JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 79/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

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

Berthan Macaulay Q.C., Mrs. M. Macaulay instructed by Mrs. Patience White for Appellant

Raphael Codlin and Alexander Williams, instructed by R. Codlin & Co. for Respondent

January 30, 31; February 1; and March 22, 1990

ROWE P.:

Arthur Wellesley Eldemire (A.W.E.) died testate in 1948 leaving Dr. Noel Holmes and Mrs. Alice Eldemire as his executors and trustees. Dr. Holmes who died in 1967, pre-deceased Mrs. Eldemire who died on December 6, 1978 testate, leaving Dr. Herbert Eldemire as her sole executor. At the time of his death A.W.E. was possessed of a vast estate the residue of which he devised upon trust for his two sons, (the appellant and respondent herein) and his widow share and share alike as tenants in common. Upon the death of his widow her share would pass to the two sons share and share alike as tenants in common. Much of this vast estate is now being consumed in litigation.

Some interesting facts emerge from the Record. By Transfer No. 171147 dated 12th and registered 15th March, 1962, Alice Eldemire having surrendered and released, all her estate and interest therein, the Trustees transferred to the appellant and respondent real property contained in eight separate Certificates of Title, including land at Vol. 212 Fol. 33 and Vol. 246 Fol. 66. In October 1967, the executors of the estate of A.W.E., and the residuary beneficiaries under that estate viz., Alice Eldemire, Arthur Eldemire (Junior) and Herbert Eldemire transferred to Arthur Eldemire a parcel of land referred to in the pleadings as approximately 22 acres. In paragraph 5 of the Recitals of that Transfer it was stated:

> "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."

All the lands transferred by the Instrument 234639 on October 18, 1967 were described in the Schedule as "land being part of lands registered at Vol. 277 Fol. 40 of the Register Book of Titles."

The appellant brought an action against the respondent claiming inter alia, a declaration that he is entitled to one half the estate of Alice Eldemire, deceased, and an account. The respondent counter-claimed. I reproduce paragraphs 6 and 7 of the Amended Defence and Counter-Claim:

> "6. That there were 39 acres of land known as Reading lands contained in various Certificates of Title registered respectively at Volume 343 Folio 2, Volume 212 Folio 33, Volume 276 Folio 9, Volume 238 Folio 23, and Volume 246 Folio 66. That these lands became vested in the Plaintiff and the Defendant in or about 1962.

> "7. That in 1967 the Executors in their capacity as Trustees, together with the Plaintiff and the Defendant executed an instrument with the consent of the Plaintiff and the Defendant and vested in the Plaintiff approximately 22 acres of these Reading Lands. It was agreed then that that portion should go to the Plaintiff as his portion of those lands. It was also agreed that the remaining portions, which were then vested in the Plaintiff and Defendant would be transferred to the Defendant, but in spite of request by the Defendant made to the Plaintiff, the Plaintiff has refused and continued to refuse to transfer the said lands to the Defendant."

In his reply to the Amended Defence and Counter-Claim the appellant stated in paragraph 5 that:

> "5. As to paragraph 7, the Plaintiff admits that approximately 22 acres of the Reading lands were transferred to him by the Trustees and Executors of their deceased father's Will but denies that the remaining portions were also then vested in the Plaintiff and the Defendant; the Plaintiff states that there was an understanding that the remainder, known as Norma Crest would go to the Defendant and further denies that he has refused to transfer the said lands to the Defendant as alleged."

Certain discussions and correspondence between the parties and their legal representatives elicited a reply from the attorneys representing the appellant dated July 16, 1987. The contents of paragraph 5 thereof are important. It was stated therein:

> "5. It was not agreed that Norma Crest will at this time be 'transferred' to your client. What I stated in my undertaking was that Norma Crest belongs to Dr. Herbert Eldemire, and he can develop it if he wishes. Norma Crest will, of course in due time be transferred by my client, when the estate is settled."

The respondent applied by Summons on June 29, 1989 for an order that the appellant execute all documents necessary to vest in the respondent the balance of the lands known as Reading Lands in the parish of St. James, which total lands amounted to 39 acres, and the balance amounts to approximately 15 - 17 acres, which said balance of lands are registered respectively at Vol. 343 Fol. 2, Vol. 212 Fol. 33, Vol. 276 Fol. 9, Vol. 238 Fol. 23, Vol. 246 Fol. 66 of the Register Book of Titles. His affidavit in support referred specifically to the lands registered at Vol. 212 Fol. 33, Vol. 246 Fol. 66, Vol. 238, Fol. 23, Vol. 276 Fol. 9. He then described certain lands transferred to the appellant and continued in paragraph 10 thereof:

> "The lands comprised in the other four (4) Duplicate Certificates of Title mentioned herein are now occupied by me, and amount to approximately 15 - 17 acres."

He attached four (4) Duplicate Certificates of Title in respect of the lands which he said he occupied.
Exhibited to the affidavit of the respondent was an affidavit of the appellant sworn to on March 15, 1987 in which the appellant said at paragraph 5:

> "I also say that the applicant has been living at Norma Crest since 1956 rent free and it was understood that I was to keep the portion transferred to me and he was to have Norma Crest which has the main family house and 2 smaller houses already constructed opposite."

Norma Crest was mentioned in the appellant's Statement of Claim as one of the properties of which Alice Eldemire died possessed. Paragraph 4 (1) stated:

> "At the time of the death of the said Alice Eldemire, she was possessed of lands situate in different places in the parish of St. James.
>
> ....."

"(1) premises at Reading, on which is situate a building known as 'Norma Crest' occupied as late as 1982 by the defendant."

The Summons came on for hearing before Ellis J. on September 21, 1989 and he made an order in Terms of the Summons. We have not had the benefit of his reasons. The appellant contends that the learned trial judge impliedly erred in law in construing Section 307 of the Judicature (Civil Procedure Code) Law as empowering him to make an order unrelated to admissions referred to in the said section. It is necessary to look at the terms of Section 307 of the Civil Procedure Code. It provides that:

> "Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may, upon such application, make such order or give such judgment as the Court or a Judge may think just."

Admissions of facts may be made in the pleadings. These may be express or implied but they must be clear. Admissions may be in the defence, or in a defence to a counterclaim, i.e. to say in a Reply. Admissions may be made in a letter before or since action brought. In Ellis v. Allen [1914] 1 Ch. 904, the admissions were contained in a letter from the defendant's solicitor. Sargant J. said of a rule similar to Section 307 of the Civil Procedure Code:

> "The object of the rule was to enable a party to obtain speedy judgment when the other party has made a plain admission entitling the former to succeed. ..... It applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."

Technistudy Ltd v. Kelland [1970] 1 W.L.R. 1042 concerned a building contract. There was dispute between the parties as to whether certain work was satisfactorily completed and what were the defects which required remedial work. Of this dispute, Lord Denning M.R. said:

> "In any event, there is no clear admission that the contractor is entitled to the balance or indeed to any specific part of it."

and he held that judgment under order 27/3 of the Supreme Court Practice was unsustainable. Roskill L.J. gave some guidance as to the scope of the Rule. He said at pp. 1046-47:

> "The reason why this order was wrong is that there is no clear admission of any kind, either in the pleadings or in the correspondence which entitled him to make the order that he did under R.S.C. Ord., 27 r. 3. As the cases show, an order should only be made under that rule if it is plain that there are either clear express or clear implied, admission."

Greene L.J. sounded a note of warning to those who would reply on admissions in proof of their case. In Ash v. Hutchinson & Co. [1936] 2 All E.R. 1490 at 1505 he said:

> "A plaintiff who relied for the proof of a substantial part of his case on admission in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted; he is not entitled to ask the court to read meanings into his pleadings which, on a fair construction, do not clearly appear, in order to fix the defendants with an admission."

Mr. Macaulay submitted quite correctly that the starting point must be to look at the facts pleaded in the counter-claim which the respondent claims, and the Court below found, to have been admitted. Allegations of fact contained

in paragraph 6 of the Amended Defence and Counter-Claim are:

(1) Reading lands consisted of 39 acres of land.

(2) These lands were represented by Certificates of Title:

Vol. 343 Fol. 2
Vol. 212 Fol. 33
Vol. 276 Fol. 9
Vol. 238 Fol. 23
Vol. 246 Fol. 66.

(3) That the lands became vested in the appellant and the defendant in 1962.

Further allegations of fact were contained in paragraph 7 of the Amended Defence and Counter-Claim:

(4) That in 1967 the Executors with the concurrence of the appellant and the respondent vested approximately 22 acres of the Reading lands in the appellant.

(5) It was agreed that the appellant would accept the 22 acres as his portion of the Reading lands.

(6) It was agreed that the remaining portions of the Reading lands, vested in the appellant and the respondent, would be transferred to the respondent.

In his Reply to the Amended Defence and Counter-Claim, the appellant joined issue with the respondent. But in paragraph 7 of the Reply the appellant made some admissions. He said:

(1) Approximately 22 acres of the Reading lands were transferred to him;

(2) That there was an undertaking that the remainder, known as Norma Crest would go to the respondent.

There is here the clearest admission that the respondent is entitled to have transferred to him the remainder of the Reading lands known as Norma Crest. Mrs. Macaulay in her letter to the respondent's attorney admitted that "Norma Crest belongs to Dr. Herbert Eldemire". There is therefore express admission coming from the Reply and from the appellant's attorney that Norma Crest which consists of the remainder of the Reading lands, (the appellant having received 22 acres therefrom,) belongs to the respondent. What is equally clear is that the appellant, Dr. Arthur Eldemire, has always freely admitted, that Norma Crest belonged to his brother the respondent. He expressly swore in his affidavit of March 12, 1987 that:

> "I also say that the Applicant has been living in Norma Crest since 1956 rent free and it was understood that I was to keep the portion transferred to me and he was to have Norma Crest which has the main family house and 2 smaller houses already constructed opposite." [Emphasis supplied]

On the face of these patent admissions, the only issue for the Court's determination is the identification of Norma Crest. Mr. Macaulay has submitted that Transfer No. 234839 indicates that the lands transferred to the appellant in 1967 were cut from lands contained in Vol. 277 Fol. 40 of the Register Book of Titles and that there is no indication in the pleadings or in the affidavits concerning the remainder of the lands which were originally contained in that Certificate of Title. It does not seem to me that the description of the lands transferred to the appellant in 1967 has any relevance to the identification of Norma Crest in 1990. One must look to the pleadings and the affidavits, to see if Norma Crest can be specifically identified therefrom.

As I read paragraph 7 of the Amended Defence and Counter-Claim, the phrase "these Reading Lands" must relate back to the lands described in paragraph 6 as being contained in Vol. 343 Fol. 2, Vol. 212 Fol. 33, Vol. 276 Fol. 9, Vol. 238 Fol. 23 and Vol. 246 Fol. 66. When therefore the appellant referred to Reading Lands in paragraph 5 of the Reply to the Amended Defence and Counter-Claim, the inescapable inference is that he was admitting that the remainder of the lands known as Norma Crest were those described in paragraph 6 of the Amended Defence and Counter-Claim. It seems to me that at that stage of the pleadings the issues in dispute did not at all concern the identification of or the entitlement of the respondent to Norma Crest, but rather to the state of the accounts, between the parties. I therefore hold that there is a clear implied admission in paragraph 5 of the Reply to the Amended Defence and Counter-Claim that Norma Crest is the lands described in paragraph 6 of the Amended Defence and Counter-Claim.

It was apparent from paragraph 3 of the affidavit of the respondent sworn to on 2nd June 1989, that lands contained in Certificates of Title at Vol. 238 Fol. 23 and Vol. 276 Fol. 9 of the Register Book of Titles were registered in the name of "A.W.E." deceased. These properties were not transferred by the executors i.e. Dr. Holmes who died in 1967 and Mrs. Alice Eldemire who died in 1978. The appellant complained in Ground II that Ellis J. erred in making the order sought in the Summons in that the properties registered in Vol. 238 Fol. 23 and Vol. 276 Fol. 9 and mentioned in order of Ellis J. were at no time vested either wholly or in part in the appellant and the order was in the circumstances unenforceable.

Mr. Codlin submitted that the appellant had obtained mortgages on both these properties in May 1987, thereby showing that he exercised complete dominion over these properties. It was now too late, he submitted, for the appellant to disclaim power or authority to deal with this land. His more persuasive submission, however, was that having regard to the death of the executors of "A.W.E.", the properties which remained in the name of the deceased, were contingently vested in the sole beneficiaries. These beneficiaries, being sui juris could act to vest the property in any way they chose. In support of this proposition, he drew attention to the letter from the appellant's attorney that "Norma Crest will, of course in due time be transferred by my client, when the estate is settled." It does not seem to me to be an insurmountable hurdle in conveyancing practice for the appellant to execute a vesting assent with suitable recitals so as to be able to transfer the properties referred to in Ground II, if he were minded so to do. To that extent therefore the order of the Court in respect of lands registered at Vol. 238 Fol. 23 and Vol. 276 Fol. 9 is not unenforceable.

For the appellant it was argued that the order of Ellis J. was unjust for five separate reasons:

(a) it required the appellant to divest himself of his interest of being tenant in common in respect of properties at Vol. 212 Fol. 33, Vol. 240 Fol. 66;

(b) it sought to invest the respondent with a Title to the same without any present or future consideration for it;

(c) the order could be interpreted as encouraging an invasion of the provisions of Section 4 of the Statute of Frauds;

(d) the effect of the order was to leave the appellant open to contemplate proceedings for failure to obey an order which he had no legal power to satisfy as the titles at Vol. 238 Fol. 23 and Vol. 276 Fol. 9 are in the name of his father "A.W.E." deceased.

(e) the effect of the order was to encourage the appellant to intermeddle with trust property without any claim of right.

The justice of the case requires that issues in respect of which, on the admissions of the appellant, there is no defence at trial, should be disposed of early so as to save costs. There is the most abundant evidence in the documents and in the affidavits evidencing in writing the consideration for the transfer to the respondent of Norma Crest. The appellant can without any difficulty comply with the order of Ellis J. and far from intermeddling with the estate he would be acting to complete its administration and to uphold his own undertakings. There is no evidence of oppression in the order of Ellis J.

In my opinion the appeal should be dismissed with costs to the respondent to be agreed or taxed.

WRIGHT J.A.:

I agree.

MORGAN J.A.:

I agree.