

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2023/0222

BETWEEN:

DEAN NICHOLAS

Claimant

And

- 1. ZEPHERINUS NORBERT**
- 2. BENJAMIN NORBERT**
- 3. CHRISAN NORBERT**
- 4. WILLIAM EDWIN**

Defendants

- 1. AGATHA NICHOLAS**
- 2. RENIE SHEILA NELSON**

Interested Parties

Appearances:

Mrs. Lydia Faisal of Counsel for Claimant

Mrs. Wauneen Louis-Harris of Counsel for first and third Defendants

Mr. Vern Gill of Counsel for second Defendant

Mr. Ramon Raveneau of Counsel for second Interested Party

2023: June 26, 27;
September 29

JUDGMENT

[1] **Innocent, J.:** The claimant is one of the administrators of the estate of Joseph Leo Nicholas (deceased) who died on 4th September 1999. The other administrators appointed by the said grant of Letters of Administration are Clifford Nicholas and Raymund Nicholas. There has been no vesting of the respective shares in the estate of Joseph Leo Nicholas in the persons beneficially entitled thereto.

[2] The defendants are the registered trustees for sale of certain immovable property (the 'Property'). The defendants became registered as trustees for sale pursuant

to Instrument Number 3386/2014 dated 22nd April 2014 and Instrument Number 3326 dated 4th September 2014.

- [3] The first named interested party is one of the last surviving of the original trustees for sale. She resides out of the jurisdiction and it would appear that she has resigned from her position as trustee for sale having considered herself incapable of fulfilling the duties of trustee for sale during her absence from the jurisdiction.
- [4] The second named interested party is Renie Sheila Nelson (nee Nicholas) who is one of the persons beneficially entitled to a share in the Property. She is represented in these proceedings by her daughters Jeannine Claire Nelson-Imoru and Nikola Jacqueline Margaret Nelson her duly appointed joint curators as appears by order of the Supreme Court of Judicature Jamaica dated 20th April 2011 wherein the said Renie Sheila Nelson (nee Nicholas) was declared incapable of managing herself or property and affairs by reason of mental disorder pursuant to section 29 of the Mental Health Act registered in Saint Lucia by order of the High Court dated 21st June 2011.
- [5] The claimant, being dissatisfied with the registration of the defendants as the current trustees for sale of the Property and their administration thereof has sought various orders and relief from the court. However, the court will first deal with the substantive issues regarding the substitution of the trustees for sale. The claimant seeks an order substituting Clifford Nicholas as Trustee for Sale in place of Chrisan Norbert and substituting himself as Trustee for Sale in place of William Edwin.
- [6] The claimant's dissatisfaction with the appointment of the existing trustees for sale is premised on the fact that the three of the current trustees for sale are siblings and represent the interest of only one party who is beneficially entitled to a share in the Property; whilst the fourth named defendant William Edwin bears no relation to any of the parties in the present proceedings and is not beneficially or otherwise entitled to any share in the Property by succession.

- [7] The claimant also took the view that whereas the existing trustees for sale, merely because they represent one estate is not objectionable per se, where there are no other persons qualified to act as trustees for sale, but in the present instance, there are other persons who are qualified to be so appointed.
- [8] In addition to all of the above, the claimant also asserted that the existing trustees for sale were appointed and substituted otherwise than in accordance with law. In the case of Zepherinus Norbert, and Benjamin Norbert, their appointment being contrary to Article 2171 of the Civil Code and section 62(2) of the Land Registration Act ('LRA'); and in the case of Renie Sheila Nelson contrary to Article 2172(9) of the Civil Code.
- [9] The following issues arise for determination in the present case:
- (1) whether the claimant is entitled to succeed in his claim for the removal and substitution of the existing trustees for sale;
 - (2) by implication of (1) above, whether the defendants obtained registration as trustees for sale otherwise than in accordance with law; and if answered in the negative, whether they should remain as trustees for sale notwithstanding the failure to adhere to the provisions of the Civil Code and the LRA;
 - (3) whether the defendants owed any fiduciary duty to the claimant in the manner in which he alleged;
 - (4) if (3) is answered in the affirmative, whether the defendants have breached that fiduciary duty; and
 - (5) whether the claimant has the capacity to trigger the court's jurisdiction to grant the relief claimed.
- [10] Title to the Property was originally registered to Arnold Nicholas and Maria Nicholas each with ½ share and formed part of their estate to be administered upon their death. Title to Arnold Nicholas' share of the Property passed on transmission to his lawful heirs upon his death namely: (1) Joseph Leo Nicholas; (2) Agatha Nicholas; (3) Electra Fletcher; (4) Noellina Norbert; and (5) Renie Sheila Nelson.

