In the Supreme Court of Bermuda

CIVIL JURISDICTION 1982 No. 252

IN THE MATTER of the Estate of John Augustus Alexander Virgil, Deceased, AND IN THE MATTER OF Order 54A of The Rules of The Supreme Court, 1952 AND IN THE MATTER OF a Lot of Land at Sandys Parish, Bermuda Island AND IN THE MATTER OF an Application by Barbara Lucille Brown, Sylvia Davis, Marion Johnson, Eunice Ming, Gladwin Ming and Marie Diane Spence.

(P A R T I E S)

BARBARA LUCILLE BROWN SYLVIA DAVIS MARION JOHNSON EUNICE MING GLADWIN MING GLENN MING MARIE DIANE SPENCE (Claiming as Beneficiaries under the Last Will and Testament of John Augustus Alexander Virgil, Deceased)	Plaintiffs
-and-	
THE BANK OF N.T. BUTTERFIELD & SON LIMITED	1st Defendant
JOHN W. SWAN LIMITED	2nd Defendant
BERMUDA HOUSING CORPORATION	3rd Defendant
JOHN ALFRED VIRGIL	4th Defendant
RHODA URIEL TAVARES	6th Defendant
ERVILLE ERSKINE INGHAM	7th Defendant
OWEN LLOYD THOMPSON	8th Defendant
LAURA PATRICIA THOMPSON	9th Defendant
ROBERT KEITH HORTON	10th Defendant

Mr. Michael Scott for the Plaintiffs
Mr. John Cooper for the 9th Defendant
Mr. John Barritt for the 3rd Defendants

J U D G M E N T

Martyn Ward, J.

By his Will, dated 21st May, 1964, John Augustus Alexander Virgil ('inter alia') appointed the Bank of N.T. Butterfield & Son Limited his sole executors and demised and bequeathed "...all my real and personal estate to such of my nephews Gladwin Ming and Glenn Ming and my nieces Sylvia Davis, Eunice Ming, Marion Johnson, Barbara Brown and Marie Diane Spence as shall survive me and if more than one equally between them." He

died on the 17th January, 1972. The Will was admitted to Probate on 27th November, 1975. Nearly seven years later, on 23rd September, 1982, all the named nephews and nieces began an action by way of Originating Summons claiming a declaration against ten named defendants that they were "entitled as tenants in common to an undivided moity of the property specified in the Appendix" to the Originating Summons. That Appendix described a parcel of land in Sandys Parish comprising 6.83 acres, the metes and bounds of which were set out. The Originating Summons itself, therefore, set out nothing to indicate why the Plaintiffs claimed that they were entitled to the declaration sought. An Affidavit in support was sworn by one of the Plaintiffs, Mrs. Barbara Lucille Brown, on 20th September, 1982. That Affidavit also supported an 'ex parte' application made on the same day, 23rd September, 1982, for an Order pursuant to RSC Order 54A rule 2 that all persons occupying or in possession of premises on the land the subject of the action, or having a beneficial interest in it, should be served with the Originating Summons. An Order was made which provided for substituted service by advertisement. As a consequence, four husbands and wives entered Conditional Appearances to set aside the Originating Summons so far as each of them was concerned. So far as I can see, none of those persons was ever made a party to the action by the Plaintiffs and no further steps have been taken with regard to any of them.

On 18th November, 1982, the 5th Defendant's application for the Originating Summons to be struck out so far as she was concerned was allowed with costs against the Plaintiffs. On the 6th January, 1983, the 1st Defendant's application in similar terms was also allowed with the same consequence. In both cases, the applications were on the same ground, namely that the Originating Summons disclosed no reasonable cause of action against them.

On 21st November, 1983, application was made on behalf of the 6th and 7th Defendants for the Originating Summons to be struck out as against them on two grounds: first, for want of prosecution and, secondly, that no reasonable cause of action was disclosed. The application was to have been heard on 8th December, 1983, but the Court instead was asked to treat the application as a Summons for Directions and that was done. The Order

provided ('inter alia') that the trial should be before a Judge alone, that the estimated length of the trial was four days, and that there were to be lists of documents exchanged within fourteen days. The fact that, apart from Mrs. Brown's affidavit, there had been no pleadings seems, quite extraordinarily, not to have been canvassed. Likewise, it is not clear whether all the Defendants who were still parties were made aware of the Order. Equally extraordinarily, however, absolutely nothing happened. Not only were none of the directions complied with, the action went to sleep for twenty months. Even then, the next event amounted to no more than a change of attorneys by the Plaintiffs to their present attorneys, Browne & Wade, which was notified to the Court on 15th August, 1985.

It was not until the 13th January, 1986, over two years after the Summons for Directions, that there was some forward movement in the action. Even then it did not spring from the Plaintiffs. On that date the 6th and 7th Defendants made an identical application to the one which they had made on the 21st November, 1983. Four Chambers appointments for the hearing of that application were adjourned for reasons which are not apparent. The matter eventually came on for hearing on the 5th August, 1986, before Austin Ward, J. Mr. Scott then appeared for the Plaintiffs and is recorded as saying that Mrs. Brown was swearing an affidavit in response to the applications. I pause merely to point out that not only did she not do so but that over two years later she had still not done so. The state of the pleadings was exactly as it had been on the date the Originating Summons was filed on 23rd September, 1982. The Order made was that the Plaintiffs should have 21 days within which to set the Originating Summons down for hearing (pursuant to the original order of 8th December, 1983) failing which the 6th and 7th Defendants were to be dismissed from the action; and that they were to have their costs in any event.

The Plaintiffs did apply to set down the action for hearing but, unfortunately, outside the 21 day limitation period. On 8th September, 1986, the Registrar wrote a letter which, if it was not addressed to all parties certainly came to the notice of some of them, to the effect that the action had been set down for hearing on the 12th January, 1987. The

response from attorneys for the 4th, the 6th and 7th, and the 8th and 9th Defendants, respectively, was immediate: "shocked," "amazed," and "complete surprise" were used by the attorneys to express their indignation at the turn of events, all of them pointing out the paucity of the pleadings and the Plaintiffs' failure to comply with simple and well defined procedures preparatory to setting down an action for hearing. Attorneys for the 6th and 7th Defendants, Vaucrosson's, moreover and not surprisingly, assumed that their clients had already been struck out of the action as a consequence of the Plaintiffs' failure to comply with the 21 day order of Austin Ward, J., on 5th August. Indeed, on 16th October, 1986, Austin Ward, J., no doubt having had Vaucrosson's letter drawn to his attention, made an order striking out the 6th and 7th Defendants with costs against the Plaintiffs.

On the same day, coincidentally, the Plaintiffs served upon the 2nd, 3rd, 4th, 6th, 7th, 8th and 9th Defendants a Notice of Intention to Proceed, and caused a Summons for Directions to be issued by the Registrar. The application for the Summons for Directions was heard on the 11th December, 1986. The Plaintiffs were then given 90 days within which to file affidavits, I assume in support of their Originating Summons. Nothing was contained in the Order to indicate the consequences of a failure by the Plaintiffs to comply.

The Plaintiffs did not comply. Instead, they made a further but quite unrelated application on 26th February, 1987, to extend the time for appealing the order of Austin Ward, J., of the 5th August, 1986. That application was listed for hearing on 12th March, 1987, but as no one appeared for the Plaintiffs, it was adjourned 'sine die'. It transpired that the application had not been served upon the 6th and 7th Defendants. After a hearing date in May was adjourned generally, that application by the Plaintiffs seems never to have been pursued further. I note, in passing, that orders made by Judges on 13th November and 11th December, 1986, were not submitted for signature until the 26th February, 1987.

Apart from a flutter of correspondence in and between April and July, 1987, between attorneys for the Plaintiffs and the 8th and 9th Defendants, the proceedings again went to sleep. They were awakened well over a year later, namely on the 13th May, 1988, when the 8th and 9th Defendants

applied to the Court for the Originating Summons to be struck out as against them, on the by now familiar grounds, first, that the Originating Summons disclosed no reasonable cause of action against those Defendants and, secondly, for want of prosecution. That application was supported by an affidavit sworn by Mr. John Cooper, of Counsel. Within days, on 20th May, 1988, a further application was made, this time by the 3rd Defendants, which was in identical terms to that made by the 8th and 9th Defendants. It is clear from an accompanying letter from attorneys for the 3rd Defendants, that they were acting in cooperation with Mr. John Cooper for the 8th and 9th Defendants.

The matters came before me on 2nd June, 1988, by which time Mr. Michael Scott for the Plaintiffs had filed a personal affidavit opposing both applications. His case seemed to be that he had been waiting since 24th February, 1987, for leading counsel in London to advise as to the Plaintiffs' prospects in the action and to settle any further pleadings if that was justified. As he had not received that advice, but expected it at any moment, I granted him an adjournment to a date to be fixed, which was fixed for the 11th October, 1988.

However, on 7th October, Mr. Scott applied to the Court for a declaration that his firm had ceased to be attorneys for the Plaintiffs, his affidavit in support showing that that was the wish of the Plaintiffs. At the hearing on 11th October, I dealt with that application first, and for reasons which I gave, I declined to make the declaration sought. Mr. Scott, therefore, continued to act for the Plaintiffs on the hearing of the two applications made by the 9th Defendant (the 8th Defendant having died in the meantime) and the 3rd Defendants, respectively. Let me state at once that he did so with admirable tenacity, attempting to defend pleadings not drafted by him.

In dealing with the applications, it is necessary, first, for me to decide which Rules of the Supreme Court apply. The Originating Summons was filed before, but these applications were filed after, the 4th January, 1988, upon which date new Rules of the Supreme Court came into effect. The wording of Order 1 rule 1(5) of the new Rules, known as RSC 1985, causes the question to be raised for doubts on the subject have been expressed. Order 1 rule 1(5) reads as follows:

(5) "These Rules shall not have effect in relation to any proceedings taken in any cause or matter which was pending before the Court or a Judge thereof immediately before the date appointed under rule 1(1) and any proceedings taken in such cause or matter shall be continued to final determination in accordance with the Rules in force immediately before the date so appointed."

For my part, I believe that the use of the singular 'was' can only apply to the words 'any cause or matter' and cannot apply to 'proceedings'. I hold, therefore, that as a matter of law these applications are proceedings in a cause which was pending before RSC 1985 came into operation and that they fall to be determined, therefore, in accordance with the Rules in force immediately before the 4th January, 1988, namely the 1952 Rules. All references hereafter to Rules of the Supreme Court are, therefore, to these Rules.

I turn, therefore, to the first ground of the instant applications, namely that the Originating Summons discloses no cause of action against the applicants. RSC Order 54 rule 4B required an originating summons to be in Form 1A, B, 1G or H in Appendix 1K. That had the effect of making an originating summons correspond in form with a Writ. In my judgment, this Originating Summons does that. In setting out merely the "relief or remedy required in the action" it conformed with RSC Order 2 rule 1. But a Writ, if not specially endorsed, must be followed by a Statement of Claim which should set out in summary form the material facts upon which a claimant relies, but not the evidence by which they are to be proved: RSC Order 19 rule 4. I treat Mrs. Brown's affidavit as being in the nature of a statement of claim in this action (there being no other) and look to see if it complies with Order 19 rule 4, so far as these Defendants are concerned.

At paragraph 5 of her affidavit, Mrs. Brown recites incontrovertible facts which do not, of themselves, advance the Plaintiffs' case one inch. There is nothing in those facts to show that the Testator owned any real estate at his death: the maxim 'nemo dat quod non habet' applies. Likewise, the mere affirmation by Mrs. Brown in paragraph 6 of her affidavit that "the Testator was entitled to an undivided moity of the property specified in the Appendix to the Originating Summons" does not make it a fact. She appears to recognise that by stating "This claim is

established as follows:" and sets out in subparagraphs (a) to (j) what may well be further incontrovertible facts. But it is the statements contained in subparagraphs (c) to (j) particularly, which go to the heart of this case. Those subparagraphs deal in turn with each of Augustus Virgil's children who inherited his estate, upon their mother's death, as tenants in common in equal shares. The Testator derived such title as he had, if he had any, from the daughter of Augustus named at subparagraph (j), Elizabeth Marian Carter. Subparagraphs (c) to (j) are totally silent as to dispositions, if any, which the children of Augustus Virgil may have made during their lifetimes of the land which they inherited.

Mr. Scott, for the Plaintiffs, hints that the Indentures which show that there were such dispositions during the lives of those children (and some have been exhibited to Affidavits in the action), from which some of the Defendants derive title, could have been unlawful by reason of fraud, forgery, undue influence or want of form. By the latter I understood Mr. Scott to imply that as all of the children of Augustus Virgil inherited his real estate as tenants in common in equal shares, they all, as co-parceners, had to agree to the making of any disposition. His argument would be that if they had not done so, or if they did not have recourse to the machinery provided by law for those reluctant to consent (under the Partition Acts of 1855 and 1914), such dispositions could be set aside.

But that argument would be to overlook the maxim 'omnia praesumuntur legitime facta donec probetur in contrarium' (all things are presumed legitimately done until the contrary is proved): Co.Litt.232(b). The Plaintiffs have had six years since their Originating Summons, or over sixteen years since the date of their uncle's death, in which to find evidence to support allegations which would bridge the gap between the simple assertions made in paragraphs 6 and 9 of Mrs. Brown's affidavit and the matters of which Mr. Scott hints. Moreover, by having had a number of Defendants dismissed from the action they have been put on notice to do so. But they have not done so. The pleadings as they stand disclose no cause of action, in my judgment, not only against these Defendants but against any Defendant.

As to the second ground, that the applications should be allowed on the basis that there has been a want of prosecution of the Originating

Summons by the Plaintiffs, it seems to me that the evidence is all one way. I have rehearsed the history of this Summons. The Plaintiffs have been put on notice time after time of the need to prosecute their claim. Yet to this day, no further affidavit has been filed in furtherance of the Plaintiffs' claim for a declaration since Mrs. Brown's affidavit which was filed with the Originating Summons. As to the Court's approach to such an application, I receive some assistance from the judgment in United Bank Limited v. Maniar, and others [1988] 1 All E.R. 229 at p. 232 letter 'e'. Millett, J., accepted the submission of counsel for the defendants, who were seeking to strike out for want of prosecution, that the approach to be adopted by the Court was not as in the case of an action begun by writ (i.e. of asking whether the plaintiff and/or his advisors have been guilty of inordinate and inexcusable delay) but whether the plaintiff had "failed to prosecute the proceedings with due dispatch" the test laid down in RSC for England and Wales for 1987 at Ord. 28 r. 10. Applying that approach, I have come unhesitatingly to the conclusion that both applications are justified and should succeed.

On both of the grounds alleged by the Defendants, therefore, they are dismissed from the action, with costs, for I can see no reason why either should be deprived of such an order.

I would merely add this: Order 54A rule 1 provides at subparagraphs (a) to (e) for a number of different remedies for which application may be made. Rule 4 provides, in relation to an application under rule 1(a) (that is for the Court to construe 'a deed, will or other written instrument'), that the Court or a Judge shall not be bound to determine any such question if in the opinion of the Court or Judge it ought not to be determined on originating summons. In Re Amalgamated Society of Railway Servants, Addison v. Pilcher (1910) 2 Ch. 547, it was held that if no question of the construction of an instrument arises (and no such question arises on the Will of John Augustus Alexander Virgil), the Court will not give partial relief by making a declaration but will leave the whole matter to be dealt with in an action. In my judgment, for the same reasons, when a declaration is sought, where contentious matters are in issue, suit should normally be joined by writ: see Re Sir Lindsay Parkinson and Co. Ltd. Settlement Trusts (1965) 1WLR 372. See also

Millett, J., in United Bank Limited (supra) at p.230 letter 'j' where he said: "The originating summons procedure provides an expeditious means for the speedy resolution of cases where there is no, or no substantial, dispute of fact." It is quite clear from Mr. Scott's submissions that very contentious matters indeed would be in issue in this case, and I have already referred to the nature of those matters, without which, or so it seems to me, the Plaintiffs' claims could not possibly proceed. Accordingly, it follows that, in my opinion, such issues should be canvassed, if at all, by way of writ and not by way of originating summons. This course would provide proposed defendants with all the machinery available for discovering what precisely the case alleged against them is.

DATED the 25th day of October 1988.

MARTYN WARD, J.