

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2020/0003

BETWEEN:

CLEMENT DONOVAN
(Attorney for Constance I. Hovis
Personal Representative of Edmund Gregory Haig Donovan)

Appellant

and

[1] ADINA WHITROD
[2] MARTIN WHITROD

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Lewis Hunte, QC with him Mr. Paul Edwards for the Appellant

Ms. Marie- Lou Creque for the Respondents

2020: November 23;

2021: June 4.

Civil appeal – Interpretation of instrument of conveyance – Whether learned judge misdirected herself as to the nature of the appellant’s claim – Whether learned judge applied correct legal principles in interpreting instrument – Admissibility of extrinsic evidence – Extrinsic evidence is not admissible to determine the intention of the parties save for an action for rectification – Instrument to be read as a whole – Plain meaning of the language in an instrument does not lead to an absurdity – Section 100 of Registered Land Ordinance – Requirement to state in the instrument whether persons are joint proprietors or proprietors in common

Winston Herbert Donovan (“Winston”), Albert French Donovan (“Albert”), Edmund Gregory Eric Haig Donovan (“Eric”), and Adina Melvina Donovan (“Adina”) were siblings and the registered owners in equal shares, of a parcel of land (“the Property”). There are two houses situated on the Property. A house painted pink which was occupied by Albert and a house painted blue which was occupied by Eric and Adina.

Winston was the first sibling to pass away, leaving no spouse or issue. In 2000, the surviving siblings, Albert, Eric and Adina, agreed that Albert would divest himself of his interest in the Property. To do this, they engaged a non-lawyer who prepared an instrument of conveyance entitled ‘TRANSFER OF UNDIVIDED SHARE’ (“the Instrument”). This was executed and was subsequently registered at the Land Registry. The Instrument stated that Albert agreed to transfer his share to his daughter Adina Whitrod, the first respondent, while Eric and Adina agreed to hold their shares as joint proprietors. There was also a declaration at the end of the Instrument, that stated that Adina Whitrod, Eric, and Adina, held the Property as joint proprietors.

In 2001, Eric executed his Will and purported to dispose of the shares in the Property held by himself and Adina, who at this time, was still alive. Both Eric and Adina are now deceased. After their death, Adina Whitrod transferred the entire Property to herself and her husband Martin Whitrod, the second respondent, in equal shares.

Aggrieved, the appellant, who is the representative of the estate of Eric, instituted proceedings in 2017, in the lower court, in which he sought several reliefs including: (i) a declaration that based on the interpretation of the Instrument Adina Whitrod was not entitled to the Property; (ii) the rectification of the Land Register; (iii) an injunction; (iv) an order that the respondents pay to the appellant’s lawyer, all sums collected as rent with respect to the Property; and (v) costs. The respondents resisted this claim, arguing that there was no inconsistency or ambiguity in the wording of the Instrument. The learned judge having heard the evidence and submissions found that the provisions of the Instrument were not irreconcilable, and that the appellant had failed to prove that the common intention of the parties was different than as stated in the Instrument. Having so found, the learned judge dismissed the claim and awarded costs to the respondents.

The appellant being dissatisfied with the learned judge’s decision has appealed to this Court, relying on five grounds of appeal. The main issues that arise for determination before this Court are: (i) whether the learned judge misdirected herself as to the nature of the appellant’s claim; and (ii) whether the learned judge applied the correct legal principles in interpreting the Instrument.

Held: dismissing the appeal; and ordering that each party bear their own costs, that:

1. A review of the claim clearly shows that the learned judge did not identify the main issue in the claim when she purported to identify the issues for determination in her judgment. However, the learned judge did in fact address the main issue, which was the interpretation of the Instrument. While the learned judge placed much emphasis on the issue of rectification, in the process of determining whether there should be rectification, the judge did interpret the Instrument, finding the provisions, including the declaration, to be reconcilable, and that there was no

need to make any determination in relation to rectification. Accordingly, the learned judge did not misdirect herself as to the nature of the appellant's claim.

