

JERSEY / JUDGMENT

Cook v Clapham and Ors [2023]

JCA 005 (13 January 2023)

[2023] JCA 005

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

Court of Appeal 13 January 2023 Before : George Bompas, K. C., sitting as a Single judge Between Richard Herbert Aster Maurice Cook Appellant And Michael Henry Clapham Andrew David Le Cheminant Leslie Rufus Crapp Respondents The Appellant in person.

judgment

GEORGE BOMPAS JA:

Introduction

1. Mr Richard Cook ("the Appellant") wishes to appeal from the judgment (Cook v Clapham and Ors

[2022] JRC 210) and order of the Royal Court (Commissioner Sir William Bailhache) given on 10 October 2022. The Appellant has, on 8 November 2022, served a Notice of Appeal together with an email giving his grounds of appeal. However, he needs leave if he is to bring any appeal. The question for me is whether the Appellant should be given that leave. 2. It may be that strictly the Appellant also needs an extension of time for any appeal. However, as any delay (if there was one) can only have been short, whatever the reasons, and unlikely to have caused any prejudice to the Respondents, the real question on an application for an extension of time would be the appeal's prospects. As this question is central to the giving of any leave, I will assume that the Appellant sought to appeal in time and consider only the giving of leave to appeal. In this regard, and paraphrasing the well-known test in *Crociani v Crociani*

[2014] JLR (1) 426 of which I have reminded myself, I have to consider whether the Appellant's appeal has a real, as opposed to a fanciful, prospect of success or should be heard for some other good reason; such a reason normally being because there is a novel point of principle or an important question on which a decision of the Court of Appeal would be to the public advantage. 3. For reasons I explain below, in my judgment the Appellant is to be refused leave to appeal; his proposed appeal has no real prospect of success and there is otherwise no good reason for it to be heard. In short, there was an unexceptionable decision by the Royal Court refusing him leave to amend his Order of Justice and granting

summary judgment against him as he has no case to go to trial. 4. The Commissioner's judgment of 10 October 2022 ("the October Judgment") affirmed on appeal a decision of the Judicial Greffier given on 12 April 2022 with, and explained in, a detailed and closely-reasoned

judgment.

The Judicial Greffier had refused the Appellant's application to amend his Order of Justice and had granted the Respondents summary judgment in respect of the Appellant's proceedings. 5. The October Judgment was handed down after a two-day hearing on 7 and 8 September 2022, and after a further set of revised submissions made by the Appellant later in September 2022 once a draft of the October Judgment had been circulated for consideration in advance of its formal handing down. The October Judgment as handed-down contains a lengthy postscript in which the Commissioner addressed in detail the further submissions made by the Appellant. 6. Like the Greffier's judgment, the October Judgment is detailed and closely-reasoned. In it the Commissioner explained at length his reasons for dismissing the Appellant's appeal from the Greffier's decision. He did so having approached the appeal (as he was entitled to do) as a hearing afresh of the amendment and striking out applications which had been before the Greffier, while nevertheless giving weight to the Greffier's judgment. 7. The Appellant had, in the earlier stages of these proceedings, been professionally represented by Jersey lawyers, although he is now extremely critical of that representation, in particular as to the production of certain documents in the course of the giving of disclosure. Also, he has been assisted by Mr Harry Baden-Powell, son of the late Hubert Edward Peter Baden-Powell referred to below. At the hearing before the Greffier Advocate D Le Maistre presented submissions as amicus. Before the Commissioner the Appellant represented himself, although Mr Baden-Powell was present as a Mackenzie friend. 8. When the appeal came before the Commissioner the Appellant had revised significantly the proposed Amended Order of Justice. This document was manifestly unsuitable to be taken, as it stood, as an amendment of the Order of Justice: its defects as a pleading were legion. However, the Commissioner went on to explain as follows at para 29. "... on a summary judgment application against a litigant in person, I considered that it was the Court's duty to attempt identification of what the real case was as well as what the pleaded case was. In some cases, this might result in the refusal of a summary judgment application and the grant of leave to amend albeit not leave to amend in the terms which the Plaintiff was seeking. Neither Advocate Evans nor Advocate Kistler [the Advocates for the Respondents] suggested I should not take that approach." 9. In other words, the Commissioner was at pains to make sure that the fact that Appellant was self-represented should not result in his losing a worthwhile claim that properly should be allowed to go to trial, if indeed such a claim could be found. 10. In reaching my decision to refuse leave to appeal I have had before me all the documents which were before the Commissioner when the hearing before him started on 7 September 2022, along with certain additional material provided to the Commissioner by the Appellant after the hearing. This I refer to later. I have also had the Commissioner's judgment, the Act of Court dismissing the appeal from the Greffier, and the Appellant's Notice of Appeal and grounds of Appeal, along with a

further email of 2 December 2022 making further observations in advance of an oral hearing before me, by remote video link, of the Appellant's application for leave to appeal. This hearing took place on Wednesday 21 December 2022, when I allowed Mr Baden Powell, sitting beside the Appellant, to explain to me for the Appellant the points which the Appellant wished to make in amplification and explanation of his grounds of appeal. 11. I describe later the principal submissions made to me on the Appellant's behalf at the hearing on 21 December 2022. But I should say at once that Mr Baden-Powell introduced himself by explaining that he has been called to the Bar of England and Wales as a barrister but does not practise. 12. On 6 January 2023, and before I had delivered this judgment, the Appellant sent the Court a further email, this time of more than eight pages of close type, repeating at length arguments already made before the Royal Court in support of his opposition to the summary judgment application. I have read and considered that email. 13. In reaching my decision on the Appellant's leave application I have taken into account also the fact that the Appellant is now self-represented, subject to the assistance he has from Mr Baden Powell, and have been careful to see that nothing further might be said on his behalf to advance his appeal.

Background

14. The proceedings were started by the Appellant by an Order of Justice dated 25 November 2019. However, the genesis of the proceedings lies many years before: the proceedings concern events starting decades ago. More recent of these events occurred during the 1970's and 1980's and thereafter. Essentially, they are concerned with affairs of the late Sir Francis Cook ("Sir Francis"), who died in 1978, and his widow ("Lady Cook"), who died on 25 November 2018, and in particular with collections of pictures with which they had been associated. 15. The First and Second Respondents are Lady Cook's Executors. Her last Will was made on 11 March 2016. Their Answer to the Order of Justice states that they themselves had not acted for Lady Cook until 2007 and 2012 respectively. 16. Sir Francis was himself an artist, and was from a distinguished family with considerable art collections. He had settled in Jersey long before his death. Until his death, he lived on the Island with Lady Cook at his home, at Le Coin, in the parish of St Brelade. 17. Before World War II there were three trusts containing assets of the Cook family. These are (1) the Cook 1934 Picture Settlement established on 31 January 1934, (2) the Cook 1939 Picture Settlement established on 24 August 1939, and
- (3) the Doughty House Trust constituted by the Will of the late Sir Herbert Frederick Cook (Sir Francis' father). 18. These trusts ("the UK Trusts") were based in the UK, where their trustees ("the UK Trustees") were based. At one time the UK Trusts held a number of old master pictures. It appears that these, or certain of these, came to be hung at Le Coin. 19. Further, it appears that following Lady Cook's death, the Appellant and Mr Baden-Powell came to have correspondence with a Mr Nicholas Barlow, of Monro Wright & Wasbrough LLP, Mr Barlow being one of the UK Trustees. The purpose of this correspondence was to make enquiries about pictures which had been comprised in the UK Trusts. Mr Barlow's correspondence featured in the hearings before the Greffier and the Commissioner, and was discussed in

their judgments. Certain of Mr Barlow's remarks in his correspondence were relied upon by the Appellant as supporting his claims. 20. Sir Francis' last Will was dated 23 August 1973. The Will refers to a trust created by Sir Francis by an indenture of the same date and known as "the Sir Francis Cook Fine Art Trust" ("the Fine Art Trust"), with Sir Francis, the Third Respondent and the late Mr Baden-Powell as trustees. The Third Respondent is still alive, although now of advanced years and long-since retired. He has sworn affidavits in these proceedings. His pleaded Answer to the Order of Justice is that the Fine Art Trust "was terminated in 1983 by the Trustees of all of the assets of the Trust by the appointment by the Trustees of all the assets of the Trust to" Lady Cook. 21. A feature of this case is that no copy of any instrument making the 1983 appointment has been found, much less the original instrument. However, there are contemporaneous documents which point to the fact of the making of an appointment in 1983 of the assets of the Fine Art Trust to Lady Cook. 22. The Fine Art Trust centred on a property known as Augres Chapel, which had been converted during Sir Francis' lifetime to galleries with living accommodation. The trust property is defined as including both "the Trust Collection", that is essentially works of art initially settled or which might be added from time to time, and an endowment which was to include the property held through a company. At the time of the formation of the Fine Art Trust it would appear that numerous works of art by Sir Francis were at Augres Chapel (which came to be known as the "Sir Francis Cook Art Gallery"). These no doubt formed the core of the Trust Collection, although a portrait of Admiral Bridport by Joshua Reynolds may have been included from the outset, perhaps as an asset of the company. The trust deed constituting the Fine Art Trust contains a recital by which Sir Francis expressed his desire to vest paintings and drawings in his own hand, and recordings of music composed by him, in the Fine Art Trustees to be held on trust, with another recital noting that he or Lady Cook might transfer further paintings, etchings, prints, drawings or musical recordings to the Fine Art Trust. Further the trust deed contemplates that the Fine Art Trustees might use the gallery, supported by the endowment, to house the Trust Collection "for the use and enjoyment of any one or more of the Appointed Class ...". This last expression is a defined term in the deed. The Fine Art Trust was constituted as a discretionary trust for the benefit of "the Appointed Class". Lady Cook was a member of the Appointed Class; so were any issue of Sir Francis. The Appellant, a grandchild of Sir Francis, is within that class. 23. It is in his capacity as a discretionary object of the Fine Art Trust that the Appellant has brought these proceedings. His Order of Justice seeks relief on behalf of the Fine Art Trust. In essence his contention is that valuable pictures belonging to Sir Francis or to the UK Trusts came to belong to the Fine Art Trust but were improperly disposed of away from the Fine Art Trust. His Order of Justice seeks relief against the Third Respondent as the surviving trustee of the Fine Art Trust and against Lady Cook's estate represented by the First and Second Respondents, on the basis that it was the Third Respondent and Lady Cook who were accountable for what the Appellant says was lost from the Fine Art Trust. 24. As all the material events in question happened many years ago, the Third Respondent alone is alive to be able to offer any evidence. In particular Mr Hubert Baden-Powell is dead, and has left no relevant records at all, notwithstanding that from time to time the Appellant seeks to rely on

the memory of the late Mr Baden-Powell as supporting his view of the case. Further, the documentary record is fragmentary. This consideration is important. The Commissioner's view was that the Court on the application which had come before the Greffier and then to him by way of appeal was in just as good a position as it would be in following a trial. 25. Although the Appellant has expressed dissatisfaction about the circumstances in which this came about, it seems clear that since about 1984 the art works by Sir Francis at the Gallery have been held by the Jersey Heritage Trust; and the Appellant disclaims any opposition to this. However, in the Order of Justice one of the contentions (one the Appellant does not seek to pursue any longer) was that the Appointment was made but was invalid as having been made to Lady Cook for the improper purpose of benefitting the Jersey Heritage Trust. 26. Clause 13 of Sir Francis' Will lies at the heart of the Appellant's Order of Justice. The Clause makes a disposition of "all paintings and mobiliary effects other than money and securities for money of which I may die possessed or to which I may be entitled ...". This disposition is subject to an exception: as the Clause explains, " For the avoidance of doubt I do hereby declare that except for those paintings and other moveables to which I specifically refer in this my Will the furniture and mobiliary effects situate at Le Coin, St Brelade, are except for those which are the subject of trusts the property of Lady Bridget Cook to whom I gave such mobiliary effects as I owned at Le Coin, on the fifth day of September, One thousand nine hundred and sixty-three by delivering the same to her and evidenced by a deed of gift of that date, a copy of which is lodged with this my Will" . 27. The disposition made by Clause 13 is simple: the property described in the clause, excluding always that which was within the words of exception just quoted, was given to Sir Francis' Executors and Will Trustees to hold on trust for Lady Cook for her life and subject to that for the trustees of the Fine Art Trust as an addition to the "Trust Collection" and on the trusts thereof. 28. The exclusion in Clause 13 appears to envisage that certain of the property at Le Coin did comprise pictures belonging to Sir Francis, these being those and only those specifically disposed of by his Will (see below); but subject to that, all the movables at Le Coin (and hence all the pictures there) were either (a) subject to trusts which might be the UK Trusts or the Fine Art Trust, or (b) belonged to Lady Cook and not Sir Francis. As the Commissioner recognised, however, while Sir Francis' Will was made in 1973, his death was only in 1978 and so it is possible that in the interval it had come about that now pictures, or some of the pictures, at Le Coin belonged to Sir Francis and were not among those excluded from the disposition made by Clause 13. But there is no evidence as to how that may have happened. 29. One of the specific dispositions of a picture made by the Will was of "the painting of Sir Herbert Cook by Sir William Orpen to the Trustees for the time being of" the Fine Art Trust as an addition to the Trust Collection. Another picture was bequeathed to the Third Respondent. These were unquestionably within the exclusion from Clause 13. The Appellant relies on these bequests as showing that at any rate when he made his Will Sir Francis owned some pictures personally, so that either not all his pictures had been given by the Deed of Gift or some had been returned to him. 30. There is evidence that in 1976 Sir Francis swore a document confirming that an annexed copy of the Deed of Gift of 1963 was a true copy of the original. 31. In these proceedings the Appellant has sought to advance a case in

