Privy Council Appeal No. 33 of 1989

Herbert Wellesley Eldemire *Appellant*

v.

Arthur Wellesley Eldemire *Respondent*

and

Privy Council Appeal No. 13 of 1990

Arthur Wellesley Eldemire *Appellant*

v.

Herbert Wellesley Eldemire *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD ACKNER
LORD LOWRY

*[Delivered by **Lord Templeman**]*

Arthur and Herbert Wellesley Eldemire are two brothers. They became entitled to land at Reading in the Parish of Saint James forming part of the residuary estate of their father, Arthur Wellesley Eldemire Senior together with their mother Alice in equal shares. By a transfer dated 18th October 1967 some 22 acres of the Reading lands registered in Volume 277 Folio 40 of the Register of Titles were transferred to Arthur and his wife as Arthur's undivided share. Alice died having appointed Herbert her personal representative and leaving her residuary estate to Arthur and Herbert in equal shares.

In proceedings E254 of 1986 in the Supreme Court Arthur by writ ("the writ action") claimed from Herbert an account of the estate of Alice. In proceedings P774 of 1986 by originating summons ("the originating

summons action") Herbert sought a declaration that he was entitled to the remainder of the Reading lands, comprising some 17 acres known as Norma Crest and consisting of land registered in Volume 212 Folio 33, Volume 246 Folio 66, Volume 238 Folio 33, Volume 276 Folio 9 and Volume 1050 Folio 312. Herbert also sought an order that Arthur execute all relevant documents necessary to vest Norma Crest in Herbert absolutely. Parts of the Norma Crest land were vested in Herbert and Arthur as trustees, part in Herbert as trustee and part was registered in the name of Arthur Senior. In the originating summons proceedings Herbert on 12th May 1988 obtained from Ellis J. the orders he sought but on 22nd March 1989 the Court of Appeal (Carey, Forte and Gordon JJ.A.) allowed an appeal by Arthur on the grounds that an originating summons was not an appropriate form of proceedings for the relief claimed by Herbert. Against the decision of the Court of Appeal in the originating summons action Herbert now appeals to the Board.

In the writ action Arthur delivered a statement of claim dated 26th October 1986 and Herbert delivered an amended defence and counterclaim dated 2nd May 1989. Paragraphs 6 and 7 were in these terms:-

"6. There were 39 acres of land known as Reading lands contained in various Certificates of Title registered respectively at Volume 343 Folio 2, Volume 212 Folio 33, Volume 276 Folio 9, Volume 238 Folio 33 and Volume 246 Folio 66. That these lands became vested in the Plaintiff and the Defendant in or about 1962.

7. That in 1967 the Executors in their capacity as Trustees, together with the Plaintiff and Defendant executed an instrument with the consent of the Plaintiff and Defendant and vested in the Plaintiff approximately 22 acres of these Reading lands. It was agreed then that the portion should go to the Plaintiff as his portion of those lands. It was also agreed that the remaining portions, which were then vested in the Plaintiff and Defendant would be transferred to the Defendant, but in spite of request by the Defendant made to the Plaintiff, the Plaintiff has refused and continued to refuse to transfer the said lands to the Defendant."

In his counterclaim Herbert sought an order:-

"(c) That the Plaintiff forthwith execute all Instruments that will transfer to the Defendant the remainder of the lands known as Reading lands and comprised in the Certificates of Title registered respectively at Volume 343 Folio 2, Volume 212 Folio 33, Volume 276 Folio 9, Volume 238 Folio 33, and Volume 246 Folio 66."

Thus, without prejudice to his appeal in the originating summons action, Herbert sought to obtain similar relief in the writ action. In his reply dated 24th May 1989, Arthur made the following admissions:-

> "As to paragraph 7, the plaintiff admits that approximately 22 acres of the Reading lands were transferred to him by the trustees and executors of their deceased father's will but denies that the remaining portions were also then vested in the plaintiff and the defendant; the plaintiff states that there was an understanding that the remainder, known as Norma Crest would go to the defendant and further denies that he has refused to transfer the said lands to the Defendant as alleged."

Similar admissions are also to be found in a letter from Arthur's legal representative. By a summons in the writ action dated 9th June 1989 Herbert applied for an immediate order that Arthur forthwith execute all documents necessary to vest in Herbert the balance of the lands known as Reading lands in the Parish of Saint James described as set out in the pleadings. This relief was sought on the basis of the admissions made by Arthur in his reply and in the letter from his legal representative. On the hearing of the summons Ellis J. made the order sought by Herbert and on 22nd March 1990 the Court of Appeal (Rowe P., Wright and Morgan JJ.A.) dismissed Arthur's appeal. Arthur now appeals to Her Majesty in Council.

Their Lordships first heard argument in the writ action because that contained the main substantive difference of opinion between Herbert and Arthur. The judgment in the Court of Appeal was delivered by the President and contained a full and careful analysis of the history of the dispute between the brothers and the submissions made by Arthur. The President considered the authorities on admissions and concluded that in the writ action the admissions made by Arthur were amply sufficient to justify the relief sought. Their Lordships agree. The President then considered the submissions on the part of Arthur that Herbert had not sufficiently identified the Norma Crest property to which he was entitled. The relevant title deeds have been exhibited in the originating summons action and were examined and considered in the proceedings before the Court of Appeal. Their Lordships agree with the President that the Norma Crest lands were identified by Herbert who had indeed been in occupation of those lands ever since Arthur in 1967 took over his 22 acres. Finally the President considered and rejected a number of technical objections by Arthur to the form of the order sought by Herbert including an objection based on the statute of frauds. Their Lordships agree with the President that there is no substance in any of these objections.

Before the Board it was faintly argued that Arthur had not made a clear admission of the right of Herbert to the portions of the Reading lands which Herbert claims. It was strongly argued that Norma Crest had not been sufficiently identified. Finally it was argued that the order made by Ellis J. and affirmed by the Court of Appeal was unenforceable. As to the admissions their Lordships agree with the Court of Appeal that they established that Arthur and Herbert agreed to share the 39 acres of the Reading lands, that the share of Arthur, comprising some 22 acres, was vested in him in 1967 and that Arthur has long been entitled to the remaining 17 acres known as Norma Crest. The submission on identification fails because the Court of Appeal carefully considered the title deeds and documents which were exhibited in the originating summons action and because the submission of Arthur relies simply on the assertion, irrelevant even if accurate, that the lands vested in Arthur in 1967 were in Volume 277 of the Register whereas some of the Norma Crest lands are registered in volumes with a lower number. This seems no basis for challenging identification. So far as the form of the order is concerned their Lordships consider that it merely compels Arthur to do that which he ought to have done long since and such an order will of course be enforceable if necessary by the law of contempt.

Their Lordships will therefore humbly advise Her Majesty that Arthur's appeal in the writ action should be dismissed. Arthur must pay Herbert's costs of the appeal to the Board.

Herbert having succeeded in the writ action does not need such relief to be granted in the originating summons action, but if, in those proceedings, the Court of Appeal ought to have granted relief then Herbert is entitled to reversal of the costs order which was made against him.

Gordon J.A., delivering the judgment of the Court, set out the provisions of section 532 of the Judicature (Civil Procedure) Code (Jamaica) which provides that executors, administrators and trustees:-

> "... and any person claiming to be interested in the relief sought, as creditor, devisee, legatee, next-of-kin or heir-at-law, of a deceased person, or as "cestui que" trust under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:-

(a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or "cestui que" trust."

The Norma Crest lands were part of the Reading lands comprised in the residuary estate of Arthur Senior. Parts of the lands are registered in the names of Herbert and Arthur, part in Herbert's name and part in the name of Arthur Senior. There is no doubt that the registered proprietors are the trustees. Herbert claims that under and by virtue of the wills and deaths of Arthur Senior and Alice and the agreement made in 1967 between the beneficiaries regarding the division of the Reading lands, the Norma Crest lands are now held upon trust for Herbert absolutely and that he is entitled to have the Norma Crest lands vested in him in law and in equity and that Arthur, who has obstructed the vesting in Herbert of the lands in question, should be ordered to execute any documents necessary to vest the Norma Crest lands in Herbert as the sole beneficiary.

In the Court of Appeal, Arthur relied on *Re Royle* [1890] 43 Ch.D. 18, *Libet v. Ifill* (1963) 5 W.I.R. 525, *Re Carlyon* [1887] 56 LJ (Ch) 219 and *Re William Davies* [1888] 38 Ch.D. 210. These cases illustrate that the court will not entertain an application by an originating summons which does not concern the trust estate. But in the present case the claim by Herbert does concern the trust estate; he claims that the trust estate so far as it comprises Norma Crest is now held upon trust for Herbert absolutely. Arthur has disputed this claim and by the present appeal is disposed to dispute the right of and duty of the registered proprietors as trustees to vest Norma Crest in Herbert absolutely. Hence the need for Herbert's originating summons action.

As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification. In the present case, as Gordon J.A. himself observed, the facts are not in dispute. The admissions of Arthur are just

as effective in the originating summons proceedings as they were in the writ action.

Gordon J.A. held that Herbert was not seeking to obtain the determination of a question affecting his right or interest as devisee or relief against an executor but specific performance of the agreement arrived at by the devisees and sanctioned by the executors of the estate of Arthur Senior. The parties to this action, he said, are the devisees and no one appears in the representative capacity as executor. But Herbert was seeking a declaration and enforcement of his claim that, in the events which had happened, he was absolutely entitled in equity and therefore entitled to have Norma Crest vested in himself absolutely. He was a *cestui qui trust*, and there were no personal representatives or trustees other than Herbert and Arthur. There was no one else who ought to have been joined in the proceedings. This was not a case of specific performance.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be allowed and that Arthur should pay the costs of Herbert before the Board and in the courts below.