- [11] Joseph Leo Nelson died on 4th September 1999. Letters of Administration was granted to Dean Nicholas, Raymund Nicholas and Clifford Nicholas.
- [12] Electra Fletcher died on 28th December 2016 without spouse or issue capable of inheriting. It is unclear whether there has been any grant of representation in her estate.
- [13] Noenilla Norbert died on 25th July 2009. Letters of Administration was granted to Zepherinus Norbert.
- [14] Maria Nicholas died on 23rd August 2002. It appears that she left a Last Will and Testament which to the best of the court's knowledge has not been admitted to probate.

Appointment of trustees for sale

- [15] The List of Proprietors¹ for the immoveable properties registered as Block 1643B Parcel 8, Block 1641 Parcel 76, Block 2037C Parcel 104, and Block 1642B Parcels 98, 103, 159, 116 is as follows:
1. Raymund Benedict Leo Nicholas, Dean Sylvanus Francileo McKenzie Nicholas, and Clifford Winston Nicholas as Administrators of the Estate of Joseph Leo Nicholas 1/10 share
 2. Maria Nicholas ½ share
 3. Zepherinus Churchill Norbert as Administrator of the Estate of Noellina Norma Norbert (nee Nicholas) 1/10 share
 4. Renie Sheila Nelson 1/10 share
 5. Agatha Bertha Nicholas 1/10 share
 6. Electra Magdalena Fletcher 1/10 share

The List of Proprietors with respect to the immoveable property registered as Block 1641B Parcels 446, 445 reads as follows:

1. Maria Nicholas ½ share
2. Raymund Benedict Leo Nicholas, Dean Sylvanus Francileo McKenzie Nicholas, and Clifford Winston Nicholas as Administrators of the Estate of Joseph Leo Nicholas 1/10 share
3. Agatha Bertha Nicholas 1/10 share

¹ Instrument No. 538/2012

4. Electra Magdalena Fletcher 1/10 share
5. Renie Sheila Nicholas 1/10 share
6. Zepherinus Churchill Norbert as Administrator of the Estate of Noenilla Norma Norbert (nee Nicholas) 1/10 share

[16] On 21st March 2014, Zepherinus Norbert as personal representative of Noenilla Norma Norbert applied to the Registrar of Lands (the 'Registrar') to substitute Chrisan Norbert as Trustee for Sale in place of Maria Nicholas and Benjamin Norbert in place of Renie Sheila Nelson on the basis that the latter was ill and had resided out of Saint Lucia for the past 12 months.

[17] By virtue of Instrument No. 1480/2014 the Registrar (Ag.), purporting to act pursuant to section 97(1)(a) of the LRA and Article 2172 of the Civil Code ordered that Instrument No. 5308/2012 in the proprietorship section of the registers for the Property which records Maria Nicholas and Renie Nicholas as Trustees for Sale be deleted and enter in the proprietorship section of the register the names CHRISAN NORBERT and BENJAMIN NORBERT as Trustees for Sale.

[18] On 4th September 2014, Chrisan Norbert and Benjamin Norbert as continuing Trustees for Sale applied to the Registrar for the rectification of the Land Registers to appoint Zepherinus Churchill Norbert and William Edwin as substitute Trustees for Sale.

[19] By virtue of Instrument No. 3326/2014 dated 4th September, the Registrar purportedly in the exercise of her powers under section 97(1) of the LRA and Article 2172 of the Civil Code ordered that the current entry in the Land Register for the subject Property be deleted and entered in the proprietorship section of the Land Registers CHRISAN NORBERT, BENJAMIN NORBERT, ZEPHERINUS NORBERT and WILLIAM EDWIN as substitute Trustees for Sale.

[20] Article 2171 of the Civil Code limits the number of persons who can be trustees for sale. Article 2171(1) provides that:

“Where, ... there are more than 4 trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to 4 or less) be capable of being appointed until the

number is reduced to less than 4, and thereafter the number shall not be increased beyond 4.”

- [21] Article 2171(2) prescribes the manner in which trustees for sale shall be appointed when the number exceeds 4 and specifically provides that:

“In the case of dispositions on trust for sale of land made or coming into operation after the commencement of this Part—

(a) the number of trustees thereof shall not in any case exceed 4, and where more than 4 persons are named as such trustees, the 4 first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(b) the number of the trustees shall not be increased beyond 4.”

- [22] The foregoing provision of the Civil Code is fortified by the provisions of Section 62(2) of the LRA which provides that registration of more than one proprietor when any land is conveyed, transferred, devised, or devolves to 4 or more persons the first 4 named shall hold the property on trust for sale.

- [23] It appears that the application made 21st March 2014 was premised on the provisions of Article 2172(1); whereas the second application dated 4th September 2014 was premised on the provisions of Article 2172(1) (b) which makes provision for the power of appointing new or additional trustees and provides that:

“(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of Saint Lucia for more than 12 months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or her, or refuses or is unfit to act therein, or is incapable of acting there in, or is a minor, then subject to the restrictions imposed by this Part on the number of trustees—

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee, may, by writing, appoint one or more other persons (whether or not being the person exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Saint Lucia, desiring to be discharged, refusing, or being unfit or being incapable, or being a minor, as aforesaid.”

- [24] The case of the second interested party interrogates the application of the provisions of Article 2172(9) of the Civil Code which provides that:

“Where a person of unsound mind, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his or her place shall be made by the continuing trustees or trustee, under this article, unless leave has been given by the Court to make the appointment.”

It appears that such leave must be obtained pursuant to Article 2178 of the Civil Code.

[25] In the present case, the question that arises is whether the applications made by the defendants for the appointment of new and substitute trustees complied with the relevant provisions of the Civil Code. The court answers this question in the negative. The next question is what is the effect of such compliance with the Civil Code and section 62(2) of the LRA? It follows by implication, that if the first question having been answered in the negative what is the appropriate order that the court ought to make in the circumstances.

[26] There appears to have been a vehement challenge to the standing of Zepherinus Norbert to make the application to appoint substitute trustees. Zepherinus Norbert's application was made pursuant to Article 2172(1) (a). However, the application could not have in law been premised on the provisions of that article. Instead, the provisions of Article 2172(1) (b) would have been the appropriate article to apply in the circumstances. This could have been the only rational basis upon which the Registrar could have granted the application.

[27] His application was made pursuant to 2157 of the Civil Code which implies that Zepherinus Norbert was purportedly exercising his power at the time as the personal representative of the sole trustee, or of the last surviving or continuing trustee. Article 2157 of the Civil Code deals with the devolution of powers or trusts; and provides that where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.² The said article also provides that until the appointment of new trustees the personal representatives or representative for the

² Article 2157(1)

time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.³

- [28] The facts of the present case show that this was not in fact the circumstances that existed at the time that Zepherinus Norbert made the application. This is clearly evident from the list of proprietors for the property. Therefore, it is beyond dispute that at the time that Zepherinus Norbert made the application he was not the personal representative of the last surviving or last surviving continuing trustee.
- [29] At the time that the application was made Maria Nicholas and Joseph Leo Nicholas were deceased but their succession devolved upon the claimant and others who were registered as trustees for sale.
- [30] The application was supported by affidavits sworn by both Electra Magdalena Fletcher and Agatha Bertha Nicholas, both trustees for sale and who concurred with the appointments and sought to be removed as trustees for sale as they no longer resided in Saint Lucia and were incapable of performing their duties as trustees for sale.
- [31] The position as it relates to Renie Sheila Nelson is captured by the provisions of Articles 2172(1) and 2172(9) of the Civil Code. It is not in dispute that Renie Sheila Nelson remained out of Saint Lucia for a period in excess of 12 months. However, the difficulty arises in relation to Article 2172(9). It does not appear that the fact of Renie Sheila Nelson being declared of unsound mind was brought to the attention of the Registrar at the time that the application was made. It may be recalled that the order declaring Renie Sheila Nelson of unsound mind was registered and had effect as an order of the court in Saint Lucia.

³ Article 2157(2)

- [32] Therefore, it appears that the Registrar in making the order did not avert his mind to the provisions of Article 2172(9) purely because the applicant did not place any evidence of this fact before the Registrar; and the Registrar simply relied on the fact that “Renie Sheila Nelson is ill, has not resided in Saint Lucia for over 12 months and not capable of performing her duties as a trustee for sale.
- [33] Therefore, in keeping with the combined effect of the provisions of Articles 2172(9) and 2178(1), the Registrar could not have acceded to the application to substitute Renie Sheila Nelson as a trustee for sale on the basis that she was of unsound mind. However, it is arguable that the Registrar may have made the decision based simply on the fact that Renie Sheila Nelson resided out of the jurisdiction for a period in excess of 12 months.
- [34] However, in the court’s view, this irregularity does not lead ineluctably to the conclusion that Renie Sheila Nelson ought to be appointed as a substitute trustee in the present proceedings. In fact, she is disqualified from being a trustee by virtue of the operation of Articles 2171 and 2172(9). Also, the court in this instance is minded to apply the power that it possesses pursuant to Article 2178 in respect of Renie Sheila Nelson. Renie Sheila Nelson continues to reside outside of the jurisdiction and is therefore incapable of performing her duties as trustee for sale.
- [35] In any event, the mere fact of the appointment of curators to manage her person and affairs is not sufficient to warrant their appointment as trustees for sale in substitution for Renie Sheila Nelson. In the circumstances, the court declines to make any order appointing them trustees for sale.
- [36] Therefore, by virtue of the application made for the appointment of substitute trustees made by Zepherinus Norbert, the result ought to have been that the trustees for sale ought to have been recorded in keeping with the provisions of Article 2171(2) and section 62(2) of the Civil Code. Obviously, it follows that the trustees for sale should have been recorded as Raymund Benedict Leo Nicholas, Dean Sylvanus Francileo Mckenzie Nicholas, Clifford Nicholas as Administrators of the Estate of Joseph Leo Nicholas, and Zepherinus Churchill Norbert.

- [37] However, it appeared that Zepherinus Churchill Norbert at the time of the application resided out of Saint Lucia for a period in excess of 12 months and accordingly was disqualified from being a trustee for sale.
- [38] The registration of Benjamin Norbert as a trustee for sale also poses a problem in that Benjamin Norbert at the material time had resided out of Saint Lucia for a period of 12 months and was therefore incapable of fulfilling his duties as trustee. It does not appear that this fact was disclosed to the Registrar. In light of the evidence presented at the trial, it appears that both Zepherinus Norbert and Benjamin Norbert still reside outside of the jurisdiction.
- [39] In a subsequent application made by Chrisan Norbert for the substitution of trustees, purportedly made pursuant to her power of appointment as continuing trustee pursuant to Article 2157 and Article 2172(1) (a) sought to have Zepherinus Churchill Norbert and William Edwin appointed as trustees for sale. This application was subsequently granted by the Registrar; and the trustees for sale were recorded as (1) Chrisan Norbert, (2) Zepherinus Norbert, (3) Benjamin Norbert and (4) William Edwin.
- [40] There appeared to be no evidence presented to the Registrar that the administrators of the estate of Joseph Leo Nicholas, or any of them were unwilling or unable to act as trustees. Additionally, William Edwin did not appear to be beneficially or otherwise entitled to any interest in the subject property. Therefore, assuming that the circumstances existing gave rise to expediency, then an application ought to have been made to the court pursuant to Article 2178(1).
- [41] In the premises, the court is of the view that Zepherinus Churchill Norbert, Benjamin Norbert, and William Edwin ought not to have been registered as trustees for sale, having applied the relevant provisions of the Civil Code.
- [42] The next question that the court must consider is whether the court ought to apply the powers conferred by Article 2178(1) of the Civil Code and appoint new trustees in substitution for the existing trustees or any of the existing trustees.

Court's power to appoint new trustees

- [43] Article 2178(1) of the Civil Code confers the power on the Court to appoint new trustees in certain specified circumstances, namely: whenever it is expedient to appoint a new or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing any trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a person of unsound mind, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

The partition claim

- [44] Section 82 LRA provides that the survivor of Trustees whenever 2 or more proprietors are registered as trustees, and the survivor of such proprietors would not be entitled to exercise alone the powers which are vested in them, the Registrar shall enter a restriction to that effect. In the present case, the Registrar gave effect to this provision as appears by the restriction on the Land Registers for the subject parcels namely, Instrument No. 3386/2012 which reads:

“Restriction: Pending the appointment of Trustees for Sale to give effect to the partition order – 1986/0129.”

- [45] It is therefore certain that the Registrar was aware of the ongoing partition action and that there was the need to appoint substitute trustees for sale. Therefore, it would appear that the purpose for which the defendants would have sought to become registered as trustees for sale was to deal with the partition action, possible sale by licitation and the compulsory acquisition of part of the property.
- [46] Counsel for the respective parties have raised the issue of whether the current proceedings affect the ongoing partition claim. The court thinks that it is appropriate to deal with this aspect of the case at this juncture.

- [47] In the partition action, the parties were the original trustees for sale of the property. The claimants were (1) Sheila Nelson, (2) Maria Nicholas, (3) Electra Fletcher, (4) Norma Norbert and (5) Bertha Bowman. The defendant was Joseph Leo Nicholas. The property which is the subject matter of the partition action had already been subdivided and mutated by the time that the present proceedings were filed, and the trustees for sale substituted in the manner herein appearing.
- [48] The following uncontested facts are relevant to the present issue. It appears that all the parties to the partition action have died save and except Renie Sheila Nelson who the court has already found incapable of acting. Maria Nicholas died on 23rd August 2022 leaving a last will and testament which has not been probated and therefore there is no representation with respect to her estate. Electra Fletcher died on 28th December 2016 without spouse or lawful issue. Noenilla Norbert died on 25th July 2009 and Zepherinus Norbert became administrator of her estate. Joseph Norbert died on 4th September 1999 and administration of his estate was granted to the claimant and his other siblings. Agatha Bertha Nicholas also known as Bertha Bowman (nee Nicholas) appears to be one of the only surviving of the original trustees for sale but resides outside of the jurisdiction.
- [49] By an application filed on 14th November 2022, Zepherinus Norbert applied to the court for an order that (1) Renie Sheila Nelson be represented by her Curators; (2) Zepherinus Norbert be appointed a representative party in place of Maria Nicholas; (3) Zepherinus Norbert be appointed a representative party in place of Electra Fletcher Nicholas; (4) Zepherinus Norbert be appointed a representative party to Noenilla Norbert and (5) that Dean Nicholas and Clifford Nicholas be appointed representative parties to Joseph Leo Nicholas.
- [50] This application came on for hearing before the court on 14th November 2022. The order was granted by the court on 31st May 2023. However, it is the court's considered view that the order so made only affects the representation of the original parties name in the partition claim. In no way can this order affect the issues to be determined in the present substantive proceedings.

- [51] It may very well be the case that the parties intend to continue with the partition action bearing in mind that there has been a substantial change of circumstances since the last order appointing a surveyor and ordering the partition to be conducted in accordance with a plan of survey which more likely than not is no longer feasible or efficacious given the significant lapse of time. In any event, the co-partitioners are no longer the same, there are now more co-partitioners than before. The parties may very well opt to discontinue those proceedings and proceed with an entirely new partition action. Otherwise, the parties may find it desirable to add parties to the existing partition claim. Further to what has already been stated on this subject, the court can say no more.
- [52] Clearly, the partition claim does not affect the present proceedings. The application for the substitution of representative parties in place of the deceased co-partitioners is a procedural matter whereas, the present claim concerns the appointment of trustees for sale in a case where four trustees for sale need to be appointed where their number has been reduced to less than four where property is held in undivided ownership.
- [53] The court had great difficulty appreciating the concerns that the parties seemed to have expressed regarding their entitlement to the trust property. The fact that trustees for sale are appointed does not in any way diminish the respective shares or beneficial interest that the parties have in the trust property by way of inheritance or succession. The trustees for sale are appointed to act in the event that there is a sale or other disposition of the land held in undivided ownership. This is separate and apart from representation and the vesting and distribution of the estate in those beneficially entitled.
- [54] Therefore, the only duty that the trustees for sale owe to the other co-proprietors who are beneficially entitled to a proprietary interest in trust property is with respect to the proceeds of sale or disposition of the property which they hold on a trust for sale. This is separate and apart from the administration of the estate. Hence, where property is held on a trust for sale, the only interest that a person

beneficially entitled thereto has is in the proceeds of sale; and to that extent, the trustees for sale owe a fiduciary duty to those beneficially entitled in the proceeds of sale.

- [55] In the premises, it would be unwise to conflate the partition claim with the issues arising in the present proceedings.

Breach of fiduciary duty

- [56] The complaint made by the claimant with respect to a breach of fiduciary duty and from whom an account is required is in respect of those persons who are presently registered as trustees for sale. The two complaints made by the claimant arise within the context of the compulsory acquisition of a part of the property and the lease of certain lands comprising the trust property.

- [57] The claimant complained that there have been, what he described as, instances of impropriety on the part of the trustees for sale as it relates to the properties held on trust for sale. He has particularised these “improprieties” in the following manner.

- [58] Specifically, he alluded to what he described as the defendants’ failure to render an account of the collection of rental income from a number of tenants who occupy some of the properties held on trust for sale.

- [59] The claimant also contended that the defendants as trustees for sale of the subject properties, but not being trustees for sale of Block 1641B Parcel 486 which was dismembered from the original Block 1641B Parcel 446 which was compulsorily acquired, made false and misleading statements to receive the compensation from the Government of Saint Lucia (‘GOSL’) without any consultation with him with respect to their intentions.

- [60] The defendants have denied any impropriety on their part. In fact, it appears that some of the property is being occupied by persons who are and have been tenants. However, the defendants contended that the tenants who now occupy the

property are not paying rent and that there are proceedings before the court regarding these tenancies and persons in unlawful occupation thereof.

[61] With respect to the matter of the compulsory acquisition, the defendants contended that in all the circumstances of the case, they acted in the best interest of the trust estate by obtaining the best value possible on the said acquisition by the GOSL.

[62] Ultimately, the defendants took the view that the claimant had failed to establish or show demonstrably that they had engaged in any impropriety or any impropriety as alleged by the claimant; and accordingly are not in breach of their fiduciary duty as trustees for sale and have at all times acted and conducted themselves in a manner that was in keeping with the best interest of the estate. In the premises, they contended that the claimant has not made out a case for their removal on the ground of breach of fiduciary duty as trustees for sale.

[63] A portion of the property was acquired by the GOSL pursuant to the Land Acquisition Act in January 2014. A Board of Assessment was convened to determine the quantum of compensation payable to the proprietors of the said property. The third named defendant, Chrisan Norbert represented the proprietors at the Board of Assessment in her capacity as trustee for sale. The Board of Assessment delivered its decision on 22nd June 2017. The Board of Assessment awarded compensation in the sum of \$1,650,000.00.

[64] The matter of the land acquisition came before the court in Claim No. SLUHCV2018/0317 in an action brought by Dean Nicholas and Clifford Nicholas against the Attorney General. The court in this instance was not furnished with the details of this claim. However, exhibited to the affidavit of Chrisan Norbert was a memorandum from the Attorney General's Chambers to the Registrar of the High Court dated 23rd January 2019, evidencing the payment of the sum of \$1,650,000.00 with interest at 6% from January 2013 into court. It also appeared from this memorandum that by Order of Justice Godfrey Smith dated 17th October 2018, that the court shall pay the legally entitled owners of the compulsorily

acquired property the sum due to them as per their proportionate share in the said parcel upon application being made to the court.⁴ Besides what is exhibited to the affidavit of Chrisan Norbert, no further details of proceedings were provided to the court.

