BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 7 of 2001

BETWEEN:

LEMUEL CALLWOOD
ADINA CALLWOOD

Appellants

and

RICHARD LOUIS CALLWOOD
MICHAEL REYNOLD CALLWOOD

Respondents

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington for the Appellant
Mr. Lewis Hunte for the Respondents

2002 : January 15, 16
April 15.

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[1] REDHEAD J.A. The appellant brought an originating summons in the High Court of the British Virgin Islands. By that summons the appellants sought the following reliefs:

1. An account of the conduct of the business of the ram distillery carried on by he defendants (respondents) at Cane Garden Bay, Tortola which said distillery forms part of the estate of Richard Louis Callwood, deceased for the period 1986 to the dated of the order.
2. An account of all uses to which the property comprising the said estate have been put. The also sought an order for the appointment of BDO Binder certified Accountants as auditors to prepare or verify the financial Statements; and an order

that the defendants pay over to the Estate of Richard Louis Callwood, deceased, the profits from the operation of the said distillery for the period 1986 to the date of the order.

3. An injunction to prevent the defendants from carrying on the said distillery pending the completion of the accounts and the administration of the estate of Richard Louis Callwood.
4. And finally an injunction to prevent the defendants from carrying on or authorizing any construction on Parcel 10 Block 2437B West Central Registration Section pending the completion of the administration of the Estate of Richard Louis Callwood, the Testator, died on 3rd September, 1940 leaving a will dated 28th September, 1925.
5. By his will the testator appointed two of his sons Lorenzo Callwood and Antonio Callwood to be the executors of his will. By a Codicil to the will dated 2nd September, 1940 Richard Lewis Callwood revoked the appointments of Richard Lewis Callwood as executor and substituted therefore one of his sons, Cleophas Owen Callwood.

[2] The testator died leaving surviving his widow Ethelinda Callwood and sons Victor, Hugo, Clifford, Antonia. Louis, Reginald Cleophas (also known as owen).

[3] The first-named appellant is the son of Reginald Callwood and grandson of the testator. The second-named is the widow of Lewis Callwood, son of the testator Richard Louis Callwood, the first-named respondent.

[4] The testator died on 3rd September, 1940. His will was probated in 1941. Letters testamentary were granted to Cleophas Callwood, one of the executors to the will. The estate was to be shared up according to the terms of the will. However, the beneficiaries all died without the land, which formed the back of the estate being given to the beneficiaries.

[5] When Cleophas Callwood died in 1986. The lands of the estate had still not been sold or distributed in accordance with the testator's will or at all. No part of the lands of the estate had been specifically transferred to any of the testator's sons who was entitled under the will or to any one else. He died intestate without administering the estate.

[6] In 1999 the respondents, two sons of Cleophas Callwood approaches the court with a view to having the estate of the testator administered in accordance with the terms of the will. They applied for Letters of Administration with will annexed. Lemeul Callwood, the first-named appellant joined with the two defendants in that application.

[7] They swore that the only part of the estate ,,,,,,,,,,,,,, remaining to be administered consisted of real property. This was land registered as Block 2437B Parcel 10 West Central Registration of Tortola and valued $2,250.00. They swore that there was no personal property.

[8] Letters of Administration were issued to the two respondents and the first-named appellant on the basis of the estate comprised of land alone.

[9] In their originating summons the main grounds of reliefs sought by the appellants were in connection with the rum distillery operated by Richard Callwood. That is an account of all uses to which he had put the property to the appointment of a certified accountant to verify financial statements of the operation of the distillery and an injunction pending the completion of the account.

[10] The learned trial judge dismissed the appellants' claim. They now appeal to the court. Four [4] grounds of appeal were filed on behalf of the appellants.

Under ground 1 the appellants allege that the learned trial judge wrong in law and that judgment ought to be set aside.

Ground 2 that the trial judge made in correct findings of fact based on the evidence and/or his findings of fact were unreasonable or were not supported by the evidence before him.

[11] The appellant listed as unreasonable the findings by the learned trial judge that:

(a) the first-named appellant did not indicate that he came to the court in is capacity as Administrator of the Estate.

(b) There was "not the quality of evidence adduced to show that the second-named respondent operated the distillery as an executor des son tort or trustee quo intermeddler."

(c) "that it would be reasonable to ,,,,,,,,,,,,,,,,that there would be no personal property of the testator still around for distribution.

(d) It is unlikely that any personal property left by the testator would be in identifiable condition for distribution in 1999.

(e) There has not even been enough evidence adduced to indicate whether there should be an accounting for the use of the building, which houses the distillery.

(f) The "seine" house is a chattel house.

[12] Under ground 3 the appellants contend that the learned trial judge erred in law:

(a) In his failure to find:

(i) that the goodwill involved in the operation of the rum distillery by Richard Louis Callwood, deceased was capable of constituting a continuing assets of his estate for which persons operating the distillery had to account;

(ii) that the respondents by their operation of the distillery constituted themselves constructive trustee thereof for the benefit of the Estate of Richard Louis Callwood, deceased;

(b) In his application of section 12 of the Limitation Act when some was not pleased nor relied on by the respondent.

(c) In failing to apply the principles in Mitchell v. Cowie 7 W.I.R 118 as the test for whether "seine house" was a chattel.

[13] Ground 4 of the appeal deals with a challenge to the exercise of judge's discretion:

in that he refused to allow cross-examination on admissions made by the second-named respondent in relation to the goodwill concerning the operation of the distillery. His calling for evidence of Declaration of value made upon the application for Letters of Administration

of the estate and his refusal to allow evidence of admissions of trusteeship made by the former Executor of the Estate or other evidence to show that the said executor the said distillery as a trustee.

[14] The appellants also complain that the trial judge made order that they should bear their own costs, when the action was brought to clarify issues pertaining to the administration of the Estate of Richard Louis Callwood.

[15] Under Ground 4 they respect the orders prayed for in the High Court that the respondents do make an account of the conduct of the rum distillery etc. an order to pay over the ,,,,,,,,,,,,,,, ,,,,, from the operation to the Estate of Richard Louis Callwood and that a declaration that the "house on the bay" (the Seine house) that was given to Reginald Callwood in the codicil to the will of Richard Louis Callwood, deceased was a fixture.

[16] The learned trial judge in dealing with the issue of the distillery at paragraph 13 of the judgment said:-

> "There was no mention of any distillery in the will by the testator. If the testator did own a distillery, and there was no evidence given to show that he owned the distillery that may have been operated on his land during his lifetime, it would have had to be dealt with as personal estate after he died, and it may well have been disposed of by the personal representative according to the will and to the satisfaction of the beneficiaries."

[17] And at paragraph 16:

> "The evidence adduced in the affidavits filed on behalf of both sides is to the effect that the second-named defendant alone operates a distillery from building on lands belonging o the estate of the testator. That evidence is that the equipment in the distillery was purchased by the said defendants. There is no evidence that if there were distillery equipment owned by the testator at his death it was retained by the personal representative and used for the benefit of the estate. It must be presumed, as the law will do, that the personal estate which would have included the distillery, if the distillery belonged to the testator, was property among the beneficiaries who were all sui juris when the personal property become distributable. Even so, no action in respect of a claim to personal estate may be brought after 12 years from the date where the right to receive the share or interest therein accrued."

[18] Finally the learned trial judge said at paragraph 17:-

> "……..the evidence in the affidavits is too tenuous for the court to be able to determine, more than fifty years after the testator, what is the ,,,,,,,,,,,,,status of something which was not even limited at in the testator's will or spoken to by any of the persons who might have been expected to know something about the ownership of the distillery and what may have happened to it in the years between 1940 and 1986."

[19] The originating summons in the High Court was heard on affidavit evidence.

[20] Adina Callwood, the second-named appellant who is the widow of Lewis Callwood deposed to an affidavit in which she said inter alia:-

> "3 I was born on July 25, 1918 in Cane Garden Bay and I have lived in Cane Garden Bay for my entire life. I am the widow of Lewis Callwood, son of Richard Louis Callwood. I live on the Callwood estate in a house constructed by my husband and me.
> 4-
> 5 my husband Lewis Callwood, died on 11th day of December, 1977 and Letters of Administration to his estate was granted to me on the 13th day of September, 1999.
> 6 Before his death, Richard Lewis Callwood operated a rum distillery at the Cane Garden Bay. Cleophas, his son carried on his operation on the distillery after the death of Richard in 1940 and Antonio another of Richard's sons, in 1941. When Cleophas died in 1986, his son, Michael continued to operate the distillery and does so at present. The distillery operations have been continuously conducted since the lifetime of Richard Lewis Callwood from the same building on the Callwood estate. No accounting of its operations has been made to me since the death of my husband in 1977."

[21] Learned Counsel, Mr. Carrington, on behalf of the appellants, in his skeleton submission conceded that the testator did not mention the distillery in his will.

[22] However, Mr. Carrington went on to argue that in the Codicil the testator left all his chattels to his wife and appointed Cleophas, one of his executors, as trustee of her property. The term used in the Codicil was "for her own use absolutely during her life." According to Mr. Carrington that is to be interpreted as giving her a life interest in the chattels on the authority of –

> Re: Hammond (1938) 3 AER 308

Learned Counsel further argued that the word "chattels" used in the will refers to any kind of personal property. In support of this argument he referred to –

> Re: Ivan 1966 3 ALL ER 393 at 397 C-H

Mr. Carrington contended that goodwill being an incorporated asset comes within such a definition as chattels. Counsel referred to-

> IRC v Muller & Cotts Margarine Ltd 1901 AC 236-237:
>
> "Goodwill is only taxable as property; and the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporated property has no existence in nature and has physically speaking, no locality at all. We, however, are dealing not with anything, which in fact fills a portion of space, but with legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language, which to me is unintelligible.
> The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution for the case before us.
> Those cases tend strongly to show that, for purposes of probate goodwill, except so far as it merely entrances the value of lands and herediaments, must be regarded as personal property situate somewhere."…. (emphasis)

[23] Assuming only for the purpose of argument that the testator owed the distillery as a fact and some one acquired it after his death any goodwill which is attached to the business would be ,,,,,,,,,,,,,,,,,,,,,,,,with the business after its acquisition by the new owner. But is, my judgment the goodwill can only last as long as it is maintained. Goodwill can ,,,,,,,,,,,,,,,in a val,,,,,,,,,,,,,,,,,,,, . As a matter of common sense for the goodwill to continue it must be maintained by the person who operates the business. If it is not maintained it cannot last.

[24] The problem for the appellants is that there is no evidence to show in what capacity Cleophas Callwood operated the distillery. It is true that Adina Callwood swore on oath that he operated the distillery. She also swore that the Testator the distillery. She would have had first hand knowledge of these things which she had sworn.

[25] But there is no evidence from anyone or any document which shows that the Testator owned the distillery.

[26] If he owned it did he make a gift of it to his son Cleophas while, he the testator was alive? Specially there seemed to have been no challenge to Cleophas's operation of the distillery from any of his brothers during their lifetime most significantly in my judgment, the testator

made his will in 1925. In 1940 he made a Codicil to the will. In neither of these two instrument did he make any mention of an important business adventure the distillery yet in his codicil, he appointed his son Reginald "in charge of the fishing-board and he is to make a correct account of same to my wife Rosita." This shows undoubtedly that the testator was a careful man.

[27] In my judgment the failure by the testator to,,,,,,,,,,,, ,,,,,,,,,,,,,,,, mention of the distillery either in his will or codicil, one can draw the incapable inference that he did not own it at the time of the make of will.

[28] The learned trial judge at paragraph 13 of his judgment said, inter alia:-

> "There was no mention of any distillery in the will of the testator. If the testator did own a distillery, and there was no evidence to show that he owned the distillery that may have been operated on his land during his lifetime, it would have had to be dealt with as personal after he died; and it may well have been disposed of by the personal representative according to the will and to the satisfaction of the beneficiaries."
> And at paragraph 14 of his judgment he said inter alia:-
> "There was nothing provided in any of the affidavits to satisfy the contention that the testator owned the distillery at the time of his death and that the distillery was not among the distributed parts of his personal estate."
> And finally at paragraph ,,,,,,,,,,,,

[29] Mr. Hunte, learned Counsel for the respondents that the case is based primarily on a questions of facts. I agree. And there is nothing in the submission or arguments by learned Counsel for the appellant to justify this court on overturning the judge finding of facts.

[30] There was also the application made by the respondent in 1999 for Letters of Administrtion to the estate of the testator. The first-named respondent joined in the application.

[31] In support of this application they swore that there was no personal property left to be distributed. The first-named appellant who is a practicing attorney is part and parcel of that declaration. I have great doubts that he can now ,,,,,,,,,,,,, from that declaration and contend otherwise now; that is, there now exists personal property.

[32] The appellants' principal claim is for the respondents to account for the profits from the goodwill which they earn by operating the distillery from 1986 until an account is taken.

[33] During argument in this case, Mr. Hunte, learned Counsel for the appellants informed this court that learned Counsel for the appellant had abandoned before the High Court an order for the appointment of an accountant without that order it would be an impossible task, if the court were minded to grant the application to order an account for the profits made out of the goodwill of business, to do so without the appointment of accountant,,,,,,,,,,,,,,,,,,

[34] I now turn to the final issue in this appeal. The appellants seek a declaration that the "house on the bay" (otherwise known as the Seine house) that was given to Reginald in the codicil to the,,,,,,,,,,,,,,,,,of Richard Louis Callwood, deceased was a fixture.

[35] The learned trial judge in his judgment at paragraph 24 says:

"The seine house was said by the second-named [Respondent] to have been destroyed by Owen Callwood prior to 1986, but Delia Mabel Richards ,,,,,,,,,,,,,,,,,,,,,,in an affidavit that she knew her grandfather gave by codicil to his will the Seine house to Reginald Callwood who was the father of the first-named [Appellant]. She said hat the Seine house was a wooded house built on wooded props and that after Reginald occupied it, it eventually rotted away and fell and no longer exists. She described it in such terms as would clearly make it a chattel house to go to Reginald free of the land on which it was standing before it disappeared.

[36] At paragraph 30 the learned trial judge said:

> "Despite what the first-named [appellant] in his affidavit that the wooden props on which the seine house stood were so driven into the ground and rotted down that the house could only have been removed by causing significant damage to the land, I an not persuaded that the bequest of the testator in his codicil was for more than the chattel the seine house, and it was taken over before his death by Reginald Callwood, the beneficiary to whom it was bequeathed. That chattel no longer exists and the bequest has been completely satisfied."

[37] Mr. Carrington, learned Counsel for the appellant relied very much on:

Michell v. Cowie (1964) 7 W.R. 118 at P. 121 Wooding C.J. said:

> "From this statement of the common law, which by enactment is deemed to be inforce in Trinidad and Tobago, the applicable principles may be in my judgment be summarized thus:-
>
> 1.A house may be a chattel of a fixture depending upon whether it stands. But the intention is to be determined objectively rather then subjectively, that is to say, according to the circumstances as they appear and by the application of rules such as are set out hereunder:
> 2. To distinguish chattel from fixtures, a primary consideration is whether or not the house is affixed to the land.
> 3. If the house is not affixed to the land but simply rests by its own weight thereon, it will ,,,,,,,,,,,,,,,,,, heed to be a chattel unless it is made to appear from the relevant facts and circumstances that it was intended to form part of the land, the onerous of so doing being upon him who alleged that it is not a chattel.
> 4. If a house is affixed to the land, be it however, slightly, it will generally be to form part of the land unless it be made to appear from the relevant facts and circumstances that it was intended to be or continue as a chattel, the onus for so doing being upon him who alleges that it is a chattel.
> 5.Specifically as regards a house affixed to land by a tenant thereof a circumstance of primary importance is the object or purpose of the annexation.
> 6.To ascertain the object or purpose of the annexation, regard must be ,,,,,,,,,,,,,,,,,to whether the affixation of the house to the land is temporary and for use as a chattel or is permanent and intended to be for the better enjoyment of the land. But for this purpose it must at all times be borne in mind that the intention or right of the tenant to remove the house from the land or the ,,,,,,,,,,,,,,,of his interest as a tenant with the result that no improvement will accuse the landlord's reversionary interest does not make the affixation (albeit that it in one sense) temporary. The critical consideration, therefore, is whether the tenant affixing his house to the land has manifested a purpose to a,,,,,,,,,,,,,,,,,,,,it thereto so that it becomes and remains a part thereof conterminously with his interest as tenant"

[38] Mr. Carrington placed a lot of emphasis on the fact that the first-named appellant swore in paragraph 10 of his affidavit that the wooden house props on which the seine house stood were so driven into the ground and bolted down that he house could only have been removed by cause significant damage to the lands.

[39] The learned trial judge said that despite that evidence he was not persuaded that the seine house ,,,,,,,,,,,no more that a chattel.

[40] Adina Callwood who should be the most knowledgeable of all the deponents, deposed in her affidavit at paragraph 10 that the seine house was destroyed by Cleophas during his lifetime and ,,,,,,,,,,,,,Callwood, the son of Cleophas has constructed what appears to be a store room in the area that the seine house occupied.

[41] There is evidence that Cleophas Callwood died in 1986. A wood building called the seine house, was so called we are told, because of the use to which it was put, that is to say, fishing nets (seine) were hung out on the house to dry.

[42] Mr. Carrington contended that is not the use to which the building was eventually put but what it was initially intended for.

[43] There is no evidence on record as exactly when he seine house was destroyed. The first-named appellant deposed as to how the props on which the house rested, were secured into the ground. He does not indicated how he come by that knowledge as certainly the evidence suggests that he would not have been around when the seine house was built. And as I have said all Adina Callwood could have deposed to was that the seine house was destroyed before the death of Cleophas in 1986. There is no exact dated when this destruction occurred.

[44] In any event the learned trial judge has the affidavits evidence of both ,,,,,,,,,,,,,Callwood and Lemuel Callwood before him. He said that despite what the first-named appellant disposed that the wooden props on which the house stood were so driven into

the ground and bolted down the house could only have been removed by causing significant damage to the land. He was not persuaded that the seine house was not a chattel house.

[45] There is nothing advanced by learned Counsel for the appellant has persuaded me otherwise.

[46] The appeal is therefore dismissed with costs to the respondents.

Albert J. Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

[sgd.]

I Concur

Albert Matthew
Justice of Appeal [Ag.]