

THE EASTERN CARIBBEAN SUPREME
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE

CASE NO. DOMHCV2014/0016

BETWEEN

FARAH JACKIE THEODORE

APPLICANT/ CLAIMANT

AND

JACQUELINE THEODORE

RESPONDENT/ DEFENDANT

Appearances:

Mr. Henry Shillingford for the Applicant/ Claimant
Mr. Lennox Lawrence for the Respondent/ Defendant

2015: May 28th
June 1st, 26th
September 24th
October 13th (Re-issued)

JUDGMENT

[1] **Thomas, J [Ag]:** Ferdinand L. Theodore died testate.

[2] The Applicant Farah Theodore is a beneficiary under her father's will which was probated and her mother was granted probate as she is the executrix named in the will.

[3] In his will the testor says the following at paragraph 4:

“I devise all other property both real and personal (including my business which I currently own on which I at the date of my death, may own or have general testamentary powers of appointment over wife and children Diana, Farah, Roosevelt. Cona and Estelle equally and absolutely.”

- [4] Based on the foregoing, one beneficiary, Farah Theodore, the applicant, on 17th January, 2014 instituted proceedings¹ with respect to her share of her father's estate. This in turn resulted in consequential proceedings in response by the Executrix of the Estate of Ferdinand Theodore.
- [5] On 17th January 2014, Farah Theodore, the applicant filed a notice of application for injunction seeking to freeze all accounts of the Executrix in which she was a signatory relating to the Estate of Ferdinand L. Theodore.
- [6] The application was supported by affidavit in which the applicant deposed as to her father's will, a judgment in the Court of Appeal in favor the Estate, building activities at the property situate at Rock-A-Way devised to the Executrix, the departure of her sister to study since the judgment aforesaid, and lack of a source of income of the Executrix.
- [7] In the circumstances the applicant sought inter alia, a preliminary payment be made to her prior to the injunction.
- [8] The application was opposed by the Executrix/ Respondent and in so doing sought to explain the status of the Estate and of her intention to submit a report thereon.
- [9] An amended application was filed by the applicant on 24th January, 2014 seeking:
1. A mandatory injunction plus costs.
 2. An order that the “plaintiff” immediately and forthwith pay over to the claimant her share of all monies received on behalf of the Estate of Ferdinand R. Theodore in respect of the matter of Jacqueline Theodore as executor and trustee of the Estate of **Ferdinand Theodore v Attorney General** of Dominica HCV2013/0130 as full and complete settlement.
 3. A prohibitive injunction
 4. Leave to vary the judgment

¹ Claim no. DOMHCV2014/0016

5. Costs.

[10] The ground of the application is that the defendant as Executrix and Trustee of the Estate of Ferdinand R. Theodore did receive money for and on behalf of the Estate and has converted the same to her own use. On 24th January 2014, the applicant filed a supplemental affidavit the respondent detailed the various persons engaged for services in the action against the Government of Dominica seeking damages for trespass both in the High Court and before the Board of Assessment. The deponent also makes reference to the anticipated hardships that would be caused by the injunction such as the payment to persons such as Clement Fingal and other professionals.

[11] The deponent also makes reference to a consent order shown to her in which Jacqueline Theodore acknowledged receipt of \$1,210,737.00 XCD and her belief that the money could only have been received by Jacqueline Theodore on behalf of the Estate of Ferdinand Theodore.

[12] The applicant deposes further that the said under speaks of a balance of \$1, 509,050.00 XCD plus interest of 5% on the reducing balance from 2003 to the date of the order to be paid in equal monthly installments of \$250,000.00 to be made to the said Jacqueline Theodore and of her information and belief that these payments must be in the name of the Estate of Ferdinand R Theodore.

[13] Based on reliefs prayed for in the amended application filed on 24th January, 2014 the court made an order on 27th January 2014 regarding payments to the applicant.

Application for Committal

[14] On 20th January, 2015 an application for committal was filed by the applicant seeking an order that:

1. The Respondent Jacqueline T. Theodore personally and as PR immediately complies with [an] order of this court dated January 27th, 2014 in all the terms as stated therein and lack of ability to satisfy same be escorted to the institution:

- a. the court orders at the executrix costs an inventory of all assets accounts and property of the estate; and
 - b. stated names, institutions and accounts in the respondent's name or which the defendant has full control and retains Power of Attorney.
 - c. sequestration thereof and freeze of all accounts as stated in said order she should be committed to prison at the state's pleasure....
2. That Lennox Lawrence as attorney for the estate as well as personal attorney for the trustee/ executrix of the said "Jacqueline T. Theodore and as officer of the Court that he under personally are in writing in pursuance of under HCV0130/2013 of this court directions as contained in court's order attached hereto."

[15] The grounds upon which the application rests relate to the following:

1. the failure of the Respondent to comply with the order of the court dated 27th, 2014;
2. the respondent being willfully in contempt of the court's mandatory and prohibitive injunctive order of January 27th, 2014 with Penal Notice attached;
3. the failure of the respondent to open an account in the name of the Estate;
4. the received money for and on behalf of the estate and cannot satisfy the beneficiaries or the court;
5. and willfully and without lawful exercise failed to pay the applicant.

[16] In her affidavit in support the applicant details the events subsequent to the order of this court dated 27th January, 2014 concerning the funds of the Estate of Ferdinand Theodore and in the final paragraph deposes, in part as follows:

"14. I have given such a complete and thorough affidavit in an effort to emphasize to the court that what is occurring between the Respondent and her attorney in their floating the orders of the court but more troubling is the disregard of basic fundamental legal tenets and principles."

[17] The respondent filed an affidavit in reply² and two supplemental affidavits in reply.³ In all of the affidavits the respondent deposes that she has complied on made efforts to comply with the orders of the court.

[18] In one affidavit in reply the respondent deposes as follows at paragraphs 27 and 28 thereof:

- “27. In any event I refer to exhibits JT 24 and JT 26 which confirm clear action with respect to the transfer of the Applicant’s entitlement. I further refer to the Applicant’s exhibit 10 of the Applicant’s affidavit wherein I have made a first payment to the Applicant which said payment had been returned and further to the fact that I had already transferred property to the Applicant as further evidence that her entitlement were being transferred to her.
28. I hereby give an undertaking to the Honourable Court pursuant to CPR 2000 Part 35.9(a) to provide as detailed as possible within 90 days of the adjourned date as this will require obtaining copies of documents in order to provide full and verifiable accounts.”

Certificate of Full Compliance

[19] On 13th March, 2015 the respondents filed a “Certificate of full compliance indicating that she has fully complied with the corrected order, dated 27th January, 2014 and filed on 31st January 2014, as confirmed by the supporting accounts and documents.” The certificate of full compliance is supported by an affidavit.

[20] In the affidavit the respondent details the events surrounding or leading to the payment of \$1,569,050.00 to the Estate of Ferdinand Theodore and the disposal thereof, including the payment of \$201,792.82 to the applicant and a further \$41,565.17 from interest paid on the said sum of \$1,569,050.00.

[21] In the premises the respondent’s contention is that she has fully complied with the order of the court.

² Filed 13th February, 2015

³ The First Supplemental Affidavit was files on 18th February, 2015 and the second on 26th February, 2015

Affidavit in Response to Affidavit in Support of full compliance

- [22] In her affidavit in response, the applicant questions the amount due to her as a result of the order of the court on 27th January, 2014 the terms of the will and resulting non-compliance therewith. This assertion rests on the respondent's revelation that the Estate of Ferdinand R. Theodore was in receipt of a compensation award. And further, certain receipts of funds were not disclosed.

Application to strike out Certificate of full Compliance

- [23] The applicant, Farah J. Theodore, on 25th March 2015 filed an application seeking to strike out the respondent's Certificate of Full Compliance. The application seeks an order declaring that the Certificate of Full Compliance is void; the order of 27th January, 2014 did not and could not be interpreted as allowing for any deductions as alleged in the affidavit; the deductions claimed are as costs are bills not payments; some deductions go back to the 20th Century and do not have any confirmation of payments exhibited and the respondent's attorney was under a duty to substantial's the transfer of funds received from the Government of Dominica to his client account.
- [24] The grounds of the application rest on the following: the failure of the respondent to obey the order of 27th February 2015; the affidavit of in support of the Certificate of Full Compliance contains perjuries with respect to payment of fees to Clement Fingal and Don Christopher; the Certificate of Full Compliance is an abuse of process, all documents are justifying deductions are not receipts but bills or invoices; legal fees of \$542,675.04 were received from the Estate prior to any beneficiary, the evidence of compliance shows that the attorney received in excess of \$2.33M of estate money in his name but no document shows that the money was paid over to any other account making the execution liable as Executor *de sons tort*; and numerous abuses of the process of the court by numerous filings.

Affidavit in Opposition to Application to Strike out Certificate of Full Compliance

- [25] On 15th May, 2015 the Respondent, Jacqueline Theodore filed an affidavit in opposition to the application to strike out the Certificate of Full Compliance.

[26] In the affidavit the respondent contends that the applicant has failed to provide full and frank disclosure regarding the 1/6 claimed and as such has misled the court in granting an order for 1/6 of an award to which she was not entitled.

[27] In seeking to show compliance with the Court's order of 27th January, 2014 the respondent points to the Certificate of Full Compliance filed on 13th March, 2015, the detailed accounts prepared by Albert Raffoul which go beyond 27th January, 2014, the relevance of the Administration of Estate Act (UK) 1925 and its application to Dominica, the additional payment of \$42,015.36 to the applicant.

Issues

[28] The Issues for determination are:

- 1. Whether the suspended committal order should be enforced having regard to the Certificate of Full Compliance, if the respondent is guilty of contempt of court?**
- 2. Whether the Respondent is guilty of contempt of court?**
- 3. Who is liable in costs?**

Issue No.1

Whether the suspended committal order should be enforced having regard to the Certificate of Full Compliance, if the respondent is guilty of contempt of court?

[29] The operative paragraphs of the order of the court dated 27th February, 2015 and entered on 10th March, 2015 are in these terms:

- "1. The respondent stands committed to 30 days imprisonment unless the order of 27th January 2014 is fully complied with as relevant by March 13, 2015.
2. The respondent shall file an affidavit of compliance with exhibits on or before 13th March, 2015.

3. A uniformed police officer is hereby authorized under [this] order to arrest the Respondent on or after 16th March, 2015 and take her to the State Prison to serve 20 days imprisonment if there is non-compliance with this order.”

Certificate of Compliance and Affidavit in Support

- [30] On 31st March, 2015 the respondent filed a Certificate of Compliance which stated in part that “I Jacqueline Theodore, personal representation of Ferdinand Theodore, deceased being the Defendant herein have fully complied with the corrected order dated 27th January, 2014 and filed on the 31st January, 2014 as confirmed in the supporting accounts and documents.”
- [31] The affidavit in support after a chronicle of events, the deponent, being the defendant/ respondent swears to full compliance with the order of the court.

Cross-Examination

- [32] Both the applicant and the respondent were cross-examined on their affidavits. The following represents a summary of the essentials of their evidence.
- [33] Farah Theodore said under cross examination that she became aware on 20th February 2014 of a stay granted by the Court of Appeal but it was discharged on 9th February, 2015
- [34] With respect to paragraph 1 of the order the applicant testified that the order refers to the sum of the \$201,792.63 to be paid to her by 31st January, 2014.
- [35] In re-examination, the applicant said that the order had not been satisfied.
- [36] Jacqueline Theodore under cross-examination said that the order of 31st January, 2014 was explained to her. She said further that the order of 27th January 2014 was concerned of 13th December, 2014 was concerned with the amount of \$201,792.83.
- [37] In further cross-examination the respondent acknowledged that she was the executor of the will and also that she does not have an account in the name of the Estate of Ferdinand Theodore. At

a later stage of her cross-examination Jacqueline Theodore testified that she transferred \$201,792.83 to the applicant and that she gave the money to her lawyer and has retained the stubs of the cheques drawn on First Caribbean International Bank. And when it was put to her that the amount of \$201,792.83 is not the amount in the order, the respondent said that she did not see a copy of the original cheque; nor did she see it handed over.

[38] In testimony respecting her position in relation to the Estate of Ferdinand R. Theodore the respondent said "I am in court in any capacity as Executrix of the Estate of Ferdinand Theodore. A trustee has a duty to perform. I have never sought advice as trustee. I will think so. I transferred money by means of a cheque. I have receipts for the amounts. I have administered the estate over the years." She went on to say that; "paying my attorney for payment to the applicant is sufficient. I am not certain that the money was paid."

[39] With respect to the letter written to the Prime Minister, the respondent admitted that it was written and went on to say that she was in the midst of the matter and the attorneys had to be paid. She added that she said a cheque for \$150,000.00 paid to her attorney and the difference paid to her in her personal name.

[40] Finally the respondent said she has complied with the order of 27th January, 2014 as the money was paid into her attorney's client account.

[41] In re-examination the respondent testified that she received money for the Estate of Ferdinand Theodore and that the amount under the consent order was in respect of the said Estate; and that she caused the sum of \$201,792.83 to be paid to the applicant.

Submissions

[42] Mr. Henry Shillingford, learned counsel for the applicant, initially raises the issues as to whether or not the order of 27th January, 2014 gave the respondent the right to deduct certain bills and expenses prior to paying over these accounts; the legal effect of a suspended committal order⁴; and then the question as to whether or not there has been a breach of the order of this court. In this regard the submission is in the affirmative and the following is advanced:

⁴ Case examined is: in Re W (13) (An Infant) [1969] Ch271 at first instance and then on appeal.

- “1. There has been a breach of the order that the Respondent is in contempt of court⁵ for deductions, the order of Thom of the CA in this matter makes that clear and she said in the course of her judgment that even if costs could be shown against the Applicant there is much of the estate not distributed from which that can be deducted.
2. The very nature of the account that it is to determine the amount payable to Farah J Theodore [in] respect of the estate of FR Theodore without mentioning the orders of the court specifically para.3 and the order of January 27 2015 make the account (If they can be graced by such a term) irrelevant as it makes assumptions and has a starting point which is totally false and must be actively and purposefully done to attempt to fool the court.
3. Besides the fact of no mention of the orders which determine what is to be paid. There is nothing in the letter nor in the letterhead itself that states his expertise or which attempts to certify this person as an accountant.
4. [According to Albert Raffoul] “42,015.36 would be 1/6th of the difference between \$1,210,038.00 is what [was] received prior to December 13th 2013 and \$2,324,000.00 is what received as complete satisfaction. The amount is specifically stated [as] \$1,113,949.35 in the Applicants affidavit at paragraph 15 is simple arithmetic. Yet the trustee is under an obligation *uberrei fide* to the Chief Justice and an order of the court gives a complicated enumeration of the total interest paid on the capital and the ‘clearance’ deductions which results in a \$41,000 payment but somehow this is added to an original payment of \$210,000.00 (of which portion she has already paid the beneficiary her 1/6th share). Notwithstanding the total of \$41,000.00 is added to the same \$210,000.00 and \$251,000.00 which is then divided by 6 the result of which is this number of \$42,095.00.
5. Having received a said total of \$2,324,000.00 in page one of JT5 accounts in cheques dated and payable to Lennox Lawrence as specified in the Applicant here exhibited. In fact the record shows and as witnesses admitted on the stand the estate never received any amount of the total received on its behalf by her attorney from 2008 to 2015. The estate she admits is incapable of receiving on holding any income as it has no account. Yet in cross-examination and in her affidavit evidence she avers that she operated the estate claiming transportation expenses on behalf of the estate company business yet “account” produced does not show any income to the estate not even one transfer on payment to the estate from recently received income or any other income.
6. The executrix here must have known or did know as a person of honesty would have recognized that an account in the name of the estate was a fundamental thing and failure to do so is not prudent.
7. Here since at least 2008 the lion share of the estate monies seem to be in the solicitors hands and contest on the executrix personal contract with no regard for the estate or beneficiaries. These facts go to the heart of the principles laid down in all the cases herein cited and state clearly that in these circumstances

⁵ Sic

the Executrix is in fundamental breach of duty to such an extent that she is personally liable.⁶

8. As per the accounting or as we more correctly put it the calculations, we submit that they are irrelevant and should not be considered. The receipts and the payments are what should be consumed as to whether or not these were valid payments.
9. This is dishonest as to accounts and dishonesty of a trustee as defined in **Royal Brunei Airways v Tan** [1905] AC as explained in **ORS v IG Markets Ltd** and others [2013] EWHC 631 (Comm) per Mr. Justice Fields at paras. 10 & 11.
10. It seems clear on the affidavit evidence and especially on the Cross-examination that the accounts were prepared with dishonest intentions especially as defined in (ii), (iii) & (v) by Mr. Justice Fields that is in reckless disregard of the truth or in not caring. What the truth was, or deliberately closing eyes and ears to the truth.”

[43] In the case of the respondent, learned counsel Mr. Lennox Lawrence submits the following:

- “33. The respondents case simply put is as follows:
 - i. That payments from the State were always paid through her attorney and not directly and accordingly this special circumstance is critical in determining clause 3 of the order of 27th January. The starting point therefore is not the amount paid by the State but the remainder of and all payments which she received from her attorney after the deductions had been made for legal fees, collection and distributions and expenses.
 - ii. That her understanding of the Order was that she was under an obligation to settle the debts and expenses relating to the estate and litigation between 1997 to 2014 and that remainder “the remainder” in clause T3 was understood was construed in that context.
 - iii. That her state of mind throughout was for full compliance with the Order of 27th January and accordingly she paid the sum ordered in accountant who clearly set out the 1/6th that was payable and that she paid that 1/6th within the time limited.
 - iv. A certificate of Full Compliance was filed in compliance with the courts order within the time limited for so doing.
34. The Respondent’s claim is that in October, 2008 the net sum of \$210,527.00 was paid by the Government to her attorney’s chambers on her behalf. From this sum the amount which she received was \$60,527.00 after authorized deductions of legal fees, collections and Court of Appeal.
35. The Respondent’s evidence is that she had entered into a contract with her attorneys for a collection fee to be deducted from the payments received from the government pursuant to claim No. 130 of 2013. Accordingly a collection fee of 10% was applied to

⁶ Authorities Cited: Vol. 48 Halsburg’s Laws of England (4th ed.) at para 850 and Wyman v Paterson [1900]AC 271,280

all the-payments from the government together with an invoice discount applied by the government in the sum of \$710.00.

36. The Respondent argues that at the date of the order of 27th January, 2014 the entire sum of \$210,527.00 had already been applied towards fees and the settlement of debts and expenses as further payments had been made in this matter relating to the retainer of Queen's Counsel, photocopy, binding and other legal fees payable to the attorney retained in this matter.
37. Accordingly the Respondent argues that she fully complied with clause 1 of the order of 27th January 2014 even despite the fact that at that date the sum of \$201,792.83 would have represented an over payment to the Applicant by virtue of the fact:
 - i) That the entire payment of \$210,527.00 was not received; and
 - ii) That all other payments had been net withholding at source of a 10% collection fee.

This shows that at all material times the Respondent's intent was for full compliance with the order of the Court.

38. The Respondent further argues that in the circumstances of this case the expression "the remainder" in paragraph 3 of the order was understood to mean the remainder after deduction of debts and expenses and it is with this understanding that there was also a withholding for payments of invoices to be settled.
39. The Respondent's further argument is that the sum of \$112,538.04 represented transportation costs was also deducted from the total award.
40. Finally that the account statement was prepared for the specific purpose of compliance with the court order."

[44] In closing submissions by leaned counsel for the respondent, the contention that there was full compliance with the order of 14th January, 2014. In so doing great emphasis is placed on the contention that no payments were made directly to the respondent.

[45] Finally, on 8th July, 2015, learned counsel for the respondent filed "amended closing submissions of respondent; however there are no indications that leave was granted to file same. For this reason the amended submissions will not be considered by the court.

[46] In terms of the submissions as a whole, those on behalf of the Applicants seek to say that there is non-compliance by the Respondent, those on behalf of the respondent seek to show the contrary.

Analysis

[47] The respondent on 13th March, 2015 filed on Certificate of Full Compliance as a response to the order of the court on 27th January, 2015. Also filed was an Affidavit in Support of even date in which the Respondent detailed events relating to order of the court. And the affidavit ends with the following:

“23. In the circumstances I say that I have complied fully with the order of the Honourable Court as confirmed in the Certificate of Compliance filed herein.”

[48] Central to this decision are paragraphs 1 and 3 of the order of this court given on 27th January, 2014 which read thus:

1. “That a mandatory injunction be issued against Jacqueline T. Theodore of Rock-a-Way, Canefield the Respondent herein whereby she is to immediately and forthwith pay to the Applicant the entirety of her one sixth(1/6th) share of all monies received in satisfaction of the judgment according to and consistent with the order dated the 12th day of December 2013 to with that 1/6th of the said amount of \$1,219,757.00 received by the executor and trustee, the amount being \$201,792.83 immediately and forthwith paid to the Applicants by the Respondent and in any case on or before January 31st 2014.”
2. That in respect the remainder of any and all payments as stated in the said order of December 12, 2013 the said one sixth (1/6) of any payment shall be paid directly to Farah J. Theodore at her account at National Bank of Dominica 100069614.”

[49] Learned counsel for the respondent puts a construction on the word ‘remainder’ to mean after deduction of debts and expenses and it is with this understanding that there was also a withholding for payments of invoices to be settled: But is this correct?

[50] The order referred to is the consent order providing for the totality of payments due to the Estate of Ferdinand Theodore to be paid in a certain manner. In short, it speaks to the totality of the money on compensation and for this reason the order of 27th January 2014 points to what is stated in that prior order of December 2013. Thus the 1/6 share due to the Applicant is not confined to \$210,737.00 but to all payments from the Government of Dominica. And more importantly the Consent Order goes on to provide for 5% interest on the reducing balance. This is a reminder of all or any payments. It cannot be otherwise.

[51] But has the respondent complied with the order dated 27th January 2014? This question coupled with the evidence and the submissions on both sides point to several issues. These are: the requirement of an account, the Raffoul Calculations, the payment of interest and abdication of the executrix.

[52] Given the foregoing, the court considers it appropriate to set out part of the governing law in the Commonwealth of Dominica. By virtue of section 11 of the **Eastern Caribbean Supreme Court Act, the Administration of Estates Act, 1925** (UK) is received in Dominica. In particular section 31(i) reads as follows:

“The real and personal estate whether real, legal or equitable, of a deceased person, to the extent of personal and his beneficial interest therein and the real and personal estate of a deceased person in pursuance of any general power (including the statutory power to entailed interest) disposes by will, are assets for the payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors and the court shall, if necessary, administer property for the purpose of the payment of the debts and liabilities.”

[53] The foregoing provision speaks directly to executors like the respondent. And the oath taken on 21st November 1995 represents a substantial part of the legal matrix in this context, from which the respondent cannot deviate.

[54] The first of the issues mentioned above must now be addressed. It is the matter of the requirement for an account. In the Oath of the Executrix sworn to by the respondent at the Registry on 21st day of November 1995 it is provided at paragraphs 3 and 4 as follows:

“3. That I am the sole executrix named in the will;

4. That I will:

- (i) Collect, get in and administer according to law the real and personal estate of the said deceased;
- (ii) When required to do so by the court exhibit in the court a full inventory of the said estate and render an account thereof to the court, and
- (iii) When required to do so by up to the court the grant of the probate.”

[55] The respondent was ordered by the court on 9th May, 2014 to deliver up an account by 23rd June 2014. But about one month after the deadline of the order then applicant sought an extension of 45 days to comply with the order. This was refused. However, in the decision of the court the

following was quoted from Williams and Mortimer- **Executors, Administrators and Probate**⁷ and Gilbert Kodilinge, **Caribbean Law of Trusts**.⁸

“An executor must account for all profits of the estate of the deceased which accrue in his own time; and if he carries on trade or business of the testator the profits must be accounted for as assets.”

[56] And from Gilbert Kodilinge's **Caribbean Law of Trusts**:

“Trustees must keep accounts and produce them for inspection by any beneficiary when requested to do so. They must also, when required give beneficiaries information as to the manner in which the trust is being administered and produce for inspection title deeds and other documents relating to the trust estate. A trustee who fails to render accounts may be ordered to pay costs of application to the court made necessary by his breach of duty.”

[57] It is common ground that the order of High Court on 9th May 2014 mandating the respondent to produce an account by June 23rd 2014 has not been complied with. In fact in two affidavits the respondent gave undertakings as follows:

- (a) To provide an detailed as possible within 90 days of the adjourned date as this will require obtaining copies of documents in order to provide full and verifiable accounts⁹.
- (b) That accounts be filed on or about 27th March 2015.¹⁰

[58] Given the foregoing coupled with numerous questioned posed by the court to the respondent in this regard, the *tabula rasa* still prevails even in the face of the order of this court on 24th May, 2014.

The Raffoul Calculations

[59] Both the respondent and her learned counsel refer to the document filed with the Certificate of Compliance as an account. In this regard the respondent in her affidavit in support; filed on 13 March 2015, deposes as follows:

⁷ 15th Ed. By J.H.G Sunnacks, M.A. (Cantab.)

⁸ 3rd Ed.

⁹ Affidavit in Reply to Application for committal filed 13 February 2013.

¹⁰ Affidavit in Support of Notice of Application to set aside adjourned date and for restoration of Adjourned hearing, filed on 26 February, 2015.

“I did submit to an accountant the available records of receipts, payments and deductions in order to prepare an account detailing made and or verifiable payments outstanding for settlement true copies of the said accounts and all supporting vouchers, receipts is¹¹ produced exhibited and marked ‘JT5’.”

[60] Learned counsel for the applicant has given technical reasons for rejecting the Raffoul documents. These will be addressed later, but for now the court will make these basic observations.

[61] First in his letter dated March 11th, 2014 to Mr. Lennox Lawrence, Albert Fingal, B.A (Fin) Accountant, uses the caption “Re calculation of Interest payable to Farah Jackie Theodore.” Secondly, Raffoul’s letter in response, in part, says “As per your request please see attached the calculation...” Thirdly, one sheet of the document proper details “Payments received from Government” while the other reads “Calculation of Interest payable to Farah Jackie Theodore.”

[62] In the end the “1/6 after deductions payable to Farah Jackie Theodore is \$42,015.36.

Submissions of learned counsel for the applicant on the Raffoul Calculations.

[63] Questions as to Albert Raffoul and aspects of the Raffoul calculations are raised by learned counsel from the applicant in these terms:

“10 . Albert Raffoul never states that he has read the Order certainly he does not cite any of the Order that apply hence according to him \$42,015.36 would be 1/6th of the difference between \$1,210,038.00 ie what received prior to December 13th 2013 and \$2,324,000.00 ie what received as complete satisfaction. The account is specifically stated \$1,113,949.35 in Applicant’s affidavit at paragraph 15 is simple arithmetic. Yet the Trustee under an obligation ubernei fide to the Chief Justice and an Order of the Court gives a complicated enumeration of the toatla interest paid on the capital and the “clearance” deductions which results in a \$41,000.00 payment but somehow this added to an original payment of \$210,000.00 (of which portion she has already paid the beneficiary her 1/6th share.) Notwithstanding the total of \$41,000.00 is added to the said same \$210,000.00 which is then divided by 6 the result of which is this number of \$42,095.00

As per the accounting or as he more correctly put it the calculations we submit that they are irrelevant and should not be considered. The receipts and the payments are

¹¹ Sic

what should be consumed as to whether or not these were valid payments.

11. This is dishonest as to accounts and dishonesty of a trustee as defined in **Royal Brunei Airways v Tan** (1965) AC as explained in **ORS v IG Markets Ltd, and Others** (2013) EWHC 631 (Comm) by Mr. Justice Fields at Paragraph 10 and 11
12. It seems clear on the affidavit evidence and especially on the cross examination that the respondent has been dishonest and that the accounts were prepared with dishonest intentions especially as defined in ii) iii) v) vi) by Mr. Justice Fields that is in reckless disregard of the truth or in not caring what the truth was, or deliberately closing eyes and ears to the truth.”

[64] The court agrees with learned counsel for the applicant that calculations are vulgar and raise questions of honesty in this regard. At the risk of being classified as repetitious, the court points to the dates of all payments from the Government of Dominica are given; but the interest payment which is from the same source is placed in a position on the “calculation sheet” to wonder about its genesis. Obviously the date would tell a story of intent.

The Payment of Interest

[65] Albert Raffoul in his calculations identifies \$755,636.35 as being paid by the Government of Dominica in the matter. From this amount a number of debts with respect to much earlier dates are deducted. These are then totaled and a further deduction with respect to commission on funds collected ($\$2,324,686.35 \times 10\%$), plus transportation costs of \$112,538.40 are all deducted from the starting figure of \$755,636.35 to reach a net interest after deduction of \$41,565.17. To this is added principal payment to the applicant of \$210,527.00 or as a Government receipt of October 10th, 2008 to arrive at a figure of \$252,092.17 and thus 1/6 share results in the figure of \$42,015.36 in favour of the Applicant.

[66] Given the foregoing the court poses the following questions since the answers are not apparent from the evidence:

1. Assuming that the interest payment was the last payment from the Government, when was it paid since the evidence is that the payments from the Government were made between September 2013 and April 2014?

2. On what legal basis was \$112,538.40 deducted for payment to the respondent?
3. Where is the evidence of payments by the respondent to Don Christopher and Co, William Reviere, Clement Fingal, Surveys Unlimited and G.S. Surveys Ltd.?
4. Is Severin McKenzie out of the equation by virtue of satisfaction of his bill?

The legal or other basis for a fee for collections

[67] The respondent while under cross in answer to a question from the court regarding the collection fee paid to her attorney on all collections, said it came as a result of an agreement.

[68] As noted above, an executor or executrix has the basic duty to administer the estate in accordance with the wishes of the testator. But before this is done, the debts must be satisfied. The record shows no debt incurred with respect to the collection of damages from the Government. In any event learned counsel was paid all of his legal fees in connection with the action against the Government of Dominica, from the High Court to the Board of Arbitration, the Court of Appeal and back to the High Court.

[69] Neither the respondent or her learned counsel has provided a legal or other basis for the payment of a collection fee of 10% on all amount paid by the Government to the Estate of Ferdinand Theodore, in any event, on 12th December, 2013 a Consent Order was executed by the relevant parties pursuant to which all payments due were made. And there is no issue of non-payments. In short, the Order was duly honoured by the Government of Dominica

Abdication of the executrix

[70] The consent order of the 12th December, 2013 whereby funds were to be paid “through” learned counsel for the respondent cannot be basis for allowing learned counsel to take full charge of the Estate of Ferdinand R. Thodre. In fact the evidence is that the only direct payment from learned counsel to the respondent was by cheque for \$60,527.00 dated 13th October, 2015. Further, the request for calculation of the interest came from learned counsel and the completed document was duly sent to learned counsel for the respondent. Further still, the cheque in response to order

of the court regarding the 1/6 share of the applicant was drawn on the Scotia Bank account of "learned counsel for the respondent Lennox Lawrence Chambers Box 320 Roseau, Dominica"¹². The executrix, despite her oath, is nowhere in sight for the purpose.

[71] In this regard the rule is that while an executor may appoint an attorney or banker to receive money, such money must not remain in those persons for longer than is reasonably necessary in the circumstances.¹³ The point must also be made that the abdication of the respondent cannot relieve her or her legal duties so as to make them applicable to her learned counsel, as he implies.

Conclusion

[72] Based on the findings of the court, it is the determination of the court that suspended committal order should be enforced because:

- (a) the failure of the respondent to supply to the court with an account as ordered or as undertaken on two occasions;
- (b) the supply of calculations (the Raffoul calculations) as an account and which is itself is vulgar and raises questions of dishonest intent in this regard and a clear intent to mislead the court;
- (c) the manner in which the \$755,636.35 paid to the Estate was treated in the calculations of interest, by way of the deduction of \$112,538.40 said to be paid to the respondent for transportation and other sums of \$10,565.00, \$86,500.00 and \$11,730.00 to Don Christopher & Co, William E. Riviere, Clement Fingal, Surveys Unlimited and G.S. Surveys Ltd without proof of payment, which on the evidence are bills rather than payments;
- (d) the payment of \$ 755,636.35 by the Government of Dominica to the Estate as interest is consistent with the Consent Order and arises because of the payment in tranches, and as such is inseparable from the principal payment of which the applicant is entitled to her 1/6 share;

¹² See Exhibit JT3 to the Affidavit in Support of Certificate of Full Compliance filed on 13th March 2015

¹³ See: *Wyman v Paterson* [1900] AC 271, 280

- (e) by implication, the purpose if the deductions was to reduce the amount payable to the applicant which is compounded by the absence of evidence of payment;
- (f) the absence of any legal or other basis supplied by the respondent or her counsel for the payment of fees for collection in the face of the long-standing unsatisfied debt of the Estate owed to the said to Don Christopher & Co, William E. Riviere, Clement Fingal, Surveys Unlimited, G.S. Surveys Ltd and Severin Mc Kenzie;
- (g) the respondent's abdication of her duties in relation to the Estate in favour of her learned counsel in terms of collection of money paid by the Government and its use does not remove or transfer her legal duties as executor.

