[2015] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 52/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

BETWEEN	**SUNSHINE DOROTHY THOMAS**	
AND	**WINSOME BLOSSOM THOMPSON (Executrices of the estate of Leonard Adolphus Brown, deceased)**	
AND	**OWEN BROWN**	**APPELLANTS**
AND	**BEVERLEY DAVIS**	**RESPONDENT**

Jeffrey Daley instructed by Betton-Small, Daley & Co for the appellants

Barrington Frankson instructed by Frankson & Richmond for the respondent

27, 28 January and 27 March 2015

PANTON P

[1] This appeal is against the judgment of Lawrence-Beswick J who, on 23 March 2012, declared that a joint tenancy held by Ms Beverley Davis, the respondent, and the

late Leonard Adolphus Brown had not been properly severed, and that the land, the subject of the tenancy, was owned solely by the respondent. In the judgment of the learned judge, the late Leonard Adolphus Brown (whose executrices and son Owen Brown were defendants in the instant suit) acted in a dishonest and fraudulent manner in changing the joint tenancy to one of tenants in common.

[2] It is undisputed that the deceased Leonard Brown and Ms Davis, the respondent lived together as man and wife for many years in England, at first, and then in Jamaica, although each was married to someone else during a portion of those years. It is also undisputed that on 26 May 1998, land registered at Volume 1079 Folio 915 of the Register Book of Titles and which may be referred to as Valley Drive was transferred to both persons as joint tenants. On 4 August 1999, they (the joint tenants) transferred the said land to themselves as tenants in common. The latter transfer gave rise to the suit filed by Ms Davis.

[3] In the amended particulars of claim filed on 16 June 2011, Ms Davis sought a cancellation of the transfer of 4 August 1999, and a declaration that she was entitled to sole ownership of the property in question.

[4] The deceased, a businessman, was the father of Mr Owen Brown the third appellant. He lived in England and was married to the mother of the third appellant until their divorce in or about May 1984. The third appellant is a beneficiary under the will of the deceased who bequeathed to him his (the deceased's) interest as a tenant in common in the premises at Valley Drive.

[5] The deceased and Ms Davis lived together in England from 1984 until about 1999 when they returned to Jamaica, their homeland. Due to issues of health, they decided to return to England for the deceased to receive medical treatment. Prior to their departure to England, the deceased made arrangements with his attorney-at-law for Ms Davis to attend at the attorney's office and sign the necessary documents for the joint tenancy to be converted into a tenancy in common. Ms Davis duly obliged. In her witness statement, she said that the deceased having been diagnosed with cancer, told her "that he was desirous of giving [her] greater control over his affairs but [she] would have to sign a document to that effect". Her statement continued as follows:

> "20. I signed the documents that were presented to me which said documents had the effect of severing the joint tenancy which Leonard and I had in the property at Valley Drive. I did this without knowing what I was signing as I had faith and trust in Leonard. I was not aware of the nature and contents of the document. I was of the belief that I was signing a Power of Attorney whereby Leonard would give me total control over all his affairs.
>
> 21. I was persuaded by Leonard to sign the said documents without obtaining legal advice and at no time did I intend to execute a transfer of the premises."

[6] In her evidence before Lawrence-Beswick J however, Ms Davis presented a different picture. She said that when she went to the attorney's office, she was given a bundle of documents and told that the deceased wanted to sever the joint tenancy. She said that she did not know what joint tenancy meant, but the attorney explained it to her briefly and she signed. She did so, although she thought she "was going to sign

power of attorney for we were going back to England for treatment – he was very ill at the time". She said that she thought the power of attorney was for Mrs Kathleen Betton-Small (the attorney-at-law) "to look after property as she did in 1997". In cross-examination, she said that she was not tricked into signing but maybe the deceased, who was not present at the signing, had deceived her. She added that she may have signed out of fear of the deceased as she could not have gone back home if she hadn't signed. According to her, she was fearful of him at all times.

[7] Mrs Betton-Small, the attorney-at-law in question, gave evidence. She was called to the English Bar in 1976 and admitted to practice in Jamaica in 1977. She said that the deceased, who was her client, instructed her to prepare a will and to sever the joint tenancy. She carried out his instructions. She had done the earlier transfer of the property into the names of the deceased and Ms Davis as joint tenants. In respect of the severance, Ms Davis came to her office and she explained the nature of the transaction to her and she signed. Ms Davis was in a rush when she went to her (the attorney's) office, and there was no question of any duress being exerted on her, said Mrs Betton-Small under cross-examination. In fact, she said that Ms Davis said she understood the nature of the document and wanted to sign, although she (Mrs Betton-Small) had suggested to her that she could take the document and get independent advice.

[8] In the amended particulars of claim, Ms Davis contended that she had executed the document under a "total mistake as to its nature and contents and in the bona fide belief that she was executing an Instrument of a totally different kind namely a

document in the nature of a Power of Attorney" [para 21]. She also stated that she was "induced to execute the said documents whilst acting under the influence of the deceased and without independent advice" [para 22].

[9] In her reasons for judgment, the learned judge, after giving the history of the relationship between the parties and the details of the transactions in question, acknowledged that a joint tenancy "can be severed by mutual agreement between the parties". However, she said it was important to consider the circumstances under which the certificate of title was endorsed with the severance, and whether there was mutual agreement for that to happen. She also acknowledged that the endorsement on the title indicating that the deceased and Ms Davis were tenants in common "can only be defeated by proof that that endorsement resulted from fraud".

[10] The learned judge concluded:

> "… that Ms. Davis signed the document without knowing that it might cause her to lose half of her interest in Valley Drive. She was hurried into signing without a full appreciation of what she was doing. If she had appreciated the import of the document and had knowingly signed it, she would have understood that the effect of the document she signed would be to create a situation where Mr. Brown could bequeath to his son a half interest in the property if he saw fit. That would carry with it the right of his son to occupy the premises and to deal with it.
>
> The question now is if fraud is involved." [para 25]

[11] Following on those conclusions, Lawrence-Beswick J related the "evidence" on which counsel for Ms Davis relied "for his submission that there is fraud". The judge then said:

> "In my view the circumstances indicate actual dishonesty by Mr. Brown as it concerns the transfer of the property to create a tenancy in common. The dishonesty of the circumstances is further exposed by the fact that Mr. Brown states in his will that he had 'already given to Beverley Sylvia Davis, the remaining one-half share of the property at 12 Valley Drive …' That statement was not accurate as she already held a share in the property initially as joint tenant and later, if the tenancy had in fact been severed, she would have held her half portion as a tenant-in-common. In both situations she held the property in her own right without it being 'already given' to her by the late Mr. Brown." [para 27]

She continued:

> "The apparent largesse of Mr. Brown to Ms. Davis, being displayed in the will may well be viewed as being a sham. This bequest was empty and was an attempt to hide the truth of his actions which appeared to be wanting in honesty as it concerns the property at Valley Drive. Indeed it is undisputed that his purported bequests to her concerning bank accounts were also empty." [para 28]

And she added:

> "Mr. Brown's will of July 16, 1999, states that he gives to his son Owen Brown 'my one-half share and interest (**the joint tenancy having been severed**) in the property at 12 Valley Drive …" (emphasis mine). However, the document purporting to sever the tenancy was signed that same day and had not been registered. Such a bequest would have been premature." [para 32]

[12] The learned judge found that the circumstances surrounding the changed endorsement on the title, given the relationship between the parties, confirmed "a dishonest approach by the late Mr Brown to his partner … sufficiently dishonest to amount to fraud". She drew the inference "that the late Mr Brown's actions/plans were dishonest i.e. born of fraud, and resulted in his interest in the property on the Certificate of Title being unlawfully altered from joint tenancy to tenancy-in-common". Consequently, she said: "The instrument of transfer in my view arose fraudulently and therefore the transfer should not be allowed to stand".

[13] The appellants filed six grounds of appeal but ground number two was abandoned. The grounds are, with respect, rather wordy in terms of the particulars, so I propose to summarize them as follows:

> **Ground 1**: The learned judge erred in law in finding that the pleadings were sufficient to support a claim of fraud against the co-registered owner who was the deceased.
>
> **Ground 3**: The learned judge failed to take account of the evidence that the property had been purchased with funds provided by the deceased and that the respondent Ms Davis was not a party to the agreement for sale, but was added to the instrument of transfer as a nominee along with the deceased to be registered as joint tenants.

Ground 4: The learned judge erred in law in finding that there had to be mutual agreement by the parties registered on the title to sever the tenancy registered on the title.

Ground 5: The learned judge erred in finding that Ms Davis signature to the transfer severing the tenancy was obtained by fraud as this was contrary to her evidence.

Ground 6: The learned judge erred in finding that the will of the deceased Leonard Brown being made on the same day that the instrument of transfer severing the tenancy was signed but not yet registered, could not properly devise the subject property to his beneficiary in his will and was itself an act of fraud.

[14] I find myself in agreement with Mr Barrington Frankson for Ms Davis that ground three is irrelevant and ought to have been abandoned. In the circumstances of the case, the fact that Ms Davis did not make a financial contribution towards the acquisition ought not to be a consideration as it is clear that the deceased intended her to have at least a half interest in the property. The deceased knew he was terminally ill, hence the addition of the name of his longtime partner and carer, Ms Davis. Accordingly, I do not intend to comment further on this ground. The focus will now be on the four remaining grounds.

The submissions

[15] The relevant submissions, in keeping with the grounds, were in respect of:

a) the severance of the joint tenancy;

b) the question of fraud on the part of the deceased Leonard Brown; and

c) the effect of the devise to Mr Owen Brown, son of the deceased.

Grounds 1 and 5 – re fraud

[16] Mr Daley submitted that there was no pleading of fraud on the part of the deceased or of any conspiracy between the attorney-at-law and the deceased to defraud Ms Davis of her interest, or of her right of survivorship under the joint tenancy. There was, in any event, no evidence of such behaviour, he said. In support of this submission, he made reference to Bullen & Leake & Jacob's Precedents of Pleadings 15th edition, volume 2, para 50–01.1 which is reproduced below, preceded by paragraph 50–01:

> **50–01 " Different types of conspiracy**.
>
> Conspiracy is 'the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means' (Mulcahy v R (1868) L.R. 3 H.L. 306 at 317). Historically, there are two kinds of conspiracy, the elements of which are distinct:
>
> (1) an 'unlawful means' conspiracy in which the participants combine together to perform acts which are themselves unlawful; and
>
> (2) a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole or predominant purpose of injuring the claimant: 'it is in the fact of the conspiracy that the unlawfulness resides', per Lord Watson in Allen v Flood [1898] AC 1 at 108 …"

> **50 – 01.1** "**Necessary elements of an action in conspiracy**. The claimant must plead and prove the following necessary elements:
>
> (i) a combination or agreement between two or more individuals (required for both types of conspiracy);
>
> (ii) an intent to injure (required for both types of conspiracy but must be shown as the sole or predominant purpose for type (2) above);
>
> (iii) pursuant to which combination or agreement and with that intention certain acts were carried out;
>
> (iv) resulting loss and damage to the claimant."

In the absence of pleading conspiracy, Mr Daley submitted that the learned judge was not entitled to find that Mrs Betton-Small assisted the deceased to orchestrate a deception upon the Ms Davis. The learned judge, he said, misdirected herself on the issue of fraud. "Fraud must be pleaded, particularized and strictly proven to defeat the title of a registered owner, or in this instance, an entry on the title", he said. Further, he added that "the mere assertion of fraud without **strict** proof of same ought not to overturn the deceased's registration of his interest as a tenant-in-common".

[17] Mr Barrington Frankson, who filed no submissions but was allowed to address the court, said that fraud had been particularized in paragraph 23 of the amended particulars of claim. That paragraph reads thus:

> "Further and/or in the alternative the deceased falsely and fraudulently purported to deprive the Claimant of the entire fee simple in the said land.

PARTICULARS

(a) Purporting to sever the joint tenancy in the said land by trick or deception

(b) Inducing and/or causing the Claimant to sign the said document by falsely representing to her the nature and effect thereof.

(c) Insisting and inducing the claimant to sign the said document at time when the deceased well knew that he would shortly die having been told by his medical advisors that treatment by chemotherapy would be of little or no avail. The deceased died in the United Kingdom some two weeks after receipt of this information the making of the will as aforesaid."

Mr Frankson said that what was represented was that a power of attorney was being signed instead of a transfer. That, he said, was a trick, and "the trick was the fraud". The judge, he said, was entitled to look at the circumstances to get to the truth; and what she drew was "an inference in favour of the truth".

Ground 4 – re the joint tenancy

[18] Mr Daley submitted that a joint tenant has the right to sever a joint tenancy. He referred to the principles set out in **Williams v Hensman** [1861] 70 ER 862. Those principles have been applied in this jurisdiction and are to the effect that a joint tenancy may be severed in three ways: (a) through a disposition of his interest by one of the joint tenants; (b) by mutual agreement of the joint tenants; and (c) by a course of dealing sufficient to indicate that the interests of all were mutually treated as constituting a tenancy in common. In view of these principles, Mr Daley submitted that the learned judge erred when she found that Ms Davis' agreement was required before

the deceased could act upon his share and sever the tenancy. He said that the learned judge focused her attention on severance by mutual agreement only in finding that there was no mutual agreement between the deceased and Ms Davis, and concluded that the severance was obtained by fraud. He submitted that the act of the deceased operating upon his own share to sever the tenancy and devise his share by his will was an unequivocal act of severance by alienation and he did not require the agreement of Ms Davis to do so.

[19] Mr Frankson, in response, submitted that the appellant's case was that there was mutual agreement to sever the joint tenancy, but the learned judge had rejected the idea that there had been agreement. Hence, he argued, there is really no need to deal with the other methods of severing a joint tenancy. The method used to get around the joint tenancy in this case, should be frowned upon, he said. In paragraph [20] of her reasons for judgment, the learned judge described the joint tenancy as having "existed for years". This obvious error should be viewed, said Mr Frankson, as being of no moment.

Ground 6 – the devise to Mr Owen Brown, son of the deceased

[20] Mr Daley referred to the learned judge's statement that the devise to Mr Owen Brown was premature because the document severing the joint tenancy was signed on the same day as the date of the will and had not yet been registered (see para [11] above). He submitted that whether the deceased had made his will before or after the instrument of transfer severing the joint tenancy was of no legal moment, because the

law permits a testator to leave by his will property to come to him which is not yet in his possession. "What is crucial is whether at the date of his death the property he had devised formed a part of his estate", he said.

In this regard, Mr Daley relied on section 19 of the Wills Act which reads:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

In Mr Daley's view, the existence of the right of the deceased to sever the joint tenancy was not inconsistent with Ms Davis' right to maintain her half interest in Valley Drive. Nor did the extinguishment of the *jus accrescendi* diminish her interest in the property. The declaration in the will that Ms Davis had already been given her half share recognized that fact, he concluded.

[21] Mr Frankson, it appears to me, was unable to offer any rebutting arguments to the submissions of Mr Daley in respect of this ground of appeal. He seemed content to merely say that reference in the will to the severance of the joint tenancy "speaks volumes". According to him, "it exposes the wrong that was perpetrated on the respondent".

Reasoning and conclusion

[22] Cheshire's Modern Law of Real Property (11th edition) provides a brief picture and history of the nature of the tenancies discussed in this case. It states:

> "From early times the right of survivorship caused a divergence of views between common law and equity.

> Common law favoured joint tenancies because they inevitably led to the vesting of the property in one person through the operation of the doctrine of survivorship, and thus facilitated the performance of those feudal dues that were incident to the tenure of land. But a tenancy in common never involved this right of survivorship, and equity, which was not over-careful of the rights of the lord, soon showed a marked inclination, in the interests of convenience and justice, to construe a joint tenancy as a tenancy in common.
>
> Equity aims at equality, a feature that is conspicuous for its absence if the survivor becomes the absolute owner of the land." [page 329]

[23] In determining this appeal, it seems to me that, first and foremost, consideration has to be given to the question of the severance of the joint tenancy. The common law position is that a joint tenancy has two principal features: (1) the right of survivorship, and (2) the four unities of possession, interest, title and time. For present purposes, the focus is on the right of survivorship. That right means that on the death of one of two joint tenants, his interest in the land passes to the other joint tenant. The right of survivorship is supreme so long as the joint tenancy exists. It is not affected by the contents of a joint tenant's will or the rules of intestacy where a joint tenant has died intestate.

[24] However, there are ways in which a joint tenancy may be determined. In Megarry and Wade – The Law of Real Property (8th edition) it reads thus at page 497:

> "The right of survivorship does not mean that a joint tenant cannot dispose of his interest in the land independently. He has full power of alienation inter vivos, though if, for example, he conveys his interest, he destroys the joint tenancy by severance

> and turns his interest into a tenancy in common, But he must act in his lifetime, for a joint tenancy cannot be severed by will."

So, it is clear that severance determines a joint tenancy by converting it into a tenancy in common. Two joint tenants would then become tenants in common with each owning a half share. In his submissions, Mr Daley referred to the fact that the principles set out in **Williams v Hensman** (para [18] above) have been applied in this jurisdiction and he mentioned specifically the judgment of this court in **Lawrence & Others v Mahfood** [2010] JMCA Civ 38. At para [25] of that judgment, Morrison JA in delivering the judgment of the court upholding the decision of Straw J, said:

> "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***."

[25] In applying these principles, it will be seen that the deceased, if he had so wished, could have properly passed his half share to his son during his (the deceased's) lifetime, and his son would have then become a tenant in common with Ms Davis. Instead, he chose to delay the gift to his son. In so doing he chose to become a tenant in common with Ms Davis, and then to pass his share by his will to his son. On the face of it, this was a perfectly legitimate transaction. The evidence shows that Ms Davis, of her own free will, went to the office of Mrs Betton-Small who explained to her the meaning of a tenancy in common while at the same time advising her that she had the right to seek independent legal advice. It is clear that Ms Davis, notwithstanding her subsequent protestations at trial, chose to sign the relevant documents in order to give effect to the wishes of the late Mr Brown. The latter was near the end of his mortal days, and Ms Davis knew that fact. It is beyond belief for her to say that she was afraid of such an individual; so fearful that she thought that she would not have been able to return home if she did not sign the transfer document. Ms Davis made this statement obviously forgetting that Mr Leonard Brown was depending on her physical assistance to travel to England to receive urgent medical care. In the circumstances therefore, her statement that she was afraid of him rings hollow. In my view, the learned judge erred in giving credence to Ms Davis in that regard. I hasten to add that I

have arrived at this view, fully mindful of the injunction that an appellate body should not lightly differ from a trial judge as regards a judgment on credibility, given the obvious advantage that a trial judge has in actually seeing and hearing a witness in person.

[26] The learned judge further erred, in my view, in elevating what she regarded as dishonesty on the part of the deceased to the status of "fraud" to warrant the setting aside of the transfer. The "dishonesty" that was found by the learned judge related to a statement in the will to the effect that Ms Davis had already been given her share in the lot. The learned judge found dishonesty in the statement on the basis that Ms Davis already "held the property in her own right" and so there was nothing for the deceased to give. Fraud, it should be remembered, has to be specifically pleaded and it has to be done with particularity. That was not done in this case so there was nothing to adversely affect the validity of the registered transfer.

[27] Finally, it is necessary to comment on what appears to have been a misunderstanding so far as the effective date of the bequest to Mr Owen Brown, the son of the deceased, is concerned. The learned judge said that the bequest "would have been premature", it having been made in the will on the day that "the document purporting to sever the tenancy was signed" seeing that the severance had not yet been registered. As stated earlier, Mr Frankson did not make any submission on the relevant ground of appeal. His stance was understandable, seeing that Mr Daley's submissions in this regard defy rebuttal. Section 19 of the Wills Act reads thus:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

In addition to this legislative provision, there is respectable authority along those lines in Megarry and Wade – The Law of Real Property (referred to above) page 566 para 14 – 012 as follows:

> "A will is an instrument that both contains and is made with the intention that it should be a revocable ambulatory disposition of the maker's property which is to take effect on death."

And Farwell J in the case **Re Baroness Llanover** [1903] 2 Ch 330 at 335 expressed it in this way:

> "Now it is to my mind plain that a testator does not settle or dispose of any property by his will unless and until such will is brought into effectual operation by his death."

[28] In the circumstances, the signing of the will on the date that the severance document was signed, but before it was registered does not provide a basis for a finding of dishonesty or fraud.

[29] Taking everything into consideration, I am of the view that the judgment below has to be set aside as the severance of the joint tenancy was properly done and the bequest to Mr Owen Brown is valid. Judgment ought to be entered in favour of the appellants with costs here and below.

BROOKS JA

[30] Mr Leonard Brown died of cancer on 28 August 1999. He had, in the previous month, sought to put his property affairs in order. He made a will and executed an instrument of transfer of his interest in his home at 12 Valley Drive, Saint Andrew. He was, however, not the sole owner of the property. His interest was held jointly with his intimate companion, of many years, Ms Beverley Davis. Ms Davis also signed the transfer. In the document the parties purported to sever their joint tenancy by transferring the property to themselves as tenants in common. The transfer was registered on the title for the property on 4 August 1999; before Mr Brown's death.

[31] The death provoked a dispute between Ms Davis and Mr Brown's executrices as to whether the transfer document was valid and whether the joint tenancy had indeed been severed. Severance would mean that the property would be owned by both Ms Davis and Mr Brown's estate. On the other hand, an invalid document would mean that Mr Brown's interest would have passed to Ms Davis by way of survivorship, which is a feature of joint tenancies. Things came to a head when Mr Brown's executrices sought to have Ms Davis removed from the premises as a precursor to its sale.

[32] The trial of Ms Davis' resultant court action came on before Lawrence-Beswick J in May 2010, and was heard on several days over the course of some 13 months. On 23 March 2012, the learned trial judge ruled that the instrument of transfer was invalid and that Ms Davis was, by virtue of Mr Brown's death, the sole owner of the property.

[33] Mr Brown's executrices, and his son Owen, who was the person named in the will to inherit Mr Brown's interest (collectively, hereafter, referred to as the appellants), are dissatisfied with the decision and have appealed against it to this court. They asserted that the learned trial judge ought to have found that the instrument of transfer was valid, having been properly executed by both parties.

[34] The main issue raised by the appeal is whether there has been an effective severance of the joint tenancy. The grounds of appeal have structured this main issue into three basic sub-issues, firstly, whether Ms Davis' statement of case allowed her to allege fraudulent conduct by Mr Brown, which would vitiate mutual severance. The second, is whether Ms Davis' execution of the instrument of transfer was secured by deception, making the execution invalid. The third is whether Mr Brown's actions in respect of the instrument of transfer were, by themselves, sufficient to achieve the severance. There is also a related issue, which is whether Mr Brown's bequest of his interest in the property to Owen was invalid by virtue of the time that it was executed.

The learned trial judge's findings

[35] In arriving at her decision that there was no mutual agreement to sever the joint tenancy, the learned trial judge made a number of findings of fact. The first of the major findings was that Ms Davis did not appreciate the nature and effect of the document that she was signing. The learned judge accepted the evidence that Mr Brown had told Ms Davis to sign the documents because "they were to allow her to

better conduct his business". The learned trial judge said at paragraph [25] of her judgment:

> "I accept the truth of the above circumstances on a balance of probabilities. I conclude from these circumstances that Ms. Davis signed the document without knowing that it might cause her to lose half of her interest in Valley Drive. She was hurried into signing without a full appreciation of what she was doing. If she had appreciated the import of the document and had knowingly signed it, she would have understood that the effect of the document she signed would be to create a situation where Mr. Brown could bequeath to his son a half interest in the property if he saw fit. That would carry with it the right of his son to occupy the premises and to deal with it.
>
> The question now is if fraud is involved."

[36] The second major finding was that there was actual dishonesty by Mr Brown in respect of the instrument of transfer. The learned trial judge said, in part, at paragraph [27]:

> "In my view the circumstances indicate actual dishonesty by Mr. Brown as it concerns the transfer of the property to create a tenancy in common…."

She further found, along these lines, at paragraph [30]:

> "Even if [Mr Brown and Ms Davis] had been only business partners, the circumstances surrounding the changed endorsement might have been properly viewed as being dishonest. But here, where they also shared such a long and personal relationship, **the circumstances in my view confirm a dishonest approach by the late Mr. Brown to his partner, whom he instructed to sign the papers, sufficiently dishonest to amount to fraud** within the meaning ascribed to in [**Willocks v Wilson** (1993) 30 JLR 297]." (Emphasis supplied)

The learned trial judge cited **Willocks v Wilson** in order to set out her understanding of the use of the term "fraud" in the Registration of Titles Act. In **Willocks**, Carey P (Ag) said, at page 300 of the report:

> "It is right to point out that fraud in this Act means actual fraud, i.e. dishonesty."

[37] The learned trial judge supported her conclusion that Mr Brown had acted dishonestly by finding that his dealings with two joint bank accounts, without Ms Davis' knowledge, were also dishonest. She found that by these dealings he was attempting to provide a legacy for Owen despite the fact that his estate was not large enough to accommodate such a legacy. She explained, at paragraph [37], her drawing of the inference:

> "In the circumstances of this case, I readily infer that the late Mr. Brown's actions/plans were dishonest i.e. born of fraud, and resulted in his interest in the property on the Certificate of Title being unlawfully altered from joint tenancy to tenancy-in-common.
>
> The instrument of transfer in my view arose fraudulently and therefore the transfer should not be allowed to stand."

The grounds of appeal

[38] These issues in this case were argued by virtue of five grounds of appeal. They are set out in a condensed form below:

1. The learned trial Judge erred in law when she found that Ms Davis' pleadings as originally stated and later amended were sufficient to support a claim of fraud

against the co-registered owner who was the deceased Mr Brown.

2. Ground two was not argued.
3. The learned judge failed to take account, or, failed to take sufficient account of the evidence that the subject property had been purchased with funds from Mr Leonard Brown's (deceased) account solely as demonstrated on documentary evidence put before the court below and further to recognize that Ms Davis was not a party to the agreement for sale but had been added to the instrument of transfer as a nominee along with Leonard Brown to be registered as joint tenants on the title.
4. The learned judge erred in law in finding that there had to be a mutual agreement by the parties registered on the title to sever the tenancy registered on the title.
5. The learned Judge fell into error in finding that Ms Davis' signature to the transfer severing the tenancy was obtained by fraud as this was contrary to Ms Davis' oral evidence that she understood what she was signing when she attended upon attorney Betton-Small's

chambers to sign the instrument of transfer and signed after its purpose was explained to her.

6. The learned judge erred in finding that the Last Will and Testament of Leonard Brown (deceased) being made on the same day that the instrument of transfer severing the tenancy was signed but not yet registered, could not properly devise the subject property to his beneficiary in his Will and was itself an act of fraud.

The learned trial judge's management of the issue of fraud – Ground 1

[39] Mr Daley, for the appellants, argued that, although there were no pleadings alleging fraud in Ms Davis' original particulars of claim, on which the trial started, the learned trial judge wrongly allowed evidence to be led concerning allegations of fraud by Mr Brown and allowed amendments to the particulars of claim to assert fraud. In addition to that error, learned counsel submitted, the nature of the alleged fraud by way of deceiving Ms Davis, would have required a conspiracy between Mr Brown and the attorney-at-law, Mrs Betton-Small, who prepared the instrument of transfer and who witnessed Ms Davis' signature on the document.

[40] According to Mr Daley, no assertion or particulars of any conspiracy was made in the statement of case or in the evidence that the attorney-at-law was in any way complicit in the alleged deception. He submitted that the learned trial judge was, therefore, wrong to have found that a fraud had been perpetrated on Ms Davis.

[41] Mr Frankson, on behalf of Ms Davis, submitted that there were assertions of fraud in the original particulars of claim and that the learned trial judge was right in allowing evidence to be led in that regard and was correct in relying on that evidence. Learned counsel submitted that there was deception by Mr Brown in giving Ms Davis the impression that she was executing a power of attorney, when in fact she was signing an instrument of transfer. He argued that there was no challenge to that finding of fact by the learned trial judge. Supplemental to that deception, submitted Mr Frankson, was Mrs Betton-Small's failure to inform Ms Davis of her right to obtain independent legal advice and the attorney-at-law's securing of Ms Davis' signature on the document in circumstances where she was rushed.

[42] It is true that neither the original nor the amended particulars of claim made any assertion of impropriety in respect of the attorney-at-law. There were, however, assertions of fraud in the original particulars of claim. Paragraph 23 spoke to fraudulent conduct by Mr Brown and itemised particulars of that conduct. It stated:

> "23) Further and/or in the alternative the deceased falsely and fraudulently purported to deprive the Claimant of the entire fee simple in the said land.
>
> PARTICULARS
>
> a) Purporting to sever the joint tenancy in the said land by trick or deception
>
> b) Inducing and/or causing the Claimant to sign the said document by falsely representing to her the nature and effect thereof.

c) Insisting and Inducing the Claimant to sign the said document at time [sic] when the deceased well knew that he would shortly die having been told by his medical advisors that treatment by Chemotherapy would be of little or no avail. The deceased died in the United Kingdom some two weeks after receipt of this information the making of the Will as aforesaid."

Mr Daley is not on good ground in his complaints about the absence, in the pleadings, of allegations of fraud by Mr Brown.

[43] Attorneys-at-law dealing with civil litigation have traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord Selborne LC in **John Wallingford v Mutual Society and the Official Liquidator** (1880) 5 App Cas 685 at page 697 stated the general rule. He said:

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

[44] In **Associated Leisure Ltd and others v Associated Newspapers Ltd** [1970] 2 All ER 754 at pages 757-8, Lord Denning MR cautioned that fraud should not be pleaded unless there was "clear and sufficient evidence to support it". Similarly in **Donovan Crawford and Others v Financial Institutions Services Ltd** [2005] UKPC 40, the Privy Council emphasised the standard in respect of the issue of fraud in civil litigation. It said, at paragraph 13 of its judgment:

> "It is well settled that actual fraud must be precisely alleged and strictly proved."

[45] It is noted that rule 8.9(1) of the Civil Procedure Rules (CPR) requires a claimant to include all the facts on which the claimant relies. This court has also decided, in the context of that rule, that even if fraud is not expressly pleaded there ought to be averment of the facts which are consistent with fraud. In other words, the allegations must suggest fraud and there must be evidence to support the allegations. In **Harley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley and Others** [2010] JMCA Civ 46, Harris JA said, at paragraph [57]:

> "The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. **It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud**. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud." (Emphasis supplied)

[46] The learned trial judge erred in two ways in her treatment of the issue of fraud. Firstly, she stated, in error, that there were no pleadings of fraud. The second is that, contrary to the admonitions above, she was prepared to infer fraud from the circumstances. She said at paragraph [14] of her judgment:

> "...Here there is no pleading of fraud, and there is no one instance of fraud being alleged, but rather several circumstances from which Counsel for Ms. Davis invites the Court to infer fraud. I therefore consider the circumstances to determine if fraud can be properly inferred."

[47] It was at paragraph [37] of the judgment that the learned trial judge stated that she drew the inference that fraud had been committed. She said:

> "In the circumstances of this case, I readily infer that the late Mr. Brown's actions/plans were dishonest i.e. born of fraud, and resulted in his interest in the property on the Certificate of Title being unlawfully altered from joint tenancy to tenancy-in-common.
>
> The instrument of transfer in my view arose fraudulently and therefore the transfer should not be allowed to stand."

[48] The next aspect to be dealt with is the learned trial judge's treatment of the evidence in that regard. It is the subject of ground five, which, because of its close relation to ground one, will be assessed next.

The learned trial judge's finding of fraud from the evidence – Ground five

[49] The assessment of the learned trial judge's finding of fraud requires an assessment of the evidence concerning Ms Davis' signing of the instrument of transfer. That assessment involves a close look at the allegations of actual fraud, undue influence and the principle of *non est factum*. These will be dealt with in turn.

Actual fraud

[50] Ms Davis' evidence, concerning the signing of the instrument of transfer, was consistent with the assertions in the particulars of claim that Mr Brown had deceived her as to the nature of the document that he was asking her to sign. There were, however, no allegations against Mrs Betton-Small in this regard, in the particulars of

claim. Neither was there any evidence suggesting that Mrs Betton-Small sought to deceive her. On the contrary, according to Ms Davis, Mrs Betton-Small did tell her what the documents were about. She said in cross-examination, at page 71 of the core bundle:

> "…I thought I was going to sign power of attorney for we were going back to England for treatment - he was very ill at that time.
>
> The power of attorney I thought was for Mrs. Small to look after [the] property as she did in 1997.
>
> I can't recall saying I was tricked. When I went Mrs. Small gave me a bundle of document [sic] – Mr. Brown wants me to sever joint tenancy – she did.
>
> I was not tricked. Mr Brown maybe deceived me – Mr Brown was not there when I [sic] signing."

[51] Ms Davis also said, at page 72 of the core bundle, that Mrs Betton-Small briefly explained to her the meaning of joint tenancy:

> "I say I did not know what joint tenancy means at the time. Mrs. Small explains [sic] it to me briefly and I sign."

Despite that evidence, Ms Davis denied that she had "full knowledge of Mr. Brown's intention to sever".

[52] The learned trial judge did not expressly find that Mrs Betton-Small did anything fraudulent or deceptive. She did, however, suggest that Mrs Betton-Small, in not having included Ms Davis in earlier discussions that she was having with Mr Brown, and in asking Ms Davis to sign documents in circumstances where delay would have meant

danger for Mr Brown's health, had created a situation which facilitated Mr Brown's deception.

[53] It is difficult to agree with the learned trial judge's conclusion. If Ms Davis' evidence is accepted that Mrs Betton-Small explained the nature of the document and the significance of joint tenancy to her and informed her that she could obtain independent legal advice, it cannot properly be said that she was operating under a misapprehension when she signed the instrument of transfer.

[54] Mrs Betton-Small's evidence in this regard was unequivocal. After testifying as to the history of her relationship with Mr Brown and Ms Davis since she had acted for Mr Brown in 1997, in the purchase of the property, Mrs Betton-Small said she took instructions from Mr Brown concerning the will and the severance when she went to his home. Mr Brown and Ms Davis came to her office, separately, and at different times thereafter, to execute the instrument of transfer. Mrs Betton-Small testified at page 83 of the core bundle:

> "…This is my transfer re severance.
>
> My instructions re this came from him.
>
> Because of several things I explained to him there must be severance.
>
> Ms. Davis attend [sic] my office and signed – Mr. Brown attend [sic] my office and signed.
>
> She came in alone. I explained meaning and effect of it. I suggested that she was within right, she could take

document – seek advice. She said she understood and she wanted to sign.

The transfer to effect severance was complete.

After the transfer both were tenants in common.

[Q.] To best of recollection did she say she [was] executing it under duress [?]

[A.] No recall [sic] that."

At page 85 of the core bundle, Mrs Betton-Small said on two occasions that she told Ms Davis that she could get legal advice. She testified that "Ms Davis said, 'I want to sign.' She showed no reluctance". There was no rejection of this evidence by the learned trial judge.

[55] It is true, however, that Mrs Betton-Small testified that when Ms Davis came to sign the document she was in a rush. The attorney-at-law testified to this at page 90 of the core bundle:

"Ques. When claimant went to your office on Friday, July 16, 1999, do you not think it obligatory on your part that she obtain separate legal advice?

Ans. She came in, in rush. I explained it, gave her that option, she said she want [sic] to sign it.

She said she was in rush – I explained – she firm [sic] on executing document."

Despite that evidence, it cannot fairly be said that Ms Davis signed on a misapprehension of what she was doing, or that she was acting under the influence of

deception by Mr Brown. The learned trial judge's finding of fraud in these circumstances cannot be supported.

Undue Influence

[56] Although, on that assessment, fraud by way of deception has been eliminated, it is necessary to address the issue of undue influence, as a subset of the issue of fraud. Ms Davis averred, at paragraph 22 of her particulars of claim, that she "was induced to execute the said document whilst acting under the influence of the deceased and without independent advice". In the particulars for that pleading she addressed Mr Brown's disposition and the nature of her relationship with him:

> "At the time of the execution of the document aforesaid the deceased had just been released from [hospital] where he had been confined for a week for treatment for cancer. The Claimant who had for upward of the previous 20 years been living with the deceased visited him daily at the hospital aforesaid. As a consequence of the long and close association she had reposed the utmost trust faith and confidence in him. In addition the deceased was domineering by disposition. The said document was executed by the Claimant under the direction of the deceased and without any separate or independent advice."

[57] Ms Davis was not married to Mr Brown. She would, however, not have been, by that reason alone, precluded from being subject to undue influence by him. Theirs would not be a relationship in which undue influence could be presumed, but evidence of actual undue influence would be admissible for consideration. If proved, the question is whether it could invalidate her execution of the instrument of transfer.

[58] Mr Daley submitted that undue influence could not have that effect. He argued that undue influence cannot defeat an interest comprised in a registered title. On his submission, undue influence cannot support a charge of fraud and only fraud can undermine a registered title. He submitted that fraud could not be inferred. Learned counsel cited **White v White and Cato** (1862) 164 ER 1092 in support of his submissions.

[59] Contrary to Mr Daley's submissions it must be said that undue influence may be the basis for rendering invalid the execution of a document by a person under such influence. In **Barclays Bank plc v O'Brien and another** [1993] 4 All ER 417, Lord Browne-Wilkinson outlined the principle of rendering such actions invalid. He said, at page 423b:

> "A person who has been induced to enter into a transaction by the undue influence of another ('the wrongdoer') is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed."

Both **Barclays Bank v O'Brien** and the case of **Royal Bank of Scotland plc v Etridge (No 2)** [2001] UKHL 44 dealt with the setting aside of mortgage instruments that were said to have been signed by virtue of undue influence.

[60] The principle of setting aside transactions based on undue influence, as set out in those cases, is also applicable to the Torrens system of registration of titles. This

was recognised in a number of Australian cases including **Garcia v National Australia Bank Limited** [1998] HCA 48.

[61] In Jamaica, sections 70 and 71 of the Registration of Titles Act do restrict, except in the case of fraud, the setting aside of transactions with the registered proprietor of land. Section 70 supports the principle of the indefeasibility of registered titles while section 71 seeks to protect persons who deal with the registered proprietor. Third parties, who deal with a registered proprietor, are not obliged to look behind the registered proprietor's title. Section 71 could not, however, prevent the consequences of undue influence in this case, if it were found to exist. This is because Mr Brown would not have been, in circumstances of undue influence, an innocent third party, but instead, would have been the wrongdoer.

[62] Mr Daley's submissions on this point are, therefore, not on good ground. **White v White and Cato**, to which he referred, does not assist the analysis. In that case, apart from the fact that there was no ruling by the court on that point, the report of the case was dealing with the issue of pleadings and whether fraud could be inferred from a pleading that a will had been executed by virtue of undue influence. The headnote, which accurately explains the decision of counsel in that case to withdraw suggestions of fraud, made in cross-examination, states:

> "Where it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea on the record alleging that the execution of the will has been obtained by fraud...."

The case states nothing more than the principle set out in **Wallingford v Mutual Society**. It is also to be noted that in more recent times actual undue influence has been characterised as a species of fraud. In **CIBC Mortgages plc v Pitt** [1993] 4 All ER 433, Lord Browne-Wilkinson said at page 439:

> "...Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right...."

[63] The learned trial judge made reference to the issue of undue influence being brought to bear on Ms Davis. At paragraph [26] of her judgment she listed, among a number of circumstances that she found indicated actual dishonesty by Mr Brown, the fact that "[Ms Davis] was fearful of him at all times and thought that she could not go back home to Valley Drive without signing the documents".

[64] Although this court is unwilling to disagree with a finding of fact by the tribunal fixed with that responsibility, it must be said that there was a paucity of evidence proffered in this regard. Despite the pleading of his influence and domineering disposition, Ms Davis made no mention of those matters in her witness statement. In cross-examination there were three instances where she made reference to that influence. At pages 71-72 of the core bundle the following is recorded:

> "Ques. Correct that you dutifully went [to Mrs Betton-Small] because Mr. Brown told you to go and sign?
>
> Ans. **Yes I would do that.**

I thought I was going to sign power of attorney for we were going back to England for treatment – he was very ill at that time.

The power of attorney I thought was for Mrs. Small to look after property as she did in 1997.

….

Ques. You were not bullied or coerced?

Ans. **Maybe I signed out of fear of Mr. Brown. I could not have gone back home if I didn't sign it – 12 Valley Drive.**

He had cancer. He was not weak we went to airport.

Ques. Were you fearful of Mr. Brown in 1999 when he told you [to] attend at Betton's office?

Ans. **Yes. I was fearful at all times.**" (Emphasis supplied)

[65] Had the learned trial judge considered this evidence more closely she would have had to consider that Ms Davis was not a housewife or a person of limited exposure who was dependent on a life partner, to whom she trusted all the affairs of business. The evidence from Ms Davis was very different from that scenario.

[66] She testified that she was accustomed to operating her own business while she lived in England. She said that, unlike Mr Brown, who had been adjudged a bankrupt, her business was profitable until she decided to turn it over to Owen. She noted that it did not take Owen long to close it. As part of her claim to ability as opposed to Mr Brown's, Ms Davis testified that Mr Brown had to come to live with her and her sister, where he "made very little contribution to the household expenses as at the time he

had to maintain his house...where his wife and two children resided" (paragraph 5 of her witness statement).

[67] The learned trial judge could not, therefore, have properly considered Ms Davis under undue influence by virtue of dependency. Ms Davis, however, in testifying that she would not have been able to go home without having signed the document, and that she was fearful of Mr Brown, suggested that there was undue influence by virtue of Mr Brown's domineering disposition. That testimony, the learned trial judge would have had to have considered in the context of Mr Brown having then been recently released from hospital, critically ill with cancer, and anxious about his health and mortality. It is difficult to think of him being able to exhibit any such dominance in those circumstances. It is also difficult to envisage Ms Davis, his caregiver at that time, being intimidated by Mr Brown while he was in that condition.

[68] A fair assessment of the evidence as a whole would have led to the conclusion that undue influence was not a relevant element in the execution of the instrument of transfer. Based on all the above, it must be said that the learned trial judge erred in finding that Ms Davis executed the document as a result of fraud.

Non est factum

[69] For those reasons also, Ms Davis would not be able to rely on the principle of *non est factum* [it is not his deed]. That principle applies if a person signs one kind of

document when he thinks he is signing another. Ms Davis, on her own evidence, was accurately told the nature of the document that she was signing.

[70] Ground five should, therefore, succeed.

The issue of Mr Brown's equitable interest in the property – Ground three

[71] Although Mr Daley did not argue this ground expansively, he is correct in his observation that the learned trial judge did not address the matter of the source of the funds that were used to purchase the property. Instead, she started from the point that these were parties in "a common-law relationship for 20 years...[who] had lived in England...[and] returned home to Jamaica where they purchased property...[which] was registered in their names as joint tenants" (paragraph [4] of the judgment).

[72] There was contested evidence on the issue of the funding of the purchase price. Ms Davis testified that Mr Brown had identified the property and proposed that they should purchase it together. She said that he told her that the purchase price was $6,000,000.00. At paragraph 10 of her witness statement she said:

> "In order to purchase the premises we both took money from our savings and we borrowed the sum of £30,000 pounds [sic] from a friend which said loan was to be repaid from the proceeds of the sale of my house at No 24 B Minard Road. The sum of $6,000,000.00 being the purchase price was forwarded to our Attorneys-at-Law, Kathleen Betton-Small to complete the purchase. This sum was forwarded to our Attorneys-at-Law over a period of time until the entire purchase price was attained."

[73] The rationale for the taking of title as joint tenants was addressed at paragraph 11 of her witness statement. There she said in part:

> "...The property was purchased in our names as joint tenants. We agreed that the property should be purchased as joint tenants so that in the event that anything should go wrong and one of us should die before the other the survivor would inherit the entire property..."

[74] In cross examination she insisted that she had contributed funds to the purchase of the property at Circle Valley Drive.

[75] For Mr Brown's estate, the evidence was that it was he who financially maintained Ms Davis. There was, not unexpectedly, no solid evidence from either Owen or Ms Winsome Thompson, one of Mr Brown's executrices, as to this assertion. Neither did either one give any evidence as to the financing of the purchase of Circle Valley Drive. Although Mrs Betton-Small testified that it was on Mr Brown's instructions to two financial institutions that she received the monies for the purchase price. She testified that it was he who signed the agreement for sale but instructed her that the transfer should be taken in his name and Ms Davis'. Mrs Betton-Small said that she had nothing to do with Ms Davis in respect of the purchase. She said she only met her after its completion. There was therefore no evidence to contradict Ms Davis' testimony that she contributed to the purchase price of the property.

[76] Mr Daley's submissions that the evidence was more in favour of Mr Brown being the sole financier of the purchase is not supported by an assessment of the relevant

evidence. Although Mr Brown's asserted in his will that he had already given Ms Davis a half interest in the property, that assertion is without the benefit of supporting evidence.

[77] This ground must fail.

The issue of severance – Ground four

[78] The issue of severance has not featured a great deal in local case law and the post-1925 authorities out of the United Kingdom must be considered with caution. Caution is required because the Law of Property Act 1925 of that country made radical changes to the law regarding co-ownership of real property in general and, for these purposes, the severance of equitable joint tenancies, in particular. Those changes have not been adopted in the framework of this jurisdiction and, in addition, this country uses the Torrens system of land registration, which is not used in the United Kingdom.

[79] Traditionally, however, both in the United Kingdom and in this country, judicial consideration of the issue of severance of a joint tenancy, commences with a reference to the touchstone on the topic; the seminal judgment of Page Wood VC in **Williams v Hensman** (1861) 1 J & H 546 at 557-8; 70 ER 862 at 867. There, the learned Vice-Chancellor identified the three methods by which a joint tenancy may be severed. He said:

> "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** [the right of accrual]. 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…." (Emphasis supplied)

[80] It is important to note that joint tenants do not each have an absolute right to have the property remain as a joint tenancy until the death of one or other of them. Severance, therefore, by whichever of the abovementioned three methods it is achieved, does not cheat surviving joint tenants of their interest in the property. It "merely" deprives them of the chance that they had of acquiring the other joint tenant's interest in the property. **Williams v Hensman** is authority for the proposition that one of two or more joint tenants may unilaterally sever a joint tenancy. A person, even in on his death-bed, may, therefore, properly sever a joint tenancy without having committed a fraud on his co-owners.

[81] Severance, however it is achieved, must, nonetheless, be correctly done. In the instant case it is the first (unilateral alienation by one of the joint tenants) and second (mutual agreement) methods, identified by Page Wood VC, which are relevant for

consideration. The second, being the method that was ostensibly used in this case, will be considered first.

[82] Severance by mutual agreement under the general law (as the Australian jurists term the law not specific to land under the Torrens system) may also be effected under the Torrens system of land registration (see **Wright and Another v Gibbons** (1948 – 1949) 78 CLR 313). This second method of severing a joint tenancy was the subject of assessment by Morrison JA in **Lawrence and Others v Mahfood** [2010] JMCA Civ 38. In a judgment, with which the rest of the court agreed, Morrison JA pointed out, at paragraph [26], that the agreement to sever may either be expressed or implied; it may be oral or reduced to writing, and formalities are not essential for efficacy. It is also apparent from Morrison JA's assessment, that registration of the agreement on the Register Book of Titles is not a requirement for the agreement to have effect. What is important is that there must be an agreement to sever.

[83] The matter of agreement was summarised in **Marshall v Marshall** All England Official Transcripts (1997-2008) (delivered 2 October 1998). Mummery LJ, in **Marshall v Marshall** stated the relevant principles thus:

> "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** [[1975] 3 All ER 142], 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**." (Emphasis supplied)

Morrison JA quoted this passage, with approval in **Lawrence v Mahfood**, at paragraph [30] of his judgment.

[84] **Lawrence v Mahfood** is one of the cases which discuss the question of whether there was an agreement to sever. It would appear from those cases, and from the extract of **Marshall v Marshall,** that, once there is a common intention to sever, the agreement need not have settled the question of the shares in which the resultant tenancy in common will be held by the parties. That was the effect of the decision in **Abela v Public Trustee** [1983] 1 NSWLR 308, although the learned judge in that case did indicate that some method of determining the shares had been agreed by those co-owners. It does seem, however, that such an element is not essential.

[85] In **Public Trustee v Pfeiffle** [1991] 1 VR 19, Kaye J set out the facts and the decisions in **Abela**. He said in the latter part of his judgment:

> "In **Abela v Public Trustee** [1983] 1 NSWLR 308 Rath J., applying **Burgess v Rawnsley**, found that the intention of a husband and wife to sever the joint tenancy of their former matrimonial home was evidenced by their agreement, the terms of which were incorporated in a consent order made by the Family Court before the commencement of divorce proceedings. The agreement and the order provided for the sale of the home, the deposit of the net proceeds of sale in a building society account, and the release of the proceeds when authorised by the parties

> or upon order of the court. **The agreement did not provide for the share of each party to the proceeds of the sale**. On the same day as the decree nisi dissolving the marriage was pronounced, the property was sold. After the decree became absolute and after the sale was completed, the husband died. Before his death the parties did not authorise the release of the proceeds of the sale and a court order for doing so was not made. Rath J., at p. 315, found that the parties agreed upon the severance of their joint tenancy at the time of the terms of settlement. His Honour, at p. 316, said of the agreement to sever: '**It did however provide a mechanism for defining the shares, which it may be presumed the parties thought would be efficacious.** The mechanism failed expressly to provide for the death of a joint tenant before agreement had been reached on the shares to be taken, **but that failure cannot alter the fact the parties had agreed upon the severance of the joint tenancy**. In my view the agreement should not be construed as an agreement that the joint tenancy be severed in the future upon resolution of the question of the share of each party. **The proper inference is that the parties agreed upon an immediate severance of their joint tenancy, leaving to the future only decision as to their shares**. The mechanism for that decision having failed, the parties have their particular interests: see **Wright v Gibbons** [1949] HCA 3; (1949) 78 CLR 313, at 330, 331, in this case their equal shares.'" (Emphasis supplied)

[86] Kaye J went on to say that it was the agreement to sever which was the effective element. Once that had been settled, other matters could be dealt with thereafter:

> "In my opinion, it is the common intention of joint tenants to sever as evidenced by their mutual agreement which may bring about severance *instanter*. **Mechanism for sale of the subject property and division of the proceeds of**

> **sale do not fix the time of severance, but are merely consequential to severance**. Consequently, the possible failure of a mechanism in the form agreed by the parties will not defeat the severance which has already been effected by the common intention…." (Emphasis supplied)

[87] Based on those authorities, the issues of fraud, undue influence and *non est factum* having been eliminated, the instrument of transfer signed by Mr Brown and Ms Davis satisfied the requirement of a mutual agreement to sever, as was identified in **Williams v Hensman**. The relevant words in the document were:

> "...the transferors HEREBY TRANSFER to the Transferees as Tenants in Common in fee simple ALL THAT parcel of land..."

The subsequent registration of the transfer on the title for the property was confirmation of that severance. On that reasoning, the learned trial judge was in error to have found that severance had not occurred.

[88] Mr Daley submitted that even if this court were to find that Ms Davis did not agree to the severance, the joint tenancy had still been unilaterally severed by Mr Brown, by his having executed the document. Learned counsel submitted that Mr Brown's actions fell within the first method of severance identified in **Williams v Hensman**.

[89] Mr Daley argued that a unilateral act of severance was permitted by sections 53 of the Conveyancing Act and section 90 of the Registration of Titles Act. He submitted that upon an act of alienation, by a joint tenant, being rendered irreversible, the unities

of interest, time and title would have been broken, resulting in severance of the joint tenancy. Learned counsel cited **Gamble v Hankle** (1990) 27 JLR 115 in support of his submissions.

[90] Mr Frankson, in response to these submissions, pointed out that no issue of unilateral severance was advanced or argued before the learned trial judge. It was therefore unnecessary to consider that aspect in this court. He did accept that there could be universal severance of a joint tenancy, but submitted that it could not be achieved "by a trick". In this vein, learned counsel accepted that the execution of an instrument of transfer by Mr Brown, without more, would have been sufficient to sever the joint tenancy. The document that was used, he submitted, became fraudulent when Ms Davis signed it. Having been so tainted, Mr Frankson submitted, the instrument of transfer was incapable of any effect.

[91] Mr Daley is correct on the point that, 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. Authority for that position may be found in **In re Wilks, Child v Bulmer** [1891] 3 Ch D 59.

[92] On the basis of that reasoning it may be said that Mr Brown's execution of an instrument of transfer which purported to sever the joint tenancy with Ms Davis, did have that effect when he brought it to her attention and, more importantly, had it registered before he died. It is not necessary to decide this point definitively, however, as it has been found that the severance was effected by mutual agreement.

The contents of Mr Brown's will – Ground six

[93] The learned trial judge made reference to Mr Brown's will in finding that he had acted dishonestly toward Ms Davis. She used references to the will, among other findings, to infer that Mr Brown acted dishonestly toward Ms Davis in respect of her interest in the property.

[94] Firstly, the learned trial judge found that Mr Brown's statement in his will that he had "already given to Beverley Sylvia Davis the remaining one-half share of the property at 12 Valley Drive", was an empty bequest and "was an attempt to hide the truth of his actions which appeared to be wanting in honesty as it concerns the property at Valley Drive" (paragraph [27] of the judgment).

[95] It would seem, however, that the learned trial judge misinterpreted the import of Mr Brown's statement in the will. It is apparent that he meant by that statement, whether or not it was true, that in having placed Ms Davis' name on the title with his, he had made a gift to her of a one-half interest in the property.

[96] The learned trial judge also made a curious assessment of the intent of the will. At paragraphs [32] – [35] of her judgment she found that the will demonstrated Mr Brown's dishonest intent. She said, in part:

> "[32] Mr Brown's will of July 16, 1999, states that he gives to his son Owen Brown "my one-half share and interest (**the joint tenancy having been severed**) in the property at 12 Valley Drive ..." (emphasis mine). However, the document purporting to sever the

tenancy was signed that same day and had not been registered. Such a bequest would have been premature.

[33] However, it is in fact the first bequest listed in the will. It is at the very least curious that the late Mr. Brown sought to give his son, some of the property at a time when he should have understood that it was not his to give moreso when the evidence shows he had available to him, the services of an attorney-at-law. However, time was not on his side with his imminent death being probable and having to leave Jamaica to go for medical attention in England within two non-working days of signing his will.

[34] It appears to me that some of what Mr. Brown sought to do was born of his desire to leave a legacy for his son....

[35] I am fortified in my view that the late Mr. Brown was determined to leave a legacy for his son, by the evidence that he tried to create other property for him to inherit when such property did not exist...." (Emphasis as in original)

[97] The learned trial judge, in this context, seemed to have ignored the fact that a will only speaks from the date of death. She was therefore in error in saying that the gift of the interest in the property "was premature". The extract also seems to indicate that the learned trial judge was of the view that Mr Brown was not entitled to alienate his interest in the property. She was also in error in stating, as she did at paragraph [33], that an interest in the property "was not his to give". If, by her statement, the learned trial judge meant "not his to give by a will", she would have been correct,

except that Mr Brown, by use of the term in his will "the joint tenancy having been severed" expressly contemplated that he was entitled to make such a bequest.

[98] To the extent that these considerations led the learned trial judge to arrive at her conclusion that Mr Brown had acted dishonestly, she was in error. Ground six should succeed.

Conclusion

[99] The analysis of the circumstances surrounding Ms Davis' execution of the instrument of transfer reveals that her assertions that they were attended by fraud are unfounded. Her evidence reveals that the attorney-at-law informed her of the nature of the document. The attorney-at-law also testified that she advised Ms Davis of her right to have independent legal advice, but that Ms Davis decided to sign nonetheless.

[100] Ms Davis cannot be heard to say, therefore, that she was unaware of what she was signing. Nor could she properly say that she was tricked by Mr Brown into believing that she was signing something other than an instrument of transfer. In light of his medical condition at the time and her experience as a businesswoman, Ms Davis could also not properly say that she acted under undue influence from Mr Brown.

[101] The document, having been properly signed and registered, operated to sever the joint tenancy that previously existed. A tenancy in common existed at the time of Mr Brown's death and his will could properly speak to the disposal of his interest in the property.

[102] Before concluding this judgment, it is necessary to note that in their notice of appeal, the appellants asked for an order that the property be sold and that the net proceeds of sale be divided equally between Mr Brown's estate and Ms Davis. It is not within the remit of this court to grant such an order. The appellants made no such claim in the court below. Their defence was limited to denying Ms Davis' claim. They filed no counterclaim asking for any relief whatsoever. Not having made the issue of sale a live one in the court below, they are not entitled to raise it in this court.

[103] The judgment of the learned trial judge to the contrary should therefore be set aside. The appellants should have judgment in their favour with costs both in this court and below.

MCDONALD-BISHOP JA (Ag)

[104] I have had the privilege of reading in draft the judgments of the learned President and my learned brother, Brooks JA. They have both in their respective reasoning, treated with the material aspects of this appeal, with much clarity and precision that has left me with hardly anything that I could usefully add.

[105] I am content to say, therefore, that upon my own analysis of the evidence against the background of the applicable law, as accurately expounded by my learned brothers, I do agree with their conclusion that the joint tenancy was properly severed

as manifested in the mutual execution of the instrument of transfer and the endorsement of the transfer on the certificate of title.

[106] I am prompted to add a few words, just for the purpose of emphasis, concerning the quality of the evidence that is required by law in proof of the allegation of fraud in civil proceedings, and, in particular, where the allegation relates to a person's interest in registered land. My decision to focus briefly on this issue arises from my observation that the evidence in this case, on which fraud was found by the learned trial judge to have been proved, did fall far short of the standard that was required to be met by Ms Davis (as the claimant) in order to discharge the legal burden of proof that was placed on her in proving her claim, as a matter of law.

[107] Although an allegation of fraud in civil proceedings must be proved to the requisite civil standard, that being, on the balance of probabilities, the authorities have established that the evidence in support of it must be commensurate with the seriousness of the allegation, which, intrinsically, involves the imputation of the commission of a criminal offence. The courts, in practice, have recognised that the more serious the allegation with which a civil court is faced, the more difficult it will be for the party who bears the burden of proving the truth of that allegation to persuade the court of the probability of its truth. In other words, the authorities have established that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. Therefore, *the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it*. See

Miller v Minister of Pensions [1947] 2 All ER 372 at 373–374; **Hornal v Neuberger Products Ltd** [1956] 3 All ER 970; **Re Dellow's Will Trusts**; **Lloyds Bank Ltd v Institute of Cancer Research and others** [1964] 1 All ER 771 at 773; and **Re H and R (Minors) (Sexual Abuse: Standard of Proof)** [1996] AC 563.

[108] In **John Chin v Watson's (Off-Course Betting) Ltd** (1974) 12 JLR 1431 Rowe J (as he then was) helpfully cited from Kerr on Fraud and Mistake (7th edn) page 672, the following excerpt, which proves quite instructive on the point. It reads:

> "The law in no case presumes fraud. The presumption is always in favour of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief not merely suspicion."

[109] The fraud that is required to be clearly and conclusively proved by cogent and credible evidence in order to vitiate the registered transfer in question in this case has long been settled on strong and binding authority that has been followed by this court. In **Harley Corporation Guarantee Investment Company Ltd v Daley and Others** [2010] JMCA Civ 46, Harris JA took note of several of the authorities on the subject in considering the question whether there was sufficient evidence of fraud, in that case, to impeach the transfer of registered land to a third party. At paragraph [52] of the judgment, she noted:

> "[52] The true test of fraud within the context of the [Registration of Titles] Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in

Waimiha Sawmilling Company Limited v Waione Timber Company Limited [1926] AC 101 by Salmon LJ, when at page 106, he said:

> 'Now fraud clearly implies some act of dishonesty. Lord Lindley in **Assets Co. v. Mere Roihi** (2) states that: 'Fraud in these actions' (i.e., actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud— an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud'."

[110] Lord Lindley, in **Assets Company Limited v Mere Roihi** (1905) AC 176, had also stated at page 210 that the fraud which must be proved "in order to invalidate the title of the registered proprietor for value must be brought home to the person whose registered title is impeached or to his agents."

[111] In **Stuart v Kingston** (1923) CLR 309 (another case noted by Harris JA) Starke J, at page 359, stated:

> "No definition of fraud can be attempted, so various are its forms and methods…But we must say this: fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of the person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party to fraud" (sec. 187), in the plain ordinary and popular meaning of those words is not protected by reason of registration under the Act."

Knox CJ, in the same case, described the kind of conduct that would amount to fraud as "personal dishonesty" or "moral turpitude".

[112] When the evidence that was before the learned judge in this case is closely examined within the context of the foregoing principles of law, it leads one to conclude that there was no clear, cogent, indisputable and conclusive evidence of actual dishonesty and/or moral turpitude on the part of Mr Leonard Brown or anyone acting on his behalf, that could and did establish fraud on a balance of probabilities. Similarly, there was no credible evidence in support of the allegation of undue influence, mistake or anything else, that Ms Davis sought to rely on to impeach the transfer.

[113] This leads one to conclude that what the learned judge, evidently, perceived to have been unfairness to Ms Davis in all the circumstances, as she accepted them to be, could not, and did not involve any dishonesty that equates to fraud in the circumstances surrounding the execution of the transfer by Ms Davis. It is reasonable to conclude on all the evidence that she did exactly what she wanted to do and that was to sign the instrument of transfer as was mutually desired by both Mr Leonard Brown and her. The joint tenancy was properly severed as it was the right of either or both of them to do during their life time.

[114] There was thus nothing in the circumstances that could have served to vitiate the transaction that led to the registered transfer of the property to the parties as tenants-in-common. The entry of the transfer in the Register Book of Titles, evidencing the severance of the joint tenancy, therefore, remains valid and effectual for all intents and purposes. Accordingly, the operation of the rule of survivorship in favour of Ms

Davis no longer subsisted at the time of the death of Mr Leonard Brown and so he was at liberty to dispose of his share in the subject property as he saw fit. The learned trial judge's finding to the contrary is, regrettably, rendered unsustainable as a matter of law.

[115] In the result, I concur with my learned brothers that this appeal should be allowed, that the judgment of the learned judge be set aside and that judgment be entered for the appellants with the necessary orders made as to costs in their favour.

PANTON P

ORDER

1. The appeal is allowed.
2. The judgment of Lawrence-Beswick J made herein on 23 March 2012 is hereby set aside and a judgment in favour of the appellants entered in its stead.
3. Costs to the appellants both here and in the court below, such costs to be taxed if not agreed.