

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 1138 of 2018

**IN THE MATTER OF THE ESTATE OF
SEYMOUR CLAIRMONTE POLLARD (also known
as CLAIRMONTE POLLARD)**

**AND IN THE MATTER OF THE SUCCESSION
ACT, CHAPTER 249 OF THE LAWS OF
BARBADOS**

BETWEEN

STEPHEN ST. CLAIR POLLARD

FIRST CLAIMANT

MARJORIE ANITA CHASTENET

SECOND CLAIMANT

WILMA VERONICA HOLLOWAY

THIRD CLAIMANT

AND

KIRTON McDONALD POLLARD

FIRST DEFENDANT

SHERRIE VANESSA GRIFFITH

SECOND DEFENDANT

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020, 18th August

**Date of Decision: 2020: 13th October (oral)
23rd October (written)**

Appearances:

**Ms. Grace McCaskie in association with Ms. Maria Knight for the 1st and
3rd Claimants; 1st Claimant present.**

Mr. Derek Daniel for the Second Claimant.

No appearance by Counsel for the 1st Defendant; 1st Defendant present.

Ms. Anne Reid for the 2nd Defendant; 2nd Defendant present.

Administration of Estates – Sale of property by Administrator – No consent by beneficiaries to sale by Administrator – Validity of sale – Remedies of beneficiaries to sale without consent – Section 32, Succession Act, Cap. 249.

RULING

Introduction

[1] The three Claimants in this matter, Stephen Pollard, Marjorie Chastenet and Wilma Holloway, and the 1st Defendant Kirton Pollard, are all siblings and beneficiaries of the Estate of their late father Seymour Pollard, deceased. The 1st Defendant is the Administrator of the said Estate, of which property known as Lot 50 Apes Hill, Baywoods, St. James (‘the Apes Hill property’), had formed a part. The 2nd Defendant is a former neighbour of the family and now owner of the Apes Hill property which was conveyed to her by the 1st Defendant in February, 2018. In August, 2018 the Claimants filed their Fixed Date Claim against the two Defendants, seeking a number of declarations and orders.

[2] The gravamen of the Claim as initially filed is that the 1st Defendant, by misrepresenting that he was the sole, as opposed to only one, of the beneficiaries entitled under the Estate, obtained Letters of Administration to the Estate. Thereafter, as Administrator falsely appointed, the 1st Defendant

by Deed of Assent, wrongfully vested title in the Apes Hill property in himself and thereafter conveyed that property to the 2nd Defendant, without the required knowledge or consent of the beneficiaries. The Claimants also contend that the 1st Defendant sold the property at an undervalue and has to date failed to account to them for other assets comprised in the Estate.

- [3] The Claimants have sought various forms of relief, including a revocation of the 1st Defendant's Grant of Administration; a set aside of the conveyance of the Apes Hill property to the 2nd Defendant; and an account to be rendered by the 1st Defendant for his dealings with the Estate. The 2nd Defendant's response to the claim is that she is a bona fide purchaser of the property, for valuable consideration. In February, 2019 the Claimants sought and obtained an injunction restraining the 2nd Defendant from any further use, development or encumbrance against the property until further order. In June 2019, the 2nd Defendant applied for the injunction granted against her in February, 2019 to be discharged. This Application also sought relief declaring the validity of the conveyance and damages. Directions were issued by the Court in February, 2020 for the hearing of the application to discharge the injunction, in addition to an issue raised of the Court's own motion, regarding the viability of the case against the 2nd Defendant.

Background

Procedural History

- [4] The Fixed Date Claim (FDC) was accompanied by a statement of claim (SOC). Additionally, two affidavits (one each by the 1st and 3rd Claimants) were shortly thereafter filed in further support of the (FDC). In April, 2019, the 1st Defendant filed an affidavit in response to the Claim; whilst the 2nd Defendant filed a defence in addition to affidavits in response. Also in April, 2019, the 2nd Claimant filed an affidavit whereby she distanced herself from the claim, which she said had been filed without her knowledge or consent. Between June and August, 2019 the 2nd Defendant filed responses to the affidavits of the 1st and 3rd Claimants, as well as an additional affidavit further to her defence to the claim. The 2nd Claimant formalized her lack of support for the claim by procuring separate legal representation, thus references from hereon to ‘the Claimants’ will only be applicable to the 1st and 3rd Claimants.
- [5] In March, 2020 during the time awaited for hearing of the 2nd Defendant’s application to discharge the injunction and the issue directed by the Court, the 1st and 3rd Claimants filed an Application of their own (without notice to or permission sought from the Court), objecting to the discharge of the injunction against the 2nd Defendant. This Application also restated the claims for relief as set out in the FDC.

This Application was supported by a further affidavit of the 1st Claimant, as well as an affidavit from an attorney-at-law previously retained by the 1st Claimant, shortly before the sale of the property took place in February, 2018. Given all of the affidavit evidence placed before the Court and the extent of relief sought by both applications, the Court finds it necessary to set the parameters of what forms part of the Court's consideration on the hearing of the Applications, as well as the relevance (or not), of the evidence before the Court. In order to do so, it is useful to outline the general thrust of the respective cases of the parties.

Scope of the Court's Inquiry

[6] The claim filed by the 1st and 3rd Claimants contended that the 1st Defendant obtained Letters of Administration by misrepresenting himself to be the sole beneficiary of their deceased father's Estate. In their submissions on the Applications before the Court, the 1st and 3rd Claimants abandoned this position regarding misrepresentation in obtaining the Grant of Administration. It is presumed that this position was abandoned, having regard to the affidavit filed by the 2nd Defendant¹ which attached forms from the 1st Defendant's application for Letters of Administration (No. 458/1997). These forms

¹ 2nd Defendant's Affidavit dd 25th June, 2019 Exh. SVG1 & SVG2

disclose the fact that the 1st Defendant was one of four children of the deceased, thus the Claimants' concession on that point is in order.

- [7] The position in relation to the 1st Defendant's bona fides in obtaining the Grant of Administration no longer being in contention, the claim advanced by the 1st and 3rd Claimants, is that the 1st Defendant obtained sole legal title to the Apes Hill property by misrepresenting himself as the sole beneficiary thereof.

As is material to the application before the Court, the FDC alleges:-

“The Claimants...claim against Kirton McDonald Pollard, the First Defendant and Administrator of the Estate herein... for (i)...

(ii) falsely claiming and knowingly making the misleading statement unknown to the Claimants that he is the sole beneficiary of the Estate herein in the Deed of Assent and vesting in which he vested in himself as the ‘Sole Beneficiary’ the Estate’s property situate at Lot 50 Apes Hill Tenantry, Baywoods in parish of Saint James (‘Apes Hill Property’);

(iii) conveying the said Apes Hill property...to the 2nd Defendant Sherrie Griffith...without the prior knowledge and/or consent of his said siblings and without giving effect to their express wishes which are in opposition to the said sale and conveyance;...”

- [8] The FDC then set out relief claimed, which include the following:-

- “1. A Declaration:
That the conveyance of the land situate at Lot 50 Apes Hill Tenantry, Baywoods in the parish of Saint James to the Purchaser Sherrie Vanessa Griffith is null and void; and*
- 2. In the alternative, the award of damages to the Claimants as compensation for their loss and damage;*
- 3. An Order that*

- (i) *An interim order restraining the 2nd Defendant whether by herself her servants and/or agents from any further use or development of the said land situate at Lot 50 Apes Hill Tenantry in the parish of Saint James until further Order;*
- (ii) *The Grant of Letters of Administration to the 1st Defendant be revoked;*
- (iii) *The 1st Defendant do lodge at the Registry of the Supreme Court the original Grant of Letters of Administration within 14 days after the service of the Fixed Date Claim Form herein;*
- (iv) *Approval be granted to the 1st Claimant, Stephen St. Clair Pollard, to apply for Letters of Administration to the Estate herein of Seymour Clairmonte Pollard also known as Clairmonte Pollard, Deceased;*
- (v) *The 1st Defendant do account for the payment by the Ministry of Housing, Lands and Rural Development of compensation for the acquisition of the said parcel of land at Orange Hill in the parish of Saint James and distribute to each of the said 3 siblings and Beneficiaries his or her respective 1/4 share of the proceeds of the acquisition;*
- (vi)...(ix)
- (x) *Any other remedy which this Honourable Court deems fit."*

