

Chief Justice

1 OPEN COURT

2
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

21-02-97

4
5 CAUSE NO. 415 OF 1992

6 CAUSE NOS. 198 AND 353 OF 1996

7
8 CAUSE NO. 415 OF 1982:

9
10 BETWEEN: DEBORAH LORAIN WEBB PLAINTIFF

11
12
13 AND: ORVILLE B. WEBB RESPONDENT

14 AND: MEMEILE WEBB INTERVENER

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16
17 CAUSE NO. 198 AND 353 OF 1996:

18
19 BETWEEN: COWCATCHER COLLECTION LIMITED

20
21 PLAINTIFF

22
23
24 AND: ROBERT HAWKES DEFENDANT

25 AND: BELINDA HAWKES INTERVENER

26
27 APPEARANCES:

28
29 In Cause 415 of 1982:

30 Mr. McDonough of Bruce Campbell & Co. for the Plaintiff.

31 Mr. Orville Webb, the Respondent in person.

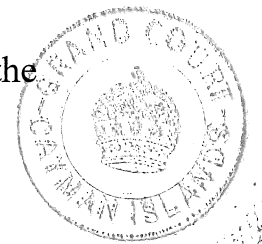
32 Mrs. Karin Thompson for the Intervener.

33
34 In Causes 198 and 353 of 1996

35 Mr. Helfretch of Ian Boxall & Co. for the Plaintiff.

36 Mr. Lamontagne Q.C. instructed by Mrs. Nervik of Nervik & Co. for the
37 Intervener.

38 The Respondent unrepresented. (absent)



1 **SMELLIE J.**

2
3 **JUDGMENT**

4
5 The issue presented in each action is whether there is power in the Court to
6 make charging orders in favour of the judgment creditor over property in
7 respect of which the judgment debtor is registered as joint proprietor.

8
9 While unrelated in any other respect, the two actions have been consolidated
10 for the purposes of the determination of that common issue.

11
12 In Cause 415 of 1982 the judgment creditor is the former wife of the
13 respondent judgment debtor. She has obtained a judgment against him in
14 respect of arrears of maintenance for the child of the former marriage.

15
16 In an effort to secure that judgment she has obtained a charging order nisi
17 over property at George Town East, Block 14D, Parcel 113 which is
18 registered in the names of the respondent judgment debtor and his present
19 wife, as joint proprietors. The wife claims to have had no notice of the
20 proceedings leading up to that charging order nisi and not being herself a
21 party to or in any way liable for that judgment debt, has intervened to set
22 aside the order on the basis that the Court had no power to make it.

23
24 In Cause 198 of 1996 the plaintiff sued on a contractual debt and obtained
25 default judgment against the defendant. In order to secure that judgment the
26 plaintiff obtained, in Cause 353 of 1996, a charging order nisi over property
27 at Bodden Town Block 44B Parcel 276 which is registered in the names of
28 the defendant and his wife, the intervener in the Cause, as joint proprietors.

29
30 The intervener in Cause 198 of 1996 also is in no way liable for the debt and
31 she therefore asserts that there is no power to charge the jointly held
32 matrimonial property with it.

33
34 The facts and circumstances recited above are undisputed. The question then
35 is a matter of law: can a charging order be made in respect of land which is
36 held by joint proprietorship and where the debt to be secured is not owed by
37 all joint proprietors?
38

1 It is conceded by counsel on behalf of both judgment creditors, and correctly
2 so in my view, that there can be no basis for impeding or interfering with
3 any interest of a joint proprietor who is not liable for the debt.
4

5 What is, in essence, being advanced, is the argument that the judgment
6 debtor has a beneficial interest in the land, in his undivided, unidentified,
7 aliquot share, to which the charging order may be attached, even if it may
8 not be enforced by a power of sale because of the indefeasible nature of the
9 interest of the non-liaible joint proprietor.
10

11 The contrary argument centres around the principle that a joint proprietor has
12 no separate disposable beneficial or legal interest in the land which is the
13 subject of the joint proprietorship. That being so, there can be no charging
14 order made in respect of an interest only of one joint proprietor, in these
15 cases, the respective judgment debtor.
16

17 To the extent relevant to the present matters it is convenient that I set out
18 here the enabling provisions. They are in Section 29 and the Third Schedule
19 of the Judicature Law (1995 Revision) (“The Law”):
20

21 “29. The Third Schedule shall have effect
22 with respect to the imposition of charges to
23 secure payment of money due or to become
24 due under Judgments or orders of the court;
25 and the Schedule has effect to make
26 provision for restraining and prohibiting
27 dealings with and the making of payments in
28 respect of, certain securities”
29 -----
30 -----

31
32 Third Schedule
33 Charging Orders
34

- 35 I. (1) Where, under a judgment or order
36 of the Grand Court, a person (the
37 “debtor”) is required to pay a sum of
38 money to another person (the

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“creditor”) then, for the purpose of enforcing that judgment or order, the Court may make an order (a “charging order”) in accordance with this Schedule imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order

(2). -----

Property which may be charged

2.(1) Subject to sub-paragraph (3), a charge may be imposed by a charging order only on -

(a) any interest held by the debtor beneficially in any asset of a kind mentioned in subparagraph (2) or any interest held by him beneficially under any trust, or

(b)

(2). The assets referred to in subparagraph (1) are -

(a) land;
(b) -----

(3) -----

Provisions Supplementing paragraphs 1 and 2

3. (1) A charging order may be made absolutely or subject to conditions as to notifying the debtor or as to the

1 time when the charge has become
2 enforceable, or as to other matters.

3
4 (2) A charge imposed by a charging
5 order made in relation to any interest
6 in land shall be in the prescribed form
7 and shall be registered in the
8 encumbrances section of the relevant
9 land register.

10
11 (3) A judgment creditor may enforce a
12 charge imposed by a charging order
13 made in respect of any interest in land
14 by selling that interest and sections 75
15 and 76 of the Registered Land Law
16 (Revised) shall apply in relation to any
17 such sale.

18
19 (4) -----

20
21 (5) -----

22
23 (6) Where a charging order has been
24 made the Court may, at any time, on
25 the application of the debtor or of any
26 person interested in any property to
27 which the order relates, make an order
28 discharging or varying the charging
29 order”.

30
31 In arriving at the conclusion in this matter, I accept Mr. Lamontagne’s,
32 submissions, adopted by Mrs. Thompson, as to the nature of the joint
33 proprietorship of land.

34
35 The following passage from Halsbury’s Laws 4th Ed. Volume 39 paragraph
36 529 describes the incidents of joint tenancy as it applied in England prior to
37 January 1926 and - but for an important distinguishing principle affecting the

1 individual right of joint proprietors to sever - as it would apply in the
2 Cayman Islands today:

3
4 “Each joint tenant has an identical interest in
5 the whole land and every part of it. The title
6 of each arises by the same act. The interest
7 of each is the same in extent, nature and
8 duration. In the case of freeholds, the seisin,
9 and in the case of leaseholds, the possession,
10 is vested in all, none holds any part to the
11 exclusion of the others. At common law the
12 interest of each must vest at the same time.
13 These are the four unites of title, interest,
14 possession and time ----”.

15
16 At footnote 5 (op. cit, ibid) it is stated that each joint tenant holds the whole
17 land and holds nothing, that is, he holds the whole jointly and nothing
18 separately.

19
20 This principle is most clearly borne out by what is perhaps the most
21 important incident of joint tenancy or proprietorship: the jus accrescendi or
22 right of survivorship which operates so that the death of one joint tenant
23 creates no vacancy in the seisin or possession of the land. His interest is
24 extinguished and the survivor becomes seized or possessed of the whole and
25 where there is more than one survivor, they continue to hold as joint tenants:
26 Halsbury’s (op. cit. para 531).

27
28 The similarities between the nature of joint proprietorship under the law of
29 Cayman and joint tenancy under the law of England pre-1926 were
30 recognised by the Court of Appeal in the unreported judgment given (per
31 Georges J.A.) in Mumms Incorporated/Anthony Thiam-Hong Tan and
32 Cayman Capital Trust and others Civil Appeal no. 25 of 1989 - written
33 judgment delivered on 28th March 1990.

34
35 The important distinction: that between the right of any joint tenant at
36 common law to demand severance of his interest and the absence of any such
37 right under Cayman law without the consent of all joint proprietors, was a
38 pivotal factor to the outcome in the Mumms case (supra).

1
2 It is a factor of equal importance here.

3
4 In the Mumms case the appellants/judgment creditors contended that the
5 interest of the judgment debtor held as joint proprietor with his wife in his
6 matrimonial home could be sold pursuant to section 42 (now repealed) of the
7 Judicature Law, to satisfy the judgment debt.

8
9 That contention was addressed in the following terms which I find applicable
10 to the present case by Justice of Appeal Georges:

11
12 “As in the joint proprietorship under the
13 Registered Land Law, joint tenants at
14 common law prior to 1925 had no separate
15 claim in the land. They did, however, have
16 separate rights or interests. The appellants
17 contend this interest can be sold under
18 section 42 of the Judicature Act.(sic) Joint
19 proprietorship under the RLL and joint
20 tenancy at common law prior to 1925 had
21 another characteristic in common - the right
22 of survivorship. As set out in Section
23 99(1)(b) “on the death of a joint proprietor
24 his interest vested ” in the surviving
25 proprietors jointly. There is, however, a
26 clear distinction between the two. At
27 common law prior to 1925 the rule is as
28 stated in Williams (on Real Property 23rd Ed
29 (1920) at page 147):

30 “The incidents of a joint tenancy
31 above referred to lasts only as
32 long as the joint tenancy exists.
33 It is in the power of any one of
34 the joint tenants to sever the
35 tenancy, for each of the joint
36 tenants possesses an absolute
37 power to dispose, in his life-
38 time of his own share of the

lands by which means he
destroys the joint tenancy”.

This right has clearly not been preserved under the RLL. Dispositions under Section 99(1) [now section 100(1)] can be made only by all joint proprietors. The term “dispositions” in that subsection cannot in my view, be interpreted to mean a disposition of the entire estate in the parcel of land jointly held. Such a proposition would plainly not need to be enacted. It can only mean that one joint proprietor can dispose of his or her interest in the land jointly held only if all the other joint proprietors agree. This is confirmed by the fact that there is one exception. The joint proprietor can transfer his or her interest to the other joint proprietors. Accordingly, any sale under Section 42 of the Judicature Act would result in a disposition inconsistent with the RLL and would be ineffectual. It appears to me that the argument on behalf of the Appellants is based on the premise that a joint proprietor under the RLL has the same rights as has a joint tenant (at common law) to sever the tenancy unilaterally. Section 99(3) makes it clear that joint proprietorship can only be severed by the agreement of all the joint proprietors. A unilateral right of severance would be inconsistent with the RLL and could not therefore, be implied”.
(emphasis supplied).

Implicit in those findings is the view of the Court of Appeal that an order for sale by the Court would only be valid if allowable as a disposition within the meaning of the RLL and that the power of the Court to so order in respect of a joint proprietorship could be no more extensive than the right of a joint proprietor to dispose.

1
2 By the time of the Mumms case (supra) it had been settled law in the
3 Cayman Islands that the RLL is a comprehensive Code of the law governing
4 the registration of and dealings in land, including the dispositions of interests
5 in registered land.

6
7 As much is stated at page 2 of the written judgment in that case. And the
8 RLL itself makes that clear. Section 37(1) of the RLL provides:

9
10 “No land lease or charge registered under
11 this Law shall be capable of being disposed
12 of except in accordance with this Law, and
13 every attempt to dispose of such land, lease
14 or charge otherwise than in accordance with
15 this Law shall be ineffectual to create,
16 extinguish, transfer, vary or affect any
17 estate, right or interest in the land, lease or
18 charge”.

19
20 In the definition section - section 2 - “disposition” is defined as:

21
22 “Any act inter vivos by a proprietor
23 whereby his rights in or over his land, lease
24 or charge are affected, but does not include
25 an agreement to transfer, lease or charge”.

26
27 In the Mumms case Georges JA cited and applied the earlier judgment of
28 Henry JA in Paradise Manor Limited (in Liquidation), M. Becker & M.L.
29 Becker v Bank of Nova Scotia [1985] CILR 437 in which those sections
30 were considered in the following terms (at page 480):

31
32 “By applying the definition of “disposition”
33 to section 37, the meaning that emerges is
34 that no right of a proprietor in or over his
35 land, lease or charge registered under the
36 law shall be capable of being affected
37 except in accordance with the Law and the
38 system of registration established by it”.

1
2 By applying that dictum to the case before him in Mumms Georges JA on
3 behalf of the Court, then proceeded to conclude, as we have seen, that as a
4 joint proprietor has no unilateral right to sever or otherwise dispose of his
5 interest under a joint proprietorship, there could be no order made for the
6 sale of any such interest.

7
8 Is there a proper basis for contending, as have the judgment creditors before
9 me, that a charging order should be differently regarded for present
10 purposes as a form of disposition and that the orders should be made
11 absolute and registered even if there never could be a power of sale?

12
13 This contention, as I understand it, centres around the word “beneficially”
14 as it is used in paragraph 2(1)(a) of the Third Schedule to the Law to
15 describe any interest held by a judgment debtor in land. This the attorneys
16 for the judgment creditors submit, is expression of the legislative intent that
17 any interest, legal or beneficial in land, shall be chargeable by order. This
18 would include the “beneficial interests” of the respectively liable joint
19 proprietors.

20
21 I find this submission to be without merit for a number of reasons. The first
22 is the fairly obvious: the joint proprietor has no separate identifiable interest
23 in the land and his “beneficial” interest must be coincidental and co-
24 extensive with his legal interest - as joint proprietor he holds the whole land
25 jointly , but nothing separately. Thus there is no separate legal or beneficial
26 interest, only identical interests with that of the other joint proprietor(s).

27
28 The second is that even if one could conceive of a separate “beneficial
29 interest” to be charged but not sold, such a charge would be nonetheless a
30 “disposition” within the meaning of the RLL and, therefore, impermissible
31 as it would purport to affect land held under joint proprietorship while not
32 conforming to section 100. As already summarised in the context of the
33 Mumms case(supra) that section governs the disposition of interests in such
34 land in the following absolute terms:

35
36 “100.(1) Where the land lease or charge is
37 owned jointly, no proprietor is entitled to
38 any share in the land, and consequently -

1 (a)dispositions may be made only by all
2 joint proprietors; and
3 (b) on the death of a joint proprietor, his
4 interest shall vest in the surviving proprietor
5 or the surviving proprietors jointly.

7 (2) For the avoidance of doubt, it is declared
8 that -

9 (a)the sole proprietor of any land, lease or
10 charge may transfer the same to himself and
11 another person jointly; and

12 (b)a joint proprietor of any land, lease or
13 charge may transfer his interest therein to all
14 the other proprietors”.

15
16 (3)”
17

18 Paragraph 3(2) of the Third Schedule settles this point. It refers to the
19 prescribed form and mandates that the charge shall be registered against the
20 title to the land. A charge operates as a disposition, even if the power to sell
21 is never exercised.

22
23 Those provisions are incompatible with the restrictions imposed upon
24 dispositions of land held upon joint tenancy - Section 100(1)(a) of the RLL -
25 and therefore would be contrary to the paramount intentions of the RLL.
26

27 Finally, I should further briefly address the contention that the interests of a
28 joint proprietor should be chargeable, even if not amenable to sale. That
29 argument proceeded on the basis for example, that a receiver could be
30 appointed over the property to receive the income without interfering with
31 the interest of the other joint proprietor(s), as a sale would do.
32

33 I found that contention to be without merit for the further reason that it
34 would cut across the clear and manifest legislative intent behind the power
35 given to the Court to make charging orders, which is to create the means by
36 which the asset in the land may be sold to satisfy the debt: see paragraphs
37 1(1) and 3(3) of the Third Schedule to the Law. The latter provision makes

1 the legislative intent clear by stating that the judgment creditor has the right
2 to sell.

3

4 The argument that section 29 and the Third Schedule to the Law provides a
5 self-contained and novel power given the Court to grant charges over any
6 interest in land would for all the foregoing reasons, be a radical departure
7 from the definitive terms of section 100 of the RLL and the many settled
8 judicial pronouncements to the effect that the RLL provides a comprehensive
9 code. Any such change would in my view, require clear and express
10 language, not the general descriptive use of the term “beneficial interest” as
11 it appears in paragraph 2(1)(a) of the Third Schedule to the Law.

12

13 It is also to be noted that the provisions in the Law are adapted from the
14 English legislation (the Charging Order Act 1979) which exists against the
15 background in England where, since January 1926, it is not possible for a
16 legal estate to subsist in an undivided share in land: Section 1(6) of the Law
17 of Property Act 1925. If not imposed by agreement, the law there since
18 January 1926, imposes a trust for sale on land held in undivided shares,
19 whether it was so held either at law or in equity: section 36(1) of the Law
20 Property Act 1925 and see Halsbury’s Laws 4th Ed Vol 17 paragraph 362
21 and Irani Finance Ltd v Singh and Others [1979] 3 All E.R. 199.

22

23 In England, the reference to a “beneficial interest in land” in the context of a
24 joint tenancy which is to be charged under the Charging Order Act 1979
25 would therefore, carry special consequences. Under that scheme, such a
26 beneficial interest has been held to be chargeable, not as an undivided share
27 in land, but as an interest in the proceeds of the trust for sale which is
28 imposed upon the land: National Westminster Bank Ltd v. Stockman [1981]
29 1 All E.R. 800.

30

31 I have already expressed the reasons for holding that the expression
32 “beneficial interest” in land may not be taken here, as contended by the
33 plaintiffs, as applying to undivided shares in land held upon joint
34 proprietorship.

35

36 That construction by no means renders the provisions adapted from the 1979
37 English Act, as they may relate to land, ineffectual for all the purposes of
38 charging orders: Cayman Islands law admits of other circumstances where

1 the "beneficial" (as distinct from the purely legal) interest in land may be
2 amenable to a charging order. The beneficial interest in land held upon trust
3 is but one example: see section 23 of the RLL the proviso which, in practice,
4 is often reflected in legal title being registered in the names of administrators
5 or trustees, but with beneficial title being vested in the beneficiaries under
6 the estates or trusts. I would venture the view that there would appear, in
7 principle, no reason why there should not be power to make a charging order
8 against such an underlying beneficial interest.

9
10 I was also referred to the more recent English case of Perry v Phoenix
11 Assurance Plc [1988] 3 All E.R. 60. That case takes the present matter no
12 further. It simply decided in the context of the English legislative scheme
13 that although a charging order could be made on an undivided share in land -
14 (now in England expressed in terms of the beneficial interest in the trust for
15 sale imposed upon land held in undivided shares) - such an order was not
16 capable of registration under the Land Charges Act 1972 (U.K.) The
17 obvious reason is that an undivided share in the proceeds of sale of land held
18 on trust for sale is *not* land. That is a far cry from the law in the Cayman
19 Islands where, as we have seen, legal estates still subsist in undivided shares
20 in land. The manner of their disposition is the main issue in contention.

21
22 For all the foregoing reasons, I find that there was no power in the Court to
23 make the charging orders nisi in these matters in respect of the two parcels of
24 land already mentioned. Those orders must be discharged and the present
25 application of the plaintiffs that they be made absolute, refused. There
26 remains a charging order nisi over Lower Valley, Block 37E Parcel 103, in
27 Cause 415 of 1982. That is the house where the intervener in that Cause
28 resides with the three children of her marriage with the respondent. It is
29 registered in the sole name of the respondent. There is no objection to the
30 order being made absolute for what it may be worth to the plaintiff - there is
31 already a first charge and power of sale conceded to a bank. That order nisi
32 now becomes absolute.

33
34 As to costs, I make no order. It would be inappropriate to penalise the
35 judgment creditors in costs when they were forced to seek recourse, albeit
36 unsuccessfully, to recover their judgment debts.

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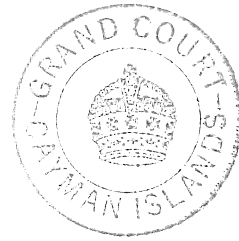
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Anthony Smellie Q.C.
Judge of the Grand Court

Dated this 21 day of February 1997