IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004 HCV 00022

BETWEEN JAMAICA REDEVELOPMENT FOUNDATION INC. CLAIMANT

AND MAX LAMBIE (Administrator of Estate of Elaine Vivienne Tully Deceased) DEFENDANT

Heard September 27, 2005 and December 9, 2005

Mr. David Johnson instructed by Piper & Samuda for Claimant/Applicant. Mr. K. Bishop instructed by Bishop & Fullerton for Defendant/Respondent.

ANDERSON, J

This matter came on for hearing on September 27, 2005, by way of a Fixed Date Claim Form dated January 8, 2004. The Jamaica Redevelopment Foundation Inc. ("the Applicant) sought the following orders:

1. A Declaration that the Defendant is not entitled to a grant of Letters of Administration in the Estate of Elaine Vivienne Tully, (deceased)
2. A Declaration that the grant of Letters of Administration Made to the Defendant on November 5, 2002 is irregular.
3. An Order revoking the said Grant of Letters of Administration.
4. An Order that the Defendant bring in and lodge the said Grant of Letters of Administration in the Registry of the Supreme Court of Judicature of Jamaica.

The Fixed Date Claim Form states that at the date of her death, the deceased was the sole proprietor of the lands contained in the Certificates of Title Volume 1324 Folio 107 through 117 of the Register Book of Titles and that the said Certificates were endorsed with mortgages numbered 937811, 1037009 and 1037010 held by the Claimant herein. It was also asserted that the

Defendant was not entitled to the Grant because he was not within the category of persons entitled to a grant of Letters of Administration under and by virtue of the provisions of the Intestates Estates and Property Charges Act and the Administrator General's Act.

According to the Applicant of Delroy Lawson filed in this court on March 22, 2004, the Fixed Date Claim Form was served on the Defendant on March 2, 2005 at the office of the claimant's attorney's-at-law.

In its particulars of claim, the Applicant averred that Workers Savings and Loan Bank, the predecessors in title to the mortgages referred to above had lent monies to Irma Maud Tully and Elaine Vivienne Tully, the then registered proprietors of land registered at Volume 1256 Folio 383 of the Register Book of Titles. The loans were secured by the mortgages 937811, 1037009 and 1037010 registered on July 8, 1996 as to the first and on December 23, 23, 1998 as to the other two. The said Certificate of Title was subsequently subdivided and the mortgages thereafter registered against the splinter titles at Volume 1234 Folios 107 through 117.

It was alleged that the mortgages went into default and Irma Maud Tully died on March 31, 1999. Elaine (her sister) the surviving joint tenant subsequently died on June 18, 2001 without liquidating the mortgages and Claimant which by then had become the successor in title to the mortgages, sought to enforce its security by selling the lands. The Defendant, a cousin of the deceased Elaine Vivienne Tully commenced proceedings for a Grant of Letters of Administration and in the pleadings therefore, indicated that a Mrs. Iris Russell, the aunt of the deceased was the only surviving relative entitled to the deceased's residuary estate.

The Grant of Letters of Administration was made to the Defendant on November 5, 2002, in circumstances where it is asserted that Mrs. Russell was the only relative of the deceased entitled to apply for such a grant pursuant to the

provisions of the then Administrator General's Act and the Intestates' Estates and Property Charges Act (the Act).

Mr. Johnson, for the Applicant, cited Section 3 Item 4, of the Act. That provision as in the following terms: -

(1) If the intestate leaves no surviving spouse, issue or parents, the residuary estate shall devolve on the other relatives entitled under this Item who survive the intestate, in the following order and manner, namely –

(a) firstly, be held under the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trust; then

(b) secondly, be held under the statutory trusts for the brothers and sisters of the half blood of the intestate, but if no person takes an absolutely vested interest under such trusts; then

(c) thirdly, on the grandparents of the intestate and, if more than one survive the intestate, in equal shares, but; but if there is no member of this class; then

(d) fourthly, be held under statutory trusts for the uncles and aunts of the intestate (being brothers and sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

(e) fifthly, be held under the statutory trusts for the uncles and aunts of the intestate (being brothers and sisters of the half blood of a parent of the intestate).

(2) Any persons who are eligible, pursuant to this Item under the statutory trusts, to qualify for any interest in the residuary estate are hereinafter referred to as "other eligible relatives"

Now it is clear that the Defendant does not fall within the classes set out in (1) (a), (b) (c) (d) or (e) of Item 4. Neither is he eligible under the statutory trusts as set out in the statute. The reference in Item 5 to "other persons for whom the

intestate might reasonably have been expected to make provision" is only a factor that the Crown may consider in relation to property devolving upon it as bona vacantia, and does not create any right or interest on the part of the Defendant.

Mr. Johnson submitted that in light of the provisions in item 4, the defendant was not a person entitled to succeed to any real or personal property of the intestate and accordingly, was not entitled to a grant of Letters of Administration. All the categories of persons so entitled are set in for the Table of Distributions which culminates with the possibility of devolution on "Other Eligible Relatives". Item 5 of section 4(2) provides that failing devolution under Items 1-4 and the statutory trusts, the residuary estate of the intestate "shall devolve on the Crown as bona vacantia". Item 4 of section 4 and paragraph (e) thereof, would allow uncles and aunts of the intestate being brothers and sisters of the half-blood of a parent of the intestate to succeed to the residuary estate as an "other eligible relative", In the cases of such persons however, the "other eligible relative" must have survived the intestate. The Defendant's claim purportedly made by virtue of his mother being an aunt of the deceased, therefore, cannot be sustained because his mother had pre-deceased the intestate.

According to the defence fled by the defendant, the intestate had one surviving family member who would have been able to claim the residuary estate and apply for letters of administration. That person was Iris Russell, an aunt of the intestate. Indeed, the Defendant in his Supplemental Oath of Administrator which he has included as a part of the defence filed in the action, states that "the deceased did not leave any beneficiaries as defined in Item 4 subsection (1) of the Intestates Estates and Property Charges Act." He, however, claimed in the Oath of Administrator that by virtue of Item 4 subsection (2) or Item 5 of subsection (2) he qualified as an "other eligible relative".

In his "Oath of Administrator" the Defendant acknowledges that he was a first cousin of the deceased and claimed to "qualify for interest in the residuary estate as "other eligible relatives" as defined in Item 4 subsection (2) or Item 5 subsection (2) and by Item 5 of the Table of Distribution of the Act". He also claims to qualify as "the sole kindred for whom the intestate might reasonably have been inspected (sic) to make provision out of the whole or any part of the property", as defined under Item 5.

Mr. Johnson submits that it was the surviving relative, Mrs. Iris Russell, pursuant to the provisions, of the Act who would have been entitled to apply for Letters of Administration. The Defendant says that he received the consent of Mrs. Russell who at 94 years old was "not willing to make the application and was incapable of carrying out the duties of Administrator". However, counsel for the Claimant says that in any event, proper consent was not given and that application would, in any event, have had to be made "for the benefit of Iris Russell". This had not been the case.

Mr. Johnson further submitted that the Defendant, notwithstanding his claim of having received the consent of the only person entitled to the grant of Letters of Administration, had not proven that he had a valid consent. In fact based upon the Defendant's own pleadings at paragraph 27 (c) of the Defence where it is stated:

> "Mrs. Iris Russell is incapable through advanced age at 94 years old to have had the physical, legal fees or mental health to apply and execute the grant and instead, she consented to my appointment."

Mr. Johnson submitted that Mrs. Russell was competent to apply for Letters of Administration while, based upon the statute, the Defendant was not. A grant to be valid in the circumstances, would have had to be made "for the benefit" of Mrs. Russell. Further, to the extent the Defendant was contending that the grant to him was made pursuant to the Civil Procedure Rules, then the grant was

irregular as the grant was made before Rules came into force on January 1, 2003.

Mr. Johnson also referred to the letter from the Administrator General's Department dated September 19, 2002 in which the Administrator General advised the Defendant that he should apply for Letters of Administration on behalf of Iris Russell who was a person eligible to apply and by virtue of a Power of Attorney from Mrs. Russell. He said the Defendant had failed to secure the Power of Attorney and, in any event he had also failed to make the application "for and on behalf of" the said Iris Russell, as recommended by the Administrator General in a letter of September 19, 2002.

