IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2007 HCV 1574

BETWEEN DENNIS SMITH CLAIMANT/APPLICANT

A N D MICHAEL SMITH DEFENDANT/RESPONDENT
(Administrator of the Estate of Oswald Smith)

Mrs. Valerie Neita-Robertson for the Claimant instructed by Robertson & Company.

Miss Juliet Y. Bailey for the Defendant.

Injunction – Application to restrain administrator of estate of deceased person – whether beneficiary has a right to purchase estate property

3rd & 7th May, 2007

BROOKS, J.

Mr. Oswald Smith died intestate on 7th January, 2005. One of his sons, Mr. Dennis Smith seeks an order restraining the administrator of Oswald's estate from selling an apartment which forms part of the estate. The administrator happens to be Dennis' brother, Michael. For convenience I shall refer to them by their first names. No disrespect is intended.

Dennis asserts that he wishes to purchase the apartment and that the administrator ought to be compelled to sell it to him. He contends that the bases for the requested order are that firstly, there was an agreement between Dennis, Michael and another brother, Roy that Dennis should have the

portion of the estate which was situated in Jamaica, and secondly, that he wished this apartment to remain in the family.

In resisting the application Michael asserts that there was no such agreement and also that the property was offered to Dennis but that he has failed to sign an agreement or to make the purchase. The question for the court at this stage is whether the interim injunction ought to be granted pending trial.

Is there a serious question to be tried?

Dennis alleges that prior to the grant of Letters of Administration in Jamaica to Michael there was an oral agreement between the three brothers that Dennis would "forego his full share of the estate of the deceased in the state of Florida in exchange for the (apartment) being conveyed to" Dennis. Dennis says that he has performed his side of the bargain but complains that Michael has reneged. Michael, he says, is now "adamant that (the apartment) be sold by way of a cash sale only at a price of $6,200,000.00". Dennis claims that he is entitled to the property by virtue of the agreement. He also says that he is now prepared to purchase the property at the price of $6.2 m, but says that Michael should be restrained from insisting on a cash sale only.

The affidavits reveal that there are a number of disputes as to fact. Those disputes even extended to differences between their respective attorneys -at- law concerning discussions held between the lawyers. What however seems clear from a letter dated August 31, 2006 from Dennis' attorney-at-law is that Dennis, even at that stage, was not asserting sole ownership of the apartment. The letter contains the following paragraphs:

> "Further to yours, it appears that our agreement in conference that the property be valued and our client purchase your client's share at the assessed market value is being ignored"

and:

> "The market value of the property as determined by the agreed Valuator is $4.5 million. Accordingly that is the price our client is prepared to pay; thereby remitting to you the two-thirds (2/3rd) share in respect of the other two beneficiaries."

and further:

> "Kindly accept this as our client's firm offer to purchase the 2/3rd share of his brothers John (sic) and Michael Smith at the market value assessed by the agreed Valuator, and in keeping with our agreement in Conference of June 29th 2006."

Although the court, at this stage is not "to try to resolve conflicts of evidence on affidavit as to facts" (*American Cyanamid Co. v Ethicon Ltd.* [1970] 1 All E.R. 504 at page 510), in light of those statements I find that Dennis is unlikely to succeed on a claim that he is, by contract, the sole beneficial owner of the apartment.

The question which now remains is whether the administrator has any obligation to sell to Dennis, on any special terms, or at all.

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."

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.)

Michael has deposed that he has an offer to purchase the property for cash (i.e. without mortgage financing) for a price of $6.5m. Strangely however, a period of sixty days has been proposed for completion. That would seem to be an unnecessarily long period.

In respect of the other aspect, Dennis has no legal claim to any priority as a purchaser. In his work *The Law of Succession* 6th Ed. at p. 249, Sir David Hughes Parry outlined the right of a beneficiary thus:

> "The title of beneficiaries claiming the property of a deceased person, whether as devisees, legatees, or statutory next-of-kin, is not complete without some act on the part of the deceased's personal representatives for giving effect to the gift or succession. Until such an act, which generally takes the form of an assent or a conveyance, occurs, a beneficiary has merely an inchoate, but transmissible right....A residuary legatee or devisee, however, has no claim to any of the deceased's estate in *specie* nor to any part of that estate until the residue is ascertained. His right is to have the estate administered and then applied for his benefit. The right of a beneficiary claiming on a total intestacy is similar, except that he takes under a statutory trust for sale and conversion."

It would seem therefore that Dennis would have no right to insist on a sale to him, though, by section 5 quoted above, he along with his brothers could have insisted on a transfer to the three, provided that the estate was otherwise free and clear. That however is not what is being sought and Michael, the administrator, has deposed that the estate is indebted to him personally for expenses which he has incurred in taking out Letters of Administration and meeting other expenses. He says the estate also has other unpaid debts relating to the apartment.

Finally Michael has deposed that Dennis was sent a draft agreement for sale for his execution from November 2006 and there has been no positive response from him with regard to it.

Based on the above, I am of the view that Dennis has no serious issue to be tried which would cause this court to lean toward the grant of an

injunction. I find that Michael has no obligation to sell the property to Dennis. Michael is obliged to get the best price for the apartment, at the best terms, in the interest of the beneficiaries of the estate. If Dennis is able to meet those requirements in a timely manner, no doubt his offer would be accepted, but those are matters of speculation.

In light of these findings I need not go on to consider the questions of whether damages is an adequate remedy and where the balance of convenience lies.

For the reasons stated above the application is refused.

The order of the court therefore is:

1. The application is refused

2. Costs to the Defendant to be taxed if not agreed.