

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2004 HCV 01473

IN THE MATTER of an Application for the
opinion and direction of the Court under
Section 39 of the Administrator General's Act

AND

IN THE MATTER of the Estate of HEADLY
GEORGE AGUSTUS ANTONIA also known as
PAUL WOODHOUSE also known as AUDLEY
ANTONIO and AUDLEY GEORGE ANTONIO
deceased, Intestate.

BETWEEN THE ADMINISTRATOR-GENERAL FOR JAMAICA CLAIMANT
(Administrator of the Estate of Paul Woodhouse)

AND DEVON CLARKE DEFENDANT

Jermaine Spence instructed by Dunn Cox for Claimant

Miss Aisha H.N Mulendwe for Defendant

Heard: November 1, 2, 9, 21, 2006 and June 10, 2008.

Daye, J.

On the 9th August 2001 one Devon Clarke, a furniture manufacturer and videographer submitted a claim to the Administrator-General on the estate of Audley Antonio popularly called "Paul".

Audley Antonio was killed on the 5th November 2000 at his residence at a Norbrook Drive address, upper St. Andrew. He died intestate survived by eight children, four of whom are minors. The Administrator-General was granted Letters of Administration to his estate on the 29th May 2003.

Mr. Devon Clarke's claim on Audley Antonio's estate is to recover the sum of US\$50,000.00 he loaned the deceased on the 25th July 1995. He bases his claim on a written loan agreement purportedly signed by the borrower, Audley Antonio. He also relies the fact that he was given as security, in terms of the loan agreement, a duplicate Certificate of Title for premises, Apartment 2C Cricklewood Apartments of 47 Shortwood Road, St. Andrew and also a Death Certificate of joint owner, Sylvia Robinson.

The handwriting and signature of the name Audley Antonio on the loan agreement and other handwritings and signatures on documents relating to the deceased in possession of the Administrator-General has raised some questions in the mind of the Administrator-General. The Administrator-General requires these questions to be answered in order to discharge her statutory duty to settle the debts and liabilities of this estate.

Therefore the Administrator-General seeks the direction of the Court, (Section 39 of Administrator-General Act). The issues in question put to the Court are:

- a) Whether, based on the circumstances as set out in the supporting Affidavit of the Claimant, the Defendant should be reimbursed the amount being claimed;

- b) If the sums being claimed by the Defendant are to be reimbursed, whether interest is payable on the said sum.
- c) Whether the Defendant has been in unlawful possession of the premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8 and whether the Defendant has been in unlawful receipts of the proceeds of the said premises.
- d) Whether the Administrator-General has the right to possession of the premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8.
- e) Whether the Administrator-General has a right to an account of and to all proceeds of the premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8 since the Defendant's occupation.
- f) Such further and/or other direction that the Court deems fit." (Vide, Amended Fixed Date Claim Form, dated 19th April 2006 and Rule 8.1(4)(f) of the CPR 2002).

Expert Evidence/Agreement – Rule 32 of CPR 2002

There are two separate opinions given by handwriting analysts on the authenticity of the handwriting and signature of Audley Antonio on the Loan Agreement dated 25th July 1995.

One opinion was requested and received by the Administrator-General from Mr. Carl Major. It is contained in his Affidavit dated February 16, 2004. He swore to another Affidavit dated 9th March 2005 that his First Affidavit has complied with obligations required under Rule 32.3 and 32.4 of CPR 2002 as to the preparation of an Expert Report. Retired Senior Superintendent of Police Carl Major found the following:

“that the signature as borrower on “loan agreement” document listed as “a” above is of different authorship to the other four (4) signatures done by another individual on documents listed at “b”, “c”, “d” and “e” ...”

The documents which were in the deceased’s personal possession and submitted to the expert for analysis were:

- (b) Application for TRN dated 25th August 2000 in name Audley Antonio;
- (c) Letter, dated August 21, 2000 to Cable and Wireless, signed Paul Woodhouse;
- (d) Transfer of Land, dated 2000, signed purchaser, Paul Woodhouse;
- (e) Agreement for Lease dated August 2000, made by Audley Antonio and Paul Woodhouse.

The Major said that in his opinion:

“The signature “Audley Antonio” as borrower on the top line for signature on loan agreement dated July 25, 1995 listed at (a) above ... is of different authorship – a

separate individual to the person who wrote all the signatures "Audley Antonio", "Paul Woodhouse" and Audley Antonio on documents ...(b) (c) (d) and (e).

BATTLE OF EXPERTS

This opinion did not support Mr. Devon Clarke's claim that the deceased signed as borrower of a loan of US\$50,000.00 from him. He therefore presented evidence on Affidavit dated 8th November 2006 which exhibited a request for and an opinion from Deputy Superintendent William Smiley Questioned Document Examiner of 20 years experience at the Forensic Laboratory as to the signature of Audley Antonio in the Loan Agreement. This is the opinion of D.S.P. Smiley:

"1. The questioned signature "Audley Antonio" on original Loan Agreement marked

"O-1" is identified with handwriting on documents marked "K-1" to "K-4" that is, the questioned signatures and known handwriting were written by one and the same person.

2. The questioned signature "Paul" in name Paul Woodhouse on copy transfer document marked "O-2" appear to have been written by the author of signature "Paul" on documents marked "K-1" to "K-4" respectively. This opinion is however inconclusive as the original transfer document was not available for examination/analysis.

3. The questioned signature "Audley Antonio" on original Loan Agreement marked "O-1" cannot be compared with the other questioned signature on documents marked "O-2" and "O-3" respectively as the names and styles of writing are different."

Four of the documents examined by D.S.P. Smiley, viz. K-1 to K-4 which were letters produced from the possession of Devon Clarke and addressed to the name Devon, are different from those examined by Mr. Major. Two of the documents O1 and O2, viz the Loan Agreement and copy lease agreement were examined by Mr. Major. There is concurrence of opinion on these two latter documents. At it's lowest, the opinion is that the writing and signature is different. Although D.S.P. Smiley's opinion supports Mr. Devon Clarke to the extent he finds the letters he examined and the signature of borrower on loan agreement was written by the same person it does not mean that there is a conflict between the opinion/ evidence of these expert witnesses.

The issue of the authenticity of the signature of the borrower on loan agreement Audley Antonio is still to be resolved. The deceased Audley Antonio used seven (7) different names during his adult life: Audley Antonio, Audley George Antonio, Headley George Augustus Antonio, Paul Woodhouse, Carl Richards and Steven Bell.

The conduct, character and credibility of the deceased is relevant to a determination of this handwriting signature Audley Antonio on the loan agreement. Mr. Leon Palmer who acted for Mr. Devon Clarke on May 25, 2005, posed written questions to Mr. Carl Major on his expert report by letter dated March 18, 2005. (Rule 32.8 (1) of CPR 2002).

Mr. Carl Major answered by letter dated May 25, 2005 and which answer shall be treated as part of that expert witness's report (Rule 32.8 (3)). He said in his letter:

"According to your request for my opinion as to the effect on differences in a persons handwriting/signature where the person is known to use a multiplicity of aliases. I quote hereunder from page 349 of that distinguish book:

"Suspect documents. Their Scientific Examination, by Wilson R. Harrison. MSc.. Phd. Former Director of Home Office Forensic Science Laboratory. Llanishan, Cardiff, Wales.

"Disguise"

"Because of the existence of natural variation, the comparison of handwriting to determine authorship cannot be regarded as simple and straight forward task, but the difficulty are increased when the writer has deliberately departed from his usual style of handwriting. A deliberate departure from normal handwriting habits, generally referred to as "Disguise" can be expected whenever":

1. The handwriting is that of on anonymous letter which the writer has no desire to have traced back to him by recognition of the handwriting.
2. The signature of a fictitious person is fabricated on a receipt or other similar document;
3. The signature of a real person is carefully copied from a genuine signature;
4. The handwriting, or more often the figuring, of another person is copied in an endeavour to place the blame elsewhere.

He then gave his opinion as under:

"... – there being significant difference between the signature "Audley Antonio" the borrower and the other sets of handwritings, reason being that the disputed signature was written in:

- (a) An unusual manner, so as to afford the signatory some plausible grounds for disclaiming same should the individual deem it expedient, or
- (b) The signatory foresees circumstances in which it might to his/her advantage to disclaim the signatures where this is so, the signature is written in a careless and illegal fashion or deliberately modified in some particular way.
- (c) In respect to the questioned signature "Audley Antonio" as borrower, the evidential value seen pictorially pronounced and contrast greatly from the represented known or acknowledged specimen submitted, hence my finding..."

This aspect of Mr. Carl Major's opinion explains that there is a possibility that the writer of signature Audley Antonio on the loan agreement deliberately signed the name in the manner seen to prevent identification of true authorship. Taking into account that

(a) the deceased used several different names on documents relating to business

(b) had possession of a Jamaican Death Certificate in the name of Audley George Antonio for 9th March 1990.

(c) An identified photograph of Audley Antonio in a British Passport in the name of Steven Bell stamped 28th October 1988, it is reasonable to infer that he is the sort of

person who engages in deception and fraud and for the purpose to conceal and to make it difficult to identify him by handwriting or otherwise. The evidence on Affidavit of Devon Clarke about the deceased Audley Antonio's or "Paul's" **modus operandi**: has not be challenged or refuted by the Administrator-General. It means then that Devon Clarke's claim cannot be dismissed. His claim viz a viz the deceased would be more credible. Further, his claim that the loan agreement was signed by Audley Antonio is supported by the opinion of D.S.P. Smiley. The letters Devon Clarke depones were sent to him by deceased evidenced similarly

There is a nexus between the name or signature Audley Antonio on the the Loan Agreement and the deceased. The reason is that Devon Clarke's Affidavit is unchallenged that he knows the deceased for over 30 years. He has produced a photograph of the deceased which is not challenged Mr. Devon Clarke's evidence reveals the deceased is someone he has been associated with personally, social and in business. He has produced correspondence between himself and the deceased when the deceased was incarcerated in Jamaica between 1979 to 1986 and in the USA between 1992 to 1995. These letters reveal an active business association between the parties. Loan Advances by Devon Clarke and banking transactions were discussed by the letter writer. There is a history of monetary transaction between the parties.

Mr. Devon Clarke cannot claim ignorance of the deceased propensity to engage in unlawful and deceitful behaviour. Mr. Devon Clarke has maintained constant contact, communication and companionship with the deceased in and out of prison locally and abroad. He has been the deceased's agent in many respect throughout his years of

friendship with the deceased. He knows that the deceased operated in a sub culture of informal and unlawful activity of deceit, falsification and fraud. He knows that the deceased emerge from time to time into the formal sector of business and banking after his illicit conduct. This does not mean that the loan agreement was not signed by the deceased as Audley Antonio.

Equitable Mortgage/Possession of Title

Mr. Devon Clarke had possession documents of Title in the name of the deceased and the death certificate of a joint owner from July 1995 (see, Para. 14 and 15 of Further Affidavit dated 13th October 2006). The possession of these documents is usually identified as an equitable mortgage. It means these documents are given up to a lender normally as security for a loan. It is also used as security for a substantial loan. There is evidence of substantial cash transactions including loans by Mr. Devon Clarke to the deceased. Therefore, a part from the signature on the Loan Agreement of Audley Antonio, possession of the documents of Title support Mr. Devon Clarke's contention that he provided a loan of US\$50,000.00 to the deceased. The documents of title were received contemporaneously with loan agreement for US\$50,000.00 dated July 1995. This evidence on Affidavit was not challenged (see, Para. 16 to 18, Further Affidavit dated 13th October 2006).

Submissions and Ruling Re: Possession of Premises Cricklewood Apartment, 47 Shortwood Road, Kingston 8

Mr. Devon Clarke had possession of the premises and exercised control and management of it after 1995. (See Para. 24, 21 of Further Affidavit dated 13th October 2006). Prior to that he had possession and managed this property of the deceased as agent. (see Para. 8 of Affidavit).

Mr. Jermaine Spence submitted that the Administrator-General is entitled to possession of this apartment. Also, he submitted the Administrator-General is entitled to all proceeds from the apartment, i.e rent, profits or payments. He says Mr. Devon Clarke ought to account for all income from the apartment. He said that Mr. Devon Clarke is in unlawful possession of the apartment.

He submits the principle which governs the position of the Administrator-General and Mr. Devon Clarke is one equitable mortgage. That is, a person entitled to an annuity or legacy or having a charge over a real estate does not have the right to take possession of the land. Such person can only, he submits, enforce their right by applying for a receiver. (**Griffen v Allen** (1889) 28 Ch. D. 48). The ratio of the case is: "A mortgagee who has not entered into possession is not entitled to an account from a second mortgagee who has been in possession." Mr. Jermaine Spence further submitted, on the authority of **Barclays Bank Limited v Bird** [1954] 1 Ch. 274, that an equitable mortgagee has no right of possession until the court gives it to him. He submitted the remedy of the equitable mortgagee is to apply for possession, foreclosure and that a receiver be appointed of the rents and profits.

Miss Aisha Mulendwe distinguished, which I accept, these two cases on the ground they relate to an equitable mortgagee who has not taken up possession. But, she submitted, Devon Clarke is in possession and has been in possession from July 1995. This claim is not challenged by the Administrator-General. It is my view that the unchallenged evidence supports Miss Mulendwe's submission. This does not dispose of the issue whether Mr. Devon Clarke has a duty to account for rents and profits received from this apartment.

The legal relationship between the Administrator-General and Mr. Devon Clarke relative to the Cricklewood Apartment is not that of two equitable mortgagees. It is that of the holder of the legal estate of the apartment and an equitable mortgage. The property of the deceased Audley Antonio vest in the Administrator-General from the date letters of Administration was granted to her. (Sec. 16 of Administrator-General Act). It means that the legal estate to Cricklewood Apartment passed to Administrator-General from 29th May 2003. The Administrator-General has the statutory duty of:

- (a) settling the debts and liabilities from the assets of the deceased
- (b) keeping a full account of all transactions of any estate administered,
- (c) furnishing to the Supreme Court accurate statements and accounts of any particular estate. (Sec. 9 and 12 of Administrator-General Act). In order to satisfy this duty in this matter she would need Devon Clarke to account to her about the rent and profit or any other expense of the Cricklewood Apartment. The obligation of Mr. Devon Clarke to account to the Administrator-General would be from July 1995 when he took up possession as an equitable mortgagee. This is so, no matter that the Administrator-General was not entitled to possession

until May 29, 2003 when she obtained grant of letters of administration. This is necessary to enable her to give a full and accurate account of the administration of this estate.

Re: Submissions and Rulings – Power of Judge in Chambers

Mr. Jermaine Spence submits and I do not agree that the Judge in chambers cannot and should not give any decision about Mr. Devon Clarke's claim on the estate. He argues that this is so as Mr. Devon Clarke ought to bring an action against Mr. Audley Antonio's estate and await the outcome.

1. I agree with Miss Mulendwe firstly, that under the powers given to a Judge in Chambers in Section 43 and 44 of the Administrator-General Act it is proper to give a decision at this stage on Mr. Devon Clarke's claim on the estate. This hearing is as a result of an action or claim brought by the Administrator-General in which issue is joined on the settlement of Mr. Devon Clarke's claim against the estate.

2. The first hearing on a Fixed Date Claim can be treated as a Case Management Conference (Rule 27.2 (7) CPR 2002 – Procedure for Fixed Date Claim). One of the powers of a Judge at Case Management Conference is to give judgment on a claim after a decision on a preliminary issue (Rule 26.1 (2) (j) CPR 2002).

3. Secondly, I agree with Miss Mulendwe that a decision on Mr. Devon Clarke's claim is permissible within the terms of the overriding objective clause of the CPR (Rule 1.1 and 1.2). This rule mandates the Court to deal with cases justly which include a consideration of, among other things, the expense of litigation and the time of resolving the case. The case would not be dealt with expeditiously and incur further costs and

expense if Mr. Devon Clarke's claim is not settled now but further on a suit at his instance.

Therefore, I advise and direct the Administrator-General as follows:

- (a) The Defendant Devon Clarke is entitled to be reimbursed the sum of US\$50,000.00 claimed on the estate of Audley Antonio.
- (b) Interest is payable on this sum of money as it was a loan. Rate of interest to be the same as that charged on a debt in the Supreme Court; that is, at 6% per annum.
- (c) The Defendant Devon Clarke has been in lawful possession of premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8 between July 1995 to 29th May 2003.
- (d) The Administrator General has a right to possession of the premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8. This right accrued as of 29th May 2003.
- (e) The Administrator General has a right to an account of and to all proceeds of the premises located at Apartment 2C Cricklewood Courts, 47 Shortwood Road, Kingston 8 from July 1995 until the premises is delivered up by the Defendant.
- (f) Cost of these proceedings to be borne by the estate.