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Dora Walcott v Barclays Bank DCO

COURT OF APPEAL OF TRINIDAD AND TOBAGO

HYATALI CJ, PHILLIPS AND CORBIN JJA

22ND NOVEMBER 1974

Trust and trustee - Creation of trust - Effect of testamentary and inter vivos oral declarations of testator.

Trust relating to interest in land - Creation of - Necessity for evidence in writing - Statute of Frauds, 29 Car 2, c 3 [UK] s 7 - Supreme Court of Judicature Act 1962 [T] s 12.

On 19th May 1952 the testator and the appellant, then unmarried but living together as man and wife, jointly purchased a 'chattel-house' standing on a parcel of land known as 28 Carr Street, in the City of Port-of-Spain, and became joint tenants of the said parcel of land then owned in fee simple by one William Thomas Carr. They occupied the premises for some time until their relationship came to an end the testator married another woman. This marriage having terminated with his wife's death about the year 1963, the testator and the appellant resumed their previous relationship and eventually were married on 23rd January 1964. On 13th March 1964 the testator purchased in his own name the freehold reversion in the said parcel of land. He subsequently permitted his brother-in-law to construct at his own expense a small house on the land for the purpose of residence. The testator died on 30th April 1966, having by his last will and testament, dated 25th April 1966, made (inter alia) the following declaration:

> 'I declare that I am seised in fee simple as joint tenant with my wife Dora Walcott of the freehold premises known and assessed as No 28 Carr Street aforesaid. My wife is also the beneficiary named in the Policies of Insurance numbered 539713 with the Colonial Life Insurance Co Ltd and No 13875 with the Crown Life Insurance Company.'

After making certain bequests the testator devised and bequeathed all his residuary estate to his executor to be held upon certain trusts, and particularly upon trust that the bulk thereof should be held for his daughter, Norma Elizabeth Walcott, upon her attaining the age of twenty-one years. No provision was made by the will in favour of the appellant. The respondent is the executor appointed by the testator. By an originating summons issued in the High Court the respondent sought determination of the following questions:

> (a) Whether 'the main building and the out building at No 28 Carr Street constitute chattel houses or buildings under the law or not';
>
> (b) The nature and extent of the rights of the parties in relation to the said freehold premises, having regard to the terms of the will and the events which happened prior to the testator's death on 30th April 1966.

At the hearing of the summons the appellant adduced evidence on affidavit of certain inter vivos oral

declarations of the testator which, it was submitted, led to the irresistible inference that the testator considered the appellant and himself to be joint owners of the freehold estate in the premises. The learned judge rejected this submission and came to the following conclusions:

> (1) The first defendant [appellant] is a tenant in respect of the said premises
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> *(1974) 26 WIR 554 at 555*
>
> 'with the tenant's right to sever fixtures (the two buildings) thereon during the term of her tenancy.'
>
> (2) The said freehold property passes under the residuary devise in cl 7 of the will as part of the residuary estate to be held by the plaintiff [respondent] upon trust as directed by cl 7 and cl 8 of will, subject to the tenancy referred to above.

On appeal against this decision,

Held - (i) The inter vivos oral declarations of the testator taken in conjunction with certain testamentary declarations clearly proved his intention to constitute himself a trustee for the appellant of a joint tenancy in the beneficial ownership of the said premises. Accordingly, on the death of the testator the appellant became entitled by operation of law to the whole of the beneficial interest therein.

(ii) The said property formed no part of the testator's residuary estate, so that the respondent acquired no right or interest therein.

Cases referred to

Mitchell v Cowie (1964) 7 WIR 118

Forster v Hale (1800) 5 Ves 308, 31 ER 603, LC affg (1798) 3 Ves 696, 30 ER 1126, 33 Digest (Repl) 791, 643

Quayle v Davidson (1858) 12 Moo PCC 268, 32 LTOS 362, 7 WR 164, 14 ER 913, PC, 47 Digest (Repl) 34, 178

Richards v Delbridge (1874) LR 18 Eq 11, 43 LJ Ch 459, 22 WR 584, 25 Digest (Repl) 588, 276

Milroy v Lord (1862) 4 De GF & J 264, 31 LJ Ch 798, 7 LT 178, 8 Jur NS 806, 45 ER 1185, LJJ, 25 Digest (Repl) 581, 222

Appeal

Appeal against the determination by a judge in Chambers of certain questions raised in relation to the estate of a deceased testator.

GW Wellington for the appellant

HAS Wooding QC and *SG Campbell* for the respondent

PHILLIPS JA. The respondent is the executor of the last will and testament dated 25th April 1966 of one Fitz Alrick Walcott, deceased, (hereinafter called 'the testator') who died on 30th April 1966. The appellant is the widow of the testator and lived with him up to the time of his death in a freehold property situate at 28 Carr Street, Port-of-Spain. The history of these premises is as follows:

On 19th May 1952 the testator and the appellant, who were then unmarried but lived together as man and wife, jointly purchased for the sum of $2,000 a dwelling house standing on a parcel of land known as 28 Carr Street, Belmont, Port-of-Spain, and became joint tenants of the land which was owned by one William Thomas Carr. They occupied the premises for some time until their relationship broke up and the testator married another woman named Bernice Best. His wife having died about the year 1963, the testator and the appellant resumed living together in open concubinage in the said premises. They were married on 23rd January 1964. On 13th March 1964 the testator purchased in his own name the freehold reversion in the said parcel of land for the sum of $3,670. Subsequent to his acquisition of the legal estate in the land, the testator permitted his brother-in-law, one Romney Homitt, to construct at his own expense a small building thereon in which he resided.

By his will, dated 25th April 1966 the testator, after appointing the respondent bank as executor and trustee thereof and making provision as to its remuneration for such services, made the following declaration:

> '3. I declare that I am seised in fee simple as joint tenant with my wife Dora Walcott of the freehold premises known and assessed as No 28 Carr Street aforesaid. My wife is also the beneficiary named in the Policies of Insurance
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> *(1974) 26 WIR 554 at 556*
>
> numbered 539713 with the Colonial Life Insurance Co Ltd and No 13875 with the Crown Life Insurance Company.'

After making certain bequests the will contains (cl 7) a residuary clause whereby the testator gave, devised and bequeathed:

> 'all my real and the residue of my personal estate wheresoever situate not hereby or by any codicil hereto otherwise effectively disposed of ... unto the Bank upon trust to sell or convert the same or any part thereof into money...'

Express trusts are then declared. For present purposes it is sufficient to refer to the following:

> '8. The Bank shall hold the net proceeds of such sale and conversion and my ready money and the income of my said real and personal estate unsold or pending sale or conversion thereof upon the following trusts.
>
> (a) Upon trust to pay thereout all my just debts funeral and testamentary expenses and pecuniary legacies and I declare and direct that the expression "testamentary expenses" shall include all death duties on gifts passing under this my will to the intent that the beneficiaries thereof shall take such gifts free of death duties and therefore the property which my wife shall inherit or become entitled to at my death by operation of law or contract shall not be free of death duties shall having sufficient funds from which to meet the same.'

It is thereafter provided by the will that the bulk of the testator's residuary estate is to be held by the respondent on trust for his daughter, Norma Elizabeth Walcott, upon her attaining twenty-one years of age, with stipulations as to its disposition in the event of her failing to obtain a vested interest, etc. These are the circumstances in which the respondent issued an originating summons for the purpose of seeking determination by the court of certain questions relating to the beneficial ownership of the said freehold property.

The first question posed by the summons was whether 'in view of the object of its (sic) annexation to the land the main building and the out building at No 28 Carr Street constitute chattel houses or buildings under the law or not.' As indicated by the learned judge there was at the trial virtually no dispute with regard to the answer to this question, and I am of opinion that he arrived at the correct decision in holding that 'both buildings at No 28 Carr Street are fixtures and form part of the realty within the principles enunciated in *Mitchell v Cowie* ((1964) 7 WIR 118), in that they are affixed to the land for the better enjoyment of the land.'

The other questions raised by the summons relate to the respective rights of the parties, having regard to the terms of the will and the events which happened prior to the testator's death in regard to the said premises. The evidence before the learned judge was confined to affidavits sworn to by the respondent's solicitor and the appellant respectively and there was no issue as to the truth of any fact deposed to therein. Apart from those already referred to, the material events which happened prior to the testator's death are stated in the appellant's affidavit as follows:

> '...the deceased told me that [the freehold] should have been vested in us both and that he would see about this later.
>
> After purchasing the said freehold and before making the said will the deceased used to say that the two houses he owned in St James were for his sister and daughter and that the house and land at the said 28 Carr Street was for me.'

The learned judge rejected the submission made on behalf of the appellant (which was repeated before this court) that these pre-testamentary expressions taken in conjunction with certain declarations contained in the will were sufficient for the purpose of showing that the testator had constituted himself a trustee of joint interest

in the freehold premises in favour of his wife. In the result he came to the following conclusion:

> (a) 'The first defendant [appellant] is a tenant in respect of the premises known as 28 Carr Street, with the tenant's right to sever fixtures (the two buildings) thereon during the term of her tenancy...'
>
> (b) 'The freehold property known as 28 Carr Street passes under the residuary devise in clause 7 of the will as part of the residuary estate to be held by the plaintiff upon trust as directed in clauses 7 and 8 of the will, subject to the tenancy referred to ... above.'

It is substantially against these findings that this appeal has been brought.

In support of the decision counsel for the respondent contended that that portion of cl 3 of the will whereby it was declared that the testator was seised in fee simple as joint tenant with his wife of the premises in question must be held to be a mistake which probably arose from the fact that previous to his acquisition of the freehold reversion the testator had been a joint tenant with his wife both of the chattel house and of the land on which it stood. I am unable to accept this submission as I consider it to be clearly inconsistent with the appellant's unchallenged averment that the testator had told her that the freehold should have been vested in both of them and that he would see about this later.

The learned judge's decision was greatly influenced by his holding that the relevant portion of cl 3 of the will was brought about by this alleged mistake on the part of the testator. The following extracts from his judgment serve to demonstrate this:

> 'The deceased had along with the first defendant purchased the first building in 1952 and with her he was a tenant in respect of the parcel of land until he purchased the freehold reversion therein in 1964. Perhaps he thought he was seised - or that he was effectively creating or declaring a trust by "declaring" - as he did in clause 3 of the will. Whatever the reason for his declaration I hold that the words do not create or declare a trust. The words are merely

indicative of an erroneous impression on the part of the deceased that he was seised in fee simple as joint tenant with the first defendant of the premises known as No 28 Carr Street. The words are plain and unambiguous; and must be given their ordinary meaning; I find no authority for doing otherwise in this case.

The effect of a mistake in a will is discussed in Vol 2 of Jarman on Wills - 8th Edition. At page 629 the learned authors observe:

'Sometimes', says Jarman "a testator shows by the recitals in his will that he erroneously supposes a title to subsist in a third person to property which in fact belongs to himself. Such recitals do not in general amount to a devise; for as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favour of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled ..."

And at pages 630-631:

'...If a testator unequivocally refer to a disposition as made in his will, which in fact he has not made, the intention to make such a disposition at all events will be *considered* as sufficiently indicated.'

In such cases:

'the court has taken the recital as conclusive evidence of an *intention* to give by the will, and fastening upon it, has given to the erroneous recital the effect of an actual gift,'

differing in this respect from the cases in which

'the testator says that only which amounts to a declaration that he *supposes*

that a party who is referred to has an interest independent of the will and in which the recital is no evidence of an intention to give by the will and cannot be treated as a gift by implication.'

I think these words applicable to the instant case. The deceased seemed to think that the first defendant was seised with him as joint tenant in fee simple of the property; so he did not think he should make an actual disposition of the property. It is probable that he was influenced in the disposition of his property by this mistake. Yet there is no necessary implication that in the event of the failure of the supposed title of the first defendant, the deceased "would have given to her that benefit to which he assumed" she was entitled.'

Moreover, I am respectfully of the view that the passages from Jarman on Wills (op cit) to which reference has been made have no relevance to the issue of a declaration of trust by a will but relate to the question as to the effectiveness as a devise of words used in a will in respect to property concerning the ownership of which the testator has made a mistake.

At an earlier stage of his judgment the learned judge, in my opinion, stated correctly the general principles applicable to the present case in the following words:

'A trust may be created *inter vivos* or by will. It need not be created in writing; it is sufficient if the writing be evidence of the fact of the trust. See 38 Halsbury's Laws, pp 813; also *Forster v Hale* ((1800) 5 Ves 308, 31 ER 603, LC affg (1798) 3 Ves 696, 30 ER 1126, 33 Digest (Repl) 791, 643). In other words it need not be created by writing, it may be proved by writing which is subsequent to the creation of it. A trust can be created by any language which is clear enough to show an *intention* to create it. No particular form of words is necessary, but the *intention* to create a trust must appear - either expressly or by necessary implication. A court of equity will look at the circumstances existing at the date of the will. *Quayle v Davidson* ((1858) 12 Moo PCC 268, 32 LTOS 362, 7 WR 164, 14 ER 913, PC, 47 Digest (Repl) 34, 178).'

It appears to me, however, that despite a correct enunciation of the relevant principles, the learned judge unwittingly slipped into the error of considering the declaration contained in cl 3 of the will separately from the inter vivos declarations of the testator referred to above. Having first held that cl 3 did not create a trust, either expressly or by implication, as the language was 'plain and unambiguous', the learned judge then addressed himself to the real question for decision, viz whether the inter vivos declarations of the testator 'can be construed as declaring (or creating) a trust (which may be said to be evidenced in the words in clause 3 of the will).'

As to the creation of an express trust, I consider it useful to refer to the following passage from Cheshire's Modern Law of Real Property (9th Edn), p 320:

> 'There are very few rules restricting the mode in which a trust may be created. The trust is the successor of the old use, and for the raising of a use no formalities were necessary. Spoken words were as effectual as written instruments, and according to the preamble to the Statute of Uses bare signs and gestures seem to have been sufficient. The one guiding principle was that effect should be given to the intention of the settlor, no matter how it had been indicated by him. So in general is it with the modern trust.'

The legal position in regard to trusts relating to land is stated in 38 Halsbury's Laws (3rd Edn), para 1388:

> 'A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his will. The trust need not be constituted by writing; it is sufficient if the writing is evidence of the fact of the trust. The writing must, however, show its terms and not merely its existence.'

This requirement for evidence in writing is stipulated by s 53(1)(*b*) of the English Law of Property Act 1925, replacing s 7 of the Statute of Frauds (29 Car 2, c 3),

which, being a statute of general application, forms part of the law of this country by reason of the provisions of s 12 of the Supreme Court of Judicature Act 1962.

When once it is predicated, as in my view the evidence clearly shows, that the testator knew that the legal estate in the freehold property was vested solely in himself, it seems to me that the declaration contained in cl 3 of the will leads to the irresistible inference that he considered the equitable estate to be vested jointly in his wife and himself. I am of opinion that support for this conclusion is to be obtained from the remaining portion of the said clause which states that the testator's wife is '*also* the beneficiary' named in certain insurance policies. It appears that the word 'also' in the particular context would be meaningless unless the preceding sentence is construed as expressing the fact that the testator regarded himself as a trustee for his wife of a joint interest in the property in question. In my opinion, other similar indicia contained in the will are as follows:

(a) Although it is not in dispute that the testator and his wife lived together on good terms up to the time of his death, the will makes absolutely no provision in her favour.

(b) Clause 8 (*a*) provides inter alia that 'the property which my wife shall inherit or become entitled to at my death by operation of law or contract shall not be free of death duties she having sufficient funds from which to meet the same'.

A great deal of argument was directed to the question as to whether the case fell within the principle laid down in *Richards v Delbridge* ((1874) LR 18 Eq 11, 43 LJ Ch 459, 22 WR 584, 25 Digest (Repl) 588, 276), in which it was held, following *Milroy v Lord* ((1862) 4 De GF & J 264, 31 LJ Ch 798, 7 LT 178, 8 Jur NS 806, 45 ER 1185, LJJ, 25 Digest (Repl) 581, 222) that there was 'no equity in the court to protect an imperfect gift'. In each of those cases there was an intention on the part of the donor to make an immediate assignment of property which failed for lack of the requisite formalities. In *Richards v Delbridge* ((1874) LR 18 Eq 11, 43 LJ Ch 459, 22 WR 584, 25 Digest (Repl) 588, 276) Sir George Jessel MR stated LR 18 Eq 11 at 15):

> 'In *Milroy v Lord* ((1862) 4 De GF & J 264, 31 LJ Ch 798, 7 LT 178, 8 Jur NS 806, 45 ER 1185, LJJ, 25 Digest (Repl) 581, 222), Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "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".'

It was submitted by counsel for the appellant that those cases are distinguishable from the present in that we are not dealing with the case of an imperfect instrument showing an intention to make an immediate gift. I am in agreement with this submission.

In considering the nature and intention of the inter vivos declarations of the testator, it is necessary to have regard not only to the close bonds of affection existing between the spouses, but also to the pecuniary contribution made by the appellant towards the purchase of the dwelling house which subsequently became part and parcel of the property in question. In such circumstances it seems to me that by those declarations the testator clearly intended to constitute himself a trustee for the appellant of a joint tenancy in the beneficial ownership of the said property. This intention, in my judgment, is 'manifested and proved' by cl 3 of the will. Accordingly, on the death of the testator the appellant became entitled by operation of law to the whole beneficial interest therein.

The conclusion at which I have arrived disposes of any question of the existence of a tenancy in the land or of the appellant's rights to 'fixtures', and I would answer the second and third questions raised in the summons as follows: On the death of the testator the freehold property known as No 28 Carr Street, Port-of-Spain, together with the buildings standing thereon, vested beneficially in the appellant and formed no

part of the testator's residuary estate, so that the respondent acquired no right or interest therein.

I would order and declare accordingly. I would also order that the costs of both parties to this appeal (as between solicitor and own client) be taxed and paid out of the testator's estate.

HYATALI CJ. I agree.

CORBIN JA. I also agree.

Appeal allowed. Order and declaration accordingly.