BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 15 of 2004

BETWEEN:

HARCOURT ANTONIO HUNTE ***Appellant/ Defendant***

AND

JOYCE HUTSON ***Respondent/ Plaintiff***

BEFORE: The Honourable Colin A. Williams, Chief Justice (Ag.), the Honourable Frederick L.A. Waterman and the Honourable Peter D.H. Williams, Justices of Appeal.

2005: April 14, 15 and October 28

Mr. Clement E. Lashley Q.C. and Miss Shaunita Jordan for the Appellant/Defendant.

Miss Laticia A. Bourne and Mrs. Marvalee Franklyn for the Respondent/Plaintiff.

JUDGMENT

INTRODUCTION

[1] The ownership of a small property at Jemmotts Lane, St. Michael, is the subject of a dispute which requires us to determine the legal effect of a deed of gift transferring the said property to Ms. Joyce Hutson, the respondent. The respondent sought a declaration that she was the rightful owner of the property by virtue of the deed of gift, and consequential relief. However, Mr. Harcourt Hunte, the appellant, claimed that he was entitled to the property under the will of Mrs. Ouida Hunte on the ground that the deed of gift was "ineffective to transfer ownership and invalid". ***Payne J*** decided in favour of the respondent and held that the deed of gift was valid. The appellant seeks to have that decision set aside and judgment entered for him with costs.

[2] Mrs. Hunte executed the deed of gift of 1,506 square feet of land at Jemmotts Lane with a dwelling-house thereon in favour of the respondent on 17 December 1993. Mrs. Hunte resided in Barbados, but the respondent in New York. The consideration for the transfer was Mrs. Hunte's "natural love and affection" for the respondent, who was her niece and whom she raised and treated as her daughter as she had no children of her own. Both parties executed the deed of gift in Barbados, in the presence of Miss Clorinda Alleyne, attorney-at-law, by whom the deed was drawn and prepared.

[3] On 25 September 1995, Mrs. Hunte made a will and appointed the respondent as her sole executrix. The will was

drawn and prepared by Miss Alleyne. Mrs. Hunte devised the property at Jemmotts Lane to the respondent, and the half-interest which she held with her husband in a property at Amity Lodge, Christ Church, to her husband's son, the appellant.

[4] On 30 December 1995, Mrs. Hunte made her second and last will in which she appointed Mrs. Maureen Lucas as her sole executrix. The Jemmotts Lane property was not mentioned in this will nor was the respondent a beneficiary. Mrs. Hunte devised her one-half share in the property at Amity Lodge to the appellant as she had done in the first will. The residue of her estate she also gave to the appellant. However, because the appellant was legally advised that the Jemmotts Lane property formed part of Mrs. Hunte's residuary estate, he claimed to be entitled to it on the basis that it had not been disposed of during her lifetime.

[5] The disposition of the Jemmotts Lane property in the deed of gift was not inconsistent with the wills. The first will bequeathed the property to the respondent and the last will did not bequeath the property. The deed of gift and the two wills were therefore consistent with Mrs. Hunte's apparent intention to give the Jemmotts Lane property, which came to her through her family, to her niece and to give her half-share in her husband's Amity Lodge property to her husband's son.

[6] The application in this case originated from the fact that the deed of gift was not recorded prior to the grant of Letters of Administration and from the advice which the appellant received on the legal effect of the deed of gift. The position taken by the appellant is explained in paragraph 17 of his affidavit filed on 22 October 2003, as follows:

> "On or about the 14th of October 2002 my Attorney-at-Law received a copy of a Deed of gift purported to be executed by Ouida Hunte in favour of the Plaintiff. The document was dated the 17th of December 1993 and not in the year 1995 as deposed to by the Plaintiff in her affidavit dated the 30th July 2002. The said Deed was never recorded, nor was exchange control permission granted for the transfer of such property in accordance with the Exchange Control Act of Barbados Cap. 71. There was no valuation on the deed for Property Transfer Tax purposes nor did the document reflect the payment of stamp duty. In the result, I am advised by my Attorney-at-Law and do verily believe that the purported deed of gift is invalid and cannot prevail in the light of Ouida Hunte's Will, dated the 30th December 1995 and the vesting of the property in me by virtue of the Assent … and because of all the other relevant circumstances."

CHRONOLOGY OF EVENTS

[7] Mrs. Hunte died on 17 February 1997 and on 13 May 1999 the High Court ordered the appellant to be substituted as administrator with the will annexed in place of Mrs. Lucas, who had been appointed the sole executrix of Mrs. Hunte's last will. On 11 February 2002, a grant of Letters of Administration with the will annexed was made to the appellant.

[8] Prior to her death, Mrs. Hunte was in charge of the Jemmotts Lane property, which was rented to St. Patrick's Roman Catholic Cathedral. After her death, the respondent took possession of the property and the focus of the

appellant was on collecting the rent for the property. Mr. Clement Lashley Q.C., acting for the appellant, wrote to the respondent's agent by letter dated 18 August 1999, advising that she should discontinue collecting rent. On the same date, he also wrote to the tenant advising her that all rent should be paid to his office. In his letter to the agent, the property was incorrectly described as a house in King William Street. The agent's attorney-at-law replied to Mr. Lashley pointing out that she could act only on the instructions of the respondent and that she was not the agent of a property in King William Street. On 3 May 2001, Mr. Lashley wrote to the respondent advising her to discontinue receiving rent on the ground that there was no recorded deed of gift and that as the property fell into the residue of Mrs. Hunte's estate under her last will, the appellant was entitled to it as the residuary legatee. On 27 May 2002, a Notice to Quit was served on the tenant requiring her to vacate the premises by 30 June 2002 and a Notice of Intention to apply to a magistrate to recover possession dated 8 July 2002 was served on her giving her seven days thereafter to vacate the premises.

[9] The unrecorded deed of gift could not then be found and was not produced by Miss Alleyne until October 2002, over eight years after it had been executed. The record does not make it clear when the appellant became aware of the existence of the deed of gift. However, by letter dated 14 October 2002, Miss Laticia Bourne, acting for the respondent, sent a copy of the original deed of gift to Mr. Lashley. Miss Bourne's letter read as follows:

> "I herewith enclose a copy of the original Deed of Gift transferring ownership of the abovementioned property from Ouida Hunte (deceased) to my client Ms. Joyce Hutson.
>
> I am in the process of having the Deed adjudicated for tax and stamp duty purposes as well as seeking permission of the Exchange Control Authority for the transaction so as to have the document ready for recording by the Land Registry Department.
>
> If there are any concerns please direct your queries to me."

[10] It is important to examine closely what transpired thereafter. On 5 November 2002, the appellant, in our opinion quite improperly, signed an assent in Ontario, Canada, as Administrator, transferring the property from the estate to himself as "the beneficiary under the will". From the receipt of the letter dated 14 October 2002, the appellant's attorney-at-law had a copy of the deed of gift. The assent was dated 15 November 2002 and it was recorded in the Land Registry on 2 December 2002.

[11] By letter dated 15 January 2003, Mr. Lashley replied to Miss Bourne's letter dated 14 October 2002 and his letter confirmed that he had spoken to Miss Bourne on 10 December 2002 informing her of his intention "to take issue with" the deed of gift. However, significantly, his letter did not disclose, as it should have done, the fact that the appellant had signed the assent in Canada and that it had been recorded in the Land Registry.

[12] In his letter, Mr. Lashley requested that the pending *ex parte* application be heard *inter partes* and that he be informed of the date of hearing. The reference to the *ex parte* application was a reference to the originating summons filed on 30 July 2002, which commenced the proceedings brought by the respondent against the appellant for a declaration that the respondent was the rightful owner of the property by virtue of the deed of gift, which in error was referred to as having been executed in 1995 instead of 1993. We should add that it appears that the reason for the summons being brought *ex parte* was the fact that the appellant's address in Canada had

been requested from his attorney-at-law, but had not been provided. The matter came on for hearing on 30 August 2002, when Miss Alleyne was subpoenaed to produce the deed of gift, but the matter was adjourned *sine die* after she gave an undertaking to make a diligent search at her office for the deed of gift.

[13] On 3 January 2003, Miss Bourne swore and filed an affidavit exhibiting a copy of the deed of gift and on 9 January 2003 ***Payne J*** made an *ex parte* order which was drawn and prepared as follows:

> "**IT IS ORDERED** that there be a declaration that the Plaintiff is the rightly *(sic)* owner of the dwelling house and land situate at Jemmotts Lane in the parish of Saint Michael in this Island by virtue of the 1995 Deed of Gift drawn and prepared by Ms. Clorinda Alleyne, Attorney-at-Law and duly executed by the Plaintiff, the Donee and Ouida Evena Hunte also known as Ouida Hunte, deceased, the Donor herein."

[14] On 31 January 2003, the appellant applied to set aside the *ex parte* order on the grounds that: (i) the evidence adduced in support of the application and on which the order was made was unreliable; (ii) it was not brought to the attention of the Court that Mrs. Hunte by her last will gave the appellant the same property referred to the deed of gift; (iii) the assent vesting the property in the appellant had been recorded and therefore took "precedence" over any unrecorded invalid deed; and (iv) there were not sufficient grounds for making the order. These grounds do not merit close examination: ground (i) was unspecific; ground (ii) was inaccurate because Mrs. Hunte did not in her last will devise the property to the appellant; ground (iii) assumed falsely that the legal validity of the deed of gift was affected by the date on which it was recorded; and ground (iv) was also unspecific. Nevertheless, on 10 February 2003, ***Payne J*** by consent revoked the previous order and ordered that the costs be costs in the action.

[15] The appellant did not file his affidavit in opposition to the respondent's originating motion seeking a declaration of the validity of the deed of gift until 22 October 2003. The substance of the appellant's position has already been set out in paragraph [6] above. On 3 November 2003, Miss Bourne filed an affidavit which stated that the deed of gift was dated 1993 (not 1995) and relied on it as conclusive of the respondent's right to the property. On 29 January 2004, ***Payne J*** gave his decision, in which he declared that the deed of gift was valid and that the respondent be at liberty to record it and he ordered that the assent be vacated and that the respondent be awarded costs for two counsel.

[16] Before dealing with the issues in the appeal and in order to have a better understanding of them, we trace the history of the deed of gift subsequent to the order of ***Payne J*** and prior to the hearing of the appeal. On 14 October 2004, the deed of gift was stamped in accordance with the ***Stamp Duty Act, Cap.91***; it was written on the deed that the fee simple value of the property was $90,000.00 and it was duly adjudicated for stamp duty at $900.00. As the value of the property did not exceed $125,000.00, it was certified on the deed that no property transfer tax was chargeable in respect of the transfer under the ***Property Transfer Tax Act, Cap.84A***. On the same date, the deed of gift was received and recorded by the Registrar of Titles in the Land Registry with a Certificate of Validation made under the ***Exchange Control Act, Cap.71***.

ISSUES IN THE APPEAL

[17] On 30 April 2004, the appellant filed his Notice of Appeal setting out eleven grounds of appeal, one of which was amended at the hearing of the appeal. We are of the view that rather than quoting them verbatim, it would be better to identify only the issues of substance raised in the appeal and to set out the submissions made on them and the reasons for our decision.

(i) Requirements of a valid deed of gift

[18] Although the appellant did not claim that the deed of gift was fraudulent, ground (v) of the appeal was that the judge erred in law in failing to take into account that the deed of gift "was invalid and could not be validated by the respondent on the death of Mrs. Hunte in the light of a valid will dated the 30 December 1995". In the context of this ground of appeal, Mrs. Marvalee Franklyn in her helpful submissions on behalf of the respondent, set out the legal requirements of a valid deed of gift. ***Section 59(1)*** of the ***Property Act, Cap. 236*** provides that "subject to (exceptions), all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed".

[19] A deed is validly executed when it is signed, sealed and delivered. "In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct…If the sealing of a deed is proved, its delivery as a deed may be inferred, provided there is nothing to show that it was only delivered as an escrow.": ***13 Halsbury's Laws, Fourth Edition Reissue (2000) on Deeds and other Instruments,*** at ***paragraph 30***.

[20] Mrs. Franklyn cited the case of ***Vincent v. Premo Enterprises (Voucher Sales) Ltd. [1969] 2 Q.B. 609 C.A.***, in which ***Lord Denning M.R.*** explained the law as to delivery of a deed, as follows:

> "The law as to "delivery" of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. "Delivery" in this connection does not mean "handed over" to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: "I deliver this my act and deed." He may, however, make the "delivery" conditional: in which case the deed is called an "escrow" which becomes binding when the condition is fulfilled."

We therefore hold that the deed of gift was valid and operative to transfer the legal estate in the land from the donor to the donee from the date that it was signed, sealed and delivered.

(i) Execution of the deed of gift

[21] The appellant's affidavit refered to a deed of gift "purported to be executed" by Mrs. Hunte in favour of the

respondent. As already stated, the deed of gift was executed by the parties in the presence of Miss Alleyne and this fact has never been challenged by the appellant. ***Section 71(4)*** of the ***Property Act*** provides that:

> "(4) Attestation of a document by an attorney-at-law has the same effect as acknowledgement of the parties or probate of the witnesses before the Judges or the Commissioners of Probate under section 16 of the *Evidence Act*."

It follows that the execution of the deed of gift has been properly proved in accordance with the section and it cannot therefore be described as a document "purported to be executed".

[22] There is no substance in the further point submitted on behalf of the appellant that the deed of gift was not executed in accordance with ***section 150(1)(c)*** of the ***Evidence Act, Cap. 121,*** which requires all deeds executed in a foreign country to be verified on oath (generally) by a Notary Public. Although the respondent's address was stated in the deed as New York, the deed was executed in Barbados before Miss Alleyne. It is usual in such circumstances to state that the deponent is at present on a visit to this Island, but nothing turns on the omission because the deed was not executed in a foreign country.

(iii) Stamp duty

[23] The appellant's counsel submitted that the deed was not stamped in compliance with ***section 22(3)*** of the ***Stamp Duty Act,*** which provides that every person required by law to stamp any instrument relating to the transfer of any interest in property shall, within 30 days of the execution thereof, present the same to the Registrar who shall if satisfied that the instrument is duly stamped, cancel the stamps fixed thereon. However, the respondent's counsel referred us to ***section 33(1)*** of ***the Act,*** which provides that any unstamped or insufficiently stamped instrument may be stamped after the stipulated period on payment of the unpaid duty and a penalty. There is also no merit in this ground of appeal as the deed was duly stamped in accordance with ***the Act***.

(iv) Property transfer tax

[24] This ground of the appeal alleged that the judge erred in law in holding that the respondent "was competent to pay the property transfer tax … after the death of the deceased so as to give effect to the imperfect gift". As stated in paragraph [16] above, property transfer tax was not chargeable in respect of the transfer. It follows that this ground of appeal was based on an error of fact and of law.

(v) Exchange control permission

[25] The appellant's skeleton argument stated that, "the deed recites exchange control permission has been granted. No permission has been granted". ***Section 33(1)(a)*** of the ***Exchange Control Act*** provides that except with the permission of the Exchange Control Authority, no person resident in Barbados shall transfer by gift any land to a person resident outside of Barbados. Although ***section 33(1)*** does not state what the legal effect is of a transfer

of land made without the permission of the Authority, ***section 33(2)*** provides for validation of transfers made without permission. The Central Bank of Barbados, pursuant to ***sections 33(2), 21(2)*** and ***41(4)*** of ***the Act***, issued a Certificate of Validation certifying that the deed of gift "is and always was as valid as if the transfer had been effected with the permission of the Exchange Control Authority". The Certificate of Validation dated 19 February 2003 was referred to in the judgment of ***Payne J*** and was recorded with the deed of gift on 14 October 2004, as stated in paragraph [16] above.

[26] In spite of the Certificate of Validation, the appellant contended in his skeleton argument "that since no exchange control permission was obtained, the Exchange Control Act prohibited the transfer of the imperfect gift to the Plaintiff/Respondent". Mr. Lashley depended heavily on ***Re Fry, Chase National Executors and Trustees Corporation v. Fry [1946] 1 Ch. 312,*** as being "very relevant in the instant case". In ***Fry,*** a donor, resident abroad, died after executing a transfer of the shares that he held in an English company, Liverpool Borax Ltd., but before the requisite consent of the Treasury, for which he had applied under the Defence (Finance) Regulations, 1939, had been obtained. The Regulations prohibited the transfer of securities in which any person outside the sterling area had an interest unless permission of the Treasury had been obtained. ***Romer J*** held that since the requisite consent had not been obtained and the company was therefore prohibited from registering the transfer, the son of the deceased and another donee of the shares did not acquire a legal title to them, nor had the donor passed the equitable interests in the shares to the donees as the gifts were incomplete.

[27] ***Fry's*** case is easily distinguishable from the present situation. First, that case dealt with **securities** and the prohibition of their transfer without the consent of the Treasury as required by the Regulations, whereas we are here dealing with **real estate**. Secondly, it is clear from the report that, on a transfer of the securities, both the transferor and the transferee had to complete separate forms and questionnaires for submission to the Treasury. Although the transferor had submitted his form, he died before the grant of the Treasury approval. ***Romer J*** said at ***page 318*** that "the Treasury might in any case have required further information of the kind referred to in the questionnaire which was submitted to him, or answers supplemental to those which he had given in reply to it; and, if so approached, he might have refused to concern himself with the matter further, in which case I do not know how anyone could have compelled him to do so. Apart, however, from considerations of this kind, it appears to me that reg. 3A of the Defence (Finance) Regulations prevents me from giving effect to the argument, however formulated, that at the time of the testator's death a complete equitable assignment had been effected."

[28] In contrast, the ***Exchange Control Act*** does not specify who should make the application for permission for the transfer of real estate or for the validation of transfers. It follows that, if the transferor or the transferee dies before exchange control permission or validation for a transfer is obtained, the death does not affect the validity of the transfer.

[29] We have considered the additional cases cited on behalf of the appellant, but have not found it helpful to refer to them. A number of them relate to imperfect gifts, which have no relevance to a determination of the issues in this appeal. They do not deal with gifts of land by deed, but with gifts of securities, the transfer of which are governed by the particular statutory provisions and company regulations relevant to the security.

[30] Finally, we should add that the date of recording the deed of gift could be relevant only if a later transaction **for value** was recorded while the deed of gift remained unrecorded. The Assent was certainly not a transaction for value.

DISPOSAL

[31] It follows that the appeal must be dismissed. This Court has wide powers to make consequential orders and declarations and to give directions so as to finally dispose of the issues between the parties: ***section 61*** of the ***Supreme Court of Judicature Act, Cap. 171A***. We declare that the assent dated 15 November 2002, from Harcourt Antonio Hunte (Administrator) vesting the property to himself and recorded in the Land Registry on 2 December 2002, is and always was void. We therefore order that:

(i) the appellant within 14 days of the date of this judgment deliver to the respondent the documents of title to the said property;

(ii) the appellant within the like period deliver up the assent to the respondent to be cancelled by the Registrar of the Supreme Court;

(iii) the said Registrar forward the cancelled assent to the Registrar of Titles for him to make the appropriate entries in the Land Registry;

(iv) The Commissioner of Land Tax make all necessary corrections or amendments to the records under his control relating to the property to ensure that they show the respondent as owner of the property and that they otherwise accord with the terms of this order.

[32] We understand from counsel that the appellant is in possession of the property and collecting the rent. There was no claim in these proceedings for an order for possession or for an account, but as a consequence of our decision we further order that:

(v) the appellant within 14 days of the date of this judgment give up possession of the property to the respondent;

(vi) the appellant within 28 days account to the respondent for all rents and profits received by him less any expenses; and

(vii) any sum found due and owing by the appellant to the respondent be paid to the respondent with interest at the rate of 8% per annum on the said sum from the date of this judgment until payment.

[33] With regard to costs, the judge awarded costs to the respondent, but he did not state whether the costs were to be paid by the appellant personally or out of the estate of Mrs. Hunte. A personal representative may commence or defend an action without the leave of the court, but failure to procure leave puts the personal representative at risk

if the action or defence fails. A personal representative should therefore generally take the precaution of obtaining the sanction of the court before commencing or defending proceedings, in accordance with the principle laid down in ***Re Beddoe, Downes v. Cottam [1893] 1 Ch. 547.*** If the court has sanctioned proceedings taken by a personal representative, then the personal representative has acted reasonably and will be entitled to an indemnity for his own costs and to have any other costs liability paid out of the estate. As the appellant in this case did not make a ***Beddoe*** application, he should be ordered to pay the costs personally.

[34] The appeal is dismissed and the order of ***Payne J*** is affirmed, subject to the orders made in paragraph [29] and [30] above. The respondent is to have her costs, here and below, certified for two attorneys-at-law, to be paid by the appellant personally, such costs to be agreed or taxed.

Chief Justice (Ag.)

Justice of Appeal

Justice of Appeal.