IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 00974

BETWEEN	NEVILLE DERBY	CLAIMANT
AND	HALCOTT ODION TOWNSEND	1ST DEFENDANT
AND	ELAINE TOWNSEND	2ND DEFENDANT

Mrs. Gloria E. Langrin for the Claimant

Mr. Kent P. Gammon instructed by Dunn Cox for the 1st Defendant

Heard: July 25 and September 20, 2006

McDonald J. (Ag.)

By way of a Fixed Date Claim Form dated 22nd March 2005, the claimant seeks the following declarations:

i the ownership of premises registered at Volume 611 Folio 38;

ii that the joint tenancy in Volume 611 Folio 38 be severed;

iii that the interests of Mr. Townsend be transferred to Mr. Neville Derby and Mrs. Maud Derby;

iv that three of the lots in the subdivided land registered at Volume 611 Folio 38 inclusive of the spot on which his house stands be given to the said Mr. and Mrs. Neville Derby;

v that the remainder of the land be given to Mrs. Townsend or

vi that, alternately, Mr. and Mrs. Townsend pay Mr. and Mrs. Neville Derby the value of the house constructed by Neville Derby on land registered at Volume 611 Folio 38 as valued at the date of this Order;

vii that the Registrar of the Supreme Court sign any necessary documentation including subdivision application and Instrument of Transfer should the defendants fail to do so.

On November 2, 2005, Reid J granted an Order for the Fixed Date Claim Form to be served on the 2nd defendant by way of substituted service. Affidavit of Publication was filed on March 6, 2006 indicating compliance with the Order. The Court records reveals that no acknowledgement of service, affidavit or defence have been filed by the 2nd defendant.

Claimant's case

In support of his claim, Mr. Derby filed an affidavit dated 22nd March 2005, and his Attorney-at-Law, Mrs. Gloria Langrin filed an affidavit on July 13, 2006 on his behalf.

Mr. Derby asserted that in 1979, he was told by Mr. Swaby's, Attorney-at-Law that one Mr. Gray, real estate agent had given him a parcel of land registered at Volume 611 Folio 38 in Manchester to sell. Mr. Swaby showed him written instructions signed by a Mr. Gray.

In 1979 he attended Mr. Swaby's office and signed the Agreement for Sale which has been exhibited. The agreed price was $7,750.00 which he paid in full in cash. Three copy receipts were also exhibited.

He stated that Mr. Swaby told him that Mr. and Mrs. Townsend were the registered proprietors of the said land, were obtaining a divorce and the proceeds of sale of the land would be divided between them. He was also told that when they came to Jamaica from the United States of America, the title would be transferred to him.

Mr. Derby said that he was put in possession by Mr. Swaby, as the lawyer representing vendors and purchasers. Copy survey notice was exhibited.

Between 1982 – 1984, he constructed a dwelling house on the said property. A copy of the approval for the building was exhibited.

He was told by Mr. Swaby that Mrs. Townsend came to Jamaica in early 1985 to sign the documents of transfer but refused to do so.

In April 1985 a plaint was filed in the Resident Magistrate's Court for the parish of Manchester by Mr. and Mrs. Townsend for recovery of possession. It was thrown out by the Resident Magistrate after being called up on ten (10) occasions.

He further stated that the Townsends retained Mr. Gresford Jones in the matter, who requested him to sign a mortgage document for the purchase of the premises at an increased price. He refused, as he had already paid the agreed price that was asked by Mr. Swaby on behalf of the vendors.

He realized that at the time the request was made, the value for the property was inclusive of the value of the house which he had constructed on it. At the time of purchase no building whatsoever was on it.

In 1986, the Townsends again sued him for recovery of possession of property. He has heard nothing more about this matter.

Sometime in 1988 – 1989 – Mrs. Townsend and her agent went to his house throw out, broke up and destroyed most of his belonging and rented out the house.

He spoke to Mr. Townsend about the matter, and he admitted that he and his wife had authorized Mr. Gray, who is Mrs. Townsend's brother to sell the house.

Mr. Townsend also signed an Instrument of Transfer to him and had it notarized on February 28, 1998. Copy of which is exhibited.

