In The Supreme Court of Bermuda

CIVIL JURISDICTION

No. 354 of 2017

Between:

ANTHONY CHARLES BURGESS

Plaintiff

And

VERONICA VICKY MCNEIL

Defendant

RULING

Preliminary Trial Point- Whether the acts of one estate representative binds another (The Administration of Estates Act 1974 and Trustee Act 1975)

Court's Discretionary Powers in Allowing a McKenzie Friend

Date of Hearing: Thursday 05 April 2018
Date of Decision: Thursday 11 April 2018

Plaintiff: In Person (assisted by Mr. Llewellyn Peniston as his McKenzie Friend)
Defendant: Mr. Kim White (Cox Hallett Wilkinson Limited)

RULING of Shade Subair Williams A/J

Introduction:

1. These Court proceedings were commenced by way of a Specially Indorsed Writ of Summons dated 28 September 2017. On the Plaintiff's pleaded case, he made an offer to the Defendant to purchase her deceased father's boat for the sum of $50,000. The Defendant claims that the offer was accepted and that a legally binding agreement had thereby been formed. In reliance

on this agreement, the Plaintiff avers that he purchased a number of items in preparation for the refit and repairs for the boat.

2. The Plaintiff in this matter is seeking by way of relief an order of estoppel preventing the Plaintiff and any other person from selling the vessel to anyone other than himself and an order enforcing the completion of the sale of the vessel to the Plaintiff in in consideration for the sum of $50,000.

3. The Defendant does not accept that a legally binding contract was formed. At paragraph 15 of the Defence it is asserted that the Plaintiff made multiple offers to purchase the boat at varying prices. However, the Defendant's case is that there was never an acceptance and or passing of consideration requisite for the formation of a contract.

4. The Defence case is also that the vessel was property belonging to the estate of the Defendant's deceased father. I take judicial notice that on 1 August 2017, Letters of Administration of the estate of John Edward Austin Whiting, who died intestate, was granted to the Defendant, Veronica McNeil, and to her sister, Jennie Lynn Whiting. Leave was reserved for the third sister, Susan Jones, to apply for and obtain a Grant.

5. As a preliminary trial point, the Defendant has invited the Court to resolve, as a matter of law, whether any such contract (which is not admitted) is capable of being enforced in any event if the Court were to find that it had been entered into by one estate administrator without the consent of the other.

6. Mr. White also strenuously objected to Mr. Peniston being accepted by this Court as a McKenzie friend to the extent that he would be permitted to advocate or make arguments in these proceedings.

7. This is a ruling with reasons on both preliminary issues.

The Law:

General Rights and Liabilities of Administrators in relation to Estate Assets

8. While neither party referred the Court to the Administration of Estates Act 1974 ("the 1974 Act") it is, indeed, the starting point from which the rights and liabilities of an administrator of an intestate estate should be considered.

9. Section 32 of the 1974 Act gives an administrator the same rights, liabilities and like accountability as that owed to an executor of an estate:

"*Rights and liabilities of administrator*
32. Every person to whom administration of the real and personal estate of a deceased is granted, shall, subject to the limitations contained in the grant, have the same

rights and liabilities and be accountable in like manner as if he were the executor of the deceased."

10. Lord Radcliffe sitting in the Privy Council in *Commissioner of Stamp Duties v Livingston [1964] 3 All ER 692 at page 696 C-E* described the role of a trustee holding un-administered property as a fiduciary one.

Duty of Estate Representatives to give effect to Beneficiaries' wishes before selling Assets

11. Where a person dies intestate, the estate representatives hold the estate with all of its assets in accordance with the law of intestacy. The wishes of the beneficiaries of the estate must remain at the forefront of the estate representative's considerations.

12. Section 23 defines the role of an estate representative as a trustee who holds the real and personal estate for persons beneficially entitled to it:

"*Trust for beneficiaries*
23 Subject to this Act, the estate representatives of a deceased person shall hold the real estate which devolves upon and becomes vested in them under section 22(1) as trustees for the persons beneficially entitled thereto in accordance with the will of the deceased person or the law relating to intestacy, or the combination of his will and that law, 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."

13. Part V governs the administration of assets and sections 38-39(1)-(2) of 1974 Act grant estate representatives a statutory right to expend and sell estate assets. Section 38 contemplates the estate assets being used as payment for estate debts and liabilities. Section 39, more broadly, permits 'the estate representative' without the consent of any person to sell assets, whether there are debts or not, to distribute the estate among the persons beneficially entitled thereto.

14. Section 39 also imposes an obligation on the estate representative to give effect to the wishes of the persons of full age beneficially entitled to the property to be sold:

39(1) The estate representative may, without the consent of any person, sell the assets referred to in section 38 for the purpose not only of paying debts, but also (whether there are or are not debts) of distributing the estate among the persons beneficially entitled thereto, and before selling for the purposes of distribution the estate representative shall, so far as practicable, give effect to the wishes of the persons of full age for the time being beneficially entitled to the property proposed to be sold, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that this section has been complied with.
(2) Unless required for purposes of administration owing to want of other assets, personal chattels as to which a person dies intestate shall not be sold except for special reason."

15. The responsibility owed by an administrator of an intestate estate to a beneficiary was plainly outlined by Mitchell J in *Clifton St Hill v Augustin St. Hill (unreported) St Vincent, Civil Suit*

402 of 1996, 24 May 2001 and subsequently cited with approval by the Eastern Caribbean Supreme Court in *Iva Freeman v Ina Freeman et al Virgin Islands Claim No. BVIHCV 2004/0151 at p.5*:

"*An Administrator of an intestate estate is a trustee. It is always the duty of an Administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level than he would in protecting his own interests. He must report and account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a lawsuit. He is not well advised if he then relied on the statutory powers given to him by the Act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a lawsuit being brought by a discontented beneficiary. Further, where the court is satisfied that an Administrator acted fraudulently in administering, the duty of sale given by the Act will not protect him. The Administrator will, in such case, be liable to be held personally responsible to make good the loss. For these reasons, among others, an Administrator should never proceed to act unilaterally in administering the estate. He should always consult with the beneficiaries and attempt to secure their consent to what he is proposing*."

The Requirement for all Estate Representatives to be in Agreement:

16. Mr. White relied on section 15(2) of the Trustee Act 1975 to support his submission that estate representatives must be in accord with one another before steps may be lawfully taken by them in administering and managing the estate.

17. The applicability of the Trustee Act 1975 to estate representatives is provided by section 2(1) as follows:

    (1) This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before, on or after 1 March 1975.

18. The terms "trust" and "estate representative" are addressed in the Interpretation section of the 1975 Act in the following way:

    "*"trust" does not include the duties incident to an estate or interest conveyed by way of mortgage, but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of an estate representative, and "trustee" includes an estate representative, and "new trustee" includes an additional trustee.*"

    "*"estate representative" means the executor, original or by representation, or administrator for the time being of a deceased person*."

19. Section 15(2) permits an estate representative to delegate his or her fiduciary functions to another person who may or may not be another estate representation. It provides:

"*15 (2) Estate representatives may delegate all or any or their functions as estate representative to-*

(a) A delegate; or

(b) One of the estate representatives (a "co-estate representative"),

and may pay such delegate or co-estate representative out of the property of the estate, whether income or capital or partly each as they may think fit."

20. Delegable functions are defined in section 15B (2) as functions of an administrative or managerial nature (including discretionary investment powers). The delegable functions given by section 15B are additional to a trustee's powers under section 17 to delegate all or any trusts, powers and discretions vested in that trustee during his or her period abroad.

21. Section 17(1)-(4) provides:

"***Power to delegate trusts during absence abroad***

17 (1) A trustee intending to remain out of Bermuda may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from Bermuda of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons so, however, that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.

(2) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the done in the same manner as if they were the acts or defaults of the donor.

(3) The power of attorney shall not come into operation unless and until the donor is out of Bermuda, and shall be revoked by his return.

(4) In favour of any person dealing with the donee, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has been revoked by the act of the donor or by his death or return to Bermuda or otherwise, be as valid and effectual as if the donor were alive and of full capacity, and had himself done such act or executed such instrument, unless such person had actual notice that the power had never come into operation or of the revocation of the power before such act was done or instrument executed."

22. The position requiring unity between more than one estate representative when selling estate assets is broached by section 24 of the Administration of Estates Act 1974 in respect of the conveyance of real estate:

"*Where as respects real estate there are two or more estate representatives, a conveyance of real estate devolving under this Act shall not be made without the concurrence therein of all such representatives or an order of the Court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or*

executors for the time being, without an order of the Court, and shall be as effectual as if all the persons named as executors had concurred therein."

23. The established common law position is that the majority of trustees cannot generally bind the rest. The overall common law approach was notably more restrictive that the statutory framework which later allowed for a delegation of a trustee's functions.

24. In Underhill's Law of Trusts and Trustees Eleventh Edition it is stated:

"*Art 53- Duty of Trustees to act jointly where more than one*
In the case of a private trust where there are more trustees than one, all must join in the execution of the trust (l), save only:
(a) where the settlement or a competent court otherwise directs;
(b) as to the receipt of income (m);
(c) as to such matters as can be lawfully delegated under Article 52.

This article is a corollary of Article 52 for, if trustees cannot delegate their duties, it follows that they must all personally form those duties, and not appoint one of themselves to manage the business of the trust. It is not usual to find one of the several trustees spoken of as one of as the "acting trustee" meaning the trustee who actively interests himself in the trust affairs, and whose decisions are merely indorsed by his co-trustees. The court, however, does not recognize any such distinction; for the settlor has trusted all of his trustees, and it behoves each and every of them to exercise his individual judgment and discretion on every matter, and not blindly to leave any questions to his co-trustees or co-trustee(n).

Majority of trustees cannot bind the rest
Thus, the act of a majority of private trustees cannot bind either a dissenting minority, or the trust estate. In order to bind the trust estate the act must be the act of all (o). For instance, where there is a trust for sale of real estate (whether express, or imposed by statute (p)) with a discretionary power to postpone the sale, the property must be sold within a reasonable time, unless the trustees are unanimously in favour of a postponement (q); and the same rule applies to a power to retain existing investments (r). At the same time, in such cases a trustee, if acting bona fide, may defer to what he considers to be the better judgment of his co-trustee, although he does so with reluctance (s). On the same ground, if one of several trustees incurs costs without consultation with his co-trustees, he cannot recover them from the estate where his efforts have resulted in loss (t)."

<u>The Doctrine on Ostensible Authority</u>

25. While this Court has been asked to consider whether one estate representative is capable of binding the other estate representative without her consent for the estate to enter the contract, I must also consider whether such a contract is rendered void or unenforceable by a third party purchaser.

26. In <u>*SJ Construction Ltd v Simons and Adderley [2015] Bda LR 9*</u> the learned Justice Stephen Hellman considered the doctrine of ostensible authority by reference to Diplock LJ (as he

then was) in *Freeman & Lockyer v Buckhurst Park Properties (Magnal) Ltd [1964] 2 QB 480, EWCA, at 503*:

"An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

27. The doctrine on ostensible authority gives rise to an argument by the Plaintiff that any contract between him and the Defendant is enforceable. However, the Plaintiff might also be called upon to grapple with the general position that a Court will not enforce the specific performance of a contract that amounts to a breach of trust (See Lewin on Trusts 19th edition para 37-035 and *Wood v Richardson (1840) 4 Beav. 174 at 176*, per Lord Langdale (although there the Court found on the evidence that there had not been a breach of trust)). In cases involving a breach of trust, a purchaser must rely on a claim for damages against the trustees.