Finally, he submitted that the Defendant's Counsel was relying upon the provisions in the United Kingdom legislation purporting to allow issue of aunts and uncles to apply for a grant. Such legislation had no parallel provision in the local Legislation.

In summarizing, Mr. Johnson submitted that the Court should take note of particular sections of the defence pleaded by the Defendant which gave clear reasons on its face, why the grant was not a proper one. In particular, he noted the "admission" by the Defendant that Iris Russell, the person entitled to the grant was "not mentally capable".

For the Defendant, Mr. Bishop in response submitted that there were three issues which the Court would have to consider in the application in deciding whether there had been a proper grant. Firstly, there was the issue of consent. He submitted that the Court had an inherent power to grant the Letters of Administrration and so the lack of formal consent by Mrs. Russell was not fatal to the grant. It appears however that this power is exercised only if there is a dispute between potential administrators, which is not the case here. He also submitted that despite the reference to lack of mental capability in Iris Russell, this was not to be interpreted as meaning that the person was mentally ill.

Secondly, he submitted that there was no requirement that the grant had to be made "for the benefit of Iris Russell". Indeed, in light of the submission that the Defendant was entitled to the grant in his own right, it was unnecessary for the application to be made in those terms. In that regard he cited the case **In Re LOCKWOOD, DECEASED, ATHERTON v. BROOKE AND ANOTHER [1958] 1CH 281**.

The headnote of the case reads as follows:

> "The next-of-kin of a spinster who died intestate were the issue of her uncles and aunts of the whole blood. The Crown claimed the estate of the intestate as bona vacantia under the Administration of Estates Act, 1925, as amended by the Intestates Estates Act, 1952, on the ground that the words in section 47(5) of the Act of 1925, as amended, required the survival of a member of the primary class, namely, uncles or aunts, in order that the issue of that class could claim in the intestacy: -
>
> *Held,* that the construction for which the Crown contended would have the effect of preferring the remoter to the nearer in blood and could not have been intended by the legislature when laying down the rules for ascertaining next-of-kin; and the court, to avoid such a capricious result, was entitled to ignore the words "or issue of any member of that class," or to treat them as not binding it to construe "class" in the earlier part of the subsection as confined to the primary class or uncles and aunts; accordingly, the estate of the intestate was held on trust for the issue of the uncles and aunts."

He submitted that this case was authority for saying that the Defendant as the issue of an aunt of the deceased intestate was a proper applicant for the Grant of Letters of Administration. As was pointed out by the attorney for the Claimant, however, this case was based upon a United Kingdom statutory provision of which there is no parallel in the Jamaican legislation. As I have also noted

elsewhere, the aunt or uncle in order to have an interest, must have survived the intestate.

The Defendant raises thirdly, Rule 68.18 of the CPR 2002 which came into force on January 1, 2003. It is claimed that that rule which now purports to allow an application for the grant of Letters of Administration by issue of aunts and uncles, whether of the whole blood or half blood, now operates to validate the earlier application by the Defendant. Finally Mr. Bishop submitted that the Defendant would be allowed to apply for the grant "per stirpes." He was unable to assist the Court with any reasoning as to how that concept would otherwise validate the grant.

As far as Mr. Bishop's submission on the principle of per stirpes is concerned, it has not been immediately apparent to me why a stirpital distribution would arise here. Indeed, the concept of and the distinction between per capita and per stirpes generally relate to how the proceeds of an estate is shared under the provisions of a will, and not normally to persons who may claim under an intestacy. The prima facie rule in those cases (dealing with wills) where questions of the relative entitlement of persons is at issue, is that distribution is to be made per capita, unless a contrary intention appears in the will. See **In re Alcock, Bonser v Alcock [1945] CH 264**. Where it may apply in an intestacy is where there is issue of the intestate, one or more of whom has predeceased the intestate leaving issue of his own. The children of the deceased's issue will take per stirpes. Thus if there were two children of the intestate, A and B, and B predeceased the intestate leaving children, D,E and F, A would be entitled to one-half of the residuary estate and the children of B as a class would share the other half. Nor would any children of A or B be able to enforce any claim if that parent was alive at the time of the death of the intestate. In this case there was no will and no issue and I am unclear as to how the principle of distribution, per stirpes, can assist the Defendant in relation to an application for Letters of Administration on this intestacy. In any case, he argued, the grant was a proper one.

