The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2017

B E T W E E N:

KEVIN WAKEFIELD SAMPSON, JR

Plaintiff/Appellant

-v-

LIONEL EARLE JAMES ANDERSON

First Defendant/First Respondent

-and-

THE ESTATE OF NINA MAE JOELL
(ALBERT JOELL, JR as Estate Representative)

Second Defendant/Second Respondent

-and-

THE ESTATE OF CLIFFORD WAKEFIELD SAMPSON
(TYRONE LLEWLLYN SAMPSON SR as Estate Representative)

Third Defendant/Third Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Sonia Grant, Grant & Associates, for the Appellant
Paul Harshaw, Canterbury Law Ltd., for the Respondent

Date of Hearing: **31 October 2017**
Date of Judgment: **17 November 2017**

JUDGMENT

Testamentary gift of real property to X for life – Remainder to Y and Z – Vesting deed in relation to life interest but not remainder – X but not Y in possession – Effect of absence of vesting deed in relation to X and Y – Implied consent.

KAY JA

1. The assumed facts in this case are uncomplicated, but their legal consequences are not. Dorothy Louise Sampson ("the Testatrix") owned a property known as "Chula Vista". She died on 3 June 1980. By her Will, she left a life interest in "Chula Vista" to her daughter, Iva Anderson ("Iva"). After Iva's death, the property was to pass to her grandson, Lionel Earle James Anderson ("Earle"), and her great-grandson Kevin Wakefield Sampson Jr. ("Kevin") as tenants-in-common.

2. In November 1980, probate of the Will was granted to Nina-Mae Joell and Clifford Wakefield Sampson ("the Original Executors"). By a vesting deed dated 26 May 1981, the Original Executors conveyed the life interest to Iva, who lived in the property until her death on 1 June 1988. No vesting deed has been executed expressly in favour of Earle and Kevin (who had attained his majority in 1981)

3. Since 1 June 1988, Earle has been in exclusive possession of the property, its rents and profits. It seems that Kevin knew nothing about the Will or its terms until 2012. By then, the Original Executors had both died – Clifford Sampson in March 2005 and Nina-Mae Joell in 2011. Her estate representative is Albert Joell, although he had not proved her Will. Nor has Tyrone Llewellyn Sampson obtained a grant in relation to the estate of Clifford Sampson, as he would be entitled to do. However, although he was made a party to these proceedings, he has not been served and I shall not need to mention him again. In the normal way, the chain of executorship passed from the Original Executors to Nina-Mae Joell alone and on her death to her executor, Albert Joell.

4. In this variously pleaded litigation, Kevin is seeking to obtain the benefit of his inheritance in relation to "Chula Vista" under the will. Earle and Albert Joel are resisting Kevin's claim.

The striking out of Kevin's Claim

5. Kevin first issued proceedings on 4 July 2014. The claim was struck out by Kawaley CJ on 24 June 2015. By October 2015, following a considerable amount of amendment and re-amendment, further pleadings on behalf of Kevin became the subject of a second strike out application. By then, the pleaded cause of action was "mistake", that is that Kevin and Earle "mistakenly believed that [Earle] was the sole beneficial owner of the property".

6. On 1 February 2016, the Chief Justice struck out that claim on the basis that it did not disclose a reasonable cause of action. The difficulties included, but were not limited to, limitation. The Chief Justice reached his conclusion "not without considerable sympathy for what appears to be quite possibly a severe injustice to [Kevin] who should have received his inheritance through a vesting deed in or about 1981." (Paragraph 39)

The case in this Court: leave to appeal

7. On 31 May 2017, this Court granted Kevin leave to appeal against the strike out. By that time, yet further amendment had been made. The basis on which leave to appeal was granted by Baker P, Clarke JA and Hellman AJA bore no resemblance to the case which has been struck out by the Chief Justice. The new case is founded on provisions in the Administration of Estates Act 1974 which had not featured in either hearing before the Chief Justice. The new case which came to find favour with the Court (in the sense that it was considered to have a "very reasonable prospect" and "considerable merit.") was succinctly summarised by Clarke JA as follows:

> *"[19] The basis upon which it is now sought to appeal is in essence as follows. A beneficiary of an estate, such as Kevin and Earle, has no vested interest in any asset of the estate which he may have been bequeathed until the administration of the estate is complete. His right is to have the estate properly administered by the executors and the property vested in him by them. The executors hold the assets in accordance with the species of trust explained in The Commissioner of Stamp Duties v Livingston [1964] UKPC 45. Thus, Kevin's half share never vested in him by operation of law on 1 June 1988. After that date, by virtue of the absence of a vesting deed in favour of Kevin and Earle, the fee simple in the property remained with the two executors of Dorothy free of any life interest in favour of Iva and is now vested in the executor of the last surviving of those two executors pursuant to section 27 of the AEA 1974."*
>
> *"[20] Earle entered into possession of the property. But such possession as he enjoyed in the property was that contemplated by section 50 (1) of the Administration of Estates Act 1974…"*
>
> *"…In consequence, no question of limitation arises. The possession which Earle enjoyed is by statute not prejudicially to affect the right of the estate representative to take possession and convey the land in accordance with the will. Accordingly, what the court should now do is to make a vesting order vesting the property presently vested in the surviving executor in the two legatees."*

8. It is plain that this exposition by Clarke JA was something of a refinement of what Ms Grant, on behalf of Kevin, had begun to formulate shortly before the hearing. Mr. Harshaw, for Earle and Albert Joell, had had little notice of it and had not had a proper opportunity to consider or to counter it.

<u>The hearing of the Appeal</u>

9. Since the grant of leave to appeal, the pleadings on behalf of Kevin have undergone yet further amendment. Indeed, if we proceed to allow the appeal, Ms Grant submits that it will be necessary to countenance more even with the

amendment. At one stage, it seemed that Mr. Harshaw was going to invite us to dismiss the appeal in limine on the ground of non-compliance with procedural orders but, in the end, he took the sensible view that there had been sufficient compliance, albeit late, and, since both sides were present and prepared, it was better to let the appeal take its course.

10. It is apparent from what I have set out from the judgment of Clarke JA, that section 50(1) now looms large in Kevin's case. It is headed "Discretionary power of estate representatives as to giving possession of land and powers of the Court".

11. It then provides:

> *"50 (1) An estate representative, before making a conveyance in favour of any person entitled, may permit that person to take possession of the land, and such possession shall not prejudicially affect the right of the estate representative to take or resume possession nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of land."*

12. Applying this to the assumed facts, Clarke JA (at paragraph 25) considered that it was difficult to infer anything other than that, in June 1988, following the death of Iva, the Original Executrixes were content to let Earle into possession and it is difficult to see how his possession could be regarded as in any way adverse. In other words, section 50 provided both the legal key to Earle's possession and freedom from the bounds of limitation, notwithstanding the passage of time.

13. Since the leave hearing in May, Mr. Harshaw has been able to give consideration to this analysis. He submits that it is fundamentally erroneous that the true position in as follows. Although the vesting deed on its face only dealt with the vesting of the life interest in Iva, it also operated, by implication, to deal with the interest in remainder by vesting the property in the Original Executors as

trustees for Earle and Kevin pursuant to the will. Whilst that would have initially enabled Kevin to call for an assent to give effect to the tenancy in common, such a claim is now statute-based.

14. The submission therefore rests on two propositions: (1) there was an implied assent in relation to the interest in remainder; but (2) the limitation period has now defeated Kevin, even though he knew nothing of the gift under the will until about 2012. For this second proposition, Mr. Harshaw seeks to rely on *Paradise Beach & Transportation Ltd. v Price-Robinson [1968] AC 1072 (PC), in which Lord Upjohn* stated (at page 1084 e-f):

> *"…Where the right of entry has accrued more than 20 years before action, the co-tenants are barred and their title is extinguished whatever the nature of the co-tenant's possession."*

15. Mr. Harshaw frankly conceded that his second proposition only avails him if his first proposition is correct. If it is not, to borrow his word, he is "sunk".

16. I therefore return to his first proposition and the issue of implied assent. At the hearing before us, Mr. Harshaw based his submission on these authorities: *Stevenson v Liverpool Corporation (1874) LR 10 QB 82; Attenborough v Solomon [1913] AC 76; and Wise v Whitburn [1924] Ch 460.* However, I do not consider that they are in point. The present case arises in the context of the Bermudian Administration of Estates Act 1974 and Conveyancing Act 1983. These statutes serve many of the purposes of the seminal 1925 property legislation in England and Wales but they do not simply replicate it (and Bermuda never adopted or adapted the Settled Land Act 1925).

17. The three authorities referred to by Mr. Harshaw all preceded the 1925 legislation. Moreover, the facts in *Stevenson* do not equiperate with those in the present case. The initial life interest related to the right to receive rents, not to possess the property which was tenanted. The executors did not execute an

assent in relation to the life interest but the Court found one by implication from conduct, viz the receipt of the rent and the transfer of it to the life tenant. It further held that, the legal estate having been vested in the executors and trustees, once there were no further trusts to perform, it vested in the ultimate residuary beneficiaries.

18. At that time, the law relating to the vesting of real property in a deceased's estate was very vague: see Megarry & Wade, <u>The Law of Real Property</u>, 4th edn (1975), pages 534-5

19. *Attenborough* remains authority for what it decided but its context was one of pure personalty at a time before the partial assimilation of the law of personal and real property. *Wise* concerned unusual facts. It was not a dispute between beneficiaries or between beneficiaries and trustees or executors. It related to an action for damages by a purchaser for breach of an implied covenant for title. There was no dispute that there had been an implied assent in relation to a bequest which extended to the beneficial interest of successive tenants for life and all persons entitled in remainder. So it did not decide the point in issue in the present case and, in any event, it preceded the 1925 legislation.

20. Since the hearing, following an invitation from the Court, Mr. Harshaw has drawn our attention to further authorities, but, with respect, I do not think that they advance his case. *Re Ponder [1921] 2 Ch 59* was another pre-1925 case concerning personal property. *Inland Revenue Commissioner v Smith [1930] 1 KB 713* was about the ascertainment of a residuary estate. *Re Hodge [1940] 1 Ch 260* did concern a devise of real property but where the executor and the beneficiary were one and the same person. *Re Cockburn's Will Trust [1957] 1 Ch 438* seems to me to be of no relevance as its concern was the appointment of trustees.

21. In English law, a situation such as the one in the present case would now leave no scope for Mr. Harshaw's first proposition. Section 36(4) of the Administration of Estates Act 1925 provides:

> *"(4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate."*

22. The strictness of this provision was illustrated by *In re King's Will Trusts [1964] 1 Ch 542*. There is no room for an implied assent of the kind for which Mr. Harshaw contends. However, section 36(4) has no equivalent in the Bermudian legislation. The question is: Does this leave the way clear for Mr Harshaw's first proposition?

23. It is true that the Bermudian legislation – the Administration of Estates Act 1974 and Conveyancing Act 1988 – did not transpose the unambiguous section 52(1) of the Law of Property Act 1925 which provided that "all conveyances of land or of any interest therein are void for the purposes of conveying or creating] a legal estate unless made by deed", subject to specified exceptions including assents by a personal representative which simply required a written document pursuant to section 36(4) of the Administration of Estates Act (above). However, it seems to me to be axiomatic that the scheme of the Bermudian legislation assumes the need for a conveyance, broadly defined. Section 6 provides:

> *"[6] Any deed, whether or not being an indenture, may be described, at the commencement thereof or otherwise, as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected."*

24. Sections 4 and 5 plainly assume that land will be transferred by a conveyance and when we come to section 50(1) of the Administration of Estates Act, which is the centrepiece of Kevin's case on this appeal, it clearly assumes that estate representatives will vest the property in the beneficiary by conveyance. I refer again to its terms: "an estate representative, before making a conveyance in favour of any person entitled, may permit that person to take possession of the land…" Where that happens, it is without prejudice to the right of the estate representative to take possession or resume possession, "nor his power to convey the land as if he was in possession thereof…" Section 50(2) is also relevant:

> *"(2) Any person who as against the estate representative claims possession of real estate…or a conveyance thereof, may apply to the Court for directions with reference thereto, and the Court may make such vesting or other order as may be deemed proper…"*

Again, what is contemplated is a vesting order in lieu of the conveyance (or vesting deed) to which the claimant is entitled.

25. In my judgment, all this is irreconcilable with the concept of an implied assent. Moreover, there are obvious reasons why this must be so. The very purpose of this area of law is to facilitate conveyancing and to ensure that a person who is seeking to transfer land has, and can demonstrate, good title. Take the present case; if Earle, considering himself to be solely entitled to the property, were to attempt to sell it, he could not deduce good title, the property never having been vested in him. A prospective purchaser could not be satisfied as to title. The essential machinery required by the law would be absent. The purpose of the 1925 property legislation in England and Wales, and the Bermudian legislation with which we are concerned, is to ensure that there are no conveyancing black holes. In these respects, real property is dealt with in a unique way, totally dissimilar from the law relating to personal property, although there is much assimilation in other respects.

26. For these reasons, I have come to the conclusion that Mr. Harshaw's first proposition in simply wrong. In these circumstances, it matters not that his second proposition might have been correct for other situations. He does not get past first base.

The Consequences

27. It follows for what I have said, that in my judgment, Kevin's case based on section 50 is founded on a reasonable cause of action and his appeal against the strike out succeeds. Unfortunately, I do not think it would be appropriate for us to go any further than that. Ms. Grant's seemingly endless amendments and her submissions would have us go much further, bringing the dispute to an end, whether by the making of a vesting order or otherwise. We have received wide-ranging submissions from both Counsel on our powers and on the nature of these proceedings, Mr. Harshaw submitting that, by reason of the amendments sought, they are in effect contentious probate proceedings but without compliance with the procedural requirements. I do not consider that we are in a position to adjudicate upon the wider submissions advanced by Ms. Grant or Mr. Harshaw's response to them. We have to deal with what is properly before us, namely a strike out appeal. Subject to what I say in the next paragraph, I would simply allow the appeal and remit the case to the Supreme Court so that it can take its course.

28. Anybody reading the history of this litigation would readily agree with the observation of Clarke JA made in his judgment granting permission to appeal. This is a case that "cries out for settlement". I appreciate that this becomes ever more of a challenge, with mounting litigation costs (themselves complicated by the fact that the point on which Kevin has succeeded only came onto the agenda in this Court) and ramifications such as income from the property which Earle may have received exclusively thus far and the enhanced value of the property

resulting from improvements which he alone has financed. However, I would implore the parties and their legal representatives to use their best endeavours to reach a settlement. If they fail, one or both of them could end up receiving little or no benefit from their intended equal inheritance. For my part, I would be willing to impose a stay of reasonable duration on further proceedings in the Supreme Court to allow time for the negotiation of a settlement.

BERNARD JA

29. I agree.

BAKER P

30. I also agree.

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Kay, JA

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Bernard, JA

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Baker, P