

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 15 of 2005

BETWEEN:

EUNICE EDWARDS

Appellant

and

1. KEITH EDWARDS
2. NJARDAS AS

Respondents

Before:

The Hon. Mr. Brian Alleyne S.C.
The Hon. Mr. Michael Gordon, QC
The Hon Mr. Hugh Rawlins

Chief Justice [Ag]
Justice of Appeal
Justice of Appeal

Appearances:

Sir Fenton Ramsahoy SC with Lionel Greenidge for the Appellant
Ms. Eleanor Clarke-Solomon for the 1st Respondent

2007: March 14;

JUDGMENT

1. **GORDON, J.A.:** When we heard this matter, we gave an oral judgment in court. We have since been asked to reduce our reasons for our decision to writing. This I now seek to do.

2. The appellant and the first respondent were man and wife¹. During the course of their marriage they acquired various properties including a holding of some 832 acres of land at Five Islands, Antigua (hereinafter referred to as “the Property”) said to be valued in excess of US\$ 40,000,000.00. They held the Property as joint proprietors. Mr. and Mrs. Edwards divorced. After the divorce there was a partition proceeding initiated by the Respondent. The parties arrived at a consent order which dealt with most of their substantial holdings. Curiously, the consent order did not address the Property. It should also be mentioned that the former matrimonial home was built on the Property. As the learned trial judge said in her judgment: “The reason for that as claimed by Mrs. Edwards in paragraph 8 of her affidavit of 3rd March was that having regard to the physical characteristics of the land it would have been difficult to determine the most equitable way of dividing the land. This beggars the imagination”²
3. The Respondent was indebted to Njardar AS, the 2nd respondent (hereafter referred to as “Njardar”) in a sum of some \$36,547.98 for which debt Njardar obtained a judgment in default of acknowledgment of service against the Respondent.
4. The judgment remained largely unsatisfied and Njardar took out a judgment summons in October 2003. The Respondent was ordered to make payments by instalments and in default to be committed to prison for 14 days. The Respondent defaulted and in December 2003 Njardar applied to have him committed. The committal proceedings were compromised by both parties, who were represented by counsel, agreeing to a negotiated settlement and as a result a consent order was entered in the proceedings. By that order, the Respondent agreed to give to Njardar a charge over a half share of the property and the order provided that his (the Respondent’s) half share be sold to satisfy the debt.
5. The appellant applied to intervene and permission was granted. The burden of the opposition of the appellant was that the court had no jurisdiction to make the consent

¹ As the 2nd respondent took no part in this appeal, the term Respondent will be used to designate the 1st respondent

² Judgment, Paragraph 2

order nor to order the sale of the Property as the same was joint property and the joint ownership could not be severed unilaterally by the Respondent acting on his own. The matter came on for hearing and the learned trial judge made an order which in part read:

“It is declared that the consent order in Suit 230 of 2003 Njdar AS made on 28th January and entered on 5th February, 2005 taken in conjunction with Mrs Edwards’ refusal to consent to a severance by joining to file the relevant instrument prescribed by the Registered Land Act has the effect of severing the beneficial joint tenancy in the Property registered as Parcels 1,2 and 3 of Block 1290A in Five Islands Registration section.”

6. The appellant has appealed that judgment of the trial judge. Antigua and Barbuda, like many of the present and former territories which form part of the British Empire and British Commonwealth has a Registered Land Act, Cap 374 of the Laws of Antigua and Barbuda (hereafter referred to as RLA). Section 3 (1) of RLA provides: “Except as otherwise provided in this Act, no other law and no practice or procedure relating to land shall apply to registered land under this Act so far as it is inconsistent with this Act”
7. Section 101 of RLA provides as follows:
 - a. “101 (1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently-
 - (a) dispositions may be made only by all the joint proprietors; and
 - (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.
 - (2) For the avoidance of doubt it is hereby declared that –
 - (a)
 - (b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.
 - (3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the

severance shall be completed by the registration of the joint proprietors as proprietors in common in equal shares and by filing the instrument.”

8. Sections 102 and 103 of LRA set forth the characteristics of proprietorship in common and the rights of co-owners.
9. The issue which was before the trial judge was, as she characterized it, really one of statutory interpretation. In the scheme of the trial judge’s interpretation one further section of LRA is set forth for ease of reference and it is section 161. Section 161 reads:

“161. Any matter not provided for in this Act or in any other written law in relation to land, leases and charges registered under this Act and interests therein shall be decided in accordance with the principles of justice, equity and good conscience.”

10. The learned trial judge made reference, in her judgment, to the case of **Mums Incorporated et al v Cayman Capital Trust et al**³, a case decided by the Court of Appeal of the Cayman Islands. In that case, the very same issue of involuntary separation of a joint interest arose. The appellants applied for an order for the sale of the second respondent’s interest in a jointly owned property (the matrimonial home) based on a judgment they had obtained against the second respondent. The wife of the second respondent was registered as a joint proprietor. The Grand Court of the Cayman Islands held that they had no power to grant an order for the sale of the second respondent’s interest save in compliance with section 100 of the Registered Land Law (Revised). The provisions of the Registered Land Law (Revised) of the Cayman Islands are in pari materia with the LRA. The appellants appealed to the Court of Appeal of the Cayman islands who upheld the finding of the trial judge. The learned trial judge in this case, very correctly, in my view, held that an authority from the Court of Appeal in the Cayman Islands was in no sense binding on her and was at best only persuasive. Having endorsed the trial judge’s characterization of the

³ (2000) CILR 131

relationship between the judgments from the Cayman Islands and judgments of our own courts, however, I find that I must prefer the reasoning of Telford Georges JA in the **Mums Incorporated** case to that of the learned trial judge.

11. What the learned trial judge sought to do, in contra-distinction to Georges JA, was to provide a 'filler' for what she saw as a lacuna in the law. At paragraphs 32 and 33 of her judgment she says the following:

"Section 101(1) reiterates the common law position that a joint tenant does not have a separate interest in the land. It goes on to state that "dispositions" shall only be made by all the joint proprietors. What then is a disposition? It is defined as meaning "any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include and agreement to transfer, lease or charge. See, Section 2. And undoubtedly in the context of section 101 a disposition can only relate to a disposition of the whole of the property by all the joint proprietors as no one proprietor has a separate share in the land.

"However, what provisions has the Act made for severance in circumstances where the joint proprietors no longer desire to hold the property as joint tenants? Surprisingly, the answer is none, unlike the situation with tenants in common where it provides by section 102(2) that no proprietor in common shall unreasonably withhold consent to a disposition by another common proprietor to a stranger. And under section 103(1) anyone proprietor in common may apply to the Registrar for partition. I note there is no reference to the Partition Act. Parliament must be presumed to know that the Partition Act applies to joint tenants as well as tenants in common and if it wished to preclude applications under the Partition Act by a joint tenant where a fellow joint tenant did not consent to a disposition or severance it had the opportunity to say so expressly. By not doing so and by not making any provision for situations where joint tenants failed to agree to file the prescribed instrument under section 101(3) it seemingly left a serious lacuna in the law."

12. The learned trial judge then seeks to use section 161 of LRA as the 'filler' for the lacuna. She states at paragraphs 34 and 35 the following:

However, to my mind on closer consideration Parliament did not leave the joint tenant without a remedy. By section 161 Parliament recognized implicitly that it might have omitted to deal with all matters touching and concerning registered land and specifically addressed this by providing that such matters be resolved as stated in section 161. What better formula could have been devised for addressing omissions.

Clearly, as I have found, Parliament omitted and I do not find that it did so intentionally, to consider the situation where joint tenants fail to agree on disposition or severance and I must therefore go on to resolve the issue having regard to the principles mandated by section 161. This brings one to a consideration of the facts of this case."

13. Georges JA in the **Mums Incorporated** case deals with the Cayman equivalent of section 161 in this way:⁴

"The long title of the RLL [the Registered Land Law of Cayman Islands] reads: "A Law to make provision for the registration of land and for dealing in land so registered and for purposes connected therewith." Section 3 states: "Except as otherwise provided in this Law, no other law and no practice or procedure relating to land shall apply to land registered under this law *so far as it is in consistent with this Law.*"[Emphasis supplied.] There is a proviso which is not relevant to the circumstances under discussion. Section 164 provides:

'Any matter not provided for in this Law or in any other Law in relation to land, leases and charges registered under this Law and interests therein shall be decided in accordance with the principles of justice, equity and good conscience'

It would appear from these provisions that the RLL is intended to cover completely the matters pertaining to the registration of land and dealings in registered land with which it purports to deal. While concepts of English land law both before and after 1925 may provide a useful backdrop against which to view the RLL, they should not be permitted to intrude upon its interpretation.

Section 37(1) of the RLL provides:

'No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charges.'

In the definitions section, s.2, "disposition" is defined as meaning "any act *inter vivos* by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include any agreement to transfer, lease or charge."

These sections were considered by Henry, J. A. in *Paradise Manor Ltd. v. Bank of Nova Scotia (1)* and he concluded (1984-85 CILR at 480):

'By applying the definition of "disposition" to s37, the meaning that emerges is that no right of a proprietor in or over his land, lease or charge

⁴ Ibid Page 134 lines 1 - 36

registered under the Law shall be capable of being affected [except] in accordance with the Law and the system of registration established by it.”

I accept this *dictum* as accurately expressing the position”

14. We found that the reasoning of Georges JA led to a conclusion with which we agreed. In those circumstances we allowed the appeal with costs to the appellant.