

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
BETWEEN**

2015/CLE/gen/001930

MARGARET CLEARE

First Plaintiff

AND

TREVOR CLEARE

Second Plaintiff

AND

ROBERT CLEARE

Third Plaintiff

AND

CATHYANN CLEARE

Fourth Plaintiff

AND

ALYSSA CLEARE-TAYLOR

Fifth Plaintiff

AND

**McQUINELLA BERNADETT CLEARE-BONIMY
McQUINELLA BERNADETT CLEARE-BONIMY
(Attorney by Deed of Power of Attorney of Shirley Bowe-Cleare)**

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Krystian Butler for the Plaintiffs
Attorney Alexander Maillis for the Defendant

Dates of Hearing: 28th October 2021, 25th January 2022

DECISION

FACTUAL SUMMARY

1. This matter concerns a family dispute over the conveyance of a property from the Defendant via Power of Attorney to herself in a personal capacity. Mrs. Shirley Cleare, the mother of the parties, gave the Defendant power to conduct and manage her affairs under a Power of Attorney dated 22 September 2008 due to her declining health. On 6 January 2009, the Defendant in her capacity as Power of Attorney conveyed to herself in her personal capacity land situated at All Saints Way in the Southern District of New Providence, The Bahamas, being the property of Mrs. Cleare. On or about a month later, Mrs. Cleare passed away. No letters of administration have been obtained in relation to her estate.
2. The Plaintiffs are all siblings of the Defendant. They claim that the Defendant breached her fiduciary obligation to act in good faith by conveying property to herself, which constitutes self-dealing. Thus, the conveyance ought to be declared void ab initio, and the property be made to form part of their late mother, Mrs. Cleare's estate. Ultimately, the Plaintiffs seek a restraining order against the Defendant from dealing with the estate of their late mother. The Plaintiffs contend that this is a matter for the Court to exercise its powers and grant summary judgment under Order 14 Rule 1 RSC, as there is no defence to self-dealing that the Defendant can claim.
3. The Defendant has filed a Supplemental Affidavit on 21 February 2022 with a Draft Defence attached, following the direction of the Court. The Affidavit was deposed by the guardians ad litem for the Defendant. In the Affidavit, the deponents averred that there are serious issues to be tried, a defence to the Plaintiffs' claims, and a counterclaim. Thus, they aver the matter should be heard on the merits. In the Draft Defence, the Defendant posited that she was not in breach of her fiduciary duties as she acted with the consent of her mother, the Donor. In this vein, she claims that the conveyance is valid and denies that the property forms part of their late mother's estate.

The issues which arise for this Court's consideration are whether there is a serious issue to be tried and whether a defence is available to the Defendant in relation to that issue.

THE PLAINTIFFS' CASE

4. The Plaintiffs claim that the Defendant acted contrary to her fiduciary powers to act in good faith when managing and conducting their late mother's affairs. They contend that the Defendant was engaged in self-dealing when she conveyed property to herself in her personal capacity as no consideration was given for the property by the Defendant and there was no benefit to be gained by their mother, who was alive and ailing at the time of the transaction. Instead, the Defendant conveyed the property for her personal use and benefit. The Plaintiffs further claim that as a result, the said conveyance is void ab initio and forms part of their late mother's estate, subjecting it to the rules of intestacy. In the Generally Endorsed Writ of Summons filed 8 December 2015, the Plaintiffs allege that the Defendant committed fraud by exercising a general power of attorney to

deal with the estate of their late mother and father Shirley Cleare and Henry Cleare before any probate or letters of administration were granted. They claim that they will suffer loss and deprivation of their statutory interest if the Court does not determine the validity of the conveyance.

