



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 505

**IN THE MATTER of the ESTATE OF JAVAN GERSHOM HENRY HUGHES (deceased 1<sup>st</sup> October 1993) and the LAST WILL AND TESTAMENT (dated 8<sup>th</sup> June 1992) and the GRANT OF PROBATE (dated 27<sup>th</sup> June 1994)**

**AND IN THE MATTER of the ADMINISTRATION OF ESTATES ACT 1974 and the TRUSTEES**

**BETWEEN:-**

**(1) BE'TRICE ANNETTA BUTTERFIELD**

**(2) KANERIKA SHIREE HUGHES**

as successor of her mother

**JULIET BURNETTA HUGHES** (deceased 11<sup>th</sup> August 2009)

**Plaintiffs**

**-and-**

**(1) HSBC BANK BERMUDA LIMITED**

(formerly the Bank of Bermuda Limited)

**(2) ANTHEA BERNICE HUGHES** (deceased 11<sup>th</sup> August 2009)

as Executors and Trustees for the Estate of Javan Gershom Henry Hughes, deceased

**Defendants**

**RULING ON FIRST DEFENDANT'S STRIKE OUT APPLICATION**

**(In Chambers)**

*Application to strike out claims for breach of trust – RSC Ord 18, r 19 – whether claims time-barred – Limitation Act 1984 s 23 – whether interest of deceased under joint tenancy survived his death – Administration of Estates Act 1974 s 22(4)*

Date of hearing: 6<sup>th</sup> April 2016

Date of ruling: 25<sup>th</sup> April 2016

Mr Kenrick L James, James & Associates, for the Plaintiffs

Ms Fozeia Rana-Fahy, MJM Limited, for the Defendants

### **Introduction**

1. This is a dispute about the administration of an estate. The Defendants are the executors of the will (“the Will”) of the late Javan Hughes (“Mr Hughes”). The Second Defendant, Anthia Hughes, was his wife. Mr Hughes died on 1<sup>st</sup> October 1993 and probate was granted on 27<sup>th</sup> June 1994.
2. The First Plaintiff, Be’trice Hughes, and Juliet Hughes are the daughters of Mr Hughes. They were among the beneficiaries named in his Will. Juliet Hughes died on 11<sup>th</sup> August 2009. Her daughter, Kanerika Hughes, sues as her successor.
3. By an Originating Summons dated 23<sup>rd</sup> December 2015, the Plaintiffs sought declarations for breach of trust against the Defendants for various actions which they took or neglected to take when administering the Will.
4. By a summons dated 23<sup>rd</sup> December 2015 the First Defendant applied to strike out the Originating Summons pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 (“RSC”) on the grounds that it is statute barred; discloses no reasonable cause of action; is frivolous and vexatious; and is an abuse of the court’s process.

## The law on striking out

5. The law as to striking out was summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

“... Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: ‘It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known..... There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220’. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: ‘Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: ‘Is what the defendant says credible’? If it is not, then there is no fair and reasonable probability of him setting up the defence’.”

6. In a very clear case, an action may be struck out because it is time-barred. See the judgment of Kawaley J (as he then was) in Global Construction Ltd v Hamiltonian Hotel & Island Club Ltd [2005] Bda LR 81 at paragraphs 16 – 17.

## Plaintiff's claim for breach of trust

7. The following provisions of the Will are relevant:

*“5. I GIVE AND DEVISE unto my said wife ANTHIA BERNICE HUGHES a life interest in all my real estate and subject thereto I make the following dispositions:*

- (a) My one half share (moiety) of property situated at St. John's Road, Pembroke, which is owned by me and my wife ANTHIA BERNICE HUGHES as tenants-in-common unto my daughter JULIET BURNETTA HUGHES.*
- (b) I GIVE AND DEVISE my two apartment house on March Folly Road, Pembroke East unto my daughter BETRICE ANNETTA BUTTERFIELD absolutely.*

.....

*6. I GIVE AND BEQUEATH my half interest in shares held in ARGUS INSURANCE COMPANY LTD. by myself and my wife ANTHIA BERNICE HUGHES unto my daughter BETRICE ANNETTA BUTTERFIELD.*

*7. My shares in the Enterprise I GIVE AND BEQUEATH unto the following as follows, that is to say, as to eighty percent thereof unto my daughter BETRICE ANNETTA BUTTERFIELD and as to the remaining twenty percent thereof unto my daughter JULIET BURNETTA HUGHES.”*

8. The Plaintiffs sought the following declarations.

- (1) The Defendants breached trust in that, on 2<sup>nd</sup> February 1999, they conveyed Mr Hughes' half share in the property at 8 St John's Road, Pembroke to the Second Defendant and others, contrary to Clause 5(a) of the Will.
- (2) The Defendants breached trust, by acting to the detriment of the First Plaintiff, contrary to Clause 5(b) of the Will; and by selling the property at 7 Palmetto Road, Pembroke Parish (ie the two bedroom house on March Folly Road) for \$120,000 on 20<sup>th</sup> January 2000 to a purchaser who re-sold it on 5<sup>th</sup> May 2000 for \$290,000.
- (3) The Defendants breached trust when, on 1<sup>st</sup> September 1994, they caused Argus Group Holdings Limited (“Argus”) to transfer 92

common shares in Mr Hughes' estate to the Second Defendant, contrary to Clause 6 of the Will.

- (4) The Defendants breached trust by not obeying Clause 7 of the Will in that they did not convey any "shares" in Enterprise to the First Plaintiff or Juliet Hughes.
9. The Plaintiffs sought a further declaration in relation to property at 1 Mount Pleasant Road, Sandys Parish, which Mr Hughes had bequeathed under the Will to his step-daughter Elizabeth Francis. As the declaration does not concern the Defendants, however, but arises under the Administration of Estates Act 1974 ("the 1974 Act"), Ms Francis' heirs or the representatives of her estate will need to be joined as parties before the claim can proceed. It may be cleaner to commence a fresh action against them. I express no view as to the merits of any such claim.

### **The limitation point**

10. The First Defendant contends that the Plaintiffs' claims against it are all statute barred. They rely on section 23 of the Limitation Act 1984 ("the 1984 Act"). This is headed "*Time limit; trust property*" and provides in material part:

*"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*

*(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*

*(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*

*(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper*

*share.*

*This subsection only applies if the trustee acted honestly and reasonably in making the distribution.*

*(3) Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.*

*For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.”*

11. An interest in possession is a present right to present enjoyment. See the speech of Viscount Dilhorne in Pearson v IRC [1981] AC 753 HL at 775E. The interest falls into possession on the date at which that right accrues.
12. The dates on which the Plaintiffs’ right of action against the Defendants accrued are as follows:
  - (1) Re 8 St John’s Road and 7 Palmetto Road, upon the death of the Second Defendant on 15<sup>th</sup> May 2009, as the dispositions in favour of Juliet Hughes and the First Plaintiff respectively were subject to a life interest in both properties in favour of the Second Defendant.
  - (2) Re the shares in Argus, on 1<sup>st</sup> September 1994 when the Executors caused Argus to transfer the shares to the Second Defendant and others.
  - (3) Re Mr Hughes’ interest in Enterprise, which was in fact a partnership between him and the Second Defendant, the position is slightly more complicated.
    - (i) The First Plaintiff’s right of action accrued no later than 15<sup>th</sup> September 1995, when the First Defendant wrote to her to advise her that the business was insolvent. It was plain from the letter that the First Defendant did not intend to transfer any interest in the business to the First Plaintiff.

(ii) There is no evidence that the First Defendant wrote in similar terms to Juliet Hughes. However, assuming for the sake of argument that the First Defendant had a duty to transfer an interest in the business to her, a time came when the First Defendant's failure to do so amounted to a breach of trust. In my judgment that assumed breach can fairly be said to have occurred, and Juliet Hughes' right of action can therefore be taken to have accrued, on or about the date of the First Defendant's letter to the First Plaintiff, ie on or about 15<sup>th</sup> September 1995.

13. It is not suggested that any breach of trust by the Defendants was fraudulent.
14. In the circumstances, the Plaintiffs' claims for breach of trust against the First Defendant are all statute barred, as they have each been brought after the expiration of six years from the date on which the right of action accrued. Accordingly, I order that the Plaintiffs' claims against the First Defendant should be struck out.
15. The Second Defendant has played no part in these proceedings. Nonetheless, I take this opportunity to consider whether the claims against her are also statute barred. The claim in relation to 7 Palmetto Road is statute barred because she did not deal with the property in her personal capacity.
16. The claims against the Second Defendant in relation to 8 St John's Road and the Argus shares are not, or may not be, statute barred, as she received those items in her personal capacity. Likewise, the claim against the Second Defendant in relation to Enterprise is not, or may not be, statute barred, as the practical consequence of the Defendants not transferring Mr Hughes' interest in the business was that the Second Defendant retained the entire business for herself.
17. If the Plaintiffs wish to proceed against the Second Defendant's estate in relation to these claims, they may wish to consider recasting the claims so as to bring them more clearly within the exception created by section 23(1)(b) of the 1984 Act to the six year limitation period.

## **The merits**

18. In light of my findings as to limitation, it is not necessary for me to consider the merits of the Plaintiffs' claim against the First Defendant. However, in deference to counsels' helpful submissions, I shall do so briefly.
19. As to 8 St John's Road, whereas the Will states that the property was held by Mr Hughes and the Second Defendant as tenants in common, it is clear from an examination of the conveyance on the First Defendant's files that it was in fact held by them as joint tenants. I find that the Plaintiffs' allegations that the conveyance has been tampered with are ill founded and indeed incredible.
20. Mr Hughes had no power to dispose of his interest under the joint tenancy by will because that interest was extinguished upon his death. This is by reason of section 22(4) of the 1974 Act, which provides:  
  
*"The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death."*
21. The Plaintiffs' claim against the Defendants in relation to the property was therefore bound to fail and, even were it not statute barred, I should have ordered that it be struck out as frivolous or vexatious and an abuse of process.
22. I would not have ordered that the remaining claims against either Defendant should be struck out on the merits as they are all fact sensitive and as such would have been best resolved at trial.

## **Summary**

23. The Plaintiffs' claims against the First Defendant are all statute barred and I therefore order that they should be struck out.
24. The Plaintiffs' claim against the Second Defendant in relation to 8 St John's Road is bound to fail as a matter of law and I order that it, too, should be



struck out. I make no order as to the Plaintiffs' remaining claims against the Second Defendant.

25. I make no order as to the Plaintiffs' claim for a declaration in relation to the property at 1 Mount Pleasant Road. If they wish to pursue this claim then they must join Elizabeth Francis' heirs or the representatives of her estate as parties to these proceedings or alternatively commence a fresh action against them.
26. I shall hear the parties as to costs.

Dated this 25<sup>th</sup> day of April, 2016

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Hellman J