

SUPREME COURT OF QUEENSLAND

CITATION: *Lennon v Bell & Ors* [2005] QSC 286

PARTIES: **JOHN LENNON**
(applicant)
v
**RICHARD BELL and JANICE MARIE GABBOTT AS
PERSONAL REPRESENTATIVES OF THE ESTATE
OF THE LATE PAULINE MARY LENNON**
(respondents)

FILE NO/S: BS4218 of 2005

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 14 October 2005

DELIVERED AT: Brisbane

HEARING DATE: 28 July 2005

JUDGE: Mullins J

ORDER: **1. It is declared that the applicant and the late Pauline Mary Lennon held Lot 143 on RP 176791, County of Canning Parish of Maroochy as joint tenants at all material times up to the time of the death of the late Pauline Mary Lennon.**

2. It is declared that the said joint tenancy was not severed prior to the death of the late Pauline Mary Lennon.

CATCHWORDS: REAL PROPERTY - GENERAL PRINCIPLES - INCIDENTS OF ESTATES AND INTERESTS IN LAND - JOINT TENANCY AND TENANCY IN COMMON - INCIDENTS - JOINT TENANCY - SEVERANCE - IN FAMILY LAW MATTERS - where joint tenants were husband and wife - where husband and wife had separated 6 months prior to wife's death - where the wife's attorney signed a notice of intention to sever the joint tenancy and registrable transfer to effect severance - where that notice and a copy of the transfer were forwarded to the husband - where the transfer had not been lodged for registration at the date of the wife's death - whether s59 of *Land Title Act* 1994 (Q) can apply - whether that act of sending notice and copy of the transfer together with negotiations for a property settlement was a course of mutual dealing sufficient to sever the joint tenancy - no severance of joint tenancy

*Land Title Act 1994**Carmody v Delehunt* [1984] 1 NSWLR 667*Corin v Patton* (1990) 169 CLR 540*Sprott v Harper* [2000] QCA 391*Williams v Hensman* (1861) 1 J&H 546; 70 ER 862

COUNSEL: D A Skennar for the applicant
M Horvath for the respondents

SOLICITORS: Noel Woodall & Associates for the applicant
Schultz Toomey O'Brien for the respondents

- [1] **MULLINS J:** The applicant and the late Mrs Pauline Lennon (“Mrs Lennon”) who commenced a relationship in 1971 were married in 1987, but separated on or about 3 June 2004. Mrs Lennon died on 3 December 2004. The issue to be determined on this application which was brought by the applicant is whether the joint tenancy in which they held the matrimonial home which they had purchased in 1999 (and was unencumbered) was severed prior to the death of Mrs Lennon. The application was brought against Mr Bell and Ms Gabbott who are the children of Mrs Lennon from her first marriage. They are sued as the personal representatives of the estate of Mrs Lennon. No issue was taken as to whether they were, in fact, the appropriate respondents. On any view, they had a relevant interest in the issue raised by the application.

Facts

- [2] Ms Gabbott deposed to being informed by Mrs Lennon in May 2004 that the applicant told her “I am sleeping with another woman” and that he then said “What would you like to do, sell up everything including the house and you get 50% and I get 50%?”. Mrs Lennon was in ill health at that stage and told Ms Gabbott that she had told the applicant that she did not feel well enough to sell the house and was not prepared to move out and that the applicant replied “That is ok, [name of new friend] does not wish you to leave”. The applicant then moved out of the matrimonial home.
- [3] Mrs Lennon consulted solicitor Mr Rafty at the Suncoast Community Legal Service for preliminary advice about a matrimonial property settlement on 30 June 2004.
- [4] On 13 July 2004 Mrs Lennon engaged the firm at which Mr Rafty was employed to act as her solicitors. They sent a letter to the applicant dated 16 July 2004 in which they identified what they were instructed were the assets of the marriage (including the matrimonial home) and advised their instructions that Mrs Lennon was prepared to accept 50% of the assets of the marriage as a property settlement if confirmation of value of the relevant assets could be reached and Mrs Lennon did not have to incur unnecessary legal costs. The possibility was raised in this letter that, depending on the value of the assets of the marriage, it might be possible for Mrs Lennon to retain the matrimonial home. Mrs Lennon changed the locks on the matrimonial home.
- [5] The applicant engaged his current solicitors to act on his behalf on 4 August 2004. They immediately wrote to Mrs Lennon’s solicitors advising that the applicant was considering the offer of settlement. Mrs Lennon’s solicitors had not received a

further response by 20 August 2004 and sent a letter to the applicant's solicitors of that date (which was not received by the applicant's solicitors until 3 September 2004) seeking a response to the offer of settlement. Mrs Lennon's solicitors referred to her not being in good health and that she would prefer to finalise matters as quickly as possible.

- [6] By letter dated 6 September 2004 the applicant's solicitors advised that he was in the process of obtaining an appraisal of the matrimonial home. The applicant's solicitors indicated that they anticipated being able to make an offer of settlement when they received the appraisal.
- [7] By letter dated 28 September 2004 Mrs Lennon's solicitors enclosed copies of letters that Mrs Lennon had obtained from two real estate agents giving an appraisal of the value of the matrimonial home.
- [8] On 6 October 2004 Mrs Lennon underwent surgery and suffered complications. She remained in hospital. Mrs Lennon executed an enduring power of attorney in favour of Ms Gabbott on 8 November 2004.
- [9] On 30 November 2004, pursuant to that power of attorney, Ms Gabbott signed a notice of intention to sever the joint tenancy in respect of the matrimonial home addressed to the applicant and the transfer to effect that severance. The notice and a copy of the transfer were forwarded by Mrs Lennon's solicitors to the applicant's solicitors under cover of a letter dated 30 November 2004.
- [10] The transfer had not been lodged for registration as at the date of death of Mrs Lennon on 3 December 2004. The transfer was subsequently lodged for registration on 12 January 2005.

Law

- [11] Prior to the enactment of s 59 of the *Land Title Act* 1994 ("the *LTA*") the methods for severing a joint tenancy had been identified in *Williams v Hensman* (1861) 1 J&H 546; 70 ER 862 ("*Williams v Hensman*") as:
- (a) by a joint tenant alienating his or her interest in the property;
 - (b) by mutual agreement; and
 - (c) by a course of dealing sufficient to indicate that the interests of the joint tenants were mutually treated as constituting a tenancy in common.

The continuing authority of *Williams v Hensman* was confirmed for Australia in *Corin v Patton* (1990) 169 CLR 540, 546-547, 565 and 587. The insufficiency of unilateral statements of intention to effect a severance was emphasised at 548, 565-566, 584 and 591.

- [12] The difficulties associated with these methods for severing a joint tenancy were addressed to some extent by the introduction of s 59 of the *LTA* which permits one joint tenant to unilaterally sever the joint tenancy:

"Severing joint tenancy

59. (1) A registered owner of a lot subject to a joint tenancy may unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.

(2) However, the registrar may register the instrument of transfer only if a registered owner satisfies the registrar that a copy of the instrument has been given to all other joint tenants.

(3) On registration of the instrument of transfer, the registered owner becomes entitled as a tenant in common with the other registered owners.

(4) If there are more than 2 joint tenants of the lot, the joint tenancy of the other registered owners is not affected.”

Section 59 of the *LTA* implements the recommendation of the Queensland Law Reform Commission in its Report on the Consolidation of the *Real Property Acts* (QLRC R40) in relation to what was then clause 38. It was suggested that such a provision “will be particularly useful where a couple, who are registered as joint tenants of property, separate or divorce”. The enactment of s 59 of the *LTA* has not displaced the other methods identified in *Williams v Hensman* for severing a joint tenancy.

[13] In *Sprott v Harper* [2000] QCA 391 (“*Sprott*”) the Court of Appeal found that a joint tenancy had been severed under both the second and third methods identified in *Williams v Hensman*. In that case the husband and wife owned the matrimonial home as joint tenants. The wife left the property and commenced living apart from the husband. They commenced negotiations through solicitors with a view to reaching a property settlement, but the parties themselves met in the absence of their solicitors and executed a handwritten document that was entitled “Agreement for Settlement and Property and Assets”. It provided that they agreed that the value of the matrimonial home was \$160,000 and that \$30,000 was owing to the bank. They agreed on the value of other assets. They divided the value of each of the assets in half and the implication of what they recorded was that the wife was to be paid \$72,000 which included \$65,000 on account of the house. The agreement stated that they agreed that the property be sold, if the husband could not afford to pay the wife out. The parties’ solicitors then continued to negotiate regarding the terms of a possible Family Court consent order based on the broad terms of the agreement that the parties themselves had reached. In the course of these negotiations the wife requested a slightly greater share of the common property and at one stage sought to be paid \$75,000. A consent order had not been achieved at the time the wife died.

[14] In referring to the second and third methods of severance, the Court of Appeal stated at paragraph [7]:

“Obviously then, it is not a pre-condition of effecting a severance that a binding agreement be made between the relevant parties.”

On the issue of whether it was necessary for the parties to turn their minds to the question of severance, the Court of Appeal stated at paragraph [8]:

“Owners may sever a joint tenancy without knowing what a ‘joint tenancy’ or ‘severance’ is. The real question is whether the parties have acted in a way that the law regards as inconsistent with the maintenance of the joint tenancy.”

[15] It was held in *Sprott* that the handwritten agreement between the parties was clear evidence of an intention on the part of both parties to sever the joint tenancy and

that there was no basis for inferring a mutual intention that the agreement was not to have effect in that regard unless it was registered in the Family Court. Although the wife had endeavoured to obtain a little more money than the handwritten agreement provided be paid to her, it was held that there was never any attempt by the parties to alter what was central to their arrangement that the husband would acquire the property or it would be sold and the relevant payment made to the wife.

