BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2004

BETWEEN:

CECIL PENN

Defendant/Appellant

and

NATALIE CREQUE

(As Personal Representative of the Estate of
Julian Antonio Creque, deceased)

Claimant/Respondent

Before:

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| The Hon. Mr. Brian Alleyne, SC | Justice of Appeal |
| The Hon. Mr. Michael Gordon, QC | Justice of Appeal |
| The Hon. Mr. Hugh Rawlins | Justice of Appeal [Ag.] |

Appearances:

Mrs. Tana'ania Small-Davis for the Defendant/Appellant
Mr. Terrance Neale for the Claimant/Respondent

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2005: January 14;
February 28.

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JUDGMENT

[1] RAWLINS, J.A. [AG.]: This is an appeal from a judgment in which the learned trial Judge found that the Parties had a definitive agreement for the sale of 2 parcels of land for the sum of $100,000. The Judge also found that on that agreement, the Defendant/Appellant, Mr. Penn, still owed Mrs. Creque, the Claimant/Respondent, the sum of $85,200 on the purchase price. Mr. Penn was ordered to pay the outstanding sum to Mr. Creque, and, in addition, $10,000 costs.

[2] The central issue in this case revolves around the consideration. The transfers were made, as required, by way of Instruments of Transfer pursuant to section 106 of the Registered Land Act, Cap. 229 of the Revised Laws of the British Virgin Islands, 1991. As far as the consideration is concerned, both transfers contain the same formulation. The Instrument of Transfer for Parcel 126 states:

> "NATALIE CREQUE ADMINISTRATRIX OF THE ESTATE OF THE LATE JULIAN ANTONIO CREQUE
> In consideration of [t]he sum of forty thousand dollars (the receipt whereof is hereby acknowledged) HEREBY TRANSFER to CECIL EDWARDO PENN [O]F THE valley, Virgin Gorda, British Virgin Islands the land comprised in the above-mentioned parcel 0.500 acres."

[3] Mr. Penn appealed on 6 grounds. They could be summarized in 3 statements that are related, which could be considered together for the purpose of this Judgment. The first is that the learned trial Judge erred in law when she found that the Parties had a definitive written contract for the sale of the land. The second is that the learned Judge erred when she took parol evidence into account that contradicted the written document that evidenced the terms of the agreement as an exception to the parol evidence rule, particularly as that evidence related to the consideration for the transfer of the lots. The third is that the learned Judge erred when she rejected submissions on behalf of Mr. Penn that it was not necessary for the actual method of payment of the consideration to be recited in the Instruments of Transfer. These will be considered against a brief background.

## Background

[4] Mrs. Creque brought an action against Mr. Penn in her capacity as the personal representative of the estate of her deceased husband, Julian Antonio Creque. In that action, she claimed the sum of $85,200, which she alleged was the outstanding balance that he owed her on the purchase price of Parcels 125 and 126 Block 5344B Virgin Gorda Central Registration Section. She also claimed damages for breach of contract, or, alternatively, the rescission of the sale

agreement and rectification of the register. She prayed for the deletion of Mr. Penn's name and for the insertion of her name instead.

[5] Mrs. Creque' alleges that she agreed to transfer the 2 parcels of land to Mr. Penn in consideration of $40,000 and $60,000, respectively. According to her, she executed 2 Instruments of Transfer for each parcel on 22nd July 1996 in the presence of a lawyer. Mr. Penn then lodged them and was registered at the proprietor of the 2 lots.

[6] In relation to the actual sale of the lands, Mrs. Creque's evidence was that she needed money at the time. She approached Mr. Penn as a trusted friend. He agreed to purchase the 2 parcels of land from her for $100,000. However, he suggested that she should transfer the lands to him to enable him to obtain financing from a bank, using the land as collateral. She acceded to his request and transferred the lands to him against the advice of her lawyer. The Parties did not sign the agreement for the sale of the lots. Since that time Mr. Penn has only paid her $14,800. He has not paid her the outstanding balance, notwithstanding that she repeatedly requested him to pay.

[7] Mr. Penn's case is that he does not owe Mrs. Creque any money for the 2 parcels of land. According to him, when he purchased the land from Mrs. Creque, she owed him in excess of $100,000 for goods, services and loans that he had extended to her over a period of time. He constantly requested her to settle the outstanding debt. She eventually agreed to transfer the lots to him in settlement of her debt to him. She thereupon took him to her lawyer who drew up the Instruments. No money actually passed on the sale because it was made in consideration of Mrs. Creque's outstanding debt to him. They explained this to her lawyer.

[8] Mr. Penn said that it was noteworthy that although the parcels were transferred to him in 1996, Mrs. Creque only brought the action against him in 2002. This, he said, was after he instituted action against her in a related matter. He said, further, that during the interim period of over 5 years, Mrs. Creque did not have a lawyer write to him to demand payment of the sum that was allegedly outstanding.

The Legal considerations

[9] It is clear that the Parties did not enter into a written agreement for the sale of the lands prior to the transfer. Mrs. Creque pleaded in her statement of claim that they had entered into an agreement that was partly oral and partly in writing. Counsel for Mrs. Creque urged the Court to view the Instruments of Transfer as the written part of the agreement for the sale of the land. Mr. Penn said that the Court erred in accepting this.

[10] Mrs. Creque stated, in her statement of claim, that the terms of the agreement were that the lands would be transferred to Mr. Penn to permit him to raise the necessary finance. It is clear from the pleadings and the proceedings in the High Court that Counsel for Mrs. Creque took, and urged the Court to take the Instruments of Transfer as the written part of the agreement for sale. He urged the Court to construe the Instruments with their oral agreement to find the essential agreement that related to the consideration.

[11] In his submissions before the High Court, Mr. Neale, learned Counsel for Mrs. Creque pointed out that Mr. Penn's evidence concerning the mode and nature of the consideration was riddled with inconsistency. He submitted that this permitted the Court to go behind the transfer documents "which forms the written part of the agreement" to ascertain the true terms of this part of the agreement because the documents did not accurately reflect the consideration. He further submitted that where a written document was not intended to express the whole agreement between the Parties, the court could admit extrinsic evidence of the additional

terms to those contained in the written document. He cited as authority Gillespie Brothers & Co. Ltd. v Cheney, Eggar & Co. [1896] 2 QB 59, but this does not relate to an Instrument of Transfer.

[12] Learned Counsel for Mrs. Creque stated, further, that at equity, a vendor is not estopped from relying on parol evidence in addition to statements in a conveyance that relate to consideration. He concluded that a court is therefore entitled to look at all the evidence in order to ascertain the exact terms of the agreement between the Parties notwithstanding what is written in the Instrument of Transfer. He insisted that although the Transfers in this case contained the words, " ... in consideration of the sum of sixty thousand dollars [or forty thousand dollars] (the receipt whereof is hereby acknowledged)", the Court is entitled to consider parol evidence in order to determine whether the purchase price was in fact paid.

[13] In his submissions before this Court, Counsel for Mrs. Creque considered the ground of appeal that questioned whether the learned Judge erred when she concluded that she could regard parol evidence that contradicted the written documents. He submitted that when the learned trial Judge found that there was a definitive written contract between the Parties she thereby accepted his submission that the agreement was partly oral and partly in writing. He said that having come to that conclusion, she was entitled to look, as she did, at the oral evidence to discover the entire terms of the agreement between the Parties. He cited as authority Chitty on Contracts, 27th edition, Paragraphs 12-081 – 12-097.

[14] Learned Counsel for Mr. Penn made the following submission: Transactions affecting the disposition of interests in land must be evidenced in writing or they will not be enforced. In this case there was no agreement for sale and the only evidence in writing were the Instruments of Transfer. The court cannot go behind what is in a written document and accept parol evidence to vary the written document. This is because parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the

Parties deliberately agreed to record any part of their contract. In this last statement, learned Counsel used written contract and Instrument of Transfer interchangeably.

[15] Learned Counsel for Mr. Penn relied on Clement Vigilance and Another v Chase Manhattan Bank N.A. (1974) 21 WIR 237. She said that, at page 242, the case stated the settled principle that evidence of a contemporaneous oral agreement is not admissible to vary what is actually written in an Instrument. However, this case does not relate to land but a contract of guarantee. The statements at page 242 were concerned primarily with the issue whether a contract was varied or rescinded.

[16] Mrs. Small-Davis submitted that parol evidence is not admissible to contradict the clear statement of a written transfer that acknowledges receipt of the full consideration in an instrument that transfers land. She insisted that having set out the value of the consideration in an Instrument, and having stated therein that the seller acknowledged it, it was not necessary to recite in addition in the Instrument the method of payment of the consideration.

## Findings

[17] The Parties in this case had no written agreement for the sale of Parcels 125 and 126. They apparently had an oral agreement and affected their agreement by way of a written Instrument of Transfer. This is the required mode by which land is transferred in the British Virgin Islands by virtue of the provisions of section 106 of the Registered Land Act. The Instruments were not agreements for the sale of the lots and did not fall to be construed as a contract could be construed by resort to extrinsic evidence.

[18] Section 106(1) of the Registered Land Act provides that every disposition of land shall be affected by an instrument in the prescribed form or in such form as the Registrar of Lands may approve for a particular case. The subsection requires every person who transfers land to use a printed form issued by the Registrar unless the Registrar permits that person to use another form. In this case, the Instruments of Transfer were executed in the prescribed form.

[19] Section 106(3) of the Act requires every Instrument of Transfer to contain a true statement of the amount of value of the purchase price or loan or other consideration, if any, and an acknowledgement of the receipt of the consideration. The prescribed form includes these. Consideration may be for cash or any other valuable consideration. However, the requirement is to state the amount of the value, rather than the exact mode by which consideration is provided. The Instruments of Transfer in this case met this requirement. The consideration was acknowledged. The transfers were therefore in the legally mandated form.

[20] Section 106 contemplates that when a person executes a transfer in accordance with the stipulated requirements and acknowledges receipt of the value of the consideration, that person has in fact received it. A court cannot go behind an Instrument of Transfer, which is completed in accordance with the terms of section 106. The court cannot go behind the transaction and rely on extrinsic evidence in order to determine whether a seller in fact received the consideration that he or she acknowledges or whether the consideration was the same as that which is acknowledged in the Instrument. The words in the Instruments, " … in consideration of the sum of sixty thousand dollars (receipt of which is hereby acknowledged)" suffice.

[21] I would only add that once an Instrument of Transfer is executed it cannot be varied on the grounds on which Mrs. Creque pursued her claim. If it were otherwise, there would be uncertainty in land transactions and the interest of third parties, who are purchasers for value without notice, would be affected. The

register can only be rectified (cancelled or amended) under section 140 of the Registered Land Act if the court is satisfied that a registration was obtained or made by fraud or mistake, so long as third party interests would not be affected.

Conclusion and Order

[22] In the foregoing premises, the Court erred when it considered extrinsic evidence and found thereby that Mr. Penn had not fully paid the amount of the consideration and ordered him to pay to Mrs. Creque the sum of $85,200 and $10,000 costs. Since Mr. Penn prevailed on this appeal, he is entitled to costs. In the appeal, he sought an order that he be paid the costs of this appeal and in the court below. He did not appeal the quantum of the costs that the court awarded to Mrs. Creque. He would therefore be awarded $10,000 costs in the court below and two thirds of that costs or $6,666 costs in the appeal.

[23] In summary then, the order is that the appeal is allowed and the decision of the High Court is set aside. Mrs. Creque shall pay Mr. Penn's costs in the proceedings in the High Court and before this Court, in the sum of $16,666.

Hugh A. Rawlins
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal