AH MU (HEYWOOD RANDALL)

v

AH MU (IMMENSELY) AND AH MU (JANE)

Court of Appeal Apia
25, 27 October 1977
Henry P, Donne and Coates JJ

APPEALS (Hearing and determination) - Principles on which appellate Court will reverse findings of fact based on credibility of witnesses - Court must be satisfied the evidence at trial was not properly weighed by the trial Judge and that his advantage of seeing and hearing the witnesses "could not be sufficient to explain or justify" his conclusion: Watt (or Thomas) v Thomas [1947] AC 484, [1947] 1 All ER 582 as quoted by Wild J in Maffey v Maffey [1971] NZLR 690, 692 applied.

In proceedings commenced in the Supreme Court by originating summons appellant sought to have a deed of conveyance of certain freehold land declared null and void on the ground of fraud. The land had belonged to his late father who died intestate. The deed was executed by deceased's widow (second respondent) as administratrix of his estate and conveyed the land to a daughter (first respondent). It recited, inter alia, that deceased had made a parol declaration of an unconditioned gift of the land to the daughter during his lifetime. The deed was registered in the Land Register of Western Samoa. Appellant's proceedings were commenced almost twelve years later. Conflicting evidence was given viva voce by the solicitor who drew the deed and had acted for the deceased father for many years, and the administratrix, who swore there had been no parol declaration, that the conveyance had been her idea, and that she did not understand the recitals. The solicitor's evidence of his dealings with the deceased was extensive and supported by his office records and he was closely cross-examined. The learned Chief Justice found there had been a parol declaration and as the gift had not been perfected during deceased's lifetime the land passed to the administratrix. Accordingly, in carrying out the deceased's wishes she could not have been fraudulent. Appellant sought a reversal of these findings on appeal.

Held, there were no grounds for disturbing the findings, which were based on acceptance of the solicitor's evidence and that of the first respondent and disbelief of the evidence of the administratrix; that the only evidence at trial which lent any support to appellant was equivocal, and did not necessarily make the solicitor's evidence unreliable; and that there was no ground for concluding that the learned Chief Justice did not weigh the evidence properly, or fail to take advantage of seeing and hearing the witnesses.

APPEAL against dismissal of action seeking a declaration of nullity of a deed of conveyance of land.
Appeal dismissed with costs.

Enari for appellant and second respondent.
Drake for first respondent.

Cur adv vult

HENRY P, DONNE AND COATES JJ. This is an appeal from the dismissal of an action in which appellant sought a declaration that a certain deed of conveyance was null and void. Mologa Ah Mu died intestate on October 22, 1961. His wife (second respondent) and seven children survived him. Appellant and first respondent are his children. Letters of Administration were granted to second respondent on July 27, 1962. The principal assets in the estate were two freehold properties. One contained 2 acres 2 rods and 33.3 perches. This was the place where the family lived although many members in due course went to New Zealand. They are all adult. This property will be called the "Lotopa block". The other property contained about sixty acres and was some ten miles away. It was used for cultivation and was known as Aleisa. On July 28, 1965 second respondent, as administratrix of the estate, executed a deed of conveyance of the Lotopa block to first respondent. This deed, (which is called "the said deed"), was registered in the Land Register of Western Samoa. The said deed recited that the conveyance was made in consideration of the natural love and affection which deceased bore towards first respondent, and also that deceased had in his lifetime made a parol declaration of an unconditioned gift of the Lotopa block to first respondent, but that no conveyance had been executed. It further recited that first respondent was in permanent occupation of the said land.

Nearly twelve years later, namely, on March 4, 1977 the present proceedings were brought by appellant. The form of proceedings, which were by way of an originating summons, was quite inappropriate, but the matter was tried on the summons, and so we must accept that situation in the absence of any objection. The usual course is for evidence to be given on affidavit, but, although an affidavit of appellant was filed in support of the summons, the case was tried on viva voce evidence. The difficulty which arises is that there were no pleadings and the issues have never been properly defined as they must be in an ordinary action. The only express relief sought was a declaration that the said deed was null and void. The only ground set out in the summons was that second respondent had no authority to transfer (sic) the said land to first respondent "since the said conveyance was completely contrary to the provisions of the Administration Act 1958 (N.Z.) and the Samoa Administration Order 1939 (N.Z.)."

It is now clear that, at the trial, appellant sought to have the said deed declared null and void on the ground of fraud. If such a declaration were made the Lotopa block would still be an asset in the estate and so available for distribution. If the said deed is not set aside then the Lotopa block has been conveyed to first respondent and the only relief sought cannot be granted. We pass no comment on what remedies may or may not be open on other pleadings in an appropriate action with a properly drawn statement of claim. Counsel for appellant conceded that the success of this appeal depends upon proof of fraud before it can succeed.

Two utterly conflicting accounts were given for the execution of the said deed. For appellant the second respondent swore that there was no prior declaration of a parol gift, and that the conveyance was her idea. Her evidence disclosed clear fraud, although she claimed that she did not understand the recitals. On the other hand, there was the evidence of first respondent and of Mr Jackson, who at all times acted as solicitor for the deceased and for his estate. Mr Jackson had had long acquaintance with the family and their affairs. If this evidence is accepted then the transaction was intended to do no more than to carry out what those concerned believed to be the intention of deceased. Prima facie there would be no fraud in so doing unless some special facts were proved which put a fraudulent complexion on what was done. The learned Chief Justice held that the parol declaration had been made but that it was an imperfect gift.

The learned Chief Justice accepted the evidence of Mr Jackson as the deciding factor and of course this meant that the evidence of first respondent was also accepted. The evidence of second respondent was rejected. The matter became one of credibility. In Maffey v. Maffey [1971] N.Z.L.R. 690, 692 Wild C.J. said:-

They [the principles] were laid down by the House of Lords in Watt (or Thomas) v Thomas [1947] AC 484; [1947] 1 All ER 582 and have been applied many times in New Zealand. The case was one in which the House allowed an appeal from the Court of Session which, taking a different view of the facts in the record of evidence, had reversed the Lord Ordinary who had refused to grant a divorce. Viscount Simon (though he dissented from the conclusion as to the result of the appeal) said that:

> "an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given" (ibid.,486; 583).

Lord Thankerton said that the principle could be stated thus:

> "I. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion; II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

We turn now to deal with the grounds put forward by counsel for appellant to support his submission that the learned Chief Justice was wrong in accepting such evidence. They are:-

(1) that he failed to give significant weight to the evidence of second respondent that the conveyance to first respondent was her idea and not a prior wish of deceased. All we need say is that her evidence was weighed and she was disbelieved, so there was no weight to be given to this claim of second respondent.

(2) that the finding was against the weight of evidence. There

is no further elaboration of this ground other than to re-state with emphasis what second respondent had said in evidence. She was not believed.

(3) next it was submitted that a letter written in Samoan by deceased after the alleged parol gift contradicted the evidence of Mr Jackson and supported that of second respondent. The translation of the relevant portion of the letter reads:-

> I noticed that no one of our children wants to live in Samoa but they all want to live in New Zealand but leave Lotopa as a place they can come to if anyone wishes to come to Western Samoa for vacation.

The learned Chief Justice had this letter before him. He heard and saw Mr Jackson, who was closely cross-examined. The extract merely stated the wishes of the children at a later date but it gave no clear statement that that was the then intention of deceased and that he had always kept the Lotopa block for that purpose. It does, however, lend support to appellant's contention, but it is only one matter in a long circumstantial account given by Mr Jackson of his dealings with deceased. The letter does not necessarily make Mr Jackson's evidence unreliable. There is no ground for concluding that this matter was not properly weighed, or for concluding that the learned Chief Justice failed to take advantage of seeing and hearing the witnesses.

(4) that the learned Chief Justice did not place sufficient weight on the fact that Mr Jackson prepared the deed and had it signed without consultation with the other beneficiaries. The suggestion appears to be that Mr Jackson was negligent in carrying out what he swore was the parol declaration or wish of deceased. The learned Chief Justice was well aware of all Mr Jackson's activities and heard long and circumstantial evidence of his knowledge of the activities of deceased in relation to his affairs supported by Mr Jackson's office records. We see no basis upon which we should disturb the finding in the Court below.

We conclude, therefore, that the finding of the learned Chief Justice that a parol declaration was made as recited in the said deed ought not to be disturbed. Counsel for first respondent commenced to argue that when the learned Chief Justice went on to hold that the gift was not perfected in the lifetime of deceased he erred in law. There was no cross-appeal on this ground so counsel was stopped from advancing this argument. This finding of law is not essential to the present judgment which needs only to assume that such was the true effect of the parol declaration. The appeal must be determined on the basis that, as the learned Chief Justice found, the gift had not been perfected at the date of death with the result that the Lotopa block passed to the administratrix.

The crucial question then is, was it proved to be fraudulent for the second respondent to carry out the said unperfected gift by executing a conveyance to first respondent? The whole case to support fraud was that this conveyance was an idea of second respondent and that it was not supported by a prior parol declaration. That falls to the ground once the evidence of the basis of and the reason for the conveyance is found to be correctly stated in the deed. No other ground of fraud has been proved or alleged. Whether or not the parol gift was perfected was a matter of law. There is no evidence of a fraudulent scheme to perfect an imperfect gift and thus deprive the estate of an asset. We are not concerned with a claim for a simple breach of trust because such a claim is barred after six years. Nor are we concerned with a "tracing of assets". That was not the basis of the action. The sole issue was whether or not the said deed was null and void by reason of relevant fraud - a matter which appellant has failed to prove before the Court below and has failed to have that result reversed in this Court.

Since the action, which was based on fraud, must fail for lack of proof of relevant fraud, that is an end to the claim, and the said deed still stands. Whether or not it can be attacked on other grounds, and whether other remedies may be available, are not matters for us to speculate on. Nor do we express any opinion on any other form of action

which appellant may consider he has. As to the applicability of the provisions of the Limitation Act 1975 in respect of any such proceedings the Court will have to determine that question when, and if, the time arrives. Argument was addressed to this Court that this was an action for the recovery of land. It was not. It was an action to set aside a deed of conveyance on the ground of fraud. If successful, the result would have been that, as claimed, the said deed would be declared to be null and void and would thus have been ineffective to pass title to first respondent.

We agree that the appeal should be dismissed with costs and that the proper order in the Court below is that, the action be dismissed, but on the ground that relevant fraud has not been proved - an event which requires no specific finding on a defence based on the provisions of the Limitation Act 1975.

Appeal dismissed with costs of $200.00 to the first respondent accordingly.

Solicitor for appellant and second respondent: Retzlaff, Apia.
Solicitors for first respondent: Jackson & Clark, Apia.