No.310

In the Court of Appeal of Guernsey

(Civil Division)

The 20th day of May, 2002 before Peter David Smith, Q.C. Presiding, Sir Philip Bailhache, and David Arthur John Vaughan C. B. E., Q. C.

PAULINE JULIE WATERMAN

Appellant

V.

MURIEL MAUDE McCORMACK

Respondent

In the matter of the Appeal by PAULINE JULIE WATERMAN from the decision of the Royal Court on 19th December, 2001;

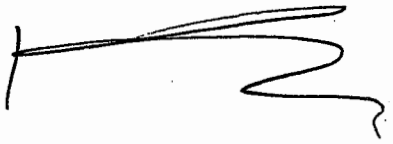
Whereas on 18th April, 2002, THE COURT heard Advocates Alison Ozanne and Pauline Allen for the respective parties thereon and reserved judgment;

THE COURT this day issued judgment in the terms attached hereto and

1. Allowed the appeal;

2. DECLARED that the interests of the Appellant and the Respondent in the property Harrington House or the proceeds of sale thereof are to be quantified as equal in amount;

3. MADE no formal order as to costs at this stage, and indicated that its inclination was that costs should follow the event in the usual way but GRANTED liberty to either party to apply, within seven days of this judgment being received by the parties, for a different order.



Registrar of the Court of Appeal

Issued on 20/5/02

0000/00

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division)

April 2002

Before: **Bailhache, Smith and Vaughan JJA**

Between	**Pauline Julie Waterman**	**Appellant**
And	**Muriel Maud McCormack**	**Respondent**

Miss Alison Ozanne for the Appellant
Mrs. Pauline Allen for the Respondent

JUDGMENT

Bailhache JA

Background

1. The judgment that I am about to deliver is the judgment of the Court. This is an appeal against a judgement of Day DB given on a preliminary question raised, it seems, of the Court's own motion, but accepted by both parties as being appropriate for argument in that way. As will appear from this judgment, the preliminary question is in fact dispositive of the issues between the parties. It is not difficult to envisage however, had this Court's conclusion been different, that the arguments and preliminary question could well have foundered upon a number of unresolved factual issues. We caution that care should be taken before embarking upon preliminary questions which might simply increase the costs of the litigation and the time taken to bring it to a conclusion.

2. The preliminary question certified by the Royal Court was whether the interests of parties who purchase a property "for themselves, the survivor of them and the heirs of such survivor" have necessarily to be quantified as equal in amount.

3. As we have stated, a number of factual issues have not been resolved. But the following brief history is, we believe, not controversial. The appellant is the daughter of the respondent. She is not the only child of her mother, there being another daughter living in Guernsey, and a son living in Australia. In 1998 the respondent sold her house and agreed to purchase, with the appellant, a property called "Harrington House" in St. Peter Port. The entire purchase price was provided by the respondent and the conveyance was completed on 12th January 1999. By the conveyance, the property was conveyed *inter alia* on the following terms –

"(1) That the Vendor hereby conveys for an estate of inheritance to the Purchasers accepting for themselves, the survivor of them and the heirs of such survivor ALL THOSE PREMISES ..... etc".

Although, in accordance with the usual conveyancing practice, the word "joint" or "jointly" was not employed, it is common ground that the property was conveyed into joint ownership and not ownership in common. Precise terminology is important, and we will use those phrases and not the English "joint tenancy" and "tenancy in common" that have been used in some of the authorities to which we have been referred.

4. After completion, the appellant and her husband moved into the property with the appellant's mother, the respondent. The appellant and/or her husband caused certain repairs and renovations to the property to be carried out at their own expense. For a time, all went well, but during 2000 relations between the parties deteriorated and the respondent made it known that she wished to terminate the joint ownership of Harrington House. The appellant accepted that the respondent was entitled to bring the joint ownership to an end but as to the entitlement to the proceeds of sale, there was no agreement. The appellant claimed that there had been a legally enforceable gift of a joint interest, upon which she had relied to her detriment, and that on severance each party was entitled, in default of agreement to the contrary, to one half of the proceeds. The respondent appears to have accepted that the appellant was entitled to some share of the proceeds, but not to half. In her action, she sought a declaration that upon severance the property should be held in undivided shares as to 95% for her and as to 5% for her daughter, or in such other proportions as the Court should think just.

The Deputy Bailiff's judgment

5. In a long and carefully considered judgment, the Deputy Baiilff reviewed the law as to co-ownership. He concluded that when the interests of joint owners were severed, there was a presumption of equality. That presumption of equality could, however, be rebutted by the

application of equitable principles. The opportunity to rebut the presumption of equality should be afforded when justice so required. He stated –

> *"In my view, the exercise, or inquiry, to be undertaken to establish the equitable interests of the joint owners (either in the property or in the proceeds of sale – the distinction is immaterial), should essentially, though with some major additions, relate to matters of a financial nature; in other words it must be a proper accounting process".*

6. The Deputy Bailiff considered that the inquiry should exclude (save perhaps in exceptional circumstances) life expectations, questions of conduct, and considerations such as the need for a home for any child of the parties.

7. Potentially relevant factors included the financial contributions of the parties to the original purchase price and mortage repayments, as well as benefits arising from occupation of the property. Also to be taken into account were "the intentions and, particularly, all the circumstances of the parties, including, specifically, the duration of the joint ownership".

8. It is plain therefore that the Deputy Bailiff's judgment arrived at a conclusion for which neither of the parties had contended at the hearing. Nonetheless, the respondent, through her counsel Mrs. Allen, accepted the ruling and invited this Court to uphold it. The appellant, through her counsel Miss Ozanne, argued that the Deputy Bailiff was wrong in finding that there was a rebuttable presumption of equality; she submitted that any presumption was irrebuttable. In other words, it was a rule of law that joint owners held the property in equal shares, so that in the event of its sale after an action in licitation, the proceeds must be divided equally.

The submissions of the parties

9. Both counsel submitted that the concept of joint ownership had been imported into Guernsey law from English law. Miss Ozanne, in particular, invited the Court to examine the common law of England and to draw inferences from that law as to what was the law of Guernsey. We do not find it necessary nor desirable to accept that invitation. It may be, although the evidence is not conclusive, that the idea of conveying real property into joint ownership was borrowed from English law. Alternatively, it might have its genesis in the customary law concept of "*communité de biens*". What is certain however is that real property has been held in joint ownership in Guernsey for at least 200 years. Conveyancing practice has evolved and a jurisprudence, even if limited, has developed. While it is, of course, permissible to refer to other systems of law where inspiration has been drawn from such systems over a period of time, the assistance to be gained

may be limited. As Lord Wilberforce said in ***Vaudin v Hamon***, Ordres en Conseil, Vol XXIV page 164-5 –

> *"Their Lordships were referred to a number of authorities under various systems of law .... These were said to be applicable, or at least relevant, by analogy to the present case. This argument appears to their Lordships to be too widely stated. If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter.*
>
> *While it may be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers quite clearly, large differences in matters not only of detail but of principle.....*
>
> *Thus, although as this Board has pointed out in La Cloche v. La Cloche (1870) L.R.3 P.C. 25, it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms, the particular legal provision under examination in any case, ... must in the end be interpreted in the light of its own terminology, context and history.".*

Even in Jersey the law in relation to co-ownership has in fact developed quite differently in certain respects.

10. Both parties were agreed that both forms of co-ownership, joint ownership and ownership in common, could be brought to an end at the instance of any co-owner. Sir Henry Maine in his book "Ancient Law" states –

> *"The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, Nemo in communione potest invitus detineri ('No one can be kept in co-ownership against his will')".*

The rule also finds expression in the maxim of both Guernsey and Jersey law –

"Nul n'est tenu de rester dans l'indivision".

It is therefore open to any joint owner, as well as a person owning land in common, to end the indivision by bringing an action for a *partage or an order for licitation.*

11. What then is the position of joint owners if the indivision is ended and proceeds of sale are to be divided between them? We were referred to two judgments of the Royal Court dealing with this question and counsel for the appellant placed much reliance upon them.

12. The first is ***Carpenter and another v Field Aviation Limited*** (11th January 1982). In that case, the plaintiff husband and wife owned jointly for themselves, the survivor of them and the heirs of such survivor a house against which was registered a bond for £25,000 to which both had consented. In March 1981, judgment was given against the plaintiff husband in favour of the defendant in the sum of £103,209. The judgment was registered in the *Livre des Obligations* as a charge or hypothec against the plaintiffs' property. The plaintiffs contended that a judgment against one joint owner could not give rise to a valid charge against jointly owned property. The defendant's *exceptions de fond* to the effect that the plaintiffs' contentions were unsound in law were upheld and the action was struck out. Frossard DB (as he then was) stated –

> *"In my judgment both parties have an equal interest in the whole of the property subject to defeasance on death of the first. Such interest is a "droit immobilier" or "droit réel". It is a greater right than an usufruit.*
>
> *An usufruit can be alienated and can be charged and indeed falls into a saisie. See Gallienne at p. 116.*
>
> *I know of nothing in Guernsey Law which prevents a person alienating a "droit immobilier". In this case it may cause inconvenience to the other party. It may not be of great value due to the hazards of mortal life but that does not alter the principle.*
>
> *The right under consideration being in my judgment a greater right than an usufruit and being a "droit immobilier" or "droit réel" can be alienated and therefore hypothecated.*
>
> *I find the Exceptions well founded. The action is dismissed with costs."*

Miss Ozanne placed particular reliance on the phrase "both parties have an equal interest in the whole of the property". We can see no evidence from our reading of the judgment that the contributions of Mr. and Mrs. Carpenter were in fact in equal proportions. It also seems to us implicit from the striking out of the action at an early stage that the Court was applying settled law.

13. The second case is ***Barclays Bank plc v Curry, Curry intervening*** (18th September 1996). The plaintiff bank obtained judgment in England against the defendant and sought to enforce it in Guernsey against a property which had been acquired by the defendant and the intervener "jointly and for the survivor" . The defendant had contributed 27.5% towards the purchase price and the intervener 72.5%. The plaintiff registered the judgment against the property which was subsequently sold so that part of the proceeds could be applied in satisfaction of the judgment debt. The question for decision was how the proceeds of sale were to be divided between the former joint owners. The Royal Court decided that the proceeds were to be divided equally. Dorey, Bailiff stated –

> *"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(sic)".*

14. It is to be noted that this decision is directly in point. The Court held that, (and we employ our own terminology) upon severance of the joint ownership of real property, the parties were equally entitled to the land or to the subsequent proceeds of sale with no account being taken of the parties' respective contributions to the purchase price. These two decisions of the Royal Court are important, particularly in a small jurisdiction where precedents are few, because legal practitioners will no doubt have advised their clients accordingly and the public will have relied on the decision. The principles expressed in the following terms in Halsbury's Laws (Volume 37 4th edition re-issue) paragraph 1245 appear to us to be relevant in this context.

> ***"Decisions followed for long time.*** *A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision was wrong. Apart from any question as to the courts being*

of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even through the court before which the matter arises afterwards might not have given the same decision had the question come before it originally.

15. Day DB appeared to recognize this principle when he stated –

> *"The arguments of both the Applicant and the Defendant, to a greater or lesser degree, are based upon the decision of Dorey B in Barclays Bank (1). While that decision is not binding on me, it should be followed, it is submitted by counsel for those parties, unless there are strong reasons to do otherwise (with which submission I generally agree)".*

16. It is perhaps unfortunate that the Royal Court did not expressly state why it considered that the decision in ***Barclays Bank v Curry*** was wrong. The Court expressed disagreement in these terms –

> *"The mere fact of registration of title vesting joint ownership in the purchasers cannot, of itself, be a quantitative statement of their respective interests (unlike the position where the purchasers acquire in specific undivided shares), unless, as a matter of law, joint ownership, unequivocally and for all purposes, is a quantitative statement as to such interests.*
>
> *Nor am I persuaded that Dorey B was correct to base his decision in* ***Barclays Bank*** *(1), in part, upon what Frossard DB had said in* ***Carpenter*** *(9) in respect of the nature of joint ownership – "Both parties have an equal interest in the whole of the property…". Those interests are necessarily the same, they are equal in nature; but the vesting in the parties of joint interests is no more than a general proprietary description, from which no quantitative assessment can automatically be implied. Title so registered is solely conclusive as to the proprietary interest of the purchasers".*

The conclusion that the vesting of joint interests is no more than a general proprietary description is not an explanation as to why the Court in **Barclays Bank** was wrong to draw the inference that on severance the parties held in equal shares.

17. It seems that the Court accepted submissions from counsel for the respondent that the inflexible application of the principle of equality could operate unfairly in certain circumstances. The Royal Court referred to one example given by counsel who postulated a joint ownership of a property by a man and a woman where the woman was an industrious "high flyer" and the man a wastrel who disappeared to Papua New Guinea for five years. During that period the woman paid the mortgage and maintained the property. The man returned from Papua New Guinea and demanded a severance of the joint ownership and an equal distribution of the net proceeds. Was this just? DB continued –

> *"I will give two more [examples]. Firstly, a man and a woman, unmarried, have two children. The parents have available funds and wish to assist both children in purchasing their own homes. To do this they purchase two properties, each of which are vested in the parents and one of the children for themselves, the survivors of them, the ultimate survivor and the heirs of such survivor (the clear intention being to benefit that child ultimately). The three of them would have equal proprietary interests in that property, and, the egalitarians would argue, equal quantitative shares. The child falls out with his parents, obtains a severance/licitation, and then demands, as of right, an equal one-third share of the proceeds of sale. Is that necessarily right? Secondly, a man owns a property, fully paid for. He decides to live with another, impecunious , man, and title is amended so as to vest the property in the two of them jointly. The original owner continues to bear all the expenses of insurance, repairs, etc. Within three months the men fall out irrevocably. Must the proceeds of sale now be divided equally between them, without more? Or, which is more likely in this example, must the original owner pay the other one half of the value of the property to restore his earlier sole interest?"*

18. If parties had entered any of these hypothetical arrangements in ignorance of the true legal position, one might accept that the application of the law could lead to injustice, but this is not a hypothesis upon which courts will generally act. People are presumed to know the law and to order their affairs against the background of that knowledge. As indeed the Royal Court itself stated, great advantage flows from certainty and clarity in the law.

19. The rebuttable presumption of equality that the Royal Court found to exist strikes at the very heart of the certainty established by the decision in **Barclays Bank**. Although the Royal Court laid down certain broad criteria for the exercise of the jurisdiction that it claimed, it seems to us that the inevitable result would be endless argument as to how the discretion could be exercised and indeed whether it should be exercised at all. It is true that in the context of matrimonial proceedings the Court has a jurisdiction conferred by Article 46 of the Matrimonial Causes (Guernsey) Law 1939 to order the division of property jointly owned by a husband and wife as it thinks fit. But this is a statutory power which is now to be exercised in accordance with settled

principles. The assertion of such a jurisdiction in relation to jointly owned property outside the context of matrimonial proceedings is in our judgment made without right.

Conclusions

20. Our conclusions may be summarized as follows. There are in Guernsey two forms of co-ownership, namely joint ownership and ownership in common. The only material distinction between the two forms of co-ownership is the right of survivorship (the *accrescendi*) which is an incident of joint ownership but not of ownership in common. The phraseology employed in the habendum of a conveyance is what establishes whether an estate of inheritance is held in joint ownership or ownership in common. If there is a reference to a right of survivorship, the estate is held jointly.

21. Joint ownership and ownership in common may be brought to an end by any co-owner in accordance with the maxim *"nul n'est tenu de rester dans l'indivision"*. The indivision may be brought to an end by agreement as for example by sale or by a *contrat de délaissance,* or by order of the Court, as for example in an action for licitation or for *partage*.

22. 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.

23. It follows that this appeal must succeed. But, in deference both to the submissions of counsel and to the full treatment given to the question of third party rights in the judgment of the Royal Court, we think that some further observations might be of assistance for the guidance of lenders and of practitioners.

24. We have referred above to "severance" and, lest there be confusion with "severance" as a term of art in English law, it is desirable to make it clear what we mean. It seems to us that the use of the term may have caused some confusion in the past. When we speak of severance, we mean

severance of the joint ownership, the removal of the right of survivorship, and the substitution of ownership in common. This is important in the context of third party rights.

25. In ***Carpenter***, the Royal Court held that the interest of a joint owner was a "*droit immobilier*" or "*droit réel*" which could be alienated and therefore hypothecated. Frossard DB observed that the alienation of a joint interest "may not be of great value due to the hazards of mortal life, but that does not alter the principle". It is clear therefore that the sale or alienation of a joint interest in land does not affect the right of survivorship nor the life which is in question. If A and B own land for themselves and for the survivor of them and B sells his interest to C, the land becomes owned jointly by A and C. But C's hope of succeeding to the whole estate depends upon B surviving A. If B pre-deceases A, C's interest in the land will die with B. It follows, of course, that the alienation of a joint interest does not give rise to severance because the right of survivorship subsists. As Day DB observed in the Court below, such a scenario may be unlikely, but is not wholly impossible as, for example, where B and C are brothers. If A does not wish to continue in joint ownership with C, his remedy is of course to claim licitation.

26. It is the same with the hypothecation of a joint interest. ***Carpenter*** decided that a joint interest in land was susceptible of hypothecation. Thus if X and Y own land jointly, and Z obtains judgment against Y and registers that judgment in the Livre des Obligations, he obtains a charge or hypothec over Y's joint interest. Similarly, if Y consents to the registration of a bond in favour of Z, registration will give rise to a charge or hypothec over Y's joint interest in the land. In either case there is no severance and the right of survivorship again subsists. Thus, if Y dies before Z has proceeded to execution, Z's charge or hypothec will die with Y. The whole estate of inheritance will have vested in X by right of survivorship.

27. In our judgment Dorey B was therefore partly in error when he stated in ***Barclays Bank*** that "a sale of one joint interest will sever the joint tenancy (sic) as will the registration of an interim vesting order on such a joint interest". The sale of a joint interest in land will not sever the joint ownership as explained by Frossard DB in ***Carpenter***. The registration of an interim vesting order against a joint interest is however a different matter. At this stage the creditor is proceeding to execution and will have instituted *saisi* proceedings. The making of an interim vesting order by the Court transfers the *saisine* in the debtor's property to the *saisi héridital* pending the completion of the process. As Day DB rightly stated in the Court below, all potential claimants against the debtor's real property must know what property is subject to the process, in order that an informed decision can be made as to whether or not to register a claim. We agree with Day DB, and with Dorey B in **Barclays Bank,** that the making of an interim vesting order severs the joint ownership by operation of law. The right of survivorship falls and what vests in the *saisi hérédital* is therefore an undivided share in the property formerly subject to joint ownership.

Generally, subject to the expression in the conveyance of some other form of partition, what will vest is an equal undivided share.

28. Our conclusion therefore is that the appeal must be allowed. We declare that the interests of the appellant and the respondent in the property Harrington House or the proceeds of sale thereof are to be quantified as equal in amount. Finally, although we have in the event differed from the conclusions of the Royal Court, we wish to record that we have been greatly assisted in our understanding of the issues by the Deputy Bailiff's detailed analysis of the authorities and the relevant jurisprudence of the Island. We are also grateful to both counsel for their help in elucidating the issues for us.

29. We make no formal order as to costs at this stage. Our inclination is that costs should follow the event in the usual way but we grant liberty to either party to apply within seven days of this judgment being received by the parties for a different order.