IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	ARTHUR ELDEMIRE	DEFENDANT/APPELLANT
A N D	HERBERT ELDEMIRE	PLAINTIFF/RESPONDENT

Berthan Macaulay, Q.C. and Pamela Benka-Coker for Appellant

R.C. Codlin and E.S. Hall for Respondent

March 16, 17 and April 24, 1989

GORDON, J.A. (Ag.):

This is an appeal from a decision of Theobalds J. delivered on May 12, 1988 on the hearing of an amended originating summons brought by the respondent against the appellant. Therein the learned judge declared, as the respondent prayed in his summons, that -

> "The plaintiff is the beneficial owner of one half of all those lands formerly known as Reading Pen in the parish of Saint James, comprised in sundry Certificates of Title and containing by survey 17 acres, namely duplicate Certificate of Title registered at Volume 343 Folio 2, Volume 212 Folio 33, Volume 276 Folio 9, Volume 238 Folio 33, and Volume 246 Folio 66."

and ordered that -

> "1. The Defendant execute forthwith all relevant documents pursuant to transferring to the plaintiff the 17 acres of land aforesaid contained in duplicate Certificate of Title registered at Volume 343 Folio 2, Volume 212 Folio 33, Volume 276 Folio 9, Volume 238 Folio 33, and Volume 246 Folio 66

" of the Register Book of Titles.

2. The Defendant is hereby restrained from acting in any way prejudicial to the plaintiff's interest in the said lands."

At the conclusion of the submissions of counsel we allowed the appeal, set aside the order of the Court below and dismissed the summons. The appellant was ordered to have costs both here and below.

The respondent claimed that by the will of his deceased father, Arthur Wellesley Eldemire dated the 12th July, 1948 the appellant and himself were beneficially entitled to approximately thirty-seven acres of land formerly known as Reading Pen in the parish of St. James. Reading Pen was contained in five Registered Titles registered at Volume 212 Folio 33, Volume 246 Folio 66, Volume 238 Folio 23, Volume 276 Folio 9 and Volume 1050 Folio 312 of the Register Book of Titles.

Mrs. Alice Eldemire, their mother was one of the executors of her husband's, (their father's) Will and she by her will admitted to probate on 3rd July, 1979 appointed the respondent sole executor of her estate, which was devised to the respondent and the appellant in equal shares.

The properties registered at Volume 212 Folio 33, Volume 246 Folio 66, Volume 1050 Folio 312 of the Register Book of Titles were transferred to the devisees as joint tenants. Those registered at Volume 238 Folio 23 and Volume 276 Folio 9 remained in the name of the testator, Arthur Wellesley Eldemire. By an instrument of transfer dated 18th October, 1967 the land registered at Volume 1050 Folio 312 consisting of twenty-two (22) acres was transferred to the appellant and his wife as joint tenants. Paragraphs 5 and 6 of the instrument state -

"5. The beneficiaries have agreed inter partes (as is signified by their execution hereof) that Dr. Eldemire should receive the said lands as his undivided share in the realty forming part of the said residuary estate and the trustees have at the request and direction of the beneficiaries agreed

to transfer the said lands accordingly

6. Dr. Eldemire had requested and directed the trustees to make title to the said lands in favour of himself and Mrs. Eldemire as joint tenants."

The affidavit evidence of both parties to this action assert that the parties agreed that on the transfer of this lot of 22 acres to the appellant the remaining portion of land comprised in the remaining four titles and consisting of approximately seventeen (17) acres should be transferred by the appellant to the respondent as settlement of his entitlement. The respondent has been in occupation of the said lots since the agreement was made but the appellant has not fulfilled his part of the bargain.

The appellant submitted that the relief sought by the respondent could not be obtained by the process employed, namely, by originating summons as the only matters which could properly be dealt with were the construction of an instrument or a statute or on a dispute between a devisee and an executor or administrator. It was further submitted that as this was a dispute between devisees, it did not fall within any class stated above. Reliance was placed on In Re William Davies (1888) 38 Ch. D. 210, In Re Royle, Royle v Hayes (1890) 43 Ch.D. 18 and Libet v Ifill (1963) 5 W.I.R. 525.

In Libit v Ifill (supra) -

> "The appellant Libet issued an originating summons seeking declarations that she was beneficially entitled to the policy moneys accruing from two insurance policies on the life of the deceased and to his leasehold premises. The summons was dismissed by a Judge in Chambers for want of Jurisdiction. On appeal the Court held -
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> It is not permissible in law for a person claiming adversely to an estate that she is entitled to the assets thereof against an executor or administrator, to do so by originating summons."

In Re Royle the question sought to be answered was 'whether a sum of £171, which the testator had handed to his widow shortly before his death, and which stood in her name in a bank, belonged to her or to his estate. On appeal the Court held 'that there was no jurisdiction on originating summons to decide adversely to the widow that the sum belonged to the testator's estate, this not being a matter which could be decided in an administration suit'. In Libit v Ifill (supra) the appellant did not fall in the class of persons who could claim relief by originating summons. Her claim was as a cestui que trust which she was not, and even if she had claimed as a creditor, her claim could not be made by originating summons as it arose out of a disputed question of fact. In Re Royle there was also a question of fact in dispute and it was not a matter which could be decided in an administration suit. The Court, however, considered the case on its merits because the widow consented to the Court assuming jurisdiction to determine the issue. The decision was in the widow's favour.

Section 532 of the Judicature (Civil Procedure Code) provides -

> "The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought, as creditor, devisee, legatee, next-of-kin or heir-at-law, of a deceased person, or as cestui que trust under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:-
>
> (a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or cestui que trust."
>
> (Emphasis supplied)

In my view the section clearly provides for the determination of questions affecting the rights or interests of persons claiming as devisees under a will. Section 532 is the former U.K. RSC Order 55 r 3. Executors can issue a summons before obtaining a grant but probate must be obtained when the case is heard. A devisee can also seek the determination of any question affecting his rights or interests but the executors, administrators or trustees must be served.

In Re Carlyon 56 L.J. (Ch.) 219 North J. held that there is no jurisdiction under rule 3 of Order 55, to determine a question between legal devisees upon originating summons. In Re William Davies (supra) North J. followed his decision in Re Carlyon (supra). At page 212 he said -

> "In my opinion I have no jurisdiction under rule 3 of Order LV. and the following rules to deal with such a question. As I have already said, in In re Carlyon 56 L.J. (Ch.) 219, the object of these rules was to afford an opportunity of obtaining a decision in a summary way of questions affecting the administration of an estate or a trust where it would previously have been necessary to have a decree or judgment for the administration of the estate or execution of the trust. Formerly, in order to obtain a decision of a single question arising in the administration of an estate, it was necessary to obtain a judgment for the general administration of the estate. The expense of this was felt to be a crying evil, and I am glad that the rules have provided a mode of avoiding that expense, and of obtaining a decision of any question affecting (inter alia) the rights of a person who claims to be a devisee, without a general administration of the estate of the testator or of the trusts of the will. Devisees are not deprived of the rights which are conferred on other persons, and any question which arises between a devisee and the executors or trustees of the will can be determined on an originating summons. But, in my opinion, these rules give no general power to determine any question arising between devisees and other persons, unless it is a question which would have arisen in the administration of an estate or execution of a trust.
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> That, I think, is the proper construction of rule 3, looked at alone, and this view is borne out by rules 5A and 5B, which provide for

> "the persons who are to be served with an originating summons. When the summons is not taken out by the executors or trustees it is to be served on them."
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> (Emphasis supplied)

I have quoted fully from the judgment of North J. because in my view it is an accurate exposition of the relevant law. The case amply illustrates the scope of actions brought under this section. The question to be answered on an originating summons must be one which facilitates the administration. Plainly therefore, disputed questions of fact or disputes between devisees are inappropriate for determination by this procedure. The only questions that can be dealt with by originating summons are those which could have been determined in an administration action under section 534 of the Judicature (Civil Procedure Code). RSC Order 55 rule 4 (U.K.) [Note].

The law makes provision for an executor to have questions answered before he embarks on administration and if administration has commenced and there is need to have problems that arise resolved, questions may be submitted to the Court then. Likewise, a person claiming as a devisee can seek relief by originating summons. The summons must be brought by the executor seeking the determination of the question or, if relief is sought, it must be sought against the executor. Any action brought must have the executor as a party thereto; section 537 C.P.C. (RSC Order 55 rule 5 U.K.).

In my opinion, what the respondent in the present case sought to obtain was not the determination of a question affecting his right or interest as a devisee or relief against an executor but specific performance of the agreement arrived at by the devisees and sanctioned by the executors of the estate of Arthur Wellesley Etdemire. The parties to this action are the devisees, no one appears in a representative capacity as executor.

The parties had transferred to the appellant 22 of 37 acres, the balance which should be 15 but on the affidavit evidence and titles submitted as exhibits and admitted on both sides is 17.25 acres approximately, was to go to the respondent. The respondent's summons sought a declaration that he was beneficially entitled to one half of this remaining portion of 17.25 acres and an order that the entire portion of 17.25 acres be transferred to him. The respondent sought an order that the agreement the parties had arrived at in 1967 should be specifically performed. Here the facts are not in dispute; the parties are ad idem on the terms of the agreement but the appellant did not submit to the jurisdiction of the Court as was done in Re Royle. Before the learned judge in chambers, the appellant submitted that the summons should be struck out because it did not fall to be considered as a section 532 claim and before us he continued and enlarged on his protest. In Re Royle the Court, with the assent of the widow, assumed jurisdiction and decided a disputed question of fact. In this case there was no dispute on the facts but there was no assent to the Court assuming jurisdiction. On the law and on the authorities cited, the procedure adopted could not be so employed. A claim for specific performance of this contract cannot be entertained under section 532 of the Civil Procedure Code; it must be by action commenced by Writ.

That is enough to dispose of this appeal but it is right to point out that in the affidavit of the respondent no mention was made of land registered at Volume 343 Folio 2 of the Register Book of Titles nor was any copy title or diagram exhibited. Although there is no evidence of the size of this lot, it is included in the declaration granted by the Judge and, of course, in the order made by him consequent to the declaration. The appellant urged that the orders made by the learned judge were bad in law and one of the orders was uncertain in its terms and they should be set aside. In view of the decision reached on the main ground advanced by the appellant, I do not find it necessary to deal with these submissions.

I am of the view that the learned judge in chambers fell into error when he ruled that he had jurisdiction to hear the originating summons herein and that the declaration and consequential orders made must be set aside.

FORTE, J.A.:

I concur.

CAREY, J.A.:

I entirely agree and have nothing useful to add.

Cases referred to

(1) In re William Davies (1888) 38 Ch D 210
(2) In re Royace, Royace v Sawyer (1890) 43 Ch D 168
(3) L. Isaacs v Hill (1963) 5 W.I.R. 525
(4) In Re Carlyon 56 L.J. (Ch) 219