

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2012/0056

BETWEEN:

[1] JARREN PHILLIPS
[2] KHANESE PHILLIPS
By Attorney-in-fact Karen Abbott

Claimants

And

[1] RASHAN ALEXANDER PHILLIPS
As Personal Representative of the Estate of Everton Phillips
[2] SADEEV HUGHES

Defendants

Appearances:

Mr. Loy Weste and Mrs. Lisa John-Weste of Thomas John & Co for the Claimants
Ms. Fiona Murphy of Simon Rogers Murdoch for the First Defendant
Ms. Gail Christian for the Second Defendant

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2018: February 27
2019: January 28
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JUDGMENT

[1] HENRY, J. The parties are all the children of Everton Phillips, who died on 9th January 2004, intestate. At the time of his death, the claimants and the second defendant were minors. The first

defendant, (Rashan) then 21 years old, applied for and was granted Letters of Administration of the estate of his father, Everton Phillips on 17th December 2004. No co-administrator was appointed, and Rashan functioned as the sale administrator throughout.

- [2] The Estate was believed to consist of shares in the Antigua Commercial Bank and two parcels of land: Registration Section: McKinnon; Block: 45 1695B Parcel 198 (**the McKinnon's property**) and Registration Section: South Central; Block: 15 1988B; Parcel 30 (the All Saints property) which had a completed 3 bedroom house thereon. The first defendant sold the shares in Antigua Commercial Bank and also sold the McKinnon property. According to him he used the proceeds of the sales to pay the debts and liabilities of the Estate and repair and renovate the All Saints property, which was thereafter placed on rent. The sum of \$380,000.00 he deposited in British American Insurance Company (BAICO). In July 2009 however, BAICO was placed under judicial management. The only distribution to the beneficiaries of the Estate was the sum of \$20,000.00 given to the second defendant. The claimants commenced the instant proceedings alleging that the first defendant has failed to provide to the claimants a true and proper accounting of the administration of the estate of Everton Phillips, and further that the defendant has breached his duty by failing to distribute the said estate to the claimants to the extent of their entitlements. The claimants therefore seek the following declarations and orders:

[See items 1 to 11 of the claim form]

- [3] In his Affidavit in Response, the first defendant avers that:
1. He has committed no breach of duty/trust
 2. He placed the monies in BAICO for their safekeeping, and he had no means of knowing the company would go into liquidation and cannot be held responsible for the current unavailability; of the sum
 3. He is not in receipt of any monies from the Estate, whether rental or other income.

- [4] **In the first defendant's Pre-trial Memorandum**, he made several admissions including:
1. That he is the Administrator of the Estate of Everton Phillips and is under a duty to the claimants as a trustee of the said Estate;
 2. He has not distributed the estate to the claimants as beneficiaries;

3. The claimants have both attained the age of majority and are each entitled to receive their vested interest in the estate of the deceased, Everton Phillips;
4. **He did place the sum of \$380,000.00 of the Estate's monies in an account held at BAICO** on or around 11th April 2007;
5. While the sum was held in the account, BAICO went into judicial management;
6. This occurred more than a year after the claimants both attained the age of majority;
7. **The claimants did seek an accounting of the first defendant's administration of the estate** herein on or about January 2006;
8. The first defendant provided the claimants with an account but the claimants rejected same and requested a further account on 16th November 2009 and again on 2nd June 2010;
9. He provided the claimants with further accounts of his administration on 20th January 2010 and again on 16th June 2010;
10. He originally provided an inaccurate account of the monies received from the sale of shares with the Antigua Commercial Bank owned by the Estate;
11. He did give the sum of \$20,000.00 to Yvonne Hughes as mother and guardian on behalf of the second defendant;
12. The claimants sought confirmation of the status of the second defendant as an issue of the deceased and one of the beneficiaries of the Estate.

