ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO:1 OF 1991

BETWEEN:

GENEVA DAMMER - Appellant

and

CARLISLE ROMEO WALLACE
and
VIVIEN ARTHWIN VANTERPOOL
(Administrators of the Estate of Thomas Alexander Webster deceased) - 1st Respondents

and

JAMES RONALD WEBSTER
(Executor of the Estate of John Augustus Webster, deceased) - 2nd Respondent

Before: The Right Honourable Sir Vincent Floissac - Chief Justice
The Honourable C.M. Dennis Byron - Justice of Appeal
The Honourable Dr. Nicholas Liverpool - Justice of Appeal

Appearances: Mr. J.S. Archibald, Q.C., and Mrs. Myrna Walwyn for the Appellant
Dr. Henry Browne and Mr. John Benjamin for the 2nd Respondent.

1993: May 10, 11; June 21.

JUDGMENT

LIVERPOOL, J.A.

Thomas Alexander Webster (the deceased) died in Anguilla on 23 September, 1931, intestate. He was survived by his wife Zellie Augusta Webster (the testator) and ten children, two of whom were the appellant and John Augustus Webster. The deceased owned large acreages of lands in Anguilla of which an area measuring a size of 135.75 acres recorded on the Land Register of Anguilla formed part.

At the time of the death of the deceased the Real Representative Act (Chapter 277) was in force in Anguilla and by its terms the real property of the deceased would have devolved on his personal representatives. Letters of

Administration of the estate of the deceased were granted on 10 February, 1932 to the testator.

The Intestates Estates Act No.4 of 1945 came into force in Anguilla on 11 December, 1945. It followed the provisions of the Administration of Estates Act of the United Kingdom (1925) by abolishing the concepts of heirship and dower. Under the provisions of the law which were in force at the date of death of the deceased, therefore, his real property after administration would have belonged to his heir subject to his widow's right to dower (which was a life interest in one-third of the deceased's real property). So that when the testator obtained letters of administration to the estate of the deceased in 1932, she held the estate in her capacity as personal representative of the deceased to give effect to those interests.

It would appear that the testator who died in 1966 took no steps to administer the estate during her lifetime. But by the provisions of her will dated 24 September, 1956 she purported to make several devises of the property in respect of which her husband had died intestate, to her children and others. She died on 21 September, 1966 and probate of her will was granted on 15 July, 1975 to Peter Adams who had been named sole executor thereunder.

Meanwhile on 6 June, 1972 the (plaintiff) appellant had entered into an agreement with her brother John Augustus Webster for the sale to him of her "interest and share" in the will of her mother. The entire agreement reads thus:

> "I Geneva Ottawa Dammer of 5407 Park Avenue, West New York, New Jersey United States of America, hereby acknowledge receipt of the sum of $1000.00 (one thousand dollars) United States Currency from JOHN AUGUSTUS WEBSTER of Mount Fortune, East End, in the Island of Anguilla, for all my interest and share in the Will of ZELLIE AUGUSTA WEBSTER (deceased). I hereby transfer the said interest

and share to the said JOHN AUGUSTUS WEBSTER this 6th day of June in the year of Our Lord One Thousand nine Hundred and Seventy-Two.

Sgd. Geneva Ottawa Dammer

WITNESS:
Sgd. Lucy G. McGrath
LUCY G. McGRATH
Sworn to and Subscribed before me
this 6th day of June, 1972.

Sgd. Lucy G. McGrath
LUCY G. McGRATH
Notary Public of New Jersey
My Commission Expires Oct 25, 1973"

The first (defendants) respondents were granted letters of administration de bonis non to the estate of the deceased on 18 May, 1983. They sold that area of land forming part of the estate of the deceased consisting of 135.75 acres to Rosano Spadaro and Coral Cove Limited, who by 1988 had duly paid for those lands and the sum of US$1,561,125.00 became available to the first respondents who technically should have held this sum on behalf of the persons entitled in accordance with the rules of intestacy which prevailed at the time of the death of the deceased.

The appellant alleged, and this was admitted by the second (defendant) respondent, that the purchase money was divided into ten equal shares among the children of the deceased and that all the children except the appellant have received from the first respondents one-tenth share of the proceeds of sale. The appellant therefore instituted these proceedings against the first respondents as Administrators of the Estate of the deceased in order to recover the sum of US$156,112.50 which she claims represents her one-tenth share which has been withheld from her.

By her writ issued on 2 June, 1989 (and amended on 6 April, 1990), the appellant stated that the first respondents sold 135.75 acres of land which hitherto formed part of the estate of the deceased to Rosano Spadaro and Coral Cove Limited and had received the purchase price of US $1,561,125.00. That the first respondents had distributed 9/10 ths. of the proceeds of sale among nine of the beneficiaries of the estate of the deceased but were withholding the one tenth share which belonged to her and were refusing to pay over the same to her. She therefore claimed a declaration that she was entitled to that 1/10th share and the sum of US $156,112.50 represented by it and an order that the first respondents should pay over that sum to her. The appellant also claimed damages and costs.

John Augustus Webster the appellant's brother, (the purchaser) who had entered into the agreement of 6 June, 1972 to purchase the appellant's interest and share in the will of their mother, died on 21 September, 1989, having appointed the second respondent to be his executor. On 25 October, 1989 the second respondent applied to the High Court for an order to be joined as an Intervener to the suit filed against the first respondents. The grounds of the application were that the appellant had, by agreement dated 6 June, 1972, and in consideration for the sum of US $1,000.00 sold to the purchaser a portion of land which devolved to the appellant on the intestacy of the deceased; that at the time of making the agreement the parties had proceeded upon the basis that the land in issue was to be inherited by the appellant under the testator's estate and that since the agreement was entered into the appellant had written at least two letters stating that she had sold the land to the purchaser. Accordingly the second defendant on behalf of the estate of the purchaser laid claim to the sum of US $156,112.50 in the hands of the first respondents.

On 12 November, 1990 an order was made by the Court granting leave for the second respondent to be joined as Intervener, and a default judgment against the first respondents was stayed. By his defence the second respondent admitted the claims made by the appellant against the first respondents in her statement of claim, but stated that it was her deceased brother John Augustus Webster who had been entitled to the 1/10th share being withheld by the first respondents by virtue of the agreement of sale of 6 June, 1972. And in his counterclaim, the second respondent repeated the statements contained both in his defence and in the grounds set out in his application to be joined as an Intervener.

In her reply and defence to counterclaim the appellant insisted that what she sold by the agreement of 6 June, 1972 was her interest in her mother's estate and not her interest in her father's estate, and also pleaded that the contract was void for mistake since her mother had a life interest only in the estate of the deceased.

The matter came up for hearing before Satrohan Singh J. on 13 June, 1989 when counsel representing the plaintiff and the second defendant elected to call no evidence, but to address the court on points of law only. The first defendants accepted service of the writ and of the notice of appeal, but have otherwise taken no part in the proceedings. The learned Judge identified the dispute as **"what interest the plaintiff in fact sold to John Augustus Webster;"** and proceeded to make the following findings:

1. "When Thomas Alexander Webster died, he was survived by his wife and ten children. As a matter of law that gave his ten children his property subject to a life interest in his wife."

2. "However, (the wife) did leave a Will and in this Will she purported to bequeath to the plaintiff, property to which the plaintiff was already entitled as a matter of law on intestacy at the death of her father, Thomas Alexander Webster."

3. "What Zellie Augusta Webster purported to bequeath to the plaintiff in her will was the plaintiff's interest on intestacy in the estate of Thomas Alexander Webster, an interest that was subject to Zellie Augusta Webster's life interest."

4. "What John Augustus Webster bought and what the plaintiff sold was that same interest which they both thought was represented in the Will of Zellie Augusta Webster."

5. "That interest has been agreed on by all the beneficiaries as being a 1/10 share of sale price of the estate lands sold to Spadaro. I come to this conclusion from the fact that all the beneficiaries have accepted their share of that money and that the defendants have withheld the 1/10 share for the plaintiff."

6. "The fact of the bequest in Zellie Augusta Webster's Will being a nullity was of no moment in the determination of the matter as without such a bequest, the plaintiff's share in the estate of Thomas Alexander Webster was still the plaintiff's to dispose of and which she in fact disposed of to the intervener herein after the death of his mother."

He thereupon dismissed the plaintiff's claim and gave judgment for the intervener on his counterclaim with costs. The plaintiff appealed. The thrust of learned Counsel's argument on behalf of the appellant was that on the death of the widow her interest in the estate of the deceased lapsed, and in any event since the appellant had no interest legal or equitable, until administration had been completed, either in the estate of the deceased or in the estate of the testator, she had no interest which she could properly sell to the second respondent. Counsel for the second respondent on the other hand, strenuously argued that the **"res"** in issue was the lands sold to Spadaro and Coral Cove Limited, and whether the appellant obtained her share from the will of the testator or as a result of the intestacy of the deceased made no difference.

I am afraid that I hold a different view of the matter from that advanced by learned Counsel on both sides. What falls to be decided in this case is the interpretation of the contract of 6 June, 1972 pure and simple. I start off therefore by rejecting the submission of the appellant that she could have had nothing to sell. In construing a written contract the intention of the parties must be gathered from the instrument itself, and the function of the court is to ascertain what the parties meant by the words which they have used. While it is true that the appellant's contract referred to **"my interest and share"** these words are not to be taken in a technical sense. One has only to examine the language used by the learned law lords of the Privy Council in the case of **Lord Sudeley v. Attorney General (1897) A.C.11** to appreciate the difficulty which can be encountered if a proper choice of words is not used. I accept the statement of law contained in the authorities cited by learned Counsel for the appellant to the effect that a devisee, legatee, or person interested under an intestacy does not have a defined or specific legal or equitable interest to which a claim may be laid before the estate has been administered. The cases of **Bannardo's Homes v. Special Income Tax Commissioner (1921) 2 A.C. 1** and **Commissioner of Stamp Duties (Queensland) v. Livingston (1965) A.C. 694** cited by learned counsel for the Appellant support this legal principle as it pertains to a will, and **Eastbourne Building Society v. Hastings Corporation (1965) 1 All ER. 779** illustrates the case of an intestacy. But I am unable to agree to the proposition that such a legatee, devisee, or other person interested under a will or an intestacy may not enter into a perfectly valid contract to sell that entitlement if any, whatever it may be. In my view what the appellant purported to sell was whatever she may have been entitled to under the will of her mother; and that this **"share"** or **"interest"** or **"entitlement"** by whatever name it may be called could only have meant what was due to her after the estate was administered.

I now turn to the all important question identified by the trial Judge, namely, what share or interest the appellant purported to sell to the second respondent. In doing so I must be guided by the first rule of the interpretation of documents (including contracts) that if the words of a document are clear and unambiguous then this is the meaning which must be given to the instrument. The words used were **"all my interest and share in the Will of ZELLIE AUGUSTA WEBSTER (deceased)".** The word "interest" is not a technical term. It has a popular rather than a technical meaning; and the law does not give this word the same specific application in all contexts in which it is used. **(Bearmans, Ltd. v Metropolitan Police District Receiver (1961) 1 All E.R. 384).** Similarly, the word "share" does not have a technical meaning; and, therefore, in giving effect to the document in which it occurs, the Court must ascertain in what sense it is used in that document. **(See Clift v Birkhead (1849) 4 Exch. 110).** In my view, in the context in which they are used in this agreement, those words do not and cannot include, as is contended by counsel for the second respondent, whatever the appellant may receive from the proceeds of her deceased father's estate.

This is a convenient point at which to examine whether the appellant had any interest under the will of her mother which she could have sold to the second respondent. The Real Representative Act came into force in Anguilla on 14 May, 1928. Under that Act in the case of deaths after that date, all property, whether real or personal, vested in the personal representatives who had full powers of administration over them. During the administration of the estate, the ownership of all the lands of the deceased would have been in his widow as personal representative, but subject to the due administration of the estate she would have held the property on trust for those beneficially entitled **(see Megarry and Wade, The Law of Real Property, Fifth Edition page 535 and 536).** In so far as her mother's will is concerned, the appellant's name is mentioned only in paragraphs 3, 4 and 7 thereof; and it is conceded that all three devises refer to land which belonged to the deceased and over which the testator could only have had a right to dower. The appellant did not therefore, acquire any right to or interest in any of those properties. When therefore it was argued before, and repeated by, the learned trial Judge that the appellant was entitled to a 1/10th share of the residue of her father's estate after the life interest of her mother, it is because nobody including the learned Judge seemed to have observed that the Intestates Estates Act did not come into force until 1945 fully 14 years after the death of the deceased. Further, that being the case the testator's right to dower (namely a life interest in 1/3 rd of the freehold estate of the deceased) died with her, and there could never have been any lawful expectation by any of her children to obtain any benefit from the estate of their deceased mother through the medium of her will.

The second respondent, in my view, bought and obtained a right to an expectancy, or as it is often more elegantly put a **"spes successiones"**. Since it has turned out that there was no property real or personal which lawfully reached the appellant under her mother's will, the second respondent is entitled to nothing under the agreement. The findings of the learned Judge were therefore based on a false legal premise and his decision cannot be upheld.

The authorities reveal that where performance of a contract is already impossible at the time of contracting, the case is one of initial impossibility or mistake, and such a contract is generally void <u>ab initio</u>. The reason being that a binding contract cannot arise from a promise which is manifestly incapable of performance either in fact or in law at the time when it is made **(see Halbury's Laws of England, Fourth Edition, Volume 9, paragraphs 441, 442 and 447)**. Further, where the initial impossibility is not known to either party, and this will be so in a case where the property has never existed even though the parties believed otherwise, the contract will, as a general rule be void. **(Galloway v. Galloway [1914] 30 T.L.R. 531** and **Law v. Harrigan [1917] 33 T.L.R. 331)**. The parties to the contract intended to effectuate a transfer of the appellant's entitlement under the will of her mother, but such a transfer was impossible for the reasons already stated. The question which arises as a consequence is will this court assist a purchaser in a position such as this where the consideration has wholly failed?

In certain cases equity will relieve against the consequences of mistake even though the mistake would not vitiate the contract at law; and the remedy of recission may be given to set aside a contract where the parties were under a common misapprehension as to their relative or respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not at fault **(Halsbury's Laws of England, Fourth Edition, Volume 9. paragraph 449)**. This is clearly a case where both parties were under a common and fundamental misapprehension as to the rights of the appellant both under the intestacy of the deceased and also under the will of the testator. I would therefore order that the contract be rescinded and the purchase price returned to the Second respondent.

The appeal is therefore allowed with costs to the appellant certified fit for two counsel against the first respondents and the second respondent jointly and severally, to be taxed or agreed. I would also make the following consequential orders:

1. Judgment be entered against the first respondents in default of appearance, consequently the order of the Registrar dated 12 November, 1990 staying the entry of a default judgment against the first respondents is hereby discharged.

2. The first respondents are hereby ordered to pay to the appellant the sum of US $156,112.50 with interest, either at the rate of interest actually earned by this sum or at the rate of 5% per annum from the date of judgment until payment, whichever rate is higher.

3. The appellant is hereby ordered to repay to the second respondent the sum of US $1,000.00 with interest at the rate of 5% from 6 June, 1972 until payment. (Learned Counsel for the appellant indicated that his client would not be averse to the repayment of the purchase price of US $1,000.00 with compound interest at 10% per annum. I sincerely hope that this undertaking will be honoured, but I make no formal order to that effect).

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NICHOLAS LIVERPOOL
Justice of Appeal

I concur

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SIR VINCENT FLOISSAC
Chief Justice

I concur

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C. M. DENNIS BYRON
Justice of Appeal