JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL NO. 54/98

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**LUCILLE WILTSHIRE**	**APPELLANT**
AND	**CLIFTON WILTSHIRE (EXECUTOR, ESTATE ARTHUR WILTSHIRE)**	**RESPONDENT**

Debayo A. Adedipe for the appellant

Miss Judith Clarke for the respondent

November 1, 2, 3, 1999 and March 13, 2000

PANTON, J.A.

The appellant is a beneficiary under the will of her late father. She is also sister of Clifton Wiltshire the respondent who is the executor of their father's will.

By an originating summons, the appellant sought orders as follows:

> "(a) determining the true extent of her interest in the estate of the late Arthur Wiltshire particularly in relation to the specific devise contained in paragraph 6 of the said Arthur Wiltshire's will;
>
> (b) that the defendant do render a true and proper account of his administration of the estate of the late Arthur Wiltshire;

(c) directing Clifton Wiltshire to abstain from taking or continuing any course of action which is calculated to defeat or diminish the specific devise to the plaintiff contained in paragraph 6 of the will of the late Arthur Wiltshire."

Both parties to these proceedings filed affidavits. Karl Harrison, J. having heard the application, made the following orders:

"(1) a right of way would be required over the land devised to the plaintiff in paragraph 6 of the will of Arthur Wiltshire deceased;

(2) the defendant do render a true and proper account of his administration of the estate of the late Arthur Wiltshire to the Registrar of the Supreme Court within 30 days from the date of this order.

(3) no order is made in relation to (c) in the originating summons."

It will be readily seen that the learned judge acceded to the request of the appellant as set out in paragraph (b) of the originating summons. It is therefore quite puzzling that the appellant has filed as a ground of appeal [namely, ground 3] a complaint that the judge made "a final decision before ordering that accounts be filed."

The learned judge's order sanctioned the creation of a right of way over the land devised to the appellant; and he refused to fetter the respondent in his administration of the estate so far as it would prevent the creation of the right of way.

The appellant has challenged the decision of the learned judge, and wishes this Court to declare and order that:

"(1) The proposed right of way through the frontage of the land devised to the plaintiff derogates from the devise to the plaintiff; and

(2) ... a right of way to the land being sold can be created via the road leading to the back of the land devised to the plaintiff and through the said land."

The main thrust of the appellant's challenge is, therefore, in respect of the right of way.

The relevant facts

Arthur Wiltshire died testate on or about October 27, 1967. Probate of his will was granted on October 7, 1969, to the respondent and his mother. The latter died in 1984. The respondent is therefore the sole surviving executor.

Paragraph 6 of the will shows a devise to the appellant of "my home with all the dwellings and one acre of land situated at Junction." The land is described further as "having a frontage on the main road." In paragraph 8 of the will, the deceased bequeaths "the rest remainder and residue of my estate ... to my beloved wife Hilda Wiltshire." It also gives her the right to live "in the home and off the estate until her death."

The devise to the appellant, therefore, appears to have been subject to the life interest of Hilda Wiltshire, although the appellant has been resident on the devised land since 1967 – that is, during the lifetime of Hilda Wiltshire.

In 1995 the respondent agreed to sell a portion of land which forms part of the residuary estate. A plan of the land, which was done in 1986, shows that from as early as then the surveyor, having been asked so to do, had made provision on the plan for a roadway by which access could be gained to this land. The proposed road would be cut through the land devised to the appellant going as close as 9 ft. to a house thereon.

Grounds of Appeal

The grounds of appeal relied on by the appellant in her quest to have us say that the proposed right of way derogates from the devise are :

> "1. The learned trial Judge erred in accepting or purporting to accept the evidence of the Surveyor over the evidence given by the Plaintiff regarding access to and from the land and finding as he did at page 11 of his written judgement that the proposed right of way is one of necessity and any other route would probably result with permission being sought for a right of way to be obtained from other persons who own land in the immediate area for the following reasons:
>
> a) the Plaintiff's evidence was that there was an alternative route by which the land being sold could be accessed by eventually making a right of way through the back of the land devised to the Plaintiff
>
> b) the sub-division plan prepared by the said surveyor shows a roadway leading to a lot 8, part of the sub-division of the land forming the estate of Arthur Wiltshire. This road also leads to the back of the land devised to the Plaintiff.
>
> c) The evidence of the Surveyor actually presented three possibilities:
>
> i) in Paragraph 8 of his affidavit he deponed that he did not observe any alternative place where the road could have been located so that it could pass over land owned by the estate of Arthur Wiltshire
>
> ii) in Paragraph 10 of his affidavit he deponed that any other location to the road would involve making it deeper into the land of the estate of Arthur Wiltshire, or
>
> iii) putting it through the land of adjoining neighbours

2. The learned trial Judge erred in finding that the proposed right of way "seems the most convenient one" and that "there seems to be no other reasonable alternative: for the following reasons:

a) The learned trial judge appears to have given undue weight to considerations of the convenience of the prospective Purchaser and the executor at the expense of the convenience of the Plaintiff

b) The said house on the land devised to the Plaintiff was constructed at least eleven years prior to the Agreement for the sale of the land. On the evidence the house had been built with the permission or acquiescence of the executors

c) There is nothing unreasonable about the alternative route proposed by the Plaintiff

3. Having regard to the conflicting evidence as to contributions made by the beneficiaries to meet the administration expenses the learned trial judge erred in making a final decision before Ordering that accounts be filed.

4. The learned trial judge erred in declining to make an order in relation to paragraph (c) of the Originating Summons and ought to have found on the evidence before him that the proposed right of way would diminish the specific devise to the Plaintiff for the following reasons, inter alia:

i) though the Plaintiff would probably still get one acre of land, the frontage, the most valuable part of the land, would be less than stipulated in the will

ii) the 2nd to 5th devises (to the testator's children) are delineated partly by reference to the frontage of the land."

As indicated earlier, Ground 3 is misconceived as the learned judge did accede to the appellant's request that the executor be ordered to render a true and proper account of his administration of the estate.

The surveyor's evidence

The first ground of appeal challenges the judge's acceptance of the evidence of Kerith Masters, a commissioned land surveyor. The relevant portions of that evidence are taken from Mr. Masters' affidavit in which he states as follows:

> "3. THAT I surveyed land at LYNCH & BALLARD PATENT in the Parish of St. Elizabeth. These lands are registered at Volume 725 Folio 1 and a piece of unregistered land adjoining.
>
> 4. THAT I surveyed all lands and I was instructed that these lands are owned by the Estate of the late ARTHUR WILTSHIRE.
>
> 5. THAT I was instructed to survey a roadway to a parcel of the unregistered land
>
> 6. THAT this road leads from the main road leading from JUNCTION to TOP HILL
>
> 7. THAT the parcel of land to which the roadway leads is less than Three Chains from the main road and the road was located to the nearest point of access to main road
>
> 8. THAT I did not observe any alternative place where the road could have been located, so that it could pass over land owned by the estate of ARTHUR WILTSHIRE
>
> 9. THAT there was no objection when the survey was being done to the road being located at that point.
>
> 10. THAT any other location to the road would involve making it deeper into the land of the Estate of ARTHUR WILTSHIRE or putting it through the land of adjoining owners.
>
> 11. THAT where the road is located has been put to the nearest point to the main road where it touch on the land of ARTHUR WILTSHIRE."

This ground of appeal points to a conflict between paragraphs 8 and 10 of the affidavit. The conflict is however more apparent than real. These paragraphs ought to be viewed in the light of paragraph 7. What is being aimed at is easy access to and from the main road.

Mr. Adedipe argued that paragraph 10 of the affidavit raises the possibility of putting the road deeper into the land of the estate of Arthur Wiltshire. He submitted that seeing that it is the vendor who selects the site of any right of way, the executor- as vendor- should have selected the area referred to in paragraph 10 of the affidavit. Further, he said, no mention is made of a right of way in the agreement for sale. He conceded that there were two choices open to the executor – "the longer route deeper into the estate, and the shorter which would bring the way in close proximity to the beneficiary's house." The beneficiary is the appellant.

Miss Clarke countered that the only credible and reliable evidence before the judge as to what would constitute a reasonable and convenient right of way was the evidence of the surveyor. That being so, she said, the learned judge was right in his acceptance of that evidence.

We find merit in Miss Clarke's contention. There was no evidence as to the practicability of creating a way other than that which was proposed by the surveyor. There are numerous matters that must be considered when a road is being contemplated. There are engineering considerations with the attendant cost factors. The learned judge had no evidence on such matters. Indeed the indications are that any other road would have cost more than that which is proposed and it is clear that the estate suffers from costs constraints.

It seems to us that the learned judge was clearly right in relying on the evidence of the surveyor as to the need for the road that was proposed at the location that he recommended.

Grounds 2 and 4 were argued together.

Mr. Adedipe submitted that, at the very least, principles of proprietary estoppel fell for consideration. He said that there was no dispute that the appellant had been given permission to build a house on the property. She, having done so, was now the victim of the respondent's decision to cut a road beside her house. He further submitted that no right of way can properly be put where the executor proposes to put it as the appellant has acquired a proprietary interest in the land, and a Court of Equity will prevent the infringement of that right. For these submissions Mr. Adedipe indicated that he was relying on the cases **Dillwyn v Llewelyn** (1861-73) All E.R. Rep. 384 pg. 387 E-F and **Inwards and Others v Baker** (1965) 1 All E.R. 446 at 448 G-H, 449 D and I.

In **Dillwyn v. Llewelyn** (1861-73) All E.R. Rep. 384, a testator devised his property to his wife for life with remainder to the plaintiff, his son, for life, with remainder to the first and other sons of the plaintiff. Subsequently, the plaintiff required a place to live. As a result the testator and the plaintiff signed a memorandum indicating that although the property was being left in the will for the testator's wife, it was her wish that a dwelling house be provided for their son, the plaintiff.

The latter took possession of the property and expended with the knowledge of the testator large sums in the erection of a house and generally improving the property.

It was held that although a voluntary agreement will not be completed or assisted by a court of equity in cases of mere gift if anything be wanting to complete the title of

the donee in obtaining it, the subsequent acts of the donor may give that right; in the circumstances the subsequent expenditure by the plaintiff with the approbation of his father supplied a valuable consideration originally wanting; and the plaintiff was entitled to the fee simple of the property.

At page 387 E-F, Lord Westbury, L.C. said:

> "So if A puts B in possession of a piece of land, and tells him, "I give it to you, that you may build a house on it; and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract which arises from the contract, and to complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal agreement, not binding originally for want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of, the subsequent part performance."

The headnote of **Inwards and Others v Baker** (supra) reads:

> "In 1931, the defendant was considering the building of a bungalow on land which he would have to purchase. His father, who owned some land suggested that the defendant should build the bungalow on his land and make it a little bigger. The defendant accepted that suggestion and built the bungalow himself with some financial assistance from his father, part of which he had repaid. He had lived in the bungalow ever since. In 1951, the father, died. The trustees of his will, who in fact visited the defendant at the bungalow, took no steps to get him out of the bungalow until 1963, when they claimed possession of it on the ground that, at the most, the defendant had a licence to be there which had been revoked.
>
> HELD: since the defendant had been induced by his father to build the bungalow on his father's land and had expended money for that purpose in the expectation of being allowed to remain there, equity would not allow the expectation so created to be defeated, and accordingly the

defendant was entitled to remain in occupation of the bungalow as against the trustees.

Dictum of Lord Kingsdown in **Ramsden v Dyson** [(1866), L.R. 1 H.L. at p. 170] and **Plimmer v. Wellington Corpn.**[(1884), 9 App. Cass. 699] applied."

Lord Denning, M.R. said at page 448 F-H:

"We have had the disadvantage of cases which were not cited to the county court judge, cases in the last century, notably **Dillwyn v. Llewellyn** ([1861-73] All ER Rep. 34) and **Plimmer v. Wellington Corpn.** [(1884) 9 App.Cas. 699]. This latter was a decision of the Privy Council which expressly affirmed and approved the statement of the law made by LORD KINGSDOWN in **Ramsden v. Dyson** (1866) L.R. 1 H.L. 129 at p. 170. It is quite plain from those authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under the expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. Counsel for the plaintiffs urged before us that the licensee could not stay indefinitely. The principle only applied he said, when there was an expectation of some precise legal term; but it seems to me, from **Plimmer's** case (at pp 713, 714) in particular, that the equity arising from the expenditure on land does not fail

'merely on the ground that the interest to be secured has not been expressly indicated... the court must look at the circumstances in each case to decide in what way the equity can be satisfied'."

Further, at page 449 C-D, Lord Denning, in dealing with the purchaser's case, said:

"... I think that any purchaser who took with notice would clearly be bound by the equity. So here, too, the plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that as a result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case that it can be

> satisfied by holding that the defendant can remain there as long as he desires to use it as his home."

And at page 449 G-I, Danckwerts, L.J. said:

> "The defendant was induced to give up his project of building a bungalow on land belonging to somebody other than his father, in which case he would have become the owner or tenant of the land in question and thus have his own home. His father induced him to build on his, the father's land and expenditure was incurred by the defendant for the purpose of the erection of the bungalow.
>
> In my view, the case comes plainly within the proposition stated in the cases. It is not necessary, I think, to imply a promise. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

Miss Clarke on the other hand submitted that:

(1) proprietary estoppel is inapplicable to the instant case;

(2) the proposed right of way does not derogate from the principle set out in the cases;

(3) the appellant's house had not been built with any promise in mind;

(4) there was no evidence that the devise to the appellant would not have been affected in any event by the process of administration – that is, quite apart from the proposed way; and

(5) an executor cannot confer any proprietary interest on a beneficiary before ascertaining the extent of the net residue of an estate.

She said that the specific devise to the appellant could not be substantially ascertained until the estate had been fully administered. It follows, she said, that it did not rest in the

trial judge to make any finding that was adverse to the executor because there came about during the executor's administration of the estate a risk to the value of the appellant's property. Further, there was no evidence presented to the learned trial judge to indicate that it was the most valuable portion of the appellant's property that would be affected. So far as the executor and the residuary estate are concerned, Miss Clarke relied on the Privy Council decision in **Commissioner of Stamp Duties (Queensland) v. Livingston** [1964] 3 W.L.R., 963.

This case concerned a claim by state authorities for the payment of succession and probate and administration duties. A testator, by his will, gave the residue of his personal estate to several persons including his widow (Mrs. Coulson). She died intestate while the testator's estate was still in the course of administration. No clear residue had been ascertained at that time so no final balance payable or attributable to the shares of residuary beneficiaries had been determined.

The ground on which the claim was based was that Mrs. Coulson's death had conferred a succession on those becoming entitled to her estate.

It was held (affirming the decision of the majority of the High Court of Australia), that in the case of an unadministered estate the assets as a whole were in the hands of the executor, his property, and until administration was complete it could not be said of what the residue, when ascertained would consist or what its value would be. At the date of the widow's death therefore, there was no trust fund consisting of the testator's residuary estate in which she could be said to have any beneficial interest because no trust had as yet come into existence to affect the assets of his estate.

We do not think that principles of proprietary estoppel are relevant to the instant case. More applicable, we think, is the reasoning contained in the judgment of the Privy Council delivered by Viscount Radcliffe. At pages 969 to 970, the judgment reads thus:

> "When Mrs. Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. The nature of that interest has been conclusively defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee.
> "An executor," said Kay J. In **re Marsden, [(1884) 26 Ch.D. 783, 789]** "is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office." He is a trustee "in this sense."
>
> It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed "duties in respect of the assets" as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been

> treated, as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms."

In the instant case, it is quite clear that the land which forms part of the residuary estate had to be sold. The estate appears to be in dire financial straits. Conventional wisdom would require the profitable disposal of the residuary estate in toto. In disposing of this land, it is only right that a way of necessity be created. A beneficiary's view of the proper place for a road cannot be given precedence over the considered expert advice of an independent party, in this case, a commissioned land surveyor. The learned judge cannot be faulted for preferring the surveyor's judgment.

In all the circumstances, we are of the view that the learned judge was right in making the orders that he made. We find no merit in the appeal; accordingly, it is dismissed with costs to the respondent to be agreed or taxed.