideration is a matter which would have to be ventilated in separate legal proceedings. In so far as this Claim is concerned, this claim for relief in respect of Lot 3 is also denied.

Breach of Trust – breach of fiduciary duty

[40] Although the BVI Trustee Act provides that the expression "trust" extends to the duties incident to the office of a personal representative, the general principle seems to be that an executor is not *ipso facto* a trustee.[6] However, it is well established that the fundamental duty of personal representatives is to administer the estate and to distribute it in accordance with the will or under

[6] Re Trollope's Will Trusts [1927] 1 Ch. 596; Re Spencer & Hauser's Contract [1928] Ch. 598

the rules of succession and in carrying out these duties; an executor must be cognizant that he is acting in a fiduciary capacity. He is in a fiduciary position as to assets coming to him in right of his office and he is for certain purposes treated as a trustee. Re Marsden[7] where at 789 Kay, J stated:

> "It seems to me as plain as can be, that where an executor accepts that office he accepts the duties of the office and he becomes, in the language of Williams on Executors, a trustee in this sense: "An executor is personally liable in equity for all breaches of the ordinary trust which in Courts of Equity are considered to arise from his office.'"

[41] This principle was applied in the case of Commissioner of Stamp Duties v Livingston[8] where at page 696 C-E the Judicial Committee observed:

> "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."

[42] In several respects therefore, an executor is treated as a trustee. There can be no doubt that an executor can be sued for breach of trust as he is in a fiduciary position with regard to the assets which come to him in the right of his office.

[43] The classic definition of a fiduciary was set out by Millet LJ in Bristol and West Building Society v Mothew[9] as follows:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work* Fiduciary Obligations *(1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."*

[7] (1884) 26 Ch. D. 783
[8] [1964] 3 All ER 692
[9] [1998] Ch. 1 at page 18

[44] In the case at bar, the Claimant contend that the Defendants have breached their fiduciary duties in a number of ways. The alleged breaches are dealt with in turn.

i. Failing to make a timely or equitable distribution of the Estate in accordance with the terms of the will.

[45] Personal representatives must take charge of and gain possession of all assets of the estate where necessary in order to carry out the obligations for the payment of taxes, debts and claims against the estate and the ultimate distribution of the estate in a manner consistent with a testator's wishes or as required by the laws of intestate succession.

[46] The law requires that this be done with all due diligence. The Court finds that the Defendants have clearly breached their duty to immediately assume control of the estate and to diligently pay up its debts, and distribute the residuary in accordance with the will of the Testator. For reasons which in no way persuaded the Court, they failed to take up a grant of administration until 15 years after the death of the Testator. Moreover, 13 years have elapsed since their appointment and yet administration and distribution of the Estate is largely incomplete. The Court notes that the first genuine attempt at distribution occurred in December 2009.

[47] The Court is satisfied that this largely unjustified and unexplained delay in complying with their duties in a clear breach of their duties as executors.

ii. The Claimant posits that prior to the grant of probate the Defendants have intermeddled in the estate. She also contends that prior to and since the Grant of Probate the Defendants have granted permission to persons not entitled under the Will to construct houses on the property and have ceded part of the estate to the Government for the construction of a public road.

[48] Having read the witness statements of the Defendants, Franklin and Arnold Donovan and indeed the Claimant herself and having heard their oral testimony, this Court is satisfied that the Defendants would have acted in breach of their fiduciary duties when they constructed buildings on properties within the estate and following the death of the Testator of a time when the properties

would clearly have to be dealt with in accordance with the rules of succession and the terms of the Testator's will.

[49] Having had an opportunity to observe both Defendants under cross examination, the Court finds that the actual dates of construction of some of their buildings are uncertain (they both indicated that it was a long time ago or at least 20 – 25 years or more ago). To the extent that such construction predated the death of the Testator, the Claimant's claim could not be maintained. However, in his oral testimony before the Court Basil Blyden's evidence revealed that he constructed a building, (assisted by Darwin) in 2006 on the Brandywine Bay property. Such construction would have taken place before the estate was distributed and vested and without informing the beneficiaries.

