Jennifer

7-12-98

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 377/98

BETWEEN: NOEL MILLWOOD
and
ASHTON MILLWOOD — PLAINTIFFS

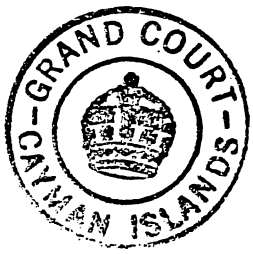
AND: CRAIG ANTHONY BROWN
and
JANET BROWN — DEFENDANTS

BEFORE MURPHY, J.
IN COURT

2 DECEMBER, 1998

Appearances:

A. Taylor for Plaintiffs/applicants
S. Brooks for Defendants/respondents



REASONS FOR DECISION

This is an application commenced 8 June, 1998 by originating summons for summary possession pursuant to the provisions of Order 113. The applicants are the registered proprietors of the property in question, George Town South, Block 14 E, Parcel 192, known as No. 10, Windsor Park (hereinafter, "the property"). The respondents are presently in possession and have been since late March or April 1998.

Graham J. made an order for possession on 16 July 1998. On 17 August, on the basis of additional affidavit evidence, he vacated his previous order and accepted, in lieu of granting an inhibition, an undertaking by the plaintiffs not to upset the status quo pending final determination of the matter.

It is unfortunate for all concerned that this unhappy situation has been allowed to continue unresolved until today.

I proceeded today by way of trial of an issue. The main affidavit evidence was that of Noel Millwood and Craig Brown (hereinafter, "Craig"). There were several affidavits of other deponents filed, but I found them of marginal relevance given the issues I must resolve. It is fair to say that much of the affidavit evidence has fallen away as the legal issues have come into sharper focus.

Noel Millwood, his father Ashton Millwood, and Craig were cross-examined before me upon their affidavits. While I found the viva voce evidence of Craig somewhat evasive at times, I am bound to say that there are few significant issues involving credibility and, for that matter, few facts in dispute. There are a few areas where there are gaps or the evidence did not provide as clear a picture as might be wished, but I am satisfied that the underlying factual record is sufficient for me to decide the legal issues.

I think it can be said that what appeared initially as a seemingly straightforward application for possession has turned out to contain at least one rather complex issue of trust and land law - one that may well be a point of first impression.

Basic background facts

It can safely be said that the root cause of this litigation is a dispute between Craig on the one hand, and his sisters Sharon and Michelle (hereinafter, "Sharon and Michelle") on the other.

Respondents' counsel invited me in argument to find or assume "fraud", "mala fides" or "dishonesty" on the part of the sisters in dealing with their brother Craig in family property matters. This I am not prepared to do on the basis of the record before me, but there is no doubt that there was "bad blood" for reasons that have not been made clear.

On or about 28 March 1990, the Brown siblings' mother transferred the property to herself and to Sharon as joint proprietors. At some point the property was encumbered by a charge in favour of Cayman National Bank.

On or before 25 November 1997 some unknown person or persons prepared a "Transfer of Land" form indicating that the mother and Sharon "in consideration of natural love and affection for my children (sic)" were transferring the property to the mother (1/5 share), Sharon (1/5 share), Craig (1/5 share) and Michelle (2/5 share) as proprietors in common. The "transferors" Sharon and her mother apparently signed the form; as did Sharon, Michelle and their mother as transferees. These signatures were apparently certified (on the appropriate portions of the standard form) by an assistant registrar of lands. Craig never signed the form. This transfer was never registered.

The events leading up to, and surrounding, the partial execution of the transfer document are virtually omitted from evidence. The mother died very shortly thereafter. Sharon's affidavit speaks only to events later, in 1998, involving the applicants. She did not attend the trial today (and presumably was not subpoenaed by either side). Michelle gave no evidence. Significantly, in answer to questioning by me, Craig admitted he had not even seen the transfer form (or a copy) until sometime subsequent to April 1998, several months later. When I asked whether he had known of it beforehand he gave vague evidence that his aunt had "told him the situation" and that he had "learnt they went to the Tower Building". As will be seen, his

contention is that his sisters held the transfer form back from him to "give him a hard time".

Craig's evidence was that his mother had told him that "she [had] left shares for me in that property,---- she signed the transfer".

Somewhat at variance with this is his evidence in his first affidavit that "--- prior to her death, my mother, who previously owned the property with my sister indicated that she did not want the house sold and that she would be leaving it in her will for all of her children, including myself and Ms. Sharon Brown".

Not long after the partial execution of the transfer form, the mother is said to have executed a will on 5 December 1997. It purports to bequeath "my 1/5 share" of the property (and her car) to Craig (the property is not otherwise dealt with); to bequeath her life savings to Craig, Sharon, Michelle, and another son; and to appoint Michelle executrix. The evidence surrounding this purported will is very unsatisfactory. In affidavit evidence Sharon dismisses the "so-called will" as "not signed and ---false". There is no original in evidence. The copy produced is signed with a signature quite different from the mother's on the transfer form of a few days previously; but I am unable to, and do not, make any findings on the authenticity of this document. There is no evidence it was probated or acted upon. There is some evidence that Craig was rebuffed when he inquired at the Truman Bodden firm, where he said the original was kept, some months later.

I cannot help observing how odd it is that the mother should attempt to gift 1/5 to Craig and 1/5 to herself on 25 November, and then purport to bequeath her 1/5 to Craig just a few days later.

The mother died on 19 December, 1997. The property vested in Sharon, the surviving joint proprietor, and she alone appears on the register as of 10 February, 1998.

The applicants are (or were) family friends of the Browns, as the Brown siblings' father and Ashton Millwood had been close. At some point in late March or early April 1998 Sharon approached the applicants offering to sell the property, telling them she had inherited it from her mother.

Meanwhile, at some point in late March or April 1998, Craig and his wife moved into the property. He did so because of "my mother's specific instructions which were incorporated in her last Will and Testament and also in a Transfer document which she purported to execute to allow the property to be owned by all of her children".

There seems to have been some overlap between the occupancy of Craig and his wife, and of Sharon. Sharon deposes that "I got home one day around the end of March 1998 to find that my brother Craig Brown and his wife Janet Brown had moved into the property without my permission". She was afraid to confront him and

sought assistance from the police, unsuccessfully as it turned out. She deposes that she was in effect driven out on 8 April 1998.

There was a great deal of affidavit and viva voce evidence as to the applicants' awareness, if any, through April, of who was occupying the property. Noel Millwood's evidence in brief is that he drove by numerous times and saw the exterior, but never actually arranged to inspect inside. He relied upon an appraisal report he ordered at his prospective chargee's request, and upon his father's feeling that inspection was not crucial.

Neither applicant claims to have known Craig was in possession, until after they bought the property. The appraiser acting for them clearly knew. Craig found it "hard to accept" that they didn't know, but couldn't "be too sure of that". In any case, on the view I take of the law, the actual state of the applicant's awareness here is not determinative.

There was minimal documentation in Sharon's sale to the applicants. There was no written offer form or agreement. They all signed the transfer form on or about 29 April 1998 in downtown George Town. Sharon received the sale proceeds of $81,000.

The transfer to the applicants and a new charge in favour of Cayman National Bank (the existing charge having been paid off 16 March 1998 from the proceeds of

the mother's life insurance) were registered 5 May 1998. The Bank seems to have handled all the paper work.

The applicants contend that they were told by Sharon that she was in possession; she asked for time to vacate. In fact it was Craig and his wife who were in possession as at the registration date and for some time prior to that.

The applicants soon learned the actual situation when Ashton Millwood came to the property later in May to do some clean-up.

There is no dispute that Craig has made no monetary contribution to the property.

Positions of the parties

The applicants assert their right to possession by virtue of the fact that they are registered proprietors.

The respondents contend that they have an "overriding interest" as protected by s. 28 (g) of the Registered Land Law (1995 Revision):

> " 28. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -
> ...

> (g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed
> ... ".

This provision is essentially the same as s. 70 (1) (g) of the English Land Registration Act 1925.

It is to be observed that the onus is on the respondents to demonstrate two things. The first is that they have a "right" in the land that the law will recognise, that is, a right known to law or equity. Mere occupation cannot create a right that does not pre-exist: Strand Securities Ltd. v. Caswell [1965] Ch. 958. Here, the respondents contend that Craig has a 2/5 interest - 1/5 by way of constructive trust based on the transfer form partially executed 25 November, 1997, and 1/5 by way of equitable interest derived from the purported will dated 5 December, 1997. As will be seen, both are based essentially upon an equitable right said to derive from the transfer form.

The second requirement is of course occupation. It is conceded that the respondents were in occupation as at both the date of completion on or about 29 April 1998 and the date of registration on 5 May 1998. The date of registration is normally the governing date, but there is House of Lords authority, Abbey National

Building Society v. Cann [1991] 1 A.C. 56, that would suggest that in this particular context it is the date of the transfer or charge that matters (see, however, Re Boyle's Claim [1961] 1 W.L R. 339). In any case, occupation is not an issue here.

Neither is actual notice of the "right", on the part of the registered owner, relevant: Williams v Glyn's Bank Ltd. v. Boland [1980] 2 All ER 408 (HL) at 412. The provisions of s. 28 override the common law of notice as it pertains to unregistered land. The claimant's occupation is deemed to be notice, in effect. If an interest exists, and if the holder of the interest is in occupation, then the interest is an overriding interest and so binding on a purchaser. In this sense the provision may go further than the doctrine of Hunt v. Luck [1901] 1 Ch. 45 insofar as the actual occupation need not be such as to give constructive notice to a purchaser.

I pause to note that I was urged by respondents' counsel to resolve any uncertainty in favour of the respondents, because of the fact that the applicants had the opportunity to make inquiries of the occupier. That is not the appropriate approach, in my view. Rather I must be satisfied that Craig had an interest in land. If he did not, this application must succeed.

Applicants' counsel, in a secondary submission, attempted to make an issue of the "proviso" to s. 28 (g), to the effect that the registered owner will not be subject to an overriding interest "where inquiry is made of such person and the rights are not

disclosed". His argument was that because inquiry was made of Sharon (who had been, and seemingly maintained that she was still, in occupation at completion), and she had not disclosed Craig's occupation, the proviso operated. I do not accept this submission on a plain reading of the statutory provision. Inquiry must be of "such person", that is, the very person who asserts the "right", not just of the registered owner or some person claiming to be in possession. (See also Hodgson v. Marks [1971] 2 All ER 684.)

The "right" asserted by the respondents

The respondents cannot succeed unless they can establish some "right" in equity.

The interests which courts have held may be protected include an equitable fee simple, a legal lease, an option, an unpaid vendor's lien, an interest under a constructive trust, a right to rectification of a conveyance and an equitable easement. The capacities in which a person may be in actual occupation include that of a purchaser allowed into possession, a tenant under a lease, a beneficiary under a constructive trust, a vendor who had remained in possession of disputed land, and a wife in a matrimonial home: J.G. Riddall, Introduction to Land Law (4th ed) at 455-6.

Despite the fact that courts have included constructive trusts in this category of "rights", my review of the case law does not make it readily apparent that Craig is

the sort of claimant equity would normally aid. (i) He was clearly a volunteer. (ii) He made no contribution to the property. (iii) There was no element of change of position in reliance that would found a claim akin to proprietary estoppel. (iv) There was no express trust or declaration of trust. Indeed, given the evidence of family acrimony, Sharon would have been astonished at the suggestion that she held the property on trust for Craig. (v) The transfer form reflects no features of a trust. (vi) The "transfer" was not specifically enforceable. This was not a case of an unregistered purchaser being let into possession by a vendor as in Bridges v. Mees [1957] 1 Ch. 475.

Applicants' counsel argues in effect that Craig cannot cobble together an equitable interest from the transfer form and the purported will. The former, he submits, simply represents an incomplete gift. As to the latter, the property passed to Sharon by right of survivorship; the property was never part of the mother's estate.

He cites the following well-known passages from Richards v. Delbridge (1874) L.R. 18 Eq. 11 at 14:

> "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and

> declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning" ;

and from Milroy v. Lord (1862) 4 De GF & J 264 at 274-5:

> " I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried".
>
> [emphasis added]

My difficulty in this case was caused, however, by a line of authority I myself discovered in my researches, and made available to counsel.

The learned editor in Underhill and Hayton, Law Relating to Trusts and Trustees (15th ed) 1995 observes at 130:

> " Registered land requires the transferee to be registered on the Land Register as proprietor of the land: he is taken to become registered proprietor as of the day on which the appropriate documents are delivered to the Land Registry. If this final step has not yet taken place, but otherwise the donor has done all that is necessary for him to do (eg executing the transfer form and delivering it to the transferee together with the land certificate if in his control) it seems the donor will be treated exceptionally as himself holding the property on a trust enforceable at the suit of the beneficiaries".

This strikes me as a very broad extension of the concept of constructive trusts. The authorities cited in support are certain Australian and New Zealand cases, Re Ward [1968] W.A.R. 33; Scoones v. Galvin and Public Trustee [1934] N.Z.L.R. 1004; and Brunker v. Perpetual Trustee Co (1937) 57 C.L.R.. 555; as well as Mascall v. Mascall (1984) 50 P & C R 119.

The facts of Mascall were as follows. A father executed a transfer of a house to his son, a volunteer, and handed over the land certificate. After the transfer had been sent to the Inland Revenue for stamping, and returned, the father (having fallen out with the son), sought a declaration that the transfer was ineffective. The son had

not yet sent the documents to the Land Registry in order to become the registered proprietor and had, therefore, not acquired legal title. It was held that the gift was complete. The father had done all he could, as the application to the Land Registry could be made by the son, from whom the father had no right to recover the transfer and land certificate.

Counsel for the respondents immediately seized upon this line of authority. Counsel for the applicants, however, contends that it is merely illustrative of the general principle. In particular, if any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. The basic principles were developed by Evershed M.R. in Re Rose [1952] Ch. 499, a case dealing with a gift of shares. He adopted the lower court's analysis of cases such as Milroy v. Lord and Re Fry [1946] Ch. 312. Those cases turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is, of course, well settled that there is no equity to complete the imperfect gift. In Rose, however, it was "too plain for argument" that the donor intended to pass his rights in the shares.

In the present case, respondents' counsel argues forcefully that the same principle applies, and that the transfer form, executed by the mother and Sharon, is sufficient basis for me to conclude that these donors had done all in their power to transfer the property to the proprietors in common named therein, that is, themselves,

Craig and Michelle. The problem, though, is that the transfer form was never delivered to Craig at any material time. In that sense, the donors had not put him in the position of the son in Mascall. Indeed it is unclear whether Craig knew of the transfer form prior to the sale by Sharon to the applicants. If he did he did nothing about it. His evidence is he did not see the form until after the sale. There is no clear evidence as to who held the transfer form between 25 November 1997 and the sale to the applicants in late April 1998. It could only have been Sharon and/or Michelle.

Craig's evidence about the transfer form was as follows:

> "... my sister Michelle Brown held back the said Transfer so that I was unable to have the other persons sign same (sic) and have it registered...
> (First affidavit)

> " I then told [the appraiser] of the problems which I had with my sisters in their not probating the will of my mother nor did they allow me to have the Transfer which she had executed..." [emphasis added]
>
> (Third affidavit)

> "it was held back from me because she had doubts - she wanted to give me a hard time"
>
> (cross-examination)

> "my younger sister Michelle Brown refused because of what she learned about the will, and wouldn't register"
>
> (cross-examination)

> "they decided they would give me a hard time" [emphasis added]
>
> (cross-examination)
>
> "Michelle refused to do it because of what she learned about the will - she thinks its all fake, lies - going to hold back transfer"
>
> (re- examination)

It must be borne in mind that this purported transfer was a gift, not a contract. The gift could be revoked at any time before delivery. The difficulty is identifying the point of no return. That is a matter of the donors' intention and actions. Respondents' counsel's view is that the gift was perfected when the donors signed the transfer form. I do not agree. The gift could not be perfected until the transfer form was at least delivered to the donee. The law has steadfastly provided an objective test of intent in this context, and it is delivery, whether the object of the gift is real or personal property. Authorities such as Rose and Mascall simply reflect that basic principle.

I put forward the hypothetical situation of two transferor/donors completely filling out and executing a transfer form in favour of A, and then retaining it in their files. Upon the death of one transferor (or indeed after a simple change of mind) the property was then gifted to B instead. Respondents' counsel conceded that there would be no claim by A in equity.

Respondents' counsel was ultimately driven to the position that delivery occurred here when the transfer form fell into the hands of some transferee, and that that accordingly would perfect the gift to Craig. That must be so, she argued, especially when there is only one form to go around.

As indicated the evidence is virtually non-existent as to what subsequently happened to the form. In any case, it is very clear to me that for whatever reason after 25 November 1997 Sharon had no intention of delivering the transfer to Craig. On this record it is apparent that this gift was never going to be perfected. Whatever the intention of the mother may have been, there is no doubt that prior to registration, the other donor, Sharon, had decided that Craig would not be gifted an interest in the land. For that matter, and as a practical point, it is difficult to see how registration would ever take place given the views of both Sharon and Michelle, there being no one else in a position to deliver the form.

The situations in cases like Rose or Mascall are quite different given either the clear intent of the donor (Rose) or the fact that the donor had objectively delivered the title indicia by putting them beyond his power to recover or reclaim (Mascall).

In short I do not regard the correct approach as being to inquire whether the transfer form was delivered to someone. Rather it is to ascertain whether the relevant donor, in this case Sharon, was prepared to cause the transfer to be released for registration in Craig's favour. Her withdrawing what appeared to be an initial willingness to gift a share of the property to Craig may strike Craig as unfair or even immoral, but it is not illegal.

(I leave aside the potential obstacle to registration that may have been caused by the existence of the first Cayman National Bank charge. Sharon's title was expressed to be non-transferable without the chargee's consent.)

As a matter of principle or policy, it is inconceivable to me that the issue of whether a purported gift to Craig was perfected should turn on the mere fortuitous circumstance that there happened to be other donees, when it is clear (and conceded by respondents' counsel) that the gift would not have been perfected if Craig had been the only donee. That cannot be the basis for the creation of an equitable right.

As a practical matter, I have regard to the circumstances in conveyancing practice in which transfers are routinely executed but held back in escrow or otherwise. It would be inconceivable that, in some such circumstances, without more, a frustrated donee could simply exercise self-help, seize possession, and thereby assert an overriding interest. Taking the respondents' position to the extreme, without a clear objective test of delivery to the claimant of the "right", conveyancing practice could be thrown into chaos. One need only contemplate a situation where donee A only finds out for the first time years after the fact that donee B holds an unregistered transfer in his favour.

In all the circumstances, I am not prepared to conclude that Craig possessed an equitable or any interest in the property.

The estate aspects

Respondents' counsel properly concedes that unless the joint proprietorship of Sharon and her mother was severed in some way, or properly transferred before the mother's death, the property passed by right of survivorship to Sharon and never became an estate asset.

It is submitted that the joint proprietorship was severed in effect or, more properly, jointly transferred by virtue of the transfer form by which the joint proprietors transferred equitable proprietorships in common to the siblings.

In other words, the same argument on the part of the respondents is put forth to satisfy the provisions of s. 100 (1) (a) of the Registered Land Law (1995 Revision) ("dispositions may be made only by all the joint proprietors").

As I have rejected the respondents' argument, this part of their claim to a "right" must also fail.

Accordingly, notwithstanding the very able argument of Ms. Brooks, I conclude that the respondents have no lawful right to possession. I order that possession of the property be yielded up to the applicants within seven days from the date hereof. As this proceeding is limited to O. 113 relief, any claim by the applicants for mesne profits or damages will have to be brought in a separate cause.

Costs of these entire proceedings to the applicants.

7 December, 1998

J.D. Murphy
Judge of the Grand Court