JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/96

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	PHILIP SAMMS	DEFENDANT/ APPELLANT
AND	LISA WONG	1ST RESPONDENT
	JOANNE BLACKERBY	2ND RESPONDENT
	JODY WONG	3RD RESPONDENT
	CHRISTINE WONG	4TH RESPONDENT
	RICHARD CHONG	5TH RESPONDENT
	DONOVAN WONG	6TH RESPONDENT

Leon Green and Oswest Senior-Smith, instructed by
Hamilton, Wong Ken, Hamilton & Green, for the appellant

Michael Hylton, Q.C. and Michele Henry, instructed by
Myers, Fletcher & Gordon, for the respondents

November 3 and 4, 1997; March 23, 1998

FORTE, J.A.:

I have read in draft the judgment of Bingham, J.A. I agree with it and have nothing further to add.

GORDON, J.A.:

I also agree and have nothing further to add.

BINGHAM, J.A.:

The deceased, Walter Rudolph Wong, died testate on May 3, 1994, following a battle with cancer. By his Will, which was drawn up and executed in Canada, he appointed the fifth and sixth respondents as well as the appellant to be the executors and trustees of his estate. During the hearing of the Originating Summons brought by the fifth and sixth respondents on their behalf, as well as on behalf of the other four respondents who are the deceased's next of kin and the named beneficiaries under his Will, the appellant renounced his executorship. He also withdrew any claim he had previously made to having a proprietary interest in premises situated at 34 Old Hope Road, a medical complex and office building known as Medi-Centre Limited, subject to certain conditions relating to a claim to be compensated for services rendered on behalf of the deceased in respect of this undertaking being ascertained and quantified.

The sole remaining question arising on this appeal, therefore, is whether the sum of $500,000 (Canadian) withdrawn by the appellant from an account standing in the deceased's name at the Toronto Dominion Bank constitutes a part of the deceased's estate or is the property of the appellant in that it was a gift to him by the deceased prior to his death.

The evidence before the learned trial judge contained in the several affidavits filed in support of and against the reliefs sought in the Originating Summons is, to say the least, conflicting. What is clear and not in dispute was that on the occasion of his last visit to Jamaica on 31st March, 1994, when the deceased was accompanied by his female companion and live-in partner Brenda Robinson, it was then known that he had been contemplating for some time

returning to Jamaica. According to Miss Robinson he was in the process of transferring money here to facilitate the carrying into effect of his intention.

The appellant had claimed that the shares in Medi-Centre Limited had been given to him by the deceased many years ago in the late 1970s just before the deceased was leaving Jamaica to settle in Canada.

The sum of $500,000 (Canadian), the appellant claims, was a gift from the deceased on the occasion of his last visit just prior to his returning to Canada. This gift was in the form of five blank cheques signed by the deceased and drawn on the Toronto Dominion Bank, each to be filled in for $100,000 (Canadian). They were to be encashed as soon as he had been informed by the deceased that there were sufficient funds available in the account. The fifth and sixth respondents, the co-executors named in the deceased's Will, admitted that they were unaware of this sum of money in the bank account. The fact that it was not specifically devised or mentioned in the Will provides the basis for the appellant contending that this situation would lend credence to his account that the money was not intended by the deceased to form part of his estate and was a gift to him. The appellant further asserted that the deceased was so concerned to know that the cheques had been negotiated, that on his death bed he insisted on knowing whether his instructions to complete and negotiate the cheques had been carried out. In order to put his mind at rest, the appellant told the deceased that he had acted in accordance with his wishes. This was not true, as there was no attempt made to negotiate the cheques until 4th May, 1994, after the death of the deceased.

The fact that the Will was silent as to the disposition of what was in effect a large sum of money, although lending support to the fact that the deceased may have intended that it be disposed of otherwise than under his Will, would not have

been decisive on this issue. It is of significance that the Will is equally silent as to the deceased's Jamaican holdings. These holdings include, apart from investments in a number of public companies, his home at Willow Run, Stony Hill, the Medi-Centre building at 34 Old Hope Road that included three commercial lots.

While asserting that the $500,000 (Canadian) was an outright gift to him during the deceased's lifetime, the appellant gave two conflicting accounts as to what the sum was intended for. He first deponed that a part of this sum was to purchase a town-house next door to his home for the use and occupation of Brenda Robinson. He also said that it was to help towards her future maintenance and support. The town-house was in fact purchased some time after the deceased's death. This was done, however, without the knowledge and consent of the co-executors. Assuming that this was the purpose for which the deceased intended the money to be utilised, the appellant would at best be a trustee of the funds for the benefit of Miss Robinson. As the Will had named three executors, of whom the appellant was one, and appointed them also as trustees under the Will with joint and several powers, for the appellant to proceed to act as he did without informing and obtaining the acquiescence of his co-executors and trustees would have been in clear breach of trust. Miss Robinson further declined to lend her support to a scheme devised by the appellant for the formation of a company in whose name the title of the property was to be vested. She further disclaimed any entitlement to the money, asserting that it rightly belonged to the deceased's children.

All this evidence is clearly inconsistent with the later assertion of the appellant that the sum of $500,000 (Canadian) was an outright gift to him. The fact that the five blank cheques were deposited with David Wong Ken, an attorney-at-

law, when the appellant was summoned to the deceased's bedside in Toronto, Canada, also negatived the appellant's assertion of the money being a gift to him. Added to this was the fact that not only was the office file opened in the deceased's name but the receipts for the cheques were issued in his name. Wong Ken was instructed by the appellant to take instructions not only from him but from the co-executors as well.

This evidence prompted the learned trial judge hearing the summons to posit the question, that if these funds were not then to be regarded by the appellant as belonging to the deceased's estate and were in fact the appellant's property why was it considered by the appellant necessary for such instructions to be given to the attorney?

The learned trial judge, in finding in favour of the respondents on the declarations sought in the Originating Summons, founded his judgment on the fact that the file in David Wong Ken's office was opened in the deceased's name, although the appellant claimed that the funds belonged to him. The issuing of the receipts in the deceased's name he saw as lending further support to the conclusion that the $500,000 (Canadian) was at all material times to be properly regarded as a part of the deceased's estate.

The appellant has sought to challenge the judgment below on the following grounds:

> 1. "The Learned Trial Judge in his assessment of the evidence made reference to and relied upon evidence not proven and failed to take into account evidence clearly proven both *viva voce* and on the affidavits and as a consequence, led himself into error in his findings as to fact;

2. The Learned Trial Judge's treatment of the evidence in his written Judgment superficial and his finding of fact arbitrary;

3. The Trial is a nullity or further or alternatively was unfair in that the affidavits of the Plaintiffs/Respondents and their witness and the *viva voce* evidence given by them contain clear allegations of fraud against the Defendant/Appellant;

4. The Learned Trial Judge erred in law in failing, in the light of the clear allegations of fraud which arise on the plaintiffs affidavits, to adjourn the case for trial into open court as if begun by writ.

5. The Learned Trial Judge erred in his finding of fact in holding that the C$500,000.00 was never any gift to the Defendant and in law in holding that it was unnecessary for him to deal with the principle of *donatio mortis causa."*

Counsel for the appellant, Mr. Green, submitted that, assuming that what is contained in the affidavit of the co-executor Richard Chong dated 21st September, 1994 was true, the appellant had always contended that the funds held by David Wong Ken was his to deal with as he wished. On the basis of what appears at paragraph 15 of the appellant's affidavit dated 9th November, 1994, the learned trial judge misinterpreted the evidence and treated the matter as a credibility issue. The intention of the deceased was what was important. Provided that he intended the appellant to have the money, he was entitled to retain it. The gift would still be good even if the cheques were negotiated after the deceased's death. Learned counsel for the appellant cited in support ***Milroy v. Lord*** 31 L.J. Ch. 798 and ***Strong v. Bird*** [1874] L.R. 18 Eq. 315 in advancing the proposition that although equity will not perfect an imperfect gift and if anything remains to be done by the donor before his death to pass the property to the donee the gift automatically fails.

If, however, there is a continuing intention on the part of the donor up to the time of his death, the appointment of the donee as one of his executors would be sufficient to pass the property to the donee, as by virtue of the appointment the deceased's estate would automatically vest in him.

Counsel for the respondent, Mr. Hylton, Q.C., submitted that in coming to his decision the learned trial judge considered not only the evidence contained in the affidavits before him, but also the documentary evidence. The file opened at David Wong Ken's office in relation to the five cheques as well as the receipts were in the deceased's name. The deceased was, on the occasion of his last visit to Jamaica between 31st March and 10th April, 1994, according to the unchallenged evidence of Brenda Robinson, contemplating relocating back to Jamaica. Contrary to the evidence of the appellant, both Brenda Robinson and the deceased's daughter Lisa Wong knew of the existence of the $500,000 (Canadian).

Paragraph 15 of the appellant's affidavit dated 9th November, 1994, further negates any intention on the part of the deceased that this sum was intended as an outright gift to him. The conflicting evidence in the appellant's affidavit, when added to the weight of the documentary evidence, had the effect of casting doubt on the credibility of the appellant and went towards supporting the finding of the learned trial judge that the money was rightly to be regarded as a part of the deceased's estate. Even assuming that the five cheques were to be a gift to the appellant, as they were not negotiated before the testator's death, the gift failed. The appointment of the appellant as one of the executors did not save the gift as he renounced his executorship before the obtaining of probate. Counsel cited in support ***Hewitt v. Kaye*** [1868] Vol. VI L.R. Eq. 198.

Paragraph 15 of the appellant's affidavit to which reference has been made by counsel states, inter alia:

> "**15.** That on the night of Friday 22nd April, 1994, Junior telephoned me from Canada at which time we spoke for a very long time. I believe for well over an hour. Junior told me that he was not likely to live beyond another couple of weeks. We discussed many things and amongst them he insisted that I lodge the cheques as at least $500,000 Canadian was in the account to cover it. That during that conversation Junior asked me to protect Brenda Robinson and to ensure that she be cared for financially for the remainder of her life. In so doing he expressed a fear on his part that if entrusted with (a) (sic) money no matter how great the sum she was likely before long to spend it all and fall into need. He expressly did not want this to happen."

It is arguable whether the claim of Lisa Wong concerning her knowledge as to the existence of the $500,000 (Canadian) in the bank account was true, she being the deceased's daughter and a party with an interest to serve. Brenda Robinson's account clearly falls into a different category. Given the contents of paragraph 15 of the appellant's affidavit, she could have chosen to lay claim to the money as a beneficiary by way of a trust. She chose instead to disclaim any interest to the money. This attitude on her part would clearly have impressed the learned trial judge when he came to assess her testimony.

Grounds 1 and 2

These may be conveniently dealt with together. In coming to his findings of fact, the learned trial judge relied not only on the affidavit evidence of the parties. He had the added advantage of seeing and hearing the deponents and observing their demeanour as to the manner in which they reacted under cross-examination. In his written judgment he expressed himself in the following manner:

> "I embarked upon and completed a detailed and critical analysis of the evidence produced by the affidavits on both sides and also in the cross examination at the hearing."

The advantage the learned judge had of seeing and hearing the witnesses meant that, unless his findings were based upon non-existent facts or on a wrong premise, this court was in no better position so as to disturb the conclusions at which he arrived. {vide ***Watt (or Thomas) v. Thomas*** [1947] 1 All E.R. 582}.

It was on this basis that the learned trial judge rejected the appellant's claim and found that there was no gift of $500,000 (Canadian) to him and made the consequential orders that flowed from his conclusions.

This primary finding he saw as relieving him from a further consideration of the legal effect of the alleged gift based upon upholding the gift as a valid *donatio mortis causa*. As this complaint is covered by ground 5, before considering the merits of that ground, one needs to deal briefly with grounds 3 and 4.

Grounds 3 and 4

These grounds raise the issue that the evidence deposed in the several affidavits of the respondents in support of the originating summons amount to allegations of fraud on the part of the appellant. Learned counsel for the appellant submitted that the learned trial judge erred in law by failing to adjourn the hearing before him into open court. He further contended that the treatment of the evidence by the learned judge was superficial.

It is trite law that the cardinal rule governing pleadings require that where fraud is alleged it has to be specifically alleged and strictly proven. The appellant, through his counsel, here seeks to infer fraud from the respondents' affidavits. An examination of the affidavits, however, did not establish an allegation of fraud but

merely sought to provide a credible narrative of the events supporting the reliefs sought in the originating summons. In the circumstances, the issues raised on the affidavits do not *per se* amount to an allegation of fraud. The learned judge was correct, therefore, in concluding that the originating summons was properly brought under section 532 of the Judicature (Civil Procedure Code) Law and that he had the jurisdiction to hear the matter in the manner he did.

For the sake of completeness, one needs to be reminded that the ground covered by this complaint as to fraud had been previously rehearsed before Langrin, J. in March, 1995, and determined in favour of the respondents. His order was subsequently affirmed on appeal by this court (vide pp. 167-169 of the Record). The appellant cannot at this stage, therefore, properly raise any argument touching on the same question.

Ground 5

Counsel for the appellant contended that the learned trial judge erred in law and fact in failing to consider that the money was given to the appellant by way of a valid *donatio mortis causa*. He relied in support on ***Rolls v. Pearce*** [1897] 7 Ch. D. 730. This contention is untenable. Although at first blush it may have appeared that the learned judge did not deal with this question, on a closer examination of the judgment it becomes clear that he fully considered the matter.

At page 4 of his written judgment, having found on the evidence that the sum in question ($500,000 Canadian) was not a gift to the appellant, the learned judge then said:

> "In view of my findings above I do not find it necessary to deal with the principle of *donatio mortis causa* simply because there never was any gift of this $500,000 to the defendant. In ***Snell's Principles of Equity*** 28th Edition, the learned author has made it

> quite clear that there are certain types of property not capable of passing by *donatio mortis causa*. Among such items are included cheques drawn by a deceased on his banker. The author is at pains to explain that a cheque is only a revocable authority given to a banker to pay money, so that a delivery or handing over of a cheque is neither a delivery of property or a document of title to property."

The learned trial judge cited as the authority for this statement of the law ***Re Beaumont*** [1902] 1 Ch. 889, 71 L.J. Ch. 478. The headnote reads:

> "On February 19, 1901, B., who was very ill and in expectation of death, drew a cheque for 300*l.* in favour of E., to whom it was at once handed. E. endorsed the cheque, and on February 23 it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., and that he required some confirmation of the signature. The Court found that the manager was minded to 'lend' the money to pay the cheque if he found that the signature was genuine. B. died on February 25, 1901, without the cheque having been cashed:
>
> *Held*, following ***Hewitt v. Kaye***, (1868) L.R. 6 Eq. 198, and ***In re Beak's Estate,*** (1872) L.R. 13 Eq. 489, that there was not a valid donatio mortis causâ."

In his judgment Buckley, J. having set out the facts said:

> "A donatio mortis causâ is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death."

Among the examples which the learned judge gave as being good subjects of a *donatio mortis causa* were:

1. "A promissory note payable to the deceased's order but not indorsed.

2. Bills of exchange in favour of the deceased or his order.

3. Bills of exchange payable to order and which had not been indorsed.

4. A cheque payable to the donor's order and not indorsed."

Later down in his judgment, the learned judge then addressed the question in issue thus:

> "But how does the case stand where the deceased's own cheque is handed over? A man's cheque in favour of another person is not an equitable assignment of any part of the donor's balance at his bankers': ***Hopkinson v. Forster*** L.R. 19 Eq. 74. The cheque is only a revocable mandate, which may be stopped in the donor's lifetime and is revoked by his death. If, before the donor's death, the cheque is presented and paid, there is no question of donatio mortis causâ of the cheque, although there may be a question whether the money has been received on the terms that it shall only be retained in case of the donor's death. If the cheque is not presented in the donor's lifetime the gift is ineffectual; the cheque is a revocable order which is revoked by the donor's death: ***Hewitt v. Kaye*** L.R. 6 Eq. 198." [Emphasis supplied]

Counsel for the respondents, Mr. Hylton, Q.C., also relied upon ***Hewitt v. Kaye*** (supra) in contending that the principle of *donatio mortis causa,* upon which the appellant's counsel sought to place reliance as supporting the gift of the money, has no application to negotiable instruments such as cheques.

The decision of ***Rolls v. Pearce*** (supra) relied on by the appellant, when examined can be seen as a case which was decided upon special facts. The wife of the testator having negotiated the cheques handed to her by him at a bank and

drawn on the funds obtained to pay the testator's debts during his lifetime the gift was upheld by the court as good *donatio mortis causa*.

In this case, even assuming that the deceased intended the appellant to receive the proceeds of the cheques, as they were not negotiated in the deceased's lifetime the authority to his bankers to make payment being withdrawn by his death, the gift failed. This is based upon the clear legal situation brought about by section 75 of the Bills of Exchange Act which provides that:

> "**75.** The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by--
>
> (1) countermand of payment;
>
> (2) notice of the customer's death"

In ***Hewitt v. Kaye*** (supra) Lord Romilly, M.R., delivering the judgment of the court, expressed himself as follows:

> "...a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave this cheque at night, and she died in the course of the same night before it could be presented; suppose she had said, 'I have got £600 in my desk; bring it to me, and I will give you the money,' and had died before it was brought to her, that would have been no gift; and the gift of a cheque is the same thing; it is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death." [Emphasis supplied]

As the cheques in this case were not negotiated until 4th May, 1994, following the testator's death, based upon the principle enunciated in ***Hewitt v. Kaye*** (supra), the gift therefore fails. As the learned judge held, therefore, the appellant was

obliged to make good the sum in question to the fifth and sixth respondents in their capacity as the remaining executors.

Counsel for the appellant sought to rely on the rule in ***Strong v. Bird*** (supra) as supportive of the gift being saved by the appointment of the appellant as executor in the Will of the deceased. As the learned counsel for the respondents rightly contended, however, having renounced his executorship the appellant could not pray in aid the application of the rule to save the gift.

The weight of the evidence was clearly supportive of the finding reached by the learned trial judge, that there was no gift of the sum in question to the appellant.

Both on a careful review of the facts which he had before him and on the law applicable, I would uphold the decision arrived at by the learned judge and dismiss the appeal with costs to the respondent to be agreed or taxed.