C.A.; Married Women's Property Act | Jurisdiction under S16 — Determination of interest of wife in shares held in name of husband — whether express agreement — whether constructive trust — whether common intention that both should have beneficial interest — whether claimant had acted to her detriment on basis of common intention — No evidence to sustain finding of trial judge — finding not sustained by evidence —

(Appeal allowed — order set aside)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 53/87

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.

Cases referred to

Gissing v Gissing (1970) 2 ALLER 780

Grant v Edwards (1986) 2 ALLER 426

National Provincial Bank Ltd v Beckwith & others (1965) 1 ALLER 449.

Jonas v Maynard (1951) 1 ALLER 802

Heseltine v Heseltine (1971) 1 ALLER 952

Pettitt v Pettitt (1969) 2 ALLER, 385

BETWEEN GASSAN ELIAS AZAN RESPONDENT

AND DAWN GENEVIEVE AZAN APPELLANT

Mr. D.A. Scharschmidt & Mr. David Batts instructed by Livingston, Alexander & Levy for Appellant

Mr. Carl Rattray, Q.C., & Mr. A. Rattray for Respondent

May 24, 25, 26, 27, June 9, 10, 20 & July 22, 1988

KERR, J.A.

I have read the draft judgments of Forte and Downer, JJA I agree with their conclusion that the appeal should be allowed and for the reasons so fully set out in the judgment of Forte, J.A.

FORTE, J.A.

This appeal is from the judgment of Reckord, J., in which he granted an application made by the respondent wife, under the provisions of Section 16 of the Married Women's Property Act, for the determination of her interest in shares held in the name of the appellant in the company, Elias Azan & Sons Ltd.

The facts of this case had their beginning on the 27th November, 1960, when as young persons, the parties were married, and commenced life together without any significant assets in their possession. As the years passed, their's was a success story. At the time of the marriage, each was employed - the wife to the British High Commission and the husband to T. Geddes Grant Ltd. In 1962 the wife changed her employment to Royal Worchester, and in 1964, on leaving that employment began manufacturing infants' clothing in the name Cradlecraft from her home. The husband in his spare time, took on the portfolio of marketing the clothing. It is agreed that both parties enjoyed tremendous success in their joint ventures. In 1969, they formed two other companies Tiny Town Manufacturing and Tiny Town Ltd and in 1981 - two others Kandy Kane Manufacturing and Markall Labels Ltd. In the meantime in 1974, the original business, Cradlecraft was incorporated. In all of these companies each of the parties either at the original formation, or subsequently, held half of the allotted shares. At the time of the marriage the appellant's father owned an Haberdashery business. This business subsequently met with financial difficulties, as a result of which the appellant's father left Jamaica, and handed over the business to his wife, the appellant's mother.

In 1971, the appellant and his two brothers formed a company Elias Azan & Sons Ltd and through that company took over the business of their father. The appellant's shares were bought in his name only, and it is the respondent's claim for a determination that she has a beneficial interest in those shares that is now the subject of this appeal.

There has been no dispute in respect of other properties which were acquired throughout the duration of the marriage. In respect of those, the parties acted with admirable responsibility and maturity, and entered into an amicable settlement which was reduced to a written agreement on the 21st March, 1985. There was however, a contention advanced both in this Court and the Court below, that that agreement was an exhaustive agreement in respect of property owned by both parties, and impliedly indicated that the respondent conceded then that she had no beneficial interest in the shares in Elias Azan & Sons Ltd, which were in the sole name of the appellant. As that contention will be of no assistance in the determination of the issues involved in this appeal, no further reference will be made in respect of it.

The determination of the beneficial interest in property of one party to a marriage, where that property is registered in the name of the other party, is in most cases difficult to resolve because of the nature of the relationship of husband and wife, which in the days when the property is acquired usually enjoys a degree of trust which results in the acceptance of verbal or implied promises made without any consideration of any possible dispute arising thereafter. In spite of this, the law does not make any presumption of beneficial interest because of the marital relationships, and therefore, the party in whom the legal estate is not vested must resort to the law of trust to establish such a beneficial interest. This was stated with clarity by Lord Diplock in the case of Gissing v. Gissing (1970) 2 All E.R. 780:

> "Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation

> "and operation of 'resulting, implied or constructive trusts.' ..... A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.
>
> And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

How then, do the Courts determine whether or not a trust has been created. This is answered in a concise and precise analysis of the judgment of Lord Diplock in Gissing v. Gissing and by Sir Nicholas Browne-Wilkinson V.C., in the case of Grant v. Edwards (1986) 2 All E.R. 426 at page 437 as follows:

> "If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant) in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial membership. This requires two matters to be demonstrated:
>
> (a) that there was a common intention that both should have a beneficial interest and
>
> (b) that the claimant has acted to his or her detriment on the basis of that common intention."

In determining whether there was a common intention to share the beneficial interest an express agreement to that effect would be sufficient. However, where, as in most cases, there is no such agreement, the common intention of the parties may be inferred from their words on conduct.

The following words of Lord Diplock in Gissing v. Gissing (supra) at page 290 confirm this view:

> "But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case a common one where the parties are spouses whose marriage has broken down it may be possible to infer their common intention from their conduct."

Substantial contributions to the acquisition of the property, made by the party not vested with the legal estate is evidence upon which an inference may be drawn that the parties had a common intention to share in the beneficial interest of the property. Indeed Sir Nicholas Browne-Wilkinson V.C., in Grant v. Edwards (supra) at page 43 understood such contributions to be relevant for four different purposes:

> "(1) in the absence of direct evidence of intention, as evidence from which the parties intentions can be inferred;
>
> (2) as corroboration of direct evidence of intention;
>
> (3) to show the claimant has acted to his or her detriment on reliance in the common intention;
>
> (4) to quantify the extent of the beneficial interest."

This view was shared by Lord Pearson in Gissing v. Gissing (supra) who speaking on the effect of contribution at page 787 stated thus:

> "If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption; it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury."

An inference of a common intention may also be founded on the basis of indirect contributions made by the claimant to the acquisition of the property. An example of this was demonstrated in the speech of Lord Diplock in Gissing v. Gissing (supra) at page 792:

> "..... It may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable him to pay the mortgage instalments out of his moneys, this would be consistent with and might be corroborative of an original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home."

Where then, there is no direct evidence of an intention of the parties to share in the beneficial interest of the property, the claimant must establish that intention by means of the words and conduct of the parties from which the common intention may reasonably be inferred.

How then did the respondent in this appeal seek to establish a beneficial interest in the shares held in the sole name of the appellant in the company of Elias Azan & Sons Ltd.

Reckord, J., through the affidavits and the oral evidence of the respondent was presented with a picture of two young persons, marrying early in life, and working together to achieve financial success. That from the very beginning of the marriage they pooled their resources, and indeed there was always an understanding that whatever was owned by either party, also belonged to the other. The learned trial judge then made findings which led him to conclude that on a preponderance of evidence there was a common intention between the parties from the inception of the marriage that their assets were to be shared equally and that this did not only apply to assets in their joint names but also to other assets separately owned.

In my view the important issues which arose in the trial were:

1. Whether there was evidence of an express agreement between the parties, showing a common intention that each would have a beneficial interest in the shares.

2. Whether in the absence of such an agreement, there was other evidence upon which Reckord, J., could have concluded:

   (a) that there was a common intention, at the time of the acquisition, to share in the beneficial interest, and

   (b) that the respondent acted to her detriment as a result of the words or conduct of the appellant on the understanding that she would share in the beneficial interest.

1. EXPRESS AGREEMENT

In coming to his conclusion, Reckord J., made no specific findings as to whether there was any evidence of an express agreement between the parties specifically related to the acquisition of the shares in Elias Azan & Sons Ltd. However, he did find that there was an understanding from the very beginning that whatever either party had, belonged to the other. This finding is obviously related to the evidence of the respondent in which she maintained that they both had an understanding which she described in the words "what is mine is yours and what is yours is mine;" an understanding which was derived from their life style of pooling their resources, and the fact that the appellant often stated those words to her. The appellant admitted in his oral testimony, that he had used those words to her on occasions but stated that that arrangement did not include his shares in the Azan Company and related only to properties which they owned jointly. He maintained that the Azan Company was entirely a family business with his parents and two brothers. Learned counsel for the respondent sought to urge that that evidence was evidence upon which the Court below, could have found that there was an agreement between the parties.

In my view, these words are too general to be relied upon, as an express agreement, demonstrating a common intention in respect of the specific acquisition of the relevant shares. In any event Reckord J., apparently did not rely upon that evidence alone and came to his conclusion, preferring to treat it as a part of the totality of evidence from which he inferred a common intention.

Lord Diplock in Gissing v. Gissing (supra) at page 790 expressed the view that in such agreements, it is contemplated that the party in whom the property is not vested would undertake to do something to facilitate its acquisition. He stated as follows:

> "This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing.
>
> But in the express oral agreement contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase on mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed."

As there was no evidence, that there was any specific provision, either expressed or implied for the respondent to do something to facilitate the acquisition of the shares, the words "What is yours is mine and what is mine is yours" per se, cannot in my view constitute an express agreement between the parties to share in the beneficial interest. The words however would be relevant in determining the common intention of the parties if as a result, the respondent acted on the basis of the promise therein, by doing things to her detriment in order to facilitate the acquisition of the shares.

I will however deal later in this judgment with the question of whether there was evidence that the respondent acted to her detriment.

2. (a) COMMON INTENTION

Reckord J., concluded that there was a preponderance of evidence that there was a common intention between the parties from the inception of the marriage that their assets would be shared equally, and that this applied not only to assets in their joint names but also to other assets separately owned. It is from this general finding, and the consequent granting of the application as prayed, from which a specific finding can be gleaned that there was a common intent for both parties to have a beneficial interest in the shares of Elias Azan & Sons Ltd.

It appears from the judgment of Reckord J., that his conclusion as to the common intention of the parties were based on the following findings of facts:

(i) That the parties started marriage with no assets and from the inception agreed to pool their resources with an understanding that whatever either party had belonged to the other;

(ii) That the appellant's initial shares in Elias Azan & Sons Ltd were paid for from an account owned jointly by the appellant and the respondent in which they both pooled their resources.

These findings, created the factual basis for concluding that the respondent made a substantial contribution to the acquisition of the shares, and in keeping with the understanding which the parties enjoyed, would be evidence from which a reasonable inference could be drawn, that the parties had a common intention that they would have an equal beneficial interest in the shares.

However, counsel for the appellant contends that:

"(a) the finding in (ii) cannot be supported by the evidence and in the alternative

(b) if their is such a joint account there being no evidence of any joint account being set up for a specific purpose, such an account would be for the general use of the parties, and any funds drawn and invested by any of the parties to acquire property in the name of that party - that property is in the sole ownership of that party."

It was the appellant's evidence that in 1971, his two brothers and himself took over his father's business and incorporated the company Elias Azan & Sons Ltd which thereafter operated the business. He acquired three hundred shares at $1.00 per share for $300.00, which he paid from an account which he had at TRoyal Bank of Canada, Hagley Park Branch, from before his marriage and to which he added respondent's name after his marriage to her.

He received a salary of $350.00 per week which he put in this account, and at the time of the purchase of the first 300 shares in Elias Azan & Sons Ltd, he had enough money from this salary to purchase same. In respect of this account, although he added his wife's name to it after marriage, she never drew any money from it except on rare occasions on his request and she never paid any money into it. Although they had joint assets whenever either received any benefits such as their indivIdual salaries, those benefits went to purchase whatever they needed as separate individuals. Accordingly the respondent placed her benefits into her account and he placed his into his account. Although her accounts were also joint accounts in his name as well, he never withdrew from or deposited any money into them. He maintained that the only reason for placing the name of each on the other's account was for the sake of convenience so that if one died, the other would be able to utilize the accounts without delay.

In 1973, the appellant's mother died and her 600 shares in the company passed to the appellant's father who in 1974 sold them to his three sons, the appellant purchasing 200 shares for which he paid $10,800. This purchase money was borrowed from the Bank of Nova Scotia King Street, Kingston. He maintained that the loan was repaid from his own resources through Elias Azan & Son.

On the other hand, the respondent's testimony in this regard, was that the shares acquired by the appellant in Elias Azan & Co., were paid for, from their pooled resources from Cradlecraft and Tiny Town companies which were jointly owned by the parties. On another occasion she maintained that when Elias Azan & Sons Ltd was incorporated the appellant had no assets independent of those owned jointly with her and that it was out of those funds that payment was made for his shares.

In so far as joint accounts were concerned, she testified to having two accounts in their joint names both at the Bank of Nova Scotia. She agreed that she received a salary of $350.00 per week and maintained that she deposited her salary and savings in her savings and current accounts at the Bank of Nova Scotia . It was from her salary that she bought her personal requirements and the pieces of art which she possessed. In her oral evidence, she testified that she drew from the appellant's accounts only on his instructions and that he at times drew from hers on her instructions. She admitted that the appellant received a salary of $350.00 per week which he paid into his account.

Reckord J., therefore accepted the appellant's evidence, at least, to the extent that the second set of shares were purchased by virtue of a bank loan.

In respect of the first purchase of shares he found that the purchase was paid for by funds from a joint account in which the parties pooled their resources. The only evidence of the existence of joint accounts is that disclosed in the summary of the parties' testimony already

adverted to; and in none of these is there any evidence of pooled resources. In fact, the respondent upon whom the burden rested to prove that she made a contribution to the acquisition of the shares, did not at anytime maintain that her contribution came from a joint account. It appears therefore that the learned trial judge rejected her testimony that the funds used to purchase the shares came from their pooled resources in Cradlecraft and Tiny Town Companies, and arrived at a conclusion which has no support in the evidence. Counsel for the respondent, however contended that there was evidence of other accounts which were jointly owned by the parties and in support referred to the agreement of the 21st March, 1985 in which 3 savings accounts at the Bank of Nova Scotia were given to the respondent. He maintained that Reckord J, could have been describing one of those accounts in his findings. In my view this argument is untenable, there having been no evidence as to the nature and circumstances of those accounts, and in particular no evidence that they were joint accounts in which the parties pooled their resources. The only rational interpretation of the learned judge's finding is that he was referring to the account held by the respondent i.e. the account at the Royal Bank of Canada, Hagley Park Branch. If, the shares were purchased from this account, then the respondent's claim, of making a direct contribution to the purchase would inevitably fail, as it is the accepted evidence on both sides, that she deposited no funds into this account, and could not draw upon it without specific approval of the appellant.

The principle governing the application of funds in a joint account is in my view accurately stated in the case of National Provincial Bank Ltd v. Bishop and Others (1965) 1 All E.R. 249 by Stamp, J., at page 252:

> "Now, where a husband and wife open a joint account at a bank on terms that cheques may be drawn on the account by either of them, then, in my judgment, in the absence of facts or circumstances which indicate that the accounts was intended, or was kept for some specific or limited purpose, each spouse can draw on it not only for the benefit of both spouses but for his or her own benefit. Each spouse, in drawing money out of the account is to be treated as doing so with the authority of the other, and in my judgment, if one of the spouses purchases a chattel for his own benefit or an investment in his or her own name, that chattel or investment belongs to the person in whose name it is purchased or invested: for in such a case there is, in my judgment, no equity in the other spouse to displace the legal ownership of the one in whose name the investment is purchased."
> (emphasis mine)

In the case before us, there was no evidence of any account existing which was intended or kept for some specific or limited purpose, and consequently, the purchase of the shares, by the husband in his sole name, would result in his sole beneficial ownership of the shares.

It was however argued before us, that the case of Jones v. Maynard (1951) 1 All E.R. 802 is applicable to the facts of this case and should therefore be applied. The headnote in the report of that case reads as follows:

> "In May, 1941, a husband and wife each had a bank account, but, as the husband was to go abroad on war service, it was decided that their joint incomes should be paid into the husband's account on which the wife was given power to draw. From time to time money was withdrawn from the account by both parties for their own purposes, and, in particular, for investments which were made in the name of the husband. In July, 1948, the marriage was dissolved.

> "It was held that on the evidence the intention of the parties was to constitute a pool of their resources in the form of a joint account; it was not consistent with that intention to divide the moneys in the account and the investments made with moneys withdrawn therefrom by reference to the amounts respectively contributed to the account by each of them; and, therefore, the husband must be regarded as trustee for the wife of one-half of the investments and of the balance of the account."

In coming to this conclusion Vaisey, J., placed great weight on the admitted evidence that the account contained funds which the parties intended to be invested and to be their joint savings. He stated it in this way:

> "In so far as money was drawn out of this account and turned into investments, to whom do those investments belong? Both parties have given evidence before me, and, although there was a good deal of difference between them, on one thing they both seemed to be more or less agreed. The wife said: 'We could not take the money to Canada, and before my husband knew that I could accompany him he put this money there and allowed me to draw on this account so that I could always have money at hand. The money was also to be a pool of our resources. It was to accumulate, and when there was sufficient accumulation it should or might be invested, and that was to be our savings.'
>
> The husband also referred to the moneys as being 'our joint savings,' ....."

He concluded thus:

> "I take the view that when spouses have a common purse and a pool of their resources, the husband's remuneration is earned on behalf of them both, and the idea that years afterwards one can dissect the contents of the pool by taking an elaborate account as to how much was paid by the husband and how much was paid in by the wife is not consistent with the original fundamental idea of a joint purse or a common pool. When the money goes into the pool it is there as joint property."

Jones v. Maynard was distinguished in the case of Re: Bishop (supra) by Stamp, J., and in terms which, in my view are equally applicable to the circumstances iof this case. Stamp, J., (page 253) in referring to Jones v. Maynard stated:

> "Now the only question which fell for determination in the case was whether the investments which the husband had purchased in his own name by drawing in the joint account were held by him in trust for the wife and himself in equal shares or whether they were held by him for himself and his wife in the shares in which they had contributed the moneys to the joint account. That was the only question which fell for determination and manifestly the argument which has been put in the present case that Mr. Bishop was entitled to the investments purchased in his own name for his own use and benefit was not open in that case. Both husband and wife agreed that investments were to be our 'savings.' It was quite impossible to contend in those circumstances, that the wife had no interest in the investments made in the name of the husband. I have to read that case in the light of those facts, and I have to bear in mind that was the only issue between the parties."

In the instant case, there is no evidnece of any specific purpose for which the joint account was opened as in Jones v. Maynard where the funds from the account were specifically to be invested and to be used as "our savings." I agree with Stamp, J., in the case of Re: Bishop when he concluded at page 256 that -

> "Vaisey, J., (in Jones v. Maynard) was not there laying down any general principle that wherever one finds money standing to a joint account and there are investments in the name of the husband that these investments are held by the husband on trust for the husband and the wife in equal shares. It must in my judgment, depend on the facts of the case and I do not think that Vaisey, J., was coming to any other conclusion."

In Heseltine v. Heseltine (1971) 1 All E.R. 952 at page 957 Karminski L.J., applied the test suggested by Stamp, J., in Re: Bishop (supra). He stated thus:

> "Applying the test suggested by Stamp J in Re Bishop (decd), National Provincial Bank Ltd v. Bishop, to which Lord Denning MR has referred, I have come to the clear conclusion that in the present case there is a strong body of evidence of intention that the joint account set up between the parties was to have a limited operation." (emphasis mine)

Denning M.R. in the same case recognized that each case depended on its own facts:

> "The fourth item concerns four houses at Dittisham in Devon. ..... They were all conveyed into the husband's name. He paid for them out of a joint account of the parties. We have not seen that joint account and it has not been analysed before the court. But the registrar found that the moneys in it were solely the wife's, and that the properties, therefore, were held on trust by the husband for her. On this point we have been referred to the cases on joint account. I need not go through them all. They were all considered in Re: Bishop (decd). In some cases where husband and wife each contribute to a joint account, the proper inference is that they are putting their moneys into the account with the intention that they should belong to them both jointly. If the marriage breaks down, investments made out of that account belong to them jointly, usually half and half, although in the name of one only: see Jones v. Maynard. But there are other cases where one party provides all the money in the joint account and it is only opened and used as a matter of convenience of administration. In such cases if the marriage breaks down, the moneys belonged to the one who provided them. So do any investments made with those moneys."

The facts of the present case in so far as they relate to the account in the joint names of the parties, fall within the latter category described by Lord Denning M.R. as the accepted evidence is that only moneys belonging to the appellant was placed in that account, the respondent withdrawing from it only at times when permitted so to do by the appellant.

In my judgement, even if it were possible to conclude that Neckord, J., was referring to some other existing account, there being no evidence of the account being opened for ~~any limited or~~ specified purpose, applying the test of Stamp, J., in Re: Bishop, which was approved by Karminski L.J., in Heseltine v. Heseltine (supra) moneys drawn from such an account and used to purchase shares in the name of the appellant, would remain in the sole ownership of the appellant. In the event, I am of the view that there was no evidence upon which Neckord, J., could conclude that the respondent made a direct contribution - substantial or otherwise to the acquisition of the shares.

(b) ACTS TO THE DETRIMENT OF RESPONDENT/WIFE

I turn now to the contention which is outlined in paragraph (b) of the 2nd issue which formed the basis of the following submission by learned counsel for the respondent:

> "If it is found by a Court that a husband made certain representation to a wife and acting on the faith of this she put herself in a position to her own detriment then the husband will not be allowed by the Court, at a later stage to say that she did not acquired the interest that he had held out to her that she had acquired."

The representation alleged and found by Neckord, J., to have been made, was the husband's frequent assurances to the wife that whatever either party had belonged to the other. In considering wnether the respondent acted to her detriment the learned judge found the following.

> "There was the unconfirmed evidence that accountants from Cradlecraft did the books for the Asan Co. Also that the work put in by the Petitioner in Cradlecraft allowed the respondent to apply his attention to the Asan Co."

He had also earlier in his judgement found:

> ".....that the Petitioner did a tremendous amount of work in their joint companies and that because of this the respondent was able to spend most of his time in the Asan Co."

Were these facts upon which the learned trial judge could conclude that the respondent acted to her detriment? Sir Nicholas Browne-Wilkinson V.C. in Grant v. Edwards (supra) recognized that there is little guidance from the cases as to what is necessary to prove that the claimant acted to his detriment:

> "What 'link' has to be shown between the common intention and the actions relied on? Does there have to be positive evidence that the claimant did the acts in conscious reliance on the common intention? Does the court have to be satisfied that she would not have done the acts relied on but for the common intention, e.g. would not the claimant have contributed to household expenses out of affection for the legal owner and as part of their joint life together even if she had no interest in the house?"

In my view the claimant must have acted to her detriment on the basis of representation held out to her by the other spouse and consequently her act must be related to the common intention that existed at the time of the acquisition of the property. This view is in keeping with the dicta of Nourse, L.J., in Grant v. Edwards (supra) page 434:

> "Was the conduct of the plaintiff in making substantial indirect contributions to the instalments payable under both mortgages conduct on which she could not reasonably have been expected to embark unless she was to have an interest in the house? I answer that question in the affirmative. I cannot see on what other basis she could reasonably have been expected to give the defendant such substantial assistance in paying off mortgages on his house. I therefore conclude that the plaintiff did act to her detriment on the faith of the common intention between her and the defendant that she was to have some sort of proprietary interest in the house."

Indeed, Sir Nicholas Browne-Wilkinson V.C., in the same case, came to the following conclusion:

> "So, in this case, as the analysis of Nourse LJ makes clear, the plaintiff's contributions to the household expenses were essentially linked to the payment of the mortgage instalments by the defendant: without the plaintiff's contribution, the defendant's means were insufficient to keep up the mortgage payments. In my judgment where the claimant has made payments which, whether directly or indirectly, have been used to discharge the mortgage instalments, this is a sufficient link between the detriment suffered by the claimant and the common intention. The court can infer that she would not have made such payments were it not for her belief that she had an interest in the house."

In Gissing v. Gissing (supra) Lord Diplock also thought that the act of the claimant must be exclusively consistent with the common intention to share the beneficial interest. In his speech at page 793 he stated:

> "Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift."

In the present case, there are two acts which Reckord, J., found and upon which it appears he came to a conclusion that the respondent acted to her detriment. Both of these related to the conduct of business in the companies which were jointly owned.

Firstly, he found that the respondent did a tremendous amount of work in those companies and as a result the appellant was able to spend most of his time in the Azan Co. In fact the evidence on both sides revealed that the respondent and the appellant each had their respective functions in the conduct of business in the other companies. The respondent was responsible for production, while the appellant was responsible for marketing the products and managing the finances. There was never any suggestion, nor did the learned trial judge find, that the respondent in order to facilitate the appellant's performance in the Azan Co, undertook any of his responsibilities in the other companies. In addition there was no evidence that the work done by the respondent in those companies was for any reason other than to advance the progress of those companies. Her conduct in my opinion would be more consistent with an interest in those companies than with an inference of a common intention to share in the beneficial interest of the shares in the Azan Co., because she did nothing more than the duties she would have been required to perform in respect of her portfolio in those companies.

Secondly, it was contended that the fact that the Accountants from Cradlecraft did the bookkeeping for the Azan Co., was an act performed by the respondent which was to her own detriment. To begin with the act is not an act of the respondent, but of the Cradlecraft Co., which was owned jointly by the parties. Again there is no evidence which in my opinion links that act with a common intention to acquire the shares for the beneficial interest of both parties.

Consequently, while approving the legal principle of proprietary estoppel propounded in the submission of counsel for the respondent, it is my opinion that there was no evidence that the respondent placed herself in a position to her own detriment because of her reliance on a representation made to her by the appellant.

That being so, I am of the view that there was no evidence in the present case of a common intention in the parties to share in the beneficial interest in the shares held in the name of the appellant in the Azan Co., nor was there any evidence upon which Reckord, J., could correctly find that the respondent acted to her own detriment.

Before leaving this appeal, there is one other matter that requires some comment. Reckord, J., found that the Azan Co., recognizing the respondent's connection paid to her $1,500 per month together with other household requirements. The evidence in this regard was that the respondent received $1,500 per month from the Azan Co., and that this money would be handed to her either by a brother of the appellant or the appellant himself. The appellant maintained, however that this sum was his house allowance which was part of his remuneration from the Azan Co., and was handed over to the respondent in keeping with his family responsibilities. The learned judge nevertheless found that the company recognized the respondents connection and for that reason paid over $1,500 per month to her. It is difficult to understand, what Reckord, J., meant by "the respondent's connection" Did he mean - that the company recognized that the respondent had a beneficial interest?

If so, was the $1,500 dividend - a share in the profits? In any event, there was not in my opinion any evidence to come to a finding that the company recognized the connection, as no representative of the company testified, and the mere fact of the appellant's brother delivering the cheque to the respondent, in a family situation such as this, cannot to my mind lead to such a finding. I agree with the submission of counsel for the appellant that that finding is not supported by the evidence, and

therefore cannot be of any assistance in the determination of whether there was a common intention in respect of the beneficial interest in the shares.

For these reasons I would allow the appeal and set aside the order of Reckord, J. The respondent to pay the costs both here and below. Costs to be taxed or agreed.

DOWNER, J.A.:

In proceedings in the Court below, Reckord, J. (Actg.), pursuant to a wife's summons under Section 16 of the Married Women's Property Act, granted a declaration to Dawn Azan that she was entitled to half the interest in the shares standing in the name of her husband Gassan Azan, as well as half of his assets in Elias Azan & Sons Limited. It is common ground that this claim is worth over a million dollars and as the husband was aggrieved by this judgment, he has appealed to have it set aside.

To understand how the claim originated and the principal basis of this appeal, it is necessary to recount the business dealings between the couple, both of whom have shown uncommon acumen during the course of their marriage, which was solemnised on the 27th November, 1960, at the Church of St. Margaret in St. Andrew and was dissolved on January 23, 1987. The printed record is complex because it involved both a claim for maintenance and proprietary rights in Elias Azan & Sons Limited. Also the learned judge decided to hear the summons on the affidavits as presented and ruled that he would ignore the irrelevant material. There is a further element for concern in that most of the documents were captioned IN DIVORCE although these proceedings were exclusively concerned with property rights.

She started out as a secretary and he as a salesman. In 1964 she entered her true vocation as a business woman, as she founded Cradlecraft Manufacturing Company Limited to make garments for infants. She was responsible for production while he handled sales and finance on a part-time basis, as he retained his job at Geddes Grant Limited. This division of labour continued throughout their marriage. They pooled their resources and they were so successful that by 1969 they formed two other companies, Tiny Town Manufacturing Company Limited and Tiny Town Limited. These specialised in children's clothing and

the latter was responsible for distribution and sales. At that stage the husband left Geddes Grant Limited and he then worked full time at their enterprises. The year 1971 was significant as the Azan brothers, the husband Gassan, George and Milade formed a company, Elias Azan & Sons Limited to take over their parents haberdashery business. Dawn Azan had no part in the management of this enterprise but her husband purchased a third of the shares and the assets. This also by all accounts has proved to be very profitable over the years.

The marriage has been dissolved. Also there has been a division of property which was in their joint names. Apart from the companies already mentioned, two others were formed during the course of the marriage - namely, Kandy Kane Limited, which made confectionery, and Markall Labels Limited, which, as the name suggests, made labels. The couple also owned substantial real estate. These were three apartments, a farm, a lot of land on Plymouth Avenue. Also there was their substantial Savings Accounts, as well as real estate in Florida. These assets were divided by agreement and the document setting its terms was exhibited. Be it noted that these assets were not in dispute either in the Court below or on appeal, but they form part of the background to this claim by the wife. There are also other aspects which need be recounted to understand why a dispute has arisen. Dawn is now a cancer patient and she is no longer able to deploy her remarkable mental and physical skills to business or indeed to public service to which she was devoted. This is a tragedy which no one could or should ignore. The other fact is that although their joint assets were divided by agreement, the husband was able to purchase her share and this has, no doubt, in retrospect generated resentment. The husband gave the wife half the proceeds of a Cayman Bank Account which was worth US$125,000.00 but as against that there was "the other woman" who was named as co-respondent in the divorce proceedings. He also gave her his share in the apartments in Florida, their savings accounts at the

Bank of Nova Scotia and the lot, with a plan and drawings for a home, on Plymouth Avenue. It was against the background of business success, the tragedy of the wife's illness, divorce proceedings with a woman named, that the learned judge had to decide the difficult question whether the claimant Dawn Azan was entitled to half her husband's shares in the business of the Azan brothers.

The next stage to which our attention must be directed is the precise factual basis as to how Gassan Azan acquired his one-third share holding in Elias Azan & Sons Limited. Was there a common intention between the disputants when the shares were acquired that they should be jointly owned or was there a subsequent understanding that there should be joint ownership? How ought a Court either at first instance or on appeal in law to approach the claims on behalf of the wife when the husband's name appears as the sole legal owner? Of particular interest in this case is that each kept separate accounts to which they paid in their earnings and each affixed the other spouse's name on these accounts, so that withdrawals could be made by the wife on the husband's account if specific instructions were given and husband had the same privilege as regards the wife's account. It is these specific circumstances which must be analysed against the general background of their business dealings and conversations for a correct determination of this issue.

In his first affidavit, Gassan Azan stressed that he paid for the shares from his own funds as at the time of the purchase they had separate bank accounts in which funds were deposited which was not jointly owned. He gave further details on this aspect of the matter. He said that the purchase price was $35,000.00 and that the second payment was made by borrowed funds from the Bank of Nova Scotia.

Apart from stressing that the payment was from his own resources, the husband detailed the specific account from which he derived the funds. Here is his account in his second affidavit of 9th February at page 69 of the record:

"21. I maintain that I paid for my shares from my own funds (I refer to paragraph 7 of her Affidavit). It was not from any assets which were created by way of pooled resources.

I never made her to understand that she had any interest in Elias Azan & Sons Limited.

I had a Bank Account with Royal Bank of Canada, Hagley Park Road before I was married and one with Bank of Nova Scotia, Princess Street. Both of these were in my name. After we were married I added my wife's name to them. She never drew any money from these accounts (except on rare occasions when I requested her to do so) and she never paid any money into these accounts.

At the time of my purchase of shares in my father's business I had enough money from my salary to purchase my shares in my father's business. Although we had joint assets in the form of the various companies referred to whenever we each received a benefit from them same went individually to us to purchase whatever we needed as separate individuals.

Accordingly, she placed her benefits into her bank accounts and I placed mine in my account."

In contrast to this detailed account which was reiterated under cross-examination, the wife's evidence was general. She said the money to buy shares came from their pooled resources. She stressed that there was an understanding that everything she owned belonged to him and vice-versa and he admitted that they had made such statements to each other during their marriage. As regards the operations of their accounts she agreed with her husband. As this is of importance, let me quote her words under cross-examination at page 111 of the record:

"When we got married respondent had 2 accounts at different banks which he placed my name in after the marriage.

I opened 2 accounts which I placed his name in. If my memory serves me right he opened another account when his manager was transferred - my name placed in it."

Further on the same page the cross-examination continued thus:

> "I drew on his accounts on his instructions and he at times drew on mine - on my instructions. He used to balance my chequing accounts for me.
>
> My salary went to the Current Account at Bank of Nova Scotia, King Street - the one he used to balance for me - respondent used to $350.00 per week which he put in his account."

It is now important to turn to the judge's finding as to how the shares were acquired. It was set out in a short paragraph to which Mr. Scharschmidt contended, contains the clue to the error in the judgment. Those findings at page 100 of the record read:

> "In 1971, the respondent and his two brothers took over their father's business and formed the Company Elias Azan and Sons Limited. I find that his initial shares were paid for from an account owned jointly by the respondent and the petitioner in which they had both pooled their resources. He subsequently bought other shares with a bank loan."

The only specific evidence concerning where the initial purchase money for the shares came from was from Gassan and he said that it was from the Hagley Park Branch of Royal Bank, and as for the second payment the judge accepted Gassan's account that he bought the other shares with a bank loan. The learned judge must also have found that the loan was repaid from the profits of Elias Azan and Sons Limited. It is against the totality of the evidence and this finding, that the relevant law relating to the operation of joint accounts and to chattels purchased with withdrawals must now be examined to determine whether the learned judge's declaration was correct.

The principal authority relied on by the appellant is National Provincial Bank Ltd. v. Bishop & Ors. Re Bishop [1965] 1 All E.R. 249, and the following passage at page 252 from the judgment of Stamp, J., accurately summarises the legal position:

> "Now, where a husband and wife open a joint account at a bank on terms that cheques may be drawn on the account by either of them, then, in my judgment, in the absence of facts or circumstances which indicate that the account was intended, or was kept for some specific or limited purpose, each spouse can draw on it not only for the benefit of both spouses but for his or her own benefit. Each spouse, in drawing money out of the account, is to be treated as doing so with the authority of the other and, in my judgment, if one of the spouses purchases a chattel for his own benefit or an investment in his or her own name, that chattel, or investment belongs to the person in whose name it is purchased or invested: for in such a case there is, in my judgment, no equity in the other spouse to displace the legal ownership of the one in whose name the investment is purchased."

This case was considered with approval in Heseltine v. Heseltine [1971] 1 All E.R. 952 and by Lord Upjohn in Pettit v. Pettit [1969] 2 All E.R. 385 at 407 and it was contended on behalf of the appellant that in addition to accepting the affidavit evidence of Gassan previously mentioned, Reckord, J., (Actg.) must have accepted the following account of Gassan, at page 112 of the record, under cross-examination in relation to operation of his account: "Reason I did so was in case of my death she would be able to draw on it; I put her name on my accounts; she put my name on hers and they became joint accounts." Further, on the same page of the record he said - "The first purchase of 300 shares was paid from my account to which I had added her name at Royal Bank of Canada, Hagley Park Road."

It is clear since the only specific evidence as to which account the shares were paid for came from Gassan, the finding by the learned judge must be related to his evidence. It was common ground that he paid $350.00 per week, his earnings, from their enterprises, in his account, and his affidavit evidence of 8th January at page 31 of the record was that he paid $300.00 for the shares initially. In the light of the husband's specific evidence, Dawn Azan's statement that the funds for the purchase of the shares came from pooled resources,

was at its highest, a conjecture and not sufficient on which to base a finding adverse to the husband. Again it is true that her name was on his Royal Bank Account but she did not draw on it as she told the Court, without instructions from her husband. This is the specific or limited purpose of which Stamp, J., speaks of in Re Bishop (supra) and on such a basis it was a misdirection in law to speak of the funds from this account as pooled resources, as the learned trial judge did. The account could be labelled a joint account as indeed Gassan did in his evidence. Such an account, although labelled a joint account, is not an account with pooled resources and shares purchased from such an account belongs to the person in whose name it was purchased.

What then is the basis of the claim by Mrs. Azan for one-half the shares standing in her husband's name? It was contended on her behalf that the understanding created by the words "Everything I have is yours" by the husband together with the fact that she did receive $1,500.00 per month from Elias Azan and Sons, gave rise to proprietary interest in her favour in the shares owned by her husband. Moreover, it was submitted that the accounting staff of Cradlecraft Limited which was jointly owned did work for Elias Azan and Sons Limited, and that her concentration on the production side of the business enabled her husband to devote his time to the business of Elias Azan and Sons Limited. But the assertion that "Everything I have is yours" by both parties could not mean that either party could not acquire property without sharing those assets or income derived from them. No enforceable contract was created by these words. As for the $1,500.00 monthly, which was paid to her, the learned judge found at page 100:

> "I find the Azan Company, recognising the petitioner's ~~connection~~ paid her $1,500.00 per month together with other household requirements."

Since the finding was specifically challenged in the 11th ground of appeal, it must be determined by this Court whether the finding was

reasonable before there is an examination whether it could give rise to a trust in favour of the wife or could be used as a basis to estop the husband from denying that he is a trustee for half the shares standing in his name.

Here is Dawn's evidence as to the payment at page 53 of the record. (paragraph 11):

> "I was paid $1,500.00 per month out of funds of Elias Azan & Sons Limited. My husband handed me the money, but I was aware that it came from that Company. Whenever he was late, he would tell me that his brother George who operated the Company had not given him the money."

She repeats this at page 86 of the record, adding that sometimes George would bring it to her home. In response, Gassan, at page 70 of the record in his affidavit, said at paragraph 23:

> "23. She was paid $1,500 per month out of funds which belonged to me and which Elias Azan & Sons Limited paid me as a housing allowance. I passed it on to the Petitioner as part of my obligation to maintain my family."

There was no evidence from Dawn Azan that she knew how the company was operated. She did no work for the $1,500.00 and she gave no evidence that it came to her by way of dividends or as a capital distribution. On her evidence she received the money through her husband and his evidence is that he paid her out of money he received from the company as a house-keeping allowance.

In any event, the learned trial judge did not explain the connection Elias Azan & Company Limited recognised in Dawn. The learned judge's finding was unreasonable and cannot stand. It was also contended that the payment gave rise to a proprietary interest or raised an estoppel as in Grant v. Edwards [1986] 2 All E.R. 427. In that case, a couple lived as man and wife and the husband had told the 'wife' that her name was not put on the title of the matrimonial home because he had matrimonial proceedings to be settled with his wife. The claimant had made substantial contributions to the repayment of the

mortgage and to the household expenses. In those circumstances she had acted to her detriment and was therefore entitled to a beneficial interest in the matrimonial home. The Court of Appeal (Sir Nicholas Browne-Wilkinson, V.C. Mustill & Nourse, L.JJ.) applied Gissing v. Gissing [1970] 2 All E.R. 780 and decided that the 'wife' had a beneficial interest in half the proceeds of the house.

The facts in the instant case are distinguishable. In Grant v. Edwards (supra) the proceeds of a fire insurance policy in respect of the house was placed in a joint account and the Court found that this was recognition of her interest in the home. This was no way comparable to a monthly payment which Dawn received through her husband. It is true that there was evidence that the accounting staff of Cradlecraft did the books of Azan & Company Limited. However, Cradlecraft was jointly owned by husband and wife and they must have agreed to that arrangement. This, therefore, did not amount to a detriment to her, thereby entitling her to half his share holding in Elias Azan & Sons Limited. It is also true that he spent part of his time at Elias Azan & Sons Limited, on the other hand, she devoted part of her time to public service as an adviser to Government.

The learned judge's generous finding on page 103 of the record, therefore, that -

> "On a preponderance of evidence I therefore find that there was a common intention between the parties from the inception of the marriage that their assets were to be shared equally."

cannot be supported in regard to the shares in issue.

As an alternative to his submissions that a trust or estoppel was created in favour of Mrs. Azan, Mr. Rattray also contended that the learned judge's finding that the initial shares were purchased from pooled resources could be supported. Further, he argued that since the second payment was made from the profits of the Company in which the wife had a beneficial interest from the outset, the judge's declaration was correct. The starting point of such a submission was that the words

"Everything I have is yours" used by both parties during the course of their marriage governed the operations of their accounts and that in such circumstances the case of Jones v. Maynard [1951] 1 All E.R. 802 was applicable. The headnote summarised the position. At page 802 it reads:

> "On the evidence the intention of the parties was to constitute a pool of their resources in the form of a joint account; it was not consistent with that intention to divide the monies in the account and the investments made with monies withdrawn therefrom by reference to the amounts respectively contributed by each of them, and therefore the husband must be regarded as trustee for the wife of one half of the investments and of the balance of the accounts."

It would seem that the facts in this case are distinguishable from that in Jones v. Maynard (supra). Although there was a pooling of some resources in the instant case, it was not the intention of the parties to operate their separate accounts on the basis of pooled resources, although each spouse added the other spouse's name to their separate accounts for convenience. The following facts as Stamp, J., pointed out in Re Bishop (supra) at page 255E are essential if investments purchased are to be shared equally between the parties as in Jones v. Maynard:

> "The wife stated in evidence that the account was opened ..... so that I could always have money at hand and also ..... the money was to be a pool of our resources. It was to accumulate, and when there was a sufficient accumulation it should or might be invested and that was to be our savings.
>
> The defendant himself, in evidence, referred to the money in the account as our joint savings."

In the instant case, the wife's name was added to the account as a matter of convenience and the husband anticipated that she would be able to draw on it if he died before her. The common intention, therefore, manifested itself in the companies that they jointly operated and at the settlement of their joint assets, the husband informed her of

monies held in Trust in Cayman and gave her the whole benefit of a joint savings account in the Bank of Nova Scotia Limited. But the common intention was never proven in the case of the shares which were acquired by the husband in Elias Azan & Sons Limited. The general words used during the marriage could not override the specific arrangements pertaining to their banking accounts. The main ground of appeal, therefore, at page 2 of the record which reads:-

> "That the learned trial judge was wrong in law in finding that the Respondent/Appellants' initial shares were paid for from an account owned jointly by the Respondent and the Petitioner in which they pooled their resources."

succeeds and determines the appeal. This is so because the only evidence in the case as to the account from which the shares were purchased was from the husband and the account at Royal Bank was not one which the law recognised as one of pooled resources and further the attempt to establish that Mrs. Azan owned a beneficial interest in the shares either by way of an implied, resulting or constructive trust or on the basis of estoppel, has failed.

Consequently, the order of Reckord, J., (Actg.), must be set aside and the respondent must pay the taxed or agreed costs both here and below.

KERR, J.A.:

Appeal allowed - judgment and declaration in Court below set aside with costs to the appellant here and in the Court below. Such costs to be taxed if not agreed.