The Law on McKenzie Friends

28. Mr. White relied on the case of *Moulder v Cox Hallet Wilkinson [2011] Bda L.R. 40* in arguing that McKenzie friends are rarely permitted to appear before the Courts to assume the role of an advocate. In that case, Auld JA in delivering the judgment of the Court of Appeal observed at page 3 para 10:

"*Ms. Judith Chambers, Mr. Moulder's former wife, has clearly been much incolved in the direction and preparation of his extensive litigation in this matter, including both actions and this appeal. The Court gave her leave to address the Court on his behalf- a role not normally accorded to a McKenzie Friend- which she did at considerable length by reference to a 42 page written submission covering the history from its beginning in 1999 and all the issues raised by Mr. Moulder's statement of claim. On the direction of the Court, her submissions were ostensibly directed to the issue of limitation, as a possibly determinative issue on the whole appeal. But, inevitably perhaps, she traversed the whole range of the substantive issues raised by him in his pleaded case before the Chief Justice and on this appeal. We also had written submissions from counsel for all the Respondents and their oral submissions on the issue of limitation*."

29. While the subject of a McKenzie friend was not decided in the case of *Moulder*, the Supreme Court in its appellate jurisdiction did consider the Court's discretionary powers to permit a

McKenzie friend to address the Court in *Jahquille Stowe v The Queen [2016] SC (Bda) 40 App (11 April 2016)*. The learned Hon. Chief Justice, Ian R.C. Kawaley, outlined in depth the applicable legal principles. Kawaley CJ referred to the Court of Appeal's remarks in *Moulder* and held at page 3 of his judgment:

"*Mr. Quallo (the McKenzie Friend) submitted, without placing any authorities before the Court, that the Court possessed a broad discretion to permit persons who were not legally qualified to assist litigants in person as a so-called McKenzie friend. In the absence of any discernible opposition from Ms Simons, I acceded to this preliminary application. Having considered the matter further, I am satisfied that the basis of the application was fundamentally sound although it seems that it is the exception rather than the rule that a "McKenzie friend" is permitted to not simply assist but also address the Court…*"

30. The learned Chief Justice in *Jahquille Stowe* had regard to the origins of a McKenzie friend which was observed by Lord Woolf in *R v Bow County Court ex parte Pelling [1999] 4 ALL ER 751; [1999] EWCA Civ J0728-15*:

"*5. The title 'McKenzie Friend' draws its name from the decision of the Court of Appeal in McKenzie v McKenzie [1971] P 33. The role of a McKenzie friend was first recognized in Collier v Hicks [1831] 2 B & Ad.663. Lord Tenterden CJ in that case said (at p.669):*

'Any person whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no-one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the Justices.'…"

31. Lord Woolf continued at paragraph 10, having regard to the English Court of Appeal's judgment delivered by Lord Donaldson in *R v Leicester City Justices, ex parte Barrow [1991] 2 QB 260*:

"*…The "McKenzie friend" does not exist at all as such and has neither status nor rights. The only right is that of the litigant and his right is to reasonable assistance, which can take many forms. If he is blind, he may need someone to read documents to him, if he is hard of hearing, he may need someone sitting next to him so he can make a note so he can read what he cannot hear. The possibilities, if not endless are at least extensive.'* "

32. Mr. White place emphasis on the following passage by Lord Donaldson (recited by Lord Woolf at para 11) to distinguish an advocate from a McKenzie friend:

"*If he wishes to have an adviser, as contrasted with an advocate, it is convenient that he should mention this fact to the justices or to their clerk in order that he may know why the person concerned is sitting next to the defendant, rather than the space reserved for the general public. Furthermore, the justices or their clerk may reasonably wish to know whether this adviser is likely to be called as a witness and should not hear the evidence of other witnesses if exclusion from court whilst that evidence is being given is usual in that class of case…*"

33. Kawaley CJ at paras 5-6 in *Jahquille Stowe v R* directed his mind to the more restricted approach applied in England to unqualified McKenzie friends when addressing the Court:

"*5. The English practice strongly suggests that only in exceptional circumstances should an unqualified McKenzie friend be permitted to address the Court. As Brook LJ observed in Noueri v Paragon Finance plc, The Times Law Reports October 4, 2001:*

> *"The discretion to grant rights of audience to individuals who did not meet the stringent requirements of the 1990 Act should only be exercised in exceptional circumstances, and the Courts should pause long before granting rights to individuals who made a practice of seeking to represent otherwise unrepresented litigants: see D v S (Rights of Audience) (The Times January 1, 1997; (1997) 1 FLR 724, 725-726)"*

"6. The restrictive approach to permitting unqualified McKenzie friends to address the Court commended by the above authorities suggests that in similar future comparatively uncomplicated cases, the same approach I adopted here might not be followed again. That said, Mr. Quallo assisted both the Appellant and the Court through his well-researched and persuasive submissions in a case where the Appellant assumed the onerous burden of undermining essentially factual findings made at trial."

Analysis:

Enforceability of Contract

34. Mr. White placed a number of authorities before the Court, each involving the Court's construction of a will which was of no real assistance in my consideration of the statutory and common law powers of estate representatives in respect of an intestate estate.

35. It is clear that there is room for argument that the doctrine of ostensible authority arises in favour of the Plaintiff's case, if this Court were to find on the evidence that a contract had been effectively formed. I am also mindful that there is scope for the Plaintiff to rely on, at least to some degree, section 39(1) of the Administration of Estates Act 1974, which allows an estate representative to sell the assets of an estate after giving effect to the wishes of adult beneficiaries, relieves a purchaser from concern on whether this section has been complied with. Further, it may be argued that section 17(4) of the Trustee Act 1975 validates the contract in favour of the Plaintiff if it is found that the Defendant entered a contract without the delegated power to do so unilaterally and without any knowledge of that lack of power on the part of the Plaintiff. Having recognized these potential arguments, I emphasize that it is not for this Court to pre-judge any competing legal arguments which may be heard after all the evidence has been called and final arguments have been made.

36. For these reasons, I find that this particular issue is a matter for determination at trial.

McKenzie Friends

37. Mr. Peniston was accepted by this Court as a McKenzie friend to assist the Plaintiff and the Court in hearing these preliminary arguments which were fixed within a short timeframe following the adjournment of the trial fixture on 20 March 2018.

38. The Plaintiff previously made an application to adjourn the trial on the basis that he terminated the services of his previous attorney for alleged misconduct which has now been reported to the Bermuda Bar Council.

39. Mr. White, who unsuccessfully objected to the trial adjournment, was keen to resume this matter as quickly as possible. In the exercise of my discretion, I fixed this matter to be heard on Mr. White's preliminary point only a couple of weeks thereafter. This timeframe would have presented some strain on the Plaintiff to secure new Counsel. Mr. Peniston, who has previously been accepted in these Courts in another matter as qualified McKenzie friend, agreed to assist the Plaintiff and Court in presenting these preliminary arguments on this basis.

40. However, this allowance is not to be taken as an indication, one way or the other, that Mr. Peniston would be again permitted to appear in this matter as a McKenzie friend at the trial proceedings.

Conclusion:

41. I have found in favour of the Plaintiff on both preliminary points raised. This simply means that I find that the points raised are arguable and matters for trial and that they do not bring an early disposal to these proceedings. Other than that, I reserve all legal and factual findings for trial.

42. Notably, much of the law raised in this ruling was done on my own researches so Counsel should be afforded the opportunity to consider the cases cited and the areas of law raised prior to trial.

43. Unless either party wishes to be heard on costs and applies to be heard within 14 days, I make no order as to costs in respect of these arguments and the hearing of 5 April 2018.

Thursday 11 April 2018

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT