

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2017/0135

IN THE MATTER OF RECTIFICATION OF AN INSTRUMENT OF TRANSFER OF UNDIVIDED SHARE

AND

**IN THE MATTER OF THE RECTIFICATION OF THE LAND REGISTER IN RESPECT OF THE ROAD
TOWN REGISTRATION SECTION BLOCK 2837F PARCEL 39**

BETWEEN

**CLEMENT DONOVAN
(ATTORNEY FOR CONSTANCE I. HOVIS, PERSONAL REPRESENTATIVE OF
EDMUND GREGORY HAIG DONOVAN)**

Claimant

AND

**[1] ADINA WHITROD
[2] MARTIN WHITROD**

Defendants

Appearances: Mr. Lewis Hunte QC, and Ms. Christina Hart, Counsel for the Claimant
Ms. Marie-Lou Creque, Counsel for the Defendants

2020: 16th April

Re-issued 11th May, 2020

JUDGMENT

[1] **Ellis J:** This claim commenced with a re-amended Fixed Date Claim Form in which the Claimant who brings the action in his capacity as attorney for Constance I. Hovis, the Personal Representative of Eric Donovan seeks the following relief:

1. A declaration that on the interpretation of Instrument No. 1798/2000, the First Defendant is not entitled to any interest in Block 2837F Parcel 39 located in Road Town Registration Section other than a $\frac{1}{3}$ share transferred to her or alternatively rectification of Instrument entitled "Transfer of Undivided Share" and registered in the

Land Register as Instrument No. 1798/2000 by deletion of the final paragraph thereof, it being contradictory to the recitals and operative part of the Instrument. .

2. Rectification of the Land Register under section 140 (1) of the Registered Land Ordinance in respect of Block 2837F Parcel 39 in the Road Town Registration Section to reflect:
 - a. Adina Whitrod and Martin Whitrod as joint proprietors of $\frac{1}{3}$ share of the parcel; and
 - b. Constance I. Hovis as registered proprietor of $\frac{2}{3}$ share of the same parcel in her capacity as personal representative of Eric Donovan.

there being a mistake in the interpretation of Instrument No. 1798/2000.

3. An order that the Defendants pay over to the Claimant's lawyers on behalf of the Claimant, all sums collected by the Defendants as rent in respect of Claimant's interest in Block 2873F Parcel 39.
4. An injunction restraining the Defendants whether by themselves, their servants or agents or otherwise howsoever from entering on the lands comprised in the estate of Eric Donovan and/or demanding rents from anyone in occupation of the same.
5. Costs.

THE FACTUAL BACKGROUND

- [2] The proprietary history of Block 2837F Parcel 39 ("the Property") is inimical to the disposal of this claim. The record reveals that at the time that the land adjudication record was compiled, the Property was registered in the names of the following persons in equal shares:

Winston Herbert Donovan ("Winston")
Albert French Donovan ("Albert")
Eric Haig Donovan ("Eric")
Adina Melvina Donovan ("Adina")

- [3] Winston died first leaving no spouse and no issue surviving him. It is not disputed that on his death Winston's undivided share would have passed to his surviving siblings Albert, Adina, and Eric in equal shares making them three owners in common.
- [4] Thereafter, Albert, Eric and Adina, who survived Winston, engaged the services of Ms. Myrna Herbert, a person who purported to carry out legal services but who was not academically or professionally qualified to do so. Intending to "settle" the Property between them, this unqualified

non lawyer drew up a document entitled “**TRANSFER OF UNDIVIDED SHARE**” dated 24th February, 2000 which was duly executed and recorded in the Land Registry as Instrument No. 1798/2000. It is this Instrument that forms the subject matter of this case and it is before the Court for interpretation.

[5] The recitals of Instrument No. 1798/2000 state as follows:

1. “**ALBERT FRENCH DONOVAN and ADINA MELVINA DONOVAN and ERIC HAIG DONOVAN** (hereinafter **ALBERT DONOVAN, ADINA DONOVAN and ERIC DONOVAN**) on our own behalf and as personal representatives of Winston Donovan, deceased are owners in common and the registered proprietors of the above-mentioned parcel;
2. **ALBERT DONOVAN** is desirous of transferring his undivided ($\frac{1}{3}$) share in the above parcel to his daughter, **ADINA DONOVAN WHITROD**;
3. and (*sic*) **ADINA DONOVAN and ERIC DONOVAN** are desirous of owning their ($\frac{1}{3}$) share in the above parcel as joint proprietors.”

[6] The operative part of the document then follows with Albert transferring to his daughter Adina Donovan Whitrod “*all my right title and absolute interests comprised in the abovementioned parcel **TOGETHER WITH** the newly constructed two (2) storey dwelling house more particularly described as Lot 1 on the plan prepared by Skelton Surveying Services Ltd annexed hereto.*”

[7] The operative part concludes with Adina Donovan and Eric Donovan transferring to themselves jointly their interests in the said parcel “***TOGETHER WITH** the old family dwelling house thereon situate*” and described as Lot 2 on the plan.

[8] No other transfer of title is contained in the Instrument, however, appended to the operative part is the following declaration:

“The **WITHIN** named **ADINA DONOVAN WHITROD and ERIC DONOVAN** hereby declare that we hold the land as joint proprietors.”

[9] Eric Donovan executed his last Will and Testament on 21st January, 2011 and disposed of the entire $\frac{2}{3}$ share he owned jointly with Adina Donovan. This Will was prepared by a firm of lawyers not involved in this case. It made no devise to Adina Donovan Whitrod. It should be noted that when Eric made his Will, his sister Adina, was still alive. Adina Donovan subsequently died

intestate. It appears that this devise was made on the basis that he and Adina Donovan were the only joint proprietors of the $\frac{2}{3}$ share.

CLAIMANT'S CASE

- [10] The Claimant submitted that the so-called problem with Instrument No. 1798/2000 is that its recitals and its operative part sets out the intention of the Parties which is then contradicted in the final paragraph. Counsel for the Claimant in identifying the contradiction noted that the first paragraph of the recitals state how the parcel is owned; the second paragraph of the recitals states what Albert Donovan intended to do with his share; and the third paragraph of the recitals states how Adina Donovan and Eric Donovan intended to hold their share. He further noted that the operative part of the document then proceeds to give effect to the intention of the Parties as set forth in the recitals:

(a) Albert Donovan transferred his $\frac{1}{3}$ share to his daughter Adina Whitrod; and

(b) Adina Donovan and Eric Donovan transferred to themselves jointly the remaining shares to which they were entitled.

- [11] In Counsel's words, the offending part of Instrument No. 1798/2000 which is set out in the final paragraph runs contrary to and contradicts everything that precedes it. It provides that:

"The WITHIN named ADINA DONOVAN WHITROD, ADINA WHITROD AND ERIC DONOVAN hereby declare that we hold the land a joint proprietors"

- [12] Counsel for the Claimant noted that the only Parties to Instrument No. 1798/2000 were Albert Donovan; Adina Donovan and Eric Donovan. He argued that nowhere is there anything in the Instrument that suggests that Adina Donovan Whitrod was a party to it. He submitted that she therefore should not have executed the document. Counsel further argued that Adina Donovan Whitrod would not have had the capacity to declare that she holds any part of the property as joint proprietor or otherwise. For these reasons he submitted that the final paragraph of Instrument No. 1798/2000 is void and of no effect.

THE DEFENDANTS' CASE

- [13] The Defendants did not file any evidence in answer to the Claimant's Re-Amended Fixed Date Claim Form. However, in the Affidavit of Adina Whitrod filed in answer to the original Fixed Date

Claim Form she asserts that the recitals are not at odds with the ultimate sentence in Instrument No. 1798/2000.

- [14] Counsel for the Defendant referred the Court to **Megarry & Wade's Law of Property**¹ which describes two types of recitals:
- (a) *Narrative recitals, which deal with such matters as how the vendor became entitled to the land; and*
 - (b) *Introductory recitals, which explains how and why the existing state of affairs is to be altered, e.g. that the parties have agreed on the sale of the property.*
- [15] Counsel submitted that the recitals, at paragraph (1), state both the history of how the parties hold the land and at paragraphs (2) & (3) state how each party intends to give/hold their interest as against each other.
- [16] The recitals are then given effect by Albert transferring his interest to his daughter; the First Defendant, and by Adina and Eric stating that they no longer own their interest in common but as joint tenants, and as against all three, that they all hold their interest jointly. In other words, she submitted that Albert transferred his $\frac{1}{3}$ interest in common to his daughter, the First Defendant. Adina and Eric transferred their $\frac{1}{3}$ interest in common to each other as joint tenants. Finally, the First Defendant, Adina and Eric then declared they no longer held the whole property as tenants in common but as joint proprietors.
- [17] Counsel invited the Court to accept the First Defendant's evidence as she is the only remaining party to Instrument No. 1798/2000 who is alive and can speak to the intention of the parties. She noted quite rightly, that the Claimant was unable to provide any firsthand evidence on these matters.
- [18] The First Defendant's evidence is that the Parcel has two houses on it. The pink house completed in 1997 and occupied by her father, while the blue house was occupied by her aunt Adina and uncle Eric. Sometime in 1999 her aunt Adina invited her to a meeting in which her uncle Eric and Ms. Myrna Herbert were present. At that meeting she states that her aunt and uncle explained to her that they wanted to ensure that they have security for their accommodation during their lifetime.

¹ Op cit, Para. 8-040, page 277

According to her, they wanted to ensure that she and the second defendant did not “kick them off the property”. The legal options were explained by Ms. Herbert. She explained the difference between joint proprietorship and tenancy in common and she recommended that the joint proprietorship was the way to go and they all agreed to this. She reiterates that they all agreed that the “last man standing would get the property” or the “whole kit and caboodle” and that way no one has more or less rights than anyone else. The meeting ended with the understanding that Ms. Herbert would draw up the papers for their signature.

- [19] The papers were prepared about 1 week later. A sketch was attached to the Instrument which was to show who occupied which house. At paragraph 16, the First Defendant states that she always understood that:

“... my Aunt Adina and Uncle Eric owned Parcel 39 with my father. My father gave me his interest. Thus, I owned Parcel 39 with Aunt Adina and Uncle Eric. When Aunt Adina dies, I owned Parcel 39 with Uncle Eric. When Uncle Eric dies, I owned Parcel 39 and subsequently transferred it to my husband Martin, the Second defendant and myself and also as joint proprietors.”

- [20] The First Defendant concluded that she was not operating under mistake or conducting any fraud when she signed the Instrument. She also concluded that her aunt and uncle were equally cognizant of what they were signing and that what was intended was being carried out.

- [21] Counsel argued that while Instrument No. 1798/2000 does not strictly adhere to the form prescribed in the Registered Land Rules, the Instrument contains the declaration that the parties hold the land as joint proprietors. In those premises, there was no need for the Registrar to have considered that there was a mistake in the form or that he mistakenly recorded and entered that the parties held the Property as joint proprietors. The First Defendant submitted that there was no mistake, neither in the intention, and express statements, of the parties or by the Registrar in the process of the registration.

- [22] Counsel therefore concluded that the Claim has not met the threshold as stipulated by section 140 of the Registered Land Ordinance as there was no mistake. Once the Defendants were registered as proprietors of the Property, Counsel submitted that they have an absolute title thereto.

GENERAL

- [23] The Claim here seeks the rectification of the land register pursuant to section 140 of the Registered Land Ordinance. This claim for relief is pursued on the basis that the purported transfer (Instrument No. 1798/2000) is irregular and in need of rectification. It follows that the following issues arise for determination.

A. Whether Instrument No. 1798/2000 should be rectified?

B. Whether the land register for Block 2837F Parcel 39 should be rectified for mistake under section 140 of the Registered land Ordinance?

Whether Instrument No. 1798/2000 should be rectified?

- [24] In the case at bar, the Claimant asserts that due to an error and by way of a mistake common to all the parties thereto Instrument No. 1798/2000 did not accord with the said agreement or the true intention of the parties in that it effectively resulted in the transfer to the First Defendant of more than a $\frac{1}{3}$ share in the Property.

- [25] The Defendants on the other hand contends that Instrument No. 1798/2000 is a true representation of the intention of the parties in that the Parties fully intended that the Property would be held in joint proprietorship so that the "last man standing would get the property" or the "whole kit and caboodle.

- [26] As a matter of general principle, on completion, a transfer of property is at an end and can only be re-opened within certain well defined limits. In the context of a sale of land transaction, the finality of conveyance was explained in **Allen v Richardson**² by Malins VC in the following terms:

"I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase-money and is put into possession, there is an end to all as between him and the vendor on that purchase. If it were otherwise, what would be the consequence? A man sells an estate generally because he wants the money; if this were not the rule, he must keep the money at his banker's, and there never would be an end to the question..."

² (1879) 13 Ch. D. 524 at 541

[27] Equity however, assumes jurisdiction in a proper case to rectify conveyances, leases, voluntary deeds, contracts and other written instruments. After considerable uncertainty on the point, it is now clear that a claimant can claim rectification of such instruments. While at first blush the granting of such relief may appear inconsistent with the general legal principle which proscribes variation of written contract with parole evidence, in practical terms once rectification is ordered, the written agreement does not continue to exist with a parole variation; it is read as if it has been originally drawn in its rectified form and it is the amended written document of which specific performance is decreed.

[28] The conditions for the exercise of this power are now well defined. Warrington LJ in **Craddock Brother Ltd. v Hunt**³ explained the position in the following terms:

“The jurisdiction of courts of equity in respect of the rectification of documents is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions of its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed on, or omitted something which was agreed on, or otherwise departed from its terms.”

[29] Counsel for the Claimant submitted to this Court that the Defendants are obliged in their defence to demonstrate how the intention of the parties in Instrument No. 1798/2000 is to be ascertained. However, contrary to the Claimant’s submissions, it is clear that in an application to rectify, the burden of proof is on the party seeking rectification and he must produce proof of the inaccuracy of the initial document and the accuracy of the proposed rectified document: **Fowler v Fowler**⁴. In **Joscelyne v Nissen**⁵ the court referred to ‘convincing proof’ but the House of Lords has confirmed that there is only one standard of proof to be applied in all civil cases which is the balance of probabilities.

[30] In the text **Private Rights of Way**⁶ the learned authors outlined the principles of rectification. At page 129 the learned authors opined:

“Generally, the remedy of equitable rectification is available in the following circumstances:

³ [1923] 2 Ch 136 at 159

⁴ (1859) 4 De G & J 250

⁵ [1970] 2 QB 86

⁶ Smith, Francis, Jessel and Shaw (2012) Jordan Publishing Limited

- (a) There is a written instrument;
- (b) Which fails to record with the true agreement between the parties;
- (c) Which failure to record arose either:
 - (i) from a common mistake (sometimes. 'mutual' or 'bilateral mistake');
 - or
 - (ii) from a mistake by one party which the other remained silent about as to profit therefrom ('unilateral mistake'); and where no other remedy is suitable to correct the mistake."
- (d) Where no other remedy is suitable to correct the mistake."

[31] To obtain rectification it is not necessary to show that there was a concluded contract prior to the written contract of which rectification is being sought. However, there must have been a continuing common intention regarding the particular provision at the moment of execution: **Joscelyne v Nissen**. As a matter of evidence, as distinct from strict legal requirement (which the older cases required), there must be an 'outward expression of accord' between the parties.⁷

[32] In **Fowler v Fowler**⁸, the court clarified that:

"..... it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify... The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I think I shall continue to exercise the jurisdiction which Clauson J., as I think rightly, held might be entertained by this court."

⁷ Munt v Beasley [2006] EWCA Civ. 370

⁸ (1859) 4 De G & J. 250; 45 E.R. 97 at page 106

- [33] However, the caution with which this task is to be approached is well known. In **Murray v Parker**⁹ the Master of the Rolls (Sir John Romilly) opined:

“In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; if there has been no previous agreement in writing, parol evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it, in the same manner as to other cases where parol evidence is admitted to explain ambiguities in a written instrument.”

- [34] In **Fowler v Fowler**¹⁰, the instrument sought to be rectified was a deed. Lord Chelmsford C held that for the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution, and a denial by one of the parties that the deed as it stands was not according to his intention at the time ought to have considerable weight.

- [35] The Court is also guided by the dictum of Simonds J. in **Crane v Hegeman-Harris Co. Inc**¹¹:

“Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as ‘irrefragable’ that the a court can act.” The Court referred to the following passage: “For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was.”

- [36] There is no doubt that this is a difficult task for any claimant. At page 106 of the judgment in **Fowler v Fowler**, the court highlighted this in the following terms:

“Upon the question of rectifying a deed, the denial of one of the parties, that it is contrary to his intention, ought to have considerable weight. Lord Thurlow, in **Irnham v. Child** (1 Bro. C. C. 93), says “The difficulty of proving there has been a mistake in a deed is so great, that there is no instance of it prevailing against a party insisting that there was no mistake.”

⁹ (1864) 19 Beav. 305

¹⁰ (1859) 4 De G & J. 250; 45 E.R. 97 at page 106

¹¹ (1939) 1 ALL E.R. 662 at 664

And Lord Eldon in *Marquis of Townshend v Stangroom* (6Ves. 334) after observing that Lord Thurlow seemed to say that the proof must satisfy the Court what was the common intention of all the parties, adds "And it must never be forgot to what extent the Defendant one of the parties, admits or denies the intention.

[37] Applying this approach, the court in that case was compelled to decline the relief, concluding:

"Under all these circumstances therefore, I cannot bring myself to the conclusion that the schedule is contrary to concurrent intention of both the parties, and I must therefore decline to hazard the exercise of a jurisdiction by which I might be imposing a different agreement upon one of them at least from that which he has deliberately executed."

[38] In order to obtain the relief claimed, the Claimant herein must therefore establish by convincing proof that by some common mistake in drafting, the subsequent written document does not accurately express their prior agreement. He must prove the existence of mistake. He must establish that the alleged intention continued concurrently in the minds of all parties down to the time of execution of the Instrument.

[39] In the case at bar, the Claimant asks this Court to recognize the real intention of the parties in Instrument No. 1798/2000 as gleaned from the recitals of Instrument No. 1798/2000; the operative part of the same instrument; and the fact that the last surviving party to the Instrument, namely, Eric Donovan made a Will. Counsel for the Claimant also commended to the Court paragraphs 11 & 12 of the Claimant's first affidavit which contains details of a conversation that Clement Donovan had with Eric Donovan. He avers that:

"11. After the death of Adina Donovan, Eric Donovan told me that the family house was now his and that he would make his Will and give me a share in the property."

12. Eric Donovan made his Will, appointed his niece Constance I Clovis his Executrix and named me as beneficiary in his Will, just as he promised that he would. I am the person who took him to the lawyer to make his Will. From my conversation with Eric Donovan it was clear to me that by Instrument No. 1798/2000 the parties thereto intended that the survivor of Eric and Adina would be the sole owner of $\frac{2}{3}$ of the part of Parcel 39 of the family dwelling house."

[40] In his Second Affidavit, the Claimant recounts the same evidence. He also sets out the benefit of legal advice which he received in respect of this matter. At paragraphs 10 – 12 he states:

"10. Mr. Hunte pointed out to me and I believe that there are only two act of transfer in Instrument No. 1798/2000, namely, the transfer to Adina Whitrod of her father's $\frac{1}{3}$ share and the transfer to Adina and Eric of their shares to be held by them as joint proprietors.

11. Mr. Hunte further explained to me and I do believe that a person can only hold property jointly with other person if they have title to that property and that Adina Whitrod only has title to the $\frac{1}{3}$ share given to her by her father, Albert. Adina and Eric did not transfer any interest in their $\frac{2}{3}$ share to Adina Whitrod.

12. It is my understanding that the final paragraph of Instrument No. 1798/2000, is not a transfer whereas the two paragraphs that precede are transfer. Moreover, the transfer to Adina Whitrod by her father is an absolute transfer of a $\frac{1}{3}$ share and not subject to any joint tenancy."

[41] Rectification is available where the words used in the contract do not record accurately what the parties have agreed or where the legal effect of the words used was not what the parties had agreed. In **Colebrook's Conveyances, Re, Taylor v Taylor**¹² three conveyances conveyed farmland to the plaintiff and his son as joint tenants. In 1962 the son died and the land devolved on the plaintiff as the surviving joint tenant. He thereupon became accountable to the Revenue for estate duty in respect of his son's share in the land. The plaintiff contended however that the conveyances did not accurately represent the agreement of the parties at the date when they were executed and he asked the court to rectify the three conveyances to give effect to the true intention of the parties by substituting the words 'tenants in common' for the words 'joint tenants'.

[42] In considering whether the evidence showed that the intention was that the conveyances should have conveyed the land to the purchasers as tenants in common rather than as joint tenants, the court noted that both the plaintiff and defendants are, therefore, here contending that a rectification order should be made. The court noted that it was some 18 years after the event, and the parties only had a vague recollection as to what actually happened when the conveyances were drafted and signed. It determined that cross-examination on this aspect of the matter would be unlikely to elucidate the position at all. On the other hand, the Court found that from the written evidence, the plaintiff and his son intended that each half share of the land in question should pass on death to their respective estates and that the right of survivorship should not apply. The court concluded that evidence was quite strong enough to discharge the heavy burden of proof which is required in such cases.

¹² [1973] 1 ALL E.R. 132, [1972] 1 WLR 1397

- [43] It bears repeating that the only remaining party to the Instrument who is alive and who can speak to the intention of the parties is the First Defendant. The Claimant produced no direct evidence as to the intention of the Parties prior to and when the Instrument was executed. There was no previous agreement in writing that was produced. Neither was there any evidence of prolonged negotiation, or indeed any direct parole evidence to show what the agreement really was. Instead, the Claimant relies on the fact that Eric purported to devise Parcel 2837F Parcel 39 in his Will dated 21st January 2011.
- [44] For several reasons, the Court is not persuaded that this evidence satisfies as convincing proof that there was some common mistake in drafting the Instrument. First, in his Will Eric Donovan purports to devise what he describes as “...*my property located in Tortola and which is described in the Register of Lands as Road Town Registration Section Block 2837F Parcel 39 to my niece Constance I. Hovis, my cousin Clement Donovan and my nephew Elton Harrigan to be held by them jointly.*” Even if the Claimant’s evidence is accepted, as at the date of this Will, by no stretch of the imagination could Eric Donovan be said to be sole proprietor of that Property. He would have on the Claimant’s case only been entitled to an undivided share in the Property.
- [45] Counsel for the First Defendant has asked this Court to note that Adina Donovan died on 13th March 2012. It follows that Eric Donovan executed his Will prior to Adina Donovan’s death. She submitted that at the time he made his Will, the gift of the property contemplated therein, would fail, as it was not his to give.
- [46] Second, accompanying Instrument No. 1798/2000 was a rough sketch of the Property which indicates that there were two buildings on the Property. It appears to be common ground between the Parties that the pink house was occupied by the First Defendant’s deceased father prior to his death, while the blue house was occupied by her deceased aunt and uncle, Adina and Eric. Although the land on which the building stood was held in undivided ownership, the Parties were content to refer to the portion of the Property on which the pink two story dwelling house stood as Lot 1 (controlled by the First Defendant’s deceased father and intended to be transferred to her in paragraph 2 of the Instrument) while the portion of land occupied by the blue old family dwelling house is referred to as Lot 2 (controlled by the First Defendant’s aunt and uncle). It is also clear from the Instrument that the Parties considered these buildings to be separately owned and

capable of being independently alienated despite the fact that they occupied one parcel of land which was held in common. Counsel for the First Defendant submitted that if the Court were to ascribe a $\frac{1}{3}$ & $\frac{2}{3}$ ownership of the Property, given the location of the buildings, the $\frac{2}{3}$ owner, Estate of Eric Donovan, would own a portion of the pink house. This would make nonsense of the ownership as it is accepted by the Claimant that the pink house was owned by the First Defendant's deceased father and transferred to her in this *inter vivos* gift.¹³ Counsel argued that there is nothing to suggest that the sketch depicts Lot 2 as being $\frac{2}{3}$ bigger than Lot 1 and so it is reasonable to accept the First Defendant's evidence that the intent of the Instrument No. 1798/2000 was to ensure no-one would be "kicked off"¹⁴ and once they all owned the Property jointly.

[47] The Claimant's evidence does not allege that there was any fraud committed by any party. In the same way the Claimant does not contend that the Parties were labouring under any mistake when they executed the Instrument. Clearly, he could not speak to this because he was not present at the material times. Instead, he asks the Court to infer that there was a mistake at least on the part of Eric who later proceeded to make a devise in his Will in which he purported to dispose of the entire parcel as if it were solely owned by him. In the Court's judgment this is an incongruous basis upon which the Court could be asked to intervene after the completion of the agreement and its subsequent registration.

[48] The Claimant essentially relies on legal advice which was not received by the parties to the Instrument. It is legal advice rendered to him as a potential beneficiary of the estate of Eric Donovan which advice seeks to reconcile the Instrument with the purported devise under the Will. To the extent that it attempts to speak to the intentions of the Parties at the time of execution, that legal advice can provide no more than surmise and conjecture as there was no preliminary documentary evidence prior to the formal instrument. Counsel for the First Defendant has argued that the Claimant cannot be permitted to use such legal advice as the basis to infer the intention of parties, when there is no attempt to establish the true intention of the parties at the time of execution as to how they intended to hold the land. The evidence of the legal practitioner cloaked in the words of the Claimant is not evidence of what in fact transpired to support the claim.

¹³ Paragraph 10 of the Claimant's Affidavit

¹⁴ Paragraph 10 of the First Defendant's Affidavit

[49] This Court agrees. The legal position is clearly summarized and reiterated by the learned authors of **Halsbury's Laws of England** in the following terms:

"Rectification will [] not be granted in order retrospectively to impute an intention that was not present at the time the instrument was executed, nor so as to make a document do something other than that which was intended at the time of its drafting, even if that other thing would be more in keeping with the draftsman's intentions or it would in fact be impossible to do what the document attempted to do."¹⁵

[50] Case law makes it plain that a claimant has a heavy burden to provide convincing proof of continuing common intention of *all parties* at the moment of execution. The Court has taken into account that the document was not drafted by a qualified legal practitioner. However, this would not *without more* preclude its validity.

[51] It is as clear as it can be on its face that the impugned clause purports to declare that the Adina Donovan Whitrod, Adina Donovan and Eric Donovan were beneficially interested in the Property as joint tenants, not tenants in common. There is no evidence that the parties did not have the benefit of professional legal advice when they individually executed the document. Indeed, the documentary evidence speaks to the contrary. It appears that in the case of Albert Donovan and Adina Donovan Whitrod their signatures were witnessed by a solicitor who certified that they freely and voluntarily executed the instruments and understood its contents. In the case of Eric Donovan and Adina Donovan, their signatures appear to have also been witnessed by a Notary Public¹⁶ with the same certification. In due course, the title was registered in their joint names as joint proprietors. Counsel for the First Defendant submitted that the intention of the parties was therefore crystallized in writing and certified by notarial witnesses such that the parties were deemed to understand what they were signing. This Court is compelled to agree.

[52] Moreover, the Court cannot ignore the compelling evidence of the First Defendant who is the only person who can speak to the common intention of the Parties and who gave credible and forthright evidence before this Court. She has unambiguously stated that it was the intention of the Parties that the last man standing would own the "whole kit and caboodle" but that until then, the Parties would be precluded from kicking each other off the property. Her evidence was not convincingly traversed on cross examination.

¹⁵ Halsbury's Laws of England, 4th Ed. Vo1.32, para. 57, page 4

¹⁶ Section 18 (1) (a) of the Commissioner of Oaths and Notary Public Act No. 7 of 2007 of the laws of the Virgin Islands requires that Notaries Public be legal practitioners admitted to practice in the Virgin Islands

- [53] Rectification is commonly given where a conveyance fails to give effect to the terms of written contract. In those cases, a claimant may be able to succeed merely on proof of the disparity. However, a more onerous burden of proof will usually rest on the shoulders of a claimant seeking to show that the written conveyance does not accord with an antecedent oral agreement. In the case at bar, the Claimant has provided no convincing proof of the parties' intention to hold the Property as tenants in common and it bears repeating that that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was: **Crane v Hegeman-Harris Co Inc**¹⁷.
- [54] The Court is not persuaded that the impugned clause conflicts with or is at cross purposes with the operative parts of the Instrument. The declaration contained in the final clause does not purport to pass title to the First Defendant. Her title derives from the first operative clause in which her father transferred his undivided share of the Property to her in consideration for natural love and affection. Having read and heard the evidence of the First Defendant, it is clear that the clause was intended to make clear that the parties, who would have been vested with ownership of the Property by virtue of the operating parts of the Instrument, were desirous of holding the property in undivided shares as joint tenants.¹⁸ No doubt this was intended to comply with section 100 of the Registered Land Ordinance which prescribes that every instrument made in favour of two or more persons and the registration giving effect to it shall show whether such person are joint proprietors or proprietors in common. The fact that no specific shares are ascribed to any of the parties is further confirmation that a tenancy in common was not intended.¹⁹
- [55] The Instrument may have been inelegantly drafted. However, the fact that it conflates several transactions in one instrument strengthens the Defendant's contention that the parties were trying to achieve joint tenancy which would have required unity of title and time. While it may not have followed the typical form, the Instrument was clearly regarded as valid by the Registrar of Lands who then proceeded to record its terms in the land register. Notwithstanding its lack of sophistication, the court has no doubt that it reflected the common intention of the parties.

¹⁷ [1939] 1 ALL E.R. 662 per Simonds J

¹⁸ Similar drafting applied in *Wilson v Wilson* [1969] 3 ALL E.R. 945

¹⁹ Section 100 (1) (b) prescribes that the share of each proprietor must be set in every instrument made in favour of two or more persons

[56] Consistent with the principles outlined in the authorities above, the Court has examined the evidence in this case in order to determine the common intention of the parties prior to the execution of the Instrument. This Court has borne in mind during this exercise the fact that the real agreement or intention of the parties could be evidenced by both written and parole evidence. All parties save the First Defendant, having died, direct evidence of the factual background known to the parties at or before the date of the instrument including evidence of the "genesis" and objectively the "aim" of the instrument²⁰ was obtainable only from the First Defendant. Counsel for the Claimant has described her evidence as subjective and self-serving. Having had an opportunity to observe her demeanor under cross examination, this Court is satisfied that her testimony was cogent and truthful. As per Lord Thurlow, in **Irnham v. Child** the claimant faced with a party to the instruments who insisted that there was no common mistake. In the face of this challenge he failed to discharge his burden of proof to prove otherwise. In light of this, the Court finds that the common intention of the parties was expressed in the Instrument No. 1798/2000 and what was conveyed to the Claimants therein was what the parties intended.

[57] Having determined that the Claimant has failed to prove on a balance of probability that provisions of the instrument are irreconcilable and having failed to prove that the common intention of the parties was other than that which was clearly stated in the Instrument, the Court does not need to go on to consider the claim for rectification of the land register which was sought in the Fixed Date Claim Form.

[58] The Claimant does however seek an account for rents collected by the Defendants in respect of the Claimant's interest in Parcel 39. At paragraph 20 of his second affidavit, he explains the claim in the following terms:

"The Defendants have collected an unknown quantity of rent from tenants in occupation of a building on Parcel 39 and which I truly believe is the property of the estate of Eric Donovan and I seek the payment of the same over to Constance I. Hovis, the personal representative."

²⁰ *Prenn v Simmons* [1971] 3 ALL E.R. 237

[59] For the reasons which I have already indicated, the First Defendant became the sole proprietor upon the death of Eric Donovan on 25th June 2015 by operation of the right of survivorship. Consequently, she is legal and beneficially entitled to all rents collected on the property. It is not clear to the Court that any claim is being maintained in respect of rents collected prior to the death of Eric Donovan and so this claim for account is accordingly denied.

[60] **The Court therefore orders:**

- i. **The Claimants' claim is dismissed.**
- ii. **The Defendant will have their costs assessed on a prescribed basis.**

Vicki Ann Ellis
High Court Judge

By the Court


(As Dep.) Registrar