[5] On the morning of trial, the court was informed that the parties have entered into a consent position so far as the second defendant is concerned. The claimants and defendants have accepted and agreed that the second defendant is the natural child of Everton Phillips, deceased. They therefore entered into a consent order that the second defendant is entitled to a one quarter share of the Estate of Everton Phillip, deceased, less the sum of \$20,000.00 already received. Therefore, the items left **for the court's consideration are items 1 to 4 and 8, 9 and 11 of the claim.**

[6] The fundamental duty of personal representatives is to administer the estate and to distribute it in accordance with the law. It is his duty to keep clear and accurate accounts, and always be ready to render such accounts when called upon to do so.¹

¹ Halsbury's Laws of England, 5th Edition, Vol 103, paragraph 1256

[7] Under the Intestates Estates Act, Cap. 34 section 6(1), the personal representatives are to collect in the estate, hold the residuary estate upon statutory trust for sale and distribute the net proceeds of sale after administering the estate. Wrongful distribution will result in the personal representatives being personally liable unless they have been ordered by the court to do otherwise. (See Halsbury's 4th Edition, Vol. 17 para 1314.)

[8] Section 4 provides for the succession to real and personal estate on intestacy. It states at s.4 (e) and (f)

(e) If an intestate dies leaving issue and no husband or wife, his residuary estate shall be distributed among the issue in accordance with paragraph (f).

(f) If all the issue are in equal degree of relationship to the deceased person, the distribution shall be in equal shares among them; if they are not, it shall be per stirpes.

[9] Everton Phillip died leaving issue but no spouse.

[10] The children of Everton Phillips **are all entitled to an equal share in their father's estate and therefore** no one beneficiary can take a greater share than the other. Hence, the first Defendant, as personal representatives, cannot distribute the estate as he sees fit. He is to administer the estate in accordance with the governing law.

[11] The court is guided by the judgment of the Privy Council in the case of Commissioner of Stamp Duties v Livingston [1964] 3 All ER 692 at page 696 C-E where Lord Radcliffe, stated that:

"a trustee held 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...he is in a fiduciary position with regard to the assets that came to him in the right of his office. He also stated that those trusts are trusts to preserve the assets, to deal properly with them and to apply them in a due course of administration".

[12] Has the first defendant breached his duty to the claimants?

The Records and Accounts of the Estate

The duty of a personal representative to keep accounts has been succinctly set out in Halsbury Laws of England Volume 103 (2016) Sec 1254 as follows:

“It is the duty of personal representatives¹ to keep clear and accurate accounts, and always to be ready to render such accounts when called upon to do so². It is no excuse that they are inexperienced in keeping accounts, for in that case it would be their duty to employ a competent accountant to keep them.”

- [13] The claimants submit that the first defendant has failed to provide proper particulars and accounts of all monies received in respect of the estate. The accounting provided by him is woefully inadequate, and contains serious inaccuracies and was provided after a protracted delay.
- [14] The first defendant has admitted that in January 2006, the claimant requested an accounting of his administration of the Estate. **In response he furnished an undated document headed “McKinnons Estate” and Statement of Rashan Phillips Re: Sale of McKinnons**” (the first accounts). This document was rejected by the claimant as being incomplete and lacking proper documentation in support of **the Estate’s assets**. In November 2009, the again in June 2010, the claimant requested true and proper accounts. By letter dated 20th January 2010, the first Defendant’s Attorney wrote to the Claimant’s Attorney informing him that they were arranging to procure the services of a Certified Accountant to provide the financial statements of the estate from 2005 to present. The letter indicated that they would need 30 days to complete the matter. By letter dated 9th March 2010, **the defendant’s Attorney again wrote to claimant’s Attorney indicating they had engaged firm to prepare the financials from 2005 to present and as soon as they received same, they would contact the claimant’s Attorney.**
- [15] Under cover letter dated 16th June 2010 a **“statement of disbursements and explanatory notes of the affairs of the estate” was provided**. The Disbursement Report for the period 2005 to 2006 shows disbursements totalling \$229,140.48. **Explanatory Note 1 states that “In addition to the total disbursements of \$229,140.48 which was derived from the computation of paid bills and payment receipts for the subject period, we also noted disbursements totalling EC\$39,943.00 from ATM cash withdrawals from ACB savings account # **8105 described as Administrator of Estate, during the period March 6, 2007 to January 26, 2010”.** Note 2 also indicated that for the period March 2007 to January 2010 a statement for the same account showed deposits totalling \$38,106.67. The first defendant admits that he originally gave an inaccurate account of the sums obtained on the sale of the shares and that this was corrected in the second statement which was prepared by an Accountant
- [16] The claimant however rejects this second statement as also being inadequate. The claimant points to other contradictions. The first statement on the estate indicated that \$40,000.00 was spent on

renovation on the All Saints Property. However, the document prepared by the accountant indicates that in excess of \$60,000.00 was spent for the period 2005 to 2006. Further, the claimant requested bank statements showing bank account balances in November 2009. The claimant never received them and none were exhibited by the defendant in any of the Bundles. Further, the Accountant **stated that there were “disbursements totalling EC\$39,943.00 from ATM cash withdrawals from ACB Account Number 8105 described as ‘Administrator of Estate’ between March 06 2007 and January 26, 2010”**

[17] Furthermore, the subsequent Income and Expenditure statement (the third statement) provided by the first defendant is undated and unsigned. It shows income of \$680,444.00. It purports to list receipts for the period 2005 to 2007 with one receipt in 2008. The court has perused the document and found three receipts dated in 2003 prior to the death of Everton Phillips. That document indicates expenses totalling \$55,636.20. When added to the total of \$380,000.00 deposited with BAICO, there is a sum of \$435,636.00 accounted for with a balance in the estate of \$244,807.80

[18] The claimant asks the court to note that withdrawals were being made by the first defendant from the estate account for some time after BAICO had gone under judicial management. The claimant reasons that there were still monies left in the Estate and being used by the first defendant. Notwithstanding the first defendant’s statement under cross examination that the only funds left in the Estate were the BAICO funds. The claimant asks the court to find that his statement false. The claimant asserts that the reality is that taking into account all the deductions of expenses, it is mathematically impossible for there to be no money left in the estate. The only conclusion, the claimants asserts, is that the first defendant has sorely mismanaged the Estate for his own personal financial gain and has deliberately given a false accounting to conceal his mismanagement. The claimant is of the view that the first defendant is liable to the Estate for mismanagement in the sum of EC\$244,807.80.

[19] The court has examined the first statement of account. It is wholly inadequate. The accounting method is quite questionable. The first defendant admits that he prepared the document himself and admits errors were made because of his inexperience. As a result he sought to obtain the advice and assistance of an accountant. .

[20] However, the document provided by the accountant provided disbursements for the period 2005 to 2006 only, with explanatory notes referring to subsequent years. This could not have been intended to comprise the full accounting of the estate for the relevant period. With regard to the third document, the first defendant now submits that it was never provided to the claimants as a record of accounting. The first **defendant claims to have been unaware of the document's existent or who** prepared it and therefore cannot explain the calculations therein. Counsel for the first defendant admits that the document is notably ambiguous and asks that the court disregards it.

[21] Bundle 3 headed Trial Bundle of Exhibit Documents was admitted into evidence on consent. In any event no application challenging the admission of the document was made. The document is therefore a part of the exhibits of the case. What is abundantly clear is that despite the passage of considerable time and multiple requests, the first defendant has failed to keep clear and accurate accounts and to render such accounts when called upon to do so as required by the oath he took. The court has in evidence three separate documents within each are contradictions and irregularities. None render a complete account of the estate.

[17] The Administrator has also failed to give an account of the \$39,943.00 withdrawn from ATM machine from the Estate account as noted in the explanation of the accountant. There are no documents indicating what the sums were used for and the requests for bank statements were never satisfied. Under these circumstances, the first defendant has a duty to render a true account of his administration of the estate and or to make good the sums unaccounted for and the court will so order.

The All Saints Property

[18] It is a part of the duty of the Administrator of the estate to identify and gather in the property which makes up the estate. According to the first defendant he first listed the All Saints property as part of the estate of Everton Phillips. He spent a considerable amount of money renovating it and furnishing it before placing it on the market for rent. Rents were collected as part of the income of **the Estate. Subsequently, it was brought to the first defendant's attention that there were no** valid documents evidencing title to the property in Everton Phillips.

[19] He was subsequently notified by the Deputy Registrar of Lands that the Land Registry was unable to verify the authenticity of the Land Certificate issued to Everton Phillip, **as the Registrar's signature**

appears to be a forgery and the corresponding page in the presentation book had been removed. As a result, the Land Certificate could not **be relied upon as evidence of Mr. Phillips' ownership**. The Deputy Registrar concluded that there was no evidence to suggest the parcel was transferred to Everton Phillips. The All Saints Property was therefore erroneously included in the Estate of Everton Phillip.

[20] **The claimant's position is that the first defendant** has wrongfully distributed the estate and ought to be ordered to repay the Estate the sums he expended on the renovation and furnishing of the All Saints property. To hold otherwise, is to permit the first defendant to use over EC\$60,000.00 from the estate to enrich himself at the expense of the Estate. The claimant refers the court to the case of Hilliard v Fulford². There it was held:

“But where, as in this case, the accounts are substantially incorrect, and where the executors have made two most serious mistakes, one in choosing to take upon themselves the office of the Court in construing an obscure will, and construing it wrongly, and secondly, making so serious an error as laying out as much as £1095 in repairing a freehold which did not belong to their *cestuis que trust*, I think the executors cannot be allowed to say that the distribution is a proper distribution . . . Therefore the difference, which I think cannot be very large, will in substance have to be made good by the executors who wrongly distributed the estate: they who have made the error **will have to pay for it.**”

[21] **The first defendant's own evidence is that he was confident that the All Saints property was owned** by his father, because it was left to him in the will of his aunt, Iris Thomas. He had in his possession a copy of the will and its grant of Probate. The Land Certificate upon which he relied however was issued in 1996, while the last Will and Testament of Iris Thomas is dated 26th July 2000. So the first defendant ought to have known that there was something amiss with the land certificate and that he needed further verification that the All Saints property was legally a part of the Estate of Everton Phillips before he expended substantial amounts of the Estate funds renovating same.

The Funds Deposited in BAICO

² (1876-77) L.R. 4 Ch. D 389 at 394

[22] The first defendant deposited the sum of \$380,000.00 belonging to the estate into BAICO on or about 11th April 2007. The first claimant, Jarren Phillips, attained the age of majority on the 19th of December 2008. The second defendant attained the age of majority on 13th March 2010. BAICO was placed under Judicial Management on 31st day of July 2009. The claimants assert that in breach of his duty as Personal Representative, the first defendant failed and/or refused to withdraw and distribute the sum of \$380,000.00 or any portion thereof to the claimants at any time prior to BAICO undergoing judicial management, despite the company going under judicial management more than two years after the claimants had made requests for payment and more than a year after the first claimant had attained the age of majority. As a result of this breach of duty, the claimants say that the first defendant is liable to the claimants for their share in the said sum of \$380,000.00 which is now unavailable to the claimants.

[23] **The first defendant's response is that from around 2006 or 2007 he and Koren Abbott and their Attorney held discussions and had several meetings to discuss the distribution of the Estate, During the meetings, he proposed that the property be distributed in equal shares among the deceased's four children. However, Ms Abbott disputed the right of the second defendant to share in the Estate. She maintained her objection to the second defendant's paternity or to his proposed distribution of the Estate. As a result, he felt he had no choice but to defer the Estate's distribution until the issue was resolved. During that time, no requests were made for the sum due and owing to the claimants. The first defendant was asked on cross examination whether he made application to the court for instructions as to how to handle the dispute. His response was "no".**

[24] **Notwithstanding the Administrator's evidence that he felt he had to defer distribution of the estate, because of the issue of the second defendant's paternity, he admitted that in 2005, he paid out to the second defendant's mother the sum of \$20,000.00 on behalf of the second defendant as his share of his father's Estate. The first defendant's rationale for the payment is that he was advised by his grandmother to pay the money. Yet for 12 years from 2004 to the filing of the claim he paid nothing to the claimants, even when the first claimant reached the age of majority.**

[25] The first defendant further asserts that he deposited the funds into BAICO because he wanted to take advantage of the 8% interest rate. According to him the money had been placed in the Bank before it was removed and deposited with BAICO. His evidence on cross examination is that after the sale of the McKinnon's property, the proceeds were placed in two accounts in the Bank: one in

the name of the first claimant and the other in the name of the second claimant. But they never came to get the funds, so he transferred the money to BAICO. When asked if he ever provided the **claimants with a bank statement on the accounts. His response was: "I can't recall".** No correspondence was presented to the court indicating notification to the claimants that their share of **their father's** estate had been placed in an account for their benefit. In fact, no documentary evidence of the existence of these two accounts have been submitted to the court. No documents evidencing the opening of the accounts or the closing of the accounts have been exhibited. No evidence was adduced as to the type of accounts that were set up and whether the claimants could have accessed **the funds without the Administrator's aid. Without this evidence, the bald assertion by the** Administrator does not assist him in establishing that there was ever a serious attempt to distribute the proceeds to either of the claimants prior to the deposit with BAICO.

[26] The court finds that the first defendant had in fact started to distribute the estate of Everton Phillip before he deposited the funds in BAICO. The first claimant had reached majority and was entitled **to receive his share of his father's estate. Had the first defendant proceeded to distribute the estate** in accordance with the law, little if any of the estate would have remained with BAICO at the time it went under judicial management. However, the court is of the view that the first defendant could not reasonable have predicted that BAICO would be placed under judicial management. In placing the funds in BAICO he acted honestly and reasonably and therefore should not be made personally responsible for the loss of funds.

Conclusion

[29] **In the court's view, the first defendant** has made at least three grievous errors:

1. Expending funds on a property that was not a part of the Estate of Everton Phillips;
2. Wrongful distribution of the Estate or Failing to distribute the Estate in accordance with the law;
and
3. Failing to keep clear and accurate records and to render a proper account of the Estate when called upon to do so.

[30] Counsel for the first defendant submits that the court has jurisdiction to relieve the first defendant from any personal liability. The court accepts that it has jurisdiction to relieve a personal representative either wholly or partly from personal liability for a breach of trust where he has acted

honestly and reasonably and ought fairly to be excused for the breach and for omitting to obtain the **court's direction**³. To have acted reasonably a trustee must at least have acted as an ordinary man of business would act in his own affairs⁴.

[31] The court has already found that in regard to the deposit into BAICO, the first defendant acted honestly and reasonably and ought fairly to be excused. However, with regard to the All Saints property the court cannot say that he acted reasonably. There was ample evidence that something was wrong with the Land Certificate upon which he relied. He is responsible to recover the sums paid from the estate to repair and refurbish the property. If he is unable to recover same, then following the reasoning in the case of Hillard v Fulford, the losses, if any, will have to be made good by the Administrator of the estate, the first defendant. He made the errors and will have to pay for it.

[40] The claimants have also requested that the first defendant be removed as Administrator of the **Estate. In light of the court's findings above, it would be inappropriate for him to continue as Administrator.** The court will therefore grant the order for removal and for Jarren Phillip, now age 28 to be appointed. There are no beneficiaries of the estate who are minors at this time therefore there is no need for a second person to be appointed.

[41] The court therefore makes the following declarations and orders:

1. An Order that the first defendant provide a true and proper accounting of the administration of the estate of Everton Phillips, deceased within 60 days of the date herein.
2. A declaration that the first defendant is in breach of his duty to keep proper accounts and to render same when called upon to do so and has failed to distribute the Estate of Everton Phillips in accordance with the law;
3. An order that the first defendant be removed as Personal Representative of the Estate of Everton Phillips and that Jarren Phillips, the first claimant be substituted as Administrator of the said estate.
4. A declaration that the first defendant is ultimately responsible to reimburse the estate for any unaccounted losses to the estate, including his expenditure of funds on the All Saints Property.

³ Marsden v Regan [1954] 1 All ER 475; Re Turner, Barker v Ivimey [1897] 1 Ch 536

⁴ Re Stuart, Smith v Stuart [1897] 2 Ch 583

5. An order that the newly substituted Administrator proceed, as soon as possible, to gather in the outstanding debts of the Estate and distribute the proceeds in accordance with the Intestate Estate Act;
6. The **second defendant is entitled to an equal share of his father's estate, less the \$20,000.00** already received.
7. Costs to the claimants in the sum of \$6,500 to be paid by the first defendant.

Clare Henry
High Court Judge

By the Court

Registrar