[2018] JMSC Civ 186.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 03037

IN THE MATTER OF ALL THAT parcel of land part of MOLYNES situated in the parish of SAINT ANDREW being the l**ot numbered TWO on the plan of part of number 135 Molynes Road** aforesaid deposited in the office of titles on the 12th day of September, 1956 and being all of the land **comprised in Certificate of Title registered at Volume 1121 Folio 699** of the Register Book of Titles.

BETWEEN	**JOYCE EVANGELINE BURKE SCOTT**	**1st CLAIMANT**
AND	**JENNIFER ANN-MARIE BURKE**	**2nd CLAIMANT**
AND	**DENISE ANN-MARIE WHITTAKER**	**1st DEFENDANT**
AND	**LLOYD ALPHANSO BURKE**	**2nd DEFENDANT**
	AND	
BETWEEN	**DENISE ANN-MARIE WHITTAKER**	**1st ANCILLARY CLAIMANT**
AND	**LLOYD ALPHANSO BURKE**	**2nd ANCILLARY CLAIMANT**
AND	**NADIA BURKE**	**3rd ANCILLARY CLAIMANT**
AND	**JOYCE EVANGELINE BURKE SCOTT**	**1st ANCILLARY DEFENDANT**

AND	**JENNIFER ANN-MARIE BURKE**	**2nd ANCILLARY DEFENDANT**
AND	**JOSEPH DONALDSON**	**3rd ANCILLARY DEFENDANT**
AND	**TASHLEE MORGAN**	**4th ANCILLARY DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**5th ANCILLARY DEFENDANT**

OPEN COURT

Mr. Donovan Williams instructed by Donovan St. L. Williams & Co. Attorney- at-Law for the Claimants and 1st & 2nd Ancillary Defendants

Mr. Sylvester Hemmings instructed by Sylvester Hemmings & Associates, Attorneys-at-Law for the Defendants and the 1st, 2nd & 3rd Ancillary Claimants

Ms. Tavia Dunn instructed by Nunes Scholefield, DeLeon & Co. Attorney – at - Law for the 4th Ancillary Defendant

Ms. C. Bolton instructed by the Director of State Proceedings for the 5th Ancillary Defendant

Heard: 19th – 23rd January 2015, 18th – 22nd May 2015, 3rd June 2015, 21 - 23 September 2015, 16th June 2016 and 20th September 2019.

Real Property - Division of Property- Tenants in Common – Whether parties whose names appear on title hold beneficial interests in property - Whether Defendants hold property on trust for the Claimants – Whether Court finds beneficial interests different from legal interests

Whether Ancillary Defendants committed trespass, nuisance and assault against Ancillary Claimants – Whether co-owner of property can sue other co-owner for trespass - vicarious liability – whether agency

THOMPSON-JAMES J.

INTRODUCTION

[1] The matter before the Court in the main concerns the question of beneficial ownership in registered property located at 135 Molynes Road in the parish of St. Andrew hereinafter referred to as "the property", between the Claimants and Defendants who are related.

[2] The 1st and 2nd Claimants are mother and daughter, the 1st Claimant and 2ndDefendant are sister and brother, and the 1st Defendant is the niece of the 1stClaimant. The 3rd Ancillary Defendant is the husband of a niece of the brother and sister mentioned above. He is a police officer thus accounting for the Attorney General of Jamaica being a party to the action. The 4th ancillary Defendant was at the material time employed to the mortgage bank.

[3] The disputed property is registered in the names of the four parties as tenants-in-common, and the relevant sale agreement and mortgage documents from the Jamaica National Building Society (JNBS) contain the names of the four parties.

[4] The house is comprised of a self-contained single detached cottage with a small side and a large side with three bedrooms. The 2nd Defendant is the only party that has permanently resided at the property and at the time of trial he and his family still resided there.

[5] By way of Fixed Date Claim Form filed May 2, 2011, (which was later converted to a Claim Form pursuant to Court order dated April 5, 2012), the Claimants seek the following orders:

1. *"A Declaration that the Claimants are the sole owners in law and equity of All That parcel of MOLYNES situated in the Parish of SAINT ANDREW being the lot numbered TWO on the plan of part of Number 135 Molynes Road aforesaid deposited in the office of titles on the 12th day of September, 1956 and being all of the land comprised in Certificate of Title registered at Volume 1121 Folio 699 of the Register Book of Titles;*

2. *A Declaration that the Defendants Denise Ann-Marie Whittaker and Alphanso Burke hold the said property on trust for the benefits of the Defendants;*

3. *An order that the First and Second Defendants themselves or any person claiming Title from them yield up occupation of the said premises;*

4. *As order that the First and Second Defendants do execute such documents as are necessary to effect a transfer of the entire estate in the said property to the Claimants and or the Claimants' nominee;*

5. *An order that should the First and Second Defendants fail to comply with the order of the court to execute all such documents relevant to the transferring of the property to the Claimants, the Registrar of the Supreme Court be empowered to sign all the necessary documentation;*

6. *The costs of this application to be borne by the First and Second Defendants;*

7. *An order that the First Defendant pay the sum of $20,000.00 per month for occupation rent from September 2007 to the date of the Fixed Date Claim herein and continuing;*

8. *Liberty to apply; and*

9. *Such further and other relief as this Honourable Court deem just be granted.*

[6] By way of Ancillary Claim Form filed July 5, 2012, the 1st and 2nd Defendants, in addition to the 2nd Defendant's daughter Nadia Burke (the Ancillary Claimants), claimed against, the 1st and 2nd Claimants (the 1st and 2nd Ancillary Defendants), as well as Joseph Donaldson (3rd Ancillary Defendant), Tashlee Morgan (4th Ancillary Defendant) and the Attorney General of Jamaica (5th Ancillary Defendant), for damages for trespass, nuisance, threats, assault, defamation of character, breach of contract and trust, hurtful feelings, pain and suffering and intimidation. The Ancillary Claimants also seek aggravated and exemplary damages, as well as a declaration 'that the action of District Constable Joseph Donaldson and other unknown police was done without reasonable and or probable cause'.

[7] The 3rd Ancillary Defendant, at all material times, was a member of the Island District Constabulary Force, and the 4th Ancillary Defendant was an officer of the JNBS. The 5th Defendant was joined pursuant to the Crown Proceedings Act.

[8] By way of Notices of Discontinuance filed May 5, 2015 and May 15, 2015, respectively, the Ancillary Claims against the 4th and 5thAncillary Defendants were discontinued.

THE CLAIM

[9] The Claimants aver that, notwithstanding the Defendants names being noted on the title, they do not hold any beneficial interest in the property and assert that the property belongs solely to them. Further the idea to purchase the property was that of the Claimants, who made all the major decisions in relation to the purchase, including identifying the property, contacting the real estate agent, negotiating the price with the vendor, and paying the deposit. The balance was paid by way of loan for 50% of the purchase price from JNBS $7,200,000.00, and a loan from the 1st Defendant of US$70,000.00, which was secured by the 1st Claimant on the agreement that the 1st Claimant would repay the loan on her return to Canada.

[10] No representations were made to either of the Defendants that they would have had a beneficial interest in the property, and their names were only added for convenience. The 1st Defendant's name was only placed on the title because she was the 1st Claimant's niece and had been willing to assist with the loan, and, it was thought that if anything happened to the 1st Claimant, the 1st Defendant and the 2nd Claimant could take care of things. The 2nd Defendant was placed on the title because they needed someone with a local tax registration number (TRN). The 2nd Defendant made no contribution to the property.

THE DEFENCE

[11] The Defendants' contend that they hold the property, along with the Claimants, in equal shares of twenty-five percent (25%), as endorsed on the certificate of title.

The property was purchased with the intention of being a family home to be called "Rita Burke's House" after their mother. The 1st and 2nd Defendants, as well as other family members not party to the suit, contributed financially to the purchase of the property to give effect to that intention. All four parties definitively agreed to be beneficiaries and contribute to the best of their ability. The 2nd Defendant, in particular, invested US$30,000.00, and loaned US$40,000.00 to the 1st Claimant for her portion of the deposit. The deposit and closing costs were paid by the 2nd Claimant, and the 1st and 2nd Defendants. Further, it is asserted that the 2nd Defendant and his wife sacrificed their own plans to obtain a house through the National Housing Trust (NHT). due to the insistence by the family, including the Claimants, to purchase a 'family home'.

THE CLAIMANTS' SUBMISSIONS

[12] The Claimants submit that, despite the Defendants being registered as tenants-in-common on the title, they have no beneficial interest in the property, and there was never any intention for the property to be held jointly. They rely on the case of **Robert Stephenson v Carmelita Anderson**, (unreported), Supreme Court, Jamaica, SCCA No. 55/00, delivered June 12, 2003 for the proposition that registration of parties' names on a title as tenants-in-common is not conclusive of a beneficial interest, and that the Court ought to look at the whole course of conduct of the parties to determine the common intention of the parties at the time of acquisition of the property. **Grant v Edwards**[1986] 3 WLR 114 is also relied on for the submission that where there is no trust document, the Court will look at the conduct to determine the common intention of the parties, and the burden of proof rests with the person asserting beneficial interest.

[13] It is argued that one of the main factors in such an exercise is the question of who has paid the money, and in the present case, there is no evidence of direct contribution from the 2nd Defendant.

[14] Relying on the authorities of **Nola Gowe v Fay Lurch**, (unreported), Supreme Court, Jamaica, SCCA No. 42 of 1996, delivered December 18, 1987, and **Jeanne Maddern v Stevie Darlington**, (unreported), Supreme Court, Jamaica, Claim No. 2010 HCV 02771, delivered July 6, 2011, It is proposed in relation to the latter case that where there is a conveyance in joint names as tenants-in-common, the person who provides the financing is presumed to hold the beneficial interest in the property, whilst the other persons hold the property on a resulting trust for that person.

[15] It is further submitted that the evidence shows that it was the Claimants who initiated and carried through the process in respect of the acquisition of the property, and it was never their intention that the Defendants would have a beneficial interest therein. The Court is urged to accept the Claimants' evidence that the 1st Defendant was only put on the title because she readily assisted with the loan, and that the 2nd Defendant was added as he was the only one in Jamaica with a TRN and in a position to oversee the property. The Claimants also desired to help the 2nd Defendant to relocate from his previous residence, which was 'less than ideal'.

