IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

C.I.C.A. (Civil) # 3 of 2004
(G.C. Cause # 5 of 1996)

BETWEEN **JUNE SMITH**
[As Administratrix of the Estate of Alvey Wilmington Smith (Deceased)]

Plaintiff/Respondent

AND

ELERY ELROY SMITH
[As Administrator of the Estate of Samuel Smith Jr. (Deceased)]

Defendant/Appellant

BEFORE: **The Rt. Hon. Mr. Justice E. Zacca, President**
The Hon. Mr. Justice G. Collett, J.A.
The Hon. Mr. Justice I. Forte, J.A.

Appearances: William Helfrecht of Ogier & Boxalls for the appellant and Kyle and Peter Boadhurst of Broadhurst Dacosta for the Respondent.

Heard: 26th July & 5th August 2004 Delivered: 26th November, 2004.

REASONS FOR JUDGMENT

FORTE, J. A.

Before addressing the issues in the substantive appeal, we must deal with a preliminary issue concerning the exercise of his jurisdiction by the learned trial judge.

The trial of the action took place on the 4th and 5th November 2002 at the end of which the learned judge reserved judgment. On the 7th April 2003, the

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attorneys for the parties received a written judgment signed by the learned judge and sealed with the seal of the Grand Court. In that judgment the learned judge held inter alia as follows:

> "The appellant is entitled to ownership of lot 80 by virtue of the quit-claim deed from Alvey Smith, Jr., dated June 18, 1984. However, in order for that transaction to be completed (the appellant) must pay the amount of $33,000 less the $525 that was previously paid. The question of whether the (Respondent) is entitled to interest on the amount of $32,475 was not argued. If the parties cannot agree, it may be spoken to ... . Although (the appellant) is legally entitled to obtain title to the land, he did not pay (the Respondent) for the $32,475 owing to him. Absent a payment into Court or a Calder Bank (sic) letter in Suitable terms, I would award costs of these proceedings to the (Respondent)."

As the parties could not agree on the terms of the Order, on the direction of the learned judge, they again appeared before him on the 5th June 2003, "ostensibly to deal with the questions of interest and costs." In the course of that hearing, counsel for the Respondent submitted that, notwithstanding that judgment in the action had been delivered, the plaintiff should be allowed to argue that the agreement contained in the 1984 deed (which will be referred to and dealt with later in this judgment) was not one which the Court could or should order the parties to perform. The learned judge acceded to that submission and ordered the parties to provide him with written submissions on the question of whether the Court could or should order specific performance of the 1984 agreement. On the 5th January 2004, the learned judge delivered

another judgment, reversing the judgment he had earlier delivered in favour of the Appellant and instead gave judgment in favour of the Respondent.

Before us, it was argued that at the time of delivering the second judgment, the learned judge was *functus officio* in relation to all questions save interest and costs, that the second judgment is of no effect and that the Order of 5th January 2004 must be set aside.

It is agreed that at the time of delivery of the second judgment, the earlier judgment had not been drawn up, entered or perfected.

In our view, until that has been done, a trial judge can always withdraw or modify his judgment. This view was also expressed in the Caymanian case of ***In the matter of C*** (1994-95) CLR 262, which is relied upon by the respondent. In that case it was held that –

> "The ex tempore conclusion the court had reached was not binding on it, since an order could always be withdrawn or altered by a judge before it was drawn up passed and entered."

In arriving at its conclusion, the Court (per Harre, CJ) relied on ***Re Harrison's Share*** (1955) Ch 260 (1955) 1 All ER 185 in which it was held that until it is perfected, "a judge was entitled to recall the order on his own initiative, whether the order was originally made in Chambers or in open Court, ..." In 1986 the English Court of Appeal sanctioned such action in the case of ***Pittalis and others v. Shevefetton*** (1986) 2 All E.R. 227 when it held that "a judge, including a Country Court judge, could always recall and reconsider his decision up until the time his order was drawn up or perfected."

Counsel for the appellant while conceding that a trial judge may recall and reverse a judgment, given orally, before it is entered and perfected, it has no power to do so when he had delivered written reasons for his judgment. This argument is without merit.

It's fallacy surfaces when it is realized that the order of the Court is declaratory of and gives effect to the learned judge's findings on the issues before him. This is so whether the judgment is oral, with or without reasons, as also when the order is a result of written reasons for judgment. Indeed an appeal is not from the reasons given, but from the Order made by the learned judge. In our view, the cases cited are applicable even in a case such as this where the learned judge gave written reasons for his earlier judgment, and we would conclude that the learned judge was entitled to reverse himself, the order not having been drawn up and entered at that time. For those reasons we allowed the appeal to proceed, as against the second judgment of the learned judge. In any event, the issues that were argued before the learned judge, have all been aired before us, and will be dealt with immediately following.

The appeal is against the judgment of Sanderson, J delivered on the 16th January 2004 and in which he made the following orders:

"It is hereby declared that:

(1) That absolute title to the land identified in the Cayman Islands Land Register as George Town Central Block 14 B, Parcel 80 (hereinafter the "Land") is vested in the Plaintiff, June Diane Smith Administratrix of the Estate of Alvey Wilmington Smith (Deceased).

IT IS HEREBY ORDERED that:

(2) The Registrar of Land is hereby directed to amend and rectify the Land Registry as it relates to the Land by:

i. deleting entry number 1 in the Proprietorship Section thereto;

ii. deleting entry number 2 in the Proprietorship Section thereto;

iii. inserting as entry number 3 therein the name of June Diane Smith Administratrix of the Estate of Alvey Wilmington Smith (Deceased), as Proprietor and the rightful owner of the Land;

iv. inserting the nature of the title in favour of the said June Diane Smith Administratrix of Alvey Wilmington Smith (Deceased) as absolute;

(3) The Defendant's Counterclaim be and is hereby dismissed;

(4) The Plaintiff to have the costs of the action, taxed if not agreed."

In doing so the Learned Judge gave to the respondent all that she had claimed in her Statement of Claim.

The plaintiff claimed as Administratrix of the Estate of Alvey Smith Jnr.

The history of the ownership of the land was undisputed up to the point where Alvey Smith Snr., from whom Alvey Smith Jnr., inherited the land, claimed ownership of it. The plaintiff and the defendant are cousins. The grandparents of Alvey and Elery, were Samuel Smith Sr., and Iolio Smith. They acquired land

described as "George Town Central Block 14 BG". The land was divided into Parcels, 60, 62, 80 and 81 (formerly 63) 64, 72, 66 and 70. The legal title to parcels 60 and 62 were held by Iolio Smith, and the others were held by Samuel Smith Snr. This couple had two sons, Samuel Smith Jnr., and Alvey Smith, Snr., and four daughters, Clara Belle, Lucille, Leonie and Aida.

Samuel Smith Snr., died intestate in 1927. On his death the land devolved to Samuel Smith Jnr., his elder son. Samuel Smith Jnr., died in 1944 and on his death Letters of Administration were granted to Charles A Smith. Samuel Smith, Jnr., had three sons, Charles, James and Elery Smith. After Charles obtained Letters of Administration, he left the island. In his absence, Clara Belle (his father's sister) conveyed four parcels of the land which originally belonged to her father Samuel Smith Snr. Included in those conveyances was the land, the subject of appeal – parcel 80, which on the 15th July 1961, she "gifted" to Alvey Smith Snr. On the return of Charles, to the island, and in pursuance of his responsibilities as Administrator he secured additional payments for the lands conveyed by Clara Belle. Alvey Smith gifted parcel 80 which was conveyed to him by Clara Belle to his son Alvey Smith Jnr.

In June 1969, Charles Smith was removed as Administrator, and was replaced by James Smith. On the 25th June 1970 James Smith conveyed parcel 80 by way of a Quit Claim to Alvey Smith Jnr. At the hearing per an affidavit of Alvey Smith Jnr., - two certified copies of entries in the Public Records Office were exhibited, one showing the gift of the land to Alvey Smith, Jnr by Alvey

Smith Snr., the other recording the quit claim by which Alvey Smith became the owner. An extract reads:

> "NOW THEREFORE, I the said James Smith, as Personal Representative of Samuel Smith Snr., deceased, of George Town in the island of Grand Cayman DO HEREBY Release and Quit Claim into Alvey Wilmington Smith of George Town in the island of Grand Cayman all the right title interest or claim whatsoever both legal and equitable I may now have or might have had in that piece or parcel of land situate lying and being at George Town in the island of Grand Cayman (hereafter the particular parcel of land is described)."

The document registered at the Public Recorder, is "signed sealed and delivered" by James Smith.

In 1988, the Quit Claim, and a certified copy of the "Indenture by way of Gift from his father Alvey Smith Snr.," were registered by Alvey Smith Jnr., with an application from Alvey Smith Jnr., to be registered as Proprietor, with absolute title. Before this, in 1974 Elery Smith, as Administrator of the Estate, having taken the place of James Smith, applied to be registered with absolute title, but instead was registered with provisional title, no documentary evidence of title being produced to the Registrar of Lands at the time.

As a result of Alvey's application to be registered with absolute title, having produced documents in support, a Restriction was entered in the record "for the prevention of improper dealings." The Registrar as a result ordered that "a Restriction shall be placed on the Registrar to ensure until final determination

of the matter can be reached or so Ordered by the Court unless previously removed in compliance with Section 134."

On the basis of the evidence summarized heretofore, and applying Section 11 of the Public Records Law (1996 Revision), the learned judge found:

> "Thus once the Quit Claim has been accepted by the Public Recorder, it is irrefutable evidence of ownership. Therefore on the 25th June 1970, Alvey Smith Jnr., became the absolute owner of Parcel 80."

For clarity, and to demonstrate the reason for concluding that this finding of the learned judge is correct, the provisions of Section 11 of the Public Recorder Law (1996 Revision) is set out hereunder:

> "Subject to this Law, the records of any letters patent enrolled and the records of any deed duly executed and proved or acknowledged and recorded in accordance with this Law, and the record of any last will and testament duly executed according to law and proved shall at all times be deemed sufficient evidence of the several persons' titles to any estate or interest in land claimed thereunder, and the same shall be read and allowed in every court within these Islands as if the original patent, deed conveyance or will were actually produced, proved and read in this court." [Emphasis added]

Of great significance in this Appeal is the fact that this finding by the learned judge "that on the 25th June 1970, Alvey Smith Jnr., became the absolute owner of the questioned land," has not been challenged.

Instead, the appellant relies on the effect of an agreement entered into by Elery Smith and Alvey Smith in June of 1984. For the purpose of easier understanding the content of the agreement is set out hereunder:

"This agreement made this 14th day of June 1984 between Elery Smith of Crewe Road, Grand Cayman, and Alvey Smith, Jnr., of Mary Street, Grand Cayman witnesseth:

That whereas Elery Smith is undisputed legal owner of a parcel of land on Mary Street known as George Town Central, Block 14 B G Parcel 80 and whereas Alvey Smith, Jr., has encroached on the said land by building a house thereon without the owner's consent now Alvey Smith, Jr., hereby agrees that he has no claim on this land and will vacate the premises within 20 (twenty) days of receiving notice from Elery Smith stating that the premises must be vacated. The serving of notice shall be deemed to take place three days after Elery Smith posts such notice by Pre-paid Registered Post or upon the day that said notice is delivered by hand.

Elery Smith, due to no legal or moral obligation but simply out of the goodness of his heart, promises Alvey Smith, Jr., that upon serving notice he will pay Alvey Smith Jr., Three Thousand Cayman Dollars for the express purpose of renting a house or apartment to facilitate Alvey Smith, Jr. completely vacating the house on Block 14 B G Parcel 80. In the event that Elery Smith so chooses he may rent a house or apartment to accommodate Alvey Smith, Jr. for three months instead of giving him the Three Thousand Cayman Dollars. In this case the location and size of any such apartment or house shall be left to the sole discretion of Elery Smith.

The day that Alvey Smith, Jr. vacates the house on Block 14 B G Parcel 80 and serves written notice to Elery Smith that he has so vacated the premises Elery Smith shall pay Alvey Smith, Jr. Thirty Thousand Cayman Dollars. The vacating of the premises by Alvey Smith, Jr. is permanent and shall apply to him and to his family members and persons whom he may have assigned any rights or privileges.

The agreement is signed by both parties and two witnesses.

It is difficult to understand, how it is that Alvey Smith in this document apparently acknowledges that "Elery Smith is the undisputed legal owner of the parcel of land etc" in the face of the Quit Claim which passed title to Alvey Smith Snr., and the subsequent transfer of that land to Alvey Smith Jnr. On the date the agreement was signed Alvey Smith would have been entitled to be registered as the owner of the land given the documentary evidence to which I earlier referred .

It appears, however, that these documents were not registered by Alvey Smith Jnr., until 1988, some four years after this agreement and some fourteen years after Elery had sought to register title in his name.

The oral evidence given by Elery Smith in cross-examination gives some assistance in resolving these difficulties. It is to be remembered that Elery became Administrator after James Smith who it was alleged by the plaintiff was responsible for the Quit Claim to Alvey Smith Snr. It is not of great surprise then, that Elery Smith in his evidence, having stated that he never had any discussion with James, about Alvey Smith's land, denied knowing of the Quit Claim given by James. The following extracts from his testimony is relevant:

> "Q. Okay. So if James had given a quitclaim to Alvey before you made the application or Mr. MacDonald made the application to have you registered as the administrator of your Dad's estate, you did'nt know about it but it is possible he could have done it?
>
> A. You mean give the quit claim?
>
> Q. Yeah

A. It could be possible. I don't know anything about it.
...

Q. Would it be fair to say, sir, that if you did know about the quit claim you might not have made the claim for this as family lands?

A. Of course not, sir."
...

Then later:

"Q. Well I am not trying to put any words in your mouth. But if there was a quitclaim there and it actually gave the land away to somebody, then it would'nt have been in the family lands. I think you would agree with that?

A. Yes, if it was given to somebody."

Subsequently Elery is questioned about the agreement:

"Q. Okay. And if, if you were aware of the quitclaim that your previous administrator had given if you were aware that he had given a quit claim to Junior with respect to this land, you would'nt have called yourself the undisputed legal owner of the property would you?

A. Absolutely not."

The witness later asserted that the document was drawn up by Mr. Earlye Ebanks, a Real Estate dealer, and this was in Mr. Ebank's office. Asked why he could'nt sell the land without involving Mr. Ebanks, he said he could'nt sell the land with Alvey Smith Jnr., on it, so he offered him the terms stated in the agreement so that he would leave the land.

The learned judge's finding that Alvey Smith Jnr., became the absolute owner of Parcel 80 on the 25th June 1970 supported as it is by the evidence, gives the lie to the agreement which describes Elery as being the undisputed owner of the land. Elery himself admits in evidence that had he known of the quitclaim to "Junior" (Alvey Smith Jnr.) with respect to the land, he would not have called himself in the document, "the undisputed legal owner of the propriety." His earlier answer as to whether he would have made the claim for the property as family land appeared ambiguous. However, given his later admission that had he known about the quitclaim, he would not have described himself as the undisputed legal owner of the property, it is reasonable to conclude that he was saying that had he known about the quitclaim, he would not have made the claim for the property as family land.

Nevertheless, the learned judge rejected the defence of the plaintiff, presented through an affidavit of Alvey Smith Jnr., who was deceased at the time of trial, that Alvey was drunk at the time of the signing of the agreement, and found it to be a valid agreement. In that event, the agreement has to be considered as to its effect, particularly having regard to the claim of Elery Smith for specific performance of the agreement. There is no doubt that the real issue in the case was the question who was entitled to be registered with an absolute title. The evidence supports the finding of the learned judge that Alvey was indeed the absolute owner since the 25th June 1970. The question that arose

then was whether the agreement of June 1984, had the effect of transferring that ownership by Alvey Smith Jnr., to Elery.

The title of Alvey would certainly defeat the provisional title which was registered by Elery who could not produce the required evidence to be registered with an "absolute title". The documents filed by Alvey Smith Jnr., in 1988, placed a restriction on the granting to Elery of absolute title to which Alvey's document entitled him. Elery admitted in evidence that Alvey had put a lien on the land, and that is why he could not sell the property. The agreement was his method of solving that problem. In spite of this, however it was not until the 8th June 1988, after Alvey Jnr., had registered his quitclaim and conveyance from Alvey Snr., to himself, that Elery's attorney by letter, gave notice to Alvey Jnr., to vacate the property. The terms of the agreement that Elery Smith would pay to Alvey the sum of $3000 on the service of the notice, was not performed. The alternative, that Elery if he so chose, would rent a house or apartment to accommodate Alvey Smith Jnr, for three months was also not performed. The alternative in the agreement was left to the decision of Elery Smith and the burden of renting the house or apartment was to be undertaken by him. However, the letter of notice, without making any reference to the promised $3000 stated.

> "We would be obliged if you could reply to us concerning alternative accommodations in which you may or might seek for yourself."

It should be noted that this notice was given four years after the agreement, by which time Alvey had registered his valid claim for title to the land, a title which was superior to that of Elery.

Thereafter, nothing occurred until June Smith, the administratrix of the estate of Alvey Smith filed a claim on the 21st January 1997. Significantly, Elery had done nothing to enforce the agreement since it was signed on June 1984.

It was not until after June Smith brought this claim that Elery filed a Defence and Counterclaim which asked for the following:

> (1) A Declaration that the subject land is vested in the Defendant in his capacity as Administrator *de bonis non administrator* of the Estate of Samuel Smith, Jr.,
>
> (2) An Order for specific performance of the agreement referred to in paragraphs 20 to 24 hereof;
>
> (3) An Order directing the Registrar of Lands to remove the Restriction in the Proprietorship Section of the Land Register placed there on the application of the Plaintiff;
>
> (4) An Order directing the Registrar of Lands to register the nature of the Defendant's title to the subject lands as Absolute;
>
> (5) Under paragraph 25 hereof mesne profits for use and occupation of the subject land in the sum of CI$51,000 and continuing; alternatively, such sum as the Court may think just;

(6) Interest thereon, as aforesaid under paragraph 26 hereof;

(7) Such further or consequential or other relief as the Court may think just and appropriate;

(8) Costs.

The finding of the Learned Judge with which we agree and which is supported by the documentary evidence, precluded him from granting any of the Declarations or Orders prayed for in the Counterclaim with the possible exception of the Order for specific performance of the Agreement. The tenor of the counterclaim suggests that its real purpose was aimed at securing a declaration that Elery was entitled to be registered with absolute title and to use the agreement to substantiate that claim. This view is supported by Elery's assertion at the hearing that he entered into the agreement with Alvey so that he could sell the land. However, he could not, Alvey being the person entitled to be so registered. The prayer for the order for specific performance is therefore grounded on a premise which is not factual. In any event, the circumstances do not entitle the appellant to such an order for the following reasons –

(1) The long delay by the appellant in seeking to enforce the agreement;

(2) his purpose for the request for specific performance so that he could be registered with absolute title, in face of the knowledge that Alvey is in fact the owner of the property;

(3) the appellant, himself did not adhere to the agreement, when on giving notice to Alvey to vacate the property, he failed to tender the $3000 or to find alternative accommodation for Alvey.

In the event we concluded that the learned judge cannot be faulted for refusing the grant of specific performance of the agreement.

The appeal is dismissed with costs to the respondent to be taxed if not agreed.

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Zacca, P.

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Collett, J.A.

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Forte, J.A.