IN THE COURT OF APPEAL FOR THE

CAYMAN ISLANDS

CIVIL APPEAL NO. 4 of 1985

BEFORE: The Honourable Mr. Justice Zacca, P.
The Honourable Mr. Justice Telford Georges, J.A.
The Honourable Mr. Justice Kerr, J.A.

BETWEEN: EDWARD ROTHNIE EBANKS

AND

EDWARD ROTHNIE EBANKS
(as joint administrator of the Estate of Henry London Ebanks - deceased) APPELLANT

AND: HOPE GLIDDEN BORDEN
(as joint administratrix of the Estate of Henry London Ebanks - deceased) RESPONDENT

Mr. Scharschmidt, Mr. N. Levy with him for the Appellant

Mr. R. Alberga, Q.C., Mr. W. Rogers with him for the Respondent

DATE: December 2, 1986 and March 9, 1987

ZACCA, P.

I have had an opportunity of reading the judgment of Georges J.A. I concur with his judgment.

GEORGES, JA

Henry London Ebanks (the Deceased) died on December 3, 1933 leaving a will dated February 23, 1931. He had married twice and had six sons. In his will he made certain specific bequests of money and parcels of land to his widow and to his sons. Clause 9 disposed of the residue of his estate equally among his sons. Several pieces of land formed part of this residue among them the two which are the subject matter of this dispute - Elmslies and Little Tom Cliff. Since the cadastral survey Elmslies is known as West Bay Block 2C Parcel 80 and Little Tom Cliff as West Bay North Block 4E Parcel 104.

In the will his wife, Martha Clementina, was named as executrix and his sons Charles Glidden and Donald Ferguson as executors. The appellant is the youngest son of the Deceased. He was 11 years old at the time of the death. The respondent is the daughter of Charles Glidden, one of the executors.

The will was in due course admitted to probate in 1934 but records for a span of years which includes 1934 have been lost. There was no assent vesting the parcels of land in the executrix and the executors nor apparently have there been any deeds conveying land to any of the beneficiaries. It is common ground that the will of the deceased was misplaced and not found until some time in 1973.

In 1978 the defendant submitted claims to the Land Adjudication Officer to be registered as the owner of both parcels of land. The contents of his claim will be considered later. He was registered as the owner of Little Tom Cliff and granted a provisional title to Elmslies.

On August 22, 1980 the defendant entered into an agreement with Tarquynn Holdings Ltd. to sell the parcel known as Elmslies to that company for $100,000. A search disclosed the state of the title. Legal advice was sought.

Doubtless as a consequence of this the appellant and the respondent applied to be appointed personal representatives of the unadministered estate of the Deceased pursuant to s.9 of the Succession Law in place of Charles Ebanks Glidden who had, by that date, died. In support of the application the appellant and the respondent swore to an affidavit stating, among other matters, that Charles Glidden had died on January 22, 1958 leaving part of the estate of the deceased unadministered. In a schedule to the application the appellant and the respondent stated that the part of the estate left unadministered consisted of West Bay South Block 2 C Parcel 80 - that is, Elmslies.

The application was in due course granted. The sale to Tarquynn Holdings proceeded but was never concluded because the appellant would not agree to a division of the proceeds of sale and the respondent would not sign unless he agreed to this.

On November 3, 1981 solicitors on behalf of the five residuary beneficiaries under the will of the deceased wrote the appellant asserting that he had wrongfully obtained registration of the two parcels of land in his name well knowing that they belonged to the estate of the deceased and demanding that he transfer them to the names of the respondent and himself as joint personal representatives or co-operate in an application to the Registrar of Lands to have the register amended. No reply was received by January 28, 1983, the date the writ was filed. The respondent did, however, reply on January 31, 1983 stating that he was the sole owner of the two pieces of land, that he had not obtained registration by fraud, that they had been given to him by Charles Glidden when he distributed the land in 1934 and that the residuary beneficiaries well knew that.

The statement of claim in effect set out the facts summarised above and prayed for declarations that the appellant was not the beneficial owner of the parcels of land, and ordered that the Registrar of Lands amend the Register by deleting the appellant's name and substituting that of the appellant and the respondent as joint administrators and a declaration that the proceeds of the sale of the land be distributed in accordance with clause 9 of the will.

In the defence the respondent asserted that he had not been wrongfully registered as absolute owner of Little Tom Cliff. He stated that he had received that parcel as his share under clause 9 of the will. As regards Elmslies, he asserted again that he had not obtained provisional registration of that parcel in his name by fraud. He stated that he had acquired the land by inheritance and that he

had been in possession of it. There was a counterclaim. The respondent averred that on the death of the testator the remainder of his estate was divided among his six sons and that he had received the two parcels as his share. His mother, Martha Clementina, had taken possession of them on his behalf and on attaining his majority he had himself assumed possession.

He claimed three declarations.

" 1 (a) that on the death of the testator the remainder under clause 9 of the Will vested immediately in the six sons;

(b) that on the distribution of the remainder under clause 9 of the Will the said parcels of land vested to him; and

(c) that the Defendant ought to be registered as absolute owner of both parcels of land.

2. In the alternative:- if it is held that the Plaintiff and the Defendant should be registered as Personal Representatives, they should be registered as Trustees for the Defendant."

The learned Chief Justice concluded that on the applicable law neither declaration 1(a) nor 1(b) could be granted. If the respondent failed to prove her claim then the parcels of land were already registered in the appellant's name and would remain so. Declaration 1(c) was quite unnecessary. No issue of registration as a trustee arose on the pleadings. The substantive relief sought in the counterclaim could not, therefore be granted.

The learned Chief Justice concluded that the appellant's evidence could not be accepted. He had put forward too many different bases for his claim to ownership of the parcels.

As regards Elmslies, he had deposed in 1981 when applying to be a joint personal representative that that portion of the estate had been left unadministered. In a voluntary declaration submitted with his claim for registration he stated that his mother had given him the land "in the year of 1948 which was used only for cultivation without dispute of ownership by anyone." In his evidence he stated that in 1934, shortly after his father's death, he had accompanied his mother, Charles Glidden and Harry Glidden on a tour of the parcels comprising the residues and during that tour Charles Glidden had allocated parcels to each of the six beneficiaries. It does not appear that the three other sons were present. The respondent would then have been between 11 and 12 years old. The learned Chief Justice did not accept his version on oath and having regard to his previous declaration that his mother had given him that parcel in 1948 the finding seems unreasonable. The story was inherently improbable and there was a prior inconsistent statement.

In his application to be registered as the owner of Little Tom Cliff he stated as he had in relation to Elmslies that his mother had given him -

> "the said piece of land, situated at the area of the Town Hall in the year 1948, which was only used for cultivation, without dispute of ownership by anyone."

He then set out the boundaries and continued -

> "My mother's name is Martha Clementina Ebanks, and she inherited the land from her husband Capt. Henry L. Ebanks about Dec. 3, 1933."

This declaration is not consistent with his evidence on oath. It appears also from his evidence that he must have been deliberately untruthful when he so stated because he had become aware of the will of the deceased in 1972 or 1973 and had actually read it. He would have known that these parcels of land had not been left to his mother.

For the appellant it was contended that the learned Chief Justice had failed to give any weight to documentary evidence which supported the appellant's version that there had been an informal distribution.

On December 17, 1949 Martha Clementina Ebanks conveyed to William Lee Crowe a piece of land known as "Absolom Yard". The document of transfer was sworn to before Charles E. Glidden, the respondent's father. The evidence of Gloria Crowe, the daughter of Charles E. Crowe was that it had also been prepared by Charles E. Glidden. Absolom Yard is described as bounded on the south by the sea, on the north by a public road, on the west by land of Edward Rothnie Ebanks and on the east by a stone wall. The parcel of land to the West of Absolom Yard is Elmslie. The fact that Charles E. Glidden prepared this document, it is contended, was convincing evidence that Elmslie then belonged to the appellant because it must be regarded as a declaration against interest by one of the executors of the estate of the Deceased.

The argument is attractive but does not in my view detract from the correctness of the findings of the learned Chief Justice. It must be seen as only part of the case. The appellant's evidence that Elmslie was an unadministered portion of the estate of the Deceased still has force and his contradictory accounts of how he came into possession remain unexplained. I do not think that the fact that Charles Glidden prepared the document would constitute the description of the land a declaration against the interest of the estate of the deceased as regards the ownership of the adjoining land. More evidence would be needed. He would be acting on instructions in drawing up the document. His mind may not have been specifically directed to the issue of ownership of abutting properties.

The other document is a conveyance or sale which is undated save as to year which is stated to be 1971. The vendors are Ethelyn Adila Glidden, the widow of Donald Emerson Glidden, Henry Edison Glidden, David Kenneth Ebanks, Odlein Ebanks and the respondent.

The recitals state that the deceased at the date of his death was seised in fee simple in possession free from encumbrances of the property to be sold. Thereafter they continue -

> "(3) Henry London Ebanks by his Will appointed his widow Martha Clementina Ebanks and his eldest son Charles Glidden (formerly Ebanks) to be his executor and devised all his property to his six sons equally but such will was never admitted to probate and has since been lost.
>
> (4) Charles Glidden during his lifetime informally partitioned the land of the said Henry London Ebanks and granted the property to two of his brothers namely David Kenneth Ebanks and Harvey Obadiah Ebanks but no Deed of Assurance was ever executed.

Two other recitals state that Charles Glidden had died on January 23, 1958 and that letters of administration of his estate had been granted to his widow Ethelyn Adila Glidden on August 25, 1958 and that the lands were then vested in her as personal representative.

It should be noted that the third recital is in important respects inaccurate. There were three executors not two. The will had been admitted to probate and the property had not been equally divided among the sons. That only applied to the residue. The widow of the deceased had been a beneficiary.

The appellant was a signatory to this conveyance. If there had been the informal distribution there recited it is all the more surprising that he should have made the voluntary declarations which he did in order to secure registration as absolute owner. He must have known that the contents of the declaration were false and his

intention must have been to deceive. There is evidence to support the finding of the Chief Justice that the registration of the properties in the appellant's name was obtained fraudulently.

It has been contended that since the appellant believed the land to be his, the conscious mistatements which he submitted caused no disadvantage to anyone and were thus not fraudulent. I find this argument unacceptable The appellant may well have obtained registration had he said what he now states to be the truth but this is not certain. The adjudicating officer may then have given notice to the surviving brothers or their representatives to establish broadly the details of the partition.

It was contended that there was in any event evidence before the Chief Justice to establish the appellant's claim that he had long been in undisturbed possession of the parcels of land. The Chief Justice found the evidence of possession unsatisfactory and his finding seems abundantly justified. The appellant spent far more time out of Grand Cayman than he did in Grand Cayman. The evidence, particularly that of Goldie Jefferson who lived with Martha Clementina Ebanks, is quite consistent with Martha being in possession of the disputed parcels and deputing the appellant to take such care of them as was required when she was herself unable to do so. I see no reason for disturbing the Chief Justice's finding in that regard.

Accordingly I would affirm the judgment of the Chief Justice and dismiss the appeal with costs.

KERR, J.A.

I concur.