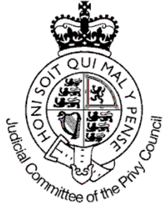

Trinity Term
[2019] UKPC 32
Privy Council Appeal No 0038 of 2018

JUDGMENT

Ryan-Cox (on her own behalf and as representative of Theobalds Cox deceased) (Appellant) *v* Cox (as representative of Rhona aka Lorna Mary Cox) (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Wilson
Lord Hodge
Lady Black
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON

27 June 2019

Heard on 6 June 2019

Appellant	*Respondent*
V Dexter Theodore QC	Leslie Prospere
(Instructed by Carrington & Associates)	(Instructed by Myers, Fletcher & Gordon)

LORD HODGE:

1. This appeal concerns events which occurred over half a century ago and legal rules which are now for most purposes only of historical interest in St Lucia after the adoption of the new Civil Code in 1957. In particular, the appeal concerns provisions of the superseded Civil Code of 1879 which relate to dower and the effect of a contract of marriage on the ability of a husband to dispose of property by testamentary disposition.

2. The facts can be stated briefly. Richardson Cox married Flavienne Cox and the couple had ten children together before she died. The Board was not informed as to the date of the marriage or the date of death of Flavienne Cox. Richardson Cox later decided to remarry and on 13 November 1948 entered into an agreement in contemplation of marriage with Lorna Mary St Marie. In that marriage contract the parties agreed (i) that they would hold as community property all property whether moveable or immoveable which they would acquire during their marriage (clause 1), and (ii) that they would hold as separate property all property which they had acquired before their marriage and all property which they might acquire by succession during their marriage (clause 2). Clause 4 provided:

> "There shall be no dower whether customary or prefix and the said future wife hereby renounces for her children all or any dower."

Richardson and Lorna Cox married on 27 November 1948 and subsequently had nine children together.

3. On 8 February 1954 Mr Cox purchased the Champagne Estate, which is described in the Deed of Sale of that date as a landholding of approximately 100 acres in the Quarter of Anse la Raye. In a later vesting deed dated 11 May 2011, which the Board mentions below, the Champagne Estate is described as comprising 60.51 hectares or 149.52 acres. The purchase price of the estate was $9,600, but as the estate was encumbered with debts of $8,842.20, which Mr Cox took on as purchaser, he was required to pay only $757.80 in cash. There was uncontested evidence in the trial that the purchase was funded by a loan from the Agricultural Bank. There was also uncontested evidence that Richardson Cox and, after his death, Lorna Cox worked the estate to repay this loan and the loans by which it had already been encumbered. Richardson Cox purchased the land in his own name with the consent of his wife, Lorna, who was a signatory of the Deed of Sale. In Wilkinson J's judgment at first instance, which the Board discusses below, the learned judge records (para 12) that a survey in 2012 valued the Champagne estate as having a market value of EC $1,285,880.

4. On 6 November 1959 Mr Cox executed his Will, in which he left the Champagne Estate in usufruct to Lorna and devised the nuda proprietas or bare ownership of the Champagne Estate to the children of his second marriage in equal shares. He left the rest of his estate to the children of his first marriage as residuary legatees. Mr Cox died on 6 October 1963. Thereafter time passed before on 29 June 1968 Lorna was granted probate of Mr Cox's estate. She appears not to have acted to implement the Will for many years. It also appears that the children of Mr Cox's first marriage were not aware of this grant of probate. As a result, Phillip, one of the children of Mr Cox's first marriage, applied for and on 21 October 1988 was granted letters of administration on Mr Cox's estate.

5. The appellant was appointed personal representative of Mr Cox in substitution for Phillip in 2006. On the understanding that Richardson Cox had died intestate, she transferred parcels of land, other than the Champagne Estate, to herself and her siblings as proprietors in common. In late 2009 she became aware of the probate granted to Lorna and, after the appellant's attorney notified a claim, Lorna executed a vesting deed on 11 May 2011 to implement Mr Cox's Will in part by vesting in herself the usufruct or life interest in the Champagne Estate and the nuda proprietas or bare ownership of that estate in the children of the second marriage.

The dispute

6. The dispute which arises in this case is between the children of Mr Cox's first marriage and the children of his second marriage. It is concerned with the extent of the property which may have been subject to legal dower in the first marriage (the Board being invited by the appellant to assume that legal dower had not been excluded by contract in relation to the first marriage) and whether clause 4 of the marriage covenant relating to the second marriage (para 2 above) prevented Mr Cox from disposing of immoveable property acquired during the course of the second marriage to Lorna and the children of that marriage by testamentary disposition.

7. By fixed date claim which was issued on 3 June 2011 the appellant and her now deceased brother, Theobalds, sought revocation of the probate in favour of Lorna and a declaration that Richardson Cox and Lorna had breached clause 4 of their marriage covenant which had excluded dower. In a judgment after trial dated 4 February 2013 Wilkinson J accepted the claimants' submission. She referred to certain provisions of the Civil Code of 1879, including articles 1180, 1185 and 1344 which the Board discusses below. She observed that the power to stipulate in a contract of marriage that there should be no dower bound both the children and the mother (article 1344) and stated, critically, (in para 19):

> "The net effect of the provision providing for no dower was that the defendant [who was then Lorna] and her children fathered by Richardson Cox were not to benefit from his estate whether under intestacy or by will."

It followed from that proposition that Mr Cox could not transfer the Champagne Estate to Lorna or the children of the second marriage by testamentary disposition and that the clauses of his Will which purported to do so were invalid. Wilkinson J therefore so declared and ordered Lorna to vacate the Champagne Estate and to distribute that estate to the children of the first marriage.

8. Lorna appealed to the Court of Appeal of the Eastern Caribbean Supreme Court, which by order dated 19 December 2013 allowed her appeal and set aside Wilkinson J's orders. The Court of Appeal (Pereira CJ, Michel JA and Mitchell JA (acting)) in an ex tempore judgment on the same date held that the exclusion of dower by the marriage covenant before the second marriage left Richardson Cox with complete freedom to dispose of his property by testamentary disposition.

9. Since the judgment of the Court of Appeal was handed down, Theobalds died in 2014 and Lorna died in 2015. The Court of Appeal granted unconditional leave to appeal as of right to the Board on 26 January 2015. In 2017 the appellant was appointed to represent Theobalds' estate and the current respondent was appointed to replace Lorna.

10. Before the Board, Mr V Dexter Theodore QC in an elegant and succinct submission again pursued the argument which had been advanced in the courts below that clause 4 of the marriage covenant prevented Richardson Cox from transferring his estate to Lorna or the children of the second marriage by testamentary disposition. He submitted that the relevant provisions of the Civil Code should be given a purposive interpretation in the interests of legal certainty so as to uphold the terms of the marriage covenant by preventing a person achieving by testamentary disposition a practical result which the marriage covenant had excluded by the renunciation of dower, which in this case was the conferring of the usufruct of the Champagne Estate on Lorna and the ownership of that estate on their children. He also sought to advance for the first time before the Board a new argument, by reference to articles 1340 and 1351 of the Civil Code of 1879, to the effect that the Champagne Estate had passed to the children of the first marriage by operation of legal dower on the death of Richardson Cox and was therefore unavailable for testamentary disposition.

11. It is not the practice of the Board, save in very exceptional circumstances, to allow a new point of law to be argued without the benefit of judgments upon it in the courts below, even where all the facts relevant to the new point have been established

in evidence or are undisputed: *Pillai v Comptroller of Income Tax* [1970] AC 1124, 1130; *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1, 9; *Deosaran v Barrow* [2006] UKPC 33, para 9. This is not a case where the relevant facts have been established to support the new argument. But in responding to the first submission the Board discusses the nature of legal dower and that discussion provides a complete legal answer to the new argument.

Discussion

12. The Board is satisfied that the Court of Appeal was correct in its determination of the appeal. The exclusion of legal dower in the marriage covenant which Richardson and Lorna Cox signed before the second marriage did not restrict the ability of Mr Cox by testamentary disposition to transfer property which he was otherwise free to bequeath. Looking at the matter practically, the effect of the appellant's submission if correct would have been that Mr Cox could have transferred the Champagne Estate in his Will to anyone other than his second wife and the children of the second marriage. The Board is quite satisfied that the Civil Code of 1879 did not give rise to such an absurd result.

13. The Code adopted an approach to matrimonial property which derived from the customary laws of France. It created as a norm the joint ownership of property by spouses but excluded from that norm immoveable property which the spouses owned before the marriage or inherited during the marriage. Such property in the hands of the husband was the subject of a charge known as dower in favour of his wife and children, unless the parties contracted to exclude dower. Thus, in the coutume of Paris, dower was explained in these terms:

> "Douaire coutumier est de la moitié des heritages que le mari tient et possede au jour des épousailles et benediction nuptiale; et de la moitié des heritages qui depuis la consommation dudit mariage, et pendant icelui, échéent et aviennent en ligne directe audit mari."

(cited in William Burge et al, The Comparative Law of Marriage and Divorce (1910), p 535)

While the assets which were made the subject of dower under French customary law varied between regions and cities, the norm was that dower was a charge on the immoveable property which the husband owned at the time of the marriage and on such immoveable property as he might acquire by succession from his direct ascendants during the marriage: R J Pothier, *Traité du Douaire* (1776), pp 17-19.

