Judgment 23/2003

Pirito v Curth
Court of Appeal
(Civil File No 321)
10th April, 2003

Land – severance of joint interests – Alderney Land and Property, etc., Law, 1949 – appeal from decision of Court of Alderney – whether property was held in equal undivided shares – intention of the parties – whether equitable "presumptions" should be imported from English law.

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 10th day of April, 2003 before Sir de Vic Carey, Bailiff, President, Richard Charles Southwell, QC., and Sir John Nutting, Bt., QC.

GIUSEPPE CATALDO PIRITO

Appellant

v

HILDA CURTH

Respondent

In the matter of the appeal by the Appellant from the judgment of the Court of Alderney on 7th June, 2001, an appeal to the Royal Court having been dismissed on 27th September, 2002;

THE COURT, having heard Advocates Mrs. F. J. Haskins and P. J. G. Atkinson for the respective parties thereon, GAVE JUDGMENT this day in the following terms:-

(i) On the evidence before them the Jurats in the Court of Alderney were fully entitled to decide that both parties knew and intended that the land (on which they intended to build a house) should be held jointly and for the survivor, as was correctly recorded in the Alderney Land Registry.

(ii) The Court of Alderney was also fully entitled to decide that, though all the price of the land, and most of the cost of the house,

had been provided by Mr. Pirito, he intended that the interests of himself and Miss Curth should be equal, thereby giving to Miss Curth her equal interest despite the inequality of financial contribution.

(iii) For the same reason the beneficial as well as the legal interests in the property were to be treated as equal.

(iv) The law of Alderney and the law of Guernsey, in cases such as this, is not to be governed by "presumptions", which are not to be imported from English law.

(v) These conclusions are consistent with the approach adopted by the Court of Appeal in *McCormack v. Waterman.(20th May, 2002)*

(vi) The decision of the Court of Alderney should be upheld, and this second appeal dismissed.

AWARDED costs to the Respondent on the standard recoverable basis; and

ORDERED that the three month period specified in paragraph 3 of the Order by the Court of Alderney made on 7th June, 2001, subject of the appeal, shall run from this day, 10th April, 2003.

K. H. TOUGH
Registrar of the Court of Appeal

THURSDAY 10TH APRIL, 2003

THE COURT OF APPEAL OF GUERNSEY

Before

Sir de Vic Carey, Bailiff - Presiding
Richard Charles Southwell Esq. Q.C.
Sir John Nutting Bt. Q.C.

PIRITO V CURTH
(CIVIL APPEAL NO. 321)

Judgment delivered by Southwell JA

1. In about 1972 or 1973 Mr Guiseppe Pirito and Miss Hilda Curth began to live together in Alderney in premises rented by Miss Curth. Mr Pirito was then and still is unskilled in reading and writing English. He has a reasonable command of English when speaking and when hearing English spoken.

2. On 18 December 1981 Mr Pirito and Miss Curth together bought a plot of land at Le Petit Val, Ladysmith, Alderney on which they intended a house to be built for them to live in together. The entire purchase price of the land amounting to £6,700 was provided by Mr Pirito. The Particulars of Ownership entered in the Land Register of the States of Alderney in relation to parcel no. F.177(c) are:

> "GUISEPPE CATALDO PIRITO and HILDA CURTH jointly and for the survivor of them absolutely by purchase from Kathryn Wharton Packe for the sum of £6,700
>
> 18th December, 1981 Land Registrar"

Part II, the Ownership Register, contains similar particulars. In Part III, the Charges and Adverse Entries Register, it is stated that

> "The registered property is subject to but has the benefit of the rights easements and obligations set out in the schedule to an Agreement dated 2 June 1981 made between Kathryn Wharton Packe and (1) Guiseppe Cataldo Pirito and Hilda Curth (2)."

This agreement was not put in evidence before the Court of Alderney.

3. On 4 January 1982 the first of their three daughters, Lucia, was born.

4. The construction of a house on their land began in 1982. The building permit and planning application were not in evidence, but they appear probably to have been in joint names. The use of Miss Curth's name was essential, because she alone had the right to build for her occupation in Alderney. It was necessary to secure bank finance to assist in the construction of the house, and £10,000 was borrowed in the joint names of Mr Pirito and Miss Curth from Trustee Savings Bank.

5. In 1984 they moved into the house. Mr Pirito had done much of the building work himself. Financing of the construction came as to £10,000 from the bank, £2,080 from Miss Curth for the windows, and the balance from Mr Pirito. Miss Curth seems to have given some help with the work of building, though her main task was to deal with the documentation involved.

6. On 15 May 1986 their second daughter Francesca was born, and on 23 January 1988 their third daughter Theresa was born.

7. On 1 August 1995, the loan from the bank having been repaid, the bank's charge was discharged. It appears that the money required to repay the loan with interest came from Mr Pirito.

8. Miss Curth and Mr Pirito never married. By October 1998 relations between them had broken down, and Miss Curth left their house to live in rented premises.

9. On 7 January 1999 Miss Curth started an action against Mr Pirito in the Court of Alderney asking for the following relief:

> "1. to order that the parties' joint interests in the property be severed;
>
> 2. for a declaration that upon the severance of their interests, the parties shall hold the property in undivided one half shares;
>
> 3. to order [Mr. Pirito] within such time and upon such penalties as the Court may be pleased to order to participate in the judicial auction ("licitation") of the said premises before Commissioners of the Court;
>
> 4. to direct whether the public should be admitted to bid at this said licitation;

5. to order [Mr. Pirito] within such further time upon such further penalty as the Court may be pleased to order to join in, execute, sign and complete such deeds, documents or other writings as shall be necessary and to give the licitation legal effect and/or

6. to make such further order or directions as the Court deems just."

10. By his defences dated 4 February 1999 Mr Pirito denied that the Alderney Court had power to order severance of the parties' joint interests in the property. If, however, the Court had this power, Mr Pirito asked the Court to decide that "he is entitled to a greater share than Miss Curth", by reason of the following matters:

"(i) The parties purchased a building plot in Parcel No. F.177(c) in Section No. III on 18th December 1981 for a stated consideration of £6,700.

(ii) The only registered charge has been a Bond dated 9th February 1983 in favour of The Trustee Savings Bank of the Channel Islands to secure a loan of £10,000 and which was cancelled on 1st August 1995.

(iii) Whilst it is true that the land is registered in joint names, the house which has been constructed on that land has been constructed largely due to the efforts of Mr Pirito, a builder by trade, both in terms of expense and his own labour. Mr Pirito will expand upon this in evidence. Mr Pirito does not criticise Miss Curth in that regard but points merely to the exceptional endeavours on his part leading to the present house which has a value now in the region of £250,000 to £280,000 depending on the manner and circumstances of sale.

(iv) Moreover Mr Pirito has always believed that the house belonged to him and has at all times acted in such belief and proceeded accordingly.

(v) He will require the house for himself and the two youngest children of the union."

I note that at that stage Mr Pirito was asking only for "a greater share than Miss Curth". Subsequently he has been asking for the entire house and land or proceeds of its sale.

11. It is a matter of no little regret that this relatively simple case has taken over 4 years to reach this Court. The objective of all involved in civil proceedings (parties, lawyers, Court staff and Courts) must be to progress to a final determination of the dispute in accordance with agreed or ordered timetables, at a

reasonable level of cost, and within a reasonably short time. I emphasise "at a reasonable level of cost" in this case, because by now the parties between them must have spent a significant portion of the current value of the house and land on legal costs. For the reasons which I will set out in this judgment, I consider it unfortunate that this second appeal was pursued in the face of clear and unassailable findings of fact by the Court of Alderney, and that the first appeal to Day DB was concentrated on an attempt to revisit his first instance judgment in McCormack v. Waterman though that judgment had been firmly reversed by the Court of Appeal.

12. Mr Pirito applied for a stay of the action, and this application was dismissed by the Alderney Court on 10 June 1999.

13. On 17 November 1999 Miss Curth was granted sole care and control of Francesca and Theresa by the Alderney Court.

14. On 23 February 2000, in the absence of Mr Pirito who had not attended Court either himself or by an advocate, the Alderney Court decided that it had power to order severance and licitation, that "as a matter of principle such severance will be in equal and undivided shares", and that the severance and licitation proceedings be heard on 17 April 2000.

15. It appeared that Mr Pirito and his then Advocate had misunderstood each other, and it was at that stage that Advocate Haskins began to represent Mr Pirito. She applied to the Royal Court of Guernsey for the order of 23 February 2000 to be set aside and this was ordered on 30 June 2000.

16. There was a full hearing before the Court of Alderney on 30 May 2001. It is not clear why there was the delay between 30 June 2000 and 30 May 2001. Evidence of Miss Curth and Mr Pirito was heard. Judgment was delivered by the Alderney Court on 7 June 2001. The Court found the basic facts I have already set out, and in addition the following:

(i) when buying the land in 1981, both parties signed the transfer documents placing the land in joint ownership;

(ii) Mr Pirito was aware that the property was owned by both Miss Curth and himself.

The Court followed the decision on joint ownership in the Royal Court in *Barclays Bank v Curry and Curry* (1996) and a passage in Lewin on Trusts (17th edition) page 249 which read:

> "It seems unlikely that a party who provides all the purchase money should intend the other party to be a mere nominee if both are to share occupation, and it seems more likely that there was a motive of gift in placing the property in joint names, so the equitable interests follow the legal title".

I note, and this is a matter of some importance to the present appeal, that the Alderney Court was aware that they needed to consider equitable interests in the property as well as legal title, and, by implication, decided that there was no difference between the legal and equitable interests. The Court concluded that the property should be held in equal undivided shares, and ordered licitation accordingly.

17. On 20 June 2001 Mr Pirito gave notice of appeal to the Royal Court. The appeal was not heard until 29 August 2002. The Deputy Bailiff delivered judgment on 27 September 2002, dismissing the appeal. Between the hearing before the Court of Alderney and the hearing before the Royal Court this Court had decided the case of *Waterman v McCormack* (25 May 2002, unreported) on joint ownership in Guernsey. In that case the Court of Appeal held that unless the joint owners made other provision in the habendum of the conveyance for the sharing of the property, or the proceeds of sale, in the event of severance of their joint ownership, they would be entitled to the property or proceeds of its sale in equal shares, though the Court left open the question "whether a private arrangement outside the conveyance could validly be made to the same effect". In so deciding this Court reversed the learned judgment of the Deputy Bailiff at first instance. The Deputy Bailiff, when hearing the appeal to the Royal Court in the present case, regarded himself as bound by the decision in *Waterman*, and, as he said, the appeal to the Royal Court

> "must founder irretrievably on the rock of the Court of Appeal's decision in *Waterman*, allied to the provisions of the [Alderney Land and Property, etc Law 1949 – "the 1949 Law"]……."

18. This Court is not bound by its previous decisions on the law of Guernsey: *Smith v Harvey* (1981) No.9 (Civil); *Morton v Paint* (1996) 21 GLJ 40; *Walters v States Housing Authority* (1997) 24 GLJ 39; *Bassington Ltd et al v HM Procureur* (1998) 26 GLJ 105. On the other hand it is not appropriate for this Court to depart from its previous decisions without good and clear reasons for doing so. One example is to be found in *Bassington* in which this Court departed from its then recent decision in *Century Holdings v HM Procureur* (1997) 23 GLJ 42 as to the jurisdiction of this Court. Here the case involves the law of Alderney, not Guernsey.

19. I now turn to the appeal presented cogently by Mrs Haskins. There are three limbs to Mrs Haskins' arguments:

(i) that *Waterman* should be distinguished from the present case on the facts;

(ii) that in any event the decision in this Court in *Waterman* was reached by mistake, because this Court (a) failed to distinguish between legal and equitable interests in land, and (b) proceeded on the basis that equity formed no part of Guernsey law;

(iii) the various grounds set out in Mrs Haskins' amended grounds of appeal to the Royal Court: such grounds are large in number, and themselves divide into two categories: (a) attacks on the Alderney Court's treatment of the evidence in its findings of fact or its lack of findings; and (b) attacks on the Alderney Court's approach to the relevant principles of law.

20. It is convenient to take the facts first. Mrs Haskins attacks the Alderney Court's finding that Mr Pirito was aware that the property was owned by both Miss Curth and himself, on the basis that this finding was contrary to the evidence in a number of respects. She relies principally on these elements in Miss Curth's evidence:

(i) that Mr Pirito always thought that it was "his house";

(ii) that she did not believe in 1981 that she had acquired an immediate interest in the land;

(iii) that she changed her understanding because of the length of time they had been together, but could not say when that occurred;

(iv) she did not fully understand the effect of the conveyance to them as joint owners;

(v) Mr Pirito always wanted the property to go to their children in equal shares;

(vi) The right of survivorship was what was explained to Mr Pirito in 1981;

(vii) The building permit was in joint names because she had lived in Alderney longer and had a right to buy land and build on it whereas he did not have that right;

(viii) Each of them owned their own savings separately and not jointly.

21. In the light of this evidence of Miss Curth, Mrs Haskins says that the Alderney Court ought not to have concluded either that Mr Pirito was aware of the joint ownership, or that in 1981 there was a common intention that their beneficial interests in the property should be equal.