Mr. Johnson submitted in response that **In Re Lockwood** was distinguishable as it was based upon specific statutory provisions which were not a part of the Jamaican Legislation.

Having reviewed the submissions, I have come to the view, somewhat reluctantly, that the grant to the Defendant was irregular. As noted in **Williams, Mortimer and Sunnucks, Executors, Administrators and Probate** by Sunnucks, Martyn and Garnett, (hereafter Williams): "The right to a grant is dependent upon the various classes of persons having a beneficial interest in the estate". Whether there is a sustainable claim to an interest in the residuary estate depends upon the terms of the Act.

Despite the letter from the Administrator General's Department dated September 25, 2002 suggesting that having reviewed the legislation, the department was now of the view that the Defendant qualified pursuant to section 5(3) of the Intestates Estates' and Property Charges Act, I am satisfied that that was not correct. Moreover, the consent as required by the statute was not given. The Power of Attorney which was also necessary was also not provided. Notwithstanding any letters from the Administrator General to the contrary, the Defendant would have to fall within the list of persons entitled, or qualify by virtue of the requisite consent and Power of Attorney.Tristram and Coote's Probate Practice 27th edition at page 372 states as follows:

> Only person entitled on intestacy incapable
>
> In the case of an intestacy, where the only person entitled to the grant is incapable, administration will be granted for his use and benefit and during his incapacity (i) to the person authorised by the Court of Protection or, if none, (ii) to his lawful attorney acting under a registered enduring power of attorney; or if none, or if such renounces administration for the use and benefit of the incapable person (iii) to such two or more other persons as the Registrar may by order direct."

In the instant circumstances, that the Defendant did not secure the legitimate consent of Iris Russell or a Power of Attorney. It is also clear that he does not fall within the group of persons eligible under item 4 in section 4(1) of the Act setting out the table of Distributions, being the group referred to as "Other eligible relatives." As such he has no interest.

There is one issue which had not been canvassed in the course of arguments before me but which I believe ought to be mentioned. That is the question of whether the Claimant in this action has *locus standi* to challenge the grant of letters of administration to the Defendant and to seek its revocation. In this regard, it may be useful to start with the proposition that the Court has an inherent power to revoke a grant which it has made. Indeed, in certain circumstances it may do so on its own motion. According to **Williams**, one of the grounds for revocation is an allegation that the grantee had no title because persons nearer in title were alive. That is the allegation here and it is supported by the pleadings of the Defendant. It is the over-arching submission of the Claimant, that that person did not validly give up her right to make the application. Williams also points out that one of the principal grounds for revocation is that the grant was secured by false *or incorrect* statements.

According to **Nunez-Tesheira** in Chapter 23 of **Non-Contentious Probate Practice in the English Speaking Caribbean**, a grant of probate or administration, (with or without will annexed) may be revoked by the Court:

(a) by an order on motion;

(b) in an action for revocation of a grant; and with respect to non-contentious probate business,

(c) only on an application or with the consent of the grantee, *unless the grant is one to which the grantee is clearly not entitled.*

The learned author points out that with respect to (c) above, the grant may be revoked for a number of reasons including where the grant has been made to one who had no rights or title thereto.

According to **Williams**, "A creditor may obtain revocation of a grant". (See **Re French, [1910] P. 169**). According to the Claimant in its grounds for the application for the declaration, it was in the position of an assignee of the debts of the intestate, which debts were secured by a mortgage over property, part of her estate. That would seem to be sufficient to allow the Claimant to bring this application, and I so hold. It does not appear that that there is any requirement for any person to have special locus standi in order to bring an action for the declaration sought herein.

In light of the holding above, the Claimant is entitled to the relief sought in paragraphs 1, 2 3 and 4 of the Fixed Date Claim Form dated January 8, 2004, and I so Order

Costs awarded to the Claimant, to be agreed or taxed.
Leave to appeal granted if necessary.