

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2003

BETWEEN:

MAXWELL FRANCIS

Appellant

and

[1] RALPH FRANCIS  
[2] CLAUDIA FRANCIS  
[3] ANTHONY FRANCIS

Respondents

Before:

The Hon. Mr. Adrian Saunders  
The Hon. Mr. Brian Alleyne, SC  
The Hon. Mr. Michael Gordon, QC

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Watt Q.C. and Mr. Hollis Francis for the Appellant  
Mr. Jason Martin for the second and third Respondents and for Mr. Ralph Francis,  
first Respondent in his capacity as executor of the will of Thirza Francis deceased.  
Mr. Ralph Francis, first Respondent in person

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2004: February 04;  
March 29.  
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JUDGMENT

[1] **ALLEYNE, J.A.:** This is an appeal against an order of Justice Rita Joseph-Olivetti dismissing an action by the Appellant, commenced by fixed date claim form seeking an order for the reconstruction, accounting and proper distribution of the Estate of Claude Earl Francis deceased pursuant to Part 41 of the Civil Procedure Rules 2000 (CPR). The claim was supported by the affidavit of Maxwell Francis, the Appellant, to which was exhibited a number of documents. The second and

third Defendants/Respondents filed affidavits in reply, and the Appellant filed a further affidavit in response to those affidavits.

[2] Claude Earl Francis (the testator) was a successful lawyer. He was married to Thirza Francis. The Claimant/Appellant and the Defendants/Respondents were all children of the marriage. The testator died in 1978, and by his will appointed his widow Thirza Francis his executor. The executor proved the will by which, so far as relevant to these proceedings, the testator devised and bequeathed all the residue of his estate 'to my wife in particular my recently constructed house at Clare Hall for herself and our four children in equal shares.' The effect of this is that Thirza Francis, as executor, thereby acquired the legal estate in the residuary real estate of the testator in trust for herself and the children as tenants in common<sup>1</sup>.

[3] Thirza Francis the executor, for her part, died in 2001 and by her will appointed Ralph Alexander Francis and Anthony Hawke Francis, the first and third Defendants/Respondents, executors of her will. If they, in turn, proved her will they would thereby, by operation of law, become executors of the will of their deceased father Claude Earl Francis by the chain of representation<sup>2</sup>, with the same interest in the estate and all the duties and obligations incident thereto as the first and immediate executor<sup>3</sup>. It appears, however, that any effort on their part to do so has up to now been prevented by a caveat presented by the Appellant.

[4] In his Affidavit in support of the claim the Appellant deposed that his father, the testator, at the time of his death, owned, among other real estate, approximately 26 acres of land at Yeptons; that the estate 'became the subject of litigation and in order to safeguard the estate' the land was transferred to Ralph Francis, the first Respondent, in his sole name in or about 1984. The Appellant claims that 'It was

<sup>1</sup> Real Representative Act, Cap. 368, section 3(1), Laws of Antigua and Barbuda Revised Edition 1992, Vol.8.

<sup>2</sup> Williams & Mortimer: Executors, Administrators and Probate, page 50.

<sup>3</sup> *Ibid.* at page 52, 634.

the understanding that Ralph Francis would act as trustee of the land for the benefit of the five beneficiaries'. The Respondents deny this claim.

[5] In paragraph 6 of his affidavit the Appellant says:

"A parcel of land at Church Street ... also formed part of my father's estate. This was transferred to me in or about 1989 and sold by me. My other two siblings (Claudia and Anthony) also benefited in various ways from the *improperly* distributed estate."

[6] The Appellant in his affidavit further deposed that in her will his mother Thirza Francis 'purported to devise as sole owner' lands owned by his father the testator which formed part of his estate, in which he, his mother and his siblings all had a beneficial interest under the will of his father, of which his mother was executor and trustee.

[7] The Appellant says that he fears that his father's estate will be frittered away and he will be deprived of his just and proper entitlement, by reason of which he applied for reconstruction, accounting and distribution of the estate.

[8] In her affidavit reply, the second Respondent Claudia Francis-Richards deposed that subsequent to the making of his will their father had informed the family on several occasions that he had acquired additional assets, in particular real property, some of which were for the deponent's sole use and benefit, and that their mother had the authority to distribute the assets of the estate as she saw fit. It is not claimed that he made a new will or a codicil to his will to that effect, or that he disposed of any of the assets inter vivos. His will therefore has full effect in governing the manner of distribution of his estate, and the executor is *prima facie* bound by the terms of the will.

[9] Claudia Francis-Richards deposed further that a family meeting was convened which was attended by Thirza, Ralph, Maxwell, Anthony and Claudia, a few days after the funeral of the testator, at which it was agreed among other things that the Appellant Maxwell Francis would receive as his share of the estate three houses

with the surrounding lands at Clare Hall. He lived in one of those houses and rented the others, receiving and converting the rents to his sole benefit. Ralph, for his part, 'would get Yeptons Estate and would not be entitled to any of the properties at Clare Hall or any other assets.' She claimed that all parties agreed to this distribution, and subsequently Ralph sold lands at Yeptons.

[10] Claudia Francis further deposes that she was given 2 parcels of land, the rent from which Maxwell collected on her behalf, but has not accounted to her for it. She later sold the land in order to prevent foreclosure by the bank, and the Appellant Maxwell Francis borrowed the net proceeds of the sale from her mother, acting as her agent, to pay off debt which he had incurred. The Appellant admits that his wife collected the rent but claims that she wired it all, save a single deduction of \$600.00 for work done on one of the houses, to Claudia. He denies having received money from the proceeds of sale of those properties.

[11] The third named Respondent Anthony Hawke Francis in his affidavit supports the allegation of a family arrangement for the distribution of the estate, and exhibits a copy of the minutes of a meeting held in April 1989, which, he claims, reflects 'a meeting of the minds to properly and equitably distribute' the testator's estate among his wife and children. The Appellant has responded to this affidavit, admitting that he has attended meetings with his siblings to discuss the proper distribution of the estate, but denying that there has ever been any agreement. While not denying the contents of the minutes of the meeting of April 8<sup>th</sup>, 1989, he claims they 'show a totally unfair distribution' of the estate and that he never agreed to this. He further claims that there was an over-inflated value placed on the Clare Hall properties which it was proposed he get, and an attempt to exclude him from the more desirable lands at Yeptons and Crawl Bay. He says 'There was an inherent inequality in the entire discussions'.

- [12] The minutes of the meeting purport to confirm that land at Yeptons, which appears to be the core of the dispute, was agreed to be given to Ralph Francis, and the land at Church Street, which the Appellant Maxwell Francis said was transferred to him in 1989 and was sold by him, was indeed agreed to be given to him, along with other lands forming part of the estate of his late father the testator. If this is true, it would appear that it might be said the Appellant has indeed taken the benefit of this voluntary distribution but now seeks to question its validity. This however is an issue of fact for determination at trial and this Court is not here making any such finding.
- [13] This case concerns the distribution of real estate comprising a residuary devise to five persons 'in equal shares'. The Appellant sought by the action to set aside the transfer to Ralph Francis of the land at Yeptons, effected in 1984, and also sought an order against the first and third Respondents Ralph and Anthony Francis as intending executors of the estate of Thirza Francis, and, by the chain of representation, of the testator, for an accounting of the estate of the testator.
- [14] The Respondents Ralph Francis and Claudia Francis by separate applications asserted that the claims are statute barred. The second-named Respondent Claudia Francis-Richards filed an affidavit in support of the application, to which the Appellant Maxwell Francis replied by affidavit, in which he specifically relied, in addition, on his affidavit sworn and filed in support of the claim. The learned trial Judge tried the issues raised by those applications as preliminary issues. She found on the basis of the affidavits that the claims were indeed statute barred, and entered judgment on the action for the Respondents. No application was made to cross-examine deponents on their affidavits, but Mr. Watt Q.C. for the Claimant/Appellant pointed out that the hearing was on a preliminary point, not the substantive issue, and submitted that the Court could not at that stage be asked to decide matters of fact. Mr. Johnson, acting also for the Claimant/Appellant, in his closing submission, reiterated this point. The Court proceeded to consider and decide the issues and gave judgment dismissing the action in its entirety based on

findings of fact on the affidavits, in relation to disputed facts. It is against this order that the Appellant appeals.

[15] The learned trial Judge defined the issues in the following terms:

(1) **Factual Issues**

(a) Whether the residuary estate was distributed in accordance with the testator's will or by agreement among the beneficiaries.

(2) **Legal Issues**

(a) Whether Mr. Ralph Francis holds the Yeptons land on trust;

(b) Whether Mrs. Thirza Francis as executrix is a trustee;

(c) Whether Mr. Maxwell Francis' claim against Mr. Ralph Francis for the Yeptons Land is statute barred;

(d) Whether the action itself is statute barred by the Act.

It seems to me that only the issue at (2)(b) is a pure issue of law. All the other issues turn substantially on questions of fact.

**Ground 1: Consequence of failure to file acknowledgement of service**

[16] Learned Counsel for the Appellant contended that the learned trial Judge erred in law when she entertained submissions on an application by the first Respondent when he was not a proper party to the claim not having given notice of intention to defend. Counsel conceded that the issue was not raised at the hearing, but nevertheless asserted that the failure to file an acknowledgement of service is a bar to the Respondent being heard on his application. The Appellant relies on Part 9.2 of the CPR 2000. It is my view that the appropriate time to take objection to this procedural defect was at the time of the hearing, and that having failed to do so, the Appellant is deemed to have waived the irregularity. In any event, rule 9.2(4) provides that a defendant need not file an acknowledgement of service if a

defence is filed within the period provided for filing an acknowledgement of service. In the case before us, affidavits in reply were served, and the record does not show whether or not this was done within the time specified by the rule. The affidavits in reply to the claim, which are deemed to be pleadings, might well have satisfied the requirements of the rule, and absent evidence to the contrary, it must be assumed that the proceedings were regular. This ground of appeal is devoid of merit and is dismissed.

#### **Grounds 2, 3 & 4: Procedure at trial**

- [17] Part 29.1 of the Civil Procedure Rules 2000 (CPR) gives the Court power to control the evidence to be given at any trial or hearing by giving directions at a case management conference or by other means. It does not appear that directions were given in this case, and therefore the procedure to be followed, adumbrated in the general rule as set out in Part 29.2, arises for consideration. This rule, as well as the more detailed rules relating to evidence in Part 29, it seems to me, applies with necessary adaptations where, as in the instant case, evidence is to be given by affidavit under Part 30. In either case parties have the right to cross-examine witnesses, although in the case of affidavit evidence application must be made for an order requiring the deponent to attend for the purpose, under rule 30.1(3) and (4).
- [18] It is apparent on the record that counsel for the Appellant did not anticipate that issues of disputed fact would be tried at the hearing of the preliminary issue, and therefore did not take steps pursuant to rule 30.1 to secure the attendance of deponents for cross-examination. The learned trial Judge does not appear to have addressed the contentions of learned Queen's counsel and junior counsel for the Appellant on the issue of whether disputed questions of fact should properly have been tried at a preliminary hearing, or should be resolved at trial. Mr. Watt Q.C. submitted that all the claimant at that stage had to present was a triable issue. The Court ruled, at page 88 of the record, that it will hear Mr. Watt on the

point whether this is an arguable case. Nevertheless, the Court proceeded to determine disputed questions of fact and to make firm findings which disposed of the case by dismissing the claim on the basis that the claim was statute barred. This approach appears to be inconsistent with the learned trial Judge's indication that she would hear Mr. Watt on the question whether the Claimant/Appellant had an arguable case.

[19] At the hearing of the appeal learned Queen's Counsel Mr. Watt submitted that in a fixed date claim such as the instant matter is, the affidavits take the place of pleadings; R. 8.1(1)(c), and at the case management conference or first hearing directions are given or orders made as to whether the affidavits would stand as evidence and cross-examination follow, or whether witness statements would be ordered to be filed. This did not happen in the instant case. Learned Queen's Counsel submitted that at the least the learned trial Judge should have allowed cross-examination on the affidavits, if she intended to make findings of fact on disputed issues on the basis of those affidavits. This, despite counsel's submissions at the hearing, the learned Judge failed to do.

[20] The first Respondent, in response to these submissions on ground 2 of the grounds of appeal, submitted that on the Appellant's own affidavit, 'taken as gospel', the Appellant does not have a case inasmuch as he stated therein that the Yeptons land was transferred in 1984, 18 years before the filing of the action, and thus well beyond the limitation period. Mr. Francis argued that the Court could not hear the Appellant to say that the land was transferred on trust in order to defeat the claims of creditors, as this would be a fraud on the creditors. Mr. Francis cited in support of this proposition the cases of **Tinker v Tinker**<sup>4</sup> and **Gascoigne v Gascoigne**<sup>5</sup>.

<sup>4</sup> [1970] 1 All ER 540

<sup>5</sup> [1918] 1 KB 223

[21] In *Tinker* Lord Denning M.R. at page 541 confirmed **Gascoigne**, declaring that the party could not be allowed to take advantage of his own dishonesty, and Salmon L.J. at page 543 amplified the decision in **Gascoigne** in these clear words:

"It is trite law that anyone coming to equity to be relieved against his own act must come with clean hands. If, in a case such as the present, he were to put forward, as a reason for being relieved against his own act, a dishonest plot on his part, e.g. to defraud his creditors, the Court would refuse him relief and would say: 'Let the estate lie where it falls'."

[22] His Lordship nevertheless went on to distinguish the case before the Court on the basis that the registrar had found that the husband had not been in any way dishonest, that he had no intention to deceive or defraud his creditors, and inferred from that finding, as did Lord Denning, that the transfer of the property was effective to vest the legal estate and the beneficial interest in the property in the transferee.

[23] In this case it was for the learned trial Judge, at the appropriate time, to determine whether the intention of the Appellant was or was not dishonest, and if it was not, what was the effect of the transaction. What the Appellant said in his affidavit is:

"My father's estate became the subject of litigation and in order to safeguard the estate the said land was transferred to my brother Ralph in his sole name. This was in or about 1984. It was the understanding that Ralph Francis would act as trustee of the land for the benefit of the five beneficiaries under my father's will."

[24] The learned trial Judge made no finding on the issue of whether or not the Appellant was party to the transaction, whether or not, if he was a party, his actions and motives were dishonest, and the consequences for him in the event. Such findings could only be properly based on an examination of all the evidence, tested by cross-examination, and taking into account all the circumstances. I cannot agree with Mr. Ralph Francis, the first Respondent, that the Appellant's case is necessarily out of Court on the principle that he who comes to equity must come with clean hands. There are questions of fact which must be determined

before the Court could conclude that the Appellant is precluded from pursuing his claim that the title to the Yeptons land is the subject of a trust.

[25] For the reasons above stated, I would allow the appeal, and award costs to the Appellant on the basis of Appendix C paragraph (2) of Part 65, and Part 65.5(1)(iii) of CPR 2000, in the sum of \$7,700.00 in the Court below, and \$5,133.33 costs of the appeal.

[26] I find it unnecessary and inappropriate, in the circumstances, to address the other grounds of appeal.

**Brian Alleyne, SC**  
Justice of Appeal

I concur.

**Adrian Saunders**  
Justice of Appeal

I concur.

**Michael Gordon, QC**  
Justice of Appeal [Ag.]