Whether joint tenancy was severed

- [16] One of the characteristics of a joint tenancy is that each tenant has a right of survivorship, so that when a joint tenant dies, his or her interest in the property is extinguished and the surviving joint tenants hold the property until the property passes into the sole ownership of the last surviving joint tenant: *Carmody v Delehunt* [1984] 1 NSWLR 667, 676-677. To be effective Mrs Lennon had to sever the joint tenancy prior to her death.
- [17] It is patent that Mrs Lennon was unsuccessful prior to her death in invoking s 59 of the *LTA*. Although Ms Gabbott on behalf of Mrs Lennon had given a copy of the relevant transfer of the matrimonial home to the applicant, that transfer had not been lodged for registration as at the date of Mrs Lennon's death and therefore s 59(3) of the *LTA* did not take effect. It is therefore not necessary to consider whether the severance would have been effective in equity, if the transfer had been lodged for registration, but not registered, when Mrs Lennon died: *MacDonald et al Real Property Law in Queensland*, (2nd ed) at para [8.380].
- [18] Mrs Lennon's children seek to rely, however, on the conduct involved in executing that transfer and providing a copy of it to the applicant together with the notice of intention to sever the joint tenancy, prior to Mrs Lennon's death, as part of the course of dealing between the parties from which it is argued that it can be inferred that the interests were mutually treated as constituting a tenancy in common.
- [19] The other conduct relied on by Mrs Lennon's children is the conversation that took place between the applicant and Mrs Lennon at the time the separation was raised. It is argued that the suggestion moved from the applicant that the matrimonial home be sold and divided equally and that proposal was, in effect, endorsed when the offer was made by Mrs Lennon's solicitors in the letter dated 16 July 2004 that Mrs Lennon was prepared to accept 50% of the assets of the marriage (including the matrimonial home) as a property settlement. Reliance was also placed on the fact that Mrs Lennon continued in sole occupation of the matrimonial home, changed the locks on the matrimonial home and obtained the appraisals of value of the matrimonial home.
- [20] Unlike the parties in *Sprott*, the applicant and Mrs Lennon had not concluded any agreement between themselves (or with the assistance of solicitors) by the time Mrs Lennon died. They were still in the throes of negotiation and the valuation of the matrimonial assets was critical to the division of the assets.
- [21] Most of the conduct relied upon by the respondents is attributable to Mrs Lennon and was consistent with the fact of separation of Mrs Lennon and the applicant. The sending of the transfer to effect severance together with the notice of intention to sever the joint tenancy was merely unilateral action on Mrs Lennon's part and is not relevant in establishing the necessary mutuality of dealings required to effect severance under the third method provided for in *Williams v Hensman* without an

appropriate response from the applicant. There was no response from the applicant, but nor was there a reasonable time to respond, before Mrs Lennon died.

- [22] The conversation in May 2004 that preceded separation in which the applicant questioned Mrs Lennon about what she would like to do in relation to the home suggested the possibility of a settlement on terms that required the sale of assets and the division of them equally, but was not in the nature of a firm proposal. That is reflected by the fact that it was not treated as such by Mrs Lennon or her solicitors, as the letter of 16 July 2004 making the offer of a property settlement (which was conditional on valuations) did not purport to be responsive to that pre-separation suggestion and, more importantly, proposed that it might be possible for Mrs Lennon to keep the matrimonial home in the division of the matrimonial assets.
- [23] The issue raised by this matter is whether unconcluded negotiations for a matrimonial property settlement which cover the matrimonial home and which had not progressed to any significant extent can be characterised as mutual dealings that are inconsistent with the continuance of the joint tenancy in respect of the matrimonial home. The applicant had obtained legal advice and was seeking valuations of the matrimonial assets, but had not responded in terms to the offer contained in Mrs Lennon's solicitors' letter dated 16 July 2004. After separation of the applicant and Mrs Lennon, there was not a course of dealing between them that was sufficient to allow the inference to be drawn that they had mutually acted inconsistently with the continuance of a joint tenancy.

Orders

- [24] It follows that the applicant is entitled to declarations in the terms sought:
1. It is declared that the applicant and the late Pauline Mary Lennon held Lot 143 on RP 176791, County of Canning, Parish of Maroochy as joint tenants at all material times up to the time of the death of the late Pauline Mary Lennon.
 2. It is declared that the said joint tenancy was not severed prior to the death of the late Pauline Mary Lennon.
- [25] The transfer to effect the severance was in fact registered on the relevant title under dealing number 708355766. The applicant in his amended originating application sought orders directed to the Registrar of Titles to reinstate the title of the property as it existed prior to that dealing or to otherwise correct the particulars in the register. It was indicated at the outset of the hearing of this application on behalf of the respondents that if they were unsuccessful in resisting the applicant's application for a declaration that the joint tenancy continued up until the death of Mrs Lennon, there would be no resistance by the respondents to the reinstatement of the title. I will give the parties an opportunity to consider what orders, if any, are required to achieve this.
- [26] I will also give the parties an opportunity to make submissions on costs.