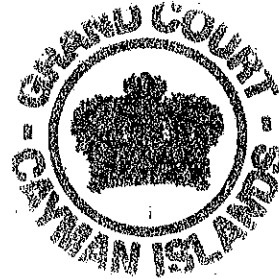


**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. G 29 OF 2018**

**BETWEEN:**

**IDANIA EBANKS**



**Plaintiff**

**AND**

**ROLANDO EBANKS**

**Defendant**

**Appearances:**

Mr. A. Steve McField for the Plaintiff

Mr. Remo Dalimonthee of Bodden & Bodden for the Defendant

**Before:**

**Hon. Justice Richard Williams**

**Heard:**

21 March 2018

**Transcript circulated:** 22 March 2018

**HEADNOTE**

*Application for Summary Possession GCR Order 113 – purpose of GCR Order 113 proceedings – Appropriateness of bringing summary possession proceedings - Effect of Plaintiff being aware of the Defendant raising a triable issue, especially before filing of Originating Summons – Orders that may be made in summary possession proceedings*

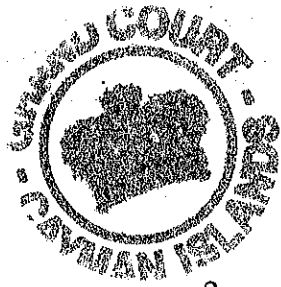
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**TRANSCRIPT OF EX TEMPORE RULING**

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**The Application**

1. I have before me the Plaintiff's ("ID") Originating Summons dated 21 February 2018 seeking an order, pursuant to GCR O.113, for summary possession of the property at 215 Fountain Road, West Bay, Block 4B, Parcel 364 ("the Parcel").



The Originating Summons is accompanied by a supporting affidavit deposited to by ID.

2. A Transfer Form dated 6 May 1981, witnessed by a Justice of Peace, indicates that Rollin Ebanks, the parties' late father, transferred the legal title in his 215 Fountain Road property ("the Property") to ID and her sister, Esther Ebanks, for natural love and affection. On 23 February 1982, Esther Ebanks and ID partitioned the Property and ID's property ("the Parcel") and her sister's property were registered at the Land Registry. It is settled law that the Certificate of Title is conclusive evidence of ownership which can only be challenged, for example, where there is evidence of fraud.
  
3. The Defendant ("RE"), who is one of the Plaintiff's brothers, opposes this application. He claims that he had helped his father build the house on the Property and that his father had *"told him that the house would be for the family and (RE) would share in the ownership in the house."* RE claims that the 1981 transfer was *"concealed"* from him and that he only found about it in 2017. RE states a belief that the transfer may have been fraudulent, as the signature purportedly made by his father is a forgery. RE claims he is in *"actual occupation"* of the Parcel and that he has an overriding interest in it pursuant to s.28 of the Registered Land Law (2004 Revision) ("the Law") and as a consequence he has applied to the Registrar of Lands to place a restriction against the Parcel.

## The Background

4. The parties' father passed away intestate on 23 May 2016. A dispute about the estate began between the father's children and his then wife ("DH") whom he had married in November 2002. Eventually on 2 October 2007, Hibbert J. ordered that ID and DH should be appointed as Joint Administrators of the father's estate.

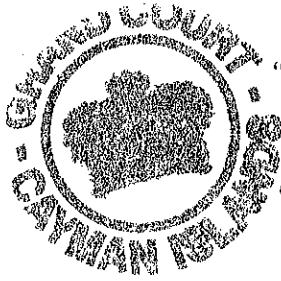
5. ID and her siblings (including RE) swore before Notary Publics a joint affidavit in support of the Summons dated 24 November 2006 seeking an order for ID to be made the Administrator of the estate. Interestingly, the Property is not mentioned anywhere in the estate proceedings or in the affidavit or identified as being an asset of the estate. In the affidavit both ID and RE only referred to the 11 Andressen Road parcel as being an asset and they relied upon an exhibited letter

signed by their father in which he wrote that:

- (i) he was giving that property to ID "*in love and affection*";
- (ii) she should operate his two named businesses; and
- (iii) this would stand until he "*did*" his 'Will'.

In the same affidavit ID and RE indicated that the father had prepared a 'Will' in the presence of Mr. W. McKeeva Bush, but he had not been able to sign it prior to his passing. That exhibited "Will" provided that it intended to cover all of the father's assets in the Cayman Islands. The Property was not listed in the affidavit as being one of his assets. Exhibited to that affidavit is a letter from Mr. Bush dated 12 September 2016 in which he confirms that, due to ill-health, the father had been unable to sign the will, adding that the father had:





*"told him that (ID) was still helping him conduct his business; that he was going to do the Will and leave (ID) his property, and that he had already put the above in writing."*

6. This evidence may give the impression that the Property was not viewed by the father or by any of these children who all swore the affidavit as being an estate asset belonging to the father at the time of his death. This may be consistent with the transfer of the Property having been made by the father to ID and Esther Ebanks in 1981.
  
7. From reviewing the affidavits filed in the proceedings before me, it became evident that the litigants had failed to draw to the attention of their attorneys some of the potentially highly relevant material contained in the probate file case number 100/2006. With this in mind, I was conscious that there may be a risk of a party perjuring himself/herself and when doing so not being aware that the Court had read the documents in the probate file. Therefore, during the hearing, I drew to the parties' attention some of the content in the probate file, including the affidavit deposed to by both of the parties and their siblings on 21 and 22 November 2006.
  
8. I also drew to the parties' attention that the Transfer of Land Form contains a Certificate of Identification signed by a Justice of Peace verifying the identity of ID, Esther Ebanks and her father and witnessing their signatures which appear therein. I have been informed by the parties that that the Justice of the Peace has

since retired, but may be able to come to Court to give evidence in relation to the transfer.

### **The law and the appropriateness of bringing summary possession proceedings**

9. I have explored with the parties whether it was appropriate for the application for possession to be one made under the summary jurisdiction given by O.113. The main purpose of O.113 is to provide a speedy and effective procedure for the owners of land to evict persons who have entered into or taken occupation of the land or who remain on the land without the owner's license or consent. As stated at Note 113/2 in the White Book:

*"... the only claim that can be made in the Originating Summons is for the recovery of possession of land; .... , no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise."*



Such proceedings are ordinarily only brought when there appears to be no dispute and, where the existence of a serious dispute is apparent to a plaintiff, he should not use this procedure. In fact, at Note 13/0/2, the authors of the White Book state that the Court:

*"discourages the use of this procedure where the plaintiff is aware of a real dispute with the occupier..."*



10. In possession proceedings against trespassers, landowners need prove only the title and an intention to regain possession (*Portland Management Ltd v Harte [1976] 1 All ER 225*). Once a Plaintiff has satisfied the Court that he has a legal right to claim possession of the land, an occupier, such as RE, who wishes to claim some right of occupation which amounts to a defence has the burden of proving its existence. It appears that the parties may agree that if the Court finds that there was a licence given to RE by ID, that she has provided the appropriate written notice to RE. This may be relevant, as a person who faces possession proceedings brought by a landowner who claims that they are trespassers may have a defence if the licence has not been determined. The Court in *GLC v Jenkins [1975] 1 All ER 354* stated that O.113 could not be used against licensees if the licence had not been terminated by the date on which proceedings were issued.

11. As RE contends that, despite the entries on the Land Register which indicate that ID is the registered legal owner of the Parcel, she is not and that he has an overriding right to occupy pursuant to s.28 of the Law, an issue arises as to whether the summary procedure is appropriate in the matter before me.

12. In the House of Lords decision of *Henderson v Law (1984) 17 HLR 237 at 241*, Griffiths L.J. stated when discussing the bringing of cases for possession under the summary procedure provided by O.113:

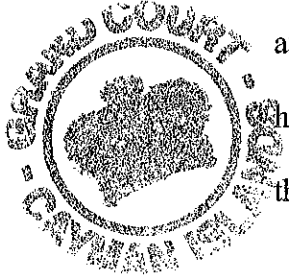
*"There will obviously be cases in which, although proceedings are started by way of a summary procedure it quickly becomes apparent*



*that a substantial issue has to be tried. If it was apparent to the applicant that a serious issue was bound to arise as to whether a tenancy or a holding ever existed, no doubt the judge would regard the use of the summary procedure as inappropriate, or even in an extreme case as an abuse of the process, and dismiss the application; but I would expect such cases to be rare, because I would not anticipate that solicitors would seek to steal a march by using an inappropriate procedure. From time to time there are bound to be cases such as this where, from the applicant's point of view, an unexpected issue surfaces which raises the question of a tenancy or a holding over. In such cases, the judge must exercise his discretion and decide whether it is wiser to continue the summary hearing, or to adjourn it for a further hearing after the parties have had a chance to reconsider the position, or possibly to dismiss the application and leave the applicant to have the issues determined in a subsequent action."*

13. In the Court of Appeal decision of *Crancour Limited v Da Silvaesa and Another, Same v Merola and Another* [1986] EWCA Civ 1 Gibson L.J. stated at paragraph 12 that:

*"A landlord is entitled to use the summary proceedings under Ord. 113 if he can demonstrate his right to do so, and the court has no discretion to deny such use merely on the grounds that the proceedings are rapid and summary and that the defendants did not enter as squatters: see *GLC v Jenkins* [1975] 1 WLR 155. The landlord, however, takes a risk of finding that the evidence put forward by the defendant is such that the landlord's claim is not sufficiently clear and straightforward for these summary proceedings and must be remitted for trial: see *Shah v Givert* (1980) 124 SJ 513."*



14. It is clear that this is a case in which ID was aware, prior to issuing her Originating Summons, that if summary proceedings were brought they would be disputed with RE raising triable issues. I say this because ID actually refers in her affidavit to the application being made by RE to the Registrar of Lands in which she claims that the transfer of the Property to her and her sister was fraudulent and that he has an overriding interest in the Parcel pursuant to s. 28 of the Law.

### **Conclusion**

15. In light of this, if this matter remains contested, the use of the summary procedure rather than ordinary possession proceedings is not appropriate. With that in mind I have a number of options, but with the consent of the parties today, rather than dismissing the application which may result in delays and increased legal costs due to ID having to bring separate ordinary possession proceedings, I adjourn the matter. When I do so I adopt the above-mentioned thinking of Griffiths L.J., as a listing for a further hearing will afford the parties, in the interim, a chance to reconsider their positions in light of the additional material in the probate file which I have brought to their attention today.
16. If the parties do not reach agreement concerning the Parcel, it is possible that at the next hearing the Originating Summons will be dismissed<sup>1</sup> and, as indicated by Griffiths L.J., that would leave ID with the option of having the issues determined in a subsequent action. Directions would have to be given at that separate action

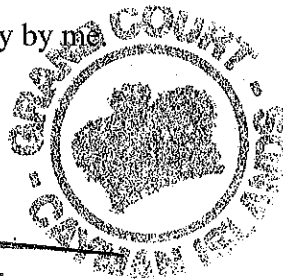
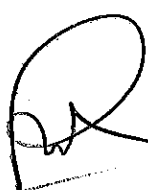
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<sup>1</sup> Although not mentioned at the hearing, having regard to the Overriding Objective, an additional approach may be for the Court to treat the Originating Summons as a Writ and then proceed to consider at a later full hearing whether to make only an order for possession.

before they went to trial. If ordinary possession proceedings were brought, then the Court would have the jurisdiction to make additional orders including mesne profits if sought.

**Order**

17. Accordingly, I adjourn this matter to come back on before me on one of my Family Mention Day slots for 30 minutes. Unfortunately I am unable at this time to get access to my diary and so cannot provide the attorneys with that date and time. I will ask my personal assistant to contact both of the attorneys with possible dates. Once the adjourned hearing date is agreed by the parties, that date should be included in the order to be drafted by the attorneys following today's hearing. Although I list the matter to come before me for the next hearing, I am not thereafter restricting the case to be heard only by me



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**THE HON. MR. JUSTICE RICHARD WILLIAMS  
JUDGE OF THE GRAND COURT**