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IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 3/98

COR: THE RON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE RON. MR. JUSTICE GORDON, J.A. ,

BETWEEN BYRON HEADLEY PlAINTIFF/APPELLANT

AND BARRINGTON HEADLEY
DEFENDANT/RESPONDENT

Georgia Gibson-Henlin instructed by E.H. Williams & Associates for the Appellant

Mr. Raymond King instructed by Messrs. Watt, King & Robinson for the Respondent

5th, 6th October. 1988 and 26th March, 1999

FORTE J.A.

This is an appeal from an order made by the Learned Resident Magistrate for the parish of St. James refusing to grant recovery of possession of laJ1d to the appellant.

The land in question as described in the plaint is land known as Brissett land bounded on the North by Catherine Davis, South by Clinton Davis and the late John Pinnock,, East by the main road from Cambridge to Ducketts, and West by land owned by Clinton Davis.

Between the appellant and the respondent there were two contesting claims to the property, the fanner claiming on the basis of a Deed of Gift purportedly executed on the 29th September, 1987 by the owner of the land, Mabel Fullett the aunt of both parties who are cousins, and the latter through Mrs. Fullet's Will which was executed on the 9th July, 1990. The appellant alleged that the respondent who occupies the property is a tenant at will and having served him the necessary notice to quit, which he disobeyed, this action has been brought.

Evidence was advanced at the trial as to the circumstances surrounding the signing of the Deed of Gift, and challenge was made by the respondent, as to the credibility of the witnesses who testified in that regard. There was also evidence from both sides, concerning the care of the owner of the land, during her latter years, when her health was fading and during which time she was dependent on the care of others, Each party

contended that he was the kind benefactor in that regard, seeing to her needs, and meeting the expenses *for* her care. It is on this basis each maintained that Mrs. Fullett in appreciation granted to them the property in question.

The Learned Resident Magistrate did not state definitively what account of the facts she accepted and apparently was content to decide the case on the legal question as to the effect of a Deed of Gift which was unsealed, a factor that cou1d not be disputed by the appellant. Even 501 the Learned Resident Magistrate made some statements it, her reasons for judgment, which suggest that she, preferred the evidence of the respondent in that regard.

She stated:-

> "(i} The validity of the Deed of Gift came into question
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> > when both Scarlett and Morris(witnesses for the appellant) contradicted each other as to when and where the Deed of Gift was signed, and as to whether or not Mabel Fullett decided to make an '*X'* mark and he did not know if she could read or write;

> (ii) To my mind and on a balance of probabilities it is more likely that Mabel Fullett would give her property to the person who was looking after her prior to her death.. and to the making of the Will;
>
> The weight of the evidence supports the Defendant that he lived at Mrs. Fullett's home *for* many years, and he Was the One who was taking care of her up until death",

On those findings it appears that *the* Learned Resident Magistrate on a balance of probabilities rejected the appellant's testimony as to the Deed of Gift and concluded that the account given by the respondent Was the truthful account and that Mrs. Fullett passed the property through her Will to the respondent.

Nevertheless the teamed Resident Magistrate considered the legal effect of the unsealed Deed of Gift as the main issue in the case. This is obvious from the following words extracted from her reasons:

> "After he8rlng the evidence on both sides.. it is my opinion that even if both the Deed of Gift and the Will were made by Mabel Fullett the main issue to be determined is the validity of the Deed of Gift at1d whether or not it did in fact transfer ownership of the property to the plaintiff'.

Then the teamed Resident Magistrate found that the Deed of Gift Was ineffective in transferring Title to the appellant because '*it* was not duly sealed i.e. executed as is

required by law' and thereafter concluded that the Will properly transfers the land to the respondent; which I understand to mean that Mrs. Fullett bequeathed the land in question to the respondent.

Before us the appellant was content to argue that the teamed Resident Magistrate fell into error when she found that ‘the un-sealing of the Deed of Gift' is fatal to *its* execution and did not address an*y* arguments to the facts of the case.

..

It was argued that by the common-law it is required that a Deed be sealed. That that is so, is evident in, the definition of a Deed as set out in Norton on Deeds

Chapter 1 treating with the form and execution of Deeds at pg. 3. It states :

> “ A deed is a writing (i) on paper, vellum or parchment, (ii)
>
> > sealed and (ill) delivered, whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest right, or property has passed" .

The question which arises therefore is whether the Deed in evidence contained a seal and

if not, whether: having regard to the wording of the document it could be presumed that it was in fact sealed. While admitting that there was no physical seal on the document, counsel for the appellant, nevertheless relied on the following dicta of Goff L.J in the case of ***First National Securities Ltd. v Jones and another*** [1978) 2 All ER 221 at pg. 228 to support the second proposition. Here is what Goff L.J. said:

> "In my judgment, in this day and age, we can, and we
>
> > ought *to,* hold that a document purporting to be a deed is capable in law of being such although it has no more than an indication where the seal should be. ***National Provincial Bank of England v Jackson****,* [1886] 3301. D 1 which was a decision of this court, does not in any way preclude 'us from arriving at that conclusion, because it was a decision on the facts. In that case the attesting witness gave evidence and was unable to reco11ect any execution of the document by the parties concerned. Moreover, there were grounds for suspecting fraud. Cotton L.J- said ' In my opinion the only conclusion We can come to is that these instruments were never in fact sealed at all'. Lindley L.J. in the passage to which Buckley L.J. has referred where he said that *Re* ***Sandilands*** was a good-natured decision, went on to say' ...but on the evidence in this case I certainly cannot come to that conclusion' I think I need make only one further reference to authority, that is to refer to the judgment of Montague Smith J. in the early case *Re* ***Sandilands*** itself, in which he relied on the apparent regularity of the

attestation as being sufficient. In my judgment, therefore, the alleged legal charge was capable of being a deed although it bore no seal and nothing was physically annexed to it"

In the case of ***TCB Ltd. v Gray*** [1986] 1 All E.R 587 decided years after Sir Nicolas Browne-Wi1kinson V .C was reluctant to go down the path taken by Goff L.J. in, the ***First National Securities*** case (supra). In dealing with a case in which the statutory provision for 'the sealing of a power of attorney was being considered he said (pg. 594);

" As I have said, there is no 5eal or other mark on the

document to indicate that it has been sealed, nor is there any oral evidence to suggest that the defendant did anything when executing it beyond signing it. On the contrary Mr. McGuiness said that the lack of a seal or wafer on the document was an oversight on his behalf. Approaching this evidence on any normal basis I would be unable to find as a fact that 81\yiliiI1g constituting sealing took place. Indeed, on the ordinary test of balance of probabilities, I would hold that it did not.

I was pressed by counsel for *TCB* with a line of cases culminating in *Fir.9t National Securities Ltd. v Jones* [1978] 2 All ER 2211 [1978] Ch. 109 in which the courts have adopted a benign approach in deciding that a document has been executed as a deed. The courts have gone a long way towards holding that any document delivered as a deed (even though nothing is done to the document itself at the time of execution) is proved to have been executed under seal. Yet no case in the High Court has been cited to me in

> which *the* court has gone as far as it would be necessary to go In this case, there being nothing to indicate that something amounting to sealing took place beyond the fact that the words of the document refer to it having been sealed. If I were to hold that this document was in fact sealed, I would not only be flying in the face of what actually happened, but also disregarding the statutory requirement that the document should be sealed. I think it would be wrong to extend the legal fiction any further and I decline to do so".
>
> Sir Browne-Wilkinson V.C, however, went on to find that the defendant in the as a deed and which says that he has there unto set his hand and seal. The document states in term~ that it was signed, sealed and delivered in the presence of Mr. McGuiness. There is therefore a representation of fact that it was in fact seal. The defendant executed the document with the intention that it should be relied on as a power of attorney and knowing that *TCB* was going to rely on it as such. *TCB* in fact relied on it to their detriment since they advanced money in reliance on documents executed U!1der the power- The case therefore has all the necessary elements of a classic estoppel'.

He therefore preferred to go the route of estoppel rather than find that the document was

sealed when in fact it was not.

In the instant case, there is no indication on the document that it was ever sealed, and in

keeping with the dicta of Browne-Wilkinson V.C. with which I agree, I would also

refrain from declaring that merely because it states that it was sealed that it was in fact sealed, when plainly it was not. The question consequently arises as to whether an estoppel would apply in the circumstances of this case.

Were the donor, Mabel Fullett, a party to the action would she be estopped from contending that the document was not sealed in the face of the evidence that she placed her *'X'* which was witnessed, on the document which asserts that it was in fact sealed? This question in my judgment is relevant to the issues between the parties in this case, because the respondent who purports to be entitled to the property claims through the ownership of Mabel Fullett, so if the latter could not successfully set up a better Title than the appellant, having previously executed the Deed of Gift to the appellant in respect of the same property, then the respondent would have no entitlement to the property.

On the principle adumbrated by Browne-Wilkinson V.C in the *T.C.B* case, it follows that Mrs. Fullett would be estopped from raising the point that the Deed Was not sealed, and

consequently would be obliged to adhere to t1\e content of the Deed, giving to the appellant the right to ownership of the property. In that event, in my judgment, the respondent, being her privy i.e. claiming Title under her, would also be estopped from relying on the *fact* that the Deed was not sealed. Mrs. Fullett would have signed the document with the intention of passing the property to the appellant and well knowing that the appellant might act in accordance with its content. In fact, he did so, by paying the taxes for the property and treating with, the residents on *the* property as his tenants, collecting the rent etc. For those reasons, in my judgment the Learned Resident Magistrate fell into error in finding that the Deed of Gift had no legal effect. Her seemingly contradictory finding on the facts in which she was content to express an opinion as to whom Mrs. Fullett would have given the property in my view not having been elevated to a finding of fraud in relation to the circumstances surrounding the creation of the Deed, would not in an anyway affect this conclusion.

I would allow the appeal set aside the order made below and substitute an order for recovery of possession and award costs fixed at $1,000 to the appellant.

POWNER. J.A.

I agree with the reasoning of Forte, J.A. on the issue of estoppel and his conclusion that the appeal should be allowed and that the appellant must recover possession, also that costs be awarded to the appellant to be agreed or taxed. But I would go further and approve of the cogent submissions of Georgia Gibson-Henlin that as a matter of law the deed Exhibit 2 of Mabel Campbell Fullett dated 26th September 1987 was signed sealed and delivered. The dictum of Goff L.J In First National Securities Ltd. v Jones cited by Forte, J.A. was reinforced by Sir David Calms. Here is how Browne-Wilkinson V.-C put it in T C B Ltd v Gray [1986] 1 All ER 589 at 595:

> "In First National Securities Ltd v Jones [1978] 2 All ER 221 at 229, [1978} Ch 109 at 121 Sir David Cairns said:
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> 'I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the signature opposite the words "Signed, sealed and

delivered", usually in the presence of a witness, and I think it would be lamentable If the validity of documents so executed could be successfully challenged.'

I agree."

Then again in First National Securities Ltd. v Jones at pp 226- 227 Buckley L.J.

who gave the leading judgment said:

"The most recent decision to which we have been

referred is a decision of Danckwerts J in Stromdale and Ball Ltd v Burden [1952] 1 All ER 59 at 62, [1952] Ch 223 at 229, 230, in which the learned judge said:

'Another point is taken which also depends on the defendant's evidence. It is said that, as she merely signed the document called “deed -of licence” and never did any act amounting to sealing, it was not effectively executed as a deed. I was referred by counsel for the defendant to NORTON ON DEEDS 2nd Edn (1928), pp 7, 8 where the formalities required for the execution of deeds are discussed, and it is said there, quoting MONTAGUE SMITH, J. in Re Sandilands LR 6 CP 411 at 413, that I". some act must be done ‘with the intention of sealing'." Reliance was also placed on Re Smith (1892) 67 L T 64 In which the document intended to be a bond bore the words "sealed with my seal" and was stated in the attestation clause to have been 'signed, sealed, and delivered," but there was no mark, wafer, or seal visible on the face of the document. It was held in that case that the document could not be treated as having been sealed. In the present case the defendant's evidence is very vague as to whether the wafer seal was on the document when she

> signed it, and I think it is unlikely that the wafer seal had not been placed on it before she was asked by the solicitors' clerk to sign. If it was there when she signed, it seems to me that the document was effectively executed as a deed. Time was when the placing of the party's seal was the essence of due execution. Signature was *not*, Indeed, necessary to make a deed valid: see NORTON ON DEEDS 2nd Edn. (19.28) p7 But with the spread of education the signature became of importance for the authentification of documents and since 1925 it has become essential by reason of the provisions of the Law of Property Act, 1925, s. 73(1). Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that at the present day if a party signs a document bearing wax or wafer or other indication of a seal with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed'."

Then in expressly approving the principle enunciated above Lord Justice Buckley

said at page 227:

> “In the present case we really have no evidence at all beyond the fact that in the first of the plaintiff’ affidavits, which the learned deputy judge mayor may not have looked at (we cannot tell), there appears this statement: 'On the 20th day of September 1974 the Defendant executed a Legal Charge of the whole of the interest in the property in favour of the Plaintiffs'. and then a true copy of the charge is exhibited. We have that exhibit, the features of which I have described, and we have no evidence to indicate in any other way whether the first defendant did or did not intend to deliver this document as his act and deed. But it is a very familiar feature nowadays of documents which are intended to be executed as deeds that they do not have any wax. or even wafer, seal attached to

them, but have printed at the spot where formerly the seal would probably have been placed, a printed circle, which is sometimes hatched and sometimes has the letters 'L. S.' within it, which is intended to serve the purpose of a seal if the document is delivered as the deed of the party executing it."

Then the learned Lord Justice continued thus;

" In the present case there is not only the circle with the letters 'L.S' within it on the document, printed as part of the printed version of the document, but also there is the feature that the mortgagor has placed his signature across that circle. In my judgment those features, and the attestation in the absence of any contrary evidence, are sufficient evidence to establish that the document was executed by the first defendant as his deed. On the material before us it seems to me that there was certainly no evidence before the learned judge on which he could have held that the document had not been so executed by the first defendant: and in the light of the authorities to which I have referred, I am of the opinion that the evidence sufficiently establishes that this legal charge was executed by the first defendant as a deed, and that the learned judge was mistaken in .law in thinking that what was done did not amount to sufficient execution and delivery of the document as the mortgagor's deed. For these reasons it seems to me that the learned deputy county court judge reached a wrong conclusion in law, and that this appeal should be allowed."

It is in the light of the above that Grounds 1 and 4 which read as follows:

"(1}The learned Magistrate erred as a matter of Law by

accepting the Defendant/Respondent's submission that or by finding that the non- sealing of the Deed of Gift is fatal to its execution;

(4) The learned Magistrate erred as a matter of fact and/or law in not accepting submissions on behalf of the Plaintiff/Appellant that the Donor and her privies are estopped *from* dealing with and or re-claiming the gift."

were to mind successfully argued by counsel for the appellant. On the principles adumbrated above the appellant is entitled to recovery of possession.