NMLS

[2010] JMCA Civ 38

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 159/2009**

**BEFORE: THE HON MR JUSTICE HARRISON JA**
**THE HON MR JUSTICE MORRISON JA**
**THE HON MRS JUSTICE M$^{C}$INTOSH JA (Ag)**

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| **BETWEEN** | **CAROL LAWRENCE** | **1$^{ST}$ APPELLANT** |
| **AND** | **MARY LAWRENCE** | **2$^{ND}$ APPELLANT** |
| **AND** | **DIANE LAWRENCE** | **3$^{RD}$ APPELLANT** |
| **AND** | **ANDREA MAHFOOD** | **RESPONDENT** |

**Samuel Smith for the appellants**

**Miss Carol Davis for the respondent**

**7, 8 July and 28 October 2010**

**HARRISON JA**

[1] I have read in draft the judgment of my brother Morrison JA and I agree with his reasoning and conclusion. I have nothing further to add.

**MORRISON JA**

**Introduction**

[2] This appeal is concerned with the beneficial ownership of a residential apartment known as No. 4 Hampshire House, 4 Rekadom Avenue, Kingston 10 in the parish of St Andrew and registered at Volume 1129 Folio 812 of the Register Book of Titles ("the property"). The registered owners of the property are Joseph Anthony Lawrence, who died on 7 March 2005 ("Mr Lawrence"), and the respondent, who was born on 3 October 1964 and was reared from infancy by Mr Lawrence and his first wife. The respondent accordingly refers to Mr Lawrence as her father. The first named appellant is Mr Lawrence's widow, and the executor of his estate, and the second and third named appellants are their daughters.

[3] By her order made on 21 October 2009, Straw J refused an application by the appellants for orders that the joint tenancy between Mr Lawrence and the respondent in respect of the property was severed before his death in 2005 and that 50% of the estate and interest in the said property belongs to the estate of Mr Lawrence. The primary issue in this appeal is therefore whether Straw J was correct in this conclusion.

**The background**

[4] The property was registered on 8 March 1983, in the names of Mr Lawrence and the respondent as joint tenants. The respondent's evidence was

that the property was purchased by Mr Lawrence in that year, at a time when she had just graduated from school and after he and his first wife (who she referred to as her mother) had separated. Mr Lawrence told her at the time that he had purchased the property in both their names as joint tenants, to be her home and so that if anything happened to him she would not have to pay transfer tax with respect to the property. He also indicated that, since she now had her own home, she "would not have to depend on any guys" to take care of her. While initially Mr Lawrence lived on the property himself, the respondent joined him there in 1992 and continued to live there by herself after he moved out in 1994. There she remained until about 1999, when she left Jamaica to go to the United States, where she subsequently decided to live permanently.

[5] For the first couple of years after vacating the property in 1999, the respondent saw to its rental and collected the rental, which she used to pay the maintenance charges on the property and otherwise for her own purposes. Thereafter, given the fact that she had by then established permanent residence abroad, Mr Lawrence then began, by agreement between them, to collect the rents and to pay the expenses of the property. Despite some inconclusive discussions between them as to a possible sale in 2001, the property remained registered in the names of Mr Lawrence and the respondent as joint tenants up to the time of his death on 7 March 2005.

[6] Within two months of Mr Lawrence's death, the respondent received information, which she confirmed by making enquires at the Office of Titles, that she was no longer registered as a joint owner of the property and that, on 7 April 2005, a transfer of the property, purportedly executed by Mr Lawrence and herself before a Justice of the Peace on 22 February 2005, had been registered in favour of the appellants as joint tenants. I shall refer to this transfer hereafter as "the 2005 transfer".

**The proceedings**

[7] The respondent challenged the authenticity of the signature attributed to her on the 2005 transfer by proceedings commenced by fixed date claim form on 22 February 2006. She sought a declaration in those proceedings that the 2005 transfer was fraudulent and an order that the Registrar of Titles correct the certificate of title registered at Volume 1129 Folio 812 by cancelling the 2005 transfer, pursuant to section 158(1) of the Registration of Titles Act. The respondent supported this application by evidence on affidavit that she had given no instructions to anyone to prepare the 2005 transfer, that she had not signed it and that on the date on which it was allegedly signed by her, she was residing in the United States of America and had not visited Jamaica for over four years. She exhibited to her affidavit copies of various documents bearing her true signature. In addition, she relied on the evidence of a handwriting expert, Mr William Smiley, whose opinion was that the signature purporting to be hers on the 2005 transfer was not in fact hers.

[8] The respondent's affidavit was responded to by an affidavit sworn to by the first named appellant, who made a number of statements about her understanding (from discussions with Mr Lawrence before his death) of the circumstances in which the respondent had come to be registered on the title as a joint owner of the property in the first place, but concluded that, while she and her daughters had in fact signed the 2005 transfer, she could not say when or whether it had in fact been signed by the respondent. But curiously, despite saying that she "did not know whether the Transfer [was] fraudulent or not", the first named appellant then asked the court to dismiss the respondent's application on the basis that, as far as she was aware, "no fraud has been committed".

[9] On 24 April 2008, a week before the fixed date claim form came on for hearing, the first named appellant, acting in her capacity as executor of Mr Lawrence's estate, filed a notice of application in the same suit, seeking declarations that the joint tenancy between Mr Lawrence and the respondent in the property had been severed before his death and that 50% of the said property accordingly belonged to his estate. Alternatively, the first named appellant sought declarations that, prior to his death, Mr Lawrence had been in sole, undisputed occupation of the property for his exclusive use and benefit for over 12 years, to the exclusion and dispossession of the respondent, and that his estate was therefore the legal and beneficial owner of the property. In support

of this application, the first named appellant relied on what were described as "various steps" taken by Mr Lawrence before his death which, it was said, effected a severance of the joint tenancy. These steps were set out in the affidavit in support sworn to by the first named appellant, to the following effect:

(i) that as far back as 1990 Mr Lawrence had been trying to sever the joint tenancy between himself and the respondent (in support of which the affidavit exhibited copies of a letter dated 5 February 1990 from Mr Lawrence's then attorneys-at-law to him, together with an unsigned instrument of transfer of the respondent's share of the property to Mr Lawrence for a consideration of $200,000.00);

(ii) that in or about 2001 Mr Lawrence's attorney-at-law, who was by this time Mr Wentworth Charles, had been in negotiations with the respondent with a view to the sale of the property and the division of the net proceeds between them (in support of which the affidavit exhibited a copy of a letter allegedly written by the respondent to Mr Charles indicating that her consent to the sale was conditional on, among other things, the terms and conditions being to her satisfaction before any final agreement was reached and

satisfactory arrangements being made "for division and payment of my share of the net proceeds");

(iii) that Mr Charles had subsequently prepared a transfer (to which I shall refer hereafter as "the 2002 transfer") of Mr Lawrence's interest in the property to one of his daughters, the second named appellant in this appeal (in support of which the affidavit exhibited a copy of an instrument of transfer of Mr Lawrence's interest in the property to the second named appellant, purportedly signed by Mr Lawrence in the presence of Mr Charles on 7 January 2002);

(iv) that Mr Lawrence had accordingly severed the joint tenancy between himself and the respondent in the property "on the basis of his various attempts to buy out the [respondent's] interest and by signing the Transfer instrument vesting his share in his daughter's name";

(v) that the respondent had not lived on or visited the property for over 15 years and had thereby abandoned her interest in the property, which should therefore fall to Mr Lawrence's estate.

[10] Both the claim by the respondent and the first named appellant's application were listed together for hearing before Jones J on 30 April 2008. On that date the judge granted the declaration sought by the respondent in the fixed date claim form (as amended, in terms not now material) and ordered that the Registrar of Titles correct the certificate of title to the property as prayed. Presumably with a view to meeting the first named appellant's application, the respondent was also given leave "to obtain [the] original transfer dated 7 January 2002 from Mr Wentworth Charles and, if available, to refer same to [the] handwriting expert, Mr Major for an opinion in respect of the signature of Mr Lawrence". The matter was then adjourned to 25 September 2008.

[11] As it turned out, the document supplied to Mr Major for examination was not the "original transfer", which Mr Charles was unable to locate, but a photocopy of the instrument of transfer which had been referred to and exhibited by the first named appellant in her affidavit (see para. [8] iii) above). In due course, Mr Major produced his report dated 21 August 2008 and from his examination and comparison of the signature which appeared to be that of Mr Lawrence on the copy of the 2002 transfer and other documents supplied to him as undisputed examples of his handwriting and signature, he concluded that the signature on the 2002 transfer had been affixed by a different person from the one who had signed the other documents used for the comparison.

[12] The first named appellant filed a supplemental affidavit sworn to on 25 September 2008, to which she exhibited a letter from Mr Charles confirming that "sometime in the year 2002", Mr Lawrence had given him instructions "for severance of the joint tenancy between himself and [the respondent] and that our office prepared the transfer and declaration of value". For her part, the respondent in a further affidavit sworn to on 29 September 2008, conceded that in 2001 Mr Lawrence and herself had considered selling the property, but stated that after the initial discussions "the talk of sale just stopped". She denied that Mr Lawrence had ever had any discussion with her about him buying out her interest in the property and she challenged the genuineness of the signature purporting to be his on the 2002 transfer.

[13] On this evidence, Straw J found that there had been no severance of the joint tenancy between the respondent and Mr Lawrence during his lifetime, so as to exclude the operation of the respondent's right of survivorship upon his death. With regard to the alternative claim by the appellants that the respondent had abandoned the property, and that her interest in it had accordingly been extinguished by adverse possession in favour of Mr Lawrence, the judge found that nothing had been put forward by the appellants to rebut the respondent's evidence that she had collected the rents and seen to the maintenance of the property until 2001. The claim based on adverse possession therefore failed and is no longer extant, there having been no appeal from this last finding.

**The appeal**

[14] Dissatisfied with this result, the appellants filed five grounds of appeal as follows:

> "1. The Learned Trial Judge erred in not finding on the evidence that before the death of Joseph Lawrence on the 7th March 2005 that there was a severance of the Joint Tenancy under which the said late Joseph Lawrence and the Claimant, Andrea Noyan owned the property known as Apartment No. 4, Hampshire House, 4 Rekadom Avenue, Kingston 10 and registered at Volume 1129 Folio 812.
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> 2. The Learned Trial Judge erred in failing to consider or take judicial notice in the hearing of the application that at the trial of the substantive action in Suit No. HCV 1378 of 2006 the Instrument of Transfer numbered 1347926 and concomitant transfer were challenged and declared by the Court to be fraudulent on the basis of the Claimant's allegations and subsequently the Court's finding that the signature of the Claimant on the said Transfer Instrument *was* forged and that at no time whatsoever did the Claimant claim, challenge or adduce any evidence to deny that the signature of Joseph Lawrence as appeared on the impugned Instrument of Transfer was anything other than genuine.
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> 3. The Learned Trial Judge further erred in failing to find that the transfer to the third parties as appeared on the Title of the aforesaid property by it's (sic) late joint owner Joseph Lawrence, notwithstanding the alleged forgery of the Claimant (sic) signature, nevertheless constituted a transfer of the interest of said Joseph Lawrence therein and thereby effected an alienation of his interest in the property, which in effect severed the Joint Tenancy.
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> 4. The Learned Trial Judge erred in failing to find that the negotiation between the joint owners evidenced by correspondence between the Claimant and Wentworth Charles acting as agent and Attorney-at-Law for the other joint owner, Joseph Lawrence, between the 29th October and the 13th December 2001, constituted a course of dealings which though may not have mushroomed into an enforceable agreement,

indicated the existence of a common or mutual intention, as opposed to a unilateral intention, on the parts of both joint tenants to sever the joint tenancy and that said joint tenancy was thereby severed.

...

5. Finally the Trial Judge erred in accepting and failing to reject the Report of the handwriting expert, Carl Majors [sic] regarding the Transfer Instrument signed on the 7th January 2002 by Joseph Lawrence one of the Joint owners, as Transferor allegedly in the presence of his Attorney-at-Law, Wentworth Charles on the following basis (sic):

i. The said report was done contrary to the Order of the Honourable Justice R. Jones made on the 30th April 2008 requiring that such analysis and concomitant Report should be based on the original Transfer and not on a copy transfer as was done.

ii. That Mr. Wentworth Charles did admit to preparing said transfer upon having been so instructed by said Joseph Lawrence, the Transferor but claimed he could not recall whether he saw said Joseph Lawrence so signed (sic) or that he attested the signature of the said Joseph Lawrence by signing his name on said Instrument as it now appears as witness. "

[15] These grounds appear to me to raise two broad issues for consideration, as follows:

(i) Whether there was a severance of the joint tenancy between the respondent and Mr Lawrence in his lifetime by either alienation by Mr Lawrence of his interest in the property, by mutual agreement between the respondent and Mr Lawrence or by a course of dealing between them (grounds 1 – 4).

(ii) Whether the trial judge fell into error in accepting the report of the handwriting expert, Mr Carl Major, notwithstanding that that report was not based on an examination of the original instrument of transfer dated 7 January 2002, as Jones J had ordered that it should have been (ground 5).

[16] On the issue of severance, which is really the substantial issue in the case, Mr Smith for the appellants, basing himself squarely on the principles laid down by Page Wood V-C in the familiar case of ***Williams v Hensman*** (1861) 70 ER 862, 867, submitted that the trial judge ought to have found on the evidence adduced by the parties that the joint tenancy in this case was effectively severed during Mr Lawrence's lifetime by his operating on his share of the property either by alienation to the appellants, or by a course of dealing involving extensive negotiations with the respondent which clearly evidenced a mutual intention on his and the respondent's part to treat the joint tenancy as severed and as holding their interests as tenants in common.

[17] As regards the question of alienation, Mr Smith pointed out that the respondent's successful challenge to the 2005 transfer of the property by Mr Lawrence and herself had been based on the fact that the signature which purported to be hers on that document had been shown to be a forgery. However, to the extent that no issue had been taken as to the validity of the signature on that document which purported to be that of Mr Lawrence, it was submitted, the document nevertheless fell to be regarded as an alienation by Mr Lawrence of his interest in the property to the appellants and was therefore

sufficient to effect a severance of the joint tenancy. Mr Smith found some support for this submission in ***First National Securities Ltd v Hegerty*** [1985] 1 QB 850, a decision of the English Court of Appeal to which I will come in due course.

[18] As far as the course of dealing between the parties was concerned, Mr Smith drew our attention to what he described as the negotiations between the parties with a view to selling the property in late 2001. He submitted that these negotiations, even if ultimately abortive, could be regarded as evidence of the mutual intention of the parties to sever their joint tenancy in the property. In support of this submission, Mr Smith placed heavy reliance on ***Williams v Hensman*** itself, as well as on the subsequent decisions of the English Court of Appeal in ***Burgess v Rawnsley*** [1975] 3 All ER 142 and ***Marshall v Marshall*** [1998] EWCA Civ 1467.

[19] The second issue has to do with the fact that the handwriting expert was not provided with the original of the 2002 transfer, purportedly signed by Mr Lawrence, for examination, as Jones J's order had contemplated that he would have been. Mr Smith submitted that the substitution of a copy for the original for the purposes of the expert's analysis was in clear breach of an order of the court and that the judge ought not therefore to have accepted the expert's report as a basis for determining the validity of Mr Lawrence's signature on the said transfer.

[20] At the outset of her submissions in response, Miss Davis reminded us of the well-established principle that the decision of a trial judge on the facts will not lightly be disturbed on appeal, unless that decision can be shown to have been "plainly wrong" (***Watt v Thomas*** [1947] AC 484 and ***Industrial Chemical Co Ltd v Ellis*** (1986) 35 WIR 303). The decision of Straw J, she submitted, did not fall into that category and ought therefore to be upheld.

[21] On the question of severance, Miss Davis also relied on ***Williams v Hensman*** and ***Marshall v Marshall***, in addition to which she referred us to ***Gamble v Hankle*** (1990) 27 JLR 115, a decision at first instance of Wolfe J (as he then was). She submitted that it was necessary for the court in each case to examine the circumstances and the actions of the parties in order to identify an act of severance which clearly showed that each party intended to deal with his share of the property in a 'separate' way.

[22] With regard to Mr Smith's submission that no issue had been taken at the trial as to the authenticity of Mr Lawrence's signature on the 2005 transfer, Miss Davis pointed out that the only issue before Jones J was whether that transfer had been signed by the respondent and on that issue there was overwhelming evidence that she had not. There had therefore been no necessity for the respondent to have called any evidence in respect of Mr Lawrence's signature. In any event, as Straw J had in fact noted in her judgment, there was no indication, either in the affidavits filed by the first named appellant, or in the

submissions to the court at the outset of the hearing before her, that reliance was going to be placed on the 2005 transfer which had been the subject of the proceedings before Jones J. As to ***First National Securities Ltd v Hegerty***, upon which Mr Smith relied, Miss Davis submitted that the case was clearly distinguishable and, properly understood, did not assist the appellants.

[23] As to the appellants' apparent reliance on a mutual intention between the joint tenants to effect a severance, Miss Davis pointed out that, in the court below, the appellants had specifically indicated to the court that they would not be relying on this category of severance and that this had also been noted by the judge (at page 15 of her judgment). But in any event, the judge did in fact consider this question as well and concluded, correctly, it was submitted, that there was no evidence that there had been a mutual intention to sever the joint tenancy.

[24] Finally, with regard to the question whether Mr Major's report ought to have been relied on in the circumstances, his not having been able to examine the original of the 2002 transfer, Miss Davis submitted that there was clear evidence that the respondent had tried unsuccessfully to retrieve the original document from Mr Charles, and that it was as a result of his inability to produce the original that the copy was made available to Mr Major. In any event, Miss Davis submitted, the judge had correctly considered that if neither party was able to account satisfactorily for the absence of the original, it could either be

ignored entirely by her in her determination of the case or it could be treated as an exhibit produced by the appellants and submitted by the respondent to the expert, in which case the judge had been entitled to find, as she did, that the signature of Mr Lawrence on the photocopy of the 2002 transfer was not genuine.

**The legal position**

[25] As Lord Denning MR observed in ***Burgess v Rawnsley*** (at page 146), "Nowadays everyone starts with the judgment of Page Wood V-C in ***Williams v Hensman***". In that case the principles governing the severance of a joint tenancy were laid down by the Vice-Chancellor as follows (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***."

[26] The three methods of severing a joint tenancy are therefore: by alienation by one of the joint tenants of his share in the property, by mutual agreement between the joint tenants and by a course of dealing between them. In respect of Page Wood V-C's second method (mutual agreement), ***Burgess v Rawnsley*** makes it clear that an oral agreement for the sale of his interest by one joint tenant to the other will suffice to effect a severance, even though that agreement may be unenforceable for the want of writing. But in order to effect a severance by this method, there must be an agreement, since, as Sir John Pennycuick observed (at page 447), "one could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for £X and the other makes a counter-offer of £Y". However, an agreement to sever need not be express, but can be inferred from a course of dealing (see per Browne LJ at page 444), which was Page Wood V-C's third method, although, as Sir John Pennycuick also observed (at page 447), this method is not "a mere sub-heading of the second, [but covers]...acts of the parties, including...negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed". The additional method of severance introduced in England by section 36(2) of the Law of Property Act 1925, that is, by the giving of a notice in writing by one joint tenant to another, does not, of course, apply to Jamaica.

[27] ***Williams v Hensman*** was applied by Wolfe J in ***Gamble v Hankle.*** That was a case in which a husband and wife were registered as joint tenants of

property which was occupied by the defendant and from whom the wife sought to recover possession after the death of the husband on 9 August 1981. At the trial, an indenture dated 21 November 1980, by which the husband purported to convey the property to the defendant by way of deed of gift, was tendered in evidence. The wife contended that, by virtue of the *jus accrescendi*, she became the sole proprietor of the property upon the death of her husband. Further, that the deed of gift to the defendant was ineffective to transfer any interest in the property to the defendant in the light of its non-compliance with section 88 of the Registration of Titles Act, which prescribed the methods by which a transfer of registered land could be effected.

[28] Wolfe J considered that, even if the document did not have the effect of transferring the husband's interest in the property to the defendant under the Registration of Titles Act, "the question arises whether or not the document evidences a dealing with an interest in land which manifests a clear intention to sever the joint tenancy and to create a tenancy in common" (page 116). After referring to ***Williams v Hensman***, the learned judge then concluded (ibid) that the deed of gift was "an act which comes within the ambit of the first of the three ways of severing a joint tenancy mentioned by Sir William Page Wood, V.C. in [that case]". It was accordingly held that the deed of gift executed by the husband had the effect of severing the joint tenancy which existed between himself and his wife before his death, with the result that the wife and the

defendant therefore held the property as tenants in common in equity and the wife was therefore not entitled to an order for recovery of possession.

[29] Both Mr Smith and Miss Davis referred to and relied on ***Marshall v Marshall,*** which was a case in which Mr and Mrs Marshall owned their matrimonial home as joint tenants. Their marriage unfortunately broke up after two years and Mr Marshall left the matrimonial home and petitioned for divorce shortly thereafter. Extended negotiations then commenced between the parties through their respective solicitors with regard to the disposition of the matrimonial home, the proposals ranging from the outright sale of the property and a division of the net proceeds to the transfer of the property to Mrs Marshall on terms. However, there did come a point in the negotiations in which the parties appeared to be agreed that the property should be put up for sale on the open market. But within a couple days of an apparent consensus having been reached on this, Mrs Marshall tragically died, giving rise immediately to the question whether Mr Marshall thereupon became entitled by operation of law, as the surviving joint tenant, to the property in its entirety. The answer to this question naturally depended upon whether Mr and Mrs Marshall remained as joint tenants of the property at the date of her death or whether there had been a severance of the joint tenancy before her untimely death.

[30] Mummery LJ, in a judgment with which the other two judges (Peter Gibson and Pill LJJ) agreed, considered the effect of ***Williams v Hensman*** and

***Burgess v Rawnsley*** and restated the ways (apart from the service of a statutory notice) by which a joint tenancy can be severed as follows:

> "First, an act of one joint tenant operating upon his own share. This would occur where one joint tenant disposes of his share to a third party by way of sale or security. It may even occur where there is a specifically enforceable agreement for such a disposition.
>
> Secondly, a joint tenancy can be severed by an agreement to sever. Whether or not there is such an agreement is a question of fact in each case. There need not be an express agreement in terms to sever or to hold the property as tenants in common. There may be an agreement to sever where the agreement is to deal with the property in a way which necessarily involves severance. The agreement need not be actually performed, or be specifically enforceable or even be legally binding. As pointed out by the Court of Appeal in ***Burgess v Rawnsley,*** the significance of an agreement is as an indication of a common intention to sever, rather than as giving rise to enforceable contractual obligations and rights.
>
> Thirdly, severance may occur as a result of a course of dealing between the parties affecting all the shares of the joint tenants. The course of dealing may include abortive negotiations between the joint tenants for a rearrangement of their interests, if that course of dealing, even though it does not lead to a concluded agreement, indicates a common intention on the part of the joint tenants that the joint tenancy should be regarded as severed."

[31] With those principles in mind, Mummery LJ went on to consider the two submissions advanced on behalf of Mrs Marshall's estate, firstly that the agreement to put the property on the open market by itself amounted to a severance of the joint tenancy, with the result that Mr and Mrs Marshall held the

property as tenants in common in equal shares, and, secondly, a common intention to sever should be inferred from all the circumstances of the case. The learned judge of appeal disagreed with both submissions. With regard to the first, the judge considered that all that had been agreed between the parties was that certain steps would be taken with a view to converting the property into proceeds of sale and there was no express agreement as to the division of those proceeds. Neither was it possible to infer solely from the agreement to put the property on the market, a common intention that the proceeds of sale would be divided in a particular way or at all. As to the second submission, Mummery LJ also concluded that from the circumstances it was not possible to discern a common intention between the parties to sever the beneficial joint tenancy.

**The issue of severance**

[32] It is against this background of settled authority that I therefore come to consider the facts of the instant case. On the question of alienation, Mr Smith placed heavy reliance on ***First National Securities Ltd v Hegerty,*** which was a case in which a husband had forged his wife's signature on mortgage documents charging the property owned by them as joint tenants as security for a loan. Mr Smith was encouraged by the fact that both Bingham J (as he then was) at first instance and Sir Denys Buckley in the Court of Appeal were of the view that, notwithstanding the forgery of the wife's signature, "...this disposition by the husband was a sufficient act of alienation to sever the beneficial joint

tenancy and convert the husband and wife into tenants in common" (per Bingham J, at page 854, and see per Sir Denys Buckley, at page 862).

[33] The analogy which Mr Smith sought to draw with the instant case was based entirely on the purported signature by Mr Lawrence on the 2005 transfer. Straw J pointed out that the appellants had not indicated in any of the affidavits filed on their behalf that they proposed to rely on this point, with the result that the respondent and her advisers had not had an opportunity to submit that signature to analysis by a handwriting expert, as she had done, the signature which purported to be hers on that transfer. I think that this was a perfectly fair comment for the judge to have made in the circumstances, since, if this was going to be the sole basis of the appellants' contention that Mr Lawrence had during his lifetime alienated his interest in the property and thus severed the joint tenancy with the respondent, one would have expected them to set about proving that he did in fact sign that transfer. As it turns out, the validity (or the invalidity) of his signature on that document was not an issue with which there was any need for the respondent to concern herself, it being sufficient for her case to successfully impugn the signature which purported to be hers, which she in fact did with telling effect.

[34] It is this gap in the evidence which, in my view, makes ***First National Securities Ltd v Hegerty***, in which the husband admitted forging his wife's signature on the mortgage documents, clearly distinguishable from the instant

case, as Miss Davis submitted. In the instant case, there is in fact no evidence at all of whether, and if so in what circumstances, Mr Lawrence affixed his signature to the 2005 transfer. In my view, Straw J was accordingly entirely correct to conclude as she did that the appellants had "failed to prove that [Mr Lawrence] did any act 'operating on his own share' from which the court could make a finding that there was an intention to treat the joint tenancy as severed" (page 15 of her judgment).

[35] With regard to the question whether a mutual agreement to treat the joint tenancy as severed can be inferred in this case, Straw J considered that there was no such evidence in the case, either express or implied, and again I agree with her. All that the correspondence of late 2001 established is that the possibility of a sale of the property on the open market was being canvassed between the parties and it is demonstrably clear from the language used by the respondent in her letter to Mr Charles dated 29 November 2001 that she was nowhere close to agreement on the matter. Thus, her consent to the sale of the property was expressly stated by her to be conditional upon the best valuation being obtained, the terms and conditions being to her "satisfaction", the arrangements for division and payment of her share of the proceeds being "satisfactory" and her being given a reasonable opportunity "to properly review and consider all the relevant documents". And just in case this was not clear enough, the letter concluded by the respondent emphasising "that in negotiating the terms and conditions of sale, you allow a reasonable opportunity for

communication between me and my agent before any final agreement is reached".

[36] And finally, on the question of whether there was a course of dealing between the parties from which it could be inferred that there was a common intention on the part of the parties that the joint tenancy should be regarded as severed, Straw J examined carefully all the evidence in the case from which it was submitted that such a course of dealing could be inferred. These included the letter dated 5 February 1990 from Mr Lawrence's then attorneys-at-law enclosing an unsigned transfer, prepared, presumably, on his instructions and the correspondence between the respondent and Mr Charles in 2001 concerning the proposed sale of the property. The judge noted that all the matters relied upon by the appellants to make good the case for a severance based on a course of dealing were inconclusive and concluded that the case did not come within Page Wood V-C's third category, that is, "a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common".

[37] Again, on this point, I consider that the learned judge was plainly correct. The element of mutuality in respect of the issue of severance to which the Vice-Chancellor's formulation adverted has been conspicuously missing from the history of the dealings between the parties in connection with the property. The negotiations between the parties in 2001 for a rearrangement of their interests

obviously led to no concluded agreement between them, either at that time or any time subsequently before Mr Lawrence's death, and cannot in my view support an inference that there was a common intention between them that the joint tenancy should be regarded as severed.

**Ought the handwriting expert's report to have been admitted in evidence?**

[38] It is clear from the record that Jones J's order called for the original of the 2002 transfer to be submitted to the expert for his examination and analysis of the signature said to be that of Mr Lawrence and it is equally clear from the evidence that what was in fact supplied to him was a photocopy. But it is not at all clear to me why this should have been regarded as invalidating his opinion, given that Jones J's order called for the original to be submitted to the expert "if available". It seems clear from the evidence that it was not available from Mr Charles, in whose custody all concerned seemed to have expected it to be. In these circumstances, it seems to me that it was perfectly reasonable for a copy to have been supplied to the expert and I cannot see why, for the purposes for which he examined the document, the original should have had such an advantage so as to make his analysis based on a copy unreliable (and no reason to suppose that it was thus unreliable has been suggested by the appellants). Certainly, Mr Major in his report did not suggest that his opinion would require to be qualified by or in any way read subject to the fact that he had not seen the original of the document in question.

[39] Straw J opted to treat the expert's report as an exhibit produced by the respondent and on that basis considered that it was "reliable and cogent". That, it seems to me, was an eminently sensible approach to the matter, particularly bearing in mind that section 20 of Evidence Act permits comparison by witnesses of a disputed writing "with any writing proved to the satisfaction of the Judge to be genuine" and provides that "such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute". In any event, save for the fact that the expert's report did not support their case, no prejudice whatsoever has been shown by the appellants as having arisen as a result of the course adopted by the judge in this case.

**Conclusion**

[40] For all of the above reasons, which are in substance the same as those given by Straw J, I have come to the view that this appeal must be dismissed, with costs to the respondent, to be taxed if not sooner agreed. However, I wish before leaving the matter, to pay tribute to the thoughtful and meticulous analysis which the learned trial judge brought to bear on her task in this case. Her full and careful judgment, in which she discussed and considered all the relevant authorities (not all of which I have referred to in this judgment), should repay careful study whenever the question of severance of a joint tenancy should arise again in the future.

**M$^{c}$INTOSH JA**

[41] I too have read the judgment in draft of Morrison JA with which I entirely agree, and have nothing useful to add.

**HARRISON JA**

**ORDER**

[42] Appeal dismissed. Costs to the respondent to be taxed if not sooner agreed.