ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 of 1983

BETWEEN:

GWENDOLYN WILLIAMS - Defendant Appellant

and

VICTOR RANDOLPH WILLIAMS - Plaintiff/Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Williams (Acting)
The Honourable Mr. Justice Byron (Acting)

Appearances: Cosmos Phillips, Q.C. for the Appellant
Time Kendall and Ann Henry for the Respondent

1985: March 4, 5,
May 27.

JUDGMENT

WILLIAMS, J.A. (Acting)

This is an appeal from a decision of Bishop J. (as he then was) given on April 29, 1983 in which he gave judgment for the Respondent on an insurance claim in the sum of $60,835.85, with costs to be taxed and dismissed the appellant's counterclaim for an account.

The appellant and the respondent were lawfully married in March, 1957 and the marriage was dissolved in 1971. On the 10th November, 1965 they obtained a Certificate of Title as joint tenants for two (2) plots of land C84 and C85 situated at Villa in the Parish of Saint John, in Antigua. After the lands were acquired they erected two houses thereon and insured them in their joint names through Kenneth A. Gomez & Sons.

On the 28th October, 1969 they negotiated a loan from the Royal Bank of Canada also in their joint names, the principal and interest

/amounting.....

amounting to $15,339.52. The loan was for a period of four years and repayment was by way of instalments. It was paid off on the 9th October, 1973.

The purpose of the loan was to improve a Guest house on the said lands and to pay off the Bank of Nova Scotia. The Royal Bank of Canada held the title to the land as security for the loan, as well as a fire insurance policy with a "loss clause" in the Bank's favour.

The marital relationship broke down in or about November, 1967 and the Respondent left Antigua to reside in the United States of America in the middle of December, 1970, and still resides there.

When the Respondent left Antigua he put the properties under the control of a Solicitor but early in 1972 the Appellant took control of the properties. The Appellant continued to live in Antigua after the Respondent left, and she carried on a business in the said premises. On the 20th April, 1972 the balance outstanding on the said loan was $5,720.30 and the Appellant undertook the obligation of repaying same partly from rental of the houses and partly from her own business.

After the termination of the marriage and while the Respondent resided in the United States of America he and the Appellant corresponded occasionally and on two occasions they met in the United States while the Appellant was visiting that country. On these occasions they spoke in a general way about the properties.

On the 8th October, 1974 the houses were damaged by earthquake and the Appellant was paid $4,000.00 by the Insurance Company which sum she made use of.

In about August, 1976 the Respondent visited Antigua and there were discussions between the Respondent, the Appellant, and their respective legal advisers with regard to the sale of the properties and a division

/of the.....

of the proceeds equally between them. The discussions broke down, no agreement was arrived at, and the Appellant continued to administer the properties as if they were hers exclusively.

On the 2nd February, 1977 the Appellant transferred the policy of Insurance from Kenneth A. Gomez & Sons where the property was insured in their joint names to State Insurance Company where she insured the two houses in her name as sole owner for the sum of $135,000.00 against loss or damage by fire. The mortgage clause on the policy showed that the Royal Bank of Canada was a mortgagee or assignee with interest in the insured properties, but the amount was not stated. The policy was to run from 2nd February, 1977 to 8th February, 1978 and same was renewed to run from 8th February, 1978 to 8th February, 1979.

On 3rd October, 1978 both buildings were completely destroyed by fire and a claim was made by the Appellant on the 5th October, 1978 to State Insurance Department for the insured sum of $135,000.00.

Victor Williams on learning of the fire returned to Antigua within days of the event. There was correspondence and discussions between the interested parties namely Victor Williams, Gwendolyn Williams, State Insurance Department, The Royal Bank of Canada and their respective Solicitors, concerning settlement of the matter but it remained unresolved. Victor Williams returned to the United States leaving Time Kendal his Solicitor to act on his behalf. Franklyn Clarke was then Solicitor for Gwendolyn Williams and A. William Archibald, Solicitor for State Insurance Department.