In Mrs. Langrin's affidavit of July 13, 2006 she deponed that her client Mr. Derby informed her that when he visited Mr. Townsend in Florida, he admitted that Mr. Gray, the valuator was his brother-in-law and authorized agent to sell the property registered at Volume 611 Folio 38. Further that Mr. Townsend signed the Instrument of Transfer on February 26, 1998. That Mr. Derby informed her that in 1998 Mr. Townsend did not claim to be suffering from glaucoma and did not appear to be having any difficulty with his vision.

The First Defendant's Case

Two affidavits were filed in support of this case. The first by Mr. Townsend on December 29, 2005 and the other by Mr. Gammon, his Attorney-at-Law on July 19, 2006.

Mr. Townsend in his affidavit stated that in 1979 he was not living in Jamaica and had no dealings with the claimant nor with a Mr. Swaby. That to date he has received no money for the alleged sale of his property to Mr. Derby.

He stated that the said land registered at Volume 611 Folio 38 is owned by himself and his former wife Elaine Townsend.

In 1998 the claimant and his wife came to his home in Plantation, Florida, introduced themselves for the first time. Mr. Derby told him his story of purchasing land belonging to his former wife and himself and that he had never been given a title. He stated that he had no knowledge whatsoever of any of the events in the story he told him.

Mr. Gammon's affidavit in response to Mrs. Langrin's affidavit stated that Mr. Townsend denied that Mr. Gray was a valuator, or the brother-in-Law of Elaine Townsend.

He denied authorizing Mr. Gray to sell the subject property registered at Volume 611 Folio 38. He stated that Mr. Townsend told him that he had purchased the subject property from his former wife, Elaine Townsend many years ago, and was never registered as the owner of the land and that he wanted to be so registered.

That on hearing the claimant's tale of sorrow, felt sympathy for him and strictly on humanitarian grounds he signed a document that he was subsequently informed by his present Attorneys-at-Law was an Instrument of Transfer.

He asserted that he never read the document that he signed, nor did he know what he was signing.

That he had been suffering from glaucoma from 1965 and that it had steadily deteriorated over there many years despite his many surgeries to treat and correct it. Mr. Townsend deponed that as far as he knew, Mr. Derby had put up two houses on the property, one he rented and the other for his own use, and that they were constructed without his knowledge or consent.

The Submissions

Attorneys-at-Law for the claimant and 1st defendant both furnished the Court with written submissions.

Mrs. Langrin submitted that Mr. Gray an in-law and authorized agent of the Townsends had brokered the sale of the said parcel of land to a Mr. Scarlett who sold it to the claimant. The claimant was put into possession by Mr. Swaby's Attorney-at-Law for both parties.

She further submitted that the claimant's position is that Mr. Townsend by executing the Instrument of Transfer has effectively severed his joint tenancy with his wife and transferred his interests in the land to the claimant.

She said that while the Agreement for Sale was not signed by the Townsends, the Instrument of Transfer was signed by Mr. Townsend. It is the Instrument of Transfer which conveys the property, the Agreement merely agrees to do so. Having signed the Transfer, the Agreement is effected and the transferee has an equitable interest in the land, to be perfected by endorsement at the Office of Titles.

She also submitted that Mr. Townsend was a joint tenant with his first wife of the subject property and the effect of his signing the Instrument of Transfer alone is evidence of his effectively severing the joint tenancy.

Mrs. Langrin asked the Court to reject Mr. Townsend's assertion that he did not know what he was signing when he signed and did not understand the document he was signing.

Mr. Gammon submitted that although the 1st defendant admitted to signing a document which he subsequently learnt was an Instrument of Transfer, the conveyance

was not properly in order in light of the absence of the Agreement for Sale in the names of the registered owners and the receipt of monies paid.

He posited that Mr. Townsend's signing of the Transfer after the alleged agreement for sale by Mr. Townsend in the circumstances deponed to in his affidavit and in that of his Attorney-at-Law did not amount to a course of dealing as contemplated in the case of **Williams v Hensman** (1861) 1 John and Hem 546 at 547 where Sir William Page Wood WC said inter alia:

> "and, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy in common."

Mr. Gammon opined that the affidavit of Mr. Townsend is opposition to the affidavit of Mr. Derby, in addition to his Mr. Gammon's affidavit in response to the affidavit of Mrs. Langrin speaks to the facts and circumstances of how Mr. Townsend signed the Instrument of Transfer and negates any clear intention of Mr. Townsend to transfer his interest in the subject property to Mr. Derby.

The Agreement for Sale

The title for the said property registered at Volume 611 Folio 38 does not show the shares each party owns, therefore a joint tenancy is presumed as the parties are husband and wife.

There must be an enforceable contract to convey the legal estate. Being a contract concerning an interest in land, the contract must be evidenced by some memorandum or note, thereof in writing, signed by the party to be charged or by some other person thereunto by him lawfully authorized. In the absence, however, of such written evidence

equity will enforce an oral agreement if there are acts sufficient to comply with the equitable doctrine of part performance.

As stated by Jessel MR in **Lysaght v Edwards** (1876) 2 ch D 499 at 506:

> "the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser."

In support of his claim Mr. Derby exhibited copy of an Agreement for Sale dated 7th May 1979 between Robert Scarlett as vendor and Neville Derby as purchaser in respect of land registered at Volume 611 Folio 38 in the names of the Townsends.

Robert Scarlett signed as vendor and Mr. Derby signed as purchaser, both signatures were witnessed by Helen Myers.

It states that Messrs McGregor, Williams & Swaby, Attorneys-at-Law had the Carriage of Sale. Sale price agreed $7,500.00. A deposit of $700.00 was made on signing of Agreement and subsequently amounts of $6,800.00 and $500.00 were paid to Mr. Scarlett and $200.00 on 8th May was received by Myers for Robert Scarlett.

I accept as true what Mr. Derby said in his affidavit namely, that Mr. Swaby had told him that Mr. Gray, a real estate agent had given him a parcel of land registered at volume 611 Folio 38 situate in Manchester to sell. In addition Mr. Swaby had shown him written instructions signed by Mr. Gary.

The statements of the learned authors of **Chitty on Contract**, 24th Edition, Volume 1 at paragraphs 2026 and 2029 on Agency are instructive.

Paragraph 2025 reads (inter alia):

> "A contract made by an agent as such, is, in Law the contract of the principal. The agent is considered merely as

> the medium by which the contract is effected; and his assent is merely the assent of his principal."

Paragraph 2029 reads (inter alia):

> "Authority may be actual or apparent. Actual authority is a 'legal relationship between principal and agent created by a consensual agreement to which they alone are parties.'" Apparent or ostensible authority is "the authority of an agent as it appears to others." Under the doctrine of apparent authority the principal may be bound to third parties because the agent appeared to have authority though as between principal and agent there was in fact no such authority granted and the normal consequences of such authority did not arise."

Although Mr. Townsend in affidavit of Kent Gammon dated 19th July 2006 denies that Mr. Gray was ever his agent and that he did not authorize him to sell the said property, his letter of 4th August 1982 shows that he had discussed the question of the sale of the land with his sister-in-Law, Mrs. Gray in the presence of Mr. Gray at a price of $2,000.00 per acre.

Further that Mr. Gray had unintentionally misinformed Mr. Scarlett on the price of the land.

Clearly, the contents of the letter in my view supports Mr. Derby's assertion that he was told by Mr. Swaby that Gray was the person who had given him the land to sell.

I also accept Mr. Derby's evidence at paragraph 5 of affidavit Gloria E. Langrin, as true that when he visited Mr. Townsend in Florida, he admitted that Mr. Gray, the valuator was his brother-in-Law and authorized agent to sell the property registered at Volume 611 Folio 38.

In addition letter exhibited and dated 31st August 1998, MacGregor Williams & Sway to Mr. Adedipe states:

This letter (i.e. registered letter from Halcott Townsend)

> "In our opinion bear out the contention of the defendant that the land was originally offered (by mistake or otherwise) to Robert Scarlett by plaintiff's agent George Reginald Grey for $2,000.00...."

In my view the above bolsters the contention that there was communication between Mr. Gray and Mr. Scarlett over the sale of the land. Infact that there was an offer for sale to Mr. Scarlett, the inference being that he purchased same, he having executed the Contract of Sale with Derby in his capacity as vendor.

Although in paragraph 11 of Kent Gammon's affidavit dated 19th July 2006, Mr. Townsends contends that he did not authorize Mr. Gray to sell the property, which I do not accept, he having executed a Transfer with respect to approximately 50% of the land, it cannot be said that he did not authorize the sale of that portion of the land to which he was entitled.

Therefore on a balance of probabilities Mr. Gray had Mr. Townsend's express authority to sell that part of the land to which he was entitled.

On a balance of probabilities, Mr. Scarlett had purchased the land and acquired an equitable interest in that part of the land in which Mr. Townsend had an interest.

Consequently, Mr. Scarlett would have been empowered to carry out the sale to Mr. Derby.

Mr. Townsend's execution of the Transfer evidently ratifies the sale of that part of the land to which he has an interest.

The Transfer

Where land is registered in the names of two or more persons as joint tenant, they together hold both the legal and equitable estate.

The general rule is that in such cases, both or all the registered proprietors shall alone be capable of making a disposition which shall affect the legal estate in the land, and the legal estate is not effectively transferred until it is registered.

The joint tenancy may be severed by:

a. alienation by one joint tenant;

b. acquisition by one joint tenant of a greater interest than that held by the other tenants;

c. sale;

d. partition by Order of the Court or by voluntary agreement.

In any such case, in order to pass the legal estate, all the joint tenants must join in the transaction.

The legal estate is not affected by a disposition of the interest of one of the joint tenants without the concurrence of the others, although it may create an equitable interest.

In this case Mr. Derby is relying on an Instrument of Transfer executed by Mr. Townsend on 26th February 1998 in respect of a portion of the land viz. one acre, two roods, sixteen perches and three-tenth of a perch.

Mr. Townsend's averment is that he signed but did not know what he signed. He is relying on the legal doctrine of non est factum.

I am guided by the statement of the learned authors in **Chitty on Contracts** – 24th Edition Volume 1 at paragraph 300 which reads:

> "The general rule is that a man is estopped by his deed, and although there is no such estoppel in the case of ordinary signed documents, a party of full age and

> understanding is normally bound by his signature to a document, whether he reads or understands it or not.
> If, however, a party has been mislead into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. The deed or writing is completely void in whosesoever hands it may come."

There is no evidence that Mr. Townsend was mislead into executing the document or that he had been induced by fraud in the execution of the transfer.

The fact that Mr. Townsend said that he executed it out of sympathy and on humanitarian grounds does not avail him.

Mr. Townsend was aware that the land belonged to himself and his wife as stated in his letter of August 4, 1982.

At paragraph 12b of the affidavit dated July 19, 2006, Mr. Townsend admitted that he understood Mr. Derby as wanting to be the registered owner. He attended a Notary Public and signed the Instrument of Transfer. By executing the transfer, his intention could only be to convey his interest in the land to Mr. Derby.

The Jamaican case of **Brynhild M. Gamble v Hazel Hankle** (1990) 27 JLR 115 was relied on by Mrs. Langrin. In that case the wife and husband were registered as joint proprietors of land. After the husband's death, the wife claimed to be solely entitled by virtue of jus acrescendi. The husband had, during his lifetime purported to convey the land to the defendant by way of deed of gift.

Justice Wolfe (as he then was) held, and I quote from the head-note:

> "(i) that the deed of gift evidenced a dealing with an interest in land which manifests a clear intention to sever the joint tenancy and to create a tenancy in common and the appellants' right of jus acrescendi was therefore extinguished.

(ii) that S.88 of the Registration of Titles Act is directive and not mandatory and S.63 does not operate to make the unregistered instrument void but only postpones the passing of the interest created by the instrument until the interest is registered."

I hold that the Instrument of Transfer is sufficient evidence to justify the transmission of Mr. Townsend's interest in the property to Mr. Derby.

It is declared that:

(i) the joint tenancy held by Halcott Odion Townsend and Elaine Townsend of land registered at volume 611 Folio 38 of the Register Book of Titles be severed.

(ii) Halcott Odion Townsend and Elaine Townsend be declared tenants in common of the aforesaid property.

(iii) That one acre two roods sixteen perches and three-tenth of a perch being a portion of the land comprised in Certificate of Title registered at Volume 611 Folio 38 be transferred to Mr. Neville Derby and Mrs. Dorrette Maud Derby.

(iv) Mrs. Elaine Townsend is entitled to the remainder of the land.

(v) The Registrar of the Supreme Court sign any necessary documentation including subdivision application and Instrument of Transfer should the defendant fail to do so.

(vi) Costs of this application to the claimant to be agreed or taxed as against the 1st defendant.