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JOY EAPI ZAU -v- BETSY OLIVE PAULSEN

High Court of Solomon Islands

(Muria ACJ)

Civil Case No. 138 of 1992

Hearing: 1 December 1992

Judgment: 11 December 1992

A. Radclyffe for Plaintiff

J.C. Corrin for Defendant

MURIA ACJ: The Plaintiff/Applicant in this case seeks from this court the determinations of three questions arising out of the dispute over two registered land in the Western Province. The land in question are Lola Island, registered as Parcel No.120-007-1 and Hombupeka Island, registered as Parcel No.121-003-1.

The Plaintiff and the Defendant are sisters and they each have "one half undivided share" in each of the islands. Each of them have been using her own parts of the islands. Both sisters live on Hombupeka Island. However the Plaintiff sister lives on the Northern side and the Defendant sister lives on southern side of the island as agreed between them. As far as Lola Island is concerned, the two sisters agreed that one of them (the Plaintiff) would use the Eastern side and the other (the Defendant) would use the Western side of the Island.

The questions put to the Court are :

"The parties being owners in common of half undivided shares in Parcel Numbers 120-007-1 (Lola Island) and 121-003-1 (Hombupeka Island) is the defendant entitled to:-

- (a) cut down coconut trees on Lola Island without the consent of the Plaintiff?
- (b) establish a tourist resort operated by Magarea Resort Ltd on Hombupeka Island without the consent of the Plaintiff?
- (c) carry on any business on the islands without the consent of the Plaintiff?

The Plaintiff further claims damages in the event the answers to the above questions are in the affirmative as well as for an account of all rents and income received by the Defendant.

The Plaintiff alleged that the defendant had carried out and still carries out businesses on the two islands without the Plaintiff's consent. The Plaintiff argued that the islands were given to her and the defendant by their father and had been registered in their names as tenants in common with each holding "one half undivided share" in each of the islands. As such she contended that the defendant should not carry out any business with outsiders on her side of the islands without her (the Plaintiff's) consent. The Plaintiff further contended that she agreed that, like herself, the defendant can only run business if they are done so by herself and for herself and her family.

It was argued for the defendant that although the islands are held by the sisters as tenants in common, there has never been any disposition of her share in the land and as such consent was not required. In any case the defendant argued that she has been carrying out whatever businesses she has with her family on her own side of the islands as agreed between the Plaintiff and herself.

On perusal of the land register there was shown that on 15/10/71 a Lease for 10 years was granted to one Ah Wing, a Merchant, of Gizo. The Lessors were both the Plaintiff and defendant who both also signed accepting the Surrender of the Lease on 25/6/76 at Munda before W.R. Low, a Magistrate. The Surrender was registered on 13/8/76. Before this court the Plaintiff sought to have the court believe that she had not consented to the Chinese (Ah Wing) operating business on the defendant's side of Hombupeka Island. The documentary evidence on the Lease clearly shows that both the Plaintiff and defendant agreed to grant the Lease to Ah Wing for ten years from 15/10/71 at a rent of \$200.00 per half-year. It cannot therefore be true the assertion by the Plaintiff that she was not consulted about "the Chinese" carrying out business on the defendant's side of Hombupeka Island. Rather as the defendant stated in court that the Plaintiff knew, and agreed to "the Chinese" running business on her (defendant's) side of the island.

The provisions of the law dealing with co-ownership is contained in Part XV of the Land and Titles Act (Cap.93). Section 175 of the Act deals with ownership in common. It states:

"175 (1) *Where a registered interest in land is owned in common the owners shall be entitled to undivided shares in the interest in*

such proportion as may be registered and on the death of any of the owners in common his share shall be administered as part of his property.

- (2) *Persons described as owners in common shall, in the absence of any expression to the contrary, be presumed to be entitled in equal shares.*
- (3) *No owner in common of a registered interest in land shall dispose of his undivided share in favour of any person other than another owner in common of the same interest except with the consent in writing of the remaining owner or owners of the interest, but such consent shall not be unreasonably withheld."*

It will be observed that subsection (1) clearly embodies one of the principles that makes a tenancy in common differ from that of a joint tenancy, that is, that there is no right of survivorship in a tenancy in common. On the death of any of the owners in common his undivided share passes under his will or if he leaves no will, then under intestacy, to be administered as part of his property.

The Plaintiff in this case sought to rely on subsection (3) and argued that under that provision the defendant was not entitled to carry out her business activities in the Magarea Resort on Hombupeka Islands, a small tourist business on Lola Islands and previously allowing a Hovercraft business to operate a base on Hombupeka Island without the consent of the Plaintiff. However before I consider the Plaintiff's contention, I consider it necessary to look at the factual basis upon which the two sisters (the Plaintiff and Defendant) now come to live on and use their respective sides of the two islands.

The two sisters agreed that they were not on good-terms with each other. That led their father who was the owner of the two islands to "divide" the two islands between the two sisters. Their father then asked one Mr. Hodges and Lawry Wickham to assist him in marking out boundaries on Hombupeka island showing each of his daughters' side of the island. The dividing boundary was marked with *posts erected* and *stones piled*. Mr. Hodges made a rough sketch map of the island with the boundary shown on it as indicated by the father of the two sisters. To the North of the island, it was given to the Plaintiff and to the South it was given to the Defendant.

Following the division of the Hombupeka Island by their father, the two sisters continued to be not in good-terms with each other. So on 22/6/69 the Plaintiff sister wrote to then Department of Lands and Surveys requesting a subdivisional survey of Hombupeka Island. No copy of that letter was produced. However, a reply from the Crown Surveyor on 4/7/69 showed that the Plaintiff wished a survey to be done to have the boundary line marked out subdividing the island. Subsequently a survey was done by one Mr. Baker of Carter Rees & Associates Ltd, Registered Surveyors in August 1969. There was agreement in the evidence of both parties that the boundary as shown in the

map (Exh.3) produced by Mr. Baker was the same as that shown by the father of the Plaintiff and Defendant to Mr. Hodges and Lawry Wickham and marked out in the sketch map produced by Mr. Hodges. From then onward the two sisters followed the division as indicated in the map (Exh.3), that is, the Plaintiff occupies and uses the Northern side (marked in "red" on the map) of the island and the defendant occupies and was the southern side (marked in "yellow") of the island.

As far as Lola Island is concerned, although the Plaintiff and Defendant agreed to divide the island, no survey had been done on that island. However in accordance with the wish of their deceased father, and also because of their differences, they (Plaintiff and Defendant) agreed to divide Lola Island as well. In evidence the Plaintiff confirmed that in 1972 she and the defendant discussed and agreed that they divide the island, so that she could use one side and the Defendant could use the other side of the island with a dividing line being a track which runs across the middle of the island. Since then the parties have been using their respective sides of the island.

It is evident that both the plaintiff and the defendant have operated some form of business in their respective sides of the two islands. The defendant had at one stage run a small piggery project on her side of Hombupeka Island. She had also allowed a Hovercraft transport business to operate out from her side of the Hombupeka Island. As I have already mentioned earlier, she also allowed a Chinese, (Ah Wing) to operate business out from her side of the island on a Lease basis.

That Lease as we have seen was granted by both the plaintiff and defendant to Ah Wing. More recently the defendant operated and still runs the Magarea Resort on her side of Hombupeka island. Also she, with her daughter, operates a small Tourist Resort on her side of Lola Island. The defendant stated that the plaintiff never objected to her running all her businesses until recently.

The Plaintiff on the other hand had also run small businesses on her side of the islands, such as a petrol depot on her side of Hombupeka Island. She had a Hawker's Licence and had been selling goods on her side of Loala Islands. She had also run a small piggery project on her side of Loala Island. The plaintiff also has a house on the island for tourist and has been running it as such. There was an Artifacts business being run on the plaintiff's side of Hombupeka Island. That business was run by a foreigner named Werner Schwab under the Registered Business Name "Blue Lagoon Artifacts." The plaintiff denied having any interest or receiving any benefit out from that business. The evidence on this is not sufficient for the Court to conclude that the plaintiff has any share in the Blue Lagoon Artifacts business. However, the evidence clearly shows that Mr. Schwab operated the Artifacts business out from the plaintiff's side of Hombupeka island. The evidence also shows that the defendant had never

objected nor raised any complaint against the plaintiff running her business operations in her portions of the two islands. That was because they had agreed that each should occupy and use her sides of the islands.

That being the factual background of how these two sisters come to be each entitled to use one half of each of the islands, I now turn to consider the flaw in the light of the plaintiff's contention on section 175(3) of the Land and Titles Act. Subsection (3) prohibits the owner in common of a *registered interest* in land from disposing his undivided share to any other person other than to another owner in common without the consent in writing of the other owner or owners of the interest. The "*registered interest*" held in common by the two sisters in this case is the registered perpetual estate in each of the two islands in which each of the sisters have a "*one half undivided share*". It is that undivided share that must not be disposed of without consent of the other owner in common.

A related question to be asked here is: has the defendant disposed of her undivided share in any of the two islands? The word "dispose" is defined in the Oxford Advanced Learner's Dictionary of Current English as meaning:

"finish with; get rid of; deal with"

In a Canadian Case of *MacPherson -v- London Loan Assets Ltd & Royal Bank of Canada [1931] OR 109* the court defined the word "*dispose*". At page 115, Logie J said:

"Dispose' in the sense in which it is used, is defined in the Century Dictionary as follows: 'To make over or part with as by gift, sale or other means of alienation, alienate or bestow'."

It is to be noted in that Canadian case that the definition of the word "*dispose*" as accepted by the court shows some of the means of disposition of a right or interest in a property. It will also be observed that the definition includes the words "other means of alienation". I take that to be synonymous to, any other means or acts of disposition'. Those words appear to be wide enough to include any means or act of dealing with a person's rights or interest in a property. When one turns to the definition of "disposition" in section 2(1) of the Land and Titles Act one sees the following:

"disposition' means any act inter vivos by an owner whereby his rights in or over the land comprised in his interest are affected, but does not include an agreement to transfer, lease or charge."

Given its natural understanding of the word, in so far as property or land is concerned, the word "*disposition*" means dealing with the property or land in a number of ways and means: *Re Leven(Earl)(Deceased). Inland Revenue Commissioners -v- Williams*

Deacon's Bank, Ltd & Others [1954] 3411. E.R. 81 at 83. On its own, it is wide enough to include any act by an owner of a property or land that affects his interest in such property or land. However, a restriction has been imposed on the extent of the meaning of "*disposition*" under the Land and Titles Act so that a mere agreement by an owner of a land to transfer, lease or charge does not amount to a "*disposition*" affecting his rights over his land.

On the present case the plaintiff would firstly have to establish that there has been a "*disposition*" by the defendant of her one half undivided shares in the two islands. Secondly if there has been such "*disposition*", whether it was done without the consent of the plaintiff.

As to the first question, the evidence clearly established that a Lease was granted to Ah Wing over Parcel No.121-003-1 (Hombupeka Island) on 15/10/71 for ten years. There can be no doubt that the lease granted, to Ah Wing was a "*disposition*", under the Act of the undivided share of the registered interest of the defendant. Again the evidence confirmed that both sisters agreed to the granting of the Lease and the Surrender of the Lease by the Lessee.

Mr. Radclyffe for the plaintiff argued that consent of the plaintiff was necessary before the defendant could carry out any of her businesses, particularly the Magarea Tourist Resort. No evidence had been adduced to show that the defendant had, by her action, *made over or a part with* as by gift or sale or *alienate or bestow* her undivided share of the registered interest in the two islands to any other person since the surrender of the Lease on 13/8/76. Equally no evidence had been shown that the plaintiff had done the same. What the evidence clearly established was that since 1976 the two sisters have been running their respective family businesses in their respective sides of the islands without disposing their respective undivided shares in the two islands.

Accordingly on the evidence I find that the defendant's actions in running her businesses on her portions of the two islands did not amount to "*disposition*" of her undivided half shares in the registered perpetual estates in the two islands. The requirement of consent as provided under subsection (3) of section 175 therefore did not arise. It may, of course, be an ideal thing for the two sisters to inform or advise each other of their business activities carried out in their respective sides of the islands but it is not a legal requirement except where such activities amount to "*dispositions*" of their undivided shares in the estates.

It follows from what I have said that each of the sisters (plaintiff and defendant) is entitled to occupy and use her respective portions of the two islands, for

that was what they had agreed to do. Their father had allocated to their portions on each of the islands and they both accepted that. They both had agreed that to ensure the boundaries of their portions of the islands were clearly marked, they requested the islands to be surveyed. Although only Hombupeka Island was surveyed Lola Island had been identified by the sisters with a track running across the island as the dividing line. The evidence shows that the two sisters have clearly agreed between them that each should use her portions of the islands without the need of interference by the other, particularly in view of the differences between them. As such it is scarcely to be supposed that they intended that each time they want to set up a Hawker's Licence business or cut down a coconut tree or run a small petrol supply in their respective portions of the islands that they need to consult each other. Mr. Radclyffe sought to draw a distinction between a "family" business or a going-concern run with an outsider. To me that distinction is a neat one but holds no water in the circumstances of these two sisters in this case.

The plaintiff further seeks to have the defendant paid to the plaintiff half of the rent or other income received by defendant from the Tourist Resort as well as from other businesses and to account for all the rents and other income received. Miss Corrin for the defendant argued that the plaintiff is not entitled to half the rent or income received by the defendant. She further argued that the plaintiff is not entitled to demand an account of the same. In support of her contention Miss Corrin referred to *Henderson -v-Eason (1851) 17 QB 701*; *Leigh -v-Dickeson (1884) 15 QBD 60*; *Squire -v-Rogers* an Australian referred to in the Article "The Conveyancer" by Peter Butt (1989) 63 ALJ 631. Those authorities deal with co-owners entitlement to profits and I find the discussions in those authorities enlightening. However each case is decided upon its own facts. The present case must be decided on its own particular facts.

In the present case the parties have clearly agreed that each should use her own portions of the islands and this they have been doing until today. That is an important factor to bear in mind in giving effect to what these two sisters have intended for themselves. They clearly do not intend that the undivided share of one should pass to the other nor do they intend that the right of survivorship should have any place in their respective business ventures. Whatever the legal requirements are in so far as the disposition of their undivided shares in the two islands, their legal status in so far as the entitlement to profits on use of their co-owned islands must be viewed in the light of the agreement they created and carried out for themselves. It was on that basis that the defendant undertook to carry out her small businesses in the past and her present tourist resort. The same can also be said to the plaintiff.

The facts of this case are different to those in *Henderson -v-Eason* and *Squire -v-Rogers*. The present case is a case where the co-owners occupying and using their

respective sides, as agreed, of the same land. In another word, they are both resident co-owners but separately occupying and using the co-owned land. In accordance with their agreement, each of the sisters is entitled to use her portions of the islands for her living which may include making some investments for purposes of producing income. This was what the defendant has done. She invested and expended money for the improvement of her portions of the islands. The income received (if any) were a consequence of the expenditure of her work and labour. She is entitled therefore to keep, if she wishes all of it absolutely without having to account for it to the plaintiff.

Thus I answer the questions asked as :

1. (a) Yes, but only on her side of the island. No consent of the plaintiff is required.
- (b) Yes. Consent of the plaintiff is not required as no disposition occurred.
- (c) Yes. Consent of the plaintiff is not required if run on her own side of the islands.
2. (a) Refused, the plaintiff is not entitled
- (b) Refused, the plaintiff is not entitled
- (c) Refused, the plaintiff is not entitled
3. Refused.

As to the Counter-Claim:

7. (i) plaintiff need no consent of the defendant to run the copra dryer on her side of Lola Island.
- (ii) plaintiff need no consent of the defendant to run piggery on her side of Lola Island
8. (i) plaintiff needed no consent, if she had run a business with Mr. Schwab provided no disposition of her undivided share occurred

(ii) plaintiff need no consent of the defendant to operate the fuel depot as alleged.

9. (i) Refused

(ii) Refused

(iii) Refused

(iv) Granted

Questions answered accordingly.

As costs is granted to the defendant, I order that the plaintiff pay the defendant her costs in this action.

(G.J.B Muria)

ACTING CHIEF JUSTICE