

**Chang Tui Sing v Royle  
(1998) SLR 153**

Philippe BOULLE for the plaintiff  
Serge ROUILLON for the defendant  
Danny LUCAS for the intervener

**Judgment delivered on 21 May 1998, by:**

**AMERASINGHE J:** The plaintiff sued her sister the defendant for a sum out of consideration due on the sale of the plaintiff's one third share in 1975 of two allotments of land V5410 and V5586 in Eau Claire Island.

It is admitted that the parties are sisters, that they entered into an agreement on 4 August 1975 for the sale of the land, that a sum of £200 out of consideration was paid and that the balance sum of £800 was due to be paid within 4 years from the date of the agreement. In answer to paragraph 4 of the plaintiff's claim, the defendant, while admitting the validity of the agreement, denies the plaintiff's claim for registration, and pleads that even if it had been otherwise the defendant is not liable to

The defendant in response to the plaintiff's claim of the failure to pay the balance sum of £800 only pleads that the claim is not due as it is time barred, but she prays for the dismissal of the plaintiff's action to recover a sum of R70,272.53 subject to costs.

In the defendant's counterclaim she avers that the plaintiff without her authority or consent has occupied the said parcel of land title V5410 for a period of over 5 years. It is also alleged that the plaintiff without her authority or consent has occupied the parcel of land title V5586 by collecting rent and authorising the reconstruction of a house with a view to selling the title to the tenants and causing the title to be encumbered with a legal charge in favour of the Seychelles Development Corporation in a sum of R102,344.00.

The defendant claiming the ownership of two thirds of the said parcels of land prayed for judgment in a sum of R94,000 as damages on the grounds pleaded. The plaintiff in answer to the counterclaim raised a point of law to the effect that the defendant as a co-owner has no locus standi to sue the plaintiff for the plaintiff's occupation of parcel of land title V6410 was without authority.

A fiduciary representing the co-ownership, on an application for an injunction, filed a statement of demand on the application being granted. In the plaintiff's answer, made under section 120 of the Seychelles Code of Civil Procedure, the intervener prayed for an order making similar allegations as made by the defendant against the plaintiff, prayed for an order to withdraw an inhibition placed on title V5410, damage

to recover the balance of the sum of £800 out of consideration due on the sale of the plaintiff's one third share in 1975 of two allotments of land V5410 and V5586 in Eau Claire Island.

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with interest, and for an order to compel the plaintiff to account to the fiduciary for all rents collected from third parties with interests and costs.

The plaintiff in her answer to the intervener's statement of demand stated that she occupied the house with the other co-owner's consent and that the fiduciary's consent was irrelevant as he had been appointed only on 12 December 1996. She further avers that the rent collected at R90 per month was spent on repairs to the rented house, and that the tenant Barallon ceased to pay rent a long time ago.

At the hearing, it transpired in the evidence of both the plaintiff and her sister Genevieve, who is the other co-owner of the balance of one third of the undivided share of the said parcels of land, that the plaintiff came into the occupation of the house in Au Claire Lane at the end of 1979 to help her and to attend to their sick and paralysed mother. The plaintiff's sister Genevieve left the said house when her mother died leaving the plaintiff to occupy the house and to look after the property. It is the evidence of the said co-owner that the plaintiff was expected to live in the said house and look after the property. According to her the plaintiff was not expected to pay rent, and that it was with her consent and approval that when the house on the other parcel of land was given to Barallon to occupy, the rent of R90 was expended on repairs to the houses, and for the supply of electricity and water. The plaintiff and her witness under cross-examination, revealed that although they wrote to the other sister, the defendant, who was in England about the house and property that they never received a reply. The plaintiff's evidence was conspicuous by her uncertainty and inability to remember facts and figures, which she attributed to the lapse of time.

The intervener produced as I(1) and I(2) two documents in proof of his appointment as fiduciary in respect of parcels of land titles V5586 and 5410. It became evident from his testimony that he has never received any instructions directly from the defendant, the owner of two thirds of the undivided shares of the said parcels of land or her sister the other co-owner. In his evidence in chief he testified to the fact that to his knowledge the defendant never gave authority to the plaintiff to occupy the premises in suit or to act in relation to the two parcels of land.

Although the intervener is an accountant by profession, in the witness box under cross-examination by the counsel for the plaintiff, Mr Boulle, he found himself in an unenviable position. His evidence was neither cogent nor coherent and he displayed a great deal of uncertainty in respect of instructions given to him. The following question and answers very vividly displayed the witness' unfortunate performance.

Q. ....  
Who gave you these instructions?

A. Yvonne Royle.

Q. Have you ever met Mrs Yvonne?

A. No.

Q. Neither have you corresponded with her?

A. No.

Q. How can you get instructions from somebody whom you have not ever met and you never correspond with him?

A. I got instructions through my counsel Mr S Rouillon.

Q. Have you ever sought instructions from the co-owner who is in Seychelles present and available?

A. I have been through my counsel Mr Rouillon.

There is no doubt that the intervener by exhibit I (1) and I (2) has been legally appointed as the fiduciary, and that his legal right to act under the circumstances will be necessarily restricted to the terms of his appointment specified in the said documents.

On the evaluation of evidence it is observed that the pleadings of both the plaintiff and the defendant along with exhibit P1 reveal, and that it is without dispute that the plaintiff has sold her one third undivided share of parcels of land titles V5410 and V.5586 to the defendant. The defendant in admitting paragraph 3 of the plaint by her answer, apparently admits the averments, that on the payment of £200 out of the consideration of £1000 there was a balance of £800 to be paid within a period of 4 years of the agreement.

The defendant in response to the specific plea in paragraph 5 of the plaint that she failed to pay and settle the said sum of £800 owed on the consideration, makes no denial of such a claim but pleads that in law no sum is due as the claim is time barred. I therefore conclude that the defendant has admitted the failure to pay the balance of £800 to the plaintiff. In the examination of the plea of prescription the exhibit P1 describes how the vendor's privilege referred to in paragraph 4 of the plaint operates. It is as follows:

And as security for the payment of the sum of Eight Hundred Pound Sterling and interest as stipulated as and when they become due, the property hereby conveyed remains mortgaged and hypothecated by special privilege until satisfaction thereof agreeable with the law.

The exhibit I (3) reveals as inscription on the registrar of a change in favour of the plaintiff in respect of the said parcels of land, for a sum of £800 made on 29 July 1975. As rightly pointed out by counsel for the defendant in accordance with section 15(1)(a) of the Mortgage and Registration Act (Cap 134) the said inscription shall have legal effect only for a period of 10 years, as it was made before the commencement of the

Civil Code of Seychelles on 1 January 1976. Hence the vendor's privilege ended in July 1984. On the application of the provisions of article 1589 of the Civil Code the sale between the parties by exhibit P1 is complete with the registration of the agreement in spite of the fact of four fifths of the consideration not being paid by the defendant. The right to sue for the recovery of the said £800 by the operation of article 2271 of the Civil Code was time barred after the lapse of 5 years, from the end of 4 years stipulated in exhibit P1 for payment. Therefore the plaint filed on 20 February 1995 is time barred, as the action was prescribed at the end of July 1984.

Counsel for the plaintiff, to overcome the aforesaid bar, had sought recourse to the provisions of article 2275 of the Civil Code and called upon counsel for the defendant to submit the defendant to "swear an oath on the question whether the thing has in fact been paid for."

Counsel cites paragraph 693 on the possibility of administering an oath to a debtor from the *Treatise on The Civil Law*, vol 2, part 1, by Marcel Planiol (eleventh ed, 1939), which reads thus:

Art 2275 contains a similar restriction regarding the ordinary effects of prescription in certain cases, which will be considered later, it authorizes the creditor to administer an oath to his adversary to determine whether the debt has been paid .... And if he refuses he will be cast despite the fact that prescription has accrued.

What transpired in Court in respect of the oath was that counsel for the plaintiff, Mr Boule, before calling evidence for the plaintiff made a demand as follows:

On top of that, as prescription is pleaded I am making a demand on the defendant to come on oath and swear to the effect that question. I am making that demand under article 2275 (quote) I am now making a demand that the defendant swears on oath though I could have been satisfied with an admission.

(No doubt the counsel's submission has not been accurately recorded.)

The proceedings thereafter in Court only reflect counsel for the defendant informing the Court that the defendant will not make an oath. It is my considered opinion if there is a demand, it was never made to the defendant in accordance with article 2275 of the Code, and the reply of counsel for the defendant in the negative with no prior notice to the defendant cannot be considered as a refusal by the defendant. The defendant was not present at the hearing and never gave evidence in Court. A demand made in her absence, and never made to her personally, cannot burden her to suffer the consequence of being cast with liability, "despite the fact that prescription has accrued" in accordance with the authority cited by counsel for the plaintiff from the *Treatise on the Civil Law* by Planiol. It is also observed that prescription against the claim of the plaintiff was never interrupted by an acknowledgement by the defendant by any admission.

I therefore dismiss the plaintiff's action on the ground that it is prescribed, with costs to the defendant for the reasons stated above.

The evidence of both the plaintiff and her sister Genevieve and the defendant established that the plaintiff came into occupation of the house at Au Claire Lane at the request of her sister Genevieve to assist her in the reconstruction of the house. Genevieve being a co-owner of the said property was legally empowered to authorise the plaintiff not only to occupy the said house but also to act in respect of the co-owned properties by letting out to a tenant a house and to authorise the reconstruction of the house. There is no evidence to conclude that the defendant acted in contravention to the other co-owners' management of the co-ownership by her silence. Hence her silence is construed to be evidence of approval of the decisions made by her co-owner and the occupant, the plaintiff Genevieve. Although the defendant has claimed that parcel of land title V5586 is encumbered with a mortgage of a sum of R102,344.00, the evidence only reveals that the parcel of land is subject to a legal charge of R500 (exhibit I, 5). The exhibit D shows that the plaintiff by an endorsement on a letter dated 15 October 1985 gave permission for the reconstruction of the house referred to therein. The letter refers to the fact that the house was in a very poor condition. It is clear that even if the plaintiff acted without the authority of the defendant her actions were not unlawful as she had the approval of a co-owner and because her actions did not cause damage to the interests of the co-ownership. Her actions have contributed towards the maintenance and preservation of the house. The defendant failed to adduce any evidence to prove her assertions that the plaintiff acted in contravention to the other co-owners' management of the co-ownership by the reconstruction of the house on parcel of land title V5586 with a view to the sale of the said land. A co-owner has the right to act independently to secure her personal interests and recover any loss suffered by her by the occupation or letting out of any buildings on, or any interest in, the land. Hence I hold that the defendant had the locus standi to bring the cause of action pleaded.

For the aforesaid reasons I therefore dismiss the defendant's counterclaim with costs to the plaintiff.

Exhibits I (1) and I (2) are evidence of the intervener's appointment as fiduciary in September and December 1996, while the plaintiff's claim was filed in February 1995. It is reflected in the question and answers reproduced earlier in this judgment that by the admission of the intervener as fiduciary that he received all instructions through his counsel and that he has never received instructions from the co-owners personally.

Counsel for the defendant claims, quoting article 825 of the Civil Code that the fiduciary "should act as if he were sole owner and not according to the whims of a co-owner who has appointed him and now disagrees with the action he has taken." Strong language indeed, and unfortunately counsel is mistaken. The same article imposes on him the

plaintiff's claim is

controverted by the house at Au Claire Lane after their mother. The plaintiff is empowered to authorise the reconstruction of the co-owned house. The defendant at the time was opposed to the reconstruction of the house by the plaintiff, but her silence constituted approval of the plaintiff's actions. The plaintiff acted as an agent of the co-ownership in paragraph 7 of the legal charge in the land title V5410 is not in dispute. The plaintiff's testimony to the fact that she gave permission in November 1985 gave permission for the reconstruction of the house. The said document shows that the plaintiff therefore concludes, that the defendant's actions were never unlawful. The plaintiff in no way caused damage to the interests of the co-ownership. Her actions have contributed towards the maintenance and preservation of the house. The defendant failed to adduce any evidence to prove her assertions that the plaintiff acted in contravention to the other co-owners' management of the co-ownership by the reconstruction of the house on parcel of land title V5586 with a view to the sale of the said land. A co-owner has the right to act independently to secure her personal interests and recover any loss suffered by her by the occupation or letting out of any buildings on, or any interest in, the land. Hence I hold that the defendant had the locus standi to bring the cause of action pleaded.

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following restrictions:

He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement duly authenticated of all co-owners or by the court.

Exhibits I (1) and I (2) by which he was appointed fiduciary reflect that his appointment was made under article 823 of the Civil Code. The said article circumscribes his powers to the terms of his appointment, which reads thus:

A fiduciary who is not appointed by the court shall be appointed by a duly authenticated notarial document which shall contain the terms of his appointment.

Therefore it is clear that by the provisions of the said two articles of the Civil Code that the fiduciary is authorized to hold, manage and administer the property, and in the execution of his duties he is called upon to do so with the diligence, honesty and in a businesslike manner of a sole owner of the property. He is not empowered to act as sole owner in disregard of the co-owner's advice directions.

Article 825 of the Civil Code lays down the obligations of the fiduciary, "to follow such instructions, directions and guidelines as are given to him in the document of appointment ...."

The appointment of the fiduciary by the two co-owners is by exhibits I (1) and I (2) and the instructions, directions and guidelines given in the two documents are identical and are as follows:

With power to sell, transfer or charge the above titles and with all the powers, rights and privileges and duties under the Code.

It is seen from the above that the fiduciary has no instructions from the co-owners to claim damages or arrears of rent that constitute the intervener's demand, when one of the co-owners in open court has expressed her objection to the said claim before the court.

The Court has already held that the co-owner who did not testify before the Court, that is the defendant, is not entitled to the claims made by her in her counterclaim. As the claim pertains to the co-ownership in relation to which the fiduciary is before the Court, there can be no claims that can be made by the fiduciary for periods before his tenure of office commenced.

There is no evidence before the Court that since he assumed the office of the fiduciary of the co-ownership that any rents have been paid to the plaintiff for any claims to arise. Where the future is concerned it is for the fiduciary to act and demand rent in the ordinary course of business from tenants before he could claim rent for past periods.

The order of the Court for an inhibition to be registered in respect of parcel of land title V5410 was made on the basis of the plaintiff's claim. Hence with the dismissal of the plaintiff's case, the intervener becomes entitled to an order for the withdrawal of the inhibition. I therefore make the order accordingly.

However subject to the aforesaid order for the withdrawal of the inhibition for the reasons stated earlier, the intervener's demand is also dismissed.

**Record: Civil Side No 142 of 1995**