[16] It is asserted that all major decisions regarding the property were made by the Claimants, including the retaining of the attorney who represented them for the purchase, negotiations with the real estate agent, the initiation of the mortgage at JNBS, and the decision of how much mortgage to borrow. Further it was the 1st Claimant who paid the deposit, and there is no credible evidence before the Court of any contribution by anyone else, and in particular, no documentary proof of contribution by the 2nd Defendant. It was the 1stand 2ndClaimants who decided to rent the property, and the 1st Claimant who entered into rental agreements and arranged how rent receipts were to be collected. The 1stClaimant bought furniture for the house which was used by the 2nd Defendant and his family. Both the 1st and 2nd Claimants repaired and renovated the property without asking for financial assistance from the Defendants or any other family member. Moreover, they were

the only ones making direct contributions to the mortgage. It is argued that, there is no evidence to substantiate the 2nd Defendant's claim that he was prevented from acquiring a house through the National Housing Trust (NHT), nor is there even any evidence of his contributions or any loan application made by him.

[17] It is therefore concluded in this respect that, by virtue of the 2nd Defendant's lack of contribution and the absence of an express intention, no beneficial interest was conferred on him by his placement on the title.

[18] The 1st Defendant's contribution, it is submitted, was merely a loan, and the fact that US$30,000 was not paid back is not conduct evidencing an intention by the Claimants for her to benefit. The Claimants refute the 1stDefendant's assertion that the 1st Claimant had no money on the basis that the 1st Claimant refunded US$40,000 of the money loaned to her by the 1st Defendant on her return to Canada, as well as on the basis that the 1st Claimant pays the mortgage. Also relied on is the evidence of Tashalee Morgan that the Claimants had qualified for a full mortgage when their assets and income were assessed. There was no arrangement for the 1st Defendant to pay mortgage as the contention that the 1st Defendant had to pay interest on her loan is rejected on the basis that the 1st Defendant gave no evidence of the life of the loan, its terms, nor when she would be able to assist with the mortgage. It is contended that she only started contributing to the mortgage after she became aware that the Claimants intended to sell the property.

[19] In relation to the other family members, although it is admitted that Hermine Hardie contributed CAD$500.00, it is asserted she never paid mortgage, and there is no evidence to substantiate the contention by Lynette Haughton that she contributed, the evidence being she only gave a loan of $3000 which was returned to her.

[20] In relation to the letter relied on by the 2nd Defendant purportedly written to him in June of 2009 by the 1st Claimant referring to him as owner and mortgagor, the court is asked to give it no weight. The letter was not put to the 1st Claimant in

cross-examination. Further the letter is type written when it is the 2nd Defendant's evidence that his sister always wrote to him in her handwriting. The court is asked to consider that the evidence of all the witnesses is that there was no issue in the family in October 2009 at the time of the wedding.

THE DEFENDANTS' SUBMISSIONS

[21] The Defendants' submit that all four parties to the Claim hold equal shares of 25%, both in law and in equity and the sales agreement and the title to the property delineate how the property was intended to be apportioned. The sale agreement indicated the purchasers as the 1st and 2nd Claimants and the 1st and 2nd Defendants, with tenancy indicated as 'tenants-in-common in equal shares'. The Defendants rely on the evidence of Attorney-at-Law Mr. Howard Facey that the 1st Claimant attended on his office and indicated that she was purchasing the relevant property, together with the other three parties. His instructions were that the parties wished to purchase the property as tenants-in-common in equal shares. Also relied on, is that the letter of possession indicating that all four parties were the purchasers and entitled to possession. It is asserted that there is no evidence to show that the money given by the 1st Defendant was a loan.

[22] The Defendants further submit that the Court ought to treat the sales agreement as any other contract that ought not to be disturbed in the absence of evidence of mistake or fraud, or unless the terms of the agreement are unclear and ambiguous. It is submitted that there is no declaration of trust, and for an express trust of land to be effective and enforceable, it must be in writing. It is also argued that if there is an apportionment, severance or some delineation, no trust can be assumed. For a trust, such as a resulting trust, to exist there must be a joint tenancy. Statements of law in the text **Commonwealth Caribbean Land Law by Sampson Owusu** (at page 335 and 338) are relied on in relation to conveyances as tenants-in-common as opposed to joint tenancy.

[23] It is further submitted that there is no evidence of any intention by the parties to create a trust. Particularly, there is no evidence that it was necessary for the 2nd Defendant to be placed on the title and in the sale agreement in order to get the loan, or that such agreement was contemplated by the attorney negotiating the purchase. The Defendants used the evidence of the 1st Claimant in cross-examination to show that what was in the contract was the true intention of the parties, and that it was in 2010 that she had a change of mind when things got ugly.

[24] In relation to the 2ndDefendant, it is submitted that he is also entitled to an interest in the property by way of proprietary estoppel, in that, he gave up the opportunity of purchasing a house with the NHT, on the basis that he bought into co-ownership in this property.

[25] In reply to the Claimant's submissions, Mr. Hemmings argued that he is not saying that simply because the Defendants' names are on the title they are entitled to a share. His submission is that how the shares are allocated on the title shows clear intention, and this is what is to obtain. Further all along the Claimants' actions showed that there was an intention that the parties be joint owners, until the problem arose in 2012. Further, there is no evidence to show that the tenancy was not explained to the Claimants or that it was a mistake. It is argued that the cases cited by opposing counsel show a clear distinction, as in those cases, there was no contract evidencing intention, and it is only in such a case that the Court can go into outside circumstances. In this case, it is submitted, there are documents evidencing the clear intention of the parties. The Court is, therefore, asked to find that the Defendants are beneficial owners and that the only account to be taken should be of the repairs done to the property.

[26] It has, however, been submitted, that, since the improvements done to the property by the Claimants were merely for aesthetics and the convenience of the wedding held at the premises, no reimbursements should be made.

[27] Similarly, in relation to the issue of mortgage payments, it is submitted that any payment of mortgage *"upon the filing of the claim and the apparent abandonment of the building"*, should be refunded to the parties who have made those payments. The evidence indicates that the Defendants/Ancillary Claimants had been paying the mortgage. The total sum paid should be deducted from the proceeds of the sale of the property, after allowing for costs and incidental expenses.

LAW & ANALYSIS

[28] It is well established that, notwithstanding the principle of indefeasibility attached to land registered under the **Registration of Titles Act (RTA)**, the names registered on a certificate of title ("title") or the absence thereof, is not conclusive of how the beneficial interest in that property is actually held, and a claim as to beneficial interest may be brought in equity to assert interests at variance with that endorsed thereon (**Gardener and Another v Lewis** (1998) 53 WIR 236, pp. 238-239).

[29] In the instant case, all the parties are registered on the title as tenants in common. However, the Claimants assert that the legal interests noted on the title are not representative of the beneficial interests in the property, and the Defendants have no beneficial interest therein.

[30] In cases of this nature, where parties hold property as tenants in common, and there is no indication as to how the beneficial interest is to be shared by the parties, the starting point is that the interest should be shared equally. This is a presumption that may, of course, be rebutted by evidence to the contrary. This was made clear by our Court of Appeal in **Kenneth Guy Thomas v Irene Victoria Thomas** [2016] JMCA Civ 57, in which the Court, relied on the cases of **Stack v Dowden** [2007] UKHL 17 and **Abbott v Abbott** [2007] UKPC 53. Phillips JA, stated the following (at paragraph 67):

> *"On the evidence in this case, even if the transfer by the respondent to the appellant remained extant,* ***the registration of their interest was as "tenants in***

> ***common". There was no indication as to how the beneficial interest was to be shared by the parties. On the basis of all the authorities, the presumption would be that the interest would be shared equally. However, that presumption is rebuttable by evidence to the contrary****, for example, "evidence of an agreement that the title was to be held on trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship...One would also have to examine the general intention of the parties by the conduct of their own affairs through the marriage with particular regard to this disputed property."****[Emphasis added]***

[31] Similar sentiments were also expressed by Phillips JA in an earlier case that same year, **JoycelinBaileyvDurvalBailey** [2016] JMCA App 8, to the effect that:

> *"...prima facie, as the parties were both registered on the certificate of title for the property, the legal and beneficial estate would be presumed to be owned equally by both of them (see Stack v Dowden [2007] 2 All ER 929).*

[32] In ***Stack v Dowden***, the House of Lords had to assess the beneficial ownership in a property that was held in the joint names of a husband and wife as tenants in common.

The Court found, at paragraph 58, that *"...in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved"*. The contrary is to be proved by looking at all the relevant circumstances in order to discern the common intention of the parties.Lady Hale rejected the notion that the starting point should be that of the presumption of resulting trust, noting that *"[t]hese days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago."*She then went on to say*:*

> *"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."*

[33] Further, at parargraph 61, she said:

> *"...the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended...it does not enable the court to abandon that search in favour of the result which the court itself considers fair."*

[34] Accordingly, Lady Hale noted that the question for the Court in such cases should be *"...'did the parties intend their beneficial interests to be different from their legal interests?' And 'if they did, in what way and to what extent?'"* (paragraph 66).

[35] How that intention is to be gleaned will depend on the facts of each case. Lady Hale outlined the following factors to be considered, at paragraph 69, noting that they were not exhaustive:

> *"In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts.* ***Many more factors than financial contributions may be relevant to divining the parties' true intentions****.* ***These include: any advice or discussions at the time of the transfer*** *which cast light upon their intentions then;* ***the reasons why the home was acquired in their joint names****; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys;* ***the purpose for which the home was acquired****;* ***the nature of the parties' relationship****;* ***whether they had children for whom they both had responsibility to provide a home****;* ***how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses****. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home.* ***The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities*** *may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account****, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual****.[Emphasis added]***

[36] I, therefore, agree with the Claimants' submission that that the whole course of conduct of the parties ought to be examined to determine the common intention of the parties at the time of acquisition of the property. I am of this view notwithstanding that the above authorities involved couples in "intimate" relationships. In my view, the principles are equally applicable. Thus, the requisite question for this Court is 'was it intended by the parties that Defendants would have a beneficial interest in the Molynes Road property? And if so, to what extent?

[37] The burden of proof, contrary to what the Claimants have argued, rests with the party seeking to show that the parties intended their beneficial interests to be different from their legal interests. That was made clear in **Stack v Dowden**. at paragraph 68, where the Court stated:

> *"The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way."*

Therefore, the Claimants must satisfy the court that it was the common intention of the parties that the Defendants would have no beneficial interest in the property.

[38] **What was the common intention of the parties at the time of acquisition?** Both sides gave a diametrically opposed accounts as to what transpired. Therefore, the Court is required to resolve many issues of fact.

The Evidence

[39] The evidence of the Claimants is that the intention was for the property to belong to them solely. The 1st Claimant's evidence is that it was her idea to buy the house. In 2005, she came up with the idea to buy a winter home in Jamaica due to the harsh Canadian winters and the fact that whenever she visited Jamaica she had to pay exorbitant costs for lodging. Two years later whilst in Jamaica she came across the advertisement for the property in the Daily Gleaner. and initiated contact with the real estate agent with whom she negotiated the purchase price with the vendor. She brought it to the attention of her daughter who agreed to buy the house with her. She did not discuss purchasing a house with her brother George or sister Constance, nor did she tell Lloyd that she intended to buy a family house. Further, she was not aware that Lloyd was trying to buy a house for his family. The evidence of both Claimants is that there was never any intention for the Defendants to have a beneficial interest in the property, nor was it ever indicated to the Defendants that this would be so.

[40] The 1st Claimant asserts that the reason she caused the 1st Defendant's name to be endorsed on the title is because she is her niece and she was willing to assist, and the 1st Defendant could take care of things if anything should happen to her and the 2nd Claimant. The 2nd Defendant's name was endorsed on the title because he was the only person with a TRN which was required to complete the mortgage, and he would be the best person to oversee the property in her absence. It is her contention that at the time the property was being purchased she did not know the meaning and consequence of registering as tenants in common.

[41] On the other hand, the evidence of the Defendants is that it was always the intention that all the parties named on the title would have a beneficial interest in the property, even though they did not contribute equal amounts. Both Defendants gave evidence that the decision to purchase the house was made as a family. The 2nd Defendant's evidence is that the idea to purchase a family home was conceived years before the purchase by several close knit family members, including the 1st Claimant, their brother George, sisters Hermaine Hardie and Lynette Haughton, nieces Marva Hepburn and Denise (1st Defendant).

[42] The 1st Claimant, as well as other family members who lived overseas, usually stay at his house when they visited Jamaica, and it was fast becoming modest considering the size of his family of five. There were many trips to look at different properties in various communities in Kingston.

The 2nd Defendant's evidence is that following a great deal of prayers, which involved the 1st Claimant, the property at 135 Molynes Road was chosen to be the family home, and was to be named 'Rita's house' after the siblings' mother. The evidence from two sisters of the 2nd Defendant and 1st Claimant, not party to the suit, support the notion that the property was to be a family home.

[43] Hermaine Hardie, gave evidence that the subject property was a family idea which evolved over years, and the agreement to buy the house was on the basis of solemn trust and fervent prayers. Sister Linette Haughton similarly gave evidence

that over the years Joyce and Lloyd had been looking for houses to purchase, and whilst on vacation in Jamaica, she has had the opportunity to go with them lo look at houses in Norbrook, Aladyce (sic) Drive, Hope Pastures, Mona Heights and Waterloo Road. According to Ms. Haughton, they told Lloyd to continue looking for a suitable house when they left Jamaica. She also asserted that the agreement was that the majority of family members overseas would pool their funds. There is no evidence or assertion that Ms. Hardie or Ms. Haughton had any motive to be biased towards the Defendant.

[44] The 1st Claimant, of course, denied that there were any such discussions, prayers or trips to look at houses.

[45] In respect of the relationship between the parties I find that the evidence on both sides indicates that the parties were close. It was not disputed that the family was close knit and that the 2nd Defendant would, from time to time, host the family members who lived abroad in his home during their visits to Jamaica, including the 1st Claimant, prior to the purchase of the house. It was also not disputed that the 2nd Defendant's daughters were also close to Aunt Joyce and would spend time with her in Canada.

Initial Steps/Financial Contributions

[46] In relation to the initial steps to acquire the house, the 1st Claimant's evidence is that, in or about January 2007 she saw the Molynes Road Property being advertised in the Daily Gleaner. She contacted the real estate agent and subsequently negotiated a purchase price of fourteen million two hundred thousand dollars ($14,200,000.00) with the vendor. She informed her daughter the 2nd Claimant about the property and of her intention to purchase it. Her daughter agreed. She met with Ms. Tashalee Morgan from JNBS February 12, 2007 to discuss the requirements for obtaining a mortgage. The 1st Claimant decided to borrow fifty percent (50%) of the purchase price of the Molynes' Property amounting to seven million two hundred Jamaican dollars (JA$) ($7,200,000.00).

She was required to pay the balance of fifty percent (50%) to her attorney-at-law or to an account at JNBS as proof of sufficient funds to complete the purchase.

[47] The 2nd Claimant sent her Canadian fifty thousand dollars (CAN$50, 000.00) towards the purchase of the property and March 22, 2007, via her attorney-at-law, she paid two million one hundred and sixty-four thousand nine hundred and fifty dollars (JAS) ($2,164,900.00) by cheque to the vendor's attorney-at-law Messrs, Frater, Ennis & Gordon. There was a shortfall. She needed more money. The vendor was migrating and wished to sell urgently. As she was in Jamaica and her daughter did not have access to her account in Canada, she asked her daughter to ask around for money to borrow, and she would repay the money when she returned to Canada.

[48] The 1st Claimant states that she was contacted by the 1st Defendant and during their conversation she told the Defendant of her intention to purchase the property, and the urgency of the situation. She asked the 1st Defendant to loan her the sum needed until she got back to Canada, the 1st Defendant said she would look into it and get back to her. It is not disputed that, July 2, 2007, the 1st Defendant wired US$70,000.00 to the 1st Claimant's JNBS account. Nor is it disputed that the 1st Claimant, through her daughter, only repaid US$40,000 of the money. However, the 1st Claimant contends that it was always her intention that the money was to be a loan and that she would repay it once she returned to Canada. This she says was communicated to the 1st Defendant, and that at no time "previous" to the funds being sent did she indicate to the 1stDefendant that she would have a beneficial interest in the property.

[49] When she returned to Canada in September of 2007she refinanced her home and obtained seventy thousand United states dollars ($70,000.00) all of which she intended to pay to the 1st Defendant, but that the 2nd Claimant advised her to hold back United States thirty thousand dollars (US$30,000.00) as the 1st Defendant's name is on the title. She agreed, and on January 9, 2008, her daughter wired United States forty thousand dollars (US$40,000.00) to the 1st Defendant on her

behalf. However, she had no intention for the 1st Defendant to get a beneficial interest in the property.

[50] The reason she caused the 1st Defendant's name to be endorsed on the title is that she is her niece and was willing to assist. The 1st Defendant could take care of things if anything should happen to her and the 2nd Claimant. It is her contention that at the time the property was being purchased she did not know the meaning and consequence of registering as tenants in common, and she and the 2nd Claimant are willing to repay the balance of the loan US thirty thousand dollars ($30,000.00) with interest.

[51] In relation to the 2nd Defendant, the 1st Claimant contends that his name was endorsed on the title because he was the only person with a TRN and the TRN was required to complete the mortgage, and he would be the best person to oversee the property in her absence. She told the 2nd Defendant that she and her daughter were purchasing the property and that he could stay there with his family and occupy two of the three bedrooms on the large side of the property, reserving one room for her and her daughter whenever they visited from Canada. Further, he would have to pay rent for occupying the property. She allowed him to pay a reduced rent of twenty thousand dollars ($20,000.00) per month, although the market value rent was $50,000 to $60,000. She also allowed him to use some of her furniture and appliances that was at the property. The small side of the property and the cottage were rented out for $13,000.00 and $25,000.00 per month, respectively. The agreement being that all rent, a total of $58,000.00, would be paid into her account from which the mortgage was being withdrawn by the bank. The monthly mortgage was $102,188.30, the difference between that amount and the rent collected was paid by the 1st and 2nd Claimants solely.

[52] The 2nd Claimant's evidence is in line with that of her mother. Her evidence is that she and her mother purchased the property primarily for the purpose of using it as a winter home for her mother who had difficulty coping with the Canadian winters. Of note is that at the time of purchase she was in Canada. Her evidence I find is

greatly based on what she was told by her mother. Between March 3 and 9, 2007 she wired fifty thousand Canadian Dollars ($50,000.00), about $3,037,500.00 Jamaica to the 1st Claimant, who was in Jamaica at the time, to put towards the purchase of the property. She and the 1st Claimant decided to borrow less mortgage to ensure a reduced monthly mortgage repayment. There was a shortfall in cash but the 1st Claimant advised her via telephone that she could not return to Canada to secure the balance as the vendor would be migrating soon and was eager to sell. Her mother asked her to borrow funds and she would repay it when she got back to Canada. She contacted her cousin the 1st Defendant in this regard, and told her that the money would be repaid when her mother returned to Canada. Sometime after, the 1st Defendant sent United States seventy thousand dollars (US$70,000.00) to the 1st Claimant in Jamaica.

[53] Her mother told her that she would put the 1st Defendant's name on the title as she was her niece and had been so willing to help with the loan. The 2nd Claimant did not object to this but she had no intention for the 1st Defendant to have any beneficial interest in the property. The 2nd Defendant's name was added to the certificate of title for the Molynes' Property on the recommendation of the 1st Claimant that he was the main relative living in Jamaica and that he and his family could stay on the premises and pay a reduced rent of twenty thousand dollars ($20,000.00) per month The rest of the property was to be rented and the proceeds used to assist in the payment of the mortgage.

[54] Once the purchase of the property was completed the 1st Claimant returned to Canada and made arrangements to repay the 1st Defendant the entire United States seventy thousand dollars (US$70,000.00.). The 2nd Claimant asserts that she intervened and advised the 1st Claimant not to repay the full sum to the 1st Defendant since her name was on the title to the property. Again, she says she had no intention that the 1st Defendant should have an interest in the property and was only trying to protect her and her mother's interests. On or around January 9,

2008, she wired forty thousand dollars (US$40,000.00) to the 1st Defendant towards repayment of the loan.

[55] Now, the evidence of the 1st Defendant is that the decision to purchase a house in Jamaica was made as a family with the understanding that it was to be a family home. A house was located and chosen, and it was decided it would be called "Rita House" after the siblings' mother. She does not say who exactly located and chose the house, but asserted that Auntie Joyce and other family members called around and raised the deposit and further payment. She contends that during the negotiations for the purchase Auntie Joyce called her in the United States of America (US) for advice as to how to deal with various challenges with the real estate agent, the vendor and the attorney. As a result, she travelled to Jamaica and demanded a change of lawyer to Mr. Facey, who had been recommended by JNBS. She asserts that Auntie Joyce gave her the phone number and email address of the mortgage officer Tashalee Morgan, and they conversed extensively about the criteria necessary to finalize the mortgage. The family decided to pay half of the purchase price in cash, rent the house, and pay the balance by mortgage from JNBS.

[56] Based on the interview she had with Ms. Morgan she knew that to qualify for a mortgage they all had to be working. Therefore, only she, the 2nd Claimant and the 2nd Defendant qualified for the mortgage. The 1st Claimant was retired at the time and was not earning any income, hence she did not meet the requirements.

[57] The 1st Defendant testified that with her husband's consent, she obtained an equity line loan of seventy thousand United States Dollars (US$70,000.00) on their current home in the US, out of which she covered the 1st Claimant's portion of the family loan of forty thousand dollars (US$40,000.00). Her intention had been to split the $70,000 between she and the 1st Claimant, but it was the 1st Claimant's idea for her the 1st Defendant to pay $30,000. She paid $40,000 because of the kindness the 1st Defendant had shown her in loaning her the money. She admitted that the $40,000.00 was subsequently repaid to her.

[58] She contends that she provided the mortgage officer with all the documents directly, and the 1st and 2nd Claimants and the 2nd Defendant agreed to pay the mortgage supported by other family members. The 2nd Claimant paid fifty thousand Canadian Dollars (CAN$50,000.00) towards the purchase price of the said property. The 2nd Defendant paid all initial costs including valuation, surveyor's cost and part of the deposit. It is to be noted that the 1st Defendant admitted in cross- examination that she did not contribute to the initial deposit.

[59] It was agreed by the family that the rest of the family would build a small cottage on the land to accommodate them on their visits. During the purchase the 1st Claimant spoke to her primarily, and she would then communicate with the 2nd Claimant, as the 1st and 2nd Claimants were having major issues. She contends that she visited Jamaica many times during the purchase, met with Mr. Facey and received a letter dated March 20, 2007 with documents for execution.

[60] It was agreed that an account held at JNBS would be the Trust Account into which monies in relation to the purchase of the property and further payments including rent for a part of the property would be deposited. The 1stClaimant would manage this account. It was agreed that the house would be rented and the difference of JA $40,000.00 would be paid equally by the 1st Claimant and the 2nd Defendant, and where necessary other family members. It was also agreed that she would not pay anything as she had the personal line of credit to repay, including interest on the sums loaned to the 1st Claimant.

[61] She asserts that she was aware that the 2nd Defendant and his wife had intended to buy a house through National Housing Trust, and that she and other family members including the 1st and 2nd Claimants discouraged them from doing so, encouraging him to purchase a family home together with them instead. At all times, they all intended that the 2nd Defendant and his wife would have equal shares as the other owners.

[62] Similarly, the 2nd Defendant's evidence in relation to the initial steps taken to purchase the house is that the property was found by his wife and daughter Nordeen, in the Sunday Gleaner and brought to the attention of the 1st Claimant who was visiting Jamaica at the time. The children, and (he thinks) his wife, went to where Joyce the 1st Claimant was staying to show her the newspaper. Thereafter they visited the premises and began the process to purchase.

[63] It is his evidence that in 1999 the 1st Claimant and other family members discouraged him from purchasing a property with his wife, and insisted that he invests in a family home. Around that time, he had sought benefits from the NHT to acquire property, and had filled out a form. He however, admitted that when he went to the NHT in 1999, he was not qualified to get a loan. He also admitted that a NHT form entered as "exhibit 8" did not bear the NHT stamp. Prior to the purchase of the property in 2007, he made no other efforts to find a house after 1999.

[64] The family gave clear instructions to, attorney-at-law, Mr Howard Facey, in relation to their intention to share the property. Mr. Facey in turn fully instructed them as to its legal implications. This intention is reflected in the title. This was arrived at after much discussion with the family including the Claimants and legal advice from the attorney.

[65] He asserts that he paid all the closing costs in relation to the purchase of the said property, and he along with the 2nd Claimant and the 1st Defendant made the mortgage available as they provided his profile, their proof of income and paid the closing costs and deposit. Additionally, he states that the receipt from Frater Ennis & Gordon in the name of the 1st Claimant represents monies paid on behalf of him and others, and there were other family members, who, through love and affection contributed to the purchase price. He did not remember the amount of the closing costs, nor did he get a receipt. He however stated in cross-examination that, when the house was being purchased, he was a self-employed tradesman and his income was not very steady at the time.

[66] During the purchase, Uncle George (deceased) was in Jamaica with him. Joyce, visited the house and gave her consent. Around this time, when she was in Jamaica they were on good terms and spoke frequently. Joyce told him that their Uncle George had contributed US$15,000 towards the purchase of the house. Both Denise and Joyce spoke to him about the US $70,000.00 that Denise had paid. She told him that it would have been impossible for them to purchase the house without Denise's contribution. His evidence is that the property has a main building consisting of 6 bedrooms and an outside cottage. He and his family occupy two bedrooms, a family room and a washroom.

The Mortgage

[67] The Claimants' evidence is that the mortgage was serviced by them, and the 1st and 2nd Defendants were never required to pay mortgage. According to the 1st Claimant, the 1st Defendant only started making payments towards the mortgage in or around October 2010 after the 1st Claimant told her that she intended to sell the property, a decision which the 1st Defendant opposed. Further the 1st Defendant only made her first mortgage payment in 2010. Lloyd started paying mortgage since 2012 in order to prevent the property from being auctioned. In relation to the 2nd Defendant, it is the 1st Claimant's evidence that the $20,000.00 he was to pay each month was not mortgage but rather a reduced rent for him being allowed to stay at the premises with his family.

[68] The1st Defendant does not dispute that she was not required to pay mortgage, but asserts that this was so as it was agreed that she had the personal line of credit to repay, including interest on the sums loaned to the 1st Claimant. According to her, it was further agreed that the house would be rented and the difference of JA $40,000.00 would be paid equally by the 1st Claimant and the 2nd Defendant, and where necessary, other family members.

[69] From the evidence I find that it is not disputed that the 2nd Defendant was to pay $20,000.00 per month, however, the 2nd Defendant's evidence is that this money

was his contribution towards the mortgage, and not rent as contended by the Claimants. This money would be pooled with rent from the other tenants towards the mortgage, and the remaining amount of mortgage, JA$30,000, would be paid by the Claimants. The evidence before the court is that the money paid by the 2nd Defendant was paid directly into the mortgage account.

Evidence of Mr. Howard Facey attorney- at- law

[70] I find Mr. Facey to be an independent witness. His evidence is that in March 2007 the 1st Claimant attended his office seeking his services to assist her with purchasing the property along with Ms. Jennifer Burke, Ms. Denise Whittaker and Mr. Lloyd Burke. His instructions were that the parties were proposing to purchase the property as tenants-in-common in equal shares. This information was forwarded to the firm who had conduct of the sale.

[71] The agreement for sale was executed by all the purchasers, and he witnessed the execution by Joyce Burke-Scott and Lloyd Burke. At that time the terms of the agreement for sale were explained and the parties indicated their acceptance thereof. He then forwarded the agreement to Jennifer Burke in Canada and Denise Whittaker in the United States of America (USA) for execution. When it returned, the purchasers obtained a valuation report and surveyor's identification report for the premises and submitted same, with the executed sale agreement to JNBS for processing of the mortgage loan.

[72] He also had conduct of the registration of the mortgage documentation on behalf of JNBS in order to secure the mortgage loan financing in the sum of seven million dollars ($7,000,000.00) to enable the purchasers to complete the purchase of the property. He was instructed by letter of July 24, 2007, that JNBS had approved the loan. He prepared the mortgage documentation in accordance with instructions from JNBS, which was executed by all the purchasers. The purchasers also executed the Offer of Finance from JNBS dated August 2, 2007, signifying their acceptance of same. The purchasers were provided with a letter of possession

from the vendor's attorney, along with letters of introduction to the utility companies. The original letters were received and signed for by Mrs. Burke-Scott. I am prepared to rely on his evidence as I believe he is speaking the truth.

The Evidence of Tashalee Morgan

[73] Ms. Morgan was initially a party to the matter. The case against her was discontinued during trial. Permission was later granted by the court to the Claimants to call her as a witness. Mr. Hemmings sought to raise as an issue that she was not properly clothed with authority to speak on behalf of JNBS or to issues arising from her work there. Further she had no documentation to support her evidence surrounding the loan transaction. It is my view that Ms. Morgan is a proper witness to give evidence in relation to matters involving her personal capacity, as she is in a position to speak directly to her personal interactions with some of the parties. I find that her evidence has not been directly disputed, nor contradicted by the evidence of the other witnesses. Further despite her alleged relationship with the Claimants, in my view her evidence does not assist their case. In fact, notwithstanding Mr. Hemmings' attempts to discredit her, her evidence in some respects enures to the benefit of the Defendants. In this respect I find her evidence important for the fact that she states that all parties were vetted and approved for the mortgage. She agreed that for the owners of the subject property to get pre-approval for mortgage financing they would have to be qualified. I place reliance on this aspect of her evidence.

[74] Her evidence is that she had been employed to JNBS for over 18 years. and met with the 1st Claimant around June 2007 in her capacity as a mortgage officer in relation to the procedure for obtaining mortgage financing from the society. The practice of JNBS was to give persons' pre-approval for mortgage financing. In order to obtain pre-approval, the 1st and 2nd Claimants provided job letters, pay slips, a credit report from their country of residence, Canada, as well as government issued identifications. Since the 1st Claimant was a pensioner, they used her disability aid, along with her pension. Both Claimants also completed and

signed a Statement of Affairs and Mortgage Life Peril Insurance. They both received pre-approval in the sum of JA $7,500,000.00. All her dealings initially were with the 1st and 2nd Claimants, and to her knowledge they were the only persons seeking mortgage financing. She only became aware of the other parties upon seeing their names as purchasers on the agreement for sale, which was submitted as required by the bank, along with valuation report, surveyor's identification report, property tax certificate and proof of deposit. Further, contact was only made with the 1st Defendant after the agreement for sale was received, that is after the Claimants had already been pre-approved for financing.

[75] In 2010, the mortgage payments went into arrears. She contacted the 1st Claimant. As a mortgage officer, she can be directed from time to time to contact the borrower with a view to having the arrears cleared. A review of the mortgage account indicated that payments made were only being remitted from Canada. She made recommendations to the 1st Claimant as to how the arrears could be cleared. Mrs. Burke Scott gave her the 2nd Defendant's phone number, following which she called him and advised him of the mortgage being in arrears and the need for payment. She asserts that the 2nd Defendant made numerous promises to settle the arrears, and eventually stated "the bank would have to do what it had to do" as he had no money.

[76] The 1st Claimant via email dated March 2, 2010, gave instructions that sums from a compulsory JNBS savings account was to be applied to the mortgage arrears, and further instructed, by letter dated September 5, 2010, addressed to Ms. Morgan personally, that the property be sold. She was unable to act as directed as it would conflict with her employment at JNBS. She communicated the 1st Claimant's intentions to the 2nd Defendant and advised him of the name of the valuator. He did not object. She received no communication, by email or otherwise, from the 1st Defendant alleging she was in breach of her professional duties. She asserts that she did not act as servant or agent for the Claimants, and that all of her actions in regard to the subject property were done in her capacity as an

employee of JNBS within the scope of her employment. As at May 7, 2013, the mortgage was still in arrears.

[77] In cross-examination, Ms. Morgan, when shown a copy of a classified ad in the Sunday Gleaner stated it was the first time she was seeing it and denied advertising the subject property, although she admitted that the number listed there was her telephone number.

[78] In relation to whether she had authority to speak on behalf of JNBS or in respect of the loan, Ms. Morgan stated that she was speaking on her own behalf. The Human Resources department was aware of the matter and all documents served on her, and advised her to go to Court and defend the matter, albeit she does not have any documents from JN to support her evidence.

Issues

[79] The main issue for the Court to decide, as previously stated, is whether it was **the common intention of the parties that the defendants would have no beneficial interest in the property**. In order to determine the common intention of the parties, I find it necessary to resolve the following issues of fact which arise from the relevant material before the Court:

i. Was the decision to purchase the property made by the family or was it made solely by the Claimants? What was the agreement between the parties as to ownership and was the agreement between the parties that the property would be a family home?

ii. Who made the major decisions regarding the property?

iii. Who made financial contributions to the acquisition of the property?

a. Who paid the closing costs?

b. Was the money provided by the 1st Defendant to the 1st Claimant a loan or an investment?

c. Was the money paid by the 2nd Defendant rent or mortgage?

d. Did Uncle George and other family members contribute to the purchase price of the house?

iv. Who is indebted to JN for the mortgage?

Disposal

[80] On a totality of the evidence, I find that the Claimants have not discharged the burden of demonstrating on a balance of probabilities that it was the intention of the parties that the Defendants were not to have a beneficial interest in the property. I find that it was the intention of the parties for the house to be a family home and for the beneficial interest in the property to be as is noted on the Certificate of Title.

[81] I prefer the evidence of the Defendants to that of the Claimants in relation to the decision and agreement surrounding the acquisition of the house. The Defendants' assertions that the house was intended to be a family home is supported by the evidence of both Linette Haughton and Hermaine Hardie, which I accept as credible. This is that several family members, including the 1st Claimant, and the Defendants, came up with the idea to buy a family home so that family members from overseas could have a comfortable place to stay when they visited, and the 2nd Defendant and his family would have a proper and better place to live. I also accept Ms. Haughton's evidence that over the years Joyce and Lloyd had been looking for houses to purchase, and that whilst on vacation in Jamaica, she had the opportunity to go with them lo look at houses in Norbrook, Aladyce (sic) Drive, Hope Pastures, Mona Heights and Waterloo Road. It is undisputed that the family was close knit at the time of the purchase of the property, and that on prior

occasions when the family visited Jamaica, most of the time they would stay with the 2nd Defendant.

[82] The 2nd Defendant's daughters also have vacationed in Canada with the 1st Claimant. This was not disputed by the Claimants, nor did they show to the court that Ms. Haughton and Ms. Hardie should not be treated as independent and unbiased witnesses. I find that the inescapable conclusion from the evidence is that the Claimants did indeed take control of the acquisition process for the most part, in that they initiated contact with the vendor, mortgage bank and the attorney. They made the decision as to how much money to borrow and paid the deposit. I accept the Claimants' assertion that they decided to whom the property should be rented and arranged how rent receipts were to be collected. The latter was not disputed by the Defendants.

[83] In respect of the financial contributions made to acquire the property, I find that several family members other than the Claimants made contributions, including both Defendants. Whilst acknowledging that financial contribution in and of itself is not definitive of where beneficial interest should lie, the circumstances of this case, it is my view, show that the intention of the parties is that the property was to be a family home, and beneficial interests were to lie with all the parties named on the title.

[84] In that regard, I find that the portion of money contributed by the 1st Defendant that has not been repaid (US$30,000.00) was intended to be an investment with a view to beneficial ownership, and not a loan as contended by the Claimants. It is undisputed that the 1st Defendant took out a loan of US $70,000.00 secured against the equity in her home that she shares with her husband, in order to facilitate her contribution to the purchase of the subject property in July of 2007. Her evidence is that, up to the date at which she gave evidence at trial, she was still paying back the loan, inclusive of interest. This court finds it implausible that a retired and disabled army veteran would put herself in such a position, so as to risk her home, if it were that it was not intended that she would have a beneficial

interest in the property. Further, it is unfathomable that, if the money was indeed a loan, up to the date of trial, roughly nine (9) years since the money was sent, no demand or complaint was made by the 1st Defendant to the Claimants or anyone else for and in respect of the return of her money. There is no evidence by any of the parties that any request was made for an explanation, nor was any explanation offered, as to why the money repaid was short $30,000.00, which in my view could hardly be considered a menial sum.

The Claimants would have the court believe that, the 1st Defendant, bearing in mind the status of her health, retired status, and that the home securing the loan is her personal residence for which she shares ownership with her husband, would continue to discharge the burden of repaying the bank for a loan over a span of at least nine years, without so much as a complaint, when the said loan was not intended to enure to her benefit. The court finds such a view preposterous and highly improbable, and the willingness of the Claimants to now repay that sum of money does not sway the court as to the intention to be inferred from the above circumstances.

[85] I also accept the evidence of the 2nd Defendant, supported by that of Linette Haughton, that, Uncle George contributed US$15,000.00 to the purchase of the house. The 2nd Defendant asserted similarly, in that his evidence is that Uncle George told him of his contribution in the presence of the 1st Claimant. Ms. Haughton's evidence is also that she herself contributed US$2000.00 to the house and loaned US$3000 to Mrs. Burke Scott, which was returned. Ms. Hardie's evidence is that she contributed US$500.00 towards the house, which was not a loan. I accept this evidence.

[86] I however have found that there is insufficient evidence to support the 2nd Defendant's contention that he paid the closing costs, deposit and surveyor's fees. I find his evidence in this respect not to be relied on. Not only has the 2nd Defendant failed to submit any documentation to substantiate what he said he contributed, but in cross-examination could not recall the amount he said he paid, nor could he

tell the court the cost of the deposit or closing costs, His evidence is that he did get a receipt for closing costs. The 1st Defendant stated she was advised by both Mrs. Burke Scott and George that Mr. Burke paid $150,000.00 for the land survey. Although he stated that the receipt for the initial payment to Frater, Ennis & Gordon represented monies paid on behalf of himself and others, he was not able to indicate how much was paid and by whom. I find the Claimants evidence to be more credible in this regard. Further, the 1st Defendant admitted that she did not contribute to the deposit, it was already paid when she came to Jamaica, and she could not recall the amount of the deposit.

[87] In respect of the mortgage, whilst I find that the Claimants paid most of the mortgage outside of the rent paid by the tenants, I accept the Defendant's submission that this was the arrangement agreed to by the parties. I reject the Claimants contention, in light of my finding, that the 1st Defendant's contribution was not a loan, and the fact that the 1st Defendant was not required to pay mortgage shows that there was no intention for her to be a beneficial owner. I accept the evidence of the 1st Defendant, that there was no arrangement for her to pay mortgage in light of her contribution via the loan and the fact that she was paying back the loan with interest. I also accept that each person was to contribute what they were able to. The JA$20,000.00 per month paid by the 2nd Defendant being what he could afford based on his employment status and income.

[88] The law indicates that in cases of this nature involving familial situations, the law of resulting trusts is of limited application, as families routinely contribute in unequal amounts based on what they can afford and out of love and affection. **(Madden vs Darlington claim No 2010 HCV 02771 Robert Stephenson vs Carmelita Anderson SCC No 55/2003)**

[89] In respect of the contributions made to the mortgage after the dispute began and the mortgage went into arrears, the documentary evidence before the court is that in 2013, Ms. Hardie contributed a total of CAD $7,150 towards the mortgage. The evidence of the 1st Defendant on amplification of her witness statement is that

along with the 2nd Defendant, up to April of 2015, they paid a total of JA $2,955,049.85. In my view, these contributions after the dispute arose do not demonstrate what the intention of the parties was upon acquisition of the property in respect of beneficial ownership.

[90] I am fortified in this view by the fact that all the parties are named in the agreement for sale ("Exhibit 3") as purchasers of the property as tenants-in-common in equal shares. It is not disputed that the parties had the counsel of Mr. Facey, an experienced attorney- at- Law. His evidence which I accept is that the emphasis of the firm is largely conveyancing. I am satisfied by the evidence, particularly that of Mr. Facey, that all the parties, the Claimants included, instructed him as to their intentions to purchase the property as tenants-in-common in equal shares, and were fully advised by him as to the effect of the sale, to which they indicated their acceptance. I am further fortified by the evidence of Mrs. Tashalee Morgan when she states that all parties were vetted and approved for mortgage and for the owners of the subject properly to get pre approval for the mortgage financing they would have to be qualified.

[91] In my view all the parties named on the certificate of title are legally indebted to JNBS in respect of the mortgage. All the parties were required to be vetted and approved in respect of the loan in order for the loan to be approved, and all the names of the parties are stated on the letter of commitment and offer of finance. The evidence of Ms. Morgan is that all parties were required by the bank to be qualified in order for the loan to be approved. So that, although the Claimants were the ones who initiated the process and whom she assessed initially, she subsequently had to request documentation and assess the qualifications of the other parties upon noticing they were also parties to the sale. Also, the letter of commitment ("Exhibit 10") dated July 24, 2007 bore the name of all four parties. It further showed that the application was approved. I am even further convinced that the intention was for all the parties to be indebted for the mortgage by the evidence of Ms. Morgan that when she contacted the 1st Claimant about the mortgage

arrears and how they could be cleared, Mrs. Burke-Scott gave her the 2nd Defendant's phone number. Ms. Morgan subsequently called the 2nd Defendant advising him of the arrears, to which she indicates that he made promises to pay but eventually stated "the bank would have to do what it had to do" because he had no money. This portion of evidence was not challenged by the Claimants. In my estimation, if it were that Mr. Burke was not intended to be an owner of the property he would have no responsibility in respect of mortgage and Mrs. Burke Scott would not have referred Ms. Morgan to him in order to collect arrears.

[92] In coming to this view, I have placed no weight on the typed letter in evidence alleged to be from the 1st Claimant to the 2nd Defendant telling him that she was going to take his name off the title because he was not keeping up with his mortgage payments. This letter was not brought to the attention of the 1st Claimant prior to trial, nor was she cross-examined in relation thereto. The letter surfaced for the 1st time when the 2nd Defendant was in the witness box. I therefore find that it would be unfair to the Claimants, particularly the 1st Claimant, for the court to rely on it, the Claimants not having had an opportunity to challenge the letter by way of evidence.

The Claimants sought relief, by way of Fixed Date Claim Form that essentially they are the sole owners in law and equity of the subject property, and as such, the Defendants hold the property on trust for their benefit. The other relief sought flows from this. From the foregoing discussion, and in all the circumstances, the evidence before the court indicates that, on a balance of probabilities, the common intention of the parties was for the property to be held as is stated on the certificate of title, with all four parties being beneficially entitled to a 25% share in the property as tenants-in-common in equal shares. There is nothing placed before the court to deflect this position. There is therefore no basis upon which the court could grant the relief sought. I appreciate that there are inconsistences and discrepancies in the evidence on both sides but I prefer the evidence of the Defendants to that of the Claimants. The relief sought in the Fixed Date Claim is refused.

THE ANCILLARY CLAIM

[93] The Ancillary Claimants have pleaded several causes of action arising out of events occurring "*on or about the 6th of February 2010 and on 'divers days' between 2009 and 2010*". They seek damages for *"trespass, nuisance, threats, assault, defamation of character, breach of contract and trust, hurtful feelings, pain and suffering and intimidation"*.

[94] The allegations are that on these days the 3rd Ancillary Defendant, as an agent of the 1st and 2nd Ancillary Defendants, by himself or with their permission, attended on the property accompanied by two unknown officers, and using his police powers, committed 'trespass, nuisance, threats, assault, defamation of character, breach of contract and trust and intimidation' against the Ancillary Claimants. He further kicked open the door of the 3rd Ancillary Claimant and assaulted her and the 2nd Claimant. For these actions, aggravated and exemplary damages are also sought.

[95] Damages are also sought against the 1st and 2nd Ancillary Defendants for causing the property to be advertised for sale in the newspaper, which resulted in trespass and nuisance by other persons. It is alleged that such action caused trauma to all the Ancillary Claimants, particularly the 1st Ancillary Claimant who was receiving treatment for shock and trauma.

[96] The claims against the 4th and 5th Defendants were discontinued. The 3rd Defendant therefore no longer remains in his capacity as a police officer but in his personal capacity. By all appearances, the Ancillary Claimants have abandoned the claims for defamation of character and breach of contract as no submissions have been made and no evidence adduced in relation to both heads. It is important to note that no police report was presented to the court in relation to the allegations of assault by Mr. Donaldson.

SUBMISSIONS ON THE ANCILLARY CLAIM

1st, 2nd& 3rd ANCILLARY CLAIMANTS' SUMISSIONS

[97] In relation to the claim for trespass, the Ancillary Claimants rely on the cases of **Keay v Goodwin** 16 Mass. 1 635 and **Saulsberry v Saulsberry** 121 F2D 318. ***Keay*** is relied on for the proposition that where there are tenants-in-common in a dwelling house, severally furnishing in different parts, no tenant has a right to disturb the other occupant by removing his furniture. ***Saulsberry*** is also relied on for the proposition that 'each co-owner has a right to exercise acts of ownership over the whole property subject to the qualification that, in so doing, he must not interfere with the like right of any other co-owner.

[98] It is submitted that, even if the 2nd and 3rd Ancillary Claimants were tenants, which it is argued they were not, they would be entitled to quiet enjoyment in the portion of the property which they occupied.

[99] Further, it is asserted that, even if the 3rd Ancillary Defendant had entered the property lawfully, he trespassed on the 2nd and 3rd Ancillary Claimants' portion of the property and thereby committed nuisance. The Ancillary Claimants contend that the issue that arises therefrom, is whether the 3rd Ancillary Defendant committed these acts outside the scope of what he had been permitted to do by the 1st Ancillary Defendant. They posited that from the evidence of the 1st Ancillary Defendant he did not.

[100] The Ancillary Claimants rely on the law outlined in the **Commonwealth Caribbean Law Series** (at pages 384-385, 388 and 391) in relation to the commission of a tort by a servant and the circumstances in which the master would be vicariously liable. They also rely on excerpts from the text **Elements of Land Law** (3rd Ed. Pages 836 – 837), to support the submission that the acts of the Ancillary Defendants could be considered as being exclusionary behaviour or an ouster, in the context of an available remedy for trespass against a co-owner. It is submitted

that there is “clear evidence of a pervasive conspiracy to ouster [sic] the Ancillary Claimants”.

[101] In relation to the nuisance claim, the Ancillary Claimants rely on the law relating to private nuisance in the **Commonwealth Caribbean Law Series** (pages 179 -180), and submit that the Ancillary Defendants committed tangible damage, as well as substantial interference with the enjoyment of the land.

[102] In relation to the evidence, it is submitted that the Court should reject the evidence of Joseph Donaldson as being inconsistent and a fabrication. The evidence of Mr. Donaldson that he had told Aunt Joyce that it was a bad idea for her to let the 2nd Ancillary Claimant stay in other side of the house as he should have been paying half of the rent, is highlighted. It is argued that this evidence shows that Mr. Donaldson was resentful of the 2nd Ancillary Claimant from the outset. Further his evidence in cross-examination as to how the 2nd Ancillary Claimant came to be a tenant is inconsistent with paragraph 4 of his witness statement. His evidence in respect of the times he went to the visit the property is inconsistent, in that, in his witness statement he said he did not go back after January 2010, but on amplification in Court, stated that the events recounted at paragraphs 17 and 18 of his statement took place at the property. It is further argued that in cross-examination, Mr. Donaldson placed himself on the scene on February 6, 2010 by stating he was there as an observer. It is submitted that this was the day on which Mr. Donaldson’s wife and the 3rd Ancillary Claimant spoke to the 1st Ancillary Defendant on the telephone, and the same day that the Duhaney Park police were called and visited the scene. Paragraphs 11-14 of Mr. Donaldson’s statement (that, inter-alia, on instructions from Joyce Burke he and his wife visited the property to remove Joyce’s furniture), puts Mr. Donaldson on the scene with his wife. Further, in relation to Mr. Donaldson’s credibility, the Ancillary Claimants note that Mr. Donaldson had staunchly denied that he was served with this matter, but later admitted that he had been served when spoken to by the Judge.

[103] In relation to the assault, it is submitted that, based on the evidence of the 2nd and 3rd Ancillary Claimants, Mr. Donaldson attended on the property more than once, assaulted them, and damaged a room door in the section occupied by the 2nd Ancillary Claimant and his family. It is submitted that the test as to whether there was an assault is the objective test of whether a reasonable man would have feared that violence was about to be applied to him. In relation to the delay in reporting the assault, it is submitted that it is not unusual that family are not quick to run to the law in situations like these, and as such nothing should be read into that.

[104] In relation to the claim for personal injury, it is submitted that the 1st Ancillary Claimant's evidence that she suffered severe depression and stress as a result of the property being advertised by the Ancillary Defendants, is substantiated by her medical certificate included in her list of documents. This certificate, it is argued, should be treated as evidence since it was filed in accordance with the **Evidence Act** and the **Civil Procedure Rules (CPR)**, and the Ancillary Defendants made no objection to it. It is also submitted that there is no issue of remoteness as there are compelling reasons to show that the 1st and 2nd Ancillary Defendant must have been aware that the 1st Ancillary Claimant suffered from post-traumatic stress disorder arising from her service in the United States Army, as well as a brain tumour. Further if the Court finds that the Ancillary Defendants' conduct were of such to trigger depression and stress, then the rule that one 'takes their victim as you find them' is applicable, and the 1st Ancillary Claimant is entitled to damages. Moreover, it is contended that during trial, no cross-examination or denial was made concerning the 1st Ancillary Claimant.

[105] The Court is therefore invited to find that the 3rd Ancillary Defendant, and by extension, his principals, committed trespass "in that he entered into the area occupied by the 2nd and 3rd Ancillary Claimants, created nuisance by his conduct...", and that the preponderance of evidence lies in favour of the 2nd and 3rd Ancillary Claimants' evidence.

1st, 2nd& 3rd ANCILLARY DEFENDANTS' SUBMISSIONS

[106] The Ancillary Defendants submit that the Ancillary Claim is baseless, frivolous, and an abuse of process, and constitutes an attempt by the Ancillary Claimants to obfuscate the real issues in the original claim.

[107] It is submitted that the allegations of trespass and nuisance are to be rejected, as it is trite that the law of trespass presumes the trespasser had no lawful authority to come onto the property. Further, private nuisance must be substantial, and the party complaining must have exclusive possession. In circumstances where there is joint ownership, each owner has a right to the property. The 3rd Ancillary Defendant had lawful authority to visit the property from the 1st Claimant, an owner of the property. It is submitted that it is clear from the evidence that the Ancillary Claimants knew of Mr. Donaldson's connection with the family, considering that he was the husband of Lloyd Burke's niece and the cousin of Nadia Burke. They were aware that he had keys to the property and that he collected receipts for the 1st Claimant. Further, Lloyd Burke's own evidence is that Mr. Donaldson was at the property during the wedding in 2009, and they would cook together and *"full them belly*". The assertion that Mr. Donaldson visited the property in the capacity of a police officer is rejected.

[108] In relation to the nuisance claim, it is submitted that the claim is based on two incidents, and two incidents are insufficient to substantiate such a claim, as nuisance must be continuing.

[109] The Court is also urged to reject the allegations of assault, intimidation, and that a door was kicked in, and to treat it as a fabrication, as no prosecution for either crimes was pursued in Court. There is also no evidence of any disciplinary proceedings pursued by the Ancillary Claimants against Mr. Donaldson. Further, based on the evidence of Sergeant Canute Collins, which the Ancillary Defendants urge the Court to accept as credible, no reports of assault or threat were found to have been made at either the Duhaney Park or Half-Way Tree Police Station. This,

it is proposed, is supported by the Ancillary Claimants' own witness, Detective Sergeant Edwards. There is no evidence of a damaged door or broken lock, and no civil claim had been filed in relation to the allegations until the filing of the initial claim in this matter.

[110] In relation to Nadia Burke's contention that she was assaulted by Mr. Donaldson in 2009, and had given a statement which she refused to sign on the advice of her attorney, it is submitted that there is no specific evidence of the offensive or misrepresentative aspects of the statement which caused her not to sign. The Ancillary Defendants therefore ask the Court to dismiss the Ancillary Claim.

LAW & ANALYSIS

[111] The Court has before it an arduous task arising from the unclear and convoluted way in which the ancillary claim has been pleaded. The submissions in support are set out in a similar way. To a great extent, it is not clearly set out what allegations are made in respect of each cause of action. In that regard, the court has sought to extract, as far and as best as possible, the case for the ancillary claimants. The ancillary claimants seek damages for *"trespass, nuisance, threats, assault, defamation of character, breach of contract and trust, hurtful feelings, pain and suffering and intimidation"*. In the circumstances of this case it seems to me that 'hurtful feelings, pain and suffering and intimidation' are not causes of action that would arise, that is if in the circumstances they are at all known to Jamaica law.

[112] Threats and intimidation, however, may fall under the head of assault, and where they arise on the evidence the court will treat them as such. In respect of pain and suffering, it appears from the pleadings that the pain and suffering alleged arises from the acts of nuisance alleged and the alleged advertising of the property in the newspaper. It is unclear from the pleadings, though what cause of action the Ancillary Claimants are saying arises from the wrongful advertisement. In that they say that the property was advertised without their consent and resulted in persons trespassing and creating a nuisance, and that such action was a breach of 'solemn

agreement' between the parties that has led to trauma. In my view this discloses no reasonable cause of action in relation to the wrongful advertisement itself.

[113] It is also unclear as to what is alleged to have occurred and when. The ancillary claim makes reference to an incident "*on or about the 6th of February 2010";* on 'divers days between 2009 and 2010"; and "on other occasions during the same period". Except for the incident on the February 6, 2010, the evidence is equally unclear. The court therefore will examine the allegations in relation to the available evidence.

[114] In respect of defamation I have previously stated this this cause of action seems to have been abandoned. Similarly, in relation to breach of contract and trust, the Ancillary Claimants have made no submissions and it is not seen where these arise on the evidence. The court is, therefore, left with the claims of assault, nuisance, and trespass.

THE EVIDENCE

The 6th of February 2010 and 'divers days' between 2009 and 2010:

[115] None of the witnesses have been consistent or ad idem in relation to the dates and details of the incidents outlined. However, what is agreed, with the exception of Mr. Burke, is that on one occasion in 2010, around February, on the instructions of Mrs. Burke Scott, Mr. Donaldson went to the premises to remove furniture. Mrs. Burke Scott's evidence is that sometime in 2010, she asked Mr. Donaldson and his wife Paulette, to remove furniture and clean up her room in preparation for renting. Nadia Burke's evidence is that around January or February 2010, Mr. Donaldson and his wife came to the premises with a removal truck, accompanied by two policemen and a removal person. Paulette opened the gate with a key and produced a letter for them to read with instructions from Auntie Joyce for her and her family to permit the removal of Aunt Joyce's furniture and for them to vacate parts of the house. On that occasion, her mother and father were present and Mr.

Donaldson did not say or do anything to them. Mr. Donaldson's evidence is that around January or February 2010, Mrs. Burke Scott telephoned him and asked him to remove her furniture for safe-keeping. He went to the property with his wife and did as asked. Mr. Burke is the only one who denies that Mr. Donaldson was at the premises in February 2010, and avers that it was only Mr. Donaldson's wife that came for the furniture. He denied that the police were called because he and his family were behaving boisterously.

[116] In relation to February 6, 2010, which appears to be a different occasion from above, Nadia Burke gave evidence that she was at home with her brother when she heard the front grill open. She saw Paulette and Mr. Donaldson and two other persons. They were there to inspect the house for sale. She observed them walking around the house taking pictures. She instructed her younger brother to go into their room and lock the door. She went outside and called the Duhaney Park police station. They said they would send a patrol car. When she went back inside, the four persons were standing in the passage way and she heard Paulette saying "kick it off D". D is the name she calls her husband. While approaching she heard three loud bangs. She then saw her room door banged open and swinging. The lock was damaged. Her sister Nordeen was in the room and appeared terrified.

[117] She was scared. Mr. Donaldson said nothing to her. She went back outside and called the police again. Two police officers came about 20 minutes later. They advised her to go to the station and make a report, which she did at the Duhaney Park Police Station, three (3) days after the incident. She did not go back to the police after that, and based on advice she did not follow up. Nadia also gave evidence that Mr. Donaldson never wore police uniform except for on one occasion, but she could not recall which one.

[118] Mr. Donaldson's evidence, on the other hand, is that he has never been to the property with police officers or with anyone from the bank. Not only does he deny that he took pictures of the property, kicked off the door and that his wife told him

to “kick it off”, but he denies being at the premises any at all February 6, 2010. His evidence in cross-examination is that he recalled going to the premises in January of 2010 but that he did not go back any time after January 2010. He later amended that in re-examination to say that when he said January 2010 he meant February 2010, and that January 2011 was the last time he visited the premises.

[119] The evidence of Sgt. Gladstone Edwards, who was stationed at the Duhaney Park Police Station February 6, 2010, is that he received a report on that day from a lady who resides in the Molynes Road area, following which he sent a team of police to the location to maintain law and order. He did not go to the premises himself and no entry was made in the station diary. There was no further investigation into the matter.

[120] There is no other evidence before the court from any other person who could speak directly to whether the events alleged did in fact occur. There is also no police report nor a statement from Nadia Burke before the court in relation to these occurrences. The evidence of Sgt. Collins is that having received instructions from the Attorney General’s Chambers to investigate the allegations of assault and threats, he interviewed and recorded a statement from Nadia Burke, but, on the advice of her attorney she refused to sign. Further, his checks made at the Duhaney Park Police Station and the Half-Way Tree Police Station for the period October 2009 to March 2010 revealed no entries in the station diaries in relation to any assault or threat reported by either Nadia Burke or Lloyd Burke.

[121] In relation to the statement, Nadia Burke stated that she refused to sign because it contained things that she had not told the officer. In relation to the report, in cross-examination she testified that she did receive a report receipt but could not recall what had become of it.

Trespass

[122] Trespass is defined in **Clerk and Lindsell on Torts** (22nded. at Paragraph 19:01) as *"any unjustifiable intrusion by one person upon land in the possession of another"*. This definition was accepted by the Court of Appeal in the **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42, at paragraph 54.

[123] Possession is defined in **Clerk and Lindsell (supra)** as "*the occupation or physical control of land*" (19-13). In relation to co-owners of land, it is widely accepted that an action for trespass by one co-owner against another will not ordinarily lie, except in limited circumstances. Such an action may only lie, if one owner has actually been ousted or dispossessed by the other (paragraph 19-27 of **Clerk and Lindsell)**. This is because each co-owner is entitled to possession of the whole land.Similarly, **Halsbury's Laws of England** (Volume 97 (2015)/5, at 580), states that a claim for trespass can only be maintained against a joint tenant or a person entitled in common under a trust of land if 'the co-tenant expels him from the land or destroys the subject of the co-tenancy'.

[124] These principles were applied in the case of **Thomas Jacobs v William Seward** (1872) L.R. 5 H.L. 464wherein the Court dealt with the rights of a tenant as against his co-tenant and whether an action for trespass would lie. In that case, it was held, per Lord Hatherley, that it appeared to be perfectly settled that *"...unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned"* (pg. 472). He went on further to say, at page 474, that, no action can lie against a tenant-in-common as long as he is lawfully exercising his right as a tenant-in-common, and that the cases in which such an action would lie *"are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights"*.

[125] The Ancillary Claimants have argued that the claim by the Ancillary Defendants that they have no interest in the land amounts to ouster. In support of this they rely on a passage outlined by the learned authors **Kevin Gray and Susan Francis Gray in Elements of Land Law,** 3rd ed. (at pages 836 and 837). I find the following portion useful.

> *"Ouster comprises any unequivocal and express 'denial of the Title and right of possession' of a co-tenant, and is wide enough to cover not merely instances in which one tenant evicts or excludes another from the land, but also circumstances where he otherwise interferes with the common enjoyment of the land. The old cases suggest that, in order to establish trespass, this interference must be such as to tend towards the destruction of the co-owned property in its original form. The modern understanding of ouster is undoubtedly somewhat broader, extending beyond 'actual' ouster to include 'constructive' ouster (eg. where a co-owner is indirectly caused to leave the co-owned property). Although conduct which merely makes life 'nasty for the co-tenant' may not constitute ouster, ouster may occur with unconsented introduction of new lover to share co-owed premises or with persistent denial of the title of the other co-owner.*

[126] The questions that arise, therefore, are (1) did Mr. Donaldson unlawfully intrude upon the Ancillary Claimants possession of the land? (2) Do the actions of the 1st and 2nd Ancillary Defendants (as complained of) amount to an ouster or dispossession of the Ancillary Claimants? In my view, the answer to both questions is no. This conclusion is borne out by the evidence and reasoning set out below.

[127] The particulars of trespass pleaded are that the 3rd Ancillary Defendant, along with unknown policemen attended upon the subject property and kicked open the door of the 3rdAncillary Claimant. No date was specified as to when this occurred. Further, it is alleged that the 1st and 2nd Ancillary Defendants, along with their agents caused the relevant property to be advertised for sale in the daily newspaper without the consent of the Ancillary Claimants, thereby causing persons to come onto the property resulting in trespass and nuisance.

[128] Since each tenant-in-common has the right of possession of the whole land, the Ancillary Defendants would have had equal right to possession of the property as would the 1st and 2nd Ancillary Claimants. This possession they would be entitled to exercise through whomever they so authorized so long as such acts of

possession did not oust or dispossess the other tenants. It is undisputed that Mr. Donaldson had the authorization of the 1st and 2nd Ancillary Defendants to enter the premises. It is the evidence of Mr. Donaldson and the 1st Ancillary Defendant, which was acknowledged by Mr. Burke, that Mr. Donaldson had been given a key to access the premises by Mrs. Burke-Scott as her agent. He was tasked with the responsibility of going to the premises and collecting rent receipts at the end of each month, as well as, on specific occasions, removing furniture and having the property cleaned in preparation for renting. This was corroborated by the 2nd Ancillary Claimant, who agreed that that Mr. Donaldson would attend on the premises from time to time on behalf of the 1st Ancillary Defendant to collect receipts, and that his sister had given Mr. Donaldson a key.

[129] Nadia Burke gave evidence that on one occasion in late 2009 she saw Mr. Donaldson on the premises and assumed he jumped the fence. She saw him borrow the tenant's key to leave. I do not find this to be a credible account as I accept the evidence of the three witnesses, including her father, that Mr. Donaldson had a key. Further, in using the word 'assumed' it is clear that she did not see him do this. I therefore, find that Mr. Donaldson had permission on all occasions he was present at the property. The Ancillary Claimants argue that even if Mr. Donaldson had entered the property lawfully he committed nuisance and acted outside the scope of what he had been given permission by the 1st Ancillary Defendant to do. I presume that this is in relation to the alleged events of February 6, 2010. No authority was provided to substantiate this proposition and I am aware of none. The authors of **Halsbury Laws of England** Volume 97(2015)5 at paragraph 563 note that a person will have committed trespass, if, having entered the land lawfully, they remain after that permission has expired. There is no evidence in this case to show that Mr. Donaldson's permission to be on the property was withdrawn. I do not think that the commission of a nuisance if indeed committed, without an express revocation of permission, could amount to trespass.

[130] In relation to the 1st and 2nd Ancillary Defendants, in my view, the granting of permission to Mr. Donaldson to carry out the above acts could not in any way amount to an ouster or dispossession of the 1st and 2nd Ancillary Claimants. In law, ouster means 'ejection from a property', whilst dispossession means 'the action of depriving someone of land, property or other possession' (**Oxford Living Dictionaries, online, Oxford University Press, 2018)**. In my view, entering premises to collect receipts, cleaning and removing furniture clearly does not meet that standard.

Nuisance

[131] The Ancillary Claimants allege private nuisance, in that, the Ancillary Defendants interfered substantially with the enjoyment of the land, as well as caused tangible damage. The Ancillary Defendants, reject this claim on the basis that the party complaining must have exclusive possession, which the Ancillary Claimants do not; the nuisance must be substantial; and the nuisance must be continuing, which in this case it is not as there are only two incidents, in which nuisance could probably be considered.

[132] Private nuisance is defined in **Clerk and Lindsell 22ED para 20-01** as 'an act or omission which is an interference with, a disturbance of or annoyance to, a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land'. I have been unable to find any precedent as it relates to the peculiar circumstances of this case, namely, that the nuisance is being alleged by and against co-owners.

[133] Generally, the authorities indicate a difference between everyday 'nuisances' and actions that constitute actionable nuisances. It is accepted that each person must put up with a certain level of discomfort and everyday annoyances. The Court will normally look at what a reasonable man should be expected to endure, and the Court will seek to 'strike a balance between the right of the Defendant to use his property for his own lawful enjoyment, and the right of the Claimant to the

undisturbed enjoyment of his property' **(Clerk & Lindsell, 22nd ED paragraph 20-10)**. It seems to me that a person sharing possession of a property with others, will have to endure even more than a neighbour, owing to the closeness with which they have to interact. In my mind, this would include whatever the other owners might choose to do in the ordinary course of lawfully exercising their possession, barring unreasonable actions or actions intended to harass the other owner.

[134] Lord Wright in **Sedleigh-Denfield v O'Callaghan** [1940] A.C. 880 at 903 laid down the following oft-used test:

> *"Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact."*

[135] The Ancillary Claimants have taken issue with the advertising of the property for sale (which was admitted by the 1st and 2nd Ancillary Defendants), and argue that, as a consequence of that advertisement, persons came to view the house without their permission. In my view, this argument is without merit. A person endorsed on a title as tenant-in-common, unlike a join tenant, is empowered to part with their interest as they see fit, and without reference to the other tenants-in-common. So that, if the Ancillary Defendants had indeed commissioned the advertising of the house for sale, they would have been so entitled as long as they sold only the interest that they were vested with. Incidental to trying to sell the property would certainly be the viewing of the property by prospective purchasers.

[136] The Ancillary Claimants have further asserted that the Ancillary Claimants have suffered trauma as a result of the advertisement, and the 1st Ancillary Claimant in particular, has suffered trauma and shock and is receiving medical treatment and have sought damages for 'hurtful feelings' and pain and suffering. I am not aware of any head of damages called 'hurtful feelings'. In relation to pain and suffering, it is unclear from the pleadings as to the cause of action under which this is claimed.

The Court can only presume that it is trespass and nuisance, since those are the causes of action pleaded in relation to the placement of the advertisement.

[137] If the Ancillary Defendants did in fact authorize the advertising of the property in the newspaper for sale, which in my view there is insufficient evidence that they did, this does not amount to an ouster. As tenants-in-common in my opinion they hold a separate and divisible legal interest in their share of the property and as such would be entitled to dispose of their share as they see fit. They would not legally be able to dispose of the entire house, as, in law, one cannot dispose of a share they do not possess. They would therefore be entitled to have prospective buyers come and view the property in aid of any prospective sale of their share. As inconvenient and discourteous as it would have been, it seems to me, it would not have been an illegal or tortious action for which damages for pain and suffering, shock and trauma could be recovered.

[138] Furthermore, even if it were, there is insufficient evidence before the court that the 1st Ancillary Defendant suffered any shock, trauma or pain and suffering occasioned by the advertisement. The documents before the court only indicate that she is a disabled veteran receiving medical treatment and are not even medical reports signed by a doctor.

Assault

[139] Assault is defined in **Clerk and Lindsell on Torts 22nd ED** (supra), as *'an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person'* (para. 15-12; **Collins v Wilcock** [1984] 1 W.L.R. 1172, 1178). The learned authors note that, to satisfy the cause of action, the impugned act of the Defendant must have been accompanied with the capability of the defendant to carry through a battery.

[140] The ancillary claim alleges that the 3rd Ancillary Defendant assaulted the Ancillary Claimants on February 6, 2010, as well as on 'divers days', in that he attended on the

subject property with unknown police officers, making it known that he was using his police powers and warning that he would exercise such powers. This Court is of the view that the assault alleged to have taken place on 'divers days' is not sufficiently particularized, and moreover there is no evidence before the court to substantiate same. There is no evidence that Mr. Donaldson ever used his police powers at the premises. In fact, Lloyd Burke gave evidence that he was not afraid of Mr. Donaldson, and Nadia Burke gave evidence that except for one occasion which she could not remember, Mr. Donaldson never wore his uniform. She gave no evidence of his presence at the premises with any other officers. Mr. Burke also gave no evidence of Mr. Donaldson attending on the premises with any police officers. Moreover, as stated above, he no longer appears in his capacity as a police officer. I find therefore that there is insufficient evidence of an assault as alleged. On the evidence before it, there is no basis for the Court to find that an assault, trespass, nuisance or any of the other allegations in the Ancillary Claim took place.

CONCLUSION

[141] The Court has found that based on the evidence before the Court on a balance of probabilities**, on the claim** the common intention of the parties was for the property to be held as stated in the certificate of title that all four (4) parties named on the title are beneficially entitled to a 25% share in the property as tenants in common in equal shares and on the **Ancillary Claim** that on the evidence before the court there is no basis for the court to find that an assault, trespass or nuisance has been committed.

The Court has also found that by all appearances the Ancillary Claimants have abandoned the claims for defamation of character and breach of contract. The Court therefore orders as follows:

ORDER

1. The relief sought in the Fixed Date Claim Form is refused. Hence judgment for the Defendants / Ancillary Claimants on the claim.

2. Costs of the claim to the Defendants /Ancillary Claimants to be agreed or taxed.

3. The relief sought in the Ancillary Claim is refused. Hence judgment for the Claimants /Ancillary Defendants on the Ancillary claim.

4. Costs to the Claimant / Ancillary Defendants to be agreed or taxed.