[2020] JMSC Civ.118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV02675

BETWEEN	**SEAN GREAVES**	**1st CLAIMANT**
AND	**SEAN GREAVES (Administrator with will annexed Of the estate of Janneth Chung, deceased)**	**2nd CLAIMANT**
AND	**CALVIN CHUNG**	**DEFENDANT**

IN OPEN COURT

Mr. Jaleel Dabdoub and Mrs. Karen Dabdoub instructed by Dabdoub, Dabdoub& Co. for the Claimants

Mr. Chukwuemeka Cameron instructed by Carolyn Reid & Co. for the Defendant

13th, 14th, 15th& 16th December 2016, 7th February 2017, 21st, 22nd& 23rd January 2019, 18th March 2019 &18th June 2020.

Real Property – Civil Procedure Rules 10.5, 10.7 – No case submission - Joint tenancy – Severance of joint tenancy – Requirements to sever joint tenancy – whether claimant has made out a prima facie case - Whether joint tenancy severed by incomplete transfer

THOMPSON-JAMES, J.

INTRODUCTION

[1] The trial of this matter involves amongst others whether a joint tenancy held by the defendant and the claimant's deceased mother has been severed thereby allowing her interest to pass to the claimant. At the end of the claimant's case counsel for the defendant made a no case submission. This submission was made on the basis that the claimant had failed to make out any of the grounds pleaded in the Fixed Date Claim Form. He elected to rest on his submissions. The manner in which the no case submission was made and after the tribunal enquires which I will return to at a later time show that counsel had no intention of calling any witnesses. Therefore, waiving the defendant's right to call evidence which effectively brought the trial to an end. Herein lies the court's decision on that submission, and consequently, the entire claim.

Background

[2] The 1st claimant, Sean Greaves, is the step-son of the defendant, Calvin Chung, and the administrator of the estate of his deceased mother Janneth Elizabeth Chung who died September 12, 2009.

[3] At the time of her death, the deceased and the defendant were husband and wife. Both are registered as joint tenants of property (hereinafter referred to as the "subject property") described as:

> *ALL THAT parcel of land known as NUMBER TWENTY-FIVE BURLINGTON AVENUE part of EASTWOOD PARK in the parish of SAINT ANDREW being the Lot Numbered TWENTY-TWO BLOCK "B" on the plan of Eastwood Park aforesaid deposited in the Office of Titles on the 7thof June, 1945 of the shape dimensions and butting as appears by the Plan thereof hereunto annexed and being the land comprised in the Certificate of Title formerly registered at Volume 1159 Folio 284 and now being registered at Volume 1404 Folio 828 of the Register book of Titles.*

[4] August 30, 2009, Janneth Chung purported to transfer all her interest in the subject property to Mr. Greaves 'in consideration of natural love and affection', he being

her 'natural born son'. No stamp duty was paid and the transfer was not duly registered.

[5] Mrs. Chung died, testate, September 12, 2009, having devised in her Last Will and Testament, dated September 5, 2008, all her interest in the subject property to her son Sean Greaves. Both executors named in the Will, having renounced their executorship, Mr. Greaves applied for and obtained letters of administration with will annexed in Mrs. Chung's estate from the Supreme Court of Jamaica March 18, 2013.

[6] June 2, 2014, Mr. Greaves filed a Fixed Date Claim Form, seeking the following in respect of the subject property:

> *"1. A declaration that the joint tenancy between the Respondent, Calvin Chung, and the deceased, Janneth Chung, has been severed as a result of the said deceased's transfer, effected by way of the Instrument of Transfer dated and signed the 30th day of August 2009, to her son in consideration of the natural love and affection she holds for him of all her estate and interest in the said land..."; and*
>
> *2. An order directing the Registrar of Titles to register the said Instrument of Transfer, transferring all the estate and interest in the subject property of the deceased to her son SEAN KIRKPATRICK GREAVES."*

Mr. Greaves brought this action against Mr. Chung both in his personal capacity, as well as in the capacity of administrator of his mother's estate as the 2nd claimant.

[7] The defendant initially resisted the claim by way of his affidavit filed August 8, 2014, broadly on the grounds that:

i. the deceased did not sign the transfer;

ii. the deceased did not have the intention to part with her legal interest in the property;

iii. the deceased did not give any instructions for a transfer to be prepared; and

iv. if the court were to find that the transfer was in fact signed by the deceased then it would have been signed under duress;

[8] At trial, the defendant objected to the admission of the transfer document into evidence. February 7, 2017, the court ruled that, the proper foundation having being laid, there was no basis in law to exclude it. The transfer was tendered into evidence as exhibit 4.

[9] The court heard evidence from five witnesses on the claimant's case: Professor David Rowe (attorney-at-law, now deceased), Mrs. Beverly Simon, Ms. Danielle Shelly (Professor Rowe's assistant), Mr. Abraham Dabdoub (Mrs. Chung's attorney), and the claimant, Mr. Sean Greaves.

[10] At trial, January 22, 2019, counsel for the defendant, conceded that the deceased did in fact sign the transfer, stating that, based on the evidence before the court, *"the veracity of the deceased's signature on the transfer document was no longer in issue",* albeit he made clear that the voluntariness of the deceased affixing her signature was still a separate and live issue.

[11] Mr. Cameron (referring to Mr. Dabdoub's evidence):

"Having read the expert report I do not think it is necessary to cross examine. The veracity of the witness is no longer in question as it relates to the signature of Mrs Janneth Chung on the transfer."

He admits that she affixed her signature to the document.

[12] January 23, 2019, at the close of the claimant's case, counsel for the defendant, Mr. Cameron made the bold assertion that, based on the evidence, the defendant had no case to answer. Having been put to his election by the court, Mr. Cameron elected to rest on his no case submission, thereby agreeing not to call any evidence in support of the defendant's case.

The Defendant's No-Case Submission

[13] The no-case submission, contained in written submissions filed by the defendant on the same date, was made on the basis that the claimants have failed to prove that the joint tenancy has been severed. Particularly, it is submitted that "*the claimants have failed to prove that there was an irreversible and complete act of alienation of the property by Mrs. Chung*".

[14] In that regard, although the defendant accepts as having been proved that Mrs. Chung executed a transfer with the intention of severing the joint tenancy for the purpose of her son being able to obtain her half interest in the property, it is contended that, such an intention, without more, is 'neither irreversible or a complete act of alienation' which are required by law for the tenancy to be severed.

[15] Alternatively, and in any event, the defendant submits that the transfer was not signed in accordance with Jamaican law, in that, the transfer which was signed outside of the jurisdiction, was not notarized or witnessed by a member of the Jamaican Consulate as required by **section 152** of the **Registration of Titles Act (RTA)**.

[16] The defendant relies on the case of **Brynhild M. Gamble v Hazel Hankle** (1990) 27 JLR 115 (Sc), and Wolfe J's approval therein of the principles set out in **Williams v Hensman** (1861) vol 70 E.R. 862 at 867 for the common law position in relation to the three ways in which a joint tenancy can be severed. On the basis of those principles, the way in which the claim has been pleaded and on the evidence before the court, it is submitted that only the first method is applicable for consideration, that is, an act by one of the joint owners 'operating upon his own share'. This act, Mr. Cameron contends, must be an irreversible and complete act of alienation', and in the circumstances, pursuant to sections 63 and 88 of the RTA, such an act of alienation could only occur upon registration of the transfer. In particular, he highlights the following:

> *63. When land has been brought under the operation of this Act...**no instrument until registered in a manner herein provided shall be effectual to pass any estate or interest in such land**...**but upon such registration the estate or interest comprised in the instrument shall pass**...*
>
> *88. The proprietor of land...**Upon the registration of the transfer**, the estate and interest of the proprietor...**shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof**... [Emphasis Supplied]*

[17] The decision of McDonald Bishop J in **Bertram Cooper v Linford Coleman** (unreported), Supreme Court, Jamaica, Claim No. 2004HCV01803, judgment delivered January 30, 2007, is relied on for that approach. Specifically, the defendant relies on her finding that:

> *"...falling short of an act of alienation or a similar unilateral act affecting the beneficial interest so as to preclude the operation of the right of survivorship, a unilateral act or declaration of intention, without more, even if communicated, is not enough to sever a joint tenancy..".*

[18] Essentially, it is submitted that, the execution of a transfer without more is not an irreversible act of alienation, and, since the evidence the claimant has placed before the court is that the transfer was not registered, the legal interest in the land was not alienated from the deceased. (**National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited** [2017] JMSC Civ 67, at paragraph 68 is also relied on in support of this point.)

[19] The defendant further relies on the Privy Council decision of **Macedo v Stroud [1922] 2 A.C. 330**, at page 337, for the proposition that *"the execution of a transfer not having been registered nor delivered to the transferee was nothing more than an imperfect gift"*. Moreover, it is submitted, the transfer not having been given to Mr. Greaves, he has no equitable or legal interest in the land. Consequently, it has been submitted that the claimants have failed to prove that the joint tenancy has been severed and the defendants have no case to answer.

The Claimants' Submissions in Response

[20] The claimants responded to the no-case submission by way of written submissions filed March 4, 2019, as well as oral submissions made March 18, 2019, the date set for continuation of the hearing.

[21] The claimants raised the preliminary issue that the court ought not to consider the defendant's no-case submission as the issues raised therein had not been previously pleaded by the defendant and, as such, he is precluded by law from relying thereon. Particularly, the claimants rely on rules 10.5 and 10.7 of the **Civil Procedure Rules (2002) (CPR)**, which, amongst others, set out that the defence must set out all the facts on which the defendant relies to dispute the claim (10.5(1)), as well as all reasons for resisting any allegation he does not admit, or denies, and for which he puts forward a different version of events (10.5(5)).

[22] It is contended that, nowhere in his defence does the defendant set out any of the facts on which he now relies in his no case submission, specifically that

(a) the transfer was not witnessed in accordance with section 152 of the RTA;

(b) the transfer was not registered prior to Mrs. Chung's death; and

(c) the transfer was not delivered to Mr. Greaves for the purpose of registration.

[23] In respect of the substantive issue, it is the claimants' position that to succeed on a no case to answer submission the defendant must show the claimant has failed to make out a prima facie case, in accordance with the formulation set out in the case of **Jeffrey Johnson v Ryan Reid** [2012] JMSC Civ. 7, per Anderson J (pg. 8), which he has failed to do.

[24] Firstly, the claimants rejects the submission that the transfer was not signed in accordance with **section 152** of the RTA, on the basis that the section makes clear

that “any other person” may witness the transfer, and that the proviso renders the section directory and not mandatory. However, it is submitted, even if this court finds that the transfer did not comply with section 152, it would have still had the effect of severing the tenancy and creating a beneficial interest in Mr. Greaves, as it has been settled by our Courts that a transfer which does not strictly comply with the RTA still has that effect. The cases of ***Gamble v Hankle*** and ***National Import-Export Bank of Jamaica*** are relied on for this proposition, respectively. Mr. Greaves, it is submitted, in accordance with ***Gamble v Hankle***, is now entitled to call on Mr. Chung to execute a transfer of Mrs. Chung’s share of the property as a tenant in common.

[25] Secondly, in respect of the defendant’s submission that the legal interest in the land was not alienated from the deceased because it was not registered, the claimants have submitted that unlike other jurisdictions that have a Torrens based system, our RTA is silent in relation to the severance of a joint tenancy, and therefore does not require registration in that respect. The claimants have cited section 97 of the Real Property Act of New South Wales, Australia, and section 59 of the Land Title Act of Queensland, Australia, in that regard. Both provisions explicitly provide that the registration of a transfer by a joint tenant severs the joint tenancy.

[26] However, the claimants asserted that, **section 2** of the **RTA** makes it clear that ‘all laws and practices so far as is inconsistent with the provisions of the Act are repealed in respect of land under the purview of the Act.

[27] Continuing, the claimants argued that the defendant’s reliance on the cases of ***National Import-Export Bank*** and ***Macedo v Stroud*** is ill-conceived, as both authorities do not address the issue of the severance of a joint tenancy which is a distinct area of law, and are therefore inapplicable to the instant case. Moreover, it is submitted, the facts of both cases are distinguishable, but nevertheless still lend support to the claimants’ position. In relation to ***National Import-Export Bank,*** although Wint-Blair J found that non-compliance with the formalities of the

RTA rendered the transfer ineffectual to pass the land intended to be transferred, said non-compliance did not invalidate the unregistered instrument, but rather only deferred the passing of an equitable interest which was created by the instrument.

[28] In respect of ***Macedo v Stroud***, and the defendant's submission that no beneficial interest was created because the transfer was not even 'given' to Mr. Greaves, the claimants have argued that the facts are entirely different, in that, in the instant case the undisputed evidence is that, whilst in that case there was no evidence that the intended transferee had signed the transfer document, the transfer instrument was immediately presented to Mr. Greaves after Mrs. Chung signed it, following which he signed it in her presence. This, it is submitted, is evidence that Mr. Greaves accepted his mother's gift to him. Further, unlike in the **Macedo** case where instructions were given to the solicitor not to register the transfer, in this case, it is submitted, the evidence is that Mr. Dabdoub had lodged the transfer for assessment and Mrs. Chung would have sent the requisite funds for the registration fees.

[29] It is further asserted, in accordance with the requirement in ***Macedo*** that no technical words are required to render an instrument a deed once it is shown it was intended to be finally executed, "*the instant transfer instrument was rendered a deed of Mrs. Chung, as she clearly advised Professor Rowe, in the presence of Danielle Shelley and her son, that she understood the meaning of the transfer instrument and that she intended to transfer her interest of the property to her son*".

[30] In relation to the law of severance in Jamaica, the claimants have relied on the authorities of **Carol Lawrence & Others v Andrea Mahfood** [2010] JMCA Civ 38 (particularly paragraph 40), which approved the law as to severance set out by Straw J in her decision in the matter in the court below, as well as Straw J's acceptance of the authority of ***Gamble v Hankle***. The case of **Michael Bagoo v Harry Narine** (unreported), Trinidad and Tobago, Supreme Court, Claim No. CV2012-02639, which "mentioned and referred" to ***Gamble v Hankle***, is also relied on, as well as ***Cooper v Coleman***, which was also relied on by the defendant. The

claimants have sought to distinguish the latter case on the basis that, unlike in that case, Mrs. Chung 'intentionally carried out a "unilateral act affecting her beneficial interest" in the property when she signed the transfer'.

[31] The claimants further submitted that not only has enough evidence been presented establishing a prima facie case that the joint tenancy was severed, but also undisputable evidence has been provided that satisfies the requirements of Jamaican law that the tenancy was indeed severed.

[32] It is therefore concluded that, the claimants only needed to present evidence sufficient to establish that:

a. Mrs. Chung had the intention to sever the relevant joint tenancy; and

b. Mrs. Chung performed an act operating on her own share.

[33] In respect of "a", not only has counsel for the defendant conceded that Mrs. Chung did in fact have the requisite intention, the undisputed evidence before the court from the claimants' witnesses is that she did in fact do so. Further, in respect of "b", counsel Mr. Cameron also conceded that Mrs. Chung did in fact sign the transfer, which, it is submitted, is an act operating on her share of the property.

Law & Analysis

Preliminary Issue

[34] The claimants have raised the preliminary issue that the court ought not to consider the defendant's no-case submission as the issues raised therein had not been previously pleaded by the defendant and, as such, he ought to be precluded by law from relying thereon. Particularly, the claimants rely on rules 10.5 and 10.7 of the Civil Procedure Rules (2002) (CPR).

[35] Rule 10.5, as is relevant, provides:

> *1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
>
> *2) Such statement must be as short as practicable.*
>
> *3) In the defence the defendant must say –*
>
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted.*
>
> *(b) which (if any) are denied; and*
>
> *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
>
> *4) Where the defendant denies any of the allegations in the claim form or particulars of claim-*
>
> *(a) the defendant must state the reasons for doing so; and*
>
> *(b) if the defendant intends to prove a different version of events from that given by the claimant,*
>
> *the defendant's own version must be set out in the defence.*
>
> *5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –*
>
> *(a) admit it; or*
>
> *(b) deny it and put forward a different version of events,*
>
> *the defendant must state the reasons for resisting the allegation.*
>
> *…*
>
> *(8)…*

[36] Rule 10.7 further provides that:

> *"The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."*

[37] It is contended that, nowhere in his defence does the defendant set out any of the facts on which he now relies in his no case submission, specifically that:

(a) the transfer was not witnessed in accordance with section 152 of the RTA;

(b) the transfer was not registered prior to Mrs. Chung's death; and

(c) the transfer was not delivered to Mr. Greaves for the purpose of registration.

[38] Counsel for the defendant's brief response was that (1) the transfer that was in evidence is not in the same condition it was in when it was served on the defendant as it was only after trial began that the absence of the stamp was brought to the claimants' attention; (2) section 10 speaks to facts, and he is not seeking to rely on any issue of fact, but rather, is asking the court to determine whether on the facts pleaded on the claimants' case a prima facie case has been made out; (3) the defendant had no duty to apply for the case to be struck out before trial as he would not have known what evidence would be led. He made the point that Mr. Dabdoub's evidence was amplified for over two hours, so the defendant would not have been in a position to challenge that evidence. Counsel submitted that it is upon that evidence that the case turned.

[39] I agree with the submission of defence counsel in respect to the response made in the proceeding paragraphs. I am not of the view that this objection has merit. In my estimation, the defendant ought to be able to show that on any fact or argument that arises on the case put forward by the claimant, the claimant has not made out a prima facie case, regardless of whether same has been set out in the defence. This is so since by making a no-case submission in my opinion he is not 'disputing' the claim per se, but rather is seeking to establish that the claimant has not put forward sufficient material to meet the evidentiary burden of his case as pleaded.

[40] Furthermore, in my view the court has the discretion to allow the defendant to rely on facts/arguments not raised in the defence, in keeping with the overriding objective. So that, even if I am wrong, I believe that these would be apt circumstances for the court to exercise its discretion in that regard, in that, it could only be in the best interest of justice for the court to satisfy itself as to whether the requirements in law have been met in order for the relief sought to be granted.

[41] I hold that it would be inimical to justice if the court could grant relief on a claim without having regard to pertinent criteria that could bar the claimant's entitlement to the relief sought, for the sole reason that it was not set out in the defence, particularly where the factual basis of these assertions, in my view, arise on the claimants' case. I, therefore, agree with Mr. Cameron in that regard. I also accept his submissions in respect of the condition of the transfer document and as it relates to the evidence of Mr. Dabdoub. Thus, I am of the view that there would be no prejudice to the claimants, and it is in the best interests of justice that the no case submission be considered.

No Case Submission

[42] The author of Adrian Keane The Modern Law of Evidence 7th Edition at pg 39 states:

> *In Civil cases tried by a Judge sitting alone, a defendant can submit that there is no case to answer at the close of the claimant's case, but in most cases the judge will only rule on the submission if the defendant elects not to call evidence Alexander v. Rayson 1936 1K.B.16961178*

Counsel for the defendant elected to rest on his no case submission and put forward no evidence.

[43] The law as to the requirements of a no case submission is essentially as the parties have outlined. Where there is a no case submission before the court, the court is tasked with assessing whether the claimant has, on the evidence called, established his or her case on a balance of probabilities. In the decision of **Annissia Marshall v North East Regional Health Authority Saint Ann's Bay Hospital & The Attorney General** [2015] JMCA Civ 56, at paragraphs 73-75, the Court of Appeal per Phillips JA, relying on the reasoning of Lord Mance in **Trevor Boyce v Wyatt Engineering et al** [2001] EWCA Civ 692, and **Michael John Miller (t/a Waterloo Plant) v Margaret Cawley** [2002] EWCA Civ 1100, outlined the procedure and burden of proof with respect to no case submissions made in civil cases. Upon making a no case submission, the defendant will, except in

extraordinary cases, be 'put to his election'. This means that ordinarily, he must indicate that he will not call any evidence for the court to hear and rule on the submission. From the latter case, the learned justice of appeal accepted, at paragraph 74, the law as stated by Lord Mance as follows:

> *"…The issue after an election is, in other words, not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. It is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his or her case by the evidence called on the balance of probabilities."*

[44] The ***Annissia Marshall*** case further indicates that the court may have regard only to the statements of case of both parties and the evidence put before the court by the claimants, including exhibits tendered into evidence by consent (paras. 76-80). I therefore, disagree with the claimants' submission that, in accordance with the decision of ***Johnson v Reid***, the defendant having elected not to call evidence, the court is to have no regard to the defence (para. 135 of the claimants' submissions).

[45] At paragraph 76 of the **Annissia Marshall** case, Phillips JA, in outlining the task that was before the trial court upon the no case submission having been made stated the following:

> *"In the instant case, on a review of the pleadings the real issue in the case was whether the respondents had performed the surgery on the appellant…without her consent…The respondents in their defence claimed that she had been told of the surgery and the risks attendant therewith before the operation…In the answers to request for information, which is also a statement of case…the respondents maintained that [sic] not being able to locate the consent form allegedly signed by the appellant, then in the alternative, the appellant had given her consent either orally and or impliedly…**Those, therefore, were the competing contentions on the pleadings before the learned judge, and which would have been his focus when assessing the evidence adduced only by the appellant to determine whether there was a case to answer**."*
>
> ***[Emphasis added]***

[46] At paragraphs 77 and 78, she went on to state what should not have been included in the lower court's consideration of the no case submission as follows:

> *"[77] The facts and issues later identified by the respondents, as set out in paragraph [28] herein, only arose subsequent to the filing of the witness statements…with regard to the allegation that the discovery of the necessity for the use of the colostomy bag…Thus, those statements ought therefore not to have been a part of the learned judge's deliberations.*
>
> *[78] …The respondents decided however, not to call any evidence and were correctly put to their election, so it was unfortunate that the learned judge when ruling on the submission of the respondents that there was no case to answer, referred to material in the respondents' witness statements as this was not acceptable..."*

[47] From Counsel for the claimants' oral submissions at this juncture I gleaned that the preference would have been that the ruling be made on the no case submission prior to the matter proceeding to a completion. Having considered the stance taken by defence counsel to put forward no evidence the tribunal formed the view that at this stage the matter could proceed to completion without more. There was no objection from Mr. Cameron and the court found it convenient to do so.

[48] What this court must then consider, the defendant having elected not to call any evidence, is whether based on the pleadings, the evidence before the court is such that the claimants have made out their case on a balance of probabilities. This in my estimation would necessarily entail an examination of the case put forward by the claimants whether, on a balance of probabilities, (1) the joint tenancy was severed by the transfer instrument, and if so (2) whether the 1st claimant is entitled to a legal and beneficial interest in the deceased's share in the property. That is to say whether a prima facie case has been made out by the claimants.

Has the joint tenancy been severed? Is the claimant entitled to a legal and beneficial interest in the deceased's share in the property?

[49] Joint tenancy is a method of holding interest in registered land that is characterized by the presence of four unities – possession, interest, title and time – as well as the right of survivorship. The authorities indicate that the right of survivorship is not absolute and each party may dispose of his or her interest as they please during their lifetime. Before this can be done, however, the joint tenancy must be

converted into a tenancy in common by way of severance of the joint tenancy [**Williams v Hensman** (1861) 70 ER 862].

[50] The **Registration of Titles Act** does not make specific provision as to the severance of a joint tenancy.

[51] It has long been accepted by our courts that the methods of severing a joint tenancy are as outlined by the common law in the case of **Williams v Hensman** (***supra***). This was confirmed by the Court of Appeal in the decision of **Sunshine Dorothy Thomas, Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus Brown, deceased) & Owen Brown v Beverley Davis** [2015] JMCA Civ 22. In approving its earlier judgment, per Morrison JA in **Carol Lawrence & Others v Andrea Mahfood** [2010] JMCA Civ 38, the Court of Appeal outlined the following principles as to severance of a joint tenancy as enunciated by Page-Wood V-C in ***William v Hensman*** (at page 867):

> *"A joint-tenancy may be severed in three ways:* ***in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share****. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship.*
>
> *Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of* ***Wilson v Bell and Jackson v Jackson****."****[Emphasis added]***

[52] It is undisputed, apparent from the pleadings, evidence, and the submissions of the parties, that only the first method of severance needs to be considered. The question, therefore, arises as to what is meant by '*an act operating on one's own share*' and whether the actions of Mrs. Chung, prima-facie, amount to acts sufficient to fall into that category so as to have effected a severance of the relevant joint tenancy.

[53] Counsel for the defendant has submitted that what is required is an '*irreversible and complete act of alienation*' and that the evidence discloses no such act. Whilst counsel has conceded that the evidence before the court shows that Mrs. Chung did in fact have an intention to sever the tenancy and to transfer her share of the property to her son, he has contended that intention alone is not enough to satisfy the first prong of the test in ***Williams v Hensman*** in order for the tenancy to be severed.

[54] The claimant, on the other hand, whilst agreeing that the claimant needs to show that the deceased had an intention to sever the tenancy, as well as that she performed an act operating on her own share, has submitted that the act of the deceased in duly signing the transfer instrument is an act sufficient to sever the tenancy.

[55] On the face of it, it seems to me that there appears to be a difference in the authorities as to the position in this regard. At paragraph 81 of the ***Sunshine Thomas*** case, Brooks JA described the requisite act as a *"unilateral alienation by one of the joint tenants"*, and at paragraph 91, relying on **In re Wilks, Child v Bulmer** [1891] 3 Ch D 59, opined that for such an act to be effective

> ***"…unilateral severance must be an irrevocable act which would prevent the actor from being able to claim survivorship of another joint tenant's interest". [Emphasis added]***

[56] In ***Bertram Cooper v Linford Coleman***, McDonald Bishop J ag. opined the following (at paragraph 23):

> *"Under the Common Law, a mere declaration of an intention to sever without the agreement of the other joint tenant was not effective to sever a legal joint tenancy. As Lord Hardwicke, LC said:*
>
> > *"If no agreement then there must be an actual alienation to make it amount to a severance. The declaration of one of the parties that it be severed, is not sufficient, unless it amounts to an actual agreement." (**Partriche v Powlet** (1740) 2 Atk. 54.)*

[57] The learned judge, who also relied on ***In Re Wilks***, noted that the above principle was applied in that case, wherein that court noted that *"the act of the joint tenant*

must be of a final and irrevocable character which effectively stops him from claiming any interest in the subject matter of the property". She considered the conflict in the authorities that she found resulted in the two schools of thought, and concluded as follows:

> *"38. At the risk of getting caught in the maelstrom of opinions on this point, I would simply say that having looked at the relevant authorities within the framework of Williams v Hensman's methods of severance, (the starting point), I am persuaded to share the view that falling short of an act of alienation or a similar unlitateral act affecting the beneficial interest so as to preclude the operation of the right of survivorship, a unilateral act or declaration of intention, without more, even if communicated, is not enough to sever the joint tenancy within the principles of Williams v Hensman.*
>
> *39. It is my view that when one considers the methods of severance within the formulations of Williams v Hensman, the only rule that indicates the acceptance of a unilateral act of one joint tenant operating on his share is rule one. Where there is no such act, then unilateral intention, without more, cannot suffice for rule one. When one goes on to consider rule two, this rule speaks to mutual agreement for severance. Clearly, this would oust any unilateral act or intention communicated or otherwise. Then, when one proceeds to consider rule three, this rule speaks to a course of dealing that evinced an intention that the interest of all is mutually treated as a tenancy in common (emphasis added). The fact that this third method also speaks to mutuality strongly indicates that there is some element of mutuality needed on the part pf the interested parties in relation to their treatment of the common property. As such, unilateral action or intention would not be sufficient. This to my mind explains the reason for Page Wood, V-C going on further to say that when it is a matter of inference to be drawn in finding severance, it is not sufficient to rely on an intention with respect to the particular share declared only behind the backs of the other joint tenants. Mutuality of intention and communication of intention seem necessary."*

[58] The learned judge therefore concluded that, in that case, communication by the deceased of an offer to purchase the defendant's share in the property, without more, would not be a sufficient act to sever the joint tenancy.

[59] The undisputed evidence before this court is that, prior to her death, Mrs. Chung signed an instrument of transfer in respect of the relevant property, purporting to transfer all her interest in the property to her son Mr. Greaves. Mr. Abraham Dabdoub, Professor Rowe and Mr. Greaves gave detailed affidavit and viva voce evidence setting out the circumstances surrounding the preparation and execution of the transfer instrument. Mr. Dabdoub in particular, gave unchallenged evidence that he was contacted by Mrs. Chung for advice on how to sever the tenancy, and

he gave her advice as to the drafting of a document that she and her husband could sign to sever the tenancy by mutual agreement. She later called him back to indicate that she needed another way as her husband refused to sign the document. He advised her of same and she gave him instructions to prepare the necessary documents to effect the severance. Mr. Dabdoub prepared the relevant transfer agreement and sent it by courier to Professor David Rowe, who arranged for Mrs. Chung to sign it. Professor Rowe's evidence, along with that of his assistant Danielle Shelley and Sean Greaves, is that the three met with Mrs. Chung August 30, 2009, and in their presence she signed the relevant transfer instrument purporting to transfer all her interest in the Burlington property to Mr. Greaves. These witnesses not having been discredited in any way, I accept this evidence as being reliable and conclude that the deceased intention was made clear to the defendant.

[60] **Do these actions amount to an** '*irreversible and complete act of alienation*'? It is undisputed that the instrument was not registered in accordance with the **RTA** for it to be effective in law. In that regard, counsel for the defendant has argued that "*it is only upon the registration of the transfer that there could be an irreversible act of alienation*", whilst counsel for the claimant contends that it is well settled that a transfer which does not strictly comply with the formalities of the RTA, still has the effect of severing a joint tenancy and creating a beneficial interest in the transferee.

[61] **Section 63** of the **RTA** provides:

> *"When land has been brought under the operation of this Act,* ***no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land****, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title.*

[62] Section 88 provides:

> ***The proprietor of land****, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively,* ***may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto****: and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof.* ***Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument****, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transfeere; and such transferee shall thereupon become the proprietor thereof..."****[Emphasis added]***

[63] Interestingly, both parties rely on ***Gamble v Hankle***, a first instance decision of Wolfe J, in which he found that even if the relevant deed of gift to transfer the property did not comply with the formalities of the RTA so as to transfer interest to the intended transferee, it was an act sufficient to fall within the ambit of the first method of severance, in that, it evidenced*"a dealing with an interest in land which manifests a clear intention to sever the joint tenancy and create a tenancy in common"*(pg. 116).In that case the plaintiff sought to recover possession of property she had held jointly with her late husband. Tendered into evidence was an indenture executed by the deceased about a year prior to his death, purporting to transfer his share in the property to the defendant by way of deed of gift. The plaintiff had contended that, since the deed of gift did not conform to section 88 of the RTA which required the transfer document to be in the forms set out in the fourth schedule of the Act, the deed was ineffectual to transfer the deceased's interest in the property, the tenancy was not severed, and therefore she was the sole proprietor by virtue of the right of survivorship. The learned judge rejected this argument, finding that the real question was 'whether or not the document evidenced a dealing with land which manifested a clear intention to sever the joint tenancy and to create a tenancy in common' (pg. 116). The learned judge also rejected the notion that even if the tenancy was severed the deed was of no effect because it had not been registered in accordance with section 63 of the RTA, and found that it was clear that the section does not operate to make the unregistered document void, but only serves to postpone the passing of the relevant interest in the land, which the plaintiff would hold on trust for the defendant, until the

instrument is registered (pg. 117). Therefore,the defendant would be entitled to call upon the plaintiff to execute a transfer of that interest to him.

[64] ***Gamble v Hankle*** was applied by Straw J in **Andrea Mahfood v Carol Lawrence & Ors** (unreported), Supreme Court, Jamaica, Claim No. 2006HCV1378, judgment delivered October 21, 2009, a decision which was approved by the Court of Appeal in ***Lawrence & Others v Mahfood*****.**

[65] In the first instance case, Straw J, relying on **Davies v Davies** (1983) WAR 305 at pg. 307, also found that a mere declaration of intention to sever did not suffice to amount to an act '*operating on one's own share*' so as to sever the tenancy.

[66] However, in coming to the decision in ***Gamble v Hankle***, Wolfe J relied on the reasoning of Plowman J in **re Draper's Conveyance;Nihan v Porter and Another** [1969] Ch. P. 486, who applied the decision of **Hawkesley v May** [1956] 1Q.B. 304. In the former case the court had found that *"...a declaration by one of a number of joint tenants of his intention to sever, operates as a severance"*, and thus concluded that a summons coupled with an affidavit in support filed by a wife seeking the division of matrimonial property held as joint tenants,

> *"...**clearly evinced an intention** on the part of the plaintiff that she wished the property to be sold and the proceeds distributed, a half to her and a half to the deceased. It seems to me that that is **wholly inconsistent with the notion that a beneficial joint tenancy in that property is to continue**..." [**Emphasis added**] [pg. 856]*

[67] In ***Hawkesley***, relying on the principles set out in ***Williams v Hensman***, the court found similarly that the first method 'obviously' included a declaration of intention to sever by one party (pg. 573). In ***Bertram Cooper***, McDonald-Bishop J considered ***Re Draper's Conveyance*** *and* ***Hawkesley***, but not ***Gamble v Hankle***. The **Sunshine Thomas Case** was decided later.

[68] Based on the foregoing, I am of the considered view that despite what I referred to as difference earlier (para 54) apart from ***Hawkesley***, there is no direct conflict between the authorities. I understand them to be saying that there must be an

intention to sever the joint tenancy, coupled with acts sufficient to unequivocally demonstrate this intention. Further, I consider that I am bound by the dicta laid down by our court of appeal. It is apt here to repeat the words of Brooks JA in the ***Sunshine Thomas*** case: **"…unilateral severance must be an irrevocable act which would prevent the actor from being able to claim survivorship of another joint tenant's interest".** It seems to me then, that, once a joint tenant demonstrates the clear intention to sever the joint tenancy by taking active steps to effect the severance this would be sufficient to sever the tenancy. This would be even more so, where the joint tenant, as in this case, signs a written transfer document with the intention of registering same to effect a transfer. I am not of the view that, having signed that document alongside Mr. Greaves, Mrs. Chung, were she alive, could resile from what was expressed in that document. Just as, had the document been an agreement for sale of her interest, she could not. I agree with the position of Wolfe J in ***Gamble v Hankle***, and as argued by the claimants, that an equitable interest would have passed to Mr. Greaves.

[69] Relying on ***Macedo v Stroud***, Mr. Cameron sought to make a distinction between an unregistered transfer document, as in this case, and the deed of gift, in the ***Gamble v Hankle*** case, arguing that whilst an unregistered deed may be effective to create an interest in land because it is not dependent upon registration, a transfer document purporting to pass land must be registered to pass 'legal ownership or other interest 'under the RTA. He contended that, the transfer not having been registered, not having been delivered to the transferee, was nothing more than an imperfect gift. These views, he submitted, were in line with the decision in ***Gamble v Hankle***. It was Mr. Cameron's position therefore, that, the entire case turns on whether in law the transfer document could be considered as a 'deed'.

[70] I am afraid I cannot agree with this position. In my view, Mr. Cameron seeks to create an artificial distinction between the deed of gift in ***Gamble v Hankle***, and the transfer by way of love and affection in this case. Firstly, Wolfe J examined and

pronounced on sections 63 and 88 of the RTA, the very same sections on which the defendant relies. Secondly, the ‘deed’ in that case, as in this case, required registration under those sections of the Act in order for the transfer to be effective in law. The learned judge’s decision was not stated to be particularly based on the fact that the relevant document was a ‘deed’, nor did it place any limitations on the principles propounded in respect of the relevant sections of the RTA. In my estimation, those sections, and the learned judge so found, are applicable to any purported transfer of registered land under the RTA, no matter the form (hence the use of the word ‘instrument’), once the relevant formalities are complied with. The limitations in sections 63 and 88, in my view speak only to the transfer of legal title.

[71] I am strengthened in this view by the authority of **Gardener and Another v Lewis** (1998) 53 WIR 236, in which the Privy Council found that under the Torrens System of land in Jamaica, the provisions of the RTA as to indefeasibility of title relate solely to the legal title to the land [Pg. 239]. The Board, having perused sections 68, 70 and 71 of the Act stated as follows:

> *“The land certificate is conclusive as to the legal interests in the land. But that does not mean that the personal claims (eg for breach of contract to sell or to enforce trusts affecting the registered land against the trustee) cannot be enforced against the registered proprietor.*
>
> *In Frazer v Walker [1967] 1 AC 569 at page 585 Lord Wilberforce said:*
>
> > *'... their lordships have accepted the general principle that registration under the Land Transfer Act 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia; see, for example, Boyd v Mayor, Etc, of Wellington [1924] NZLR 1174 at page 1223 and Tataurangi Tairuakena v MuaCarr [1927] NZLR 688 at page 702.'*
>
> ***In their lordships' view those principles are equally applicable to the Torrens system of land title applicable in Jamaica. [Emphasis added]***

[72] That principle, in my view, would similarly apply to sections 63 and 88 of the **RTA**. In ***Macedo v Stroud***, a father before his death, sought to transfer property to his daughter in consideration of his affection for her. Part of the property was unregistered property and only required a deed of conveyance that did not need to be sealed, but the other part was registered and required registration under a provision of the Real Property Ordinance which provided that "*No instrument until registered…shall be effectual to pass any estate or interest in any land*…". The deed only needed the signature of the transferor and delivery of the deed to the transferee. The facts as accepted by the court were that the deceased instructed his solicitor that he wanted to give the property to his daughter. The solicitor prepared a memorandum of transfer in respect of the registered part of the property, and a separate conveyance for the part that was not. He executed both instruments but told his solicitor to keep them and not register them. He subsequently died before they could be registered. The court found whilst both documents had been duly signed by the deceased, the effect was different. It was found that there was no doubt that the conveyance was a deed duly delivered. Relying on **Xenos v Wickham 1,** the court noted that:

> *"(1) no particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery: "but any other words or acts that sufficiently show that it was intended to be finally executed will do as well."*

[73] The court then went on to say the following, which Mr. Cameron staunchly relies on:

> *"The memorandum of transfer, however, stands on a different footing. It was never made the subject of registration, nor did Ribeiro present it, or hand it to the transferee, for that purpose. It therefore, having regard to the terms of the ordinance, transferred no estate or interest either at law or in equity. At the most it amounted to an incomplete instrument which was not binding for want of consideration. Had it been in terms a declaration of trust, a Court of equity might have compelled the trustee to carry out the trust, which would have been binding on him, even if voluntary. But it does not purport to be a declaration of trust, or anything else than an inchoate transfer. As such, and as it is voluntary, their*

> *Lordships think that it is no more than an imperfect gift of which a Court of equity will not compel perfection. The judgments of Lord Eldon in Ellison v. Ellison(1), and of Turner L.J. in Milroy v. Lord(2), have placed this principle beyond question. Their Lordships are therefore of opinion that the respondent was not entitled to succeed on her claim to the registered property. They are at one with the view of the Chief Justice, who, agreeing with the other learned judges about the validity of her title to the unregistered property, himself thought that she must fail on this branch of her case."*
>
> 1.1867 L.R. 2 H. L. 296, 36 LJCP 313, 16 WR 38

[74] Even if I were to accept this statement of the law, which I am not convinced ought to be applied here, I am of the view that the claimant must succeed on two bases. Firstly, I agree with the claimant that the transfer instrument would have been delivered to Mr. Greaves the moment when it was handed to him to sign after Mrs. Chung had signed it. Secondly, even if the equitable interest did not pass, the joint tenancy would, in my view had still been severed, and upon Mrs. Chung's passing, her interest in the property would have devolved to her estate and the gift thereof to Mr. Greaves would become operative to create a beneficial interest in him.

[75] I am of this view notwithstanding the deficiency noted in respect of section 152 by Mr. Cameron. Section 152 provides:

> *Instruments and powers of attorney under this Act signed by any person and attested by one witness shall be held to be duly executed; and such, witness may be –*
>
> *within this Island - the Governor-General, any of the Judges of the Supreme Court, or any Justice of the Peace, or the Registrar under this Act, or a Notary Public, or a Solicitor of the Supreme Court;*
>
> *in Great Britain or Northern Ireland - the Mayor or Deputy Mayor, or the Chief Magistrate or Deputy Chief Magistrate, of any city, borough or town corporate, or a Notary Public;*
>
> *in any other Commonwealth country-the Governor or person exercising the functions of Governor, the Commander-in-Chief, a Judge of any Court, the Mayor or Chief Magistrate of any city or town, or a Notary Public;*
>
> *in any Foreign State or Country-the Jamaican or the British Consular Officer (which expression shall include Consul-General, Consul and*

> *Vice-Consul, and any person for the time being discharging the duties of Consul-General, Consul, or Vice-Consul), or a Notary Public:*
>
> *Provided that where any such instrument or power of attorney purports to have been witnessed or certified by any Notary Public in any Foreign State or Country, there shall be annexed to such instrument or power of attorney a certificate, under the hand and seal of the appropriate officer of such Foreign State or Country to the effect that the person by whom such instrument or power of attorney has been witnessed or certified is a Notary Public duly commissioned and practising in such Foreign State or Country, or some portion thereof! and that full faith and credit &in be given to his acts.*
>
> *Such witness, whether-within or without this Island, may also be any other person, but m such case he shall appear before one of the officers or persons aforesaid, who, after making due enquiries of such witness, shall endorse upon the instrument or power a certificate in the Form in the seventeenth and such certificate shall be deemed sufficient proof of the due execution of such instrument or power, subject to the proviso hereinbefore contained as to any such instrument or power of attorney witnessed or certified by a Notary Public in any Foreign State or Country. Where an instrument or power of attorney shall be witnessed or certified out of this Island by any of the officers aforesaid the seal of office of such officer shall be axed to his attestation or certificate on such instrument or power of attorney*

I accept the claimants' submissions on this point.

[76] On the totality of the material placed before me and on a balance of probability I could not find that the voluntariness of the deceased affixing her signature to the transfer was "a separate and live issue" or an issue at all.

Conclusion

[77] In the balance, I find that Mrs. Chung not only evinced an intention to sever the joint tenancy, but took active steps to act upon that intention. The steps she took, in my view, for the reasons discussed, were sufficient to pass the equitable estate in the property to her son Mr. Greaves. I am satisfied, therefore, that the evidence before this court is sufficient to raise a prima facie case for the defendant to answer. Therefore, the no-case submission fails.

[78] Counsel for the defendant having elected to rest on his submissions and not call evidence on the defence's case, the legal burden being one that only requires that

the claimants prove their case on a balance of probabilities, and there being no evidence to rebut the prima facie case made out by the claimants, I find therefore that this leads to the inescapable conclusion that the claimants must succeed on the claim.

[79] It would be remiss of me if I did not commend counsel on both sides for their industry and diligence in the conduct of the case and preparation of submissions which the court found of great assistance. The delay in delivering this decision is deeply regretted.

Ruling

1. The defendant's no case submission fails. Case to answer.

Order

1. Judgment for the claimants on the claim.

2. The beneficial joint tenancy between the defendant and the deceased Janneth Chung has been severed by way of the instrument of transfer signed by the deceased Janneth Chung dated August 30, 2009.

3. The defendant holds the legal estate on trust for the benefit of himself and the 1st claimant in equal shares.

4. The Registrar of Titles is empowered to Register the instrument of transfer dated August 30, 2009 transferring the interest of the deceased to the 1st Claimant.

5. Costs to the Claimants to be agreed or taxed.

6. Liberty to apply.

7. Application for stay of execution of the judgment is granted. Unless the defendant files appeal within 30 days of the date hereof the stay of execution is removed.