relation to certain of the old masters comprised at one time in the UK Trusts. As matters have developed, it appears that there are some 15 of these. There is evidence that at some time before Sir Francis' death various old masters, pictures subject to the UK Trusts, had been hung at Le Coin. A foundation for the Appellant's case is a statement made by Mr Barlow in a letter dated 6 March 2020 sent to the Appellant saying "Notes from our predecessor Trustees indicate that the paintings", seemingly 15 out of the 23 or so pictures (or some of them) listed in paragraph 17 of the Order of Justice, "were transferred to [Lady Cook], pursuant to Clause 13 of Sir Francis' Will under which she enjoyed a life interest, with the paintings reverting on her death to the [Fine Art Trust]". Mr Barlow failed to explain how these pictures had come to belong to Sir Francis as his own property to be disposed of by his Will, if they had once been comprised in the UK Trusts. I say more about this letter a little later in this judgment. 32. An alternative case made in the course of the Appellant's submissions, and emphasised to me, was that these old master pictures may have been appointed by the UK Trustees to Lady Cook for her life and thereafter to the Fine Art Trust; but there is simply no evidence of any such appointment, even if the trust instruments for the UK Trusts had given the UK Trustees power to make the appointment to the Fine Art Trust. 33. In summary, the pleaded case in the Order of Justice is that the property disposed of by Clause 13 of the Will, being property owned by Sir Francis at the time of his death, (referred to in the Order of Justice as "the Assets in the Reversionary Interest") has been lost or misapplied; and the Appellant seeks to have the Respondents (that is, Lady Cook's executors and the Third Respondent as the surviving trustee of the Fine Art Trust) account for those assets and to have them reconstitute or compensate the Fine Art Trust. As listed in the Order of Justice, in paragraph 17, the Assets in the Reversionary Interest included sculpture busts of Sir Herbert Cook and 22 specified pictures, among them the Reynolds (listed as "Reynolds, Admiral Bridport"). Although the Order of Justice does contain a description of what is said to have been comprised in the Fine Art Trust in 1984 (including the portrait of Sir Herbert Cook by Sir William Orpen), that description distinguishes between on the one hand the endowment fund and works by Sir Francis (in other words, assets settled in 1973), and on the other the property disposed of by Clause 13 of the Will on the death of Sir Francis (this being expressed as including the Assets in the Reversionary Interest, namely the pictures listed in paragraph 17 of the Order of Justice). 34. The Order of Justice records that the Appellant was told by "the Trustees" (that is the Third Respondent and the late Mr Baden-Powell) that: "a purported transfer of the assets of the Trust ... to Lady Cook took place by a transfer, that cannot be identified, in 1984 ("the Appointment") principally to enable the Sir Francis Cook Art Gallery at Augres to be managed by Jersey Heritage Trust and to give effect to" Sir Francis' wishes. 35. The Order of Justice seeks to advance a case that either the Appointment never encompassed the Assets in the Reversionary Interest, so that they remained subject to the Fine Art Trust, or that the Appointment was invalid through mistake or as having been made for the improper purpose of benefitting the Jersey Heritage Trust. 36. In short, the Order of Justice claims that the Assets in the Reversionary Interest (as listed and defined) had belonged to Sir Francis at the time of his death in 1978 and not to Lady Cook. If this can be established, the Order of

Justice claims that the Appointment (if made at all) was ineffective to transfer the Assets in the Reversionary Interest to Lady Cook. 37. However, the Appellant's case was sought to be developed in November 2021, when he issued a summons seeking leave to amend the Order of Justice. This first proposed Amended Order of Justice is not easy to follow. However, liberally distributed throughout were allegations of dishonesty on the part of Lady Cook and the Third Respondent. Also, it sought to put in play questions concerning many more pictures: 37.1 The document referred to about a dozen old master pictures as having been passed over from the UK Trustees for Lady Cook to enjoy for her life and then to go to the Fine Art Trust. (As matters developed these were identified as comprising the 15 pictures, all of which - with the exception of the Durer (below) - had been listed in paragraph 17 of the Order of Justice as Assets in the Reversionary Interest.) 37.2 The document added a Durer picture, "The Procession to Calvary", as one of the Assets in the Reversionary Interest, while removing the Reynolds picture to include it as having been comprised in part of the endowment fund within the Fine Art Trust; 37.3 The document contended that there were about 70 or more pictures, without individual description, which had been Assets in the Reversionary Interest, pictures which were not by Sir Francis himself but which were said to have been part of his personal collection. 38. In his judgment on the Appellant's amendment application, the Greffier explained, correctly, that the purpose of pleadings is to enable parties to know the case they are required to meet. He also cited Rule 6/8(1) of the Royal Court Rules, a rule which requires pleadings to contain in summary form a statement of the material facts, the statement being as brief as the nature of the case admits. The Greffier said, at para 22 of his judgment, the following of the proposed amendment: "22. The proposed amendments are found in several places throughout the order of justice but are most salient in: - (I) Paragraph 11 (which runs to 4 pages of unbroken text) and paragraph 15 (which runs to 2 ½ pages of unbroken text), both of which make the broad allegations of fraud mixed in with extraneous narrative and purported evidence; and (ii) Paragraph 17 (which seeks to add a further "70 plus" paintings to the list of items alleged to have formed part of the Reversionary Interest and which should be returned to the Trust)." 39. In the event the Greffier refused the leave, after a detailed consideration of the arguments on each side. Among his reasons were that the allegations of fraud were inadequately particularised and without basis in evidence, and that as a whole the proposed Amended Order of Justice failed to comply with rules and principles of pleading, being verbose, unformatted, confused and self-contradictory. 40. The Greffier went on to give summary judgment in favour of the Respondents pursuant to Rule 7/1 of the Royal Court Rules. He explained his approach as follows at para 88 of his judgment: "88. Summary judgment is a power that should be applied by the court with considerable caution and only when the evidence in support of the application is sufficiently compelling. To reach a decision I have had to review a very large number of documents, many of which date back several decades. I considered very carefully the affidavit evidence provided by the Defendants and am persuaded by the submissions of the Defendants that there is very little likelihood that further documentary evidence will be discovered and available to a trial judge that is not presently before me." 41. The basis for the summary judgment was that the documentary evidence pointed