State Insurance Department was reluctant to pay out the insured sum until the differences between Victor Williams and Gwendolyn Williams were settled and the interest of Victor Williams if any in the policy of insurance had been determined.

On the 12th December, 1979 the Solicitors for both Victor Williams
/and Gwendolyn....

and Gwendolyn Williams in the presence of Gwendolyn Williams and Rolston Barthley a representative of State Insurance Company signed and delivered to the Insurance Company a document wherein both the Appellant and the Respondent by their respective Solicitors acknowledged that "the said Gwendolyn Williams in effecting the above insurance acted on behalf of herself and Victor Williams". On the basis of this document it was agreed between the parties that the Insurance Company would pay the full sum over to the Royal Bank of Canada who would then make payment to the parties in terms of their respective interest. On the 2nd January, 1980 State Insurance made out a cheque for the sum of $121,677.71 payable to Gwendolyn Williams and The Royal Bank of Canada, following which Gwendolyn Williams signed a Bond of Indemnity to State Insurance Department against any claim that may be made against the Company arising out of the said transaction. Out of the said sum the Bank retained the amount due to them and paid the remainder over to Gwendolyn Williams who kept the entire amount. The claim of Victor Williams for the sum of $60,838.85 is in respect of his one half share of the $121,677.71.

On the 20th January, 1980 a Writ of Summons endorsed with a statement of claim was filed by the Solicitor for Victor Williams. I will make reference to certain passages in the pleadings.

The Statement of Claim alleged that:-

> "8. The defendant.....made a claim on the said insurance company for compensation for the total loss of the said buildings.....without disclosing to them the interest of the plaintiff. While the defendant was attempting to recover the insurance monies the plaintiff's solicitor by letter dated the 17th October, 1978 put the said insurance company on notice that the proceeds of any such insurance claim belonged to the plaintiff and the defendant.
>
> 9. Early in December, 1979 a representative of the said insurance company told the solicitor for the plaintiff and the solicitor for the defendant, at the same time, that unless the defendant acknowledged in writing that in effecting the said insurance she acted on behalf of the plaintiff and on her own behalf the said company would pay to the defendant only the compensation in respect of her one half interest in the said buildings.

/10. On the....

"10. On the 12th December, 1979 the solicitor for the plaintiff and the solicitor for the defendant and the said representative of the insurance company signed and delivered to the insurance company a document wherein both the plaintiff and the defendant by their respective solicitors acknowledged that "the said Gwendolyn Williams in effecting the above insurance acted on behalf of herself and Victor Williams".

11. Thereupon it was agreed among all parties concerned that on the strength of the said document they would pay the full amount of the compensation to the Royal Bank of Canada with notice to the solicitors for the plaintiff and for the defendant, who would then arrange with the said bank for the release of the remaining funds to the parties according to their respective interests, that is to say, the plaintiff would be paid one half of the total proceeds of the claim."

It is in respect of paragraphs 9 to 11 above that Counsel for Gwendolyn Williams submitted that:-

"Gwendolyn Williams was not aware of the content of the document signed."

The Statement of Claim alleged that the Insurance Company paid out to Gwendolyn Williams the sum of $121,677.71 being the entire proceeds of the claim and that she executed a Bond of Indemnity in favour of the Insurance Company.

The Statement of Claim continued:-

"13. Out of the said sum of $121,677.71 the said bank retained the amount due them.... and the balance was paid to the defendant."

Finally the Statement of Claim asserted that the defendant received the sum of $60,838.85 being one half of the total proceeds of sale for and on behalf of the plaintiff but has refused and still refuses to pay the same or any part thereof to the Plaintiff.

The Defence and counterclaim of Gwendolyn Williams pleaded as follows:

/8. ....the sum....

"8. .....the sum of $121,677.71 was paid in settlement by State Insurance to her and the Royal Bank of Canada but denies that the plaintiff had any interest in the said sum or any part thereof.

9. The defendant admits accompanying her solicitor..... to the offices of State Insurance and that her solicitor and.... solicitor for the plaintiff signed a document but says that the contents were neither explained to her nor did she approve the same.

10. Further and in the alternative, if it is found that the defendant did consent to the said document (which is denied) the same was obtained by threats and duress:-

(a) by State Insurance threatening to withhold payment to the defendant and the Royal Bank of Canada; and

(b) by the plaintiff threatening to assault and beat the defendant.

11. Further, and in the alternative, if it is found that the defendant did consent to the said document (which is denied) the plaintiff gave no consideration for such consent.

12. Further, and in the alternative, the defendant will contend that the Statement of Claim does not disclose a cause of action."

The counterclaim then alleged:-

"14. The plaintiff has disposed or otherwise dealt with the said business to his use and has neglected to discharge the.....mortgage debt or repay the defendant the monies she paid to discharge the same."

And the defendant claims:-

(a) an inquiry as to the amount of money she repaid the Royal Bank of Canada in discharge of the mortgage debt; and

(b) a declaration that such sum constitutes a charge upon the land jointly owned by the plaintiff and the defendant."

The learned trial Judge found:-

"That Gwendolyn Williams took on the management and control of the joint property after removing it from the hands of the solicitors in whose charge it had been left by her former husband the Plaintiff."

/That subsequent....

That subsequent to her doing so there had been discussions between the concerning the properties and although these discussions did not bear fruit, they were both aware of the position taken by each other in respect of the properties.

Gwendolyn Williams was seeking to get what she considered to be her share of the property and felt that she was entitled to one half share. Victor Williams took the view that she was entitled to a share in the properties but not as much as one half.

The trial Judge came to the conclusion that Gwendolyn Williams changed Insurance Companies without the knowledge or concurrence of Victor Williams and that she did so in 1977.

In dealing with Victor Williams' return to Antigua after the buildings were destroyed by fire he stated thus:-

> "I accept that Victor Williams came to Antigua in pursuit of what he considered to be his interest in the matter; and I think that it must be clear that he would not have journeyed from the United States of America to Antigua if he regarded Gwendolyn as the only person with an interest in the property or entitled to the proceeds of the claim made on the Insurance Company. Or to put that another way, he would not have done so if he did not regard himself - rightly or wrongly - as being entitled to part of the proceeds of the claim."

There followed a great deal of correspondence between Time Kendall Solicitor acting on behalf of Victor Williams, State Insurance Department, and A. William Archibald, Solicitor acting on behalf of that Company as well as Franklyn Clarke Solicitor for Gwendolyn Williams. Finally Mr. Archibald gave an opinion to the State Insurance Department in which he made it clear that the Company was "liable" for the insured loss. The learned trial Judge went on to say "Mr. Archibald gave a clear indication to State Insurance Department about the manner in which the claim could be satisfactorily concluded, when he wrote:-

/"Perhaps.....

> "Perhaps the most satisfactory conclusion to this matter would be for Gwendolyn Williams to retract her denial of having any interest other than her own leaving the insurer free to pay the sum of $121,677.71."

In December, 1979, there was a meeting at the office of Rolston Barthley the then Acting General Manager of State Insurance Department and Mrs. Gwendolyn Williams. At that meeting a discussion ensued concerning the claim and Mr. Barthley told her of the opinion he received from Mr. Archibald and the suggestions made therein. Of this the learned trial Judge said "up to that time Mr. Barhtley was unaware that Gwendolyn Williams was contending that she had not insured the two properties iether as agent for Victor Williams or on his behalf; he had been told by her that the properties were jointly owned by them. I accept as true the evidence which he gave :-

> 'In December, 1979.....I acted as Acting General Manager. While so acting I spoke to her about the claim. I told her I received an opinion from Mr. Archibald, Solicitor, and that he had suggested 3 types of settlement: (1) that we pay Royal Bank of Canada the amount owed and hold the rest of the money until an agreement could be reached regards splitting the difference between Victor Williams and herself (2) since it was proved that other people had insurable interest her fifty per cent portion could be paid and (3) as long as she assured us that at the time of the insurance she acted on her behalf and on behalf of Victor Williams a full settlement could be made."

It was as a result of this meeting between Mr. Barthley and Mrs. Williams that a later meeting took place on the 12th December, 1979 at State Insurance Department in the office of Mr. Barthley, between Gwendolyn Williams, her Solicitor Mr. Clarke, Mr. Kendall Solicitor for Victor Williams and Mr. Barthley. This meeting had been suggested by Mr. Barthley with a view to arriving at a final agreement.

This is what the learned trial Judge had to say with regard to what took place at that meeting:-

/"The evidence...

"The evidence of what occurred at the meeting was contained in versions given by the witness Barthley and the defendant Williams. I accept the former's version. I find that the two solicitors and the defendant were at the office of the witness and the defendant's solicitor produced a document - exhibit VW18 - after the matter was discussed among them. That document was read aloud so that everyone heard the contents; and, I may add, everyone was free to ask for and read it for himself or herself but no one sought to do so. I believe this was so because the full import of the document was appreciated as a result of the discussion and the reading of it. Gwendolyn Williams a business-woman and her solicitor were both there. Victor Williams was absent but his solicitor was there. The Insurer was there. There was no difficulty in the statement. It was a single statement of six lines, two or more of which contained the names of the parties and of their solicitors, and the remainder indicating what was accepted. The document read thus:

"Re Policy No. H77/02/1020

WE the undersigned FRANKLYN A. CLARKE and TIME H. KENDALL acting respectively on behalf of Gwendolyn Williams and Victor Williams accept that the said Gwendolyn Williams in effecting the above insurance acted on behalf of herself and the said Victor Williams.

Dated the 12th day of December, 1979."

Continuing the learned trial Judge said this:-

"Gwendolyn Williams would have this Court believe that although she was present she did not know what "the paper" was about and that she only asked her solicitor about it when she got back to his office. According to her, he then gave her an explanation. I do not believe her; and it is further incredible to conceive that, as a business-woman of some experience, Gwendolyn Williams would sit in the office of the insurance company from which she was making a claim, in the company of her own solicitor and the solicitor of Victor Williams, see the solicitors sign a document likely to be if not obviously connected with the business of her claim, say or ask nothing and remain in ignorance of what was going on and what was being signed by her solicitor; and then she would enquire of her solicitor only after they had left the company's office. I do not accept her version of events on 12th December, 1979. I find that she knew and understood what was going on and what her solicitor signed on her behalf especially

/because....

> because she had, some time earlier, advised the acting General Manager of State Insurance Company that she and Victor were joint owners of the property which she had insured for $135,000.00."

The leraned trial Judge went on to say:-

> "I find as a fact that, in the words of Rolston Barthley, "Gwendolyn Williams did consent..... to Mr. Clarke signing the document". After signing the defendant enquired of the Manager of the Insurance Company how soon she could expect payment."

If, I might interject, the allegation of Gwendolyn Williams that she was unaware of what was taking place must be viewed in the light of the fact that this meeting had come about on a suggestion of Rolston Barthley who in his evidence had said:-

> "I ask her to get Mr. Clarle her solicitor, along with Mr. Kendall, Mr. Williams' solicitor, along with myself so that a final agreement could be reached."

Following this a cheque was drawn by the Insurance Company for the sum of $121,677.71 payable to Gwendolyn Williams and the Royal Bank of Canada, Gwendolyn Williams being the insured and the Royal Bank of Canada the mortgagee or assignee under the mortgage clause in the insurance policy. When this was done Barthley was of the view that whatever money was eventually paid over to Gwendolyn Williams would be shared equally between her and Victor Williams.

Continuing the learned trial Judge said:-

> "Gwendolyn Williams failed completely to establish that her consent to the signing of the document at the office of Rolston Barthley on the 12th December, 1979 was obtained either by Rolston Barthley threatening to withhold payment on the claim or by Victor Williams threatening to assault or beat her. There was not a scintilla of evidence to show that duress, which was not particularised, in the pleading."

/The learned....

The learned trial Judge went on to deal with the legal principles involved and then he stated thus:-

> "From my consideration of all the facts and circumstances and based upon such evidence as I accept, I am of the view that Gwendolyn Williams was not entitled to retain the full amount of $121,677.71 which was recoverable and was indeed recovered. She was entitled to a part only of that amount and Victor was entitled to part. The property which was the subject matter of the insurance contract was equally theirs and so they ought to benefit equally. The persons interested were the two of them and the Royal Bank of Canada. Consequently the amount received by Gwendolyn Williams ought to be divided equally between herself and Victor Williams. She would be entitled to half of it and the remainder should go to Victor Williams. He would thus be entitled to judgment for that amount."

And the learned trial Judge concluded by saying:-

> "The counterclaim set out assertions of fact all of which were alleged to have occurred more than six years before the pleading was filed; additionally I am of the view that the material facts in dispute were not established. The defendant is not, in my judgment entitled to any of the relief sought. I would therefore dismiss the counterclaim, and I so order."

The Grounds of Appeal were as follows:-

2. (1) The Plaintiff/Respondent was a stranger to the Contract of Insurance and cannot claim any interest in the policy monies.

(2) The Defendant/Appellant was under no duty to disclose to the insurer that the Plaintiff/Respondent was a joint owner of the property insured and, in any event, a breach of any such duty cannot confer any interest in the policy monies upon the Plaintiff/Respondent.

/(3) The Defendant....

(3) The Defendant/Appellant had an insurable interest to the extent of the whole value of the insured property and was entitled to the whole of the policy monies for her own account and the contrary and/or doubtful opinion of the insurer and/or its legal adviser could not confer any benefit upon the Plaintiff/Respondent.

(4) The policy monies were subject to a trust in favour of the Royal Bank of Canada and the destination thereof could not be altered without the consent of all the cestui que trust.

(5) If at any time the Defendant/Appellant agreed to share the policy monies with the Plaintiff/Respondent he gave no consideration for it.

(6) The Defendant/Appellant had an equity arising from the payment of mortgage monies which the Plaintiff/Respondent was under an obligation to pay and the Statute of Limitations has no application.

Counsel for Gwendolyn Williams stated that there never was any dispute that the Appellant and the Respondent were joint owners of the property and that this was conceded on all sides. He submitted that the nature of Gwendolyn Williams' interest is an entitlement to one half of the interest and a right of survivorship to the other one half. If Victor Williams died Gwendolyn Williams would then be entitled to the whole. he therefore contended that on that basis Gwendolyn Williams could properly have insured the houses on her own behalf and they having been

/destroyed.....

destroyed by fire she was entitled to the whole of the insured benefit. Counsel submitted that the learned trial Judge was wrong in finding that Gwendolyn Williams' insurable interest was one-half of the sum for which the houses were insured. He argued that because A had an insurable interest A could not claim on a property insured by B just on the basis that A had an insurable interest in the property. He contended that Gwendolyn Williams had no duty at Common Law or otherwise to disclose that Victor Williams was joint owner of the properties with her; that Gwendolyn Williams and Victor Williams had a common interest in the properties but not in the insurance policy; and that Victor Williams was not a party to the Contract of Insurance. Counsel argued that there is no obligation on a joint tenant to insure and if the prudent one insures for his benefit he is entitled to all the interest, and that the mere taking out of a policy of insurance cannot give the other party any right.

It was submitted that the insurance policy was taken out on the raising of a loan from the Royal Bank of Canada for the purpose of securing the loan. It was done by Gwendolyn Williams for her own purposes and as a requirement of the Bank. This fact alone would support her contention that the policy was for her benefit alone to the exclusion of Victor Williams. It was pointed out that Victor Williams wanted to share the benefit of the policy and not the obligations under it. If he was going to accept the policy then it was submitted he must do so in its entirety and also accept one half the debt of the loan of $50,000.00 which Gwendolyn Williams secured in her own name from the Royal Bank of Canada, although it was done without his knowledge or consent.

I am unable to agree with Counsel's submission that Victor Williams should share in the obligation of a debt that was contracted without his consent or knowledge and from which there is no evidence that he benefited in any way.

/It was....

It was further submitted that the finding of the learned trial Judge that when Gwendolyn Williams took out the insurance she acted on her behalf as well as that of Victor Williams was inconsistent with his finding that she dealt with the property as if she was the sole owner, and that the document dated 12th December, 1969 signed by the respective solicitors acting on behalf of both parties which in effect stated that when Gwendolyn Williams took out the insurance policy she did so on behalf of herself and the said Victor Williams means that they were joint owners of the property and not that it was a joint insurance policy.

I do not agree with Mr. Phillips' interpretation of this document. In my view the import of the document is quite clear and needs no explanation. From the language it is explicit that Gwendolyn Williams is saying she had insured the properties on her own behalf and on behalf of Victor Williams.

I see no inconsistency in the finding of the learned trial Judge that during the period Victor Williams was residing in the United States of America Gwendolyn Williams dealt with the property as if she was the sole owner and the finding that when she took out the policy of insurance she did so on behalf of herself and Victor Williams. She dealt with it as if she was the sole owner but the factual situation is that she was not the sole owner.

Counsel further submitted that the insurance policy does not run with theland and is not attached to it. It is a personal contract and does not affect the other party. He cited from the Judgment of Brett, L.J. in Rayner v. Preston (1881) 18 Ch. D p.1 at page 11.

> "As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But this is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it."

/In my....

In my view this case is distinguishable from that under consideration before this Court. In Preston's case there was no relationship between the Plaintiff and the Defendant at the time when the contract of insurance was entered into, whilst in the case before this Court at the time of the Contract of Insurance they were joint tenants, they had a joint interest and if the tenancy was severed at the time of the loan then there would be a continued relationship of a tenancy in common.

As Brett, L.J. said at page 10 of his Judgment:-

> "In this case there was a contract of insurance made between the Defendants and the insurance company. That contract was made by the Defendants not on behalf of any undisclosed principal, not on behalf of any one interested other themselves. The contract was made by the Defendants solely and entirely on their own behalf, and at a time when they had no relationship of any kind with the Plaintiffs. It was a personal contract between the Defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in Equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the Defendants to the Plaintiffs." (My underline for emphasis).

In the case before this Court there is clearly a relationship between the Appellant and the Respondent. In my view the interest of Victor Williams in the property as a joint tenant created an interest in the insurance policy because of the nature of a joint tenancy.

In any event there would still be the signing of the document of the 12th December, 1979 by the respective solicitors of the parties to be considered in which Gwendolyn Williams said that when she insured the properties she did so on behalf of herself and Victor Williams and which the learned trial Judge found to be so, and with which finding I fully agree. The effect of this document must be conclusive.

A number of cases were cited by Mr. Phillips dealing with Carriage of Goods, Charter Party, Vendor and Purchaser, Mortgagor and Mortgagee,

/Lessor....

Lessor and Lessee and double insurance.

Most of the cases to which references have been made which are based on the legal principle that the insurance policy effected enures for the sole benefit of the person effecting it and that the other persons interested in the property have no right to participate, are in my opinion not applicable to joint tenancies.

The one case cited by Mr. Phillips to which I will make reference is -

Gaussen v Whatman (1904 -7) All E.R. p.1417

This was a case that dealt with the responsibility if any, of a tenant for life to insure, and the benefit to be derived from the proceeds of such insurance policy. The following passage from the Judgment of Kekewich, J. was referred to at p. 1420:-

> "The tenant for life is not bound to insure, and, therefore subject to a remark to be made presently, he insures for his own benefit - that is to say, he insures or not as he pleases. He pays it out of the income which he receives as tenant for life, and it seems to me impossible to say that he is equitably bound to hold that which he recovers out of his own money for the benefit of others. The absence of liability to insure seems to me to carry with it a right to receive money, if money is forthcoming by reason of the insurance, which he was under no liability to effect. That seems to be sound."

The comment I would make is that a life tenancy is fundamentally different from that of joint tenancy. The life tenant is entitled to all the proceeds from the estate during his life time, while in the case of a joint tenancy both parties are equally entitled to the proceeds of the estate during their joint lives. In my view this case does not assist the Appellant.

In my opinion the above remarks of Kekewich, J. were intended for the particular facts and circumstances of that case and were not meant to apply to a joint tenancy. The effect of a joint tenancy is that in that theory of law the joint tenants hold but one estate. When

/therefore....

therefore the Appellant insured her interest she also insured the Respondent's interest.

No authority was cited by Mr. Phillips based on joint tenancy in support of the propositions which he put forward.

In conclusion Counsel submitted that there should have been an enquiry with respect to the monies Gwendolyn Williams spent to discharge the joint mortgage and that the statute of limitation did not apply; that the repayment of that loan was partly from rental received from the properties and partly from Gwendolyn Williams' own money.

Counsel for Victor Williams indicated that he would deal with the issues under the following heads:-

1. The Pleadings.
2. The relevant law
3. The Judge's Findings.

He reviewed the facts, then analysed the pleadings and submitted that with respect to the loan of $50,000.00 made in 1977 by the Royal Bank of Canada to Gwendolyn Williams, she being a joint tenant could not give a valid security by way of pledging the joint property. Once payment of the joint loan of $15,000.00 had been paid off in October, 1973, that was the end of the Bank's security, and after that event, the Bank was no longer a mortgagee and could no longer validly endorse a mortgage clause on the Title Deed. He further submitted that the document signed by the respective solicitors was binding on Gwendolyn Williams. She was fully seized of its contents and import, agreed to same, and was well aware at the time that she was only entitled to one half the insured sum.

He contended that a joint tenancy is based on four unities:-

1. Unity of Interest
2. Unity of Possession
3. Unity of Title; and
4. Unity of Time.

/and that.. .

and that if any one of these unities is destroyed the joint tenancy in law comes to an end and a tenancy in common is substituted therefor. He submitted that if the joint tenancy is preserved there is no method known to law whereby it can be served so as to make a part insurable without the other part. It can be severed by conduct and the act of Gwendolyn Williams in using the joint property as security for the loan of $50,000.00 from the Bank solely to her was an act such as was to sever the joint tenancy.

In support of his proposition Counsel cited from Halsbury's Laws of England Third Edition Volume 32 paragraph 517 which reads as follows:-

> "Nature of joint tenants' interest:-
>
> Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature, and duration..... none holds any part to the exclusion of the others. At common law the interest of each must vest at the same time. These are the four unities of title, interest, possession and time."

And paragraph 523 which reads as follows:-

> "Severance in title:-
>
> The unity of title is destroyed when one joint tenant assigns or mortgages his his share to a third person. If there are only two joint tenants, this creates a tenancy in common in equity between the assignee and the other joint tenant."

The quotations above clearly indicate that while the joint tenancy persisted Gwendolyn Williams could not insure her share only.

In further support of his argument Counsel cited Hawksley v May (1955) 3 All E.R. p. 353 at p. 356 letter E where Havers J. quoted from the judgment of Sir W. Page Wood V.C. in the case of Williams v Hensman where he said:

/"A joint.....

> "A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right of suvivorship only in the event of no severance having taken place of the share which is claimed under jus accrescendi. Each one is at liberty to dispose of his own interest in such a manner as to sever it from the joint fund .....losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested."

Counsel further contended that the moment the loan was granted to Gwendolyn Williams by the Bank the joint tenancy became a tenancy in common and therefore she was only entitled to one half the insured sum. In any event Counsel submitted that whether it was a joint tenancy or tenancy in common Gwendolyn Williams would only be entitled to one half the insured sum and he relied on Castellain v Preston (1882 - 1883) [illegible] Vol 11 p. 380 at page 386 in which Brett, L.J. said this:-

> "In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in the case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."

/If I may.....

If I may say so with respect the judgment of Bowen, L.J. is instructive in this regard when at page 398 - 399 he said this:-

> "A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. ....There are persons who have a limited interest and yet who insure for more than a limited interest, who insure for the total value of the subject matter ..... If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself and being a person whose interest is only limited, he cannot hold anything beyond the amount of loss caused to his own particular interest."

I would with respect adopt these words of Bowen, L.J. and apply them to the present case. In my view the interest of Gwendolyn Williams and that of Victor Williams were so inextricably bound that they could not be separated while the joint tenancy subsisted and therefore when the insurance policy was taken out it was the joint interest that was insured and Victor Williams would have been entitled to one half share of the policy. The position is further fortified by the document of 12th December, 1979 to which reference has previously been made and in which the Appellant admitted that she insured the houses on behalf of herself and the Respondent.

There is a well-established principle of insurance that a policy of fire insurance is a contract of indemnity and that you cannot be indemnified by the insurance company for a greater sum than the loss suffered. What is the loss that Gwendolyn Williams suffered? In the case of joint tenancy her loss would be one half the total loss. Her right of survivorship even if it subsisted at the date when the premises were destroyed by fire would not have materialized until the death of Victor Williams. It would have been a future right which may or may not have materialized. On that date Victor Williams was alive and therefore Gwendolyn Williams would have been entitled only to one half the proceeds of the insurance policy and no more.

/Mr. Phillips'....

Mr. Phillips' submission that Gwendolyn Williams was insuring her one half interest in the properties and her other one half interest in her right of survivorship is an ingenious one but with respect it is without merit and therefore fails.

With regard to the counterclaim Counsel for the respondent submitted that it would have been pointless for the Court to have acceded to a request for an account when the property had been in the exclusive control of the appellant Gwendolyn Williams for six years during which time she alone collected the rents. In evidence she said she did not know how much rent she collected during that period and there is no suggestion that Victor Williams collected any rents after he left Antigua to reside in the United States. Furthermore the sum of $4,000.00 for earthquake damage to the properties in 1974 was paid exclusively to her, and in any event her claim would have been statute barred. I agree with with Mr. Kendall's submission.

Counsel in conclusion indicated that the Court had power under the 1980 Amendment Supreme Court Act to order payment of up to 10% on a judgment in the discretion of the Court and that he would urge the Court to vary the judgment and order the payment of interest on same. This submission can be speedily disposed of in that the Respondent in this case filed no cross-appeal against the judgment. There is therefore no basis on which the judgment could be varied in this respect.

The learned trial Judge saw and heard the witnesses and had the opportunity of assessing their demeanour. He indicated that he preferred the evidence of Victor Williams to that of Gwendolyn Williams. He did not consider her a reliable witness. In addition he found that the document that was signed on the 12th December, 1979 by the respective Solicitors of the parties to the action was a document the content of which Gwendolyn Williams was fully aware and that she was in full agreement with it. That is, that when she took out the insurance

/policy.....

policy she did so on behalf of herself and that of Victor Williams and I share the view of the learned trial Judge.

For the reasons given I would dismiss the Appeal, with costs to the Respondent to be taxed.

L.G. WILLIAMS,
Justice of Appeal (Acting)

I agree.

L.L. ROBOTHAM,
Chief Justice.

I also agree.

C.M.D. BYRON,
Justice of Appeal (Acting)