14. The Civil Code of 1879 adopted this approach in St Lucia and achieved a balance or symmetry in its regime for matrimonial property. Thus, in article 1195 it provided:

> "The immoveables which the consorts possess on the day when the marriage is solemnised, or which fall to them during the continuance of the marriage by succession or an equivalent title, do not enter into the community."

If the parties to a marriage had not contracted to the contrary, they were presumed under article 1180 of the Code to have subjected themselves irrevocably to legal community of property and legal dower. But there was excluded from the community of property the assets in article 1195 (above) and it is such assets in the husband's ownership which are subjected to the charge of legal dower. This is clear from the following provisions of the Code.

15. The Code in article 1339 distinguished between legal dower and conventional dower. The latter, with which the Board is not concerned in this appeal, was dower upon which the parties agreed in their contract of marriage and which affected only the property of the husband acquired before marriage (article 1341). The relevant provisions of the Code relating to legal dower, with which this appeal is concerned, were as follows:

> "1340. Legal dower is a charge which the law, independently of any agreement, and from the mere act of marriage, attaches to the property of the husband, in favour of the wife as usufructuary, and of the children as owners. …
>
> 1344. If there be no contract of marriage, or if that which has been made contains no explanation on the subject, legal dower is held to be intended.
>
> But it is lawful to stipulate that there shall be no dower, and such a stipulation binds children as well as mother. …
>
> 1347. Legal dower consists of the usufruct by the wife, and the ownership by the children, of one half of the immoveables which belong to the husband at the time of the marriage, and of one half of those which accrue to him during marriage from his father or mother or other ascendants. …

> 1351. Dower, whether legal or conventional, is a right of survivorship which comes into operation by the death of the husband. …"

16. It is clear from these provisions that legal dower was confined to the assets listed in article 1347. The appellant's assertion to the contrary, which underpins both her original argument and also the new argument which she has sought to raise before the Board, focusses exclusively on article 1340, which defined the nature of legal dower and overlooks article 1347 which alone defined the assets which are subject to the charge.

17. The first submission, that the marriage contract relating to the second marriage prevented Richardson Cox from bequeathing his property by testamentary disposition, is misconceived for two separate reasons. First, the exclusion of dower in that contract could have no effect upon Mr Cox's ability to bequeath immoveable property which he acquired during the course of that marriage other than by direct lineal succession. As the Champagne Estate was acquired during the course of the marriage and funded by borrowing, it could never have been the subject of legal or conventional dower. Secondly, even if the Champagne Estate could have been the subject of legal dower but for the exclusion of legal dower in the marriage contract, such exclusion, as the Court of Appeal held, would have freed the Estate from the charge and would have enabled Mr Cox to bequeath it in his Will. While the appellant is correct that article 1185 of the Code provided that the parties to a marriage could not alter the covenants in their marriage contract after their marriage and otherwise confer inter vivos benefits on each other, that provision cannot assist her in the circumstances of this case as (i) the bequest involved no alteration of the marriage contract and (ii) a testamentary disposition is not an inter vivos gift.

18. Article 1347 provides a complete answer to the second submission, namely that the Champagne Estate fell within legal dower relating to the first marriage (on the assumption that such dower had not been excluded by contract). The Estate could not be charged with legal dower relating to the first marriage as Mr Cox did not own it before that marriage and did not acquire it by succession. Indeed, article 1349 hammers a further nail in the coffin of that argument as it provides for the existence of legal dower in successive marriages. It provides:

> "The legal dower resulting from a second marriage, when there are children born of the first, consists of a half of the immoveables, not affected by the previous dower, which belong to the husband at the time of the second marriage, or which accrue to him during such marriage from his father or mother or other ascendants.

> The rule is the same for all subsequent marriages which the husband may contract, when there are children of the previous marriages."

This article is inconsistent with the view, which the appellant advances, that articles 1340 and 1351 of the Code had the effect that the dower relating to the first marriage included the whole property of Richardson Cox at the date of his death.

19. It follows that there was no bar on Richardson Cox against bequeathing the Champagne Estate to his wife in usufruct and to the children of the second marriage as owners.

20. For completeness, the Board observes (i) that there was no evidence that Richardson Cox owned immoveable property before the first marriage or inherited immoveable property during that marriage which could have been charged with dower and (ii) that the purchase of the Champagne Estate was funded by borrowing and not by the reinvestment of funds from the sale of any such immoveable property. There is therefore, in any event, no factual basis for the appellant's claim to the Champagne Estate.

Conclusion

21. The Board will humbly advise Her Majesty that the appeal should be dismissed. Written submissions as to costs are invited within 21 days of the date of this Advice.