

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV2050 of 2011

BETWEEN

**SHARIFA GRIFFITH
KANDIA GRIFFITH**

**FIRST CLAIMANT
SECOND CLAIMANT**

AND

GRANVILLE GRIFFITH

DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: September 6

2017: May 2

Appearances:

Mr. Michael Koeiman, Attorney-at-law on behalf of the Claimants

**Mr. Benjamin Drakes, Attorney-at-law holding papers for
Mr. Guyson Mayers on behalf of the Defendant**

DECISION

Introduction

[1] This case raises issues surrounding the application of CPR 15, the Part of the Civil Procedure Rules that addresses requests for summary judgment – the Claimants have made an application for summary

judgment to be entered against the Defendant. The factual background to this matter can be succinctly described as follows: the Claimants are the children of Delcina King (the deceased) and beneficiaries of her estate. At the time of the deceased's death the Claimants were minors. The Defendant is the father of the beneficiaries, the former spouse of the deceased and Administrator of the estate. The deceased died intestate on the 5th April, 1998. The application was supported by an affidavit of the Claimants of equal date. The main thrust of the application is that the Defendant has no real prospect of successfully defending the claim since he unreasonably refused to transfer and convey to the Claimants their share in the deceased's estate in breach of his duties as administrator and trustee.

The Facts:

- [2] On December 12, 2011 the Claimants made an application for delivery of their two-third share in the estate of the deceased. At the time of the deceased's death, the estate comprised of cash and two properties situate at Airy Hill in the parish of St. George. One of the properties comprised of land and a dwelling house and the other of land only.

- [3] Since at the date of death of the deceased the Claimants were minors, the Defendant held the Claimants' share in the estate on trust pursuant to a Vesting Deed dated August 15, 2001, until they reached the age of majority. Upon reaching the age of majority, the Defendant, as trustee was required to transfer to the Claimants their share in the deceased's estate by an appropriate Deed of Conveyance. It should be noted that the two properties continued to be subject to a mortgage.
- [4] It is accepted that the Defendant was trustee to the Claimant's share in the deceased's estate and that he used the money held on trust for the Claimants. In fact, on the 2 February, 2012, in response to the Claimant's application, the Defendant filed a defence and counterclaim where he claimed that as a parent, it was his responsibility to provide for the Claimants. He pointed out that in the execution of his duties as a parent to the Claimants, he applied all the money received from the deceased's estate including his share to carry out repairs and improvements on the house, which is occupied by the parties.
- [5] The Defendant further contended that the sums claimed takes no account of his contribution to the Claimants since their majority and the funds which were used for their benefits.

- [6] In his defence he noted that if the court finds he is not entitled to a set off against the amount due to the Claimants, then he will counterclaim for what he had expended on the Claimants and the property.
- [7] On 16 May, 2012 the Defendant applied to amend the defence filed on 2 February, 2012. It was his contention that the amendment was necessary since he wished to rely on **section 69** of the Trustee Act, Cap 250 in order to be relieved of sanction. The grounds of the same application to amend are that the Defendant acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions from the court dealing with the trust funds.
- [8] The court on the 25 October, 2012 made the following order namely that the parties jointly procure a valuation of the two properties at Airy Hill, St. George on or before 29 November, 2012 and the Defendant make a payment on account in the sum of \$10,000.00 to the Claimants on or before the 29 November, 2012. The matter was adjourned to the 1 February, 2013.
- [9] On June 17, 2013 a cost order was made in favour of the Claimants after the hearing of a case management conference where the Defendant was ordered to pay the sum of \$705.00 on or before 15 September, 2013.

- [10] The court then ordered both parties to file written submissions regarding the application for summary judgment on or before the 20 May, 2014.
- [11] In his submissions, filed on 26 May, 2014 the Claimant stated that the Defendant is not resisting that he is guilty of a breach of trust but is claiming relief from liability under **section 69**. The Claimants filed secondary submissions on 6 June, 2014 where they submitted that the Defendant's facts were unsupported by pleadings. The Claimants drew the court's attention to the fact that neither party pleaded any of the facts purportedly relied on by the Defendant and therefore should not be considered by the court in its determination of the Claimant's application for summary judgment.
- [12] The Claimants further submitted that the Defendant made a few misstatements of law in his submissions with regard to the application for summary judgment.
- [13] The Defendant submitted that the facts referred to by the Claimant, do not affect the legal conclusions reached and furthermore the Claimants' application for summary judgment was long determined by the court presided over by the then **Acting Justice Beckles** on the 16 April, 2012 and therefore cannot be review at this stage. With respect to the alleged misstatements, counsel for the Defendant stated

inter alia, that the Defendant's presentation on the power of the court to relieve a trustee of personal liability is legally sound.

[14] The matter continued at case management level.

On 4 April, 2016 the Claimant filed a Notice of Application for summary judgment pursuant to Rule 15 of the CPR and an affidavit in support of the same application.

Issue

[15] The issue for determination is whether the court should grant the application for summary judgment in the instant case were the Defendant is in breach of his duties as a trustee.

