IN THE ROYAL COURT OF THE ISLAND OF JERSEY

(Heritage Division)

191.
87/73

Before Sir Peter Crill C.B.E., Bailiff (Single Judge)

6th November, 1987.

In the Matter of the Representation of L.F. Morgan Limited

Anthony Joseph Porter and Pauline Mary Porter (née Jackson)	First Party Convened
Dorothy Noreen Warren (née Smith)	Second Party Convened
Edna Hatherall (née Cross)	Third Party Convened
George Alfred Bisson, Junior	Fourth Party Convened

Advocate B.I. Le Marquand for Representor
Advocate M.S.D. Yates for First, Second and Third Parties Convened
Advocate P.A. Bertram for Fourth Party Convened

Until 1966, Mrs. Catherine Mary Coutin née Nunn, owned four properties at Beaumont, St. Lawrence. In that year she sold them all to various purchasers and provided in each of the four contracts that each purchaser would own the private roadways serving the properties and leading to the public road in common. She retained no further interest in any of her properties and it may be inferred from the dates of the sales and the 'jointures' in each contract that, had circumstances allowed, all the four contracts of sale would have been passed on the same day.

The relevant contract with which the Court is concerned was that to Mr. and Mrs. J.A. Whittaker on the 19th August, 1966. In that contract Mrs. Coutin sold two corpora fundi. They were 1) the house then known as "Alabama House" and 2) a garden which formed the North-East part of the properties owned by the seller. These two corpora fundi were separated by one of the private roads I have already mentioned. The clause conveying rights to Mr. and Mrs. Whittaker

over the private roads was as follows:- "Que lesdits chemins ou passages servant tant la propriété presentement baillée et vendue que celles que se reserve ladite Bailleresse et Venderesse seront en commun entre lesdites parties leurs hoirs ou ayant droit respectifs et seront maintenus et entretenus comme tels à fin d'héritage". Similar clauses were included in the other three contracts except that there were references to persons deriving rights of ownership in common of the private roads from Mrs. Coutin. The different wording makes no material difference.

On the 20th January, 1984, Mr. and Mrs. Whittaker sold the first corpus fundi and the South-East part of the second corpus fundi to Mr. George Alfred Bisson Junior. They retained the bulk of the second corpus fundi which at that time was a garden. The clause conferring rights upon Mr. Bisson in relation to the private road was as follows:- "Que lesdits chemins ou passages servant tant lesdits héritages présentement vendus que ladite propriété que se réservent lesdits Vendeurs ainsi que celles appartenant aux ayant droit de ladite Catherine Mary Nunn, veuve comme dit est, sont et demeureront en commun entre lesdites parties leurs hoirs ou ayant droit respectifs et seront maintenus et entretenus comme tels à fin d'héritage."

On the 20th June, 1986, L.F. Morgan Limited (the Company) bought the rest of the second corpus fundi, that is to say the garden, from Mr. and Mrs. Whittaker. Again, a similar clause regarding the private roads was inserted in its Deed of Purchase. The Company, having obtained the consent of the Island Development Committee for the erection of two new houses on the garden, wishes to transfer to the owner of each of two building plots a right similar to that which it was given in its contract of the 20th June, 1986. One of the present owners of part of the rest of the property that was owned by Mrs. Coutin has denied that the Company (and therefore those claiming from it, that is to say those who will own the two plots in the former garden) has any right to use the road for any purpose nor any right of ownership in common over it. Accordingly, the Company has brought this Representation and has asked the Court to declare:-

"1. that the Representant and its successors in title have rights of ownership in common with the parties convened to this Representation of the said "chemins ou passages";

2. that the rights of ownership in common of the Representant and its successors are capable of being further divided up between parts of the building plots; and

3. that the Representant and its successors in title by virtue of their rights of ownership in common of the said "chemins ou passages" may use the said "chemins ou passages" at all times and in all reasonable ways in order to gain access from the said public road, "La Route de la Haule", to the building plots including access for the purpose of constructing and maintaining the aforesaid pair of semi-detached houses and access to and from the aforesaid pair of semi-detached houses to the said public road after they have been constructed."

I have been invited by Mr. Le Marquand, for the Company, to ask myself the following three questions:-

1. What is the nature of ownership in common?

2. Can such an ownership be sub-divided without the consent of the original owners in common?

3. If it can, did the sale by Mrs. Coutin to Mr. and Mrs. Whittaker of the second corpus fundi include such common rights of ownership to the garden?

4. Even if it can not, did the sale of the garden, the second corpus fundi, confer on the Company and therefore to those claiming under it, a form of servitude, exercisable over and in the private roads, by the owners first of the garden and then the two plots?

Having regard, however, to the well known practice that the Royal Court does not supplement the Prayer of a Representation or that of an Order of Justice, I am restricted, in my opinion, to answering the first three questions only. If I find against the Company, it seems to me that its remedy, if any, may lie not just against the other parties in right of Mrs. Coutin but, depending on the lay-out of the whole area, against the owners of adjacent properties not necessarily claiming through Mrs. Coutin. It would be pointless of me to rule on the fourth question because, before doing so, I would have to hear evidence before I could rule on a submission that the title of the Company conferred on it, in addition to its contractual rights given in the clauses, a servitude of necessity by implication and that further, that that servitude and the use of it could be sub-divided against the wishes of the other parties even though it might be said to aggravate the use of the access to the public road. It is clear to me that in the course of the first contract, that is to say when Mr. and Mrs. Coutin sold to Mr. and Mrs. Whittaker on the 19th August, 1966, ownership in common of the private roads was conveyed in such a way that Mr. and Mrs. Whittaker were entitled to use the passage, owning it in common, not only to serve the property "Alabama House" which abuts onto the main road, but also the garden which is the second corpus fundi. The placing of the clause in the contract after the second corpus fundi supports this view. But having said that, it does not mean necessarily that, having divided the two corpora fundi, the sellers, that is to say Mr. and Mrs. Whittaker, were entitled to divide the rights in the same way.

I turn, therefore, to consider what is meant by ownership in common. First of all, I should add here that I had to decide whether the case was a proper one for me to entertain and to make a declaratory judgment. In Jersey Hotels Limited v. Inglebert Hotels Limited, 1979, Jersey Judgments, page 39, the Royal Court examined the circumstances under which it would exercise its discretion to make a declaratory judgment. Unlike that case, this application is not based on hypothetical facts; declarations and remedies are sought. I am satisfied, therefore, that this is a proper case in which the Court should exercise its discretion and entertain the Representation.

The two types of ownership in which it is possible for a number of persons to have common or joint ownership were examined by the Royal Court in the matter of the degrévèment Bonn reported in 1971, Jersey Judgments page 1771. Looking at that case, it is clear to me that what each owner has in common in the present case, as regards his rights over the private road, is not joint ownership but an interest in the whole as owners in common. However, it is necessary to go on to consider whether that ownership in common is capable of division (une part indivise) or is indivisible. There is some authority in Dalloz's 2nd Edition, 1964 at paragraph 380, to suggest that an individual share or undivided share may be inter alia hypothecated. However, it is not a servitude, (Dalloz op cit paragraph 364: "De ce que la copropriété n'est pas une servitude, il résulte plusieurs conséquences qui, d'ailleurs, sont consacrées par la jurisprudence") nor can it be likened to one, (Dalloz op cit paragraph 356: "La copropriété ne doit pas être confondue avec l'indivision (V. infra nos 357 et s.) et, d'autre part, la copropriété ne peut s'analyser en une servitude réciproque existant au profit et à la charge de chacun des copropriétaires (V. infra, nos 366 et s.).) That must be so because, for a servitude, there is a need for a dominant and a servient tenement. In my view, the judgment in the case of Le Sueur v. Le Sueur, 1968, Jersey Judgements, at page 889, which related to licitation between joint owners (as in the case of Bonn I prefer to use the word owners rather than tenants which is the English expression) does not apply here. Persons who own a road in common, as here, cannot claim licitation where the road in common is attached to a property, which clearly in each case it is, in the present circumstances. Moreover, this is the view taken by the French Courts. On page 116 of the Third Edition of Amos and Walton's Introduction to French Law, the authors say this: "The most important problem presented by co-ownership is that of its permissible permanency. In what cases, and to what extent, will the law support a co-owner in resisting his partner's demand for partition?" However, they go on to say at page 117: "Secondly, there can be no partition, adversus invitum, of property which, as an undivided unity, is a necessary accessory to properties which are separate. Of this rule party walls, courtyards, passages and the common parts of buildings divided by storeys or apartments offer the most

familiar examples; but the courts are lenient in their judgment of the necessity of the undivided accessory to the use of the divided property." Thus, it is clear, that the ownership in common of the private roads stems from the ownership of individual properties to which that right is attached. There is no doubt, as I have already said, that Mr. and Mrs. Whittaker had the right in common of the roads not only because of their ownership of "Alabama" but also of the garden which depended from it. It would be absurd to suggest that they would not have the right to go to and from the garden having rights in common in and over the whole of the private roads. The question is, whether having severed a large part of the garden from the main house, they can attach to that part of the garden the same rights as they themselves had when they owned the two corpora fundi in their entirety. It is not, I think, necessary for me to go into the issue in very great detail looking at the opinions of, for example, Poingdestre and other writers on this subject. There are three Jersey cases which I think lay down a clear principle. The first case is that of Atkinson v. Gray (1890) 10 C.R. 476, Judgment in which was given on the 18th October, 1890. There the Full Court laid down the principle that in the case of co-ownership of a well, one of the co-owners, the defendant in that case, could not effect any changes to the well, or pump serving it, without consulting his co-owner, the plaintiff. The second case is that of H.A. Gaudin and Co. Ltd v. A.P.G. Bennett and uxor (1976) Ex 448 which was heard on the 15th November, 1976. That case concerned the ownership in common of some land in front of a row of houses. One of the co-owners attempted to lay a hard surface for motorcars in front of his property with the consent of or reference to only some of the other proprietors of similar houses. The Court held that proprietory rights held in common can only be altered with the consent of all the owners. The third case was an unreported case in 1979 of Wade v. Weston and Triggs. In that case the defendant had placed some "speed bumps" over a road which was owned in common with a number of other persons. The Court was referred to Dômat, which has authority in this Court and particularly to Book II, paragraph IV: "Aucun des propriétaires d'une chose commune ne peut y faire de changemement, qui ne soit agréé de tous: et un seul même peut empêcher contre tous les autres qu'il ne soit innové.

Car chacun d'eux a la liberté de conserver son droit tel qu'il est. Ce qu'il faut entendre des changements qui ne sont pas nécessaires pour la conservation de la chose." These three cases indicate to me that there is a clear principle that, in the absence of agreement between co-owners, one of the co-owners cannot alter their proprietory rights. In my opinion, the increase of the numbers of co-owners, as proposed by the Company, would be such an alteration. Indeed, the sale by Mr. and Mrs. Whittaker to Mr. Bisson in 1984 of less than the whole of the two corpora fundi was such an alteration. (See the 1861 edition of Pothier, Volume 9, paragraph 14). The answer, therefore, to the second question I mentioned earlier is that co-ownership of private roads, which as an undivided unity, are a necessary accessory to properties which are separate, cannot be sub-divided without the consent of all the co-owners. I have already referred to question four and having regard to my answer to question two, an answer to question three is no longer required. I am therefore unable to grant the application or make the declarations sought by Mr. Le Marquand.

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16. Jersey Hotels Ltd. -v- Inglebert Properties Ltd. (1979) J.J. p. 39
17. Le Sueur v. Le Sueur 1968 JJ889
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