IN THE REPUBLIC OF TRINDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2014-04505

ERIC POTTER

Claimant

AND

VERDEL FOXX

1st Defendant

MARVIN WARNER

2nd Defendant

Before the Honourable Madam Justice Madame Justice Quinlan-Williams

Attorney for the Claimant: Ms. Mohanie Maharaj-Mohan
Attorneys for the Defendant: Mr. John Heath instructed by Ms. Sonja Gopeesingh-Luckhoo

JUDGMENT

1. Before the court is a claim for vacant possession and trespass to land filed by the Claimant, Eric Potter against the First Defendant, Verdel Foxx and the Second Defendant, Marvin Warner. At the end of the trial on the 18th April, 2018 the court made an order that there be the filing and exchanging of written addresses on or before the 21st May, 2018, and any replies to be filed and served on or before the 4th of June, 2018. The date for the delivery of judgment was fixed for the 28th June, 2018. The court now delivers the reasons[1] for the court's judgment is contained in the written judgment.

[1] A synopsis was read in court on the date of delivery of the judgment.

Background

2. The claimant, filed the claim form and statement of case on the 21st November, 2014. In it, the claimant pleads that he is the fee simple owner of a parcel of land comprising freehold land together with a dwelling house thereon at #11 Riley Road, Claxton Bay (hereinafter called "the property"). The description, location and dimensions of the property are not in issue. The first and the second defendants, occupy the left apartment (hereinafter called "the apartment") downstairs the dwelling house. The first and second defendants are husband and wife. The first defendant came into occupation of the apartment in the year 2000. The second defendant joined the first defendant in occupation of the apartment in the month of July in the year 2008.

3. The claimant seeks the following reliefs:
    i. An order against the first and second defendants to deliver up to the claimant vacant possession of the apartment.
    ii. An order against the first and second defendants that they pay to the claimant the outstanding sums due and owing for the use of electricity from the month of December, 2011 to December, 2013 in the sum of Six Thousand and Three Hundred Dollars (S6,300.00) and continuing until the date of the order.
    iii. An order against the first and second defendants that they pay to the claimant the outstanding sum of One Thousand and Nine Hundred Dollars ($1,900.00) for WASA bill for the period December, 2011 to November, 2014 and continuing until the date of the order.
    iv. An order that the first and second defendants tender to the claimant the outstanding sums for rents due and owing from September, 2014 in the sum of Seventy-Five Thousand Dollars ($75,000.00).
    v. Interest.
    vi. Costs.
    vii. Such further or other relief as the court shall deem just.

4. The first defendant was served on the 12th January, 2015 and entered an appearance on the 21st January, 2015. The second defendant was served on the 7th January, 2015 and entered an appearance on 21st January, 2015. The defence of the first and second

defendants was filed on the 13th March, 2015. The first and second defendants also filed a counter-claim on the 13th March, 2015. The claimant filed a reply to the defence and defence to the counter-claim of the first and second defendants on the 13th April, 2015.

Claimant's pleadings

5. The claimant pleads that he is the fee simple owner of the property where the apartment in question is located. In the year 2000, the first defendant came into occupation of the apartment with the permission of the claimant and his mother Adriana Mildred Potter (hereinafter called "Adriana"). Permission was granted to the first defendant because she said she did not have anywhere to live and she needed temporary accommodation.

6. In 2007 to 2008 the arrangement changed. It was agreed that the first defendant would continue in occupation of the apartment as a caregiver of Adriana, in lieu of rent and in addition, pay one half of the WASA and electricity bills.

7. The arrangement was fraught with difficulties both in terms of the care to Adriana as well as the first defendant not paying her half share of the bills.

8. In July 2008, the first defendant brought the second defendant into the apartment and thereafter they co-habited. The claimant says that they then entered a monthly tenancy arrangement. The first and second defendants were to pay the sum of One Thousand Dollars ($1,000.00) per month plus one half of the electricity and WASA bills.

9. The claimant says that the first defendant paid rent for the month ending the 15th July, 2008. A receipt was given for this rental payment. Thereafter two rental payments were made; One Thousand dollars ($1,000.00) on the 7th February, 2010 for the month of February 2010 and One Thousand dollars ($1,000.00) on the 8th August for the month of August 2010.

10. Two payments were made towards the utility bills; One Hundred dollars ($100.00) on the 10th February, 2010 towards the WASA bill for the months of January to March 2010 and Three Hundred dollars ($300.00)[2] on the 8th August, 2010 towards the electricity bill. Receipts were given for these payments.

11. Claims for the payment of rent and sums toward the utility bills were made by the claimant to the first and second defendants. However, the first and second defendants refused to pay any further sums saying "they go own the said property"[3]. No further monies towards either the rent or utility bills were paid by the first and second defendants.

12. The claimant served the first and second defendants with notices to quit on the 10th December, 2011 and 22nd October, 2013. Nevertheless the first and second defendants remain in occupation of the apartment.

<u>First and second defendants' pleadings</u>

13. The first and second defendants' defence was filed on the 13th March, 2015. In that defence the defendants begin by setting out the family relationship between the claimant and the first defendant. The claimant and the first defendant' mother, Bernadette Munroe (hereinafter called "Bernadette") were brother and sister. Their father was a man named Clarence Potter. Clarence Potter was married to Adriana. Adriana therefore was the stepmother of the claimant and the first defendant's mother. Clarence Potter (hereinafter called "Clarence") died in 1997 leaving Adriana as his widow.

14. Bernadette became the caretaker of her stepmother, Adriana, from the time of Clarence's death in 1997. In 2000, the first defendant went to live with her mother Bernadette and Adriana. The first defendant was pregnant at that time with her first child. The first defendant says she assisted her mother with the caregiver duties and

[2] The receipt annexed and marked "D" to the statement of case has the sum of Three Hundred and Fifteen dollars ($315.00)

[3] Paragraph 10 of statement of claim filed on 27th November, 2014.

eventually took over in 2007. Bernadette died in 2007, sometime after the first defendant took over the caregiver duties, full time. In 2007, Adriana was "blind, she could not hear too well and she could hardly walk on her own".[4]

15. The first defendant pleads that "Following the death of Bernadette Munroe in 2007 Mrs. Potter in gratitude for the service given by the First Defendant and on the undertaking of the First Defendant being willing to continue caring for her thereafter, promised that the First Defendant and her daughter Kearra Mia Bonas would be able to continue to live in the left apartment downstairs until their respective deaths. The left apartment was self-contained from the upstairs house but shared one electrical meter and one water main"[5]. In addition to looking after Adriana, the first defendant worked at the Trinidad Dance Theatre in Mon Repos, San Fernando for seventeen years (at the date of filing of the defence) from 1998. The first defendant pleads that her brother, Ian Munroe, assisted her in caring for Adriana as she worked during the day. Her brother built and lived in the apartment on the right side of the building, while the first defendant lives in the left side apartment.

16. The break in the relationship between the claimant and the first defendant occurred in 2010 after the claimant secured the services of a caregiver, Rosemarie Floyd, for Adriana.

17. The first defendant pleads that the claimant's deed to the property was obtained by fraud. The particulars of the fraud pleaded are as follows:
    i. No document has been attached to the statement of case indicating that Mrs. Potter gave instructions to the attorney who prepared the 2013 deed.
    ii. The thumb print of Adriana is not a voluntary thumb print.
    iii. The purported thumb print is a forgery.
    iv. Adriana did not on her own volition or at all execute the 2013 deed.

[4] Paragraph 8 of defence of the first and second defendants filed on 13th March, 2015.
[5] Paragraph 9 of defence of the first and second defendants filed 13th March, 2015

v. The claimant had knowledge of the fraud and the knowledge is to be imputed by the following:

    a. The conveyance is a deed of gift.

    b. The claimant knew of the arrangement whereby the first defendant and her daughter Kerra Mia Monas were to be given a permanent interest in the apartment which they occupied and acted so as to prevent the first defendant and her daughter from receiving that interest.

vi. The witness affidavit of Marlon Roberts annexed to the 2013 deed is a sham.

vii. The witness affidavit of Marlon Roberts states that he personally was present when the deed was executed at Riley Road, Claxton Bay on the 29th of March 2013. In fact, Adriana was relocated to a home in early December 2011 and never returned to the property at Riley Road, Claxton Bay.

18. The first defendant denies being a tenant but rather received a life interest in the property.

19. The first and second defendants deny that the claimant was ever an agent of Adriana or that Adriana was the claimant's mother. The first defendant admits that Adriana gave her permission to occupy the apartment in the year 2000. The permission was not because the first defendant had no place to live.

20. The first and second defendants plead that the claimant lived abroad and only made contact with Adriana periodically. He made a brief appearance in 2008 and only became interested in the property in 2010 as his divorce was imminent.

21. The first defendant denies that there was any agreement in 2007 that the first defendant would remain on the premises as a caregiver to Adriana in lieu of rent, or that there was any agreement at all for a tenancy. The first and second defendants deny any agreement that they were to pay half of the electricity and WASA bills. Payment for those bills came from Adriana's pension.

22. The first defendant pleads that it was out of love and affection that she cared for Adriana. She did not require a salary and she relied on the word of Adriana that she, the first defendant, and her daughter would be given a life interest. The first defendant denies that the relationship between her and Adriana was difficult or that there was any abuse.

23. The first defendant pleads that she had a conversation with Adriana in 2007 thanking her for the care she was giving to her. Adriana, in that conversation, told the first defendant that she and her daughter, would have the apartment for their lifetime. Adriana told the first defendant that she did not have to tell the claimant what she, Adriana, wanted to do with her own property. The first defendant pleads that Adriana would reiterate this promise to her on "an almost daily basis"[6].

24. The second defendant pleads that Adriana gave her permission and blessings for him to be in the apartment in July, 2008. The first defendant was pregnant with the second defendant's child. The first defendant refused to leave Adriana to go live with the second defendant in San Fernando.

25. The first defendant pleads that the claimant knew that the left apartment was to belong to the first defendant and her daughter for their lives, as long as the first defendant was willing to care for Adriana.

26. The first and second defendants plead that there was no tenancy agreement, no agreement to pay any utility bills nor did they ever receive any proper notice to quit.

27. The first defendant pleads that she signed a blank receipt dated 17th July, 2008 at the request of the claimant. She trusted her uncle and did not suspect that he would use it as evidence of rent payment received. She never paid rent. The first and second defendants deny paying any monies for rent or utility bills nor did they receive any receipts.

[6] Paragraph 22 of defence of the first and second defendant filed on the 13th March, 2015.

28. The second defendant asserts that he paid rent for the right apartment in the sum of Fifteen Hundred Dollars ($1,500) for the period of February to March, 2010. The second defendant rented the right apartment for the sum of Seven Hundred and Fifty Dollars ($750.00) per month with the intention of starting up a business. This tenancy agreement ended after four months as the business venture was not successful.

29. The second defendant pleads that the receipt for One Hundred Dollars ($100.00) dated 10th February, 2010 was for money he gave the claimant for traveling to the airport on three occasions. He did notice that the receipt stated "Water Bill Period Jan – March" yet no objections were made. The second defendant claims that limitation period has expired for the payment of the utility bills. The first and second defendants deny that they were ever requested to pay half of the utility bills.

30. The first and second defendants also plead that the claimant's first notice to quit was issued at a time that pre-dates the purported 2013 deed. Therefore, at that time Adriana was the legal owner of the property and the claimant did not have that authority. In any event such a notice to quit would have been inadequate to terminate the monthly tenancy that the claimant alleges existed.

31. The first and second defendants filed a counterclaim. The first and second defendants claim:
    i. Possession of the left apartment.
    ii. A life interest for the first defendant and her daughter.
    iii. Alternatively, payment to the first defendant for the care of Adriana during the period 2000 to June 2010 at the standard rate.
    iv. Monthly expenses incurred due to the cutting of the electricity since the 7th March, 2014 totaling Seventy-Six Dollars ($76.00) per day.
    v. Loss of food from the refrigerator when the electricity was cut.
    vi. Cost of building the right apartment and remodeling the left apartment.
    vii. Interest.
    viii. Costs.
    ix. Such further and/or other relief as the nature of the case requires.

32. The claimant filed a reply to the defence and defence to the counter-claim on the 13th April, 2015. The claimant pleads that the alleged promise of the giving of a life interest in the apartment to the first defendant and her daughter is untrue, misleading and baseless.

33. The claimant pleads that Clarence was not Bernadette's father. The claimant and Bernadette had the same mother (Ellen Alexander) but the claimant is the only child of Ellen Alexander fathered by Clarence. Therefore, the claimant denies that Adriana was the step mother of Bernadette.

34. The claimant pleads that he hired one Gillian Cathy-Ann Newton Greenage to look after Adriana from 1997 to 2001. The claimant denies that Bernadette was the primary caregiver of Adriana as Gillian was hired to do that job. He also pleads that Bernadette never left her home at Gasparillo to permanently reside with Adriana. Bernadette was paid the sum of One Thousand Five Hundred Dollars ($1,500.00) for night caregiver duties as she worked during the day at Trinidad Dance Theatre.

35. The claimant pleads that he ran a business out of the right apartment, Micro Chemical Trinidad Ltd. Ian Munroe (the first defendant's brother) was employed by the claimant in the business.

36. The claimant pleads that Bernadette asked him, the claimant to become the full-time caregiver of Adriana and to stay at the residence as her home was in dire need of repairs. The claimant pleads that none of Bernadette's children ever gave care to Adriana.

37. The claimant pleads that as far back as 1975, it was Adriana's and Clement's wish for the claimant to have the property. This is evidenced by a 1975 deed which made Adriana, Clement and the claimant joint tenants of the property. It was in 2007/2008 that the first defendant came to care for Adriana. The claimant denies that the first defendant, her mother or her brother constructed or repaired the left or right apartments.

38. The first defendant's brother asked the claimant and was given permission to move into the right apartment. He first paid half the utilities and then the rent of Seven Hundred and Fifty Dollars ($750.00) per month in 2008.

39. Due to the poor standard of care provided by the first defendant to Adriana, the claimant made alternative arrangements Adriana's care.

Issues

40. A statement of agreed issues between the claimant and the first and second defendants was filed on the 4th March, 2016. The agreed issues are as follows:
    i. Is the Deed of conveyance described as DE201300970 void arising out of an alleged fraud?
    ii. Is the claimant entitled to vacant possession against the first defendant and second defendant?
    iii. Is the first named defendant entitled to a life interest in the subject lands by way of an alleged promise from Adriana Mildred Potter?
    iv. Are the defendants tenants of that portion of the building namely the left apartment that forms part of the building outlined in DE201300970?
    v. Are the defendants in arrears for non-payment of electricity from December 2011 to December 2013 in the sum of $6300.00?
    vi. Did the defendants fail to pay the outstanding sum of $1900.00 for WASA bill for the period December 2011 to November 2014?
    vii. Did the defendants fail to pay outstanding rents due and owing from September 2008 to September 2014 in the sum of $75,000.00?
    viii. Are the defendants entitled to an equitable interest in the subject matter premises?

Evidence and analysis

41. The claimant gave evidence on his own behalf. The first and second defendants both gave evidence and called one additional witness; Rosemarie Floyd. The claimant filed a witness statement for a witness Adriana Mildred Potter on the 29th July, 2016.

Unfortunately, the witness died at the age of 110, on the 4th November, 2016, before the date of the trial. The claimant made an application to adduce the witness' statement as hearsay evidence – as an out of court statement. The court considered the **Civil Proceedings Rules (CPR),** both Part 30.1 and also Part 30.8:

> *30.1 (2) "Hearsay evidence" means a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated.*
>
> *….*
>
> *30.8 The court may permit a party to adduce hearsay evidence falling within sections 37, 39 and 40 of the Act even though the party seeking to adduce that evidence has—*
>
> *(a) failed to serve a hearsay notice; or*
>
> *(b) failed to comply with any requirement of a counter-notice served under rule 30.7.*

42. The court considered relevant section of the **Evidence Act Chapter 7:02**, section 37, to determine whether it was an out of court statement, within the meaning of the Act:

> *37. (1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to Rules of Court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.*

43. The side note to section 37 states "Admissibility of out-of-Court statements as evidence of facts stated". This note clearly points to the interpretation and meaning to give to the section. For the purpose of section 37, out of court ought to mean statements other those made by the witness when sworn in court, whether the witness later gives oral evidence or accepts the contents of a witness statement signed by him. Unless and until either happens, the statement remains an out of court statement for the purpose of Section 37 of the Evidence Act. The definition of hearsay in the CPR Part 30.1(2) supports this. In this instance the witness provided a statement but died before being called as a witness and before having had the opportunity to say, on oath, that this is her evidence. Although the witness statement was prepared for court and filed and served, for the purpose of the Evidence Act, the court ruled that it was an out of court statement and exercised its discretion to admit it as an exception to the hearsay rule by virtue of the CPR Part 30.8.

44. The court made no adverse findings or inferences about the absence of any witness, rather the court made its decision on the evidence before the court. The first and second defendants relied on the case of **Jorsling E. Guide (trading as Guide's Funeral Home), Jorsling Emmanuel Guide, Enez Guide v. Richar Guide, Diane Bird and Guide Funeral Services and Crematoruim Limited CV 2006-00214.** In the judgment Pemberton J. said the fact that the witness did not show up for court to be cross-examined on his affidavit, should have an impact on the weight the court gives to the witness's evidence. Certainly, that fact cannot apply, ipso facto since it was not that Adriana Mildred Potter did not show up but rather could not show up for court because death intervened. Instead the court was guided by the **Evidence Act Chapter 7:02, Section 41**:

> *41. (1) Without prejudice to the generality of section 22, where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 37, 39 or 40 it may, subject to any Rules of Court, be proved by the production of that document or (whether or not proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the Court may approve.*
>
> *(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 37, 39 or 40 the Court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document the form and contents of that document.*
>
> *(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 37, 38, 39 or 40 regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular—*
>
> > *(a) In the case of a statement falling within section 37(1) or 38(1) or (2), to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;*

45. With respect to the weight that the court gave to the statement of Adriana Mildred Potter, the court considered that the statement was prepared sometime after the events in question, the age of the person making the statement and the relationship

between the maker of the statement and the claimant. The court also considered the contents of the statements. The court would have arrived at the same findings it made without the statement, based on the other evidence before the court. However, it did provide corroboration on issues that were material to this case; the voluntariness of the Deed in question and whether or not any promises were made to the first defendant about a life interest.

46. The evidence will be analysed in context and relative to the issues agreed between the parties. Firstly, is the Deed of conveyance described as DE2013 00970 11D001 (the 2013 Deed) void arising out of an alleged fraud? The 2013 deed was made on the 29th of March, 2013 and registered on the 22nd April, 2013. The Deed was prepared by Dons Waithe, Attorney-at-Law of # 66 Abercromby Street, Port of Spain. The deed gifts the property from the donor-Adriana, to the donee-the claimant. The first and second defendants have the burden of proving the fraud they allege. The court of appeal in the judgment of **Ramsumair, Navi v Ramsumair, Saghuni, P. C.A.CIV.P.016/2018**, re-asserted that it is for the party alleging fraud to properly plead and prove the fraud.

47. The evidence of this alleged fraud, was expected to come from the witness Rosemarie Floyd. The witness Floyd's evidence in chief, is that the priest Father Michael de Veurteil witnessed Adriana's thumb print being affixed to a document in June or July of 2011. In doing the document was described and explained to Adriana as a deed both by Floyd and the priest, however Adriana seemed confused. The witness said also that she put Adriana's thumb print on her pension cheques for the period July 2010 to November 2011. One assumes that the witness was satisfied that Adriana was capable of understanding what she was doing.

48. It is interesting to note that the witness expects the court to believe that Adriana was compus mentis to put her thumb print on her pension cheque up to November, 2011 but could not understand what the priest explained to her and her affixing her thumb print to a document when assisted by the priest. In any event, the witness admitted under cross-examination that she did not know what the 2011 document was, despite her description to the court purporting it as a deed. She also admitted in cross-

examination, that she was not around in 2013, and could not give any evidence as to what happened then and more particularly with the 2013 deed.

49. The court does not accept that this witness' evidence shows that the 2013 deed was fraudulently executed. There was no evidence led by the first and second defendants that would satisfy the court on a balance of probabilities that the 2013 deed was executed fraudulently and that the claimant was aware of the fraud. The particulars of the fraud allege have not been proven by the first and second defendants. There is no evidence from which the court could find that Adriana did not voluntarily affix her signature to the 2013 deed, or that the signature was placed by force, or that the thumb print is not Adriana's. There is also no evidence from which the court could find or infer that Adriana did not know and approved of the contents of the 2013 deed.

50. The claimant relied on the case of **Re Dellow's Will Trusts [1964] 1 WLR 41**, where Ungoed-Thomas J. observed that the gravity of the allegations in alleging fraud, becomes part of the circumstances that the court must consider when deciding whether it has been proven by the party alleging fraud. The claimant also relied on the case of **Paragon Finance Plc (formerly known as National Home Loans Corporation Plc) v D B Thakerar and Co (a Firm) [1999] 1 ALL E R 400** and the judgment of Millet L.J. where he said:

> *It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge.*

51. Still on the issue of fraud, the first and second defendants relied on aspects of the 2013 deed itself to prove the fraud. The defendants point to paragraph 3 of the 2013 deed which stated that the *"Donee has instructed his Attorney-at-Law to prepare this Deed of Conveyance without the benefit of a Title Search and has further agreed with his said Attorney-at-Law to fully indemnify him against all claims and/or liabilities that may arise subsequently to the registration of this Deed"* as contradicting the claimant's

evidence. The claimant said in cross-examination that he did not instruct the Attorney-at-Law to prepare any deed of conveyance and that it was done on Adriana's own initiative. The claimant's evidence in cross-examination, was that he was abroad at the time the attorney prepared the deed. His mother informed him of her wish, he contacted the attorney as well as made arrangements for the witnesses to the deed. Apart from this the claimant maintained that he had nothing to do with the deed. The court understood the claimant to be saying that he did not cause Adriana or the Attorney to prepare the deed of gift. Adriana knew what she wanted done with her property and she caused it to be done. What is recited in paragraph 3 of the 2013 deed does not contradict what the claimant said in cross-examination that he did not fraudulently or with undue influence cause the property to be gifted to himself.

52. The first and second defendants also raised that the 2013 deed did not mention the 1975 deed and that was suspicious. It appears on the face of the 1975 "deed" that it was prepared and signed but not registered. As such, there was no reason to recite it in the 2013 deed. Additionally, with respect to the issue of the deed having been executed at Riley Road when Adriana in fact did not return to Riley Road after 2011, does not satisfy the court that the claimant committed fraud in the preparation and execution of the 2013 deed. It may well be a mistake by the Attorney-at-Law to put that address, or more over Adriana considering that to be her address and not where age and other circumstances caused her to be. The evidence does not allow the court to resolve that issue–however it is not sufficient to satisfy the court that the fraud, as alleged, was committed.

53. The first and second defendants' submitted that the claimant tried to avoid the joint tenancy purportedly created by the 1975 Deed because Adriana had behaved in a manner to sever it. The defendants presented no evidence to satisfy the court that the 1975 deed had been registered or that the claimant was using the 2013 Deed to avoid the consequences of the joint tenancy.

54. The first and second defendants further relied on the case of **Susan Samaroo and Eugene Williams CV 2016-00359** and the judgment of Seepersad J. at paragraph 24 where he accepted the common law position of the harshness occasioned by virtue of the operation of the right of survivorship that is inherent in a joint tenancy and consequently has recognized *"that certain acts or events can serve to intimate that the interests of all were mutually treated as constituting a tenancy in common per **Williams v Hensmen (1861) 70ER 862**".* Even if a joint tenancy was created in 1975, the first and second defendants have led no evidence that Adriana acted such that it intimated to the claimant that her interest and his interest in the property were mutually independent. The first defendant's evidence is that the promise made to her by Adriana was made in private. It was only when Adriana was moved to the home in 2012, that the first defendant said, *"I mentioned that I was given this apartment for the rest of my life, he said that all that has changed*"[7]. The first defendant claims that the circumstances under which she shared this information with the claimant was in the heat of an argument, in response to the claimant asking her to leave. Consequently, such assertions do not give the court the confidence that this was in fact said. If it was said, the circumstance does not give the court the confidence that it was true. The court is not satisfied on a balance of probabilities that the first defendant said this to the claimant at all. As a result, there is no evidence that the claimant knew of any promise of a life interest given by Adriana to the first defendant. Therefore, there was no evidence that if a joint tenancy was created in 1975 that Adriana acted in a manner to intimate to the claimant that their interest (the interest of both joint tenants) were mutually to be treated as constituting a tenancy in common.

55. In addition, the first and second defendants relied solely on the fact of Adriana's age as providing evidence, that Adriana could not have of her own free will, executed the deed of gift. The first and second defendants relied on **Alvarez v Chandler 1962 5, WIR 226**. It should be noted that **Alverez v Chandler (supra)** is a case involving the testamentary capacity of a testatrix who was more than 100 years old when she made

[7] Paragraph 52 of witness statement of Adriana Potter filed on 29th July, 2016.

her two wills five year apart from each other. Wooding C.J. noted that there are circumstances when the court should be moved – as the trial judge was moved by the evidence that the testatrix suffered from dementia at the time she made the latter will. Wooding C.J. decided that the same circumstances that moved the court should also have moved the court to consider the validity of the will made only five years earlier and so remitted the case for the trial judge to consider that issue. In this case Adriana was over one hundred when she executed the deed. There is evidence from the claimant that she was of sound mind, the witness called by the first and second defendant (Rosemarie Floyd) testified that Adriana was competent to understand that she was placing her thumb print on her pension cheques every month. Further the court also must consider who was to benefit from the deed of gift. From the evidence it appeared that Adriana considered the claimant her son and he was the beneficiary of the deed of gift. Adriana did not have any biological children of her own. No flags are raised in these circumstances about the execution of the deed of gift to the claimant by Adriana. The first and second defendant's witness Floyd, gave evidence that while she (Floyd) was Adriana's caregiver, Adriana would often ask for the claimant. Floyd would call the claimant two or three times per week. This belied the evidence of the first defendant that the claimant had all but abandoned Adriana and only became interested in the property and Adriana because of his divorce in 2012. The court is fortified in its opinion of this by the fact that Adriana was capable of giving a witness statement in this matter in the year 2015, at the age of 109.

56. Secondly, is the claimant entitled to vacant possession against the first and second defendants? The claimant's evidence is that he is the legal and equitable owner of the premises and prior to the 2013 deed, acted as agent for Adriana. The first and second defendants' evidence is that the claimant never acted as agent for Adriana.

57. The year 2007 to 2008 seems to be an important year in resolving this issue. It is not in dispute that up to 2007, Bernadette was Adriana's caregiver. Bernadette died in 2007. Thus, 2007 Adriana needed a new caregiver. Both the claimant and the first defendant say that the first defendant became Adriana's caregiver in 2007, albeit under different circumstances. The claimant's case is that he agreed for her to remain

in occupation of the apartment as a caregiver to Adriana in lieu of rent, but that she had to pay one half of the utilities. The first defendant's evidence is that she assisted her mother as caregiver to Adriana and after her mother's death in 2007, she *"was now left with the task of being Mrs. Potter's sole caretaker*"[8]. The first defendant listed all the task she undertook as caregiver for Adriana. The first defendant's evidence is that she was responsible for the daily upkeep of the premises including paying the utility bills. Of note, however, was the first defendant's evidence where she said *"when I started taking care of Mrs. Potter fully, after the death of my mother, the Claimant had contacted me and told me that when I got Mrs. Potter's pension cheque I am to use seven hundred dollars ($700.00) for the purpose of purchasing food and the balance was to be deposited into Mrs. Potter's account. I did this every month".*[9]

58. Then in 2008, the second defendant moved into the apartment with the first defendant. By this time according to the claimant, there were issues with the first defendant's care of Adriana. Also, in 2008 there is a rent receipt signed by the first defendant in the sum of One Thousand Dollars ($1,000.00) for rent for the apartment for the period ending 15th July 2008. The first defendant gave an explanation about the receipt, that she signed a blank receipt, did not know what it was for and did not expect her uncle to use it to say she paid rent. This explanation is so puerile, especially when she says she knew that she was signing a blank receipt. It is clear that the receipt was for the payment of rent that was tendered when the changed circumstances of the first defendant bring her husband to the premises caused or contributed to a change in the circumstance under which the first and second defendants were to be in the apartment.

59. The court is satisfied that upon the death of Bernadette – who was being paid to provide care for Adriana, it seemed an easy solution for the first defendant to assume that role. However, even on the evidence of the first defendant, she was working full time. It is natural therefore to find that rather than being paid a salary she would

[8] Paragraph 23 of first defendant's witness statement. Filed on 29th July, 2016.
[9] Paragraph 33 of first defendant's witness statement. Filed on 29th July, 2016

continue to live in the apartment rent free. Rent free was in lieu of payment for the caregiving role which the first defendant would fulfill on mornings and on evenings; before and after work. But 2008 brought changed circumstances, including the fact that the first defendant had taken on a companion. The court is satisfied on a balance of probabilities that all parties agreed to a changed relationship – that of landlord and tenant. The rental agreement was evidenced by the rental receipt for One Thousand Dollars ($1,000.00) per month. Given the level of detail and specificity as described by the first defendant about the arrangements, the court does not accept that she would just sign a blank receipt. The first defendant knew that the receipt signaled the beginning of a landlord and tenant relationship – which was a changed relationship from the one that had existed up to that time. The terms of the rental agreement were clear. In exchange for the sum of One Thousand Dollars ($1,000.00) per month the first and second defendants were to have exclusive possession of the apartment (left side apartment on the premises).

60. The first and second defendants submit that the claimant has not provided any evidence that he was the agent for Adriana. They point, inter alia, to the claimant's evidence that he did not have a power of attorney from Adriana. The principal - agent relationship – if any – was between the claimant and Adriana. To unravel the issue requires an understanding of the nature of that relationship, **Halsbury Laws of England**[10] states that:

> *The terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.*
> *The relation of agency typically arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely the relation of agency may arise despite a provision in the agreement that it shall not.*

[10] Agency. Volume 1 (2017) 1. Nature and Formation

> *A servant or an independent contractor, though not necessarily the employer's agent, may often have authority to act as such when relations with third parties are involved. Nevertheless an agent, as such, is not a servant. An agent, although bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not, unless he is also the servant of the principal, subject in the exercise of his authority to the direct control or supervision of the principal.*
> *The essence of the agent's position is that he is only an intermediary between two other parties, and it is therefore essential to an agency in the sense that a third party should be in existence or contemplated.*

61. For a principal-agency relationship to exist it is not necessary for there to be a formal agreement in writing, such as a power of attorney. The principal and agent must intend to have created the relationship. In this case, the claimant's evidence is that he discussed with Adriana, the changed circumstances permitting the second defendant into the apartment and that a new relationship of landlord and tenant should be created. As such, this was to be discussed with the first and second defendant by the claimant. This does not seem, to the court, to be strange or out of the ordinary in the circumstances at present. After all, the claimant was Adriana's only child. He was the one who had given directions to the first defendant, according to her, about how Adriana's pension was to be dispersed. The court is therefore satisfied on a balance of probabilities, that when the claimant acted in 2007 and 2008, he acted as Adriana's agent. Furthermore, the first defendant, at least, recognized and accepted that the claimant was acting as Adriana's agent when she paid the rent and accepted a receipt from the claimant as proof of the rent payment. Whether or not the claimant lived in Trinidad and Tobago or the United States of America, and how often he visited Trinidad and Tobago is not evidence to determine whether or not an agency relationship existed between the claimant and Adriana. When he was required to act on her behalf he was present; such as establishing the rental agreement in 2008. The first and second defendant's witness, Floyd, is clear that there was continuous and frequent telephonic communication between the claimant and Adriana.

62. Even if the claimant did not have authority from Adriana to create a tenancy in 2008, the first defendant accepted the tenancy. This acceptance is evidenced by the first defendant's payment of rent and acceptance of the receipt from the claimant. The

first defendant is therefore estopped from later denying the tenancy. When the claimant acquired the legal titled to the property by the 2013 deed, the effect was to "feed the estoppel" converting the tenancy by estoppel into a legal tenancy. **Halsbury's Laws of England**[11] states:

> *A lease or mortgage of land is created by estoppel when the grantor or landlord has no legal estate or interest in the land at the time of the grant; and, although a title by estoppel, such as the landlord or grantor in this case possesses, is good only against the person estopped by his own deed, namely the tenant or the grantee, yet as against the person estopped it has all the elements of a real title. It has been judicially stated that 'tenancy by estoppel' does not, however, describe an agreement which would not otherwise be a lease or tenancy but which is treated as being one by virtue of an estoppel. The estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate; and the basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation. Thus on this analysis it is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way round.*
>
> *A tenant who holds under a lease by a deed between parties is estopped from disputing his landlord's title both during and after the expiration of his term unless he has been evicted by title paramount. The estoppel continues after the tenant has gone out of possession with respect to breaches of covenant committed during the lease.*

63. In addition, there is further evidence, not in dispute, which supports the existence and acceptance of an agency relationship between the claimant and the first and second defendants. The second defendant's evidence is that he entered into a contractual relationship with the claimant to rent the right side apartment for the sum of Seven Hundred and Fifty Dollars ($750.00). The second defendant's evidence is that he paid rent to the claimant and the claimant issued him a receipt. The claimant admitted that the receipt detailing the sum of One Thousand Five Hundred Dollars ($1,500.00) dated 7th February for rent for February and March[12], was in relation to rent for the right side apartment and not for the left side apartment as has he had pleaded. The first and second defendants' evidence gives numerous other examples of the authority that the claimant had over the affairs of Adriana. There were other receipts such as,

[11] Volume 47 (2014). Paragraph 33

[12] This annexure to the claimant's witness statement marked "C", does not have a year printed.

the 10th of February, 2010 for One Hundred Dollars ($100.00) concerning the water bill for the period January to March. As well as the receipt dated 8th August, 2010 for Three Hundred and Fifteen Dollars ($315.00) regarding electricity. The claimant hired the caregiver, he decided when the first defendant would no longer care for Adriana and he decided on her movement to a home. The first and second defendants accepted that the claimant was within his rights to make all these decisions. The court is satisfied that before the 2013 deed, the claimant acted as the agent of Adriana and that the first and second defendants recognized this agency.

64. Thirdly, is the first named defendant entitled to a life interest in the subject lands by way of an alleged promise from Adriana Mildred Potter? The first defendant is relying on a promise allegedly made by Adriana to establish this equitable interest in the apartment. The first defendant claims that Adriana was appreciative of the care that she had received and was expected to continue to provide to her (Adriana). The law relating to the promissory estoppel is:

> *If A under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land , a court of Equity will compel B to give effect to such expectation." Taylor Fashions Ltd. v Liverpool Victoria Trustee Co. Ltd. per Oliver J. cited in Snell's Principles of Equity 31st Ed. Para 10-16 to 10-17.*

65. The first and second defendants relied on the decision of **Kurt Farfan, Sharon Harrison, Allison White v. Anthony White CV2016-03644**, whereby this court accepts Kokaram J. statements reproduced from paragraphs 23 to 26 on the law relating to promissory estoppel. The claimant relied on the case of **Taylor Fashions Limited v. Liverpool Vikoria Trustees Limited [1981] 2 WLR 576** and the statement of the three required elements of (i) a promise, representation or assurance; (ii) an act of detrimental reliance; and (iii) an unconscionable denial of rights which was expected to be received. The court also accepts that these are the three required elements to prove promissory estoppel.

66. The alleged promise of a life interest was made between 2007 and 2008. Since then the first defendant has not provided any evidence that she did any act to her detriment in connection with the apartment that would cause the court to say that it should compel the claimant to give effect to the expectation she claims. Even on the issue of the utilities – according to the first defendant, she lived in the apartment with her husband, the second defendant, and her two children. Yet the first defendant did not pay the electricity bill, although she enjoyed the comforts afforded by electricity. The first defendant did not pay the WASA bill although she enjoyed the comforts afforded by running water. Why would a person who has a life interest for herself and her daughter not pay the utility bills for the utilities they used? Why would such a person not contribute one half of those utility bills? Why would a person be contented to have a pensioner, who she is alleged to have had so much care for, pay for her (the first defendant's) utilities. The answer is clearly because the first defendant had no connection to the apartment – legally or equitably and was content to live for free as long as she could. Based on the first defendant's conduct, it was reasonable to assume her view was that it was not her property, not her apartment and therefore not her responsibility. That could be the only logical answer. The first defendant asserts that she did repair and refurbishment works but was not able to provide any proof of these works. Further, when crossed examined about her salary and commitments, it is obvious that the expenditure she claimed to have made was not arithmetically possible. The court does not believe that the first defendant moved into an incomplete apartment in 2000. The claimant's evidence is that the apartments, both left and right, were completed since 1983 and the court is satisfied on a balance of probabilities that this is true. The claimant evidence, which is unchallenged, is that the first defendant's brother came to live with his mother in 1999 and worked in a business the claimant ran from the right apartment, Micro Chemical Trinidad Ltd until operations ceased in 2001. The court is satisfied on a balance of probabilities that the right apartment was completed before 1999, and not as the first defendant says by her brother after 2000.

67. The context of the promise, according to the first defendant, is that her mother, Bernadette, provided care to Adriana since the year 1997. More so, the first defendant denied that her mother was paid for this service. The first defendant's evidence is that

her brother also assisted – in fact her brother did the morning shift when Bernadette was at work. The first defendant denied that the claimant hired anyone to do the night shift as he claimed during the years 1998 to 2001. The first defendant submits that Bernadette cared for Adriana until she became too ill to do so in 2007, all this time without pay, yet Adriana did not make any such promise to Bernadette. Instead, she did so only after a short time of the first defendant's care to her. Neither did Adriana make such a promise to the first defendant's brother who assisted Bernadette in caring for Adriana, yet she made a promise to the first defendant after providing care for only a short period. The court is not satisfied that any promise was made by Adriana to the first defendant giving her a life interest. The first defendant has not demonstrated by any evidence, that she acted to her detriment as a result of any promise. The court is satisfied on a balance of probabilities that the first defendant has made this up in an effort to resist vacating the apartment to continue to live rent free, and to not have the usual responsibility of paying for the utilities that one uses.

68. Fourthly, are the defendants tenants of that portion of the building namely the left apartment that forms part of the building outlined in DE201300970? The answer to this is yes the first and second defendants are tenants of the left apartment. The tenancy was created in July, 2008 at a rental of One Thousand Dollars ($1,000.00) per month. The first and second defendants only paid one month's rent, July of 2008. What is the state of that tenancy agreement now? The claimant served two notices to quit. One on the 10th December, 2011 giving fourteen days' notice, the notice ending on the 30th December, 2011. The other dated 22nd of October, 2013 giving fourteen days' notice, the notice ending on the 6th November, 2013. Following the expiration of the notice in the last notice to quit, the claimant filed an ejectment complaint at the Magisterial District of Victoria. The tenancy created in July, 2008 was a monthly tenancy therefore it required a month's notice. However, the action to sue for recovery of possession is unequivocal proof of the claimant's intention to forfeit the tenancy created in July 2008 for arrears of rent.

69. Fifthly, are the defendants in arrears for non-payment of electricity from December 2011 to December 2013 in the sum of Six Thousand Three Hundred Dollars

($6,300.00)? The court is satisfied on a balance of probabilities, that the tenancy agreement included the payment of half of the electricity bill. That is, one half of the actual electricity bill for the billing period. Special damages must be specially and specifically proved by the party claiming them and documentary evidence is usually required for such claims to be allowed. In the case of **Anand Rampersad v Willies Ice-Cream Ltd Civil App. No. 20 of 2001** in delivering the judgment Archie J.A. (as he then was) said the following:

> *The rule is that the plaintiff must prove his loss. The correct approach is as stated by Lord Goddard C.J in Bonham Carter v Hyde Park Hotel [1948] 64 Law Times 177:*
>
> *'Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage, it is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost, I ask you to give me these damages.' They have to prove it'.*

This head of damages was not proved by the claimant. As such the claim, in this part, fails.

70. Sixthly, did the defendants fail to pay the outstanding sum of One Thousand Nine Hundred Dollars ($1,900.00) for WASA bill for the period December 2011 to November 2014? As with the electricity bill, the court is satisfied that the tenancy agreement included the payment of half of the WASA bill. That is, one half of the actual WASA bill for the billing period. This head of damages was not proved by the claimant. As such the claim, in this part, fails see **Anand Rampersad v Willies Ice-Cream Ltd (supra)**.

71. Seventhly, did the defendants fail to pay outstanding rents due and owing from September 2008 to September 2014 in the sum of Seventy-Five Thousand Dollars ($75,000.00)? Based on the court's findings that the first and second defendants were tenants from July, 2008, the claimant is entitled to mesne profits from 16th July, 2008 to the date of filing 21st November, 2014. That is six years and four months at the rate of One Thousand Dollars ($1,000.00) per month. The claimant is therefore entitled to recover mesne profits in the amount of Seventy-Six Thousand Dollars ($76,000.00).

72. Finally, eighthly are the defendants entitled to an equitable interest in the subject matter premises? Based on the court's findings above as it relates to the first defendant's claim of a life interest given to her by Adriana, the defendants are not entitled to any equitable interest in the apartment. They are tenants who have lived rent free since July, 2008.

73. Based on the finds, the First and Second Defendant's counter-claim filed on 13th March, 2015 is dismissed.

Result

74. It is hereby ordered that:

    i. There be judgment for the claimant against the first and second defendants on the claim.

    ii. The first and second defendants are to immediately deliver up to the claimant vacant possession of the left apartment on the premises at #11 Riley Road, St Margaret Village, Claxton Bay.

    iii. The first and second defendants are to pay to the claimant the sum of Seventy-Six Thousand Dollars ($76,000.00) as mesne profits.

    iv. Interest on Seventy-Six Thousand Dollars ($76,000.00), at the rate of 2.5% per annum from 16th July, 2008 to the date of judgment, 28th June, 2018.

    v. There be judgment for the claimant against the first and second defendants on the counter-claim.

Costs

75. The first and second defendants are to pay the claimants costs. On the claim, costs in the sum of Fourteen Thousand Dollars ($14,000.00) and on the counter-claim costs in the sum of Twenty Thousand, Seven Hundred and Forty Dollars ($20,740.00).

76. Stay of execution 30 days.

Dated this 28th, June , 2018

Avason Quinlan-Williams

Judge

(Romela Ramberran, Judicial Research Counsel)