JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 2/82

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA - PRESIDENT
THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE CARBERRY, J.A.

BETWEEN: KELSEY WOOD - PLAINTIFF/APPELLANT

A N D : DORIS WOOD and UNA WOOD - DEFENDANTS/RESPONDENTS

Mr. Carl Rattray, Q.C. and Mr. W.W. Conolly
for the Plaintiff/Appellant.

Mr. R.D. Alberga, Q.C. and Mr. O.L. Panton
for the Defendants/Respondents.

June 16 and 17; November 1982

CARBERRY, J.A.:

This was an appeal from the judgment of Sir John Summerfield, Chief Justice of the Cayman Islands in a dispute over land situated in East End, and referred to by the parties as the Half Moon Bay Property. All parties refer to it as a single parcel of land, but it is cut into two pieces by a public road, and was registered in two parcels, High Rock 64 A 34 and High Rock 64 A 27. Both parcels were registered in the names of the defendants, two sisters, as tenants in common equally. One parcel High Rock 64 A 27 was sold to a company Bal Mor Limited before the suit began.

The plaintiff/appellant is their cousin, and the background to this dispute has a certain Biblical ring about it. The original undisputed owner of this land was James Dennis Wood, described in the deed through which both sides claim as a labourer. He died in January, 1954. The two defendants are his lawful daughters. Apparently he had no son. When his brother died in Honduras in about 1928, he sent for and "raised"

his brother's son, the plaintiff, as he would his own son. The plaintiff was then about eleven years old, and he grew up with the two defendants as one of the family.

In or about 1935 the plaintiff went to sea as did a great many Caymanians in those days. He would then have been about eighteen. This left the two girls without a "man in the house" save for their father. Their father on the 22nd June, 1939 (when world war two was already casting its shadow), signed a Deed the first clause of which reads thus:

> "This Deed made at East End, in the Island of Grand Cayman this 22nd day of June in the year of our Lord one thousand nine hundred and thirty nine, between James Wood, Labourer, of the one part; and Doris, Una and Kelcey Wood - providing always, that the said Kelcey Wood works the said land in connection with the said Doris and Una, failing to do so his name shall be struck out of this deed Absolutely, - parties of the other part WITNESSETH
>
> That in consideration of the love, good treatment maintenance and other Good and Valuable Consideration realised at the hands of my beneficiaries which have moved me so to do, I James Wood, as beneficient (sic) owner in Fee Simple, give, grant, remise, (sic) release and quit claim, as from the date of this Instrument, unto the above mentioned Doris, Una, and Kelcey Wood, their heirs and assigns, in equal portions, all privilege, right, title, interest, claim or demand whatsoever I may have acquired in certain properties situate at Half Moon Bay in the above mentioned Island and butting and bounded as follows: ....."

The Deed ends thus:

> "All the within described property, I, James Wood, give unto the said Doris, Una and Kelcey Wood absolutely, and in equal portions, to have and to hold, to own and possess for themselves their heirs and assigns in fee simple forever, as from the date hereof....."

The Deed was duly witnessed, sealed and signed, and acknowledged before a Justice of the Peace on the 3rd July, 1939. The beneficiaries did not sign the Deed of gift. Indeed Kelsey the plaintiff may have been away at sea when it was drawn up, though it appears that he visited the Island in 1939, but whether before or after the deed is not clear, though it was probably before, as he did not become aware of the condition "tying" him to

the land until 1956. It is not clear when the two girls became aware of the provisions of the deed: it may or may not have been common family knowledge. But on the 7th October, 1953, James Dennis Wood added a "postscript", unwitnessed but signed by him, in these words:

> "I am leaving my daughter Doris to be in charge as long as the good Lord should make her live."

According to the evidence of Doris, her father was sick at the time that he made this addition or postscript; she says that plaintiff Kelsey was told of his illness, but never came home. James Dennis Wood died in January 1954. Kelsey's next visit home was in 1956. The Deed was recorded in the Public Record Office of the Cayman Islands on the 4th August, 1954. The two girls had been doing what they could with the land during their father's illness. After his death they continued, and "entered upon their inheritance."

It appears that on his visit home in 1939, Kelsey had helped his uncle work the land. The latter was evidently anxious that he should come back and settle down, and so were the girls. He never did so. Though it is agreed by all parties that on his return in 1956 he was shown the deed and became aware of the condition in it. According to Doris, whose evidence on this point was accepted, Kelsey told her in response that "he was not going to live in Cayman and work this old land." He was true to his word.

On the other hand it is plain that the burden of the inheritance fell on Doris and to some extent Una, though Doris appears to have been the active partner. She describes herself as "having been a school teacher all my working life, I have done a lot of cultivating too." She was, as her father had put it, "in charge," and she remained so up to the bringing of this action. But in charge for who? and on what basis? This has been the only really disputed area of fact in the case.

Early in his judgment the learned Chief Justice addressed the question of whether the condition of the gift to Kelsey requiring him to "work" the land or lose his interest in it was good or not. (He did not work the land). The Chief Justice decided on the basis of "the able arguments addressed to him, and on the case law," that the condition was void, and that the plaintiff Kelsey would, subject to the Limitation of Actions law, have retained his interest in the land up to the time when the adjudication record (discussed below) became final under Section 22 of the Land Adjudication Law, 1971.

Neither side has challenged this finding of the learned Chief Justice, who had the benefit of the able arguments and the case law. It however remains of some importance in weighing what the parties themselves thought about the matter, without benefit of legal advice.

It appears that, before the present dispute arose, Doris had not given up hope that Kelsey would return. In those years she had married and divorced. Kelsey himself had married and settled in America, with his home in New York, and become a naturalized American citizen. In 1971, Doris, and her sister Una (who never married), drew up a deed giving to Kelsey a house spot, described and bounded, on other land inherited from their mother at Blakes. The operative part of the deed runs thus:

> "To all whom this may concern know ye that I Doris Idaline Wood Levy married woman of East End Island aforesaid and my sister Una Wood of the same district, seeing that our cousin Kelsey Wood seaman of New York, has by no means merited the terms of my father's James D. Wood deed to us, Doris Wood Levy, and Una Wood, his two daughters, and that he the same Kelsey Wood has now come to live with his family in this country without a shelter and through our good will towards him, we hereby give, grant, convey and confirm by these presents do give, grant and convey all our right share interest and title into a certain spot of land situated at East End and known as "Blakes" to us and to the public ..... (describing the land) .....
>
> The same for the said Kelsey Wood to have, and to hold, to occupy, possess and enjoy all our

> "rights share interest and title to the abovenamed spot of land to him his heirs, and assigns from henceforth and forever, and we do from henceforth quit all right share, interest, and title to the abovenamed spot of land ....."

Doris herself prepared the deed.

The deed was duly witnessed, sealed and signed, and has been recorded in the Public Record Office. It was says Doris handed to Kelsey on the occasion of a two week visit that he paid to Cayman in December 1971, with his family. But Doris kept it and recorded it, on the same day on which she and Una signed it. (Kelsey claims to have been aware of the gift but not to have seen the actual deed). Kelsey however did not stay. According to Doris he said he was going to stay but he did not stay. He told her (later) he would not be coming back to live.

The deed shows what Doris herself thought about Kelsey's one third share of the land at Half Moon Bay. It does not of course show what he himself thought. Typically, he has never asserted his claim to this part of the land at Blake's and on the coming of land registration to Cayman it has been registered in the name of the two sisters, i.e. it is embraced in the registration of the larger area from which it was carved out. Possibly, on reflection, Kelsey may have thought that if he accepted this gift it would mean that he had abandoned his one third claim to the land at Half Moon Bay.

Apart from what the parties thought as to the continuing validity of the original gift by James Wood to the three: a gift that made them tenants in common, with one third share each, what in fact happened after Kelsey visited in 1956?

Kelsey's version is that he made an arrangement with Doris to manage the land on his behalf (as well as her own), and that he from time to time sent her money to do so. The Chief Justice in his judgment rejected this assertion and accepted Doris' evidence that no such arrangement was ever made, though from time to time Kelsey did send small gifts of money, "The

remittance from the plaintiff to members of his family in these Islands would have been in keeping with a well established Caymanian practice in those days when the seafarer would send money to ease what was then, for many, a fairly frugal livelihood" as the Chief Justice puts it.

It appears from both the evidence and the Chief Justice's findings on it, that the relationship between the two sisters who stayed in Cayman, and their adopted brother who had settled in New York and become a seaman in U.S. ships remained fairly cordial but never close. He had no intention of returning to Cayman and had adopted a life style inconsistent with that. No doubt to the disappointment of his sisters. It appeared that the family still looked to him for some assistance in life's emergencies: a lawsuit that Doris had over land with her mother-in-law; a brush with the police on a charge of obeah. The sisters regarded him as having forfeited the interest in Half Moon Bay, land which they worked and cultivated, to the extent of which it was capable. When he visited in 1971, hoping he would come to stay they offered building land for a house at Blakes. He never took it up. The question of whether that gift is still valid in view of the fact that that entire parcel has been registered in the name of the two sisters, without mentioning the gift of part of it, was never canvassed, and like the Chief Justice we express no opinion about it.

