NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT E.232A/2001
(Consolidated with Suit No. P.609/1999)

BETWEEN	MAURICE HITCHINS	CLAIMANT
AND	AUDLEY HITCHINS (Administrator of the estate of Myrtle Joyce Stephenson, deceased)	DEFENDANT

Mrs. Arlene Harrison-Henry for Claimant.

Mr. Alton Morgan and Miss Arlene McLeod instructed by Messrs Alton E. Morgan & Co for Defendant.

Mr. David Wong Ken watching proceedings on behalf of an interested party.

IN CHAMBERS

Originating Summons to set aside Agreement for Sale

13th, 14th, 15th, 26th, 27th, 29th July , 4th August & 28th October 2005

BROOKS, J.

Time constraints caused this case to be heard over the course of many days, but only for a short time on each occasion.

I have previously made an interlocutory order in respect of this matter and it was embodied in a written judgment. That judgment sets out the factual circumstances of the case and I shall, in introducing the matter here, repeat the relevant part of the former judgment.

> "Maurice and Audley Hitchins are brothers. Their mother was Mrs. Myrtle Joyce Stephenson. She died intestate on 25th June 1997. This was

> when they were themselves mature adults and the only beneficiaries of her estate....
>
> Audley was granted letters of Administration in his mother's estate. The major asset in the estate is premises No. 1D Bamboo Avenue, in the parish of Saint Andrew. Audley is proposing to sell the premises. There are, however, two problems. Firstly, he entered into an agreement to sell before he had received the grant of Letters of Administration ('the grant'). Secondly, although he had declared to the court, in applying for the grant, that the property was valued $8.0M on the date of his mother death, he has nonetheless agreed to sell it for $5.0M in December 1999.... Maurice has brought this action to prevent the completion of the sale."

The "action" mentioned in the last sentence of that quotation is the Originating Summons being considered here. On the first day of the hearing of the Originating Summons, Maurice was present and Mr. Morgan, who is Counsel for Audley, commenced cross-examining him. Maurice was to have returned on the following day for the cross-examination to be continued. He did not do so and in fact did not return until the final day of hearing. Ill health is said to be the cause of his absence. I ruled that the hearing proceed despite his absence. This was because the matter had been previously delayed on a number of occasions because of his being said to have been ill. I found then that the circumstances did not permit a further delay.

Audley's response to the claims made in the Originating Summons is that Maurice had possession and control of the property at and after the time that the valuation was done. He alleges that Maurice neglected to maintain it, allowed it to fall into a deplorable state of disrepair and refused

prospective buyers access to it. As a result, says Audley, the price for which the agreement was made was the best that the property could then fetch.

The main issues arising for assessment from the circumstances as described are:

A. Is there a valid agreement subsisting for the sale of the property? This question requires the assessment of three subsidiary issues, namely;

(i) Was the agreement validly made?

(ii) Does the doctrine of "relation back" apply in these circumstances?

(iii) Did subsequent actions by Audley affect the status of the initial agreement?

B. Is there an obligation placed on the administrator to sell the property at the best price possible?

C. Is the property being sold at an undervalue?

D. What remedies are available against an administrator who proposes to sell at an undervalue?

I shall address each question in turn.

A. **Is there a valid agreement for sale in place?**

(i) Was the agreement validly made?

There has been no dispute in respect of this aspect of the matter. It is trite law that it is the grant of Letters of Administration which gives the administrator his authority to act in respect of the estate. Audley received the grant on 6th July 2000. He therefore had no authority to enter into an agreement to sell the legal interest in the fee simple for this property when he purported to do so on 14th December 1999.

(ii) Does the doctrine of relation back apply?

Mrs. Harrison-Henry, appearing for Maurice, submitted that the agreement made thus, without authority, is void and that no subsequent act is capable of rendering it effective since it is not for the benefit of the estate.

The question is whether the doctrine of relation back can save this agreement. The learned authors of Williams Mortimer and Sunnucks on Executors, Administrators and Probate (17th Ed.) make it clear that at common law in certain circumstances an act done prior to the grant of Letters of Administration may be validated thereafter. They say at p. 91:

> "Cases may however be found, where the letters of administration, have been held to relate back to the death of the intestate, so as to give validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor *de son tort*, and sells them, and afterwards obtains letters of administration, it seems the sale is good by relation and the wrong is purged."

And at page 92 they continue:

> "Again where goods had been sold after the death of an intestate and before the grant of letters of administration, avowedly on account of the

> estate of the intestate by one who had been the intestate's agent, it was held that the administrator might ratify the sale and recover the price from the purchaser as goods sold and delivered."

The case of *Foster v Bates* (1843) 12 M & W 226 is among cases cited in support of both propositions.

