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land transfer.

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 201/96

BETWEEN:	**Rayburn Conolly**, as personal representative of the estate of **Anthony McField Conolly**, deceased	Plaintiff
AND:	Alfonso Rankine	Defendant

APPEARANCES

For the plaintiff: Mr. Pierre Lamontagne Q.C.
instructed by Mrs. E. Nervik of Nervik & Co.

For the Defendant: Mr. Norman Hill Q.C.
instructed by Mr. S. McField of Steve McField and Associates

BEFORE DOUGLAS J

JUDGMENT

This action comes before the Court by way of an Originating Summons in which the plaintiff seeks the following Declaration and Orders.

(1) A Declaration that the transfer of the land described as Registration Section East End, Block 76B, Parcel 2 ("the land") by Aurelia E. Conolly as personal representative of the estate of the late Anthony McField Conolly, deceased to the defendant of 30th August, 1983, which was registered on 10th January 1984,

is void and of no effect.

(2) An order that the registered of the land be rectified by:
(a) directing the cancellation of entry No. 2 in the proprietorship section thereof and

(b) substituting therefor the following entry: "RAYBURN CONOLLY as personal representative of the estate of Anthony Conolly, deceased."

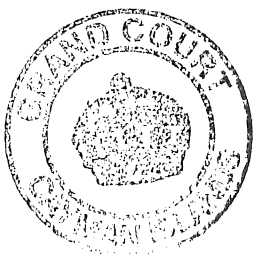
(3) An order that, further and in the alternative, the defendant be ordered to execute and deliver a transfer of the land in the prescribed form from himself personally to the defendant as personal representative of the estate of Anthony McField Conolly, deceased within twenty-one (21) days from the date of this judgment sought herein.

It is now necessary to summarise as briefly as I can the chronology of events leading up to this action.

The plaintiff, Rayburn Conolly is the personal representative of the estate of his grandfather Anthony McField Conolly who died on or about 23rd January 1937 leaving a Will and a Codicil. This Will was never probated, an omission which has, in effect, resulted in this conflict.

For the purpose of this judgment it is only necessary to record those portions of the Will and Codicil that are relevant.

By Clause 2 of the Will the testator appointed his widow Lora Conolly as his sole Executrix.



Of utmost importance is the first devise which is as follows:

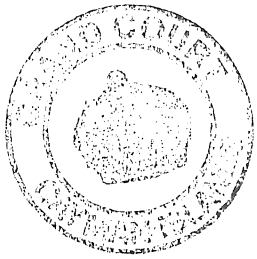
> "I give my dwelling house with all appurtenances and yard premises situate in said district of to my said wife Lora absolutely and for disposal at her will but subject to the provisos hereinafter mentioned."

The provisions mentioned are to be found at the second paragraph of Clause 7 and are as follows:

> "Further it is also my will and desire that should my said wife Lora be moved or should find it needful to dispose of my dwelling house, appurtenances to same, with yard premises by any manner of lawful conveyance, whatever the first option of of acquiring said premises shall be given to some lawful descent of my family; or should she desire to dispose of same by say of a Will and Testament, I desire that such disposition shall be made in the manner just mentioned."

In 1936, a year before his death, and some nine years after the execution of the Will, the testator executed a Codicil. This revoked the appointment of his wife as his Executrix, and in her place appointing his three sons, Hemmerde, Anthony and Newman, and the survivor or survivors of them, Executors and Trustees of his Will. Clause 4 of this Codicil is as follows:

> "After my wife's death it is my desire and



request that my dwelling house, and out house shall go to my son Lloyd McFarlane, and my two unmarried daughters Aurelia Orme and Iva Maud."

It is accepted by both parties that the land in question is part of that described as Registration Section East End, Block 76B Parcel 2 (the land), the boundaries of which have been identified by the defendant. Here I should mention that the named beneficiaries of the residue of the estate were his eight children. An issue to be determined is whether they, as beneficiaries, are entitled to a share of this land under the Will.

Newman, one of the Executors died in 1946. Anthony another Executor died in 1957. This left Hemmerde, the father of the plaintiff, as the sole Executor. Eva Maud the second daughter named in Clause 4 of the Codicil, died in 1946. There seems to be some confusion as to when Lora, the widow passed on. The plaintiff in his affidavit gives the time of her death as 1946. Both Aurelia in her application for Letters of Administration with Will Annexed, and the defendant's evidence, reveal that Lora was still alive in 1957. The defendant told the Court that she died in 1962, and this certainly appears to be the case. The only importance of this is that it supports the defendant's own testimony that Aurelia's application for the grant of Letters of Administration was prompted by her urgent need for financial support for herself and her aging mother following the death of her brother Anthony. At that time he had been the only Executor within the jurisdiction, and apparently their sole means of

support. The evidence is that Hemmerde, the only surviving Executor, was overseas and unable to be contacted by Aurelia. It was at this point that she applied for, and was granted the Letters of Administration (ibid).

At the conclusion of the hearing of the evidence, an adjournment was sought to enable the plaintiff to challenge the validity of the grant to Aurelia of Letters of Administration with Will Annexed. However, learned Queens Counsel for the plaintiff conceded that such a grant is equivalent to a judgment in rem and until revoked bestowed upon the personal representative all the powers and privileges attached thereto. Accordingly, the application was dismissed.

Word of Aurelia's financial distress must have reached Hemmerde, as in 1959 he wrote from Singapore granting Aurelia permission to sell two pieces of land, the proceeds of one, in his words, "are to be used by my sister Aurelia to the benefit of herself on my mother Lora Conolly."

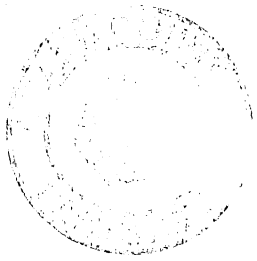
In August 1983 Aurelia transferred the land to the defendant. It is this transfer that the plaintiff now seeks a Declaration that it is null and void. The plaintiff's affidavit in support states very clearly his reasons for seeking this Declaration. For completeness the relevant reasons should be recorded. These are contained in the following paragraphs:

3. "That the land described as Registration

Section East End, Block 76B parcel 2 ("the land") was not specifically disposed of under the terms of the said Will and, consequently, would have formed part of the residue of the deceased's estate thereunder., The named beneficiaries of that residue were the deceased's eight children."

6. "That my Aunt Aurelia Conolly, in her capacity as personal representative of the estate of the deceased, purported to transfer the land to the defendant on 30th August, 1983, using for that purpose a form of transfer by personal representative to a person entitled under a Will or and Intestacy. The said form of transfer was registered on 10th January, 1984 and a copy of thereof is now shown to me and marked "RC-3".

21. "That is my contention that my aunt, Aurelia Conolly, did not have the right, in her capacity as personal representative of the estate of the deceased, to transfer the land to the defendant as sole proprietor thereof, since my father and a number of his siblings and nephews and nieces had, at the relevant time, an interest therein as beneficiaries thereof."

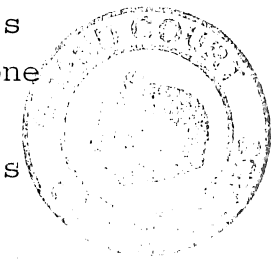


Basically what the plaintiff is saying is that the land is part of the estate of the late Joseph McField Conolly, and is therefore part of the residue of that estate of which he is now the personal representative. Accordingly, Aurelia had no right to sell the land to the defendant, and in addition, in so doing used the wrong form of

transfer. Section 140 (iv) of the Registered Land law specifically provides for the Court to rectify any registration, where the same has been obtained, made, or omitted by fraud or mistake.

In seeking the aid of the Court the plaintiff has not pleaded fraud, but has based his case on the mistakes which he alleges were made in effecting the transfer. The first difficulty he faces is in the categorisation of the type of mistake of which he complains, whether of fact or of law. In a local case, that of **Juneau v. Gynell,** reported at 1984-85 CILR 1, at page 2 Summerfield C.J. had this to say:-

> "In my view, ignorance of the law cannot be a foundation for mistake under S. 140(1) of the Registered Land Law. It must be a mistake based on fact. I cannot see how a Court can allow the re-opening of the adjudication proceedings because that is what this amounts to by a different route merely because someone was ignorant of the process under the Land Adjudication law. That could lead to endless cases being re-opened and defeat one of the main purposes of that Law to ensure quiet titles."



In determining whether the plaintiff's claim is valid we must examine the evidence to see which events could have constituted the mistakes of which the plaintiff complains. In so doing, it is first necessary to review the facts surrounding this transfer, and the relevant law.

Sometime following the death of Newman in 1957 the defendant, who was then residing in the United States, began sending monthly amounts of money to his aunt Aurelia. It is not disputed that the monthly sum was $79.00 and finally totalled $13,000.00. This, says the defendant, constituted payment for the land. This is not denied. What is quite clear is that at the time of the sale the defendant was a bona fide purchaser for value. The matter goes further. In 1984 his name was placed on the land Register as proprietor. Section 23 of the Registered Land, the provisions of which are subject to certain criteria not relevant to this matter, is as follows "The registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute title of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever."

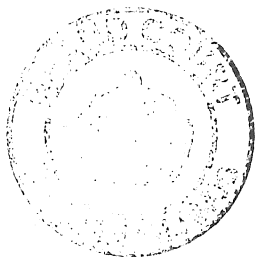
It is at this point that the weakness of the plaintiff's case becomes even more obvious. It is difficult to see how the plaintiff arrived at the conclusion contained in paragraph 3 of his affidavit, i.e. that the land was not specifically disposed of under the Will and therefore forms part of the estate which all the beneficiaries are entitled to. This is directly opposed testator's intent as expressed in Clause 2 (a) of the said Will which gives the wife Lora the land absolutely. The conditions to which this devise is subject does in no way assist this contention of the plaintiff. The testator has directed that upon Lora's death the land shall go to his son Lloyd and two daughters Aurelia and Maud. In 1983, at the time of the transfer to the defendant, Maud having already passed away without issue, the only two

persons beneficially entitled to the land under the Will were Lloyd and Aurelia. Clause 7 of the Will directed that should his widow find it necessary to dispose of the land by any manner of lawful conveyance, the first option shall be given to some lawful male descent. The validity of the transfer ought not to be obfuscated by the argument put forward by the plaintiff. From the nature of the evidence it is not difficult to deduce that Aurelia, in effecting the transfer, was of the opinion that the defendant, being of lineal consanguinity with the testator, was a person entitled under the Will. Accordingly, as personal representative she used the form which she, or her legal advisor, deemed appropriate. They were obviously unaware that the law does not bestow upon an unnamed transferee the legal status of a person entitled under the will. It does however give a legal title to a transferee, who is a purchaser for value without notice. The defendant is not only such a person, but is also registered as proprietor on the Register of Titles. In any event the property may not be followed into the hand of such a purchaser.

In such circumstances the Court will place little significance on the form of the transfer. In Frazier v. Walker and others reported at (1967) 1 All E.R. a case based on the indefeasibility of title of registered proprietors, it was held, inter alia, that registration was effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void. In his judgment Lord Wilberforce took this approach, "Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry...

registration once effected must attract the consequences which the Act attached to registration whether that was regular or otherwise". Later his Lordship said "It is in fact the registration and not its antecedents which vests and divests title." We have seen that Aurelia, a personal representative, and a person beneficially entitled under the Will, sold the land to the defendant who became a bona fide purchaser for value without notice. He was then registered as the proprietor. Under Section 23(supra) his title became indefeasible unless fraud or some mistake of fact is proved. In addition to this, following the purchase of the land, the defendant renovated the premises, and for three years had it rented out. Under these circumstances the defendant's title would also be amply protected by the provision of Section 140(2) which is as follows:

> "The Register shall not be rectified so as to effect 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 or 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."



The plaintiff has suggested that there could be an equitable remedy. In view of the circumstances of this case such a remedy would be contrary to all that is equitable. In selling the land to the defendant Aurelia was carrying out the true intent of the testator.

Here the maxim "Equity looks at that as done which ought to be done" is fully applicable. Furthermore, the sale did not result in the exclusion of any member of the family from any of the estate to which they would have been entitled to share. The defendant being a purchaser for valuable consideration without notice, all equitable interests were extinguished.

However, the plaintiff goes on to contend that the defendant purchased the land knowing that he was described on the transfer as a person entitled under a Will or Intestacy when in fact he was not. It seems to me that the plaintiff not only wishes to eat his cake, but also to have it. He has not pleaded fraud but in this contention he is clearly attempting to slip it in through the back door. What he is in fact saying is that the defendant, knowing that he was not entitled to the land, went ahead and registered himself as proprietor, thereby committing the type of fraud that might enable the Court to declare the transfer null and void. As far as both the pleadings and the facts go, this is a non issue.

It only now remains to consider a matter that the plaintiff sees as another of the mistakes which ought to render the transfer void. Aurelia transferred the ownership of the land to the defendant on 30th August 1983. The Agreement of the sale of Lloyd's interest was not signed by him until June 1984, several months after the transfer. In his testimony the defendant told the Court that the discussions with his uncle Lloyd took place in 1983. At that time Lloyd was overseas and the signed Agreement was not returned to the defendant until

September 1984. Both Lloyd and Aurelia received certain sums of money from the defendant. I fully accept that the transfer was to give effect to this sale. The time at which Lloyd signed the written agreement cannot without proof of fraud, justify any rectification of the Register.

I find that on this evidence there is nothing, either in law or in equity, that would justify the Court making the Declaration and Orders sought. Aurelia and Lloyd merely sold land to which they were entitled. The defendant was a purchaser for valuable consideration without notice. No other interest was impacted. The use of the wrong form gives rise to no remedy.

I am of the view that the plaintiff is not entitled to the Declaration, nor to the Orders sought, and accordingly give judgment for the defendant wit costs to be agreed or taxed.

6th March 1998

Kipling Douglas

Judge