Issue No. 2

Whether the respondent is guilty of contempt of court?

[73] In broad outline in relation to the law of contempt three fundamental rules exist. The first is that the person alleged to be contempt must be shown to have the necessary *mens rea*. The second is that the person must be shown to have conducted himself or herself to give rise to an *actus reus*. The third rule is that the criminal standard applies is to say beyond a reasonable doubt¹⁴.

Submissions

[74] As far as learned counsel for the applicant's is concerned the contention is that the facts show "a willful disregard for the courts order which is compounded by the fact that it follows a litany of stretching the courts resources by the filing of multiple applications replete with supplemental affidavits all defeated but geared to evasion, time wasting, costs enhancement and intentional depletion of estate resources as well as calculated emotional damage."

¹⁴ See generally: Vol. 9 Halsbury's Laws of England, (4th ed) at para. 87; Comet Products UK Ltd v Hawbex Plastics Ltd [1971] QB 67

[75] In the case of the respondent it is submitted that all parties agree that there has been full and absolute compliance with paragraph 1 of the order as well as the relevant provisions of the order. On this premise, the contention is that the application for contempt should be denied.

The Law

[76] In drawing a broad distinction between civil and criminal contempt Lord Toulson in **R v O'Brien**¹⁵ said the following at paragraphs 37 and 38 of his judgment:

- “37. There is a long distinction recognized in English law between ‘civil contempt’, ie conduct which is not itself a crime but which is punishable by the court in order to ensure that its orders are observed, and ‘criminal contempt’. Among modern authorities, the distinction was explained in general terms in **Home Office v Harman** [1983], AC 280 (in particular by Lord Scarman at p. 310) and **Attorney General v Times Newspapers Ltd** [1992], AC 191 in particular by Lord Oliver at pp. 217-218
38. Breach of an order made or undertaking obtained in the course of legal proceedings may result in punishment of a person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt. As Lord Oliver observed in **General v Times Newspapers Ltd**, although the intention with which the person acted will be relevant to the question of penalty, the liability is strict in the sense that all that is required to be proved is the service of the order and the subsequent doing by the party bound of that which was prohibited (or failure to do that which was ordered..) However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record.”

[77] The law relating to civil contempt is well settled but in the recent case of **Liao Hwang Hsaing v Lial Chen et al**¹⁶, Madame Justice Ellis examined a host of authorities and quoted Mr. Justice Christopher Clarke in **Masri v Consolidated Contractors Intl** in which he ruled in this regard as follows:

“In order to establish that someone is in contempt it is necessary to show that (i) he knew the terms of the order; (ii) he acted (or failed to act) in a manner which involved a breach of the order; and (iii) he knew of the facts which made him conduct a breach: **Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors** [2009] EWHC 1445 (QB). There can be no doubt that the judgment debtors have at all times been fully aware of the orders of this

¹⁵ [2004] UKSC 23

¹⁶ BVIHCV 2011/0222

court. It is not and could not sensibly be suggested that the conduct of which is complaint is made was casual or accidental or unintentional. However, the question arises whether it is also, necessary to show that they acted knowing that what they were doing was a breach of, and intending to breach any of the orders.”

- [78] The applicant in this case is merely seeking to have her fair share of her father’s estate in accordance with the terms of his will. The Executor of the will is the widow of the deceased and the applicant’s mother.

Analysis

- [79] Based on the findings the court gave above, the court rejects the following propositions advanced on behalf of the respondent. First, all parties agree that there was full compliance with the order of the court dated 27th January, 2014. Second, the fact that the sum of \$1,569,050.00 was not received by the respondent is of no moment. Equally, the fact that \$232,468.64 was not received by the respondent falls in the same category as before. Also reflected for lack clarity and “destination is the contention that between 2008 and 2013 various payments had already been made towards litigation as set in the accounts prepared by Mr. Raffoul.”
- [80] Intention is to be inferred from what a person says or does in the context of the matter. As such, based on the ruling in the **Masri case**, the question is whether the respondent acted or failed to act in a manner which involved a breach of the order.
- [81] As noted by learned counsel for the applicant, the respondent has filed numerous applications seeking various reliefs with respect to the order of the 17th January 2014 which mandated the payment of 1/6 of the sum of \$ 201,792.83. The order also mandated the filing of a certificate of compliance with affidavit in support and documents exhibited therewith. From the filing of the numerous applications with respect to the order, knowledge on the part of the respondent is inferred by the court. Further, under cross-examination the respondent did testify that the order of the court was explained to her. And as Mr. Justice Christopher Clarke put it, in relation to judgment debtors: “It is not and could not be sensibly be suggested that the conduct of which the complaint is made was casual or accidental or unintentional.”

[82] Further, the court infers intention from the respondent's failure to submit an account of the Estate despite two late undertakings to do so in affidavits submitted to the court¹⁷. But the respondent ended up filing as part of her compliance, calculations of interest and referred to the document in her affidavit as an account despite the fact that the author of the document does not refer to it as an account. The calculations themselves have been found to contain a number of unsubstantiated deductions or bills which would have the effect of reducing the amount of interest due to the applicant consistent with her share of the payment of principal in particular the claim for transportation expenses concern a time prior to the court action and should have been claimed in the earlier court proceedings. And to this must be juxtaposed the respondent's early unproven allegations that the applicant stole documents from her home which have a direct bearing on the filing of an account for the Estate. Thus the fact of the two undertakings to file an account by the respondent are construed by the court as impacting on the allegation of theft and advances the issue of intention on the part of the respondent.

[83] Finally the respondent's submission on calculations relating to the calculation of interest and which contained questionable deductions from the total amount of interest paid had the effect of reducing money payable to the applicant and thus defeating the purpose of the order.

[84] In sum therefore, the actions of the respondent relative to the order of the court show an intention to disobey the said order.

Actus reus

[85] It is also the determination of the court that the *actus reus* on the part of the applicant rests on the fact that the respondent paid the applicant \$42, 015.36 and as such failed to pay the applicant the amount of money due to her by engaging in several acts with the clear intention of reducing the amount of money that should be paid and thus frustrating the intent and purpose of the order.

[86] It is determination of the court that the respondent is guilty of contempt since on the evidence she has both the intention and *actus reus* as required by the law relating to civil contempt of court.

¹⁷ See para [57], supra and footnotes 9 and 10 thereto

[87] In the premises the suspended order must be enforced and the respondent must serve 10 days imprisonment rather than 30 based on the court's discretion on the issue¹⁸.

Issue No. 3

Who is liable in costs?

[88] It is common ground that this matter involved many applications and court appearances, but, these do not detract from the fact that it is an application for committal the end of the day it is an application of contempt.

[89] In all the circumstances the court assesses the costs in the amount of \$ 5,000.00 to be paid by the respondent personally to the applicant. The point must be made that all of this litigation falls squarely at the feet of the respondent due to her failure to carry out her duties as executor according to law. The costs must be paid on or before 6th December 2015 and a penal notice attaches to this requirement of the Order.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The suspended committal order should be enforced against the respondent, if she is guilty of contempt, because
 - (a) the failure of the respondent to supply to the court with an account as ordered or as undertaken by her on two occasions;
 - (b) the supply of calculations (the Raffoul calculations) as an account and which is itself vulgar and raise questions of dishonest intent in this regard and a clear intent to mislead the court;
 - (c) the manner in which the \$755,636.35 paid to the Estate was treated in the calculations of interest, by way of the deduction of \$112,538.40 said to be paid to the respondent for transportation and other sums of \$10,565.00, \$86,500.00 and \$11,730.00 to Don Christopher & Co, William E. Riviere, Clement Fingal, Surveys Unlimited and G.S. Surveys Ltd without proof of payment;
 - (d) the payment of \$755,636.35 by the Government of Dominica to the Estate is consistent with the Consent Order and arises because of the payment in tranches plus

¹⁸ See: Vol 9 Halsbury's Laws of England, (4th ed.) at para 101. See also in *Re (B) (An Infant)* [1969] Ch 50; *Leslie Knight Advertising and Associates Ltd v Dehorn Brokers Ltd*; *Yager v Musa*; *Danchevsky v Danchevsky* (1974) Times 17th July.

interest of 5% on the reducing balance, and as such is inseparable from the principal payments of which the applicant is entitled to her 1/6 share;

- (e) by implication, the purpose of the deductions was to reduce the amount payable to the applicant which is compounded by the absence of evidence of payment;
- (f) the absence of any legal or other basis supplied by the respondent or her counsel for the payment of fees for collection in the face of the long-standing unsatisfied debt of the Estate owed to the said Don Christopher & Co, William E. Riviere, Clement Fingal, Surveys Unlimited and G.S. Surveys Ltd;
- (g) the respondent's abdication of her duties in relation to the Estate in favour of her learned counsel in terms of collection of money paid by the Government and its use does not remove or transfer her legal duties as executor.

2. The respondent is guilty of contempt of court since the evidence reveals that the respondent is possessed of the *mens rea* and *actus reus* of civil contempt as:

- (a) The *mens rea* or intention rests on the following actions of the respondent: the respondent's knowledge of the order based on the applications in relation thereto plus the respondent's evidence that the order was explained to her; the failure to submit an account in relation to the Estate as ordered plus the respondent's two undertakings to file an account and; the submissions on calculations to the court rather than an account which is referred to as the account in the affidavit in support; the agreement with her attorney to pay him 10% collection fee with respect to all payments from the Government of Dominica; the deduction made from the interest payments of \$755,636.35 are not supported by evidence of payment and as such a manifestations of an intention to disobey the order of the court
- (b) the *actus reus* rests on the respondent's payment of \$42,015.36 and failure to pay the applicant, as required by the order by engaging in a several acts which reveal a clear intention of reducing the amount of money that should be paid to the applicant, thus frustrating the intent and purpose of the order accordingly the respondent must serve 10 days imprisonment in accordance with the suspended order.

[3] In the circumstances of an application for committal the respondent must personally pay the applicant costs in the amount of \$5,000.00 on or before 6th December 2015. A penal notice shall be attached to this requirement of the Order.

[4] The citation of the respondent for contempt of court does not remove or alter her legal liability to the applicant.

Apology and gratitude

This decision has taken some time to be delivered but it is common ground that this court was also concerned with the criminal session during the relevant period. But with that said the court is mindful of what is said at para. 101 of Vol. 9 of **Harlsbury's Laws of England**, 4th ed: "The power to order committal for civil contempt is a power to be exercised with great care." But even in spite of the foregoing, the court wishes to apologies for the unavoidable delay. At the same time the court also wishes to thank learned counsel on both sides for their assistance, for most of the times.

Errol L Thomas

High Court Judge [Ag]