

SEVERANCE OF A JOINT TENANCY

*Diaz v Diaz*¹

IN 1993 the Conveyancing and Law of Property Act² (“CLPA”) and the Land Titles Act³ (“LTA”) were amended to introduce a new and additional method of severance of joint tenancies. Under section 66A(3) of the CLPA, a joint tenant may sever a joint tenancy by making a deed of declaration and by serving a copy of the deed on the other joint tenants. Under subsection 4 the parties shall hold their interests in the land as tenants in common “[u]pon the making of the deed of declaration and the service of the deed of declaration pursuant to subsection (3)”. Section 53(5) of the LTA lays down a similar procedure for registered land and uses almost identical language to section 66A(3) of the CLPA, except that in registered land one must use “an instrument of declaration in the approved form” rather than a “deed of declaration”. Section 53(6) provides that the registered land shall be held by the declarant and the remaining joint tenants as tenants in common “[u]pon the registration of the instrument of declaration which has been duly served as required by subsection (5)”. It will be noted that in registered land there is the additional requirement of registration which does not apply to unregistered land.⁴

In *Diaz v Diaz* Theresa Diaz and her elder daughter purchased registered land as joint tenants in 1989. In 1994 Mrs Diaz signed an instrument of declaration in the approved form under section 53(5) of the LTA before a commissioner of oaths and shortly afterwards a copy was served on the elder daughter by registered post. For some unknown reason, however, the

¹ [1998] 1 SLR 361.

² Cap 61, 1994 Rev Ed.

³ Cap 157, 1994 Rev Ed.

⁴ As a dealing with the legal title, one might expect a deed of declaration to be registrable under the Registration of Deeds Act (Cap 269, 1989 Rev Ed). It may be argued, however, that it falls neither within the normal nor the extended meaning of the word “assurance”, which has been defined as “the legal evidence of the transfer of property” (*Fung Sin Wah v Moi Chan Hen* (1897) 4 SSLR 175, at 178, *per* Leach J).

instrument was not registered pursuant to section 53(6). Mrs Diaz made a will in 1995 in which she appointed her younger daughter as sole executrix and left her entire estate to her. Mrs Diaz died in 1996. The question arose, therefore, whether the joint tenancy had been severed by the unregistered instrument of declaration – with the result that the younger daughter would be entitled to a half share in the property – or whether the entire property now belonged to the elder daughter under the doctrine of survivorship. To prevent a possible sale the younger daughter lodged a caveat against the property and the elder daughter brought the present action to remove the caveat.

At first sight the language of section 53(6) quoted above would appear to suggest that until registration the joint tenancy is not severed. However, the Court of Appeal decided, affirming the judgment of CR Rajah JC, that once a copy of the declaration is served under section 53(5) the joint tenancy is severed *as between the joint tenants*. However, until registration, the severance of the joint tenancy affects only the co-owners themselves and third parties are entitled to treat the joint tenancy as subsisting. Once the declaration is registered, the severance is completed in the sense that the tenants hold the land as tenants in common on the register and third parties are bound by this.

There is undoubtedly considerable merit in this approach. It would subvert the basic principles of the Torrens system for third parties to be bound by private dealings of the parties which are not reflected on the register. Conversely, when one co-owner receives a copy of the instrument of declaration, he should be entitled to assume that the joint tenancy is indeed severed. Often the recipient may alter his will in reliance on the declaration, assuming that he now has an interest in the land which he can dispose of in his will. It cannot be right to place an obligation on the recipient to check the register to ensure that the instrument of declaration has indeed been registered. Since it is the declarant who has initiated the process of severance, it is for the declarant to complete it by registration and the co-owner is entitled to assume that this has been done. Moreover, as LP Thean JA, who gave the judgment of the Court of Appeal, pointed out, there can be difficulties in registering the declaration:

If the duplicate certificate of title is in the possession of one of the other joint tenants or other person, say a mortgagee, who refuses to release it, the declarant would not be able to proceed with the registration. In such a situation notwithstanding the fact that he has complied with section 53(5), he would still be unable to sever the joint tenancy. Thus, the purpose of sub-sections (5) and (6) of section 53 would be frustrated. In our view, this cannot be the intention of the legislature. Plainly, the purpose of these provisions is to provide a co-owner a

simpler way of severing the joint tenancy without having to obtain the consent of the other party which sometimes may or would not be feasible.⁵

Nevertheless, there are considerable difficulties in the approach adopted in *Diaz v Diaz*. The concept of a form of severance which operates only between the co-owners without affecting third parties is a novel one and its introduction complicates considerably the Singapore law on severance. It seems that we must now distinguish between four types of severance.

1. Severance at common law – effected by alienation – which binds the world (subject to registration requirements).
2. Severance in equity – effected by one of the three methods laid down in the leading case of *Williams v Hensman*.⁶ These are (i) an act of any of the joint tenants operating on his own share, (ii) a mutual agreement or (iii) a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. This type of severance binds the world other than the *bona fide* purchaser for value of the legal estate without notice (subject to registration requirements).
3. Severance by statute effected by service of an appropriate declaration (in the case of unregistered land)⁷ or by service of an appropriate declaration followed by registration (in the case of registered land). This type of severance binds the world and is thus equivalent in its effects to severance at common law.
4. Severance by statute in the case of registered land effected by service of an appropriate declaration without registration. This type of severance binds only the co-owners themselves and does not affect third parties.

The fourth type of severance was introduced by *Diaz v Diaz*. In principle the notion of a form of severance which binds only the co-owners is unobjectionable. The difficulty, however, is in finding an appropriate place for this new form of severance within the framework of the established

⁵ At 370.

⁶ (1861) 1 J & H 546.

⁷ *Quaere* whether a deed of declaration is registrable under the Registration of Deeds Act. See note 4, *supra*.

rules of Singapore land law. Property rights are normally defined as rights enforceable against the world. Where a right can only be enforced against a given individual or his estate, it is a right *in personam*. The fourth type of severance is not enforceable against the world, but only against the other co-owner. As such, it would appear not to be a property right at all.

Where the fourth type of severance has occurred, the estate of the deceased co-owner has a personal claim against the survivor, although as against the world the survivor is the sole owner of the property. In other words, the estate of the deceased co-owner has no interest in the property. If so, it would appear that the estate cannot lodge a caveat against the property. Section 115 of the LTA allows any person claiming an interest in land to lodge a caveat against that land. Section 4 of the LTA defines “interest” as “any interest in land recognised as such by law”⁸ and the personal claim of the estate of the deceased co-owner does not fall within this definition.⁹ Section 115(3) extends the normal meaning of the phrase “a person claiming an interest in land” to include a person who has obtained an injunction in respect of an interest in land. This might mean that once the estate of the deceased co-owner succeeds in its personal claim against the survivor for a share in the land, it can lodge a caveat. However, there is nothing in the Act which would enable the estate to lodge a caveat validly before it obtains such an injunction.

At first instance CR Rajah JC held that the younger daughter, who was the executrix of her mother’s estate, had a caveatable interest. The appeal was dismissed by the Court of Appeal without any discussion of this point. It is submitted with respect that the finding that the younger daughter had a caveatable interest conflicts with the decision that the fourth type of severance has no effect on third parties. One may test the matter by asking what would have happened if, after the younger daughter lodged her caveat, the elder daughter had sold the property to a third party, who lodged his transfer for registration. Under section 115(2) of the LTA a caveator may “according to the extent of his interest” forbid the registration of any dealing. But the “interest” of the caveator in this case does not bind third parties. Therefore, the caveat will lapse and the Registrar of Titles will register the transfer because the younger daughter will not be able to obtain a court order extending the operation of her caveat.¹⁰ This analysis serves to confirm the view that the personal claim of the estate against the surviving co-owner

⁸ See also *Tan Soo Leng David v Wee, Saktu & Kumar Pte Ltd* [1993] SLR 569.

⁹ Cf *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694.

¹⁰ See ss 120 and 121. It is of course assumed in the foregoing discussion that the purchaser is not party to fraud within the meaning of s 46(2)(a) nor are there any grounds which might

is not an interest in land. The estate can no doubt sue the surviving co-owner for its share of the proceeds of sale, but it would undoubtedly have been in a stronger position if it could have prevented the sale in the first place.

It is submitted that this case could have been resolved more satisfactorily by reference to the established doctrines of equity. The Court of Appeal pointed out that statute had added a new method of severing a joint tenancy but that the existing methods still remained in force. The judgment refers to these generally as severance at common law rather than distinguishing between severance at common law and severance in equity. It is, of course, by no means unusual to employ the term "common law" to refer to judge-made law generally as opposed to statute law. However, this usage runs the risk of obscuring the distinctive role played by equity in a case such as this.

The first head of severance in equity is an act of one of the joint tenants operating on his own share. Clearly the disposal of one joint tenant's interest is an act of that party operating on his own share. There is here an area of overlap with severance at common law, which is effected by disposal or, as it usually said, by "alienation". However, the first head of severance in equity is not limited to disposals. If one joint tenant concludes a specifically enforceable contract to transfer his share to a purchaser, that will sever the joint tenancy in equity.¹¹ There is also judicial support for the view that the formal commencement of litigation concerning the joint tenancy effects severance in equity under this head.¹²

In Singapore it was held in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah*¹³ that a unilateral declaration of intention is not sufficient to sever a joint tenancy.¹⁴ However, that case was decided before the 1993 amendments to the CLPA and the LTA and at that time it was difficult to see how a unilateral declaration could constitute an "act" of a party operating on his own share. Statute now lays down a procedure for severance by unilateral declaration. In the present case Theresa Diaz followed precisely

lead to rectification under s 160. The fact that the purchaser may have actual notice of the younger daughter's "interest" is irrelevant under s 47.

¹¹ *Brown v Raindle* (1796) 3 Ves 256.

¹² See *In re Draper's Conveyance* [1969] 1 Ch 486, at 492 and *Harris v Goddard* [1983] 1 WLR 1203, at 1209.

¹³ [1988] 1 MLJ 341; [1987] SLR 182.

¹⁴ The Singapore Court of Appeal refused to follow the *obiter dictum* of Lord Denning MR in *Burgess v Rawnsley* [1975] Ch 429 that a unilateral declaration of intention was sufficient in equity to sever a joint tenancy and that s 36(2) of the English Law of Property Act 1925 was merely declaratory in this regard.

the procedure laid down in section 53(5) of the LTA. It is submitted that this was the act of a party operating on her own share which should have severed the joint tenancy. The result was that as from service of the notice, the joint tenancy was severed in equity but not at law. Mrs Diaz and her elder daughter were joint tenants at law, holding on trust for themselves as tenants in common. Had the declaration been registered under subsection (6), Mrs Diaz and her elder daughter would have become tenants in common at law. As it happens, the declaration was never registered. The result was that on the death of Mrs Diaz, the doctrine of survivorship came into play with regard to the legal estate. The elder daughter held the entire legal estate on trust for herself and the estate of her mother as tenants in common. Since the mother's estate had an equitable interest in the property, it was able to lodge a caveat under section 115 of the LTA.

The above analysis seeks to provide an equitable solution to the problem raised in *Diaz v Diaz* within the confines of existing property law. If it is correct, there are only three forms of severance of a joint tenancy in Singapore law. More importantly, however, if this approach is accepted, the estate of the deceased co-owner is able to protect its interest from third parties by the simple expedient of lodging a caveat under the LTA.

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