The Law

[16] The summary judgment principle is provided for in Part 15 of the Supreme Court (Civil Procedure) Rules, 2008 (the 'CPR'). Rule 15.2 states:

“The court may give summary judgment against a party on the whole of a claim or on a particular issue if

- (a) It considers that
 - (i) the claimant has no real prospect of succeeding on the claim or issue; or
 - (ii) the defendant has no real prospect of successfully defending the claim or issue; and

- (b) there is no other reason why the case or issue should be disposed of at a trial.”

[17] The applicable test, as outlined in the CPR is a two-pronged test which firstly requires consideration of whether the party against whom the court is urged to enter summary judgment has a real prospect of success and thereafter, a determination of whether there is any other reason why the case or issue should be disposed of at trial.

[18] To quote **Lord Woolf MR** in *Swain v Hillman* [2001] 1 All E.R. 91:

“The words “no real prospect of succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

[19] **Judge LJ** in the same case agreed with **Lord Woolf MR** adding the following:

“To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding. This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect to success, the direction to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court’s conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court.”

[20] In this matter the Claimants are alleging that the Defendant is in breach of trust and that he acting dishonestly and unreasonably. On the other hand, the Defendant while not denying his breach is seeking relief from his breach of trust since he is claiming that it was done honestly and reasonably in the circumstances. It is therefore the duty of this court to consider all the facts of this case and to apply the test for summary judgement in order to determine if there is a real prospect of successfully defending the claim – if there is, the court should dismiss the application – if there is not the matter should proceed to trial on the evidence.

[21] The correct approach therefore on an application for summary judgment is as follows:

- (1) “the court must consider whether the Claimant/Defendant has “realistic” as oppose to a “fanciful” prospect of success;
- (2) a “realistic” claim is one that carries some degree of conviction; this means a claim that is more than merely arguable;
- (3) in reaching its conclusion the court must not conduct a “mini-trial”;
- (4) this does not mean that the court must take at face value and without analysis everything that a Claimant/Defendant says in his statements before the court; in some cases it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents;

- (5) in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
- (6) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts that is possible at a trial but which is not permissible on an application for summary judgment; the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, at the time of the application, were reasonable grounds exist for believing that a fuller investigation into the facts of the case would add or alter the evidence available to the trial judge so as to affect the outcome of the case;
- (7) the court should be especially cautious of striking out a claim in an area of development jurisprudence, because in such areas decisions on novel points of law should be decided on real, rather than assumed facts;
- (8) the overall burden of proof rests on the applicant for summary judgment to establish that there are grounds to believe that the Respondent to the application has no real prospect of success and that there is no other reason for a trial;
- (9) where the Applicant for summary judgment addresses credible evidence in support of the application, the Respondent to the application becomes subject to the evidential burden of proving some real prospect of success or some other reason for trial but the standard of proof required of the Respondent is not high and it suffices to rebut the Applicant's statement of belief that there is no real prospect of success and no other reason for a trial."

[22] Accordingly a party seeking to successfully invoke summary judgment must satisfy both aspects of the test. From this it follows

that even where there is no reasonably prospect for success, it will still need to be shown that there is no other compelling reason why the case or issue should be disposed of at a trial.

[23] Where however there are disputes of facts, a court is unlikely to grant an order for summary judgment. In *Lyle v Lyle (2005) Supreme Court, Jamaica*, **Sinclair-Haynes J** emphasized that summary judgment is inappropriate where there are important disputes of facts, and that accordingly on an application for summary judgment, the Claimant must satisfy the court of the following:

- (a) All substantial facts relevant to the Claimant's case, which are reasonably capable of being before the court must be before the court.
- (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
- (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.

[24] So that where there are reasonable grounds for believing that a fuller investigation into the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case, in such a case summary judgment would be inappropriate. At paragraph 17 of *Bolton Pharmaceutical Co. 100 Ltd. v Doncaster Pharmaceutical Groups Ltd and Others [2006] All E.R. (D) 289* **Mummery J** warned that:

“It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of cases. The classic instance is where there are conflicts of facts on relevant issues, which have to be resolved before a judgment can be given...A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice”.

- [25] The issue of whether the Defendant acted honestly and reasonably as alleged by him or dishonestly and unreasonably which would amount to reprehensible conduct and in breach of his trust as alleged by the Claimants may only be determined after an assessment of the case as a whole.
- [26] It therefore becomes necessary to briefly examine the duties of the trustee, the standard of care owed to the beneficiary, the power of the trustee and the breach of duty if any and if there is a breach whether the Defendant should be exonerated from liability.
- [27] A trustee has a general duty to exercise reasonable care in performing the trust – he must act with due diligence and prudence. More specifically, the duties of the trustee are to properly preserve the trust fund; pay the income and capital to those entitled and to give the beneficiaries on demand, information as to the way in which the trust is being managed.

[28] Thus it is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly, whereas if he commit a breach of trust by acting beyond his powers but he does so in good faith and in the honest belief that he is acting in the interest of the beneficiaries, then his intention is not dishonest and his conduct maybe forgivable.

[29] In Zoria Khan et al v Gary Holdings et al BVIHCMAP 2014/0018 the Court of Appeal referring to the dicta in Armitage v Nurse 1998 Ch. 241 at page 253 held inter alia:

“A trustee as a legal owner of property for the benefit of the beneficiaries has control over the trust assets. The trustee has a fiduciary duty to the beneficiaries in respect of the trust property. The trustee usually has all management and ownership functions of the trust property. The beneficiary’s only remedy is to ensure that the trust property is properly administered in accordance with its terms and the trustee’s fiduciary duties. The trustee must maintain accurate accounts of trust property and it is the duty of a trustee to be constantly ready with his accounts. The trustee’s duty to account is the irreducible core minimum of the trusteeship.”

[30] In Armitage v Nurse **Miller J** found that:

“There is an irreducible core of obligation owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trust. But I do not accept ...that these core obligations include the duties of skill and care, prudence and diligence. The duty of trustees to perform

the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.”

[31] In *Speight v Gaunt (1883) 9 App Cas 1* **Lord Blackman** stated that a trustee sufficiently discharges his duties “if he takes in managing trust affairs all those precautions which an ordinary, prudent man of business would take in managing affairs of his own.”

[32] The powers of a trustee are derived from the trust instrument, statute or under general law – whereas a duty is mandatory, a power is discretionary. As noted by Kodilinye and Carmichael in Commonwealth Caribbean Trusts Law, 2nd Edition page 251:

“The court will not normally interfere with trustees’ exercise of their discretions, in the absence of bad faith, and although a trustee is under a duty to consider the exercise of his fiduciary powers, he will not be compelled to exercise them.”

[33] In relation to a trustee’s power of maintenance, where the beneficiary of the trust is a minor as in the instant case, the trustee has to apply to the court for an order to be able to have access to the trust fund.

[34] **Section 35(1)** of the Trustees Act Cap 250 of the Laws of Barbados provides:

“Where any property is held by trustees in trust for any person for any estate or interest whatsoever, whether vested or contingent, then subject to any prior estates or interest or charges affecting that property

- (a) during the minority of any such person; if his estate or interest so long continues, the trustee may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is
 - (i) any other fund applicable to the same purposes; or
 - (ii) any person bound by law to provide for his maintenance or education; and
- (b) if such person on attaining the age of majority has not a vested estate or interest in such income, the trustees shall hence forth pay the income of that property and of any aceration thereto under **sub-section (3)** to him, until he either attains a vested estate or interest therein or dies, or until failure of his estate or interest.”

[35] Where however a trust estate sustains a loss due to the trustee’s failure to act with due care, the trustee will be liable to place the trust estate in the position it was in had the breach not occurred. **Street J** in *Re Dawson (Deceased)* [1966] 2 NSWLR 211 had this to say with regards to the trustee’s obligation to restore property lost from the trust estate:

“If a breach has been committed then the trustee is liable to place the trust estate in the same positon as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.”

[36] A trustee may be exonerated from liability for a breach of an equitable duty by the terms of the trust instrument, by statute or by the court.

Section 69 of the Trustees Act, Cap 250 confers discretionary power on the court to absolve a trustee from liability where he has acted honestly and reasonably. It provides:

“(1) if it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

(2) In this section “trustee” includes a person who has ceased to be a trustee and the personal representative of a deceased trustee.”

[37] Thus where it is found that the trustee acted honestly and reasonably, the court has the power to absolve him from liability for breach of trust, however this judicial absolution is not easily secured.

Disposal

[38] In the present case, the Claimants’ main ground for summary judgment is that the Defendant acted dishonestly and unreasonably in not transferring their share in the deceased’s estate which he held for them on trust. Conversely, the Defendant while acknowledging that

he held the Claimants' share in the estate on trust contends that he did not use the money dishonestly but instead used it for the benefit of the Claimants. This is clearly a matter which is in dispute.

[39] In the circumstances since dishonesty is being alleged there are serious issues to be investigated, the Claimants have been put to strict proof of the allegations made by them and the Defendant must be given the opportunity to cross-examine them if that becomes necessary. One cannot at this stage embark on a mini-trial.

[40] The Defendant is asserting that at all material times he acted properly and that he always had the Claimants best interests at heart. Even though he breached his duty as a trustee in that he used the trust funds without seeking the permission of the court, the monies were not expended for his personal use but were used to take care of the two minor children at the time (the Claimants); pay a mortgage or in fact mortgages because both the house and the parcel of land were subject to mortgages at the time; pay the utilities, taxes, repair the home in which the Claimants resided and generally to maintain the household and the Claimants after his spouse (the deceased and mother of the Claimants) died. He was a single father raising two small children in extremely difficult circumstances. He is therefore seeking amongst

other things to be relieved of sanction pursuant to **section 69** of the Trustees Act.

Conclusion:

[41] It is therefore the opinion of this court that the application for summary judgment is dismissed to allow for a full ventilation of the issues. The Defendant has demonstrated that he has a real prospect of successfully defending the claim. The pleadings disclose issues of fact which will have to be determined at trial.

PAMELA A. BECKLES
Judge of the High Court