overwhelmingly to the Appointment having been made and effective to put an end to the Fine Art Trust in favour of Lady Cook, and also that in any case there was insufficient evidence that the items listed in paragraph 17 of the Order of Justice as the Assets in the Reversionary Interest had belonged to Sir Francis at his death so as to be within Clause 13 of his Will. In addition, the Greffier concluded that there was an available defence under the exoneration provision in the deed constituting the Fine Art Trust, and also one of prescription by reason of the lapse of time. 42. Before the Commissioner the Appellant's case was revised with a fresh draft Amended Order of Justice. This refined what had gone before, removing text proposed to be added in the previous iteration of the proposed amendment, and now including a 12-page single-spaced Annex. There was a change to list of assets in paragraph 17 of the Order of Justice: by way of example, the Reynolds was added back, and the category of 70 plus pictures was removed (although still claimed for in the Annex). The proposed amendment included a paragraph explaining that pictures comprised in the UK Trusts, specifically the 15 old masters, had been provided to Lady Cook to enjoy during her life with the Fine Art Trust being entitled on her death. And it made explicit that now a case was being made that Lady Cook and the Third Respondent had committed fraudulent breach of trust. This was expanded upon in the Annex. 43. As the Commissioner explains in his judgment, at the outset of the hearing the Commissioner set out to establish the essence of the Appellant's claims, which the Commissioner then summarised. The Appellant maintained still that some 70 plus paintings had been in Sir Francis' personal collection and had passed to the Fine Art Trust by Clause 13. Further, the 15 old masters were being claimed for on the basis that their journey into the Fine Art Trust was by operation of a disposition made by the UK Trustees appointing the pictures to Lady Cook for life and then to the Fine Art Trust. The 15 old masters claimed for were not specifically identified, although it would seem that pictures originating from the UK Trusts were included in the list of Assets in the Reversionary Interest set out in paragraph 17. 44. As the Commissioner explains in his judgment, at the start of the second day of the hearing the Appellant withdrew his allegation that Lady Cook and the Third Respondent had been fraudulent. Also, the Appellant said that he did not wish to pursue any claim about the 15 old masters. However, he still maintained a claim to the 70 plus pictures in Sir Francis' personal collection, along it would seem with certain of the pictures listed in paragraph 17 of the Order of Justice. Also, he wished to maintain his claim concerning the portrait by Sir William Orpen. 45. The Commissioner observed, in this regard, that the Respondents had put forward persuasive contentions "that the evidence shows that in fact Lady Cook purchased the [old masters] and did not receive them from any appointment by either the UK or the Fine Art Trustees". 46. This final position was explained by the Commissioner in paragraphs [38] to [41] of his judgment. Those paragraphs need not be repeated. 47. Once this position had been reached, it was inevitable that the Appellant would be refused leave to amend in terms of the revised Amended Order of Justice, even if leave could ever have properly been given for that amendment. That document no longer set out the case which the Appellant was arguing for in opposition to the summary judgment ordered against him. In particular the Appellant had dropped his case in fraud. 48. In his judgment Commissioner

expressed the view that the allegations of fraud should never have been made. He continued: "There was no focus in them, and the amended pleading simply besmirches the Third Defendant's integrity without any justification or particularisation. The fact that the Plaintiff is a litigant in person and not a qualified lawyer is no excuse." 49. Also, the Commissioner disposed of the application for summary judgment by concluding that ultimately the Appellant had no proper answer to the application. Having considered the evidence, the Commissioner concluded "In my judgment, the evidence is against him, and it not at all obvious that he has

- or will have - any evidence to support the contention which he wishes to advance" 50. As I have mentioned, following the provision of a draft of the Commissioner's judgment to the parties, the Appellant sought to resile from the concessions he had made during the hearing and to resurrect the case in fraud. This was said to be justified by reference by what was said to be new evidence not previously available. The Commissioner considered and rejected what was argued by the Appellant. His conclusion was that there was no new evidence which had not been available at the hearing, and that it would be unfair to allow the Appellant to resile from the concession which he had made and on the basis of which the Respondents had argued the case before the Commission 51. There is, however, a further element of concessions made by the Appellant at the hearing before the Commissioner. This concerns in particular the claim in respect of the 15 old masters. For this It is necessary for me to explain a little further about the background to the Appellant's concessions and what he said in is supplementary submissions to the Commissioner and then to this Court in support of his application for leave to appeal. The proposed appeal - discussion and decision 52. Although not put forward as a ground of appeal in the emailed grounds of 8 November 2022, the Appellant plainly wishes to contend that he has a ground of appeal by reference to the course of the hearing before the Commissioner, in particular concerning the circumstances in which he made the concession which he later claimed to have been mistaken. I address this in some detail, as the Appellant's arguments in this respect have been emphasised by him in support of his application for leave. I should add, however, that the point was covered fully by the Commissioner in paragraphs [61] to [70] of his judgment in terms which cannot be faulted. 53. Correspondence with Mr Barlow started on 15 January 2019 when he introduced himself to the First Respondent by saying, as his letter was expressed, that he was a trustee of the trusts established by the Will of the late Sir Francis Cook. It was in this context that he said he had been contacted by Mr Harry Baden-Powell, acting for the Appellant, seeking information about paintings and effects formerly owned by Sir Francis. He made reference to Clause 13 of Sir Francis' Will, and enquired about the ownership of the paintings and effects at Le Coin at the date of Lady Cook's death. Almost at once the First Respondent replied pointing out that it seemed surprising that Mr Barlow was claiming to hold the position stated in his letter, and Mr Barlow then explained that his previous letter was unclear and that he was in fact a trustee of the UK Trusts in respect of which Sir Francis exercised various powers of appointment by his Will. I would add that these appointments are irrelevant for present purposes. 54. From an email dated 17

November 2019, from Mr Harry Baden Powell to Mr Barlow, it is apparent that Mr Barlow had by then given "files" to Mr Baden Powell "a few months ago" containing documents. 55. Next, on 6 March 2020 and after the date of the Appellant's Order of Justice, Mr Barlow wrote to the Appellant a letter dated 6 March 2020 in which he explained seemingly that certain listed paintings, the 15 old masters, were indicated by notes from predecessor trustees to have been transferred to Lady Cook pursuant to Clause 13 of Sir Francis' Will, with her having a life interest only and there being a reversion on her death to the Fine Art Trust. His letter did not explain how the particular paintings might have come to belong to Sir Francis, or when, and what the context of the "notes" was. However, Mr Barlow's letter of 6 March 2020 became a central plank in the Appellant's case. 56. A letter dated 30 September 2020 from Mr Barlow to the First Respondent (described by the Commissioner at paragraph [61] of his judgment) did, however, give what seems to be an explanation concerning the notes, saying that these were in-house handover notes originally reviewed by Mr Barlow on becoming a trustee in 2008, and comprising annotations to Sir Francis' Will, with the inclusion of a précis "enclosed by way of attachment". Neither the précis nor the annotations accompanying the 30 September 2020 letter in fact supported a conclusion that the 15 old masters were regarded by the UK Trustees as having been disposed of by Clause 13 of the Will, for the reason that they said nothing about the old masters and did not identify what if anything in fact came to be disposed of by the Clause 13 bequest. Mr Barlow's letter of 30 September 2020 also explained that his letter of 6 March 2020 summarised among other things "the above précis ". 57. The letter of 30 September 2020 was a response to one of 23 July 2020 from the First Respondent to Mr Barlow, when the First Respondent was seeking information about what Mr Barlow had said in his letter of 6 March 2020. What he said was, among other things, that Lady Cook's Executors had made exhaustive researches to demonstrate Lady Cook's title to the Assets in the Reversionary Interest, that they managed to assemble evidence to show that she had purchased good title to the paintings included among those Assets, that they had sent to the Appellant's Jersey Advocate a letter of 4 June 2020 along with a bundle of 144 pages of all the relevant documentary evidence then available, and had been told that the bundle had been copied on to Mr Barlow who was "intending to retrieve the paperwork from 'deep storage'". 58. The letter of 4 June 2020 referred to in the First Respondent's letter of 23 July 2020 went into considerable detail in giving to the Appellant's Jersey Advocate information about each of the pictures listed in paragraph 17 of the Order of Justice as Assets in the Reversionary Interest. With the letter of 4 June 2020 was a bundle of documents to support the explanations given in the text of the letter. These documents are described in the letter, and comprise, for example, letters dating back to the 1960's. In view of what I say later, it is illustrative that two of these, both dated 24 February 1967 and from the Third Respondent, were to Sir Francis and Lady Cook respectively, both referring to a purchase by Lady Cook of certain paintings within the list of Assets in the Reversionary Interest at paragraph 17 of the Order of Justice. The letter to Lady Cook was said to enclose a receipt for her purchase of the paintings, one being said in the 4 June 2020 letter to be "Fra Bartolomeo, Madonna and child with saints" purchased for £50,000. 59. I have referred above to Mr Barlow's letter of 30 September 2020. In the letter he

explained searches that had been made for documents by the UK Trustees. It is clear from his letter that he had been provided with "several zip files" and had "historic papers located here". The last sentence was "I will be contacting [the Appellant's Jersey Advocate] to advise him that historic documentation has been located in storage". It is a reasonable inference that following the 30 September 2020 the Appellant's Jersey Advocate did indeed obtain materials from Mr Barlow or his office. 60. There is a final letter to Mr Barlow which I should mention. On 23 June 2022 Ogier (Jersey) LLP, acting for the First and Second Respondents, wrote further to the 30 September 2020 letter. Among other matters the 23 June 2022 letter reported: "We note that [the Appellant] gave discovery of additional documentation which is at Appendix 2 to this letter and summarised in the Schedule hereto. That documentation was consistent with much of what was provided under cover of our letter to [the Appellant's Jersey Advocate] dated 4 June 2020 in that it showed that Lady Cook acquired title to the listed valuable paintings from the UK Trustees". It also made the point that the additional documentation, "we understand, subject to correction, was provided by you to [the Appellant's Jersey Advocate]" . There is no evidence of any correction being offered by Mr Barlow in the subsequent correspondence between him and Ogier during August 2022. The Schedule refers to and describes 8 letters dating from 11 January to 9 March 1967. 61. Meanwhile, the inter partes correspondence conveys that the Appellant assisted by his Jersey Advocate gave discovery during the summer of 2021. This was referred to in a letter dated 28 June 2021 from Ogier which contained two tables summarising the principal documentary evidence that exists in the present proceedings. One of the tables addressed seriatim each of the Assets in the Reversionary Interest listed in paragraph 17 of the Order of Justice: for each there were several documents dating from the 1960s or before. These documents gave a convincing indication of sales of the old masters to Lady Cook from the UK Trustees. 62. On 17 December 2021 the First Respondent swore an affidavit to which he exhibited a bundle comprising about 400 pages, including copies of much old documentation concerning the old masters. His affidavit explained the enquiries made by Lady Cook's Executors in the search for evidence, and the reasons for believing that no further contemporaneous documentation was likely to be forthcoming. It explained the source of the documents now available as having included, among others, the personal papers of Sir Francis and Lady Cook, as well as "documents held by Monro Wright & Wasbrough LLP Solicitors (formerly Fisher Dowson & Wasbrough Solicitors)". The affidavit addressed, item by item, each of the Assets in the Reversionary Interest listed in paragraph 17 of the Order of Justice and the documents relating to it. The exhibit to the affidavit included each of the documents comprised in the 17 pages attached to the Appellant's email of 26 September 2022, referred to below. 63. The Greffier's judgment explains that at the hearing before him the Court was taken through a detailed examination of the available evidence regarding the ownership of the Assets in the Reversionary Interest. At paragraph [89] the Greffier said: "For the [Appellant] to succeed at trial, he would need to convince the court that, on the balance of probabilities, it was more likely than not that the items listed in the Reversionary Interest were indeed assets belonging to Sir Francis Cook at the time of his death. That would entail negating the substantial documentary evidence supplied by the

