

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2021/0127

BETWEEN:

OSWALD SITNEY
(As Personal Representative of the Estate of Thomas Bristol Deceased)
Claimant

and

FRANCIS SITNEY
Defendant

Before:

The Hon. Mde. Justice Agnes Actie High Court Judge

Appearances:

Mr. Francis Paul for the Claimant
Ms. Johanan L. Lafeuillee for the Defendant

2023: March 29th
April 4th

JUDGMENT

- [1] **ACTIE, J.:** This claim is one of the numerous familial land disputes in this jurisdiction. The claimant and the defendant are brothers and sons of the late Thomas Bristol (hereafter referred to as “the deceased”). Thomas Bristol died testate on 22nd February 2020 naming the claimant as executor.
- [2] The claimant, as the personal representative of the deceased estate, filed a fixed date claim form with statement of claim on 26th March 2021 seeking the following reliefs against the defendant namely:

- (1) An order for vacant possession of land situate at the Carenage, St. George;
 - (2) An account of all monies outstanding and/or received by the defendant in respect of the rental of the said land from the business operated under the name "Sweet Mango";
 - (3) A declaration that the defendant is liable to make good all sums of monies received by him from the rental of the said property;
 - (4) An order that the defendant do pay to the claimant such sum as may be found due upon the taking of the said account;
 - (5) Mesne profits at the rate of \$2,700.00 per month from in or about July 2015 to November or December 2017, and from on or before 23rd August 2019 until possession of the said property is delivered up;
 - (6) Damages, such further or other relief and costs.
- [3] The claimant states that by Power of Attorney dated 19th January 2012, the deceased appointed the claimant and the defendant as his lawful attorneys and gave them power to take possession of all his property of every kind to manage, turn to account, mortgage, charge, sell and rent.
- [4] The claimant avers that in or about July 2015, the defendant without the consent of the deceased and the claimant, entered upon the property situate on the Carenage and commenced operating a restaurant and bar named "Choko's Sports Bar and Grill" and "Choko's Entertainment Center", and created a paid parking lot on the property.
- [5] The claimant avers that the defendant in breach of clause 11 of the power of attorney operated the business solely for his benefit and failed to pay rent or any sums of money whatsoever to the deceased or to the claimant as one of the attorneys of the deceased.
- [6] The claimant in a letter dated June 2016 wrote to the defendant reminding him of their duties as attorneys of the deceased under the power of attorney and that he was unlawfully occupying the said property for his personal benefit.

- [7] In or about November or December 2017, the defendant ceased the operation of the aforementioned business on the Carenage property and instead leased the said property to an individual who continued with the operation of a restaurant and bar under the new name "Sweet Mango". The claimant contends that the defendant collected the proceeds from the rental of the said property but failed to deliver the same to the claimant as co-attorney for and on behalf of the deceased.
- [8] Between the period May and July 2019, the property was vacated, and the business "Sweet Mango" ceased operation. On Friday 23rd August 2019, the claimant asserts that the defendant re-entered onto the said property and recommenced the operation of "Choko's Sports Bar and Grill" and "Choko's Entertainment Center". The defendant again failed to pay any monies whatsoever to the claimant or to the deceased.
- [9] The deceased died on 22nd February 2020 and by his Will dated 28th January 2003, bequeathed all his properties and assets to the Oswald Orlando Sitney, Dwane Thomas Bristol, Glenroy Cunningham and Ann-Marie Smith. The defendant was not named as a beneficiary under the deceased will.
- [10] The claimant asserts that the defendant continued his unlawful occupation of the Carenage property and continues to retain the rent and profits without paying any monies to the estate of the deceased although no devise was made to the defendant.
- [11] By letter dated 9th October 2020, the claimant's attorney-at-law wrote to the defendant demanding that he desist from continuing acts of trespass and to vacate the said property. The claimant asserts that the defendant blatantly ignored the letter and continued the operation of his business.
- [12] The claimant argues that by reason of the acts of the defendant, the estate of the deceased and the devisees in the Will of the deceased, including the claimant in his personal capacity, have been deprived of the use of the property and earnings therefrom.

Defendant's Pleaded defence

- [13] The defendant in his pleaded defence avers that any and all transactions were done in the best interest of and under the instructions of the deceased.
- [14] The defendant pleaded that the deceased always said he, the defendant, was the one with the business head in the family and could do anything with the property on the carenage. He pleaded that he drafted a rental agreement to rent the premises the subject of these proceedings, but the deceased refused to sign. However, the defendant pleaded that the deceased gave him his full consent to use the property as he sees fit.
- [15] The defendant pleaded that he was acting upon the deceased's consent and authorization when he created the business formally known as "Choko's Sports Bar & Grill" and "Choko's Entertainment Center".
- [16] The defendant's defence admits that he and the claimant were granted power of attorney over their father's affairs, who was at the time ailing rapidly. That he together with the claimant ran the family business formerly owned by the deceased.
- [17] The defendant pleaded that he has been occupying and paying property tax for the said property with the consent of the deceased, long before his death, from 2002 to 2020 totalling \$93,386.44.
- [18] The defendant further pleaded that prior to the deceased's death he paid over \$800,000.00 in taxes and construction work towards the refurbishing and maintenance of the property on the Carenage. The defendant pleaded that he paid all judgments against the deceased's property in the sum of \$115,650.00 as well as all rates and tax penalties on the subject property.

- [19] The defendant pleaded that he spent \$8,993.00 carrying out the cleaning and clearing of the property on the Carenage caused by Hurricanes Ivan and Emily, and \$37,852.00 to maintain the said property. The defendant also pleaded that he spent \$487,457.62 towards the refurbishing and maintenance of the property known as "Choko's Sports Bar and Grill".
- [20] The defendant pleaded that his refurbishing and maintaining of the said property evinces his intention to acquire an interest in the property. He asserts that the claimant at all material times had knowledge of his actions and did not restrain him, nor asked him to discontinue the said acts or make any financial contributions towards the expenses. The defendant pleaded that the claimant by his conduct has encouraged the defendant to expend money and labour on the said property to his detriment.
- [21] The defendant's defence contained a counterclaim seeking, among other things:
- (1) A declaration that the Carenage property is held by the claimant on resulting trust for the defendant absolutely;
 - (2) A declaration that by virtue of the claimant's conduct and to the encouragement of the defendant's deceased father, the defendant is entitled to a beneficial share and/or interest therein as a matter of constructive and/or resulting trust, proprietary estoppel and/or unjust enrichment;
 - (3) An order that the claimant do repay to the defendant such sum as found to have been paid or spent by the defendant towards the payment of judgments, repairs, refurbishing and maintenance of the said property together with 6% per annum and pursuant to Section 27 of the West Indies Associated States Supreme Court Act;
 - (4) A declaration that the property which is the subject matter of these proceedings purportedly devised to the claimant and his other siblings with the exception of the defendant is held by them upon trust for the benefit of the defendant;
 - (5) An injunction restraining the claimant from vesting any properties belonging to the estate of the deceased;
 - (6) Such further relief and Costs.

Preliminary Issue

- [22] The matter came on for trial on 29th March 2023. Ms. Johanan Lafeuillee, counsel on record for the defendant filed an application to vacate the trial date.
- [23] The court notes an email dated 24th March 2023 from counsel to the Registrar indicating her intention to lodge an application to vacate the trial scheduled for the 29th March 2023. Notwithstanding, the application to vacate the trial date was filed on 27th March 2023 at 2:39 pm. Counsel made reference to written communication received from Dr. Xiaoping Shao, requesting that the defendant be excused from the upcoming court matter as he is not currently able to tolerate the related stress. The court, having regard to the history of the matter and the nature, refused the application to vacate the trial date.
- [24] The defendant was absent at the trial. The court stood down the matter to allow counsel to make contact with her client to join the proceedings virtually which she said she was unable to do. Parties are to understand that an application to vary a trial date is discretionary and not as of right as the court may refuse the application. An application to vary the dates in circumstances set out in **Part 27.8** must be made in advance of the date. The requirement for the application to be made in advance of the date is in keeping with overriding objective to enable the court to utilize the date to schedule other matters if the application to vacate the date is granted. The last minute application to vacate the case management date under Part 27 .8 should only be entertained in a case of sudden illness, death, or extreme emergency.
- [25] Counsel for the defendant was given an opportunity to cross examine the claimant and the claimant's witnesses which she declined. Accordingly, the matter is determined on the claimant's evidence.

Legal Analysis

- [26] The power of attorney fails to specify whether the claimant and defendant were to act jointly or severally, thus it is presumed that the claimant and the defendant as attorneys for the deceased were to act jointly¹. The claimant asserts that prior to the operation of this business, the deceased resided on the property. On 21st January 2013, the claimant states that the deceased was diagnosed with senile dementia and mild arterial hypertension and was placed in the Saint Martin Home for the Aged at Crochu, St. Andrew.
- [27] The claimant states that the deceased lacked the mental capacity to give his consent to the defendant to create the business. The claimant avers that the defendant operated the businesses solely for his benefit, and failed to pay rent or any sum of monies whatsoever to the deceased or to the claimant.

Whether the defendant expended sums of money on the Carenage Property

- [28] The defendant alleged in pleadings that he spent the sums of \$487,457.62 towards refurbishment and maintenance of the said property; \$37,852.00 to maintain the property, and \$8,993.00 carrying out cleaning and clearing of the said property caused by Hurricane Ivan and Emily. The defendant further averred that he paid over \$800,000.00 in taxes and construction work towards the refurbishing and maintenance of the property on the Carenage, St. George's, and \$115,650.00 on all judgments against the deceased's property as well as rates and tax penalties on the subject property.
- [29] The defendant's evidence consists of a mediation agreement in Claim No. GDAHCV2006/0222 in which \$19,000.00 was agreed to be paid by the defendant on behalf of the deceased in settlement of Claims Nos. GDAHCV2001/0641 and GDAHCV2006/0222. Evidence is also in the defendant's case of receipts of MoneyGram transfers to attorney-at-law for the deceased in the aforementioned matters in the sums of \$3,991.98, \$3,047.21, \$3,388.95, \$691.94, and \$1,053.86. It

¹ Encyclopaedia of Forms and Precedents Vol 31(2)(A) Para 41

is also the evidence that a number of tax receipts, as well as a MoneyGram receipt of transfer from the defendant to Joan Christopher in the amount of \$1,744.31.

[30] There is nothing before the court which demonstrates that the claims for which the mediation agreement was entered into concerned the disputed property, nor that the sums expended by the defendant were his money as opposed to money of the deceased. The pleaded defence also fails to explain the MoneyGram receipt of transfer from the defendant to Joan Christopher in the amount of \$1,744.31.

[31] The claimant contends that any monies spent by the defendant on the disputed property were made to accommodate the defendant's business. The part of the building on the property used by the defendant for his business was previously used by the deceased as his residence, necessitating the defendant to refurbish same. The monies were therefore spent solely for the benefit of the defendant to acquire the said property and not to benefit the deceased and/or the estate of the deceased.

[32] Furthermore, the claimant provides the court with evidence of one Lashley Charles who evinced that he was hired by the claimant to conduct cleaning on the disputed property.

[33] The claimant admits however to the defendant's payment of taxes on the disputed property but contests the amount claimed by the defendant. The claimant said that both himself and the defendant paid taxes for the said property. It was therefore for the defendant to prove on account the amount expended on property taxes for the disputed property following the death of the deceased, and that prior to the death of the deceased, that the monies expended in the payment of taxes on the Carenage property were that of the defendant as opposed to the deceased.

Whether the Carenage Property or a portion thereof is Subject to a Constructive Trust in Favour of the defendant

- [34] The principle arising out of the case of **Grant v Edwards**² is that where the legal estate is vested in one person and another claims a beneficial interest, in order to establish said beneficial interest, the person claiming to show that it would be inequitable for the legal owner to claim sole beneficial ownership must demonstrate that there was a common intention that both were to have a beneficial interest, and that the one claiming has acted to his detriment on the basis of that common intention.
- [35] It is well established law that in the absence of express words evidencing the requisite common intention between two parties, the court may infer the requisite intention from the conduct of the parties³.
- [36] In **Lloyds Bank Plc v Rosset & Anr**⁴, the House of Lords held that the fundamental question to be resolved was whether there had been at any time prior to the acquisition of the property, or exceptionally at some later date, any agreement, arrangement or understanding reached between the parties that the property was to be shared, beneficially coupled with detrimental action or alteration of position on the part of the person claiming the beneficial interest.
- [37] Where there is no evidence to support a finding of an agreement or arrangement to share, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust, direct contributions to the purchase price by the partner who is not the legal owner will readily justify the inference necessary by the creation of a constructive trust and it is extremely doubtful whether anything less will do⁵.
- [38] Although it is not disputed that the defendant expended monies on the Carenage property by way of the payment of taxes, it is for the defendant to prove that the amounts he alleged were spent on the refurbishment, maintenance and cleaning of

² [1986] 2 All ER 426

³ Claim No. Application by Merline Vidal and Delbert Vidal

⁴ [1990] 1 All ER 111

⁵ **Lloyds Bank Plc v Rosset & Anr** [1990] 1 All ER 111

the Carenage property to improve the deceased's property, and that the amounts spent were not assets of the deceased. It is the defendant's pleaded defence that he and his brother were appointed attorney for the deceased due to his rapid ailing health. The defendant pleaded that he prepared a rental agreement for the said property which the deceased refused to sign.

- [39] Further, the defendant filed a second supplemental list of documents on the 15th March 2023. One of the exhibits is an order of the court dated 8th July 2019, where Smith J being satisfied that the deceased was a person who by reason of mental disability was incapable of supervising his financial, medical and legal affairs, appointed the defendant as a Guardian of the deceased with general powers to manage, control and supervise all his affairs as if it were his dealing with them personally, inclusive of medical and legal affairs of the deceased, with authority to demand accounts and reports of all money in commercial banks and related institutions. The defendant was granted authority to manage and administer over the property of the deceased including appointing gardeners and other persons.
- [40] The defendant, under the guardianship order, was also directed to keep and produce to the court or any relevant authority that requires it, a full accounting and financial statement of the deceased claims including any monies disbursed for his personal care, including medical and legal expenses.
- [41] As it stands the defendant, by his own pleadings as attorney under power of attorney granted by the deceased and the order of guardianship, acknowledged that the deceased was unable to manage his affairs. Moreover, given that the deceased was deteriorating and resident in the Home of the Aged from the year 2013, the likelihood of the deceased sharing such a common intention with the defendant in his deteriorating health at the time is false.

[42] The defendant was in a position of trust for his deceased father during his lifetime both under a power of attorney and as a court appointed Guardian. He could not have invested and convert trust property into his own personal use.

Whether the Carenage property or a portion thereof is Subject to a Resulting Trust in Favour of the defendant

[43] The defendant asserts that the Carenage property is held on resulting trust in his favour.

[44] Resulting trusts are defined in **Halsbury's Laws of England**⁶ as:

“A trust arising by operation of law:

- (1) Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or in part; or
- (2) Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
- (3) Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.

In all these cases the beneficial interest in the property so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or in the case of his previous death his representatives.”

[45] Moreover, in **Westdeutsche Landesbank v Islington**⁷ the following was held:

“Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their

⁶ Vol 48 4th Edn para 604

⁷ [1996] AC 669 per Lord Browne Wilkinson

contributions. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest”.

- [46] The claimant submits and the court accepts that the monies spent on the property as pleaded by the defendant do not equate to or do not create a resulting trust in his favour. The defendant having been appointed under the power of attorney was an agent for the deceased during his lifetime. The appointment of the claimant and the defendant as agents under the power of attorney created a fiduciary relationship whereby the agents were required to manage the property and make financial and business decisions on behalf of their father during his lifetime.
- [47] The broad powers granted in the power of attorney required both the claimant and the defendant to act with the highest degree of good faith in the best interests of their father and not for their personal gain. The claimant asserts that the defendant has taken possession of the deceased's property and has acted as if it is his personal property without accounting to anyone.
- [48] Where an agent takes actions that are not authorized by the power of attorney, the agent can be held liable for breach of fiduciary duty. The defendant as agent is under a duty to keep bank statements and all other documents demonstrating the actions that have been taken in relation to the property on behalf of deceased owner during lifetime. As agent he was required to maintain records to address any questions or challenges that may arise with respect to the management of the deceased's assets. The defendant as joint agent with the claimant was also required to consult with the claimant being mindful of the obligations imposed on both of them under the power of attorney.
- [49] Further, the defendant was appointed as a guardian for the deceased by order of Smith J in 2019. The order directed that the defendant as guardian was to provide an account of his affairs with the deceased's accounts. The defendant as an agent under the power of attorney and as a guardian was a trustee for the deceased during his lifetime.

[50] The court in **A.G for Hong Kong v Reid**⁸ stated:

“A trustee must not use or deal with the trust property or exploit his position for his own private advantage for he will be strictly liable to account for his profits of which he will be a constructive trustee: and he will similarly be personally accountable for losses arising where there real sensible possibility of a conflict between his fiduciary duty and his self-interest.”⁹

[51] The court, based on the evidence presented by the claimant and reading the pleaded defence, is of the view that the claimant has proved his case that the defendant has acted outside his fiduciary duties as agent under the power of attorney granted by the deceased during his lifetime.

[52] The court is of the view that the defendant’s actions were not done in the best interest of the deceased as he alleges. The defendant has exceeded his powers as trustee and dealt with the property for his own personal use in breach of his obligations under the power of attorney and as a court appointed guardian for the deceased. When an agent accepts his or her appointment, a special legal relationship that is a “fiduciary” relationship is created. He or she commits a breach of trust if he/she fails to carry out his/her duties in relation to the fiduciary trust or exceeds his/her power.

[53] It is therefore necessary for the defendant to prove his dealings with the affairs of his father under the power of attorney and order of Guardianship respectively, and also since the death of his father. Accordingly, the defendant is required to provide full accounting and financial statements of his dealings with the property to the claimant in his capacity as personal representative of Thomas Bristol, deceased.

Conclusion

[54] Given the above circumstances, judgment is entered in favour of the claimant:

⁸ [1994] 1 AC 324

⁹ Clark Boyce V Mouat [1994] 1 Ac 428

- (1) The defendant, Francis Sitney, shall provide an account of his dealings with the deceased's property on the Carenage and shall account of all monies outstanding and/or received in respect of the rental of the said land from the business operated under the name "Sweet Mango" within sixty (60) days from today's date;
- (2) The defendant is liable to make good all sums of monies received by him from the rental of the said property;
- (3) The defendant, Francis Sitney, shall pay to the claimant such sum as may be found due upon the taking of the said account;
- (4) The defendant shall pay Mesne profits at the rate of \$2,700.00 per month from in or about July 2015 to November or December 2017, and from on or before 23rd August 2019 until possession of the said property is delivered up;
- (5) The defendant shall give up vacant possession of the Carenage property within sixty days (60) of today's date;
- (6) Damages and costs to be assessed if not agreed.

Agnes Actie
High Court Judge

By the Court

Registrar