In the meantime "progress came to Cayman," in the form of tourism and off shore banking. Land prices began to boom. In 1971 The Legislature of Cayman passed two laws: The Land Adjudication Law, 1971, (Law 20 of 1971) and The Registered Land Law (Law 21 of 1971). The Memorandum of objects and reasons of the Land Adjudicttion Law describes it as "designed to pave the way for the establishment of a modern system of land registration, whereby title to all land in the Islands will

become certain and guaranteed by the government, and transfers and other dealings in land can be accomplished simply and expeditiously." Briefly put, the Land Adjudication Law provided for a complete survey and demarcation of the boundaries of all land held in the Islands and at the same time set up a tribunal to hear and adjudicate on the various claims made thereto, to establish ownership and other rights therein. It was intended that area by area would thus be considered, boundaries settled and ownership established: which would be described as either absolute or provisional. As each area was considered, the Adjudicator would send out notices, requiring claimants to come forward and establish their respective claims. In due course these would be adjudicated on. Disputes as to boundaries and claims would go through two levels, through a demarcator, and on appeal to the Adjudicator and a Land Adjudication Tribunal.

At that level it would appear that the basic idea was to clothe possession with title, so far as this could be done, and the Adjudicator and Records Officer were given a discretion to admit evidence which would not be admissible in a court of law, and to use evidence adduced in any other claim or contained in any official record and to call evidence on their own. (Section 16(4)). Provision was made in case of dispute for a re-hearing at that level by petition to the Tribunal (Section 20), and after the final adjudication record had been settled and a certificate to this effect given under Section 22, for an Appeal to the Grand Court within a limited time: Section 23. At this stage such issues would be decided on the normal legal basis. In short, it might be said that the idea was to settle once and for all the equivalent of a "Doomsday Book." That "Book" was to be the Land Register set up by and under the Registered Land Law, (Law 21 of 1971). By that law, Section 9(1):

> "9(1) The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Law, 1971, and a register in respect of each lease required by this Law to be registered. ...."

Section 10 provided for the Registrar of Lands to prepare a register for each parcel when the adjudication record became final and had been delivered to him by the Adjudicator, and Section 11 provided for this first registration by the Registrar. The entry in the register would show ownership, description, (by map), and incumbrances etcetera.

Section 23 provided for the effect of registration: It reads:

> "23. Subject to the provisions of Section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatever, but subject ....."

to certain registered and non-registered overriding interests, described in Section 23(a) and (b) and in Section 28. (Section 27 relates to voluntary transfers).

It should be noted that apart from registering land individually owned, the process described above would also take in and register as such Crown Land, (including land to which there was no valid existing individual claim).

Section 139 provides for rectification of the register by the Registrar; while Section 140 provides for rectification of the register by the Court. It reads:

> "140(1) Subject to any provisions of the Land Adjudication Law, 1971 and to the provisions of subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially, contributed to it by his act, neglect or default."

In reading this section attention should be paid to the earlier Section 38, "protection of persons dealing in registered land."

We must confess to being far more familiar with the Torrens system of land registration, which is used in Jamaica and a good many other Commonwealth Territories. We notice with some dismay the lack of an equivalent to Sections 70 and 71 of the Jamaican Registration of Titles Act (Sections 69 and 70 of Cap. 340 of the 1953 Code), both of which are standard and valuable sections. The one provides for preferential and prior rights to be defeated, save in the case of fraud, and the other provides protection to parties dealing with the registered owner which is much wider than that in Section 38 of the C.I. Registered Land Law. Section 23 of the C.I. Law corresponds with Section 26 of the Jamaican Law, a section seldom relied on as compared with Section 70. Be that as it may, Section 140 of the C.I. Registered Land Law set out above, specifically states that it applies to a first registration, though it says "Subject to the provisions of the Land Adjudication Law."

To return to the narrative, these two laws having been introduced into the Cayman Islands, the land adjudication and registering of titles to their holdings became a matter of common and widespread concern to all landholders.

In November of 1975 the defendants submitted their application or claim to the Half Moon Bay holding to the Adjuicator, and supported it by including the Deed of 1939 from their father James Dennis Wood.

The holding was shown on the demarcator's map as two separate pieces of land, and so two separate applications were made. They did not apply on behalf of the plaintiff, though his name was on the deed. It is not known what view was originally taken of this fact by the land adjudication authorities. Presumably the fact of their possession was well known and presumably the authorities had never seen the plaintiff, in relation to that land, if at all. The defendants' claim was recognized. It was uncontested. The defendants were registered with absolute title on 13th July, 1977.