On the question of whether, at common law, the grant will relate back, the learned authors of Williams Mortimer and Sunnucks (*supra*) say, at page 90:

> "The test is objective, that is to say, the grant will "relate back" only if this actually benefits the estate and not because the expected administrator thinks it will benefit the estate. Although there is no authority on the question it is thought that the test of "benefit" must be as at the date of the act in question regardless of supervening events."

Whether this purported agreement may be deemed for the benefit of the estate will require a closer assessment.

An assessment of *Foster v Bates* (*supra*) will be of assistance in determining the issue. In that case the court ruled that an administrator could maintain a suit against a purchaser for the payment of goods, forming part of the estate, but which were sold by an agent prior to the grant of Letters of Administration. Parke B. in delivering the judgment of the court said at page 233:

> "It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of death of the intestate; and that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover.... The reason for this relation...is that otherwise there would be no remedy for the wrong done. The relation being established for the

> benefit of the intestate's estate, against a wrongdoer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party."

He went on to say (still on p. 233):

> "In the present case...the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate, and it was ratified by the plaintiff after he became administrator; and when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command."

In the instant case Audley entered into the agreement after he had applied for the grant of Letters of Administration. The agreement stipulated that it was subject to his obtaining that grant. I am of the view that, in principle, under the doctrine of relation back, it was an agreement capable of being ratified by him in his capacity of Administrator.

(iii) Did subsequent actions by Audley affect the status of the initial agreement?

Subsequent to his obtaining the grant Audley has (in July 2000) placed the purchasers into possession at a rental of $10,000.00 per month. He has also (in November 2000) executed an instrument of transfer of the property in their favour. The document has however not yet been registered.

I find that these were acts of ratification, by the administrator, of that initial agreement.

B **Is there an obligation on the Administrator to sell at the best price possible?**

The administrator of an estate has extensive powers of disposition over all the personal and real estate of the intestate. His powers however are to be exercised in good faith for the benefit of the estate. This is so because he holds the real property in the estate on trust for the beneficiaries of the estate. Section 5(1) of the Real Property Representative Act states as follows:

> "Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate, as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

It has been held that a personal representative may be guilty of waste if he collusively sells estate property at an undervalue. (See *Rice v Gordon* (1848) Beav. 265) In that case, the court was of the view that the sale of the property to the brother of the personal representative "was at an undervalue so gross, that it ought to be deemed fraudulent and void". (See page 270) In *Buttle and others v Saunders and another* [1950] 2 All E. R. 193 at p. 195 Wynn-Parry J. held that trustees had, "an overriding duty to obtain the best price which they can for their beneficiaries."

In *Dance v Goldringham* (1873) VIII Ch. App. Cas. 902 at p. 907 Malins V.C. put it slightly differently, saying; "the duty of the trustees is to

protect the *cestuis que trust*, and to sell the property for the best price, that can be reasonably be obtained for it." (Emphasis mine.)

C **Is #1D Bamboo Avenue being sold at an undervalue?**

Although there has been much disagreement between the parties concerning whether there was an agreed price for which the property would be sold and also as to its condition at the time that Audley entered into the agreement, certain aspects are indisputable. One of those is the appraisal by C.D. Alexander Realty Ltd. carried out in May 1998. That company carried out an inspection of the property and appraised it as being valued $8.4 m. as at June 1997 (the month of Mrs. Stephenson's death) and $9.4 as at May 14, 1998.

The appraisal noted: "the building appeared poorly maintained and required attention to most of its components". Further, in respect of the building, the appraisal noted:

> "Modern technology had been employed in the development of this structure"...,
>
> Roof — reinforced concrete slab (rendered underside) with a small section of galvanized iron sheeting...
>
> Walls — reinforced concrete blocks and cutstone."

Finally the valuators opined that they expected that the building, "if adequately repaired and maintained should have a further useful life of approximately 30 years".

The land itself was said to be valued $4.8m. This meant that the building, by calculation (9.4 - 4.8), would be worth $4.6m. The replacement value of the building was assessed to be $8.4m. A reserve price, (sometimes referred to as the 'forced sale price') of $7.52m. was recommended by the valuators.

It is not insignificant that in applying for the grant of Letters of Administration, Audley, in his Oath of Administrator and in an inventory of the assets of the estate (both signed on the 7th May, 1999), swore that the property was worth $8.0m as at 25th June 1997.

What then would induce him to enter into an agreement to sell that property for $5.0m just over six months later? The reasons he has advanced may be summarized as follows:

a) Maurice had by his neglect and acts of waste (removal of the front door and general slovenliness) had reduced the property to a "simulacrum of what it used to be". A witness, Kimberly Hitchins (Audley's daughter) in her affidavit described the property as having the appearance of an "abandoned house".

b) Maurice also refused entry to an agent whom Audley had commissioned to secure a buyer for the property, as well as to several prospective purchasers.

c) There had been a softening of the real estate market.

The result was that according to Audley $5.0m. was the best offer that he had received for the property.

He was not oblivious to the discrepancy. At paragraph 11 of his affidavit sworn to on 19th April 2005, he deposed:

> "That an Agreement for Sale was signed on the 14th December 1999 for the agreed sale of $5,000,000.00 as no higher offers were made. I was advised by my Attorneys and do verily believe that the discrepancy in figures with the valuation and the sale price for the purposes of saving the estate expenses, a reapplication could be made to the court, however same may not be accepted...."

His concern seemed more attuned to the fact that the estate would be paying costs associated with the administration of an $8.0m. estate, while selling the property comprised in that estate for $5.0m.

The agent on whom Audley relied was Mr. Stafford Dixon. The latter deposed that the appearance of the property and the restricted access to it severely impeded his efforts to interest prospective purchasers. He said that he received only one offer above $4.5m. At paragraph 11 of his affidavit sworn to on 13th April 2005, he said:

> "That I had asked Messrs. Hitchins to bush the property to give it a better appearance and to appeal to prospective purchasers, in particular the female prospective purchasers as many came and only stood at the gate, refusing to venture further. That I was not informed and did not see any work done to the property which may have enhanced its uninviting and run-down appearance."

And at paragraph 16:

> "That based on my number of years in the industry, my training experience, the prevailing conditions within the industry, the economic conditions generally and the condition of the property with a depressed market, my professional opinion is the premises could not fetch a better sale price at the time it was sold. It is not unusual for vendors, in hindsight after a property is sold and the new owners have refurbished same to believe that they could have received a higher sale price at the time."

In cross-examination Mr. Dixon made a very significant statement. He said:

> "I wasn't looking at (the building) for remodelling at the time, I was looking at it (for) demolishing. I was actually trying to sell the land."

and,

> "In my mind it was the land I was selling.... To me I wasn't selling it from a house point of view. To me, the person I was selling it to would probably be demolishing the house."

and,

> "I really placed no value on the house at that time. I am talking 1998-1999."

For his part, Audley, in cross-examination, said "I have no idea whatsoever about real estate so I left it up to the agent."

There is also one other significant aspect that I wish to mention. Though Mr. Dixon deposes to having done his best to secure a sale of the property, there has not been produced to the court the tangible evidence of those efforts. No copies of advertisements have been produced; no information as to what steps Mr. Dixon took to advertise the premises. The purchaser Mr. Richard Spence in his affidavit deposed that he saw a

classified advertisement for the property sometime in 1998. He said that he saw another advertisement in or about October 1999. There is no other evidence to show a concentrated effort to expose this property to the market. In light of the obligation placed on the administrator to sell at the best price reasonably obtainable I find that Audley had a duty to produce such "other" evidence.

There was some evidence as to the value of the property, which would support Audley agreeing to sell at this price. Produced to the court, was an appraisal of the property by Messrs David DeLisser and Associates Ltd. It was prepared on the 10th January 2000, at the behest of the purchasers. Some of the comments by these valuators require noting.

"AREA ANALYSIS:	The area surrounding the property is developed with a variety of residences in the middle to upper income bracket, many of which are owner occupied and well maintained. Real Estate Values in this area have been increasing steadily over the past few years and in our opinion should continue to do so, however, due to the current economic trends, some decreases in market values may be experienced....
GENERAL REMARKS:	At the time of our inspection, the building was in need of general, renovations and remodeling, (sic) however, the structure appeared to be of sound character....
VALUE:	LAND : $2,500,000.00 BUILDING: $3,244,000.00 $5,744,000.00....

INSURANCE:	In our opinion the Full Replacement Cost on the building described herein is in the amount ELEVEN MILLION THREE HUNDRED AND FIFTY-FOUR THOUSAND DOLLARS ($11,354,000.00).
FORCED SALE:	In the event of a Forced Sale, the sum of FOUR MILLION FIVE HUNDRED AND NINETY-FIVE THOUSAND TWO HUNDRED DOLLARS ($4,595,200.00) should be realized...."

There is nothing in this report, which shows any dramatic change in the character of the property to justify such a major difference in value from that opined by Messrs C.D. Alexander Realty. There, of course, will be differences from time to time between valuators as to the value of the property; they may give differing weights to the various aspects comprising the appraisal. I however am inclined to accept that of Messrs. C. D. Alexander Realty and reject that of Messrs. David DeLisser & Associates. Firstly, Mr. Dixon, the other realtor giving expert evidence supports the former. Mr. Dixon, in his testimony on cross-examination puts the value of the land at that time at $5,000,000.00. Secondly, Messrs. David DeLisser & Associates' appraisal of the replacement value of the building, which they assess to be of "sound character", at $11,354,000.00, does not tally with an existing valuation of $3,244,000.00, which they ascribe to it.

Based on the circumstances as a whole, I am of the view that this agreement proposes for this property to be sold at a gross undervalue. I find

that in entering into this agreement Audley has been either been badly advised or there has been serious miscommunication between himself and his advisors. That situation has continued to exist. He has therefore spent much effort and resources in seeking to resist Maurice's claim that the agreement be set aside.

Whereas an ordinary vendor would be honour bound to complete this agreement and to resist it being set aside, the *Buttle* case (*supra*) shows that Audley has overriding considerations, which oblige him to act for the benefit of the beneficiaries of the estate.

D **What remedies are available against an administrator who proposes to sell at an undervalue?**

For the purposes of this sale, this property has been treated as if it is bare land. This is despite the fact that the building on it is solidly constructed and needed only repair, albeit in significant areas. It may have been that bushing the lot may have been the only action required to enhance its appeal to the market. I find that any steps reasonably required to enhance its value was and is Audley's responsibility.

Audley asserts that Maurice's actions and also his inactivity caused the property to depreciate. This depreciation, I find, cannot warrant the property being sold for a price of just over half of what it was worth eighteen months prior to the date of the agreement for sale. It is not that the property

was damaged by fire, flood, hurricane, earthquake or some natural or man-made disaster. The evidence is that it was abused by Maurice's slovenly attitude. Although the circumstances may not be as obvious as those in the case of *Rice v Gordon* (supra) I find that this purported sale was made at an undervalue so gross that it ought to be deemed fraudulent and void. In *Rice v Gordon*, *Buttle v Saunders* and *Dance v Goldringham* mentioned above, the respective courts set aside or prevented the completion of sales by the trustees. I find that in like manner this sale ought not to be completed.

Audley's Counsel have strenuously argued two additional points, firstly, that Maurice by his occupation of the property and his acts of waste is primarily liable to the estate. This point, with respect to the industry of learned counsel, is not relevant to the issue for the court's adjudication under this Originating Summons.

The second point they make is that his behaviour precludes Maurice from securing relief from a court of Equity. They say that Maurice has not come to Equity with "clean hands". There is no doubt that Maurice will be made to suffer for his inexcusable behaviour, however as the beneficiary of the estate he should not be precluded from asking the court to ensure that the trust is fairly and properly administered.

Finally, I shall consider the position of the proposed purchasers who will be adversely affected by this decision to set aside the sale. They have expended significant sums in repairing the property. They have however paid only a minimal rental for their occupation over the past five years. I doubt that they are worse off for the experience. Mrs. Harrison-Henry sought to emphasize the fact that the purchasers have since entered into an agreement, which will see the property being developed by the construction of townhouses, and that the sale price of those units will be in the region of $18.0m each. I do not think that that is a factor relevant to the question as to whether the property was sold at an undervalue on 14th December 1999. What I do think is relevant is that, if this sale were to be allowed to proceed, the beneficiaries of this estate would have received little or no benefit from it, especially when the costs of this litigation is considered, while the purchasers would have a property worth just under twice the price they paid for it. That, I find, is an untenable situation when dealing with trust property.

Conclusion

Despite the fact that Audley entered into the agreement to sell this property before he was authorized to do so, his subsequent receipt of the grant of Letters of Administration allowed for him to ratify the agreement.

He did in fact take steps, which amounted to ratification. Audley, however, as the administrator of this estate, held the realty as a trustee. As trustee, he is obliged, in selling the realty, to secure the best price reasonably obtainable for it in the circumstances.

The agreement was entered into for just over one-half of its appraised value, within eighteen months of a formal appraisal. The trustee has not demonstrated by tangible means that he did secure the best price. It seems that he relied on advisors who had different perspectives from his.

The sale price is at a gross undervalue and therefore is deemed fraudulent and void.

The circumstances demand that the court monitor any future sale.

In respect of the issue of costs, although Maurice has been the successful party his behaviour has contributed to the situation and as a result he should be denied costs.

The orders are therefore, as follows:

1. The agreement for sale dated 14th December 1999 between the Defendant Audley Hitchins and Richard Anthony Spence and Leonie Verna Spence be and is hereby set aside.

2. Any future agreement for sale of premises 1D Bamboo Avenue shall be submitted to the court for its approval before it shall become effective.
3. There shall be no order as to costs.