SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.11 OF 2002

BETWEEN:

[1] THEODORE HOBSON
[2] DAPHNE HOBSON

Appellants

and

[1] IRA WALWYN
[2] BRIDGET HUNKINS
(Executors of the Estate of Edna McMahon, deceased)

1st & 2nd Respondents

and

MONTGOMERY TURPIN
(Executor of the Estate of Gladys Fox, deceased)

3rd Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian D. Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal

Appearances:

Mr. Charles Wilkin QC with Mr. E. Ferdinand for the Appellant
Mr. Terrence Byron for the first and second Respondent
No Appearance for the third Respondent

2003: November 3;
2004: January 12.

JUDGMENT

[1] SAUNDERS, J.A.: This appeal turns on the interpretation of six words in a deed of sale. The deed is dated 28th May, 1971. It is a conveyance from Clara Rosita Rawlins as vendor to the said Clara Rosita Rawlins, Gladys Lousiana Fox and Edna Eltruda McMahon as purchasers. By this deed, certain property in Nevis ("the property") was sold for the sum of $4,000.00. According to the deed, the purchasers were to hold the property "as joint tenants in equal shares". The issue

for this Court is whether, by these words, the purchasers held the property as tenants in common or as joint tenants.

[2] The purchasers, Clara, Edna and Gladys were sisters. They are now all deceased. Details about them are sketchy. They may have each been married and divorced, or they may have survived their husbands. We can only guess. Edna and Gladys died testate. There is no mention of husband or children in either of their Wills. Clara must have died intestate as no Will of hers was ever produced. Nor was any application ever made for a grant of Letters of Administration of her estate.

[3] Clara originally owned the property in dispute. In 1961 she conveyed it to Edna, her sister, for a consideration of $100.00. Curiously, a few days later Edna conveyed the property back to Clara. On this occasion the consideration was $6,000. Ten years later Clara executed the deed referred to in paragraph 1 above.

[4] Of the three sisters, the first to pass away was Clara, in 1974. Edna lived in the property for some 25 years before she too died in 1992. In her Will, Edna made a specific devise of the whole property to various persons. Gladys was the last to die. She survived her two sisters. She had migrated from Nevis to the United States many years before her death on 10th February, 1997. Her Will makes no specific mention of any share in the property but its terms do not exclude it.

[5] After the death of Gladys, her executor, Mr. Turpin, took the view that the entire property formed part of Gladys' estate. The executor interpreted the 1971 deed to the sisters as creating a joint tenancy. If he were right in this respect, after Edna's death, Gladys would have owned the property solely by the doctrine of survivorship. In May, 1997 Mr. Turpin, as executor, sold and conveyed the property to Mr. and Mrs. Hobson for a price of $50,000USC. Edna's executors, Messrs. Walwyn and Hunkins, commenced this action later in 1997 to set aside the sale to the Hobsons. They contend that the 1971 deed to the sisters gave

each sister a one third share in the property and that Mr. Turpin could dispose only of Gladys' one third share.

[6] The learned trial Judge, Bruce-Lyle, J., noted that, in the deed to the sisters, the phrase in the habendum "unto the purchasers as Joint Tenants in equal shares" expressed words of severance. The Judge therefore held that the purchasers took the property as tenants in common and not as joint tenants. The Judge went on to hold that the deed to the Hobsons ought to be rescinded and rendered wholly void.

[7] Assuming for the moment that the trial Judge was right to find a tenancy in common, I think the Judge erred when he rendered void the entire deed to the Hobsons. Having found a tenancy in common, the Judge should have held that the deed to the Hobsons was effectual only to convey the share or interest held by Gladys' estate. That conclusion is supported by section 17 of the Conveyancing and Law of Property Act. The section states that every conveyance is effectual to pass the interest which the conveying party has in the property. The more fundamental question however is whether the sisters were joint tenants or tenants in common.

[8] Counsel for Edna's executors made a valiant attempt to reconcile the words in controversy. He submitted that the phrase "as joint tenants" was not inconsistent with a tenancy in common because tenancies in common are a form of joint ownership. I consider however, that the expression "joint tenants" has such a specific and unambiguous meaning in law that, certainly in a legal document, it cannot be right to vulgarise that meaning in the manner suggested by counsel.

[9] Counsel for the Hobsons urged on us that the Court should find a joint tenancy. Counsel reasoned that if the transferor had intended a tenancy in common in equal shares she could simply have conveyed a one third share in the property to each of her sisters instead of including herself as one of the purchasers. That is

true. But that notion is offset by the alternative view that if she had intended a joint tenancy then she need not have indicated the distinct shares in which each sister should hold the property. In my opinion, each of these viewpoints requires us to speculate and I think it would be wrong to resolve this dispute based on such conjecture.

[10] Counsel for Edna's executors rightly reminded the Court that equity always favours a tenancy in common. He referred to passages in Pickering v. Stevens[1], In Re Woolley[2] and Robertson v. Fraser[3]. In Robertson Lord Hatherley said:

> "…anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy".

Each of these cases cited by counsel was decided on its own special facts. In each of them the Court arrived at a tenancy in common from a fair reading of the document as a whole. In Pickering, the Court presumed a tenancy in common upon an analysis of the entire trust deed and because the beneficiaries were minors whose shares or interests would vest in them at different times. In Re Woolley, the Court reached a tenancy in common based on its interpretation of other clauses in the Will. In Robertson, a difference in the language that was used in a codicil was sufficient to vitiate the idea of a joint tenancy occurring in the Will.

[11] Counsel also referred us to Burgess v Rawnsley[4]. There, a Mr. Honick and a Mrs. Rawnsley bought a house together as joint tenants. The man went into the transaction contemplating that he would marry Mrs. Rawnsley. He anticipated that the house would be their matrimonial home. Mrs. Rawnsley was never interested in marriage. She simply wanted to inhabit the upstairs flat. As it turned out she never lived in it and the parties never married. They remained friends however and at one stage she orally agreed to sell Mr. Honick her share in the house. Before the legal formalities could be completed she changed her mind. The man pre-

[1] (1984) 34 W.I.R. 127
[2] (1903) 2 Ch 206
[3] (1871) L.R. 6 Ch. 696, 699
[4] (1975) 1 Ch. 429

deceased her and the issue before the Court was who was entitled to the beneficial interest in the house. Lord Denning, M.R. held firstly that Mrs. Rawnsley held the property on a resulting trust for herself and the gentleman's estate. More particularly, Lord Denning held that the oral agreement that Mrs. Rawnsley would sell her share operated as a severance of the joint tenancy. I do not find this case particularly helpful because we are not dealing here with severance of a joint tenancy. The issue here is whether from the very beginning a joint tenancy or a tenancy in common was created.

[12] The phrases "as joint tenants" and "in equal shares" are in my view plainly irreconcilable. They stand in stark contradiction to each other. Nothing in the deed, preceding or following the two contradictory expressions, gives us a hint at how they should be interpreted. Neither the conveyance itself nor the evidence adduced at the trial indicates the source of the consideration of $4,000.00 or how or by whom (and in what proportions) the purchase money was put up. We have no clues to aid us in discerning what was the sisters' intention at the time. Regrettable drafting has created a dilemma that the law must somehow resolve. So what is the Court to do?

[13] There is a quaint principle of law that comes to one's aid when such a dilemma presents itself. Courts do not relish relying upon this principle. It has been referred to as a "counsel of despair". But it does afford a means of resolving problems that are as intractable as this one is. The principle was succinctly stated and applied by Lord Wrenbury in Forbes v. Git et al[5]

> "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails".

[14] The principle was also referred to and applied in Bateson v. Gosling[6] and in Re Gare[7]. It should not be applied if the later clause merely qualifies and does not

[5] (1922) 1 A.C. 256, 259
[6] (1871) L.R. 7 C.P. 9
[7] (1951) 2 A.E.R. 863

destroy the former clause[8] and resort should only be had to it if all else fails. Joyce v. Barker (Bros) Builders[9] affords us a recent illustration of the principle. The report we have of that case is found in the Current Law Year Book of 1980 at Para. 2255. The report isn't long so I shall reproduce it in its entirety:

> "In 1973 property was conveyed to J and his wife "in fee simple as beneficial joint tenants in common in equal shares". Consideration was £500 from J and surrender of a tenancy by his wife. The language in the habendum was inconsistent. The court applied a rule of construction laid down in Slingsby's Case (1587) 5 Co. Rep. 186 that if there were two inconsistent provisions in a deed and the court could not reconcile them in a sense which made sense of the whole, the earlier provision prevailed. The habendum did not make sense as a whole. If the words were construed as creating a tenancy in common the courts would not only have to strike out words but add them also. Where a husband and wife were purchasers there was the assumption that they intended the survivor to live in the matrimonial home and one way of doing that was to create a joint tenancy. *Held,* the resolution of the conflicting words was to construe them as creating a beneficial joint tenancy and to strike out the remaining words as inconsistent".

[15] Mr. Byron asks us to cast doubt on the strength of this case because its *ratio* was, or may have been, grounded partly on the fact that the parties to that deed were husband and wife and that as such they must have intended the survivor to live in the home. I don't believe however that it would be right to harp on the spousal relationship of those parties. I think that the *ratio* of the case can stand on the principle laid down in Slingsby's Case alone. In the use of that principle Courts are generally blind to the consequences of its application. I think that when the Judge in Joyce v. Barker referred to the relationship between the parties, the Judge was merely giving an additional reason for finding a joint tenancy.

[16] In view of the conflicting phrases in the habendum of the deed to the sisters, I would apply the rule in Slingsby's Case. In my judgment there was created here not a tenancy in common but rather, a joint tenancy. The property devolved to Gladys by the doctrine of survivorship. The effect of this holding may not seem fair to Edna's beneficiaries and personal representatives but if one wishes to

[8] See: Forbes v. Git @ p.259
[9] The Times, February 26, 1980

emphasise fairness, one must start with the position of the sisters and, while they were alive, a joint tenancy may well have been eminently more desirable to these ladies who apparently were all childless.

[17] In all the circumstances I would allow the appeal and uphold the validity of the deed to the Hobsons. I would order the Respondents to pay costs of $9,333.33 to the Appellants.

Adrian D. Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal