

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2002/0200

**IN THE MATTER OF A NOTICE OF INTENTION TO
APPEAL TO THE HIGH COURT**

BETWEEN:

MYRNA FLAX CHRISTOPHER

And

HAZEL DE CASTRO as Executrix of Osbert Flax

Claimants

AND

THE REGISTRAR OF LANDS

And

THE ATTORNEY GENERAL

Defendants

Appearances:

Mrs. Benedicta Samuels-Richardson for the Claimants

Mr. Baba Aziz, Senior Crown Counsel, for the Defendants

2003: April 7, 9

JUDGMENT

- [1] **RAWLINS, J:** This case comes on appeal from an order that was issued by the Registrar of Lands ("the Registrar") on the 21st day of September 2002. That order granted an application by Rudolph Vanterpool and Clennel Vanterpool ("the Vanterpools") to register a Restriction on Parcel 6 Block 4544A Virgin Gorda Registration Section, to endure until the resolution of terms of how the parcel is to be partitioned or disposed of.

- [2] The decision of the Registrar was made pursuant to **section 132 (1) of the Registered Land Act, Cap. 229 of the Laws of the British Virgin Islands (Revised Edition 1991)** (“the Act”). The section empowers the Registrar to make an order that prohibits or restricts dealings with land, “for the prevention of fraud or improper dealing or for any other sufficient cause”.
- [3] The property upon which the Restriction was placed is an island. It comprises about 28 acres of land. Persons held it as tenants in common. The Vanterpools together hold 11/88 parts of the land. Ivy Flax owns 11/88 parts. She is an elderly person. The Claimants hold 33/88 parts, respectively. Myrna Flax Christopher, the First named Claimant, holds as the Personal Representative of Edwin S. Flax, deceased. Hazel DeCastro, the Second named Claimant, holds as the executrix of the Will of Osbert Flax, deceased.
- [4] In an Affidavit deposed on the 20th day of December 2002, the Registrar stated that the evidence of the Vanterpools is that they were invited to a meeting with prospective buyers. At the time of the meeting, they had not been previously consulted on any negotiations for the sale of the land. It appeared to them that prior negotiations were conducted for the sale of the land without consulting them. The Vanterpools wish the entire property to remain in the hands of the current owners to be developed by them. If the property is sold, they prefer to retain their interest. The Registrar said that it became evident at the hearing that serious differences existed between the Vanterpools and the other proprietors of the property in relation to the disposal of the land. It became clear to him that the land will have to be partitioned in order that the Vanterpools could retain their interest in it. He therefore determined that the Vanterpools had shown that there was sufficient cause for the Restriction to be placed.

The Grounds for the Appeal

- [5] The Claimants base their appeal on the following grounds: -
1. The Restriction compromises their interest in the property.

2. They cannot sell the property without the knowledge and consent of all of the other proprietors and did not attempt to do so, because the Vanterpools were informed that a sale was possible, and were invited to meetings to discuss it.
3. No evidence was adduced to show that the Claimants intended to or attempted to carry out any fraudulent or improper dealings with the property.
4. The Registrar failed to consider relevant factors, including the provisions of **section 102(2) of the Act**.
5. The Registrar failed to consider the numerous attempts that were made by the Claimants to discuss the partitioning of the property with the Vanterpools. The latter have not cooperated with them on this.
6. The Registrar erred in law by making the Order with no evidence or insufficient evidence.
7. The Registrar erred by not giving reasons for the Order.
8. The Order is couched in vague and general terms, particularly; it may be interpreted to have placed a restriction on the property for an indefinite or unspecified period.

