The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2017

B E T W E E N:

KEVIN WAKEFIELD SAMPSON, JR
Plaintiff/Appellant

-v-

LIONEL EARLE JAMES ANDERSON
First Defendant/First Respondent

-and-

THE ESTATE OF NINA MAE JOELL
(ALBERT JOELL, JR as Estate Representative)
Second Defendant/Second Respondent

-and-

THE ESTATE OF CLIFFORD WAKEFIELD SAMPSON
(TYRONE LLEWLLYN SAMPSON SR as Estate Representative)
Third Defendant/Third Respondent

Before: **Baker, President**
Clarke, JA
Hellman, JA

Appearances: Sonia Grant, Grant & Associates, for the Appellant
Paul Harshaw, Canterbury Law Ltd., for the Respondent

Date of Hearing: **30 May 2017**

Date of Judgment: **31 May 2017**

JUDGMENT

(In Court)

Clarke JA

1. We have before us an application for leave to appeal against a decision of the Chief Justice of 1 February 2016 and for an extension of time for doing so.

2. The case concerns a property known as "Chula Vista" ("the property") in Pembroke Parish. It was owned during her lifetime by Dorothy Louise Sampson. She died on 3 June 1980. In her will she left a life interest in the property to Iva Anderson ("Iva"), her daughter, and, after Iva's death, the property was to pass to Lionel Earle James Anderson ("Earle"), her grandson, who is the first defendant, and Kevin Wakefield Sampson Jr ('Kevin"), her great grandson, the plaintiff, as tenants in common.

3. Probate of the will was granted on or about 4 November 1980 to Nina-Mae Joell and Clifford Wakefield Sampson. On 28 January 1981 Kevin became an adult, when he reached his 21st birthday. By a Vesting Deed dated 26 May 1981 the executors conveyed the life interest granted by the will to Iva, the life tenant. No Vesting deed appears ever to have been executed in favour of the two beneficiaries in remainder.

4. On 1 June 1988 Iva died.

5. By a writ of summons dated 4 July 2014 Kevin brought an action claiming possession of the property and "Losses". That was later amended so as to be a claim for restitution of his 50% interest in the property or a sum equal to a 50% interest. The action was brought against those who were said to be the representatives of the estates of the executors of Dorothy Sampson's will.

6. Clifford Sampson died before Nina Mae Joell in March 2005. Nina Mae Joell, herself, died in November 2011. The representative of her estate is Albert Joell, the second defendant, ("Albert"). Albert has not sought probate of Nina Mae Joell's will, although he can be cited for that purpose. The third defendant is the Estate of Clifford Sampson, whose estate representative is said to be Tyrone Llewellyn Sampson. No probate has been sought of that Estate nor has the 3rd defendant, who was added in the amended statement of claim of 17 November 2014, been served. The third defendant would appear to be an unnecessary party since the chain of executorship passed from Nina Mae Joell and Clifford Sampson to Nina Mae Joell alone, and then to her executor Albert Joell.

7. By a summons dated 12 October 2015 the Earle and Albert applied to strike out Kevin's claim on the ground that it either failed to disclose a reasonable cause of action or was an abuse of process.

8. By a judgment of 1st February 2016, wrongly referred to on its first page as dated 1 February 2015, the learned Chief Justice struck out the claim against all the defendants. This was not the first striking out in the proceedings. On an earlier occasion the Chief Justice had struck out the Statement of Claim, but not the writ. The basis on which the Chief Justice struck out Kevin's claim on 1 February 2016 was that the pleadings disclosed no reasonable cause of action which would not be defeated by the defendants' limitation defence. This was notwithstanding that, as the Chief Justice put it [14], the evidence strongly suggested that Kevin was not made aware of the will and the half interest in the property conferred upon him before in or about 2012 and had a genuine grievance about what on the face of it appeared to be a serious injustice.

9. The basis for the judgment of the Chief Justice was that, as he found, Earle had assumed exclusive possession of the property as of 1 June 1988 [3], the date of Iva, his mother's death. It was common ground below that Earle had been in sole possession since that date [10]. Accordingly, as the Chief Justice held, section 18 of the *Limitation Act 1984* applied, so that in 2008 the period prescribed by section 16 of that Act for bringing an action to recover land, namely 20 years, had expired without any action being brought with the result that Kevin's title to the land was extinguished.

