IN THE COURT OF APPEAL

DOMINICA

Civil Appeal No. 1 of 1972

Between: Jean Mary Regan nee Aird in her representative capacity as one of the Executors of the Estate of James Otto Aird deceased and in her personal capacity — Plaintiff/Appellant

and

Bernice Rita Matthews formerly Aird in her representative capacity and the other Executor of the Estate of James Otto Aird deceased and in her personal capacity — Defendant/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

K.H.C. Alleyne Q.C., with B.G.K. Alleyne for Plaintiff/Appellant
F.E. Degazon for Defendant/Respondent

1972, December 5

JUDGMENT

CECIL LEWIS, C.J. (Ag.)

The plaintiff/appellant issued an originating summons supported by affidavit dated April 25, 1972 asking the Court to determine the following questions, viz; "whether the defendant can take the property known as Rose Cottage at Morne Bruce, Dominica to which she is entitled by right of survivorship upon the death of James Otto Aird deceased, her joint tenant, and also retain the benefits given to her by the will of the said James Otto Aird deceased, or must elect between her right under the joint tenancy and the benefits given to her by the will. The said James Otto Aird having devised by his said will the said property known as Rose Cottage to the plaintiff, and devised and bequeathed part of his estate to the defendant". This summons was fixed for hearing on July 10, 1972. It required the defendamt/respondent

/to .....

enter an appearance thereto within eight days after service thereof upon her.

The respondent did not enter an appearance to the summons, but instead, on May 2, 1972, caused a summons to be issued on her behalf requiring all parties concerned to attend before a judge in chambers on May 9, 1972 "on the hearing of an application on the part of the defendant that leave be granted to the defendant to enter a conditional appearance to the originating summons herein; and that the originating summons, aforesaid, be struck out on the grounds adduced in the affidavit filed therein in support of this application."

It will be observed that the respondent was making a dual application under the same summons, viz; an application for leave to enter conditional appearance to the originating summons, and an application for an order that this summons be set aside. The affidavit in support of the respondent's summons will be referred to later.

On July 10, 1972, when the originating summons came on for hearing, the plaintiff was represented by her counsel. Counsel for the respondent was present. The Judge's note of what took place reads as follows:

> "F.E. Degazon appears for the defendant only for the purpose of having summons struck out. In limine, defendant will apply to have summons struck out and leave granted to enter a conditional appearance.
>
> K.H.C. Alleyne: By o. 12 r. 6 a defendant may enter a conditional appearance. No such leave granted yet. O. 12 r. 6(2) does not yet arise.
>
> O. 12 r. 7 White Book sets out circumstances and grounds on which writ may be set aside. O.12 r. 1 .....
>
> In this case, the application to enter conditional appearance does not seek to impugn the writ or service thereof for irregularity, or the jurisdiction of the Court .....
>
> Deft. has made both applications in one."

/In .....

In his argument in the court below, counsel for the respondent submitted that under the Rules of Court, a conditional appearance required the leave of the court and that there was no provision for appearance under protest. However, in the rubric to order 12 rule 7 of the Rules of the Supreme Court of England, which corresponds to the local order 12 rule 6, it is stated "there is no real distinction between the terms 'conditional appearance' and 'appearance under protest." He admitted that there was nothing wrong with the originating summons or the service thereof and that his objection was to the jurisdiction of the court and to the competence of the appellant to make an application to the court "at all in the premises." He submitted that the court did not have jurisdiction in a matter which was brought before it in a manner contrary to law. He then referred to the matters specified in the affidavit in support of the respondent's summons and at that stage, the judge's note in the record is that counsel for the appellant "now makes formal objection to applications being made in a single summons," and he submitted that the only course open to the Court was to consider whether or not to allow a conditional appearance to be entered.

Despite this objection, counsel for the respondent then stated that he intended to defend the claim in all respects and indicated that his defences would be (i) that the respondent was not debarred from arguing that the appellant is not competent in the proceedings; (ii) that the appellant was statute-barred; (iii) that the appellant's claim should be dismissed on the grounds of estoppel, acquiescence and laches; (iv) that the appellant's claim does not disclose the possibility of invoking the doctrine of election, and (v) that the estate of James Otto Aird deceased, was jointly administered by the appellant and the respondent and discharges had been signed by all beneficiaries including the appellant. All those were matters

/which .....

which were raised in the respondent's affidavit in support of her summons.

Following upon these remarks of counsel for the respondent, the words "no objection" and the words "leave granted to appear" are to be found in the record of the judge's notes. The words "no objection" as used in this context are extremely vague and I was somewhat at a loss to understand to whom these words were to be ascribed. However, the trial judge, in an effort perhaps, to explain these cryptic words said in his judgment:-

> "Counsel for the plaintiff did not take any objections to the above matters being argued on behalf of the defendant and as a result leave to enter conditional appearance was granted and the hearing proceeded."

If the trial judge meant to imply by that statement that counsel for the appellant was not taking any objection to the procedure which was being adopted, then he very seriously misunderstood his submissions. His objection to the respondent pursuing her two applications in one summons was taken in the very clearest terms and there can be no doubt whatever about that.

From the first ground of appeal, it is apparent that the appellant's counsel was submiting that the respondent's affidavit did not disclose any allegation of irregularity in the originating summons or lack of jurisdiction in the court so as to support a claim for leave to enter conditional appearance, secondly, that he would not object to the respondent being granted leave to appear unconditionally, and thirdly, that the defences which the respondent sought to put forward were not appropriate for such a purpose, but could only properly be urged upon the merits of the originating summons in which case he would have no objection to the matters in the affidavit being used for this purpose. Thid is the context in which the words "no objection" were used,

/but ....

but the trial judge unfortunately misunderstood the submission and thought that counsel was saying that he had no objection to respondent's affidavit being used in support of her application to enter a conditional appearance.

The judge's record of the proceedings in my view, shows substantially that the appellant's contention is correct that this is what had occurred at the trial, but his submissions were, as I have already mentioned, musunderstood, with the result that the position became rather confused. The trial judge made an order that the defendant/respondent should take the property known as Ross Cottage and also retain the benefits given to her by the will of James Otto Aird. From this order, the appellant has appealed substantially on the ground that there were never any grounds upon which leave to enter conditional appearance could have been granted, that the judge erred in granting such leave, and the defendant/respondent has not in fact in any way "entered appearance."

The learned trial judge in my view misdirected himself as to the effect of the words "leave granted to appear." He was apparently under the impression that when he pronounced those words, they in some manner put the respondent properly before the court in the sense that she thereby automatically entered an appearance and that he could proceed with the hearing. This was of course erroneous as I will later point out.

The following steps were open to the respondent. She could have applied by summons or motion under order 12 rule 7 to set aside the originating summons at any time before entering an appearance thereto, or, if she entered a conditional appearance, she could have applied within 14 days after such appearance to set aside the summons. She could also have applied under order 12 rule 6(1) to enter a conditional appearance with the leave of the court. The respondent did in fact apply by summons under order 12 rule 7 to set aside the originating summons before entering an

/appearance .....

appearance and in that same summons she also sought to obtain the leave of the court to enter a conditional appearance. This procedure as counsel for the appellant rightly submitted is incorrect.

The respondent's application to set aside the originating summons could not in any event be granted on the basis of the facts set out in her affidavit, because these were matters which could only properly be raised when the merits of the questions in the originating summons were being discussed, and they did not go to the jurisdiction of the court, as counsel for the respondent contended. Counsel for the respondent was therefore mistaken in his submission that on the basis of the matters contained in his client's affidavit, the jurisdiction of the court could be ousted.

The trial judge made no order to set aside the originating summons but purported to give leave to the respondent to enter a conditional appearance thereto. This, in the circumstances, was wrong for the solicitor for the respondent did not even have with him the requisite documents for entering an appearance.

In order to obtain leave to enter a conditional appearance, the necessary documents would have to be produced to the judge who, if he were minded to make an order granting leave to enter conditional appearance, would indorse thereon his leave and at the same time specify the time within which the application to set aside the originating summons must be issued. According to the rubric under this order every conditional appearance and duplicate should be sealed on entry with the stipulation that the appearance is to stand as unconditional unless the defendant applies within the prescribed number of days to set aside the originating summons or service thereof and obtains an order to that effect. An order for conditional leave could therefore not be made in these circumstances.

/Notwithstanding .....

Notwithstanding these irregularities, the trial judge proceeded to hear the respondent's summons to set aside the originating summons and the order he made on that summons purported to dispose of the questions raised in the originating summons. He could not dispose of the originating summons before making an order on the summons to set it aside, and the only orders he could have made on the respondent's summons were either an order to set aside the originating summons or an order refusing the respondent's application for this purpose.

In the result, the position is that, no order was made setting aside the originating summons and the order purporting to grant leave to enter conditional appearance was irregular. The order purporting to determine the questions raised in the originating summons was in these circumstances null and void, and must be set aside. The matter will be remitted to the High Court and the respondent will then be able to take such steps as she may be advised to obtain leave from the court to enter an unconditional late appearance.

I would allow the appeal with costs here and in the court below.

P. Cecil Lewis
JUSTICE OF APPEAL

E.L. ST. BERNARD, J.A.

I agree with the judgment just delivered by the learned President and I will allow the appeal and set aside the judgment. I agree with the order proposed.

E.L. St. Bernard
JUSTICE OF APPEAL

Allan Louisy, J.A.

I agree.

Allan Louisy
JUSTICE OF APPEAL