[50] The Court also finds that the Defendants were complicit in permitting Franklin and Arnold Donovan (neither of whom are lawful beneficiaries under the Will) (Brandywine Bay) to construct houses on property falling within the estate, after the death of the Testator and before the estate had been administered. Although there is some evidence that prior to his death the Testator may have given oral permission to occupy prior to his death, for the most part construction would have commenced after the death of the testator when the property in question would have clearly fallen into the estate.

[51] Having had an opportunity to observe both Franklin and Arnold Donovan give evidence under oath, the Court is satisfied that Franklin Donovan constructed two houses on the Brandywine Bay part of the estate, one of which was completed in the year that Testator died (1989). It is therefore not in issue. However, the Court finds that construction of the other house commenced in 1998 with the consent of the Defendants. In the case of Arnold, the Court finds that construction of his house commenced in October 1996 with the consent of the Defendants and only one other beneficiary, Ethlyn Donovan.

[52] Finally, neither Defendant sought to deny that part of the property at Hope Hill would have been acquired or sold to the Government in order to construct part of a public road. The full details of the purported alienation did not emerge during the evidence. However, it is apparent that the

Defendants failed to appreciate their obligation to account for this potential loss to the Estate (regardless of its nature) and have to date offered no explanation to the beneficiaries.

[53] In the Court's view all of these actions demonstrate that the Defendants have flagrantly ignored their fiduciary duty and have thus acted in breach of trust.[10]

iii. The Claimant also contends that the Defendants have failed to communicate, involve or cooperate with beneficiaries in the distribution of the Estate.

[54] In support of this contention Counsel for the Claimant relied on the dictum in Clifton St. Hill v Augustin St. Hill[11] where at paragraph 13 of the judgment Mitchell J observed:

> *"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."*

[55] This dictum has been repeatedly applied in subsequent judgments in this region.

[56] The Court is satisfied that the only duty prescribed by Mitchell J was a duty to satisfy the beneficiaries that the executor is properly administering the estate. In the Court's judgment, the recommendation which followed is just that and no more. It prescribes "best practice" guidance which should be followed by personal representatives if they wish to avoid litigation.

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[10] Colin George et al v Morriel Jenneth George-Carr ANUHCV0750/2006

[11] Civil Suit No. 402 of 1996, St. Vincent & the Grenadines [unreported] 24 May 2001

[57] Counsel for the Claimant relies on the authority of Butt v Nelson[12] in support of the contention that a court will interfere in the exercise of a representative's discretion when beneficiaries are absolutely entitled between them, to ensure that their unanimous wishes are complied with. The ratio in that case is obviously confined to the peculiar facts of that case. It cannot be overlooked that that Court's judgment was premised on the finding that the rights of the beneficiaries (as a whole) were that they should be treated as though they were the registered shareholders in respect of trust shares with the advantages and disadvantages which would be involved in that position, and they could compel the trustee directors, if necessary, to use their votes as the beneficiaries (or as the court, if the beneficiaries themselves were not in agreement), thought proper, even to the extent of altering the articles of association if the trust shares carried votes sufficient for that purpose. In the Court's view, this judicial authority does little to assist the Claimant because there is no contention that these beneficiaries are *absolutely entitled* to ensure that their unanimous wishes are carried out.

[58] As a general principle of law, there can be no doubt that there is no legal obligation compelling a personal representative to consult beneficiaries in the administration of an estate. As per Re Hayes' Will Trust,[13] the duty of a personal representative is to the estate as whole and not to individual beneficiaries. They must however act prudently and properly in the administration as a whole, ensuring that they apply an even hand when dealing with the beneficiaries.

[59] Having said this, only an imprudent executor would ignore Mitchell J's best practice guidance in circumstances where the Testator's will did not detail the method of distribution for the Estate which spreads over three different location with varying topographical features. For reasons which are incomprehensible, the Defendants have deliberately chosen to ignore what is clearly best practice. However, this would not on its own rise to level of breach of trust.