2. Extrinsic evidence is not admissible to determine the intention of the parties, save for an action for rectification. The intention of the parties is to be determined from the document itself, when read in its entirety having regard to the factual matrix. The evidence of Adina Whitrod, which the learned judge took into consideration, went beyond evidence relating to the factual matrix. The evidence related to the subjective intention of the parties to the Instrument. This evidence, being extrinsic evidence, was clearly inadmissible in interpreting the Instrument. In so doing, the learned judge erred.

Investors Compensation Scheme Ltd v West Bromwich Building Society [1999] All ER (D) 23 applied; **Cherry Tree Investments Ltd v Landmain Ltd** [2013] 2 WLR 481 applied; **Prenn v Simmonds** (1971) 1 WLR 1381 considered; **Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd** [1976] 1 WLR 989 considered; **Irnham v Child** 1 Bro C C 93 considered.

3. The approach of the court is to apply general principles in the interpretation of documents irrespective of the nature of the document. As it relates to instruments conveying property, the court must have regard to the instrument as a whole, including any plan which forms part of it. The court has no power to improve upon the instrument which it is called upon to construe. When the Instrument is read as a whole, it is pellucid that Albert was desirous of giving his interest in the Property, along with the newly built house where he resided, to his daughter Adina Whitrod, while the other two siblings agreed to continue to live in the blue house and hold their interest jointly. Further, where land is held by more than one person, section 100 of the **Registered Land Ordinance** requires that it must be stated in the instrument whether the persons are joint proprietors or proprietors in common. If they are proprietors in common, the share of each party must be stated. The declaration made by Adina Whitrod, Eric and Adina, which they executed before a Notary Public, states very clearly that they hold the Property as joint proprietors. The provisions of the Instrument are not irreconcilable and the plain meaning of the words of the Instrument do not lead to an absurd result. It therefore follows that, in so far, as the learned judge admitted the evidence of Adina Whitrod to ascertain the intentions of the parties, the learned judge was not correct in her application of the principles of interpretation of an instrument of conveyance, albeit the interpretation remains the same as found by the learned judge.

Lovering and another v Atkinson and others [2020] UKPC 14 applied; in **Re Moon, ex parte Dawes** (1886) 17 Q.B.D 275 considered; **Attorney General of St. Lucia v River Doree Holdings Ltd** [2017] UKPC 39 considered; **Attorney General of Belize and others v Belize Telecom Ltd and another** [2009] 1 WLR 1988 applied; Section 100 of the **Registered Land Ordinance** Cap 229 of the Revised Laws of the Virgin Islands applied.

4. Section 100 of the **Registered Land Ordinance** simply requires parties to a transfer to indicate whether the parties are joint proprietors or proprietors in common. If they fail to do so, this does not invalidate the transfer document but rather they would be held to hold the property as proprietors in common. When the judgment of the learned judge is read in context, it is apparent that the learned judge was simply stating that in the absence of specific shares, and where there is a declaration that the parties hold as joint proprietors, then the parties hold as joint proprietors. The learned judge was not seeking to state a principle of law that where no specific shares are ascribed to parties, a proprietorship in common does not arise. The learned judge therefore did not err in construing the effect of section 100 of the **Registered Land Ordinance**.

Section 100 of the **Registered Land Ordinance** Cap 229 of the Revised Laws of the Virgin Islands applied.

JUDGMENT

Introduction

- [1] **THOM JA:** This appeal concerns the interpretation of an instrument of conveyance.

Background

- [2] Winston Herbert Donovan (“Winston”), Albert French Donovan (“Albert”), Edmund Gregory Eric Haig Donovan (“Eric”), and Adina Melvina Donovan (“Adina”) were siblings. They are all now deceased. They were the registered owners in equal shares of a parcel of land registered in the Land Registry as Block 2837 F Parcel 39 (“the Property”). It is common ground that they were not joint proprietors. There are two houses situated on the Property. The house, painted pink and referred to by the parties as “the pink house”, was occupied by Albert. The other house which was painted blue and referred to by the parties as “the blue house” was occupied by Eric and Adina.
- [3] Winston died first, leaving no spouse or issue and around 2000, Albert, Eric and Adina agreed that Albert would divest himself of his interest in the Property. They engaged a non-lawyer to prepare the documentation to give effect to their decision. An instrument of conveyance was prepared entitled ‘TRANSFER OF UNDIVIDED SHARE’ and dated 24th February 2000 (“the Instrument”). The Instrument was executed and registered as Instrument No. 1798/2000, at the Land Registry. The Instrument states that Albert agreed

to transfer his share to his daughter Adina Whitrod, the 1st Respondent, while Eric and Adina agreed to hold their shares as joint proprietors. There is also a declaration at the end of the Instrument that Adina Whitrod, Eric, and Adina held the Property as joint proprietors.

[4] On 21st January 2001, Eric executed his Will and purported to dispose of the shares in the Property held by himself and Adina. At this time, Adina was alive. However, Adina died on 13th March 2012 and was subsequently followed by Eric.

[5] After the death of Adina and Eric, Adina Whitrod transferred the entire Property to herself and her husband Martin Whitrod, the 2nd respondent, in equal shares.

Proceedings in the Court Below

[6] The appellant, who is the attorney for Constance I. Hovis, the legal personal representative of the estate of Eric, instituted proceedings in the lower court in which he sought the following reliefs:

- “ (1) A declaration that on the interpretation of Instrument No. 1798/2000, the First [Respondent] is not entitled to any interest in Block 2837 F 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 2837 F 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 [Respondents] pay over to the [Appellant’s] lawyer on behalf of the [Appellant], all sums collected by the [Respondents] as rent in respect of [appellant’s] interest in Block 2873F Parcel 39.

(4) An injunction restraining the [Respondents"] 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."

[7] In order to outline the basis of the appellant's claim clearly, which is based on the interpretation of the Instrument, it is necessary to outline the terms of the body of the Instrument. It reads as follows:

"WHEREAS

(1) **ALBERT FRENCH DONOVAN** and **ADINA MALVINA DONOVAN** and **EDMUND GREGORY ERIC HAIG DONOVAN** (hereinafter **ALBERT DONOVAN, ADINA DONOVAN** and **ERIC DONOVAN** on our own behalf and as personal representatives for Winston Donovan, deceased are owners in common of and the registered proprietors of the above-mentioned parcel;

(2) **ALBERT DONOVAN** is desirous of transferring his undivided share in the above parcel to his daughter **ADINA DONOVAN WHITROD**;

(3) and **ADINA DONOVAN** and **ERIC DONOVAN** aforementioned are desirous of owning their share in the above parcel as joint proprietors.

NOW THEREFORE witnesseth:

I **ALBERT DONOVAN** in consideration of my natural love and affection for my daughter **ADINA WHITROD** her heirs and assigns **HEREBY TRANSFER** to my said daughter **ADINA WHITROD** all my right title and absolute interest comprised in the above-mentioned parcel **TOGETHER WITH** the newly constructed two (2) story dwelling house thereon situate more particularly described as Lot 1 on the plan prepared by Skelton Surveying Services Ltd annexed hereto.

AND we, **ADINA DONOVAN** and **ERIC DONOVAN** on our own behalf and as personal representatives of the estate of Winston Donovan, deceased **HEREBY TRANSFER** to ourselves jointly our interest comprised in the above-mentioned parcel **TOGETHER WITH** the old family dwelling house thereon situate described as Lot 2 on the aforesaid plan.

THE WITHIN named **ADINA DONOVAN WHITROD, ADINA DONOVAN** and **ERIC DONOVAN** hereby declare that we hold the land as joint proprietors.

Dated this 24th day of February 2000

1. Annexed to the Instrument was a sketch showing Lot 1 with the pink house and Lot 2 with the blue house."

- [8] The respondents' case was that there is no inconsistency or ambiguity in the wording of the Instrument. They submitted that the Instrument reflected the intention of the parties. None of the parties were operating under a mistake when the Instrument was executed and there was no mistake by the Registrar in the registration process, as there was a clear declaration at the end of the Instrument stating the parties held the Property as joint proprietors.
- [9] The learned judge having heard the evidence and submissions and having examined several authorities on the issue of rectification of deeds such as **Fowler v Fowler**;¹ **Crane v Hegeman-Harris Co. Inc.**;² **Munt v Beasely**;³ and **Craddock Brothers Ltd v Hunt**,⁴ found that the provisions of the Instrument were not irreconcilable, and that the appellant had failed to prove that the common intention of the parties was different than as stated in the Instrument. Having so found, the learned judge determined that it was not necessary to decide the claim for rectification. The learned judge dismissed the claim and awarded costs to the respondents.

The Appeal

- [10] The appellant being dissatisfied with the decision of the learned judge appealed on the following grounds:
- (1) The learned judge in paragraph 24 of the judgment misdirected herself as to the nature of the appellant's claims which were based on a mistake in the interpretation of Instrument No. 1798/2000 and not on a common mistake common to all parties.
 - (2) The learned judge having found as a matter of fact that there was no transfer of title to the 1st respondent, erred in law in concluding that she was the sole survivor in a joint proprietorship, thereby entitling her to claim title to the shares held by Adina Donovan and Eric Donovan on their death.

¹ (1859) 4 De G. & J. 250.

² [1939] 1 All ER 662.

³ [2006] EWCA Civ 370.

⁴ [1922] 2 Ch. 809.

- (3) The learned judge erred when she failed to make a specific ruling as to the legal effect of the Declaration at the end of the Instrument, such a ruling being essential to a correct interpretation of the entire Instrument No. 1798/2000.
- (4) The learned trial judge erred in the admission of extrinsic evidence as to the intention of the parties since not only should such evidence not be received but also it is not objective.
- (5) The learned judge misdirected herself regarding the legal effect of the will of Eric Donovan.

[11] I will deal with grounds 1 through 5 together as they relate to the issue of whether the learned judge properly interpreted the Instrument. These grounds cumulatively raise two issues to be determined:

- (a) whether the learned judge misdirected herself as to the nature of the appellant's claim; and
- (b) whether the learned judge applied the correct legal principles in interpreting the Instrument.

Issue 1- Nature of the Claim

[12] Learned counsel for the appellant Mr. Hunt QC, contends that in identifying the issues which arose on the appellant's claim, the learned judge erred when she determined that the issue was one of rectification even though she had earlier determined that the Instrument was before the court for interpretation. Learned counsel referred to paragraphs 4 and 23 of the judgment. These paragraphs read as follows:

"[4]... 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.

...
"[23] The claim here seeks 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 2837 F Parcel 39 should be rectified for mistake under section 140 of the Registered Land Ordinance?”

- [13] Mr. Hunt, QC submits that in so identifying the issues, the learned judge omitted the substantive issue in the claim which was what was the correct interpretation of the Instrument, which indeed the learned judge had identified as the issue earlier in paragraph 4.
- [14] Mr. Hunt, QC further contends that the mischaracterisation of the appellant's case by the learned judge permeated throughout her reasoning in the judgment. The focus of the judgment was in addressing the two issues identified by the learned judge in paragraph 23.
- [15] Ms. Creque for the respondents, acknowledged that the learned judge at paragraph 24 of the judgment misstated the appellant's case. However, she submitted that while the judge addressed the issue of rectification extensively, when the judgment is read in its entirety, the learned judge did address the appellant's case as it relates to interpretation of the Instrument.
- [16] In my opinion, a review of the claim clearly shows that the appellant sought several remedies of which rectification pursuant to section 140 of the **Registered Land Ordinance**⁵ was only one of them. The first remedy sought by the appellant was a declaration which required the court to determine the correct interpretation of the Instrument and alternatively rectification based on equitable principles. I therefore agree with the appellant that, the learned judge did not identify the main issue in the claim when she purported to identify the issues for determination in paragraph 23. It must be noted however, that earlier at paragraph 4 as pointed out by Mr. Hunte, the learned judge did state that interpretation of the Instrument was an issue before the court.