[9] The FDC was accompanied by a Statement of Claim (SOC) which repeats the allegations that the Assent to the Apes Hill property was obtained by the 1st Defendant misrepresenting himself as the sole beneficiary to the property;

further, that the property was sold without the Claimants' prior knowledge and consent.

The SOC alleges that the Claimants discovered the false claim and misrepresentation by the 1st Defendant in relation to the property only in January, 2018 when the property was being sold. The SOC accuses the 1st Defendant of perjury – sets out 'Particulars of Perjury' and repeats the relief set out in the FDC. There was no specific allegation pleaded in relation to the 2nd Defendant having any part in the 1st Defendant's alleged misrepresentation. The FDC and SOC merely sought relief against the 2nd Defendant in the form of the injunction and the set aside of the conveyance of the property.

- [10] The initial affidavits filed by the 1st and 3rd Claimants in September, 2018, set out allegations in relation to the 1st Defendant's actions as well as their account of how they came to be aware of the sale of the property, and their attempts to prevent the sale by retaining an attorney at law to write to the 1st Defendant. The 2nd Defendant's defence to the Claim asserted that she had acquired a good title from the 1st Defendant and was a bona fide purchaser for value, without notice of any other claims to the property. The 1st Defendant seems to have erroneously filed an affidavit in response to the FDC and SOC instead of a defence – but that is not to be an issue at the moment.

[11] The 1st Defendant denied making any false statement in relation to his application for the grant of administration and also spoke of him being the only one of his siblings who played a role in taking care of their elderly parents in the years prior to their deaths. The 1st Defendant alleged that he consulted with his siblings prior to the sale of the property and they all agreed to the sale. In support of this contention, the 1st Defendant attached copies of drafts (money orders) by which he sent to the Claimants, their portions of the proceeds of the sale of the property. The 1st Defendant also denied having seen any letter from the 1st Claimant's prior Attorney regarding objections to the sale of the property. As stated before the 2nd Claimant by affidavit and retention of separate counsel, has distanced herself from the Claim. She swore in her affidavit filed in April, 2019, that she had no knowledge of the filing of the claim and had not consented to being a claimant. Moreover, the 2nd Claimant disputed facts claimed by the 1st and 3rd Claimants regarding any family plans for the property and instead confirmed that she had consented to sell the property in question.

[12] In support of her Application to discharge the injunction which was filed in June, 2019, the 2nd Defendant filed 3 affidavits. These affidavits set out her account of how she came to purchase the property through an interaction in 2017, with the 1st Defendant and 2nd Claimant. The 2nd Defendant deponed

that it was the 2nd Claimant who in fact raised the issue of the sale of the land by way of offer to her and her sister.

This assertion was supported by the 2nd Defendant's mother and the 2nd Claimant. In March, 2020², the 1st Claimant filed a further affidavit in which he alleged for the first time, that the 2nd Defendant was aware either directly from her attorney or constructively, as a result of communication made to her attorney, that the Claimants were objecting to the sale of the property by the 1st Defendant. In support of this allegation, the 1st Claimant's prior attorney filed an affidavit which alleged that he had notified the 2nd Defendant's attorney of the position in relation to the existence of other beneficiaries and their objection to the sale of the property. The Claimant replaced this affidavit with another, filed in August, 2020, on the basis that there were typographical errors that required correction.

[13] The above, in the round, is the evidence before the Court. There is much detail that is not specifically recounted by the Court, however, given the parameters of the Applications which need to be defined, it is the Court's position that the majority of the evidence placed before the Court is not relevant to the determination of the respective applications. The Applications are summarized as follows:-

² The 1st Claimant's affidavit of March, 2020 was replaced by another filed in August, 2020.

