SC CIV 78 014

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

YELLOWKNIFE PUBLISHING COMPANY LTD.

PLAINTIFF

AND:

JANIS E. ALEXANDER

DEFENDANT

Application by the defendant for dismissal of the Plaintiff's action pursuant to Rule 129.

Application dismissed with costs.

Application by the plaintiff for an order directing payment into court to the credit of the within action of the sum of $16,237.73 and directing the release of the balance of the proceeds of the sale of Lot 4, Block 87, Yellowknife to the plaintiff company.

Application dismissed with costs.

Heard at Yellowknife May 17th, 1978.

Reasons for Judgment filed:

Reasons for Judgment by:

The Honourable Mr. Justice C.F. Tallis

Counsel on the Hearing:

Mr. J. Edward Richard for the Plaintiff

Mr. Graham Price for the Defendant

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

YELLOWKNIFE PUBLISHING COMPANY LTD.

PLAINTIFF

AND:

JANIS E. ALEXANDER

DEFENDANT

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

The plaintiff, by its statement of claim dated the 17th day of February, A.D. 1978, seeks, inter alia, a declaration that A. Colin Alexander and the defendant Janis E. Alexander held certain premises known as Lot 4, Block 87, Yellowknife in trust for the plaintiff.

The allegations set forth in the plaintiff's statement of claim are as follows:

"1. The Plaintiff is a body corporate incorporated pursuant to the laws of the Northwest Territories with an office at the City of Yellowknife, in the Northwest Territories.

2. The Defendant, so far as is known to the Plaintiff, resides at Baker Lake in the Northwest Territories.

3. On or about the 14th day of June, 1974, the Plaintiff purchased property in the City of Yellowknife, in the Northwest Territories, known as Lot 4, Block 87, (the Premises), at and for a purchase price of $29,800.00.

"4. In order to finance the purchase of the premises, and improvements to the premises, the Plaintiff applied for a loan from Central Mortgage and Housing Corporation (CMHC) in the amount of $35,000.00, but was advised by CMHC that application for such loan could only be made by a registered owner of property who was an individual person, rather than a corporation.

5. In order to facilitate the application for a CMHC loan, on or about the 10th day of October, 1974, the Plaintiff therefore transferred the title for the premises into the names of A. Colin Alexander and the Defendant, Janis E. Alexander.

6. At the time of the transfer referred to in the preceding paragraph, A. Colin Alexander was the principal shareholder, a director and the President of the Company, and the Defendant was a director and Secretary of the Company.

7. No monies or other consideration were paid or given to the Plaintiff Company by A. Colin Alexander or the Defendant for the transfer of the premises.

8. The Plaintiff company received the entire proceeds from the mortgage loan granted by CMHC.

9. The Plaintiff company paid the entire purchase price of $29,800.00, referred to in paragraph 3, and none of the said purchase price was paid by A. Colin Alexander or the Defendant.

10. The Plaintiff Company has paid each and every of the payments due and owing to CMHC under the mortgage loan agreement, and none of the said payments have been made by A. Colin Alexander or the Defendant.

11. The Plaintiff Company has collected and received on its own behalf rental payments as a result of the rental of the said premises, and none of the said rental payments have been collected or received by or on behalf of A. Colin Alexander or the Defendant.

12. It was the intention of the parties that A. Colin Alexander and the Defendant would hold the said premises in trust for the Plaintiff company.

13. From the said 10th day of October, 1974, A. Colin Alexander and the Defendant were trustees holding the said premises in trust for the Plaintiff Company, the beneficial owner of the said premises, and continue to so hold the said premises in trust for the Plaintiff company.

"14. In the alternative, the Plaintiff says that the Defendant would be unjustly enriched if she were permitted to retain title to the said premises, or to retain or receive on her own behalf any proceeds from the sale of the said premises.

15. On or about the 9th day of September, 1977, the Plaintiff company agreed to sell the said premises to Robert O. Baetz and Margreta G. Baetz, (the Purchasers), at and for a purchase price of $88,000.00. The agreement provided for a possession and closing date of December 30th, 1977.

16. On or about the 9th day of December, 1977 the Plaintiff Company called upon the said A. Colin Alexander and the Defendant to sign a transfer of the said Premises to the Purchasers.

17. The said A. Colin Alexander signed the said transfer.

18. Initially the Defendant refused to sign the said transfer; and on or about the 31st day of January, 1978, the Defendant provided a signed transfer to the Plaintiff with the stipulation that the said proceeds be held in trust pending settlement of the dispute between the Plaintiff company and the Defendant.

19. As a result of the original refusal, and the subsequent signing of the transfer upon conditions, the Plaintiff company has suffered damage, particulars of which are as follows:

(a) An unascertained amount of potential damages payable by the Plaintiff to the Purchasers, referred to in paragraph 15 for failure to perform the said transaction.

(b) Interest on the sale proceeds from December 30th, 1977.

(c) An unascertained amount of damage as a direct result of the Plaintiff company not having the sale proceeds available for reinvestment in other company projects.

20. The Plaintiff proposes the trial of this action be held at the City of Yellowknife, in the Northwest Territories.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

(a) A declaration that A. Colin Alexander and the Defendant, Janis E. Alexander held the premises in

trust for the Plaintiff;

(b) an Order directing the payment of the sale proceeds to the Plaintiff company.

(c) General damages.

(d) Costs."

A statement of defence has been filed in the within action. Paragraphs 3-5 thereof are as follows:

"3. The Defendant states that she held, at all material times hereto, title to the property referred to in paragraph three of the Statement of Claim herein as joint tenant for her own use and benefit.

4. The Defendant further states that consideration was given by the Defendant by the Plaintiff on the execution by the Defendant of a personal covenant to pay in favour of Central Mortgage and Housing Corporation and upon delivery of the loan proceeds referred to in paragraph eight of the Statement of Claim herein by the Defendant to the Plaintiff.

5. In the alternative, if the Defendant does not hold title to her own use and benefit, which is not admitted but expressly denied, the Defendant states that the agreement and trust relationship pleaded by the Plaintiff in the Statement of Claim herein is illegal and is contrary to public policy, as is disclosed by the facts alleged in the Statement of Claim herein, and specifically paragraphs four and five thereof, and the Defendant states that the Plaintiff is estopped from relying upon the arrangement and trust relationship alleged in the Statement of Claim herein."

The plaintiff has applied by notice of motion for the following relief:

(a) An order directing payment "into Court to the credit of the within action the sum of $16,237.73, being one-half of the proceeds of the sale of property known as Lot 4, Block 87, City of Yellowknife, such property being the subject matter of the within action, and"

(b) An order directing "the release of the balance of the said proceeds to the Plaintiff Company."

In support of this application the plaintiff filed the affidavit of Colin Alexander which reads as follows:

"1. THAT I am the President of Yellowknife Publishing Company Ltd., the Plaintiff in the within action, and as such have personal knowledge of the matters herein deposed to, save where stated to be on information and belief.

2. THAT the Plaintiff purchased property in Yellowknife, Northwest Territories, known as Lot 4, Block 87, on June 14, 1974 for a purchase price of $29,800.00.

2A. THAT between June 14, 1974 and October 10, 1974, the Plaintiff Company made improvements to the said premises of a value of approximately $30,000.00 and the Plaintiff Company paid for these improvements.

3. THAT on or about October 10th, 1974, the Plaintiff Company transferred the premises to myself and my wife, Janis E. Alexander, the Defendant in the within action, to be held by the Defendant and myself in trust for the Company, subject to certain terms and conditions.

4. THAT from and after October 10, 1974, it was understood and agreed that the Plaintiff Company would be responsible for all mortgage payments for the said premises, and all other payments in connection with the said premises for utilities, etc. and also, that the Plaintiff Company would receive for its own benefit all rental revenues from the said premises.

5. THAT in fact the Plaintiff Company has paid the purchase price for the said premises, and paid all mortgage payments and utility payments, and has received on its own behalf and for its own benefit, all revenue to date.

6. THAT at the time the Plaintiff Company transferred the said premises in trust to the Defendant and myself, the Defendant was a Director and Secretary of the Plaintiff Company, and signed the transfer document as an officer of the Company.

7. THAT at the time the Plaintiff Company transferred the said premises in trust to the Defendant and myself, no monies or other consideration were paid or given to the Plaintiff Company by the Defendant or myself.

7A. THAT from the 14th day of June, 1974, the said premises have been shown on the financial statements and records of the Company as an asset of the Company.

8. THAT on or about the 9th day of September, 1977, the Plaintiff Company agreed to sell the said premises to Robert O. Baetz and Margreta G. Baetz at and for a purchase price of $88,000.00, with a scheduled possession and closing date of December 30, 1977.

9. THAT I am advised by the Plaintiff's solicitor, J. Edward Richard, and verily believe, that he forwarded to the Defendant a transfer document to be signed by her transferring the said premises to Mr. and Mrs. Baetz.

10. THAT I am further advised by Mr. Richard, and verily believe, that on or about December 22, 1977, he received a telephone call from Mr. Barry Singer, the Defendant's Saskatoon lawyer, and was advised by the said Mr. Singer that the Defendant refused to sign the said transfer.

11. THAT subsequent to December 22, 1977, the Plaintiff Company instructed its solicitor Mr. Richard to seek from the Court a declaration that the Plaintiff Company was the beneficial owner of the said premises, and, in addition, an Order compelling the Defendant to sign the transfer in favour of the prospective purchasers.

12. THAT I am advised by Mr. Richard and verily believe, that on or about January 31, 1978, he received from the Defendant's Solicitor a signed Transfer of Land, which was delivered to Mr. Richard as solicitor for the Plaintiff Company upon certain trust conditions, i.e., that the net proceeds from the sale be held in trust "and not be released without (a) Written permission from Janis Alexander, or (b) an Order of an appropriate Court."

13. THAT attached hereto and marked as Exhibit "A" to this my Affidavit is a photostat copy of the letter received by Mr. Richard which letter contains the trust conditions set out by the Defendant's solicitor.

14. THAT I am advised by Mr. Richard and verily believe, that the sale to Mr. and Mrs. Baetz was concluded on or about February 15, 1978, and that since that date the net proceeds of $32,475.46 have been held in trust pursuant to the conditions imposed by the Defendant's solicitor in his letter attached as Exhibit "A" to this my Affidavit.

15. THAT on or about February 7, 1978, the Plaintiff Company entered into an agreement with Canarctic Graphics Ltd. to sell a substantial portion of its assets and its business operations in the City of Yellowknife for a total purchase price of $265,000.00.

16. THAT the said agreement provided for a down payment of $100,000.00 and the balance of $165,000.00 to be paid to the Plaintiff Company over ten years.

17. THAT the said business operations were turned over to Canarctic Graphics Ltd. on April 17, 1978, pursuant to the said agreement.

18. THAT the down payment received from Canarctic Graphics Ltd. were used by the Plaintiff to discharge prior encumbrances and to pay trade creditors, as required by the provisions of the said agreement.

19. THAT the Plaintiff Company is in the process of commencing a new business venture in the City of Ottawa, in the Province of Ontario, namely the establishment of a weekly newspaper in that City.

20. THAT the Plaintiff Company urgently requires funds to enable it to commence this new business venture.

21. THAT by reason of the facts alleged in paragraphs 15 and 17 above, the Plaintiff Company did not receive any net proceeds from the sale of its business operations in Yellowknife for reinvestment in its new business operations in the City of Ottawa.

22. THAT I verily believe that the Plaintiff Company will be unable to obtain new financing in an adequate amount for its new business operations in Ottawa, Ontario, without the input of some of the Plaintiff Company's own funds, as this is a standard and conventional requirement of financial institutions before approving a loan to a borrower such as the Plaintiff Company.

23. THAT because of the fact that the down payment referred to in paragraph 16 above was insufficient to satisfy all prior encumbrances and trade creditors, the Plaintiff Company was required to obtain a loan from the Canadian Imperial Bank of Commerce, Yellowknife to satisfy its indebtedness to its trade creditors.

24. THAT since approximately the month of September, 1976, the Defendant and myself have been living separate and apart.

25. THAT on or about February 9, 1977, the Defendant and myself signed a Separation Agreement providing, inter alia for distribution of the matrimonial property and for settlement of all claims for maintenance and for alimony.

26. THAT attached hereto and marked as Exhibit "B" to this my Affidavit is a photostat copy of the Separation Agreement referred to in the immediately preceding paragraph.

"27. THAT I have in fact made the payments to the Defendant in the amount and on the dates stipulated in paragraph 13 of the said Separation Agreement.

28. THAT I have read the Statement of Claim filed herein on behalf of the Plaintiff Company, and I am advised by the Plaintiff's Solicitor, J. Edward Richard, and verily believe, that the Plaintiff Company has a meritorious cause of action.

29. THAT I have read the Statement of Defence filed herein on behalf of the Defendant, and I am advised by Mr. Richard, and verily believe, that the Defendant in her pleadings alleges that she is the beneficial owner of one-half of the proceeds from the sale of the said premises.

30. THAT the Plaintiff Company is prepared and willing to pay into Court to the credit of the within action one-half of the said proceeds from the sale of the said premises, pending the disposition of the within action.

31. THAT I make this Affidavit in support of an application by the Plaintiff Company for an Order directing the payment into Court of one-half of the said proceeds, and directing the release of the balance of the said proceeds to the Plaintiff Company.

SWORN BEFORE ME at the City of Yellowknife in the Northwest Territories, this 20th day April,.A.D 1978.

"Colin Alexander"
Colin Alexander

A Commissioner for Oaths in and for the Northwest Territories.
My Commission expires...NOT..

This notice of motion came on before me at Yellowknife on the 3rd day of May, A.D. 1978 and at that time counsel for the defendant applied for an adjournment so that the defendant could cross-examine the deponent, Colin Alexander, on his affidavit sworn on April 20th, 1978. An adjournment for this purpose was granted but subsequent to the granting of the adjournment counsel for the defendant advised that cross-examination was not being proceeded with but that a motion was going to be made on behalf of the defendant

An application was accordingly made by the defendant to this court, by way of notice of motion, in which the following relief was sought:

(a) An Order staying the Plaintiff's application returnable May 3rd, 1978 as adjourned, pending the determination of the matter raised in this Motion, pursuant to Rule 221(1);

(b) An Order directing the determination forthwith of the partly fact and partly law issue of whether the agreement and trust relationship pleaded by the Plaintiff in its Statement of Claim filed is illegal or is void being contrary to public policy, pursuant to Part 17 of the Rules;

(c) Upon the issue stated being decided in the affirmative, an order directing that the Plaintiff's action be dismissed as being an abuse of the process of this Court, pursuant to Rule 129.

In support of this application the defendant did not file affidavit evidence but relied upon the pleadings filed, the affidavit of Colin Alexander and the following documents which were introduced into evidence pursuant to section 44 of the Evidence Ordinance:

1. Transfer dated October 21st, 1974 from Yellowknife Publishing Company Ltd. to A. Colin Alexander and Janis E. Alexander, as joint tenants and marked as Exhibit "1";

2. Mortgage filed under No. 14,199 on October 21st, 1974 from A. Colin Alexander and Janis E. Alexander as joint tenants to Central Mortgage and Housing Corporation;

3. Abstract of title confirming A. Colin Alexander and Janis E. Alexander as registered owners of property legally described as Lot 4, Block 87, in the City of Yellowknife, in the Northwest Territories, according to a plan of survey filed in the Land Titles Office for the Northwest Territories under No. 637;

4. Caveat registered by Central Mortgage and Housing Corporation on the 26th day of November 1974 under No. 14,351;

5. Transfer dated February 10th, 1978 from A. Colin Alexander and Janis E. Alexander to Robert O. Baetz and Margreta G. Baetz as joint tenants.

These two applications referred to were argued before me by counsel on the same date. By agreement between counsel the application of the defendant for an Order dismissing the plaintiff's action as an abuse of process pursuant to Rule 129 was argued first. I reserved judgment on this application and then proceeded to hear the application of the plaintiff for the relief sought in its notice of motion. Judgment on this application was also reserved.

I accordingly turn to a consideration of the application of the defendant to have the plaintiff's action dismissed as being an abuse of the process of the court pursuant to Rule 129 of the Rules of Court which provides as follows:

"129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or
(b) it is scandalous, frivolous or vexatious, or
(c) it may prejudice, embarrass or delay the fair trial of the action, or
(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition."

Learned counsel for the defendant contends that if there is a trust relationship alleged by the plaintiff in its statement of claim then it is fraudulent or illegal. In this connection counsel for the defendant relies strongly on the allegations of fact pleaded in paragraphs 3 to 8 in the statement of claim. Dealing with this matter learned counsel for the defendant referred specifically to the case of O'Kelly v. Downie Vol. VI W.W.R. 911 and particularly at 912 where Chief Justice Howell stated as follows:

> "The defendant in his answer to the amended statement of claim, set up the original, and claims that it is the record in this cause, or, at all events, that the plaintiffs are bound by it.
>
> In Daniel's Chancery Practice, 7th ed., at p. 490, the following is stated:-
>
> 'The right of one party to read the pleading of another party as evidence against the latter is confined to the pleading as it stands, so that if the pleading has been amended, the original pleading cannot be read as such evidence.'
>
> This principle is stated to be the law in Annual Practice, 1914, at p. 581. That is also my memory of the practice in the past."

Learned counsel for the defendant Janis E. Alexander submitted that when you read the allegations contained in the statement of claim together with the provisions of the National Housing Act, it is very clear that the transaction relied upon by the plaintiff corporation is fraudulent or illegal. It is contended that the course of conduct relied upon by the plaintiff constitutes a deceit on Central Mortgage and Housing Corporation and in particular learned counsel for the applicant referred

to the following, inter alia, provisions of the National Housing Act:

"6.(1) Subject to section 7, a loan is insurable if

(b) it was made to

(i) the person (in this Act called the "home owner") who owns the house or condominium unit and intends to occupy the house, one of the family housing units thereof or the condominium unit,

(ii) a builder who intends to sell the house or condominium unit to a person (in this Act called the "home purchaser") who will own and occupy the house, one of the family housing units thereof or the condominium unit,

(iii) the person who owns the farm upon which the house has been built,

(iv) the cooperative housing association that owns the cooperative housing project,

(v) the person who intends to occupy the existing house, one of the family housing units thereof or the condominium unit, or

(vi) the person who owns the rental housing project;"

"34.15 (1) The Corporation may make a loan for the purpose of assisting in the construction or acquisition of a house or the acquisition of a condominium unit by an individual.

(2) A loan made under the authority of this section

(a) shall bear interest at a rate determined by the Corporation;

(b) shall not exceed such percentage of the lending value of the house or condominium unit as may be prescribed by regulation of the Governor in Council;

(c) shall be for a term not exceeding forty years from the date of completion or acquisition of the house or acquisition of the condominium unit;

(d) shall be secured by a first mortgage upon the house or condominium unit in favour of the Corporation or such other security as the Corporation deems adequate to safeguard its interests; and

(e) shall be repayable by such payments of principal and interest as are satisfactory to the Corporation.

(3) Loans may be made under the authority of this section only in respect of family housing units not exceeding such cost as may be prescribed by regulation of the Governor in Council, and only where the housing units will, upon completion or acquisition, be occupied by not less than such number of persons as may be prescribed by regulation of the Governor in Council."

"58.(1) Where in the opinion of the Corporation a loan is not being made available to a person pursuant to Part I or section 14, the Corporation may make such a loan on the same terms and conditions and subject to the same limitations as those upon which a loan may be made to such person under Part I or section 14.

(2) When the Corporation makes a loan under this section pursuant to Part I, it shall collect from the borrower an insurance fee in the same amount as an approved lender would collect from the borrower if the loan were made by an approved lender.

(3) The Corporation shall pay the amount of any insurance fee collected pursuant to subsection (2) into the Mortgage Insurance Fund, and any loss incurred by the Corporation in respect of such loan when held by the Corporation shall be charged to the Fund to the extent of the amount that would have been payable to an approved lender pursuant to section 8 if the loan had been held by the approved lender, and the mortgaged property acquired by the Corporation shall be an asset of the Fund.

(4) When a loan is made under this section on behalf of the Corporation by an approved lender the mortgage taken in respect thereof may be taken in the name of the Corporation or in the name of the approved lender as determined by agreement between the Corporation and the approved lender. 1953-54, c. 23, s. 40; 1956, c. 9, s. 16; 1964-65, c. 15, s. 16; 1968-69, c. 45, s. 21."

It should also be pointed out that in chapter 38 S.C. 1974-75-76 the term "individual" as used in section 34.15(1) of S.C. 1973-74 was amended to read as follows:

> "34.15(1) The Corporation may make a loan for the purpose of assisting in
>
> (a) the construction of a house or a condominium unit by a person (in this Part called the "qualified owner") who owns the house or condominium unit and intends to occupy the house, one of the family housing units thereof or the condominium unit, or by a builder who intends to sell the house or condominium unit to a person (in this Part called the "qualified purchaser") who will own and occupy the house, one of the family housing units thereof or the condominium unit, or
>
> (b) the acquisition of a house or a condominium unit by a prospective qualified owner."

In support of its position with respect to this application, counsel for the defendant, Janis E. Alexander, relied upon the following, inter alia, authorities:

(1) Chettiar v. Chettiar P.C. 1962 1 All England Law Reports 494

(2) Berg v. Sadler and Moore [1937] 2 K.B. 158

(3) Elford v. Elford [1922] 3 W.W.R. 339 particularly at 345

(4) Zimmermann v. Letkeman [1977] 6 W.W.R. 741

(5) Fesser v. McKenzie [1971] 1 W.W.R. 620

(6) Hanbury Modern Equity, Ninth Edition 34.

After carefully reviewing these authorities, I am of the opinion that they can be distinguished on a footing that they deal with situations where the trial judge after hearing all of the

evidence has made a determination of the issue. On this particular application, I am being asked by way of interlocutory relief to strike out the plaintiff's claim without any trial of the issue ever being held.

In my opinion the law is well settled that a plaintiff should not lightly be deprieved of its right to have its cause tried in the courts and a statement of claim should be struck out only in the clearest and most obvious case:

(1) Great Northern Railway Company v. Cole Agencies Ltd. et al (1964) 49 W.W.R. 153;

(2) Balacko v. Eaton's of Canada Limited 60 W.W.R. (N.S.) 22.

Rule 129 was also carefully considered in a recent judgment in the Appellate Division of the Supreme Court of Alberta, Cerny v. Canadian Industries Limited et al /1972/ 6 W.W.R. 88 wherein Cairns, J.A. in giving judgment for the court makes a complete review and exposition of the relevant law. At page 95 Cairns, J.A. states as follows:

> "It is clear from these decisions that a court should not strike out a pleading or part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action; or a question is raised fit to be tried by a judge or jury, or merely because it is demurrable; or where the matter complained of is only part of the action set up, or where by going to trial the facts

"could be elicited which would have some effect on the case, or where justice and reason dictate that it should go to trial; or where a pleading is not clearly vexatious or frivolous but which would, if it were allowed to stand, be an abuse of the process of the court; or where questions of general importance are raised or serious questions of law are in issue, unless the matter is entirely clear."

He then goes on to say:

"These are generally the points which have to be considered under R. 129 but, as I have stated above, most of them apply to an application to strike out a pleading under the inherent jurisdiction of the court. This jurisdiction is exercised to stop the abuse of the process of the court or to prohibit scandalous, frivolous and vexatious actions. This power of the court certainly should not be exercised to strike out a pleading or to strike out a party from an action where there is a serious point of law to be considered which cannot be said to be clear. How can such a pleading be an abuse of the process of the court or frivolous or vexatious?"

In dealing with this matter I have also carefully considered and follow the approach of Morrow, J. in a recent unreported judgment in the Northwest Territories case of Poole Construction Limited et al v. Wood & Gardner Architects Limited et al dated April 28th, 1978.

In my opinion, the above principles are applicable to this case and I adopt with respect the approach of Cairns, J.A.

Under the circumstances I feel that it would be inappropriate for me to deprive the plaintiff of a trial on what to me appears to be substantial issues. In arriving at this conclusion I am not unmindful of the fact that a finding of illegality may not be conclusive as against the plaintiff. See Gorog v. Kiss 78 D.L.R. (3d) 690.

The application of the defendant Janis E. Alexander for the relief sought in her notice of motion dated May 12th, 1978 is accordingly dismissed with costs.

I turn now to a consideration of the application of the plaintiff set forth in its notice of motion dated April 20th, 1978. Learned counsel for the plaintiff Yellowknife Publishing Company Ltd. contended that the court should direct payment into court to the credit of this action of the sum of $16,237.73 being one-half of the net proceeds of the sale of the property in question. On the facts of the case, he submitted that the very most that the defendant would be entitled to would be a one-half share of the proceeds.

Counsel for the defendant took the position that one of the issues that will have to be determined by the trial judge is whether or not there is in law an existing joint tenancy. As far as the defendant is concerned she is prepared to see the joint tenancy maintained and under the circumstances I have to consider whether or not this issue should not more properly be dealt with by the trial judge. I do not think that I should decide on an interlocutory application of this nature whether or not the joint tenancy has been severed. There are perhaps compelling arguments that could be made to suggest that the joint tenancy has in fact been severed but in the absence of full and complete evidence on the issue I do not think that such a declaration should be made on an interlocutory application.

The words of Sir W. Page Wood V-C in Williams v. Hensman (1861), 1 John & H. 546, 70 E.R. 862 at 867, are generally recognized as the classic statement on the severance of a joint tenancy:

"A joint-tenancy may be several in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed upon the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund--losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of Wilson v. Bell (1843), 5 I. Eq. R. 501, and Jackson v. Jackson (1804), 9 Ves. 591, 32 E.R. 732."

In this connection I have also considered the following, inter alia, authorities:

(1) Ginn v. Armstrong (1969), 3 D.L.R. (3d) 285;

(2) Schofield v. Graham (1969), 69 W.W.R. 332, 6 D.L.R. (3d) 38;

(3) Re Draper's Conveyance; Nihan v. Porter, [1969] 1 Ch. 486, [1967] 3 All E.R. 853;

(4) Munroe v. Carlson 21 R.F.L. 301, [1976] 1 W.W.R. 248, 59 D.L.R. (3d) 763;

(5) Grant v. Grant [1952] O.W.N. 641; and

(6) Nielson-Jones v. Feddon, [1974] 3 W.L.R. 583, [1974] 3 All E.R. 38.

For the foregoing reasons I am of the opinion that the order sought by the plaintiff should not be granted on this

interlocutory application and I accordingly dismiss the application of the plaintiff with costs.

I have no doubt that it is desirable that matters of this kind be resolved as quickly as possible and under the circumstances counsel may apply for an early date for trial once the certificate of readiness has been filed.

DATED at the City of Yellowknife, in the Northwest Territories, this 20th day of June, A.D. 1978.

C. F. Tallis

C.F. Tallis,
J.S.C.

NO. SC 4230

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

B E T W E E N:

YELLOWKNIFE PUBLISHING COMPAN
LTD.

PLAINTIFF

AND:

JANIS E. ALEXANDER

DEFENDANT

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE C.F. TA