IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 2002 MO94

BETWEEN	**SHEILA MILLER-WESTON**	**CLAIMANT**
AND	**PAUL MILLER**	**FIRST DEFENDANT**
AND	**LEITHIA YVONNE MILLER** (Also known as "Peaches Miller")	**SECOND DEFENDANT**

IN CHAMBERS

Mrs. Jacqueline Samuels -Brown and **Ms. Tameka Jordon** for the claimant.

Mr. Garth McBean for the second defendant.

First Defendant not present or represented.

March 28 &June 22, 2007

McDONALD-BISHOP, J. (Ag.)

THE FACTS

1. The claimant brought an action against the two defendants, who are husband and wife, to recover money she allegedly lent to them in respect of property jointly owned by them as joint tenants at 53 Woodland Way, Coopers Hill, St. Andrew.

2. On October 18, 2002, the claimant obtained default judgment against the first defendant in the sum of $2,850,559.00 plus interest thereon at 12% per annum from the date of the judgment to date of payment and costs in the sum $16,000.00. The judgment debt remains unsatisfied by the first defendant while proceedings between the claimant and the second defendant are yet to be resolved.

3. Accordingly, by Notice of Application dated June 28, 2006, the claimant now seeks to enforce the said judgment against the first defendant. To this end, the claimant seeks, *inter alia*, the following orders:

(i) A declaration that the joint tenancy between Paul Miller and Leithia Miller (a.k.a. Peaches Miller) in relation to the property known as Lot 53 Woodland Way, Coopers Hill in the parish of St. Andrew, registered at Volume 1046 Folio 83 of the Register Book of Titles, has been severed.

(ii) That the property be sold by private sale or public auction as a means of enforcing the judgment obtained against the first defendant, Paul Miller, on October 18, 2002 and entered in Binder 731, Folio 302.

(iii) That upon a sale of the property the debt owed to the claimant inclusive of interest and costs be repaid from the first defendant's share of the proceeds of sale.

4. By means of a document headed **'AGREEMENT AND CONFIRMATION'** dated January 16, 2006, the first defendant confirmed his indebtedness to the claimant in respect of both the principal sum and the interest. He also confirmed that the loan was solicited for the purpose of preventing the foreclosure on the property in question and asserted that *"accordingly the debt is a charge on the said property."* He further agreed to make the best effort to sell the property at the earliest date at a price as close to the market value as is available and to repay the claimant the debt owed along with other attendant costs. The second defendant was not made a party to this agreement.

5. The first defendant also executed a document headed **'INSTRUMENT OF TRANSFER FOR CHANGE OF TENANCY'** dated June 23, 2006. In this document he purported to have the joint tenancy changed to a tenancy in common. Again, it must be noted that the second defendant was not a party to the execution of this document. It also was unilaterally executed by the first defendant.

6. On the strength of the declarations contained in the foregoing documents, it was submitted on the claimant's behalf that certain declarations made by the first

defendant, coupled with assertions made by the second defendant in her affidavit in these proceedings, are enough to sever the equitable joint tenancy. Mrs. Samuels-Brown submitted that severance of the joint tenancy occurs if either of the tenants enters into any transaction which severs the joint tenancy and converts it into a tenancy in common, as for example, where one tenant alienates his share to another person or if one of the tenants acquires an interest greater in quantum than that held by the other tenant. Mr. McBean on behalf of the second defendant, however, contended that there is no severance of the joint tenancy in the circumstances of the case.

THE ISSUE

7. The issue to be ultimately determined is whether the joint tenancy ownership of the defendants in the common property has been severed so that an order for sale can properly be made to enforce the judgment against the first defendant. This question would, of necessity, involve an analysis of the legal effect of any acts done or declarations made by the joint tenants in respect of the common property.

THE LAW

8. It is well established that the essence of joint tenancy is that each joint tenant is 'wholly entitled to the whole' of the estate which is the subject of the co-ownership. In joint tenancy, no joint tenant holds any specific or distinct share himself, but each is, together with the other joint tenant or tenants, vested with the entire interest in the property in question. In the words of Bracton, 'each joint tenant *totum tenet et nihil tenet*: each holds everything and yet holds nothing.' They hold as one single owner as against the whole world. There is the presence of the four unities- unity of title, possession, interest and time. In that regard, none of the defendants in this case would have any distinct share in the property in question unless there is severance.

9. The right of survivorship (or *jus accrescendi*) is described as the 'grand and distinguishing' incident of joint tenancy. The right of survivorship, however, may be

destroyed by severance of the joint tenancy during the life time of the joint tenants. This would mean a severance of one or the other of the essential unities. When this occurs, the joint tenancy becomes a tenancy in common and each party is entitled to a distinct share. With severance, each party may deal with his interest as a separate and distinct share and the right of survivorship is totally and irrevocably destroyed. It follows then that there has to be a severance of the joint tenancy in this case before there can be a distinct 'share' of the first defendant to be made subject to enforcement of the judgment against him.

10. It must be noted at the very outset that the U.K. **Law of Property Act, 1925** does not apply to our jurisdiction and so our position on severance has to be guided by the pre -1926 law of the U.K. In this regard, a consideration of the issue for determination must begin with the application of the rules authoritatively laid down in the celebrated dictum of Sir Page Wood V-C in **Williams v Hensman** (1861) vol. 70 E.R. 862 at 867. This judgment has been widely accepted as the applicable pre-1926 law on the question of severance of a joint tenancy. The applicable principles were stated thus:

> "A joint tenancy may be severed in three ways. In the first place, an act of anyone 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 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* (1843) 5 Eq. R 501 and *Jackson v Jackson* (1804) 9 Ves. Jun, 591."

11. In **O'Connor Estate v Lindsay** (1987) 51 Man R. 2(d) 65, the Manitoba Court of Queen's Bench (Canada), after re-affirming the **Williams v Hensman's** formulations, stated: *"these principles have been applied in many cases, the outcome generally speaking, being determined by each court's finding of fact."* The resolution of the issue in this case is thus one of fact and the onus of proving that there is a severance lies on the claimant who is making such assertion (**Re Denny** (1947) 177 L.T. 291, at 293). The facts must, therefore, fit within at least one of those rules before a finding of severance in equity can properly be made. Apart from those rules, the other statutory methods of severance applicable in the U.K. are not of any relevance to these proceedings.

ANALYSIS OF THE LAW AND THE FACTS

Is there an act severing the joint tenancy

12. The first rule of **Williams v Hensman** stipulates that any act of any of the joint tenants operating upon his share is enough to sever his share. The authorities all establish that this is usually by alienation or by any act that affects the beneficial interest to the extent that the right of survivorship in favour of that joint tenant is precluded. It is, therefore, well established that a party may alienate his interest *inter vivos* thereby creating a tenancy in common.

13. In this case, Mrs. Samuels-Brown submitted that when the first defendant acknowledged his debt to the claimant and indicated his intention to repay her, his interest in the property then vested in the claimant as creditor. The thrust of counsel's argument is, basically, that by those acts and declarations of the first defendant, his interest in the property vested in the claimant as a matter of involuntary alienation and that an analogy can be drawn with the situation where a joint tenant is adjudicated bankrupt. In support of this proposition, she prayed in aid the English cases, **Re Dennis** [1992] 3 All E.R.; **Re Gorman** [1990] 1 WLR 616 and **Re Pavlou (A Bankrupt) [1993] 1 WLR, 1046.**

14. In **Re Dennis**, a husband and wife owned property as joint tenants. The husband committed an act of bankruptcy. The creditor presented a bankruptcy petition. Two months after the petition was presented, the wife died leaving her estate to her two children. The husband was subsequently adjudged bankrupt and an order was made. The issue before the court was whether the beneficial joint tenancy had been severed before the wife's death by the act of bankruptcy, the presentation of the bankrupt petition or by the retrospective effect of adjudication after her death or whether the beneficial joint tenancy had not been severed at the time of the death so that the beneficial interest passed to the husband. It was held that at the time of the wife's death, there was no alienation by the husband of his interest in the joint tenancy. It was declared that although there was an involuntary alienation by the husband of his property when he became bankrupt, on a true construction of the Bankruptcy Act, 1914, title to his property only vested in the trustee when the adjudication order was made. The adjudication did not operate retrospectively to sever the joint tenancy. The husband was, therefore, entitled to the whole beneficial interest.

15. **Re Dennis** re-affirms the principle that a joint tenancy is severed if a joint tenant disposes of his interest *inter vivos*. It also re-affirms that such a disposition may be voluntary, example by a gift or a sale, or involuntary as occurs upon bankruptcy when the bankrupt's property vests in his trustee (see also **Re Gorman** (supra)). In our jurisdiction, the Bankruptcy Act expressly stipulates that upon a provisional bankruptcy order been made by the court, the bankrupt's property vests in the trustee without need for any conveyance or transfer to be effected. Clearly, this alienation is by operation of law and, therefore, involuntary. In the case of an adjudged bankrupt joint tenant against whom an order has been made, this would have the effect of severing the joint tenancy.

16. However, even if there might be involuntary alienation upon an act of bankruptcy, it is clear from **Re Dennis** that it is not the act of bankruptcy, without more, that would sever the joint tenancy but the vesting of the property in the

trustee upon the order of the court. In this case, the first defendant is not declared or adjudged bankrupt. As such, the Bankruptcy Act does not apply to his situation and so there can be no automatic vesting of his interest in the property in any creditor by virtue of operation of that statute. The claimant is merely one of his creditors by virtue of the judgment. That situation does not put the first defendant in the position of a bankrupt. And even if it did, the mere fact of him being in such a position would not vest the property in the creditor without more. An order of the court that would operate to vest the property in the creditor would have been needed analogous to that which obtains in bankruptcy proceedings. Counsel for the claimant has asked for severance to be found on the basis of an analogy to be drawn with cases of bankruptcy but she has failed to point me to any statutory provision or any legal or factual basis upon which involuntary alienation could operate in the circumstances of this case. **Re Dennis** and the other cases cited by counsel on the claimant's behalf cannot advance the claimant's case in any way on this point.

17. I have observed further that we are here dealing with registered land and there is no act on the part of the first defendant that could qualify as an alienation of his interest in favour of the claimant under the Registration of Titles Act or under any other statutory regime. Although the first defendant said that he accepts that the debt is a charge on the land, there is, however, no charge or mortgage created or executed or registered by him in favour of the claimant. His words do not and cannot create a charge or any interest in the property. The claimant has no rights over the property as the first defendant has given her no such rights. He has done nothing by which his share in the property may vest in the claimant as a matter of law. As such, no question of voluntary or involuntary alienation of the first defendant's interest can arise to ground a severance of the joint tenancy.

18. An example of the act of one joint tenant operating on his share is clearly demonstrated in the Jamaican case of **Brynhild M. Gamble v Hazel Hankle (1990) 27 JLR 115,** a case prayed in aid by the second defendant. There the plaintiff sought to recover possession of an estate in which she had been registered

as joint tenant with her late husband. The husband died. The plaintiff tendered into evidence an indenture whereby the deceased husband purported to convey to the defendant his interest in the property by way of deed of gift. The plaintiff claimed that based on jus accrescendi she became the sole proprietor upon the death of her husband and the purported deed of gift was of no effect because it failed to comply with the Registration of Titles Act. She further maintained that even if the tenancy was severed, section 63 of the Registration of Titles Act operates to make the deed of gift of no effect as it had not been registered. Wolfe, J. (as he then was) found that the deed of gift evidenced a dealing with an interest in land which manifested a clear intention to sever the joint tenancy and to create a tenancy in common. The plaintiff's right of *jus accrescendi* was therefore extinguished. He stated at pages 116 and 117:

> "I am satisfied that the Deed of Gift is 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 Williams v Hensman (supra)... Following the line of cases referred to above I hold that the Deed of Gift executed by Robert Hankle in favour of the defendant had the effect of severing the joint tenancy which existed between himself and the plaintiff."

As can be seen from the facts of the instant case, there is no deed or any other act purporting to convey any interest or right whatsoever on the claimant or anyone else, for that matter, as in **Gamble v Hankle** (supra) that could put the facts of this case squarely within the first rule of **Williams v Hensman.**

Whether unilateral declaration can sever the joint tenancy

19. The claimant has exhibited the documents signed by the first defendant purporting to be an agreement and confirmation of the debt and a purported draft agreement to change the tenancy to one of tenancy in common. These documents are not signed by the second defendant. These would, at best, amount to mere unilateral declarations of the first defendant's intention to deal with the property held as joint tenancy. The question that now falls for contemplation is whether such

declarations, as contained in the documents executed by the first defendant, are sufficient and effective to sever the joint tenancy.

20. 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 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.**

21. This principle was followed in **Re Wilks, Child v Bulmer** [1891] 3 Ch. D. 59. In this case, a fund had been carried over in an administration action for the benefit of three infant plaintiffs "as joint tenants." One of the plaintiffs (Wilks), upon attaining twenty one, instructed his solicitors to have his one third share paid out to him. The solicitors actually obtained leave to add an application to a pending summons for payment of his one third share to him. Wilks' evidence was completed but the amended summons was not reached. He died and the question was whether there had been a severance of his share. The court held that there had not been a severance as nothing was done by Wilks or on his behalf to amount to a severance. Stirling, J. stated that in order to bring about severance, 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.

22. This decision in **Re Wilks** was later followed in **Nielson- Jones v Fedden** [1974] 3 All E.R. 38. On the question as to the effect of a unilateral declaration, Walton, J. had this to say at page 45:

> "The question is: can such a declaration- a unilateral declaration- ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for so saying that it can. So far as I can see, such a mere unilateral declaration does not in any way shatter any one of the four unities."

23. There is, however, another line of authority that supports the view that a unilateral declaration of intention of one joint tenant to sever that is communicated to the other is sufficient to sever the joint tenancy in equity. In **Hawksley v May** [1955] 3 All E.R 353, for instance, a settled fund was held on trusts under which the plaintiff and his younger sister, upon attaining the age of twenty, one would become absolutely entitled as joint tenants. On attaining twenty one the plaintiff wrote a letter instructing that her share be paid into an account. Havers, J., in dealing with the question as to whether there was a severance, found that when the sister wrote the letter that was a sufficient act of severance of the joint tenancy. He then said: *"if I am wrong about that, there clearly was a severance when her share of the trusts funds was transferred to her in September."*

24. This argument was followed in Re **Draper's Conveyance, Nihan v Porter and Another** [1967] 3 All E.R. 853 and by Lord Denning in **Burgess v. Rawnsley** [1975] 3 All E.R. 142. In **Re Drapers,** a husband and wife held property jointly as joint tenants. They divorced but prior to that the wife applied under the Married Women's Property Act for a determination of their interest in the property. She sought a half share in her affidavit. The husband did not defend the suit. An order for sale was made with the wife declared to be entitled to half share in the proceeds of sale. The husband died intestate before the property could be sold. In determining the question as to whether there was a severance of the beneficial joint tenancy during the life time of the husband, Plowman, J. held that the wife's summons under the Married Woman's Property Act coupled with her affidavit in support was sufficient to sever the joint tenancy. The court acted on the principle that a declaration by one joint tenant to sever is effective in severing the joint tenancy.

25. In **Burgess v Rawnsley** (supra) page 147, Lord Denning, MR asserted that **Nielson-Jones v Fedden** (supra) "was not correctly decided" and approved, albeit obiter, the dictum of Havers, J. in **Hawksley v May** and Plowman, J **in Re Drapers** (supra). In endorsing the view that a unilateral declaration of intention by

one joint tenant, communicated to the other, is sufficient to sever the joint tenancy, he stated:

> "It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasize that it must be made clear to the other party. That is implicit in the sentence in which Page Wood V-C says-
>
> > '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'. "

This view has been endorsed by Sampson Owusu in **Commonwealth Caribbean Land Law,** p.350 as the preferred view. He maintained that what is required for a unilateral declaration to be effective is that it should have been communicated, even if the other joint tenant is not in agreement with the proposal. This view, he noted, is supported by the learned authors of Snell's Equity where it is reportedly stated: *"it seems that a unilateral declaration by a joint tenant communicated to the other joint tenants will effect a severance."*

26. It is interesting to note though that although this line of authority approves a unilateral declaration as acceptable, it is enunciated in all the cases that the unilateral declaration must be communicated by one joint tenant to the other joint tenant (for emphasis). In this case, there is no evidence that the declarations, contained in the documents shown to have been prepared by the first defendant, were ever communicated to the second defendant by him. These were evidently for the purposes of the claimant only. So even on this line of authority, the unilateral declarations of the first defendant that have not been communicated to the second defendant, as the other joint tenant, could not constitute an act of severance.

27. It must be noted too that it seems that the weight of authority is against the view that a unilateral declaration of intention, even if communicated, is sufficient to sever. The Australian position, for instance, was strongly declared by the Supreme

Court of New South Wales in the case of **Corrin v Patton** (1990) 169 C.L.R. 540. The head notes read as follows:

> "A joint tenant of land registered under the Torrens system in New South Wales executed a transfer of her interest to a trustee to be held on trust for herself. She died before the transfer was registered. The certificate of title to the land was held at all times by a mortgagee. On the issue as to whether there was severance of the joint tenancy it was held that the joint tenancy was not severed by the execution of the transfer."

According to Mason, C.J. and McHugh, J., a unilateral declaration of intention or other unilateral act inconsistent with joint tenancy does not sever joint tenancy. In disapproving **Burgess v Rawnsley,** the learned judges stated (page 548):

> "There is no evidence in the present case of Mrs. Patton's intention to sever the joint tenancy having been communicated to Mr. Patton. But in any event there are powerful reasons for declining to adopt in Australia the approach which was taken in *Burgess v Rawnsley.* First, as the judgment of Sir John Pennycuick makes clear (38), the decision turned on the construction of s 36 (2) of the Law of Property Act 1925 (UK) which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other, rather than on the state of the pre- existing law. Secondly, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the so called four unities: see Blackstone *Commentaries on the Law of England* (1778), vol. 2 pp. 185-186. Unilateral action cannot destroy the unity of time, of possession, or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property. A statement of intention, without more, does not affect the unity of title. Thirdly, if statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interest in land which had been the subject of statements said to amount to declaration of intention. Finally, there would be no point in maintaining as separate means of severance the making of mutual agreement between the joint tenants."

28. In the Canadian case **Walker v Dubord** 92 D.L.R. (4th) 257, Rowles, J.A. delivering the judgment in the British Columbia Court of Appeal stated:

> "A joint tenancy may be severed by an act of one of the joint tenants operating on his own share. However, despite English authorities to the contrary, in British Columbia, a unilateral declaration of intent to sever does not result in a severance, regardless of whether notice of that intent is given to the other joint tenant(s)."

29. **Harris v Goddard** [1983] 3 All E.R. 242 is said to have apparently settled the confusion prevailing in the English cases as to the effect of unilateral declaration on the existence of a joint tenancy (See: Professor A.J. McLean, "Severance of Joint Tenancies" (1979) 57 Can. Bar Rev.1 at page 25). Lawton, LJ. at page 246 stated:

> "unilateral action to sever a joint tenancy is now possible, Before 1925 severance by unilateral action was only possible when one joint tenant dispose of his interest to a third party. When a notice in writing of a desire to sever is served pursuant to section 36(2) it takes effect forthwith."

30. In **Walker v Dubord** (supra), Rowles, J.A. declared:

> "Any uncertainty about the law as it existed before 1925 in respect to unilateral declarations of intent now appears to have been dispelled by **Harris v Goddard."**

Megarry & Wade, **The Law of Real Property,** 6th edn, page 495, expressed the view that the better view is as stated in **Harris v Goddard** that a unilateral act is insufficient and that severance by a unilateral act only occurs where a joint tenant alienates his interest or in some other way act so that there is a change in the equitable interest in the property. Megarry & Wade's view clearly does not accord with that of Owusu's who sees Lord Denning's view as the preferred one.

32. In **Bertram Cooper v Linford Coleman, claim no. 2004HCV01803** delivered June 15, 2007, I endorsed this view expressed by **Megarry & Wade** and I also stated that on a consideration of **Williams v Hensman**, nothing short of actual alienation or an act operating on the share of one of the joint tenants is sufficient to create a severance within rule one. I would, therefore, reiterate my preferred view, which is in keeping with **Harris v Goddard** and the Australian and Canadian

positions, that a unilateral declaration of an intention to sever, whether communicated or not, is not sufficient to effect a severance within the rules of **Williams v Hensman.** On the basis of this view, I find that there is no act on the part of the first defendant that would be effective, in and of itself, to create a severance of the joint tenancy.

33. The cases in which unilateral declaration to sever was taken as effective, seems to be properly reconcilable on the basis of the **Law of Property Act 1925, s.36 (2)**which provides for the giving of written notice by one joint tenant to the other as a method of severance. I would suggest, therefore, that given that those cases in which unilateral intention to sever was seen as effective were all decided after 1925 in the UK they should be viewed with caution in our context where a written notice of one joint tenant to sever does not constitute a method of severance.

34. Having examined the various authorities on both sides of the divide, it has become abundantly clear that one common principle that runs throughout is that a unilateral declaration of intention by one joint tenant that has not been communicated to the other joint tenant cannot effect a severance. This is the position of law whichever line of authority one would choose to adopt. I am, therefore, persuaded to the view that in the absence of an act of alienation or a similar unilateral act affecting his share so as to preclude the right of survivorship, the first defendant's unilateral action in signing the documents in question and the declarations he made in them are not enough to sever the joint tenancy within the rules of **Williams v Hensman.**

Is there mutual agreement to sever?

35. It is well established that joint tenants, by acting together, may agree, *inter se,* to sever the joint tenancy. This method of severance by mutual agreement would, naturally, oust the operation of a unilateral act or intention communicated or otherwise. In this case, there is no evidence that the parties have come to an agreement, *inter se,* to sever the joint tenancy. The circumstances prevailing in this

case do not fit within the ambit of rule two of **Williams v Hensman.** There is thus no severance by mutual agreement.

Is there mutual conduct evincing a common intention to sever?

36. The third method of severance under **Williams v Hensman** may occur by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. Sir Page Wood V-C, however, established a caveat before severance may be found on this limb. He warned:

> "When the severance depends on an inference of this kind without an 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."

37. In the case at bar, there is no evidence of any dealing between the joint tenants in relation to the property, *inter se,* that could point to a course of dealing between them. What we have, on the one hand, is the first defendant indicating his intention to satisfy the judgment debt from the sale of the property. He has not made any reference to 'his share' in the property. He was speaking to the entire property and not to any particular share. It means that at the time of executing that document, he did not conceptualize the property as having been divided into distinct and separate shares. The treatment of the property by all the joint tenants as a tenancy in common, even in ignorance of the nature of a joint tenancy, is a necessary pre-requisite for the operation of the third rule of **Williams v Hensman.**

38. Further, and even more importantly, there is no evidence that the first defendant had embarked on any arrangement with the other interested party, the second defendant, to have their interest in the property rearranged in any way. Clearly, his acts and intention as expressed to the claimant have been declared behind the back of the second defendant. This is not acceptable as sufficient in law to effect a severance. In such a situation, there is no mutuality of treatment or

conduct in relation to the property evincing a common intention to sever the joint tenancy.

39. On the other hand, the second defendant has been shown to be in dialogue with the claimant's attorneys- at- law concerning the property in question. There is no evidence of the first defendant having been a party to such discussions. Mrs. Samuels-Brown has asked that certain communication between the claimant and the second defendant concerning sale of the property should be accepted as evidence of the latter's agreement to sever. The communication concerning the property between the second defendant and the claimant was contained in 'without prejudice' letters written through their legal representatives. An issue has been raised as to the use that can be made of such correspondence. Mrs. Samuels –Brown has suggested that they are not privileged and the court may look at the contents. Mr. McBean thinks otherwise.

40. In **Walker v Fisher** (1889) 23 QBD 335, the issue arose as to whether letters and interviews 'without prejudice' should have been considered in order to determine whether there was good cause or not for depriving the plaintiff of costs. Lord Esher, M.R. said this:

> "It is I think a good rule to say that nothing which is written without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. I am therefore of the opinion that the learned judge should not have taken these matters into consideration in determining whether there was good cause..."

Lindley, LJ. said:

> "We have to decide whether a judge is entitled to look at letters written without prejudice, in order to determine a question of the existence of good cause for depriving a successful litigant of cost. The authorities do not appear to be uniform on the subject...It becomes, therefore, necessary to consider the point with care. What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter although written

without prejudice operates to alter the old state of things and establish a new one."

41. In **Western Broadcasting Services Ltd. v Edward Seaga, SCCA No. 88 of 2003** delivered December 20, 2004 in the Court of Appeal, Jamaica, Harrison, J.A. held the view that the learned case management judge was entitled to consider the 'without prejudice' communication that had passed between the parties in order to determine whether a settlement had in fact been arrived at.

42. In looking at the foregoing authorities, it is clear that there is no one approach to the question as to whether "without prejudice" correspondence is admissible. It seems to depend on the circumstances and the question to be examined in a particular case. In this case, the correspondence to be examined and relied on would relate to dealing between the claimant and the second defendant. The first defendant was not a party to such dealing. In examining the third rule of **Williams v Hensman,** what I am interested in is not an agreement or dealing between the claimant and any of the defendants to the exclusion of the other but rather dealing involving the two joint tenants *inter se*. I cannot look for any act or declarations made behind the backs of either of them if I am to keep true to the principles concerning the third method of severance laid down in **Williams v Hensman.**

43. I conclude, therefore, that the 'without prejudice' communication between the claimant and the second defendant, as it stands without the participation of the first defendant, is by no means material to the determination of the issue in this case. The common intention to sever cannot be evinced by any of the joint tenants dealing with the claimant behind the back of each other. I would, therefore, in the circumstances hold such 'without prejudice' correspondence to be irrelevant and therefore, inadmissible.

44. I would, nevertheless, venture further and say that even if the communication between the second defendant and the claimant were examined and held admissible, it would merely constitute a unilateral declaration of one joint

tenant expressed behind the back of the other joint tenant and on any of the authorities one would choose to follow, this could not be effective in severing the joint tenancy.

Is there severance by acquisition of a greater interest?

45. This now takes me to another point raised on behalf of the claimant. It has been pointed out that the second defendant has declared in her affidavit that she is entitled to a share in the common property because of improvements she has done to it. Counsel for the claimant has asked me to find from this declaration that there is a severance. This is on the basis that when one party acquires a greater share, it acts as severance of the joint tenancy. It is, indeed, the law that the acquisition of a greater interest by one joint tenant will act as severance of a joint tenancy in equity. The crucial question, however, is whether there is such an acquisition of a greater share in this case?

46. It is accepted as an established principle of law that substantial repairs or improvement to property cannot give an interest in property where none existed before. It is trite law that the beneficial interest in property vests at the time of acquisition unless it is subsequently changed by the conscious acts of the parties. It is the common intention of the parties at the time of acquisition that matters. The parties in this case hold the property as joint tenants. There is no evidence to rebut the presumption raised by the title that the common intention of the parties at the time of acquisition of the property was that both would hold in equal undivided share. Subsequent unilateral acts of improvement by one of the parties, just like repayment of the mortgage, cannot alter this position unless it is shown to have been expressly agreed by the parties at the time of acquisition that it should have that effect.

47. In **Re Gorman** (supra), the wife and husband held property jointly, the land registry transfer did not say whether the property was conveyed to them as beneficial joint tenants or beneficial tenants in common. The husband left the home

and the wife remained with the children. There were considerable arrears in the mortgage repayment and the wife had to make such payments. The husband was adjudged bankrupt. The only asset in his name was the matrimonial home. The trustee in bankruptcy applied for an order for sale of the property. At first instance, the judge held that the property belonged solely to the wife. He found, inter alia, that by meeting all the mortgage repayments, the wife had provided the whole of the purchase price. On appeal by the trustee, the appeal was allowed. The court concluded that the property was held as a joint tenancy. It also found conclusive evidence that it was the common intention of the parties that they were to hold as beneficial joint tenants. The joint tenancy was, however, severed by the husband's act of bankruptcy.

48. It was stated that the wife's payment of the husband's share of the mortgage installments could not entitle her to a greater than half share in the property unless it provided evidence, albeit retrospectively, of what had been the parties' intention at the time of purchase. The wife was, however, entitled to bring such payments into the equitable accounting that would take place after sale to determine the parties' respective shares in the proceeds of sale.

49. **Re Gorman** cannot assist the claimant in her contention in this case. It is clear on that authority that the payment of the mortgage did not enlarge the wife's beneficial share. The same can be said of any improvements made by the second defendant in this case. The share in the beneficial interest, as taken at time of acquisition, would still stand in the absence of evidence that the parties expressly agreed otherwise. Improvements, without more, cannot vest her with a greater beneficial interest in the property. The second defendant would only be entitled to bring her expenditure on the property into equitable accounting if and when there is a sale so that she may be compensated upon proof of her expenditure: see also **Re Pavlou (A Bankrupt)** (supra).

50. In any event, the second defendant has merely asserted that she would be entitled to more than the first defendant in any proceeds of sale due to improvement she has done. There is no evidence of such improvement having been done and no proof of the expenditure. At this point, all we have is mere 'word of mouth', that is, mere assertions made behind the back of the first defendant. This brings us right back to the principle that unilateral declaration by one joint tenant, made behind the back of the other interested party, cannot effect a severance. This situation fits nowhere in the **Williams v Hensman** formulations that govern the question before me.

51. On the evidence, there is no mutual treatment of the common property by both joint tenants- being the two defendants- to indicate that they have mutually viewed and treated their interests as separate and distinct. Even with the first defendant saying he would proceed to sell the property, he did not say he would sell his share. As already indicated, that shows that he had not even started to conceptualize his interest in the property as separate and distinct. For there to be severance by mutual conduct, there must be mutual treatment by the parties of their interest as separate and distinct as if constituting a tenancy in common. As such, the mere empty assertions of the second defendant of having a greater interest, without even an attempt to prove it, are just that-empty.

52. The mere oral assertions of one joint tenant pointing to an intention to sever the joint tenancy is the type of situation that Mason, C.J. and McHugh, J. in **Corrin v Patton** (supra) sought to warn against when they said:

> "If statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interest in land which had been the subject of statements said to amount to declaration of intention."

I, therefore, find that the assertion of the second defendant in her affidavit that she is entitled to a greater interest in the property by virtue of her expenditure on improvements cannot amount to a severance of the joint tenancy in any way.

CONCLUSION

53. There being no severance of the joint tenancy in law or in equity (as could occur under the pre-1926 law that still applies to this jurisdiction), the claimant's notice of application for court orders is, therefore, dismissed with costs to the second defendant to be agreed or taxed.

ORDER is made accordingly.