[60] What concerns the Court is that the Defendants appear to have little appreciation of their fiduciary responsibilities. Moreover, the Court is satisfied that they have simply not done enough to properly administer this estate.

[12] [1952] 1 All ER 167
[13] [1971] 2 All ER 341

[61] For that reason this Court will order that they produce file and serve accounts of their dealings with the estate since the date of death of the Testator within 30 days of today's date. In the Court's judgment this is particularly necessary in light of the unapologetic evidence of Darwin Blyden that no estate account has been established. It became clear to the Court that the Defendants were largely ignorant of their duty to keep records and receipts of the administration of the estate and to account to the beneficiaries for the same.

[62] Counsel for the Claimant has submitted that the Defendants should be liable for any loss or diminution in value of the Estate and that such loss once quantified, should be deducted from the Defendants' entitlements as beneficiaries. Although the Claimant successfully demonstrated clear breaches by the Defendants, during the course of this trial, she has failed to demonstrate that there was any loss or diminution to the value of the estate. This, despite the availability of expert assistance. Counsel has submitted that the Court should order that such an assessment be carried out and determined by a new personal representative appointed by the Court. Thereafter, once the loss has been quantified, it should be first sanctioned and approved by the Court on an application by the personal representative under CPR Part 67 or such other applicable provision of the Law. In the Court's judgment, this proposal is inconsistent with the overriding objective which demands that parties assist the court in dealing with cases in an economical manner. The Court has some difficulty in discerning why this critical issue could not be fully ventilated in the current proceedings.

Revocation of the grant of probate and removal as executors

[63] If a beneficiary believes that an estate is not being properly administered then it is open to him to apply for the court to exercise its discretion to remove or substitute one of more of the personal representatives. In Viola Richardson et al v Albert Hughes[14] the learned Blenman J (as she then was) put the position in this way.

> *"It is the law that a personal representative may be removed either by the revocation of his grant or by the appointment of a substituted personal representative or by the termination of the appointment. If the grantee commits a serious breach of his duties, the Court, in an appropriate case, will revoke the grant and make a new one in order to secure the proper administration of the Estate."*

[14] Claim No. AXAHCV 0036/2007 at paragraph 102

[64] However it is also clear that the removal of an executor is not a simple task. Much will depend on the particular facts of the case and whether they disclose that there are clear and compelling reasons that would adversely affect the administration and the welfare of the beneficiaries. Bad relations between parties will generally not be enough. Further, a court will always take into account the fact that a testator has chosen his personal representatives. Such a decision will generally not lightly be interfered with. The Court will also consider whether the cost of removal, hand over and replacement may be disproportionate to the issue in dispute.

[65] Ultimately, the test for removal of an executor is based on whether there is prejudice to the estate or the beneficiaries' welfare. Simple speculation is not enough – there must be clear and persuasive evidence.

[66] The Claimant contends that the Defendants several breaches of trust demands that their grant of probate be revoked. Counsel for the Claimant submitted that the Defendant's failure to make a timely and equitable distribution of the estate provides sufficient grounds for removal. She submitted that since the death of the Testator, 28 years have elapsed and since the grant of probate, 13 years have elapsed. The evidence before the Court discloses that effective attempts at administering the estate only commenced in 2009 and it is not in dispute that only one part of the estate has been distributed as at the date of trial.

[67] The Court is not persuaded that the delay is in any way defensible. The Defendants were clearly content to proceed in their own time and the Court has no doubt that it is this litigation which has accelerated their administration. It now appears that with the benefit of legal and technical advice that they have settled on a distribution plan.

[68] Although the administration has been unduly prolonged, it has not been demonstrated that such delay has endangered the trust property. It may well be that this complaint could best be addressed through specific directions rather than outright removal. However, Counsel for the Claimant has argued that the more egregious breaches centered on the Defendants' misappropriation of estate assets to themselves, and the mala fides applied in dealing with the estate and the Claimant.

[69] The Court has made certain findings in respect of Lot 3 in the Hope Hill Estate. However, it is clear to the Court that since the Testator's death, the Defendants have carried out construction on prime locations within the estate which would not have been authorized by the Testator prior to his death. To the extent that such construction was carried out during the life of the testator and with his consent or acquiescence this could not be subject of challenge. However, any contruction which took place after this – including the 2006 construction by Basil Blyden potentially puts them at odds with the other beneficiaries and may give rise to a potential conflict of interest.

[70] Moreover, rather than diligently administer the estate; the Defendants abused their power by permitting third parties (the Franklin and Arnold Donovan) who have no entitlement under the Testator's will, to construct buildings on estate property. Counsel for the Defendants has suggested that this is of no moment because they granted permission to the Donovans on the basis that they had been given permission to occupy by the Testator during his lifetime. Counsel further argued that the Donovans have occupied the property for some time on the understanding that the same would form part of their mother's share of the Estate. While there may be some force in the former argument, the rationale of the latter escapes the Court. As previously indicated, (and subject to the finding that one of Franklin's houses pre-dated the Testator's death) the Court finds that the Defendants' actions were inconsistent with their fiduciary obligations and a clear breach of trust. The Donovans (and indeed the Claimant) may well be entitled to advance claims against the estate as a direct result of the Defendants' actions. This could potentially be detrimental to the estate.

[71] Counsel for the Claimant also submitted that the Defendants have failed to keep an even hand in dealing with the beneficiaries. According to Counsel, the Defendants have deliberately excluded the Claimant from distribution. Indeed, during the trial it became clear that while the transfer in respect of Lot 7 had been prepared for some time, the Defendants chose not to forward the same to the Claimant. No logical explanation was given for this failure and the Court can only conclude that it was actuated by malice.

[72] It is clear that the relationship between the Claimant and Defendants has completely broken down. In Kershaw v Micklethwaite and Others[15], the Court held that friction and hostility were not in themselves reasons for removing an executor. Rather, it was a factor to be taken into account only where it affected the administration of the estate. Although the court considered it arguable that the administration could be carried out at less cost had there been no hostility between the parties, the learned judge concluded that poor relationships need not and should not interfere with the administration of the estate. In that case, Justice Newey observed:

> "As I have already said, however, I do not consider that friction or hostility between an executor and a beneficiary is of itself a reason for removing the executor. Mr. Child suggests that, on the facts of this case, the hostility between Mr. Kershaw and his sisters has the potential to create difficulties in the administration of the estate. While, though, it may well be that the administration of the estate could be carried out more quickly and cheaply were Mr. Kershaw and his sisters to be on good terms, I do not think that the potential problems are such as to warrant the executors' removal. As I see it, the poor relations between the parties need not and should not either prevent or impede substantially the administration of the estate."

[73] When looking at the removal of an executor on the grounds of personal conflict, the court will take into account the proper administration of the estate and the welfare of the beneficiaries. This Court is guided by the leading case on the removal of executors, Letterstedt v Broers[16], in which it was stated that direct intervention by the court in the administration of an estate and the removal of an executor has to be *'justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries'.*

[74] Clearly, a lack of confidence or feelings of mistrust are not generally sufficient in themselves to justify removal of a personal representative unless they are likely to jeopardize the proper administration of the estate. However, when the Court considers the exclusion of the Claimant from distribution and the deep division revealed by the allegations of misappropriation, abuse of power and mala fides, (made by the Claimant and now by one of the heirs of Iante Benjamin), the need for an independent appointment in the Claim is, in the Court's view, warranted.[17]

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[15] [2010] EWHC 506 (Ch.) – Although this case concerned an application to remove an executor, the Court is satisfied that the same principle can be applied to the appointment of an administrator

[16] (1884) 9 App Cas. 371

[17] Ghafoor & Ors v Cliff & Ors David per Richards J (2006) 1 WLR 3020 (Ch) at paragraph 63