5. By Summons filed 2 February 2021, the Plaintiffs made an application pursuant to Order 18 Rule 1 of the Rules of the Supreme Court (RSC) for final judgment against the Defendant for the claims that were set out in the Statement of Claim. This was supported by an Affidavit sworn by Jomo Campbell who averred that the Plaintiffs had been adversely affected by the Defendant's self-dealing. Additionally, the deponent averred that up to that very date, the Defendant failed to file and serve a Defence in the matter. Notwithstanding this, it was averred that the Defendant does not have a defence to the claim.
6. The Plaintiffs submit that the Defendant was involved in self-dealing due to no provision being made for their late mother or for anyone else, including the three adopted sons of the mother, and that, the Defendant as a fiduciary had the sole benefit of the property derived from the conveyance. The Plaintiffs submit further that the Defendant has failed to acknowledge that the deceased is unable to verify or validate her intentions and thus, no accurate account of her wishes can be provided. In all, the Plaintiffs contend that there is no viable defence to self-dealing by a fiduciary – not even where the Defendant had received assistance from Counsel.
7. The Plaintiffs rely on the authority of *Roberts v Plant [1895] 1 QB 597* which set out that in order to obtain summary judgment, the Plaintiff must show to the satisfaction of the Judge that he has a clear case against the Defendant, which the Defendant cannot possibly answer. Additionally, the Plaintiffs relied on *Right Reverend Hollis (Bishop of Portsmouth) v Rolfe [2008] All ER (D) 295 (Jul)* in which the Court outlined the rule against self-dealing at paragraphs 176 and 177. The Plaintiffs use this case to advance the position that a person in a fiduciary position cannot contract with himself. In the case, it was specifically stated that:

“176. There are in fact three rules. There is what one may call the “primitive self-dealing rule” which does not require any trust or fiduciary relationship but results from the fact that no-one can contract with himself and any attempt to do so is ineffective.

177. The second rule, usually referred to as the “self-dealing rule”, is “that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction.” See *Tito v Waddell (No. 2) [1977] Ch.106.*”

8. Further reliance is placed on the Canadian authority *Tarantino v Galvano 2017 ONSC 3535* to submit that a fiduciary as the attorney for the property is to act for the benefit of the donor and put their own interest aside. The Plaintiffs contend that for these reasons, the conveyance should be declared void, and summary judgment be given as there is no defence available to the Defendant for self-dealing (whether one was filed or not).

THE DEFENDANT'S CASE

9. The Defendant posits that there is a viable defence and counterclaim to the Plaintiffs' case, and the matter should not be summarily dismissed. In her Draft Defence, the Defendant claims that at the time when she conveyed the property to herself, she was acting under a Power of Attorney for her mother, who had instructed her to do so. The Defendant claims that her mother was not under duress, but in her right mind and had the assistance of Counsel when she decided to have the Defendant convey the property to herself. This was done to provide for three minor boys whom the mother adopted, and also to provide for the deceased. The Defendant denies any impropriety in having the property conveyed to herself, or that the property forms part of the late mother's estate.
10. The Defendant further claims that in an attempt to cooperate with the Plaintiffs, she offered to share rents derived from the property. The Defendant claims that the Second Plaintiff now collects the rent, and that the Defendant is excluded from receiving her share of the rent. The Defendant prays for her guardians ad litem to collect the rent from the property and account to the Plaintiffs in this regard. Further, that an order be granted declaring the conveyance valid, and that the property does not form part of their late mother's estate. The Defendant counterclaims for an accounting of the rent collected from the property by the Second Plaintiff since this action was commenced, and to be paid her share of the rent.
11. The Defendant submits that the Plaintiffs may only succeed on an application for summary judgment if the Defendant has no defence to a claim included in the writ, or to a particular part of such claim. The Defendant posits that the Court must determine whether there is a triable issue or question which ought to be heard or whether for some other reason, there ought to be a trial. In this regard the Defendant relies on the authority of *Swain v Hillman and another* [2001] 1 All ER 91. The Defendant further relied on *Newman and others v Clarke and another* [2017] 4 WLR 26 and *Sergeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA to advance her position that there is no conflict with self-dealing where the Donor of a Power of Attorney, (for whom the fiduciary acts) consents to or directs the transaction which can be for the benefit of persons for whom the Donor wished to make provisions.
12. The Defendant also submits that the Plaintiffs' authority *Tarantino v Galvanto* does not support their claim, as the Court made the observation at paragraph 46 that:

