4.3.98

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO 296 OF 1986

BETWEEN : A. STEVE MCFIELD PLAINTIFF

AND: (1) STANLEY WILLMITT
(2) FRANK EBANKS

DEFENDANTS

Appearances

Norman Hill QC instructed by A. Steve McField & Assoc. for the plaintiff
Roald Henriques QC instructed by Steven Barrie of CS Gill & Co. for the defendants.

RULING

I have before me a situation which is unusual even by the often unpredictable standards of litigation.

It involves the question of the intention of the parties when entering into a consent order made by this Court as long ago as November 1987.

At that time the plaintiff had already secured a default judgment against the first defendant a United States resident, who had chosen despite having been deemed to have had notice of these proceedings - to take no part in them.

The dispute between the plaintiff and the first defendant was over their competing asssertions of title to the same property which is the subject of the action as presently joined between the plaintiff and the second defendant.

There is no dispute that the effect of that default judgment as between the plaintiff and the first defendant was to declare the entitlement to be in the plaintiff vis-à-vis the first defendant. There is no challenge to the plaintiff's right to have moved to secure that default judgment or as to his locus standi on the occasion when it was obtained. The legal effect of the default judgment is also clear and undisputed – it creates an estoppel so as to prevent the first defendant from challenging the plaintiff's title as that was the matter directly decided as between them. See New Brunswick Railway Company [1939] A.C. 1 and Halbury's Laws 4th Edition Vol.16 paragraphs 15-17 to 15-30, generally.

On the basis of those authorities Mr. Hill also submitted that the default judgment was also one in rem, creating an entitlement in the plaintiff as against all the world.

My own view is that for present purposes I need not decide whether the judgment was one in rem or one only in personna as against the first defendant .

The issues as they are presently joined before me are clear: the second defendant's claim to the title depends on and comes entirely through that of the first defendant so that the effect of the default judgment, as it stands, will be to prevent the second defendant from asserting a claim to title as against the plaintiff.

The reason for this is that the second defendant dealt only with the first defendant through whom he transacted to purchase the property.

It is acknowledged that the plaintiff had no notice of that transaction and was in no manner a party to them. What is asserted by the second defendant is that the plaintiff holds the property (of which he has actual possession) as trustee, attorney or agent for the first defendant and as the first defendant's interest was transferred to the second defendant the plaintiff is to be deemed trustee for the second defendant of the property

and of any income from it.

The issue at hand is therefore pivoted to the outcome and must so have been regarded by all concerned at the time the consent order was struck.

The plaintiff had already secured a signed transfer of title which he had presented for registration which did not go through because of Mr. Aylin's objections on behalf of the first defendant. Instead a restriction was placed in the register. Within 3 weeks on the 24th September 1986 the plaintiff filed his action against all defendants.

It is in that context that the order is to be construed .

Paragraph one is as follows:

> "1. Plaintiff undertakes not to seek registration of the property the subject matter of this action by trial or settlement." (sic)

Taken as expressed there is some obvious difficulty with the literal state of that provision. However I conclude it must mean the only sensible thing: forbearance on the part of the plaintiff not to seek registration of his title until the conclusion of the action by trial or settlement.

From the tenor of his submission I think even Mr. Henriques accepts that any real difficulty, such as it is, is with the second provision:

> "2. In the event that the Court directs that the property be registered in the name of the second defendant, the plaintiff will consent to the setting aside of the default judgment granting him possession or registration."

I can say immediately that implicit in that provision is the acceptance by the second defendant that the effect of the default judgment as it then stood was to grant the right to possession and to registration of title to the plaintiff.

The issue is over what was meant by the first part – "in the event the court directs that the property be registered in the name of the second defendant"

Mr. Henriques submits that it must be taken to imply the understanding as between the parties that the question of the title of the first defendant (and hence of the plaintiff) is entirely at large because it must have been in the contemplation of the plaintiff and of the second defendant as reasonable men that otherwise there could be a triable issue. There could be no triable issue because the second defendant would have had no hope of success unless the first defendant's title with vis-à-vis the plaintiff could be established. And that that must have been what the trial would have been contemplated to be about - witness the state the pleadings as they then stood, the same pleadings on which the trial would proceed.

The natural conclusion of this argument and one which Mr. Henriques was compelled to address was what then would be the status of the default judgment - which the rest of the second provision of the order clearly contemplated would remain extant - to be set aside in the event of a successful trial in the second defendant's favour.

In addressing that issue Mr. Henriques sought to advance the novel concept not only that the order would be suspended but also that it would be suspended - in effect - so as to have no force whatsoever as an order giving judgment in default.

When asked in that context whether he was not advancing what was tantamount to an estoppel by conduct, he nonetheless asserted no such claim.

I am unable to accept that such a construction as that contended for can be placed upon the provisions of the consent order.

Either the default judgment exists or it does not exist. Either the plaintiff is entitled to

reply upon it or he is not.

There can be no middle ground such that it be deemed "suspended" - in effect so as to leave open the question of title as between the plaintiff and first defendant to be resolved at trial - and then to be set aside depending on the outcome.

If that issue remains at large, and the court were to decide for the second defendant, then there could be no question of the plaintiff "agreeing to consent to set aside" the default judgment. On the other hand if the default judgment exists the matter is res judicata as between the plaintiff and the first defendant - at least so far as this court is concerned.

And as regards what the plaintiff must have intended as a reasonable man in the circumstances of the consent order; I find Mr. Hill's submissions to be compelling. The plaintiff had every right and standing to move to secure judgment in default against the first defendant. Having secured that judgment, he could have had nothing to gain by agreeing to vitiate it so as to allow the second defendant to prove his own title – which could only be done by reliance on the first defendant's claim to entitlement.

The second defendant, at the time of the consent order, was in no position to prevent the plaintiff from obtaining that default judgment against the first defendant. In that respect the second defendant had no locus standi .

I must therefore seek to discern the intention of the parties in agreeing to the provisions of the consent order against the background of those known circumstances.

Against that background I entertain no doubt at all that - as Mr. Hill submits – all that was agreed was that the plaintiff would take no steps to enforce the default judgment which he had secured until the action which remained joined between himself and the second defendant was determined by trial or settlement.

I do not accept that by so doing the plaintiff was making any concession as to his own entitlement vis-a-vis the first defendant insofar as that entitlement depended upon the default judgment which he had secured.

What remained was a matter of proof by the second defendant and it was to be entirely a matter for him to determine how he should proceed depending on the advice of those who advised him.

I do not see the need now to discuss the possible permutations of that advice - one that comes to mind would have been the possibility of endeavouring to get the first defendant to come back in himself to apply to set aside the default judgment or to influence a possible settlement.

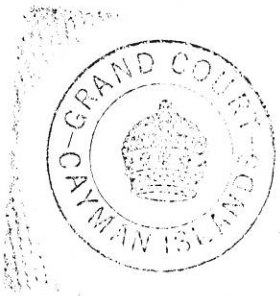
Any such hope, as matters have transpired, would have been futile. The first defendant is nowhere to be seen and the fact of the recalcitrance of the first defendant is a reality which the second defendant must confront as he claims title through the first defendant.

I cannot see my way clear to interpret the provisions of the consent order so as to effect the result which the second defendant desires by the indirect means of restoring the position of the first defendant. The disadvantage to be visited upon the plaintiff would be obvious and unjust.

As to the remaining provisions of the consent order – those in paragraphs 3 and 4 – I regard them as naturally complementary of the other provisions and to be simply in keeping with the understanding reached - to ensure that the status quo was preserved until the resolution of the action.

For those reasons I find that the default judgment remains in effect and that the plaintiff is entitled to rely upon it as he does in paragraph 6 of his defence to the counterclaim and as

he has consistently purported to do in the pleadings and correspondence since the date when it was entered as long ago as November 1987.



Anthony Smellie
Judge of the Grand Court

Dated the 4th day of March 1998