Defendants which prima facie demonstrates that those items listed in the Reversionary Interest were previously owned not by Sir Francis Cook, but by the UK Trusts] and were subsequently purchased by Lady Cook." 64. The Greffier went on to explain how the Respondents "took the court forensically through the available documentation, cataloguing the items listed within the Reversionary Interest and evidencing their origin and provenance". 65. In the face of the material exhibited to the Affidavit of 17 December 2021, together with the explanations given at the hearing before the Greffier and in his judgment, it is difficult to see how the Appellant could have thought that there was a sustainable case in respect of the 15 Old Masters. 66. The Commissioner's judgment records, at paragraphs [36] and [37], the following concerning the hearing before him: "36. After the close of the Plaintiff's address, Advocate Evans took me through the documentation in relation to the clause 17 paintings in detail with a view to establishing that a large number of them had clearly been bought from the UK Trustees by Lady Cook. We adjourned at approximately 5.15pm on the 7th September, and first thing the following morning the Plaintiff asked for permission to say something further which, he said, might save time. He passed me a written statement which I read aloud and was to this effect. He had not realised that documents which were in the Court bundle were provided by [the Appellant's Jersey Advocate], then acting for him, on his behalf and not from the Defendants when he swore the affidavit for discovery. He now realised that the communications including the minutes of the meeting of 31st March 1983 were genuine and that his former view that the Third Defendant had fabricated evidence was unfair and untrue. He said it would therefore be wrong for him to retain his position that either Lady Cook or the Third Defendant were fraudulent in any way. 37. The Plaintiff said that he no longer wished to pursue his action with regard to the fifteen Old Master paintings, nor the Reynolds' painting of Captain Hood. He no longer complained that Mr Baden-Powell, the Third Defendant's co-trustee, was not involved in what was done in relation to the Appointment in 1983. He accepted that all this was a long time ago and that unless fraud was alleged, there was nothing that could be done about it. It seemed clear to me that as he did not allege fraud, that was an end to the matter insofar as those claims were concerned. As his case was that the UK Trustees had made an appointment of the Old Masters to the Trustees of the Fine Art Trust, he must be taken to accept that the Appointment included those paintings or that Lady Cook did indeed buy them - it was unclear which of these represented his position. I make that comment recognising the Defendants' contentions - which seemed to me persuasive - that the evidence shows that in fact Lady Cook purchased the paintings in question and did not receive them from any appointment by either the UK or the Fine Art Trustees. Indeed, there is no evidence that the UK Trustees made any such appointment, whereas there is evidence in the correspondence at the time that the Fine Art Trustees made the Appointment, albeit a copy of the document itself is no longer available." 67. The explanation given for the Appellant's seeking to withdraw that concession was set out in an email to the Court dated 30 September 2022 sent on the Appellant's behalf by Mr Baden-Powell. Essentially the contention was that the Appellant had not known what material was included in the disclosure provided by his Jersey Advocate, of whom he was extremely critical, and had only

come to appreciate during the hearing before the Commissioner that it was being said against him that certain material relied upon by the Respondents had come from his own disclosure and in turn had come from the UK Trustees. He then asserted that he understood Mr Barlow to have said that he does not recognise the documents. Based on this he claimed that the documents must have been generated by the Third Respondent at the request of Lady Cook, and he wished to continue with his case in fraud. 68. As the Commissioner noted in his judgment, there was no evidence of Mr Barlow having disclaimed the provenance of any of the documents relied on as evidencing sales of paintings to Lady Cook. Before me Mr Baden-Powell, in the course of his address on behalf of the Appellant, repeated the assertion, also made by the Appellant in his email of 2 December 2022, that the documents did not come from the UK Trustees. But this assertion by Mr Baden-Powell was not evidence but submission, and there was nothing from Mr Barlow (or anyone else involved with the UK Trustees) in the way of an affidavit, or even a letter or email to support the assertion. That remains the case, even though in his email of 6 January 2023 the Appellant states that Mr Baden-Powell has had a meeting with the UK Trustees who "confirmed to him that ... the pertinent 'evidence' ... had not come from them". 69. In contrast, before the Commissioner had been two emails sent to Mr Barlow by or on behalf of the Appellant. These were provided with Mr Baden-Powell's email of 30 September 2022. The first, from the Appellant and dated 26 September 2022, attached various documents, namely the letter from Mr Barlow of 6 March 2020 and "around 17 pages that effectively completely contradict" what had been said in the 6 March 2020 letter. The Appellant's email went on to say, "When I first saw [the pages] I did not give it much importance as I noted the absence of names, signatures and proper letterheads and therefore, particularly given the several contradictory statements and general behaviour of the Third [Respondent] believed them not to be genuine documents but forgeries". He explained how "shocked and completely destabilised" he was at the hearing before the Commissioner when told that the documents had been in his own discovery, and concluded by saying "I now need to know from you, very urgently, whether you/your firm are indeed the source of these attached documents ... or whether you know nothing about them and do not recognise them ...". 70. The second of the emails to Mr Barlow was one dated 28 September 2022 from Mr Baden-Powell, an email to similar effect as that from the Appellant saying that "We have not been in contact for a long time" and requiring his urgent confirmation that he does not recognise the documents as documents sent by him to the Appellant's Advocate or to the Respondents. No letter or email from Mr Barlow in reply to this correspondence was provided to the Commissioner, and none has been sought to be relied upon in support of the proposed appeal. 71. Of the 17 pages, there was the letter of 6 March 2020 on which the Appellant relies, along with two letter of 30 June 1977 from Sir Francis to the UK Trustees which had been exhibited to the Appellant's own affidavit of 10 January 2022 and were deployed in support of his proposed amended Order of Justice. The remaining pages comprised the 8 copy letters described in the Schedule to Ogier's letter of 23 June 2022. 72. Illustrative of these 8 copy letters is one dated 11 January 1967 from "The Manager, Trustee Department" to Mr H. J. Wasbrough at Messrs Fisher, Dowson & Wasbrough, saying among other things, "As mentioned in my letter of the 30th

December, I agree to the sale of the Fra. Bartolomeo to Lady Cook for the sum of £50,000". The second of the Assets in the Residuary Interest listed in paragraph 17 of the Order of Justice is referred to as "Fra Bartolomeo, Holy Family". This same document was referred to in one of the annexes to the letter of 28 June 2021. It was also exhibited to and relied upon in the affidavit of 17 December 2021. That affidavit also exhibited the two copy letters of 24 February 1967 referred to above along with the copy receipt enclosed with the letter to Lady Cook, this receipt dated 2 February 1967 being expressed to be from the solicitors for one of the UK Trusts, and addressed to Lady for £55,000 for various paintings, including £50,000 in respect of the Fra Bartolomeo. 73. Quite apart from the question whether any of the documents exhibited to the 17 December 2021 Affidavit had come from the UK Trustees to the Appellant's Advocate and thence, after production on discovery, into evidence given by the First Respondent, or whether all the documents had come from other researches made by the Appellant's Advocate or by Respondents, the Commissioner found, as he was entitled to do, (a) that the totality of the documents before the Court provided sufficient evidence to support the summary judgment sought by the Respondents, and (b) were not properly to be challenged by the Appellant after the hearing by claiming them, or some of them, possibly to be forgeries, and (c) in any event there was no evidence that the 15 old masters had ever come to be appointed or disposed of by the UK Trusts so as to pass them into by Sir Francis' ownership (or, for that matter, to the Fine Art Trust after Lady Cook's death), while there was material pointing to the pictures having been acquired by Lady Cook. In reaching this conclusion the Commissioner accepted the possibility that Mr Barlow or the UK Trustees might after all not recognise some of the documents, notably the 17 pages with the Appellant's email of late September 2022, as having coming from their files. In short, the Commissioner addressed the substance of the case presented by the Appellant in the email of 30 September 2022. 74. As mentioned already, both in his submissions to the Commissioner made after the hearing and in support of his application for leave to appeal the Appellant has been extremely critical of his Jersey Advocate, including as to his provision to the Appellant of documents produced on disclosure. However, the problem for the Appellant concerns documents which were in evidence and discussed and deployed at the hearing before the Greffier. There was nothing surprising about the material documents by the time of the hearing before the Commissioner, and the Jersey Advocate's handling of disclosure no longer of relevance. 75. For completeness concerning the way the Appellant conducted the hearing before the Commissioner and then afterwards sought to resile from concessions made, I should deal with a further explanation offered to me. The Appellant by Mr Baden-Powell said that at the hearing he, the Appellant, had been suffering from a serious nervous attack which impacted his ability to read, think and communicate, so that when on the second day he passed to the Commissioner written notes which the Commissioner read out, the notes did not set out his full case which he wished to explain orally. This point was made also in the Appellant's email of 2 December 2022 sent in advance of the hearing before me. 76. As it seems to me, this cannot assist the Appellant as providing a ground of appeal with any prospects of success. There was no request made for an adjournment before the Commissioner. Nothing was said in the long and detailed email of

30 September 2022 sent by Mr Baden-Powell on behalf of the Appellant about his having had any difficulty in communicating or understanding at the hearing on 7 and 8 September 2022, or as having wished to add to his submissions at that time, so as to found a case that the Commissioner made some error in the conduct of the proceedings including in relation to the Commissioner's consideration of the email of 2 October 2022. 77. I now consider in turn each of the stated grounds of appeal in the email of 8 November 2022, explaining why they give no basis for leave to appeal. Broadly, however, the grounds fail to explain any reason for thinking that the Commissioner may have been mistaken in refusing the amendment application; and as regards the decision to uphold the summary judgment order, the grounds amount to little more than a rehearsal of arguments as to the merits of the Appellant's claim without any attempt to explain specifically where or how the Commissioner may have fallen into error. 78. Ground 1 makes a general criticism of the Commissioner's judgment as being "unbalanced and unfair", a criticism expanded on in the 6 January 2023 email, and also complains about what the Appellant sees as a disparity between the treatment received by him and by certain other beneficiaries under Lady Cook's Will. He also offers a view as to what Sir Francis might have wished concerning his personal collection of paintings and the old masters. This ground fails, however, to recognise that the Commissioner was entitled to take account of the fact that the burden of proof would rest on the Appellant at any trial; and it fails to identify any error on the part of the Commissioner in his appreciation or analysis of the evidence before him or the relevant law. It does not justify leave to appeal. 79. Ground 2 complains that the Commissioner was led to believe, mistakenly, that "the main issue in the case was whether 1250 paintings by Sir Francis' own hand ... were correctly transferred to" the Jersey Heritage Trust's ownership. There is nothing in this ground. It is obvious from his judgment that the Commissioner knew that the Appellant was not primarily concerned about these particular paintings, or whether or how they had come to be in the ownership of the Jersey Heritage Trust. On the other hand, once it was recognised that the Fine Art Trust had been emptied of these paintings, and that they had come to the Jersey Heritage Trust following the Appointment to Lady Cook, it was more likely than not that any interest in any other pictures in the Fine Art Trust would have come to her at the same time, with the Fine Art Trust terminating. That was what was suggested by the surviving documents. 80. Ground 3, insofar as adding to Ground 2, is a criticism of the conduct of the case on the Appellant's behalf by his original lawyers, with further indication that the Appellant has been unable to obtain representation from anyone else. This does not amount to a good ground of appeal. The Appellant conducted the hearing before the Commissioner. The Commissioner's judgment shows the care taken to ensure that the Appellant was not disadvantaged in the hearing by his position as a litigant in person. 81. Ground 4 asserts that there was no need for any appointment to have been made by the trustees of the Fine Art Trust in order for assets comprised in the trust to have ended up with the Jersey Heritage Trust. The difficulty with this is that the Jersey Heritage Trust was not an object of the Fine Art Trust. Lady Cook was. By some process, even on the Appellant's case, paintings by Sir Francis which had been within the collection owned by the Fine Art Trust came to be owned by Jersey Heritage Trust. The available evidence supports this

process as having involved the making of the Appointment in favour of Lady Cook in 1983 followed the next year by a disposition in favour of the Jersey Heritage Trust. This ground therefore does not advance the Appellant's case for leave to appeal. 82. Ground 5 is no more than an assertion of the Appellant's belief that the Fine Art Trusts still exists and has a claim. This is not a good ground of appeal. 83. Grounds 6 to 9 together are, at the highest, a case that Commissioner failed to give cogent reasons for concluding that, accepting that pictures became subject to the Fine Art Trust (as some did, notably pictures by Sir Francis), the trustees exercised their powers to appoint the pictures out to Lady Cook, together with an attack on the evidence of the Third Respondent and the Commissioner's assessments. 84. In Ground 7 in particular the Appellant states that there are three categories of assets in question. He summarises these as being the personal collection, that is the 70 plus pictures, along with the Reynolds picture of Lord Bridport; the 15 old masters; and the two notable pictures, namely the Reynolds (again) and the Orpen. 85. The 15 old masters may conveniently be set to one side, for reasons explained already at length. There is ample evidence that they were sold by the UK Trustees to Lady Cook. On this basis they did not become assets of the Fine Art Trust, so that there can be no relevant claim concerning them in these proceedings. But, if they were not sold to Lady Cook and did not become her property, there is no explanation as to when or how they ceased to belong to the UK Trusts and passed to the Fine Art Trust. 86. As to the remaining pictures, the Commissioner did give cogent reasons for his conclusions concerning the appointment out of the Fine Art Trust in favour of Lady Cook, and those reasons are convincing. Accordingly these three grounds of appeal, Grounds 6 to 9, have no realistic prospect. 87. Ground 10 involves an assertion that the late Mr Baden-Powell, as trustee of the Fine Art Trust, would not have joined with the Third Respondent in anything which diverted Cook assets away from Sir Francis' bloodline descendants, while he would have been happy for paintings in Sir Francis' own hand going to the Jersey Heritage Trust. The difficulty with this is that the late Herbert Baden-Powell cannot now speak for himself, while Lady Cook was a named object of the Fine Art Trust: a disposition in her favour would have left her free to deal as she wished with her assets. 88. Ground 11 states that the Appellant wants a trial of the issues where he is able to cross-examine the Third Respondent and also James Lynch. His idea appears to be that by cross-examination he will be able to show that these individuals are telling lies, even if only about matters irrelevant to the Fine Art Trust, and that that will lead to it being shown that assets have been misappropriated from the Fine Art Trust. The fundamental problem with the Appellant's case is that there is no proper foundation for a case that either of these individuals is dishonest even if possibly mistaken in recollection as to some matter. In this regard the Appellant has laid great emphasis on what he sees as inconsistencies in various statements made at different times by the Third Respondent. 89. The inclusion of James Lynch in the Appellant's list of possible witnesses to be cross-examined needs a little explanation. By her Will Lady Cook made dispositions in favour of various beneficiaries, the Appellant included. Patrick Lynch and James Lynch were also beneficiaries; these two, indeed, were her among her residuary beneficiaries. Both of these two were referred to by Lady Cook in her Will as "my nephew". 90. The Appellant plainly has a grievance that Lady

Cook by her Will benefitted James and Patrick Lynch. He has put forward a contention that James and Patrick Lynch are not in fact blood-relations of Lady Cook. He asserts that Lady Cook "always said to everyone [the Appellant] knew that ... they were not related to her". He also asserts that Lady Cook's body was cremated, rather than being buried, as a result of "a previously undisclosed decision (by James Lynch)". 91. For the hearing before the Commissioner James Lynch made an affidavit dated 12 August 2022. He explained that he made it with the agreement of Patrick Lynch and another residuary beneficiary, and that they had agreed with the contents to the best of their recollection, information and belief. This affidavit was in response to correspondence from the Appellant to the First and Second Respondents' Advocate, and then allegations made by the Appellant in an affidavit, concerning among other matters the connection of James and Patrick Lynch with Lady Cook, and arrangements for her funeral. 92. However, even if these assertions of the Appellant were true - and the Commissioner held them to be without foundation, a conclusion which cannot be faulted in my judgment - and if in particular, and contrary to James Lynch's evidence, either (a) James and Patrick Lynch were not Lady Cook's nephews or (b) she had in the past been in the habit of denying that they were her nephews, none of this is relevant to the destiny of the pictures many years ago which the Appellant now wishes to claim for the Fine Art Trust. His wish to cross-examine James Lynch was no possible reason for a trial. 93. So far as concerns the position of the Third Respondent, the Commissioner's judgment gave careful attention to the fact that the matters in issue were many years old and that inevitably the Third Respondent's memory would be imperfect. For obvious reasons, therefore, detail of what transpired in the years up to 1984, when the Third Respondent considered the Fine Art Trust to have terminated, were likely to be best evidenced by contemporaneous documents. These the Commissioner reviewed, concluding also that it was improbable that any further documents would be turned up. In other words, cross-examination of the Third Respondent would not further the record, so that a wish on the part of the Appellant to cross-examine him was not a justification for refusing summary

judgment.

94. Accordingly, the Appellant is to be refused leave to appeal. Authorities *Cook v Clapham and Ors*

[2022] JRC 210 . *Crociani v Crociani*

[2014] JLR (1) 426. Royal Court Rules. Page Last Updated: 19 Jan 2023 [Back to top](#) [About JLIB](#) [Accessibility](#) [Contacts](#) [Disclaimer](#) [Feedback](#) [Privacy policy](#) [Site map](#) © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. [BAILII: Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2023/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/cook-v-clapham-and-ors-2023-jca-005-13-january-2023>

Prepared on 29 October 2026 · Esheria