“46. As a fiduciary, an attorney for property is “obliged to act only for the benefit of [the donor], putting her own interests aside”: *Richardson Estate v Mew*, 2009 ONCA 4033, 96 O.R. (3d) 65, at para. 49. An attorney is prohibited from using the power for their own benefit unless “it is done with the full knowledge and consent of the donor”: *Richardson Estate v Mew*, paras. 49-50”

13. In all, the Defendant contends that she acted under express instruction from her late mother and that the conveyance was not for her benefit, therefore this did not constitute self-dealing in the strict sense of the prohibition. The Defendant contends that Counsel was involved in the transaction who would be able to corroborate the instructions given to the Defendant. It is the Defendant's position that the Court should refuse summary judgment where the full facts of the matter is not known or are before the Court as this is a matter to be tried on the facts, and one in which a viable defence exists.

LAW

14. Summary judgment is a discretionary power of the Court that is to be used sparingly as it has the effect of culminating an action in whole or in part, if the Court is not satisfied that there is a viable defence to the Plaintiff's claims. Order 14 of the RSC governs Summary Judgment and provides in part that:

"1.(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

....

3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed." [Emphasis added]

15. Lord Esher in *Roberts v Plant [1895] 1 QB 597* laid out the essence of summary judgment pursuant to Order 14. In that case at page 603, he stated that:

"The substance of Order XIV is that where, with reference to a claim within Order III., r. 6, the plaintiff can shew to the satisfaction of the judge that he has a clear case against the defendant, which the defendant cannot possibly answer, the judge may give the plaintiff leave to enter judgment forthwith, without the expense and delay which would be involved in letting the case go on to trial in the ordinary way. That is a stringent power to give, and therefore the Courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within the scope of the provisions of the order; but that does not mean that effect will be given to every unsubstantial technicality that may be set up by way of objection to

proceedings under the order. The meaning is that care must be taken to see that the plaintiff has, in accordance with the terms of the order, made out a cause of action to which the defendant can have no possible defence.”

16. The test for summary judgment is well established as whether there is a fair or reasonable probability that the defendants have a real or bona fide defence after the consideration of all of the circumstances of the matter. This test was articulated in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and another* [1984] 1 Lloyd's Rep 21 by Ackner LJ when he expressed that:

“It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence.” [Emphasis added]

17. As the filing of a Defence is central to the resolution of this matter, the Court granted leave to the Defendant to put before it an Affidavit containing a Draft Defence, despite the delay in filing the actual Defence. This is not an unusual practice for the Court, as in *Hunter v Crowch* [1985] BHS J. No. 27 the Court examined the draft Defence and decided that it raised triable issues and that ‘justice would best be served if the Defendant is given leave to defend and afforded an opportunity to be heard at the trial.’

18. Self-dealing is a rule encompassed in trust law in relation to the purchase of trust property by a trustee or a person in a fiduciary position. Lewin on Trust 17th Edn has explored the parameters of this rule. At pages 469 to 470, the text provides:

“A trustee is disabled from purchasing the trust property, whether it be real estate or a chattel personal or a ground rent; whether the property is in reversion or possession; whether the sale is by private contract or public auction; and whether the sale is by himself as a single trustee or with the sanction of his co-trustees. The rule was developed because a person who undertakes to act for another in any matter cannot, in the same matter, act for himself. The situation of a trustee gives him an opportunity of knowing the value of the property, and, as he acquires that knowledge at the expense of the beneficiary, he is bound to apply it for the beneficiary's benefit. The rule, now often called the self dealing rule, is based, not only upon the consideration that a trustee cannot be both seller and buyer (which is the rationale of the two party rule and genuine transaction rule considered above) but also on the wider principle that a trustee must not put himself in a position where there is conflict or possible conflict between his interest and duty. Moreover, unless there are exceptional circumstances, the court

will not entertain any inquiry as to whether the trustee did in fact take any advantage of his situation, for the fact that he held the office of trustee and might possibly have had the means of taking advantage of his situation suffices to make him subject to the rule. The rule is thus a severe one which applies however honest the circumstances, even though the price is fair and irrespective of whether any profit is made by the trustee. Where the rule applies, the trustee and his successors in title (other than a bona fide purchaser for value of a legal estate without notice) take a voidable title on the authorities as they stand, and any beneficiary whose claim is not barred by concurrence or delay is entitled to have the transaction set aside *ex debito justitiae*. This may, however, be more of a rule of practice than an absolute rule of law.”

19. The text goes on to consider five exceptions to the self dealing rule at page 470. It provides:

“A trustee is not disabled from purchasing the trust property if:

- (1) the purchase is made in accordance with a power expressly conferred by the relevant trust instrument; or
- (2) the purchase is made in circumstances where the trustee has not placed himself in a position of conflict of interest and the duty but has been placed in that position by the settlor or the terms of the trust; or
- (3) the purchase is authorized by statute; or
- (4) the purchase is made with the concurrence of the beneficiaries, all being of full age and capacity, after a full and proper disclosure has been made to them; or
- (5) the purchase is made with the sanction of the court.”

20. The applicability of this rule was discussed in the text at page 479. It highlighted that ‘the self dealing rule applies in its strict form not only to trustees strictly so called, but all who, though differing in name, are invested with the like fiduciary character, such as an executor or administrator, an executor de son tort, trustees for creditors, an agent or a beneficiary with delegated fiduciary powers under a trust of land.’

ANALYSIS

21. The application before me is for Summary Judgment, by which the matter can be disposed of summarily by granting judgment to the Plaintiffs without a protracted review of the arguments and evidence, as the matter will not be heard on its merits in a trial. The two main issues of concern are whether the Defendant has a viable defence to the Plaintiffs’ claim and whether summary judgment should be granted in the circumstances. The Plaintiffs claim that the Defendant was involved in self-dealing, to which they say there is no defence. The Defendant on the other hand submits that she has a viable defence to the claim as she acted with the consent of the donor.

22. A general power of attorney confers a wide scope of powers upon an attorney, to act on the direction of the donor to carry out functions or obligations in the name of the donor. The power of attorney instrument executed by the Defendant and her mother, the donor, gave her wide express powers to conduct and manage the affairs of the donor for a three-year period. This included the power:

“1. To act conduct and manage all my affairs as my said Attorney shall think fit WITH POWER either by herself or jointly with other persons to sell, buy, trade, lease, mortgage, assign, rent, manage and deal with or dispose of any or all of the my real and personal property of whatsoever nature and wheresoever situate in the Commonwealth of The Bahamas, which I presently own or to which I am or shall be lawfully entitled and to possess, occupy, hold and dispose of the same as she shall in her sole and absolute discretion think fit;

2. To execute, accept, undertake and perform all contracts in my name relative to the sale of such real and personal property; including the right to make sale and dispose of all and singular the said real and personal property in such manner as my said attorney shall think fit and proper and to receive from the purchaser or purchasers the purchase moneys to be payable for or in respect of the said real and personal property and upon such receipt to give good and sufficient discharges for such purchase moneys;

3. To make execute sign seal deliver all such acts deeds including but not limited to agreements conveyances or assurances as may be deemed necessary or expedient for the purpose of effecting such disposition or alienation of any said real and personal property or such part or parts thereof as shall be sold and disposed of as aforesaid to the purchaser or respective purchasers of the same in accordance with the laws of the Commonwealth of the Bahamas and effectually as such laws allow;

...

8. AND I HEREBY DELCARE AS FOLLOWS:-

That the powers hereby given to my attorney shall be given the widest interpretation and shall be construed as an express authority to her to act in and deal with my affairs as fully and effectively as I myself could do.

...

9. My said attorney hereby accepts the appointment subject to its terms and agrees to act and perform in a fiduciary capacity consistent with my best interests as she in her best discretion shall deem advisable.

10. AND I HEREBY AGREE to ratify and confirm all and whatsoever my said attorney or any substitute or substitutes shall do or cause to be done by virtue of this deed.”

