

ROYAL COURT
(Samedi Division)

133.

22nd July, 1996

Before: Sir Philip Bailhache, Bailiff, and
Jurats Blampied and Potter

Between:	Carletta Rose de Mouilpied wife of Arthur Noel Fallaize	Plaintiff
And:	Arthur Noel Fallaize	Defendant

Advocate J. G. P. Wheeler for the Plaintiff.
The Defendant did not appear and was not represented.
Advocate F. J. Benest for the Viscount, Intervenor.

JUDGMENT

THE BAILIFF: This case raises an interesting point of law relating to the procedure of "*licitation*". The background facts can be shortly stated.

5 The plaintiff and the defendant are husband and wife who own jointly for themselves and for the survivor of them the property known as No. 7, La Grand Pré, Causie Lane, in the parish of St. Clement. The property was acquired by them in 1970. It appears that differences have arisen between them on account, it is said, 10 of the religious beliefs of the Defendant. The parties have for some time been living separately in different parts of the property. The Plaintiff wishes to bring this situation to an end and to sell the property. The Defendant has refused to co-operate with the Plaintiff to this end.

15 It is a well-known maxim of Jersey law that "*nul n'est tenu de rester dans l'indivision*". The procedure whereby one co-owner may compel another to bring an end to co-ownership is known as "*licitation*". The Plaintiff accordingly brought an action "*en licitation*" by way of Order of Justice seeking an order against 20 the Defendant:

"to consent to and to co-operate and participate in the completion of the sale of the Property to such person and at such price as may be agreed between the parties or as the court might order or, failing such agreement, to co-operate and participate in the sale of the Property by public auction for the benefit of the parties in equal shares and to pass before court the necessary contract of sale of the Property".

The inclusion in the prayer of the Order of Justice of the words "or as the court might order" was unusual, and might be said to give rise to an ambiguity. Be that as it may, on 3rd May, 1996, and in the presence of the Defendant, the Court made an Order in those terms.

The Plaintiff's agents accordingly sought to find a purchaser for the property. They have now negotiated a sale to prospective purchasers in the sum of £177,000 for the realty and £2,000 for the contents. On the 24th May, 1996, the Plaintiff's solicitor, Mrs. Fiona del Amo, wrote to the Defendant notifying him of the proposed sale and inviting his co-operation. On the 5th June, Mrs. del Amo wrote again to the Defendant giving him particulars of the proposed transaction. On the 19th June, Mrs. del Amo wrote a third letter to the Defendant informing him that he was required to attend in the Royal Court to pass the necessary contract at 2.30 p.m. on 21st June and that he would be required to vacate the property on the 28th June. The Defendant did not respond to any of that correspondence and failed to appear in court on 21st June. The contract was accordingly not passed. On the same day these proceedings were served upon the Defendant by Order of Justice. The Order of Justice recites the history of the matter identifying the purchasers and the proposed consideration, and seeks in the prayer that the court might:

"(a) order the sale of the property at the earliest opportunity to the purchasers for the consideration and authorise the Viscount to appear before the Royal Court in the place of the Defendant to pass the necessary contract of sale of the property.

(b) condemn the Defendant to pay the costs of the action".

On 28th June, the return date for the Order of Justice, the Defendant did not appear and was not represented by counsel. The Viscount however sought leave to intervene. Leave was granted, and we heard Mr. Benest on his behalf.

Mr. Benest told the court that the Defendant had not expressly consented to the proposed sale, and that his consent could not be implied. He submitted that there was no precedent for the order which the Plaintiff sought. A "licitation" meant,

in his submission, a sale by public auction, and not the enforcement of a sale by private treaty at the behest of one of the co-owners. A public auction, at which either co-owner could bid, ensured that the price to be obtained for the property was the market price.

Mr. Wheeler, for the Plaintiff, urged that the Court should make the order sought. The Defendant had failed to take legal advice and to co-operate in the proposed sale. He drew attention to a dictum of Le Masurier, Bailiff in Ritson v. Slous (1973) JJ 2341, at 2346, where the learned judge stated:

"We are satisfied that it is the incontestable right of the owner of an undivided share of any real estate to enforce the sale of such real estate, and we know of no rule of law which prevents this court from divesting a person of his property when the justice of a case dictates that that be done".

Mr. Wheeler submitted that there was evidence on affidavit from Mrs. del Amo referring to a letter from the estate agent in question which asserted that £179,000 for the property and contents was the maximum price which could be achieved. A bank valuation also indicated that the price of £177,000 for the property was fair. Counsel accordingly submitted that the Court should break new ground to achieve a just result. He also reminded the Court that the legislature had made provision in the Matrimonial Causes (Jersey) Law, 1949 for the transfer of jointly owned property after matrimonial proceedings, and that the practice was for such a transfer of immoveable property to be effected by the Viscount if one of the parties refused to pass the necessary contract.

The law appears to us to be quite clear. All the definitions of "licitation" which have been cited refer to a sale being effected, in default of agreement between the parties, by public auction. We need refer only to Domat's - Les Loix Civiles, Livre I, Titre II, and Article X De la licitation:

"Lorsqu'une chose qui ne peut que difficilement être divisée, comme une maison, ou qui ne sauroit l'être comme un Office de judicature, se trouve commune à plusieurs personnes, & qu'ils ne peuvent ou ne veulent s'en accommoder entr'eux; ils la vendent, pour en partager le prix; & ils l'adjugent aux encheres ou à l'un d'eux, ou à des étrangers qu'ils reçoivent à encherir. Et c'est cette maniere de vendre qu'on appelle licitation".

The dictum of Le Masurier, Bailiff in Ritson v. Slous (1973) JJ 2341 must be read in the context of the facts of that case which concerned a complication involving statutory controls on

price which no longer exist. Earlier in the judgment the learned judge stated:

5 *"The law relating to a property in that state is clear. Any one shareholder in land owned in equal shares can compel his co-owners to join in putting an end to the indivision, and failing agreement, the procedure of "licitation" is invoked and the land is put up for auction and knocked down to the highest bidder. By that means the highest market price is obtained and each co-owner is free to bid and so has an opportunity of becoming the single owner".*

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15 The question for the court is therefore whether the common law procedure of "licitation" should be extended to embrace the enforcement of a sale of immoveable property by private treaty by one co-owner against the wishes or without the consent of another. In our judgment it would not be right to accede to the submissions of counsel for the Plaintiff. To do so would have at least two

20 adverse consequences. First it would deprive the recalcitrant co-owner of his right to bid for the property himself. Secondly it would open the door to the possibility of injustice, particularly where the uncooperative co-owner took no steps to protect his own interest whether as a matter of some principle or even out of

25 stubbornness. A properly conducted sale by public auction is the only sure means of achieving a sale at the market price. We accordingly dismiss the Order of Justice.

Authorities

Ritson -v- Slous (1973) JJ 2341.

Domat: "Les Loix Civiles dans leur ordre naturel, Le Droit Public et Legum delectus" (Paris, 1783).

Le Sueur -v- Le Sueur (1968) JJ 889.

Le Gros: "Traité du Droit Coûtumier de l'Ile de Jersey (Jersey, 1943): p.461.