CURRY (JAMES PETER & MERCEDES AGNES) v
TIAFAU HOTELS LTD AND OTHERS

Court of Appel Apia
Morling, Ward and Muhammed JJ
9 November, 13 November 1992

LAND LAWS - rectification of deed of conveyance to reflect the parties true intention.

HELD: Appeal allowed to enable simple rectification without the conditions imposed by the trial judge.

CASE CITED:

- Joscelyne v Missen [1970] 2 QB 86

R Drake for Appellants
Kamu for First & Second Respondents

Cur adv vult

This is an appeal from a decision of Ryan CJ given in proceedings in which the Appellants sought an order that a deed of conveyance executed by them on 14 October 1980 be rectified so as to reflect what they claimed to be the true intentions of all the parties to the deed. Consequential orders were also sought.

Prior to the execution of the deed, Tiafau Hotels Ltd (a company controlled by the Appellants) was the owner of parcels 220 and 221 Flur III having frontages to Beach Road Apia. Upon this land an hotel was erected. The hotel kitchens and freezers were erected on part of the adjoining parcel 219 which was owned by J.E. Curry & Sons Ltd. This company was also controlled by the Appellants. It was agreed in 1978 that parcel 219 should be transferred to the Appellant by J.E. Curry & Sons Ltd but a conveyance of the land had not been registered when the Memorandum of Agreement and deed of conveyance hereafter referred to where executed.

In the 1970's the Appellants and the Government of Nauru entered into negotiations with regard to the sale of the hotel. Eventually a Memorandum of Agreement was signed late in March

1980. The Memorandum itself is undated. The sale price was $750,000 comprising land and buildings $600,000 and fittings and other items $150,000. It was a term of the Agreement that possession of the hotel would be given and taken on 8 April 1980.

The land which was the subject of the Agreement was described as being:

> "All those pieces or parcels of land more particularly described in the Schedule hereto with all buildings thereon..."

The Schedule referred to parcels 219, 220 and 221 Flur III and contained detailed descriptions of all three parcels. Following these detailed descriptions of the parcels there appeared the words "More particularly delineated in the Plan annexed hereto and marked red". However, no plan was annexed to the Agreement.

At all relevant times the driveway to the Appellants' house has been over part of parcel 219. The driveway is over the triangular hatched area shown on the plan which is annexed to and forms part of these reasons. The hotel kitchen and freezers to which we have referred were built upon that part of parcel 219 as is not hatched on the annexed plan.

It was the Appellants' case at the trial that it had never been their intention to sell the whole of parcel 219. They claimed that, notwithstanding the terms of the Agreement, it had been the common intention of the parties that only that part of parcel 219 upon which the hotel kitchen and freezers were erected was to be transferred to the purchaser. Indeed, in para. 5 of the Statement of Claim it was alleged:

> "5. THAT on or about 25th March 1980 the Second Defendant was advised through its solicitor that the Board of Directors of the First Defendant had at a meeting held on 25th March 1980 resolved "to agree to the total sale price of WS$750,000 the terms of which included all the land upon which the hotel is now situated plus Land belonging to Mr Sua James Curry and upon which is situated the hotel freezers and kitchen."

In their Statement of Defence the first two Respondents conceded inter alia that: "they agree with the matters contained in paragraph 5 ... of the Statement of Claim."

This concession by the Respondents was inevitable having regard to the events which preceded the signing of the Agreement. Evidence was tendered, and not refuted, at the trial that in a draft agreement prepared not long before the final agreement was signed the land to be sold was to include two parcels of land

(curiously identified as Parcels 221 and 299) "together with that area of land occupied by the Paradise Cannery building." It was common ground that the kitchen and freezers were erected on the land formerly occupied by the Paradise Cannery building.

In a letter written by the purchaser's solicitors to the vendor's solicitors on 6 March 1980 it was specifically stated that the purchaser was "only interested in... the hotel plus the freezer area".

Moreover, in a letter written on 15 March 1980 by the vendors' solicitors to the purchaser's solicitors statements are made which are only explicable if the agreement between the parties was that only that part of parcel 219 upon which the kitchen and freezers stand was to be included in the sale.

Mr Curry was cross-examined but at no stage did he concede that he intended to sell the whole of parcel 219. Indeed, he repeatedly denied that he ever had such an intention. No evidence was called on behalf of the Respondents. The learned Chief Justice appears to have accepted Mr Curry as a reliable witness. His credit was not attacked in cross-examination. His evidence was strongly corroborated by the terms of the draft agreement, the letters of 6 and 15 March 1980 and the concession in the Statement of Defence.

However, during the course of his evidence Mr Curry was asked by the Chief Justice whether his particular concern was to keep that part of parcel 219 over which the driveway to his house was constructed. He said that was correct.

He was then asked: "And how important to you is the piece at the back?" This was obviously a reference to the balance of the hatched area on the plan annexed to these reasons. To this question Mr Curry replied: "To straighten this Your Honour, that would make a straight fence". His Honour then asked: "But your particular concern is to keep that narrow piece so that your driveway is not interfered with?" To that question Mr Curry replied: "That is correct".

These exchanges apparently led His Honour to conclude in his judgment that Mr Curry would be satisfied to receive back the driveway area. Accordingly, he made an order that the driveway area be surveyed and conveyed to the Appellants, but made no order with respect to the balance of parcel 219 claimed by the Appellants. Moreover, he ordered that the Appellants should pay to the Respondents a sum of money, to be fixed by agreement between the parties or failing agreement by the Court, as a condition for the conveyance of the driveway area.

The Appellants submit that His Honour erred in failing to order the re-conveyance of the balance of the hatched area on the plan, and in ordering that the Appellants should pay for the value of the driveway area.

It is first necessary to determine whether the Appellants made out a case for rectification of the deed of conveyance executed in 1980. In our opinion such a case was plainly made out at the trial. Indeed, counsel for the Respondents did not contend otherwise. He was content to support the orders made by His Honour which were obviously predicated on the basis that the deed of conveyance should be rectified.

We think the irresistible conclusion from the evidence tendered at the trial, was that the vendors and the purchaser understood at the time the conveyance was executed that only that part of parcel 219 as formed the site of the hotel kitchen and freezers was to be conveyed. The solicitors for the purchaser knew that that was the vendors' intention. Their knowledge must be imputed to their client. If it had been the purchaser's understanding that it was purchasing the whole of Lot 219 it would have been a simple matter to call evidence to that effect. Yet no such evidence was called.

This is a case where the terms of the documents signed by the parties did not accurately represent their mutual intention. In such a case, the Court will order rectification: see Cheshire Fifoot and Furmston's Law of Contract, 7th ed. (NZ) at p.254 and Joscelyne v Missen [1970] 2 QB 86 at 98.

Having made out a case for rectification, the Appellants were entitled to orders which restored them to the position they would have been in if the Memorandum of Agreement and conveyance had accurately reflected the common intentions of the parties. Since the common intention was to transfer only that part of parcel 219 as was the site of the kitchen and freezers, an order should have been made that the balance of that parcel should be re-conveyed to the Appellants.

We think His honour failed to make such an order because he was unduly influenced by Mr Curry's statement that his particular concern was to keep the area of land over which the driveway to his house passed. In making that statement Mr Curry was not abandoning the claim that the balance of Parcel 219 (save the site of the kitchen and freezers) should be reconveyed. Further, it was not appropriate to order that the Appellants should make any payment to the Respondents as a condition for the re-conveyance since the price paid by the Respondents for the hotel did not include anything in respect of the area to be re-conveyed.

For these reasons, we think the appeal should be allowed and the orders made by His Honour should be set aside.

We make the following orders:

1. Appeal allowed.

2. Order that the deed of conveyance dated 14 October 1980 made between James Peter Curry and Mercedes Agnes Curry of the one part and Tiafau Hotels Limited of the other part be rectified by deleting therefrom the description of the land in the Schedule thereto and substituting the following description:

   "All that piece or parcel of land situated at Mulinuu in the district of Tuamasaga, described as that part of Parcel 219, Flur III, Upolu as is not hatched with diagonal lines on the plan annexed hereto, being also part of Court Grant 422 and 52 and being registered in Volume 10 Folio 94 of the Land Register of Western Samoa."

3. Order that a survey by a registered surveyor be carried out at the expense of the Appellants to delineate the land referred to in Order 2.

4. Order that Parcel 219 Flur III Upolu, with the exception of that part of it as is referred to in Order 2, be conveyed to the Appellants by the first Respondent.

5. Order that the Appellants pay to the first Respondent its reasonable costs of conveying the land referred to in Order 4.

6. Order all parties to do all things and execute all such documents as shall be necessary to give effect to the foregoing Orders.

7. Order the first and second Respondents pay the Appellants' costs of the trial at first instance and of the Appeal. These costs are assessed in total at the sum of $1750.

8. No order as to the costs of the third Respondent.

9. Liberty to all parties to apply to the Court on 14 days notice on any matter arising out of the implementation of the orders. Such application may be made in writing.