10. In paragraph 17 the Chief Justice said this:

> *"Where the claimant is dispossessed (or, by analogy, enters into possession when his interest crystalizes), time starts running for limitation purposes from the date the defendant enters into possession: First Schedule, paragraph 1. It was common ground that the effect of all these provisions as applied to the agreed faces of the present case was that, absent some legal basis for postponing the commencement of the limitation period to a date subsequent to June 1 1988, the Plaintiff's title to the Property was extinguished on June 1 2008".*

11. He then turned to consider whether or not Kevin had shown sufficient grounds for being afforded an opportunity to apply for leave to further amend the Re-Amended Statement of Claim and, in particular, whether Kevin could avail himself of section 33 of the 1984 Act upon the basis that his claim was for relief from the consequence of a mistake and that the period of limitation did not begin to run until he had discovered his mistake or could with reasonable diligence have discovered it.

12. As to that the Chief Justice concluded, *inter alia*, that the section only availed a plaintiff who was advancing a substantive claim seeking relief from the consequences of his mistake, a mistake which would still be complained of even if the claim was brought within the limitation period.

13. For those reasons, and not *"without considerable sympathy for what appears to quite possibly be a serious injustice done to the plaintiff who should have received his inheritance through a vesting deed in or about 1981"* [39] he found that the only proper way to exercise his discretion was to strike out the plaintiff's writ and statement of claim as against the first defendant. He also struck out the proceedings against the 2nd and 3rd defendants (in the case of the third defendant this was done of the court's own motion).

14. That was 1 February 2016. The time for seeking to appeal to this court expired in mid-March 2016. Thereafter nothing happened, so far as the court was concerned, until 24 January 2017 when an application was made for permission to appeal; but not for an extension of time. Since no application had been made for an extension of time, the case appears to have been taken out of the list on 8 February 2017. The Notice of Motion to this court for leave to appeal and for an extension of time was filed on May 1 2017 – 15 months to the day after the judgment and nearly 3 months after 8 February 2017.

15. No satisfactory reason has been given for this delay. What happened after the 1st February 2016 was that Kevin received a bill for some $ 91,961 in respect of the costs of Canterbury Law Ltd which were later taxed down to $ 57,612. This, says Kevin, added insult to the injury resulting from the striking out of his claim.

16. In what seems to be about July 2016 there was a family meeting attended by Kevin, Earle and Albert at which, according to Kevin, Earle said he would sell the property and pay Canterbury Limited's costs for himself and Albert. No definitive statement was made about what would happen to the balance of the funds. Kevin suggested that Earle should keep the property until his death whereupon it should pass to him or, if he was not alive, to his son.

Earle agreed to pay his attorneys but Albert said he wanted his $ 45,000 from Kevin. Since then, according to Kevin, he had been trying to get enough money to launch an appeal and had sought the services of a lawyer who would help him.

17. That lawyer was Ms Sonia Grant, who moved this application before us. Kevin came to her office in March and again in April 2016. On 11 July 2016, she received a telephone call at home from Kevin to tell her that there had been no resolution of the question at the family meeting and that he wanted to press ahead with appealing the Chief Justice's judgment. She says that she was unable to assist immediately because of pressure of work; and that she went abroad for nine days in August 2016 returning on about 12th August. There was then a backlog of work, not helped by an electric storm on 11 September 2016 and Hurricane Nichole in October 2016.

18. It was, she said, only on or about 21 January 2017 that, having read the *Paradise Beach* Privy Council decision she realised how the plaintiff's case had fallen off track as a result of the erroneous assertion by the defendants that the property had vested in Kevin and Earle by operation of law. The *Paradise Beach* decision is a Privy Council decision which is expressly referred to in the decision of the Chief Justice as supporting the strike out claim.

19. The basis upon which it is now sought to appeal is in essence as follows. A beneficiary of an estate, such as Kevin and Earle, has no vested interest in any asset of the estate which he may have been bequeathed until the administration of the estate is complete. His right is to have the estate properly administered by the executors and the property vested in him by them. The executors hold the assets in accordance with the species of trust explained in *The Commissioner of Stamp Duties v Livingston* [1964] UKPC 45. Thus, Kevin's half share never vested in him by operation of law on 1 June

1988. After that date, by virtue of the absence of a vesting deed in favour of Kevin and Earle, the fee simple in the property remained with the two executors of Dorothy free of any life interest in favour of Iva and is now vested in the executor of the last surviving of those two executors pursuant to section 27 of the AEA 1974.

20. Earle entered into possession of the property. But such possession as he enjoyed in the property was that contemplated by section 50 (1) of the *Administration of Estates Act 1974 which provides.*

> **"Discretionary power of estate representative as to giving possession of land and powers of the Court**
> *50 (1) An estate representative, before making a conveyance in favour of any person entitled, may permit that person to take possession of the land, and such possession shall not prejudicially affect the right of the estate representative to take or resume possession nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of land."*

In consequence, no question of limitation arises. The possession which Earle enjoyed is by statute not prejudicially to affect the right of the estate representative to take possession and convey the land in accordance with the will. Accordingly, what the court should now do is to make a vesting order vesting the property presently vested in the surviving executor in the two legatees.

21. The circumstances which I have so far described are, or should be, highly unusual for a number of reasons.

22. First, there seems to me no good and substantial reason for the failure to appeal within the prescribed period of time. The time for appealing is well known and Kevin was represented at the hearing before the Chief Justice,

albeit by different counsel. If he wanted to appeal he should have done so within the time limit. The fact that in July 2016 there was a family conference, which went nowhere, afforded no ground for not launching an appeal, which should have happened by March 2016. The delay between July 2016 and January 2017 was equally unacceptable. Ms Grant in her affidavit and in her submissions to us claimed that pressures of work, including a backlog which had built up in consequence of the difficulties of dealing with the effects of various hurricanes, had caused her not to act with the necessary speed. Whatever sympathy we might have for her predicament we do not find this a good reason for delay on her part, especially as she told us that she was back at her office in July 2016. Further, if one lawyer cannot handle the case timeously another must be found. The delay from the beginning of February until May 1st 2017 was by itself excessive, particularly given the fact that Ms Grant had been, she told us, preparing nonstop for five days before she was due to appear in front of the Chief Justice.

23. Second, the case now sought to be put forward is not the case that was put forward before the Chief Justice and is, in some respects the opposite of it. In their letter of 15 October 2014 Canterbury, the solicitors for Earle and Albert, had said that it could not be seriously disputed that on or about 1 June 1988 when Iva died the property vested in the remaindermen as tenants in common absolutely and the judge accepted that [2], as did Kevin's then counsel. The case now put forward is that that was not what happened at all. Further, no reference appears to have been made at trial to the Administration of Estates Act 1974. In addition, this attempt to secure relief is something like the fourth attempt to do so. Mr Harshaw for Earle, submitted with some force that, in private civil matters, it is for the parties to decide what points they want to take and, if they fail to do so, the court should not allow a change of mind, and certainly not in present circumstances. The client should be left to his remedy against his lawyers.

24. Third, however, it seems to us that there is a very reasonable prospect that the appellant, if allowed to do so, may establish that he is right. Mr Harshaw, who had only received the skeleton argument very recently told us that he was not in a position to deal in any detail with the substance of the new case, but it seems to us that it has considerable merit. The proposition that the property vested in the remaindermen on June 1988 appears to us *prima facie* inconsistent with sections 22 - 24 of the Administration of Estates Act and to represent the position before but not after that Act. Further it would appear to us to be the intention of section 50 of the Act that remaindermen in the potion of Earle should not be allowed to avail themselves of a limitation defence against the executors thus preventing them from giving effect to the bequests in the will on account of one remainderman being allowed into possession.

25. Mr Harshaw submitted that, on the face of the SOC section 50 does not apply because that pleads that Earl took possession of the property on Iva's death. We are not, however, convinced that this point is valid. On Iva's death, the persons entitled in remainder were Earle, the grandson and Kevin, the great grandson, then an infant. I infer from the material before us that Earle must have known of the will and the executors certainly did so. In those circumstances, it seems to us difficult to infer anything other than that they were content to let him into possession and difficult to see how his possession could be regarded as in any sense adverse.

26. Fourth, Kevin would appear to have suffered a very serious injustice. His great grandmother left him half her house. He has never received it and her grandson has enjoyed the full benefit of it for many years. We do not know what passed between Kevin and Earle. But if, as the Chief Justice thought likely, Kevin did not learn of the bequest until 2012, and if, as seems inherently likely, Earle knew of the will, it would follow that Earle never told

his fellow remainderman and cousin that he was entitled to half, and thereby could be said morally to have contributed to the injustice.

27. Fifth, the prejudice suffered by Earle if permission is granted is limited. He has enjoyed the full benefit of the property for many years. He will, of course, suffer prejudice if he is now held not to be entitled to the property as to 100% but that will be because that is what the law requires and is not relevant prejudice for present purposes. He will, of course, have suffered costs which could have been avoided if the right points had been taken first time round. If he loses the appeal, any costs that Kevin recovers can be ordered to be set off against the costs presently due from him. If he wins there may be difficulty in recovering costs but we have no information on that score.

28. It is necessary to take account of all of these factors - length of delay, reasons for delay, strength and merits of the case, and prejudice – together with the overriding objective, in order to determine what order should justly be made.

29. We have come to the conclusion that we should extend the time for filing a notice of appeal and grant permission to appeal because, despite the delay, it seems to us (i) that there are strong grounds for thinking that, through no fault of his own, the Chief Justice may have been in error; (ii) that the strike out may have inflicted a serious injustice on Kevin, which ought to be corrected; (iii) that it may well have been the intention of the legislature that this sort of defence should not be open to someone in Earle's position ; and (iv) that the delay and prejudice to Earle is not such as to require us to refuse permission.

30. We would wish however to make a number of things clear.

31. First, this is an exceptional case where a combination of factors has led to the result. Time limits are there to be observed. It is not acceptable to delay filing applications because of the shock of losing, the possibility of settlement, inertia, or the engagements of counsel. This application came very close to being refused on account of the delays alone.

32. Second, we have dealt with the application on the material before us, which is pretty limited, and which does not include all the trial material.

33. Third, such observations as we have made on the facts and the law are entirely open to review on the appeal. We are concerned only with whether permission should be granted.

34. Fourth, it seems to us that consideration should be given as to the content of the statement of claim which in its present form does not accurately reflect the case as now put forward by the appellant, and, also, of the writ. A draft amendment should be provided within a short period of time together with an application to amend to be heard at the hearing of the appeal.

35. Fifth, it is essential that the material for the appeal is provided in good time to the other side and to the Court itself. Delivery of material a day or so before the hearing date is not acceptable. We would be minded to order (i) that skeleton arguments and trial bundles be provided by a date which is well before any hearing of the appeal; and (ii) that provision by the appellant of an application to amend the writ and the statement of claim and of a skeleton argument by a specified date should be a condition of the grant of permission to appeal and an extension of time.

36. Sixth, it is desirable to ensure that the appeal and any further proceedings are conducted as efficiently as possible. We would hope that the appeal, although against a striking out order, may resolve the whole case. It would

be undesirable for a situation to arise where the appellant succeeds on the issue of principle but the matter still had to go to trial on the application of the principle. We would invite counsel on both sides to address their minds to this question.

37. Seventh, and most important of all, this is a case which cries out for settlement. As is apparent the judgment of the Chief Justice has not proved the end of the matter; and the result of the appeal for which we would give permission is uncertain. More costs will be expended in arguing it which the appellant, if unsuccessful, will be likely to have to pay. If successful, the appellant may find any costs awarded in his favour are set off against the costs he presently owes. There are, also, potentially difficult questions as to what the position will be in relation to the improvements to the property carried out by Earle. Mr Harshaw said that if the appeal was successful the counterclaim (of which we know practically nothing) would or may be advanced. It would be to the benefit of all if this dispute between members of the family, which has, so far, not given any effect to the last wishes of the testator in relation to Kevin, could be resolved without further reference to the courts.

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Clarke, JA

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Baker, P

Hellman, JA