

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. T150 of 1994

BETWEEN

**Jean Janice Elliot
Rawle Hiram Elliot
Rhonda Karen Elliot**

Plaintiffs

And

Administrator General

Defendant

Before the Honourable Mr. Justice Gregory Smith

Appearances:

Ms. J. Jones for the Plaintiffs

Mr. D. Byam for the Defendant

JUDGMENT

INTRODUCTION

1. The Plaintiffs commenced this action for the partition or sale of a parcel of land in Tobago. The Defendant has now brought a summons in which the main relief sought is for the Defendant (the Administrator General) to cease to be a party to this action and that the action should accordingly be dismissed. This

relief was central to this application and the other grounds stood or fall by the decision on this issue.

2. I decided to strike out the Defendant as a party to this action and since the Administrator General was the only Defendant and there was no application to substitute anyone else as a Defendant, I dismissed the action. The reason for this decision was that pursuant to section 10(4) of the Administration of Estates Ordinance Ch 8 No.1 (hereafter cited as "Section 10 (4)") the Administrator General was only a bare legal trustee of the estate of the deceased person against whose estate the claim for partition or sale was made, and as such a bare legal trustee he could not be sued for the reliefs as claimed.

However, because the Defendant had, by its actions, caused this litigation to be unnecessarily protracted, I ordered the Defendant to pay the costs of this summons and all costs thrown away to date certified fit for Counsel.

I will now set out my reasons in detail.

Brief Facts and History of the Litigation

Facts:

3. According to the Statement of Claim, Winston Elliott and Newton Elliott were brothers and they held the fee simple as tenants in common of a parcel of land (hereafter referred to as “the Land”) comprising 4 acres, 3 roods and 31 perches situated in Tobago.

Winston Elliott (hereafter referred to as “Winston”) died intestate on the 2nd November 1963 and the First Plaintiff, Jean Elliott who is his wife, got Letters of Administration to his estate. By a deed of assent dated 23rd July 1964 she conveyed Winston’s half share in the Land to herself and the two other Plaintiffs who are the children of her marriage to Winston.

Newton Elliott (hereafter referred to as “Newton”) died intestate on the 11th February 1979. No one has been granted Letters of Administration to his estate and it is alleged that Newton’s interest in the Land remains vested in the Defendant pursuant to the provisions of the Administration of Estates Ordinance.

The Plaintiffs, by the writ and Statement of Claim in this action seek orders for the partition or sale of the land and other consequential orders.

History of the Litigation:

4. On 28th June 1994 the Writ in this matter was filed in the Tobago Sub-Registry of the Supreme Court. It was served on the Defendant on the 29th November 1994. On the 23rd November, 1995 the Plaintiffs applied for leave to

enter a default judgment against the Defendant, but that application was dismissed on the 12th January 1996 for non appearance of the parties. On the 6th February 1996 the Defendant entered an appearance to the action. On the 6th November 1997 the Plaintiffs brought an application for leave to continue the action and to transfer it to the Registry of the Supreme Court in Trinidad; both applications were granted. On the 31st December 1997 the Plaintiffs again applied for leave to enter a default judgment against the Defendant and on the 5th February 1998 such leave was granted. Thereafter, the Plaintiffs applied for a variation of the order for judgment in February 2000 and the same was varied in April 2000. The Plaintiffs duly advertised the Land for sale and then negotiations commenced with the Defendant; these negotiations were conducted with a view to getting persons who were identified as potential next of kin of Newton, to apply for a grant of Letters of Administration of his estate and ultimately, to compromise this matter. No one ever applied for the grant of Letters of Administration of Newton's estate and in March 2002 the Plaintiffs applied for further directions to proceed with the sale of the Land. In June 2002 such orders were made. In September 2002 this application was filed by the Defendant seeking:-

- (i) to dismiss this action to Order 18 R19 as disclosing no or no reasonable cause of action.
- (ii) To strike out the Defendant as a party and to dismiss the action accordingly
- (iii) To stay the sale of the land
- (iv) To set aside the default judgment

5. As was stated in the introduction, the central relief in this summons was the application to strike out the Defendant as a party to this action and to have it dismissed as a result; and the case stood or fell by my decision on this issue.

The Rival Submissions

6. The Defendant contended that Newton's estate only vested in the Defendant by virtue of the provisions of Section 10(4). Under these provisions, only the bare legal estate of a deceased was vested in the Defendant and he was expressly forbidden from interfering in such an estate. The authorities showed that it was not competent for the Defendant, as such bare legal trustee, to sue or be sued on behalf of the estate of a deceased (see Manning v The Administrator General (1962 5 WR 265, Arthur v Gomes (1966) 11 WIR 25 and Leopold v The Administrator General H.C.A. 1957 to 1989).

That being the case, the Defendant had to be struck out as a party and the matter should accordingly be dismissed.

Counsel also submitted that it was not the case that the Defendant could never be a party to litigation but to do so he had to apply for a grant of Administration or Probate or he could intervene pursuant to the provisions contained specific pieces of legislation authorizing him so to do e.g. to prevent the spoliation of an estate pending administration (see section 37 of the Wills and Probate Ordinance, Ch 8 No. 2).

Further, Counsel submitted that what the Plaintiffs should have done to properly sue the estate in this case when no one had applied for a grant of Letters of Administration, was to apply to the Court to join someone (e.g. one of the prospective next of kin of the deceased or even a nominee of the Plaintiff) as an Administrator ad Litem pursuant to section 25 of the Wills and Probate

Ordinance. It was not proper to sue the Defendant as a bare legal trustee, on behalf of the estate of a deceased.

7. Counsel for the Plaintiffs distinguished the cases referred to above. It was submitted that what was said in Manning's case and in Arthur v Gomes was really obiter dicta and that the reason the action failed against the Administrator General in Leopold's case was that the very nature of the reliefs sought necessitated the Administrator General going beyond the powers of a bare trustee and actually intervening in an estate.

Counsel submitted that it was not the case that a bare legal trustee was totally forbidden from any action on behalf of an estate and cited the case Smith v Mather (1948) 1 All ER 704 in support of that proposition.

Counsel then submitted that the relief sought in this case could be made even against persons who were not parties to an action and that on the present facts the Defendant would not be required to do anything to perfect the orders sought so that he would not be intervening in the action, hence the matter could properly proceed as against the Defendant.

REASONS:

8. Section 10(4) provides that:

“(4) On the death of any person all his estate real and personal whatever within the colony shall vest in law in the Administrator General until the same is divested by the grant of probate or letters of administration to some other persons or persons: Provided that the Administrator General shall not, pending the grant of such probate or letters of administration, take possession of or interfere in the administration of any estate save as in this Ordinance and in the Wills and Probate Ordinance provided.”

In Manning's Case, the Administrator General sued the appellant for a declaration that two deeds of gift executed by the deceased, R. M., before his death were void or passed no interest to the Appellant. The Administrator General was suing because there had been no grant of Administration or Probate of the Estate of the deceased, and it was alleged that the property of the deceased vested in him. At the time of the suit the Administrator General was not a corporation sole and it was held that he could not sue or be sued in his capacity as Administrator General hence the action was a nullity. However, in the text of his judgment Wooding C.J. referred to Section 10(4) and considered what would have been the position if the Administrator General somehow had the capacity to sue on behalf of an estate; he concluded that Section 10(4) only made the Administrator General a bare trustee and the section expressly forbid him to interfere in any way in the administration of the estate and as such he could not claim any of the relief sought.

In Arthur v Gomes Wooding C.J. again considered what was the effect of Section 10(4) in respect of the powers of the Administrator General and stated at page 28 that “only the bare legal title passes to the Administrator General. He is merely a depository, so to speak, holding things in medio until such time as a grant is obtained. This is because the title cannot remain in vacuo pending the grant.”

Arguably, that statement was obiter dicta, but it was cited with approval in Leopold's case, in which latter case the decision in Section 10(4) was not obiter dicta.

In Leopold's case, the Plaintiff's mother had died in October 1938 and a parcel of land formed part of her estate. The Plaintiff had a brother and a sister. The brother applied for Letters of Administration to the mother's estate, swearing falsely that he and the Plaintiff's sister were the only next of kin to the Plaintiff's mother. He then executed a memorandum of assent by which he conveyed the parcel of land to himself and their sister, who had colluded with him by swearing falsely that he and she were the only persons entitled to the estate. The sister then transferred her share in the parcel of land to the brother. The Plaintiff's sister died in June 1985 and his brother died in November 1985. There had been no grant of Probate or Letters of Administration to the estate of the brother and the Administrator General was sued since the brother's estate vested in him pursuant to Section 10(4). In the action, the Plaintiff claimed two declarations that he was entitled to share in the estate of his mother equally with his brother and sister; a declaration that pursuant to Section 10(4), the Administrator

General held the parcel of land in trust for the Plaintiff, his brother and sister; relief No. (4) was for an order that he be registered jointly as proprietor of the land with the other persons so entitled; relief No. (5) was for an account and relief No. (6) was for the payment of profits upon the taking of the account.

The Administrator General, entered a conditional appearance and brought an application to strike out the action against him. (It should be noted that at the time of this action, the Administrator General had become a corporation sole).

Gopeesingh J. who heard the application made a thorough analysis of the law and authorities and cited with approval the dicta from Manning's case and from Arthur v Gomes, referred to above, and concluded that the Administrator General was a bare legal trustee and as such reliefs (4), (5) and (6) could only be obtained from the executor or administrator of the estates of the Plaintiff's brother and sister after a grant of Probate or Letters of Administration to their estates. In the circumstances the Administrator General was struck out as a party and there being no application to substitute anyone as a defendant, the matter was dismissed.

9. These authorities demonstrate that in his capacity as a bare legal trustee, the Administrator General may not sue or be sued to represent the estate of a deceased.

10. With respect to the case of Smith v Mather cited by Counsel for the Plaintiffs; the facts were that a tenancy was protected under the provisions of the

U.K. Rent Acts. The contractual tenant died and left her son and daughter in the premises. The landlord served a notice to quit the premises on the “probate judge” (who held the bare legal estate on trust similarly to the Administrator General (see Manning’s case at page 269 D - G). It was decided, inter alia, that the service of the notice to quit was valid and effective.

11. Smith v Mather is a case limited to its own special facts. It only decided that on the facts and the law as it stood in that case, a notice to quit was validly served on the “probate judge”; it can already be distinguished from cases like the present one where the probate judge/Administrator General was purportedly a party to litigation. In fact, no case was cited where the probate judge/Administrator General, sued or was sued successfully as a party to litigation pursuant only to the powers vested in him under Section 10(4).

Further, based on the relevant Rent Restriction legislation in Trinidad and Tobago, Smith v Mather may have been differently decided here (see the facts in Arthur v Gomes cited above) and the case cannot be taken to lay down any general propositions of law that would be applicable to Trinidad and Tobago.

In the circumstances, I find that based on the time honoured decisions of our local courts, the Administrator General cannot sue or be sued pursuant to his powers as a bare legal trustee under Section 10(4) simpliciter.

12. Assuming that I am wrong about this and that there is merit in the submissions of Counsel for the Plaintiffs that one needs to examine the nature of

the relief sought to determine whether the Administrator General was exceeding his powers as a bare trustee, an examination of relief (4) which was sought in Leopold's case, is instructive. That relief (4) was for an order that the Plaintiff be registered as a joint owner of the land in question. This order could have been directed to the Registrar General or the Registrar of the Supreme Court, and arguably would not have necessitated the Administrator General doing anything in the Estate. In spite of this, relief (4) was held to be beyond the powers of a bare legal trustee. Similarly, in the present case, even though it is contended that the Administrator General is not himself bound to do the actual partition or sale requested, and that the Registrar General or the Registrar of the Supreme Court could be ordered to perfect these acts, these acts would still be done on behalf of the Administrator General as a party to the litigation, and, like relief (4) in Leopold's case, would be action (on his behalf) which is in excess of the powers of a bare legal trustee.

13. In any event, even assuming that there is some power which allows the Administrator General to sue or be sued in his name in cases where the reliefs claimed would not involve an interference in the estate of a deceased, one need only examine (i) The Partition Ordinance (Ch 27 No. 14), which legislation governs actions for Partition or sale and also (ii) the actual reliefs claimed in this matter, to see that an action for partition necessarily involves the party sued taking active steps in the litigation, inconsistent with being a passive or bare

trustee, and more specifically for the Administrator General to take active steps in the estate of a deceased beyond those of a bare legal trustee.

(i) Re The Partition Ordinance:

14. (a) Section 3, 4, 5 and 10 of the Partition Ordinance contemplate the court acting upon information to exercise its discretion to order a sale and to pay the proceeds over to the parties. Where the Administrator General is the only party sued (as is the case here) he could end up receiving money on behalf of the estate and would have to decide how to distribute it. Again, he would have acted beyond the powers of a bare trustee.

(b) The Ordinance itself also enables the power of sale to be exercised upon the request of any of the parties to the suit and in spite of the dissent of others; also, any of the parties can prevent a sale by undertaking to purchase the share of the party requesting the sale. These powers are also beyond those exercisable by a bare trustee.

(c) Section 8 gives the court power to direct inquiries as to other necessary parties to the action. Once again the Defendant or any other party to a partition action may have to undertake such enquiries and decide on further parties to join and/or even seek the leave of the court to join other parties who may be interested in the matter (e.g. occupiers and next of kin).

Therefore, it can be seen that the whole scheme of the Ordinance contemplates active and meaningful participation by the parties who sue and who are sued, which participation would not be within the powers of a bare legal trustee.

(ii) The Reliefs claimed in this matter:

15. In the present matter the reliefs claimed include prayers for the partition or sale of the Land. To decide on the course of action to be pursued, the Administrator General would have had to make enquiries of the next of kin to ascertain what would be their position with respect to the suit and even to make a decision as to if, and how, to defend such a suit. He would necessarily have to consider other matters on behalf of Newton's estate, such as whether to exercise the option to purchase the interest of the Plaintiffs or to resist the applications for partition or sale or to join Newton's next of kin and/or other occupiers of the land. The Administrator General is immediately cast in a role to make decisions which decisions he cannot make because they make him exceed his powers as a bare legal trustee.

Similarly, with the other reliefs sought, namely liberty to the Plaintiffs to bid at a sale; lodging of the proceeds in court "to the credit of this action", the charging of costs against the proceeds of sale. These involve the Administrator General taking steps and making enquiries and generally participating in the action, if only to assist the Court. In actual fact the Administrator General did

further intervene in Newton's estate by seeking out the next of kin and negotiating to compromise the action. These were acts beyond those of a bare trustee.

Further, when one examines the Order for sale that was made, it would place the Administrator General in a position where he would have to intervene in the Estate, for it has been ordered inter alia, that the net proceeds of sale be lodged in Court to the Credit of this action until further order. The Administrator General, being the only Defendant, would now have to take steps to see that the money is not left in court indefinitely for fear that he may then be in breach of a duty to potential next of kin or other possible claimants to the land to see that the money gets to the beneficiaries and/or the claimants or is properly invested.

The nature of the relief claimed and actual orders made in this matter does make the Administrator General act beyond his powers as a bare trustee.

16. I agreed with the submissions of Counsel for the Defendant that even though the Administrator General cannot sue or be sued on behalf of an estate which vests in him pursuant to Section 10(4), it does not mean that he cannot be a party to litigation. If the Administrator General is to sue or be sued on behalf of an estate, he must first have obtained a grant of Probate of Letters of Administration or he must be a party to litigation pursuant to specific statutory provisions enabling him to do so (e.g. section 37 of the Wills and Probate Ordinance, to prevent spoliation of an estate pending administration).

17. I also accepted the submissions of Counsel for the Defendant that the Plaintiffs could and should have applied to join the potential next of kin of Newton as Administrators ad Litem pursuant to section 25 of the Wills and Probate Ordinance and then proceed with this partition action.

18. The only cause for concern in this matter was that, as stated in paragraph 15 above, I had noticed that the Administrator General had already intervened in the matter beyond his powers as a bare trustee and I was concerned that there was some estoppel against him now taking issue with his joinder as a party to the action. I asked for further submissions on this point from both Counsel and it was only Counsel for the Defendant who gave me written submissions on the point which were not opposed by Counsel for the Plaintiffs.

These submissions were that the Administrator General as a creature of statute and by virtue of his functions, was a public authority and that there could not be an estoppel against a public authority to allow it to act ultra vires or to break the law. (See Maritime Electric Co. Ltd. v General Dairies Ltd 1937 A.C. 610). By intermeddling illegally or ultra vires his powers in Newton's estate the Administrator General could not now be estopped from continuing so to act.

In the face of no argument to the contrary I accepted the submissions of Counsel for the Defendant on this point.

The Order:

19. In all the circumstances, I held that the Defendant was not a proper party to these proceedings and struck him out as a party; there being no other Defendant nor any application to substitute anyone as a Defendant in place of the Administrator General, I dismissed the action.

However, this objection to the joinder of the Defendant as a party could and should have taken place much earlier in the proceedings. In fact, the Defendant should have entered a conditional appearance and then have the point determined as was done in Leopold's case. If this had been done this present litigation would not have been as protracted as it was. In these circumstances, I ordered the Defendant to pay the costs of this summons and all costs thrown away to date certified fit for Counsel.

Dated this 22nd day of September 2003

**Justice Gregory Smith
JUDGE**