



# 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 Administratrix of the Estate of Barbara Eloise Hollis)**

**Defendant**

Dates of Hearing: 8 December 2014, 9 January 2015 and 23 January 2015

Date of Judgment: 24 February 2015

Moniz & George – Raymond DeSilva for the Plaintiff

J2 Chambers – Eugene Johnston for the Defendant

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## JUDGMENT

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### The Parties

1. The parties in this matter are Winslow Hollis (Plaintiff) and his sister Lisa Hollis (Defendant).
2. The Plaintiff and the Defendant, together with their two siblings, are beneficiaries of the estate (the 'Estate') of Barbara Eloise Hollis who died intestate on 9 March 1981.

These four beneficiaries became entitled to an equal undivided interest in the Estate.

On 31 May 1999, with the consent of her three siblings, Lisa Hollis was granted Letters of Administration of the Estate.

### The Summons

3. By summons dated 28 November 2012, the Plaintiff (Winslow Hollis) commenced proceedings against the Defendant (Lisa Hollis) seeking an order *inter alia* that

*1) The Defendant shall provide vacant possession of the estate property at 41 Wellington Slip Road, St. George's Parish GE 02 (hereinafter referred to as the "Estate Property") on or before 31st January, 2013 or by such other date as the Honourable Court sees fit to grant, in order to facilitate the marketing for sale of said property;*

*2) In order to facilitate said sale the Defendant shall inform the Honourable Court and the Plaintiff's attorneys of the location of the title deeds to the Estate Property, and should they be being held as security for any loan the Defendant shall provide the most recently available financial statement to confirm the level of indebtedness and the identity of the lender;*

*3) The Plaintiff's attorneys shall be at liberty to employ such real estate professionals as are necessary to market the Estate Property for sale and to be permitted to recoup any costs for same out of the sale proceeds thereof;*

*4) The Defendant shall be assessed further occupation rent from 14th September, 2010 (reference paragraph 38. of the Judgment dated 27th May, 2011) until the date of vacation of the Estate Property and the Judgment rates of \$925 for the upper unit and \$500 for the lower unit be applied (reference paragraph 42. of the Judgment and additional to those sums assessed in paragraph 1. of the Order dated 4th August, 2011);*

*5) The Defendant shall be removed with immediate effect as Administratrix of the Estate as above-captioned and the Registrar be empowered to execute*

*such documents as are necessary to market and sell the Estate Property, including but not limited to any Sale and Purchase Agreement and/or Conveyance thereof.*

*6) The Court grant such other directions as it deems necessary to effect sale of the Estate Property, gather in the proceeds thereof, and properly complete the equitable distribution thereof to the Beneficiaries.*

*7) Costs be awarded to the Plaintiff on an indemnity basis against the Defendant, given that the Plaintiff is legally aided and the Defendant has become entirely uncooperative.*

### **Background: previous court proceedings**

4. Except for the factual matters with which this Court must refer to in dealing with this application, this Court does not propose to reiterate the full background to this matter, which has been comprehensively covered in the 27 May 2011 judgment of Mrs Justice Charles-Etta Simmons, Puisne Judge (Civil Jurisdiction 2004/185).

5. In an originating summons dated 8 June 2004 the Plaintiff sought orders that (1) the Defendant as Administrator furnish particulars of investments and accounts of the Estate; (2) the Defendant collect and distribute the assets of the Estate according to the law of intestacy; and (3) in so far as may be necessary, the Court should administer the Estate.

6. On 27 May 2011, after a contested hearing of the 8 June 2004 summons, Justice Simmons found that there was acrimony between the Plaintiff and the Defendant:

*24. ... 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.*

7. With regard to the administration of the Estate and the Defendant's use of the Estate Property to secure funds, Justice Simmons found:

*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. ... No evidence has been produced to show that Miss Hollis was acting other than in the interest of the Estate. ...*

*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.*

8. With regard to the beneficiaries' entitlement, Justice Simmons found that the '... court is unable at this juncture to quantify the beneficiaries' entitlement'.

Simmons J continued:

*55. ... 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.*

9. With regard to the administration of the Estate, Simmons J concluded *inter-alia* that:

*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.*

10. On 4 August 2011 Justice Simmons signed a 17-paragraph order that summarized the terms of her 27 May 2011 judgment. The order in part reads:

*14. Taking into consideration the foregoing provisions, that the Defendant has expressed an interest in wishing the option to buy out the other beneficiaries and the Plaintiff has expressed an interest in receiving his fair share of the proceeds of sale, it is hereby found that the agreed value of the subject property is \$612,500.00, less Estate payments to the Defendant of \$216,937.21, plus the Defendant's payment to the Estate for occupation rent of \$189,375.00 = \$584,937.79 total value of the Estate. Less \$11,598.88 as the only Estate payment out to the LCCA = \$573,338.91 as the net total value of the Estate (excluding legal costs). As a result with 4 beneficiaries \$573,338.91 divided by 4 = \$143,334.73 x 3 (other beneficiaries entitlements) = \$430,004.18 for the Defendant to buy out the other beneficiaries interests.*

*15. The Defendant shall have until 6th July, 2011 to provide confirmation of the requisite financing to the Plaintiff's attorneys in order to exercise her option to buy out the other beneficiaries' interests at the above-mentioned figure of \$430,004.18, failing which the subject property to be advertised for sale, arrangements to be mutually agreed between Counsel failing which there be liberty to apply. [Emphasis added]*

11. On 12 September 2013, the matter came before Mr Justice Greaves who ordered that:

*1. The Defendant shall have a further 30 days within which to obtain financing and provide proof to the Plaintiff's attorneys, failing which the property at 41 Wellington Slip Road, St. George's Parish GE 02 shall be listed for sale with JW Bermuda Realty Company Limited, with the Plaintiff's attorneys being at liberty to make such arrangements.* [Emphasis added]

*2. Should the said 30 days expire without the Defendant obtaining financing, the Defendant shall provide vacant possession of the said property by 30th November, 2013.* [Emphasis added]

*3. The Defendant shall file and serve a copy of the valuation report prepared by Crisson & Co. Ltd. Real Estate, subject to the ability of the Defendant to obtain a copy of said report from Capital G.*

*4. The matter is adjourned for further review on Thursday, 31st October, 2013 at 11a.m. in Chambers.*

## **Administration of the Estate and sale of the Property**

### Defendant's submission

12. Mr Johnston, Counsel for the Defendant, submits that the Plaintiff's 28 November 2012 summons before this Court does not flow naturally from the 27 May 2011 judgment of Simmons J. He argues that the summons is an impermissible attempt to do what Simmons J said that she would not do.

13. Mr Johnston urges the Court to bear in mind that 1) this is an administration action; 2) the only asset left in the Estate is the land at 41 Wellington Slip Road; and 3) that although these proceedings were at times conducted as if this were a private dispute between two beneficiaries, because the Defendant is the Administrator, this is in fact a dispute between one beneficiary (the Plaintiff, Winslow Hollis) and the Estate.

14. Mr Johnston submits that the Plaintiff's summons attempts to seek to administer the Estate, and these are powers which he was expressly denied the right to have in Justice Simmons' May 2011 judgment:

*... [Justice Simmons] was still leaving the administration of the Estate in the hands of Ms Hollis ... she did not think that the Estate was being administered badly at all to justify the court administering the Estate. Now the significance of that [is] very important, there is nothing in administrative action that... allows the court to give the power to administer the Estate to the Plaintiff ... either the court assumes control of the administration or some aspect of it, or leaves the power in the hands of Ms Hollis.*

...

*What we say flows from that is Ms Hollis is still in control of the administration of the Estate, she is given the duty as she always had to progress the administration in a way it necessary to do so. Short of the Plaintiff alleging anew that there have been some changes of circumstances that makes it absolutely necessary for the court to administer the Estate, meaning some dereliction of duty on the part of Ms Hollis ... the Estate should remain under the control of Ms Hollis.*

He continues that unless the Plaintiff can point in some way in which Ms Hollis has failed to carry out her duties or prove some dereliction of duties as administrator, which he cannot do, his summons must fail.

#### Plaintiff's submission

15. Mr DeSilva, Counsel for the Plaintiff, submits that the Defendant has been given ample time within which to obtain proof of financing and that the matter needs to be progressed. The Wellington Slip Road property is the only property remaining in the Estate and the Defendant has been given an opportunity to buy out the other beneficiaries. The Defendant has had three years and while the Plaintiff has heard what she has to say regarding her efforts to raise financing nothing has been achieved.
16. Mr DeSilva maintains that if the Plaintiff did not follow up after each hearing then nothing would be done; and nothing has been done since the substantive hearing in 2010. That hearing was long after the grant of Letters of Administration. Justice Simmons afforded the Defendant latitude in terms of recouping expenses she had in relation to paying her legal fees, her mother's expenses with LCCA, and for capital improvement of the Property over the years.
17. Mr DeSilva continues that:

*... as far as administering the Estate nothing has been done. ... the Defendant has clearly shown she had absolutely no intention in progressing the administration, which is her duty. ... We are not at the point where we are trying to realise everything and ... the only way we can get the Defendant to do anything else has been fruitless for the last 3 years, so on [that] basis we would say that the Plaintiff would be entitled to his costs and in terms of the recovery that it ought to be on an indemnity basis because now we say the Defendant is flagrantly in breach of her duties as an administrator which in essence [is] to get on with it.*
18. Mr DeSilva refers to Justice Greaves' 12 September 2013 order, which set out the terms of possession. He asserts that judgment has been obtained and the Defendant should provide vacant possession of the Property.

19. Mr DeSilva argues that if the Court takes the April 2013 Crisson and Company valuation of \$400,000 plus \$260,000 assessed for occupation rent, one looks at a position of \$660,000. If one deducts expenses of \$285,777 this leaves a net figure of \$376,000.

He argues that in all likelihood the Property will fetch \$300,000 on sale and – with the various deductions – the Estate will end up with basically nothing. This figure does not take into account legal fees.

20. The Plaintiff is seeking to have the Estate administered. This is not a personal claim against the Defendant who continues to live in the Property. Also, the Plaintiff thinks the Defendant owes more money than she can pay and that in the end there will be more bills than assets.

## **Occupation rent**

### Defendant's submission

21. Mr Johnston asserts that the greatest example illustrating that the Plaintiff's summons does not flow naturally from Justice Simmons' judgment is in relation to the request for occupation rent.

The court had assessed a figure of \$925 monthly over 135 months for the upper unit, and \$500 monthly over 129 months for the lower unit. He argues that there is nothing in the judgment that suggests a further figure of what is called occupation rent will be or should be assessed by the court.

22. Mr Johnston adds that occupation rent is only available in quite limited circumstances. He referred the Court to Chief Justice Kawaley's finding in *Young v Young* [2013] Sc (Bda) 10 Civ at paragraph 46:

*46. It was common ground that the Petitioner was not entitled to claim credit for an "occupation rent" unless he left the Property involuntarily or was excluded: Barlow, 'Cohabitants and the Law', at page 261. ...*

23. Mr Johnston maintains that:

*It may on its surface [seem] that occupation rent is maybe available in a case like this, but there is one point that comes out quite clearly about occupation rent [that it] is only payable between co-owners, the principle is known to apply ... in Partition Acts because you've got co-owners ... trying to either sell property or partition property, [and] get their interest out, and the question become[s] an assessment of that interest. ... In this case importantly we say Ms Hollis [the Defendant] is not an owner at all of this Property. The property is merely invested in her as personal representative ... by virtue of Section 22 of Administration Act 1974.*

24. Mr Johnston further argues that even if occupation rent were due and owing to the Plaintiff (Mr Hollis), by virtue of the findings of Simmons J in paragraphs 33–34 of her judgment, the Plaintiff is debarred from obtaining that rent and any benefits from that rent because he has committed criminal or quasi-criminal acts. The Court cannot produce a result that allows the Plaintiff to benefit from these acts.

To support his argument Mr Johnston cites the maxim of *ex turpi causa non oritur actio* as referred to in *Les Laboratoires Servier & Anor v Apotex Inc & Ors* (Rev 1) [2014] UKSC 55 (29 October 2014) and *Gray v Thames Trains & Ors* [2009] UKHL 33 (17 June 2009). In essence *ex turpi causa* refers to the legal principle that a plaintiff or claimant should not be allowed to seek a benefit or gain where their claim is founded on their own illegal acts.

He maintains that the court should debar the Plaintiff from recovering any part of his interest regarding occupation rent.

#### Plaintiff's submission

25. Mr DeSilva argues that the point in the authorities cited by Mr Johnston regarding occupation rent does not apply:

*The ... matters my friend referred to are co-owners. This is not a co-owner issue, so he says exactly, but the point in those authorities doesn't apply. Where you have co-owners as joint tenants or tenants in common there is the principle that basically one can not charge the other rent, but they are all entitled to live there. The only way that one can get any kind of rent is if they are forced to move out, and they have been excluded and they are entitled, it has absolutely no applicability, my friend has gone through the authorities that have no inkling of application to this particular matter. Here, and this is what was accepted and this is where my friend is challenging the substance of the judgment without expressly doing so ... It was accepted by Justice Simmons that Regal [i.e. Regal Hastings Ltd v Gulliver [1942] 1 All ER 378; [1967] 2 AC 134n] did apply and the reason it applies is that the Administratrix ... is in fiduciary relationship in relation to the responsibilities to the Estate.*

26. Mr DeSilva asserts that Simmons J, accepted the application of the law – which Mr Johnston (for the Defendant) now seeks to challenge – and assessed the occupation rent that was due and owed up to the date of the hearing. However, if certain rational legal principles have been accepted as applying up to the date of the hearing then implicitly they continue thereafter. The Property is not in a fit state and as no reasonable tenant was going to live there the rent amount was reduced. Mr DeSilva maintains that Justice Simmons did this, and this was accepted by the Crisson report: the only issue is the rate not whether it should continue.



27. Mr DeSilva states that the Plaintiff would be happy for the Defendant to organize financing and do the buyout as she has been given the opportunity to do for years:

*... in the big picture we have the Defendant doing nothing, sitting on her hands and acting like oh well these other people who aren't doing things for me, Capital G is not co-operating, at one point it was Crisson & Co. ... that's fine a few months down the line, but we are years down the line now.*

The only relief the Plaintiff has is to press for enforcement of the judgment.

28. Mr DeSilva asserts that the Plaintiff is claiming that as a result of *ex turpi causa* the Defendant is not entitled to his portion of the occupation rent. However, he claims that *ex turpi causa* does not apply: the Plaintiff is a beneficiary who committed criminal acts but it is not as a result of those criminal acts that he is seeking to be paid. He is saying 'I am a beneficiary please pay me'.

## **The Court**

29. The *ex turpi causa non oritur actio* maxim supports the policy that a claimant cannot recover for damages that are the consequence of his own criminal act. Mr Johnston seeks to rely on criminal offences for which the Plaintiff was convicted. In this Court's judgment the criminal or quasi-criminal offences committed by the Plaintiff, and upon which Mr Johnston seeks to rely, are not connected with the administration of the Estate.
30. As regards occupation rent, the Court rejects Mr Johnston's submission that occupation rent only applies to co-owner relationships. As a matter of principle the Defendant has been occupying the premises, consequently it could not be rented or sold. The Estate is entitled to a benefit for whatever period she occupies the Property.
31. In this matter the courts gave the Defendant, as administrator, fullest opportunity to complete the administration of the Estate and to purchase the Property. Equally the courts have a responsibility to protect each beneficiary's interest.

In this case the Intestate died 9 March 1981, with Letters of Administration granted to the Defendant in 1999.

The Plaintiff filed his original action on 8 June 2004. After the filing of pleadings and various adjournments the matter was heard and judgment rendered on 27 May 2011. Thereafter, the case was adjourned from time to time to give the Defendant an opportunity to secure financing to purchase the Property.

32. The Defendant (Ms Hollis) appeared during the hearing of this matter, but she did not offer a coherent explanation to the Court as to why her bank did not provide her with a pre-approval letter or with a date when it is likely that such a letter would be forthcoming.

33. It must not be forgotten that the Intestate died in 1981 when property prices were robust. The Court can take judicial notice of the fact that property prices over the ensuing years have dropped sharply. This is coupled with the Estate's liability to meet legal fees in respect of defending or bringing proceedings for the Estate.
34. It is the duty of any administrator to administer an estate promptly for the benefit of all the beneficiaries. If there is no good reason for delay then the courts can intervene.
35. In this case it would seem that the administrator – the Defendant – is not doing her job. There is a conflict of interest: she is living in the premises and is thereby obstructing the sale of the premises. For the sale to proceed, unless the Defendant purchases the Property, she must vacate the premises.
36. Having referred to all the circumstances placed before it, the Court is satisfied that the Defendant in her capacity as administrator has been given ample time to administer the Estate and, if she so wished, to secure financing to purchase the other beneficiaries' interest in the Estate.
37. Accordingly the Court orders that:
  - a) The Defendant shall provide vacant possession on or before the expiration of 45 days from the date of this order;
  - b) As directed by Justice Simmons in her 27 May 2011 judgment, the Defendant shall pay occupation rent at \$925 monthly (upper unit) and \$500 monthly (lower unit) as this Court adopts Justice Simmons' figures. This occupation rent is to be paid for the period from 30 November 2013 – the deadline for vacating the premises as under Justice Greaves' 12 September 2013 order – until the date the Defendant provides vacant possession;
  - c) The Defendant shall inform the Honourable Court and the Plaintiff's attorneys of the location of the title deeds to the Estate Property. If these deeds are being held as security for any loan, the Defendant shall provide the most recently available financial statement to confirm the level of indebtedness and the identity of the lender;
  - d) The Plaintiff's attorneys shall be at liberty to employ real estate professionals to market the Estate Property for sale, and be permitted to recoup any costs for same out of the sale proceeds thereof;
  - e) The Defendant shall be removed with immediate effect as Administratrix of the Estate Property and the Registrar be empowered to execute such documents as are necessary to market and sell the Estate Property, including but not limited to any sale and purchase agreement and/or conveyance thereof. In the event the Defendant is able to purchase the Property for the market value within the specified timeframe she is to be given first option to purchase.

Costs

38. The Plaintiff seeks cost on an indemnity basis as he submits that the Defendant is in breach of her duties as an administrator. Legal Aid has funded the Plaintiff's entire costs of this action.
39. Having referred to all the circumstances placed before it, the Court is satisfied that the costs – on a party and party basis – should be borne by the Estate.

Dated \_\_\_\_ day of February 2015

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Justice Norma Wade-Miller  
Puisne Judge