

Prosperere (Nee Madore) v. Prosperere & Anor (**Eastern Caribbean Supreme Court** (St. Lucia)) [2007] UKPC 2 (17 January 2007)

Privy Council Appeal No 18 of 2005

Noellina Maria Prosperere (Nee Madore) *Appellant*

v.

(1) Frederick Prosperere

(2) Jennifer Remy *Respondents*

FROM

**THE COURT OF APPEAL OF
EASTERN CARIBBEAN SUPREME COURT (ST LUCIA)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 17th January 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Mance

[Delivered by Lord Bingham of Cornhill]

1. There are formally three parties to this appeal: Mr and Mrs Prosperere, who were married in 1956 and divorced in 1995, and Ms Remy. The dispute giving rise to the appeal is effectively between Mrs Prosperere (the appellant) and Ms Remy (the second-named respondent) and concerns an undivided one-half share in certain properties situated at Gros Islet in St Lucia. I shall for convenience refer to this undivided one-half share in these properties as "the land". Ms Remy claims to have bought the land. Mrs Prosperere challenges the validity of Ms Remy's title because, she contends, the land belonged to her and her husband in community; it could not in law be alienated by him without her consent; and she never gave her consent. Ms Remy replies that Mrs Prosperere is prevented from so contending *per rem judicatam*. The courts below upheld Ms Remy's argument, but Mrs Prosperere challenges it on appeal to the Board.

The land

2. By a deed of sale made on 21 July 1978 before Mr Kenneth Foster, a notary royal, and registered shortly thereafter, Edmund Montoute sold to Mr Prosperere seven parcels of land which included the land. By a further deed of sale made on 25 June 1982 before Sir Keith Gordon, a notary

royal, Mr Prospere sold (or purported to sell) the land to Ms Remy. It was an undivided one-half share in the properties he had bought from Mr Montoute. Mrs Prospere was not a party to this deed.

The first action

3. On 14 November 1989 Ms Remy issued a writ in St Lucia against Mr Prospere. In this she pleaded the purchase by Mr Prospere from Mr Montoute and the sale by Mr Prospere to her. She asked that her undivided one-half share be partitioned from the one-half share retained by Mr Prospere, so as to secure to her the land to which she claimed to be entitled. She also claimed a declaration of her ownership of the land. Mrs Prospere was not joined as a party to the action. In his defence and counterclaim Mr Prospere resisted Ms Remy's claims. He pleaded that the lands bought from Mr Montoute (including the land) were owned in community between him and Mrs Prospere. He also sought cancellation of the 25 June 1982 deed on grounds of *non est factum*.
4. In a judgment given on 16 September 1991, following a trial, d'Auvergne J rejected Mr Prospere's defence of *non est factum*. But she held, applying the Civil Code of St Lucia, that the land sold by Mr Prospere to Ms Remy was community property and that Mrs Prospere had not consented to the sale. She accordingly declared that the deed of sale of 25 June 1982 was null and void.
5. Ms Remy appealed to the Court of Appeal of the Eastern Caribbean States (Sir Vincent Floissac CJ, Byron and Liverpool JJA) who on 30 October 1992, for reasons given by the Chief Justice, allowed her appeal: (1992) 44 WIR 172. The ratio of the decision was that the meaning of community property in St Lucia was governed by the law of St Lucia; that according to that law property was community property only if both parties were domiciled in St Lucia at the date of their marriage; that the burden lay on Mr Prospere to prove his St Lucian domicile at the date of the marriage; that he had not proved this; and that he should not be permitted to introduce on appeal evidence which he could have adduced at trial. The court concluded that the 25 June 1982 deed of sale had been based on the assumption that the land did not form part of the community (if any) which existed between Mr Prospere and his wife, who had not intervened, or testified or sought to impugn the deed. Mr Prospere could not challenge his own deed. The appeal was therefore allowed, and the judgment below set aside with costs. It is not known whether the Court of Appeal drew up any order or, if so, what it said.

The second action

6. On 16 December 1992, within two months of the Court of Appeal judgment in the first action, Mrs Prospere issued a writ against Mr Prospere and Ms Remy. In this she pleaded that the lands bought by Mr Prospere from Mr Montoute had been owned in community between herself and her husband. She further pleaded that she had not consented to or joined in or signed the 25 June 1982 deed of sale of the land to Ms Remy and that the deed was accordingly of no effect. She claimed a declaration that the deed was null and void, and asked that it be improbated.
7. Ms Remy served a defence and counterclaim. In the counterclaim she denied that Mrs and Mr Prospere had been married in community of property, relied on the result of the first action and contended that Mrs Prospere was prevented *per rem judicatam* from challenging the validity of the sale to her. She sought a declaration that she was the owner of the land.
8. The case came before d'Auvergne J on 23 April 1996 when both Mrs Prospere and Ms Remy were represented by counsel and Mr Prospere and Ms Remy were present. The order made by the court on that day (headed "Judgment after Trial") records that, the action having been tried, it was ordered that the action be dismissed with no order as to costs.

The third action

9. The present appeal arises in this third action, begun by the issue of a summons by Mrs Prospere against Mr Prospere on 21 May 1999, after their divorce. The summons referred to the properties bought by Mr Prospere from Mr Montoute and sought orders that he transfer to her his community half share in certain of those properties, particularised in the summons, and that she transfer to him all her community half share in the remaining properties. It does not appear that Mr Prospere resisted these orders and on 9 July 1999, in his presence, d'Auvergne J made orders as asked.
10. It appeared, however, that the orders of 9 July were not in practice workable, and Mrs Prospere applied to the court by summons dated 16 March 2000 to vary them. At this stage, by summons dated 24 May 2000, Ms Remy applied to be joined as a party. In her supporting affidavit she relied on her own title and the Court of Appeal judgment, stigmatising the proceedings as vexatious. She sought a declaration that she was the owner of the land. On 26 July 2000 it was ordered that Ms Remy be joined as a party to the proceedings, and she issued a summons (supported by affidavit) seeking to set aside the order of 9 July 1999.

11. Following a vigorous exchange of affidavits, the matter came before Saunders J, who gave judgment in favour of Ms Remy on 10 November 2001. Referring to the Court of Appeal's judgment in the first action he said:

"13. Counsel involved in the application before me had different interpretations of the import of the Court of Appeal's reversal. All I would say is this. It would be illogical for the courts to find, in a suit involving a husband and a third party, that certain lands were, at the time of the sale thereof by the husband to the third party, not community property but then, in a suit involving both the husband and the wife on the one hand and the same third party on the other, conclude that the very same lands did indeed form part of community property. In my view the only reasonable inference to draw from the order made by the Court of Appeal is that Ms Remy's entitlement to a half share in the said lands had been thereby validated. Moreover, it cannot be said that Mrs Prospere was unaware of the proceedings brought by Ms Remy against Mr Prospere. Indeed, the first instance judgment shows that in the course of those proceedings one of Mr Prospere's witnesses testified and put into evidence a general Power of Attorney from Mrs Prospere to himself."

He then referred to the second action, concluding that the validity of Ms Remy's deed had been twice adjudicated between "these three parties" and could not now be relitigated. It was *res judicata*. He did not set aside the order of 9 July, but made declarations that Ms Remy was the owner of the land and that the order of 9 July should not be construed in any manner which would defeat her entitlement.

12. Mrs Prospere appealed, but on 18 June 2003 the Court of Appeal (Sir Dennis Byron CJ, Redhead JA and Georges JA (acting)) upheld the judge's decision. For reasons given by the Chief Justice, who had been party to the Court of Appeal's decision in the first action, the court rejected Mrs Prospere's interpretation of that decision and agreed with the judge that it would be illogical to come to any conclusion other than that Ms Remy's title had been validated. The order of Saunders J, being based on the fundamental principle of *res judicata*, correctly concluded the matter.

The Civil Code

13. It is unnecessary for present purposes to explore the provisions of the Civil Code governing community of property. By article 1190,

"Legal community is that which the law, in the absence of stipulation to the contrary, establishes between spouses by the mere fact of their marriage, in respect of certain descriptions of property."

Those descriptions include land (article 1192). Property is deemed to be the joint acquisition of the community unless (in effect) the contrary is agreed or shown (article 1193). Neither spouse can alone encumber or dispose of the community property by gift or otherwise *inter vivos* without the consent of the other, unless it is goods of trifling value, and this applies to all community property whenever acquired and to all spouses married in community whether before or after the coming into force of article 1211. No criticism was, or could be, made in these proceedings of the Court of Appeal's ruling on domicile in the first action, which was based on article 1180.

14. More pertinent to this appeal is article 1171, which provides:

"The authority of a final judgment (*res judicata*) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."

This article was cited by the Chief Justice in his judgment under appeal.

15. It was common ground between the parties that, if in doubt about the interpretation of the St Lucia Civil Code, the Board should seek guidance from authority on the Civil Codes of Quebec and France. As Lord Hoffmann said in *Polinere v Felicien* (Privy Council, 26 January 2000, unreported),

"Their Lordships consider that anyone attempting to interpret the Civil Code must bear in mind that it is derived, in most cases word for word, from the Quebec Civil Code of 1865, which in turn was derived from the Code Civil of France. In adopting the St Lucia Civil Code, the legislature must in their Lordships' view have intended that its terms should be construed with due regard to what they had been understood to mean in Quebec and France. The jurisprudence which has been attached to the provisions of the Code by the courts and legal writers of those countries must at the very least have considerable persuasive authority."

16. In this context, the Board was referred to *Roberge v Bolduc* [1991] 1 SCR 374, where L'Heureux-Dubé J, giving the judgment of the Supreme Court of Canada, interpreted the provisions of the Civil Code of Lower Canada as they apply to *res judicata*. She identified a number of conditions which must be met before the judgment of one court is held to preclude re-litigation of an issue in a second court: the first court must have had jurisdiction (pp 405-406); the first proceedings must have culminated in a definitive judgment (pp 406-407); the earlier judgment must have been given in a contentious matter (p 408); the principle only prevents re-

litigation of an issue by those who were parties to or represented in, and so bound by, the first judgment, and who act in the same capacity in the second proceedings (pp 409-413); the object and purpose of the second proceedings must be the same as those of the first (pp 413-415); there must be identity of cause in the two actions (pp 415-418).

17. Most of these conditions were met in the first and second actions, as Mr Hall Taylor acknowledged in the course of his admirable argument for Mrs Prospere. Thus there was, for instance, no argument about the jurisdiction of the court in the first action; both actions were contentious; and the essential purpose of the two actions (to resolve the issue of title to the land) was the same, despite the differing aims of the parties. Identity of cause is a more elusive condition, but may be taken to require that the essential basis of the two actions is the same.
18. It is clear from the judgment in *Roberge* (p 406) that a judgment, to be definitive, must contain either an order or a dismissal of the action. The decision may follow adversarial argument, or may be made on default or non-appearance by a party duly served. Thus the following rulings are made or authorities cited (p 407):

"Even *ex parte* and default judgments can be 'definitive', since they arrive at a conclusion and decide the case. Nadeau, in 'L'autorité de la chose jugée' (1963) 9 McGill LJ 102, sets out this proposition at p 107:

'They [definitive judgments] may have been rendered after argument and counter-argument or even by default, provided the opposing party has been served ...' "

"It [a definitive judgment] may also be rendered by default where the party has failed to appear or make submissions, if the defendant has been duly served." [see Royer, *La preuve civile* (1987) at No 770, p 284].

"Whereas in applying the rules of *res judicata*, even a judgment rendered by default or *ex parte* has the same definitive effect as if it had been rendered following argument and counter-argument." [see *Markel Insurance Co of Canada v Travelers du Canada* [1986] RDJ 516, 519].

Conclusions

19. The effect of the Court of Appeal's judgment in the first action was to set aside the judge's declaration that the deed of sale was null and void, and thus to leave the deed of sale unchallenged on the register. But even if it be assumed (despite the narrow basis on which it was put) that the judgment resolved the issue of title to the land, it did so only as between Ms Remy and Mr Prospere. Mrs Prospere was not a party, and there is

nothing to suggest that Mr Prospere was acting on her behalf or with her authority. It follows that she was not bound by that judgment and cannot be prevented by it from pursuing her claim to the land in a later action, however illogical that conclusion may appear. She could have applied to be joined in the first action, as Ms Remy did in the third. There is no reason to question the finding of the judge, quoted above, that Mrs Prospere was fully alive to the proceedings. But she was not a party or represented, and that is fatal to a plea of *res judicata* based on that judgment. On this point the Board must respectfully disagree with the courts below. On the other hand, as the Supreme Court of Canada observed in *Roberge v Bolduc* [1991] 1 SCR 374, 409-410 and 420-421, even a judgment to which someone is not a party may affect his or her interests. In such cases, the person concerned can take advantage of article 381 of the Code of Civil Procedure (Chapter 243 of the Revised Laws of Saint Lucia 1957) which provides:

"Any person whose interests are affected by a judgment in a case in which neither he nor persons representing him were made parties, may file an opposition to such judgment."

A third party whose interests are affected in this way must challenge the judgment in question directly. On behalf of Ms Remy Mr Deterville argued that Mrs Prospere's interests were indeed affected by the decision in the first action and, since she had not mounted a direct challenge to the judgment of the Court of Appeal, that judgment did in fact constitute an obstacle to her taking the present proceedings. The Board did not hear full submissions on the point, however, and, because of the decision which it has reached in respect of the second action, it is unnecessary to reach a conclusion.

20. In the second action the situation was different. Mrs Prospere was the claimant who brought the action. The case was fully pleaded and the issue of title defined. At the hearing she was legally represented. But she did not appear and the action was dismissed, it may be for want of evidence. But even if the judgment is regarded as a default judgment, that is enough to prevent Mrs Prospere from re-litigating the same issue in a later action. So much is clear from article 1171 of the Civil Code, construed in the light of the authority considered above. It follows that Mrs Prospere is prevented *per rem judicatam* from pursuing any claim to the land in the third action, and the judge and the Court of Appeal reached the right conclusion.
21. The appeal must therefore be dismissed with costs against Mrs Prospere. No order is made against Mr Prospere, who played no part in the proceedings.