⁵ Cap 229 of the Revised Laws of the Virgin Islands.

[17] What is critical is whether the learned judge addressed the issue of the interpretation of the Instrument and whether in doing so applied the correct principles.

[18] In keeping with the issues which she identified in paragraph 23, from paragraphs 25 to 53, the learned judge addressed whether there should be rectification because of common mistake of intention at the execution of the document. Having determined that there was no common mistake of intention, the learned judge stated the following at paragraphs 54 and 55 of her judgment:

“[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 of 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 operative parts of the Instrument, were desirous of holding the property in undivided shares as joint tenants. No doubt this was intended to comply with section 100 of the Registered Land Ordinance which prescribes that every instrument made in favor of two or more persons and the registration giving effect to it shall show whether such persons (sic) 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.

[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...”

[19] The above paragraphs show that while the learned judge placed much emphasis on the issue of rectification, in the process of determining whether there should be rectification, the learned judge did interpret the Instrument. In her opinion, there was no conflict between the concluding clause, the recitals, and the operative part of the Instrument. The learned judge found that the Instrument reflected their common intention. She made this finding having accepted the evidence of the 1st respondent who was the sole surviving

person who signed the Instrument. The learned judge was of the view that her finding was fortified by the fact that section 100 of the **Registered Land Ordinance** required parties to indicate how they hold their shares and the fact that no specific shares were ascribed shows that they intended to hold the Property jointly. Indeed, in concluding the judgment, the learned judge stated at paragraph 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.”

In this paragraph the learned judge is in my view stating that having interpreted the Instrument and finding the provisions including the declaration to be reconcilable, there was no need to make any determination in relation to rectification. I therefore do not agree with the submissions of Mr. Hunte, QC that the learned judge did not address the main issue which was the interpretation of the Instrument. The learned judge did not ascribe to the Instrument the interpretation that the appellant wanted her to give the Instrument.

Issue 2- Whether the Learned Judge applied the correct principles in interpreting the Instrument

[20] Mr. Hunte, QC contends that the learned judge erred in several ways in interpreting the Instrument. Firstly, the learned judge wrongly admitted extrinsic evidence in interpreting the Instrument; secondly, in interpreting the Instrument, the learned judge was required to apply the principles in **Re Moon, ex parte Dawes**;⁶ **Jenner v Jenner**;⁷ and **Crouch v Crouch**;⁸ thirdly, the learned judge erred in construing the effect of section 100 of the **Registered Land Ordinance**; and fourthly, the learned judge erred in construing the effect of Eric's Will.

Extrinsic Evidence

⁶ (1886) 17 Q.B.D 275.

⁷ (1866) L.R. 1 Eq. 361.

⁸ [1912] 1 K.B 378.

[21] Mr. Hunte, Q.C. contends that the learned judge erred in law by receiving and relying on the subjective evidence of Adina Whitrod for the purpose of ascertaining the intention of the parties when she held at paragraph 54:

“...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 operative parts of the Instrument, were desirous of holding the property as joint tenants.”

[22] Mr. Hunte, QC submits, that the evidence of Adina Whitrod was extrinsic evidence and was therefore inadmissible for the purpose of interpreting the Instrument. Further, Adina Whitrod being a party to the claim, her evidence was not objective. In support of his contention, counsel referred to the following passages in **Prenn v Simmonds**,⁹ and **Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd**.¹⁰ In **Prenn** Lord Wilberforce stated:

“It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively obtained, may be a surrounding fact... And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go... Far more, and indeed totally, dangerous is to admit evidence of one party’s objective — even if this is known to the other party. However strongly persuasive this may be the other party may only be willing to give it partial recognition...”¹¹

And further:

“In my opinion, then, the evidence of negotiations, or of the parties’ intentions... ought not to be received, and evidence should be restricted to evidence of the factual background...”¹²

[23] In **Reardon Smith Line Ltd** Lord Wilberforce stated:

“When one speaks of the intention of the parties to a contract, one is speaking objectively- the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.”¹³

⁹ (1971) 1 WLR 1381.

¹⁰ [1976] 1 WLR 989.

¹¹ (1971) 1 WLR 1381 at 1385.

¹² Ibid.

¹³ Ibid at 996.

[24] Ms. Creque in response submits that the learned judge was entitled to take into consideration extrinsic evidence, in so far, as it relates to the background of the factual matrix of the Instrument. Counsel contended that the evidence of Adina Whitrod which the learned judge took into account, did not relate to any negotiations between the parties, but rather it was related solely to the factual background of the Instrument. Such evidence can be taken into consideration as they are within the principles outlined in the above authorities on which Mr. Hunte, QC relied. Ms. Creque also relied on the following dicta of Lord Hoffman in **Investors Compensation Scheme Ltd v West Bromwich Building Society**¹⁴ which was applied in **Cherry Tree Investments Ltd v Landmain Ltd**,¹⁵ which states:

- “(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was formerly referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase, is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be maintained next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words: The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using these words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally

¹⁴ [1999] All ER (D) 23.

¹⁵ [2013] 2 WLR 481.

happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.”¹⁶

And further:

“The rule that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”¹⁷

- [25] Ms. Creque submitted that when the above principles are applied to this case, the learned judge did not err in relying on the evidence of Adina Whitrod in interpreting the Instrument.

Discussion

- [26] The above authorities show that when interpreting a document, extrinsic evidence is admissible to establish the factual matrix of the document. But extrinsic evidence is not admissible to determine the intention of the parties (as Lord Hoffman stated, the limited exception being in a claim for rectification). The intention of the parties is to be determined from the document itself when read in its entirety having regard to the factual matrix.
- [27] The critical question is what evidence of Adina Whitrod the learned judge relied on in interpreting the Instrument. As stated earlier the learned judge in considering whether the Instrument should be rectified based on common mistake, sought to determine what was the common intention of the parties. In so doing the learned judge relied on several cases dealing with rectification including **Crane v Hegeman-Harris Co. Inc.**, and the case of **Irnham v Child**¹⁸ where Lord Thurlow stated ‘[t]he difficulty of proving that 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.’
- [28] The learned judge dealt with the evidence of Adina Whitrod in paragraphs 52 and 56. In paragraph 52 she stated:

¹⁶ Ibid at 488.

¹⁷ Ibid at 498.

¹⁸ 1 Bro C C 93.

“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.”

[29] And at paragraph 56 she stated further that:

“... 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 instrument was obtainable only from the First Defendant.”

[30] The evidence of Adina Whitrod, which the learned judge took into consideration, went beyond evidence relating to the factual matrix. The evidence related to the subjective intention of the parties to the Instrument. This evidence being extrinsic evidence was clearly inadmissible in interpreting the Instrument. The above passages show that the learned judge gave much weight to this evidence. In so doing, having regard to the principles in **Investors Compensation Scheme Ltd** and **Cherry Tree Investments Ltd**, the learned judge erred. The learned judge having placed much focus on the issue of rectification on the basis of common mistake, fell into error. I agree with the submissions of Mr. Hunte, QC on this issue.

Principles of Interpretation – Re Moon, ex parte Dawes

[31] Mr. Hunte, QC submits that in interpreting the Instrument the learned judge was required to apply the principles in **Re Moon, ex parte Dawes**, **Jenner v Jenner** and **Crouch v Crouch**. Mr Hunte, QC relied on the statement of Lord Esher MR in **Re Moon, ex parte Dawes** where he outlined three principles which should be applied in interpreting an instrument. These are: (a) if the recitals are clear and the operative part is ambiguous the recitals govern the construction; (b) if the recitals are ambiguous and the operative part is clear, the operative part governs the construction; and (c) if both the recitals and the operative part are clear, but are inconsistent with each other, the operative part is to be

preferred. Mr. Hunte, QC submits that in applying the principles in **Re Moon, ex parte Dawes**, when the Instrument is considered, the recitals are not ambiguous as they clearly set out what the parties were seeking to establish. The operative part is also very clear as it gives effect to the details in the recitals. He submits that in view of the clarity of both the recitals and the operative part of the Instrument, applying the principles in **Re Moon, ex parte Dawes** and **Jenner v Jenner** the declaration in the last paragraph of the Instrument was inconsequential in determining the property rights of the parties. Adina Whitrod was only entitled to the one-third share given to her by her father Albert.

- [32] Ms. Creque, in response, agrees that the recitals and the operative part are clear. However, she contends that the declaration in the concluding paragraph of the Instrument is required by section 100 of the **Registered Land Ordinance**. The declaration is clear and is not inconsistent with the rest of the Instrument. It merely states how the parties hold the property. The Instrument dealt not just with the ownership and occupation of the land, but it also declared how the parties hold the land.

Discussion

- [33] The principles in **Re Moon, ex parte Dawes** were applied by the New South Wales Court of Appeal in **Schwartz v Hadid**,¹⁹ where the court was considering the interpretation of a deed of agreement. Meagher JA in referring to **Re Moon, ex parte Dawes** noted that:

“[81] Recitals often set out aspects of the background or the context of the transaction which are the subject of the agreement. Used in that way, they are available to assist in the interpretation of the operative provisions, often recording the object or purpose of the agreement as identified by the parties. However,...ordinarily the recitals do not control the interpretation of the operative provisions when those provisions are clear and unambiguous.”²⁰

- [34] The Privy Council in **Attorney General of St. Lucia v River Doree Holdings Ltd**²¹ took a similar approach in interpreting a lease agreement. At Paragraph 48 the Board stated:

“The Board is quite prepared to accept that a recital may in appropriate circumstances serve as background or as introduction informing or assisting the interpretation of a substantive provision in the Lease. But the two must at least be

¹⁹ 2013 NSWCA 89.

²⁰ Ibid at para 81.

²¹ [2017] UKPC 39.

capable of being read consistently with each other, which is not the case here. ...No ambiguity can be created from a mere recital which cannot consistently be read together with the substantive and operative parts of the contract concerned. The Board has set out the inconsistencies between recital E and clause 9(9) ... In the circumstances preference has to be given to one or the other, and high authority dictates that in such circumstances preference must be given to a substantive provision over a recital.”

[35] The parties agree that the recitals and the operative part of the Instrument are clear and unambiguous. They also agree that the declaration in the concluding paragraph in the Instrument is clear and unambiguous. Their disagreement lies in the effect of the declaration in the concluding paragraph. The learned judge found that the declaration was not in conflict with the operative part of the Instrument. Also, the declaration did not vest title in Adina Whitrod but was in compliance with section 100 of the **Registered Land Ordinance**. The thrust of Mr. Hunte’s submission is that the declaration was of no moment because (a) it did not confer any title as correctly stated by the learned judge in paragraphs 8 and 54 of the judgment; and (b) since it did not confer title, it was inadequate to constitute Adina Whitrod as a joint proprietor. There was no unity of title.

[36] The approach of the court is to apply general principles in the interpretation of documents irrespective of the nature of the document. In **Lovering and another v Atkinson and others**,²² the court, in considering the interpretation of a conveyance, approved the following statement of Brinkley LJ in **Webb v Nightingale**:²³

“When a court is required to decide what property passed under a particular conveyance it must have regard to the conveyance as a whole, including any plan which forms part of it. It is from the conveyance as a whole that the intention must be ascertained.”

[37] When the Instrument is read as a whole, in my view it shows three siblings having lived in separate houses on the Property for several years and having held the Property as proprietors in common. Albert was desirous of giving his interest in the Property along with the newly built house where he resided to his daughter Adina Whitrod, while the other two siblings agreed to continue to live in the blue house and hold their interest jointly. Where

²² [2020] UKPC 14.

²³ (1956) 168 EG 150.

land is held by more than one person, section 100 of the **Registered Land Ordinance** requires that it must be stated in the instrument whether the persons are joint proprietors or proprietors in common. If they are proprietors in common, the share of each party must be stated. Adina Whitrod, Eric and Adina were each entitled to a one-third interest in the Property. The declaration made by the three of them which they executed before a Notary Public states very clearly that they hold the Property as joint proprietors. The provisions of the Instrument are not irreconcilable. The plain meaning of the words of the Instrument do not lead to an absurd result.

[38] It is a well settled principle that where the plain meaning of the language in an instrument does not lead to an absurdity then it is not the role of the court to disregard the plain meaning simply because in so doing the effect of the Instrument would be more equitable. The court is constrained by the language in the Instrument. As Lord Hoffman stated in **Attorney General of Belize and others v Belize Telecom Ltd and another**²⁴ at paragraph 16 ‘...[t]he Court has no power to improve upon the instrument which it is called upon to construe whether it be a contract, a statute or articles of association.’

[39] It therefore follows that, in so far as the learned judge admitted the evidence of Adina Whitrod to ascertain the intentions of the parties, the learned judge was not correct in her application of the principles of interpretation of an instrument of conveyance. However, when the correct principles as outlined in the authorities submitted by Mr. Hunte, QC are applied to the Instrument, the interpretation remains the same as found by the learned judge.

Section 100

[40] Mr. Hunte, QC further submitted that the learned judge fell into error when she misstated the law at paragraph 54 by stating ‘... [t]hat the fact that no specific shares are ascribed to any of the parties is further confirmation that tenancy in common was not intended.’ Learned counsel contends that this statement is contrary to section 100 of the **Registered Land Ordinance** and the principles of equity where there is a presumption of tenancy in common

²⁴ [2009] 1 WLR 1988.

where in the absence of specific shares the parties are regarded as holding their interest as in common. Therefore, if there was no declaration at the end of the Instrument, equity would presume a tenancy in common.

[41] Ms. Creque in response submitted that the learned judge in her statement above was merely stating that in keeping with section 100, which requires that where land is held by more than one person, then the instrument must state how the parties hold the land. The Instrument stated that the parties hold the Property as joint proprietors. It did not ascribe specific shares to any of the parties. Had the Instrument so specified, that would have showed an intention by the parties that they hold the Property as proprietors in common.

[42] I agree with Learned Queen's Counsel that section 100 simply requires parties to a transfer to indicate their shareholding, that being, whether the parties are joint proprietors or proprietors in common. If they fail to do so, this does not invalidate the transfer document but rather they would be held to hold the property as proprietors in common. However, when the statement of the learned judge is read in context, the learned judge was simply stating that in the absence of specific shares, and where there is a declaration that they hold as joint proprietors, then the parties hold as joint proprietors. The learned judge was not seeking to state a principle of law that where no specific shares are ascribed to parties a proprietorship in common does not arise.

Will of Eric Donovan

[43] Under this ground the appellant complains about statements the learned judge made in her analysis in paragraphs 44 and 45 in relation to the Will of Eric Donovan which was executed before the death of his sister Adina Donovan. These statements are firstly at paragraph 44:

"[I]n his Will Eric purports to devise what he described 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 the Will, by no stretch of the imagination could Eric Donovan be said to be sole proprietor of that Property."

Secondly at paragraph 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.”

[44] In my view the submissions relating to the Will of Eric Donovan do not in any way advance the case of the appellant having regard to the central issue raised on the appeal. There is therefore no need to address any issue surrounding the Will of Eric Donovan since it will not in any way impact the resolution of the appeal.

[45] In conclusion, while I agree with Mr. Hunte, QC that the central issue on the claim was the interpretation of the Instrument and that the learned judge erred in considering extrinsic evidence in interpreting the Instrument, when the correct principles, as outlined in the authorities submitted by Mr. Hunte, QC, are applied to the Instrument, the interpretation remains the same as found by the learned judge. The provisions of the Instrument are clear and unambiguous. The declaration is in keeping with section 100 of the **Registered Land Ordinance** and is not irreconcilable with the recitals or operative part of the Instrument. The appeal is therefore dismissed. In view of the fact that both parties had some success, I order that each party bear their own costs.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar