IN THE SUPREME COURT OF BELIZE, A.D. 2005

CLAIM NO. 251 OF 2005

BETWEEN: FERNANDO ARAGON APPLICANTS

AND

1. PRIMITIVO ARAGON
2. JOSE ARAGON RESPONDENTS

Mr. Oscar Sabido S.C., for the applicant
Mr. Michael Peyrefitte, for the respondents

AWICH J.

2.06.2009 J U D G M E N T

1. *Notes: Land Law- joint tenancy; whether there has been severance of the joint beneficial tenancy in regard to the interest of the applicant by agreement; whether there has been severance by giving statutory notice or by other acts effectual to sever the joint tenancy under s: 38 of L.P.A, or by sale of the interest of the applicant, one of the co-owners; conversion of joint tenancy into equitable tenancy in common; whether upon severance, a former "joint tenant" is entitled to unilaterally partition off a portion of the land as represesting his interest.*

2. On 21.4.1986, Mr. Tirso Aragon conveyed his freehold title in one hundred acres of land in Sarteneja Corozal District, the subject of Minister's Fiat Grant No. 106 of 1953, "jointly" to his three sons: Mr. Fernando Aragon the applicant, Mr. Primitivo Aragon, the first respondent, and Mr. Jose Aragon, the second respondent. The conveyance was recorded at Lands Registry in Deeds Book Volume 3 of 1986 at Folios 1235 to 1240.

3. In 2003, Fernando the applicant, wished to sell his part of the co-ownership in the joint tenancy. Pursuant to that intention, he obtained the signatures of Jose and Ms. Irma Aragon on an application form submitted to the Land Subdivision and Utilization Authority, LSUA, under s: 4 of the Land Subdivision and Utilization Act, Cap. 188, for approval to have the land subdivided by curving out one third portion measuring 33.317 acres for himself. Irma is the eldest sister of the three brothers. The applicant said that Irma signed the application form on behalf of Primitivo who at the time lived in the USA. Irma did not have a power of attorney, which would be in writing. On one occasion, Fernando and Jose attended on Mr. Patrick Sebastian, the District Lands Officer, regarding subdividing the land.

There has been no evidence about what Jose might have said, if at all he said anything.

4. LSUA must have made its report and recommendation for the subdivision to the Minister; he gave provisional approval. A subdivision plan was prepared by a surveyor, Mr. Guillermo E. Valdez, on the instruction of the applicant. According to the Act, that is done subsequent to provisional approval. The Minister has granted final approval under s: 15 of the Act for the subdivision. The approval was notified in a letter dated 23.12.2003, from LSUA. There is now physically a portion curved out of the one hundred acres.

5. The applicant has entered a contract of sale of the 33.317 acre portion which he claimed he was entitled to. He has collected $13,000.00 deposit from the buyers, Mr. Dennis Walz and Mrs. Hovita Walz. The respondents, the other two brothers, took the view that any sale must be of the entire land. That is because the portion that the applicant seeks to sell is more accessible and more valuable; and without it the remaining portion of the land will not be easy to sell or will not fetch a good price.

6. The applicant insists on the sale he made. He has served on Primtivo, notice of severance of the beneficial joint tenancy in regard to his interest, under the proviso to s: 38 of the Law of Property Act, Cap. 190, Laws of Belize. The notice was dated 11.3.2005; it was addressed to Primitivo Aragon, C/o Jose Aragon. The applicant has further applied for a vesting order of this court, vesting title to the 33.317 acre portion in him. Learned counsel Mr. O. Sabido, S.C., for the applicant, submits that the application has been made under s: 33 of the Act.

7. ***Determination.***

By having the conveyance from himself to his three sons recorded on Deeds Book, the relevant register at the General Registry, Mr. Tirso Aragon, created and transferred a legal title to the one hundred acres of land to his three sons – see ***s: 40(1)(b) of the Law of Property Act Cap. 190.*** The title was passed to the sons jointly without any words of severance of the beneficial joint tenancy. The applicant does not claim that the conveyance contains words that show that each son was to take a separate share of the property. The conveyance was not of the so called, "undivided shares". Further, there has been no evidence

to show that the children were partners in business and the land was conveyed to the partnership or for the purpose of a joint business venture – see ***Lake v Gibson (1729) 1EQ Cas Abr 290, 21 ER 1051 –*** a summary is in, ***O.L Paton v Dorothy Roulstone 24 WIR 462***, an appeal from Grand Cayman to the Court of appeal of Jamaica in 1976.

8. There has not been an issue that the interests of the sons were not identical and existed as a single joint title against a third party; and there has been no issue that the entire land was not held in joint tenancy upon conveyance to the sons. They hold the legal title, as trustees for their own beneficial interests. They are the trustees and the beneficiaries as well.

9. As co-owners in a joint tenancy, the three sons own together at the same time, identical interests or estates in the whole of the land; none has exclusive or sole right over a particular portion. Together they have at the same time, the right to possession over the whole one hundred acres. Each has the same title; their title is traceable from the same conveyance (or transfer or transaction). The estate for each vests and subsists for the same time. What I have just described are

the so called four unities: of interest, of possession, of title and of time.

10. In practice, identifying these four features so as to exclude tenancy in common is not always easy. Tenancy in common is an equitable co-ownership of land by two or more persons in equal or unequal undivided shares. The difficulty in differentiating joint tenancy from tenancy in common is compounded by the fact that even co-owners in a tenancy in common sometimes are entitled to possession at the same time.

11. ***Malayan Credit Ltd v Jack Chia MPH Ltd [1986] 1 All E.R. 711,*** was a case where there was common possession by co-owners of a leasehold at the same time. The Privy Council, the final appellate court for Singapore, held that the evidence showed that the relationship between the parties was a tenancy in common. In the case, the trial judge in the High Court of Singapore had held that the evidence disclosed that the tenants had taken the premises that they shared for their separate businesses "*in equity as tenants in common in unequal shares".* The Court of Appeal of Singapore reversed the

decision of the trial judge; and held that the evidence disclosed a joint tenancy. The Privy Council reversed the decision of the Court of Appeal; and held that, the payment of rent and services charge in unequal shares, the payment of the stamp duty and survey fee in unequal shares, the unequal contributions to the deposit payable under the terms of the lease, and the meticulous calculations of the shares of the space of the seventh floor, *"pointed decisively to the inference that the parties took the premises in equity as tenants in common in unequal shares,"* not as joint tenants. It ordered that the property be sold and the net proceeds be divided proportionally.

12. Another example is the case of ***Bull v Bull [1955] 1 All ER253,*** where the Court of appeal in England held that the arrangement between son and mother when they bought a house to live in together was that they became beneficial tenants in common. Yet another example is ***Paton v Roulstone,*** cited above, where the Court of Appeal in Jamaica held that the inference from the evidence was that the parties acquired the six properties registered in their joint names, in pursuance of a joint business and held the properties as tenants in common, so the shares of the deceased did not pass automatically to the survivor.

13. A special feature of a joint tenancy is, the *jus accrescendi",* the right of survivorship, which means that upon the death of one joint owner his ownership, that is, his interest, accrues (or passes) automatically to the survivor or joint survivors. There is a good statement of this principle of law in ***Harris v Goddard [1983] 1 W.L.R 1203.*** At page 1210 Dillon L.J. stated in two short and clear sentences as follows:

> *"Joint tenancy is a form of co-ownership or concurrent ownership, of property. Its special feature is the right of survivorship, whereby the right to the whole property accrues automatically to the surviving joint tenant or joint tenants on the death of any one joint tenant".*

14. In the case, the property, a matrimonial home, was conveyed in the joint names of husband and his second wife in 1978. They held the joint legal title in joint tenancy, and also held in equity the beneficial interest jointly The wife petitioned for divorce in 1979, and prayed that court order be made, "by way of transfer of property and/ or settlement of property… and otherwise as may be just". While the divorce proceedings were pending the husband was injured in a car

accident and went into a coma until he died before the proceedings were concluded. When the husband was in a coma, a notice of severance, of the beneficial joint tenancy was served on the wife. The executors of the estate of the husband, his children by first marriage, claimed that there had been severance by the prayer of the wife for transfer of property in the divorce petition; or by the notice of severance, so that the right of survivorship did not accrue automatically to the wife. On appeal, it was held that neither the prayer in the petition nor the notice, effected severance. The Court of appeal said that the prayer in the petition for divorce did no more than invite the divorce court to consider at some future time, whether to exercise its discretion; and that notice of severance had to show intention to bring about sale, and had to take effect forthwith. The Court of Appeal held further that, the notice was given without authority when the husband was in a coma.

15. Opinions may continue to be split about the decision in ***Harris v Goddard,*** especially in view of the decision in ***Re Draper's Conveyance,*** and in ***Hunter v Babbage*** but Harris v Goddard has not been overruled. Opinions may differ because it is a matter of

inference by different judges from the evidence, as to whether the probable inference is that there has been severance, or that there has been no severance.

16. The words of Dillon L.J. offered a precise description of the main incidence or consequence in law, of co-ownership by joint title. It applies to the co-ownership by the three brothers in this case. All the four unities I have explained above attend their title, and confirm their co-ownership as joint tenancy, and not a tenancy in common, or any other form of co-ownership,

17. By my reckoning from the evidence, the application to this court by Fernando for an order vesting title in him was made based on: (1) the claim that the other two brothers, Primitivo and Jose, had agreed to severance of the beneficial joint tenancy, eventhough they changed their minds; and so severance was claimed by agreement; (2) the claim that there has been dealing by the brothers that intimated that the interest of all the brothers were mutually treated as severed; and (3) the claim that there has been a sale by the applicant, of his interest in the joint title.

18. Alternatively, the application was based on the consequence of the notice of severance given by the applicant, and on acts by the applicant that he said, *"had been effectual to sever the joint tenancy"*. Mr. Sabido, S.C., cited section 33 of the Law of Property Act as authority for these alternative grounds. With due respect, ***s: 33*** does not apply. It is ***s: 38*** that applies.

19. From the grounds advanced, the task of the court is to determine whether there has been severance of the beneficial joint tenancy; be it by agreement, by sale of interest, by statutory notice given, or by an act which was effectual to sever the beneficial joint tenancy.

20. Before I embark on the task, it is appropriate that I remind myself about what severance of joint tenancy means. Again Dillon L.J. stated it in simple form in, ***Harris v Goddard*** at page 1210, in these words:

> *"Joint tenancy is a form of co-ownership of property. Its special feature is the right of survivorship, whereby the right to the whole of the property accrues automatically to the surviving joint tenants or joint tenant on the death*

*of any one joint tenant. Severance is, as I understand it, the process of separating off the share of a joint tenant, so that the concurrent ownership will continue, but the right of survivorship will no longer apply. The parties will hold separate shares as tenants in common. Joint tenancy may come to an end through other acts which destroy the whole concurrent ownership…"*

21. So, I have to look for a process or an act which has been recognized by courts or sanctioned by legislation, as having the effect of separating off the share of the applicant. In Common Law it was recognized at an early stage that, severance of joint tenancy may be by agreement, by sale or mortgaging or otherwise charging the interest of one of the "joint tenants", or by a course of dealing – see: ***Williams v Hensman [1861] 1 John & Hem 546; Burgess v Rawnsley [1885] 1 Ch 429*** and recent cases: ***Andrew Marshall v John Stuart Marshall CCRTF97/161/2,*** the case cited by Mr. Sabido; and ***Hunter v Babbage*** cited above**.** Statute, ***the Law of Property Act, in s:38,*** has since introduced two unilateral manners of severing the beneficial

joint tenancy, namely; by giving *" notice"* to the "other tenants" or by doing such other acts as would be *"effectual to sever the tenancy in equity..."*

22. The first point that I resolved is that Primitivo did not, as a matter of fact or of law, give his consent to the application to the Land Subdivision and Utilisation Authority for subdividing the one hundred acre land. He lived in the USA. He denied having authorized Irma to sign the application form on his behalf. Irma confirmed the denial. In any case, it was a matter for which a written power of attorney needed to be donated. There was no power of attorney in the evidence. It may not be necessary for all joint tenants to make an application to LSUA for subdividing land; however, in this case it would be a relevant and useful item of evidence to prove an agreement or intention of all the joint co-owners to sever the beneficial joint tenancy. It has not been proved that Primitivo agreed or showed an intention to sever the beneficial joint tenancy.

23. It follows that even if I were to accept that Jose agreed or showed intention with Fernando, to sever the beneficial joint tenancy, that

would not be enough for severance by agreement. All the three brothers needed to agree or show intention to have the beneficial joint tenancy severed to the extent of the interest of the applicant or totally. The significance of an agreement regarding severance of beneficial joint tenancy, is really whether the agreement shows that there has been intention on the part of the joint owners to have the beneficial joint tenancy severed and, that some action was taken to pursue the intention. There has been no evidence of such intention and action on the part of all the sons.

24. There is also difficulty with the notice of severance given by the applicant under the proviso to s: 38, of the Law of Property Act. It is not sufficient notice. I find as a fact that the applicant gave written notice of his desire to sever the joint tenancy. The notice is in the letter dated 11.3.2005, exhibit C(FA) 1E. ***Section 38 of the Act*** does not require any particular wording of the notice. The notice was sufficient as far as notice to Primitivo was required. Unfortunately it was not notice at all to Jose. The letter was addressed only to Primitivo, although his address was given as, c/o Jose Aragon. The proviso requires that a written notice be given, *"to the other tenants"*.

That means to, *all the other tenants.* Fernando did not give notice of his desire to sever the beneficial joint tenancy to both the other joint tenants, as required in order to force a unilateral severance under ***s:38 of the Law of Property Act.*** It will not be difficult for him to give all round notice, I suppose. However, the court cannot proceed on that supposition; it must leave it to Fernando to complete his part as required by s: 38 of the Act.

25. I am persuaded though that Fernando sold his interest, although strictly speaking, the sale may not be enforceable. An agreement which is not enforceable may be relied on for effecting severance – see ***Burgess v Rawnsley [1975] Ch. 444.*** In any case, the agreement is good enough to provide evidence that Fernando did acts that would be effectual to sever the joint tenancy. ***The proviso to s: 38 of the Law of Property Act,*** provides for acts which would be effectual to sever beneficial joint tenancy, as ways of unilateral severance, in addition to giving notice of severance. In my view sale of one's interest is one such act. The provisio states:

*"Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other tenants a notice in writing of such desire or do such other acts or things as would in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land, the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance".*

26. Severance in effect converts the beneficial interest in joint tenancy into equitable beneficial interest in tenancy in common. That is my interpretation of ***subsections (1) and (2) of s: 38 of the Law of Property Act*** which state:

*"38.-(1) Where a legal estate (not being settled land) is beneficially vested in more than one person or held in*

*trust for any person as joint tenants, it shall be held on trust for sale, in like manner as if the person beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.*

*(2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants".*

27. Examples of severance to convert beneficial joint tenancy into beneficial interest in tenancy in common abound. ***In Re Draper's Conveyance [1969] 1 Ch. 486,*** confirmed in Harris v Goddard cited above, a prayer in a summons for division of property after a decree nisi of divorce had been granted, and the supporting affidavit, were held to be sufficient notice of severance. The prayer asked that the

property may be sold and the proceeds distributed equally, alternatively that the respondent pay the applicant one – half of the value of the property.

28. Another example is in ***Burgess v Rownsley [1975] Ch. 42.*** In the case, a widower and widow lovers bought a house. They paid unequal shares. The property was conveyed into their joint names. The man hoped to marry the woman and live with her in the house as the matrimonial home. She did not expect marriage; she hoped to occupy the upper flat while he would occupy the lower floor. They did not marry, and disagreed. Following that, there was an oral agreement between them whereby she would sell her share to the man, but she later resiled. He died and his daughter, the administratrix, claimed a resulting trust on the ground that the purpose for the purchase of the house failed. In the alternative, she claimed that joint tenancy had been severed in equity by the agreement to sell. The woman counterclaimed that the house was held by the man and herself in joint tenancy, and that she was entitled to the whole property by the right of survivorship. On appeal it was held that since the man alone entered into the purchase arrangement in contemplation of marriage, there was

no purpose which failed to bring about resulting trust. It was held further that, the beneficial joint tenancy of the man and woman had been severed by the oral agreement to sell the woman's share to the man eventhough the agreement was not enforceable; there was no right of survivorship any more.

29. I have decided that, by selling his interest in the joint tenancy, the applicant evinced an intention to sever the beneficial joint tenancy; does it follow that he is entitled to the 33.317 acre portion subdivided out of the one hundred acres? My view is that he is not entitled alone to that particular portion of the land or the proceeds of its sale. By severance, a joint tenant sets apart his interest in the joint tenancy so that he becomes an equitable tenant in common on the one hand, with the remaining two or more joint tenants on the other hand. According to Dillon L.J. in, ***Harris v Goddard,*** the right of survivorship ends, but the concurrent ownership continues. Before severance, the interest of the applicant together with the interests of the other two joint tenants extended over the whole land; each interest was not limited to a particular portion of the land. The applicant cannot unilaterally claim a particular portion. He requires consent of the other joint tenants or a

court order, in order to partition off a particular portion of the land to represent his severed interest. The facts in this application show that he has failed to secure the consent of the other two brothers.

30. Moreover, on an application to have the property sold, or partitioned if it became necessary, the court will consider all the circumstances of the case so as to arrive at a just order – see ***Re Buchanan Curtis v Buchanan Wallaston [1939] 2 All E.R. 302.***

31. It must be noted that the right of the applicant after giving notice or performing acts of severance is to force sale of the entire 100 acres so that he take his share of the net proceeds. If there is difficulty in selling the land, an application may be made to court for partitioning.

32. So, there is a way out for the applicant in this case. He is entitled under ***the proviso to s:38 of the Law of Property Act,*** upon giving notice of severance or having performed an act of severance, to demand sale and division of the net proceeds thereof in equal shares, as if there has been a trust for sale. The trust for sale arises under ***s: 38(1)*** which I have already quoted above.

33. A summary of my determination is that: the applicant has effected severance of the beneficial joint tenancy unilaterally by sale of his interest in the joint title; however he is not entitled to a particular portion of the 100 acres of land; he is entitled to demand sale of the entire one hundred acres, and one third of the net proceeds. The sale by the applicant of the 33.317 acres is not enforceable, but the other two brothers may agree to it to proceed if they desire to share in the proceeds of the sale. Failing agreement on the sale of the 33.317 acre portion and sharing the proceeds, the applicant will be entitled to demand sale of the entire one hundred acres for the purpose of severing and taking one-third share of the net proceeds of the sale.

34. The application for an order to vest title to the 33.3 acre portion subdivided from the one hundred acre land is dismissed. Costs to be agreed or taxed, are awarded to the respondents, Jose Aragon and Primitivo Aragon.

35. Delivered this Tuesday 2nd day of May 2009
At the Supreme Court
Belize

Sam L. Awich
Judge