In The Supreme Court of Bermuda

CIVIL JURISDICTION

2004 No. 185

In the Estate of BARBARA ELOISE HOLLIS, DECEASED

BETWEEN:

WINSLOW HOLLIS

Plaintiff

-and-

LISA HOLLIS

(as Administrator of the Estate of Barbara Eloise Hollis)

Defendant

Mr. R. DeSilva for the Plaintiff

Ms. K. Lomas for the Defendant

JUDGMENT

1. The Plaintiff commenced this action by way of originating summons dated the 8th day of June 2004. In it he claims to be a beneficiary of the Estate of Barbara Eloise Hollis (the "Estate") under the laws of intestacy. The basis of his claim is that the defendant, as administrator of the Estate has failed to administer the Estate properly or at all. Accordingly the Plaintiff seeks the following relief pursuant to Order 85 rule 2(3) (a) and (e) of the rules of the Supreme Court 1985:

(1) The Defendant as Administrator be ordered to furnish particulars of investments and accounts of the Estate;

(2) An order that the Defendant collect in and distribute the assets of the Estate according to the laws of intestacy;

(3) If and so far as may be necessary, administration of the Estate by the Court;

(4) Costs.

History

2. The only asset remaining in the Estate consists of a property situate at 41 Wellington Slip Road in St. Georges parish. This property was the family home of the parties' grandfather Charles Hilliard Williams. He died having willed the property to the parties mother Barbara Eloise Hollis reserving to his wife, the parties' grandmother, Ottis Olivia Williams a life interest. Barbara Eloise Hollis predeceased Ottis Olivia Williams.

3. Barbara Eloise Hollis died intestate on 9th March 1981. The Plaintiff, the Defendant and their two other siblings each became entitled to an equal undivided interest in the Estate property upon the death of Ottis Olivia Williams on the 3rd of April 1994. The Defendant with the agreement of her siblings was granted letters of Administration of the Estate of Barbara Eloise Hollis on the 31st May 1999.

4. The Defendant is involved in two other court matters. The Defendant's involvement was predicated upon her belief that the Estate comprises or has an interest in a waterside lot of land adjacent to the Estate property. The Defendant's involvement in both those cases is relevant to claims made by the Plaintiff. The Defendant asserts that she acted in her

capacity as administrator of the subject Estate in both matters, and as a consequence had to borrow money to retain lawyers to represent the Estate in both instances.

5. In the first matter the Defendant is the defendant in an action brought by the plaintiff Alexander Winston Joseph Anglin Swan. In it the plaintiff Mr. Swan seeks to establish that he is in possession of and has been granted title to the water side lot of land adjacent to the subject Estate property in fee simple. He also claims a right of way over the subject Estate property to the waterside lot. An injunction was granted in that case preventing Miss Hollis from blocking the said right of way. A strike out application by Miss Hollis was unsuccessful and dismissed by the court. The substantive matter has not yet been fully determined.

6. In the second action Miss Hollis sought leave to commence judicial review proceedings against the Development Applications Board ("the Board") and the above referred Alexander Winston Joseph Anglin Swan. The application was essentially to have quashed the decision of the Board in granting Mr Swan permission for the construction of a dwelling on the above mentioned water side lot adjacent to the subject Estate property. Leave was granted to the Defendant on an ex-parte basis, however it was subsequently set aside upon arguments on an inter partes hearing. No further action was taken in that matter. In both cases the Defendant was represented by counsel.

7. The Originating Summons in the instant matter for various reasons began by fits and starts; it lay fallow for some periods and in fact for one period in excess of one year. Both the Plaintiff and the Defendant have filed affidavits herein. On 16th September and on the 21st October 2004 the court directed the Defendant to file proof of the status of the

two above referred court actions. On the 2nd of March 2006 she was ordered to produce proof of the rental of the lower apartment to a named individual, as well as proof of the purchase of various materials of repairs to the premises. By all appearances the Defendant complied with that aspect of the order producing the tenancy agreement and various receipts as ordered.

8. The Defendant was also ordered to facilitate an inspection of the premises by the Plaintiff's attorneys at which time the attorney would be at liberty to photograph the lower apartment and the exterior of the premises. The Plaintiff's attorney was able to attend at the subject premises and inspect and photograph the premises as ordered. He relied upon those photographs in his cross-examination of the Defendant.

9. By summons dated the 17th February 2006 the Plaintiff sought an order permitting him to reside in the lower apartment of the subject premises. The Plaintiff cited financial hardship and having nowhere else to reside as his main reasons for wanting access to the lower level apartment of the subject premises for his occupancy. The hearing of that summons was adjourned on two occasions including the 16th March hearing date which was vacated by written request of the Defendant who cited work commitments.

10. That matter never came back before the court for consideration. The relevance of that issue is that the Defendant and the Plaintiff have an unhappy history of not getting along which is documented in the court file by a letter dated 1999 exhibit to the Defendant's affidavit of the 28th June 2004.

11. Also exhibited to that affidavit is a copy of a restraining order that the Defendant had obtained against her brother, the Plaintiff for threats of violence he uttered against her.

The Defendant claims that she had cause to seek the help of the police in at least two instances where the Plaintiff came onto the subject premises entered the upper unit and either unlawfully assaulted the Defendant and or did damage to the upper apartment where the Defendant was residing.

12. It is against this back drop that the Defendant claims as against the Plaintiff reimbursement for certain loss for damage done to her belongings and reimbursement for repairs made to the premises. In his fourth affidavit the Defendant denied both the assault and damage as alleged. In the final analysis this comes down to a matter of quantum where the damage or loss was sustained by the estate and paid by the Defendant as the Plaintiff admitted in the trial that he unlawfully entered the premises and caused damage therein.

The Plaintiff's Case

13. Counsel for the Plaintiff has alleged breach of duty as against the Defendant in her position of Administrator of the subject Estate. In his submissions he has set out three heads of loss as a result of breach of duty, and suggests methods of quantifying the resultant loss to the Estate. In addition counsel for the Plaintiff argues that some of the expenses claimed as Estate expenses are in fact personal to the Defendant. He further attacks some of the Estate expenses as having been unreasonably incurred.

Taking the breach of duty first, the three heads of loss are:

(i) Failure to adequately maintain the property at 41 Wellington Slip Road;

(ii) Failure to pay occupation rent for the upper unit of the subject property;

(iii) Failure to repair, renovate and rent out the lower unit of the subject property.

Negligence: Failure To Maintain

14. The Plaintiff relies on **In re Lucking's Will Trust/Renwick and Another** [1968] 1 WLR 866 for the test of negligence. The test set out is that the Defendant as executor is only bound to conduct the business of the trust in such a way as an ordinary prudent man would conduct a business of his own. He relies further on **Speight-v-Grant** (1883) 22 ChD 727 concerning waste/devastavit for the general proposition that an executor may be liable for loss arising to the estate by the abuse of assets by the executor or by reason of the estate having to bear charges it would not have had to bear but for the culpable negligence of the executor.

15. The Plaintiff complains that the Defendant failed to maintain the Estate property. He argues that she had the roof repaired over the years, but that nothing else of substance was done to maintain the property. He concedes that there was no money in the Estate. However he submits that the Defendant could have raised money to carry out repairs and maintenance rather than borrowing money for the expense of attorneys in pursuing the matter regarding Mr. Swan and the waterside lot. I shall come on to the issues concerning the waterside lot.

16. On an assessment of the evidence, I find that it is not accurate of counsel for the Plaintiff to state that all the Defendant did was to paint the roof. The Defendant has produced evidence that shows the maintenance work that she carried out on the premises. A list of maintenance carried out on the property is set out in the Defendant's bundle of documents along with the invoices, receipts etc. and the attendant costs.

17. This is further augmented by her affidavit sworn on the 22nd of September 2009 wherein she claims for repayment of other repairs or improvements to the premises. Of the latter mentioned items of improvement the only item that appeared from cross-examination to be questionable was whether a second new meter was installed by the Defendant at the residence. This evidence clearly supports the contention of the Defendant that she carried out repairs as and when she was able to.

18. Counsel for the Plaintiff criticizes the Defendant for incurring legal fees for attempting to preserve the waterside lot. Ms Hollis' evidence was that she had always believed that the waterside lot formed part and parcel of the Estate property. She based her belief on what she had learned from her Grandmother; the fact that her grandmother had maintained the lot; and having seen her grandfather use the dock on the lot over the years openly, without permission or interruption. Ms Hollis also relied on the recollection of her sister set out in a letter exhibited to an affidavit of the 28th June 2004 regarding the family's belief that the waterside property was theirs. The Defendant's sister supported the court actions over the waterside lot.

19. It would appear reasonable in the circumstances for the Defendant to seek legal advice as to the strength of any possible claim that the Estate might have regarding ownership of the lot as against Mr. Swan, the new purported owner and developer of the lot in question. I do not believe that Ms Hollis expected that she would incur the substantial fees that she in fact incurred; especially as the lawyers accomplished no real result. The judicial review action was commenced late, nonetheless it would appear to have been

reasonable for Ms. Hollis to attempt to challenge the permission granted by the development and planning process for development by Mr. Swan of the lot.

20. As pointed out by Miss Lomas counsel for the Defendant, Ms. Hollis sought the advice of experienced counsel, and being a lay person left it to counsel's judgment to properly advise and represent her. There is of course always a risk of losing in litigation, and it is easy in hind sight to judge the relative worth of the advice and representation that she received.

21. Having considered all of the factors in play at the time it would appear to me that an argument could have been made in the reverse had the Defendant not tried to protect what at least she and her sister believed to belong to the Estate.

22. There is one other factor to be taken into account. This is essentially a family matter. The sole asset is the family home. Miss Hollis was not a stranger to the Estate, and clearly her siblings thought that she was the responsible one in the family. Her uncontested evidence was that she was thrust into the position of administrator. I do not think that it serves the justice of the case to set her conduct up against an arbitrary standard of a prudent man of business.

23. Hers was a working class family if I may be permitted to categorise the grandfather's family in that way. The uncontested evidence was that they were propertied but not rich. There was no evidence that the property had been maintained to a high standard prior to the grandmother's death. Quite the contrary; the evidence was that the property was in poor condition at the time of the grandmother's death. There was no cash in the Estate. I accept these facts as proved.

24. Further this was not a case where the beneficiaries sat down on a regular basis and discussed the Estate matters as they arose or in anticipation of distributing the Estate property. There was bad blood between the Plaintiff and the Defendant. He admitted that in trial. In fact he admitted that he is a different person now than he was then. He admitted that he did not appear to be acting even in his own best interest at the time. He admits to damaging the property.

25. What is pellucid from the evidence is that the Defendant could not rely on the Plaintiff for his views on management of the property. At some point the other siblings left the matter entirely to the Defendant and eventually left Bermuda. I do not think it lies in the Plaintiff's mouth to criticize the Defendant in regard to her attempt to secure to the Estate the waterside lot as a part of the Estate. No evidence has been produced to show that Miss Hollis was acting other than in the interest of the Estate. The court accepts that to the extent that she has been unable to present a breakdown of a lawyer's charges in respect to the litigation over the lot, it results from the law firms that represented her failing to provide details of their representation and charges upon request.

26. In the circumstances, subject to an assessment that I make below, I reject the Plaintiff's contention that the Defendant has been negligent by failing to maintain the property. I also reject the argument that she has caused waste/devastavit by incurring expense. I conclude that preservation of the integrity of the property including the waterside lot would have been important to the value of the Estate and the distribution of capital eventually. Borrowing money to pursue the case in court was not in the circumstances

culpable negligence by the Defendant. The Defendant is entitled to repayment for the items of expense that she has claimed as mentioned above.

Failure To Pay Occupation Rent For Living In The Upper Unit And Failing To Rent The Lower Unit

27. Under this head counsel for the Plaintiff relies on **Regal (Hastings) Ltd –v-Gulliver and Others et al** [1967] 2 AC 134, a decision of the House of Lords. This case is authority for the proposition that those who use their fiduciary relationship and only their fiduciary relationship and obtain financial benefit are personally accountable for any profit gained personally by them.

28. In reliance on this authority counsel for the Plaintiff argues that the Defendant has in fact obtained a secret profit by virtue of her sole occupation of the premises since the grant of letters of administration. He refers to the Defendant as having granted to herself a lease over the years at no rent. Counsel for the Plaintiff contends that payment for the rent should be calculated from the date of the grandmother's death or alternatively from the date of the grant of letters of administration.

29. He further contends that the lower unit should have been made tenantable and rented at the market rent. Therefore the Petitioner's position is that rent for that apartment ought to be taken into account. For the estimated rents the Petitioner relies on the valuation report of Bermuda Realty which includes estimates of similarly sized and located apartments. The report is qualified however. It refers to the estimates of rental value as they would be if the apartments were in tenantable repair. The lower apartment the report indicates was

not in tenantable repair. The upper was barely tenantable. The report sets out the reasons for that assessment.

31. Having found above that the Defendant should not be held personally liable for failing to maintain the premises it would be contrary to reason to hold her responsible for profiting to the level of what amounts in the circumstances to a speculative rental liability.

32. The Defendant's answer to this complaint is essentially that the overall value of the property has increased over the years; that the grant was not made until 1999 showing that the beneficiaries were in no hurry for their share of the value of the estate; and there was no demand made of the Defendant to pay an occupation rent for the upper premises.

33. This issue has two connected issues. Firstly the Plaintiff has been shown to have demanded that he be permitted to occupy the lower level apartment. The Defendant resisted that at each occasion that it arose. The Defendant's evidence was that she did so because of the Plaintiff's threatening and abusive behavior toward her. In support of that allegation she had obtained a domestic violence protection order against the Plaintiff. He was ordered to stay away from the premises.

34. The history of this matter reveals and the Plaintiff admitted in evidence that he acted in violation of that order. He admitted that he entered the Defendant's home and caused some damage to the upper apartment. In those circumstances the Defendant was reasonable in denying him the ability to reside in the lower apartment of the premises. The other siblings have not sought to reside in the premises or demanded a payment of rent from the Defendant. None the less, the Plaintiff by virtue of the fact that he sought permission to reside in the property but was refused can be taken to have in consequence

have made a demand for his fair share of the rental potential of the premises. His share would be one fourth of the rental potential of the two apartments.

35. Quantifying the value of that share poses some difficulty for the reasons given above. The Defendant's evidence suggests that the tenant in occupation at the time of the grant that had to be removed from the premises by court process removed the fixtures and fittings right down to the toilet. The Defendant subsequently entered into an agreement with a Mr. Bremar for him to reside in the premises (on a temporary basis) without payment of rent in exchange for carrying out some work on the premises.

36. From the pictures tendered in evidence it is apparent that apart from the lack of kitchen and toilet facilities the lower apartment was otherwise useable space; indeed livable space. The precise time that it reached that stage is not clear from the evidence. After Mr Bremar's departure from the premises the Defendant used the apartment for her own purposes as storage and to house her laundry machines. She clearly benefited from the lower unit in these latter instances.

37. As to quantum, the Petitioners figures take the average of the rent rate of the upper unit and the lower unit as his base and then multiplies the averages by years representing either the date from the death of the grandmother, or alternatively from the date of probate. He then suggests halving the sums due to the rundown condition of the premises. This calculation is too artificial. The lower unit was not tenantable, and this was not the fault of the Defendant. The former is borne out by the qualifying statements in the valuation. Secondly the Plaintiff's figures are based on an assumption that all of the

beneficiaries seek repayment of the "profits"; the fact is that they have not sought any such payment.

38. A fairer calculation in my estimation would be to half the market rent for the upper unit calculated over the period from the grant of letters of administration, commencing June 1999 up until 13th September 2010. I see no justification for using two periods of time and two averages, in the circumstances of this case this would be artificial. The result is for the upper unit a charge of $925 over 135 months.

39. I do not think that it would be fair to take a market rent for the lower unit. I have already shown that the Defendant cannot be held responsible or not bringing this unit up to rental condition at her own expense. The Defendant presented an estimate in excess of $40,000 for bringing this unit up to tenantable condition. Half of the lowest appraised rental rate submitted by the Plaintiff would be approximately $500 per month. A charge for storage might have attracted less than that, however, given that a rental value is all that we have, fairness calls for that sum to be considered.

40. Given their history the Plaintiff himself could not be expected to occupy the premises, nonetheless the Defendant had no greater right to occupancy than the Plaintiff. She was therefore under a duty to see that the estate benefited in lieu of occupancy by the Plaintiff. A shorter period for the purposes of calculation is relevant for two reasons. Firstly, because the original tenant had to be removed by court process; secondly, because the court accepts that Mr Bremar was there for a short time whether he actually spent the whole time there himself or had it for his use from time to time is irrelevant. A

deduction of 6 months would be reasonable in the circumstances for a total of 129 months of profit gained by the Defendant's sole personal use.

41. I conclude from the history of this matter that Miss Hollis did not turn her mind to gaining any income from the lower unit. She certainly did not consider the Plaintiff's interest because she did not intend for him to reside in the lower unit. Consequently, in my estimation, she was blind to her duty to obtain what she could for this unit since the Plaintiff was presumably willing to take it as it was. Instead she used it for her own purposes which purposes benefitted only her.

42. In the result the calculation for the upper unit is $925 over 135 months and the lower unit is $500 over 129 months. Since only the Plaintiff's interest is being calculated, one fourth of the apportionment of profit for the sum of the two units is what the Defendant is liable to the Plaintiff for. The result is that the Defendant must pay to the Plaintiff the sum of $47,333 if my math is correct (or such corrected sum as counsel agree) on this limb of the Plaintiff's case.

The expenses submitted by the Defendant

43. The Plaintiff's position is that the expenses that are truly estate expenses and were reasonably incurred are the only expenses that should be repaid to the Defendant. There is no dispute that the Defendant is to be reimbursed from the estate $7,228.22 for cost associated with legal fees regarding the eviction of a tenant from the lower unit of the property. She is also to be repaid $1,841.07 for the fees related to the grant of administration and estate duty. Further the sum of $11,598.88 is to be repaid to the LCCA which advanced money for the parties mother's medical care.

44. Counsel for the Plaintiff takes issue with the costs set out in tab 3 of the Defendant's bundle of documents that are associated with the legal wrangling between the Defendant and Mr. Swan over the right of way, and ownership of the waterside lot. As mentioned above Ms. Hollis and her sister had an honest belief that the waterside lot was estate property. Further the Defendant could not at the time have foreseen that she would expend the sum of $159,665.31 in that pursuit. In hind sight it seems a staggering amount, however added to the mix is the problems that she encountered with what on the face of it appears to have been excessive billing on the part of the law firm concerned. I do not think that the Defendant should be held personally liable for these expenses.

45. The defendant sought legal advice of more than one attorney and followed it. Perhaps she could have come across an attorney who could have imparted more practical advice, dissuading her from taking, or advising her to abandon, the legal action. That however is not the reality. In the absence of evidence that she was offered and refused the advice of an attorney to abandon asserting a legal right over the waterside lot her action can only be seen as reasonable. To the extent that the legal fees were not reasonable charged, they were in the circumstances reasonable incurred. Therefore I find the Plaintiff's complaint on this issue to be without merit.

46. The Defendant could well have an action against Milligan Whyte and Smith in relation to both the fees charged and the lost deeds. It is a matter for her and the other beneficiaries whether that ought to be perused. Of the other sums claimed against the estate in tab 3, Counsel for the Plaintiff is correct that legal fees incurred in defence of this action fall to be considered in the final analysis of this matter. The $2,340 claimed in respectf o the

action by Ms. Hollis against the Plaintiff was in my view personal to the Defendant arising from her relationship with the Plaintiff and therefore is not an estate expense.

47. As to tab 4, counsel for the Petitioner is correct that only those claims related to the repairs and replacement in the upper unit that were damaged by the Plaintiff are expenses repayable to Ms Hollis. They amount to $1,164.04. Those sums shall stand charged against the Plaintiff's interest in the Estate property. The remaining items claimed however are properly claimed against the Estate. The Defendant's evidence was that they were incurred either in maintenance or improvements to the property.

48. The Defendant has produced receipts for the materials and labour charges for items such as purchasing and installing a sliding glass door, windows, pressure tank etc. these were repairs or improvements to the subject property. It cannot be reasonable to assume that the Defendant should bear the costs of these items of expense personally. What is more there is no evidence to the contrary. The Defendant shall have the balance of the tab 4 expenses paid to her from the estate.

49. The damage done to the television and CD player are not recoverable from the Estate. Repayment of those sums relate to the Plaintiff in his personal capacity. Likewise the $850 in lost wages that the Defendant claims as a result of the incident involving the Plaintiff is personal to the Defendant and not recoverable from the Estate.

50. As to tab 6 expenses, charges relating to landscaping, land tax, and house insurance are all properly charged against the Estate. The maintenance expense was reasonably incurred notwithstanding that counsel for the Plaintiff suggests that the Defendant should

have taken on that task herself. The given figures were adjusted for the hearing and may need to be further adjusted as agreed by counsel.

51. As to tab 8 expenses, it is the Plaintiff's case that the Defendant as occupier of the premises ought to be responsible for these charges if she has not been charged an occupation rent, but should stand as Estate expenses if she has been so charged. The Defendant has been assessed for an occupation rent, therefore I need say no more on the items in tab 8.

52. However the Defendant's evidence was that she had to repair and replace antiquated wiring, have new external meters installed, replace pipes and have roof work done. I can see no reason why the Plaintiff could dispute that she ought to be reimbursed these sums expended on maintenance. The only exception is that it was clearly demonstrated by the Plaintiff's attorney that only one new external meter has been installed. In those circumstances only the cost of one meter is recoverable. The total recoverable under this head is therefore $22, 492.64,(if my math is correct) as opposed to the sum sought.

Conclusion

53. The Plaintiff sought an order for the particulars of the Estate accounts. The court concludes that all that remains of the Estate is the property situate at 41 Wellington Slip Road. The only third party debt of the Estate to be settled is the LCCA debt of $11,598.88. The court is not aware of whether that debt attracts or includes interest. Then there are the sums due and owing to the Defendant. These need to be quantified by counsel by agreement after consideration of the sums awarded above. Secondly the apportionment of rent shall have to be deducted from that sum. Thereafter such costs as

have been attributed to damage to the Estate property caused by the Plaintiff shall have to be totaled by agreement.

54. A decision shall have to be made as to whether in the circumstances the action involving Mr. Swan and the adjacent waterside lot will be pursued or compromised or otherwise brought to an end. There are bound to be cost associated with ending that action. All reasonable costs would be estate costs, and would stand to be settled.

55. The court is unable at this juncture to quantify the beneficiaries' entitlement. In respect to Eugene Cox, one of the beneficiaries, the Defendant requests that a sum of $25,000 be set aside to cover costs of determining whether or not he is alive. While it would be appropriate for the Defendant in her role to try to ascertain his whereabouts, there is currently no money in the Estate, so this request effectively 'puts the cart before the horse'. This brings the court to the ultimate question of whether and if so when an order should be made for the sale of the property. The Defendant has indicated an interest in buying out the other beneficiaries. The Defendant has indicated that he wishes to have his share of the Estate. I take that to mean he wants the house sold and his share of the proceeds of sale.

56. I do not think that it is necessary in all of the circumstances for the court to administer the Estate. However I believe that it is in the interest of all involved that the court remains seized of the matter until the outstanding issues are resolved. Therefore, the court requires counsel to draw up a consent order setting out the payments referred to above; resolving the issue of the sale of the property including a time line; further outlining the issue of how the outstanding litigation will be addressed. Once these matters have been

addressed the court should be in a position to make a final order in respect to distributing the Estate.

Costs

57. Having considered the issue of costs, I am of the view that the appropriate order should be that costs should be paid out of the Estate to date. I shall adjourn this matter to chambers with liberty to apply to hear the parties on any interim matter.

Dated this 27 day of May 2011

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Charles-Etta Simmons
Puisne Judge