Should the Appeal be allowed

- [6] Learned Counsel for the Claimants, Mrs. Benedicta Samuels-Richardson, submitted that an order that is made by the Registrar under **section 132(1) of the Act** must have a statutory basis, and must be made either for the prevention of fraud, improper dealing or any other sufficient cause. Both Counsel agree that fraud is not operative in this case. Mrs. Samuels-Richardson submitted that there was no 'improper dealing' with the property. She said that the word 'improper' means "wrongful", which in turn means otherwise than by inevitable accident, and there was no wrongful dealing with the property by the Claimants. Learned Counsel for the Defendants, Mr. Baba Aziz, submitted that in order to determine whether there was any improper dealing or any other sufficient cause, **section 132(1) of the Act** must be read with **section 102(1) and (2) of the Act**.
- [7] **Section 102(1) of the Act** provides that where land, lease or a charge is owned in common, each proprietor is entitled to an undivided share in the whole. **Section 102(2) of the Act** states:

“No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

- [8] While it is clear that **section 132(1) of the Act** provides the grounds upon which the Registrar may place a Restriction upon land that is held in common, **section 102(2) of the Act** provides a specific statutory requirement for proper or lawful dealing with that land. A breach of this section will constitute improper dealing under **section 132(1) of the Act**. It does not, however, provide the only basis against which proper or improper dealing may be measured. The Registrar may still impose a Restriction on common property outside of its terms, if he finds circumstances that will amount to “any other sufficient cause”.
- [9] In his Affidavit, the Registrar stated that he found on the evidence that was presented there was sufficient cause to enter the Restriction. His Affidavit does not reflect, however, that he actually considered the application of the formulation in **section 132(1) of the Act**, to wit, “.. fraud or improper dealing or any other sufficient cause” to the facts presented at the hearing. The requirement is not merely to find whether there is sufficient cause. He did not state that he found that the Claimants dealt improperly with the property or that they had acted in contravention of **section 102(2) of the Act**.
- [10] The Affidavit of the Registrar is in the nature of reasons for the decision. I accept it as such and do not impeach the decision on the ground of failure to give reasons. It will be helpful, however, particularly for the benefit of persons who may wish to consider appealing from decisions of the Registrar, if he writes a short decision affording reasons. This should always be done where there is notice that the decision will be appealed. A signed copy of the written decision and any notes taken in evidence at the hearing should be given to the appellant or to his or her Counsel. These should be exhibited to the Fixed Date Claim Form which issues on the appeal.
- [11] However, Mr. Aziz is of the view that the decision of the Registrar falls within **section 102(2) of the Act**. He submitted that the section is intended to provide protection for tenants in common in the nature of an injunction. To this extent, he said that it is designed

to enable a tenant in common to prevent the sale of the common property to a third party, before other tenants are given a right of first refusal to purchase the property. This, he submitted, is because the section is similar to the right of pre-emption or first refusal that is enjoyed by the Crown in English law. Mr. Aziz further submitted that under this principle, the Claimants would first have had to inform the Vanterpools of the price that a third party offered for the property and give them the option to purchase it for the same price or to decline to purchase. He said that they could only enter into a transaction with a third party if the Vanterpools declined. He submitted that since the Claimants did not give the right of first refusal to the Vanterpools, the Registrar lawfully entered the restriction for their failure to comply with **section 102(2) of the Act**. He submitted that the Court is at liberty to confirm the decision of the Registrar if it finds that it falls within the requirements of this section, notwithstanding that the Registrar did not expressly so find.

- [12] Mr. Aziz further submitted that when the Claimants entered into negotiations with third parties, the intended result was to sell the property, or to make arrangements to sell it. They thereby dealt improperly with the property for the purposes of **section 132(1) of the Act**. He pointed to the meaning of “deal” as defined in **Black’s Law Dictionary (6th Edition)**, at page 399. There, the word “deal” is defined thus:

“An arrangement to obtain a desired result by a combination of interested parties; the prime object being usually the purchase, sale, or exchange of property for profit. Also, an act of buying and selling; a bargain to purchase at a favourable price.”