- (i) The 2nd Defendant's application is for discharge of the injunction, declaration of the validity of her conveyance and damages. Aside from the discharge of the injunction, it is not open for the 2nd Defendant to have sought a declaration as to the validity of the conveyance or for damages by way of application. These are remedies which are afforded on final judgment, not by way of interlocutory application. The 2nd Defendant would have been obliged to move the Court by counterclaim or by ancillary claim in order to seek relief in relation to the validity of the conveyance or damages. Even if one were to ignore the deficiency in form, the relief sought would still not be considered at this stage of the proceedings or without a full inquiry on the merits.
- (ii) The 1st and 3rd Claimants' Application – was filed in March, 2020 – 19 months after the filing of their FDC. The Application seeks all of the relief prayed in the FDC, with the exception of the following alteration and addition (paraphrased):-

- (a) That the interim injunction restraining the 2nd Defendant from dealing with the property remain in force until the disposal of the Claim;
- (b) That the 1st Defendant and 2nd Claimant be found in contempt for failing to comply with the Court's order of 19th February, 2019, by which they were ordered to lodge monies received from the sale of the Apes Hill property with the Registrar of the Supreme Court.

The grounds of the 1st and 3rd Claimants' Application (to continue the injunction) assert knowledge on the part of the 2nd Defendant of the following facts as alleged:-

- Constructive knowledge of the fact that the Apes Hill property was not for sale to persons outside the Pollard family;
- Constructive notice that the 1st Defendant was not the sole beneficiary as alleged in the conveyance of the property, due to the childhood relationship as next door neighbour of the family;
- Constructive notice that all of the beneficiaries of the property were not agreed as to the sale;
- By her own admission having met with only 2 of the 4 siblings, that all siblings had not agreed to the sale;

- Direct notice through her attorney at law prior to the sale that the 1st Defendant was selling the property in breach of section 32(1) of the Succession Act.

[14] Insofar as this Application repeats the claims for relief as set out in the FDC, the same position applies in relation to the 2nd Defendant's Application. Save for the prayer in opposition to the discharge of the injunction and the order of contempt sought against the 1st Defendant and 2nd Claimant, the remaining prayers for relief do not arise for consideration within the bounds of an interlocutory application. In relation to the order for contempt, the Rules are clear as to the procedure to be undertaken in respect of a party's failure to comply with an order of court requiring that party to do or refrain from doing an act to be. Other than to refer Counsel for the 1st and 3rd Claimants to CPR Part 53, consideration of the application seeking a contempt order does not arise. The only aspect of the 1st and 3rd Claimants' application of March, 2020 which arises for consideration therefore is their opposition to the discharge of the injunction against the 2nd Defendant. The Claimants need not have filed an application to ventilate this objection, but it is observed that the application serves a wider purpose in that it introduces allegations against the 2nd Defendant which were not pleaded in the FDC. The Court will return to these

allegations introduced against the 2nd Defendant in the Claimants' March, 2020 application.

- [15] In this moment however, the only matter which arises out of the Applications filed respectively on behalf of the 2nd Defendant, and the 1st and 3rd Claimants, is the question of the discharge of the injunction against the 2nd Defendant. In addition to this issue however, the Court had in February, 2020 at the first appearance before the Court as currently constituted, directed Counsel for the parties' attention to section 32(2) of the Succession Act, Cap. 249 and ordered submissions on the viability of the Claim against the 2nd Defendant having regard to the provisions therein. The discharge or continuance of the injunction against the 2nd Defendant will therefore flow from the Court's determination of what effect if any, section 32(2) of the Act has on the case against the 2nd Defendant.

Submissions of Counsel

- [16] The submissions on behalf of the 2nd Defendant rest upon interpretation of various provisions of the Succession Act. Counsel for the 2nd Defendant acknowledges that by section 3(2) of the Act, a personal representative holds the estate of a deceased person on trust for the beneficiaries of the estate. However, it is submitted that section 32 of the Act, is an exception to section 3(2), insofar as it grants a power of sale to the personal representative subject

to certain conditions. Those conditions are the duty as far as practicable, to consult and give effect to the wishes of adult beneficiaries, or in the event of a disagreement, to give effect to the wishes of the majority.

Also relevant, is section 34 of the Act, which makes provision for a deed of assent, particularly, its execution and effect. The deed of assent in this case complied with the requirements of section 34 and as such the legal estate of the property was effective in vesting the entire estate of the property in the 1st Defendant.

[17] Counsel for the 2nd Defendant's submissions continued by acknowledging that the definition of 'purchaser' in the Act, meant a person who in good faith acquires an estate or interest in property for valuable consideration³. Notwithstanding this definition however, Counsel submitted that by virtue of section 32(2) of the Act, a purchaser of property sold by a personal representative pursuant to section 32(1), is not by the terms of the statute, required to ascertain whether the personal representatives have complied with the wishes of the beneficiaries. As far as the Court understands the submission on behalf of the 2nd Defendant, is that in the absence of undue influence, negligence or fraud, the 2nd Defendant not being obliged to look behind the 1st Defendant's title and as such had obtained good title to the property. More

³ Succession Act, Cap. 249, section 2.

particularly, the Claimants had not pleaded that the 2nd Defendant had any role in any fraud or misrepresentation in relation to the 1st Defendant's obtaining the Assent for the property.

In this regard, Counsel pointed out that the Assent had been executed some 17 years prior to the conveyance to the 2nd Defendant. As a consequence, it submitted that the injunction should be discharged and the action against the 2nd Defendant dismissed with costs.

[18] Counsel for the 1st and 3rd Claimants appears not to have apprehended the Court's direction in relation to the consideration of section 32 of the Act. As a consequence, Counsel's submissions (written) addressed only the issue of the discharge of the injunction, with reference to the evidence before the Court. Those written submissions do not therefore assist the Court in its consideration of the construction of section 32 and any effect in relation to the viability of the Claim against the 2nd Defendant. In oral submissions however, Counsel for the 1st and 3rd Claimants held to the view that the 2nd Defendant had notice of the Claimants' opposition to the sale of the property, as well as to the lack of authority of the 1st Defendant in relation to the Assent. The notice attributed to the 2nd Defendant is through her knowledge of and close relationship with the family, as well as the information conveyed to her attorney at law, prior to the execution of the conveyance. There was no

appearance by or on behalf of the 1st Defendant nor any account given for the absence of the 1st Defendant or his counsel, however given that the issue pertains only to the 2nd Defendant, the absence of any participation on behalf of the 1st Defendant at the hearing is of no effect.

The Court's Consideration

[19] The Court directed Counsel for the parties' attention to section 32(2) of the Act in the exercise of its powers of case management. Consideration of the effect of section 32(2) in the Courts view was as a matter of law, potentially dispositive of the claim against the 2nd Defendant, as a result of which submissions were invited pursuant to the Court's power under CPR Rule 26.4.

As a matter of law, the following can be accepted with little contention:-

- (i) 'purchaser' as defined by section 2(1) of the Succession Act, Cap. 249, has built into its definition, the requirement for good faith and valuable consideration. The question of what amounts to 'good faith' and 'valuable consideration' are variable according to circumstances, but are subject to judicial definition;
- (ii) A personal representative, by virtue of section 3(2) of the Act, is a trustee for the beneficiaries of a deceased person's estate;

Section 32 of the Act which provides as follows, however requires a bit more consideration:-

“(1) The personal representative may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, but before selling for the purpose of distribution, the personal representative shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold, or in the case of a dispute, of the majority (according to the value of their combined interest) of such persons.

(2) A purchaser of the estate or part thereof to which subsection (1) refers shall not be concerned to see that the personal representatives have complied with the wishes of those persons referred to in subsection (1), and it shall not be necessary for any person entitled to concur in such sale.”

- (iii) Section 32(1) vests in a personal representative a power of sale of the whole or any part of an estate, for purposes of paying debts or for distribution;
- (iv) Where a sale is for purposes of distribution, section 32(1) obliges the personal representative to give effect to the wishes of adult beneficiaries, in respect of property proposed to be sold. That obligation however is qualified by the words ‘as far as practicable’, even in relation to the wishes of a majority in case of a dispute;
- (v) Section 32(2) in very plain terms provides that a purchaser has no obligation to satisfy itself of whether or not the personal

representative has complied with the wishes of the beneficiaries as provided in section 32(1).

[20] In construing section 32, one must be mindful that ‘purchaser’, by definition means, purchaser in good faith. By general principle, it can be accepted, that if a purchaser knows that a disposition is made in breach of a duty on the part of the personal representative, the purchaser’s bad faith vitiates the disposition.⁴ Reference is made to **George v Johnson**⁵ in illustration of the requirement for good faith in securing the protection to a purchaser of property from a personal representative. In this case, a purchaser who knowingly participated in a sale at a gross undervalue was held to have colluded with and participated in the administrator’s breach of trust and as such the conveyance was set aside. Lewis J. therein cited **Woodhead v Fallows**⁶ in which the following was stated:-

“That an executor or administrator has at law full power to dispose of the assets of his testator, so as to give a perfect title to whoever takes them honestly and bona fide, is a proposition on which no doubt can be entertained. That he may make an effectual disposal of them in consideration of a debt of his own, and to discharge his own debt, if there be no fraud in the creditor in accepting such disposal, is also equally clear. But where there is collusion between the executor and the person to whom he passes the property, and the latter knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud

⁴ Woodhead v Fallows (1832) 2 Cr. & J. 481

⁵ (1961) 3 WIR 544

⁶ Fn 2 supra

vitiates the transaction, and the attempt to transfer the property is ineffectual and void.

[21] Section 32 however, must also be construed in light of the general principle regarding the status of beneficiaries vis-à-vis property in an unadministered estate. On the authority of **Commissioner of Stamp Duties (Queensland) v Livingston**⁷, beneficiaries under a will or intestacy have no equitable (proprietary) interest in the unadministered assets of an estate. Instead, the beneficiary has a chose in action to ensure due administration of the estate.⁸ How then are these two principles (good faith on the part of the purchaser versus non-proprietary right of beneficiary to estate property) to be applied in the instant case?

[22] The Court's reconciling of the matter arises from construction of the section (32) and in the context of the circumstances at bar. These circumstances are as follows:-

- (i) The conveyance of the property to the 2nd Defendant was executed by the 1st Defendant not as personal representative, but as legal and beneficial owner of the property, by virtue of the Assent executed in 2001;

⁷ [1965] AC 694 @ 707

⁸ Ibid @ 708.

- (ii) The Claim – i.e. the FDC with statement of claim – makes no allegations of fraud or bad faith on the part of the 2nd Defendant at all;
- (iii) The claim as pleaded, alleges misrepresentation by the 1st Defendant, in executing the Assent to himself to the exclusion of the remaining siblings. The relief claimed to set aside the conveyance to the 2nd Defendant, is sought on the basis of the actions of the 1st Defendant only;
- (iv) By their Application of March, 2020, the 1st and 3rd Claimants have attempted to expand the basis of their claim against the 2nd Defendant, by means of factual allegations clothed as grounds of the said Application⁹;
- (v) The Claimants could not at this stage of the proceedings, alter their pleadings without the permission of the Court, nor could they do so by means of grounds contained in a notice of application;
- (vi) The Court does however, have regard to the affidavit filed on behalf of the Claimants, by the previous attorney retained by the 1st Claimant, who depones that in January, 2018, he notified the

⁹ See para. 13 pg 12 supra

2nd Defendant's attorney-at-law, of the objections to the sale by the Claimants;

(vii) This affidavit of the 1st Claimant's prior attorney-at-law however, does not impute knowledge to the 2nd Defendant of any alleged wrongdoings of the 1st Defendant in relation to the *Assent*;

(viii) It therefore remains a fact, that the 1st Defendant executed an *Assent* of the property to himself, some 17 years prior to the conveyance to the 2nd Defendant and conveyed the property on the basis of this *Assent*;

[23] Within the factual circumstances of this case, the pleadings and evidence are that the sale to the 2nd Defendant was executed on the basis of the *Assent* executed some 17 years prior without her involvement or complicity. Neither the pleadings nor the evidence seek to impute such involvement or complicity in relation to the *Assent*. The *Assent* was recorded. The 2nd Defendant's knowledge of the existence of the 1st Defendant's siblings does not give rise to knowledge of wrongdoing in the execution of the *Assent*. As a consequence, the 2nd Defendant is to be regarded as a purchaser in good faith for valuable consideration having purchased from the 1st Defendant as legal

and beneficial owner of the property. Any obligations in law towards the remaining siblings is a matter for the 1st Defendant and his siblings.

[24] Aside from the Court's position on the Assent, the Court's construction of section 32 of the Act will bear the same result in relation to the claim against the 2nd Defendant. Consideration of section 32 of the Act, is illustrated with reference to *Commissioner of Stamp Duties v Livingston*¹⁰, as it pertains to the interest of beneficiaries to a deceased person's estate. The interest of a beneficiary is not a proprietary interest, but this position has not been without difficulty,¹¹ and the specific provision that is section 32 is not found in the Administration of Estates Act of England. Reference is however made an authority from the Eastern Caribbean, **Clifton St. Hill v Augustin St. Hill**¹² which considered the statutory power of sale of a personal representative versus the right of the beneficiary, in St. Vincent. This case concerned the distribution of 21/4 acres of land by the plaintiff to his siblings, on the administration of their deceased mother's estate. The defendant, one of the siblings, challenged the assents executed by the plaintiff for the lots of land which were created for distribution to the siblings, the defendant included.

¹⁰ Fn 6, supra

¹¹ It must be recognized however that the decision in *Livingston* has created difficulty regarding the question of with whom the beneficial interest lies, if not the beneficiary, as the personal representative by definition of his duties, does not hold a beneficial interest in the property of the estate.

¹² ECSC St. Vincent & the Grenadines CV No. 402 of 1996

The defendant was contending that a house which formed part of the lot of land assented to the plaintiff, was in fact his property.

- [25] The plaintiff in *St. Hill*, had failed to consult his brother, the defendant, in relation to the division and distribution of the property. In determining whether the assent without the consent of the defendant was valid, Mitchell J. said as follows in relation to an Administrator's power of sale:-

“...By section 47 of the Act, the Administrator holds the real estate upon a trust for sale. In legal theory, his duty is to sell the real estate and to distribute the proceeds among the beneficiaries. The beneficiaries have no automatic entitlement to receive any land by division of the real estate of the deceased. They are beneficially interested not in the land of the deceased but in the proceeds of the sale of any remaining land after the expenses of administration have been met. The Administrator may in the absence of fraud freely dispose of the real estate to third parties without the concurrence of the beneficiaries.”

The Court finds that the categorization of the beneficiaries' interest by Mitchell J. to be consistent with the legislative intent in section 32 of the Act. Particularly, section 32(2) is clear in terms that the requirement to (as far as practicable), give effect to the wishes of the beneficiaries in respect of any proposed sale is expressly divorced from any obligation on the part of a purchaser, to be assured of compliance, with such wishes.

- [26] Even further, in the final analysis, the statute preserves the right of the personal representative to sell without the concurrence of the beneficiary.

In the face of such express provisions, the Court considers that the highest remedy available to a beneficiary against a personal representative for failing to act in accordance with section 32(1), is an action against the personal representative, and barring fraud, not against the purchaser. Mitchell J' continued in *St. Hill v St. Hill* as follows:-

“When an Administrator is distributing the real estate among the beneficiaries, the only deed that the Act now requires of the Administrator is a unilaterally executed deed of assent.”