[75] The Court has taken into account that part of the Estate has been distributed and that a further distribution scheme has now been conceptualized and that the appropriate (legal and technical) expertise has been retained at significant expense to facilitate this second phase of distribution. However, the administrator is now again at a standstill. Although subdivision plans for the Brandywine Estate have been drafted and submitted to the planning authorities since 2012, the Court is concerned that there has been little progress in the last 5 years. The Court is not satisfied that the Defendants have diligently pursued this matter and it goes without saying that the excuses advanced failed to persuade the Court that such inaction was justified. This Estate is somewhat large and not without complexity. The beneficiaries of this Estate are all now at advanced age and many have died in the time which has elapsed. Having reviewed the totality of the evidence, the Court has serious concerns about the ability of these two Defendants to work together in a cohesive and progressive way to complete the administration of this estate in a timely manner.

[76] Finally, the Court has some doubt about the impartiality of the Defendants to administer the Estate. By their actions, they have clearly positioned themselves in a way which reveals an intention to assert a right of entitlement to defined parts of the Estate which may not necessarily be consistent with the general bequest under the Testator's will.

[77] For these reasons, this Court is satisfied that this Estate would benefit from the removal of the Defendants from their office.

[78] The Non Contentious Probate Rules empowers the Court to appoint such person as it may think fit (including an independent administrator) where it is satisfied that the circumstances so require the appointment. Such an appointment can be made notwithstanding that some person has been entrusted with administration or is beneficially entitled to the estate and is willing and able to take a grant. Ultimately the selection of an administrator rests with the discretion of the court. It is a legal discretion, governed by principle and sanctioned by practice. In exercising this discretion, the Court cannot act capriciously; it cannot be guided solely by the wishes or feelings of parties or any party. Rather, the Court must look to the benefit of the estate and to that of all the persons interested in the distribution of the property.

[79] In that regard, the Claimant has suggested that her daughter, Marva Wheatly-Dawson be appointed as administrator on the removal of the Defendants. The parties are clearly not *ad idem* on such an appointment and in those circumstances the Court is satisfied that litigation and expense would be avoided or diminished by removing the Defendants as representatives of the estate and appointing an independent administrator.

Costs

[80] In successive case management conferences, the Parties agreed that costs would follow the event in the sum of $15,000.00 to the successful party and then in the amount of $7,500.00 to the successful party. In the Court's judgment both sides have been somewhat successful in their prosecution and defence of this claim. For that reason, the Court finds that each side should bear their own costs.

[81] For the avoidance of doubt, the Court finds that the Defendants should personally bear the costs of their defence of this claim. Such costs are not be defrayed from the estate. Costs in a probate action are always at the discretion of the court and as in Eileen Papone et al v James Anthony, there is no doubt that this action was necessitated by the Defendants' own inappropriate, unreasonable and dilatory conduct. They should not be relieved from having to fund their defence this Claim.

CONCLUSION

[82] For the reasons set out herein, the Court declares that the Defendants have acted in breach of the ordinary trust which in courts of equity are considered to arise from their fiduciary office.

[83] The Court further orders that:

i. Parties are to execute the transfer of Lot 7 of the Hope Hill Estate within 7 days of this Order.
ii. The Defendants shall within 30 days of this Order, produce, file and serve on the beneficiaries comprehensive accounts of their dealings with the Estate between the date of death of the Testator and the date of this Order.

iii. The Defendants be removed as personal representatives of the Estate of the Testator.

iv. Within 30 days of this Order, the beneficiaries are to nominate a suitable individual to carry on and complete the administration of the Estate.

v. Failing such nomination, the Court hereby appoints the Official Receiver to carry on and complete administration of the Estate. All costs and expenses associated with such appointment are to be defrayed from the Estate.

vi. The Parties are to bear their own costs.

vii. The Defendants are not entitled to recover the costs of their defence and counterclaim from the estate.

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Vicki Ann Ellis
High Court Judge