- [65] It is clear that when the property was compulsorily acquired none of the parties were appointed as trustees for sale. The substitute trustees were appointed in 2014. It may readily be inferred that what precipitated the application for the appointment of substitute trustees may very well have been the need to appoint persons to treat with the Chief Surveyor for the purpose of obtaining compensation for the acquired land.
- [66] The claimant in any event admitted that the estate of Joseph Leo Nicholas received their rightful share of the compensation paid out by the GOSL. He admitted that Chrisan Norbert also participated along with him in discussions with the Chief Surveyor. He also admitted that Chrisan Norbert made a significant contribution towards obtaining the award made on the compulsory acquisition.
- [67] In the present case, it has not been shown by the available evidence that the trustees for sale in accepting the price paid on the compulsory acquisition, failed to obtain the best possible advantage for the beneficiaries under the trust for sale. In the court's view, Chrisan Norbert gave fair and impartial attention to the interest of all the parties concerned. In all the circumstances of the case, the court is satisfied that the trustees for sale had obtained the best price available for the trust property at the time of the compulsory acquisition. In the court's estimation, the conduct of the trustees for sale cannot be impeached. In the court's opinion, they acted in a cautioned and bona fide way. Whether there might have been disagreement or an honest difference of opinion matters not. This is not to say that trustees for sale do not have an overriding duty to obtain the best price where they can for the beneficiaries.

⁴ Exhibit CN6

- [68] The court having considered the evidence of the parties and the submissions of counsel, is of the considered view that the claimant has not provided any or any cogent evidence to substantiate any breach of fiduciary duty on the part of the defendants. In the court's view, mere disagreement with the manner in which the affairs of the estate have been conducted or undertaken by the defendants is insufficient by itself to warrant their removal. In the same vein, being disgruntled or being in disagreement with the persons appointed as trustees for sale cannot in and of itself warrant the removal or substitution of the present trustees for sale. In the court's view, what is relevant to the present proceedings is to see that the appropriate persons are appointed trustees for sale in accordance with law.
- [69] In the premises, the court declines to make any finding that there has been a breach by the present trustees for sale or any or any fiduciary duty owed to the claimant or any other persons beneficially entitled to the property.
- [70] In law, a trustee for sale is under a duty to account. The claimant's complaint appeared to be with respect to the trustees' failure to manage, maintain, and preserve the estate as it relates to the rental income from certain tenancies involving the trust property. Having reviewed the evidence it appears that portions of the trust property have been rented out by several of the beneficiaries of the trust estate even prior to the appointment of the defendants as trustees for sale.
- [71] Overall, the tenancy arrangements appear to have been undertaken in an ad hoc manner and for all intents and purposes do not seem capable of being properly managed. In fact, several of the tenancies are the subject of court proceedings; and in some instances, several of the tenants have claimed title by prescription. In addition, it does not appear that the rental for these tenancies is being collected.
- [72] The court also discerned that there is no proper accounting for the collection of rent from these tenancies or a complete list of the tenants who occupy the trust property. The trustees for sale were under a duty to give information to the beneficiaries pertaining to the condition of the trust property, the number of

tenancies and whether there was any receipt of income from such tenancies. The beneficiaries are required to have detailed information about the trust property.

[73] The evidence presented to the court in these proceedings in respect of any income derived from the trust property may properly be regarded as sketchy. Therefore, the rental income, if any, derived from the trust property cannot readily be determined. In the circumstances, the court will order that the defendants render an account of their management and dealings with the trust property.

[74] Before concluding, it is necessary to deal with a procedural point raised by the defendants in the present proceedings. The defendants adopted the position that the claimant was not competent to commence the present proceedings as he lacked the necessary standing; and accordingly, the court's jurisdiction to make any of the orders sought by the claimant was not properly triggered if at all.

[75] Mrs. Harris submitted that the claimant was not competent to bring the proceedings on behalf of the estate of Joseph Leo Nicholas ostensibly for the reasons that he has not obtained an extension of time to administer the succession and also because he was purporting to act solely in the absence of the other named administrators of that estate. The court finds no merit in this argument. The claimant is a person beneficially entitled or otherwise interested in the trust property. Article 2194 of the Civil Code provides that a person may apply for an order for the appointment of a new trustee or concerning any interest in land subject to a trust, where that person is beneficially interested in the land.

[76] The practical importance of this point is in relation to the relief sought by the claimant in respect of the removal and substitution of trustees for sale, and breach of fiduciary duty on the part of the trustees for sale. It appears that the defendants' submission on this point was that the claimant was only an assignee of part of the beneficial interest held by Joseph Leo Nicholas or the trust property, and that any claim on his part ought to fail in limine; and that in any event, the claimant has brought the action without the intervention of the other beneficiaries.

- [77] The defendants appeared to be suggesting that the claimant, in bringing the claim in his personal capacity and not as administrator and/or beneficiary under the estate of Joseph Leo Nicholas, could not maintain the claim against the trustees for sale. It is not disputed that the claimant is the administrator of the estate and one of the beneficiaries under the estate of Joseph Leo Nicholas.
- [78] In the court's view, the term beneficiary is wide enough to include the personal representative of the estate of a deceased beneficiary where the estate is entitled to receive the deceased beneficiary's share of the proceeds of the trust property. Therefore, it cannot be said that the claimant's entitlement to claim the share to which he is entitled is proscribed. Therefore, the claimant was entitled to bring the present proceedings as administrator on the grounds that the trustees for sale were also trustees for those he represented as part of the estate of Joseph Leo Nicholas on the grounds of intestacy.
- [79] The court has concluded that the claimant holds a proprietary right on behalf of himself and the other beneficiaries in the estate of the deceased beneficiary Joseph Leo Nicholas. Therefore, he is entitled to bring the present claim.
- [80] Having considered all of the evidence presented the court has arrived at the following conclusions regarding the appointment of trustees for sale.
- [81] It seems expedient for no less a reason than the need to complete the partition of the property, or more importantly to embark on a sale by licitation, that the appropriate trustees for sale be appointed. The present partition action is in abeyance. The court has observed that none of the parties have taken the appropriate steps to complete the administration of the estates of all of the original trustees for sale. There simply has been no vesting of the appropriate shares in the persons beneficially entitled thereto. Additionally, there has been no grant taken out with respect to the estate of Maria Nicholas. Such action would clearly augment the number of persons who are capable of being appointed trustees for sale.

- [82] With respect to the appointment of the existing trustees for sale, it would appear that the Registrar fell into error in considering both applications for the appointment of substitute trustees for sale. The said appointments were made otherwise than in accordance with the provisions of Article 2171(2) of the Civil Code and section 62(2) of the LRA. Therefore, these appointments cannot stand.
- [83] It also seems expedient to appoint new trustees in substitution for the existing trustees in light of the irregularities which obtained in the appointment of the existing trustees for sale based on a misapplication of the law as it relates to the appointment of trustees for sale under the Civil Code and the LRA.
- [84] The court has noted that the first named interested party Agatha Bertha Nicholas also known as Bertha Bowman (nee Nicholas) was not represented by counsel in these proceedings and did not take an active part in the same. In any event, it would appear that Ms. Bowman would have been competent to act as trustee for sale.
- [85] In the circumstances, and for the reasons already outlined in this judgment, the court makes the following orders:
1. That Dean Nicholas, Raymund Nicholas and Clifford Nicholas be appointed trustees for sale in place of Zepherinus Norbert, William Edwin and Benjamin Norbert.
 2. Crisan Norbert shall continue to act as trustee for sale.
 3. That the previous trustees for sale shall render an account in respect of the trust property that is occupied by tenants; and setting out the rental income that is earned and outstanding from the said tenancies
 4. Whereas Article 2196 confers on the court the power to charge costs on trust property; and provides that the Court may order the costs and expenses of and incidental to any application for an order appointing a new trustee, or of and incidental to any such order, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may

seem just. In this instance, the court is minded to treat the claim in accordance with CPR 65.5 and therefore makes an award of prescribed costs against the defendants. The court makes no costs order with respect to the interested parties. However, in the court's considered view, the claimant is not entitled to recover the full amount of the prescribed costs. The court has determined that the claimant acted unreasonably in pursuing a claim for breach of fiduciary duty against the defendants in their capacity as trustees for sale which was not well founded and or not supported by the evidence. Therefore, costs is awarded to the claimant in the amount of 1/3 of the prescribed costs which he ought to have been entitled to in the sum of \$2,500.00.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar