

# IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 7 of 1998  
Grand Court Cause No. 201 of 1996

**BETWEEN:**

**RAYBURN CONOLLY**  
(as personal Representative of  
the estate of Anthony McField Conolly, deceased)  
Plaintiff/APPELLANT

- AND -

**ALFONSO RANKINE**  
Defendant/RESPONDENT

BEFORE: The Rt. Hon. Edward Zacca, President  
The Rt. Hon. Telford Georges, Justice of Appeal  
The Hon. Gerald Collett, Justice of Appeal

Mr. Pierre Lamontagne Q.C. & Mrs. Eileen Nervik instructed by Nervik & Company for the Appellant.

Mr. Norman Hill Q.C. and Mr. A. Steve McField instructed by Messrs. A. Steve McField & Associates for the Respondent.

April 8, 1999; August 20, 1999

## JUDGMENT

### COLLETT, J.A.

Anthony McField Conolly ("the Testator") died on 23<sup>rd</sup> January 1937 leaving a duly executed last will and testament and one codicil thereto. He was survived by his widow Lora, three sons, and five daughters. By the terms of that codicil the three sons, Newman, Anthony and Hemmerde, were named as executors and trustees in place of the widow. At the date of the widow's death in 1962, Hemmerde survived as the sole named executor and trustee of the Testator's estate.

We are concerned in this appeal with a parcel of land at East End, Grand Cayman which the Testator sought to dispose of by clause III (a) of the Will as follows:

“I give my dwelling house with all appurtenances and yard premises situate in the said district to my wife Lora absolutely and for disposal at her will but subject to the provisos hereinafter mentioned.”

The provisos in question are contained in clause VII of the Will and fall to be considered presently. The gift was, however, modified by clause 4 of the Codicil which states:

“After my wife’s death it is my desire and request that my dwelling house, and outhouse, shall go to my son McFarlane and my two unmarried daughters, Aurelia Orme and Iva Maud.”

Upon a proper construction of these provisions of the Will and Codicil it becomes apparent that the Testator intended this particular parcel of land to be left to his widow for a life interest in possession and thereafter in fee simple remainder to the three children named in the Codicil in equal shares. Each of these three children survived the testator.

Mr. Lamontagne for the Appellant has argued and Mr. Hill for the Respondent concedes that, by reason of the technical rules of Common Law of Real Property particularly described in Halsbury’s Laws of England 4<sup>th</sup> Edition, Vol. 39(2) at paragraphs 162 and 166, each of the named three children took at the death of the Testator a vested one-third interest in remainder in this parcel of land. The death of Iva Maud, one of the three, without leaving issue in 1946 did not operate to extinguish her interest, which being vested survived, it would seem, for the benefit of her own estate despite the fact that she had died before the interest of her mother, the life tenant, had determined and so never came into possession of the land.

After the death of the widow the other unmarried daughter Aurelia continued to reside in the Testator’s dwelling house. The evidence put in before the Grand Court shows that she became in urgent need of financial support. Her nephew Alfonso Rankine began to send regular monthly cheques for her support from the U.S.A. and it is common ground that he remitted in total the sum of \$13,000 for that purpose. The Respondent’s evidence was that he regarded that amount as being a payment to acquire his aunt’s interest in the land. In the meantime since the surviving executor and trustee, Hemmerde was abroad in Australia and unable to administer the estate, Aurelia with his consent applied for and was granted Administration of the Testator’s estate. In 1983 the Respondent also paid \$5,000 by agreement with his uncle Lloyd for a purchase of the latter’s interest in this same land.

In August, 1983 pursuant to these arrangements, Aurelia took steps to transfer the entire land to the Respondent as sole proprietor. By this time the parcel of land on which the Testator's house is built had been identified during the cadastral survey of 1976/7 as East End Block 76B, parcel 2, and Aurelia as the Administratrix of the Testator's estate had been duly registered as the first proprietor of that parcel in the property section of the land register maintained under the Registered Land Law. The form of transfer which was employed for that purpose was a form appropriate to the transfer of an interest by a personal representative to a person beneficially entitled under a will or on intestacy.

No doubt the Respondent was under the impression that the correct transfer form had been employed by the Administratrix because the Respondent, being a grandchild of the Testator, was one of those entitled under the terms of clause VII of the Will to a first option upon sale of the dwelling house in favour of some lawful male descendant of his family. The learned trial Judge found that this impression could be deduced from the evidence before him and I agree. Be this as it may, the use of that particular form was, as the trial Judge also found, erroneous in that no specific benefit is in law conferred upon the Respondent by this part of the Will.

The Appellant relied upon that mistake in the Grand Court as a material one justifying a rectification of the Register under Section 140 of the Registered Land Law. The learned Judge declined to so regard it. Indeed in my view use of a wrong form makes little difference. Upon the premise that the Administratrix had power to transfer the land, that she did so to a person who had an option to acquire the land under the terms of the Will and that he was a bone fide purchaser for value, the use of an incorrect form is not apt to vitiate the transfer. 'Falsa demonstratio non nocet.' In any case the Appellant has not relied upon this particular error in his Grounds of Appeal before this Court.

What the Appellant, who has since the death of his Aunt Aurelia taken out Letters of Administration de bonis non to the Testator's estate, does strongly rely upon is that, as we have seen, the beneficial interest in Block 76B, parcel 2 did not, as appears to have been assumed in 1983, reside entirely in Augusta and Lloyd. The surviving interest of those entitled to the deceased Iva Maud's one-third remainder were ignored. This Mr. Lamontagne has argued deprived Aurelia of the legal right to transfer the proprietorship to the Respondent and ought to give rise now either to a rectification of the Register in the Appellant's favour or else to an order in personam to require him to retransfer the parcel to the Testator's estate.

Mr. Hill for the Respondent, in reply to Mr. Lamontagne's submissions, has strongly relied upon the terms of Clause VII of the Will as giving the former Administratrix ample authority to dispose of the land in question. That clause reads as follows:

“ Seventh. It is my will and desire and I hereby charge my whole estate real and personal for the decent support and maintenance of my wife until her death, and of such of my children who may be minors until they have reached their majority. It is also my wish and it is herein provided that my unmarried daughters shall be maintained out of my said Estate until they marry or are married if such should happen or be the case.”

There seems no doubt that this charge for the proper maintenance of the unmarried daughters attached as fully to the property sought to be disposed of by clause III(a) of the Will and clause 4 of the Codicil as it does to any other part of the real property disposed of by other parts of the Will, some of which as the evidence shows was in fact sold to provide maintenance for Aurelia after her brother's death in 1957. I reject any argument that this particular parcel 2, which remained part of the Testator's estate until its transfer to the Respondent; was for some undisclosed reason immune from this charge expressed as it is to cover 'my whole estate real and personal'.

It appears, therefore, that what may perhaps be termed 'the Iva Maud beneficial interest' in Block 76B, parcel 2 was overreached in August, 1983. That does not mean that it has been extinguished. If those who can identify themselves as being currently entitled to the benefit of that interest wish to pursue a claim against the Testator's estate for the value of it there should be no impediment to them doing so and the evidence would suggest that, since the estate is not yet fully administered, there may well be valuable assets out of which such a claim might be satisfied by the present Administrator.

The Appellant, however, goes further and it has been argued on his behalf that, on account of the mistake made in 1983 in ignoring the Iva Maud beneficial interest the Register ought to be rectified or else the Respondent required to relinquish the parcel which he believed he had bought. In rejecting those claims the learned trial Judge relied upon a number of factors, the most significant of which were the provisions of the Registered Land Law (1995 Revision). Section 38(2) provides:

“ (2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasable by reason of the fact that such disposition amounted to a breach of trust.”

Section 140 deals with rectification by the Grand Court and provides –

“ (1) Subject to the Land Adjudication Law 1971 and to 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.”

It is the Appellant’s case that the Respondent had actual knowledge of the mistake made in overlooking the Iva Maud beneficial interest in 1983. This is based upon a single set of answers given in cross-examination by the Respondent when he testified in the Grand Court: “ my grandmother tried to give me a piece of land but Uncle Lloyd said no. She cannot, it belonged to his aunt Aurelia and Maud.” This evidence establishes that sometime prior to 1962 the Respondent was informed of Iva Maud’s interest in the property; it does not establish that in 1983 many years after his aunt’s death, the Respondent was aware of the continuance of the Iva Maud beneficial interest despite the fact that the only then surviving beneficiaries named in the Will were his Aunt Aurelia and Uncle Lloyd. In the light of all the evidence the overwhelming probability is that the mistake was one of pure law and that the Respondent was at all times in ignorance of the legal consequences of the facts he had earlier learned.

In Juneau vs. Gynell 1984/5 CILR 1 at p. 2 Summerfield C.J. held that ignorance of the law cannot be a foundation for mistake under section 140(1) of the Registered Land Law. It is true that that decision was made in respect of an attempt to rectify a first registration and not, as here, a subsequent registration of proprietorship. But no distinction is made in the wording of that section between the nature of the mistakes which may vitiate a first registration and a subsequent registration respectively. There is nothing to suggest that a different quality of mistake will suffice to support rectification of the latter but not of the former. If the dicta of Summerfield C.J. which has been cited with approval in later decisions of this Court is to be followed, I can see no basis for distinguishing it from the facts of the present case.

It has also been suggested that to draw a distinction between mistakes of law and of fact is contrary to the trend of modern authority. In support counsel cited the recent decision of the House of Lords in Kleinwort Benson Ltd. vs. Lincoln City Council (1998) 4 AER 513 which overturned the long prevailing doctrine that restitution of money paid under a mistake of law could not be ordered. I have carefully examined the speeches of their Lordships in that case but have found nothing in them which persuades me that the dicta of Summerfield C.J. in Juneau vs. Gynell or the decision of the learned trial Judge in the instant case are wrong. A decision however authoritative as to the quality and effect of mistake in the law of quasi contract is not of its essence apt to affect the proper

interpretation of a Cayman Islands statute. To give effect to counsel's submissions in the present appeal, this court would be obliged to hold that the Respondent, because he had knowledge of facts which, if he had been a Chancery lawyer would have led him to the conclusion that there was an outstanding beneficial interest, must be deprived of the ownership of the land for which he has paid and for which he has been registered over the past sixteen years, on account of his ignorance of the law with only a doubtful hope of obtaining compensation from the state to console him. Only a decision directly on point and binding upon us that section 140 of the Registered Land Law had to be interpreted in such a fashion could lead me to an unhappy conclusion of that kind which would seem repugnant to any principle of equity and fair dealing.

Furthermore, it has been observed more than once judicially that the protection afforded by the Registered Land Law to registered proprietors by way of what has been described as "inviolability of title" is markedly less here than in other jurisdictions where the Torrens system of land registration prevails. To further weaken that protection by enlarging the ambit of the expression 'mistake' in section 140 would therefore be an undesirable development of law.

Even if I were convinced, as I am not, that there is jurisdiction in the Grand Court to grant rectification under section 140 of the Registered Land Law upon the basis of such a mistake as has occurred in the present case, I would not regard this as being a fit case for the exercise of that jurisdiction. That is because, in my judgement, the former Administratrix in her capacity as such in which she purported to transfer the land to the Respondent, appears to have had ample power and ample justification based upon Clause VII of the Will for executing such as a transfer. If by so doing she committed a breach of trust, even an innocent breach, this might not protect her estate from any claim which the putative beneficiaries of Iva Maud's estate if any, might bring against her. But section 38(2) of the Registered Land Law would certainly protect the Respondent from such a claim unless his bona fides as a purchaser for value could be impeached. And because in my view his prior knowledge of the Iva Maud's interest while she was alive cannot infect him with knowledge of the survival of that interest beyond her death without issue, it follows that his bona fides in August, 1983 cannot be called in question.

It was also suggested by counsel for the Appellant that the 'house, appurtenances and yard premises' described in clause III of the Will was part only of the tract now comprised in Block 76B parcel 2. That submission was based upon an English authority as to the meaning of the expression "yard" in a United Kingdom statute, as being a small enclosed area. This Court however takes judicial notice as the Grand Court has done in earlier cases that the expression "yard" bears a very different meaning in the Cayman Islands and indeed in the West Indies Region generally. Keeping in mind that no cadastral survey had taken place up to 1937 and that the whole of the land surrounding his dwelling house was owned by the Testator and occupied as a single tract, I have no doubt that the expression used by him in Clause III of the Will was intended to include

the whole of it. I am further satisfied that the reference at page 4 of his judgment to the land in question being "part of" parcel 2 was not intended by the learned Trial Judge as a finding that it was part only of that parcel. There is nothing in that point.

Having therefore carefully considered counsels' helpful submissions, the authorities and the evidence before the Grand Court, I have reached the conclusion that the decision of Kipling J. to refuse rectification or the alternative remedy of an in personam order against the Respondent was correct.

I would accordingly dismiss this appeal with costs.

Collett, J.A.

Zacca, P.:

I agree.



Georges, J.A.:

I agree.