23. Deference must be given to the Power of Attorney which was made prior to the said conveyance in January 2009. The donor died in February 2009. This indicates that during this time, any acts of the Defendant on behalf of the donor, were ratified and done with the consent of the donor. In this vein, the Defendant can legitimately rely on the consent exception to the self-dealing rule as was put forth in the Draft Defence. The Plaintiffs’ position that the self-dealing rule applies strictly in these circumstances might well be ill-founded. It is insufficient just to say that the rule applies strictly, with no consideration given to the exceptions and the applicability of the same by the Plaintiffs. Whether any of the exceptions apply is a matter to be ventilated at trial after a full consideration of the evidence, but am unable to find that this is a cause of action to which the Defendant has absolutely no defence.
24. The Plaintiffs contend that the donor is not living and cannot verify her wishes as to the conveyance of the property. If the conveyance was executed in January 2009 as it was purported to be, the donor was alive and, likely, the Power of Attorney was in effect. Unless there is some evidence to suggest that the donor revoked the Power of Attorney or withheld consent from the Defendant to convey the property to herself, the Defendant had wide powers to act under the Power of Attorney. A Power of Attorney is by its very nature an intricate document that empowers the attorney to act on the direction of the donor, or in this case, on behalf of the donor in her sole and absolute discretion. The intention of the Defendant when the property was conveyed, and whether it was done for the benefit of the donor, the adopted sons, or the Defendant herself are all matters I find should be determined at a trial, as is the question of whether the Donor of the power consented to the conveyance of the property.
25. It is too early in the proceedings to chastise a party for the lack of evidence to substantiate or refute the claim, as no evidence is as yet before the Court. This Court cannot summarily accept the Plaintiffs’ position that there is no defence to the claim. Nonetheless, the Defendant bears the burden to satisfy the Court that there is a viable defence to the claim. By virtue of this Power of Attorney, coupled with the intended defence contained in the Draft Defence I find that there is a real and bona fide defence that can be put forth by the Defendant.
26. I come to my second question, which is whether summary judgment should be granted. As I have found that the Defendant has a real and bona fide defence as outlined in the Draft Defence, I am constrained to find that this is not a proper case in which to grant Summary Judgment. This Court is not seized of any evidence of the conveyance or even the circumstances in which it occurred, to be able to rule summarily that the Defendant was engaged in self-dealing. I find that in the absence of the same, there is some value in the Defendant’s position that should be explored and determined at a trial. The trial Court will have the benefit of the evidence given by both parties, especially the conveyance, and would be able to determine whether it should be declared null and void on the Plaintiffs claims.

27. The Plaintiffs claim that they will suffer loss and deprivation of their statutory interest if the Court does not determine the validity of the conveyance. This is not an appropriate juncture to determine whether the conveyance is valid, whether the property forms part of Mrs. Shirley Cleare's estate or whether the Donor or her adopted sons benefitted from the sale of the property. There is much evidence to be placed before the Court before these issues can be determined. Given this rationale, it is only logical to not dismiss the matter summarily so that issues like this can be determined.
28. I find that the Plaintiffs will suffer no real prejudice if this application for summary judgment is not granted, and the matter is allowed to advance to a trial, where, if they are successful, their rights to benefit from the estate of the deceased might be vindicated. The Defendant contends that the Plaintiffs are involved in the affairs of the said property. The Court cannot be sure as to the extent of their involvement. Nevertheless, the Court is minded to grant an injunction to prohibit the Defendant from dealing with the property in any way that would cause her to part with the property, and for the status quo to be preserved until a trial of the matter is concluded.

CONCLUSION

29. I hereby dismiss the Plaintiffs' application for Summary Judgment. This is a matter raising appropriate legal issues and a bonafide draft defence which ought to be determined on the merits. It is imperative that the status quo be preserved in this matter given that the right to the property is central to the action. The Defendant is hereby prohibited from conveying or using the property in any way which may cause her to part with it, or diminish the status quo.
30. As the Defendant has not yet filed a defence, but was merely given leave to file an affidavit with a draft defence, in the interests of saving time and expense, and having regard to the overriding objective of the Civil Procedure Rules 2022 which will now govern this matter, I grant leave to file the defence, and order that the same be filed within seven days of the date of this decision. I further order that each side bear their own costs of this application.

Dated this 22nd day of March, A.D. 2024



Neil Brathwaite

Justice