- [13] On the other hand, Mrs. Samuels-Richardson pointed out that the word “dealing” is defined in the Act to include disposition or transmission of property. She submitted that there was no “disposition” of the property, because the Claimants did not make any *inter vivos* transaction, which affected the rights of the proprietors in or over the land. She said that there was no “transmission”, since this means the passing of land by the operation of law on death, and includes the compulsory acquisition of land under written law. Discussions on the sale of land, she said, cannot therefore constitute improper dealing with property.
- [14] First, the fact that this Court is requested to confirm the decision of the Registrar under **section 102(2) of the Act**, when the Registrar has not done so, confirms my view that the

Registrar did not consider the application of the statutory provisions when he made the decision.

- [15] Second, I agree with Mr. Aziz that the opening words of **section 132(1) of the Act**, “For the prevention of any fraud or improper dealing ...” can lead to the conclusion that the provision is pre-emptive. There are circumstances in which it will be open to the Registrar to find that, even at the stage of negotiations or the filing of documents, an action that might culminate in the transmission or disposition of land that is held in common may be proscribed. By the terms of the section, however, the decision of the Registrar cannot be based on speculation. It must be based, objectively, upon evidence adduced at the hearing and upon all of the circumstances revealed by that evidence.
- [16] In the third place, I do not think that the Registrar could have found, reasonably, that the Restriction was necessary either under **section 102(2) or section 132(1) of the Act**, on such facts that have come to my attention. The Claimants were not acting by stealth. They informed the Vanterpools and invited them to participate in their discussions.
- [17] In the fourth place, I agree with the submission that was made by Mrs. Samuels-Richardson that the term “any other sufficient cause” is synonymous with “good cause”. The burden is on the Vanterpools to show that there were legally sufficient reasons for the Restriction to be placed on the property. They had failed to show that there was because there were only discussions, the result of approaches that various persons made to the proprietors with a view to buy their interest.
- [18] In the fifth place, the action of the Claimants was not proscribed under **section 102(2) of the Act** either. That section does not, in my view, provide a right of pre-emption. It speaks to two scenarios on its true construction. On the one hand, it provides for circumstances in which a proprietor in common may deal with his undivided share in the property in favour of another or other tenants in common. Its purport, in these cases, is to permit the proprietor to deal with the property without requiring the written consent of the other proprietors. On the other hand, it provides that where a proprietor in common deals

with his share of the common property with third parties, he or she requires the written consent of the other proprietors.

[19] However, I do not think that written consent will usually be required for merely conducting discussions with a third party and the other proprietors of the property. It will depend upon the circumstances that obtain in each case. In the context of **section 102(2) of the Act**, the word “deal” will usually require steps that are more tangible to be taken to transmit or dispose of the property. The written consent of the other proprietors of common property will usually be required prior to entering into an agreement to sell, lease or to rent the property. It will certainly be required to sell the property or to confer some interest that is to be registered. In the latter case, the section must be read as imposing a duty upon the Registrar to ensure that such an interest is not transferred to a third party without the written consent of the other tenants in common.

[20] I do not agree that the Restriction is vague and does not comply with **section 132(2) of the Act**, because it is to endure until the resolution of terms of how the property is to be disposed of. If I were to find the decision otherwise correct, the Restriction will endure until a particular event – the partitioning of the property. This might require the intervention of the Court, on application, if the Vanterpools were to be uncooperative. The ensuing process might be lengthy. This does not make the formulation of the decision vague or uncertain.

[21] In the end, it is my hope that the proprietors will all agree to partition the property without the need for litigation. If there are proprietors who wish to transact or dispose of their interest in the property, and they act under **section 102(2) of the Act**, the written consent of the other proprietors should not be unreasonably withheld. Complications will increase with passing time.

Order

[22] There is no evidence that the Registrar considered or applied the relevant statutory provisions as the bases of his decision. The decision can be quashed on this ground

alone. Additionally, however, I am of the view that there is insufficient ground upon which the Restriction may be made under **sections 102(2) or 132(1) of the Act**. I therefore grant this appeal. The decision of the Registrar is quashed and the Restriction on the property removed. I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Hugh A. Rawlins', written in a cursive style.

Hugh A. Rawlins
High Court Judge