ANGUILLA

IN THE COURT OF APPEAL

Civil Appeal No. 5 of 1999

BETWEEN:

1. SHEILA HARRIGAN
2. DOLYKIN HARRIGAN

Appellants

and

KENNETH ROGERS

Respondent

Before:

The Hon. Mr. Satrohan Singh	-	Justice of Appeal
The Hon. Mr. Albert Redhead	-	Justice of Appeal
The Hon. Mr. Albert N.J.Matthew	-	Justice of Appeal (Ag.)

Appearances:

Mr. Lee Moore Q.C. and Mr. C. Abel for the Appellants
Mr. S. Bennett and Mrs. M. Walwyn for the Respondent

1999: May 13 and 25.

JUDGMENT

MATTHEW J.A. (Ag.)

This case concerns two brothers who decided to go into a business venture but shortly thereafter the relationship turned sour. The Respondent is the younger brother who, at the material time, lived in St. Thomas. Connell Harrigan was the older brother who lived in Anguilla. He was the original Defendant in a suit brought by Rogers. He died on July 17, 1994. Appellant No.1 is his daughter who was granted probate of his estate and Appellant No.2 is his Widow.

The facts reveal that Connell Harrigan and Kenneth Rogers agreed in 1977 and 1978 to buy a property jointly at Cauls Pond, Anguilla, Registration No.69014B Parcel 47. There was a two-storey building on the 0.45 acre of land. The lower storey belonged to Ronald Webster and the upper storey belonged to David Bergland. Each of the owners was selling his half share for U.S.$30,000 but an additional sum of $5,500 was agreed on for the purchase of equipment used in the operation of a cinema on the upper storey.

It is accepted and agreed that each of the brothers paid US$15,000 for the purchase of Ronald Webster's interest. It follows that U.S.$35,500 was due to Bergland for his interest. In order to pay Bergland the brothers raised a loan in that sum from Caribbean Mortgage Bank (Anguilla) Ltd and a promissory note dated January 27, 1978 which was tendered as **KR3** is evidence of this**.** Transfer forms were executed by the Vendors and the Respondent in 1978 and the evidence is that these were ultimately given to Connell but no registration was ever effected in the name of the Respondent. For whatever reason, registration of the property was not effected before 1984.

According to the Respondent there were to be 96 equal monthly installments and the payments were to be made quarterly calculated at $720.24 per month. The Respondent made three quarterly payments of $1,000 the last being in November 1978. By February 15, 1979 the bank now called the Caribbean Commercial Bank (Anguilla) Ltd was complaining that the loan was not being paid in accordance with the terms. Two months later by letter dated April 24, 1979 Connell was proposing that he takes over the ownership of the property, that he would be responsible for payment of the loan and would repay Kenneth a sum of US$15,000. The relationship between the brothers deteriorated and in January 1986 the Respondent filed a writ with a statement of claim which was later amended and asking for certain relief including:-

(a) a declaration that he is proprietor in common along with the Defendant of the property described as Block 69014 B Parcel 47 Registration section, Cauls Pond in the Island of Anguilla;
(b) a declaration that he is and was a partner in the business;
(c) an order for accounts to be taken of all transactions of the business.

The matter came before *Saunders J* for hearing on April 24 and 25, 1997 and five days later, on April 30 he gave judgment in favour of the Respondent and ordered as follows:

1. That the Plaintiff is the owner of a one-half undivided share of Block 69014B parcel 47, Registration Section, Cauls Pond and that the land register be rectified accordingly;
2. That the Plaintiff holds a half-share interest in such business or businesses as are carried on at the said property by either of the Defendants;
3. That the value, as a going concern, of such business or businesses be agreed by the parties hereto or assessed by a valuator to be agreed by the parties hereto, in either case within

three months of the date hereof, and that any party be thereafter at liberty to buy out the share or shares of the others; failing such agreement any party may apply to the court for further directions as to how best to realize the assets and liabilities of such business or businesses;

4. That the Plaintiff's costs be borne by the estate of Connell Harrigan, deceased.

The Defendants were not satisfied with the decision and they filed their notice of appeal on June 5, 1997.

GROUNDS OF APPEAL

There were seven grounds of appeal as follows:

1. The Learned Trial Judge erred in law in holding that section 140 of the Registered Land Ordinance 1974 was applicable to this case when there was no pleading or proof of fraud or mistake to justify the application of the aforesaid section.
2. The Learned Trial Judge erred in law in giving no or no sufficient weight to the evidence of Colonel Harrigan a witness for the Plaintiff which supports the plea of rescission of the Defendant and in particular his evidence that the Plaintiff confronted Defendant on Defendant's job and demanded a refund of his money and calling the arrangement between them "quits".
3. The Learned Trial Judge erred in law in finding that the signing of land transfer forms by the Plaintiff meant that all that was left to be done was for the Defendant to register those said forms in the face of the fact that no evidence was led that the said transfer forms were ever signed or executed by the other necessary parties to the transaction; that is to say, the transferors and the deceased transferee, and also in the face of the actual registration of the said parcel of land in the names of the Deceased Defendant and Dolykin Harrigan on the basis of the filing and registration of duty completed land transfer forms in accordance with the provisions of the Registered Land Ordinance 1974.
4. The Learned Trial Judge was wrong in law in holding that the Plaintiff was entitled to be registered as owner of a one-half undivided share of the subject land in light of the clear evidence that he never completed his payment of the loan and accepted the sum of $14,000 as a refund of the moneys paid by him.
5. The judgment of the learned Trial Judge is erroneous in point of law to the extent that he ordered that an account be taken of the business currently carried on on the subject property without any evidence at all as the basis of such an order and against the weight of the evidence that the Plaintiff made no contribution to the business in any form and after the latter part of 1978 and that the business operations were thereafter changed.
6. The learned Trial Judge erred in law in failing to accept and to give full weight to the evidence of the Plaintiff that he accepted the $14,000 and deposited it to his account as *"the beginning of payment for any portion of building and business"* the clear inference from this evidence being that the Plaintiff himself had accepted that he was no longer to be a registered owner of any part of the building.
7. The learned Trial Judge erred in law in his order that the Plaintiff is the owner of a one-half undivided share in the subject property and that the land register be rectified accordingly without taking into account or giving effect to the evidence that the Defendant Connell Harrigan had made addition to the said property.

Ground 3 was not pursued at the hearing. I shall proceed to deal with Grounds 1, 4, 5 and finally with grounds 2, 6, and 7 which were argued together by learned Counsel for the Appellants.

Ground 1

Section 140(1) of the **Registered Land Ordinance 1974** is as follows:

> "Subject to the provisions of subsection (2) of this section, the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake."

The learned Trial Judge seems to have applied that provision in arriving at his conclusion.

Learned Counsel for the Appellants has submitted that the evidence in this case does not reveal that there was any mistake and no fraud was pleaded or proved. Counsel submitted that when the registration was effected the Parties had come out of the arrangement. In response to this ground of appeal, learned Counsel for the Respondent submitted that one need not rectify the register to give effect to an equitable interest under the **Registered Land Ordinance.** It may be that this is a concession that the Respondent is not claiming or insisting to be registered as the owner of one-half undivided share of Block 69014B parcel 47 as the learned Trial Judge had ordered.

But whether it is a concession or not I agree with the submission of learned Counsel for the Appellants that section 140 does not apply firstly because there was no mistake or fraud proved upon the registration and secondly because by the time the registration was effected in 1984 the Respondent had evinced a clear desire not to be concerned with the property or business and all he wanted was his money.

Ground 4

I am not sure that it is necessary to deal with this ground, having regard to my finding above. It follows that the Respondent would not be entitled to be registered as owner of a one-half undivided share of the subject land.

But learned Counsel for the Appellants under this ground referred to evidence of the Respondent before the learned Trial Judge where he said:

> " *After the third payment it was our agreement that the business would pay the balance of the payments. I was under the assumption based on what my brother had said that the business would be in a position to make the payments.*"

By making reference to the statement of claim, defence, reply and amended statement of claim Counsel demonstrated that it was never pleaded that the Respondent made payments to the mortgage bank through the profits of the business and such evidence was inconsistent with his pleadings. It was submitted that the evidence was wrongly admitted but in any event ought not to have been used as a basis for His Lordship's finding that the Respondent ceased to repay the loan pursuant to an understanding with his brother that the profits of the business would be used for that purpose.

There is force in that submission but as I have said earlier, I am of the view that Rogers was not entitled to be registered as owner of a one-half undivided share of the property at the time of the registration in 1984.

Ground 5

This ground of appeal attacks the second order made by the learned Trial Judge namely –

> "That the Respondent holds a half share interest in such business or businesses as are carried on at the said property by either of the Appellants."

Learned Counsel for the Appellants asks what is the justification for this order and poses the further rhetorical question –

> "Suppose young Sheila had opened a thriving hair dressing business how could Kenneth be entitled to a half-share in that?"

In my judgment the reality of the situation is that the Respondent had long ceased to consider himself as part of the venture. It may not be as early as November 1978 when he stopped making payments or April 1979 when Connell wrote him to the effect that he was taking over the ownership of the entire building, but certainly by 1983.

I could not agree with an order that gives the Respondent a one-half share of the business currently carried on at the property in Farrington.

Grounds 2, 6 and 7

Learned Counsel for the Appellants submitted that the gravamen in relation to these grounds of appeal is that the evidence when taken as a whole justify a finding that the Parties had agreed to put an end to their original agreement; in short, to rescind it.

In support of that submission learned Counsel relied on a letter I referred to earlier which was written by Connell Harrigan to his brother, Kenneth, on April 24, 1979. The letter was admitted in evidence as **KR.17.** Counsel also relied on the evidence of a younger brother of the Parties, Colonel Harrigan. I shall set out the contents of the letter in its entirety:

> "Little Dix
> Anguilla
>
> 24th April, 1979
>
> Mr. Kenneth W.Rogers
> Sebastian
> St.Thomas
> U.S.V.I.
>
> Dear Kenneth,
> Following our discussions over the last weekend, I wish to confirm our business position.
> I will be taking over the ownership of the entire building at The Farrington known as the Super Cinema and Anguilla Shopping Centre.
> I will pay off the bank accordingly. I admit owing to you the sum of $15,000 U.S. which I will repay you after I have settled with the bank.
> Kindly sign the copy of this letter to indicate your agreement with its terms.
>
> Yours sincerely,
> Connell Harrigan"

Learned Counsel for the Appellants submitted that the evidence before the learned Trial Judge justified that the contract was orally rescinded and in that context he cited the case of **Morris v Baron 1918 A.C.1 H.L..**

Learned Counsel for the Respondent submitted in reply that there was no evidence that the Respondent had accepted the unilateral proposals by Connell Harrigan. Indeed, in evidence before the learned Trial Judge the Respondent stated:-

> *"I never agreed with Connell that he would pay me back $15,000 and proceed with the venture solely."*

In my judgment Exhibit **KR.17** contains an offer to rescind which was not accepted. I cannot agree with the submission that there was a rescission of the contract by April 1979.

I agree with the submission by learned Counsel for the Respondent that the Respondent obtained a proprietary interest in the property when the purchase price was paid to the vendors in January 1978 even though there was still an obligation to pay the loan which provided the purchase money on the authority of **Calverly v Green** [1983] Vol.153 C.L.R. 242; 257.

Thereafter the Respondent obtained a proprietary interest in the property. The legal estate was never vested in him but as his counsel admits, he had an equitable interest subject to his obligation to pay his portion of the loan.

Although Connell's letter of April 24, 1979 could not have unilaterally terminated the business relationship between the Parties, his intentions must have been manifest. The position of the Parties did not improve and on March 30, 1983, the Respondent wrote Connell Harrigan a letter which is important. In that letter Rogers expressed a desire to buy the business of his boss in St. Thomas. The business was up for sale and he seemed to have had some priority in the transaction, or so he believed, and there is an urgent request to Connell to pay him all the money due to him. The letter reads in part:

> "I am writing to you to find out whether you can and I hope you will make a general effort to try to pay me as much of the moneys you owe me. As it is quite obvious that money is bringing in profits to you and you alone. I have called off even thinking in terms of interest and of course, you know if I had my money in a common saving account I could have gathered 5 per cent interest and I need not say that C.O. pay as high as 10 per cent. None the less, my major reason for asking you to try and try hard is - Sebastians is now on the market my boss is in process of selling and the way he wants to do it I can buy into it and I would like to do so."

In my judgment this letter, when coupled with the evidence of Colonel, seems to evince a clear desire that Kenneth wants to get out of the relationship and to collect all money due to him to purchase Sebastians' business in St.Thomas.

It was about the same time, in 1983, that Kenneth and Colonel had gone to Connell at his job when Kenneth said that he would like to get back his money and let them split.

I think March 1983 should be accepted as the date when the Respondent decided to part company with his brother and the business venture. The Respondent should be entitled to one-half of the value of the property at that date excluding the different additions to the Western side downstairs if they had already

been constructed. The Respondent should also be entitled to one-half of the value of the business at the said date; but we recognize the difficulty in quantifying the business at that date and propose that whatever is due to the Respondent should be set against the amounts he was required to pay towards the loan.

CONCLUSIONS

I would allow the appeal and set aside the order of the learned Trial Judge. I regret that I have to remit the case back to the High Court to hear evidence so as to determine the value of the property at Block 69014 B parcel 47, Registration Section Cauls Pond, excluding the different additions to the Western side downstairs as at March 30, 1983 so as to assess the entitlement of the Respondent.

Since the Respondent is going to be compensated for his one-half share of the property he must be made to account for the $14,000 paid to him by Connell in the letter written to the Respondent by Connell on February 4, 1986.

There shall be no order as to costs.

A.N.J. MATTHEW
Justice of Appeal (Ag.)

I concur

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal