IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00164

BETWEEN	**NEALE BROWN**	**1ST CLAIMANT**
AND	**SHARON BROWN**	**2ND CLAIMANT**
AND	**MICHAEL BROWN**	**DEFENDANT**

Mr Jerome Spencer instructed by Patterson, Mair, Hamilton, Attorneys-at-law for the Claimants

Ms Carlene Afflick instructed by Ms Frances Barnes of the Kingston Legal Aid Clinic, Attorney-at-law for the Defendant

Heard: 11th, 12th, 13th, 14th, 15th March and 12th April 2019

Landlord and Tenant - Whether surviving tenants in common can claim for rent against a tenant after the death of a co-tenant in common who had put him in occupation pursuant to an oral rental agreement

Real Property - Registration of Titles Act - Whether a power of attorney with a certificate of attestation pursuant to the seventeenth schedule of the Registration of Titles Act which bears a false declaration is valid for purposes of enabling the donee of the power of attorney to transfer the interest of the donor.

LAING, J

The Claim

[1] The Claimants, by Claim Form and Particulars of Claim filed on 15th March 2018, seek an order for recovery of possession of part of, all that parcel of land known as 48 East Queen Street, Kingston being the land comprised in Certificates of Title registered at Volume 1402 Folio 416 ("the Property"). The Claimants also claim the sum of $546,300.00, this being the sum that they assert is outstanding for rent and utilities for the period November 2013 to March 2018.

[2] The Claimants and the Defendant are children of Keith Brown, deceased, who died on 13th October 2016. The parties also have one other siblings namely Kamori Brown. In this judgment, in some instances I will refer to the parties by their christian names only rather than their full names purely as a matter of convenience and in an effort to make it easier for the reader of this judgment to identify the parties. Although this suggests an air of informality, this is an unintended but unavoidable consequence and absolutely no disrespect is intended to the parties.

[3] The Claim Form and Particulars of Claim refer to the Property being registered at Volume 1402 folio numbers 415 and 416 of the Register Book of Titles. This appears to be an error which can lead to confusion and for the purposes of this Judgment, I will refer to the premises located at number 57 Hanover Street, registered at Volume 1402 Folio 415 of the Register Book of Titles as the "Hanover Street Property", which is consistent with the evidence. The Hanover Street Property and the Property are referred to together herein as "the Properties".

[4] The Certificates of Titles in respect of the Properties, reveal that the Properties were purchased in 2006. Keith, Sharon and Neale were registered as proprietors in common in equal shares in fee simple in respect of the Properties. Pursuant to two transfers by way of gift registered on the 13th day of September 2016, Keith transferred his interest to Neale and Sharon. This was effected by Keith Neale and Sharon transferring their interests to Neale and Sharon only. The effect of this is that Neale and Sharon are noted on the Certificate of Title of the Hanover Street

Property and the Certificate of Title for the Property as tenants in common in unequal shares, as to two undivided one third share to Neale (two thirds) and the remaining one undivided one third share to Sharon, in each case.

[5] The transfers were signed on behalf of Keith by Neale under a general power of attorney ("the POA"). The POA was purportedly executed by Keith and witnessed by Dr M. O'Reggio on 21st January 2016. In explaining how Sharon and himself came to be registered as the only proprietors, Neale's evidence was that he was the person who took Keith to Dr Michael O'Reggio on the 21st January 2016 when the POA was executed. However, he stated that he was not inside Dr O'Reggio's office when the POA was being executed and witnessed. He also stated that it was Keith who retained the services of an Attorney-at-Law to draft the POA, but admitted that he took Keith to the Attorney-at-Law and also took the POA to the Attorney-at-Law on Keith's instructions for it to be registered after it was executed and witnessed by Dr O'Reggio. Neale further stated that he had no involvement in the certification of the POA by the Justice of the Peace.

The Defence

[6] In his Defence, Michael asserted that that Neale and Sharon are without *locus standi* to being the claim, having procured registered titles dishonestly and by fraud. He also asserted that there was no rental agreement between the parties and accordingly Neale and Sharon are not entitled to any sums, rent or otherwise and there is no obligation on his part to pay the $546,300.00 as claimed.

[7] The assertion that the certificates of Title in respect of the Hanover Street Property and the Property were procured dishonestly and by fraud is hinged on two planks. Firstly, an Expert Report of Mr Dixon and secondly, the evidence of Michael as to the desires of Keith to benefit his children and grandchildren, which Michael asserts is inconsistent with Keith giving Neale the POA in such wide and sweeping terms that would have allowed him to execute the transfer of Keith's interest in the Properties as he did.

Was there an irregularity in the certificate contained in the POA

[8] Section 149 of the Registration of Titles Act ("RTA"), provides that any proprietor of land under the operation of the Act may, by signing a power of attorney in the appropriate form, appoint any person to act for him in transferring or otherwise dealing with such land. Such power of attorney or a copy thereof shall be deposited with the Registrar.

[9] Section 152 of the RTA provides the appropriate method for the attestation of a power of attorney as follows:

> *"Instruments and powers of attorney under this Act signed by any person and attested by one witness shall be held to be duly executed; and such, witness may be— within this Island—the Governor-General, any of the Judges of the Supreme Court, or any Justice of the Peace, or the Registrar under this Act, or a Notary Public, or a Solicitor of the Supreme Court;*
>
> *…Such witness, whether within or without this Island, may also be any other person, but in such case he shall appear before one of the officers or persons aforesaid, who, after making due enquiries of such witness, shall endorse upon the instrument or power a certificate in the Form in the Seventeenth Schedule and such certificate shall be deemed sufficient proof of the due execution of such instrument or power..."*

[10] The Seventeenth Schedule of the RTA is in the following terms:

> *SEVENTEENTH SCHEDULE (Section 152)*
>
> *Appeared before me, at ……...the ……day of , 19 , C.D., the attesting witness to this instrument, and declared that he personally knew A.B., the person signing the same, and whose signature the said C.D. attested, and that the name purporting to be the signature of the said A.B., is his own handwriting, and that he was of sound mind and freely and voluntarily signed such instrument.*

[11] The POA bears the following declaration at the end which is in slightly different terms than that which is provided for in the seventeenth schedule:

> *BE IT REMEMBERED that on the 21 day of January Two Thousand and Sixteen came and appeared before me the undersigned one of Her Majesty's Justices of the Peace in the island of Jamaica Dr M. O'Reggio of*

95 Maxfield Avenue in the parish of St. Andrew the subscribing witness to the due execution of the within Power of Attorney who being by me duly sworn made oath and said that he/she was present and did see the said Keith Osmond Brown sign, seal and as and for her proper act and deed deliver the said Power of Attorney for the purposes therein mentioned.

[Signature of the Justice of the Peace (redacted)]

_____

Justice of the Peace for

The parish of St Thomas

However, the execution of this clause is not in conformity with section 152 of the RTA, because the evidence of Dr O'Reggio, which I accept as true, is that he did not attend before that Justice of the Peace as the Justice of the Peace purported to assert in his certification clause. In such circumstances, I find that the purported declaration by the Justice of the Peace for the Parish of St Thomas, is a false declaration. Accordingly, the POA does not conform with the statutory requirement provided for by section 152 of the RTA to address cases where the donor of the power of Attorney executes it before a person other than those persons specifically mentioned therein.

[12] Mr Spencer, Counsel for the Claimants, submitted that the validity of the POA is not affected by the fact that Dr O'Reggio did not appear before the Justice of the Peace as the certificate indicates. Counsel submitted that, firstly, at common law a deed which included a power of attorney does not have to be witnessed or attested to be valid. Counsel submitted that, secondly, if a deed such as a power of attorney failed to comply with statutory requirements as to attestation, the deed is not automatically invalidated but is only invalid if the relevant statute expressly prescribes such a consequence or if it can be ascertained by implication that the statute intends such a consequence.

[13] Counsel relied on the Privy Council case of **National and Grindlays Bank Ltd. v Dharamshi Vallabhji and Others** [1966] 2 All ER 626. That case concerned the validity of a letter of hypothecation which was signed but not attested and was

given by the respondents to the appellant bank pursuant to which the bank caused the respondent's property to be seized. At the center of the case was the interpretation to be placed on section 15 of the Chattels Transfer Ordinance 1930 of Nairobi, (the jurisdiction from which the appeal emanated) which provided that "*Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation"*. The Court (Lord Pearce and Lord Pearson with Lord Morris of Borth-Y- Gest dissenting) held, as summarised in the headnote, that in the absence of any express provision in that section as to the consequence of non attestation:

> *"…the natural implication from the provisions of s.15 and its context and the scheme of the Ordinance was that an unattested instrument was valid between the parties but incapable of registration and so was ineffectual against other persons; accordingly the letter of hypothecation was valid as between the appellant bank and the respondents and the acts of the appellant bank were justified:"*

The Court's interpretation of section 152 the RTA

[14] A power of attorney is a formal instrument by which a person, referred to as the donor, confers authority on another, termed the donee, to act on behalf of the donor.

[15] Bowstead & Reynolds on agency (17th ed 2001) page 97 para 3-011) provides that:

> *'The term "power of attorney" is usually applied to a formal grant of power to act made by deed or contained in a deed relating also to other matters. There was in fact no rule that agency must be created by deed, except where the agent himself is to be empowered to execute a deed, and it seems that such a power could at common law be granted by simple writing…'*

[16] In England, the execution of powers of attorney is addressed in the Powers of Attorney Act, section 1(1) of which provides that an instrument creating a power of attorney shall be executed as a deed by the donor of the power. The Law of Property (Miscellaneous Provisions) Act 1989 section 1.1(b) abolished any rule of

law which requires a seal for the valid execution of an instrument as a deed by an individual.

[17] We do not have a Powers of Attorney Act in Jamaica which is in similar terms to the English Act. However, the procedure laid down by section 152 of the RTA is very detailed. For purposes of execution within Jamaica, (with which we are concerned in this claim), the RTA establishes a two tiered witnessing regime where the witness is within Jamaica. In the first tier, instruments and powers of attorney under the RTA shall be signed by any person and attested by any of the following persons:

(a) the Governor-General;

(b) Judge of the Supreme Court;

(c) a Justice of the Peace;

(d) the Registrar under RTA;

(e) a Notary Public; or

(f) a Solicitor of the Supreme Court.

Where this occurs, the Instrument or power of attorney **shall be held to be duly executed** (my emphasis).

[18] In the second tier, instruments and powers of attorney under the RTA shall be signed by any person and may be witnessed by any other person other than the persons I have conveniently placed in categories (a) to (e) above. However, in such a case, the following conditions have to be satisfied:

(a) The witness **shall** appear before one of the officers or persons in the categories (a) to (e);

(b) The person in category (a) to (e) before whom he appears must make due enquiries of such witness; and

(c) The person in category (a) to (e) shall endorse upon the instrument or power a certificate in the form in the Seventeenth Schedule.

Where there is such compliance with these conditions such certificate shall be "***deemed sufficient proof of the due execution*"** of such instrument or power (my emphasis). It should be noted that the wording of the seventeenth schedule certificate implies that these additional steps must be taken in front of the category (a) to (e) person before the certificate is signed. The witness must be duly sworn and make oath and declare that:

(i) he personally knew the person signing the instrument or power of attorney;

(ii) he attested the signature on the instrument or power of attorney ;

(iii) that the name purporting to be the signature he attested is in fact in the person's own handwriting; and

(iv) that the person was of sound mind and freely and voluntarily signed such instrument.

What is the effect of the false declaration in the Seventeenth Schedule Certificate?

[19] The circumstances of this case are different from those of **National and Grindlays Bank** (supra). I am not trying to ascertain whether an instrument such as a signed letter of hypothecation is valid between the parties as was the issue in that case. In this case, the improperly completed POA has been used to effect registration of the POA, which the Court on the facts in **National and Grindlays Bank** (supra) found was not possible. Furthermore, the POA, (subsequent to its registration), was used to effect transfers of interest which were recorded in the Register Book of Titles and provided notice to the world.

[20] Because the judgment of Lord Morris of Borth-Y- Gest in **National and Grindlays Bank** was a dissenting one, I have due regard to the facts of that case and the view of the other judges that the improperly attested letter of hypothecation nevertheless created rights as between the parties. However, although considered by the majority not to have been correct on the facts of that case, I find that Lord Morris' analysis is quite apt and impeccable when applied to the facts of the case herein. At page 637 the learned law Lord considered the issues in that case as follows:

> *In my view the words in s 15 are mandatory and obligatory. The section enacts that every execution of an instrument "shall be attested" in a particular way. It so enacts in the context of "validity". I do not think that it would be reasonable to read into the section some words to the effect that in certain circumstances an instrument that has not been attested as directed (and which therefore lacks validity) may nevertheless (e.g., as between the parties) be regarded as only partially invalid. There are no such words. Nor are there any words to the effect that the section is only to apply to instruments which it is proposed to register. In* ***Liverpool Borough Bank v. Turner*** *((1860), 1 John 7 H 159 at P 169), Sir William Page Wood VC, said:*
>
> > *"… if the legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law* ***and*** *in equity are mere surplusage."*
>
> *On appeal Lord Campbell LC, in approving the judgment of the Vice Chancellor said ((1860), 2 De GF & J 502 at pp 507,508):*
>
> > *"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statue to be construed."*

[21] I wholly adopt and adapt Lord Morris' approach to the fact of this case before me. As it relates to section 152 of the RTA, I find that the requirement that the witness "*shall appear before one of the officers or persons*" named in that section, is mandatory. I also find that that its provisions as to attestation and the procedure dictated for the generation of the seventeenth schedule certification is a "*positive and obligatory one*", failing obedience to it, the POA is not a valid power of attorney.

[22] I have arrived at this conclusion following an analysis of the RTA and its clear intent. It is my opinion that the detailed procedural requirements of what I have characterised as the second tier execution, implies that there is considerable weight attached to compliance with its various components. I am also influenced by the fact that compliance with the various components only results in the consequential certificate being "*deemed sufficient proof of due execution*". The certificate is not conclusive, which is a marked distinction when compared with execution and attestation before one of the persons listed in categories (a) to (e) aforesaid, in which case the instrument or power of attorney "*shall be held to be duly executed"*.

[23] If a power of attorney is not attested to by one of the persons listed in the aforementioned categories (a) to (e) and does not bear a Seventeenth Schedule Certificate, there would be no valid certificate which can be "*deemed sufficient proof of due execution*". Accordingly, there would be no basis for the registration of that power of attorney and its use to effect a transfer of an interest in land. It would be invalid for all such purposes. It appears to me, that it would be nonsensical if such a person could simply cure that defect by having one of the persons in the aforementioned categories (a) to (e), prepare a Seventeenth Schedule Certificate with a false declaration. Then, as a consequence of so doing, obtain a certificate which would be valid for purposes of enabling the transfer of an interest in land, with there being no adverse consequence arising from its misuse. If the declaration in the certificate is demonstrated to be false then the certificate cannot be "*deemed sufficient proof of due execution*". The use of a certificate with a false declaration defeats the purpose of the requirement for a certificate and I think ought to be equated with the situation where there is no certificate at all.

[24] The extensive procedure for the obtaining of the certificate is considered, deliberate and logical. It is my considered opinion that the clear implication of the RTA is that a power of attorney with a false declaration is invalid for purposes of enabling a transfer of an interest in land. It matters not that the RTA does not expressly state this, such an implication is the only reasonable and logical

conclusion to be reached. If my conclusion is incorrect, the result would be that the statutory procedure can be disregarded with impunity with no material consequence. That could not have been the intention of the framers of the RTA.

[25] Mr Spencer has sought to rely on the case of **Wickham v Marquis of Bath** 55 ER 816 in support of his supplemental submissions and to submit that this case suggests that the POA is valid notwithstanding the fact that Dr O'reggio did not appear before the justice of the Peace.The relevant portion of the case at page 203 is reproduced below:

> *"The first answer to this objection is that the plaintiff having admitted the execution of the transfer in his pleadings and himself put it in evidence, cannot now be allowed to deny the fact of execution. The second answer is that the provisions of sec. 107 are not mandatory, but facultative. That section provides that instruments executed pursuant to the provisions of the Act shall be held to be duly attested, if attested by one witness. The transfer in question purports to be so attested. The section goes on to provide that the execution of such instruments "may be proved before" certain specified persons. I have some difficulty in interpreting this provision, but I understand that in practice it is taken to mean that an instrument attested by any of those persons is admitted to registration. Sec. 108 provides that the execution of an instrument "may be proved" by the attendance and voluntary acknowledgment of the person executing it before any one of certain specified persons to whom he is personally known, or by the attendance of the attesting witness before any one of the persons specified in sec. 107, and answering certain prescribed questions, the answers being certified upon the instrument. This may be done at any time before registration. The operation (if any) of the instrument after execution and before registration is not affected by these provisions. Moreover, it appeared from the evidence of the Deputy Registrar-General that for the last thirty years at least it has been the practice of the office to accept the attestation by a solicitor of the execution of an instrument under the Act as sufficient, and that the transfer in question would have been admitted to registration without further proof of execution. This objection therefore fails.*

[26] It must be appreciated that this case concerned sections 107 and 108 of the New South Wales Real Property Act, 1900 and it seems clear from the passage quoted above that the provisions are not identical with the RTA. Accordingly, different considerations apply. By way of example the use of the words "*may be proved*" in the New South Wales Act, which from the quote above provided some difficulty to the judge (understandably), versus the very clear and certain "*shall appear*" in the

RTA. It is the failure of the witness to appear before an appropriate person which is the issue in the case before me. The Court in **Wickham** also referred to the practice of accepting the attestation of a solicitor and there is no evidence of a practice in this jurisdiction of accepting the witnessing of the execution of a power of attorney by a medical doctor without the appropriate certification. I therefore do not find any reason in the case of **Wickham** which would lead me to a conclusion other than the one I have reached and expressed herein.

[27] For the sake of clarity I should probably indicate that I am not going so far as to suggest that the POA is necessarily forever void in its entirety and that the defective seventeenth schedule cannot be cured by re-certification in accordance with the Seventeenth Schedule of the RTA. I am inclined to this view because these facts cannot be equated with the situation where a deed, when delivered, was voidable, for example, because of duress. In the case of duress, the redelivery of the deed after the influence has ceased would arguable be inoperative and re-execution by the donor would be necessary. Nevertheless, these comments are *obiter dicta* only and not necessary for resolving the issues raised on the claim and/or arriving at a decision.

Are the Certificates of Title void as a result of the procedural irregularity in the execution of the POA or for fraud?

[28] Section 70 of the RTA provides as follows:

> *"**70.** Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that my by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a*

purchaser for valuable consideration or deriving from or through such a purchaser:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."

[29] As stated by Harris JA in **Harley Corporation Guarantee Investments Co. Ltd v The Estate Rudolph Daley [2010] JMCA Civ 46** at paragraph 57;

"[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 particularised. 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"

[30] Harris JA at paragraph 51 provides the following analysis:

"51. As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In Fels v Knowles (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620:

> *The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in*

> *which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."*

[31] An important consideration in this case is whether there is any evidence of fraud as raised by Michael which can be attributable to Neale and/or Sharon. As Lord Lindley observed in the Privy Council case of **Assets Company Ltd v Mere Roihi & Others** [1905] AC 176 at page 210 of the Judgment:

> *"Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquires for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

[32] Mr Spencer submitted and I agree with his submission that Michael has not sufficiently particularised his allegation of fraud by Neale and Sharon in this Defence. Michael asserted that they procured registered titles dishonestly and by fraud but did not expressly assert that Keith Brown did not sign the POA. Although there is this obvious weakness in the pleadings, I have considered that by relying on the expert report Michael is attempting to assert that Keith did not sign the POA. I have therefore considered the evidential value of the expert report.

The evidential value of the expert report

[33] Mr Spencer submitted that the Defendant has admitted in cross examination that he did not see Keith sign the rent receipts and there was no evidence from anyone purporting to have seen him sign them. The significance of this is that the conclusion of the expert that the receipts and the POA were not signed by the

same person is unhelpful in assisting the Court to conclude that Keith did not sign the POA. I entirely agree with these submissions.

[34] In any event, I was impressed with the manner in which Dr O'Reggio gave his evidence. He appeared to be a honest and truthful witness with no interest to serve. I found his evidence that he did witness Keith sign the POA and that he attested his signature to be compelling evidence and I accept his evidence that Keith did sign the POA.

[35] Neale's uncontradicted evidence is that he was not aware of the Justice of the Peace's involvement in the certification of the POA. There was an absence of any evidence which could have formed the basis for a proper conclusion that Neale and Sharon or either of them had any knowledge of, or were participants in a fraud, or that any fraud could be attributable to them.

[36] In **Frazer v Walker and others** [1967] 1 All ER 650, the Privy Council held that registration under the Land Transfer Act of New Zealand was effective to vest title in a registered proprietor notwithstanding that he had acquired his interest under an instrument that was void. The applicability of the concept of indefeasibility of a registered title under the Registration of Titles Act has also been confirmed in cases such as **Fabian Lee Bradshaw, Yeazmin Katherine Stewart-Bradshaw v Jonathan Ellis and others** [2016] JMSC Civ 102. In the absence of any finding of fraud on the part of Neale or Sharon, there would be no legal basis for the Court to interfere with the transfers of Keith's interest in the Properties, notwithstanding the Court's findings in relation to the validity of the POA.

Proceedings in the Parish Court

[37] Michael has pleaded that by these proceedings in the Supreme Court the claimants "…*maliciously abuse the course of justice by wrongfully seeking an order from this court after their dissatisfaction and disrespect for the decision of the Parish Judge*". The Defendant exhibited the Plaint no. 229/17 by which the Claimants had brought an action in the Parish Court against him for recovery of

possession. The plaint had endorsed on it "*Plaintiffs non-suited, the Defendant is not a squatter*". Neale asserted in his evidence that the plaint was dismissed because the annual value of the Property exceeded the monetary jurisdictional limit of the Parish Court. However, it is not clear from the record exhibited on the plaint that this was a material factor in the dismissal of the plaint.

[38] It is therefore not clear to this Court from the evidence as to exactly what transpired at the Parish Court. The finding that the Defendant is not a squatter by itself does not indicate the "*… points upon which the court was actually required by the parties to form an opinion and pronounce a judgment*" per Sir James Wigram, V-C in ***Henderson v Henderson*** **[1843] 67 All ER Rep 378 at 381**)**.** Did the Court accept that the Claimants together were the 100 percent legal owner as per the certificate of title and if so were they only permitted to obtain an order of possession against the Defendant if he was found to be a squatter?

[39] I am inclined to be guided by the observations of Lord Bingham of Cornhill in ***Johnson v Gore Wood & Co (A Firm)*** **[2002] 2 AC 1** at page 31 C-D in adopting a broad merits-based approach to *res judicata*. In that case he observed as follows:

> *"...It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.."*

[40] There is an overriding need to prevent the multiplicity of actions and the Court of Appeal in **Jamaica Citizens Bank Ltd v Dyoll Insurance Co. Ltd.** (1991) 28 JLR 415 suggested that Courts should guard against this occurrence.

[41] However, in all the circumstances of this case I do not find that the claimant are misusing the process of the Court in having pursued the claim in the Supreme Court. Although the Defendant raised the issue of abuse of process in his defence,

it was not pursued at the case management conference stage or earlier on an interlocutory notice of application when it would have had the most impact in saving judicial time. At this point at the end of the trial, the Court's resources have already been deployed in the hearing of the claim and all the points raised therein. In my view, it would be counterproductive at this late stage to find that the claim amounts to an abuse of process especially when there is uncertainty as to what exactly transpired at the Parish Court.

Was Michael a Tenant?

[42] Since the POA was void for purposes of effecting a transfer of Keith's interest in the Properties, then assuming Keith's interest in the Properties would devolve on an intestacy, Michael may be entitled to a one-fifth portion of Keith's interest pursuant to the operation of the Intestates Estates and Property Charges Act. However, as at the date of this judgment, this would at the highest only be a beneficial interest (assuming that Keith did not make a valid will which disposes of his interest in a manner which excludes Michael).

[43] Mr Spencer submitted that Michael is either a licencee or a tenant at will. It should be noted that it is essential to the creation of a tenancy that the tenant must be granted the exclusive possession of the relevant premises. This is an essential characteristic and if all that is granted is the ability to use without exclusive possession then a licence is granted. However, the granting of exclusive possession is not decisive and the court will consider a number of other factors in order to determine the substance of each agreement and whether what was granted is a lease of license. A tenancy at will is a variety of tenancy. It may be created by express agreement or by implication and is determinable at the will of either party. It is a relationship which is personal to the landlord and tenant and the result of this is that it determines on the death of either party (see Hill and Redman's Law of Landlord and Tenant 1989 Volume 1 A [111]).

[44] Mr Spencer submitted that the reasonable conclusion to be drawn on a balance of probabilities is that the two receipts tendered into evidence were receipts for the payment of rent, having regard to the periods which they indicate they cover and the monthly nature of these periods. Michael's evidence was that they were not for rent and that this is evidenced by the fact that they do not bear the word "*rent*" anywhere. Interestingly, Michael did not proffer an alternative explanation as to what the receipts were for but asserted that he would not have moved from premises for which he was paying rent to the Property if he was expected to pay rent. I do not accept this explanation to be convincing, there are often a myriad of reason which may influence a person moving from one rented premises to another. In the absence of any alternative explanation by Michael as to what was the reason for the payments in respect of which the receipts were issued, I accept the submission of Mr Spencer that the receipts were for rental of a portion of the Property. I find that this points to the reasonable inference that Michal occupied the Property pursuant to an oral rental agreement with Keith and I find on a balance of probabilities that this was a tenancy at will.

[45] Mr Spencer commended the case of **Girlena Wilson v Delroy Campbell and Others** Claim No 2007 HCV 02615 delivered 23rd September 2011 for the Court's consideration. In that case the claimant was the wife of a deceased employee. The employee (Mr Wilson) was allowed occupation of premises owned by his employer in lieu of the payment of redundancy payment when the employer migrated. Mr Wilson died and subsequently the employer also died. In those circumstances and on the particular facts of that case Mangatal, J found that the Claimant who continued to occupy the premises after Mr Wilson's death was not a licencee because her occupation was not in the capacity of servant or agent, and the learned Judge formed the view that the Claimant's occupation "*would appear to have been that of a tenant at will*".

[46] A tenant who holds over at the end of his lease without either agreement or disagreement of the owner is a tenant at sufferance. This is so regardless of the nature of the tenant's former estate even if it was only as a tenant at will. If there

is the landlord's consent to the tenants possession he becomes a tenant at will (see Hill and Redman (supra) at A [98]). In the instant case before the Court, on Keith's death, the relationship I have found to be a tenancy at will between himself and Michael would have been terminated and in my view Michael, would have continued in possession under a tenancy at sufferance. A tenant holding over will oftentimes seek to assert that the interim occupation post the termination of the tenancy is a periodic or other form of tenancy but we are not concerned with such a situation in this case. Michael is asserting that he has a beneficial interest in Keith's one-third interest (which he claims was improperly transferred), which entitles him to occupancy of the Property. I find that Neale and Sharon consented to his holding over (initially), but the parties are all agreed that there was no agreement for the rental of the Property reached as between them.

The Court's conclusion as to whether the Claimants can maintain a claim for possession of property

[47] In Commonwealth Caribbean Land Law, by Samson Owusu, at page 531 in relation to then tenancy at sufferance the author suggests that "*It is not apt to ascribe to it the concept of a "tenancy", a term which is used only because of the past landlord and tenant relationship which existed between the parties."* The learned author also notes at page 532, that a tenancy at will creates tenure, which does not exist under tenancy at sufferance. In the circumstances of this case, having found that Michael is a tenant at sufferance, I also find that Neale and Sharon as proprietors in common are entitled to properly maintain a claim against Michael for possession of the Property. My conclusion is unaffected by any issue as to whether Michael had a beneficial interest or not since in any event his current possession is incidental to his occupancy, initially as a tenant at will and subsequently as tenant at sufferance. An intervening interest would not be relevant as demonstrated in the case of **Leigh and Another v Dickson** 15 (1884) QBD, the facts of which will be explored in greater detail below.

Can the Claimants maintain a claim for rent?

[48] In relation to the issue as to whether Michael and Sharon can maintain a claim for rent since the death of Keith, Mr Spencer relied on the case of **Carlton Forrester v Lorna Thompson** C.L. F090 of 1999 (consolidated with C.L. T-118 of 2001 and C.L. F066 of 2001), in support of his submission that they can do so. This case involved consolidated claims which included a claim by Mr Forrester for sums he asserted were overpaid in breach of the Rent Restriction Act. The salient facts were that premises which were jointly owned by Mr and Mrs Thompson were let to Mr Forrester by Mr Thompson who subsequently died. Mrs Thompson sued for arrears of rent. In the claim for overpayment of rent, Counsel representing Mrs Thompson argued, *inter alia,* that she was not a proper party to the claim because she was not the person to whom rent was paid up to the time of Mr Thompsons death, she was not Mr Thompson's personal representative and she was not a party to the rental agreement. The learned Judge, Gayle J, found that the covenant to pay rent was a covenant which touches and concerns the land and applied the principle of privity of estates to find that Mrs Thompson was entitled to maintain a claim for the rent which had accrued since the death of Mr Thompson. Fundamental to the Judge's analysis was the fact that the premises were jointly owned by Mr and Mrs Thompson and on Mr Thompson's death his interest automatically accrued to Mrs Thompson, because of the right of survivorship (the *ius accrescendi*) which is a essential characteristic of a joint tenancy.

[49] It is settled law that in a joint tenancy each tenant is entitled to the whole of the property. Each owns the whole property and no one has a distinct or separate title or interest. In the case of a tenancy in common on the other hand, each tenant in common has a distinct but undivided share. A key distinction between the joint tenancy and the tenancy in common is that there is no right of survivorship in a tenancy in common.

[50] Where parties are tenants in common as were Keith, Neale and Sharon, the situation is different from that which obtained in the case of **Forrester v**

Thompson (supra). As I have also previously found, on the death of Keith, Michael became a tenant at sufferance. It should be observed that a claim is maintainable against a tenant at sufferance for use and occupation. In the case of **Leigh and Another v Dickson** 15 (1884) QBD the English Court of Appeal held that such a claim was maintainable even against a co-tenant in common. In that case, the owner of an undivided three fourths share in a house had rented it to a tenant. The Defendant acquired the lease by assignment and subsequently purchased the one fourth interest of the other tenant in common. The Defendant continued in possession after the lease had expired. The Court of Appeal held that although the defendant was a tenant in common he had exclusive possession of the whole of the house by virtue of the lease which was granted by his tenant in common. Cotton LJ at page 66 held that in such circumstances the defendant was liable for rent at the same rate as was reserved by the lease.

[51] On the facts before this Court, I am of the view that the doctrine of privity of contract is applicable to the rental agreement (which I have found existed between Keith and Michael). I find that Keith's death terminated that agreement. Accordingly, I find that Neale and Sharon not having been parties to that rental agreement are not entitled to claim against Michael for use and occupation arising from the fact that he held over after Keith's death. Furthermore, there not having been any agreement between Neal, Sharon and Michael as to his continued occupancy of the Property subsequent to the death of Keith, I find that Neale and Sharon as joint tenants in common do not have a proper legal basis on which they can maintain their claim for rent or for use and occupation. Mr Spencer had conceded in his closing submissions that Neale and Sharon were abandoning their claim in respect of the arrears of rent, which had accrued before Keith died since there was no basis on which it could succeed. However, I find that their claim for rent after his death also fails as a matter of law.

Disposition

[52] For the reasons expressed herein the Court awards judgment in favour of the Claimants only on their claim for recovery of possession of the Property against the Defendant and I make the following orders:

1. The Defendant is to vacate the property at 48 East Queen Street, Kingston being the land comprised in Certificates of Title registered at Volume 1402 Folio 415 within 60 days of the date of this order.

2. Each party is to bear his own costs.