It appears that in 1980 the plaintiff, acting no doubt under Section 139 of the Land Registration Law, applied to the Land Registrar in respect of his claim. The Registrar acting under his general powers given in Section 6(b) invited all three parties to a hearing. They were heard on 22nd May, 1980. Some evidence was taken. The Registrar on 28th May, 1980, decided that this was not the sort of matter in which he could intervene, but he placed a "short term restriction on the land forbidding all dealings for a maximum period of six months" and left the plaintiff to pursue his remedies elsewhere in the courts.

It does not appear whether the sale of the parcel to Bal Mor Limited was completed before or after this period lapsed. (The copy Land Register relating to this parcel actually shows that sale to Bal Mor was entered on the 22nd August, 1980, but deleted and a fresh sale or resale to Half Moon Bay Limited, was entered on the 23rd December 1980. It does not show the Registrar's "inhibition" which appears on the Certificate in respect of the remaining portion).

Possibly it was the sale to Bal Mor and the price obtained thereby that prompted the plaintiff to come forward. He could not have been short of "informants": Doris' ex-husband was his principal witness.

The plaintiff's present action was commenced on 3rd November, 1980. He claimed a declaration that he was entitled to a one third share in the property the subject of the deed of James Dennis Wood dated 22nd June 1939 in respect of the Half Moon Bay Land. He sought rectification of the Land Register in respect of the unsold portion of that Land, and as to the portion sold to Bal Mor Limited on the 18th August and registered on 22nd August 1980 he claimed an account and his one third share of the price.

The plaintiff's statement of claim, which he supported by some evidence, was to the effect that the defendants had always acknowledged his entitlement under the deed of gift; that they had in the past given him monies representing his share of the proceeds of sales of sand and fill taken from the land; that he had had notice of the survey and adjudication process and had given the defendants money to assist them therein; in effect that he had thought that they were securing his registration as part owner as well as their own; and that on his return in 1980 they told him that he had in fact been so registered, but when he checked this at the Land Registry he discovered that they were registered and he had been omitted. He had asked them to set this right by executing a transfer of the unsold portion into the names af all three, and by giving him his one third share of the proceeds of the sale to Bal Mor Limited but they had refused to do either.

The plaintiff's claim was in effect under Section 140(1) of the Registered Land Law, so far as rectification was concerned, and under the general principles of equity so far as he sought an account and share in the purchase price. In particular he sought to establish that Doris was a trustee for him, by virtue of the postscript that she was to be in charge, and or alternatively that she was his agent in respect of his share, as he sent her money to look after the land and she would account to him for his share.

The defence was to the effect that the plaintiff had forfeited his share by breach of the condition in the deed that required him to work it; that they relied on the Statute of Limitations, and also on their having been registered without any opposition. They denied that the plaintiff was entitled to any of the relief claimed. As we have seen, in their oral evidence they denied the trust and agency relationship sought to be set up.

The Chief Justice found against the plaintiff on all the material issues of fact. He therefore found that there was no such "agency" relationship as alleged, and, as a matter of law, that the postscript that Doris was to be "in charge" did not constitute Doris a Trustee for herself and the other two named in the deed. He was plainly right in these findings.

In the event the learned Chief Justice found for the defendants, the two sisters, on two basis: (a) that on his construction of the relationship between the provisions of the Land Adjudication Law, 1971, and the Registered Land Law, (1971), it was not open to a person who had failed to use, or exhausted the provisions in the Land Adjudication Law with respect to the prosecuting of disputed claims to land being adjudicated on, to come forward and invoke the provisions of Section 140 of the Registered Land Law and invite the Courts to once more review his claims. He had had the chance to seek the Court's intervention under Section 23 of the Land Adjudication Law, and it seemed anomalous that he should have a second chance to do so under the Land Registration Law. The Chief Justice regarded the finality of the land adjudication process under Section 22 of that law as extinguishing "all (other) Legal estates and registrable rights and interests in land not reflected in the adjudication record."

There is much to be said in favour of this point of view, both as a matter of common sense and of law; we are not however presently prepared to endorse it, and wish to leave the matter open for argument in some future case. (The argument in the present case turned largely on the Statute of Limitations). We have observed that there is absent from the Land Registration Law the equivalent of Section 70 of the Jamaican Registration of Titles Law, which can be described as the very kernel of all Torrens systems of land registration. It specifically provides for the extinguishment of all prior rights, save in the case of fraud (or double or overlapping registrations). Section 23 of the C.I. Registered Land Law falls short of achieving this, and it is to be observed that Section 140(1) as noted earlier, specifically provides for the Court to rectify "any registration, including a first registration." Where the same has been obtained, made or omitted by fraud, or mistake.

The Chief Justice went on to observe that even if his view above was wrong, and he had taken too rigid a view on the finality of the land adjudication record, fraud was not established in this case. It failed on the facts: the sisters had sent in the full deed, and had never attempted to conceal that under it the plaintiff had at one time had an interest, though they regarded it, not unreasonably, as having determined. Nor was mistake pleaded, (whose mistake?) and whether the sisters were right or wrong in their view of the determination of the plaintiff's rights under the deed of gift, they had in fact prescribed. In this we are of the view that the Chief Justice was plainly right, in fact and on law.

The second basis on which the Chief Justice decided in favour of the defendants, (b) rests then on the provisions of the C.I. Limitation of Actions Law, Cap. 86. That law, passed apparently in 1881, in all its sections reproduces the provisions of the United Kingdom Real Property Limitations Act 1833, as

amended by the Real Property Limitation Act, 1874.

Section 3 of the C.I. Law (reproducing the provisions of Section 1 of the U.K. 1874 Act) provides for a twelve year period of limitation:

> "..... next after the time at which the right to make such entry ..... or bring such action or suit, has first accrued....."

Section 4 of the C.I. Law, (reproducing, with better punctuation, the provisions of Section 3 of the U.K. 1833 Act) sets out an amplification of the earlier section: it sets out some specific cases and states when the right to make an entry or bring an action shall be deemed to have first accrued. The two applicable cases here are sub-sections (b) and or (c), the former would make time run from the date of the death of James Dennis Wood, the person through whom the plaintiff claims; the second would make time run from the date when the plaintiff first became entitled to possession by virtue of the instrument through which he claims, viz. the deed of gift. That date would be either (i) the date of the deed itself (22nd June 1939), or alternatively (ii) the date on which it was delivered (unknown, but probably prior to the date of death of the donor, 2nd January 1954).

Further, Sections 14 (and 15) of the C.I. Law, (reproducing the provisions of Sections 12 (and 13) of the U.K. Act of 1833, specifically provides, taking the applicable words:

> 14. "When any one or more of several persons entitled to any land ... as tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, ... for his or their own benefit ..... such possession shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

In this case Doris and Una, the two sisters, have been found to be, and have clearly been in possession of the disputed land since their father's death, the only issue being was it for their own benefit? If so, then their possession would

not be the possession of the plaintiff, and his right of action or claim would be barred by the earlier provisions of the law referred to above. This is made abundantly clear by Section 30 of the C.I. Law (reproducing Section 34 of the U.K. 1833 Act): it provides for the extinguishment of the claim of the party out of possession at the end of the limitation period.

We have had the benefit of the judgment of the Privy Council in a recent case on appeal from the Bahamas, Paradise Beach and Transportation Co. Ltd. v. Cyril Price-Robinson (1968) A.C. 1072. The case was very similar: "family-land" left by a testator to several children and grand-children, of whom two sisters only entered into or remained in possession, cultivating and possessing it, until their deaths some fifty years later. Held that the claims of the others (and those who claimed through them) had been extinguished.

There, as here, attempts were made to pray in aid the trust concept (time does not run in favour of a trustees as against a beneficiary: and see Section 26 of the C.I. Law, reproducing Section 25 of the U.K. 1833 Act) and also the provision with respect to concealed fraud (see Section 27 of the C.I. Law, reproducing Section 26 of the U.K. 1833 Act).

There, as here, the background to the dormant claims was the sudden appreciation in the value of what had been hitherto a neglected coral strand.

The relevant sections of the Limitation Act of the Bahamas, very similar to the C.I. Law, were reviewed in the Paradise Beach case by their Lordships and we respectfully adopt, without repeating, the views to which they came after reviewing the English cases such as Culley v Doe d. Taylerson (1840) 11 Ad & E 1008; 13 E.R. 697 and Nepean v Doe d. Knight (1837) 2 M & W 894; 150 E.R. 1021 and others.

No trust and no concealed fraud were established, and the right of the plaintiff, the co-tenant in common, was barred and his title extinguished. We agree with Mr. Alberga that the decisions of the Court of Appeal and the House of Lords in Kennedy v de Trafford (1896) 1 Ch 762 and (1897) A.C. 180 show that there is no fiduciary relationship between tenants in common as such, nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character, and, as the Chief Justice found, there were no other facts present which might have established this, once the plaintiff was disbelieved and the defendant's evidence accepted. In the result this appeal fails, and the defendants/respondents are entitled to judgment, with the usual order for costs both here and below.

Zacca, P. - I agree

Kerr, J.A. - I agree