The remedy of the beneficiary is a personal action against the administrator:-

“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 law-suit 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.”

[27] Having regard to the above authorities, and the Court's construction of section 32, particularly 32(2) of the Succession Act, Cap. 249 of the Laws of Barbados, it is concluded that unless the Claimants were alleging fraud or other complicity on the part of the 2nd Defendant in the execution of the Assent in 2001, the beneficiaries have no claim against the 2nd Defendant. The 2nd Defendant by the express terms of section 32 of the Act, is excluded from any consideration of the duty of the personal representative to consult with the beneficiaries prior to a sale of the property in question. At the time of the sale, the 1st Defendant had been in possession of the legal and beneficial title for 17 years with the 2nd Defendant having no notice of any alleged wrongdoing in the execution of the Assent. At the time of the sale, the 2nd Defendant had no duty to inquire as to the wishes of the beneficiaries, nor did she have any obligation to go behind the 1st Defendant's Assent to himself. Even to affix the 2nd Defendant with notice as the Claimants (by their evidence) have attempted to do, does not assist their claim.

[28] Instead, section 32(2) affirms a personal representative's right of sale without the beneficiary's consent and excludes the application of notice in respect of a purchaser. Therefore, in the absence of fraud (of or attributed to the purchaser), the beneficiaries right of action is not against the purchaser. In the circumstances of this Claim, the remedies of the 1st and 3rd Claimants subsist

against the 1st Defendant only and would remain to be proved in the trial of the claim. Consequently, the 2nd Defendant is to be struck out as a party to the claim, and the injunction discharged with costs awarded in her favour.

Miscellaneous

[29] With respect to the continued conduct of the Claim, having regard to the affidavit filed by the 2nd Claimant in which she has disavowed any authority given to be joined as a Claimant, the Court considers it appropriate to strike the 2nd Claimant out as a claimant in the matter. The requirement in Rule 68.3 is for all persons entitled to administer the estate of a deceased person to be joined as a party to probate proceedings. Whilst the 2nd Claimant, as a sibling is caught by that rule, to join as a party is not to join as a claimant without authority. In light of want of authority and the 2nd Claimant's affidavit and retention of separate counsel, the 2nd Claimant is visited with no liability for costs arising from the Court's dismissal of the Claim against the 2nd Defendant.

Disposition

[30] The 2nd Defendant's application to discharge the injunction is subsumed by the Court's direction of consideration of the issue of the effect of section 32(2) of the Succession Act, Cap. 249, on the claim against the 2nd Defendant. The issue is determined as follows:-

- (1) The claim against the 2nd Defendant is dismissed on the basis of the following:-
 - (i) The 1st Defendant sold the property at Apes Hill, St. Peter to the 2nd Defendant as legal and beneficial owner on the basis of the Assent executed in his favour in 2001. In the absence of any notice or complicity on the part of the 2nd Defendant in the execution of that Assent, the 2nd Defendant is a purchaser in good faith for valuable consideration;
 - (ii) Further or in the alternative, the 2nd Defendant is afforded the protection of section 32(2) of the Succession Act and the rights of the 1st and 3rd Claimants as beneficiaries subsist against the 1st Defendant alone.
- (2) Upon dismissal of the claim against the 2nd Defendant, the injunction granted on the 19th February, 2019, restraining the 2nd Defendant from any use, development or dealings with the Apes Hill Property, is discharged.
- (3) Costs are awarded against the 1st and 3rd Claimants in favour of the 2nd Defendant. The Court will hear Counsel for the parties on the issue of costs.

- (4) The 2nd Claimant Marjorie Anita Chastenet is struck out as a claimant and is instead to be added as a defendant to the claim.
- (5) The matter is adjourned to the 8th December, 2020 for Report and the 1st Defendant is directed to file and serve his defence to the Claim on or before the 16th November, 2020. Liberty is thereafter granted to the Claimants to file a Reply.
- (6) The continued first hearing of the Claim is adjourned for 19th February, 2021 via Zoom.

SHONA O. GRIFFITH
Judge of the High Court