22. The reference to "beneficial interests" is made by Mrs Haskins because she contends that neither the Alderney Court nor the Royal Court addressed themselves to the question whether or not the equitable interests on severance followed the legal title. It is an essential part of her case that though the legal title was joint, and apparently held equally, the equitable interests were not equal, and since Mr Pirito had provided all the money which went into the land and virtually all the money which paid for the house, and did almost all the work on the house, there was and is a resulting trust in favour of Mr Pirito as to 100% or nearly 100% of the value of the land and house.

23. The major difficulty which Mrs Haskins faces is that the only firm evidence of what the parties intended in 1981 is to be found in the transfer into joint ownership and the registration of title in this way. The Alderney Court was in my judgment entitled to find that the transfer into joint ownership was explained to both parties, and was understood to a sufficient degree by both to parties. Miss Curth gave evidence that Mr. Beer, the Land Registrar in Alderney, explained both to her and to Mr. Pirito "the meaning of vesting the property jointly and for the survivor" of them, and that she also explained this to Mr. Pirito and made certain that he understood. Mrs. Haskins placed her main emphasis on some answers which Miss Curth gave in cross-examination. But the Jurats in the Alderney Court were bound to look at her evidence as a whole. Looked at as a whole her evidence was consistent with both parties having understood and intended that either could ultimately be the sole owner of the property if the other died first. The Jurats were entitled to accept her evidence in preference to the evidence of Mr Pirito, as clearly they did.

24. Most of Mrs Haskins's arguments depend on her proposition that Mr Pirito could not and did not understand either the terms or the nature of the documents which he signed. First, she points to the fact that Mr Pirito could not and cannot read or write English. This is correct. But it appears that Mr Pirito could understand spoken English, and on the evidence before them the Jurats were entitled to find that a sufficient explanation of the joint ownership of the land was given to Mr Pirito and that he understood this. Secondly, she says that Mr Pirito "spoke very little English" in 1981. But given the history of this matter, starting with the agreement of June 1981 with the vendor, and also Mr Pirito's obvious articulateness in speaking English and his ready understanding of spoken English in 2001 as shown by the transcript of his evidence, the Alderney Court was in my judgment entitled to treat this point with a pinch of salt, and to prefer Miss Curth's evidence as to Mr Pirito's understanding in 1981. Thirdly, she relies on the evidence of Mr Pirito that he did not know or understand the nature or content of the documents signed in 1981, or the purpose of both parties signing the transfer, or the capacity in which each party signed. Viewed as a whole, Miss Curth's evidence was to the contrary, and the Jurats were entitled to accept her evidence in preference to Mr Pirito's. Fourthly, Mrs Haskins says that neither party "properly understood the legal and/or equitable concepts relating to the legal and beneficial ownership of the property". Neither party had any legal training, so it is likely that neither had a <u>full</u> understanding of what was involved. But on the evidence of Miss Curth the Jurats were entitled to find that both parties had a <u>sufficient</u> understanding.

25. I add that, contrary to Mrs Haskins' submission, the Alderney Court did address both the legal title and any beneficial interests, as I have indicated in paragraph 16 above, by reference to the quotation from Lewin on Trusts.

26. I turn to the law, the law of Alderney. I emphasise this because almost all of Mrs Haskin's submissions on the law were founded on English law. The land laws of Alderney and Guernsey have developed through the centuries on the basis of ancient Norman customary law. To seek to engraft on to Alderney or Guernsey customary law relating to immovable property different concepts of English common law or equity is an exercise to be undertaken with the greatest care. That is clear from a number of decisions of the Privy Council of the 19th and 20th century, and by analogy can be seen in the excellent guide to the Origin and Development of Jersey Law written by Miss Stephanie Nicolle QC, HM Solicitor General for Jersey.

27. A further reason for the greatest care in this respect lies in the seriously inadequate state of English law so far as concerns the property rights of men and women who have long lived together, without marrying, and have later parted. This aspect of English law is regarded by many involved as in need of urgent reform. I will illustrate this by just a few observations:

(i) In the 2000 edition of Lewin on Trusts it is stated in paragraph 9-31 that

> "No presumption of advancement arises when a man purchases property in the name of his mistress, even if they are living together as man and wife."

In the footnote it is indicated that this is so even if they subsequently marry. But such a presumption is applied in the case of a wife, an intended wife (even if the marriage does not take place, or takes place but is dissolved or declared voidable), a legitimate child, or a person to whom the person regarded as making the gift stands in the position of a parent, e.g. an illegitimate child, a stepchild or a grandchild whose father is dead. But there is in English law no such presumption in favour of a woman with whom the man has lived for even 50 years, but without marrying her.

(ii) In such a case, on the contrary, there may be in English law a presumption of a resulting trust to the man. This presumption can be rebutted by evidence of the actual intention, based on acts or declarations of the parties before or at the time of the transaction. Subsequent acts or declarations can be relied on only as evidence against the party who did or made them, and not in his or her favour. See generally Snell's Equity, 30th edition, paragraphs 9-07 & foll.

(iii) Under English family law, as under Guernsey family law, the Courts have power to ignore strict property rights on a divorce of married persons, and to order an appropriate division of the total assets of husband and wife. Under English law the Courts have no such power if the man and the woman are unmarried. It is stated in some of the English cases (see Lewin on Trusts at paragraph 9-52) that the principles developed before the 1970s in matrimonial property cases are relevant in so far as they apply in cases where the parties in dispute are not married to each other. Thus in *Bernard v Josephs* [1982] 3 All ER 162 the English Court of Appeal applied such principles in a case in which it was clear that the parties had committed themselves to each other to the same degree as if they had been married. But it remains unclear how far the English Courts can in such a case take into account events taking place during the cohabitation as opposed to the time when it began and the home was purchased.

(iv) In English law, if a man and a woman do not marry but live together for many years, and the man has provided the entire purchase price of the house, unless the English Court can find some evidence of an intention that the woman should have some share of beneficial ownership, the man may be held to be entitled to the whole house or the whole proceeds of sale, and the woman to nothing. The laws of almost all other civilised countries have been developed so as to avoid such a result, but English law remains unreformed.

(v) There are other reasons for not adopting the English approach to real property cases in this field. Using Jersey law by analogy, the differences between English and Jersey law in relation to joint ownership were spelled out in some detail in *Re Dégrèvement of the Real Property of Bonn* (1971) JJ 1771 Deputy Bailiff Ereaut: see also the other cases cited in the Jersey Law of Property by Matthews and Nicolle at paragraphs 1.17 and 1.18.

28. With these preliminary observations I turn to examine the three Guernsey cases which have been cited. First, *Carpenter et al v Field Aviation Limited* (11th January 1982, Royal Court, Frossard Deputy Bailiff, unreported). In that case husband and wife owned a house jointly for themselves, the survivor of them and the heirs of such survivor. Judgment was obtained in a large sum against the husband only. Husband and wife contended that judgment against one joint owner could not be enforced against jointly owned property. Frossard DB upheld that contention to the extent that in his judgment he indicated that both joint owners had an equal interest in the whole of the property subject to defeasance on death of the first joint owner. He ought perhaps to have added, subject also to defeasance on severance and licitation. Frossard DB did not have to consider in *Carpenter* the respective rights as against each other of joint owners, and his reference to "an equal interest" was not necessary for his decision. It sufficed that each

joint owner had a material interest. Frossard DB in the course of his judgment appeared to indicate the view that a joint owner could alienate his or her interest: if so, in my judgment that may not be correct.

29. The second case is *Barclays Bank plc v Curry, Curry intervening* (18 September 1996, Royal Court, Dorey Bailiff, unreported). In that case the bank took a judgment against Robert Curry in England and obtained permission to enforce it in Guernsey. A house in Guernsey had been bought by Robert and Paul Curry as joint owners. As Dorey B pointed out, the Norman and hence Guernsey principle – nul n'est tenu de rester dans l'indivis – applied to jointly owned land. One joint owner can force partition by applying to the Royal Court for either partage or licitation. This is what Dorey B held, following an earlier case in Jersey: *Le Sueur v Le Sueur* 1968 JJ 889 Royal Court (Sir Robert Le Masurier, Bailiff). In relation to *Dégrèvement of Bonn* Dorey B appeared to reject the conclusion in that case under Jersey law that a joint owner could not affect the title of the other owner by the unilateral alienation (or hypothecation) of the first joint owner's joint interest in the property. If so, in my judgment that may not be correct. If a joint owner wishes to alienate or hypothecate his or her interest in jointly owned property, partage or licitation must first take place. In *Barclays Bank* Robert Curry had contributed 27.5% and Paul Curry 72.5% of the purchase price. The question which the Guernsey Royal Court had to decide was whether, on licitation, the joint owners took half each of the proceeds of sale, or whether they took shares equivalent to their percentage contributions to the purchase price. At page 9 Dorey B agreed with Frossard DB's statement in *Carpenter* that "both parties have an equal interest in the whole of the property", subject to defeasance. Earlier at page 3 Dorey B stated his reasons for agreeing with Frossard DB in these words:

> "As regards to the extent of the interest accruing to each party on severance of a joint tenancy [sic], in my judgment the parties are entitled to equal undivided shares of the land, no account being taken of life expectations or any other mortality estimation and no account being taken of the parties' respective contributions. This appears in other common law jurisdictions to be a rule of thumb measure which is particularly apt for Guernsey, with its meticulous registration of title and charges, and is supported by the judgment in *Carpenter v Field Aviation* (post). So title duly registered in the Greffe to a joint tenancy [sic] can only mean in law equal 50/50 interests pending the death of one joint tenant."

By "joint tenancy", an English law concept, he no doubt meant "joint ownership". There is some force in his view that unless the registration of title of joint owners means (in the absence of any express words in the ownership register) equal shares, there is a risk that others who deal with one or both of the joint owners may be misled. But the difficulty with this is that, as Mrs Haskins submitted, the register is of legal interests and does not necessarily indicate what the beneficial or equitable interests may be. In theory, but improbably, joint owners could be trustees, holding the legal title in trust for others, e.g. children or relations. As Day DB pointed out in the next case, the register is no guarantee of title anyway.

30. The third case is *McCormack v Waterman* (April 2002, Court of Appeal – Bailhache, Smith and Vaughan JJA, unreported). In that case mother and daughter bought a house as joint owners and for the survivor of them and the heirs of such survivor. The mother provided the entire purchase price of the house. The mother, the daughter and the daughter's husband moved into the house. Relations between them broke down. It was agreed that the mother could bring the joint ownership to an end. What was not agreed and had to be decided by the Courts was in what proportions the proceeds of sale were to be divided. In his learned and scholarly judgment in the Royal Court Day DB in the conjoined cases of *Selwood v Madeley* and *McCormack v Waterman* (19 December 2001, unreported) referred to the way in which joint ownership, as opposed to ownership in common (which originally seems to have been the sole means of co-proprietorship), was introduced by the 17th century into Guernsey law, as recorded in Warburton on the History, Laws and Customs of the Island of Guernsey and in Gallienne on Renonciation par Loi Outrée. I wish to pay a well-deserved tribute to the care and learning which Day DB put into his judgment.

31. At the end of it Day DB turned to consider what presumptions of law (if any) might apply in the case of joint ownership, and whether any such presumptions might be rebutted. He said this, at pages 46-47:

> "The 19th century *coutumiers*, and Jeremie in particular, are clear that equality is presumed, unless otherwise satisfactorily established, in respect of ownership in common, with its implicit quantitative nature. Is there any reason why the same presumption should not apply to joint ownership, albeit it is not by nature quantitative? Some, very limited, support for that contention might be gained from the example (given by Gallienne (at p. 184) to which I have referred) of the joint purchase of Mr and Mrs Vinning (*"conjointment"* though *"aux hoirs procréés et engenders d'eux deux")* which the Court subsequently held vested a one half interest in each. Such a development, applying the established principles of the customary law to new situations, would be in step with the application of the principle of "*nul n'est tenu..."* to joint ownership. Equality might also be thought to be equitable.
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> The real point, however, about joint ownership, in contrast to ownership in common, is that it is not intended to be quantitative, merely qualitative; it reflects the intimate nature of the relationship between the parties and their agreement that the property is to be shared and that the survivor will take the whole. It is, in reality, of no consequence what the respective quantitative interests may be whilst the parties are of one accord. In so far as it is material to determine as a matter of law (which I doubt), what defined quantitative interests are vested in the joint owners, I conclude that such interests must be deemed to be equal. The evidence for such conclusion is thin, but stronger than for any other conclusion. There is no statutory basis for it, and only limited assistance can be derived from customary law; but what there is prevails. It is the answer which *"l'esprit"* provides.

> The essence, however, is what is to happen when the basis for joint ownership comes to an end, because harmony has been replaced by discord. For joint owners who are married, their potential remedies lie before the Matrimonial Causes Division. No such assistance is available for those who are unmarried (or not divorced), or for those, I stress, who seek to enforce established claims against one only of the owners. Severance of the joint interests, with their conversion into undivided shares, must, for the reasons already given, inevitably follow. With what further consequences for those unaided by the jurisdiction of the Matrimonial Causes Division?
>
> I must initially consider the theoretical extent of the undivided shares in the property arising from severance. I have already expressed the view that such undivided shares should reflect as nearly as possible what may have been their joint interests, quantitatively assessed. My conclusion that the joint interests must be deemed, as far as it is necessary to do so for such purposes, to be equal, must lead me, at the least, to the conclusion that the, now, severed undivided shares of the parties should be presumed also to be equal. (I refer to a presumption deliberately, for reasons I will explain later)."

32. Day DB went on to hold that joint ownership is presumed to be in equal shares, but this presumption is rebuttable. He considered the circumstances which might be relevant to the rebuttal of this presumption. Not surprisingly he found considerable difficulty in distinguishing between relevant and irrelevant matters. He ordered a factual inquiry into such matters. It is clear that Day DB was struggling with the practical consequences of what he was deciding, there being no clear way to distinguish between the matters he might have regarded as relevant or irrelevant.

33. The Court of Appeal in *McCormack v Waterman* drew attention to the certainty established by the decision in *Barclays Bank*, and the uncertainty involved in a rebuttable presumption with the prospect of "endless argument as to how the discretion could be exercised and indeed whether it should be exercised at all", though the Court acknowledged that the degree of uncertainty would be not much different from that involved in decisions under Article 46 of the Matrimonial Causes (Guernsey) Law 1939 on financial settlements when married persons divorce. The Court's conclusion on the point at issue was set out briefly in paragraph 22 as follows:

> "In both forms of co-ownership, unless different shares are stated in the conveyance, the parties hold in equal shares, subject, of course, in the case of joint ownership to the right of survivorship. Subject to the proviso below, in the event of a severance of joint ownership, the parties are entitled to the property, or to the proceeds of sale of the property, in equal shares. The proviso is that there seems to us no reason in principle why the parties to a conveyance into joint ownership should not, if they so wish, make different provision for the sharing of the property or the proceeds of sale in the event of severance. Such provision would obviously be included in the habendum. We leave open the

question whether a private arrangement outside the conveyance could validly be made to the same effect."

The Court went on to express obiter views on other aspects of joint ownership to which I will return later.

34. The Court of Appeal did not express its conclusion in terms of an irrebutable presumption, in my respectful view, correctly. In my judgment it is important that there should not be imported into the law of Guernsey the presumptions of advancement and the like which have caused so much difficulty in English law, and which have ossified English law despite the changes in social circumstances. I have already given one example of direct relevance to this case: in English law there is a presumption of advancement by a man to his fiancée, even if they never marry, but no such presumption in the case of a man and a woman who live together for 25 years, never become engaged and never marry. Such presumptions are a bad example of lazy thinking in English law.

35. Mrs. Haskins argued that equitable principles of English law form part of the law of Guernsey, and must be applied in the same way as in English law. For my part I do not consider that such principles can be imported wholesale into the Guernsey law of real property, which is derived from Norman not English origins, and which is in many respects very different from English law, particularly English statute law from the major statutory reforms of 1925 onwards.

36. If, however, one supposes that English equitable principles were directly applied in Guernsey, Mrs. Haskins' argument that there is a resulting trust in favour of Mr. Pirito, as the provider of almost all the money which went into the land and the house, has to be considered. The relevant English law is summarised in paragraphs 9 – 60 and 9 – 61 of *Lewin on Trusts* (2000, 17th ed.) as follows:-

"Purchase in joint names: one party sole contributor

9 – 60 If property is purchased in joint names, and one party makes no contribution at all, there is normally a rebuttable presumption that the property is held in trust for the party who provides all the purchase money. However, if property is purchased in joint names by husband and wife, or parent and child, and the husband or parent provides all the purchase money, the presumption, at any rate in relation to land, is of beneficial joint tenancy. Where investments, or other items of personalty, are purchased in the name of husband and wife, or parent and child, and all the purchase money is provided by the husband or parent it may be the intention of the husband or parent, whether proved by direct evidence or inferred from the circumstances, that the wife or child should take the investments only upon the survivorship, and that in the meantime the income is to belong to the husband or parent. But it is doubtful whether there is any presumption to this effect.

9 - 61 *It is doubtful, however, whether the presumption of resulting trust has any significant weight in a case where the property is purchased in the joint names of the parties for their joint occupation and one of them provides all the purchase money. Unless there is some special explanation for the property being purchased in joint names (for example that this was required by a mortgagee) the court may infer from the circumstances of joint occupation that a beneficial joint tenancy was intended. And so, in the absence of any particular evidence as to intention, the position may be exactly the same as in husband and wife joint purchase cases where the husband provides all the purchase money. It may seem odd at first sight that the party who provides nothing at all on a purchase in joint names should end up better off than one who provides less than half the purchase money. But this is not really so. In the former case there is no apparent explanation for the property being placed in joint names. It seems unlikely that a party who provides all the purchase money should intend the other party to be a mere nominee if both are to share occupation, and it seems more likely that there was a motive of gift in the property being placed in joint names. In the latter case it makes sense (in the absence of any particular evidence as to intention) for the parties to take beneficially rateably according to their contributions and there is no reason to suppose that a motive of gift was involved in placing the property in joint names."*

This passage includes the sentences on which the Court of Alderney relied. Thus even if English law were applied, there was good reason to reject the notion of a resulting trust in favour of Mr. Pirito on which Mrs. Haskins relied.

37. In the present case we are concerned with the law of Alderney. Except for the specifics of land registration in Alderney, I have seen no reason to distinguish between Alderney and Guernsey law.

38. Accordingly I summarise my conclusions in relation to this appeal as follows:-

(i) On the evidence before them the Jurats in the Court of Alderney were fully entitled to decide that both parties knew and intended that the land (on which they intended to build a house) should be held jointly and for the survivor, as was correctly recorded in the Alderney Land Registry.

(ii) The Court of Alderney was also fully entitled to decide that, though all the price of the land, and most of the cost of the house, had been provided by Mr. Pirito, he intended that the interests of himself and Miss Curth should be equal, thereby giving to Miss Curth her equal interest despite the inequality of financial contribution.

(iii) For the same reason the beneficial as well as the legal interests in the property were to be treated as equal.

(iv) The law of Alderney and the law of Guernsey, in cases such as this, is not to be governed by "presumptions", which are not to be imported from English law.

(v) These conclusions are consistent with the approach adopted by the Court of Appeal in *McCormack v. Waterman.*

(vi) The decision of the Court of Alderney should be upheld, and this second appeal dismissed.

39. I am not sorry to reach these conclusions under the law of Alderney. English law with its concentration in equity on "presumptions", and on the precise sources of funds, when considering issues of severance of a jointly owned house, has led to its own injustices, and to creating almost a lottery for unmarried joint home owners. If this case had been decided in the way Mrs. Haskins for Mr. Pirito argued that it should be, that would have meant that Miss Curth would have to leave this long relationship with Mr. Pirito, during which she bore and brought up their three children, without a penny. That would have been a result repugnant to all concepts of fairness and equity.

40. The Court of Appeal in *McCormack v Waterman* went on to express the view that one joint owner can alienate or hypothecate his or her interest without the assent of the other joint owner. As I have already indicated, my view, in line with *re the Dégrèvement of Bonn* in Jersey law, is that in this respect the Court of Appeal may not have been right, and I want to say a little more on this aspect because of my concerns about the implications of the Court of Appeal's view. A and B are married and hold their family home in joint ownership. C and D are man and woman who are unmarried and have lived together in their home which they hold in joint ownership for 25 years. E and F are of the same sex and have lived together in their home which they hold in joint ownership for 25 years. I ask the rhetorical question in each case – is it really the law of Guernsey or of Alderney that one of the joint owners can sell his or her interest with all the consequences that will involve, including the right of the new joint owner to occupy the house of which he or she is now joint owner. To my mind the answer to this question, which was the answer given in Jersey law by Ereaut DB in *re the Dégrèvement of Bonn*, probably is that alienation by a joint owner is not possible until after severance. I make these points because I consider that before the legal profession in Guernsey were to act in accordance with what the Court of Appeal said in *McCormack v Waterman* in this respect there is a need to consider the implications more fully.

41. Finally, I wish to say something about the preparation of files for the Court of Appeal. In future it would be more helpful to have from the appellant's advocate

(i) a file of pleadings, orders, judgments and other formal documents in the particular cause (this should be agreed between the parties);

(ii) a file of affidavits (with duplication being avoided by the insertion not of a second or third copy of the same document, but rather of a single sheet indicating the nature of the document and where it is to be found);

(iii) the transcript or relevant part of the transcript, where this is necessary;

(iv) a file of documents put in evidence (duplication being avoided in the way already described);

(v) a file of authorities divided into sections, first, Guernsey authorities, secondly any Jersey authorities, thirdly any English or Privy Council authorities, each section being assembled in chronological order.

The respondent's advocate should not duplicate any of this material, but instead should insert into the appellant's files any documents which he or she considers to have been omitted.

In this way it will be possible for the Court to focus on what is relevant, and not to waste time on considering duplicated documents.